2019 WL 4918159 (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 ("J.R.") Gustafson, Plaintiffs, Appellants,
v.
SPRINGFIELD, INC. d/b/a Springfield Armory, and Saloom Department Store; and Saloom Dept. Store, LLC d/b/a Saloom Department Store, Defendants, Appellees.

No. 207 WDA 2019.
May 20, 2019.

On Appeal from the Order of the Court of Common Pleas of Westmoreland County, Entered on January 15, 2019 in the Civil Division, No. 1126 of 2018, Harry F. Smail, Jr., Judge

Brief for Plaintiffs/Appellants

Carlson Lynch LLP, Gary F. Lynch, R. Bruce Carlson, Kelly K. Iverson, 1133 Penn Avenue, 5th Floor, Pittsburgh, PA 15222, T: 412-322-9243, F: 412-231-0246.

Brady, Jonathan E. Lowy, Robert Cross, 840 First Street, N.E., Suite 400, Washington, DC 20002, T: 202-370-8104, for plaintiffs/appellants.

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*1 I. *STATEMENT OF JURISDICTION*

This Court has jurisdiction to consider "all appeals from final orders of the courts of common pleas .... "42 Pa.C.S.A. § 742. The trial court entered a final Opinion and Order dismissing this case on January 15, 2019. Plaintiffs/Appellants ("Appellants") filed a timely notice of appeal on February 6, 2019 under Pa.R.A.P 903(a).

II. *ORDER IN QUESTION*

The trial court entered the following Order:
AND NOW, to wit, this 15th day of January, 2019 ... Defendants' preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. 1028(a)(4), requesting dismissal of the Plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") is SUSTAINED, for the reasons elaborated upon below.

The Opinion and Order are attached as Exhibit A ("Ex. A").

III. *SCOPE AND STANDARD OF REVIEW*

In an appeal from an order that sustains preliminary objections in the nature of a demurrer and dismisses a complaint, the Superior Court exercises plenary review. *See* ***2** *Little Mountain Community Ass'n, Inc. v. Southern Columbia Corp.*, 92 A.3d 1191, 1195 (Pa. Super. 2014). The Court reviews the record, accepting as true all well-pled facts and giving the plaintiffs all reasonable inferences that the Court could deduce from these facts. *See Joyce v. Erie Ins, Exch.*, 74 A.3d 157, 162 (Pa. Super. 2013); *McClellan v. HMO*, 413 Pa. Super. 128, 138 (1992).

> Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint ... Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Joyce, 74 A.3d 157 at 162 (internal quotation omitted).

This Court must consider whether the trial court committed an error of law or abused its discretion in sustaining a defendant's preliminary objections. *See* *Werner v. Piater-Zyberk*, 799 A.2d 776, 783 (Pa. Super. 2002). "[A]n inquiry into an abuse of discretion is operationally equivalent as one into the merit of the ***3** trial court's decision." *Coker v. S.M. Flickinger Co., Inc.*, 625 A.2d 1181, 1182 (Pa. 1993).

IV. *STATEMENT OF QUESTIONS INVOLVED*

1) Does the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901-7903, bar Appellants'claims?

Trial Court's Answer: Yes.

2) Does the United States Constitution permit PLCAA to bar Pennsylvania courts from applying Pennsylvania law to provide civil justice to Appellants?

Trial Court's Answer; Yes.

V. *STATEMENT OF THE CASE*

A. Factual Allegations

Defendants/Appellees Springfield and Saloom [1] ("Appellees"), respectively, made and sold a semi-automatic handgun ("the Handgun") without feasible safety features and warnings that prevent unintentional shootings of and by children. James Robert ***4** ("J.R.") Gustafson, a thirteen-year old boy, was killed as a result of Appellees' negligent actions. Appellants are J.R/s parents.

Appellees had every reason to expect that their guns would be used in scenarios like that which resulted in J.R/s death, and they could have designed and marketed their guns with safety features to prevent such injuries and deaths. But they chose not to. Appellees have long known that: (1) there is a great likelihood that firearms they sell - especially handguns - will be accessible to children and others who cannot be expected to safely use the weapons (Complaint filed March 19, 2018 ("Cmpl.") at at 1-3 ¶¶ 5-8 ¶¶ 30-37, 38-39, 45); (2) the design of semi-automatic firearms frequently deceives people into falsely believing that a gun is unloaded after the ammunition magazine is removed (although a bullet may remain in the chamber) (*id*); (3) many people - often children - are killed as a result (*id.*); and (4) guns can be made and sold with inexpensive, feasible safety features that prevent many of these tragedies. (*Id.* at 8-12 ¶¶ 46-65).

***5** Appellees could have prevented foreseeable deaths like J.R.'s by manufacturing and selling guns with magazine disconnect safeties, that were developed over a century ago to prevent a gun from firing when the magazine is removed (*id.* 9-10 HH 51-54); loaded chamber indicators that alert users when a round is in the weapon (*id.* at 10 ¶¶ 55-56); or built-in locks and other features that prevent unauthorized users from firing guns. (*Id.* at 10-12 ¶¶ 58-65). But Appellees chose to design, market and sell the Handgun without these safety features or adequate warnings. (*Id.* at 3 ¶ 5-6, 9, ¶¶ 21, 8-12 ¶¶ 46-65).

Springfield exacerbated the risks it created in its design failures with deceptive messaging that misled consumers by overstating the benefits of firearms and understating (or not mentioning) the risks associated with firearm ownership. (*Id.* at 7-8, 12-13 ¶¶ 35-44 ¶¶ 66-71). For example, Springfield encouraged people to buy guns to keep readily accessible for "[w]hen the police are minutes away and the threat is seconds away," without mentioning that a gun in the home is more likely ***6** to be used against family members than in their defense, especially when stored unsafely. (*Id.* at 44)

In precisely the sort of scenario Appellees knew would likely happen, a fourteen-year-old boy ("the Juvenile Delinquent") obtained the Handgun in the home, thought it was unloaded after the magazine was removed, and pulled the trigger of what he thought was an unloaded gun. (*Id.* at 5-6, 15 ¶ 20-28 82). [2] Because Appellees chose not to include a magazine disconnect or other feasible safety features, the bullet that remained hidden in the chamber killed J.R. (*Id.*) J.R. would not have died if Appellees had satisfied the duty imposed by Pennsylvania law to manufacture and sell the Handgun in the safest manner reasonably possible.

B. Procedural History

Appellants timely filed their Complaint, alleging products liability claims under Pennsylvania tort law, on March 19, 2018. Before any discovery, Appellees responded with preliminary objections seeking dismissal of the Complaint on June 29, 2018. ***7** Appellees did not contest that Appellants had adequately pled their claims under Pennsylvania law, but argued that Congress, in PLCAA, required Pennsylvania courts to dismiss the case. Appellants filed a brief in opposition on August 7, 2018 in which they argued that 1) PLCAA did not bar their claims and 2) in the alternative, if it did bar their claims, PLCAA was unconstitutional. The United States Department of Justice intervened to defend PLCAA's constitutionality. Following oral argument, on January 15, 2019, the trial court dismissed Appellants' case, ruling that PLCAA extinguished Appellants' claims and that PLCAA was constitutional. Appellant timely appealed to this Court.

VI. *SUMMARY OF ARGUMENT*

Pennsylvania tort law provides Appellants with a right to seek civil justice against Appellees for wrongfully causing the death of their son, and PLCAA does not deprive Pennsylvania's authority to apply its common law and hear this case. Under Supreme Court federalism precedent, such state authority cannot ***8** be taken away unless Congress meets a heavy burden to unmistakably state an intent to do so. *See* *Bond v. United States*, 134 S. Ct. 2077 (2014); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). PLCAA does not approach expressing that clear intent.

In dismissing Appellants' case, the trial court failed to read PLCAA in accord with this precedent. PLCAA must be read narrowly through this federalism lens since, read broadly, it deprives Pennsylvania of its traditional sovereign authority to allocate lawmaking functions between branches of government and to make state law as it chooses. According to the trial court, PLCAA bars Pennsylvania from providing civil justice for certain wrongfully-injured Pennsylvanians where there was a violation of Pennsylvania common law. However, PLCAA unquestionably permits Pennsylvania to impose liability in identical cases under its "predicate exception," 15 U.S.C. § 7903(5)(A)(iii), for a violation of standards established by the legislature - such as laws requiring certain safety features or warnings. By dictating to ***9** Pennsylvania which branch of government it must use to impose liability in gun industry cases such as this, PLCAA infringes on Pennsylvania's sovereign lawmaking authority.

Bond and *Gregory* make clear that courts may only read a federal law to so upset the federal-state balance of powers if Congress expressed an unmistakably clear intent to do so, and that intrusive reading cannot be avoided. But PLCAA does not approach stating a clear intent to bar cases like this. On the contrary, PLCAA's stated Purposes and Findings express an intent to only bar claims against gun companies where the harm is "solely caused" by third party criminal or unlawful conduct (see 15 U.S.C. § 7901(b)(1), (a)(6)) - not cases like this, where another cause was gun industry negligence. See *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 131, 137-138 (2019) (referencing "solely caused" language).

PLCAA also permits products liability actions unless caused by a "criminal," "volitional" act - which is far from a clear statement of intent to bar cases in incidents like J.R.'s which ***10** involved juvenile misconduct and unintentional harm. *See* § 7903(5)(A)(v). Without a clear statement as to whether such cases are barred, PLCAA must be read to allow Appellants' case so as to minimize the intrusion on state authority. *See* *Soto*, 331 Conn, at 131, 137-138 n. 58.

If PLCAA is read to require dismissal, it is unconstitutional because it violates the Tenth Amendment, Due Process and Equal Protection and exceeds Congress's Commerce Clause authority. U.S. Constit. amend. X, V; art. I, § 8, cl. 3. The trial court erred in giving short shrift to these constitutional principles.

This Court should reverse the trial court's decision.

VII. *ARGUMENT*

A. This Case Is Not A Prohibited "Qualified Civil Liability Action" Under PLCAA

1. Federalism Principles And The Presumption Against Preemption Require Reading PLCAA To Allow This Case

a. Federalism Principles Require Reading PLCAA To Allow Appellants' Claims

Supreme Court precedent requires courts to read federal statutes through a federalism lens which preserves the traditional ***11** powers of state governments and the federal-state balance of powers unless Congress explicitly and clearly states its intent to deprive states of their authority. PLCAA does not include the clear statement of intent required to bar Appellants' claims.

PLCAA purports to intrude on Pennsylvania's core sovereign authority to decide how to allocate lawmaking authority between its governmental branches. Pennsylvania has chosen to apply common law standards to impose liability on makers and sellers of all unreasonably dangerous products - including guns. *See Snyder v. Phila.*, 564 A.2d 1036 (Pa. Commw. Ct. 1989). Common law products liability is an important state policy:

Strict liability in tort for product defects is a cause of action which ***implicates the social and economic policy of this Commonwealth*** ... The risk of injury is placed, therefore, upon the supplier of products. ***No product is expressly exempt*** and, as a result, the presumption is that ***strict liability may be available with respect to any product***, provided that the evidence is sufficient to prove a defect.

Tincher v. Omega Flex, Inc., 104 A.3d 328, 381-82 (Pa. 2014) ***12** (internal citations omitted) (emphasis added).

According to the trial court, PLCAA bars Pennsylvania from effectuating this policy and imposing liability here for harm caused by Appellees' violation of judicially-created *common law*. Yet PLCAA would allow Pennsylvania to apply its liability law to precisely the same conduct if the legislature created the applicable law - if Appellees knowingly violated a *statute* applicable to the sale and marketing of firearms. *See* § 7903(5)(A)(iii).

For example, if a Pennsylvania statute required that firearms sold in Pennsylvania have magazine disconnect safeties, or other safety features or warnings, PLCAA would allow Pennsylvania courts to hear Appellants' case under the "predicate" exception. *Id., see also, e.g.,* *City of New York v. A-l Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 350-52 (E.D.N.Y. 2007) (claims survived under predicate exception); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 147-148 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013) (similar); ***13** *Smith & Wesson Corp, v. City of Gary*, 875 N.E.2d 422, 432-435 (Ind. App. 2007), *transfer denied* 915 N.E.2d 978 (Ind. 2009) (similar); *Corporan v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 93307, *6-*11 (D. Kan. 2016) (similar). Hence, under PLCAA, Pennsylvania must utilize its legislature - not its courts -if it wishes to impose liability on certain conduct by gun companies.

This is an impermissible intrusion on state sovereignty. "[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has repeatedly emphasized that how states choose to allocate lawmaking power between the branches of state government is a core prerogative of the states as sovereign entities. "[T]he States are free to allocate the lawmaking function to whatever branch of state government they may choose." *Minn. v.* *Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n. 6 (1981). "How power shall be distributed by a state among its governmental organs is commonly, if not always, a ***14** question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937). "It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the ... States." *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J. concurrence). "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v Mississippi*, 456 U.S. 742, 761 (1982). If read to bar Pennsylvania from using its judiciary to establish liability standards in cases such as this, PLCAA improperly interferes with Pennsylvania's right to allocate lawmaking authority. [3]

Under the trial court's ruling, PLCAA also infringes on Pennsylvania's choice to apply its civil justice law equally. *See* Pa. Con. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall ***15** have remedy by due course of law ... *Tincher*, 104 A.3d a 381-82.

The Supreme Court in *Gregory* emphasized that courts must avoid construing a federal statute as supplanting state authority, and should only do so when the law satisfies the "plain statement rule," which requires Congress to clearly and unambiguously express its intent to override state law. "[I]t is incumbent upon the ... courts to be certain of Congress' intent before finding that federal law overrides [the usual constitutional] balance [of federal and state powers]." 501 U.S. at 460 (internal quotation omitted); *see also* *United States v. Bass*, 404 U.S. 336, 339 (1971). In the absence of such a plain statement, courts must interpret statutes in a way that minimizes the intrusion on state sovereignty.

Gregory demonstrated how courts may be required to avoid a more straightforward statutory interpretation if it would infringe on state authority. *Gregory* involved a challenge to Missouri's mandatory retirement age for judges, which appeared to violate a ***16** federal law that barred age discrimination in employment. Deeming restricting ages for judges as within Missouri's sovereign right to structure its government, the Court read the federal bar on age discrimination as exempting judges under an exception for "'appointee[s] on the policymaking level.'" *Id.* at 466-67. The Court recognized that its statutory interpretation was "an odd way for Congress to exclude judges," "particularly in the context of the other exceptions that surround [the exclusion applicable to judges]." *Id.* at 467. However, the Court would not construe the federal law as displacing Missouri law unless it was "absolutely certain" about Congress' intent. *Id.* at 464. Reading the law through the required federalism lens, the Court was "not looking for a plain statement that judges are excluded" from the coverage of the federal statute, but, instead, "[would] not read [the federal law] to cover state judges unless Congress ha[d] made it clear that judges [we]re *included*" in the scope of its coverage. *Id.* at 467 (emphasis in original).

***17** In *Bond*, the Supreme Court went further in rejecting a plain reading of a federal statute to avoid intruding on state sovereignty. 134 S. Ct. 2077. Bond was charged with violating a federal law that criminalized chemical weapons use, with no exceptions for local crimes generally covered by state law. "[I]t [was] clear beyond doubt that [the act] cover[ed] what [the defendant] Bond did," (*id.* at 2094 (Scalia J., concurrence)), which was a traditionally local crime. But because a plain reading would lead to the federal government "'dramatically intruding] upon traditional state criminal jurisdiction/" the Court held that the federal law did not apply to Bond. *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350). Importantly, the Court did not find the statutory language ambiguous, but found that "ambiguity derives from the improbably broad reach of the key statutory definition." *Bond*, 134 S. Ct. at 2090. The Court rejected a plain reading because that "would 'alter sensitive federal-state relationships.'" *Id.* at 2091-92 (quoting earlier *Bond* decision). *See also United* ***18** *States v,* *Toviave*, 761 F.3d 623, 627-629 (6th Cir. 2014) (applying *Bond* to cabin expansive language).

As explained below, PLCAA does not include a clear statement of intent to deprive states of their authority to hear cases such as this. Applying the federalism principles articulated in *Bond/Gregory* is particularly appropriate here since one of PLCAA's stated purposes is "[t]o preserve and protect ... important principles of federalism [and] State sovereignty ..." § 7901(b)(6).

b. The Presumption Against Preemption Requires Reading PLCAA To Permit Appellants' Claims

The presumption against preemption further demands reading PLCAA to permit Appellants' claims. The "doctrine presumes that police powers historically left to the states are not supplanted by federal law." *Romah v. Hygienic Sanitation Co.*, 705 A.2d 841, 849 (Pa. Super. Ct. 1997). "Absent express preemption, courts are not to infer preemption lightly, particularly in areas traditionally of core concern to the states such as tort law." *Id.* at 849 (but finding that this high standard for ***19** preemption was met) (internal quotation omitted); *see also* *Wheeling & Lake Erie Ry. Co. v. PUC*, 778 A.2d 785, 792 (Pa. Commw. Ct. 2001) (federal statute did not "preempt the states' traditional police power over the public safety of the rail-highway crossings" where Congress did not "expressly" state intent to preempt) (internal quotation omitted).

Even when a statute's "express language" mandates some preemption, the "presumption [against preemption] reinforces the appropriateness of a narrow reading" of the "scope" of the preemption. *See* *Cipollone*, 505 U.S. at 517-18; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis omitted). This "approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id.* These principles have special resonance when tort law may be preempted, for "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest." *Martinez v. California*, 444 U.S. 277, 282 (1980).

***20** Here, as explained below, the scope of PLCAA preemption is, at most, ambiguous. In resolving that ambiguity, the presumption against preemption requires narrowly construing the scope of PLCAA's protection. Appellees cannot overcome the heavy burdens imposed by *Bond, Gregory*, and *Cipollone* to support the broad protection they seek.

2. PLCAA Fails To Make A Plain Statement Of Intent To Bar Claims Like Appellants'

Bond/Gregory principles and the presumption against preemption require allowing Appellants' Pennsylvania tort case, since Congress, in PLCAA, did not clearly state an intent to bar states from hearing such claims.

Congress stated the cases it wished to bar in § 7903, which establishes that for a case to be barred by PLCAA, a case must ***both*** meet the general definition of a "qualified civil liability action" in § 7903(5)(A) ***and*** fail to satisfy an exception. Congress did not come close to making the required "plain statement" which can make this Court "absolutely certain" that PLCAA intended to either include claims like Appellants' in the ***21** general definition of prohibited claims (§ 7903(5)(A)) ***or*** to exclude claims like Appellants' from the product liability exception (§ 7903(5)(A)(v)).

a. At Minimum, PLCAA Is Ambiguous As To Whether Appellants' Claims Meet The General Definition Of Prohibited "Qualified Civil Liability Action[s]"

i. PLCAA's "Solely Caused" Language Indicates That PLCAA Was Not Intended To Bar Claims Like Appellants'

It is far from "absolutely certain" that Appellants' claims are included in the general definition of a prohibited "qualified civil liability action." A qualified action, in pertinent part, is an action for damages "resulting from the criminal or unlawful misuse" of a gun by a third party. § 7903(5)(A). "Resulting from" is undefined in PLCAA and is ambiguous because it is susceptible to multiple "reasonable interpretations." *JP Morgan Chase Bank N.A. v. Taggart*, 203 A.3d 187, 194 (2019) (internal quotation omitted).

The trial court held that "resulting from criminal or unlawful misuse" meant, "where one cause is criminal or unlawful misuse." ***22** But that is not the only - or even the most - reasonable interpretation of this phrase. PLCAA's text and legislative history support reading "resulting from criminal or unlawful misuse" as "*solely caused by*" criminal or unlawful misuse, thereby permitting cases such as this, where Appellees' tortious conduct was another cause of harm.

Congress's intent "[t]o prohibit causes of action *** for the harm solely caused by" third party misuse is stated in PLCAA's first stated Purpose and one of its Findings. § 7901(b)(1); *see also* (a)(6) (expressing concern for "[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others"). To further Congress's intent, the "solely caused by" language should inform the meaning of "resulting from the criminal or unlawful misuse." *See* *Conroy v. Aniskoff*, 507 U.S. 511, 515-16 (1993) (statute must be read as a whole); Antonin Scalia & Bryan A. Gardner, *Reading The Law: The Interpretation*

Of Legal Texts (2012), ("*Reading the Law"*) at 167-170 (same); *id.* at 217-221 (preambles and prefatory language are valid ***23** indicators of meaning); *id.* at 63-66 (interpretation that advances overall goal of statute is favored).

The word "solely" is particularly indicative of Congress's intent, as it was one of the few changes made to an earlier version of PLCAA that failed to pass. *Compare* S. 1805, 108th Cong. § (b)(l)(2003) (Exhibit B) *with* § 7901(b)(1) (Exhibit C) and S. 397, 109th Cong. (2005) (Exhibit D). No statutory word should be treated as superfluous (*Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991); *Reading the Law* at 174-180), especially a word that may well have been critical to PLCAA's enactment. Further, when Congress amends statutory language, a noteworthy change in content is presumed to reflect a change in meaning. *See Reading the Law* at 256-261. Applying these principles to effectuate Congress's intent, PLCAA's general definition only bars actions where third-party misuse was the "sole cause" of harm - and not actions like this case where gun industry negligence was also a cause of the harm.

24** Not only is this reading of "qualified civil liability action" reasonable and mandated by canons of construction, it is required under *Bond/Gregory*. Under *Gregory*, this Court should "not [be] looking for a plain statement that [common law claims like Appellants'] are excluded" from the coverage of PLCAA's bar, but instead, should "not read [PLCAA] to [bar common law claims like Appellants'] unless Congress has made it clear that [they] are *included*." 501 U.S. at 467 (emphasis in original). PLCAA's expressed intent to bar cases where the harm was "solely caused" by third party misuse is the *opposite* of a clear statement of intent to bar cases, like this case, where the harm was ***not solely caused by a third party.

The trial court's expansive reading of "qualified civil liability action" should also be rejected because it would lead to the federal government "'dramatically intrud[ing] upon traditional state [civil justice] jurisdiction.'" *Bond*, 134 S.Ct. at 2088 (*quoting Bass*, 404 U.S. at 350)); *id.* at 2090. In accord with *Bond* and *Gregory*, PLCAA should be read to avoid dramatic ***25** intrusions on state sovereignty by construing "qualified civil liability action" to not include this case.

The trial court's decision is further undermined by the subsequently-decided *Soto* case, in which the Supreme Court of Connecticut engaged in the most extensive analysis of PLCAA to date. *Soto* applied the plain statement rule and *Bond/Gregory* principles to PLCAA, finding that "[t]hese principles apply with particular force to congressional legislation that potentially intrudes into a field ... traditionally ... occupied by the states." *Soto*, 331 Conn, at 137-138 n. 58. *Soto* reversed a ruling dismissing all of plaintiffs' claims as barred by PLCAA because, "in the absence of a clear statement in the statutory text or legislative history that Congress intended to supersede the states' traditional authority ... we *are compelled to resolve any textual ambiguities in favor of the plaintiffs."* *Id.* at 138 (emphasis added). *Soto* cited PLCAA's "solely caused" language to support its conclusion that one of plaintiffs' claims survived. *Id.* at 131. While previous courts did not accept this construction of PLCAA, ***26** they, unlike *Soto*, did not properly consider Supreme Court federalism precedent. *See, e.g., Delana v. CED Sales*, 486 S.W.3d 316, 323 (Mo. 2016), and *Kim v. Coxe*, 295 P.3d 380, 389 (Ak. 2013). *Delana* and *Kim* also allowed some claims to proceed, so the intrusion on state authority was less severe.

The trial court misunderstood *Bond/Gregory* as a "constitutional avoidance doctrine" (Ex. A at 4). It is not. *Bond/Gregory* is a federalism principle that governs how federal statutes must be construed. The court also appeared to conclude that these principles do not apply if Congress expressed an intent to preempt state law in some way. *See id.* But, in fact, these principles function to limit the scope of preemption where it exists to prevent "the improbably broad reach of the key statutory definition," *Bond*, 134 S. Ct at 2090; *cf. Medtronic*, 518 U.S. at 485.

The trial court also erroneously concluded that allowing Appellants' claims would render PLCAA's negligence per se and negligent entrustment exceptions meaningless surplusage. Ex. A ***27** at 6-7. Appellants' products liability claims have distinct elements from negligent entrustment or negligence per se claims, so those provisions are not superfluous. And regardless, *Bond*

and *Gregory* demand construing laws to avoid infringing on state authority even if those readings are "odd." See 501 U.S. at 467.

ii. PLCAA's Legislative History Supports Allowing Appellants' Claims

When a statute is ambiguous, the court must "consider matters other than the statutory language" - including the legislative history. See *JP Morgan*, 203 A.3d at 191 n. 3, 194. This is especially true when determining the scope of statutory language that purports to preempt state law to some degree. See *Wheeling*, 778 A.2d at 792 (examining legislative history of ambiguous statute purporting to preempt state law). PLCAA's legislative history indicates an intent to not bar cases like this.

PLCAA's author and chief sponsor, Senator Larry Craig, made clear that Congress did not intend PLCAA to immunize gun industry actors from liability when their own tortious conduct was one cause of harm. Senator Craig emphasized that:

> ***28** [PLCAA] is not a gun industry immunity bill because it *does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct*. ... As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry ... *If manufacturers or dealers break the law or commit negligence, they are still liable*.

151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005) (emphasis added). Other co-sponsors similarly expressed an intent to preserve cases like these: "[T]his bill carefully preserves the rights of individuals to have their day in court with civil liability actions where negligence is truly an issue." (151 Cong. Rec. S9077 (daily ed. July 27, 2005) (Sen. Hatch)); "This bill ... will not shield the industry from its own wrongdoing or from its negligence." (151 Cong. Rec. S9107 (daily ed. July 27, 2005) (Sen. Baucus)); "This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [s/'c] the firearms ***29** dealer or manufacturer." 151 Cong. Rec. S9389 (daily ed. July 29, 2005) (Sen. Allen).

The Supreme Court of Connecticut recognized that many legislators indicated that "the only actions that would be barred by PLCAA would be ones in which a defendant bore *absolutely no responsibility or blame* for a plaintiff's injuries." *Soto*, 331 Conn, at 148 (emphasis added). As Senator Craig said, "The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle." 151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005).

An example of the "novel" actions that Congress intended to bar - where harm was "solely caused by" criminal misuse - is *Kelley v. R.G. Industries, Inc.* 497 A.2d 1143 (Md. 1985), superseded by statute, Md. Ann. Code art. 27 § 36-1(h), which allowed strict liability for making certain guns used by criminals even when the gun companies engaged in *no negligent or unlawful misconduct*. Congress did not intend to bar negligence cases like this.

***30 b. PLCAA Is Not Clear That The Juvenile Delinquent Committed A "Criminal," "Volitional" Act That Prevents Application Of PLCAA's Product Liability Exception (§ 7903(5)(A)(v))**

Even if this case met the general definition of a prohibited "qualified civil liability action," it is still not a prohibited "qualified civil liability action" because it is exempt under PLCAA's products liability exception. § 7903(5)(A)(v). More precisely, it is not "absolutely certain" that this case falls outside of the products liability exception, as required by *Bond/Gregory*.

Section 7903(5)(A)(v) allows products liability actions *except* where "discharge of the [gun] was caused by a volitional act that constituted a criminal offense." *Id.* There is at least ambiguity as to whether J.R.'s death was "caused by a volitional act that constituted a criminal offense," and any ambiguity must be resolved in favor of allowing Appellants' suit. *See* *Soto*, 331 Conn, at 138; *cf.* *Breazeale v. Victim Servs.*, 198 F. Supp. 3d 1070, 1077-1078 (N.D. Cal. 2016).

For one, the shooting of J.R. was subject to juvenile, not criminal, proceedings, and, thus, was not "criminal." Congress ***31** intended for the definition of "criminal" to be narrow in this provision. While PLCAA's general definition of "qualified civil liability action" bars actions where harm results from a "criminal or unlawful" misuse of a firearm (15 U.S.C. § 7903(5)(A)), the disqualifying provision in the products liability exception only bars cases involving a "criminal" act. § 7903(5)(A)(v). When a legislature excludes one term from a list of terms, it is excluding that term from its scope. *Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals*, 572 Pa. 240, 247 (2002). Thus, Congress intended to allow products liability claims involving "unlawful" but not "criminal" acts.

Juvenile offenses - such as the Juvenile Delinquent's involuntary manslaughter adjudication - are "unlawful" but not "criminal," as they are not subject to the criminal justice system. The "discharge" that killed J.R. was therefore not a disqualifying "criminal offense" under § 7903(5)(A)(v).

The trial court disagreed, finding that while juvenile delinquency proceedings are not criminal, delinquent acts are still ***32** acts defined as "crimes" under Pennsylvania law. Ex. A at 8. The trial court erred. For one, it was an error to apply Pennsylvania's definition of "criminal" when interpreting this federal law; what *Congress* meant by disqualifying "criminal" acts in § 7903(5)(A)(v) governs. Regardless of how Pennsylvania categorizes the Juvenile Delinquent's actions, PLCAA did not clearly intend for acts of juvenile delinquency to be viewed as "criminal."

Under *Bond/Gregory*, the Court must allow Appellants' action unless Congress clearly intended to include this juvenile delinquent as a "criminal" disqualifying offense. By excluding "unlawful" acts from the disqualifying phrase of the products liability exception, Congress did not make the required clear statement that products liability claims involving juvenile offenses are barred. Indeed, it is hard to imagine a more apt example of an "unlawful" but not "criminal" "discharge" of a firearm than the one at bar.

***33** It is also far from certain that Congress intended to view a minor's firing of a gun he believed was unloaded as a discharge "caused by a volitional act." Even if pulling the trigger was "volitional," that does not make a discharge "caused by a volitional act" any more than an explosion would be "caused by [the] volitional act" of answering a cell phone if, unbeknownst to you, terrorists had wired your phone to a remote bomb. In both cases, there was "volition" to engage in a seemingly non-dangerous act, but not to cause an unforeseen dangerous result. Allowing Appellees to be held liable also comports with Congressional intent, as their failure to include safety features and warnings facilitated J.R.'s death.

At minimum, there are multiple "reasonable interpretation[s]" of "criminal" and "volitional" in PLCAA's products liability exception which make it at least ambiguous as to whether the disqualifying phrase in § 7903(5)(A)(v) applies to the Juvenile Delinquent's unintentional shooting of J.R. *See* *J.P. Morgan*, 203 A.3d at 194. This Court should "not read [PLCAA] ***34** to cover [common law claims like Appellants'] unless Congress has made it clear that [they] are *included*" in PLCAA's coverage.

501 U.S. at 467 (emphasis in original). As the products liability exception does not clearly bar Appellants' claims, this Court must construe it to permit these claims.

B. PLCAA Is Unconstitutional If It Bars This Case [4]

1. PLCAA Violates The Tenth Amendment

If PLCAA is read to bar Appellants' claims, it violates the Tenth Amendment and principles of federalism by interfering with the authority of states to decide how to make and apply their law.

Under the trial court's reading, PLCAA bars states from imposing liability on negligent gun companies if states have chosen to have their judiciaries establish the relevant liability standards through common law (like Pennsylvania), while allowing identical claims if the states used their legislatures to establish the relevant liability standards. *See* 15 U.S.C. § 7903(5)(A)(iii) and *supra* at 12-13. However, Congress has no permissible authority to infringe on a state's decision of which ***35** branch of government it chooses to make law. Indeed, "whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern." *Erie R.R.*, 304 U.S. at 78. *See also* *Clover Leaf Creamery Co.*, 449 U.S. at 461; *Highland Farms Dairy,* 300 U.S. at 612; *Sweezy*, 354 U.S. at 256; *FERC v Mississippi*, 456 US at 761. PLCAA contravenes these principles.

There is no precedent for PLCAA's severe intrusion on state sovereignty and lawmaking authority. The most similar statute of which Appellants are aware was held to potentially violate the Tenth Amendment in *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York ("Vargas")*, 131 A.D.3d 4 (N.Y. App. Div. 2015). Like PLCAA, that federal law could have been read to require a state legislative enactment to opt out of the law's restrictions. The *Vargas* court held that such an interpretation would violate the Tenth Amendment because:

> a ... reading of 8 U.S.C. § 1621 (d), so as to require a state legislative enactment to be the sole ***36** mechanism by which the State of New York exercises its authority granted in 8 U.S.C. § 1621 (d) to opt out of the restrictions on the issuance of licenses imposed by 8 U.S.C. § 1621 (a), unconstitutionally infringes on the sovereign authority of the State to divide power among its three coequal branches of government.

Id. at 6. The court noted that Congress "cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its authority to determine which coequal branch of government should exercise the power of the sovereign." *Id.* at 26-27. *Vargas* explained, "[t]he ability, indeed the right, of the states to structure their governmental decision-making processes as they see fit is essential to the sovereignty protected by the Tenth Amendment." *Id.* at 24.

The trial court did not engage with *Vargas* or the Supreme Court precedent that protects the authority of states to allocate their lawmaking authority. Instead, the court erroneously held that the Tenth Amendment only protects against the "commandeering" of state officials. Ex. A at 9. This is incorrect.

***37** The Tenth Amendment does not merely prohibit "commandeering." The Supreme Court, in *New York v. United States*, 505 U.S. 144, 188 (1992) stated that: "The Constitution [] leaves to the several States a residuary and inviolable sovereignty,

reserved explicitly to the States by the Tenth Amendment. *Whatever the outer limits of that sovereignty may be, one thing is clean* The Federal Government may not compel the States to enact or administer a federal regulatory program." *Id.* at 188 (internal quotations omitted) (emphasis added); *see also* *City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1117-1118 (9th Cir. 2014) (considering claim that federal action "transgress [ed] general principles of federalism" protected by the Tenth Amendment *as distinct from a "commandeering" claim*, "but ultimately rejecting both claims on the facts presented); *Vargas*, 31 A.D.3d 4.

If the Tenth Amendment only protected states from federal "commandeering," then Congress could permissibly restrict how states structure their governments and make law in a myriad of ***38** ways. For example, federal law could neuter state judiciaries by requiring dismissal of any cases against an industry favored by a majority in Congress - or any cases at all - unless the lawsuits were approved by the governor, or by the legislature. Those laws may sound absurd, but since they do not "commandeer" state officials any more than PLCAA, they would be constitutional, according to the trial court. It is hard to fathom, then, what "residuary and inviolable sovereignty" the Tenth Amendment would protect. *New York*, 505 U.S. at 188.

While a handful of courts have upheld PLCAA as constitutional, those cases are distinguishable and incorrect. *Heto v.* *Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009), and *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008) did not consider Tenth Amendment challenges. *Deiana*, 486 S.W.3d at 323, and *Kim*, 295 P.3d at 389 erroneously held that the Tenth Amendment only prohibited "commandeering." And *Deiana* and *Kim* allowed some claims to proceed, so PLCAA's preemption of state authority was far less severe than here.

***39** PLCAA violates the Tenth Amendment.

2. PLCAA Violates Due Process

PLCAA violates the Due Process Clause of the Fifth Amendment because, according to the trial court, it eliminates any remedy for victims of gun industry negligence like Appellants. Congress has never before, or since, extinguished tort actions without providing a reasonable alternative remedy, nor has the Supreme Court ever held that that is permissible.

The Supreme Court has long recognized that "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (*quoting* Sir William Blackstone, Commentaries 23 (1869)); *see also* *Truax v. Corrigan*, 257 U.S. 312, 330 (1921) ("a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive the person suffering the loss of due process of law"); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (access to the courts is a fundamental right).

***40** Congress has always provided a reasonably just alternative compensation scheme or preserved some meaningful access to judicial redress when it has limited potential plaintiffs' legal actions. For example, Congress created the September 11th Victims Compensation Fund, Pub. L., 49 U.S.C. § 40101, to provide an incentive for victims of the terrorist attacks to seek a no-fault guaranteed remedy rather than pursuing civil litigation. The National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-l to 300aa-34, set up a vaccine court where plaintiffs could accept or reject a remedy in lieu of pursuing traditional tort remedies. The Biomaterials Access Assurance Act of 1998, 21 U.S.C. § 1604, limited liability of certain suppliers of materials for implants but preserved judicial remedies by allowing for the impleading of the suppliers in certain cases.

Authority on which the trial court relied - *Duke Power Co, v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978) - actually highlights how PLCAA violates Due Process. While the trial court focused on the Supreme Court's expression of doubt about ***41** whether the Due Process Clause requires an alternative compensation scheme (see Ex. A at 11-12), the Court would have simply upheld the liability-limiting law if there was no Due Process right to any remedy. Instead, the Court predicated its

approval of the statute on a careful analysis of the substitute remedies provided by Congress and a finding that "[t]his panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by [the act]." 438 U.S. at 93. And, subsequently, Justice Marshall explained that "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *Pruneyard Shopping Ctr. v, Robins*, 447 U.S. 74, 94 (1980) (J. Marshall concurring).

One trial court held that PLCAA violates due process. *City of Gary* v. *Smith & Wesson Corp.*, No. 45D05005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (Exhibit E), *affirmed on other grounds* ***42** *by* *Smith & Wesson Corp. v. City of Gary*, 875 N.E 2d 422 (Ind. Ct. App. 2007). Another court held PLCAA would violate due process if it barred plaintiffs' claims. *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 24:19-25:3 (Wis. Cir. Ct. Mar. 24, 2014) (Exhibit F). A commentator has also argued that PLCAA is unconstitutional for eliminating any right to redress. *See* Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72 U. Cin. L. Rev. 1739, 1750-56 (Summer 2004) (discussing precursor bill to PLCAA).

The trial court relied on cases which suggest that there is no right to a common law claim until there is a final, non-reviewable judgment. See Ex. A at 11. But regardless of when rights vest, this does not refute Appellants' primary Due Process argument. For even if Appellants had no vested right in a Pennsylvania product liability claim, they have a right to *some* "remedy."

***43** If there is no Due Process right to a remedy, then Congress could, for example, prohibit state courts from granting any relief for tortious acts or require state courts to send their civil dockets to the Speaker of the House or the Senate Majority Leader every morning for that legislator to choose which cases must be dismissed. These absurd laws would render the language of *Marbury v. Madison*, and other cited precedent, meaningless.

The trial court disregarded these authorities, and relied on *Ileto*, 565 F.3d. 1126. *See* Ex. A at 12. *Ieto* is non-binding and inapposite. While *Ieto* held that PLCAA does not extinguish rights to a remedy because it contains exceptions, the trial court decided that none of PLCAA's exceptions applied, so they cannot provide any redress. Additionally, *Ieto* did not consider *Gregory*, or *Bond* (which had not been decided); it gave short shrift to due process rights; it did not involve PLCAA's products liability exception; and it did not even state that the action was supported by common law. This Court should not follow this inapplicable case.

***44** PLCAA violates Appellants' Due Process rights.

3. PLCAA Violates Equal Protection Principles

PLCAA violates the Equal Protection guaranteed by the Fifth Amendment by discriminating between classes of tort plaintiffs without any rational basis. PLCAA creates a discriminatory judicial system in which persons injured by gun industry negligence in states with legislation codifying judicially-created liability standards can recover damages; those harmed on identical facts in states which rely on common law standards cannot recover; and those injured from identical negligence from unlicensed gun sellers or from defectively designed bb guns can recover everywhere. No rational basis supports such discrimination.

Rational basis is deferential, but it is not a rubber stamp. *See* *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (striking down tort statute on rational basis review); *and* *City of Cieburne v. Cieburne Living Ctr.*, 473 U.S. 432 (1985) ***45** (striking down zoning ordinance on rational basis review).[5] To survive rational basis review, a justification for discrimination within a statute must not be patently illogical and insufficient to explain the differential treatment.

In *McBride*, a state statute allowed the state to recover 75% of punitive damages awards in products liability cases but permitted plaintiffs in non-products liability cases to retain 100% of punitive damages awards. The court held that the law "denie[d] equal protection to product liability punitive damage plaintiffs in its discrimination in favor of other nonproduct liability punitive damage claimants" without rational basis. 737 F. Supp. at 1578. The court emphasized that "there is no rational basis under the reasoning advanced by the State that the 75% award is a revenue producing measure inasmuch as it would be arbitrary to fail to assess all punitive damage awards if the purpose of assessing any award was to raise revenue for the State." *Id.*

***46** The trial court's attempts to validate PLCAA's discrimination highlights its lack of a rational basis. The court suggested that PLCAA's discrimination between classes of plaintiffs was supported by Congress's desire to protect Second Amendment rights by limiting liability, and by Congress's fear that state judicial officers might override more "democratic" legislatures. See Ex. A at 13. Neither basis withstands scrutiny.

If PLCAA were rationally protecting the Second Amendment by limiting liability, Congress would not have permitted unlimited liability where legislatures have codified liability standards. See § 7903(5)(A)(iii). Just as the state's proffered justification of raising revenue could not rationally explain taking *no money* from one class of plaintiffs in *McBride*, a desire to limit liability cannot explain leaving *unlimited* liability in some states.

Congress's purported preference for supposedly more "democratic" legislatures also cannot support PLCAA's discrimination between classes of plaintiffs. Congress's preference is not a permissible justification because it is up to ***47** states to decide how to allocate their lawmaking authority. *See also* *Clover Leaf Creamery Co.*, 449 U.S. at 461; *Highland Farms Dairy*, 300 U.S. at 612; *Sweezy*, 354 U.S. at 256; *FERC v Mississippi*, 456 US at 761. Further, in many states judges are elected by, and can be voted out by, the people. And states can choose to have legislators appointed, making their courts more "democratic" - yet PLCAA's anti-courts bias would remain.

PLCAA's discrimination between different classes of tort victims fails under rational basis review.

4. PLCAA Is Not A Permissible Exercise Of Congress's Commerce Clause Authority

Congress has no legitimate authority to enact legislation such as PLCAA. Congress's only purported authority for PLCAA is the Commerce Clause, but that does not empower Congress to regulate the lawmaking functions of states. PLCAA is not permissible preemption because "every form of [permissible] preemption is based on a federal law that regulates the conduct of private actors, not the States." *Murphy v. NCAA*, 138 S.Ct. 1461, 1481 (2018). PLCAA does not regulate private conduct.

***48** An example of permissible preemption is *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2007), in which the Court found that federal premarket approval of a product preempted state common law claims against the manufacturer because the approval process imposed design standards which adequately balanced public safety and effectiveness. *See* *id.* at 323-325; *see also* *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013). In contrast, PLCAA does not set a standard of conduct for gun companies. It simply dictates to states which branch of government they must use to make law on which to base liability for the gun industry.

The trial court did not explain how its decision comports with *Murphy's* requirement that permissible preemption involve regulation of private actors, not sovereign *states* - or how allowing unlimited liability in states with codified liability standards, but no liability in states that rely on common law, is a rational regulation of interstate commerce. Even if there are constitutional methods by which Congress could preempt gun ***49** industry liability, it cannot do so by impermissible means. "The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *See* *New York*, 505 U.S. at 162.

PLCAA exceeds Congress's Commerce Clause authority.

C. The Principle Of Constitutional Avoidance Further Supports Appellants' Interpretation Of PLCAA

The principle of constitutional avoidance also supports construing PLCAA to not bar Appellants' case. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail - whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005); *see also Reading the Law* at 247-252. As detailed above, PLCAA would present severe constitutional problems if read to bar Appellants' claims, so that reading should be avoided. Appellants' more than plausible ***50** interpretation of PLCAA would avoid these problems and should be adopted.

The trial court failed to appreciate that constitutional avoidance requires a court to adopt a "plausible" statutory construction if that construction would avoid constitutional issues. *See id.* Appellants' reading of PLCAA more than meets this test.

VIII. *CONCLUSION*

Appellants respectfully request that this Court reverse the January 15, 2019, Order and Opinion of the Westmoreland County Court of Common Pleas, overrule Appellees' preliminary objections, and remand this case to the trial court for further proceedings.

***51** Respectfully submitted,

By: */s/ Kelly K. Iverson*

Kelly K. Iverson

Gary F. Lynch

R. Bruce Carlson

Kelly K. Iverson

Carlson Lynch, LLP

1133 Penn Avenue

5th Floor

Pittsburgh, PA 15222

T: 412-322-9243

F: 412-231-0246

Jonathan E. Lowy

Robert Cross

Brady

840 First Street, N.E.

Suite 400

Washington, DC 20002

T: 202-370-8104

Attorneys for Plaintiffs/ Appelants

Appendix not available.

Footnotes

1 Saloom collectively refers to Appellees with "Saloom" in their names.

2 The boy pled guilty in a juvenile delinquency proceeding. (*Id.* at 8 ¶ 29).

3 Congress was open about its animus to the judiciary in PLCAA, stating that federal law was needed to prevent "judicial officer[s]" from acting as "maverick[s]" in permitting certain gun litigation. *See* § 7901(a)(7).

4 These arguments assume, *arguendo*, that PLCAA bars Appellants' claims.

5 *McBride* and *Cleburne* relied on the Equal Protection Clause of the 14th Amendment, which is co-extensive with the protection provided by the 5th Amendment. *See* *Bolling v. Sharpe* 347 U.S. 497 (1954).