

2019 WL 4918573 (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.

June 18, 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 Defendants/Appellees

[John K. Greiner](#), Tremba, Kinney, Greiner & Kerr, LLC, 302 W. Otterman Street, Greensburg, PA 15601, Telephone: (724) 838-7600, Facsimile: (724) 838-8870.

[Christopher Renzulli](#) (pro hac vice), Renzulli Law Firm, LLP, One North Broadway, Suite 1005, White Plains, NY 10601, Telephone: (914) 285-0700, Facsimile: (914) 285-1213, for defendants-appellees, Springfield Amory, Inc. s/h/a Springfield, Inc. d/b/a Springfield Armory, Saloom Department Store, and Saloom Department Store, LLC d/b/a Saloom Department Store.

June 19, 2019

***i TABLE OF CONTENTS**

TABLE OF AUTHORITIES	iii
I. COUNTERSTATEMENT OF THE CASE	1
II. SUMMARY OF THE ARGUMENT	3
III. ARGUMENT	6
A. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT	6
1. Purpose of the Protection of Lawful Commerce in Arms Act	6
2. This Case is a Qualified Civil Liability Action	8
3. The Supreme Court's Decisions in <i>Gregory</i> and <i>Bond</i> are Inapplicable to the Construction of the PLCAA Because it Involves Express Preemption of Qualified Civil Liability Actions that are Otherwise Valid Pursuant to State Law	11
4. The PLCAA Bars All Qualified Civil Liability Actions Regardless of Whether Plaintiffs Claim that the Alleged Negligence of a Manufacturer or Seller of Firearms is also a Cause of Their Damages	16
B. NONE OF THE EXCEPTIONS TO THE DEFINITION OF A QUALIFIED CIVIL LIABILITY ACTION ARE APPLICABLE TO THIS CASE	25
*ii C. The PLCAA EASILY PASSES CONSTITUTIONAL MUSTER	41
1. The PLCAA Does not Violate the Tenth Amendment or Principles of Federalism	43
2. The PLCAA Does not Violate Plaintiffs' Right to Due Process	44
3. The PLCAA Does not Violate Plaintiffs' Right to Equal Protection	47
4. Congress had the power to enact the PLCAA Pursuant to the Commerce Clause	50
IV. CONCLUSION	51
CERTIFICATE OF COMPLIANCE WITH RULE 2135(d)	53
CERTIFICATE OF COMPLIANCE WITH RULE 127	54
CERTIFICATE OF SERVICE	55

***iii TABLE OF AUTHORITIES**

Cases

 <i>Adames v. Sheahan</i> , 909 N.E.2d 742 (Ill. 2009)	30, 31, 32, 33, 34, 37, 38, 39, 44
 <i>Bond v. United States</i> , 572 U.S. 844 (2014)	10, 13, 14
 <i>Chavez v. Glock, Inc.</i> , 207 Cal. App. 4th 1283 (Cal. Ct. App. 2012)	28
<i>City of Gary v. Smith & Wesson Corp.</i> , _____ N.E.3d _____, No. 18A-CT-181, 2019 WL 2222985 (Ind. Ct. App. May 23, 2019)	N.E.3d _____, No. 18A-CT-181, 2019 WL 2222985 (Ind. Ct. App. May 23, 2019) 46
<i>City of Gary v. Smith & Wesson Corp.</i> , No. 4505005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006)	45
 <i>City of New York v. Beretta U.S.A. Corp.</i> , 401 F. Supp. 2d 244 (E.D.N.Y. 2008)	44, 49
 <i>City of New York v. Beretta U.S.A. Corp.</i> , 524 F.3d 384 (2d Cir. 2008)	43, 51
<i>Commonwealth v. Bonner</i> , 135 A.3d 592 (Pa. Super. Ct. 2016)	40
<i>Commonwealth v. Carnes</i> , 82 Pa. Super. 335 (Pa. Super. Ct. 1923)	40
<i>Copier By and Through Lindsey v. Smith & Wesson Corp.</i> , 138 F.3d 833 (10th Cir. 1998)	18
*iv  <i>Delana v. CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016)	14, 15, 22, 44
 <i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008)	44, 50
 <i>Duke Power C. v. Carolina Env't'l Study Group</i> , 438 U.S. 59 (1978)	45
 <i>Estate of Kim ex rel. Alexander v. Coxe</i> , 295 P.3d 380 (Alaska 2013)	16, 22, 44, 50
 <i>Gilland v. Sportsmen's Outpost, Inc.</i> , No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011)	23
 <i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	10, 11, 12
 <i>H.J. Inc. v. Northwestern Bell Telephone Co.</i> , 492 U.S. 229 (1989)	21
 <i>Heller v. Doe by Doe</i> , 509 U.S. 312 (1993)	49
 <i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9th Cir. 2009)	15, 44, 49, 51
 <i>Ileto v. Glock, Inc.</i> , 421 F. Supp. 2d 1274, (C.D. Cal. 2006)	18
 <i>In re Miller</i> , 439 A.2d 1222 (Pa. Super. Ct. 1982)	40
<i>Interest of Brown</i> , 417 A.2d 1188 (Pa. Super. Ct. 1980)	40
*v <i>Interest of G. T.</i> , 597 A.2d 638 (Pa. Super. Ct. 1991)	40
<i>Interest of Smith</i> , 579 A.2d 889 (Pa. Super. Ct. 1990)	40
 <i>Jeffries v. District of Columbia</i> , 916 F. Supp. 2d 42, 46 (D.D.C. 2013)	28
 <i>Kelley v. R.G. Industries, Inc.</i> , 497 A.2d 1143 (Md. 1985)	18

<i>Lopez v. Badger Guns, Inc.</i> , No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014)	47
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	45
<i>Phillips v. Lucky Gunner, LLC</i> , 84 F. Supp. 3d 1216 (D. Colo. 2015)	22
<i>Ryan v. Hughes-Ortiz</i> , 959 N.E.2d 1000 (Ma. Ct. App. 2012)	34, 35, 36
<i>Smith & Wesson Corp. v. City of Gary</i> , 875 N.E.2d 422 (Ind. Ct. App. 2007)	46
<i>Soto v. Bushmaster Firearms Int'l, Inc.</i> , No. FBTCV156048103S, 2016 WL 8115354 (Conn. Super. Ct. Oct. 14, 2016)	28
<i>Soto v. Bushmaster Firearms Int'l, LLC</i> , ____ A.3d ____, 331 Conn. 53 (2019)	A.3d ____, 331 Conn. 53 (2019) 23, 24
Statutes	
15 U.S.C. §§ 7901- 7903	<i>passim</i>
*vi 18 U.S.C. §§ 921(a)(3)(A) & (B)	9
18 U.S.C. § 921(a)(10)	8
18 U.S.C. § 921(a)(11)(A)	9
18 U.S.C. § 921(a)(21)	8
18 U.S.C. § 921(a)(21)(A)	8
18 U.S.C. § 921(a)(21)(C)	9
18 U.S.C. § 922(g) & (n)	27
29 U.S.C. § 630(f)	12
Md. Code art. 27 § 36-I(h), recodified at Md. Public Safety Code § 5-402(b)(1)	18
42 Pa. Stat. § 6302	39
18 Pa. Stat. § 2504(a)	39
Other Authorities	
2A Sutherland, <i>Statutes and Statutory Construction</i> § 47.04, at 146 (5th ed. 1992, Norman Singer ed.)	22
Black's Law Dictionary 1605 (8th ed. 2004)	36
Patricia Foster, <i>Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional</i> , 72 U. Cin. L. Rev. 1739, 1750-56 (Summer 2004)	47

***1 I. COUNTERSTATEMENT OF THE CASE**

As alleged in the Complaint, on March 20, 2016, a fourteen year old boy (“Juvenile Delinquent”) intentionally pulled the trigger of a model XD-9 semi-automatic handgun (“Subject Handgun”), shooting and killing plaintiffs' decedent. R. 11a-12a (Compl. ¶¶ 20, 22-23, 26-28). Plaintiffs allege that the Juvenile Delinquent believed that the Subject Handgun had been unloaded because the magazine had been removed, even though there was a live round in the chamber. R. 12a (Compl. ¶¶ 24-27). The Juvenile Delinquent was charged with, and pled guilty to, involuntary manslaughter in a delinquency proceeding in juvenile court for having shot plaintiffs' decedent with the Subject Handgun. R. 12a (Compl. ¶ 29).

The Subject Pistol was manufactured by defendant Springfield Amory, Inc. s/h/a Springfield, Inc. d/b/a Springfield Armory (“Springfield”) and sold by defendants Saloom Department Store, and Saloom Department Store, LLC d/b/a Saloom Department

Store (collectively “Saloom”). R. 7a-11a, 21a, 27a (Compl. *2 ¶¶ 1, 5, 18-20, 83-84, 115-16). Although their decedent was killed as a result of the Juvenile Defendants' criminal conduct, plaintiffs filed a lawsuit against Springfield and Saloom, instead of the Juvenile Delinquent, or those that allowed him to obtain access to the Subject Handgun. Even though the Subject Pistol functioned as designed and intended, plaintiffs claimed that it is defective because it did not have a:

magazine disconnect safety, an effective loaded chamber indicator, an internal locking system or other safety system that would prevent it from being unintentionally fired by a child, a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users, or a child-proof or child-resistant safety device, or effective and appropriate warnings.

R. 20a (Compl. ¶ 77). In their wrongful death and survival action against Springfield and Saloom, plaintiffs raised causes of action for products liability (design defect and failure to warn), negligent design and sale, negligent warnings and marketing, and sought compensatory damages, punitive damages, interest and costs, and such other relief as the court may deem appropriate.

R. 31a (Compl. at 25).

***3 II. SUMMARY OF THE ARGUMENT**

Federal law, the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (“PLCAA”), provides defendants with immunity from plaintiffs' claims, regardless of whether those claims may otherwise be valid pursuant to state law. In an effort to put an end to what it considered to be abusive lawsuits seeking to blame manufacturers and sellers of firearms for harm caused by the criminal and unlawful misuse of firearms, Congress enacted the PLCAA in 2005. The PLCAA prohibits a qualified civil liability action from being filed. A “qualified civil liability action” is defined as a:

civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product or a trade association, for damages, punitive damages, injunctive or declaratory relief, or penalties or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party...

15 U.S.C. § 7903(5)(A).

Plaintiffs' complaint is considered to be a qualified civil liability action for purposes of the PLCAA because it is a civil action through which they are seeking to recover damages, punitive damages, and other relief against the manufacturer and seller of a *4 firearm that a third party criminally and unlawfully used to kill their son, and who subsequently pled guilty to involuntary manslaughter in juvenile court.

The operative language of the PLCAA provides manufacturers and sellers of firearms with immunity from having to even defend against qualified civil liability actions, such as those brought by the plaintiffs, by stating that a “qualified civil liability action may not be brought in any Federal or State court.” 15 U.S.C. § 7902(a). Based on the express intent of Congress to preempt contrary state law pursuant to the Supremacy Clause, there is no requirement to narrowly read the PLCAA not to preempt state law, and it would be inappropriate to do so. References to “harm solely caused by the criminal or unlawful misuse of firearms” in the findings and purpose section of the PLCAA cannot override the clear language of its operative provisions. The PLCAA bars actions for damages resulting from the criminal or unlawful misuse of firearms regardless of whether plaintiffs claim that the negligence of defendants also caused their injuries.

*5 None of the six narrow exceptions to the PLCAA's definition of an otherwise prohibited qualified civil liability action applies to plaintiffs' claims. Plaintiffs' claims do not satisfy the product defect exception provided in 15 U.S.C. § 7903(5)(A)(v). The Juvenile Delinquent pointing the Subject Handgun at plaintiffs' decedent and intentionally pulling the trigger was a volitional act that constituted the criminal offense of manslaughter. The product defect exception to the PLCAA therefore declares the acts of the Juvenile Delinquent to be the “sole proximate cause” of the death of plaintiff's decedent and their

resulting claims for damages. The acts of the Juvenile Delinquent constitute the criminal offense of manslaughter, and it does not matter whether he was charged with, or convicted of, a criminal offense for the product defect exception not to apply.

Finally, the PLCAA easily passes constitutional muster and its constitutionality has been repeatedly upheld by federal and state courts throughout the country in response to similar constitutional challenges. The trial court properly applied clear and binding *6 federal law that prohibits plaintiffs' claims and its decision should be affirmed.

III. ARGUMENT

A. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS' COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

1. Purpose of the Protection of Lawful Commerce in Arms Act

The PLCAA, which was enacted on October 26, 2005, prohibits the institution of a “qualified civil liability action” in any state or federal court, and states that any such “action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.” 15 U.S.C. §§ 7902(a) & (b). One of the stated purposes of the PLCAA is to “prohibit causes of action against manufacturers ... for the harm solely caused by the criminal or unlawful misuse of firearm[s] ... by others when the product functioned as designed and intended.” *Id.* § 7901(b)(1).

The following are among several findings that Congress made regarding the necessity to enact the PLCAA:

*7 • Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.

• The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.

• Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. §§ 7901(a)(3)-(5). Based upon the above findings, and to achieve the above purpose, Congress made the decision to prohibit qualified civil liability actions, such as the present, from being “brought in any Federal or State court.” *Id.* § 7902(a).

*8 2. This Case is a Qualified Civil Liability Action

As defined by the PLCAA, and subject to six limited exceptions, a “qualified civil liability action” is a “civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product or a trade association, for damages, punitive damages, injunctive or declaratory relief, or penalties or other relief resulting from the criminal or unlawful misuse of a qualified product by the person or a third party” 15 U.S.C. § 7903(5)(A). Based on the allegations in the Complaint, this case is a civil proceeding brought by a person (Mark and Leah Gustafson) against a manufacturer (Springfield)¹ and seller *9 (Saloom)² of a qualified product (the Subject Handgun)³ for damages and other relief based on the criminal use (the shooting of plaintiff's decedent) of the qualified product (the Subject Handgun) by a third

party (the Juvenile Delinquent). R. 7a-11a, 21a, 27a (Compl. ¶¶ 1, 5, 18-20, 22-29, 83-84, 115-16). The claims in the Complaint are therefore considered to constitute a *10 qualified civil liability action, which the PLCAA prohibits from being “brought in any Federal or State court.”

The factual allegations in their Complaint bring their claims against Springfield and Saloom directly within the PLCAA's definition of a prohibited qualified civil liability action. Nevertheless, plaintiffs argue that the trial court erred in dismissing their claims pursuant to the PLCAA because it is not “absolutely certain” that their claims meet the definition of a qualified civil liability action relative to the requirement that they are seeking damages “resulting from the criminal or unlawful misuse” of a firearm by a third party. Pls.' Brief at 21.

Plaintiffs' reference to “absolutely certain” is taken from [Gregory v. Ashcroft](#), 501 U.S. 452, 464 (1991), a Supreme Court decision addressing the issue of constitutional avoidance in cases involving implied preemption. That case, and the case of [Bond v. United States](#), 572 U.S. 844 (2014), are inapplicable to the issues in this case because the PLCAA involves express preemption that clearly and unambiguously prohibits plaintiffs' claims. They are also inapplicable for the separate and independent reason that *11 there are no serious doubts about the constitutionality of the PLCAA. The constitutionality of the PLCAA has been repeatedly challenged for more than a decade, but has been upheld by every single appellate court to have considered the issue.

3. The Supreme Court's Decisions in Gregory and Bond are Inapplicable to the Construction of the PLCAA Because it Involves Express Preemption of Qualified Civil Liability Actions that are Otherwise Valid Pursuant to State Law

In *Gregory v. Ashcroft*, the Supreme Court addressed the issue of whether a provision in the Missouri Constitution providing that all “judges other than municipal judges shall retire at the age of seventy years” violates the Age Discrimination in Employment Act (“ADEA”) and comports with equal protection pursuant to the federal constitution. [501 U.S. at 455](#). The Court noted that:

Congressional interference with this decision [requiring judges to retire at the age of seventy years] of the people of Missouri, defining their constitutional officers, would upset the usual constitutional balance of federal and state powers. For this reason, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance.

[501 U.S. at 460](#) (citation and quotation marks omitted). Nevertheless, the Court explained that as long as it is “acting *12 within the powers granted it under the Constitution, Congress may impose its will on the States.” *Id.* See also [id. at 464](#) (questioning whether the power of Congress to regulate interstate commerce can override the “authority of the people of the States to determine the qualifications of their government officials”).

To determine whether Congress intended to alter the balance of power between the states and the federal government, the Supreme Court applies the plain statement rule, pursuant to which “Congress should make its intention clear and manifest if it intends to preempt the historic powers of the States.” [Gregory](#), 501 U.S. at 461 (citation and quotation marks omitted). In *Gregory*, the Court noted that the ADEA excluded from the definition of a covered employee any “person elected to public office in any State or political subdivision of any State” and an “appointee on the policy making level.” [Id. at 465](#) (quoting [29 U.S.C. § 630\(f\)](#)). The Supreme Court concluded that, in the context of the ADEA, a statute that “plainly excludes most

important state public officials, ‘appointee on a policymaking level’ is sufficiently broad that we *13 cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.”  *Id.* at 467.

In *Bond v. United States*, the Supreme Court interpreted the Chemical Weapons Convention Implementation Act (“CWCIA”), a federal statute passed to effectuate the terms of a treaty known as the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction.  572 U.S. at 848-51. The Court held that the CWCIA did not apply to the conduct of a woman who applied legal, commercially available chemicals to various surfaces hoping that her best friend, who was pregnant by her husband, would come into contact with them and “develop an uncomfortable rash,” which resulted in the intended victim suffering a “minor chemical burn on her thumb, which she treated by rinsing with water.”  *Id.* at 852-53. The Court noted that the CWCIA was designed to implement a treaty about the use of chemical weapons in “war crimes and acts of terrorism,”  *id.* at 855-56, and there was no clear indication that Congress intended it to apply to local criminal offenses, explaining that:

*14 the global need to prevent chemical warfare does not require the Federal Government to reach into the kitchen cupboard, or to treat a local assault with a chemical irritant as the deployment of a chemical weapon. There is no reason to suppose that Congress - in implementing the Convention on Chemical Weapons - thought otherwise.

 *Id.* at 866. See also  *id.* at 865 (noting that the case is unusual and the analysis appropriately limited).

Plaintiffs argue that the Supreme Court's decisions in *Gregory* and *Bond* require the PLCAA to be interpreted as not preempting traditional state law claims, and contend the “PLCAA does not approach stating a clear intent to bar cases like this.” Pls.’ Brief at 9. Counsel for plaintiffs has unsuccessfully raised this argument before.

In *Delana v. CED Sales, Inc.*, the Missouri Supreme Court unanimously rejected plaintiffs’ argument that the Supreme Court's decisions in *Gregory* and *Bond* require the court to “narrowly construe the PLCAA to avoid federalism issues,” quickly disposing of an argument that it found to be “without merit.”  486 S.W.3d 316, 322-23 (Mo. 2016). In *Delana*, the court explained that:

*15 *Gregory* and *Bond* involved implied preemption. In both cases, the Court held that expansive statutory definitions should be narrowly construed to avoid excessive federal intrusion into traditional issues of state concern. *Gregory* and *Bond* are not applicable to this case because the PLCAA expressly and unambiguously preempts state tort law, subject to the enumerated exceptions. This preemption is accomplished pursuant to Congress's constitutional power to regulate interstate commerce. Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues.

 486 S.W.3d at 323 (internal citations omitted).

The Supreme Court's decisions in *Gregory* and *Bond* address the issue of constitutional avoidance. Although not addressing those specific decisions, other courts have held that the doctrine of constitutional avoidance is inapplicable to construction of

the PLCAA because its intent to bar qualified civil liability actions is clearly expressed and because there are no serious doubts about its constitutionality.  *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1143 (9th Cir. 2009) (holding that the doctrine of constitutional avoidance is not applicable to interpreting the PLCAA because “congressional intent is clear from the text and purpose of the statute” and there *16 are no grave doubts over its constitutionality);  *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013).

Because the very purpose of Congress in enacting the PLCAA was to expressly preempt qualified civil liability actions, such as the present, the Supreme Court's decisions in *Gregory* and *Bond* are simply inapplicable to construing the clear terms of the PLCAA in an attempt to avoid its specifically intended application.

4. The PLCAA Bars All Qualified Civil Liability Actions Regardless of Whether Plaintiffs Claim that the Alleged Negligence of a Manufacturer or Seller of Firearms is also a Cause of Their Damages

Plaintiffs argue that the trial court improperly “held that ‘resulting from criminal or unlawful misuse’ meant, ‘where one cause is criminal or unlawful misuse.’” Pls.' Brief at 21. Although plaintiffs purport to quote from the trial court's decision, they do not provide a citation for it. This is because the trial court did not hold that the PLCAA's use of the term “resulting from criminal or unlawful misuse” meant “where one cause is criminal or unlawful misuse,” but rather held that the “phrase on its face has a plain meaning that does not require further definition.” Ex. A at 6-7.

*17 One of Congress' stated purposes in enacting the PLCAA was to “prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms ... for the *harm solely caused by the criminal or unlawful misuse of firearm[s]* ... by others when the product functioned as designed and intended.”  15 U.S.C. § 7901(b)(1) (emphasis added).

Improperly relying on the Supreme Court's decisions in *Bond* and *Gregory*, plaintiffs contend that the PLCAA's definition of a qualified civil liability action as one seeking damages or other relief “resulting from the criminal or unlawful misuse” of a firearm by a third party should be interpreted so that it “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.” Pls.' Brief at 23. There is no support for this argument in the operative provisions of the PLCAA.

If plaintiffs' argument were to be accepted, it would mean that Congress passed the PLCAA for no reason, and it does not *18 prohibit any causes of action. ⁴ If plaintiffs argued that the harm of which they complain was solely caused by the criminal or unlawful misuse of a firearm, they would not name as defendants and seek damages from the manufacturers and sellers of that firearm. Instead, Congress specifically explained that it was passing the PLCAA because of its findings that:

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the *19 harm caused by the misuse of firearms by third parties, including criminals.
- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.
- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

- The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

*20 • The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.

- The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

 [15 U.S.C. §§ 7901\(a\)\(3\), \(5\)-\(8\)](#).

Regardless of whether plaintiffs agree, Congress found that when someone is shot or killed with a firearm in circumstances related to the criminal or unlawful misuse of that firearm by a third party, the harm is “solely caused” by the *21 criminal or unlawful misuse of the firearm, and the manufacturers and sellers of the firearm should not be held liable. In fact, Congress specifically determined that holding manufacturers and sellers liable for the harm caused by firearms under such circumstances, even if they could otherwise be held liable under applicable state tort law, would threaten separation of powers and principles of federalism.  [Id. § 7901\(a\)\(8\)](#).

The operative provision of the PLCAA therefore simply prohibits the filing of a qualified civil liability action, which is defined as any action “resulting from the criminal or unlawful misuse” of a firearm by a third party,  [15 U.S.C. § 7903\(5\)\(A\)](#), regardless of whether the alleged negligence of the manufacturer or seller of the firearm is also alleged to be a cause of the harm for which plaintiff is suing. Language regarding the purpose for which a statute is enacted cannot be used to limit the clear terms used in the operative provisions of that statute.  [H.J. Inc. v. Northwestern Bell Telephone Co.](#), 492 U.S. 229, 245 (1989) (rejecting argument that the expansive coverage of the operative provisions of the Racketeer Influenced and *22 Corrupt Organizations Act should be narrowly read to apply only to organized crime based on statements regarding the purpose of the Act). *See also* 2A Sutherland, Statutes and Statutory Construction § 47.04, at 146 (5th ed. 1992, Norman Singer ed.) (“The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.”).

For this reason, courts have repeatedly rejected plaintiffs' argument that the reference by Congress to “solely caused” in the purposes section of the PLCAA can be used to narrow the operative language of the PLCAA.  [Delana](#), 486 S.W.3d at 322 (holding that the “statement of purpose does not overcome the fact that the specific substantive provisions of the PLCAA expressly preempt all qualified civil liability actions against firearms sellers, including claims of negligence);  [Estate of Kim](#), 295 P.3d at 387 (unanimously rejecting plaintiffs' argument on the basis that it would “elevate the preamble over the substantive portion of the statute, giving effect to one word in the preamble at the expense of making the enumerated exceptions meaningless”);  [Phillips v. Lucky Gunner, LLC](#), 84 F. Supp. 3d 1216, 1223-24 (D. Colo. 2015) *23 (rejecting plaintiffs' argument that the PLCAA only protects defendants against claims for harm “solely caused” by the criminal or unlawful misuse

of firearms for the reasons stated in the *Estate of Kim* case); [Gilland v. Sportsmen's Outpost, Inc.](#), No. X04CV095032765S, 2011 WL 2479693, at *15-*16 (Conn. Super. Ct. May 26, 2011) (holding that the PLCAA “includes cases where it is alleged that gun sellers negligently cause harm” despite the reference to “solely caused” in [15 U.S.C. § 7901\(b\)\(1\)](#)).

Although plaintiffs suggest that the Supreme Court of Connecticut adopted their reading of “solely caused” in [Soto v. Bushmaster Firearms Int'l, LLC](#), ___ A.3d ___, 331 Conn. 53 (2019), Pls.' Brief at 25-26, they misconstrue that decision. Plaintiffs are relying on their uniformly rejected “solely caused” argument to contend that the PLCAA does not even apply to their claims because they do not constitute a qualified civil liability action. In contrast, in the *Soto* case, the Connecticut Supreme Court clearly held that the “PLCAA will bar the present action unless (1) the plaintiffs have pleaded a cognizable CUTPA violation, and (2) *24 CUTPA constitutes a predicate statute for purposes of [15 U.S.C. § 7903 \(5\)\(A\)\(iii\)](#).” [Soto](#), 331 Conn. at 85.⁵

The 4-3 majority in the *Soto* case only made reference to the “solely caused” language in the PLCAA's statement of findings and purposes as support for its conclusion that an alleged violation of CUTPA could satisfy the predicate exception, [Soto](#), 331 Conn. at 130, “[b]ecause Congress clearly intended that laws governing the marketing of firearms would qualify as predicate statutes,” [id.](#) at 129-31.⁶ If the *Soto* court had actually agreed with plaintiffs' argument, it would have simply held that the PLCAA was not applicable because plaintiffs' claims did not constitute a prohibited qualified civil *25 liability action, rather than determining whether any of their claims fell within an exception.

Accordingly, plaintiffs' claims against defendants constitute a qualified civil liability action that is expressly barred by the PLCAA unless they can satisfy the requirements of the one of the six narrow exceptions.

B. NONE OF THE EXCEPTIONS TO THE DEFINITION OF A QUALIFIED CIVIL LIABILITY ACTION ARE APPLICABLE TO THIS CASE

There are six categories of claims that the PLCAA excludes from the definition of a qualified civil liability action and therefore does not bar:

(i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted;

(ii) an action brought against a seller for negligent entrustment or negligence per se;

(iii) an action in which a manufacturer or seller of a qualified product 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, including -

*26 (I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under [subsection \(g\)](#) or [\(n\)](#) of section 922 of Title 18;

(iv) an action for breach of contract or warranty in connection with the purchase of the product;

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

 [15 U.S.C. §7903\(5\)\(A\)](#).

*27 The only one of the six exceptions that could remotely be applicable based on the allegations in the Complaint is

 [15 U.S.C. § 7903\(5\)\(A\)\(v\)](#) (“product defect exception”).⁷ The product defect exception to the PLCAA excludes from the definition of a prohibited qualified civil liability action:

an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, *except that where the discharge of the product was caused by a volitional act that constituted a criminal offense*, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage

 [15 U.S.C. § 7903\(5\)\(A\)\(v\)](#) (emphasis added).

*28 The PLCAA is very clear that the product defect exception does not apply when the discharge of the firearm was caused by a volitional act that constituted a criminal offense.

In keeping with the purpose of the Act to shield the firearm industry from liability when the product is properly designed and functions as intended, product defect actions are *excluded* from the definition of qualified civil liability actions *unless* the discharge of the firearm “was caused by a volitional act that constituted a criminal offense” in which case “such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage....” ( [15 U.S.C. § 7903\(5\)\(A\)\(v\)](#)).

 [Chavez v. Glock, Inc.](#), 207 Cal. App. 4th 1283, 1316 (Cal. Ct. App. 2012) (emphasis in original).⁸

Recognizing that the exception to the product defect exception bars their claims, plaintiffs argue that “it is not *29 ‘absolutely certain’”⁹ that the discharge of the Subject Handgun was “caused by a volitional act” that constituted a criminal offense.” Pls.’ Brief at 30. The primary basis for plaintiffs’ argument is that the Juvenile Delinquent was a minor at the time and was therefore charged in a juvenile delinquency proceeding instead of criminal court. Pls.’ Brief at 30-31.¹⁰ Plaintiffs therefore *30 contend that the requirement of a criminal offense has not been satisfied.

There have been very few cases in which plaintiffs have sought to use the product defect exception to avoid the PLCAA’s general prohibition on bringing a civil action against manufacturers and sellers of firearms for damages resulting from the criminal or unlawful misuse of a firearm by a third party. This is because the PLCAA is clear that the product defect exception does not apply when the discharge of the firearm was caused by a volitional act that constituted a criminal offense.

The product defect exception to the PLCAA was first construed by the Illinois Supreme Court in its unanimous decision in  [Adames v. Sheahan](#), 909 N.E.2d 742 (Ill. 2009). The facts in the *Adames* case are almost identical to those alleged in the

Complaint in the present case: On May 5, 2001, Billy Swan, then thirteen years old, was playing with his father's semi-automatic Beretta 92FS pistol when he accidentally shot and killed his friend, Josh  [Adames](#), 909 N.E.2d at 745. “Billy pushed the button on the Beretta, took the *31 magazine out and put it in his pocket. ¹¹ **** Billy pretended he was firing the gun, then pulled the trigger, discharging the gun.  *Id.* at 746. When Billy realized that he had shot Josh, he called 911 and stated that he had “found a gun and accidentally shot his friend while playing”; he conceded that he “knew he was handling a real firearm and real ammunition when he shot Josh.” *Id.* In juvenile court proceedings arising from the shooting of Josh, Billy was found to be delinquent for committing involuntary manslaughter and reckless discharge of a firearm. *Id.*

Plaintiffs sued Beretta, raising claims for:

product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. Specifically, plaintiffs alleged that the Beretta was inherently dangerous and defective because it did not incorporate safety features, including: a magazine disconnect safety that would prevent the gun from being fired if the magazine is removed; an effective chamber-loaded indicator to make users aware of when *32 a bullet is loaded into the gun's chamber; and other safety devices such as a built-in lock, a child-resistant manual safety, a grip-safety, and personalized gun technology that would have prevented unauthorized users, such as children, from firing the gun.

Plaintiffs also alleged that the gun was defective because it did not include adequate warnings concerning the foreseeable use of the gun by unauthorized persons, including children. Plaintiffs asserted that the defects included a failure to warn that: the gun may be loaded and can be fired even if the magazine is empty or disconnected from the gun; that the gun is loaded when there is red showing on the extractor; that the gun is loaded when the extractor is protruding; that the gun can be fired by children and other unauthorized users; that the gun automatically loads bullet cartridges into the gun's chamber after being fired or after the gun is released from a lookback position; and that the gun should not be used or stored without additional safety devices.

 [Adames](#), 909 N.E.2d at 750-51. The trial court granted summary judgment in favor of Beretta and, while the case was on appeal, the PLCAA was enacted.  *Id.* at 751, 760. The appellate court affirmed the dismissal of the design defect claims, but reinstated the failure to warn claims (plaintiffs did not appeal the dismissal of their breach of implied warranty of merchantability claim).  *Id.* at 752, 759.

*33 On further appeal, the Illinois Supreme Court unanimously held that plaintiffs' claims were barred by the PLCAA. In doing so, it noted that the PLCAA only requires “criminal or unlawful misuse” of a firearm, and “does not contain a requirement that there be criminal intent or a criminal conviction,” or even an intention to discharge the firearm.  [Adames](#), 909 N.E.2d at 761-62. The court continued to note that:

Billy was adjudicated delinquent based upon the finding of the court in the juvenile proceeding that Billy committed involuntary manslaughter and reckless discharge of a firearm when he shot Josh with his father's Beretta. **** Billy's use of the Beretta, therefore, certainly violated the Criminal Code, a statute, when he was adjudicated delinquent for involuntary manslaughter and reckless discharge of a firearm, satisfying the definition of “unlawful misuse.”

In addition, involuntary manslaughter and reckless discharge of a firearm are criminal offenses. It follows, then, that Billy's use of the Beretta in this case also had the character of a crime and was “in the nature of a crime” and, therefore, was a criminal misuse.

Id. (taking judicial notice of Billy's adjudication as a juvenile delinquent) (internal citations omitted). Relative to the product defect exception, the court held that  [Section 7903\(5\)\(A\)\(v\)](#) also does not require a conviction, “only that the volitional act *34 constitute a criminal offense.” *Id.* at 763. The court further held that the product defect exception did not require that “Billy

intended to shoot Josh or understand the ramifications of his conduct,” because “he did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger,” therefore acting in a volitional manner that constituted a criminal offense. *Id.* Pursuant to the product defect exception to the PLCAA, therefore, Billy's actions were considered as a matter of law to be the sole proximate cause of plaintiffs' injuries, mandating the dismissal of their claims against Beretta. *Id.* at 763-64.

The next court to substantively address the product defect exception to the PLCAA was the Appeals Court of Massachusetts in the case of *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Ma. Ct. App. 2012). In the *Ryan* case, Charles Milot, a convicted felon who was on probation after having served eighteen months in jail, stole two handguns, including a Glock Model 17 pistol, and some ammunition from the home of Thomas Hughes, for whom he was doing various odd jobs. *Id.* at 1002-03, 1008. Charles Milot showed the handguns to his sister, who convinced him to return them. *Id.* *35 Charles Milot attempted to return the stolen firearms and ammunition and apparently shot himself in the left thigh, severing his femoral artery and causing him to bleed to death, when he attempted to place the Glock pistol in its storage case. *Id.* at 1003. Elizabeth Ryan, as Administratrix of the Charles Milot's estate, sued Thomas Hughes and Glock, Inc. (“Glock”). *Ryan*, 959 N.E.2d at 1002. Plaintiff raised claims against Glock for breach of the implied warranty of merchantability, negligence, wrongful death, and unfair and deceptive acts and practices, alleging that the Glock pistol and its storage case were defective because the trigger must be in the fully rearward position in order to insert it in the storage case, *i.e.*, you have to pull the trigger before putting the pistol in the storage case. *Id.* at 1006-07. The superior court dismissed plaintiff's claims against Glock pursuant to the PLCAA. *Id.* at 1006.

The Appeals Court of Massachusetts affirmed the dismissal of plaintiff's claims against Glock, concluding that the case constituted a “‘civil action or proceeding’ brought by a ‘person’ *36 (Ryan) against a ‘manufacturer’ (Glock, Inc.) for ‘damages,’” and that the “Glock pistol is a ‘firearm’ and therefore a ‘qualified product.’” *Ryan*, 959 N.E.2d at 1007-08. The court further held that “Milot's possession of the Glock pistol ... constituted ‘criminal or unlawful misuse’ due to Milot's prior felony conviction,” so that the case was a qualified civil liability action for purposes of the PLCAA. *Id.* at 1008 (noting that the “PLCAA does not require a criminal conviction in order for an activity to qualify as ‘criminal or unlawful’ misuse”). The court further held that the product defect exception did not apply because the “relevant volitional act that caused the gun's discharge was Milot's unlawful possession of the Glock pistol,” which “constituted a criminal offense.” *Id.* at 1008-09.

In the present case, plaintiffs' claims also fail to satisfy the requirements of the product defect exception to the PLCAA because the Juvenile Delinquent's shooting of plaintiffs' decedent was a volitional ¹² act that constituted the criminal offenses of involuntary *37 manslaughter and is therefore considered as a matter of law to be the sole proximate cause of plaintiff's injuries. R. 12a (Compl. ¶ 26 (the Juvenile Delinquent “pulled the trigger of the handgun”), and (Compl. ¶ 29 (the Juvenile Delinquent pled guilty to manslaughter in juvenile court.)).

Plaintiffs respond by claiming that “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).” Pls.' Brief at 31.

The Illinois Supreme Court unanimously rejected plaintiffs' argument in the *Adames* case 909 N.E.2d 742, which plaintiffs do not attempt to distinguish - or even mention in their appellate brief. Plaintiffs' failure to address the *Adames* case - despite the fact that it is the only case that has construed the product defect exception to the PLCAA in the context of a minor being the person whose volitional act caused the discharge of the firearm and was therefore charged as a juvenile - can only be explained because *38 they are unable to distinguish its well-reasoned and unanimous holding.

The PLCAA's focus in the product defect exception is on whether the volitional act that caused the discharge of the firearm constituted a criminal offense, not on whether the person committing such act was, or could be, charged with a criminal offense. As plaintiffs concede, the volitional act that led to the discharge of the Subject Handgun and the death of their son constituted the criminal offense of involuntary manslaughter. R. 12a (Compl. ¶ 29). The fact that the Juvenile Delinquent was charged in

juvenile court does not change the nature of the act or the PLCAA's reason for deciding that the product defect exception does not apply under such circumstances.

Just like with the Juvenile Delinquent in this case, in the *Adames* case, Billy Swan was charged in a juvenile delinquency proceeding and adjudged to have committed an act that constituted the criminal offense of involuntary manslaughter. [Adames, 909 N.E.2d at 761-62](#). The Illinois Supreme Court unanimously and correctly held that plaintiffs' claims against the *39 manufacturer of the firearm for damages under such circumstances are barred by the PLCAA because the volitional act causing the discharge of the firearm constitutes the criminal offense of involuntary manslaughter and it does not matter if the shooter is not charged with a criminal offense because he is a juvenile and is charged through juvenile delinquency proceedings. *Id.*

Pennsylvania law specifically defines a “delinquent act” as an “*act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law*” 42 Pa. Stat. § 6302 (emphasis added). The Juvenile Delinquent pled guilty to manslaughter in juvenile court. R. 12a (Compl. ¶ 29). Pursuant to Pennsylvania law, a “person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person.” 18 Pa. Stat. § 2504(a).

Acts that are committed by juveniles that would constitute the crime of involuntary manslaughter if committed by an adult can be handled through delinquency proceedings in juvenile court. *See, *40 e.g., Interest of Smith, 579 A.2d 889, 891-92, 895-97 (Pa. Super. Ct. 1990); In re Miller, 439 A.2d 1222, 1223 (Pa. Super. Ct. 1982); Interest of Brown, 417 A.2d 1188, 1189-90 (Pa. Super. Ct. 1980); Commonwealth v. Carnes, 82 Pa. Super. 335, 337-41 (Pa. Super. Ct. 1923)*. Although “delinquency proceedings are not criminal in nature,” delinquent acts such as involuntary manslaughter are still crimes, and Pennsylvania allows a juvenile to be prosecuted in criminal court for the same act if it is determined that the “rehabilitative goals” of adjudicating him as a juvenile delinquent instead cannot be met. *Interest of G.T., 597 A.2d 638, 641-42 (Pa. Super. Ct. 1991)*. Because the acts for which a juvenile can be adjudicated as a juvenile delinquent are considered to be crimes, they can be used for purposes of establishing a prior criminal conviction for sentencing purposes. *Commonwealth v. Bonner, 135 A.3d 592, 600-03 (Pa. Super. Ct. 2016)*.

Accordingly, the Juvenile Delinquent's shooting of plaintiffs' decedent is considered to be a volitional act (pointing the Subject Handgun at him and intentionally pulling the trigger) that constituted the criminal offense of involuntary manslaughter. It is *41 therefore considered as a matter of law to be the sole proximate cause of the death of plaintiffs' decedent, rendering the product defect exception to the PLCAA inapplicable and requiring the dismissal of their case.

Based on the above, the trial court correctly dismissed plaintiffs' Complaint pursuant to the PLCAA because it is a qualified civil liability action, in that the damages of which plaintiffs complain resulted from the criminal use (the shooting of plaintiffs' decedent) of a qualified product (the Subject Handgun) by a third party (Juvenile Delinquent) and it fails to satisfy the requirements for the product defect (or any other) exception.

C. The PLCAA EASILY PASSES CONSTITUTIONAL MUSTER

Recognizing that the PLCAA prohibits their claims, plaintiffs argue that it is unconstitutional. Plaintiffs contend that the PLCAA is unconstitutional on four grounds: (1) that it violates the Tenth Amendment and principles of federalism; (2) that it violates due process; (3) that it violates equal protection; and (4) that it exceeds the authority granted to Congress pursuant to the *42 Commerce Clause. Plaintiffs contend that only a “handful of courts have upheld PLCAA as constitutional” and claim that those decisions are both distinguishable and incorrect. Pls.' Brief at 38. There is no support for plaintiffs' claims.

In the more than decade long period since it was first enacted, the constitutionality of the PLCAA has been repeatedly challenged. The PLCAA has been found to be constitutional by each and every appellate court to have addressed the issue, including the United States Courts of Appeals for the Second and Ninth Circuits, and the highest courts of Alaska, District of Columbia,

Illinois, and Missouri. Other than their claim that all of these courts incorrectly held that the PLCAA is unconstitutional, plaintiffs' only attempt to distinguish them is based on the fact that certain of the decisions did not address each of the constitutional challenges that they raise in this case (Pls.' Brief at 38), or did not address the Supreme Court's decisions in *Bond* and *Gregory* (*id.* at 43). As explained in Section III.A.3., the Supreme Court's decisions in *Bond* and *Gregory* apply only to cases of implied preemption, and are not applicable to *43 construction of the PLCAA, which involves the clear and express preemption of qualified civil liability actions.

1. The PLCAA Does not Violate the Tenth Amendment or Principles of Federalism

The trial court correctly held that the PLCAA does not violate the Tenth Amendment and principles of federalism because it does not involve “commandeering the powers of state executive officials or legislative processes in any manner.” Ex. A at 9-10. The trial court further observed that the PLCAA does not “impermissibly dictate the balance of power between the states' judicial and legislative branches, but merely disallows certain civil actions, whether created through common law or through statute.” *Id.* at 10.

All other courts to have issued decisions on the issue have agreed that the PLCAA does not violate the Tenth Amendment or principles of federalism because it does not commandeer the executive or legislative branches of the states to administer a federal program, but rather changes the applicable law, which state courts are required to apply pursuant to the Supremacy Clause.  *44 *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-97 (2d Cir. 2008);  *Estate of Kim*, 295 P.3d at 388-89;  *Adames*, 909 N.E.2d at 764-65;  *Delana*, 486 S.W.3d at 323-24.

2. The PLCAA Does not Violate Plaintiffs' Right to Due Process

Similarly, the PLCAA does not violate plaintiffs' right to due process because they do not have a protected property right in an unvested common law claim, and because the PLCAA contains exceptions allowing certain claims against manufacturers and sellers to proceed.  *Ileto*, 565 F.3d at 1140-41;  *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 294 (E.D.N.Y. 2008) (plaintiff did not even raise due process claim on appeal);  *Estate of Kim*, 295 P.3d at 390-91;  *Delana*, 486 S.W.3d at 324;  *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 173-82 (D.C. 2008). The trial court agreed with these well-reasoned decisions, holding that a “due process analysis is inapplicable” because plaintiffs “do not have a constitutionally protected property right in their tort claim in this matter.” Ex. A at 11. Congress changed the law applicable to plaintiffs' claims against defendants before such claims even arose, and the due process clause does not require Congress to substitute a new remedy when changing the law to *45 eliminate one that was previously available.  *Martinez v. California*, 444 U.S. 277, 282 (1980);  *Duke Power C. v. Carolina Env'tl Study Group*, 438 U.S. 59, 88 (1978).

In response to the above authorities, plaintiffs rely on an unpublished trial court decision in the case of *City of Gary v. Smith & Wesson Corp.*, No. 4505005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006), attached as Exhibit E to their brief. The trial court's decision in the *City of Gary* case does not support plaintiffs' arguments for several reasons. First, it concluded that the PLCAA violated the City of Gary's right to due process because it was an ex post facto law that retroactively required the dismissal of the City of Gary's pending claims, that had already been deemed viable. Ex. E at 3-6. In contrast, the PLCAA changed the applicable law in 2005, more than a decade before plaintiffs' decedent was shot by the Juvenile Delinquent, so unlike the City of Gary, they never had a legally viable claim against defendants. Second, the trial court's decision in the *City of Gary* case was affirmed only to the extent that it denied the defendants' motion for judgment on the pleadings pursuant to the PLCAA. The Indiana Court of Appeals concluded that an *46 exception applied so that the City of Gary's claims were not barred by the PLCAA, and therefore did not address its constitutionality.  *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007). For that reason, in a later decision, the Indiana Court of Appeals held that citations to the trial court's decision

holding the PLCAA to be unconstitutional are “not well taken.” *City of Gary v. Smith & Wesson Corp.*, ____ N.E.3d ____, No. 18A-CT-181, 2019 WL 2222985, at *3 n.5 (Ind. Ct. App. May 23, 2019).¹³

Plaintiffs' remaining authority for their claim that the PLCAA violates their right to due process is even less persuasive. They rely on the transcript of an oral decision from a trial judge suggesting in dicta that he would find the PLCAA to be unconstitutional if it applied to the claims of the plaintiffs in that case because he does “not think that it is proper to bar people from coming to court because something has been lobbied by some groups to persuade Congress *47 to do something,”¹⁴ and a student law review article arguing that an earlier version of the PLCAA that was not passed by Congress would be unconstitutional.¹⁵ Pls.' Brief at 42. The fact that plaintiffs would even cite to such feeble “authority” demonstrates the lack of support for their claim that the PLCAA violates their right to due process.

3. *The PLCAA Does not Violate Plaintiffs' Right to Equal Protection*

Plaintiffs' argument that the PLCAA violates their right to equal protection does not even challenge the provisions in the PLCAA that prevent them from having a valid claim against defendants. Plaintiffs contend that the:

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.

*48 Pls.' Brief at 44.

Plaintiffs' differentiation between the first two categories, legislative and common law claims, relate to the predicate exception to the PLCAA (see *supra* footnote 7), not the product defect exception that they argue applies to their claims. The product defect exception does not differentiate between manufacturing or design defect claims that are based on product liability statutes or the common law, 15 U.S.C. § 7903(5)(A)(v), and therefore plaintiffs' argument does not apply. Relative to the third category, Congress had ample reason to differentiate between federally licensed manufacturers and sellers of firearms and persons who do not have a federal firearms license. Federal law requires anyone engaged in the business of manufacturing or selling firearms to be licensed and, by passing the PLCAA, Congress was protecting these legitimate businesses from what it deemed to be unjustifiable lawsuits seeking to blame them for the criminal or unlawful misuse of firearms. 15 U.S.C. § 7901(a)(3)-(5). Congress had a rational basis to exclude individuals manufacturing a firearm for personal use or occasionally selling a firearm in their collection, or persons *49 illegally engaged in the business of selling firearms without a federal firearms license. *Id.* Similarly, Congress had a rational basis in making the PLCAA applicable to firearms, as opposed to BB guns or other types of products that were not being targeted by the predatory lawsuits that the PLCAA is designed to preempt. *Id.*

As recognized by the trial court, an equal protection challenge to the PLCAA is subject to rational basis review, which is an “extraordinarily deferential standard, and a classification must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.” Ex. A at 13 (quoting *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993) (internal citation and quotation marks omitted)). For that reason, every court to have considered the issue has held that the PLCAA does not violate equal protection because Congress had a rational basis to conclude that the firearms industry needed protection from qualified civil liability actions, while choosing to allow actions that fall within an exception to that definition to proceed. *Ileto*, 565 F.3d at 1141; *50 *City of New York*, 401 F. Supp. 2d at 294-95

(plaintiff did not even raise an equal protection claim on appeal); [Estate of Kim](#), 295 P.3d at 391-92; [District of Columbia v. Beretta U.S.A. Corp.](#), No. 2000 CA 000428 B, 2006 WL 1892023, at *18 (D.C. Super. Ct. May 22, 2006) (plaintiff did not even raise an equal protection claim on appeal).

4. Congress had the power to enact the PLCAA Pursuant to the Commerce Clause

Plaintiffs' argument that the PLCAA violates the Commerce Clause also ignores the actual purpose and effect of the PLCAA. Although captioned as a Commerce Clause challenge, plaintiffs' actual argument is that the PLCAA "dictates to states which branch of government they must use to make law on which to base liability for the gun industry." Pls.' Brief at 48. This argument is a repeat of their argument that the PLCAA is unconstitutional on the basis that it allegedly violates the Tenth Amendment and principles of federalism. *See* Pls.' Brief at 34-38.

To the extent that plaintiffs' appeal is even considered to have raised a challenge that Congress did not have the power to enact the PLCAA pursuant to the Commerce Clause, it should be rejected. The trial court properly held that it was:

*51 entirely reasonable [for Congress to have concluded] that the PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce. It is not unreasonable for Congress to find that limiting liability in certain situations would directly affect and bolster interstate trade in firearms, and the Commerce Clause, together with the Supremacy Clause, allows Congress the specifically enumerated authority to do so.

Ex. A at 14-15. All other courts to have considered the issue have rejected similar challenges because it is clear that Congress had the authority to enact the PLCAA pursuant to the Commerce Clause because it found that the qualified civil liability actions it bars are a threat to the firearms industry, which is of an interstate (and international) character, and it only applies to firearms that have been shipped or transported in interstate or international commerce. [Ileto](#), 565 F.3d at 1140-41 ("Congress carefully constrained the Act's reach to the confines of the Commerce Clause."); [City of New York](#), 524 F.3d at 393-95.

IV. CONCLUSION

For the above reasons, Defendants respectfully request that this Court affirm the January 15, 2019 decision of the Court of Common Pleas sustaining their preliminary objections pursuant to the PLCAA and dismissing plaintiffs' Complaint in its *52 entirety with prejudice, and grant such other relief as it deems just and proper.

Respectfully submitted,

By: /s/ John K. Greiner

John K. Greiner

TREMBA, KINNEY, GREINER & KERR, LLC

302 W. Otterman Street

Greensburg, PA 15601

Telephone: (724) 838-7600

Facsimile: (724) 838-8870

- and -

Christopher Renzulli (*pro hac vice*)

RENZULLI LAW FIRM, LLP

One North Broadway, Suite 1005

White Plains, NY 10601

Telephone: (914) 285-0700

Facsimile: (914) 285-1213

Attorneys for Defendants-Appellees

Springfield Amory, Inc. s/h/a Springfield, Inc.

d/b/a Springfield Armory, Saloom Department

Store, and Saloom Department Store,

LLC d/b/a Saloom Department Store

Footnotes

- 1 The PLCAA defines a “manufacturer,” with respect to a qualified product, as “a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.”  [15 U.S.C. § 7903\(2\)](#). Chapter 44 of title 18 of the United States Code, in turn, defines a manufacturer as “any person engaged in the business of manufacturing firearms ... for purposes of sale or distribution; and the term ‘licensed manufacturer’ means any such person licensed under the provisions of this chapter.”  [18 U.S.C. § 921\(a\)\(10\)](#). The PLCAA defines the term “engaged in the business” with reference to  [18 U.S.C. § 921\(a\)\(21\)](#). The term “engaged in the business,” relative to a manufacturer of firearms, is defined as “a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured.”  [18 U.S.C. § 921\(a\)\(21\)\(A\)](#). As a federally licensed manufacturer of firearms, Springfield is a “manufacturer” pursuant to the terms of the PLCAA. R. 21a, 27a (Compl. ¶¶ 83-84, 115-16).
- 2 The PLCAA defines a “seller,” with respect to a qualified product, as “a dealer (as defined in  [section 921\(a\)\(11\) of Title 18](#)) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to

engage in business as such a dealer under chapter 44 of Title 18.” 15 U.S.C. § (6)(B). Pursuant to 18 U.S.C. § 921(a)(11)(A), a “dealer” is defined as “any person engaged in the business of selling firearms at wholesale or retail.” The term “engaged in the business,” relative to a seller of firearms, is defined as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.” 18 U.S.C. § 921(a)(21)(C). As a federally licensed dealer of firearms, Saloom is a “seller” pursuant to the terms of the PLCAA. R. 21a, 27a (Compl. ¶¶ 83-84, 115-16).

3 The PLCAA defines a “qualified product” as “a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code) ... or a component part of a firearm ... that has been shipped or transported in interstate or foreign commerce.” 15 U.S.C. § 7903(4). Pursuant to 18 U.S.C. §§ 921(a)(3)(A) & (B), a firearm is defined as “any weapon ... which will or is designed to or may readily be converted to expel a projectile by the action of an explosive” or “the frame or receiver of any such weapon...” Pursuant to the allegations in the Complaint, plaintiffs’ decedent was shot with the Subject Handgun, which is considered to be a qualified product pursuant to the terms of the PLCAA. R. 7a-9a, 11a-12a (Compl. ¶ 1, 5, 23, 26-29).

4 Plaintiffs suggest that the PLCAA was only intended to prohibit novel cases like *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985). Pls.’ Brief at 29. The *Kelley* decision held that “manufacturers and marketers of Saturday Night Special handguns [could be held] strictly liable to innocent persons who suffer gunshot injuries from the criminal misuse of their products.” *Id.* at 1159. The *Kelley* decision defined “Saturday Night Specials” as a limited class of handguns that “are too inaccurate, unreliable and poorly made” for legitimate uses, and were described by the manufacturer’s representative as “most assuredly a ghetto gun” and “a piece of crap.” *Id.* at 1158. Despite the limited definition of “Saturday Night Specials” to which strict liability applied, no other states adopted a similar rule, and the Maryland legislature enacted a statute to overrule the decision. See *Copier By and Through Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 837 n.3 (10th Cir. 1998); Md. Code art. 27 § 36–I(h), recodified at Md. Public Safety Code § 5-402(b)(1). Plaintiffs offer no explanation as to why Congress would have enacted the PLCAA in 2005 solely to address a single case from twenty years earlier that had long been legislatively overruled. In addition, Congress rejected a proposed amendment to the PLCAA that would have provided an exception for claims involving the alleged gross negligence and recklessness of a manufacturer or seller, further disproving plaintiffs’ argument that the PLCAA does not prohibit claims in which a seller’s alleged mere negligence is alleged to be a cause of the harm. *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006), *aff’d* 565 F.3d 1126 (9th Cir. 2009).

5 See also *Soto*, 331 Conn. at 66 (“agree[ing] with the defendants that most of the plaintiffs’ claims and legal theories are precluded by established Connecticut law and/or PLCAA”) and 117 (“The question presented by this appeal is whether CUTPA qualifies as such a predicate statute, that is, a ‘statute applicable to the sale or marketing of [firearms]

6 Similarly, the *Soto* court only cited to the Supreme Court’s decision in *Bond* relative to its discussion of the predicate exception and whether plaintiffs’ CUTPA claims were barred on the basis that they did not constitute a statute applicable to the marketing of firearms. *Soto*, 331 Conn. at 137 n.58. Significantly, it did not find the operative language of the PLCAA not to constitute a clearly expressed statement of Congress’s definition and prohibition of qualified civil liability actions.

7 Plaintiffs contend that if the Pennsylvania legislature had enacted a statute requiring that “firearms sold in Pennsylvania have magazine disconnect safeties, or other safety features or warnings” then the exception set forth in 15 U.S.C. § 7903(5)(A)(iii) (known as the predicate exception because it requires a knowing violation of a statute in addition to a viable claim by plaintiff) would allow their claims to proceed. Pls.’ Brief at 12-13. Plaintiffs are incorrect. The predicate exception applies only to the knowing violation of statutes applicable to the sale or marketing of firearms, such as the provisions in the Gun Control Act, 18 U.S.C. § 922(g) & (n), listed as examples in 15 U.S.C. § 7903(5)(A)(iii)(II). By its express terms, the predicate exception does not apply to statutes governing the design of firearms, and

all of the cases cited by Plaintiffs addressing the predicate exception involved statutes regarding the manner in which the firearms were sold, not their design features.

- 8 See also [Jeffries v. District of Columbia](#), 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (*sua sponte* dismissing case pursuant to the PLCAA when it was “uncontroverted that a third party discharged the assault rifle, during the commission of a criminal act,” where only the product defect exception could possibly apply because that “exception does not apply ‘where the discharge of the product was caused by a volitional act that constituted a criminal offense.’”); [Soto v. Bushmaster Firearms Int’l, Inc.](#), No. FBTCV156048103S, 2016 WL 8115354, at *21 n.31 (Conn. Super. Ct. Oct. 14, 2016) (noting that the product defect exception would not apply because the plaintiffs’ injuries resulted from the discharge of the firearm by a third party during the commission of a criminal act), reversed in part on other grounds, [331 Conn. 53](#) (2019).
- 9 As discussed in Section III.A.3., plaintiffs’ reference to “absolutely certain” is based on their arguments that the PLCAA must be interpreted as not applying to their claims based on the Supreme Court’s decisions in *Bond* and *Gregory*. Those decisions involved implied preemption and issues of constitutional avoidance that are not relevant to the express preemption at issue in the PLCAA. In addition, as discussed in Section III.C, there is no doubt as to the constitutionality of the PLCAA.
- 10 Plaintiffs also make an incredulous argument that 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 nondangerous act, but not to cause an unforeseen dangerous result. Pls.’ Brief at 33. In the present case, the Juvenile Delinquent pointed the Subject Handgun at plaintiff’s decedent and pulled the trigger. That constituted a “volitional act.” Such volitional act constituted a “criminal offense” because the Juvenile Delinquent had not checked to see whether a round of ammunition was loaded in the chamber, and the death of plaintiffs’ decedent was a reasonably foreseeable result of his actions. To discharge a bullet is the reason why someone pulls the trigger of a firearm, and it is the normal and foreseeable result. By no means can pointing a firearm at another person and pulling the trigger be considered a “seemingly nondangerous act,” like simply answering a cell phone. In contrast, a terrorist bomb detonating is not a normal and foreseeable result of answering a cell phone.
- 11 “When Billy picked up the Beretta, he pushed a button that released the magazine. Billy could see the bullets in the magazine. Billy then put the magazine back in the Beretta. Billy moved the slide at the top of the gun and a bullet popped out. Billy again removed the magazine and put the bullet back in the magazine. Billy repeatedly removed and replaced the bullets and magazine from the gun. Billy knew that the Beretta was loaded when the magazine was in the gun, but thought it was unloaded when the magazine was taken out. He thought that the bullet came out the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber.” [Adames](#), 909 N.E.2d at 745.
- 12 Volition is defined as: “1. The ability to make a choice or determine something. 2. The act of making a choice or determining something. 3. The choice or determination that someone makes.” Black’s Law Dictionary 1605 (8th ed. 2004).
- 13 The trial court had dismissed the City’s case pursuant to the PLCAA in January 2018 based on subsequent developments in the law, necessarily holding it to be constitutional, despite not even addressing the City’s renewed challenges to the constitutionality of the PLCAA. [City of Gary](#), 2019 WL 2222985, at *4.
- 14 [Lopez v. Badger Guns, Inc.](#), No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014), attached as Exhibit F to Plaintiffs-Appellants’ Brief.
- 15 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).