2019 WL 4918572 (Pa.Super.) (Appellate Brief)
Superior Court of Pennsylvania.

Mark and Leah GUSTAFSON, individually and as Administrators and Personal Representatives of the Estate of James Robert Gustafson, Plaintiffs-Appellants,

v.

SPRINGFIELD, INC., and Saloom Dept. Store, LLC, Defendants-Appellees.

No. 207 WDA 2019.
June 18, 2019.

On Appeal from the Court of Common Pleas of Westmoreland County

Brief for the United States as Intervenor

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INTRODUCTION

This case involves a constitutional challenge to the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (PLCAA) (codified at 15 U.S.C. §§ 7901-7903), a federal statute limiting the extent to which firearms manufacturers and distributors may be held liable for the actions of third parties. The statute reflects Congress's determination that holding firearms manufacturers and distributors liable for "harm that is solely caused by others" constitutes "an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(6). The PLCAA therefore preempts certain tort lawsuits against gun manufacturers and distributors based on the "criminal or unlawful misuse" of a firearm. *Id.* § 7903(5)(A).

Plaintiffs, the parents of a minor child shot and killed by another minor in 2016, have sued a gun manufacturer and seller on a variety of tort-law theories. The defendants have argued that suit is barred by the PLCAA. In response, plaintiffs have argued that the PLCAA is unconstitutional and that it would not preclude their suit in any event. The United States has intervened solely to defend the constitutionality of the PLCAA. *Cf.* 28 U.S.C. § 2403(a). The United States takes no position on whether the PLCAA forecloses this suit.

Every state or federal appellate court to consider the constitutionality of the PLCAA has upheld the statute. *Ileto v. Glock, Inc.*, 565 F.3d 1138 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016); *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008). The United States Supreme Court has repeatedly made clear that Congress, in the exercise of its Commerce Clause power, can preempt state tort laws without raising Tenth Amendment concerns or infringing due process. Plaintiffs' constitutional contentions provide no basis for setting aside the statute or for interpreting its provisions to avoid serious constitutional concerns. ***2**

STATEMENT OF JURISDICTION

The Court of Common Pleas dismissed plaintiffs' complaint on January 15, 2019. R.292a. Plaintiffs filed a timely notice of appeal on February 7, 2019. R.2a. This Court has jurisdiction under 42 Pa. Cons. Stat. § 742.

ORDER IN QUESTION

Plaintiffs have appealed the Court of Common Pleas' January 15, 2019 order sustaining defendants' preliminary objections in the nature of a demurrer and dismissing plaintiffs' complaint with prejudice. That order is reproduced at R.292a-307a.

SCOPE AND STANDARD OF REVIEW

"When an appellate court rules on whether preliminary objections in the nature of a demurrer were properly sustained, the standard of review is *de novo* and the scope of review is plenary." *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008).

*3 STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Protection of Lawful Commerce in Arms Act at a time when States' tort law concerning firearms was in flux. In the years preceding the PLCAA, neighboring jurisdictions adopted competing legislative measures: by 2006, some States restricted lawsuits against firearms manufacturers, *see, e.g.*, Va. Code Ann. § 15.2-915.1 (enacted 2000), while other jurisdictions imposed absolute liability on manufacturers for any injuries caused by certain weapons, *see, e.g.*, D.C. Code Ann. § 7-2551.02 (rev. 1994). As Congress explained in enacting the PLCAA, plaintiffs were thus able to commence lawsuits against "manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended," seeking relief for harm caused by the "misuse of firearms by third parties, including criminals." 15 U.S.C. § 7901(a)(3). The possibility of such tort suits, Congress found, "erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty … and constitutes an unreasonable burden on interstate and foreign commerce of the United States." *Id.* § 7901(a)(6); *see* H.R. Rep. No. 109-124, at 21-22 (2005) (further criticizing these suits as "efforts at extraterritorial regulation").

To address these concerns, the PLCAA generally preempts tort actions brought "by any person against a manufacturer or seller" of firearms for injuries "resulting from the criminal or unlawful misuse of [a firearm] by the person or a third party." 15 U.S.C. §§ 7902(a), 7903(4), (5)(A). The statute applies only to suits concerning ***4** firearms that have "been shipped or transported in interstate or foreign commerce," *id.* § 7903(4), and it protects only manufacturers and sellers who engage in "interstate or foreign commerce," *id.* § 7903(2), (6).

The PLCAA contains various exceptions that allow certain tort actions that would otherwise be preempted. In addition to these exceptions, the PLCAA does not prohibit suits against individual users of firearms for the injuries they may cause.

First, the PLCAA permits suits against sellers that transfer firearms knowing that those weapons will be used to commit a crime of violence. 15 U.S.C. § 7903(5)(A)(i); *see* 18 U.S.C. § 924(h).

Second, it allows actions against sellers for negligent entrustment or negligence per se. 15 U.S.C. § 7903(5)(A)(ii).

Third, it allows suits alleging knowing violations of "a State or Federal statute applicable to the sale or marketing of the product," so long as that violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii). This exception is often referred to as the "predicate exception," because a plaintiff must allege a knowing violation of a "predicate statute," *i.e.*, a statute applicable to the sale or marketing of firearms. *Ileto*, 565 F.3d at 1132.

Fourth, the PLCAA does not bar claims for breach of contract or warranty. 15 U.S.C. § 7903(5)(A)(iv).

Fifth, it permits claims based on defective design or manufacturing, so long as the product was used as intended or in a "reasonably foreseeable manner" and the ***5** discharge of the product was not "caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v).

And *sixth*, it does not bar the Attorney General of the United States from enforcing federal firearms laws. 15 U.S.C. § 7903(5)(A)(vi).

B. Factual and Procedural Background

This case arises from the fatal shooting of James Robert ("J.R.") Gustafson by a fourteen-year-old boy. R.11a (Compl. ¶ 23). In 2016, while both J.R. and the boy were visiting a home in Mt. Pleasant, the boy discovered a handgun and, believing the gun to be unloaded, pointed it at J.R. and pulled the trigger.[1] R.12a (Compl. ¶¶ 25-26). The handgun contained a live round, which struck and killed J.R. *Id.* (Compl. ¶ 28). The friend subsequently pled guilty to involuntary manslaughter in juvenile court. *Id.* (Compl. ¶ 29).

Plaintiffs are J.R.'s parents. R.10a (Compl. ¶ 12). In 2018, they commenced this action against Springfield, Inc., which manufactured the firearm, and Saloom Department Store, which sold the handgun at retail. R.10a-11a (Compl. ¶¶ 18-19). Plaintiffs' complaint alleged that the handgun was defectively designed, negligently designed and sold, and lacked appropriate marketing and warnings. R.20a-25a (Compl. ¶¶ 76-103); *see* R.25a-31a (Compl. ¶¶ 104-135).

***6** Defendants filed a demurrer seeking dismissal of the complaint, contending that the PLCAA barred each of the causes of action asserted. R.35a-38a; *see* Pa. R. Civ. P. 1028(a)(4). Plaintiffs responded by arguing that the PLCAA did not preempt their suit and, if it did, that the PLCAA was unconstitutional. R.73a. On October 19, 2018, the United States intervened for the limited purpose of defending the PLCAA's constitutionality. R.144a.

The trial court sustained defendants' demurrer and dismissed the case. R.292a. The court held that the PLCAA governed this suit, R.299a, and rejected Appellants' constitutional objections to the law, R.307a. The court explained that the PLCAA does not violate the Tenth Amendment and principles of federalism or plaintiffs' substantive due process and equal protection rights; it further noted that the PLCAA fell within Congress's Commerce Clause authority. R.300a-07a.

SUMMARY OF ARGUMENT

As every federal or state appellate court to consider these questions has held, the PLCAA does not violate the United States Constitution. Plaintiffs' arguments to the contrary should be rejected, and this Court should interpret the PLCAA in accordance with its text.

The PLCAA simply preempts certain tort claims against firearms manufacturers and distributers. The United States Supreme Court has long made clear that such legislation falls well within Congress's authority and does not infringe on any protected property interest. The statute does not require any part of any State ***7** to act or refrain from acting, and thus does not implicate the Tenth Amendment. That Congress limited the scope of the preemption with respect to some state legislative enactments in no sense commandeers any State or otherwise implicate the Tenth Amendment.

ARGUMENT

I. The PLCAA does not violate the Tenth Amendment.

A. The Tenth Amendment provides that "[f]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

The Supreme Court has explained that the Tenth Amendment limits "the circumstances under which Congress may use the States as implements of regulation." *New York v. United States*, 505 U.S. 144, 161 (1992). The federal statute at issue in *New York v. United States* unconstitutionally "'commandeer [ed]' state governments" by forcing them to enact regulation according to Congress's instructions. 505 U.S. at 175. And in *Printz v. United States*, 521 U.S. 898, 935 (1997), the federal statute "conscript[ed]" local law enforcement officials by requiring them to perform background checks in connection with firearms sales.

Thus, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396 (2d Cir. 2008). As that court and the trial court in this case concluded, it plainly does not. The statute simply preempts certain claims while imposing "no ***8** affirmative duty of any kind" on "any branch of state government." *Id.* at 397. For these reasons, every appellate court to consider the issue has held that the PLCAA comports with the Tenth Amendment because it does not commandeer state powers. *See* *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016); *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009). And, as one of those courts observed, "where Congressional action does not commandeer states or state actors, the Tenth Amendment reflects Congress's limitation to act within its enumerated powers." *Estate of Kim*, 295 P.3d at 389.

Indeed, plaintiffs do not contend that the PLCAA's preemption of state tort remedies violates the Tenth Amendment. That should be the beginning and end of the Court's inquiry.

B. Plaintiffs urge, however, that Congress violated the Tenth Amendment by including an exception to preemption for certain statutory claims. A limitation on the scope of federal preemption does not implicate the Tenth Amendment in any sense. That Congress did not extend the exception to certain common-law claims has no bearing on the constitutional analysis.

Plaintiffs nevertheless argue (Br. 34, 37) that the Tenth Amendment "does not merely prohibit 'commandeering'" and that the PLCAA violates the Tenth Amendment by "interfering with the authority of states to decide how to make and apply their law." The Supreme Court has never endorsed this proposition. As the Second Circuit has explained, "federal statutes validly enacted under one of Congress' ***9** enumerated powers … cannot violate the Tenth Amendment unless they commandeer the states' executive officials or legislative processes." *City of New York v. Beretta*, 524 F.3d at 396 (quoting *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002) (citation and alteration omitted)). Because the PLCAA fits squarely within Congress's Commerce Clause authority (*see infra* Part III), it cannot violate the Tenth Amendment unless it commandeers the States.

The principal case that plaintiffs cite (Br. 37) as authority for bringing a Tenth Amendment challenge "distinct from a 'commandeering' claim" does not support plaintiffs' view. In *City of Spokane v. Federal Nat'l Mortg. Ass'n*, the Ninth Circuit rejected a non-commandeering Tenth Amendment challenge because the statute at issue was a straightforward application of Congress's Commerce Clause power. 775 F.3d 1113, 1117-18 (9th Cir. 2014). Thus, *City of Spokane* is consistent with the principle that a statute that is "validly enacted under one of Congress' enumerated powers" and does not commandeer state officials cannot violate the Tenth Amendment. *City of New York v. Beretta*, 524 F.3d at 396.

Even on its own terms, plaintiffs' contention that the PLCAA's exception interferes with the States' authority to decide how to make their law reflects multiple errors. First, the PLCAA does not dictate which branch of state government must make law. Under the Act, States are free to allocate their decision-making authority as they see fit. Pennsylvania may regulate (or decline

to regulate) firearms through whichever branch of government it chooses; Congress's enactment of the PLCAA ***10** simply means that different choices by States may have different effects in subsequent lawsuits. *See* *City of New York v. Beretta*, 524 F.3d at 396-97; *Estate of Kim*, 295 P.3d at 388-89; *Adames*, 909 N.E.2d at 764-65.

The Supreme Court's most recent Tenth Amendment case underscores the PLCAA's constitutionality. In *Murphy v. NCAA*, the Court explained that the Tenth Amendment applies both when Congress commands affirmative action and when it imposes a prohibition. 138 S. Ct. 1461, 1478 (2018). Thus, Congress cannot "prohibit[] a State from enacting new laws." *Id.* But just as the PLCAA does not require States to legislate, it also does not prohibit States from doing so. Instead, it simply preempts certain laws, as many other federal statutes do. [2]

Second, as the trial court detailed (R.301a), plaintiffs misconstrue the scope of the PLCAA's exceptions. The Act does not preserve every claim authorized by a legislature and preempt every rule adopted by a court. For example, the PLCAA preserves some claims that may be created by either the legislature or the judiciary, such as negligent entrustment, negligence per se, and breach of contract. 15 U.S.C. § 7903(5)(A)(ii),(iv). The PLCAA leaves it up to the States to decide whether to recognize those claims by statute, common law, or not at all. Similarly, the predicate exception does not reach every effort by a legislature to create statutory liability. ***11** Congress limited the exception to *knowing* violations of the subset of statutes that are "applicable to the sale" of firearms. *Id.* § 7903(5)(A)(iii). Because the PLCAA preempts a variety of both common-law and statutory claims, it does not create the wholesale shift between the state judiciary and legislature that plaintiffs allege.

Third, plaintiffs are quite wrong to assert (Br. 35) that the PLCAA's exception is without precedent. Indeed, other statutes expressly require States' legislatures - not their governors or judicial officers - to act in order to benefit from a federal program. *E.g.*, 29 U.S.C. § 49c (employment); 43 U.S.C. § 870(b) (land grants); c*f.* *Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002) (explaining that it "would be perfectly rational for Congress not to pre-empt common-law claims," but to preempt "positive enactments" in state statutes).

Finally, the PLCAA does not prohibit state courts from altering or creating common law, or from interpreting state statutes. As the Second Circuit held, the PLCAA does not "foreclose[] the possibility" that state-court interpretations of state legislation may bear on whether a state law falls within the PLCAA's exception. *City of New York v. Beretta*, 524 F.3d at 396 (quoting *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 266 (E.D.N.Y. 2005)). And, of course, state courts are free to recognize whichever common-law causes of action they wish; the PLCAA simply preempts some claims from going forward if they involve firearms manufacturers. And it is uncontroversial that state courts, like federal courts, are bound to recognize ***12** the supremacy of federal law and dismiss preempted claims. *See, e.g.,* *Miller v. French*, 530 U.S. 327, 349 (2000).

Plaintiffs cite (Br. 35) a decision of the intermediate New York appellate court as holding that "[t]he most similar statute" to the PLCAA violated the Tenth Amendment. *See In re Vargas*, 10 N.Y.S.3d 579 (N.Y. App. Div. 2015). The statute in that case prohibited States from issuing professional licenses to undocumented immigrants absent a new state enactment authorizing the license grant. *Id.* at 582; *see* 8 U.S.C. § 1621. The New York state court found that statute unconstitutional to the "limited" extent it governed attorney admissions, where New York law provided that only the judiciary could wield the "sovereign authority" of the State. *In re Vargas*, 10 N.Y.S.3d at 582. And the only other court to consider such a challenge rejected it. *See* *Maine Mun. Ass'n v. Maine Dept. of Health and Human Serv.*, No. AP1439, 2015 WL 4070311, at *8 (Me. Super. Ct. June 9, 2015).

This case is entirely dissimilar. Plaintiffs have not argued that the law of this Commonwealth precludes the legislature from enacting tort laws. Nor have plaintiffs argued that the PLCAA prohibits any State from taking any action. Their argument here,

by contrast, is that Congress could not constitutionally except certain state laws ***13** from the scope of preemption without excepting others. That decision presents no Tenth Amendment problem. [3]

II. The PLCAA does not violate the Fifth Amendment.

Plaintiffs contend (Br. 39-47) that the PLCAA violates the Fifth Amendment's Due Process Clause, as well as that Amendment's equal-protection component. Again, every appellate court to consider these arguments has rejected them. *See Ileto v. Glock, Inc.*, 565 F.3d 1138, 1140-42 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A2d 163, 175-80 (D.C. 2008); *Estate of Kim*, 295 P.3d at 390-91; *Delana*, 486 S.W.3d at 323-24.

A. To succeed in a due process challenge, a plaintiff must demonstrate both a "depriv[ation] of life, liberty, or property" and that the deprivation was "without due process of law." U.S. Const. amend V. As the trial court recognized (R.302a-03a), plaintiffs lack any property right in this litigation. And, even if they had such a right, the PLCAA does not violate any due-process guarantee.

There is no constitutional property right in pending or unfiled tort litigation. The Constitution "does not forbid the creation of new rights, or the abolition of old ***14** ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122 (1929). Accordingly, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917); *see Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978) ("[A] person has no property, no vested interest, in any rule of the common law."). It is only when a "final unreviewable judgment" is obtained that a litigant acquires a constitutionally protected property right. *Ileto*, 565 F.3d at 1141.

For this reason, the Supreme Court of this Commonwealth has recognized that neither the U.S. nor Pennsylvania Constitutions "prevent[] the legislature from extinguishing a cause of action." *Singer v. Sheppard*, 346 A.2d 897, 903 (Pa. 1975); *see id.* ("Any conclusion that an individual has a vested right in the continued existence of an immutable body of negligence law … would [result in] the stagnation of the law in the face of changing societal conditions."). And numerous courts of appeals have rejected due-process challenges to legislation affecting pending tort claims. *See, e.g.*, *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *see also Schmidt v. Ramsey*, 860 F.3d 1038, 1048-49 (8th Cir. 2017); *Ducharme v. Merrill-National Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978); *Carr v. United States*, 422 F.2d 1007, 1010-11 (4th Cir. 1970).

This principle resolves plaintiffs' due-process challenge. At the time the PLCAA was enacted, plaintiffs had not filed their suit, much less obtained a final and ***15** unreviewable judgment. [4] Accordingly, they have no property right in this litigation, and so cannot state a due-process claim.

Even if plaintiffs had a cognizable property right, their due-process challenge would fail. Plaintiffs complain (Br. 39) that the PLCAA violates due process because it "extinguishe[s] tort actions without providing a reasonable alternative remedy." But the Constitution does not require such remedies. *See, e.g.*, *Martinez v. California*, 444 U.S. 277, 280 (1980) (upholding statute barring tort suits over "[a]ny injury resulting from determining whether to parole or release a prisoner"); *Silver v. Silver*, 280 U.S. at 121-22; *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 580 (1883); *cf.* *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (upholding against separation-of-powers challenge statute that provided that all actions relating to a single piece of property "shall be promptly dismissed"). Those cases are indistinguishable from this one.

In any event, such remedies exist here. Plaintiffs may sue the individual who "pled guilty to … involuntary manslaughter in juvenile court" for committing the shooting. R.12a (Compl. ¶ 29). They may also sue any other individual whose negligent or intentional conduct proximately led to J.R.'s death. And they may sue the ***16** manufacturers, distributors, and sellers of the firearm used in the shooting under any claim that falls within the Act's multiple exceptions. *See* 15 U.S.C. § 7903(5)(A)(i)-(vi). Thus, the Ninth Circuit correctly held that "the PLCAA does not completely abolish Plaintiffs' ability to seek redress." *Ileto*, 565 F.3d at 1143; *see also* *District of Columbia v. Beretta*, 940 A.2d at 177 n.8 (similar).

Plaintiffs resist this conclusion by suggesting (Br. 43) that those alternatives are inadequate because they might not permit them to bring the precise claim asserted here. But, as the Supreme Court has emphasized in other constitutional contexts, alternatives may be adequate even though they are not "perfectly congruent" to the existing statutory scheme, and even though they may not "provide complete relief." *Minneci v. Pollard*, 565 U.S. 118, 129 (2012); *see* *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). That the PLCAA might force plaintiffs to reconsider their litigation strategy is not relevant for constitutional purposes.

In the absence of case law to support their argument, plaintiffs ask this Court (Br. 40-41) to draw a negative inference from *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). There, the Court observed that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88. But it held that it "need not resolve this question" because the challenged act did "provide a reasonably just substitute for the common-law or state tort law remedies it replaces." *Id.* All that the Court said, therefore, was ***17** that the *Duke Power* plaintiffs - just like the plaintiffs here - would lose their due-process challenge even were their view about adequate remedies correct. Accordingly, the Court correctly declined to reach this issue, just as this Court can properly do in this case.

B. Plaintiffs are on no firmer ground in arguing (Br. 44-47) that the PLCAA violates equal protection because it discriminates among various classes of tort victims. As plaintiffs acknowledge, this claim could succeed only if they could demonstrate that there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993); *see id.* ("[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

As the trial court explained (R.303a-04a), plaintiffs cannot meet that heavy burden here. Plaintiffs urge that in enacting the PLCAA, Congress irrationally distinguished between victims of knowing violations of state statutes and victims of knowing violations of state common law. Rational-basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *Heller*, 509 U.S. at 319 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). And, insofar as federal preemption applies more broadly to common-law tort actions, Congress could rationally conclude that the unpredictability of common-law tort actions could pose a greater threat to the firearms industry than would defined and codified ***18** legislative enactments that are necessarily passed by democratically accountable actors. *See* 15 U.S.C. § 7901(a)(7).

III. The PLCAA is a valid exercise of Congress's power.

The PLCAA is a straightforward exercise of (at a minimum) Congress's authority "[t]o regulate commerce … among the several states."[5] U.S. Const. art. I, § 8, cl. 3. The Supreme Court has "upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." *United States v. Lopez*, 514 U.S. 549, 559 (1995). If Congress acts to regulate "economic activity" that "substantially affect[s] interstate commerce," then "legislation regulating that activity will be sustained." *Id.* at 560.

The PLCAA plainly regulates economic activity that substantially affects interstate commerce. Congress determined in enacting the statute that the possibility of suits against gun manufacturers and sellers "constitute[] an unreasonable burden on interstate and foreign commerce." 15 U.S.C. § 7901(a)(6). In order to protect that economic activity, Congress determined to combat States' "efforts at extraterritorial regulation [that] aim to reduce interstate commerce." H.R. Rep. No. 109-124, at 22H.R. Rep. No. 109-124, at 22; *see* *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) ("[O]ne State's power to ***19** impose burdens on the interstate market … is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." (citation omitted)).

At the same time, Congress took care to ensure that the required "nexus to interstate commerce" was present. *See* *Lopez*, 514 U.S. at 562. The PLCAA's bar on tort lawsuits applies only to suits against manufacturers and sellers who manufacture or sell firearms "in interstate or foreign commerce." 15 U.S.C. § 7903(2), (6). Similarly, it preempts only those suits concerning firearms "that [have] been shipped or transported in interstate or foreign commerce." *Id.* § 7903(4). Those protections ensure that Congress does not regulate commerce that is "truly local," and therefore beyond the federal government's ambit. *Lopez*, 514 U.S. at 568.

Plaintiffs urge (Br. 47) that the Commerce Clause "does not empower Congress to regulate the lawmaking functions of states." But it is axiomatic that Congress can preempt state statutes under its Commerce Clause powers. *See, e.g.*, *Hughs v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016); *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013). The Supreme Court has made clear that the power to preempt includes federal statutes that preempt state tort laws, *see* *Riegel v. Medtronic*, 552 U.S. 312, 323 (2008), and that preempt laws governing the use of evidence in state and federal courts, *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003).

***20 IV. This Court should interpret the PLCAA in light of its text.**

Because the PLCAA is constitutional in all respects, this Court should affirm the trial court's order if it concludes that the PLCAA bars this suit. The United States takes no position on that underlying statutory question. But the Court should answer that question in light of the PLCAA's text, structure, history, and purpose. Principles of constitutional avoidance, urged by plaintiffs, should have no bearing on the resolution of this case.

A. Under principles of constitutional avoidance, a court may adopt a plausible interpretation of an ambiguous statute if a different interpretation would raise "serious constitutional concerns." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988). For the reasons explained above, there are no serious constitutional problems with the PLCAA, and the constitutional-avoidance principle does not apply. *National Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (noting that the canon of constitutional avoidance does not apply "at the mere mention of a possible constitutional problem"); *see* *Ileto*, 565 F.3d at 1144 (declining "to apply the doctrine of constitutional avoidance" in interpreting the PLCAA).

B. Equally without merit is plaintiffs' insistence that their preferred reading is compelled by the Supreme Court's decisions in *Bond v. United States*, 572 U.S. 844 (2014), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Like the constitutional avoidance doctrine generally, those cases stand for the proposition that statutes should be ***21** narrowly construed if necessary to avoid "upset[ting] the usual constitutional balance of federal and state powers," thereby creating "a potential constitutional problem." *Gregory*, 501 U.S. at 460, 464; *see* *Bond*, 572 U.S. at 858, 860. In *Gregory*, the Supreme Court expressed

concern that interpreting the Age Discrimination in Employment Act to apply to state judges would undermine the "authority of a State's people to determine their government officials' qualifications," an authority that the Court suggested "may be inviolate." 501 U.S. at 464. In *Bond*, the constitutional risk inhered because applying a federal criminal statute to petitioner's behavior would have "dramatically intrude[d] upon traditional state criminal jurisdiction" by permitting federal prosecution of "purely local crimes." *Id.* at 857, 860 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

This case presents no such problem. As previously discussed, the PLCAA is an unremarkable exercise of Congress's power to regulate interstate commerce, and does not in any way undermine the ability of any State's voters to choose their governing officials. Instead, the PLCAA effects a simple preemption of state tort law, an act that raises no serious constitutional question. *See* *Riegel*, 552 U.S. at 326. There is therefore no need to consider these precedents.

In any event, the trial court correctly concluded that, even if *Gregory* and *Bond* bore on this case, the "text of the statute makes manifest Congress's intent to preempt state tort law." R.295a; *see* *Delana*, 486 S.W.3d at 323 ("Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to ***22** preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues."). The PLCAA clearly indicates Congress's intention to "prohibit causes of action" brought under state tort law. 15 U.S.C. § 7901(b)(1); *see id.* § 7902(a) (providing that certain tort actions "may not be brought in any Federal or State court"). What particular actions are or are not barred by the PLCAA is a question of statutory interpretation, on which the United States takes no position in this action. But there is no question that, in enacting the PLCAA, Congress unambiguously preempted state law.

***23 CONCLUSION**

The Court should uphold the constitutionality of the PLCAA and interpret that statute in accordance with its text.

Respectfully submitted,

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Footnotes

1 The United States accepts all facts in plaintiffs' complaint as true for purposes of this appeal. *See Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. 2000).

2 Plaintiffs are incorrect to aver (Br. 47) that the PLCAA does not "regulate private conduct." The PLCAA regulates private conduct by preempting private tort suits that fall within its scope.

3 Plaintiffs' invocation (Br. 35) of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is wholly out of place. That case, which stands for the proposition that "[t]here is no federal general common law," does not concern the Tenth Amendment. *Id.* at 78. And the language that plaintiffs cite does not apply where "matters [are] governed by the Federal Constitution or by acts of Congress," as here. *Id.*; *see* *Lehman Brothers v. Schein*, 416 U.S. 386, 389 (1974) (under *Erie*, a state is free to make its own common law, "providing there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce").

4 This suit is therefore distinguishable from *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006), *aff'd on other grounds*, 875 N.E.2d 422 (Ind. Ct. App. 2007), the sole trial-court decision finding the PLCAA unconstitutional. In that case, the PLCAA was signed into law after plaintiffs brought their suit. *See* Pl. Br. Ex. E, at 2. The Court of Appeals of Indiana ultimately held that the PLCAA did not bar the suit, without reaching the constitutional issue. 875 N.E.2d at 434-45.

5 The trial court also held (R.306a-07a) that the PLCAA could be upheld as an exercise of Congress's Fourteenth Amendment powers. Plaintiffs do not challenge that independent holding in their opening brief. *See Commonwealth v. Otero*, 860 A.2d 1052, 1054 (Pa. Super. Ct. 2004).