

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA**

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JESUS RAMOS and NORMA DOLSON, Individually and as Parents and Co-Administrators of the Estate of FRANCINE E. ARAMOS, deceased; and JOSEPH GRAY, JR. and IRENE GRAY, Individually and as Parents and Co-Administrators of the Estate of TREVOR D. GRAY, deceased; and EDWARD KETROW, Individually and as Parent and Administrator of the Estate of KORY KETROW, deceased,

5:16-cv-00304 (JFL)

Plaintiffs,

-against-

WAL-MART STORES, INCORPORATED; WAL-MART STORES EAST, L.P.; WAL-MART STORES EAST INC.; NICOLE ANN EVERETT; ADDIEL JAVIER; and JOHN DOE WALMART CASHIER,

Defendants.

-----x

BRIEF OF AMICI CURIAE IN SUPPORT OF PLAINTIFFS’ MOTION TO REMAND

Molly Thomas-Jensen (Admitted *pro hac vice*)
Christina K. Canto*
Office of the Public Advocate for the City of New York
1 Centre Street, 15th Floor North
New York, NY 10007
212-669-4092
mthomas-jensen@pubadvocate.nyc.gov
ccanto@pubadvocate.nyc.gov

Attorney for Amici Curiae

**Law Graduate, not yet admitted to practice law*

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

CONSENT OF PARTIES vii

STATEMENT OF INTEREST..... vii

STATEMENT OF FACTS..... x

ARGUMENT..... 1

I. As This District Has Previously Determined, Litigating The Scope Or Applicability Of An Embedded Federal Question Will Disrupt The Federal-State Balance 2

II. Federal Question Jurisdiction Fails Because The Present Case Does Not Necessarily Raise A Federal Issue That Is Actually Disputed And Substantial 5

A. No federal question is “necessarily raised” by Plaintiffs’ negligence claim because it is merely an alternate theory to Plaintiffs’ purely state-law claim of ordinary negligence..... 5

B. The federal question is not “actually disputed” because there is no controversy respecting the validity, construction, or effect of § 922(b)(1)..... 7

 1. There is no actual dispute respecting the construction of § 922(b)(1)..... 7

 2. There is no actual dispute respecting the effect of § 922(b)(1) 10

 3. There is no actual dispute respecting the validity of § 922(b)(1) 10

C. The federal question is not “substantial,” according to the substantiality factors 11

 a. *The federal government has little interest in this case*..... 12

 b. *The federal issue in this case is not dispositive* 14

 c. *No other factors weigh in favor of finding that the issue is substantial*..... 15

CONCLUSION 16

TABLE OF AUTHORITIES

Statutes

15 U.S.C. § 7901(b)	5
15 U.S.C. § 7903(5)(A).....	5
18 U.S.C. § 922.....	<i>passim</i>
28 U.S.C. § 1331.....	1
28 U.S.C. § 1332.....	1
28 U.S.C. § 1441(a)	1
N.Y.C. Admin. Code § 17-191	vi
New York City Charter § 10.....	vi
New York City Charter § 24.....	vi

Supreme Court of the United States Cases

<i>Caterpillar, Inc. v. Williams</i> , 482 U.S. 386 (1987).....	8
<i>Chicago v. Int’l Coll. of Surgeons</i> , 522 U.S. 156 (1997).....	11
<i>Empire Healthchoice Assurance, Inc. v. McVeigh</i> , 547 U.S. 677 (2006).....	11, 13
<i>Franchise Tax Bd. v. Constr. Laborers Vacation Tr.</i> , 463 U.S. 1 (1983).....	11
<i>Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.</i> , 545 U.S. 308 (2005).....	<i>passim</i>
<i>Gully v. First Nat’l Bank</i> , 299 U.S. 109 (1936).....	8
<i>Gunn v. Minton</i> , 133 S. Ct. 1059 (2013).....	1, 11, 12, 16
<i>Merrell Dow Pharms., Inc. v. Thompson</i> , 478 U.S. 804 (1986).....	11, 12, 15
<i>Shulthis v. McDougal</i> , 225 U.S. 561 (1912).....	7

Third Circuit Cases

<i>Boyer v. Snap-On Tools Corp.</i> , 913 F.2d 108 (3d Cir. 1990).....	2
<i>Goepel v. Nat’l Postal Mail Handlers Union</i> , 36 F.3d 306 (3d Cir. 1994).....	6
<i>Hetherington v. Sears, Roebuck & Co.</i> , 593 F.2d 526 (3d Cir. 1979).....	8

Hunziker v. Scheidemantle,
 543 F.2d 489 (3d Cir. 1976)..... 6

In re Orthopedic Bone Screw Prods. Liab. Litig.,
 193 F.3d 781 (3d Cir. 1999)..... 6

Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.,
 772 F.3d 158 (3d Cir. 2014)..... 6

Samuel-Bassett v. Kia Motors Am., Inc.,
 357 F.3d 392 (3d Cir. 2004)..... 1, 2

Steel Valley Auth. v. Union Switch & Signal Div., Am. Standard, Inc.,
 809 F.2d 1006 (3d Cir. 1987)..... 2, 7

Eastern District of Pennsylvania Cases

Ayala-Castro v. GlaxoSmithKline (In re Avandia Mktg.),
 624 F. Supp. 2d 396 (E.D. Pa. 2009) 3, 4, 5, 8

Chirik v. TD BankNorth, N.A.,
 No. 06-04866, 2008 U.S. Dist. LEXIS 3939 (E.D. Pa. Jan. 15, 2008)..... 2

Cty. Of Del. v. Gov’t Sys.,
 230 F. Supp. 2d 592 (E.D. Pa. 2002) 5, 9

In re One Meridian Plaza Fire Litig.,
 820 F. Supp. 1460 (E.D. Pa. 1993) 7

Pennsylvania v. Eli Lilly & Co.,
 511 F. Supp. 2d 576 (E.D. Pa. 2007) 2

Zgrablich v. Cardone Indus.,
 No. 15-4665, 2016 U.S. Dist. LEXIS 13338 (E.D. Pa. Feb. 3, 2016) 1, 2, 7

Other Cases

Adventure Outdoors, Inc. v. Bloomberg,
 552 F.3d 1290 (11th Cir. 2008) 13

Alderman v. Bradley,
 957 S.W.2d 264 (Ky. St. App. 1997)..... 4

Appalachian Res. Dev. Corp. v. McCabe,
 387 F.3d 461, (6th Cir. 2004) 8, 14

Bell v. Smitty’s Super Valu,
 900 P.2d 15 (Ariz. Ct. App. 1995)..... 4, 8

Brown v. Wal-Mart Stores,
 976 F. Supp. 729 (W.D. Tenn. 1997)..... 14, 15

Cabiroy v. Scipione,
 767 A.2d 1078 (Pa. Super. 2001)..... 6

City of N.Y. v. A-1 Jewelry & Pawn, Inc.,
 501 F. Supp. 2d 369 (E.D.N.Y. 2007) viii

<i>City of N.Y. v. Bob Moates' Sport Shop, Inc.</i> , No. 06-CV-6504, 2008 U.S. Dist. LEXIS 11699 (E.D.N.Y. Feb. 15, 2008).....	viii
<i>DeAngelo-Shuayto v. Organon USA, Inc.</i> , No. 07-2923 (SRC), 2007 U.S. Dist. LEXIS 92557 (D.N.J. Dec. 12, 2007).....	8
<i>Estate of Kim v. Coxe</i> , 295 P.3d 380 (Alaska 2013).....	5
<i>Holder v. Bowman</i> , No. 07-00-0126-CV, 2001 Tex. App. LEXIS 540 (Tex. App. Jan. 25, 2001).....	4
<i>Hood ex rel. Miss. V. AstraZeneca Pharms., LP</i> , 744 F. Supp. 2d 590 (N.D. Miss. 2010).....	9
<i>Hoosier v. Lander</i> , 17 Cal. Rptr. 2d 518 (Cal. Ct. App. 1993).....	4
<i>Howard Bros. of Phenix City, Inc. v. Penley</i> , 492 So. 2d 965 (Miss. 1986).....	9
<i>Marren v. Stout</i> , 930 F. Supp. 2d 675 (W.D. Tex. 2013).....	11
<i>Mersmann v. Cont'l Airlines</i> , 335 F. Supp. 2d 544 (D.N.J. 2004).....	5
<i>Miller v. Wal-Mart Stores</i> , 918 S.W.2d 658 (Tex. App. 1996).....	4
<i>NASDAQ OMX Grp., Inc. v. UBS Sec., LLC</i> , 770 F.3d 1010 (2d Cir. 2014).....	13, 16
<i>NRA of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives</i> , 700 F.3d 185 (5th Cir. 2012)	10
<i>Olson v. Ratzel</i> , 278 N.W.2d 238 (Wis. Ct. App. 1979).....	4
<i>Pavrides v. Niles Gun Show</i> , 637 N.E.2d 404 (Ohio Ct. App. 1994).....	4, 9
<i>Phillips v. K-Mart Corp.</i> , 588 So. 2d 142 (La. Ct. App. 1991).....	4, 8, 15
<i>Rains v. Bend of the River</i> , 124 S.W.3d 580 (Tenn. Ct. App. 2003).....	4
<i>Ramsey v. Summers</i> , No. 10-CV-00829, 2011 U.S. Dist. LEXIS 19836 (W.D. Pa. Mar. 1, 2011)	6
<i>Robinson v. Howard Bros. of Jackson, Inc.</i> , 372 So. 2d 1074 (Miss. 1979).....	4
<i>Russell v. Chesapeake Appalachia, L.L.C.</i> , No. 4:14-cv-00148, 2014 U.S. Dist. LEXIS 163401 (M.D. Pa. Nov. 21, 2014).....	6
<i>Smith v. Bryco Arms</i> , 33 P.3d 638 (N.M. Ct. App. 2001).....	9

Stout v. Novartis Pharms., Corp.,
 No. 08-856, 2009 U.S. Dist. LEXIS 110870 (D.N.J. Nov. 30, 2009) 8

T & M Jewelry, Inc. v. Hicks,
 189 S.W.3d 526 (Ky. 2006) 4, 5, 15

United States v. Jackson,
 546 F. App'x 643 (9th Cir. 2013) 15

Wal-Mart Stores v. Tamez,
 960 S.W.2d 125 (Tex. App. 1997) 4, 8

Wal-Mart Stores, Inc. v. Coker,
 742 So. 2d 257 (Fla. Dist. Ct. App. 1997) 4, 9

Wells Fargo Bank, N.A. v. Krantz,
 No. 2:13-cv-02628 (ES) (JAD), 2014 U.S. Dist. LEXIS 32404 (D.N.J. Mar. 13, 2014) ... 5

Williams v. Wal-Mart Stores East, L.P.,
 99 So. 3d 112 (Miss. 2012) 9

Secondary Sources

Bureau of Alcohol, Tobacco and Firearms,
Federal Firearms Regulations Reference Guide 107 (1995) 14

Bureau of Alcohol, Tobacco and Firearms,
Firearms: Frequently Asked Questions (Dec. 27, 2002),
<http://www.atf.gov/firearms/faq/faq2.htm> 14

N.Y.C. Child Fatality Review Advisory Team,
Understanding Child Injury Deaths (2013),
[https://www1.nyc.gov/html/doh/downloads/pdf/
 ip/ip-nyc-inj-child-fatality-report13.pdf](https://www1.nyc.gov/html/doh/downloads/pdf/ip/ip-nyc-inj-child-fatality-report13.pdf) vii

Restatement (Second) of Torts § 285 cmt. c (1977) 10

Restatement (Third) of Torts § 14 cmt. a (2001) 10

CONSENT OF PARTIES

Counsel for Plaintiffs have consented to the filing of this brief of amici curiae. Counsel for Defendants do not consent to the filing of this brief of amici curiae.¹

STATEMENT OF INTEREST

Letitia James is the duly elected Public Advocate for the City of New York. As Public Advocate, James is a citywide elected official, the immediate successor to the Mayor, and an ex-officio member of the New York City Council. New York City Charter (“Charter”) §§ 24, 10, 24(e). The Public Advocate is responsible for identifying systemic problems, recommending solutions, and publishing reports concerning her areas of inquiry. She has the power to introduce legislation and hold oversight hearings on legislative matters. *Id.* at § 24. James, in her role as Public Advocate, also appoints a member to the New York City Child Fatality Review Advisory Team and receives the Team’s reports on child fatalities. N.Y.C. Admin. Code § 17-191.

Gale A. Brewer is the President of the Borough of Manhattan (the municipal designation of New York County), having been elected to the position in 2013. Pursuant to the Charter of the City of New York her powers and duties include monitoring the major problems faced by her constituents; analysis of the sources and possible remedies for such problems and developing policy proposals for the benefit of Manhattan and New York City. Her office deals regularly with the effects of gun violence and the proliferation of unregulated guns in New York City, and the many deaths and life-threatening wounds inflicted by weapons brought into the City from jurisdictions with less restrictive gun regulations.

Ruth Hassell-Thompson is a New York State Senator who represents parts of Bronx and Westchester counties. Senator Hassell-Thompson has fought for broader awareness of the

¹ Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae or their counsel made a monetary contribution to its preparation or submission.

impact of gun violence, and has promoted a five year plan to reduce gun violence. Senator Hassell-Thompson co-sponsored a package of gun control laws that became law in 2013, giving New York State some of the strictest gun control laws in the nation. Senator Hassell-Thompson is also a member of the steering committee of State Legislators Against Illegal Guns.

Brad Hoylman is a New York State Senator who represents the 27th Senate District in Manhattan. Senator Hoylman has worked to strengthen gun control, including introduction of legislation to create gun violence restraining orders and introducing a fee on firearm purchases that would be used to fund gun violence prevention research.

Liz Krueger is a New York State Senator who represents the 28th Senate District in Manhattan. Senator Krueger co-sponsored a package of gun control laws that became law in 2013, giving New York State some of the strictest gun control laws in the nation. Senator Krueger has advocated for sensible gun control.

Francisco Moya is New York State Assemblymember whose district is in Queens. Assemblymember Moya is a strong advocate for sensible gun control.

Gustavo Rivera is a New York State Senator whose district extends from the Northwest Bronx to areas of the East Bronx. Senator Rivera has served as the ranking member of the Crime Victims, Crime and Corrections Committee, and has advocated for better reentry policies. Senator Rivera co-sponsored a package of gun control bills that became law in 2013.

Jumaane Williams is a Member of the New York City Council, where he represents the 45th Council District in Brooklyn, New York. Council Member Williams is co-chair of the council's Task Force to Combat Gun Violence, a group charged with producing a series of tangible solutions aimed at reducing citywide shootings and promoting positive alternatives for young people. Under Williams' leadership, the Anti-Gun Violence Initiative was established to

fund almost \$5 million in its first year for programs such as crisis intervention, therapeutic services, conflict mediation and community development.

Gun violence in New York City is a serious problem with tragic consequences. In 2015, there were over 1,000 shooting incidents. The most recent report issued by the New York City Child Fatality Review Advisory Team contains disturbing statistics about the prevalence of young victims of firearms: “Firearm-related injury was the leading cause of injury death among NYC youth aged 15 to 17.”² Firearms are the fourth leading cause of injury death for children aged 10 to 14 in New York City.³

This case involves the sale of ammunition in a Philadelphia-area Wal-Mart store. Given the strength of New York State and City gun control measures, both guns and ammunition are difficult to purchase in New York City. However, many guns and bullets are trafficked illegally into New York City along what is known as the “Iron Pipeline”—a route that runs along Interstate Highway 95 from southern states with lax gun control laws. Thus, New Yorkers—and their elected representatives—have a strong interest in the standards to which retailers are held, particularly for retailers operating in states such as Pennsylvania that are on the “Iron Pipeline.”⁴

² N.Y.C. Child Fatality Review Advisory Team, *Understanding Child Injury Deaths* (2013), <https://www1.nyc.gov/html/doh/downloads/pdf/ip/ip-nyc-inj-child-fatality-report13.pdf>.

³ *Id.*

⁴ Courts have recognized New York City’s specific interest in the standards applied to the sale of firearms in states that are sources of guns trafficked into the city. *City of N.Y. v. Bob Moates’ Sport Shop, Inc.*, No. 06-CV-6504, 2008 U.S. Dist. LEXIS 11699, at *20-21 (E.D.N.Y. Feb. 15, 2008) (“New York has a strong interest in the safety [of] its residents and territory from handgun violence as well as in regulating the illegal flow of handguns into its territory. By enacting strong gun control laws to protect its citizens from gun-related crimes New York has expressed a special public policy interest in the subject matter of this litigation. The activities that Defendants are alleged to be involved in are illegal and against the public interest in all states. Their alleged illegal practices hinder the ability of New York and the federal government to regulate the sale and ownership of firearms in accordance with extant statutes and contribute to serious criminal dangers in this City.”); *City of N.Y. v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 427 (E.D.N.Y. 2007) (“The nature of the firearms market, especially the secondary illegal firearms market, ensures that sales made in one part of the country will impact other areas of the nation. The fact of gun trafficking and the imbalance in the restrictions placed on guns from state to state facilitates a flow of guns from states without major restrictions on firearms to states, like New York, that have stricter regulation.” (citations omitted)).

In particular, this case has the potential to disrupt the federal-state balance, with grave effects for residents of Pennsylvania and neighboring states.

STATEMENT OF FACTS⁵

On July 5, 2015 at 2:56 a.m., Wal-Mart Defendants sold a box of 50 Winchester .38 caliber handgun bullets, manufactured for a Smith and Wesson revolver handgun, to Robert Jourdain, a potentially intoxicated 20 year-old. (C: 11). Wal-Mart Defendants did not require that Jourdain present valid identification verifying his age. (C: 12). Wal-Mart Defendants also did nothing to determine whether Mr. Jourdain was intoxicated. (C: 12).

Shortly after the sale, Jourdain loaded a .38 caliber Smith & Wesson model 10 revolver handgun with the ammunition he had just purchased and left the Wal-Mart parking lot accompanied by a friend and a cousin. (C: 13, 16). Less than thirty minutes after the sale, Plaintiff-decedent Kory Ketrow was shot multiple times and killed by the bullets sold by Wal-Mart. (C: 14). Less than one hour after the sale, Plaintiff-decedents Francine Ramos and Trevor Gray were also shot numerous times and killed by the bullets sold by Wal-Mart. (C: 14-15).

Plaintiffs filed suit in the Pennsylvania Court of Common Pleas alleging ordinary negligence, negligence *per se*, and negligent entrustment. Defendants timely filed Notice of Removal to this Court on the basis of diversity and subject matter jurisdiction. (NOR: 3).⁶ To support their diversity jurisdiction argument, Defendants claim the individual Defendants were fraudulently joined. (NOR: 3). In support of their subject matter jurisdiction argument, Defendants contend that Plaintiffs' negligence *per se* theory necessarily raises a federal question,

⁵ The facts described herein are taken from the allegations in the Plaintiffs' Complaint ("C"), which this Court must regard as true for the purpose of determining jurisdiction. *Zgrablich v. Cardone Indus.*, No. 15-4665, 2016 U.S. Dist. LEXIS 13338, at *6 (E.D. Pa. Feb. 3, 2016). Defendants, Wal-Mart Stores, Incorporated, Wal-Mart Stores East, L.P., and Wal-Mart Stores East, Inc. are hereinafter referred to as "Wal-Mart Defendants" or "Defendants."

⁶ References to "NOR" are to Defendants' Notice of Removal, filed with this Court.

actually disputed and substantial, which a federal forum may entertain without disturbing any congressionally-approved balance of federal and state judicial responsibilities. (NOR: 3, 15).

ARGUMENT

This Court does not have federal question jurisdiction over this case. A civil action brought in state court may be removed to federal court only when federal district courts have original jurisdiction over the matter. 28 U.S.C. § 1441(a). Original jurisdiction may be based upon: (1) federal-question jurisdiction under 28 U.S.C. § 1331, which requires a civil action “arising under the Constitution, laws or treaties of the United States”; or (2) diversity under 28 U.S.C. § 1332. Although Defendants raise both bases in their Motion to Remand, this brief addresses only whether federal question jurisdiction lies in the instant action—*i.e.* whether this action “arises under” 18 U.S.C. § 922—a federal statute.

In order for a suit to “arise under” federal law, either federal law must create the cause of action, or the claim must satisfy all four elements of the *Grable* test, which asks: (1) “does a state-law claim necessarily raise a stated federal issue”; (2) is the issue actually disputed; (3) is the issue substantial; and (4) may a federal forum adjudicate this case “without disturbing any congressionally-approved balance of federal and state judicial responsibilities?” *Grable & Sons Metal Products, Inc. v. Darue Eng’g & Mfg.*, 545 U.S. 308, 314 (2005). Because there is no private federal cause of action for a violation of § 922, Plaintiffs’ claim may only “arise under” federal law if it satisfies each prong of the *Grable* test. Defendants must prevail on each element in order to establish federal question jurisdiction. *Gunn v. Minton*, 133 S. Ct. 1059, 1065 (2013) (discussing *Grable*, 545 U.S. at 314) (“Where all four of [the *Grable*] requirements are met, we held, jurisdiction is proper...”). This case fails to satisfy any of the *Grable* prongs.

Notably, the removing defendants bear “the burden of proving to a legal certainty that federal subject matter jurisdiction exists.” *Zgrablich v. Cardone Indus.*, No. 15-4665, 2016 U.S. Dist. LEXIS 13338, at *6 (E.D. Pa. Feb. 3, 2016) (citing *Samuel-Bassett v. Kia Motors Am., Inc.*, 357 F.3d 392, 396 (3d Cir. 2004)). “In resolving the parties’ dispute, we must assume that all of

the fact-based allegations in the complaint are true.” *Id.* (citing *Steel Valley Auth. v. Union Switch & Signal Div., Am. Standard, Inc.*, 809 F.2d 1006, 1987 (3d Cir. 1987)). Additionally, “removal statutes are strictly construed against removal,” and “all doubts must be resolved in favor of remand.” *Id.* (citing *Boyer v. Snap-On Tools Corp.*, 913 F.2d 108, 111 (3d Cir. 1990) and *Samuel-Bassett*, 357 F.3d at 403).

I. As This District Has Previously Determined, Litigating The Scope Or Applicability Of An Embedded Federal Question Will Disrupt The Federal-State Balance.

Before this Court need address the first three *Grable* elements, this Court should rule in accordance with this District’s existing jurisprudence and deny federal question jurisdiction on the grounds that it will disrupt the federal-state balance proscribing state tort claims to state courts. *See Ayala-Castro v. GlaxoSmithKline (In re Avandia Mktg.)*, 624 F. Supp. 2d 396, 400 (E.D. Pa. 2009); *see also Grable*, 545 U.S. at 314 (“[T]he appropriateness of a federal forum to hear an embedded issue could be evaluated only after considering the ‘welter of issues regarding the interrelation of federal and state authority and the proper management of the federal judicial system.’”); *Pennsylvania v. Eli Lilly & Co.*, 511 F. Supp. 2d 576, 586 (E.D. Pa. 2007) (“The federal issue will ultimately qualify for a federal forum only if federal jurisdiction is consistent with congressional judgment about the sound division of labor between state and federal courts...”). If permitting jurisdiction would “materially affect, or threaten to affect, the normal currents of litigation,” “herald a potentially enormous shift of traditionally state cases into federal courts,” or “attrac[t] a horde of original filings and removal cases raising other state claims with embedded federal issues,” then such action would not satisfy the federal-state balance prong of *Grable*. 545 U.S. at 318-19. Thus, even if the state-law claim meets the other three *Grable* prongs, “the exercise of federal jurisdiction is subject to a possible veto.” *Chirik v. TD BankNorth, N.A.*, No. 06-04866, 2008 U.S. Dist. LEXIS 3939, at *9 (E.D. Pa. Jan. 15, 2008).

Applying these principles to a question almost identical to the question posed by this case, a fellow judge of this District determined jurisdiction would disrupt the federal-state balance. *Ayala-Castro*, 624 F. Supp. 2d at 400. *Ayala-Castro* examined a group of cases in which the principal federal issue was whether a plaintiff may recover against a manufacturer for negligent failure to warn, a state-law cause of action, where the Food, Drug, and Cosmetic Act (FDCA), a federal law, prohibited the distributor from altering the manufacturer's label. *Id.* The defendants in *Ayala-Castro* argued for federal question jurisdiction on the basis that the plaintiffs' claim required the court to "construe and apply" the FDCA and its implementing regulations. *Id.* at 400-01. In other words, there was ambiguity as to the scope and applicability of a federal statute embedded in a state-law claim. *Id.* at 415. The court determined that "a significant disruption of the congressionally-determined balance between the federal and state judiciaries would be risked if federal jurisdiction could be based upon a question, embedded in a state tort claim, as to the scope or applicability of a related federal statute." *Id.* at 416. In so holding, Judge Rufe relied on *Grable's* analysis of *Merrell Dow*, which explained that "a potentially enormous shift' of state tort cases into federal courts would result if federal jurisdiction were to spring from tort claims' reliance on 'mislabeling' under the FDCA 'and other statutory violations.'" *Id.* at 415 (emphasis added).

Defendants make similar scope and applicability assertions here. Specifically, Defendants claim the issue is "whether the statute prohibits the sale of interchangeable ammunition to individuals who are at least 18 years old but who are under 21 years old if the individual represents the ammunition is for a rifle." (NOR: 21). But as illustrated by *Ayala-Castro*, this is an insufficient basis for disrupting the congressionally-approved federal-state balance, especially considering the reality that state courts are fully competent to interpret § 922(b)(1).

Indeed, Judge Rufe concluded in *Ayala-Castro* that state courts were “entirely capable” of interpreting and implementing federal regulation to determine whether a defendant’s conduct was prohibited, and any federalism concerns were “allayed by the fact that any such determination would be subject to review by the United States Supreme Court.” *Ayala-Castro*, 624 F. Supp. 2d at 416. There is no reason the same would not be true in this case.

In fact, state courts across the country have been adjudicating tort claims involving § 922(b)(1) violations without trouble. *See generally, e.g., Wal-Mart Stores, Inc. v. Coker*, 742 So. 2d 257 (Fla. Dist. Ct. App. 1997); *T & M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526 (Ky. 2006); *Alderman v. Bradley*, 957 S.W.2d 264 (Ky. St. App. 1997); *Olson v. Ratzel*, 278 N.W.2d 238 (Wis. Ct. App. 1979); *Rains v. Bend of the River*, 124 S.W.3d 580 (Tenn. Ct. App. 2003); *Holder v. Bowman*, No. 07-00-0126-CV, 2001 Tex. App. LEXIS 540 (Tex. App. Jan. 25, 2001); *Miller v. Wal-Mart Stores*, 918 S.W.2d 658 (Tex. App. 1996); *Hoosier v. Lander*, 17 Cal. Rptr. 2d 518 (Cal. Ct. App. 1993); *Pavlides v. Niles Gun Show*, 637 N.E.2d 404 (Ohio Ct. App. 1994); *Robinson v. Howard Bros. of Jackson, Inc.*, 372 So. 2d 1074 (Miss. 1979).

More specifically, several state courts have decided the precise issue of whether interchangeable-ammunition sales are prohibited by § 922(b)(1). *See, e.g., Wal-Mart Stores v. Tamez*, 960 S.W.2d 125, 129-30 (Tex. App. 1997); *Bell v. Smitty’s Super Valu*, 900 P.2d 15, 17 (Ariz. Ct. App. 1995); *Phillips v. K-Mart Corp.*, 588 So. 2d 142, 144 (La. Ct. App. 1991). These cases demonstrate that the minor issues of the scope or applicability of § 922(b)(1)—which state courts have adjudicated without problem for decades—are insufficient to disrupt the federal-state balance proscribing state-tort-law claims to state courts. State courts are the more appropriate venue for determining the proper standard of conduct for retailers of ammunition. This Court should not disrupt the proper federal-state balance, under which state courts adjudicate tort claims against retailers of ammunition.

II. Federal Question Jurisdiction Fails Because The Present Case Does Not Necessarily Raise a Federal Issue That Is Actually Disputed and Substantial.

Additionally, Plaintiffs' Complaint does not necessarily raise a federal issue, which is actually disputed and substantial, because: (1) the negligence *per se* claim is merely an alternate theory of liability, (2) any ambiguity allegedly present in § 922(b)(1) is related only to defenses raised in the Notice of Removal, and (3) the substantiality factors weigh against the grant of federal question jurisdiction.

A. No federal question is “necessarily raised” by Plaintiffs’ negligence claim because it is merely an alternate theory to Plaintiffs’ purely state-law claim of ordinary negligence.⁷

Although a federal issue may be “necessarily raised” if vindication of a state-law right necessarily turns on some construction of federal law, “a claim supported by alternative theories

⁷ To the extent that Defendants argue the Protection of Lawful Commerce in Arms Act (PLCAA) bars the ordinary negligence claim, potentially leaving only the negligence *per se* claim, this argument has no bearing on whether federal question jurisdiction exists. First, because this Court lacks subject matter jurisdiction, it should not address the merits of the Motion to Dismiss. *See, e.g., Mersmann v. Cont'l Airlines*, 335 F. Supp. 2d 544, 547 (D.N.J. 2004); *Wells Fargo Bank, N.A. v. Krantz*, No. 2:13-cv-02628 (ES) (JAD), 2014 U.S. Dist. LEXIS 32404, at *11 (D.N.J. Mar. 13, 2014). Second, the dispute over whether PLCAA is a defense to liability has no import because well-settled law dictates that a federal defense cannot be a basis for federal question jurisdiction. *See, e.g., Ayala-Castro*, 624 F. Supp. 2d at 414; *Cty. Of Del. v. Gov't Sys.*, 230 F. Supp. 2d 592, 599 (E.D. Pa. 2002) (remanding to state court because whether federal law preempted plaintiff's claim was a defense). Lastly, even if this Court entertained Defendants' PLCAA argument at this stage, the PLCAA may not dispose of Plaintiffs' ordinary negligence claim. The court possessing proper jurisdiction may decide the negligence claim is not preempted by the PLCAA for any of several reasons. For example, the trial court may find that the claim falls within the predicate exception. *See* 15 U.S.C. § 7903(5)(A)(iii) (In what has come to be known as the “predicate exception,” the PLCAA allows an action against an ammunition dealer who “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.”); *see also, e.g., T & M Jewelry, Inc. v. Hicks*, 189 S.W.3d 526, 530 (Ky. 2006) (allowing plaintiff to proceed on common law negligence even under PLCAA because plaintiff alleged violations of 18 U.S.C. § 922). Equally plausible, the trial court may hold that Plaintiffs' harm was not “solely caused by” the criminal misuse of ammunition, but also the negligent sale that illegally provided the purchaser with access to that ammunition. *See* 15 U.S.C. § 7901(b) (The stated purpose of the PLCAA is, in relevant part, “to prohibit causes of action against...dealers...of...ammunition products...for the harm *solely caused* by the criminal...misuse of...ammunition products by others when the product functioned as designed and intended” and “to prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.” (emphasis added)). The PLCAA was designed to protect law-abiding sellers from potentially costly litigation stemming from the illegal acts of their customers. It was not intended to shield sellers that are themselves violating the law. Additionally, the trial court may hold that the PLCAA violates the Constitution. *Cf. Estate of Kim v. Coxe*, 295 P.3d 380, 388-92 (Alaska 2013) (considering the constitutionality of the PLCAA and concluding that the statute survives constitutional review). The weight of these considerations supports the Court postponing a determination on Defendants' Motion to Dismiss until after proper jurisdiction has been established. In the meantime, Plaintiffs' ordinary negligence claim stands as an alternate theory of liability. *See Cty. Of Del.*, 230 F. Supp. 2d at 599.

in the complaint does not necessarily raise a federal question unless federal law is essential to each theory.” *Manning v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 772 F.3d 158, 163-64 (3d Cir. 2014) (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 810 (1988)).

In this case, ordinary negligence and negligence *per se* are merely alternate theories supporting the same claim of negligence. Under Pennsylvania law, the doctrine of negligence *per se* liability does not create an independent basis of tort liability but rather establishes, by reference to statutory scheme, the standard of care appropriate to the underlying tort. *Cabiroy v. Scipione*, 767 A.2d 1078, 1082 (Pa. Super. 2001) (quoting *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 790 (3d Cir. 1999)); *Russell v. Chesapeake Appalachia, L.L.C.*, No. 4:14-cv-00148, 2014 U.S. Dist. LEXIS 163401, at *8 (M.D. Pa. Nov. 21, 2014); *Ramsey v. Summers*, No. 10-CV-00829, 2011 U.S. Dist. LEXIS 19836, at *5-6 (W.D. Pa. Mar. 1, 2011). Negligence *per se* merely enables plaintiffs to establish, as a matter of law, “a breach of duty in a negligence action, so that only causation and damages need be proved.” *In re Orthopedic Bone*, 193 F.3d at 790; *see also Hunziker v. Scheidemantle*, 543 F.2d 489, 497 (3d Cir. 1976).

Although it is true that Plaintiffs pled ordinary negligence and negligence *per se* as separate causes of action, Pennsylvania law operates in the same manner in this case regardless of how the Complaint has been organized.⁸ Thus, despite the formulation of the Complaint, Plaintiffs assert only one claim of negligence supported by two arguments. First, that Defendants acted unreasonably under the circumstances. Second, that Defendants’ violation of the laws defining the minimum age to purchase handgun ammunition constituted negligence *per se*. A

⁸ Whether federal law is necessarily raised should not depend upon how the plaintiff numbers the counts in the complaint. It is immaterial whether the plaintiff separately numbers his negligence counts or whether the complaint contains only one Roman numeral within which the plaintiff asserts all reasons supporting negligence. While many jurisdictional principles depend upon the plaintiff being the master of the complaint, which issues qualify for federal jurisdiction under *Grable* should not depend on the complaint’s organization. Just as the well-pleaded complaint rule does not consider artful pleading in its analysis, *Goepel v. Nat’l Postal Mail Handlers Union*, 36 F.3d 306, 310 n.5 (3d Cir. 1994), determining the outcome by mere numbering should be disallowed as well.

jury can make only one finding of negligence predicated on either of these two arguments. *Cf. In re One Meridian Plaza Fire Litig.*, 820 F. Supp. 1460, 1491 (E.D. Pa. 1993) (treating two counts of negligence as distinct where the negligence *per se* liability was limited to damages proximately caused by the violation of law but the ordinary negligence claim may have proximately caused other damage).

B. The federal question is not “actually disputed” because there is no controversy respecting the validity, construction, or effect of § 922(b)(1).

Even supposing a federal question is “necessarily raised,” federal question jurisdiction still fails because the question is not “actually disputed.” In order to be “actually disputed,” the federal statute upon which jurisdiction relies must be subject to “controversy respecting [its] validity, construction, or effect.” *Grable*, 545 U.S. at 315 n.3 (quoting *Shulthis v. McDougal*, 225 U.S. 561, 570 (1912)). Section 922(b)(1) fails all three areas of potential controversy.

1. There is no actual dispute respecting the construction of § 922(b)(1).

In this case, the federal statute unambiguously prohibits the sale of handgun ammunition to persons under the age of 21. *See* 18 U.S.C. § 922(b)(1). According to fact-based allegations in Plaintiffs’ Complaint, which this Court must regard as true, the ammunition was “a box of *handgun* bullets, specifically a box of Winchester .38 caliber *handgun* bullets, meant for a Smith and Wesson revolver *handgun*.” (C: 11 (emphasis added)); *Zgrablich*, 2016 U.S. Dist. LEXIS 13338, at *6 (citing *Steel Valley*, 809 F.2d at 1010). The Complaint further explains the ammunition was in fact used in a Smith & Wesson handgun. (C: 16). Applying the law to these facts requires no resolution of any alleged ambiguity.

Yet, in an attempt to articulate an actual dispute, Defendants state that “Plaintiffs argue Defendants sold handgun ammunition...in violation of federal law” while Defendants “contend the sale did not violate federal law because the...ammunition is interchangeable.” (NOR: 17).

Not only does this argument fail to articulate an actual dispute as to the meaning of federal law,⁹ it runs afoul of the well-pleaded-complaint rule, which governs all *Grable* prongs, including whether the issue is “actually disputed.” *See, e.g., Stout v. Novartis Pharms., Corp.*, No. 08-856, 2009 U.S. Dist. LEXIS 110870, at *13 (D.N.J. Nov. 30, 2009) (discussing the theoretical tension between the well-pleaded-complaint rule and the actually-disputed prong, ultimately determining they must coexist).

Instead, federal jurisdiction exists only when a federal question is presented on the face of the properly-pleaded complaint. *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 393 (1987). “A case may not be removed on the basis of a federal defense . . . even if it is anticipated by the plaintiff’s complaint, and even if both parties concede that the federal defense is the only question truly at issue.” *Id.*; *e.g. DeAngelo-Shuayto v. Organon USA, Inc.*, No. 07-2923 (SRC), 2007 U.S. Dist. LEXIS 92557, *21 (D.N.J. Dec. 12, 2007); *e.g. Ayala-Castro*, 624 F. Supp. 2d at 414. The “actually disputed” inquiry is not an invitation for courts to ignore the well-pleaded complaint rule. As Justice Cardozo wrote:

If we follow the ascent far enough, countless claims of right can be discovered to have their source or their operative limits in the provisions of a federal statute or in the Constitution itself with its circumambient restrictions upon legislative power. To set bounds to the pursuit, the courts have formulated the distinction between controversies that are basic and those that are collateral, between disputes that are *necessary* and those that are *merely possible*. We shall be lost in a maze if we put that compass by.

Gully v. First Nat’l Bank, 299 U.S. 109, 117-18 (1936) (emphasis added). Accordingly, the

⁹ Notably, the cases relied upon by Defendants in their Notice of Removal also fail to show an “actual dispute.” *See* (NOR: 19-20). The first three cases cited by Defendants all hold that selling interchangeable ammunition did not violate § 922(b)(1). *See Wal-Mart Stores v. Tamez*, 960 S.W.2d 125 (Tex. App. Ct. 1997); *Bell v. Smitty’s Super Valu, Inc.*, 900 P.2d 15 (Ariz. Ct. App. 1995); *Phillips v. K-Mart Corp.*, 588 So.2d 142 (La. Ct. App. 1991). Contrary to Defendants’ suggestion, neither *Appalachian Res. Dev. Corp. v. McCabe* nor *Hetherton v. Sears, Roebuck & Co.* holds otherwise. In *Appalachian Res. Dev. Corp.*, the Sixth Circuit concluded that the ammunition in question was handgun ammunition and thus did not reach the question of whether § 922(b)(1) prohibits interchangeable-ammunition sales. 387 F.3d 461, 466 (6th Cir. 2004). *Hetherton* analyzed Delaware state law, not § 922(b)(1), and thus is not in dispute with the above cited state cases. 593 F.2d 526 (3d Cir. 1979).

“actually disputed” prong of *Grable* is best interpreted as distinguishing those disputes that are necessary from those that are merely possible. It does not give defendants the ability to claim federal jurisdiction by raising the dispute as a defense. Instead, the plaintiff’s complaint must, on its own, raise a dispute that must necessarily be resolved in order to establish their *prima facie* case. *See, e.g., Cty. Of Del. v. Gov’t Sys.*, 230 F. Supp. 2d 592, 599 (E.D. Pa. 2002) (remanding to state court because plaintiff could establish *prima facie* case under state law without addressing whether federal law preempted their claim, which was a defense); *Hood ex rel. Miss. v. AstraZeneca Pharms., LP*, 744 F. Supp. 2d 590, 606 (N.D. Miss. 2010) (holding that despite defendant’s claim that the “entire premise” of plaintiff’s injury required showing that defendant’s act violated federal law, *Grable* was not met because plaintiff could establish a *prima facie* case under state law without such a showing).

For example, had Defendants sold rifle ammunition capable of use in a handgun, Plaintiffs would be required to show in their *prima facie* case that “handgun ammunition” includes interchangeable ammunition, and the issue may be actually disputed. But because the Complaint alleges a clear-cut sale of handgun ammunition, which is indisputably prohibited by § 922(b)(1), Defendants’ contention that proving a violation of § 922(b)(1) necessarily requires interpretation of the statute’s applicability to interchangeable ammunition is erroneous. In fact, many state courts have determined negligence under § 922(b)(1) without ever needing to reach the question of whether “handgun ammunition” includes interchangeable ammunition. *See generally, e.g., Coker v. Wal-Mart Stores*, 642 So. 2d 774; *Hoosier*, 17 Cal. Rptr. 2d 518; *Pavrides*, 637 N.E.2d 404; *Williams v. Wal-Mart Stores East, L.P.*, 99 So. 3d 112 (Miss. 2012); *Smith v. Bryco Arms*, 33 P.3d 638 (N.M. Ct. App. 2001); *Howard Bros. of Phenix City, Inc. v. Penley*, 492 So. 2d 965 (Miss. 1986). That Defendants may raise this issue is irrelevant to

whether the issue is actually disputed under *Grable*. This case falls squarely within the realm of “possible” disputes that Justice Cardozo and *Grable* aimed to exclude as a basis for federal question jurisdiction.

2. There is no actual dispute respecting the effect of § 922(b)(1).

In the present case, should Plaintiffs rely on § 922(b)(1), it would be solely to establish the duty owed in a state tort negligence claim. This use of federal law as a basis for the standard of care owed under state tort law is widely accepted; violations of federal statutes are often “given negligence *per se* effect in state tort proceedings.” *Grable*, 545 U.S. at 318. The Restatement (Second) of Torts recognizes the use of statutory law as the basis for duty:

Even where a legislative enactment contains no express provision that its violation shall result in tort liability, and no implication to that effect, the court may, and in certain types of cases customarily will, adopt the requirements of the enactment as the standard of conduct necessary to avoid liability for negligence.

Restatement (Second) of Torts § 285 cmt. c (1977). The Restatement (Third) applies this analysis specifically to the role of federal statutes. *See* Restatement (Third) of Torts § 14 cmt. a (2001).

Accordingly, there is no viable dispute as to the effect of § 922(b)(1) in this case.

3. There is no actual dispute respecting the validity of § 922(b)(1).

In the only case where the constitutionality of § 922(b)(1) has been raised, the Fifth Circuit upheld the subsection as valid and constitutional. *See NRA of Am. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 203 (5th Cir. 2012). After examining considerable evidence and engaging in thorough analysis, the Fifth Circuit held that burdening the ability of 18-to-20-year-olds to purchase handguns or handgun ammunition is “consistent with a longstanding, historical tradition, which suggests that the conduct at issue falls outside the Second Amendment’s protection.” *Id.* Namely, § 922(b)(1) is consistent with the traditions of “targeting select groups’ ability to access and to use arms for the sake of public safety” and of

“age-and-safety-based restrictions on the ability to access arms.” *Id.* In light of the rarity of constitutional challenges and the thorough, accurate analysis of the Fifth Circuit, it cannot be said there is an “actual dispute” regarding the validity of § 922(b)(1).

C. The federal question is not “substantial,” according to the substantiality factors.

As to the final *Grable* element, the federal question in this case is not a substantial one. Federal question jurisdiction demands not only a contested federal issue, but a substantial one, “indicating a serious federal interest in claiming the advantages thought to be inherent in a federal forum.” *Grable*, 545 U.S. at 313 (citing *Chicago v. Int’l Coll. of Surgeons*, 522 U.S. 156, 164 (1997); *Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 814 n.12 (1986); *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.*, 463 U.S. 1, 28 (1983)). This prong does not turn on whether the federal issue is “significant to the particular parties in the immediate suit.” *Gunn v. Minton*, 133 S. Ct. at 1066. Rather, substantiality looks “to the importance of the issue to the federal system as a whole.” *Id.*

While there is no bright-line rule regarding whether a state-law claim presents a “substantial” federal question, the Supreme Court has identified a number of factors that weigh in favor of such a finding: (1) “that the federal government has an important interest in the issue, particularly if the case implicates a federal agency’s ability to vindicate its rights in a federal forum”; (2) “that the case presents a nearly pure issue of law that would control in many other cases,” rather than a “fact-bound and situation-specific” issue; and (3) “that a determination of the federal question will be dispositive of the case.” *Marren v. Stout*, 930 F. Supp. 2d 675, 683 (W.D. Tex. 2013) (citing *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700-01 (2006)). The Supreme Court has also examined factors that weigh against a substantiality finding: (1) that Congress chose not to provide a private remedy for a violation of federal law, and (2) that a state is able to resolve the federal issue without threatening the uniformity of

federal law. *Merrell Dow*, 478 U.S. at 814; *Gunn*, 133 S. Ct. at 1066-67. The sum of these factors weighs against this Court exercising federal question jurisdiction.

a. The federal government has little interest in this case.

Defendants' Notice of Removal erroneously interprets the operation of a "federal interest" in the substantiality analysis. It is not any federal interest that satisfies substantiality. Instead, it is the specific, narrow federal interest in "claiming the advantages thought to be inherent in a federal forum" that must be present. *Grable* 545 U.S. at 313. Accordingly, it is irrelevant whether there is a general "federal interest in the regulation of sales of firearms and ammunition to juveniles," as Defendants suggest. (NOR: 20).

To illustrate this, we first turn to two cases upon which Defendants rely: *Grable* and *NASDAQ*. Under a generous reading of *Grable*, as many as four federal interests were mentioned by the Court: (1) the interest "in construing federal tax law," (2) the "interest in the prompt and certain collection of delinquent taxes," (3) the interest in "clear terms of notice" that would enable the IRS to satisfy its claims from the property of delinquents, and (4) the national interest in providing a federal forum for federal tax litigation. The federal *issue*—as opposed to a federal *interest*—of the meaning of the federal tax provision, even if "important," is not listed among these as it was the federal question, which is insufficient for substantiality. *Cf.* (NOR: 18) (citing *Grable*, 545 U.S. at 315).¹⁰ By contrast, the interest in providing a federal forum for federal tax litigation was dispositive. In essence, the Court concluded that only the experience and uniformity inherent in a federal forum could ensure the important federal interests of prompt and certain collection by the Internal Revenue Service. *See Grable*, 545 U.S. at 313, 315.

¹⁰ The Supreme Court explained that a federal *issue* is "substantial" only where that issue also indicates a serious federal *interest* in claiming the advantages inherent in a federal forum. *Grable*, 545 U.S. at 313. Thus, under *Grable*, the statutory interpretation issue, without more, could not be dispositive. *See id.*

Likewise, the Second Circuit in *NASDAQ OMX Grp., Inc. v. UBS Sec., LLC* also relied on the needs for uniformity and for the federal agency to assert its authority in determining that the federal issue was substantial. 770 F.3d 1010, 1024 (2d Cir. 2014). The federal issue in that case—whether NASDAQ violated its Exchange Act obligation—implicated the Securities and Exchange Commission’s ability to preserve and strengthen the operation of national securities markets, which could be protected only if there was a uniform body of federal securities regulation. In both *Grable* and *NASDAQ*, the advantage of uniformity that a federal forum could provide was necessary for the federal government to function properly.

In *Empire Healthchoice Assurance Inc. v. McVeigh*, the Supreme Court determined that a federal question was *not* substantial in part because “the reimbursement claim was triggered, not by the action of any federal department, agency, or service, but by the settlement of a personal-injury action launched in state court.” 547 U.S. at 700. For this reason, the federal government did not have a direct stake in the outcome of the case. *Id.*; see also *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1301 (11th Cir. 2008) (“The federal government has a limited interest in this private tort action over private duties tangentially related to the federal gun laws, and the federal government may continue to enforce federal gun laws and regulations without concern for the outcome of this lawsuit. Because the ATF is not a party to this suit, the outcome cannot possibly have any *res judicata* effect that would apply to the ATF or any other arm of federal law enforcement.”).

In the context of this case, there is no procedural benefit to the federal system as a whole in systematically litigating in federal courts those state tort claims that may rely upon violation of § 922(b)(1). There is no federal cause of action in jeopardy and no agency action is implicated. The largely factual question of whether Defendants illegally sold handgun ammunition does not

require “resort to the experience, solicitude, and hope of uniformity that a federal forum offers.” *Grable*, 545 U.S. at 313. Whether there is a broad “federal interest in the regulation of sales of firearms and ammunition to juveniles” (NOR: 20)—which is nothing more than a general basis for passing gun regulation to begin with—is wholly irrelevant to the question of substantiality.

b. The federal issue in this case is not dispositive.

The federal issue posited by Defendants here does not dispose of this case. If the trial court rules that selling interchangeable ammunition to minors under 21 is legal, Plaintiffs are free to argue, as a factual matter, that the ammunition in this case was not interchangeable. Plaintiffs could do this by showing, for example, that the ammunition was either incapable of being used in a rifle or regarded and marketed only as handgun ammunition. *See Appalachian Res. Dev. Corp. v. McCabe*, 387 F.3d 461, 466 (6th Cir. 2004) (finding that the cartridge, while technically capable of being shot from specific rifles, was not “interchangeable” because it was “universally regarded and marketed as strictly handgun ammunition”). It would also be sufficient for Plaintiffs to show the ammunition was “intended” for use in a handgun. *See Brown v. Wal-Mart Stores*, 976 F. Supp. 729, 733 (W.D. Tenn. 1997) (citing Bureau of Alcohol, Tobacco and Firearms, *Federal Firearms Regulations Reference Guide* 107 (1995)) (“If the ammunition is ‘intended’ for use in a handgun, the buyer must be at least 21 years old.”).

Alternatively, Plaintiffs can still argue that Defendants had no actual or constructive knowledge that the ammunition sold was for a rifle, which is typically required by courts in assessing whether the interchangeable ammunition exemption applies. *See, e.g., Appalachian*, 387 F.3d at 466 (citing Bureau of Alcohol, Tobacco and Firearms, *Firearms: Frequently Asked Questions* (Dec. 27, 2002), <http://www.atf.gov/firearms/faq/faq2.htm>) (holding in the alternative that defendant was still liable because the court remained unconvinced that defendant was “satisfied” the ammunition was for use in a rifle or shotgun); *Brown v. Wal-Mart Stores*, 976 F.

Supp. at 733 (noting “a material issue of fact exists as to whether Wal-Mart’s clerk made a sufficient inquiry to determine” the type of weapon the minor intended to use); *cf. Phillips v. K-Mart Corp.*, 588 So. 2d at 144 (holding that dealer did not violate § 922(b) by selling interchangeable ammunition to minor who told clerk he intended to use ammunition in rifle). Notably, neither Plaintiffs’ Complaint or Defendants’ Notice of Removal allege any facts that suggest that Defendants had any cause to believe that the ammunition sold was for use in a rifle. Accordingly, resolving the alleged ambiguity in § 922(b)(1) would not dispose of this case.

c. No other factors weigh in favor of finding that the issue is substantial.

Congress’s decision not to create a private, federal cause of action supports a finding that the federal issue is not substantial. *See Grable*, 545 U.S. at 318 (treating *Merrell Dow* as examining a factor within the substantiality analysis); *Merrell Dow*, 478 U.S. at 814 (construing Congress’s decision not to provide federal remedy as dispositive evidence that the federal question was insufficiently substantial to confer jurisdiction). The significance of the fact that there is no private, federal cause of action in the instant matter “cannot be overstated.” *Merrell Dow*, 478 U.S. at 812. The Supreme Court has emphasized that “it would flout congressional intent to provide a private federal remedy for the violation of the federal statute.” *Id.* at 825. In this case, no such cause of action exists. Instead, the only scenario in which private citizens have relied on § 922(b)(1) is in the context of state tort claims. *Compare, e.g., United States v. Jackson*, 546 F. App’x 643 (9th Cir. 2013) (U.S. prosecution of a defendant for being a felon in possession of a firearm in violation of § 922(b)(1)) *with T & M Jewelry, Inc.*, 189 S.W.3d 526 (private citizen suing for negligence). This weighs heavily in favor of finding that the federal issue in this case is not substantial.

Additionally, adjudicating this negligence dispute in state court will not affect the uniformity of federal law. State courts adjudicating § 922(b)(1) claims will be guided by federal

court interpretations of the statute, just as federal courts sitting in diversity are guided by state court interpretations of state law. *See Gunn v. Minton*, 133 S. Ct. at 1066-67 (discussing state’s ability to resolve a dispute without threatening uniformity of federal law as factor that might signal lack of substantiality). The possibility that a state court may incorrectly resolve a claim is not, by itself, enough to trigger the federal courts’ jurisdiction, even if the potential error is rooted in a misunderstanding of federal law. *Id.* at 1068. There is no special circumstance present in this case to counter these basic rules. *Cf. Grable*, 545 U.S. at 313; *NASDAQ*, 770 F.3d at 1021.

Finally, the federal issues in this case are fact-bound and situation-specific. Defendants must make two factual assertions before a question of law is ever raised: (1) that the ammunition in this case was interchangeable, and (2) that Defendants were “satisfied” that the ammunition was going to be used in a rifle. Those fact-bound, situation-specific questions are predicate to the determination of whether § 922(b)(1) prohibits the sale of interchangeable ammunition. Accordingly, this factor also weighs in favor of finding that the federal issue is not substantial.

CONCLUSION

This Court should remand this matter to state court. State courts are best suited to trying the central issue in this case: whether an in-state retailer acted negligently in selling ammunition to an in-state consumer. While Defendants may call on the state to interpret federal law in the course of presenting their defense, this is not dispositive. State courts often interpret federal law in the course of adjudicating cases arising under state law. This case does not fall into the rare, limited instance where the potential interpretation of federal law in an otherwise state-law case justifies its adjudication in federal court. The questions at the center of this case—Did Defendants act negligently in executing this sale? If so, did that negligence cause of the subsequent deaths of three innocent individuals? And what state-law remedy can best address the harm?—all sound in state law and should be heard in a state forum.

Dated: March 2, 2016
New York, NY

Respectfully Submitted

By: /s/ Molly Thomas-Jensen

Molly Thomas-Jensen (admitted *pro hac vice*)
Office of the Public Advocate for the City of New York
1 Centre Street, 15th Floor North
New York, NY 10007
212-669-4092
Mthomas-jensen@pubadvocate.nyc.gov

Attorney for Amici Curiae