Received 8/30/2023 7:40:53 PM Supreme Court Western District

Filed 8/30/2023 7:40:00 PM Supreme Court Western District
7 WAP 2023

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DIVISION

CASE NO. 7 WAP 2023

SPRINGFIELD, INC. d/b/a SPRINGFIELD ARMORY, and SALOOM DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC d/b/a SALOOM DEPARTMENT STORE,
Defendants, Appellants
and
THE UNITED STATES OF AMERICA,
Intervenor

v.

MARK AND LEAH GUSTAFSON, individually and as Administrators and Personal Representatives of the ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON,
Plaintiffs, Appellees.

Appeal from the Per Curiam Order of the Superior Court en banc entered Aug. 12, 2022 (207 WDA 2019), reversing the Order of the Court of Common Pleas of Westmoreland County, Civil Division, at No. 1126 of 2018 (Smail, J.)

APPELLEES' BRIEF

Kelly K. Iverson
Lynch Carpenter LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
p-412-322-9243
kelly@lcllp.com

Jonathan E. Lowy
Global Action on Gun Violence
805 15th Street, N.W. #601
Washington, D.C. 20005
p-202-415-0691
jlowy@actiononguns.org

Robert M. Cross
Brady Center to Prevent Gun Violence
840 Street NE, Suite 400
Washington DC 20002
(202) 370-8106
rcross@bradyunited.org

Attorneys for Plaintiffs/ Appellees

Date: August 30, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

I. INTRODUCTION

A Pennsylvania child was wrongfully killed because of negligent conduct and a defective product. Pennsylvania law entitles his parents to civil justice. Appellants, Springfield Armory ("Springfield") and Saloom Department Store ("Saloom," and collectively with Springfield, "S&S") contend that Congress has deprived Pennsylvania of the authority to enforce its common law and provide these parents justice. But Congress has not done so. And, if it has, the Constitution does not allow such intrusion on state sovereignty.

James Robert ("J.R.") Gustafson, the 13-year-old son of Appellees Mark and Leah Gustafson, was tragically killed as a result of S&S's negligent design, warnings, and sale of a defective gun. S&S chose not to include feasible safety features that would have prevented J.R.'s death. Pennsylvania law provides the Gustafsons with a cause of action in tort to obtain compensation from S&S for their loss. *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 381-82 (Pa. 2014); 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 have remedy by due course of law …"). S&S seek to block that access by claiming that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901-7903 ("PLCAA") precludes the Gustafsons' cause of

action, thus depriving Pennsylvania of the authority to enforce its tort law in this case. S&S are wrong.

PLCAA's text and purpose establishes that it provides no basis to dismiss this case that is founded on long-established products liability law. This case falls squarely within an exception to PLCAA, expressly permitting the Gustafsons' case to proceed. Supreme Court federalism precedent, the presumption against preemption, and other interpretative principles make that conclusion undeniable. PLCAA does not meet the heavy burden imposed on Congress to express its unmistakable intent to intrude on traditional state authority. Further, as four judges concluded below, PLCAA is unconstitutional, in violation of the Tenth Amendment and unsupported by the Commerce Clause.

The Superior Court's opinion should be affirmed. The Gustafsons should be permitted to pursue their case.

II. COUNTER-STATEMENT OF THE CASE

A. The Facts

On March 20, 2016, J.R. was visiting the home of Josua Hudec in Mt. Pleasant, Westmoreland County, Pennsylvania. *See* Complaint filed March 19, 2018 ("Cmpl.") at ¶¶ 20-22. A fourteen-year-old boy who was a friend of J.R. (the "child gunholder") was also visiting the Hudec house. Cmpl. at ¶

23. Also in the Hudek home was a semiautomatic handgun, model XD-9 (the "Springfield handgun"), which had not been modified in any way and had the same safety features (or lack thereof) as it did at the time of its manufacture by Springfield and its sale by Saloom. Cmpl. at ¶¶ 20-21. The child gunholder came into possession of the Springfield handgun and thought it was unloaded because the ammunition magazine of the Springfield handgun had been removed. Cmpl. at ¶¶ 24-25. Thinking the Springfield handgun was unloaded, the child gunholder pulled the trigger; however, unbeknownst to the child gunholder, a live round remained in the chamber of the Springfield handgun. Cmpl. at ¶¶ 26-27. The Springfield handgun discharged a live round, unintentionally killing the child gunholder's thirteen-year-old friend, J.R. Cmpl. at ¶ 28.

The Gustafsons alleged wrongful death and survival claims against S&S under Pennsylvania law for products liability, negligent design and sale, and negligent warnings and marketing, and seek to hold S&S liable for their negligent conduct that substantially contributed to the death of J.R. Cmpl. at Counts 1–6. Specifically, the Gustafsons alleged that Springfield made, and Saloom sold, the Springfield handgun knowing it lacked economically feasible safety features and warnings that would prevent unintentional shootings, often of and by children, including magazine

disconnect safeties that were invented more than a century ago to prevent such shootings. *See* Cmpl. at ¶¶ 30-71. J.R.

J.R.'s death was an entirely predictable, foreseeable result of S&S's negligent decisions. Firearms manufacturers and dealers like S&S have long known that when they sell a firearm, especially a handgun, there is a great likelihood that it will be stored in a home accessible to children and others who cannot be expected to safely use the weapon. Cmpl. at ¶ 32 (most gun owners living with children do not store their guns locked and unloaded); ¶ 36 (every day on average more than one person is killed and 45 are injured in unintentional shootings); *see also* ¶¶ 2-3, 5-7, 30-35, 38-39, 45.

S&S have also long been aware that the design of semi-automatic firearms frequently deceives individuals into falsely believing that a gun is unloaded after the ammunition magazine is removed (although a live round may remain in the chamber), and that many people—often children—are injured or killed as a result. Cmpl. at ¶ 38 (a substantial number of deaths and injuries would be prevented by safety features on guns); *see also* ¶¶ 2-3, 5-7, 30-35, 45.

S&S also knew or should have known of long-feasible, inexpensive safety features that could prevent unintentional shootings, while enabling

appropriate users to use a firearm when they wish. Cmpl. at ¶¶ 46-65. For example, more than a century ago, magazine disconnect safeties were developed to prevent a gun from firing when the magazine is removed, because users often mistakenly think the gun is unloaded. Cmpl. at ¶¶ 51-54. Magazine disconnect safeties have long been technologically and economically feasible for manufacturers like Springfield to include in their firearms. Cmpl. at ¶¶ 51-54.

Additionally, effective loaded chamber indicators can alert users when a round remains in the chamber whether the magazine is in or not. Cmpl. at ¶¶ 55-56. Built-in locks, child-proof safeties, user recognition technology, and other safety features can prevent juveniles and other unauthorized users from firing guns that they are not authorized to use. Cmpl. at ¶¶ 58-65. Adequate warnings can alert gun owners and adolescents about the latent risk of unintentional shootings of guns thought to be unloaded. Cmpl. at ¶¶ 66-71.

Any one of these safety measures would have prevented J.R.'s death. Cmpl., generally.

Springfield exacerbates the foreseeable risks created by its faulty design and warnings by encouraging users to buy guns and keep them immediately accessible for "[w]hen the police are minutes away and the

threat is seconds away"—without mentioning that it is far more likely that family members or visitors to the home will be victimized by readily accessible firearms in incidents like the tragic death of J.R. Cmpl. at ¶¶ 44, 66. Springfield's marketing makes it even more likely that guns will be stored loaded, accessible to children, and that as a result, fatal shootings like J.R.'s will occur. *Id.*

Springfield's decision to not include safety features and to exacerbate risks to consumers, their families, and household visitors stands in sharp contrast to the behavior of other industries that design products to prevent harm resulting from the design of their goods. For example, cars are designed to inform users when seat belts are not buckled. But, rather than responsibly minimize the risk of harm, S&S chose to manufacture and sell the Springfield handgun without a magazine disconnect safety, other safety features, or sufficient warnings that would adequately inform the child gunholder of the latent risk that a live round remained in the chamber of the Springfield handgun when the magazine was removed, even though S&S knew that children like J.R. would likely be killed as a result. Cmpl. at ¶¶ 6, 9, 21, 46-65.

J.R.'s death was a direct and foreseeable result of these reckless decisions. Due to the absence of appropriate safety measures and/or

warnings, the child gunholder mistakenly—but predictably to S&S—— thought the Springfield handgun was unloaded once the magazine was removed, and pulled the trigger of what he thought was an unloaded gun. Cmpl. at ¶¶ 20-28, 82. The bullet that remained hidden in the chamber killed J.R. *Id*. The child gunholder pleaded guilty to involuntary manslaughter in a juvenile delinquency proceeding. Cmpl. at ¶ 29. J.R. would not have died if S&S had satisfied the duty imposed on them by Pennsylvania tort law to manufacture, market, and/or sell the Springfield handgun in the safest manner reasonably possible. Cmpl. at Counts 1-3.

It is undisputed for purposes of this appeal that Pennsylvania law provides the Gustafsons with the right to seek a remedy for the harm inflicted by S&S's misconduct, and Pennsylvania law could impose liability on S&S for J.R.'s death. Indeed, the Gustafsons' case is based on well-established common law theories of products liability and negligence. *See generally Tincher*, 104 A.3d at 328; *cf. Smith v. Bryco*, 239 P. 452 (N.M. Ct. App. 2001) (gun manufacturer could be liable for unintentional shooting of 14-year-old boy by his 15-year-old friend with a gun that lacked a magazine disconnect safety); *Hurst v. Glock*, 684 A.2d 970 (N.J App. Div. 1996) (gun manufacturer could be liable for unintentional shooting of 15-year-old boy

by his 14-year-old friend with a gun that lacked a magazine disconnect safety).

The only issues in this appeal are 1) whether the Gustafsons' case constitutes a "qualified civil liability action" under PLCAAA and 2) whether PLCAA is unconstitutional.

B. PLCAA

The Protection of Lawful Commerce in Arms Act prohibits certain defined lawsuits against gun manufacturers, sellers, and trade associations. 15 U.S.C. §7901-7903. PLCAA prohibits defined "qualified civil liability action[s]." To come within this prohibited category, Defendants must establish two elements.

One, a prohibited action must first meet the general definition in 15 U.S.C. §7903(5)(A), which includes, inter alia, a "civil action" "brought by any person against a manufacturer or seller of a [firearm]" "for damages" "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." §7903(5)(A).

Two, a "qualified civil liability action" "shall not include" actions that meet the general definition, but satisfy any exception in §7903(5)(A)(i) – (vi). Most relevant here, §7903(5)(A)(v) allows:

> 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.

Also of relevance, the "predicate exception" allows "any action in which a manufacturer or seller of a [firearm] 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 …." §7903(5)(A)(v).

PLCAA's Findings, Purposes, and legislative history make clear Congress's intent to constrain the development of certain novel common law theories in actions against gun companies, while not disturbing the enforcement of well-established common law or statutory law. §7901(a)(7) finds that certain lawsuits are, in Congress's view, "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." Id. Congress feared that "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." Id.

PLCAA identifies these baseless theories as actions seeking to impose liability on gun companies "for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended." §7901(b)(1); *see also* §7901(a)(6) ("The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system.").

PLCAA's legislative history confirms this narrow intent. PLCAA's chief Senate sponsor, Senator Larry Craig, emphasized:

> [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*** *. . . 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) (emphasis added).

Other co-sponsors similarly stated an intent to allow for negligence liability. Sen. Hatch: "[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. Baucus:

"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. Allen: "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 [sic] the firearms dealer or manufacturer . . . ." 151 Cong. Rec. S9389 (daily ed. July 29, 2005); Sen. Sessions: "Manufacturers and sellers are still liable for their own negligent or criminal conduct." 151 Cong. Rec. S8908-01, S8911 (July 26, 2005).

Other Sponsors stated that PLCAA "does not interfere with traditional remedies for damages resulting from defects or design in the manufacture of products" (151 Cong. Rec. H8990-05 (daily ed. October 20, 2005) (Rep. Boucher)) and "[t]he bill allows suits . . . for harm caused by a defect in design or manufacture." 151 Cong. Rec. S9374-01 (daily ed. July 29, 2005) (statement of Sen. Thune).

C. The Superior Court Issues a Per Curium Opinion

A majority of the Superior Court's *en banc* panel concluded that PLCAA did not prohibit the Gustafsons' case. *Gustafson v. Springfield, Inc.*, 282 A.3d 739 (Pa. Super. Ct. 2022) (per curium). Two judges concluded that the case did not fall within PLCAA's definition of "qualified civil liability action", 15 U.S.C. §7903(5)(A)(v), *see id.* (Bender, P.J.E., concurring); *id.*

(Dubow, J., concurring). Four judges concluded that PLCAA is unconstitutional, in violation of the Tenth Amendment and unauthorized by Congress's Commerce Clause authority, *id*. (Kunselman, J., joined by Panella, J., Lazarus, J., concurring); and (Bender, P.J.E., concurring). Four judges dissented, concluding that PLCAA required dismissal and was constitutional, *id*. (Judges Olson, Bowes, McCaffery, Murray, dissenting).

III. SUMMARY OF ARGUMENT

S&S contend that even though Pennsylvania law provides the Gustafsons with a right to seek civil justice under Pennsylvania tort law, the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §7901-7903, has deprived Pennsylvania of its authority to enforce its tort law in this case. However, PLCAA, properly construed, provides no basis to dismiss the Gustafsons' case. Even so, PLCAA is unconstitutional.

PLCAA does not provide a basis to dismiss the Gustafsons' case for multiple independent reasons, each of which supports affirming the Superior Court.

First, the Gustafsons' case satisfies PLCAA's product liability exception, which excludes design defect cases like this from the definition of otherwise-prohibited "qualified civil liability actions." 15 U.S.C. §7903(5)(A)(v). S&S concede that the Gustafsons' case satisfies the first

prong of the exception, which exempts design defect actions from PLCAA's bar. They argue that dismissal nonetheless is mandated by the so-called "exclusion to the exception," under which when "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…." *Id*. S&S must establish ***both*** that "the discharge of the [gun] was caused by a volitional act," ***and*** that act "constituted a criminal offense," *id*., but they can establish neither. The child gunholder's unintentional discharge of the Springfield handgun that he thought was incapable of discharging was not "a volitional act." And his juvenile offense that was not subject to the criminal system was not "a criminal offense."

Although Judge Bender correctly concluded that the product liability exception was satisfied based on PLCAA's plain meaning, the U.S. Supreme Court federalism precedent and the presumption against preemption make it further undeniable that PLCAA does not mandate dismissal.

Federalism principles require reading PLCAA so that Pennsylvania retains its authority to make and enforce its tort law unless Congress has clearly and unmistakably stated an intent to so upset the federal-state balance. *See Gregory v. Ashcroft*, 501 U.S. 452, 463 (1991)*; Bond v.*

United States, 572 U.S. 844 (2014); *Dooner v. DiDonato*, 97 A.2d 1187, 1194 (Pa. 2008). In PLCAA Congress does not approach expressing an unmistakable intent to prohibit tort actions like the Gustafsons' lawsuit. Even if PLCAA expressly bars some cases, federalism principles narrow the scope of the bar. *Medtronic v. Lohr*, 518 U.S. 470, 485 (1996); *Dooner*, 97 A.2d at 1193. PLCAA's exclusion for gun discharges caused by "volitional acts" that are "criminal offenses" is far from an unequivocal statement of Congressional intent to bar cases involving unintentional discharges that are juvenile offenses.

Second, federalism principles require reading PLCAA's general definition of prohibited "qualified civil liability actions" in §7903(5)(A) to not include the Gustafsons' case. As statutory provisions should be harmonized where possible. *Maracich v. Spears*, 570 U.S. 48, 68 (2013). Section 7903(5)(A)'s general definition, which bars liability for harm "***resulting from***" criminal or unlawful gun misuse, should be read consistently with PLCAA's Purposes and Findings, which express Congress's intent to only prohibit liability for harm "***solely caused by***" criminal or unlawful gun misuse. §7901(b)(1), (a)(6) (emphasis added). *Bond* and *Gregory* mandate this reading to avoid significantly "alter[ing] sensitive federal-state relationships," which would occur if PLCAA broadly

prohibited state common law liability against gun companies. *Bond*, 572 U.S. at 863; *Gregory*, 501 U.S. at 463. As S&S were also a cause of the Gustafsons' injuries, this case does not satisfy the general definition.

The principle of constitutional avoidance counsels reading the Gustafsons' case as not coming within §7903(5)(A)'s general definition, as the Gustafsons' reading is "plausible" and is required to avoid PLCAA's fatal Tenth Amendment flaw—its intrusion on Pennsylvania's sovereign authority to make liability law through its judiciary. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005). Constitutional avoidance provides courts with a "tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Id*. at 381.

Third, PLCAA is unconstitutional, as four judges properly concluded below. PLCAA violates the Tenth Amendment and federalism principles by generally barring states from enforcing their law against gun companies only when judge-made, rather than legislatively enacted. §7903(5)(A)(iii). This violates the rule that "the 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) (internal citations omitted). PLCAA also impermissibly requires state courts to

dismiss cases and construe state tort law pursuant to Congress's instructions, although "Congress has no power to declare substantive rules of common law." *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938).

PLCAA is also not a permissible exercise of Congress's Commerce Clause authority, because it regulates states and litigation, but does not regulate gun companies or any entities actively engaged in commercial activity. *See Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519 (2012); *Murphy v. Nat'l Collegiate Athletic Ass'n, Inc.*, 138 S.Ct. 1461, 1478-79 (2018). Nor is PLCAA a permissible preemption law. It does not preempt any actions that involve a statutory violation; it simply restricts states in using their judiciaries to utilize or establish the applicable law. 15 U.S.C. §7903(5)(A)(iii); Brief of Federalism Scholars ("Federalism Br.") at 4-8, 11-12. "[E]very form of preemption is based on a federal law that regulates the conduct of private actors, not the States," *Murphy*, 138 S.Ct. at 1481, but PLCAA does not regulate the gun industry in any way.

* * * *

To prevail, S&S must refute all of these arguments. They cannot refute any. The Superior Court's decision should be affirmed.

IV. ARGUMENT

A. PLCAA DOES NOT BAR THIS CASE.

1. The Court Must Apply the Plain Statement Rule and the Presumption Against Preemption in Determining Whether PLCAA Bars the Gustafsons' Case.

The Supreme Court has explained that "because the States are independent sovereigns in our federal system, we have long presumed that Congress does not cavalierly pre-empt state-law causes of action. In all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' (citation omitted), we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Medtronic, Inc.*, 518 U.S. at 485 (quoting *Rice v. Santa Fe Elevator Corp*., 331 U.S. 218, 230 (1947)).

Supreme Court federalism precedent must be applied in construing the extent to which PLCAA prohibits Pennsylvania from enforcing and making its tort law. "[T]he State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez v. California*, 444 U.S. 277, 282 (1980).

Pennsylvania has a strong interest in protecting its citizens from the manufacture and sale of defective products by enforcing its products liability law, as this Court explained in *Tincher*:

> ***Strict liability*** in tort for product defects is a cause of action which ***implicates the social and economic policy of this Commonwealth***. *** those who sell a product (*i.e.,* profit from making and putting a product in the stream of commerce) are held responsible for damage caused to a consumer by the reasonable use of the product. 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, 104 A.3d at 381-82 (internal citations omitted) (emphasis added). The Supreme Court has also recognized, as a function of interstate commerce, each state's inherent interest in products introduced into "'the stream of commerce with the expectation that they will be purchased by consumers in the forum State' [when] those products subsequently injure forum consumers." *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 473 (1985) (citation omitted).

Pennsylvania's consumer safety policies are implicated here. S&S placed the Springfield handgun onto the market without appropriate, feasible safety features and without adequate warnings about the latent risk of an unintentional shooting, in reckless disregard of the risk to Pennsylvania consumers and residents. If S&S had not manufactured and

sold a defective gun, J.R.'s death would have been avoided. The Gustafsons seek to hold S&S liable for their failure to use feasible and cost-effective safety precautions and warnings to avert foreseeable danger in light of the type and magnitude of risk posed by the Springfield handgun's manufacture and sale. *See Tincher*, 104 A.3d at 397-98.

S&S contend that PLCAA deprives Pennsylvania of the authority to enforce its common law in this case, which compensates victims like the Gustafsons and prevents other lives from being lost in Pennsylvania. But PLCAA's "predicate exception," §7903(5)(A)(iii) allows Pennsylvania to enforce its tort law in identical cases if the defendant knowingly violated a law enacted by the legislature, as opposed to judge-made common law. *See, e.g.*, *Minnesota v. Fleet Farm LLC*, No. 22-2694, 2023 WL 4203088, *1 (D. Minn. June 27, 2023) ("Because the Court finds that the negligence, public nuisance, and aiding-and-abetting claims are each at least partially predicated on the violation of state and federal statutes governing firearms, the Court concludes that the entire action is exempt from the PLCAA and may proceed.").

PLCAA thus significantly intrudes on Pennsylvania's sovereign authority under our federalist system, and causes a significant recalibration of the federal-state balance of authority in at least three respects:

One, PLCAA intrudes on the authority of Pennsylvania to allocate its lawmaking authority between its judicial and legislative branches. *See, e.g., See Clover Leaf Creamery Co.*, 449 U.S. at 461 (internal citations omitted) ("[T]he States are free to allocate the lawmaking function to whatever branch of state government they may choose."). "[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.*, 304 U.S. at 78, yet Congress requires states to ignore identical laws when judicially declared but not when the product of legislative activity. However, judge-made common law "is not the common law generally but the law of that State existing by the authority of that State." *Id*. at 79. It is treated no differently for federal purposes than statutory law. *See Geier v. Am. Honda Motor Co*., 529 U.S. 861, 894 (2000) (explaining that a conflicting federal statute equally preempts "a state statute, administrative rule, or common-law cause of action.")

Two, PLCAA intrudes on Pennsylvania's "'traditional authority to provide tort remedies to their citizens' as they see fit." *Wos v. E,M,A, ex rel Johnson*, 568 U.S. 627, 639-40 (2013) (*quoting Silkwood v. Kerr-McGee Corp*., 464 U.S. 238, 248 (1984)); *see also CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014) (States' "traditional authority to provide tort remedies to

their citizens" is "an area traditional governed by the States' police powers") (quotation marks omitted).

Three, PLCAA intrudes on Pennsylvania's authority to develop and interpret its common law. *See Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 365 (1991) (Scalia, J., concurring) ("Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals.").

These significant intrusions on traditional state authority and the federal-state balance require application of the "plain statement rule" when construing PLCAA. In *Gregory*, the Supreme Court explained that when construing a federal statute "it is incumbent upon the [] courts to be ***certain of Congress'[s] intent*** before finding that federal law overrides [the usual constitutional balance of federal and state powers]." *Gregory*, 501 U.S. at 464 (emphasis added); *see also United States v. Bass*, 404 U.S. 336, 349 (1971). If Congress wishes to "alter the usual constitutional balance between the States and the Federal Government, it must make its intention to do so ***unmistakably clear in the language of the statute***." *Gregory*, 501 U.S. at 460-61 (quoting *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989)) (emphasis added).

In the absence of such a "plain statement," courts are required to interpret a statute in a way that minimizes any intrusion on state sovereignty—even if, as in *Gregory*, that construction is "odd." *Gregory* considered a provision of the Missouri Constitution that required judges to retire at age 70 and appeared to violate the federal Age Discrimination in Employment Act of 1967 ("ADEA"). *Gregory*, 501 U.S. at 455-56. To prevent intrusion into Missouri's sovereign right to structure its government (by setting retirement ages for judges), the Court rejected a statutory construction that was more consistent with the plain text of the statute, and instead read the ADEA to exempt judges under an exception for "appointee[s] on the policymaking level." *Id.* at 465.

The Court recognized that its 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's unless it was "absolutely certain" about Congress's intent. *Id*. at 464. The Court was "not looking for a plain statement that judges are excluded" from the coverage of the federal statute, but instead, it "[would] not read the ADEA to cover state judges unless Congress has made it

clear that judges are *included*" in its coverage. *Id.* at 467 (emphasis supplied).

In *Bond*, the Supreme Court went further, and refused to apply clear statutory language in order to avoid significant intrusion on the traditional federal–state balance. *Bond*, 572 U.S. at 866. *Bond* considered a prosecution under the federal Chemical Weapons Convention Implementation Act, which implemented a chemical weapons treaty. *Id.* at 848. The Act's language criminalized chemical weapons use, without exceptions for local crimes of the sort generally covered by state law. *Id.* at 859-60. Mrs. Bond was charged with violating the Act after she put chemicals on doorknobs, car door handles, and a mailbox causing minor injuries to a woman who had an affair with Mrs. Bond's husband. *Id.* at 844. Justice Scalia stated that "it is clear beyond doubt that [the act] cover[ed] what Bond did . . ." *Id*. at 867 (Scalia J., concurring). Nonetheless, the Court refused to apply a plain reading of the statute because it would lead to the federal government "dramatically intrud[ing] upon traditional state criminal jurisdiction" by federalizing a traditionally local crime. *Bond*, 572 U.S. at 866.

Instead, the Court ***read ambiguity into otherwise unambiguous language***, finding that "ambiguity derives from the improbably broad reach

of the key statutory definition." *Id.* at 859-60. The Court held that the law could not constitutionally be applied because "[t]he Government's reading of [the act] would 'alter sensitive federal–state relationships,' convert an astonishing amount of 'traditionally local criminal conduct' into a 'matter for federal enforcement,' and involve a 'substantial extension of federal police resources.'" *Id*. at 859 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

The presumption against preemption similarly presumes that a federal law does not supersede state authority unless Congress has made that intention clear. This Court has explained that:

> concepts of federalism and state sovereignty make clear that in discerning whether Congress intended to preempt state law, there is a presumption *against* preemption. *Altria Group, Inc. v. Good,* 555 U.S. 70, 76 (2008). Specifically, the United States Supreme Court has stated that "it will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so." *New York State Dep't of Social Servs. v. Dublino,* 413 U.S. 405, 413 (1973) (quoting *Schwartz v. Texas,* 344 U.S. 199, 202-03 (1952)). Stated another way, a cornerstone of the United States Supreme Court's preemption jurisprudence is that, "[i]n all pre-emption cases, and particularly in those in which Congress has 'legislated . . . in a field which the States have traditionally occupied,' . . . we 'start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.'" *Wyeth v. Levine,* 555 U.S. 555, 565 (2009) (quoting *Medtronic, Inc.*, 518 U.S. at 485).

Dooner, 971 A.2d at 1194 (cleaned up); *see also Romah v. Hygienic Sanitation Co.,* 705 A.2d 841, 849 (Pa. Super. Ct. 1997) ("Absent express preemption, courts are not to infer pre-emption lightly, ***particularly in areas traditionally of core concern to the states such as tort law***.") (internal quotations and citations omitted) (emphasis added).

Below, Judge Murray incorrectly concluded that "[b]ecause Congress 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." *Gustafson*, 282 A.3d at 780 (Murray, J., dissenting). But PLCAA never "expressly" states that products liability or negligence actions are preempted, much less "unambiguously." Indeed, it expressly excepted such actions from the definition of "qualified civil liability action." *See*, *e.g.*, 15 U.S.C.A. §7903(5)(A)(v).

Even assuming *arguendo* that PLCAA expressly bars some liability, the Supreme Court pointedly rejected an identical argument "that this assumption should apply only to the question whether Congress intended any pre-emption at all, as opposed to questions concerning the *scope* of its intended invalidation of state law." *Medtronic, Inc.*, 518 U.S. at 485 (citation omitted). The Court explained that using "a 'presumption against the pre-

emption of state police power regulations' to support a narrow interpretation of such an express command" "is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety." *Id*.; *see also Cipollone v. Liggett Group*, 505 U.S. 504, 517-18 (1992).

This Court has noted similarly that, "even if a federal law contains an express preemption clause, the inquiry continues as to the substance and the scope of Congress' displacement of the state law." *Dooner*, 971 A.2d at 1193 (citing *Altria Group, Inc.,* 555 U.S. at 76-77). Further, "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'" *CTS Corp.*, 573 U.S. at 18-19.

Judge Murray dismissed the presumption against preemption as "merely one factor in the Court's analysis" which "will not override the intended purpose of Congress as revealed by the text and the framework of the PLCAA." *Gustafson*, 282 A.3d at 779. That fundamentally misunderstands the presumption and the plain statement rule. These rules do not "override" the statutory purpose; rather, they instruct courts to impose a heavy burden on Congress to make its intended purpose unmistakably clear in the statute if it wishes to recalibrate the federal–state

balance of authority. Congress did not approach carrying that burden in PLCAA.

As explained further below, these principles support both reading the Gustafsons' case as satisfying the product liability exception, §7903(5)(A)(v), and not satisfying the general definition of qualified civil liability action, §7903(5)(A).

2. The Gustafsons' Case is Permitted Under the Product Liability Exception.

PLCAA provides no basis to dismiss the Gustafsons' action because the lawsuit is permitted under PLCAA's product liability exception, §7903(5)(A)(v).

PLCAA commands courts to dismiss actions that satisfy Congress's definition of a "qualified civil liability action," which is generally defined in 15 U.S.C. §7903(5)(A). However, otherwise-prohibited "qualified civil liability actions" "shall not include" any action that satisfies any of PLCAA's six exceptions (set forth in §7903(5)(A)(i) – (vi)).

PLCAA's product liability exception exempts from PLCAA's bar:

> 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 ***.

§7903(5)(A)(v). The product liability exception establishes that PLCAA ***does not*** bar a products liability action for design or manufacturing defect when used as intended or in a reasonably foreseeable manner. S&S do not contest that the Gustafsons satisfy this exception. S&S's sole argument is that the "exclusion to the exception" is not satisfied.

To prevail, S&S must establish that, as a matter of law, assuming all allegations in the complaint are true, the discharge of the Springfield handgun that killed J.R. was ***both*** (1) caused by "a volitional act," ***and*** (2) the volitional act "constituted a criminal offense." S&S can prove neither.

a. The Child Gunholder's Juvenile Offense Was Not a Disqualifying "Criminal Offense."

As Judge Bender correctly opined below, J.R.'s death was not "caused by a volitional act that constituted a criminal offense," as meant by the disqualifying phrase in §7903(5)(A)(v).

The natural meaning of "criminal offense" is conduct actionable in the criminal justice system. As Judge Bender explained, "[e]ven if construed as a volitional criminal act, [the child gunholder's discharge of the gun] still did not 'constitute a criminal offense' in Pennsylvania because our General Assembly has determined that certain criminal acts of juveniles should be treated separate and apart from the way we treat

criminal offenses generally." *Gustafson*, 282 A.3d at 762 (Bender, P.J.E., concurring).

In Pennsylvania "juvenile proceedings are not criminal proceedings." *In re S.A.S.,* 839 A.2d 1106, 1108 (Pa. Super. Ct. 2003) (citing *In re R.A.*, 761 A.2d 1220, 1223 (Pa. Super. Ct. 2000)). The Superior Court has explained:

> Under the Juvenile Act, juveniles are not charged with crimes; they are charged with committing delinquent acts. *** Indeed, the Juvenile Act expressly provides an adjudication under its provisions "is not a conviction of crime." 42 Pa.C.S. § 6354(a) *** The entire juvenile system is different, with different purposes and different rules.

In re R.A., 761 A.2d at 1224; *see also Middendorf v. Henry*, 425 U.S. 25, 36 (1976) ("juvenile hearings" are not "criminal proceedings").

Further, PLCAA's text suggests that Congress did not intend for juvenile offenses to be considered as criminal offenses. Congress could have used "straightforward language" if it "intended the [product liability] caveat to encompass any discharge that occurs during the commission of any crime." *Gustafson*, 282 A.3d at 760 (Bender, P.J.E., concurring). Congress could have expressly excluded "criminal and juvenile offenses" from §7903(5)(A)(v). But PLCAA does not mention juvenile offenses as disqualifying.

Yet Congress must have known that products liability claims against gun manufacturers often involve juvenile offenses, and that such offenses generally are treated outside of the criminal system. After all, "when Congress uses language with a settled meaning at common law, Congress 'presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed.'" *Beck v. Prupis*, 529 U.S. 494, 500-01 (2000) (quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952)).

Congress's failure to mention "juvenile offenses" indicates that Congress likely intended "criminal offense" to have a narrower meaning than any acts that could conceivably be subject to criminal law. After all, it has long been recognized that states "developed a juvenile justice system [so that] most offenders under the age of 18 are not held criminally responsible" but treated differently. *Thompson v. Oklahoma*, 487 U.S. 815, 824 (1988).

PLCAA's text also indicates that Congress intended to allow some product liability claims in which the discharge of the gun was "unlawful," but not "criminal." That intent is indicated by the fact that the general definition of "qualified civil liability action" disqualifies liability for harm

resulting from "criminal or unlawful misuse," while the product liability exclusion only exempts "criminal offenses." *Compare* 15 U.S.C. §7903(5)(A) with §7903(5)(A)(v). When a legislature excludes one term from a list of terms, it excludes that term from the scope of the provision. *See, e.g., Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals*, 814 A.2d 180, 184 (Pa. 2002).

Juvenile offenses logically fall within this category of unlawful misuse that is not a criminal offense. The child gunholder's conduct was unlawful, but not subject to the criminal system. *See Gustafson*, 282 A.3d at 762 (Bender, P.J.E., concurring).

S&S rely on *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009) and other out-of-state authority, but those cases are neither binding nor persuasive. Among other errors, *Adames* rendered the word "unlawful" in 15 U.S.C. § 7903(5)(A) meaningless surplusage, in violation of the rule that "we must give effect to every word of a statute wherever possible." *Leocal v. Ashcroft*, 543 U.S. 1, 12 (2004).

S&S repeat another mistake from *Adames* by arguing that even though juvenile delinquency proceedings are not criminal in nature, the child gunholder engaged in "criminal acts." App. Br. At 20. But the exclusion to the exception requires a "criminal offense," not a "criminal

act." *Gustafson*, 282 A.3d at 760 (Bender, P.J.E., concurring) (explaining similar error in *Adames*).

Judge Bender did not apply federalism principles in ruling that the child gunholder's juvenile offense is not a disqualifying criminal offense under §7903(5)(A)(v). But this court may do so; federalism principles make it undeniable that the Gustafsons satisfy the product liability exception, to come to the same conclusion as Judge Bender.

Applying the plain statement rule, Congress in PLCAA did not indicate the requisite unmistakably clear intent to exclude juvenile offenses from the product liability exception. For one, it did not mention juvenile offenses as excluded from §7903(5)(A)(v), so Congress has not "made it clear that [juvenile offenses] are *included*" in PLCAA's bar. *Gregory*, 501 U.S. at 467 (emphasis in original).

Further, any ambiguities on this point should be decided in the Gustafsons' favor. *See Soto v. Bushmaster Firearms Int'l LLC*, 202 A.3d 262, 313 (Conn. 2019), *cert denied*, 140 S.Ct. 513 (2019) ("in the absence of a clear statement in the statutory text or legislative history that Congress intended to supersede the states' traditional authority to regulate the wrongful advertising of dangerous products such as firearms, we are compelled to resolve any textual ambiguities in favor of the plaintiffs.");

CTS Corp., 573 U.S. at 18-19 ("when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily 'accept the reading that disfavors pre-emption.'").

The child gunholder's juvenile offense was not a disqualifying criminal offense under 15 U.S.C. §7903(5)(A)(v).

b. The Child Gunholder's Unintentional Discharge of a Gun He Thought Incapable of Discharging Was Not a Disqualifying "Volitional Act."

Judge Bender properly opined that the "discharge of [the gun]" also was not caused by a "volitional act" because the unintentional discharge of a gun thought to be incapable of discharging does not constitute a volitional act within the product liability exception. *Gustafson*, 282 A.3d at 760 (Bender, P.J.E., concurring).

"Volitional" is undefined in PLCAA, and therefore should be construed "in accordance with its ordinary or natural meaning," *FDIC v. Meyer*, 510 U.S. 471, 475 (1994). "Volitional" has been defined as "the act of making a choice or determining something," *Mitsui Sumitomo Ins. Co. of Am. v. Duke Univ. Health Sys.*, 509 Fed. Appx. 233, 237-38 (4th Cir. 2013) (citing *Black's Law Dictionary* 1605 (8th ed. 2004)); *see also Oxford English Dictionary* (2023) ("pertaining or relating to the action of willing"); *Merriam-Webster Dictionary* (2023) ("an act of making a choice or decision");

Cambridge Dictionary (2023) ("done because someone has decided or chosen to do it").

Pennsylvania courts routinely treat "volitional" similarly to connote some intent. *See, e.g., In re Jury's Estate*, 112 A.2d 634, 638 (Pa. 1955) ("'wilful', from which the adverb 'wilfully' derives, may mean intentional, volitional, deliberate, etc., in common parlance, the word connotes fault, wrongdoing, blameworthiness, etc."); *Commonwealth v. Brumbaugh*, 932 A.2d 108, 111 (Pa. Super. Ct. 2007) ("volitional" used in relation to "knowingly made"); *Commonwealth v. Feeney*, 101 A.3d 830, 834 (Pa. Super. Ct. 2014) ("volitional" used in relation to "deliberate").

This meaning is confirmed by its context in PLCAA, where "the discharge of the product was caused by a volitional act that constituted a criminal offense" describes potential scenarios in which a gun company may be sued for product liability. §7903(5)(A)(v). In that context, with its understood meaning, "volitional" logically includes some level of decision or choice to discharge the gun, at a minimum.

Here, the child gunholder did not decide, or intend, or make a choice to discharge the gun. The discharge was not a deliberate or knowingly made act. On the contrary, he thought the gun was unloaded and was

incapable of discharging a round. When he pulled the trigger, he did not believe the gun contained anything to discharge.

Even if there are alternate definitions of "volitional," Congress's intended meaning is critical. PLCAA imposes two separate requirements for the exclusion to the exception: that the discharge was both caused by a "volitional act" and that it constituted a criminal offense. This indicates Congress's intent to allow some product liability cases that satisfy one element and not the other, such as shootings that constitute a criminal offense in which the discharge was caused by a non-volitional act.

Further, the pulling of the trigger only resulted in a discharge because of S&S's failure to include a magazine disconnect safety and other feasible safety features that would have prevented the gun from firing. It would plainly be contrary to Congress's purpose to enable S&S's defects and negligence to bring its victims' case within the exclusion that precludes liability for those defects and negligence. Similarly, there is no evidence that Congress meant for mistakes by innocent children who are deceived by defective designs should be deemed the "sole proximate cause" of harm to relieve gun manufacturers of liability for their own defective design that caused that very deception.

While Judge Kunselman read PLCAA's product liability exception as

"toothless" since she viewed all criminal offenses as volitional, *Gustafson*, 282 A.3d at 744 (Kunselman, J., concurring), as Judge Bender explained, criminal offenses "can be premised on an omission to perform an act of which a person is physically capable," which does not require volitional conduct. *Id.* at 760 (Bender, P.J.E., concurring); *see also Chavez v. Glock, Inc.*, 207 Cal. App. 4th 1283, 1317-18 (Cal. Ct. App. 2012) (similarly rejecting a broad reading of the exclusion as it "would effectively eliminate the exception for product design defect claims expressly provided by Congress.").

Rules of construction demand that the Court avoid conflating "criminal offense" and "volitional act," as that renders "volitional act" superfluous and would violate the rule that "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant...." *Hibbs v. Winn*, 542 U.S. 88, 101 (2004).

In addition, even assuming *arguendo* that the child gunholder's pulling of the trigger was volitional in the strictest sense, as Judge Bender explained, the extraordinary circumstances of this case indicate that this volitional act did not carry with it a criminal intention. *Gustafson*, 282 A.3d at 760 (Bender, P.J.E., concurring). As Judge Bender recognized, pulling the trigger of a gun which one believes is unloaded is no more the cause of

a volitional discharge of the gun than picking up a cell phone call is the cause of a volitional detonation of a bomb if terrorists had secretly rendered the phone a remote-control detonator. *Id.*

Ryan v. Hughes-Ortiz, 959 N.E.2d 1000 (Mass. App. Ct. 2012), relied on heavily by S&S, reinforces how the child gunholder's unintentional act was not volitional. In *Ryan*, the volitional act that constituted a criminal offense was a convicted felon's intentional and illegal possession of a gun he stole. *Ryan*, 959 N.E.2d at 1008. That is a far cry from a child's unintentional firing of a gun he thought was unloaded.

At a minimum, whether the discharge was caused by a "volitional act" is a jury question. *See Heikkila v. Kahr Firearms Group*, No. 1:20-cv-02705, 2022 WL 17960555, at *12 (D. Colo. Dec. 27, 2022) ("Here, Plaintiff's alleged illegal discharge is not enough to preclude application of the products liability exception as a matter of law because a jury would still need to determine whether the illegal discharge (or some other criminal offense) was volitional.").

PLCAA contains no unmistakably clear statement that Congress intended to bar design defect cases involving unintentional shootings like this one. PLCAA's exclusion of certain "volitional acts" that cause a discharge is far from a clear statement that Congress intended to bar the

Gustafsons' claims involving an unintentional shooting with a gun thought incapable of discharging.

S&S and the cases they rely on fail to consider any of these points. They do not provide meaning for "volitional act" that is not subsumed within "a criminal offense." They do not consider applicable federalism principles, or that any ambiguities must be resolved in favor of the Gustafsons. *See Soto,* 202 A.3d at 331; *CTS Corp.*, 573 U.S. at 18-19. Nor are those cases consistent with Congress's overall purpose in including an exception which generally permits product defect claims like those here in the absence of a disqualifying act.

The child gunholder's unintentional discharge of the Springfield handgun he thought was unloaded and, therefore, incapable of discharging is not a volitional act that caused a discharge under §7903(5)(A)(v).

3. Principles of Federalism and Statutory Constructions Require Reading §7903(5)(A) as Not Including the Gustafsons' Case.

Even if the Gustafsons' case did not satisfy §7903(5)(A)(v)'s product liability exception, it is permitted because it does not meet the general definition of "qualified civil liability action" in §7903(5)(A).

PLCAA indicates Congress's intent to bar liability actions against gun manufacturers and dealers that were "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." 15 U.S.C. §7901(a)(7). PLCAA's first Purpose explains what those purportedly unfounded theories were — actions seeking to impose liability "for the harm ***solely caused by*** the criminal or unlawful misuse" of a gun. §7901(b)(1) (emphasis added); *see also* §7901(a)(6) (referencing "liability on an entire industry for harm that is ***solely caused by others*** ….") (emphasis added). These purposes must guide construction of the Act and its undefined terms. *See Medtronic, Inc.*, 518 U.S. at 485-86 ("'the purpose of Congress is the ultimate touchstone' in every pre-emption case") (quotation omitted).

PLCAA's general definition of prohibited "qualified civil liability actions" operationalizes PLCAA's Purposes. §7903(5)(A). The general definition prohibits "a civil action or proceeding […] brought by any person against a manufacturer or seller of a qualified product, or a trade association" for damages or other relief "***resulting from the criminal or unlawful misuse of a qualified product***…." *Id*. (emphasis added).

"Resulting from" is undefined and should be read consistently with PLCAA's purpose to only bar liability for harm "solely caused" by third party misuse of a gun. "The provisions of a text should be interpreted in a way

that renders them compatible, not contradictory. . . . [T]here can be no justification for needlessly rendering provisions in conflict if they can be interpreted harmoniously." *Maracich*, 570 U.S. at 68 (quoting Antonin Scalia & Bryan Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012)). Courts should comply with the "general rule, without exception, in construing statutes, that effect must be given to all their provisions if such a construction is consistent with the general purposes of the act and the provisions are not necessarily conflicting. All acts of the legislature should be so construed, if practicable, that one section will not defeat or destroy another, but explain and support it." *Bernier v. Bernier*, 147 U.S. 242, 246 (1893).

Reading §7903(5)(A) inconsistently with §7901(b)(1) not only violates these rules, but it ignores "solely." *See Leocal*, 543 U.S. at 12 (courts "must give effect to every word of a statute wherever possible"). It is particularly important to give effect to "solely" because the word was of critical importance to Congress. Its insertion into §7901(b)(1) was one of the few changes Congress made to the bill after it failed to pass in the previous Congressional session. *Compare* S. 1805, 108th Cong. §7901(b)(1)(2003) with 15 U.S.C. §7901(b)(1) and S. 397, 109th Cong. (2005). The only reason to add "solely" was to make clear in PLCAA's first Purpose that

PLCAA was not intended to prohibit liability where third-party gun misuse was one cause of harm and gun company misconduct was also a cause of harm.

Reading §7903(5)(A) consistently with §7901(b)(1) accomplishes Congress's stated intent to prohibit theories "without foundation," §7901(a)(7), and allows PLCAA to accomplish its intended purpose. By prohibiting liability for harm "solely caused by" third party misuse, PLCAA prohibits truly "maverick" decisions, §7901(a)(7). One example of the liability theories Congress intended to bar is *Kelley v. R.G. Industries, Inc.* 497 A.2d 1143, 1150 (Md. 1985), which created a new theory of strict liability for certain gun manufacturers and marketers for harm caused by criminals misusing their products, even where the defendants engaged in *no negligent or unlawful misconduct*.

If §7903(5)(A) is read inconsistently with §7901(b)(1), states may be generally prohibited from enforcing their common law against negligent gun companies whenever one cause of harm was criminal or unlawful misuse (absent an exception), and states are required to create legislative authorization for many gun industry tort claims. *See, e.g., Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013) (reading PLCAA as generally prohibiting negligence actions).

To paraphrase *Bond*, that reading would "convert an astonishing amount of 'traditionally local [tort law]' into a 'matter for federal enforcement.'" *Bond*, 572 U.S. at 863. That construction cannot be accepted unless this Court is certain from PLCAA's language that Congress's intent is "unmistakably clear." PLCAA includes nothing close to such an indication of Congressional intent.

First, PLCAA never says that it prohibits negligence, products liability, or any other type of action. It simply defines prohibited "qualified civil liability actions," using none of those terms. §7903(5)(A).

Second, Congress's expressions of intent in PLCAA suggest that it did not want to prohibit established common law actions. *See* §7901(b)(1) (only barring liability for harm solely caused by third party misuse); (a)(6) (same); (a)(7) (attacking actions "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").

Third, the undefined term "resulting from" is far from an unmistakably clear statement of Congressional intent to prohibit liability for harm caused by both gun industry negligence and criminal or unlawful misuse, especially given that §7901(b)(1) and (a)(6) express a contrary intent that can be read

harmoniously with "resulting from." Indeed, "caused by" and "resulting from" may be treated synonymously. *See Burrage v. United States*, 571 U.S. 204, 210 (2014) ("death caused by ('resulting from') the use of that drug").

While it may be argued that aspects of PLCAA's exceptions could be read as superfluous under this construction, PLCAA's exceptions are not inconsistent with a narrow reading of §7903(5)(A). The exceptions merely at most reinforce that those exempted actions are not prohibited, and they may be read to establish that in exempted actions liability can be imposed even for harm that is "solely caused by" third party misuse.

Regardless, the exceptions are not an unmistakably clear statement of an intent to prohibit non-exempted cases, and *Bond* instructs that courts may find even core plain language ambiguous and unenforceable because of "the improbably broad reach of the key statutory definition." *Bond*, 572 U.S. at 859-60. Construing §7903(5)(A) consistently with PLCAA's Purposes and Findings is far more supported and far less of a reach than *Bond*.

Judge Murray incorrectly suggests that the Gustafsons argue that "the purpose section" "redefine[s] the plain language of the statute." *Gustafson,* 282 A.3d at 779 (Murray, J., dissenting). Not so. "Resulting from" is undefined, so it cannot be "redefined." And while Judge Murray

states that courts "look to the intent of Congress when the language is not dispositive," *id*., reading "resulting from" to mean "solely caused by" is ***consistent with*** Congress's statements of intent as expressed in PLCAA's Purposes and Findings, which is the most definitive source. *See* §7901(b)(1), (a)(6), (a)(7).

While no court has adopted this construction of PLCAA, none of those courts have properly applied *Bond*, *Gregory*, and the presumption against preemption. Under *Gregory*, this Court should "not [be] looking for a plain statement that [common law claims like the Gustafsons'] are excluded" from the coverage of PLCAA, but instead, should "not read [PLCAA] to cover [common law claims like the Gustafsons'] unless Congress has made it clear that [they] are *included*" in PLCAA's bar. *Gregory*, 501 U.S. at 467 (emphasis in original).

Congress did not make it unmistakably clear that it intended to bar common law actions for harm that was caused in part by gun industry negligence or defective products manufactured and sold by the gun industry. Therefore, §7903(5)(A) should be read to only bar liability for harm solely caused by criminal or unlawful misuse of a gun. On the contrary, Congress's intent can only be furthered by reading PLCAA to allow negligence and product liability actions. This can best be done by reading

the "resulting from" language in §7903(5)(A) consistent with the "solely caused by" language in §7901(b)(1). The Gustafsons' case is not a "qualified civil liability action" under PLCAA and, therefore, the Superior Court's decision should be affirmed.

4. Constitutional Avoidance Requires Adopting the Gustafsons' Plausible Statutory Construction.

The principle of constitutional avoidance further counsels in favor of reading PLCAA to allow the Gustafsons' case. The Supreme Court has directed that:

> When 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, 380-81 (2005); *see also* Scalia, *Reading Law* at Principle 38. This principle instructs courts not to simply choose the statutory construction that they find most compelling; rather, when one construction raises a multiple of constitutional problems that can be avoided by a "plausible" construction, that plausible construction should be adopted.

As Judge Kunselman (along with Judge Bender, Panella, and Lazarus) found that PLCAA is unconstitutional; indeed, reading PLCAA as

S&S suggest would "raise a multitude of constitutional problems." *Clark*, 543 U.S. at 380-81. Therefore, so long as the Gustafsons' construction of PLCAA is "plausible," it should be accepted. *Id.*

PLCAA's fatal Tenth Amendment flaw—impermissibly intruding on Pennsylvania's sovereign authority to make and enforce state law—can only be avoided by reading the general definition in §7903(5)(A) consistently with §7901(b)1) to only bar liability for harm "solely caused by" criminal or unlawful gun misuse. As explained, that reading is more than plausible. Therefore, it should be adopted.

B. PLCAA IS UNCONSTITUTIONAL

PLCAA is unconstitutional—and unprecedented—in several respects. One, it violates the Tenth Amendment and federalism principles by significantly intruding on states' sovereign authority to allocate its lawmaking authority through its branches of government, and to interpret and enforce state law.

Two, PLCAA is not authorized by Congress's Commerce Clause authority because it regulates states, not existing commercial activity.[1] Nor

[1] PLCAA also deprives certain victims of gun industry negligence of all rights to a remedy against gun companies without any alternate compensation, thereby violating the Due Process and Equal Protection Clauses of the Fifth and Fourteenth Amendments. However, that issue was

is it permissible preemption, because it does not preempt and does not regulate private commercial actors.

In addition to the arguments below, the Federalism Scholars Amicus Brief, cogently explains these Constitutional flaws.

1. PLCAA Violates the Tenth Amendment and Federalism Principles.

Federalism, which finds expression in the Tenth Amendment, assures, "The powers not delegated to the United States by the Constitution . . . are reserved to the States respectively, or to the people." U.S. Constitution amend. X. It "leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment." *New York v. United States*, 505 U.S. 144, 188 (1992) (internal quotes omitted); *see also Murphy*, 138 S.Ct. at 1475; *Gregory*, 501 U. S. at 457.

The Supreme Court has made clear that the Constitution "confers upon Congress the power to regulate individuals, not States." *New York* , 505 U. S. at 166. Congress "may not conscript state governments as its agents," nor can it "require the States to govern according to [its] instructions." *Id.* at 162, 178.

---

not ruled on by the superior court, and was not accepted by this Court as an issue on appeal.

a. PLCAA Impermissibly Intrudes on States' Lawmaking Authority

PLCAA violates the Tenth Amendment and federalism principles by intruding on the sovereign authority of states to allocate their lawmaking powers. PLCAA impermissibly requires states to enact statutory law through their legislature in order to generally enforce tort law against gun companies in many cases. §7903(5)(A)(iii).

Among the attributes of state sovereignty protected by the Tenth Amendment is the authority of states to make law and allocate powers amongst their own branches of state government. "[T]he States are free to allocate the lawmaking function to whatever branch of state government they may choose." *Clover Leaf Creamery Co.*, 449 U.S. at 461, n.6 (internal citations omitted); *see also Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) ("How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself."); *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J., concurrence) ("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."); *FERC v Mississippi*, 456 US 742, 761 (1982) ("[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature.").

The Supreme Court has recognized that state courts have authority to make law through their judiciary in common law: "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, [even if] not for federal tribunals." *Lampf, Pleva, Lipkind, Prupis & Petigrew*, 501 U.S. at 365 (Scalia, J., concurring in part). As this Court has recognized, "[i]t lies firmly within this Court's authority to recognize and adopt a common law cause of action as a matter of first impression." *Marion v. Bryn Mawr Tr. Co.*, 288 A.3d 76, 84 (Pa. 2023); *see generally* Federalism Br. at 20-22.

The state's lawmaking authority is particularly salient when fashioning tort liability laws. As noted, "the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational." *Martinez*, 444 U.S. at 282.

The authority of states to make law through their courts is a core aspect of state sovereignty, and Congress has no authority to intrude on state authority to determine what branch of state government is used to make state law. "[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.*, 304 U.S. at 78, and "the decisions of state

courts are definitive pronouncements of the will of the States as sovereigns." *Bush v. Gore*, 531 U.S. 98, 112 (2000) (Rehnquist, C.J., concurring) (citing *Erie*).

In PLCAA, Congress intrudes on this sovereign authority. Rather than respect states' authority to make law through its judicial or legislative branches as they wish, in PLCAA Congress puts a heavy thumb on the scales to disfavor the judiciary. *See* §7901(a)(7) (expressing concern with "maverick judicial officers"). According to S&S, PLCAA generally bars states from enforcing liability law against negligent gun companies if the law is made by the judicial branch through common law (unless the case falls within an exception, §7903(5)(A)(i–vi). However, PLCAA's "predicate exception" allows states to enforce their tort law in otherwise prohibited lawsuits if the harm was caused by a knowing violation of a statute enacted by the legislature. 15 U.S.C. § 7903(5)(A)(iii).

For example, if this identical case claimed that S&S violated a (legislature-made) Pennsylvania statute that required the Springfield handgun to be sold with certain safety features or warnings, PLCAA would allow Pennsylvania courts to impose liability under the predicate exception. *Id*.; *see, e.g., Fleet Farm LLC*, 2023 WL 4203088 at *1 ("Because the Court finds that the negligence, public nuisance, and aiding-and-abetting claims

are each at least partially predicated on the violation of state and federal statutes governing firearms, the Court concludes that the entire action is exempt from the PLCAA and may proceed."); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. App. 2007) (allowing negligent design and other claims to proceed based on §7903(5)(A)(iii) predicate violation). However, according to S&S, this identical case is prohibited if they only violated (judiciary-made) common law that imposes liability for failing to include those some feasible safety features.

In this respect PLCAA does not preempt any theory of liability—even theories that Congress found were "without foundation," §7901(a)(7), are allowed if there is a statutory violation that satisfies §7903(5)(A)(iii). Rather, PLCAA prevents states ***from using their judicial branch*** to establish civil liability standards in certain cases. Indeed, if there is a statutory violation that satisfies §7903(5)(A)(iii), volitional criminal offenses no longer constitute the "sole proximate cause" of the harm in product liability cases, because PLCAA no longer bars the case.

As explained in the Federalism Brief, PLCAA does not constitute field preemption, or limited preemption—nor is it an immunity law—because it does not preempt or immunize. Federalism Br. at 4-12. Unlimited liability

may be imposed on the gun industry, so long as a predicate statute is violated and causes harm. §7903(5)(A)(iii).

Congress made its animus to the judiciary clear in PLCAA, suggesting federal law was needed to prevent "judicial officer[s]" from acting as "maverick[s]" in permitting what Congress deemed to be baseless gun-related litigation. 15 U.S.C §7901(a)(7). Regardless of whether one considers Congress's fears of the judicial branch well-founded or not, the Tenth Amendment and federalism prohibit Congress from imposing those views on states in exercising their sovereign authority to make and enforce state law as ***they*** wish.

PLCAA thus intrudes in a core area of Pennsylvania's self-governance by seeking to control the balance of lawmaking power between Pennsylvania's legislature and judiciary when determining gun industry liability. However, the "autonomy and independence of the States—independence in their legislative and independence in their judicial departments," is central to the Constitution's principles of federalism, and "[a]ny interference with either, except as thus permitted, is an invasion of the authority of the States . . ." *Gustafson*, 282 A.3d at 755 (Kunselman, J., concurring) (citing *Erie R.R.*, 304 U.S. 64 at 78-79).

The Supreme Court has made clear that the Tenth Amendment is not limited to a prohibition against commandeering of state officials. *Murphy* stated that the federal law at issue there "violates the anticommandeering rule" because it "unequivocally dictates what a state legislature may and may not do." *Murphy*, 138 S.Ct. at 1478. The Court rejected the argument that Congress could "prohibit[] a State from enacting new laws." *Id*. Yet PLCAA generally prohibits states from enacting and enforcing new laws – common law that can be enforced against gun companies.

In an analogous case, the New York Appellate Division held that the Tenth Amendment was violated by a federal statute "requiring a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority . . . to opt out of the restrictions on the issuance of licenses . . ." *In re Vargas*, 131 A.D.3d 4, 24 (N.Y. App. Div., 2nd Dep't, 2015). The Court explained: "[t]he ability, indeed the right, of the states to structure their governmental decision-making process as they see fit is essential to the sovereignty protected by the Tenth Amendment." *Id*.

The implications of tolerating PLCAA's Tenth Amendment flaws are significant. Congress, unconstrained by its proper Constitutional limits, could restrict how states structure their government in a myriad of ways. A federal law could require courts to dismiss civil justice cases against opioid

companies (or the industry most favored by the Congressional majority of the moment). Congress could mandate that state lawsuits require approval by the Governor or the legislature. As Judge Kunselman explained, "If courts allow Congress to regulate tort litigation involving these products, it could eventually regulate all litigation." *Gustafson,* 282 A.3d at 756 (Kunselman, J., concurring).

b. PLCAA Impermissibly Commands Judges to Interpret and Enforce State Law Pursuant to Congress's Instructions.

PLCAA also impermissibly infringes on state sovereignty by commanding state courts to construe state tort law pursuant to Congress's direction, and to dismiss cases that are fully supported by state law – based on Congress's determination that such suits are "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." §7901(a)(7). As Judge Kunselman explained, PLCAA rewrites state common law by generally eliminating common-law-tort claims when the statute applies. *See Gustafson*, 282 A.3d at 756 (Kunselman, J., concurring).

PLCAA also commands courts to find that the "sole proximate cause" of harm in certain product liability actions is a third party's volitional,

criminal offense, even though "Pennsylvania tort law [ ] maintains that multiple substantial factors may cooperate to produce an injury … and that concurrent causation will give rise to joint liability." *Estate of Harsh v. Petroll*, 887 A.2d 209, 218 (Pa. 2005) (citations omitted); *see also* Restatement (Third) Torts, Products Liability §16 (discussing product seller's liability for increasing harm also "result[ing] from other causes"). As PLCAA does not create actions, §7903(5)(C), proximate cause in this case is an element of a Pennsylvania common law action. Yet Congress directs how Pennsylvania courts must determine proximate causation under state law without creating a superseding federal cause of action.

This direction conflicts with *Erie*'s instruction that: "[t]here is no federal common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Erie R.R.*, 304 U.S. at 78. In the absence of preemptive federal law, determining what is supported by the common law is entirely the province of states. Yet in PLCAA, to paraphrase *Murphy*, "[i]t is as if federal officers were installed in" the filing offices of every state courthouse "and were armed with the authority to stop" any gun litigation Congress disfavored. *Murphy*, 138 S.Ct. at 1478.

These principles are violated by PLCAA.

c. PLCAA is not a permissible preemption law.

While federal preemption law may compel courts to dismiss certain cases that are supported by state law, PLCAA is not a permissible preemption law.

One, PLCAA does not preempt. As explained, so long as there is a statutory violation that satisfies §7903(5)(A)(iii), no cases are preempted. PLCAA simply restricts the ability of a sovereign State, such as Pennsylvania, to enforce its common law in certain cases. *See* Federalism Br. at 5. "PLCAA's only effect is to restructure state government by disfavoring the actions of one branch of state government in favor of a different branch with respect to a specific subject area, namely, gun liability." *Id.* at 3.

Two, PLCAA is not preemption because "every form of [permissible] preemption is based on a federal law that regulates the conduct of private actors, not the States." *Murphy*, 138 S.Ct. at 1480-81. When "federal law 'imposes restrictions or confers rights on private actors' and 'a state law confers rights or imposes restrictions that conflict with the federal law,' 'the federal law takes precedence and the state law is preempted.'" *Kansas v. Garcia*, 140 S.Ct. 791, 801 (2020) (quoting *Murphy*).

But PLCAA does not "impose[] restrictions or confer[] rights" on gun companies at all. It simply defines certain lawsuits as "qualified civil liability actions;" commands courts to dismiss them; and orders victims to not file prohibited actions.

Permissible preemption laws establish federal regulatory schemes, which then may require dismissal of lawsuits based on state standards or actions that conflict with or are not permitted by that scheme. *See Geier*, 529 U.S. at 861 (petitioner's suit was preempted because state tort law would have stood as an obstacle to the accomplishment of a Federal Motor Vehicle Safety Standard); *cf. Wyeth*, 555 U.S. at 555 (FDA's pre-market approval of new drug, which included authorization of text in proposed label, permitted a manufacturer to strengthen warnings without FDA approval, therefore allowing state failure-to-warn lawsuits to proceed).

While PLCAA's Findings reference gun laws, PLCAA does not preempt state actions that conflict with those laws. On the contrary, if gun companies knowingly violate an applicable state law and thereby cause harm, under §7903(5)(A)(iii) states can hold them liable even if defendants complied with federal gun laws.

Preemption may prevent state court proceedings from conflicting with a permissible federal regulatory scheme that relates to interstate

commerce. *See e.g., Pierce County v. Guillen*, 537 U.S. 129 (2003) (upholding constitutionality of federal statute that barred use of documents prepared by state authorities pursuant to a federal highway program). However, unlike the restriction on civil litigation in *Pierce County*, PLCAA is untethered to any regulation of interstate commerce, and is solely designed "to be an effort-free tool in litigation." *Id.* at 146. PLCAA affects litigation, and litigation alone. This is impermissible.

d. S&S's and Judge Olsen's Arguments Are Contrary to Supreme Court Precedent.

S&S do not address *Murphy* or the gist of PLCAA's fatal Tenth Amendment flaws. Judge Olsen's dissent also fails to grapple with PLCAA's Tenth Amendment flaws or the Court's ruling in *Murphy*.

S&S wrongly suggest that the Tenth Amendment is limited to the "anti-commandeering" principle, and that the anti-commandeering principle is limited to barring "states mandating legislation." App. Br. 38. Judge Olsen similarly suggests that the anti-commandeering principle only prohibits Congress from commandeering legislatures to enact certain laws or commanding executive branch members of a state to administer or enforce a federal regulatory program. *Gustafson*, 282 A.3d at 787 (Olsen, J., dissenting). But as the Federalism Scholars explain, *Murphy* held that the subject law "violated that 'anti-commandeering rule' by dictat[ing] what a

state legislature may and may not do." Federalism Br. at 28 (quoting *Murphy*, 138 S.Ct at 1478). Because "anti-commandeering" operates as a principle of "political accountability" "to assure that authority is divided between the federal and state governments" and enable voters know which level of government to credit or blame, *Murphy*, 138 S.Ct at 1477, it equally prevents Congress from telling states what it may allow its courts to do or not do. This clarification in *Murphy* of the true scope of the Tenth Amendment similarly dooms the pre-*Murphy* decisions on which Judge Olsen relies. *See* Federalism Br. at 27-30.

Judge Olsen also fundamentally misconstrues PLCAA when claiming that PLCAA's direction to states to employ legislatures (through §7903(5)(A)(iii)) is irrelevant because "even if a claimant brought a design defect claim in a state that has codified its product liability laws, the claim would be barred unless the claim fell within PLCAA's design defect exception." *Gustafson*, 282 A.3d at 772 (Olsen, J., dissenting). Section 7903(5)(A) establishes that a prohibited "qualified civil liability action" "shall not include" "an action" that falls within any exception set forth in §7903(5)(A)(i-vi). The predicate exception does not exclude product liability actions. Therefore, if S&S "knowingly violated a State or Federal statute applicable to the sale or marketing of [firearms], and the violation was a

proximate cause of the harm for which relief is sought," §7903(5)(A)(iii), the Gustafsons' case would not be a qualified civil liability action and would not be barred by PLCAA. *Smith & Wesson Corp.* allowed all claims—including a negligent design claim—based on an (unrelated) §7903(5)(A)(iii) predicate violation. *Smith & Wesson Corp.*, 875 N.E.2d at 422.

PLCAA violates the principles of federalism protected by the Tenth Amendment.

2. PLCAA Is Not Authorized by the Commerce Clause

PLCAA is also unconstitutional because Congress has no legitimate authority to enact legislation such as PLCAA. When the constitutionality of an act of Congress is put into question, the "Federal Government . . . must show that a constitutional grant of power authorizes each of its actions." *Sebelius*, 567 U.S. at 535. Congress's purported authority for enacting PLCAA is the Commerce Clause, but PLCAA does not regulate interstate commerce. Instead, PLCAA regulates states. That is not within the ambit of Commerce Clause authority. *Murphy*, 138 S.Ct. at 1476.

The Commerce Clause authorizes Congress to "regulate Commerce with foreign Nations, and among the several States…" U.S. Const art. I § 8 cl. 3, but "the power to regulate commerce, though broad indeed, has limits." *Sebelius*, 567 U.S. at 554 (opinion of Roberts, J.). Congress may

not regulate *purely local events*, as doing so would "destroy the distinction. . . between commerce 'among the several States' and the internal concerns of a State." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937). "The distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Id.*

The Commerce Clause may only be used to regulate three categories of activity: (1) "channels of interstate commerce"; (2) the "instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities"; and (3) "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995) (citations omitted). The Supreme Court has explained that "in every case where we have sustained federal regulation [on the basis of its indirect effect on commerce], the regulated activity was of an apparent commercial character." *United States v. Morrison*, 529 U.S. 598, 611, n.4 (2000) (citations omitted).

In *Sebelius*, the Supreme Court explained important limitations to the Commerce Clause, which doom PLCAA. *Sebelius*, 567 U.S. at 552. The Court struck down the Affordable Care Act's ("ACA") individual mandate, which imposed a "shared responsibility payment" on individuals who failed

to maintain health insurance. *Id.* The mandate unquestionably had substantial impacts on the interstate health industry, and the Government argued that the mandate fell within Congress's Commerce power because "the failure to purchase insurance 'has a substantial and deleterious effect on interstate commerce' by creating a cost-shifting problem." *Id.* at 548–49.

Chief Justice Roberts rejected that argument as too expansive a reading of the Commerce Clause. He explained that "the power to *regulate* commerce presupposes the existence of commercial activity to be regulated." *Id.* at 550 (opinion of Roberts, C.J.). Notwithstanding the ACA's individual mandate's effects on interstate commerce, it was impermissible under the Commerce Clause because it did not "regulate existing commercial activity." *Id.* at 552.

In his dissent, Justice Scalia explained that Congress may not seek to command "those furthest removed from an interstate market to participate in the market . . ." *Id.* at 652-53 (Scalia, J., dissenting). The uninsured people "regulated" by the Act—who would be forced to buy insurance—were not engaged in existing commercial activity, and it was impermissible to compel people "to become active in commerce by purchasing a product, on the ground that their failure to do so affects

interstate commerce." *Id.* at 552 (opinion of Roberts, C.J.); *see also Gustafson*, 282 A.3d at 745 (Kunselman, J., concurring).

PLCAA has similar fatal flaws.

One, PLCAA does not regulate "existing commercial activity." PLCAA does not regulate companies engaged in the gun industry. It does not regulate the conduct of gun companies. It does not regulate gun sales, possession, or use. It does not regulate the effects of gun commerce. It does not seek to reduce gun violence or crime that results from interstate commerce in firearms. It does not even regulate lawsuits that can affect commerce.

For the most part PLCAA "regulates" states. It prohibits states from enforcing their law when that law is the product of the judiciary, rather than the legislature, and commands that cases invoking the common law, but not statutory law, be dismissed. It requires states to employ their legislature to enact laws in order to authorize certain tort actions. Requiring lawsuits emanate from a specific branch of state government is not commercial activity. Nor is it within the ambit of permissible Congressional authority. The Constitution "confers upon Congress the power to regulate individuals, not States." *New York*, 505 U.S. at 166.

S&S concede that PLCAA regulates litigation. App. Br. 38 (PLCAA "directly regulates qualified civil liability actions…."). But the manner in which it regulates litigation is what affronts federalism. PLCAA does not prohibit any particular tort action against gun manufacturers; it only prohibits those in which the State exercises its lawmaking authority solely through the courts, without state legislative blessing. As a result, it does not regulate lawsuits affecting commerce but, rather, lawsuits that do not emanate from Congress's preferred source within the state. That is not commerce.

S&S simply ignore binding Supreme Court authority on these points. Instead, they rely on cases that predate that authority, some of which did not even make the arguments made here. *Ileto v. Glock, Inc.*, 565 F. 3d 1126 (9th Cir. 2009), did not consider the Commerce Clause, but rejected a Fifth Amendment challenge to PLCAA. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), upheld PLCAA because it defined the anti-commandeering principle too narrow, a view repudiated by *Murphy*.

Further, Congress's own conclusion that lawsuits barred by PLCAA burden interstate commerce does not authorize the use of powers granted by the Commerce Clause. The Supreme Court has made clear: "Simply because Congress may conclude that a particular activity substantially

affects interstate commerce does not necessarily make it so." *Lopez*, 514 U.S. at 557, n.2 (quoting *Hodel v. Virginia Surface Min. and Reclamation Ass'n, Inc.*, 452 U.S. 264, 311 (1981) (Rehnquist, J., concurring in judgment). Whether an activity "affect[s] interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question and can be settled finally only be [the courts]." *Lopez*, 514 U.S. at 557, n.2 (quoting *Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 273 (1964) (Black, J., concurring). PLCAA only tells states how they must enact their laws, which is outside the congressional grant of power under the Constitution.

As discussed above, PLCAA is not a permissible preemption law.

The interstate character and effects of the gun industry certainly subject it to broad regulation under the Commerce Clause, but that does not support PLCAA's "regulation" of state lawmaking authority and state judicial interpretative authority.

PLCAA does not constitute a valid exercise of Congress's Commerce Clause authority.

V. CONCLUSION

Appellees, Mark and Leah Gustafson, have a right to seek civil justice against S&S for the wrongful death of their son, J.R. PLCAA does not mandate that Pennsylvania courts dismiss their case, certainly not when PLCAA is properly construed through the Supreme Court's federalism lens. Additionally, PLCAA is unconstitutional.

The superior court's opinion should be affirmed.

Dated: August 30, 2023

Respectfully submitted,

By: */s/ Kelly K. Iverson*
Gary F. Lynch
Kelly K. Iverson
Lynch Carpenter LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222
p-412-322-9243
gary@lcllp.com
kelly@lcllp.com

Jonathan E. Lowy
Global Action on Gun Violence
805 15th Street, N.W. #601
Washington, D.C. 20005
jlowy@actiononguns.org

Robert M. Cross
Brady Center to Prevent Gun Violence
840 Street NE, Suite 400
Washington DC 20002
(202) 370-8106
cross@bradyunited.org

CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned hereby certifies that this brief contains 13,656 words, excluding the table of contents and table of authorities and certificates of counsel.

/s/ Kelly K. Iverson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing petition was filed on August 30, 2023 using the Court's electronic filing system (PACfile), which will cause service on the following counsel of record for Appellees, both of whom are registered e-filing users:

Christopher Renzulli
Scott C. Allan
Renzulli Law Firm, LLP
One North Broadway, Suite 1005
White Plains, NY 10601
914-285-0700

John J. Hare
Shane Haselbarth
Marshall Dennehey Warner Coleman & Goggin
2000 Market Street, Suite 2300
Philadelphia, PA 19103
215-575-2609

By: */s/ Kelly K. Iverson*