

**IN THE INDIANA SUPREME COURT  
CASE NO. \_\_\_\_\_**

CITY OF GARY, INDIANA,	)	Appeal from the Lake Superior Court
	)	Room Number One
Appellant/Plaintiff,	)	
	)	
	)	
v.	)	Indiana Court of Appeals
	)	Case No. 18A-CT-181
	)	
SMITH & WESSON CORP., et al	)	
	)	
Appellees/Cross-Appellants	)	The Honorable John M. Sedia, Judge
Manufacturer Defendants.	)	Lower Court Cause No. 45D01-1211-CT-00233

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**PETITION TO TRANSFER OF APPELLEES/CROSS-APPELLANTS  
MANUFACTURER DEFENDANTS**

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**QUESTIONS PRESENTED ON TRANSFER**

Did the Court of Appeals err in holding that (1) the City's lawsuit was not preempted under Indiana Code § 35-47-11.1 *et seq.* as a measure by a political subdivision to regulate firearms commerce; (2) the law of the case doctrine precluded revisiting Defendants' immunity under the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") in light of subsequent federal appellate court interpretations of the statute; and (3) Defendants were not entitled to immunity under Indiana Code § 34-12-3-1 *et seq.* because the City had adequately pleaded that Defendants acted unlawfully?

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### **BACKGROUND AND PRIOR TREATMENT OF ISSUES**

On August 30, 1999, the City of Gary (“City”) filed its Complaint against Defendants<sup>1</sup> and others. (Appellant’s App. Vol. IV p. 2). The trial court dismissed the Complaint on January 11, 2001. (Appellees’ App. pp. 60-72). The City then filed a First Amended Complaint (“FAC”). (Appellant’s App. Vol. II p. 53), which the trial court dismissed on March 13, 2001. (Appellant’s App. Vol. I p. 41). The City appealed, and the Court of Appeals affirmed in part, and reversed in part. *City of Gary v. Smith & Wesson Corp.*, 776 N.E.2d 368 (Ind. Ct. App. 2002). On the City’s Petition to Transfer, the Indiana Supreme Court reversed and remanded. *City of Gary v. Smith & Wesson Corp.*, 801 N.E.2d 1222 (Ind. 2003).

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (“PLCAA”). 15 U.S.C. § 7901 *et seq.* The PLCAA, which applied retroactively to pending actions, generally provides threshold immunity for firearm manufacturers and sellers against claims that they are legally responsible for harm caused by the criminal misuse of firearms by third parties. *Id.* §§ 7902(b), 7903. Defendants moved to dismiss the FAC based on PLCAA immunity on November 23, 2005. (Appellant’s App. Vol. IV p. 70). The trial court denied Defendants’ motion, finding the PLCAA unconstitutional. (*Id.* at p. 104). Defendants appealed, and the Court of Appeals affirmed on non-constitutional grounds, holding that the City’s action based on an alleged violation of the Indiana public nuisance statute was not barred by the PLCAA because it fit within the predicate exception to PLCAA immunity. *Smith & Wesson Corp. v. City of*

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<sup>1</sup>“Defendants” are firearms manufacturers Smith & Wesson Corp., Sturm Ruger & Co., Inc., Beretta U.S.A. Corp., Colt’s Manufacturing Company, LLC, Phoenix Arms, Glock, Inc., Beemiller, Inc. d/b/a Hi-Point Firearms, Browning Arms, and Taurus International Manufacturing, Inc.

*Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007). The Supreme Court denied Defendants' Petition to Transfer. *Smith & Wesson Corp. v. City of Gary*, 915 N.E.2d 978 (Ind. 2009).

On May 4, 2015, the Indiana General Assembly amended the Immunity Statute and made its provisions retroactive to August 26, 1999. Ind. Code § 34-12-3-1 *et seq.* The trial court gave the City 60 days to amend its pleadings in response to the amended statute. (Appellant's App. Vol. I p. 26). The City did not amend, and Defendants filed their Motion for Judgment on the Pleadings on November 23, 2015, asserting immunity under the Immunity Statute and the PLCAA. (Appellant's App. Vol. II p. 92). The trial court granted Defendants' motion on January 2, 2018, finding that Defendants were entitled to immunity under both the federal and state statutes. (*Id.* at p. 46).

The City appealed, and on May 23, 2019, the Court of Appeals affirmed in part, reversed in part and remanded the case for further proceedings. *City of Gary v. Smith & Wesson Corp.*, No. 18A-CT-181, 2019 WL 2222985 (Ind. Ct. App. May 23, 2019) (hereafter "App. Op."). The court held, *inter alia*, that (1) the City's lawsuit was not preempted by Indiana Code § 35-47-11.1 *et seq.*; (2) Defendants were not immune under Indiana Code § 34-12-3-1 *et seq.* from the City's negligent distribution and public nuisance claims because the City alleged Defendants committed unlawful acts; and (3) pursuant to the law of the case doctrine, the PLCAA does not bar the City's claims.

### **ARGUMENT**

This case presents significant questions of law in a case of public importance. *See* Ind. R. App. P. 57(H)(4). The City of Gary seeks to regulate by mandatory injunction the manner in which Defendants market and sell the firearms they manufacture. The relief the City seeks would radically change the law under which Defendants sell firearms throughout the country and

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would commandeer from the State of Indiana its exclusive right to regulate firearms commerce under Section 35-47-11.1 *et seq.* (“Preemption Statute”). The Court of Appeals disagreed, finding that the City’s 20-year effort to dictate through the courts how firearms commerce should be conducted is not preempted because its lawsuit is not a “measure” undertaken “as a means to an end.” (App. Op. \*6). The court is incorrect, and its decision opens the door to attempts by municipalities across the State to regulate firearms commerce in the courts, creating a patchwork of laws that Section 35-47-11.1 *et seq.* was enacted to prevent.

Cloaking itself in law of the case, the Court of Appeals also adhered to its earlier interpretation of the PLCAA, which is in conflict with decisions of the Second and Ninth Circuit Courts of Appeals. *See* Ind. R. App. P. 57(H)(3). In doing so, the court undermines congressional intent to provide firearms manufacturers threshold immunity from litigation arising from criminal misuse of their products. The Court of Appeals was not bound by law of the case, and its refusal to acknowledge the subsequent contrary federal appellate court decisions regarding the PLCAA’s meaning warrants transfer.

The decision of the Court of Appeals also conflicts with immunity granted firearm manufacturers by Indiana Code § 34-12-3-1 *et seq.* (“Immunity Statute”) against damages and injunctive relief based on lawful marketing and sales of firearms. The court relied upon an interpretation of the FAC by this Court in 2003 that the Defendants “presumably” acted as “knowing accomplices” in unlawful sales by third party retail sellers. (App. Op. \*9). This presumption was indulged before Congress enacted the PLCAA and before the General Assembly amended the Immunity Statute to make it retroactive—legislative acts intended to provide threshold immunity from litigation. Transfer is warranted for this Court to consider its earlier characterization of the FAC in the context of the federal and state immunity statutes,

particularly whether the conclusory allegation of Defendants’ “accomplice liability” justifies depriving Defendants of immunity from suit. *See* Ind. R. App. P. 57(H)(5). Unless the Court does so, plaintiffs in Indiana will be able to negate the immunity of firearm manufacturers based only on conclusory allegations that their practices were unlawful.

The decision of the Court of Appeals further conflicts with *District of Columbia v. Heller*, 554 U.S. 570 (2008). *See* Ind. R. App. P. 57(H)(3). The Court of Appeals ruled that Defendants’ advertisements promoting possession of firearms in the home for self-defense may constitute the crime of “Deception” under Indiana Code § 35-43-5-3(a)(9). (App. Op. \*11). However, in *Heller*, the Supreme Court recognized that a constitutional right exists to possess firearms in the home for self-defense. An advertisement promoting the exercise of a fundamental constitutional right cannot constitute unlawful conduct as a matter of law.

**I. INDIANA LAW PREEMPTS THE CITY’S ATTEMPT TO REGULATE FIREARMS COMMERCE THROUGH THE COURTS.**

The Preemption Statute generally provides that municipalities “may not regulate” firearms, including the “transfer of firearms” and “commerce in firearms.” Ind. Code § 35-47-11.1-2 (2011). The “provision” of any “measure” undertaken by a municipality “before, on or after June 30, 2011” that “pertains to or affects firearms is void.” Ind. Code § 35-47-11.1-3. The Court of Appeals purported to apply the rules of statutory interpretation to determine what the legislature intended to accomplish with this statute, but it did so erroneously.<sup>2</sup>

A “measure” by a municipality is not limited to a “legislative enactment” under its plain meaning or within the context of the Preemption Statute. Although the dictionary definition of “measure” relied on by the court below used “legislative act” as an example of a “measure,”

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<sup>2</sup>*See generally* Brief Appellees/Cross-Appellants Manufacturer Defendants, pp. 26-29.

there is no basis to find that a “measure” is limited to such a “legislative act.” Indeed, the same dictionary also defines “measure” more broadly as “a way to accomplish something.” MERRIAM-WEBSTER ONLINE DICTIONARY, [www.merriam-webster.com/dictionary/measure](http://www.merriam-webster.com/dictionary/measure) (last visited July 3, 2019). When the City elected to seek an injunction imposing terms and conditions on the manner in which Defendants would conduct their businesses, its purpose was to bypass the General Assembly and regulate firearms commerce in ways that legislatures had not.

Moreover, in limiting “measure” under Section 3 of the Preemption Statute to a “legislative act,” the Court of Appeals renders “measure” entirely superfluous. Section 3 lists different types of legislative actions: ordinances, enactments and rules. If a “measure” is limited to a legislative act, it becomes redundant of the other prohibited acts, and courts are to “avoid[] an interpretation that makes any part of a statute superfluous.” *Buelna v. State*, 20 N.E.3d 137, 142 (Ind. 2014).

The Court of Appeals also incorrectly found that Section 3 does not apply because the City’s lawsuit does not have “provisions that are subject to being voided.” (App. Op. \*6). But it is the very injunctive relief that the City seeks that will necessarily have specific terms or “provisions” regarding how the Defendants are to conduct their businesses. *See* Ind. Trial R. 65(D) (Injunctions “shall be specific in terms ... and shall describe in detail ... the act or acts sought to be restrained.”). The terms of an injunction would be “provisions” resulting from the City’s “measure” to accomplish regulation through litigation.

This Court’s 2003 ruling, based on now-repealed Indiana Code § 35-47-11-2 and finding that the City’s “lawsuit does not seek to implement a regulatory scheme,” should no longer guide the analysis. *City of Gary*, 801 N.E.2d at 1238. The Preemption Statute was not yet law, and it more broadly prohibits local governmental attempts to regulate firearms and expressly declares



them “void.” Ind. Code § 35-47-11.2-3. And this Court’s characterization of the City’s lawsuit as simply seeking “redress under existing state law of nuisance and negligence” was an inaccurate reading of the FAC. *City of Gary*, 801 N.E.2d at 1238. The City seeks an injunction that will “[i]mplement reasonable standards and training regarding [Defendants’] distribution of handguns.” (Appellant’s App. Vol. II p. 36). Likewise, the Court of Appeals’ characterization of the City’s suit as an ordinary suit to enjoin a nuisance (App. Op. \*13) rings hollow where an injunction here will be a “regulation” requiring Defendants to comply with new standards when selling their products, which is precisely what Indiana Code § 35-47-11-2 prohibits.<sup>3</sup>

Whether this lawsuit is seen as “a step ... taken as a means to an end” or “a way to accomplish something,” it is a “measure” undertaken to accomplish firearms-related regulation. *See City of Philadelphia v. Beretta U.S.A. Corp.*, 126 F.Supp.2d 832, 889-90 (E.D. Pa. 2000) (City could not accomplish firearms regulation by litigation where state preemption statute prevented it from doing so legislatively); *Penelas v. Arms Tech., Inc.*, 778 So.2d 1042, 1045 (Fla. Ct. App. 2001) (“[T]he judiciary is not empowered to ‘enact’ regulatory measures in the guise of injunctive relief.”). The City’s attempt to bypass the General Assembly and impose its own regulations should be rejected as a violation of the Preemption Statute.

## **II. GENERAL PUBLIC NUISANCE STATUTES DO NOT COME WITHIN THE PREDICATE EXCEPTION TO IMMUNITY UNDER THE PLCAA.**

Enacted in 2005, the PLCAA provides that a “civil action \*\*\* brought by any person against a manufacturer or seller of a [firearm or ammunition] product \* \* \* for damages \* \* \* or other relief, resulting from the criminal or unlawful misuse of [the] product by the person or a

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<sup>3</sup>Although the Immunity Statute expressly authorizes municipalities to seek injunctive relief to “enforce a valid statute, rule or ordinance” against firearm manufacturers, it does not authorize enactment of new measures via injunction in contravention of the Preemption Statute. Ind. Code § 35-47-11.1-3.

third party” “may not be brought in any Federal or State Court.” 15 U.S.C. §§ 7902(a), 7903(5)(A). Recognizing the constitutional right to keep and bear arms, *id.* §§ 7901(a)(1)-(2), Congress determined that lawsuits seeking to hold law-abiding firearms manufacturers and sellers liable for third-party criminal acts “threaten[] the diminution of a basic constitutional right and civil liberty.” 15 U.S.C. § 7901(a)(6).

This broad immunity is subject to certain limited exceptions. *See* 15 U.S.C. § 7903(5)(A)(i)-(vi). As relevant here, the PLCAA permits “action[s] in which a manufacturer or seller of a [firearm or ammunition] knowingly violated a State or Federal statute *applicable to the sale or marketing* of the product, and the violation was a proximate cause of the harm for which relief is sought.” *Id.* § 7903(5)(A)(iii) (emphasis added). This exception “has come to be known as the ‘predicate exception,’ because a plaintiff not only must present a cognizable claim,” but also “a knowing violation of a ‘predicate statute,’” *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir. 2009), *i.e.*, a statute “applicable to the sale or marketing of [firearms],” 15 U.S.C. § 7903(5)(A)(iii). Congress provided illustrations of the types of “applicable” statutes, each of which describes statutes that expressly create obligations on the part of firearm manufacturers and sellers regarding the sales of their products. *See* 15 U.S.C. § 7903(5)(A)(iii)(I) & (II).

**A. The Legal Framework for Considering Application of the PLCAA Has Changed Since the Court of Appeals’ Prior Decision.**

When the Court of Appeals examined the PLCAA in 2007, no federal appellate court had addressed the meaning of the predicate exception. Relying on the broadest dictionary definition and a single federal district court decision addressing a similar New York nuisance statute, the Court of Appeals held that Congress intended “applicable” to mean “capable of being applied” to

the sale or marketing of firearms. *Smith & Wesson*, 875 N.E.2d at 431, 434 (citing *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 261-64 (E.D.N.Y. 2005)).

After the Court of Appeals' 2007 decision, two federal appellate courts weighed in.<sup>4</sup> First, the Second Circuit reversed the district court relied on by the court below. *See City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 403 (2nd Cir. 2008). The court held that the New York nuisance statute neither "expressly regulat[ed]" nor could "clearly . . . be said to implicate" the sale or marketing of firearms. *Id.* at 399, 403. The Second Circuit rejected the district court's interpretation of "applicable to" to mean "capable of being applied" because it was a "too-broad reading of the predicate exception" that "would allow the predicate exception to swallow the statute..." *Id.* at 401-02.<sup>5</sup> The Ninth Circuit followed, also rejecting a broad reading of "applicable" with respect to the California public nuisance statute and finding significance in the illustrative predicate statutes set forth in Sections 7903(5)(A)(iii)(I) & (II), noting that "each of the examples has—at the very least—a direct connection with sales or manufacturing." *Ileto*, 565 F.3d at 1133-34;<sup>6</sup> *see also Dist. of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169, 171 (D.C. 2008) (holding the District's Assault Weapons Manufacturing Strict Liability Act did not fit the predicate exception because, unlike the PLCAA's illustrative statutes, it did not contain standards that could be "violated").

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<sup>4</sup>*See generally* Brief Appellees/Cross-Appellants Manufacturer Defendants, pp. 39-43.

<sup>5</sup>Indiana state courts regularly rely on federal court interpretation of federal statutes. *See, e.g., Ind. Dep't of Pub. Welfare v. Payne*, 622 N.E.2d 461, 468 (Ind. 1993) (lower federal court decisions are not binding but persuasive authority on federal questions). Respect for federal appellate courts on questions of federal law is reflected in Rule of Appellate Procedure 57(H)(3).

<sup>6</sup>*See Ileto v. Glock, Inc.*, 421 F.Supp.2d 1274, 1282-83 (C.D. Cal. 2006), for a description of the plaintiffs' claims under the California public nuisance statute, Cal. Pen. Code § 370, which is virtually identical to Indiana's public nuisance statute.

Thus, with one recent exception, every appellate court decision after the Court of Appeals' prior ruling—including federal appellate courts in *City of New York* and *Ileto*—rejected the Court of Appeals' interpretation of the predicate exception. That one exception is a 4-3 decision from the Connecticut Supreme Court in *Soto v. Bushmaster Firearms International, LLC*, 202 A.2d 262 (Conn. 2019), which held that a claim under the Connecticut Unfair Trade Practices Act, Conn. General Statutes § 42-110a *et seq.*, fell within the predicate exception based on the broad definition of “applicable” as “capable of being applied,” noting that Congress *could* have explicitly employed narrowing language. (App. Op. \*13). Yet “the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used,” *Deal v. United States*, 508 U.S. 129, 132 (1993), and *every* contextual indicator supports the narrower reading of the predicate exception adopted by federal appellate courts. Indeed, if Congress had used “applicable” as broadly as the Court of Appeals in this case in 2007 and as the court in *Soto*, “there would be no need to list examples at all.” *Ileto*, 565 F.3d at 1134.<sup>7</sup>

The Court of Appeals held that the trial court was bound by law of the case to apply its prior interpretation of the predicate exception, yet recognized that it was free to revisit its own decision. (App. Op. \*13). Rather than provide a substantive analysis of its prior ruling in light of subsequent, contrary federal appellate court decisions, the Court of Appeals simply decided it was not bound by those decisions and cited to the 4-3 decision in *Soto*. However, substantive consideration of the developments in the law was particularly warranted here because immunity under a federal statute intended to shield parties from litigation is at stake. *See Digital Equip.*

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<sup>7</sup>The Connecticut Supreme Court stayed proceedings in *Soto* pending the United States Supreme Court's decision on the defendant's petition for certiorari to be filed by August 1, 2019. <https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/18A1185.html>. The question on which review is sought is whether Congress intended the predicate exception to accommodate broad statutes of general application.

*Corp. v. Desktop Direct, Inc.* 511 U.S. 863, 879 (1994) (“When a policy is embodied in a ...statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its ‘importance.’”).

**B. The City Has Not Sufficiently Alleged that the Manufacturer Defendants Knowingly Violated Statutes Applicable to the Sale or Marketing of Firearms.**

In reversing the trial court, the Court of Appeals also relied on its prior statement that, even if the predicate exception requires an allegation of a knowing violation of a statute specific to the sale or marketing of firearms, the City has met that threshold. (App. Op. \*13). When this Court allowed the City’s public nuisance claim to proceed in 2003 (prior to adoption of the PLCAA), it concluded that Defendants’ *lawful* conduct could still constitute a public nuisance. *See City of Gary*, 801 N.E.2d at 1233. Rejecting Defendants’ argument that compliance with regulatory statutes precludes a public nuisance claim, the Court reiterated that lawful conduct can form the basis for a claim and also noted that “[s]ome of the activity alleged in the complaint *presumably* violates those regulatory statutes, either directly in the case of the dealers or as knowing accomplices in the case of the other defendants.” *Id.* at 1235 (emphasis added). The Court of Appeals’ subsequent statement when applying the PLCAA that the City alleged violations of Indiana firearms statutes, *Smith & Wesson*, 875 N.E.2d at 432, rested on that prior *presumption* by this Court.

In the face of the PLCAA and the Indiana Immunity Statute amendment, both of which make clear that claims can no longer be based on lawful conduct, and in light of the recognition of an individual’s constitutional right to keep and bear firearms, the “presumption” of alleged statutory violations is no longer appropriate. As discussed below (*infra*, pp. 14-15), the City must be required to allege specific statutory violations to give Defendants notice of the claims

against them, particularly where the City’s allegations are being measured against a threshold established by a federal statute for bringing a claim. *Cf. Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (pleading of plausible claims “asks for more than a sheer possibility that a defendant has acted unlawfully”). It is plain that the current claims do not rest on actual knowing violations, but on allegations that Defendants *do not know, but should know* about unlawful acts by others. (*See, e.g.*, FAC p. 3). This does not meet the threshold standard of the predicate exception. *See Phillips v. Lucky Gunner LLC*, 84 F.Supp.3d 1216, 1224 (D. Colo. 2015) (seller’s alleged “indifference” to drug use by buyer of ammunition was not a “knowing” violation within predicate exception).

### **III. THE AMENDED IMMUNITY STATUTE BARS THE CITY’S ACTION.**

Subsection 3(2) of the Immunity Statute, by its plain language and as interpreted by this Court, prohibits actions for damages resulting from the criminal or unlawful use of a firearm by a third party. Ind. Code § 34-12-3-3(2); *KS&E Sports v. Runnels*, 72 N.E.2d 892, 900 (Ind. 2017) (The Immunity Statute “forecloses aggrieved plaintiffs from bringing suit.”). Subsection 3(1) of the Immunity Statute further prohibits actions for damages, injunctive relief and nuisance abatement against firearm manufacturers relating to their lawful design, manufacture, marketing or sale of firearms. *Id.* § 34-12-3-3(1).

#### **A. The City’s Conclusory Allegation that Defendants Acted as “Knowing Accomplices” in Statutory Violations by Others Is Insufficient to Avoid Threshold Immunity.**

Notice pleading is a liberal standard, but it is not formless. It requires “pleading the operative facts so as to place the defendant on notice as to the evidence to be presented at trial.” *Noblesville Redevelopment Comm’n v. Noblesville Assocs.*, 674 N.E.2d 558, 563 (Ind. 1996). Whether “a complaint sufficiently pleads a certain claim turns on ‘whether the opposing party

has been sufficiently notified of the claim ... so as to be able to prepare to meet it.” *Id.* at 564. The application of the Immunity Statute to the City’s claims turns on whether the FAC alleges that each Defendant violated any firearms laws. This Court characterized the FAC in 2003 as “presumably” alleging that Defendants had acted as “knowing accomplices” in retail sellers’ violation of firearm statutes. Yet when the linchpin of a lawsuit is a statutory violation, notice pleading should require identification of when, where, and who violated what statute. Without basic notice of the statutory violations for which each Defendant is allegedly responsible as a “knowing accomplice” or otherwise, they cannot be “prepare[d] to meet it.” *Id.*

The Court of Appeals erred in relying on *Daniels v. USS Agri-Chems*, 965 F.2d 376 (7th Cir. 1992), to find that identification of an underlying statute is not required. *Daniels* was a wrongful death case in which the question was whether plaintiff’s claim could proceed despite incorrectly referencing the Illinois, rather than Indiana, Wrongful Death Act in her complaint and failing to file an amended complaint correctly identifying the Indiana act within the applicable limitation period. The Seventh Circuit held the original complaint stated a claim for relief under Indiana law and the defendant did not challenge the sufficiency of the substantive allegations. The failure to reference the correct wrongful death act was of “no more legal significance than the correction of a typographical error.” *Id.* at 382.

In contrast, identification of a specific statutory violation necessary to overcome threshold immunity and on which an action exclusively depends is not legally insignificant but fundamental to notice “as to why a plaintiff sues.” *Noblesville*, 674 N.E.2d at 564. If immunity is to serve its fundamental purpose of eliminating the need to defend covered claims, such notice of specific statutory bases for avoiding immunity is critical. *See KS&E*, 72 N.E.2d at 900.

**B. Advertisements Promoting Possession of Firearms in the Home for Self-Defense Cannot Constitute the Crime of “Deception” as a Matter of Law.**

The Court of Appeals’ finding that Defendants may have violated Indiana Code § 35-43-5-3(a)(9) and committed the crime of “Deception” by advertising their firearms for possession in the home for personal defense must be reversed. The Supreme Court found that the home is “where the need for defense of self, family and property is the most acute,” *Heller*, 554 U.S. at 628-29, and any law that prohibits possession of firearms for that purpose is categorically unconstitutional, *id.* at 629. Nonetheless, under the Court of Appeals’ decision, immunity would be defeated if the Defendants publicly promoted the exercise of the Second Amendment right to keep firearms in the home. Any debate over whether firearm possession for “defense of hearth and home” increases personal security or poses safety risks is irrelevant. *Heller*, 554 U.S. at 635. The law cannot criminalize promotion of the constitutional right to keep and bear arms, and courts have recognized that activities facilitating exercise of the Second Amendment right are protected. *See Ezell v. City of Chicago*, 846 F.3d 888, 892 (7th Cir. 2017) (striking down zoning regulation limiting location of shooting ranges as a violation of residents’ Second Amendment right to maintain proficiency in firearm use).

**CONCLUSION**

For the foregoing reasons, Manufacturer Defendants ask this Court to Grant their Petition to Transfer and affirm the trial court.

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I verify that the Petition to Transfer of Appellees/Cross-Appellants Manufacturer Defendants contains no more than 4,200 words, including footnotes.

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CERTIFICATE OF SERVICE

I certify that on July 8, 2019, I electronically filed the foregoing document using the Indiana E-Filing System (IEFS). I also certify that on July 8, 2019, the foregoing document was served upon the following person(s) via IEFS:

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