No. _____

IN THE

Supreme Court of the United States

Mark and Leah Gustafson, individually and as administrators and personal representatives of the Estate of James Robert ("J.R.") Gustafson,
Petitioners

v.

Springfield, Inc., d/b/a Springfield Armory, *et al.*
Respondents.

On Petition for a Writ of Certiorari to the Pennsylvania Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Where Congress in the Protection of Lawful Commerce in Arms Act (PLCAA), Pet.App.276a-287a (15 U.S.C. §§ 7901−7903), commanded judges to dismiss certain lawsuits involving gun-related liability under common-law authority but chose not to preempt state law or provide immunity against the same liability when it is the product of a legislative enactment, the Questions Presented are:

1. Has Congress violated federalism principles and the Tenth Amendment by invading a core structural element of State sovereignty when PLCAA bars a State from imposing liability on gun manufacturers and sellers in certain instances based on judicial determinations under the common law, but allows identical liability actions if the State imposes liability through legislative determinations?

2. Has Congress in PLCAA legitimately exercised its authority over interstate commerce when it does not regulate commercial activity of the firearms industry but prohibits state courts from authorizing liability for certain actions against gun manufacturers and sellers while refraining from the same prohibitions when a state legislature authorizes identical liability-inducing actions?

PARTIES TO THE PROCEEDING

Petitioners Mark and Leah Gustafson, individually and as administrators and personal representatives of the estate of James Robert ("J.R.") Gustafson, were plaintiffs in Court of Common Pleas, Westmoreland County, Pennsylvania, in *Gustafson v. Springfield, Inc.,* 2019 WL 11000305 (Pa. Com. Pl. Jan. 15, 2019) [Pet.App.53a], appellants in the Pennsylvania Superior Court, 2020 WL 5755493 (Pa. Super. Sept. 28, 2020) [Pet.App.184a] and 282 A.3d 739 (Pa. Super. 2022) [Pet.App.63a), and appellees in the Pennsylvania Supreme Court, 333 A.3d 651 (Pa. 2025) [Pet.App.1a].

Respondent Springfield, Inc. was the defendant in the Court of Common Pleas, the appellee in the Superior Court, and the appellant in the Pennsylvania Supreme Court.

Respondent United States was an appellee-intervenor in the Pennsylvania Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Mark and Leah Gustafson and the Estate of James Robert ("J.R.") Gustafson state that they are individuals and the estate of an individual. They have no parent corporation and that no publicly held company owns 10% or more of Applicants' stock.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Gustafson v. Springfield, Inc.,* No. 7 WAP 2023, Pennsylvania Supreme Court (Mar. 31, 2025) (reported at 333 A.3d 651).
- *Gustafson v. Springfield, Inc.*, No. 207 WDA 2019, Superior Court of Pennsylvania (August 12, 2022) (reported at 282 A.3d 739).
- *Gustafson v. Springfield, Inc.*, No. 207 WDA 2019, Superior Court of Pennsylvania (Sept. 28, 2020) (withdrawn and set for reargument).
- *Gustafson v. Springfield, Inc.*, No. 1126 of 2018, Pennsylvania Common Pleas Court (Jan. 15, 2019) (unreported but available at 2019 WL 11000305).

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PETITION FOR A WRIT OF CERTIORARI

Mark and Leah Gustafson respectfully petition for a writ of certiorari to review the judgment of the Pennsylvania Supreme Court in this case.

OPINIONS BELOW

The Pennsylvania Supreme Court's decision is reported at 333 A.3d 651 and included in the Appendix (Pet.App.) at Pet.App.1a. The Pennsylvania Superior Court issued two decisions, one reported at 282 A.3d 739 and included at Pet.App.63a. The other was

withdrawn and set for reargument en banc and is included at Pet.App.184a. The Pennsylvania Common Pleas Court decision is unreported but available at 2019 WL 11000305 and included in Pet.App.253a.

JURISDICTION

The Supreme Court of Pennsylvania entered judgment on March 31, 2025. Pet.App.1a–62a. On June 16, 2025, Justice Alito extended Petitioners' deadline to petition for a writ of certiorari to and including July 29, 2025. No. 24A1235. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, and the Tenth Amendment, U.S. Const. amend. X, are reproduced at Pet.App.275a.

The relevant provision of the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901–7903 (2005), are reproduced at Pet.App.276a–287a.

INTRODUCTION

This Court has recognized that our federalist system provides states with sovereign authority to make law through the branches of government as they choose. Yet the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901-7903 (2005)

[Pet.App.276a-287a], commands federal and state courts to dismiss certain *common law* tort actions, while allowing identical actions if based on state *legislative* enactments. This unprecedented federal law infringes on states' sovereign lawmaking authority and structural choices, in conflict with the Tenth Amendment and fundamental principles of federalism. The Supreme Court of Pennsylvania is the latest of a series of courts to uphold PLCAA based on a failure to appreciate this Court's federalism, Tenth Amendment and Commerce Clause holdings. This Court's review is needed to reassert and enforce these foundational constitutional precepts.

The lawsuit at issue was brought by the family of 13-year-old J.R. Gustafson, who was unintentionally killed by another boy with a negligently designed firearm that failed to include easily feasible safety features that would have prevented the shooting. The Gustafsons live in Pennsylvania; J.R. was killed in Pennsylvania; they brought suit in Pennsylvania state court, under Pennsylvania negligence and product liability law. Pennsylvania has chosen to provide its judicial branch with "the authority and duty at common law" to develop state tort law. *Tincher v. Omega Flex,* 104 A.3d 328, 381 (Pa. 2014). There is no dispute that the Gustafsons' lawsuit was permitted under Pennsylvania tort law. The Supreme Court of Pennsylvania ultimately held that PLCAA commanded Pennsylvania courts to nonetheless dismiss the lawsuit. However, PLCAA (under its "predicate exception") would allow the lawsuit if it were based on a violation of

statutory law rather than common law. That is, Congress required Pennsylvania courts to dismiss the Gustafsons' lawsuit not because Congress granted the gun manufacturer and seller immunity (it didn't), or because Congress preempted states from imposing liability on certain commercial activity of gun companies (it also didn't). Congress commanded Pennsylvania courts to dismiss the Gustafsons' otherwise-valid lawsuit because Pennsylvania did not employ Congress's preferred method of lawmaking: legislation, as opposed to common law judicial decisionmaking. If Pennsylvania chose to have its legislature impose liability on firearms manufacturers and sellers for failing to include the feasible safety features that would have prevented J.R.'s death in a products-liability statute, PLCAA would permit Pennsylvania courts to hear the Gustafsons' lawsuit. But because Pennsylvania common law imposed that liability, PLCAA mandated dismissal.

There is no precedent for PLCAA's intrusion on State sovereign authority, allowing it only to make law through the branch of government Congress chooses. Congress may not regulate States as States, but PLCAA does just that, as the Superior Court held twice. Congress may preempt state regulation, lawmaking, and liability, but PLCAA does not preempt any liability or regulation, so long as the action involves a knowing statutory violation, rather than under common law. Put another way, any "preemption" can be "un-preempted" by a state's legislative branch. That is not preemption.

Nor is it a rational exercise of Commerce Clause authority. Indeed, PLCAA does not regulate commercial activity or the firearms industry in any way; it simply "regulates" States and state courts, requiring them to dismiss prohibited common-law actions, and victims of gun industry negligence, who are prohibited from bringing certain actions. That is not commercial activity that can serve as a permissible basis for Congress' Commerce Clause authority. And liability based on legislative standards burdens commerce just as much as identical liability based on common law.

This past term this Court applied PLCAA for the first time, holding that the law prohibited a lawsuit brought by the Government of Mexico because the action did not adequately allege that the firearm manufacturer defendants aided and abetted illegal gun sales which would constitute a knowing violation of statutory law, as required by PLCAA. *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556 (2025). However, the Court did not address whether PLCAA is constitutional, because no party raised that argument. That foundational issue is raised and joined here.

In upholding PLCAA, the Pennsylvania Supreme Court ignored or contradicted a raft of this Court's fundamental holdings. *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453 (2018), made clear that Congress violates the Tenth Amendment's anti-commandeering prohibition by prohibiting certain state lawmaking; but the court below used a narrower, pre-*Murphy*

conception to find that PLCAA's restrictions on the enforcement of state liability law are permitted by the Tenth Amendment. This Court has repeatedly recognized States' sovereign authority to make law as they choose; but the Court below found no fault in PLCAA barring enforcement of state common law actions, while allowing identical actions when statutorily based.

This Court has made clear that Congress's exercise of Commerce Clause authority must regulate commercial activity; yet PLCAA does no such thing, and only "regulates" States and courts. The Pennsylvania Supreme Court relied on decisions from the Supreme Courts of Alaska, Illinois, Missouri, and the Second Circuit to render its decision, but those cases demonstrate the growing body of decisions wholly inconsistent with this Court's federalism and Commerce Clause jurisprudence. It is of critical importance that this deepening problem is remedied, and this Court's holdings are properly applied and understood, both in the context of PLCAA, and to make clear more broadly Congress's constitutional limits in imposing structural requirements on the States.

STATEMENT OF THE CASE

A. Underlying Facts.

On March 20, 2016, 13-year-old James Robert (J.R.) Gustafson was at the home of a friend with another 14-year-old boy, who found a gun in the home. Pet.App.8a. The ammunition magazine had been

removed. *Id*. The 14-year-old boy, thinking the gun was unloaded, pulled the trigger. *Id*. The live round hidden in the firing chamber fired and killed J.R. *Id*. The boy who fired the weapon was subsequently adjudicated delinquent of involuntary manslaughter in juvenile court. *Id*.

For more than a century, firearms manufacturers have known that children – and adults – sometimes obtain and fire guns they mistakenly believe are unloaded. *See Smith v. Bryco*, 33 P.3d 638, 648-49 (N.M. Ct. App. 2001); *Hurst v. Glock*, 684 A.2d 970, 972 (N.J. Super. Ct. App. Div. 1996). This often happens when the magazine (which holds ammunition) is removed, but a live round remains in the firing chamber, leading to unintentional shootings. *See, e.g.* Pet.App.26a. For that reason, safety features have been developed to prevent these inadvertent shootings. *See Smith*, 33 P.3d at 648; *Hurst*, 684 A.2d at 972-73. Magazine disconnect safeties, inexpensive features in use for more than a century, prevent a gun from firing when the magazine is removed; internal locking devices, that prevent the gun from firing unless it is unlocked, have been available for decades; and loaded chamber indicators, that alert users when a round is in the chamber, have long been feasible. *See e.g.*, *Smith*, 33 P.3d at 648-49; *Hurst*, 684 A.2d at 972-73.

Respondent Springfield Armory, the manufacturer of the handgun, failed to include a magazine disconnect safety, an internal lock, an effective loaded chamber indicator, or any other feasible safety feature or warnings that would prevent unintentional shootings. Pet.App.55a. Respondent Saloom Department

Store sold the firearm that killed J.R. Pet.App.2a. If Springfield included any of those feasible safety features, J.R. would be alive today.

Defendants did not contest that Plaintiff's allegations could support liability under Pennsylvania negligence and product liability law. Indeed, courts have held that firearms manufacturers may be liable for shootings, very similar to J.R.'s, for failing to include a magazine disconnect safety that could have prevented the shooting. *See Smith*, 33 P.3d 638; *Hurst*, 684 A.2d 970.

B. Statutory Background.

In 2005, Congress enacted the Protection of Lawful Commerce in Arms Act ("PLCAA"). Pet.App.276a-287a (§§ 7901-7903). PLCAA does not regulate the firearms industry in any way. It simply commands state and federal courts to dismiss – and prohibits plaintiffs from filing – congressionally-defined "qualified civil liability actions" against certain gun industry members, even if those actions are permitted under state tort law. Pet.App.266a (§ 7902).

Congress generally defined "qualified civil liability action[s]" (QCLA) to include "a civil action . . . brought by any person against a manufacturer or seller of a [firearm] . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]" Pet.App.282a (§ 7903(5)(A)). However, Congress carved out six exceptions that otherwise satisfy the general definition of prohibited QCLA but remain permissible legal actions. Pet.App.282a-284a (§ 7903(5)(A)). Permitted exceptions include, *inter*

alia, certain defective design or manufacturing actions and, most importantly here, the so-called "predicate exception," which allows otherwise-prohibited actions in which a firearms or ammunition manufacturer or seller knowingly violated "a State or Federal statute applicable to the sale or marketing of the product" that was the "proximate cause of the harm for which relief is sought[.]" Pet.App.283a (§ 7903(5)(A)(iii)). Courts have generally interpreted PLCAA and its predicate exception as requiring state courts to dismiss negligence actions that are permitted by state common law, while allowing identical claims if the defendant also knowingly violated state or federal statutory law.

C. Proceedings Below.

1. Pennsylvania Court of Common Pleas.

On March 19, 2018, J.R.'s parents, Mark and Leah Gustafson, brought wrongful death and survival claims against the gun's manufacturer, Springfield, and its seller, Saloom, in Pennsylvania state court under Pennsylvania law for products liability, negligent design and sale, and negligent warnings and marketing that substantially contributed to J.R.'s death. Pet.App.8a-9a. The Gustafsons alleged that Springfield made, and Saloom sold, the handgun that killed their son without adequate safety features that would prevent unintentional but foreseeable shootings, particularly of children, including the shooting that killed J.R. Pet.App.55a.

No one disputed that Pennsylvania negligence and product liability law provided the Gustafsons with a

cause of action. *See e.g.*, *Phillips v. Cricket Lighters,* 841 A.2d 1000, 1008-010 (Pa. 2003) (lead opinion) (plaintiff stated a negligent design claim against a manufacturer of a lighter that did not include child safety features and was used by child to start a fire). Nonetheless, Defendants moved to dismiss the case, asserting that PLCAA prohibited Pennsylvania courts from applying and enforcing Pennsylvania tort law in the Gustafsons' case. Pet.App.9a. The U.S. Department of Justice intervened to defend the statute's constitutionality. *Id.* at 11a. On January 15, 2019, the trial court dismissed Petitioners' case, ruling that PLCAA required dismissal of Petitioners' claims and that PLCAA was constitutional. Pet.App.10a. The court held that PLCAA's design defect exception was not satisfied, since, the court concluded, the 14-year-old's discharge of the gun that killed J.R. was "caused by a volitional act that constituted a criminal offense," and was therefore excluded from the design exception. Pet.App.284a (§ 7903(5)(A)(v)). The court also held PLCAA constitutional.

2. Pennsylvania Superior Court.

The Gustafsons appealed to the Pennsylvania Superior Court, raising two questions: 1) Did PLCAA bar their claims?; and 2) Did the United States Constitution permit PLCAA to bar Pennsylvania courts from applying Pennsylvania law to provide them civil justice? Pet.App.69a. A three-judge panel of the Superior Court, in a published opinion, unanimously reversed the trial court's dismissal and declared PLCAA unconstitutional. Pet.App.184a, 252a.

On Commerce Clause grounds, the Court found that PLCAA "regulates the inactivity of individuals who may ***never*** have engaged in a commercial transaction with the gun industry . . . PLCAA reaches out and forces J.R. Gustafson and his parents to provide financial support for the gun industry by forgoing their tort claims against its members." Pet.App.89a (emphasis in orig.). The Court emphasized that neither J.R. nor his parents purchased the gun used to kill him, so they had not engaged in any commercial activity with the gun industry that Congress might regulate. *Id.* The Court was "unwilling to find that Congress's Commerce Clause authority extends to an area of law too-far removed from interstate commerce." *Id*. at 92a. On federalism grounds, the Court found that "Section 7902(b) of PLCAA, which directs courts to dismiss common-law claims that fall within the definition of 'qualified-civil-liability action,' violates the Tenth Amendment" because "[t]ort law is decidedly a state issue." *Id*. at 103a.

Upon the Respondents' request, the Superior Court granted en banc review and withdrew the panel opinion. *Id*. at 69a.

The en banc court issued a per curium opinion that agreed with the Superior Court panel that PLCAA did not bar the Gustafsons' lawsuit. In multiple opinions, the judges splintered on their holdings. *Id*. at 65a-183a. Four judges concluded that PLCAA is unconstitutional, in violation of the Tenth Amendment and unauthorized by the Commerce Clause. *Id*. at 106a-107a. Two judges (including one who joined the unconstitutionality opinion) concluded that the case did not fall

within PLCAA's definition of qualified civil liability action, as they fell within PLCAA's design defect exception. *Id*. at 107a-118a. Four judges dissented, concluding that PLCAA required dismissal and was constitutional. *Id*. at 64a, 140a.

3. Pennsylvania Supreme Court.

The Pennsylvania Supreme Court allowed appeal to address whether the Gustafsons' action constituted a "prohibited qualified civil liability action" under PLCAA; whether the product-defect exception applied to the Gustafsons' action; and whether PLCAA was unconstitutional either because it is not a permissible exercise of the commerce power or because it violates the Tenth Amendment and principles of federalism. *Id*. at 13a.

On March 31, 2025, the Court reversed the Superior Court. *Id.* at 2a. The Court held that the action is a "qualified civil liability action" subject to PLCAA immunity. Pet.App.31a. *Id.* at 31a. The Court next held PLCAA's products-liability exception did not apply to Plaintiffs' claims. *Id.* at 40a. Finally, the Court held that "Congress's Commerce Clause powers permitted it to enact PLCAA . . . [because a] firearm designed and manufactured by an Illinois corporation that was sold and used in Pennsylvania necessarily must have been involved in interstate commerce in some manner." *Id.* at 44a, 46a. It further held that PLCAA does not impermissibly intrude on states' ability to allocate their law-making authority between their legislatures and courts, because "PLCAA has explicitly preempted state tort law in regard to qualified civil liability

actions," and "nothing in the PLCAA dictates to the states which branch of government they can use to enact any laws." *Id*. at 59a-60a.

REASONS FOR GRANTING THE PETITION

This case presents exceptionally important questions about federalism and congressional authority under the Commerce Clause in which courts have lost sight of fundamental principles due to the underlying subject matter of the statute. The Pennsylvania Supreme Court's decision is the latest court, relying on a single decision of the Second Circuit prior to this Court's reformulation of the anticommandeering doctrine, to provide a narrow and unwarranted version of federalism, Tenth Amendment and Commerce Clause holdings in order to uphold PLCAA and more broadly allow federal control of state governing arrangements.

Most fundamentally, the broad implications of upholding PLCAA would allow Congress to infringe upon the sovereign authority of states to make and enforce law through the branch of government they choose. In that respect, PLCAA is unlike any other federal law before or since, but provides a template Congress could use to dictate how States make their laws. PLCAA allows states to enforce liability law in some cases only when a legislative standard is violated, but prevents it when State law is based on common law. But this Court has stated 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); *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., concurring) ("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.").

While Congress can of course enact permissible preemption laws that bar certain state regulation or lawsuits, that is not what PLCAA does. In PLCAA Congress did not preempt state-imposed liability on gun manufacturers and dealers. It did not immunize gun manufacturers or dealers from state liability. Instead, PLCAA expressed Congress's determination that certain state causes of action against gun manufacturers authorized by statutes were legitimate but those authorized by judicial determination without a statutory basis were not. Thus, PLCAA does not prohibit states from enforcing liability law on gun manufacturers or dealers; it simply restricts *how* states make liability law. Courts are commanded not to enforce gun industry liability law in certain cases if that law is made by the judicial branch, but identical cases are allowed if the liability law is blessed by the legislative branch. That is inconsistent with the precepts that "whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern[,]" *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), and "[t]he

Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. 144, 162 (1992).

Further, while Congress relied on its Commerce Clause authority to enact PLCAA, Congress did not seek to regulate any commercial activity. PLCAA does not regulate the firearms industry in any way; it simply bars victims of gun industry negligence like the Gustafsons from bringing – and courts from allowing – otherwise-permissible lawsuits unless they have legislative blessing. That determination, telling States how they may make their laws, not only invades the core of state sovereignty and violates federalism – it also has no basis in the commerce power.

At its heart, the Questions Presented ask whether Congress may insist state law reflect legislative judgments rather than exercises of state common law by courts that are legitimate under state law. And whether the Commerce Clause authorizes laws that do not regulate commercial activity, but "regulate" judges and juries by insisting that they impose liability only when Congress or a state legislature authorizes it.

In these ways, PLCAA represents a unique but wholly improper approach to federal preemption that allows Congress to dictate how States may authoritatively declare their laws. In doing so, Congress invades the very core of state sovereignty and pushes its authority under the Commerce Clause beyond all bounds to do so.

If Congress can dictate to States how they may enact their gun-liability laws to be legally cognizable, it may do the same with respect to any common-law doctrine that a State recognizes—and it will have un-"split the atom of sovereignty," and interred the "idea that our citizens would have two political capacities, one state and one federal, each protected from incursion by the other[,] … each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring).

I. THE PENNSYLVANIA SUPREME COURT'S UNDULY NARROW CONSTRUCTION OF FEDERALISM PRINCIPLES CONFLICTS WITH THIS COURT'S PRECEDENTS AND PERMITS CONGRESS TO REGULATE A CORE ASPECT OF STATE SOVEREIGNTY.

A. PLCAA Prohibits Lawsuits Only When a Court Proceeds without a Legislated Basis.

PLCAA crosses the well-established bright line against regulating States as States. The Act's purpose in handcuffing state courts when exercising purely judicial authority was expressed directly in the law's findings and purposes. *See* Pet.App.277a-279a (§ 7901(a)(6)-(8); § 7901(b)(1)). For example, one Finding conveys the congressional determination that:

> 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.

Pet.App.277a-278a (§ 7901(a)(7)).*

That objection to state judicial decision-making is quite different from the traditional ways in which federal law pre-empts state law. The scope of permissible preemption is directed to all laws that interfere with a federal objective; it embraces state statutes, regulations, and common law causes of action equally. *See Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323-24 (2008). It does not, as PLCAA does, reserve its pique for judicial determinations but withdraws that objection when accompanied by legislative endorsement. Yet, PLCAA represents a congressional objection to

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* Different constitutional rules apply that allow Congress to restrain the exercise of federal sovereign authority while also being disabled from restraining the exercise of state sovereign authority. *Compare City of Boerne v. Flores*, 521 U.S. 507, 536 (1997) (invalidating the Religious Freedom Restoration Act (RFRA) to the extent it limited state authority) with *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 691, 695 (2014) (applying RFRA as a valid restriction on the authority of the federal government).

lawsuits premised on state *common-law causes of action,* such as for negligence or public nuisance. *See Ileto v. Glock, Inc.* [*Ileto II*], 565 F.3d 1126, 1135 (9th Cir. 2009), *cert. denied*, 560 U.S. 924 (2010) (holding that "Congress clearly intended to preempt common-law claims, such as general tort theories of liability.") Earlier and notably, in *Ileto*, a pre-PLCAA motion to dismiss failed when the Ninth Circuit held that plaintiffs stated a claim under California public nuisance and negligence law based on allegations that the manufacturers and sellers of guns had created an illegal secondary market that defendants knew or should have known would put guns into the hands of illegal buyers and result in injuries to innocent victims. *Ileto v. Glock Inc.* [*Ileto I*], 349 F.3d 1191, 1194 (9th Cir. 2003), *cert. denied sub nom., China N. Indus. Corp. v. Ileto*, 543 U.S. 1050 (2005). This Court saw no reason to interfere in that decision by denying certiorari. After PLCAA was enacted, *Ileto II* held it necessary to dismiss the action as there was no statutory basis to support the common-law claims.

PLCAA prohibits a "qualified civil action." from being maintained "in any Federal or State court." Pet.App.280a (§ 7902(a)-(b)). The statute defines a qualified civil action 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, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or

> unlawful misuse of a qualified product by the person or a third party, but shall not include [specified enumerated exceptions.]

Id. at 282a (§ 7903(5)(A)).

One exception, known as the "predicate exception," permits States to override that prohibition if a manufacturer or seller knowingly violated, not just common law, but a "statute applicable to the sale or marketing of [firearms], and the violation was the proximate cause of the harm for which relief is sought." *Id*. at 283a (§ 7903(5)(A)(iii)). PLCAA does not limit what liability standards a statute may adopt *legislatively*.

Thus, for example, the Connecticut Supreme Court held that PLCAA did not bar a lawsuit against manufacturers, distributors, and sellers of the assault rifle used to shoot 20 first-graders and six staff fatally, while wounding two other staff members, at Sandy Hook Elementary School in December 2012. *Soto v. Bushmaster Firearms Int'l, LLC*, 202 A.3d 262, 309 (2019), *cert. denied sub. nom., Remington Arms Co., LLC, v. Soto*, 140 S. Ct. 513 (2019). Although the Court found other asserted causes of action "precluded by established Connecticut law and/or PLCAA," it held that allegations that the defendants "knowingly marketed, advertised, and promoted the [assault rifle] for civilians to use to carry out offensive, military style combat missions against their perceived enemies" were authorized through the predicate exception by the Connecticut Unfair Trade Practices Act (CUTPA), Conn. Gen. Stat. § 42-110a *et seq*. *Id*. at 272, 325.

Soto demonstrates that PLCAA does not completely prohibit lawsuits against manufacturers and sellers, regardless of the underlying legal theory. Instead, Congress preserved what it deemed to be "legitimate" lawsuits, meaning those based on legislative choices. *Id.* at 318 (2019) (quoting legislative history). The Connecticut Supreme Court took note that PLCAA's principal sponsor, Sen. Larry Craig, as well as key House members told their colleagues that the "legislation was primarily directed at heading off unprecedented tort theories, which explains why the predicate exception expressly preserved liability for statutory violations." *Id.* at 320 (citing 151 Cong. Rec. 19,120 (2005) (remarks of Sen. Craig); *id.* at 23,267 (remarks of Rep. Mike Pence); *id.* at 23,273 (remarks of Rep. F. James Sensenbrenner, Jr.)). *See also Ileto II*, 565 F.3d at 1135 ("Congress clearly intended to preempt common-law claims").

Indeed, as the Connecticut Supreme Court held, PLCAA, while taking aim at court-based rulings, allowed for manufacturer and dealer statutory liability "for violation of any applicable law, and not only those laws that specifically govern the firearms trade," based on proponents' assurances that "the bill would not immunize firearms companies that had engaged in any illegal activity." *Soto,* 202 A.3d at 322.

As a proxy for its enmity for so-called common-law theories, Congress determined that lawsuits that exist as a matter of legislative grace were inherently legitimate but not those that lacked statutory blessing, what PLCAA denominated rulings by a "maverick judicial officer or petit jury." Pet.App.278a

(§ 7901(a)(7)). PLCAA thus dictated to States which branch of state government could authoritatively declare state law.

The bottom line is that, if there is applicable state statutory law, the operative section of PLCAA is without effect, and a State may impose the exact same liability that PLCAA would otherwise prohibit if the action were solely based on common law made by the judicial branch. Because PLCAA does not wholly "preclude[a State] from regulating conduct in a field that Congress, acting within its proper authority, has determined must be regulated by its exclusive governance," *Arizona v. United States*, 567 U.S. 387, 399 (2012), PLCAA does not constitute a form of field preemption. Rather, if it can be called preemption, it allows a State to "un-preempt" and retrieve its regulatory authority by acting legislatively.

B. The Pennsylvania Supreme Court Did Not Appreciate this Court's Prohibition on Regulating States as States.

Federalism "was our Nation's own discovery," *U.S. Term Limits, Inc.*, 514 U.S. at 838 (Kennedy, J., concurring), and "central to the constitutional design" for it "adopts the principle that both the National and State Governments have elements of sovereignty the other is bound to respect." *Arizona*, 567 U.S. at 398.

Interference with state authority to determine how its laws are made violates that essential constitutional principle that "States are independent sovereigns in our federal system." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Early in its history, this

Court recognized that the Constitution did not facilitate

> a surrender of powers already existing in state institutions, for the powers of the states depend upon their own constitutions; and the people of every state had the right to modify and restrain them, according to their own views of the policy or principle. On the other hand, it is perfectly clear that the sovereign powers vested in the state governments, by their respective constitutions, remained unaltered and unimpaired, except so far as they were granted to the government of the United States.

Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 325 (1816).

Under the system of dual sovereignty, when, as here, "the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Alden v. Maine*, 527 U.S. 706, 751 (1999). To resist that encroachment, the Constitution recognizes that States retain "'a residuary and inviolable sovereignty,'" *Printz v. United States*, 521 U.S. 898, 919 (1997) (quoting The Federalist No. 39, at 245 (C. Rossiter ed. 1961) (J. Madison)), and "substantial sovereign powers." *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991).

These retained powers "are numerous and indefinite," as they "'extend to all the objects which, in

ordinary course of affairs, concerns the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.'" *Id.* at 458 (quoting The Federalist No. 45, at 292-93 (J. Madison)). For example, the States have enjoyed "historic primacy … [over the] matters of health and safety." *Lohr*, 518 U.S. at 485. They also have plenary authority to organize a representative government without congressional interference as a "power reserved to the States under the Tenth Amendment." *Gregory*, 501 U.S. at 463; *see also Prentis v. Atlantic Coast Line Co.*, 211 U.S. 210, 225 (1908) (Holmes, J.) (acknowledging that there is "nothing to hinder" a state from "unit[ing] legislative and judicial powers in a single hand" "so far as the Constitution of the United States is concerned."). And this Court has recognized that "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 v. California*, 444 U.S. 277, 282 (1980). To intervene in those processes constitutes an impermissible exercise of a power "to directly regulate the States as States [because] the Tenth Amendment requires recognition that 'there are attributes of sovereignty attaching to every state government which may not be impaired by Congress.'" *Hodel v. Virginia Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 286-87 (1981) (citation omitted).

In contravention of these bedrock principles of federalism, the Pennsylvania Supreme Court, like several others before it, limited the Tenth Amendment's scope to the outdated anti-commandeering principle

articulated in *New York*, 505 U.S. at 157 (1992), where this Court held that "Congress may not simply 'commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." Pet.App.50a (quoting *New York*, 505 U.S. at 161) (brackets provided in *New York*). The anticommandeering principle was later employed in *Printz*. There, this Court explained that experience under the Articles of Confederation had persuaded the Framers to avoid federal-state conflicts by prohibiting the federal government from using "States as instruments of federal governance" and "rejected the concept of a central government that would act upon and through the States." *Printz*, 521 U.S. at 919. In the Pennsylvania Supreme Court's view, the anti-commandeering principle provided the sum and substance of the Tenth Amendment's protection of federalism.

It therefore adhered to views expressed in other courts that had reviewed PLCAA and narrowly employed anticommandeering principles. It thus took comfort in the formulation of the essential federalism question posed by the Second Circuit in a 2008 challenge to PLCAA: "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states." Pet.App.52a (quoting *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396 (2d Cir. 2008)). It approvingly reported that the Second Circuit "found the PLCAA did not violate the Tenth Amendment as the Act 'does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.'" Pet.App.52a (quoting *City of New York*, 524 F.3d at 397).

The Pennsylvania Supreme Court found further support for its approach in other PLCAA challenges. *See id*. at 52a (citing *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009) (same); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380 (Alaska 2013) (same); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 323-24 (Mo. 2016) (same). In agreement with those courts, the Pennsylvania court held that "PLCAA does not command state executive officers to implement federal regulations nor does it direct state legislatures to pass any legislation. The Act merely directs that qualified civil liability actions may not be brought in federal or state court." Pet.App.53a.

As understood by these courts, however, federalism is given a short shrift contrary to decisions rendered by this Court. For example, in *Gregory*, state court judges in Missouri challenged a state constitutional provision that set 70 as a mandatory retirement age. To overcome the state constitutional provision, the judges asserted that the Supremacy Clause, U.S. Const. art. VI, cl. 2, allowed Congress to override the state constitutional provision, which it did in the Age Discrimination in Employment Act of 1967, 81 Stat. 602, as amended, 29 U.S.C. §§ 621–634. This Court rejected that argument, holding that Congress was divested from interfering with structural decisions committed to the States as a sovereign. *Gregory*, 501 U.S. 464. Even if applying federal age discrimination law to state officials was not "commandeering" of state officials to implement a federal program, it went to a fundamental aspect of sovereignty because it is "[t]hrough the structure of its government, and the character of those who exercise government authority,

a State defines itself as a sovereign." *Id*. at 460. That States have plenary authority to organize a representative government without congressional interference is a "power reserved to the States under the Tenth Amendment." *Gregory*, 501 U.S. at 463. Shoehorning that fundamental constitutional principle into a bar on commandeering insufficiently respects our system of dual sovereigns.

The Pennsylvania Supreme Court took its cue on federalism and PLCAA from *City of New York*, the first court to grapple with PLCAA's federalism issues. Pet.App.44a. *City of New York* is inconsistent with the subsequently decided *Murphy,* 584 U.S. 453. At issue in *Murphy* was whether the federal Professional and Amateur Sports Protection Act, which generally made it unlawful for a State to "authorize" sports gambling schemes was "compatible with the system of 'dual sovereignty' embodied in the Constitution. *Id*. at 458. The lower courts upheld the Act "because it 'does not command states to take affirmative actions.'" *Id.* at 465 (citation omitted).

Reversing, *Murphy* described the anticommandeering doctrine as "sound[ing] arcane," but gave it a more expansive reach by stating that it represented a "fundamental structural decision … to withhold from Congress the power to issue orders directly to the States." *Id*. at 470. *Murphy* noted that anticommandeering as a principle emerged "relatively recently, when Congress attempted in a few isolated instances to extend its authority in unprecedented ways." *Id*. at 471. *Murphy* explained that *New York* held a law unconstitutional "because 'the Constitution does not

empower Congress to subject state governments to this type of instruction [of taking title to or regulating as Congress preferred low-level radioactive waste].'" *Id*. at 471 (citation omitted). It treated the violation as orders to "either the legislative or executive branch (depending on the branch authorized by state law to take the actions demanded)." *Id*.

The Pennsylvania Supreme Court and the other courts on which it relied did not follow that instruction here or the larger role this Court conveyed to the anti-commandeering principle. It read *Murphy* to use the anticommandeering principle to invalidate a law "that prohibited states from authorizing sports gambling." Pet.App.52a (citing *Murphy*, 584 U.S. at 474). By dictating what a state legislature may not do, it reasoned that the statute at issue in *Murphy* gave control of state legislatures directly to Congress. *Id*. at 52a (citing *Murphy*, 584 U.S. at 474). That is an incorrect reading of *Murphy*. Indeed, that is what every valid statute with pre-emptive effect does. *See, e.g.*, *Barnett Bank of Marion Cnty., N.A. v. Nelson*, 517 U.S. 25, 28 (1996) (holding, "under ordinary pre-emption principles, the federal statute pre-empts the state statute").

To further limit *Murphy's* relevance and its broader reading of the anticommandeering principle, the Pennsylvania court also engaged in sophistry, explaining:

> PLCAA does not bar states from enacting any law and instead merely preempts state law in relation to qualified civil liability actions. The predicate exception does nothing to alter this

> conclusion. Rather, the exception merely excuses from the general definition of a qualified civil liability action "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 which relief is sought[.]" 15 U.S.C. § 7903(5)(A)(iii).

Pet.App.56a.

That incorrectly assumes that state law is never a function of judicial decision-making. But as New York's chief judge wrote, "state courts -- not federal courts -- are the keepers of the common law" and "[e]ven in today's legal landscape, dominated by statutes, the common-law process remains the core element in state court decisionmaking." Hon. Judith S. Kaye, *State Courts at the Dawn of A New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. Rev. 1, 6 (1995) (footnote omitted).

State courts adopt and adapt the common law, which is nothing less than "lawmaking and policymaking by judges." *Id.* at 5. This lawmaking function is "derived not from authoritative texts such as constitutions and statutes, but from human wisdom collected case by case over countless generations to form a stable body of rules that not only determine immediate controversies but also guide future conduct." *Id.* (footnote omitted). Similarly, Justice Cardozo in his seminal work on judicial decisionmaking agreed that common-law judges legislate because "the resulting

product is not found, but made." Benjamin Cardozo, The Nature of the Judicial Process 113-15 (1921).

PLCAA declares that a State that wishes to hold gun manufacturers and dealers liable for conduct that enables or facilitates criminal activity must enact legislation to do so and not rely on state judicial doctrine or common law. That stance could theoretically reflect a proper understanding of limits on federal courts. *See Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001) (recognizing that, without a congressional enactment, "a cause of action does not exist and [federal] courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute."). It does not, however, reflect the authority of state courts. *See id.* at 287 ("[r]aising 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." (*quoting with approval Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment)); *see also Tincher,* 104 A.3d at 381 (Pennsylvania judiciary "retains the authority and duty at common law" to develop state tort law).

This Court recently explained that the anticommandeering principle occurs when the federal government "harnesses a State's legislative or executive authority." *Haaland v. Brackeen*, 599 U.S. 255, 281 (2023). It therefore "applies 'distinctively' to a state court's adjudicative responsibilities." *Id.* at 288 (citing *Printz*, 521 U.S. at 907). It does so because, before Congress created lower courts, the Supremacy Clause anticipated that state courts and state judges would have

to be pressed into service of federal laws. *See id.* at 290-91 (describing the Madisonian Compromise); U.S. Const. art. VI, cl. 2.

Yet the object of PLCAA's ire, state common-law authority, is a lawmaking function over which States have sovereign authority to allocate. As such, when a State assigns that function to the courts, as they are entitled to do, *see Prentis*, 211 U.S. at 225, it is not within congressional authority consistent with federalism principles to require the State to develop its chosen causes of action only through the state legislature. This Court's federalism precedents – and *Murphy* – make that clear, and the Pennsylvania Supreme Court's misuse of the anticommandeering principle, common among other courts, cannot be reconciled with them.

II. THE PENNSYLVANIA SUPREME COURT'S RULING DEEPENS AN INTRACTABLE CONFLICT BETWEEN CIRCUITS AND STATE SUPREME COURTS APPLYING THIS COURT'S FEDERALISM DECISIONS.

In the two decades between *Printz* and *Murphy*, most courts took an unduly narrow view of federalism, applying anticommandeering as its limits and finding only cases analogous to the facts in *Printz* and *New York* to violate the Tenth Amendment. That is evident in the cases upholding PLCAA cited and relied upon by the Pennsylvania Supreme Court, *see* pp. 8, 25 *supra*, including *City of New York* from the Second Circuit, *Adames* from the Illinois Supreme Court, *Est. of Kim* from the Alaska Supreme Court, and *Delana* from

the Missouri Supreme Court. This line of authority conflicts with this Court's current Tenth Amendment precedent, yet it has now been adopted in the highest courts of four states and at least one Circuit in upholding PLCAA.

This misappreciation of this Court's federalism precedent also is reflected in a continuing circuit split on broader federalism issues. For example, the Second Circuit in *State v. Dep't of Justice*, 951 F.3d 84 (2d Cir. 2020), held that denying federal grants to state and local governments for not cooperating with the federal government did not violate the anticommandeering doctrine because the loss of grants were not "so significant a percentage of their annual budgets as to cross the line from pressure to coercion." *Id*. at 116. The Second Circuit's position contrasts with those of the First, Third, Seventh, and Ninth Circuits, all of which upheld resistance to being forced to assist the same federal policies. *See City of Providence v. Barr*, 954 F.3d 23 (1st Cir. 2020); *City of Philadelphia v. Att'y Gen.*, 916 F.3d 276 (3d. Cir. 2019); *City of Chicago v. Sessions*, 888 F.3d 272, 282 (7th Cir. 2018), *reh'g en banc granted in part, opinion vacated in part with respect to issuance of a nationwide injunction*, No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018); *City of L.A. v. Barr*, 941 F.3d 931 (9th Cir. 2019) and *City & County of S.F. v. Barr*, 965 F.3d 753 (9th Cir. 2020).

The Ninth Circuit's differing views on federalism are reflected in *Credit One Bank, N.A. v. Hestrin*, 60

F.4th 1220 (9th Cir. 2023). Credit One Bank sued to prevent a county district attorney from suing over a violation of state law because, *inter alia*, the National Bank Act only authorized the state attorney general to sue. Although the Ninth Circuit found that contention at odds with the Act and therefore did not reach the potential federalism issue, it stated that, "accepting Credit One's argument [that Congress could determine for the State who could bring such an action] would raise serious anti-commandeering concerns under the Tenth Amendment." *Id.* at 1231.

By the same token, as in this case, the narrow application of anticommandeering principles shortchanges federalism's protection of our system of dual sovereignty by allowing Congress to determine who authoritatively declares the law of the States.

III. THE PENNSYLVANIA SUPREME COURT ERRONEOUSLY TREATS STATE JUDICIAL RULINGS AS COMMERCE SUBJECT TO CONGRESSIONAL REGULATION IN CONFLICT WITH THIS COURT'S TEACHINGS.

Congress exercises its power to regulate interstate commerce within three broad categories of activity: use of the channels of interstate commerce; use of "the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities;" and engagement in "activities having a substantial relation to interstate commerce, ... *i.e.,* those activities

that substantially affect interstate commerce." *United States v. Morrison*, 529 U.S. 598, 608-09 (2000) (citations omitted).

PLCAA does not regulate channels or instrumentalities. It does not attempt to regulate the firearms industry. It does not establish standards of behavior for the industry, provide guidelines for regulation of the industry, or provide additional means of enforcement of existing regulations applicable to the industry.

PLCAA, at most, is an attempt to regulate an activity – the adjudication of certain lawsuits but only when authorized by a disfavored branch of state government. *See* Pet.App.278a (§ 7901(a)(8)) ("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").

PLCAA justified Congress's invocation of its commerce power through a finding that the:

> possibility of imposing liability on an entire industry for harm that is solely caused by others … constitutes an unreasonable burden on interstate and foreign commerce of the United States.

Pet.App.277a (§ 7901(a)(6)); *see also* Pet.App.279a (§ 7901(b)(4)) (declaring a purpose of the Act to be "[t]o

prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce."). Still, Congress did not -- nor could it -- explain why lawsuits authorized by legislative bodies do not pose the same "unreasonable" burdens on commerce that are effectuated by lawsuits based on common-law judicial decisions. The only logical explanation is a distrust of courts but not fellow legislators – which does not concern commercial activities or commerce.

PLCAA regulates only non-commercial activities. Its only operative command is addressed to the judicial branch, requiring state and federal courts to refuse jurisdiction in the future and to dismiss immediately all then-pending lawsuits that are not legislatively authorized. *Id.* at 280a (§ 7902(a)-(b)). This Court has made clear, however, that "in every case where we have sustained federal regulation under [the theory that it has an indirect effect on commerce], the regulated activity was of an apparent commercial character." *Morrison*, 529 U.S. at 611 n.4 (striking a law intended to regulate criminal behavior, not economic activities); *see also Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 550 (2012) (opinion of Roberts, C.J.) ("The power to regulate commerce presupposes the existence of commercial activity to be regulated.") (emphasis omitted). The exercise of judicial authority, as opposed to legislative authority, is not of an "apparent commercial character." *Id.*

The distinction PLCAA draws between gun-violence lawsuits that originate from legislation and those that originate from the common law impermissibly regulates the States and dictates how States may establish their laws with respect to gun liability. It seeks only to regulate the exercise of the States' own lawmaking powers – and that is not an exercise of the Commerce Power. The Tenth Amendment confirms the limits on the Commerce Power with respect to incidents of state sovereignty and is thus not overridden by that power. *New York*, 505 U.S. at 156-57.

Just as the Commerce Power is insufficient to override the authority of a state's people "to determine the qualifications of their most important government officials" by overriding a mandatory retirement age for state judges, *Gregory*, 501 U.S. at 463, Congress cannot rely upon the Commerce Clause to invalidate state law based solely on its source within the State. The Commerce Power does not authorize interference with a State's structure, which is the essence of its sovereign authority. *Id.* at 460. For that reason, the determination of which branch or branches of government comprise the authoritative expositor of state policy rests in the people of the State and may well be inviolate. Congress has no Commerce authority to choose between state branches and recognize state law only when emanating from its preferred branch.

In the end, PLCAA is unique. Its structure and exceptions reveal that it is not a rational attempt to

regulate commerce, limit liability exposure to an industry, or preempt state law. Instead, the Act powerfully interferes with the states' allocation of power between their legislative and judicial branches, contrary to the strictures of the Tenth Amendment. It denies to the judicial branch at the state level the power to recognize and adjudicate certain valid claims consistent with the state constitution when based on state common law. Because it defers to a state legislative branch while invalidating state judicial authority, it does not rationally further interstate commerce and instead invades state sovereignty.

As it did with respect to the federalism question, the Pennsylvania Supreme Court relied heavily on other courts for its Commerce Clause ruling. It found persuasive the Second Circuit's determination that PLCAA was authorized by the Commerce Clause where "there can be no question of the interstate character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail." *City of New York*, 524 F.3d at 395 (quoted in Pet.App.131a). The court below also noted that other courts were in lockstep with the Second Circuit. *Id*. (citing *Ileto II,* 565 F.3d at 1140; *Adames,* 909 N.E.2d at 765; and *Delana*, 486 S.W.3d at 323).

It found "particular significance" in PLCAA's findings and purposes about the effect of lawsuits on the industry and found it "completely reasonable" for Congress to want to eliminate those lawsuits. Pet. App.44a, 46a. Nowhere did the court discuss the

rationality of finding that lawsuits based on common-law rulings but not those based on statutory authorizations can burden interstate commerce differently.

IV. THE PENNSYLVANIA SUPREME COURT'S APPLICATION OF THE COMMERCE CLAUSE REVEALS THE NEED TO CLARIFY THE "SUBSTANTIALLY AFFECTING COMMERCE" BASIS FOR CONGRESSIONAL AUTHORITY.

Courts, including the court below, that have upheld PLCAA as a legitimate exercise of Congress's Commerce Clause authority have focused on whether lawsuits substantially affected interstate commerce, as Congress had found and declared as PLCAA's purpose. They have failed to recognize *Lopez*'s and *Morrison's* teaching that the proper focus of analysis when considering the substantial effects approach is on the economic nature of the regulated activity. 529 U.S. at 610.

In *United States v. Lopez*, that focus meant a determination of the economic effect of possession of a gun in a school zone, not on how it might burden the industry more broadly. *See* 514 U.S. 549, 561 (1995). This Court also explicitly rejected an argument about the costs of crime, in part, because under that reasoning there were no limits to the commerce power. *Id.* at 564. It would then embrace "all activities that might

lead to violent crime, regardless of how tenuously they relate to interstate commerce." *Id*.

Similarly, in rejecting a rationale based on any impact on national productivity, this Court worried that accepting the argument would allow Congress to "regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example." *Id*. In fact, this Court suggested that "it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign" under such a regime. *Id*.

Morrison, too, instructs that "the proper inquiry" is whether the challenge is to "a regulation of activity that substantially affects interstate commerce." 529 U.S. at 609; *see also Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173 (2001) (indicating that the inquiry focuses on the "precise object or activity that, in the aggregate, substantially affects interstate commerce.").

The rationales upholding PLCAA on Commerce Clause grounds rely on an analysis that is as open-ended as the "costs of crime" or "national productivity" rationales rejected in *Lopez*. If Congress can regulate state lawsuits based on which branch of state government authorizes it, because liability could

substantially affect commerce, the authority ceded to Congress would be utterly boundless.

Courts have struggled with the substantially affecting commerce rubric, and this case presents this Court with an opportunity to explain its limitations.

V. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO DECIDE THESE ISSUES.

This case provides an excellent vehicle to decide both Questions Presented and assure that the courts follow this Court's jurisprudence. The essential facts are undisputed; PLCAA presents a unique but potentially enticing approach for Congress to impermissibly provide immunity for an industry through restricting state lawmaking authority; and PLCAA has received extensive percolation as courts continue to trod down the same path the Second Circuit blazed before this Court's clarification in *Murphy*.

The Commerce Clause does not authorize Congress to define how a State makes its liability laws, permitting it if it comes from legislation and prohibiting it if it comes through judicial decisions, and the Tenth Amendment protects the States' authority to choose which path to take. Without the exercise of this Court's discretion, courts will continue to allow this neutering of state sovereignty and Congress could easily redefine the dual sovereignty so critical to our system of government and remake it in a federal image.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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APPENDIX A

[J-22-2024]
IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

TODD, C.J., DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, McCAFFERY, JJ.

MARK AND LEAH GUSTAFSON, INDIVIDUALLY ANDAS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON
v.
SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE AND THE UNITED STATES OF AMERICA
APPEAL OF: SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE

No. 7 WAP 2023
Appeal from the Order of the Superior Court entered August 12, 2022, at No. 207 WDA 2019 Reversing the Order of the Court of Common Pleas of Westmoreland County entered January 15, 2019, at No. 1126 of 2018 and Remanding.

ARGUED: April 9, 2024
OPINION

JUSTICE MUNDY DECIDED: MARCH 31, 2025

In March 2016, thirteen-year-old J.R. Gustafson tragically died after he was accidentally shot by his fourteen-year-old friend (the Juvenile) at the home of another. After J.R.'s death, his parents, Mark and Leah Gustafson filed the underlying action against Springfield Armory, the manufacturer of the firearm used to shoot J.R., and Saloom Department Store, the retailer that sold the firearm. The trial court sustained preliminary objections filed by Springfield and Saloom (collectively, the Defendants) and dismissed the Gustafsons' complaint with prejudice. In doing so, the court relied on the federal Protection of Lawful Commerce in Arms Act (PLCAA or the Act), which bars certain civil actions against firearms manufacturers and sellers from being brought in either state or federal court. On appeal, an en banc panel of the Superior Court issued a per curiam order reversing the trial court's sustaining of preliminary objections and remanding the case for further proceedings. We granted allowance of appeal to address whether the PLCAA operates to bar the Gustafsons' action and, if so, whether the PLCAA is constitutional under the Commerce Clause and the Tenth Amendment of the United States Constitution and principles of federalism. After careful and sober consideration, we answer those questions affirmatively. We therefore reverse the Superior

Court's per curiam order and affirm the trial court's dismissal of the Gustafsons' action with prejudice.

I. BACKGROUND

A. The PLCAA

Necessary to the disposition of this matter is a thorough understanding of the PLCAA. Thus, we begin there. When Congress passed the PLCAA in 2005, it included specific enumerated findings of fact and purposes. Congress found, *inter alia*:

> (3) 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.
>
> (4) 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.
>
> (5) 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.

(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, 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.

(7) 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. [ ]

> (8) 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 judgements 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)-(8). In light of these findings, Congress set out its specific purposes in passing the PLCAA, including, *inter alia*, to "prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearms products or ammunition products by others when the products functioned as designed and intended[]" and "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." *Id*. at § 7901(b)(1) and (4).

To these ends, the PLCAA bars a "qualified civil liability action" from being brought in either federal or state court. *Id*. at § 7902(a). 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, abatement,

restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]" *Id.* at § 7903(5)(A). A "qualified civil liability action," however, does not include:

> (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 [ ];
>
> (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 manufacturer 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 provisions of chapter 44 of Title 18 or chapter 53 of Title 26.

Id. at § 7903(5)(A)(i)-(vi). These enumerated subsections are often referred to as the PLCAA's exceptions.

The Act also defines several terms included within the definition of a "qualified civil liability action" that are relevant to our current discussion. Pertinently, the Act defines a "qualified product" as "a firearm … , or ammunition … , or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce." *Id.* at § 7903(4). A "manufacturer" is defined as "with respect to a qualified product, 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[.]" *Id.* at § 7903(2). A "seller" on the other hand, with respect to a qualified product, is an importer, dealer, or person engaged in the business of selling ammunition, as defined by Title 18, who is engaged in that business in interstate or foreign commerce at the wholesale or retail level. *Id.* at § 7903(6). Lastly, while the PLCAA does not define "criminal misuse" it defines "unlawful misuse" as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." *Id.* at § 7903(9).

B. Factual and Procedural Background

On March 20, 2016, J.R. and the Juvenile were visiting a residence in Mt. Pleasant, Westmoreland County.[1] At some point, the Juvenile came into possession of a semiautomatic handgun (the Firearm), which was manufactured by Springfield and purchased by the Firearm's owner from Saloom. Believing the Firearm was unloaded, as the ammunition magazine had been removed, the Juvenile pulled the Firearm's trigger. Unbeknownst to the Juvenile, however, a live round remained in the chamber and, when the Juvenile pulled the trigger, the live round discharged, killing J.R. As a result of his actions, and upon his admission, the Juvenile was adjudicated delinquent of involuntary manslaughter in juvenile court.

In response to J.R.'s death, his parents Mark and Leah Gustafson (Plaintiffs), in their individual capacity and as the administrators of J.R.'s Estate, filed a complaint against the Defendants pursuant to the Wrongful Death and Survivor Statutes (Complaint).[2] Specifically, Plaintiffs raised products liability claims asserting defective design, negligent design and sale, and negligent warnings and

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[1] The facts are taken from Plaintiffs' complaint. As the trial court sustained Defendants' preliminary objections in the nature of a demurrer, we must accept Plaintiffs' factual allegations as true for purposes of this appeal. *See Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008).

[2] Complaint at ¶¶ 15 and 16 (relying on 42 Pa.C.S. §§ 8301 and 8302).

marketing in relation to the Firearm, averring Defendants' actions were the proximate cause of J.R.'s death.

Defendants filed preliminary objections to the Complaint in the nature of a demurrer, seeking dismissal with prejudice pursuant to the PLCAA. According to Defendants, the Firearm was a qualified product, and the case constituted a qualified civil liability action under the PLCAA because J.R.'s injuries were caused by the Juvenile's unlawful use of the Firearm. Further, Defendants contended that none of the PLCAA's exceptions applied. According to Defendants, the only exception that arguably applied was exception (v), otherwise known as the "product defect exception." *See* 15 U.S.C § 7903(5)(A)(v). However, Defendants maintained that because the Complaint specifically averred that the Juvenile intentionally pulled the Firearm's trigger shooting and killing J.R., and that the Juvenile was charged with, and adjudicated delinquent of, involuntary manslaughter, the product defect exception was inapplicable. In other words, the Juvenile's volitional act of pulling the trigger constituted a criminal offense, which, under the exception, is considered the sole proximate cause of J.R.'s injuries and thus, the exception did not apply. Accordingly, Defendants insisted that the PLCAA barred each of Plaintiffs' causes of actions, requiring the trial court to dismiss the Complaint with prejudice.

Plaintiffs filed a response, asserting the PLCAA did not bar their action. In particular, they argued that since the PLCAA purports to intrude on a

traditional area of state sovereignty, a court must interpret the Act to minimize that intrusion and only find that it bars claims when Congress has made its intent clear by providing a plain statement that certain claims are prohibited. Plaintiffs insisted that when viewing their action through this lens, the matter could not be considered a qualified civil liability action because: (1) the harm they alleged was not solely caused by the criminal misuse of a firearm, but was caused, at least in part, by Defendants' own tortious conduct; and (2) the product defect exception should be read expansively to not include juvenile misdeeds as criminal acts. Further, Plaintiffs argued that if the PLCAA barred their claims, the Act itself was unconstitutional because it, *inter alia*, violated both principles of federalism and the Tenth Amendment to the United States Constitution and was not a legitimate exercise of Congress' Commerce Clause authority.[3] Upon learning of the Plaintiffs' constitutional arguments, the United States of America (United States or the government) intervened to defend the PLCAA's constitutionality. After hearing argument, the trial court sustained Defendants' preliminary objections and dismissed Plaintiffs' Complaint with prejudice, finding the PLCAA barred all of Plaintiffs' claims and was constitutional.

Plaintiffs appealed the dismissal to the Superior Court and reasserted both their statutory and

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[3] Plaintiffs also argued the PLCAA violated the Due Process and Equal Protection clauses of the Fifth Amendment. This Court did not grant allowance of appeal to address those issues. As such, we will not discuss them further.

constitutional arguments. Initially, a three-judge panel of the court, in a published opinion, held the PLCAA barred Plaintiffs' Complaint. *Gustafson v. Springfield, Inc.*, 207 WDA 2019 (Pa. Super. filed Sept. 28, 2020) (withdrawn). The panel, however, also held the Act unconstitutional, opining that it exceeded Congress' authority under the Commerce Clause and violated the Tenth Amendment. Thus, the intermediate court reversed the trial court's order and remanded the case with directions for the trial court to enter a declaratory judgment in Plaintiffs' favor declaring the PLCAA "repugnant to the constitution of the United States and, therefore, without the force or effect of law." *Id*. at 63.

Both Defendants and the United States filed applications for reargument en banc. The court granted reargument and withdrew the panel's decision. After supplemental briefing, the en banc panel issued a *per curiam* order reversing the trial court's order sustaining Defendants' preliminary objections and remanding for further proceedings. *Gustafson v. Springfield, Inc.*, 282 A.3d 739, 740 (Pa. Super. 2022) (*per curiam*). Although five of the nine participating judges authored opinions either in support or dissent of the court's disposition, no single expression or rationale garnered majority support. Rather, three judges concluded the PLCAA barred Plaintiffs' claims but was unconstitutional, *see id*. at 740-57 (Kunselman, J.) (Opinion in support of *Per Curiam* Order to Reverse) (joined by Panella, P.J and Lazarus, J.); one Judge believed the Act both did not bar Plaintiffs' claims and was unconstitutional, *see id*. at 757-62 (Bender, P.J.E) (Opinion in Support of *Per*

Curiam Order to Reverse); one Judge thought the PLCAA was constitutional but did not bar Plaintiffs' action, *see id*. at 762 (Dubow, J.) (Opinion in Support of *Per Curiam* Order to Reverse); and four Judges found the Act both barred Plaintiffs' claims and was constitutional, *see id*. at 762-76(Olson, J., dissenting) (joined by Bowes, J. and McCaffery, then J., and Murray, J. concurring in the result); *id*. at 776-89 (Murray, J., dissenting) (joined by Bowes, J., Olson, J. and McCaffery, then J. concurring in the result). Altogether, a five-judge majority voted to reverse, albeit for different reasons – two judges concluded the PLCAA simply did not apply under the facts as alleged in Plaintiffs' Complaint with conflicting opinions as to the constitutionality of PLCAA, while three judges held that, even if the PLCAA barred the Plaintiffs' action, the Act was unconstitutional.

In response to the Superior Court's *per curiam* order and myriad of accompanying opinions, Defendants filed an application to correct, arguing that since a majority of the court found both that the PLCAA barred Plaintiffs' Complaint and was constitutional, the trial court's order sustaining their preliminary objections should be affirmed, not reversed. The Superior Court denied Defendants' request, stating the *per curiam* order "properly reflect[ed] the votes of the individual judges and their separate writings in directing that the PLCAA does not bar the claims at issue[,]" and "accordingly reflect[ed] only th[e] [c]ourt's majority agreement to reverse the trial court's order, and all reasoning reflected in the writings attached to the [o]rder are

dicta." *Gustafson v. Springfield, Inc*., 207 WDA 2019 (Pa. Super. filed August 19, 2022) (*per curiam*).

We granted allowance of appeal to address the following issues:

> (1) Do [Plaintiffs'] claims for damages against the manufacturer and seller of a firearm that was criminally or unlawfully misused by a third party constitute a prohibited qualified civil liability action pursuant to the [PLCAA], 15 U.S.C. §§ 7901-7903 [ ]?
>
> (2) Do [Plaintiffs'] claims fail to satisfy the product defect exception to the PLCAA when the discharge of the firearm was caused by an intentional trigger pull while the firearm was pointed at another person and resulted in a juvenile delinquency adjudication for involuntary manslaughter?
>
> (3) Is the PLCAA a permissible exercise of the power of Congress pursuant to Article I, Section 8 of the U.S. Constitution, or does it instead violate the Tenth Amendment and principles of federalism?

Gustafson v. Springfield, Inc., 296 A.3d 560 (Pa. 2023) (order).[4]

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[4] On October 4, 2024, the Supreme Court granted *certiorari* in *Smith & Wesson Brands v. Estados Unidos Mexicanos*, 145 S.Ct. 116 (2024) (Mem), Docket No. 23-1141, for which the Court held argument on March 4, 2025. There, the Mexican government brought an action against several firearms companies alleging the companies' involvement in illegal trafficking of guns into

As noted, the trial court sustained Defendants' preliminary objections in the nature of a demurrer. We review that decision under the following well settled standard:

> When an appellate court rules on whether preliminary objections in the nature of a demurrer were properly sustained, the standard of review is *de novo* and the scope of review is plenary. The court may sustain preliminary objections only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief. For the purpose of evaluating the legal sufficiency of the challenged pleading, the court must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts.

Mazur, 961 A.2d at 101 101 (Pa. 2008) (internal citations omitted).

Mexico, which were then used by Mexican drug cartels. The First Circuit held that the action was a "qualified civil liability action" under the PLCAA but that the action satisfied the predicate exception, 15 U.S.C. § 7903(5)(A)(iii), to the PLCAA's bar. *Estados Unidos Mexicanos v. Smith & Wesson Brands*, 91 F.4th 511 (1st Cir. 2024). The issues the High Court granted *certiorari* on deal with the predicate exception's applicability and do not implicate the issues this Court granted allowance of appeal to review.

Based on the claims presently before us, we are tasked with addressing questions of both statutory interpretation and constitutional validity. We will first consider whether the PLCAA operates to bar Plaintiffs' claims and then address Plaintiffs' constitutional challenges.

II. Applicability of the PLCAA

Determining whether the PLCAA bars Plaintiffs' Complaint requires us to interpret the Act, a federal statute. In this regard, we have previously explained:

> "The construction of a federal statute is a matter of federal law." Council 13, [*Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO ex rel. Fillman v. Rendell*,] 986 A.2d [63,] [ ] 80 [(Pa. 2009)]. Pursuant to federal rules of statutory construction, the courts consider the particular statutory language, as well as the design of the statute and its purposes in determining the meaning of a federal statute. *Id*. (citing *Crandon v. United States*, 494 U.S. 152, 158 (1990)). But, if the [statute's] language is clear, we should refrain from searching other sources in support of a contrary result. *See Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 228[ ] (2008) ("We are not at liberty to rewrite the statute to reflect a meaning we deem more desirable."); *Carter v. United States*, 530 U.S. 255, 271[ ] (2000) (statutory interpretation "begins by examining the text … not by psychoanalyzing those who enacted it"); *United States v.*

> *Gonzales*, 520 U.S. 1, 6[ ] (1997) (where "[g]iven [a] straightforward statutory command, there is no reason to resort to legislative history*"); Connecticut Nat'l Bank v. Germain*, 503 U.S 249, 252-54[ ] (1992) ("[I]n interpreting a statute a court should always turn first to one cardinal canon before all others. We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'"). *Accord Dooner v. DiDonato*, [ ] 971 A.2d 1187, 1195 ([Pa.] 2009) ("The language used by [Congress] is the best indication of its intent.").

Samuel-Bassett v. Kia Motor Am., Inc., 34 A.3d 1, 51 (Pa. 2011).

Further, as the PLCAA bars a qualified civil liability action from being brought in state court per 15 U.S.C. § 7902(a), we are tasked with interpretating statutory provisions that expressly preempt state law. While the preemptive language of the PLCAA "means that we need not go beyond that language to determine whether Congress intended the [federal statute] to pre-empt at least some state law, we must nonetheless identify the domain expressly pre-empted by that language." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484 (1996) (internal citation and quotations omitted). In *Medtronic*, the High Court explained that in determining the extent of Congress' intended

preemption, courts are guided by two presumptions: (1) the presumption that Congress did not intend to preempt or supersede the state's historic police powers unless that intent is clear and manifest; and (2) the purpose of Congress is the touchstone in every preemption case. *Id.* at 485. However, the Supreme Court has also explained that when a federal statute contains an express preemption clause, courts "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce of U.S. v. Whiting*, 563 U.S. 582, 594 (2011) (quoting *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993)). Further, when a Congressional statute contains an express preemption clause, courts "do not invoke any presumption against pre-emption[.]" *Commonwealth of Puerto Rico v. Franklin California Tax-free Trust*, 579 U.S. 115, 125 (2016). Instantly, we find that the PLCAA contains such an express preemption clause, which explicitly preempts state law relative to qualified civil liability actions. *See* 15 U.S.C. § 7902(a). Thus, we do not apply any presumption against preemption and, instead, focus on the PLCAA's plain language.

Plaintiffs, relying on *Gregory v. Ashcroft*, 501 U.S. 452 (1991),[5] and *Bond v. United States*, 572 U.S. 844

[5] In *Gregory*, state court judges brought a challenge under the federal Age Discrimination in Employment Act (ADEA) with respect to a mandatory retirement provision of the Missouri Constitution requiring state judges to retire at the age of seventy. In rejecting the judges' ADEA claim, the United States Supreme Court explained that the authority of states to determine the qualifications of important elected officials is at the heart of a

(2012),[6] argue that this Court should employ a narrow interpretation of the PLCAA. They assert that the PLCAA intrudes on Pennsylvania's sovereignty in a myriad of ways, which, absent a "plain statement" of Congress' intent to so intrude, requires us "to interpret [the PLCAA] in a way that minimizes [that] intrusion[.]" Plaintiffs' Brief at 22.

Initially, it is important to note that *Gregory* and *Bond* involved *implied* preemption statutes, as

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representative government, and such authority is reserved to the states under the Constitution. *Gregory*, 501 U.S. at 463. The Court further invoked the "plain statement" rule, explaining that "'[i]f Congress intends 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.'" *Id*. at 460 (internal citation omitted). The High Court refused to read the ADEA to cover state judges because Congress had not made it clear in the statute that judges were included. *See id*. at 467.

[6] Congress enacted the Chemical Weapons Convention Implementation Act of 1998 (the Chemical Weapons Act) in order to implement the International Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. In *Bond*, a defendant was convicted of possessing and using a chemical weapon under the Chemical Weapons Act after spreading two toxic chemicals on the car, mailbox, and doorknob of her romantic rival. While the Chemical Weapons Act could be read to include the defendant's conduct, the United States Supreme Court found that Congress was not completely clear that the statute intended to cover purely local minor criminal offenses and concluded reading the statute in such a manner "would mark a dramatic departure from [its] constitutional structure and a serious reallocation of criminal law enforcement authority between the Federal Government and the States." *Bond*, 572 U.S. at 866. As such, the Court found the Chemical Weapons Act did not cover the defendant's actions.

opposed to the PLCAA's *express* preemption. *See Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 323 (Mo. 2016). Accordingly, other courts, such as the Supreme Court of Missouri, have found that *Gregory* and *Bond* are inapplicable to an analysis of the PLCAA because the Act "expressly and unambiguously preempts state tort law, subject to the enumerated exceptions." *Id*. We agree that *Gregory* and *Bond* are inapplicable to our analysis of the PLCAA because the Act expressly and unambiguously preempts state tort law. *See also Travieso v. Glock Inc.*, 526 F. Supp.3d 533, 541 (D.Ariz. 2021) ("[T]he PLCAA contains a clear statement of Congress's intent to preempt the states."); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387-88 (Ak. 2013) ("The PLCAA expressly preempts state common law by requiring that state courts immediately dismiss qualified civil liability actions."). We further agree that "there is no need to employ a narrow construction" when analyzing the PLCAA. *Delana*, 486 S.W.3d at 323. As we reject Plaintiffs' contention that we must employ a narrow reading to the PLCAA's preemption clause, our understanding of the scope of that preemption "must rest primarily on a fair understanding of congressional purpose[,]" which is "primarily … discerned from the language of the pre[]emption statute and the statutory framework surrounding it." *Travieso*, 526 F.Supp.3d at 541 (quoting *Medtronic*, 518 U.S. at 485-86) (internal citations and quotations omitted and emphasis removed).

A. Qualified Civil Liability Action

As noted, PLCAA bars a "qualified civil liability action" from being brought in state court and defines such an action, subject to specific exceptions discussed more fully below, 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, abatement, restitution, fines, 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). Applying the plain language to the instant matter, Plaintiffs (1) brought a civil action against both a manufacturer and seller, (2) of a qualified product, (3) for damages, (4) resulting from the criminal or unlawful use of a qualified product by a person or third party, thus seemingly barring their claim under the PLCAA.[7]

However, the crux of Plaintiffs' argument is that Section 7903(5)(A) of the Act does not bar their action because their claims do not "result[ ] from the criminal or unlawful misuse of a qualified product[.]" Plaintiffs observe that the PLCAA does not define the term "resulting from" and the Court should interpret the

[7] Plaintiffs do not contest that Defendants qualify as either manufacturers or sellers under the PLCAA or that the Firearm is a qualified product.

term in light of the PLCAA's stated purposes. Specifically, according to Plaintiffs, Congress intended the PLCAA to bar causes of action "'for the harm solely caused by the criminal or unlawful misuse of' a gun [,]" Plaintiffs' Brief at 39 (quoting 15 U.S.C. § 7901(b)(1) (emphasis added by Plaintiffs)), rather than harms caused by a combination of third-party gun misuse and gun company conduct, such as that which led to J.R.'s death. *Id*. at 41. Plaintiffs argue that an interpretation of Section 7903(5)(A) that would bar causes of action where the harm was caused by a combination of third-party criminal misuse of a firearm and gun company actions would ignore the phrase "solely caused by" in Section 7901(b)(1) and violate rules of statutory construction requiring courts to give effect to all provisions of a statute. *Id*. at 40 (citing *Bernier v. Bernier*, 147 U.S. 242, 246 (1893)). Plaintiffs further contend that reading Section 7903(5)(A) consistently with Section 7901(b)(1) accomplishes Congress' stated intent to prohibit theories of liability "without foundation." *Id*. at 41 (quoting 15 U.S. § 7901(a)(7)). Plaintiffs also reiterate their position that *Bond* and *Gregory* mandate their interpretation.[8]

In response, Defendants counter that the facts and circumstances of this case clearly satisfy each of the required elements of a "qualified civil liability action." Specifically, as to Section 7903(5)(A)'s requirement that damages "result[ ] from the criminal

[8] Plaintiffs additionally argue that federalism mandates the Court adopt their position. We address Plaintiffs' federalism concerns later in our discussion of the PLCAA's constitutionality.

or unlawful misuse of a qualified product[,]" Defendants assert Plaintiffs' injuries arise entirely from the Juvenile's independent criminal acts. Defendants' Brief at 17. Defendants observe the Juvenile was adjudicated delinquent of involuntary manslaughter for his actions resulting in J.R.'s death and that, under Pennsylvania law, a delinquent act includes "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[.]" *Id*. at 17-18 (quoting 42 Pa.C.S. § 6302) (emphasis removed)). In Defendants' view, the Juvenile's adjudication "conclusively establishes that Plaintiffs' claims are based on the criminal misuse of the [Firearm] by a third party[,]" *id*. at 19, and the action is thus a "qualified civil liability action" pursuant to the PLCAA.[9] The United States does not take a position on whether the PLCAA bars Plaintiffs' claims but, as discussed *infra*, only advocates in support of the PLCAA's constitutionality.[10]

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[9] After the Court held oral argument, Defendants filed a request entitled "Application Under PA.R.A.P. 2501(a)" (Application) in order to bring the opinion from the Rhode Island District Court in *Santos v. City of Providence*, 2024 WL 1198275 (D.R.I. Mar. 20, 2024), to the Court's attention. Neither Plaintiffs nor the United States have filed a response to the Application. The Application is granted.

[10] Numerous amici have also filed briefs in support of the parties. The Commonwealth of Pennsylvania, through the Office of the Attorney General, Federalism Scholars, the Pennsylvania Association for Justice, and Everytown for Gun Safety Support Fund filed briefs in support of Plaintiffs. The State of Montana, joined by nineteen other states, the Philadelphia Association of Defense Counsel and the Pennsylvania Defense Institute, and

Initially, we find Plaintiffs' reliance on the PLCAA's purpose section, Section 7901(b)(1), in an attempt to narrow the Act's preemptive language, unpersuasive. Addressing an identical argument, the District Court of Arizona stated:

> While instructive, a statute's purposes section cannot control over the law's express terms. Preambles and prefatory language, such as the findings and purposes section of the PLCAA, are valid sources for determining congressional intent. ANTONIN SCALIA & BRYAN A GARDNER, READING LAW 167-70 (2012). However, these sources are used to resolve ambiguities, not to create them, and it is well established that the purposes section of a statute will not control in the face of clear enacting provisions. *Jogi v. Voges*, 480 F.3d 822, 834 (7th Cir. 2007) (citing cases); *see also H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 245[ ] (1989); 2A SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 47.04, at 146 (5th ed. 1992, Norman Singer ed.). In the present case, the language of the PLCAA's enacting provisions clearly shows Congress intended to preempt a broader scope of actions than those suggested by the Plaintiff. As such, the recitation of the phrase "solely caused" in the purposes section will not control the Court's analysis.

The National Shooting Sports Foundation, Inc. have filed briefs in support of Defendants.

Travieso, 526 F.Supp.3d at 543. *See also Estate of Kim*, 295 P.3d at 386-87 ("[A] statutory preamble can neither restrain nor extend the meaning of an unambiguous statute; nor can it be used to create doubt or uncertainty which does not otherwise exist. The [plaintiff's] construction would elevate the PLCAA's preamble over the substantive portion's clear language." (internal citations and quotations omitted)); *Delana*, 486 S.W.3d at 322 ("The general statement of the purpose of the PLCAA does not redefine the plain language of a statute. Therefore, the statement of purpose does not overcome the fact that the specific substantive provisions of the PLCAA expressly preempts all qualified civil liability actions against firearms sellers, including claims of negligence." (internal citations omitted)). In line with courts that have previously considered the issue, we agree that the PLCAA's purpose section could be helpful in resolving any ambiguity in the Act's operative language. However, we find that the PLCAA's definition of a "qualified civil liability action" as an action seeking damages "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[,]" contains no such ambiguity and clearly evinces Congress's intent to preempt a broader scope of actions than those suggested by Plaintiffs. To wit, if Congress intended to limit the Act's bar on qualified civil liability actions to those "solely caused by the criminal or unlawful misuse of firearms products[,]" it could have used that language in Section 7309(5)(A). Stated differently, Congress's failure to employ such limiting language indicates its intent for the Act to encompass a wider range of civil actions. *See Clay v. United States*, 537

U.S. 522, 528 (2003) ("When Congress includes particular language in one section of a statute but omits it in another section of the same Act, we have recognized, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusions or exclusion.") (internal quotations and citations omitted).

Our conclusion is further supported by the fact that Plaintiffs' interpretation would render several of the PLCAA's exceptions superfluous. *See Travieso*, 526 F.Supp.3d at 543. For example, as to exception (iii), Section 7903(5)(A)(iii), known as the "predicate exception,"[11] "if [the] PLCAA preemption never covered cases alleging any wrongful conduct by a manufacturer, then the exception allowing actions for a seller's knowing violation of State or Federal gun laws would be completely unneeded." *Id*. The same conclusion applies to the "product liability exception", which is particularly relevant here. This exception states 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 harm." 15 U.S.C. § 7903(5)(A)(v) (emphasis added). Plaintiffs' position that the PLCAA only covers actions where the harm was solely caused by a third-party bad actor would render the product liability exception's limitation of

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[11] Exception (iii) "has come to be known as the 'predicate exception' because a plaintiff not only must present a cognizable claim, he or she also must allege a knowing violation of a 'predicate statute.'" *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1132 (9th Cir.2009) (citing, *inter alia*, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir.2009)).

proximate cause absolutely meaningless. *See id.* at 543-44. Thus, we decline Plaintiffs' invitation to graft the limiting language "solely caused" contained in the PLCAA's purpose section onto the Act's broader definition of a "qualified civil liability action."

As to whether Plaintiffs' alleged harm "result[ed] from the criminal or unlawful misuse of a qualified product[,]" 15 U.S.C. § 7903(5)(A), we find the Illinois State Supreme Court's decision in *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), with facts strikingly similar to those in the case *sub judice*, to be particularly instructive. In that case, a thirteen-year-old boy (the shooter) came into possession of firearms owned by his father. *Adames*, 909 N.E.2d at 745. The shooter showed the firearms to his friend (the victim) and the boys started playing around with the weapons. *Id.* at 746. At some point, the shooter removed the magazine from one of the firearms and placed it in his pocket. *Id.* Then, believing the firearm was unloaded because he had removed the magazine, the shooter pointed the firearm at the victim and pulled the trigger, discharging the gun and shooting the victim. *Id.* The victim died as a result of his injuries and the shooter was later found delinquent of, *inter alia*, involuntary manslaughter. *Id.*

The victim's estate (the Estate) filed suit against, *inter alia*, Beretta U.S.A. Corporation (Beretta), the manufacturer of the firearm, raising claims for product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. *Id.* at 751. After the PLCAA was implicated, the Estate argued that its action was not

a qualified civil liability action because the alleged harm did not "result[ ] from the criminal or unlawful misuse of a qualified product." *Id*. at 760. Relying on the PLCAA's definition of "unlawful misuse," the Illinois Supreme Court rejected the Estate's argument, determining that "[the shooter's] use of the [firearm] … 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.'" *Id*. 761. Further, relying on Black's Law Dictionary's definition of "criminal" as an adjective, the court found that the shooter's misuse of the firearm also "had the character of a crime and 'in the nature of a crime' and, therefore, was a criminal misuse." *Id*.

In reaching these determinations, the Illinois Supreme Court rejected the Estate's argument that it should not look to the shooter's juvenile adjudication in determining whether there was an unlawful or criminal misuse because the shooter had not been convicted of anything and lacked criminal intent. The court observed that the PLCAA does not require a criminal conviction or criminal intent. Rather, it merely requires criminal or unlawful misuse. *Id*. In fact, the court noted that Congress did require a conviction in order for an exception to the PLCAA to apply under Section 7903(5)(A)(i). *Id*. at 761-62 (citing 15 U.S.C. § 7903(5)(A)(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[.]")). The court found that when Congress includes particular language in one

section of a statute but omits it from another section of the same act, courts may presume Congress acted intentionally and purposely in that exclusion. *Id*. at 762 (citing *Clay*, 537 U.S.at 528).

Similar to *Adames*, in the case *sub judice*, the Juvenile was adjudicated delinquent in juvenile court of involuntary homicide for his actions related to the shooting of J.R. Under the Juvenile Act, 42 Pa.C.S. §§ 6301-6375, a "delinquent act" is defined as, absent certain exceptions not relevant here, "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.C.S. § 6302. Pursuant to the Crimes Code, "[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.C.S. § 2504(a). In order to adjudicate a child delinquent, the court must find the child committed the delinquent act by proof beyond a reasonable doubt. See 42 Pa.C.S. § 6341(b). As such, the Juvenile's adjudication for involuntary manslaughter is proof beyond a reasonable doubt that, through his reckless or grossly negligent actions in shooting J.R. with the Firearm, he caused J.R.'s death, in violation of the criminal law of this Commonwealth.

The PLCAA defines "unlawful misuse" as "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9). The Juvenile's adjudication for involuntary manslaughter is proof

beyond a reasonable doubt that he violated a statute related to his use of the Firearm, which all parties concede is a "qualified product." In this regard, we concur with the Illinois Supreme Court's conclusion in *Adames* that a juvenile adjudication clearly satisfies the PLCAA's definition of "unlawful misuse." *Adames*, 909 N.E.2d at 761.

That said, the PLCAA does not define "criminal misuse." Thus, as the Illinois Supreme Court did in *Adames*, we consult Black's Law Dictionary (Black's). *See Commonwealth v. Gamby*, 283 A.3d 298, 307 (Pa. 2022) ("To discern the legislative meaning of words and phrases, our Court has on numerous occasions engaged in an examination of dictionary definitions.") (internal citations omitted). "Criminal" in Section 7903(5)(A) of the Act is used as an adjective and Black's defines "criminal" in its adjective form as, "1. Of, relating to, or involving a crime; in the nature of a crime… 2. Of, relating to, or involving the part of the legal system that is concerned with crime; connected with the administration of penal justice … 3. Wrong, dishonest, and unacceptable." CRIMINAL, Black's Law Dictionary (12 ed. 2024). Further, under Section 6302 of the Juvenile Act, a delinquent act is "an act designated a crime under the law of this Commonwealth[.]" 42 Pa.C.S. § 6302. As the Juvenile was adjudicated of involuntary manslaughter for shooting J.R., we conclude his actions were "[o]f, relating to, or involving a crime[,]" and "in the nature of a crime[,]" and constituted "criminal" misuse of a qualified product under the PLCAA. *See* Blacks, *supra*.

In reaching this conclusion, we find the fact that the Juvenile was not convicted of a criminal offense immaterial to our analysis. As stated *supra*, the plain language of Section 7903(5)(A) does not require a criminal conviction. *See* 15 U.S.C. § 7903(5)(A) (defining a "qualified civil liability action" as an action seeking damages "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party[.]" (emphasis added)). Like the Illinois Supreme Court recognized in *Adames*, Congress's failure to require a criminal conviction in Section 7903(5)(A) contrasts with its inclusion of a criminal conviction requirement elsewhere in the PLCAA, and

> because Congress specifically included language requiring a conviction in [S]ection 7903(5)(A)(i), but did not include such language in [S]ection 7903(5)(A), we presume that Congress did not intend criminal misuse to require proof of a criminal conviction.

Adames, 909 N.E.2d at 762. As such, we conclude that an underlying criminal conviction is not required for an action to meet the PLCAA's definition of a "qualified civil liability action." *See also, e.g., Delana*, 486 S.W.3d at 321 ("PLCAA preemption is based on 'criminal or unlawful misuse' and not the existence of a criminal conviction."); *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000, 1008 (Mass. App. Ct. 2012) ("[T]he PLCAA does not require a criminal conviction in order for an activity to qualify as 'criminal or unlawful misuse.'").

We acknowledge that Plaintiffs argue that this interpretation renders the phrase "unlawful misuse" meaningless surplusage. Plaintiffs' Brief at 31. We disagree, as such an assertion ignores the PLCAA's definition of "unlawful misuse," which requires "conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product." 15 U.S.C. § 7903(9). Actions can satisfy this definition even if the law they violate is purely civil in nature. As discussed above, however, criminal misuse requires actions that are "[o]f, relating to, or involving a crime[,]" and "in the nature of a crime[.]" Black's, supra. One can violate a civil statute, ordinance, or regulation, through actions that are not criminal in nature. Under the PLCAA, those actions would qualify as "unlawful misuse" but not "criminal misuse."

Based on the above analysis, we conclude that Plaintiffs' alleged harm resulted from the Juvenile's "criminal or unlawful misuse" of the Firearm and, as such, their action constitutes a "qualified civil liability action" pursuant to the PLCAA, unless one of the Act's enumerated exceptions is found to apply.

B. The Product Liability Exception

The PLCAA commands courts to dismiss actions that satisfy the definition of a "qualified civil liability action." However, otherwise-prohibited qualified civil liability actions "shall not include" any action that satisfies any of the PLCAA's six exceptions as set forth in 15 U.S.C. §§ 7903(5)(A)(i)-(vi). Plaintiffs assert their action satisfies the "product liability exception" in

Section 7903(5)(A)(v), which exempts from the definition of "qualified civil liability actions:"

> [A]n 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). Here, the parties do not contest that Plaintiffs' Complaint is "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[.]" *See* Plaintiffs' Brief at 28; Defendants' Brief at 20-29 (only arguing the "exception to the exception" renders the product liability exception inapplicable). The issue therefore is whether Plaintiffs' claim falls into the "exception to the exception," *i.e.*, whether the "discharge of the [Firearm] was caused by a volitional act that constituted a criminal offense[.]" 15 U.S.C. § 7903(5)(A)(v). Plaintiffs insist the requirements of the exception to the exception are not met because the discharge of the Firearm was neither a "volitional act" nor a "criminal offense."

i. Criminal Offense

Plaintiffs assert that while the Juvenile's actions may be considered a juvenile offense, they do not constitute a "criminal offense" under the PLCAA. First, they insist the natural meaning of the phrase "criminal offense" is "conduct actionable in the criminal justice system." Plaintiffs' Brief at 28. According to Plaintiffs, in Pennsylvania "juvenile proceedings are not criminal proceedings[,]" *id*. at 29 (quoting *In re S.A.S.*, 839 A.2d 1106, 1106 (Pa. Super. 2003)), and under the Juvenile Act, juveniles are not charged with crimes but rather with committing delinquent acts. *Id*. (citing *In re R.A.*, 761 A.2d 1220, 1224 (Pa. Super. 2000)). Further, Plaintiffs argue the PLCAA's text suggests that Congress did not intend for juvenile offenses to be considered criminal offenses, as Congress did not expressly include juvenile offenses in the product liability exception. In the Plaintiffs' view, "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 subjected to criminal law." *Id*. at 30. Lastly, again relying on Gregory, supra, Plaintiffs argue that Congress has not made it clear that juvenile offenses are included within the meaning of "criminal offense" and the Court should settle any ambiguity in the Act in their favor. *Id*. at 32.

Citing *Adames*, *Travieso*, and *Ryan*, Defendants counter that the "PLCAA's focus with respect to the product defect exception is 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." Defendants' Brief at 28 (emphasis omitted). In the case *sub judice*, Defendants assert the Juvenile engaged in a volitional act at the time he shot J.R. that constituted the criminal offense of involuntary manslaughter. *Id.* As such, they contend the exception to the exception applies to bar Plaintiffs' claims.

To reiterate, in this case, the Juvenile was adjudicated delinquent for his actions in shooting J.R. Under the Juvenile Act, that adjudication is proof beyond a reasonable doubt the Juvenile committed "an act designated a crime under the law of this Commonwealth," 42 Pa.C.S. § 6302, specifically involuntary manslaughter. *See* 42 Pa.C.S. § 6341(b) ("If the court finds on proof beyond a reasonable doubt that the child committed the acts by reason of which he is alleged to be delinquent it shall enter such finding on the record and shall specify the particular offenses, including the grading and counts thereof which the child is found to have committed."). Even though the Juvenile was charged under the Juvenile Act rather than through the criminal division, that does not change the fact that his actions constituted the crime of involuntary manslaughter as set forth in the Crimes Code.

As further example, consider the disposition in *Travieso*. In that case, the district court addressed the application of the product liability exception as it pertained to an action initiated after a fourteen-year-old girl shot and severely injured another, but did not face charges in either juvenile or criminal court. In *Travieso*, the court found:

> the PLCAA's product liability preemption is triggered by the criminal nature of the act, not whether the actor is or can be charged with the crime. Here, even if a juvenile shooter would not face a criminal conviction, the finding of delinquency would be based on an admittedly criminal act. As such, the [c]ourt is convinced that **regardless of whether the [s]hooter would face criminal charges, the criminal nature of the act triggers the PLCAA's preemption.**

Travieso, 526 F.Supp.3d at 547 (internal citations omitted) (emphasis added). We agree with the *Travieso* court that the exception to the exception is triggered by the criminal nature of the act rather than whether the shooter faced or could have faced criminal prosecution. As such, we determine that the phrase "criminal offense" in the product liability exception includes actions by juveniles that constitute "an act designated a crime under the law of this Commonwealth[.][12]

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[12] We further observe that under certain circumstances a juvenile who is accused of committing a delinquent act can face criminal prosecution. Pursuant to Section 6355 of the Juvenile Act "[a]fter a petition has been filed alleging delinquency based on conduct which is designated a crime or public offense under the laws … of this Commonwealth, the court … may rule that [the Juvenile Act] is not applicable and that the offense should be prosecuted, and transfer the offense, where appropriate, to the division or a judge of the court assigned to conduct criminal proceedings, for prosecution of the offense if" certain specific conditions exist. 42 Pa.C.S. § 6355(a). In those circumstances, under Plaintiffs' interpretation of the exception to the exception, whether the PLCAA bars an action would depend on a judge's decision

ii. Volitional Act

Plaintiffs also argue that the Juvenile's shooting of J.R. was not a volitional act but rather an "unintentional discharge of a gun thought to be incapable of discharging[.]" Plaintiffs' brief at 33 (citing *Gustafson*, 282 A.3d at 760 (Bender, P.J.E., concurring)). Relying on various dictionary definitions and prior Superior Court cases, Plaintiffs assert the term volitional connotes some form of intent. *Id.* at 34 (citing, *inter alia*, *Commonwealth v. Brumbaugh*, 932 A.2d 108, 111 (Pa. Super. 2007) ("volitional" used in relation to "knowingly made"); *Commonwealth v. Feeney*, 101 A.3d 830, 834 (Pa. Super. 2014) ("volitional" used in relation to "deliberate")). As used in the PLCAA, Plaintiffs assert volitional "logically includes some level of decision or choice to discharge the gun, at a minimum." *Id.* They argue here the Juvenile "did not decide, or intend, or make a choice to discharge" the Firearm as he thought

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whether or not to transfer a juvenile offender's case to criminal court. If the judge transfers the case, the PLCAA would bar a plaintiff's action. However, under Plaintiffs' interpretation, if a judge declines to transfer the case, the PLCAA would not bar the action. To hinge the applicability of the PLCAA's preemption on a trial judge's decision whether or not to transfer a juvenile offender's case to criminal court would be contrary to Congress's stated intent of barring "qualified civil liability action[s]" from being brought in either Federal or State court. *See* 15 U.S.C. § 7902(a). *Accord Travieso*¸ 526 F.Supp.3d at 547 ("While the decision whether to charge the [s]hooter as an adult is discretionary, the [c]ourt cannot believe that the PLCAA's preemption hinges on whether the state actually exercises this discretion of how to charge a shooter. To hinge the effect of the PLCAA on a state's discretionary choice would be contrary to Congress's purpose.").

it was unloaded and "incapable of discharging a round." *Id.* at 34-35. According to Plaintiffs, this interpretation is in line with Congress's intent and any alternative understanding would conflate "criminal offense" and "volitional act" and render "volitional act" superfluous. At a minimum, Plaintiffs contend the question of whether the Firearm's discharge was caused by a volitional act is a jury question.

Defendants counter, citing Judge Murray's dissenting opinion below, that whether the Juvenile intended to shoot J.R. is irrelevant, as the PLCAA's requirement of a volitional act "includes no mens rea requirement and does not reference an actor's acuity or state of mind[.]" Defendants' Brief at 28. According to Defendants, the Juvenile committed a volitional act by pointing the Firearm at J.R. and intentionally pulling the trigger. As such, they contend the exception to the exception applies and Plaintiffs' action is not permitted under the product liability exception.

"Volitional" is not defined in the PLCAA, but Black's defines "volition" 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. – volitional, adj." VOLITION, Black's Law Dictionary (12 ed. 2024). We reject Plaintiffs' argument that because the Juvenile did not intend to shoot J.R., or to discharge the Firearm at all, his actions were therefore not volitional. We find the key question is not whether the Juvenile made a "choice or determination" to shoot J.R. but rather whether he made "a choice or

determination" that caused the discharge of the Firearm which constituted a criminal offense. This interpretation is in line with the plain language of the product liability exception, which does not mention the shooter's intent to shoot an individual or that a shooter intended the consequences of his actions. The only requirement is that the "volitional act" or the "choice or determination" caused the discharge of the firearm and constituted a criminal offense. *See* 15 U.S.C. § 7309(5)(A)(v) ("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[.]"). The volitional act at issue here, or the choice or determination the Juvenile made, was to pull the trigger. As discussed fully above, this choice or determination constituted the criminal offense of involuntary manslaughter, for which the Juvenile was adjudicated delinquent. Further, the Juvenile's choice to pull the trigger clearly caused the discharge of the Firearm.[13] It is of no moment that the Juvenile did not

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[13] The direct link between the Juvenile's volitional act of pulling the Firearm's trigger and J.R.'s death makes this case readily distinguishable from *Chavez v. Glock, Inc.*, 207 Cal.App.4th 1283, 144 Cal.Rptr.3d, 236, 353 (2012). There a father stored his firearm in his vehicle in a manner that allegedly violated California penal statutes. Then, while he was driving, the father's three-year-old son gained possession of the firearm and shot father in the back, severely injuring the father. Father filed suit against, inter alia, the firearm's manufacturer raising product liability claims. The manufacturer filed for summary judgment based on the PLCAA. In addressing the exception to the exception, the appellate court found that "[b]y specifically linking the actual act of discharge to the criminal offense, as it

intend to shoot J.R. Stated differently, what brings Plaintiffs' claim within the exception to the exception is the Juvenile's choice or determination to pull the trigger, not his intent behind the action.

Our interpretation is consistent with that of other courts that have addressed the product liability exception. For example, the *Adames* court determined that the juvenile chose and determined to point the gun at the victim and pull the trigger. *Adames*, 909 N.E.2d at 763. Accordingly, even though the juvenile did not intend the consequences of his actions, his act was nonetheless a volitional act. *Id*.

The Travieso court came to a similar conclusion when it determined that the mere fact that the shooter did not intend to shoot the victim or fire the gun did not mean that the shooter did not act volitionally. *Travieso*, 526 F.Supp.3d at 548. That court found that the shooter took numerous actions, including taking possession of the firearm, pointing the firearm at another individual, and pulling the trigger that constituted volitional actions. *Id*. Similarly, in *Ryan*, the court determined that the volitional act that caused the firearm's discharge was the individual's unlawful possession of the firearm, thus bringing the

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did," Congress did not intend "to allow any unlawful act in the causal chain, however remote from the actual firing of the weapon, to defeat the exclusion." *Chavez*, 207 Cal.App.4th at 1318. The father's alleged criminal offense of improperly storing the firearm was far removed from the firearm's discharge. The Juvenile's volitional act and criminal offense of pulling the Firearm's trigger here was the direct cause of the Firearm's discharge.

case under the auspices of the PLCAA. *Ryan*, 959 N.E.2d at 1008-09.

Based on the above analysis, we determine that the product liability exception does not exempt Plaintiffs' Complaint from the PLCAA's definition of a "qualified civil liability action." The PLCAA, therefore, bars Plaintiffs' Complaint.

III. Constitutionality of the PLCAA

With our determination that Plaintiffs' action is barred by the PLCAA, we now turn to Plaintiffs' constitutional challenges. Plaintiffs argue the PLCAA is not a valid exercise of Congress's Commerce Clause authority under Article I, § 8 of the Constitution and violates the Constitution's Tenth Amendment, as well as general principles of federalism. As the United States Supreme Court has observed, "[d]ue respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds." *U.S. v. Morrison*, 529 U.S. 598, 607 (2000). "With this presumption of constitutionality in mind," *id.*, we will now address Petitioners' constitutional challenges in turn.

A. The Commerce Clause

The Commerce Clause gives Congress the power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. CONST Art. I, § 8, cl. 3. The Supreme Court has

identified three broad categories of activity the Commerce Clause gives Congress authority to regulate: (1) "the use of the 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) "the power to regulate those activities having substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce." *U.S. v. Lopez*, 514 U.S. 549, 558-559 (1995) (internal citations omitted). As the PLCAA clearly does not fall within the first two categories, we narrow our inquiry to whether the Act regulates activities that "substantially affect interstate commerce."

Plaintiffs argue the PLCAA is not authorized by the Commerce Clause because it does not regulate commerce, but instead regulates states. In this vein, Plaintiffs reject as immaterial Congress's statement that the qualified civil liability actions have a substantial impact on interstate commerce. They assert that simply because Congress says a particular activity substantially affects interstate commerce does not necessarily make it so and the final determination of whether an activity sufficiently affects interstate commerce is a judicial, not a legislative, one. Plaintiffs' Brief at 64-65 (citing *Lopez*, 514 U.S. at 557 n.2). According to Plaintiffs, the Supreme Court has explained that in every case where it has sustained federal regulation on the basis of its indirect effect on commerce, the regulated activity was of an apparent commercial character.

Plaintiffs compare the PLCAA to the individual mandate in the Affordable Care Act (ACA), which the High Court addressed in *National Federation of Independent Businesses v. Sebelius*¸ 567 U.S. 519 (2012). There, according to Plaintiffs, the Court held that Congress's power to regulate commerce presupposes the existence of commercial activity and, notwithstanding the individual mandate's effect on interstate commerce, it was impermissible under the Commerce Clause because it did not regulate existing commercial activity. Plaintiffs' Brief at 62 (citing *Sebelius*, 567 U.S. at 552 (opinion by Roberts, C.J.)). In Plaintiffs' view, the PLCAA suffers from similar flaws as they contend the PLCAA does not regulate the firearms industry or the conduct of firearms companies or the sale, possession or use of firearms or individuals in any manner. Rather, they contend the Act regulates states by prohibiting them from enforcing their common law as compared to their statutory laws. *Id.* at 63-64. As such, Plaintiffs assert the PLCAA does not regulate lawsuits affecting interstate commerce but rather "lawsuits that do not emanate from Congress's preferred source within the state." *Id.* at 64. In light of these arguments, Plaintiffs assert that the PLCAA is not an authorized exercise of Congress's Commerce Clause authority and courts that have found otherwise were incorrect.

Defendants counter Congress found that lawsuits against the firearms industry were "an unreasonable burden on interstate and foreign commerce[,]" Defendants' Brief at 32 (quoting 15 U.S.C. § 7901(a)(6)), and that one of the PLCAA's stated purposes is to prevent or alleviate such burdens. *See*

id. at 33 (quoting 15 U.S.C. § 7901(b)(4)). According to Defendants, in order to ensure the PLCAA would not exceed its Commerce Clause authority, Congress specifically limited the Act's applicability to those manufacturers and sellers engaged in interstate commerce. *Id*. (citing 15 U.S.C. § 7903(2), (4), (6)). In Defendants' view, "there can be no question of the interstate character of the [firearms industry] and Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail." *Id*. at 35 (quoting *City of New York v. Berretta U.S.A. Corp*., 524 F.3d 384, 395 (2d. Cir 2008)). Defendants further observe that the highest courts of several other states have previously concluded the PLCAA is authorized under Congress's Commerce Clause authority and implore this Court to find the same.

The United States concurs with Defendants' analysis of the PLCAA's purpose and impact on interstate commerce. The government further rejects Plaintiffs' assertion that the Act does not regulate private conduct, observing that the PLCAA preempts select suits "brought by any person against a manufacturer or seller of a qualified product[.]" United States' Brief at 14 (quoting 15 U.S.C. § 7903(5)(a) (emphasis provided by United States)). In addition, the United States rejects Plaintiffs' reliance on *Sebelius* because, unlike the ACA's individual mandate, the PLCAA does not force anyone to engage in commerce, and it only reaches suits that have an explicit connection to or effect on interstate commerce. *Id*. at 16.

While this is an issue of first impression for this Court, and the Supreme Court has not addressed the PLCAA's constitutionality, numerous other courts have addressed the question of whether the PLCAA falls within Congress's Commerce Clause authority. The first court to do so was the Second Circuit in City of New York, which found that the PLCAA did not exceed Congress's Commerce Clause authority "where there can be no question of the interstate character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail." *City of New York*, 524 F.3d at 395. Numerous other appellate courts have subsequently agreed with the Second Circuit's conclusion. *See Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140 (9th Cir 2009) ("Congress carefully constrained the Act's reach to the confines of the Commerce Clause."); *Adames, supra*, 909 N.E.2d at 765 (agreeing with *City of New York*); *Delana*, 486 S.W.3d at 323 (the PLCAA preempts state tort law "pursuant to Congress's constitutional power to regulate interstate commerce."). After careful consideration, we concur that Congress's Commerce Clause powers permitted it to enact PLCAA.

In reaching this conclusion, we reiterate that in enacting the PLCAA, Congress made several factual findings. Of particular significance, Congress found that lawsuits had been filed against firearms companies operating in interstate and international commerce "for harm caused by the misuse of firearms by third parties, including criminals[,]" and that firearms companies engaged in interstate and international commerce should not be held liable

for such harm. 15 U.S.C. § 7901(a)(3), (5). Congress further explicitly found that imposing such liability on the firearms industry "constitutes an unreasonable burden on interstate and foreign commerce of the United States." *Id*. at § 7901(a)(6). The existence of congressional findings, however, "is not sufficient, by itself, to sustain the constitutionality of Commerce Clause legislation." *Morrison*, 529 U.S. at 614. "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 (internal quotation marks and citations omitted). Rather, "[w]hether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question[.]" *Id*. (internal citations omitted). That being the case, the Supreme Court also stated that

> [w]hile Congress normally is not required to make formal findings as to the substantial burden that an activity has on interstate commerce, the existence of such findings may enable us to evaluate the legislative judgment that the activity in question substantially affects interstate commerce, even though no such substantial effect is visible to the naked eye.

Morrison, 529 U.S. at 613 (internal quotation marks, citations, and brackets omitted). Further, we are not required to determine if a regulated activity actually has a substantial effect on interstate commerce, but

only "whether a 'rational basis' exists for so concluding." *Gonzales v. Raich*, 545 U.S. 1, 22 (2005) (citing *Lopez*, 514 U.S. at 557; *Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 276-80 (1981)).

The facts of the instant matter make clear that the interstate nature of the firearms industry cannot be disputed. Defendant Springfield, who designed, manufactured, and sold the Firearm, is an Illinois corporation. Complaint at ¶ 18. Defendant Saloom sold the Firearm in retail in Pennsylvania and is a Pennsylvania limited liability company. *Id.* at ¶ 19. The shooting also occurred here in Pennsylvania. A firearm designed and manufactured by an Illinois corporation that was sold and used in Pennsylvania necessarily must have been involved in interstate commerce in some manner. Further, it cannot be disputed, as evidenced by the numerous cases cited within this opinion, that the firearms industry has faced, and will likely continue to face, litigation over its products. Under these circumstances, we determine that it was reasonable for Congress to conclude that these suits would financially impact the firearms industry. *See* 15 U.S.C. § 7901(a)(3) ("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[.]" (emphasis added)). Given this conclusion, we hold it was completely reasonable for Congress to find that these suits "constitute an unreasonable burden on interstate and foreign commerce of the United States[,]" 15 U.S. § 7901(a)(6), and to enact the PLCAA

to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." *Id*. at § 7301(b)(4).

Such a finding is inapposite to the Supreme Court's determination in *Lopez* that a portion of the Gun-Free School Zones Act of 1990 making it a federal offense to possess a firearm in a school zone exceeded Congress's Commerce Clause authority. With respect to that act, the Supreme Court was concerned it did not contain a "jurisdictional element which would ensure, through case-by-case inquiry, that the firearm possession in question affects interstate commerce." *Lopez*, 513 U.S. at 561. Similarly, in finding a portion of the Violence Against Women Act (VAWA) that provided a federal civil remedy for victims of gender-motivated violence was outside Congress's Commerce Clause authority, the High Court in *Morrison* expressed concern that Congress did not include a "jurisdictional element establishing that the federal cause of action is in pursuance of Congress' power to regulate interstate commerce." *Morrison*, 529 U.S. at 613.

The PLCAA does not contain any similar jurisdictional issues. The Act bars a qualified civil liability action from being brought in federal or state court, *see* 15 U.S.C. § 7902(a), and defines such an action, in relevant part, as a civil action brought "against a manufacturer or seller of a qualified product[.]" *Id*. at § 7903(5)(A). The Act further defines these terms. A manufacturer, in relevant part, is "a person who is engaged in the business of manufacturing the product in interstate or foreign

commerce[.]" *Id*. at § 7903(2). A seller is, with respect to a qualified product, an importer of firearms or ammunition, a person engaged in selling or repairing firearms or their parts, or a seller of ammunition who is engaged in interstate or foreign commerce. *Id*. at § 7903(6). Lastly, a qualified product is a "firearm … or ammunition … or a component part of a firearm of ammunition, that has been shipped or transported in interstate or foreign commerce." *Id*. at § 7903(4). As seen from these definitions, Congress carefully crafted the PLCAA to ensure the Act only barred suits that directly involved products and defendants engaged in interstate commerce. These jurisdictional requirements materially distinguish the PLCAA from the more tenuous connections to interstate commerce the Supreme Court found insufficient in *Lopez* and *Morrison*.

The PLCAA's jurisdictional requirements also differentiate the Act from the ACA's individual mandate that the Supreme Court addressed in *Sebelius*, "which requires individuals to purchase a health insurance policy providing a minimum level of coverage[.]" *Sebelius*, 567 U.S. at 530-31. In addressing the government's argument that the individual mandate fell within Congress's Commerce Clause authority, Chief Justice Roberts, writing only for himself on this issue, observed that the Constitution gives Congress the authority to regulate commerce, which "presupposes the existence of commercial activity to be regulated." *Id*. at 550 (Roberts, C.J.). In finding the Commerce Clause did not authorize the individual mandate, Chief Justice Roberts noted the individual mandate did not regulate

existing commercial activity but, instead "compel[led] individuals to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." *Id.* at 552 (Roberts, C.J.) (emphasis in original). The PLCAA's bar on qualified civil liability actions does not compel similar activity as it only pertains to actions that involve a qualified product, which by definition requires activity in interstate commerce to have already occurred. *See id.* at § 7903(4). Therefore, unlike the individual mandate, the PLCAA does not compel anyone to become active in commerce by purchasing a product but, rather, only applies after a product has already moved in interstate commerce.[14]

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[14] We further reject Plaintiffs' argument that the PLCAA is not a valid preemption law because it does not regulate individuals or the firearms industry in any manner but rather, regulates only "lawsuits that do not emanate from Congress's preferred source within the state." Plaintiff's Brief at 64. However, as the United States observes, the PLCAA explicitly regulates individuals by barring qualified civil liability actions brought by any "person," which the Act defines as, inter alia, "any individual." 15 U.S.C. § 7903(3). Further, while the PLCAA's provision that "[a] qualified civil liability action may not be brought in any Federal or State court," *id.* at § 7902(a), may not initially appear to regulate the firearms industry, Congress need not employ "a particular linguistic formulation" in preempting state law, and thus, "it is a mistake to be confused by the way in which a preemption provision is phrased." *New Jersey Thoroughbred Horsemen's Association v. National Collegiate Athletic Association*, 584 U.S. 453, 478 (2018) (*Murphy*). In analyzing the concept of express preemption, which the PLCAA accomplishes, the Supreme Court in *Murphy* discussed its prior holding in *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992), which involved the Airline Deregulation Act of 1978 (the Deregulation Act), providing that "no State or political subdivision thereof" could enact or enforce any regulation relating to certain activities of covered airlines.

B. Tenth Amendment

The Tenth Amendment states, "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amend. X. "[T]he Tenth Amendment confirms that the power of the Federal Government is subject to limits that may, in a given instance, reserve power to the States." *New York v. U.S.*, 505 U.S. 144, 157 (1992). One of these limits is that "Congress may not simply 'commandee[r] the legislative process of the States by directly compelling them to enact and enforce a federal regulatory program." *Id.* at 161 (quoting *Hodel*, 452 U.S. at 288 (brackets provided in *New York*)). This concept is known as the anticommandeering doctrine and "is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.,* the decision to withhold from Congress the power

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Id. at 420 (Stevens, J., (continued…) dissenting) (quoting the enactment). The *Murphy* Court stated the Deregulation Act may "appear to operate directly on the States," but looking beyond the language "it is clear that this provision operates just like any other federal law with preemptive effect. It confers on private entities (i.e., covered carriers) a federal right to engage in certain conduct subject only to certain (federal) constraints." *Id.* at 478-79. The PLCAA's bar on qualified civil liability actions operates in a similar fashion: it confers on private entities (i.e., firearms manufacturers and sellers) a federal right to engage in interstate commerce subject only to certain (federally allowable) civil suits (*i.e.* exceptions to the bar on qualified civil liability actions). Viewed in this manner, the PLCAA clearly regulates the firearms industry rather than merely the states themselves and, as such, it is a permissible form of express preemption.

to issue orders directly to the States." *Murphy*, 584 U.S. at 470.

In *New York*, the Supreme Court found that a federal statute that required states, under certain circumstances, to "take title" to low-level radioactive waste or to "regulat[e] according to the instructions of Congress[]" violated the Tenth Amendment. *New York*, 505 U.S. at 175. The High Court found the statute would either "'commandeer' state governments into the service of federal regulatory purposes" or "command to state governments to implement legislation enacted by Congress[,]" and "the Constitution does not empower Congress to subject state governments to th[at] type of instruction." *Id.* at 175-76. In *Printz v. U.S.*, 521 U.S. 898 (1997), the Court invoked the anticommandeering doctrine to invalidate a portion of the Brady Act that required state and local law enforcement officials to perform background checks and other tasks in relation to handgun license applications, stating

> We held in *New York* that Congress cannot compel the States to enact or enforce a federal regulatory program. Today we hold that Congress cannot circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program.

Id. at 935.

More recently, in *Murphy*, the Supreme Court found a federal statute that prohibited states from authorizing sports gambling violated the anticommandeering doctrine. *Murphy*, 584 U.S. at 474. According to the Court, the statute "unequivocally dictate[d] what a state legislature may and may not do" and "state legislatures [were] put under the direct control of Congress." *Id*. According to the Court, it was "as if federal officers were installed in state legislative chambers and were armed with the authority to stop legislators from voting on any offending proposals. A more direct affront to state sovereignty is not easy to imagine." *Id*. According to the *Murphy* Court, the anticommandeering doctrine bars Congress from both affirmatively commanding states to act and prohibiting state legislatures from acting as "[t]he basic principle – that Congress cannot issue direct orders to state legislatures – applies in either event." *Id*. at 475.

Numerous courts have rejected arguments that the PLCAA violates the Tenth Amendment and the anticommandeering doctrine. According to the Second Circuit in *City of New York*, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states." 524 F.3d at 396. That court found the PLCAA did not violate the Tenth Amendment as the Act "does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them." *Id*. at 397 (quoting *Connecticut v. Physicians Health Servs.*

of Conn., Inc., 287 F.3d 110, 122 (2d Cir. 2020)). Other courts that have addressed Tenth Amendment challenges to the PLCAA have concurred with the Second Circuit's holding. *See Adames*, 909 N.E.2d at 765 (agreeing with *City of New York*); *Estate of Kim*, 295 P.3d at 389 ("The PLCAA does not compel Alaska's legislature to enact any law, nor does it commandeer any branch of Alaska's government." (emphasis in original)); *Delana*, 486 S.W.3d at 323-24 ("The PLCAA does not commandeer the executive or legislative branch of Missouri government …. The PLCAA does not violate the Tenth Amendment."). We agree with these courts that the PLCAA does not command state executive officers to implement federal regulations nor does it direct state legislatures to pass any legislation. The Act merely directs that qualified civil liability actions may not be brought in federal or state court.

Plaintiffs assert the PLCAA's requirement that state courts dismiss cases that are fully supported by state law impermissibly infringes on state sovereignty by commanding state courts to construe state tort law according to Congress's direction. According to Plaintiffs, this command conflicts with *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938), because "[t]here is no federal common law. Indeed, 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 part of the law of torts." Plaintiffs' Brief at 55 (quoting *Erie R.R.*, 304 U.S. at 78). Yet, according to Plaintiffs, that is exactly what the PLCAA does as it "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." *Id.* (quoting *Murphy*, 584 U.S. at 474).

Plaintiffs' reliance on *Erie R.R.* is misplaced. Prior to the passage quoted by Plaintiffs, the Supreme Court stated, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R.R.*, 304 U.S. at 78 (emphasis added). The PLCAA is such an "act of Congress" that is enforced over applicable state law pursuant to the Supremacy Clause.[15] To the extent the PLCAA requires state judges to dismiss civil actions that could otherwise proceed under state law, that requirement does not violate the anticommandeering doctrine, but is rather a product of the Supremacy Clause. *See New York*, 505 U.S. at 178-79 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."); *see also Delaware County, Pa. v. Federal Housing Finance Agency*, 747 F.3d 215, 228 (3rd. Cir. 2014) ("A state official's compliance with federal law and non-enforcement of a preempted state law – as required by the Supremacy Clause – is not an unconstitutional commandeering.").

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[15] "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. CONST Art. VI, cl. 2.

As to the anticommandeering doctrine, Plaintiffs rely on *Murphy*, asserting the Supreme Court has made clear that the Tenth Amendment's anticommandeering requirement is not limited to commandeering of state officials. *Murphy*, according to Plaintiffs, rejected the argument that Congress could "prohibit[] states from enacting new law." Plaintiffs' Brief at 53 (quoting *Murphy*, 584 U.S. at 474) (brackets provided by Plaintiffs). Plaintiffs assert that is exactly what the PLCAA does by prohibiting states from enacting and enforcing new laws recognized through common law rather than through legislation. Plaintiffs' argument in this regard relies on their interpretation of the predicate exception, which they assert "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." *Id.* at 50 (citing 15 U.S.C. § 7903(4)(A)(iii)). According to Plaintiffs, if the case *sub judice* claimed that Defendants violated a legislatively passed statute that required the Firearm to be sold with certain safety features or warnings, the PLCAA would permit Pennsylvania courts to impose liability under the predicate exception. Therefore, Plaintiffs contend the PLCAA does not preempt any theory of liability but rather "prevents states from using their judicial branch to establish civil liability standards in certain cases." *Id.* at 51 (emphasis removed). The United States counters that nothing in the PLCAA prohibits state courts from altering or creating common law or from interpreting state statutes, as it does not "foreclose[] the possibility" that state court interpretations of state legislation may bear on

whether a state law falls within the PLCAA's exception. United States' Brief at 20 (quoting *City of New York*, 524 F.3d at 396).

Plaintiffs' reliance on *Murphy* fails for a simple reason: the PLCAA does not bar states from enacting any law and instead merely preempts state law in relation to qualified civil liability actions. The predicate exception does nothing to alter this conclusion. Rather, the exception merely excuses from the general definition of a qualified civil liability action "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 which relief is sought[.]" 15 U.S.C. § 7903(5)(A)(iii). Unlike the statute at issue in *Murphy*, the predicate exception does not "dictate[] what a state legislature may and may not do." *Murphy*, 584 U.S. at 474. The PLCAA does not contain any language comparable to the statute at issue in *Murphy* that declared it to be unlawful for states to authorize sports gambling. Under the PLCAA state legislatures remain free to pass any statute they deem appropriate, while the predicate exception does not limit states' ability to recognize new causes of action through common law. Nor does the predicate exception prohibit states from interpreting state statutes through their courts. *See City of New York*, 524 F.3d at 396 (reflecting court would not "construe the PLCAA as foreclosing the possibility that predicate statutes can exist by virtue of interpretations by state courts."). Thus, the predicate exception simply carves out civil actions alleging

certain knowing violations of state or federal statutes from the Act's general definition of a qualified civil liability action. States remain free, either through their legislatures or their courts, to recognize any cause of action they deem appropriate. All the PLCAA, including the predicate exception, does is preempt certain causes of actions involving the firearms industry.

Plaintiffs further assert the PLCAA, through the predicate exception, violates the Tenth Amendment and federalism principles by impermissibly intruding on states' lawmaking authority and infringing on their sovereign right to allocate their lawmaking powers as they see fit. Plaintiffs contend the authority of states to make law through their courts is a core aspect of their sovereignty and Congress does not have authority to determine what branch of state government is used to make state law. Plaintiffs Brief at 49 (citing *Erie R.R.*, 304 U.S. at 78). According to Plaintiffs, through the predicate exception, Congress essentially determined that states are required to enact laws regulating the firearms industry though their legislatures rather than their courts. In this sense, Plaintiffs analogize the PLCAA to the New York Court of Appeals decision in *In re Vargas*, 131 A.D.3d 4 (N.Y. App. Div, 2 Dep't 2015), where the court, in addressing a federal statute regarding the granting of professional licenses to undocumented immigrants, stated "[t]he ability, indeed the right of the states to structure their governmental decision-making process as they see fit is essential to sovereignty protected by the Tenth Amendment." Plaintiffs' Brief at 53 (quoting *Vargas*,

131 A.D.3d at 24.). In addition to the arguments made in their brief on this issue, Plaintiffs also adopt the arguments made by their amicus Federalism Scholars, a group of constitutional law professors. *See* Federalism Scholars Brief at 1. According to *amici*, the PLCAA impermissibly intrudes on states' ability to allocate their law-making authority between their legislatures and courts, through the predicate exception and concludes "[a] congressional enactment, like [the] PLCAA that denies state court authority to declare state law and requires instead exclusive reliance on legislatures for the definitive pronouncement of that state's law invades the core of state sovereignty." *Id*. at 24 (citing *Alden v. Maine*, 527 U.S. 706, 751 (1999)).

In response the United States asserts the Supreme Court has never recognized this novel theory that a federal statute violates the Tenth Amendment by infringing on a state's decision of which branch of government it chooses to make law. *See* United States' Brief at 19. On the other hand, the government argues, the Supreme Court has explicitly rejected arguments that "general principles of federalism place some areas of state authority beyond the reach of a validly enacted Act of Congress." *Id*. at 21 (citing *Hodel*, 452 U.S. at 276; *Garcia v. San Antonio Metro. Transit Auth*., 469 U.S. 528, 550 (1985)). In their reply brief, Plaintiffs assert the United States is incorrect in asserting that the Supreme Court has never recognized that state's decision on which branch of government it chooses to make law violates the Tenth Amendment as the Court has recognized that "the States are free to allocate the lawmaking function to

whatever branch of state government they may choose." Plaintiffs' Reply Brief at 6 (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461n.6 (1981)).

Initially, we find Plaintiffs' reliance on *Erie R.R.* unpersuasive. *Erie R.R.* simply stands for the proposition that "[t]here is no federal general common law." 304 U.S. at 78. Under *Erie R.R.*, states are free to make their own common law "provid[ed] there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce." *Lehman Bros. v. Schein*, 416 U.S. 386, 389 (1974). As the PLCAA has explicitly preempted state tort law in regard to qualified civil liability actions, we find *Erie R.R.* does not impact our Tenth Amendment analysis.

Next, as a New York state intermediate appellate court decision, *Vargas* is clearly not binding on this Court and, to the extent it would have any persuasive value, we do not find the case instructive. *Vargas* involved a federal statute "which generally prohibits the issuance of state professional licenses to undocumented immigrants unless an individual state has enacted legislation affirmatively authorizing the issuance of such license." *Vargas*, 131 A.D.3d at 6. In addressing an undocumented immigrant's application for admission to the New York State bar, the intermediate appellate court found the statute violated the Tenth Amendment to the extent it required the state legislature to act in order to grant an individual admission to the bar, rather than the court. The court's focus was not on the statute in

general but rather "solely" on the impact it had on the judicial branch's decision to grant licenses to practice law, and the court emphasized "that the Tenth Amendment concerns implicated here by the issuance of law licenses do not exist in regard to the issuance of other types of professional licenses by other arms of the state's government." *Id*. at 27. Clearly, by its own terms, *Vargas* does not impact Tenth Amendment analysis to circumstances outside the limited arena of the judiciary's granting of bar admissions, which the PLCAA clearly does not implicate.

Even if the analysis in *Vargas* was applicable, the statute at issue there is easily distinguishable from the PLCAA. As the district court aptly explained in *Travieso*

> unlike the statute at issue in *Vargas*, the PLCAA does not simply allow states to "opt out" and allow tort claims as long as the legislature creates them. While the statute's restrictions in *Vargas* became inoperative as soon [as] the legislature acted, the PLCAA preempts tort actions regardless of what branch creates them. It does not matter if they are developed by the court or codified by the legislature.

Travieso, 526 F. Supp.3d at 551 (internal citations omitted).

As the *Travieso* Court implies, nothing in the PLCAA, and specifically the predicate exception, dictates to states what branch of government can pass laws. States remain free to enact new laws either

through their legislatures or develop legal doctrines at common law through their courts. All the PLCAA does is preempt certain civil actions regardless of what branch of state government has created them. The predicate exception does not alter this structure but merely exempts claims raising certain specific statutory violations from the general definition of a qualified civil liability action. This exception has no impact on how states choose to allocate their lawmaking authority.

Assuming Plaintiffs and the Federalism Scholars are correct that the federal government does not have authority to dictate to states which branch of their government shall enact certain laws, we agree with the United States that that principle is not applicable to the PLCAA. *See* United States Brief at 19. The reason, as explained above, is straightforward: nothing in the PLCAA dictates to the states which branch of government they can use to enact any laws.[16] The Act merely bars certain civil actions from being brought. The predicate exception does not alter this conclusion as the exception merely excludes certain statutory based claims from that general bar. States remain free to enact any law they wish through any branch of government they wish without any restriction from the PLCAA.

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[16] Twenty states have either filed or joined *amicus* briefs in this matter. None of those states have argued the PLCAA unconstitutionally infringes on their sovereignty by dictating which branch of their respective governments they choose to enact laws. *See* Brief of State of Montana (joined by eighteen other states) and Brief of Commonwealth of Pennsylvania (takes no position of the Act's constitutionality).

IV. Conclusion

Plaintiffs' action is a qualified civil liability action pursuant to the PLCAA and does not qualify under the Act's product liability exception. As such, the PLCAA operates to bar Plaintiffs' action. Further, the PLCAA is a valid exercise of Congress's Commerce Clause authority and does not violate the Tenth Amendment or principles of federalism. We therefore vacate the Superior Court's *per curiam* order reversing the trial court and remand for reinstatement of the trial court's order sustaining Defendants' preliminary objections in the nature of demurrer.

Chief Justice Todd and Justices Donohue, Dougherty, Wecht and Brobson join the opinion.

Justice McCaffery did not participate in the consideration or decision of this matter.

APPENDIX B

J-E02008-21

2022 PA Super 140

MARK AND LEAH GUSTAFSON, INDIVIDUALLY AND AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
Appellants	:	
v.	:	
SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE;	:	
Appellees	:	
THE UNITED STATES OF AMERICA,	:	
Intervenor	:	No. 207 WDA 2019

Appeal from the Order Entered January 15, 2019
In the Court of Common Pleas of Westmoreland County
Civil Division at No(s): 1126 of 2018

BEFORE: PANELLA, P.J.; BENDER, P.J.E.; BOWES, J.; LAZARUS, J; OLSON, J.; DUBOW, J.; KUNSELMAN, J.; MURRAY, J.; and McCAFFERY, J.

PER CURIAM: **FILED: AUGUST 12, 2022**

The order of the trial court sustaining preliminary objections is reversed, and the case is remanded for further proceedings. Jurisdiction relinquished.

KUNSELMAN, J. files an opinion in support of the per curiam order to reverse in which PANELLA, P.J. and LAZARUS, J. join.

BENDER, P.J.E. files an opinion in support of the per curiam order to reverse.

DUBOW, J. files an opinion in support of the per curiam order to reverse.

OLSON, J. files a dissenting opinion in which BOWES and McCAFFERY, JJ. join, and MURRAY, J. concurs in the result.

MURRAY, J. files a dissenting opinion in which BOWES, OLSON and McCAFFERY, JJ. concur in the result.

2022 PA Super 140

MARK AND LEAH GUSTAFSON, INDIVIDUALLY AND AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
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DUBOW, J.; KUNSELMAN, J.; MURRAY, J.; and McCAFFERY, J.

OPINION IN SUPPORT OF PER CURIAM ORDER TO REVERSE BY KUNSELMAN, J.

FILED: AUGUST 12, 2022

In this appeal, the Court must decide whether the trial court erred by finding that a federal statute, the Protection of Lawful Commerce in Arms Act of 2005, 15 U.S.C. §§ 7901-7903 ("PLCAA"), bars a state, product-liablity lawsuit arising from the shooting death of Mark and Leah Gustafson's 13-year- old son, James Robert ("J.R.") Gustafson. The Gustafsons claim PLCAA does not apply to their product-defect claims or, alternatively, PLCAA is an unconstitutional infringement upon the sovereign police powers of the fifty states.

This Court is not deciding whether PLCAA represents good policy or is wise legislation. Nor does this Court consider whether this statute would be constitutional if the General Assembly of Pennsylvania adopts it. Finally, the Court today does not render any opinion regarding an individual's right to bear arms under the Second Amendment of the Constitution of the United States or Article I, § 21 of the Constitution of the Commonwealth of Pennsylvania.

Based on the reasons below, I vote to reverse the Order dismissing the Gustafsons' case and remand for the Defendants to file their Answer and New Matter.

BACKGROUND

On March 20, 2016, J.R. Gustafson and his 14-year-old friend visited the Westmoreland County home of Joshua Hudec.[1] J.R.'s friend obtained Mr. Hudec's semiautomatic handgun. ***See*** Gustafsons' Complaint at 5. The friend removed the handgun's magazine and therefore believed it "was unloaded, because . . . there were no adequate indicators or warnings to inform him that a live round remained in the chamber." ***Id***. at 6.

"Thinking the handgun was unloaded, the boy pulled the trigger." ***Id***. The chambered bullet fired and killed J.R. The district attorney charged J.R.'s friend with general homicide, and the friend eventually pleaded delinquent to involuntary manslaughter[2] in juvenile court.

Mark and Leah Gustafson, as Administrators of J.R.'s estate and in their own right as surviving kin, then sued the manufacturer and seller of the handgun (Springfield Armory, Inc. and Saloom Department Store, hereafter "Defendants").[3] The Gustafsons

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[1] I take these facts from the Gustafsons' complaint, which we must accept as true for purposes of this appeal. ***See Mazur v. Trinity Area Sch. Dist.***, 961 A.2d 96 (Pa. 2008). The complaint does not indicate what role, if any, Mr. Hudec played in these events.

[2] 18 Pa.C.S.A. § 2504(a).

[3] Springfield Armory, which made the handgun and has its principal place of business and incorporation in Illinois, did not

asserted that, under the common law of Pennsylvania, the Defendants were negligent and strictly liable for manufacturing and/or selling a defective handgun that caused their son's death. ***See id.*** at 13-25. They alleged a design defect, because the gun lacked a safety feature to disable it from firing without the magazine attached. They also alleged inadequate warnings on the handgun to alert the user that a bullet could remain in the chamber after removing the magazine.

Seeking to dismiss the action under the Pennsylvania Rules of Civil Procedure, the Defendants filed preliminary objections.[4] The Defendants asserted PLCAA immunized them from liablity, even if they tortiously contributed to J.R.'s death under Pennsylvania law. ***See*** Preliminary Objections at 5.

The Gustafsons responded that PLCAA does not apply to their suit. In the alternative, they argued the Act is unconstitutional. Upon learning of the Gustafsons' constitutional attacks against its statute, the United States of America ("the Federal

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contest the trial court's in personam jurisdiction. Saloom Department Store, the Pennsylvania corporation that sold the handgun, operates in Westmoreland County. The parties agree they are a "Manufacturer" and a "Seller" as Congress defined those terms in PLCAA.

[4] In Pennsylvania, a defendant may challenge the legal sufficiency of a claim by filing a preliminary objection in the nature of a demurrer. ***See*** Pa.R.C.P. 1028(a)(4). This is the state equivalent of a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).

Government") intervened to defend PLCAA. It claimed Congress properly enacted PLCAA under the Commerce Clause and the Bill of Rights.

The trial court concluded PLCAA barred the Gustafsons' suit, upheld the Act as constitutional, sustained the Defendants' preliminary objections, and dismissed the complaint. This timely appeal followed.

Initially, a panel of this Court, in a published opinion, unanimously reversed and declared PLCAA unconstitutional.[5] Upon the Defendants' request, this Court granted *en banc* review and withdrew the panel opinion.

The Gustafsons raise two appellate issues:

1. Does [PLCAA] bar [their] claims?

2. Does the United States Constitution permit PLCAA to bar Pennsylvania courts from applying Pennsylvania law to provide [them] civil justice?

Gustafsons' Brief at 3.

Our scope and standard of review are the same for both issues. "When an appellate court rules on whether preliminary objections in the nature of a demurrer were properly sustained, the standard of review is de novo, and the scope of review is plenary."

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[5] President Judge Emeritus Bender, Senior Judge Musmanno (retired), and the present author comprised the panel.

Mazur v. Trinity Area Sch. Dist., 961 A.2d 96, 101 (Pa. 2008). We affirm an order sustaining preliminary objections "only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief." ***Id.*** Also, this Court "must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." ***Id.***

I.

First, I consider whether the language of PLCAA bars the Gustafsons' product-defect lawsuit. When interpreting a federal statute, if its terms are unambiguous, our analysis "begins, and pretty much ends, with the text." ***Lomax v. Ortiz-Marquez***, 590 U.S. ___, ___, 140 S. Ct. 1721, 1724 (2020).

A. Qualified-Civil-Liablity Action

PLCAA restricts certain suits from being filed against gun manufacturers and sellers. Under the Act, a "qualified-civil-liability action may not be brought n any federal or state court." 15 U.S.C. § 7902(a). If such an action is filed, PLCAA dictates it "shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. § 7902(b). Thus, if the Gustafsons' lawsuit meets the definition of a "qualified-civil-liablity action," PLCAA requires dismissal. The trial court ruled that this case met the definition and, therefore, dismissed it.

A "qualified-civil-liability action" is any:

> civil action or proceeding or administrative proceeding against a manufacturer or seller of a [firearm or ammunition that moved through interstate commerce] for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of [that firearm or ammunition] by the [plaintiff] or a third party . . . ."

15 U.S.C. § 7903(5)(A).

Applying that definition here, it is undisputed that the Gustafsons filed a "civil action . . . against a manufacturer [and a] seller of a [firearm] for damages . . . ." 15 U.S.C. § 7903(5)(A). Moreover, the damages they seek resulted, at least in part, from the criminal or unlawful misuse of that firearm by a third party: i.e., the shooter. Under PLCAA, the "term 'unlawful misuse' means conduct that violates a statute, ordinance, or regulation as it relates to the use of a [firearm or ammunition]." 15 U.S.C. § 7903(9). Any unlawful misuse will suffice, even unlawful possession of the gun itself.

For instance, in ***Ryan v. Hughes-Ortiz***, 959 N.E.2d 1000 (Ma. App. 2012), a man was returning a Glock to his employer's display case, when the handgun accidentally discharged and killed him. The administratrix of his estate sued Glock for defectively designing both the gun and the display case that had failed to stop the stray bullet. The plaintiff argued

PLCAA did not apply, because the decedent had not "misused" the handgun in any way. 15 U.S.C. § 7903(5)(A). The appellate court disagreed. The court held that the decedent, who was a convicted felon, "misused" the gun merely by possessing it.[6] ***See Ryan***, 959 N.E.2d at 1008. Thus, PLCAA applied and immunized Glock from any liability under Massachusetts law.

Like the shooter in ***Ryan***, J.R.'s friend committed a state crime when he fired the gun. Thus, this case also involves "criminal or unlawful misuse" of a gun that meets the general definition of "qualified-civil-liablity action." 15 U.S.C. § 7903(5)(A). That general definition applies.

B. Product-Defect Exception

Although this case meets the general definition of "qualified-civil-liablity action," the Gustafsons claim it falls within one of PLCAA's six exceptions to that definition.

Those six exceptions are:

> (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;

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[6] 18 U.S.C. § 922(g)(1); ***see also United States v. Tann***, 577 F.3d 533, 534 (3d Cir. 2009).

(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 [firearm or ammunition], and the violation was a proximate cause of the harm for which relief is sought . . . ;

(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 [firearm or ammunition], when used as intended or in a reasonably foreseeable manner, except that where the discharge of the [firearm or ammunition] 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 [of the United States] to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26 [of the United States Code].

Id. If a lawsuit fits into one of these exceptions, PLCAA does not compel its dismissal. The Gustafsons assert that their lawsuit comes within exception (v). ***See*** Gustafson's Brief at 30.

Exception (v) seemingly allows product-defect lawsuits like this one to proceed if the firearm was "used as intended or in a reasonably foreseeable manner . . . ." 15 U.S.C. § 7903(5)(A)(v). However, it contains a critical caveat. If "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." ***Id***. That caveat renders exception (v) toothless, because all criminal offenses require a ***volitional*** act.[7] Whenever a defective gun causes harm and a crime is involved, exception (v) cannot apply.

This exact scenario occurred in ***Adames v. Sheahan***, 909 N.E.2d 742 (Ill. 2009), *cert. denied* sub nom. ***Adames v. Beretta U.S.A. Corp.***, 558 U.S. 1100 (2009). There, like here, a teenager found a handgun inside a home. The boy knew the gun was loaded when the magazine was connected, but he thought it was

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[7] This is basic criminal law. For example, in Pennsylvania, "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable." 18 Pa.C.S.A. § 301(a) (emphasis added). Courts may "not impose criminal liability on a person for an involuntary act." ***Commonwealth v. Lamonda***, 52 A.3d 365, 369 (Pa. Super. 2012). ***See also Voisine v. United States***, 579 U.S. 686, 693 (2016) (distinguishing between a "volitional" act and "an involuntary motion" when interpreting a federal statute).

unloaded without it. He removed the magazine, pointed what he thought was an unloaded gun at his friend, jokingly pulled the trigger, and killed him. A juvenile court found the shooter delinquent of involuntary manslaughter and reckless discharge of a firearm. The victim's parents sued the gun manufacturer for product liability (design defect and failure to warn about a bullet concealed in the chamber). While the case was proceeding, Congress passed PLCAA.

The Supreme Court of Illinois held the general rule of PLCAA applied and dismissed the parents' product-defect lawsuit. It reasoned that the shooter criminally misused the gun, because his actions were state crimes. The fact that the shooter was a juvenile who did not intend the harm was immaterial. ***See id***. Rejecting plaintiffs' reliance upon exception (v), the court found the caveat to that exception "requires only that the volitional act constitute a criminal offense. As discussed . . . shooting [the victim] constituted a criminal offense." ***Id***. at 763. As ***Ryan*** demonstrates, the criminal act that triggers a "qualified-civil-liability action" under PLCAA will always be a volitional act that nullifies exception (v). Thus, the exception will never apply; I find the Gustafsons' argument fails.

C. Canon of Statutory Construction of Constitutional Avoidance

Next, the Gustafsons urge us to construe PLCAA narrowly. They believe such an interpretation can avoid unconstitutional, federal encroachment into the States' police power – specifically, the law of torts. ***See***

Gustafsons' Brief at 7-8 (citing ***Bond v. United States***, 572 U.S. 844 (2014); and ***Gregory v. Ashcroft***, 501 U.S. 452 (1991)). The crux of the Gustafsons' theory is that, despite the plain language of the statute, Congress did not manifest an unmistakable desire to preempt this particular type of product-liability action. I disagree.

The trial court ruled that the statute cannot be read narrowly, because it found a clear Congressional intent to preempt state tort law. The trial court said the canon of statutory construction of constitutional avoidance applies:

> "where an otherwise acceptable construction of a statute would raise serious constitutional problems." ***Edward J. DeBartolo Corp. v. FL Gulf Coast Bldg. & Const. Trades Council***, 485 U.S. 568, 572 (1988). In such situations, "the Court will construe the statute to avoid such problems, unless such construction is plainly contrary to the intent of Congress." ***Id***.
>
> * * *
>
> [T]he text of [PLCAA] makes manifest Congress's intent to preempt state tort law. Congress explicitly stated in PLCAA that it intended to "prohibit causes of action" as defined in PLCAA to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." 15 U.S.C. § 7901. Throughout PLCAA, Congress unambiguously and without question states

> its intention to definitively preempt state tort law.

Trial Court Opinion, 1/15/19, at 3-4.

Like the trial court, I would conclude that Congress clearly manifested its intent to upend "the traditional constitutional balance of federal and state power." ***Gregory***, 501 U.S. at 464. Congress desired for PLCAA to supplant the sovereign police powers of the States to regulate their own laws of torts. Critically, the Gustafsons offer no narrower interpretation of PLCAA that would not revamp state tort law, because, as explained below, usurping state tort law was Congress's goal in passing PLCAA.

Hence, I agree with the trial court – the canon of statutory construction of constitutional avoidance does not apply to PLCAA. Federal overreach arises (and will continue to arise) in every PLCAA case.

The Gustafsons' arguments that PLCAA's statutory language does not apply to their lawsuit are meritless.

II.

The Gustafsons' second issue challenges the constitutionality of PLCAA under the principles of federalism.[8] Federalism divides sovereign authority between the Federal Government and the States,

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[8] The Gustafsons also challenge PLCAA under the Fifth Amendment, which I decline to address given my decision on their other constitutional theories.

based on the "unique insight [of the Founders] that freedom is enhanced by the creation of two governments, not one." ***Alden v. Maine***, 527 U.S. 706, 758 (1999).

In that system of government, "there is no question that State and local authorities . . . enjoy the general power of governing, including all sovereign powers envisioned by the constitution and not specifically vested in the Federal Government." ***National Federation of Indep. Bus. v. Dep't of Labor, Occupational Safety & Health Admin.***, 595 U.S. ___, ___, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring) (some punctuation omitted) ("***OSHA***"). "The Federal Government's powers, however, are not general but limited and divided." ***Id***. (citing ***McCulloch v. Maryland***, 17 U.S. 316 (1819)).

In addressing a constitutional challenge under federalism, courts must determine "whether particular sovereign powers have been granted by the Constitution to the Federal Government or have been retained by the States." ***New York v. United States***, 505 U.S. 144, 155 (1992). As Justice O'Connor explained, this question may be approached in either of two ways:

> In some cases, the Court has inquired whether an Act of Congress is authorized by one of the powers delegated to Congress in Article I . . . In other cases, the Court has sought to determine whether an Act of Congress invades the province of state sovereignty reserved by

> the Tenth Amendment . . . [T]he two inquiries are mirror images of each other.

Id. (citations omitted).

The Federal Government takes the first approach to rebut the instant Tenth Amendment challenge. It avers that PLCAA is authorized by one of the powers delegated to Congress in Article I. ***See*** Federal Government's Substituted Brief at 7. The Gustafsons take the second approach; they claim that PLCAA invades the province of state sovereignty reserved by the Tenth Amendment. I address each of their approaches in turn.

A. The Commerce Clause

When confronting a challenge to Congressional authority, the "Federal Government . . . must show that a constitutional grant of power authorizes each of its actions." ***National Federation of Indep. Bus. v. Sebelius***, 567 U.S. 519, 535 (2012) ("***Sebelius***"); ***see also OSHA, supra*** (Gorsuch, J., concurring) (accord). Thus, if the Constitution does not explicitly provide Congress with authority to pass a bill, then Congress may not enact it.

The Federal Government claims that Congress had the authority to pass PLCAA under the Commerce Clause. **See** Federal Government's Substituted Brief at 8-11. That clause grants Congress power to "regulate Commerce with foreign Nations, and among the several States . . . ." U.S. Const. art. I, § 8 cl. 3. The Federal Government believes that "the possibility of suits against gun manufacturers and sellers

'constitute[s] an unreasonable burden on interstate and foreign commerce.'" Federal Government's Substituted Brief at 8 (quoting 15 U.S.C. § 7901(a)(6)).

In reviewing that Commerce Clause theory, the trial court relied upon ***Ileto v. Glock, Inc.***, 565 F.3d 1126 (9th Cir. 2009), and found that the Commerce Clause permitted PLCAA's enactment. The trial court agreed with the Ninth Circuit "that it is entirely reasonable that PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce." Trial Court's Opinion, 1/15/19, at 14. Therefore, the trial court concluded that it was "reasonable for Congress to find that limiting liability in certain situations would directly affect and bolster interstate trade in firearms . . . ." ***Id***. at 14-15.

However, ***Ileto*** is not a Commerce Clause case. The plaintiffs in ***Ileto*** did not challenge (and the Ninth Circuit did not consider) Congress's authority to pass PLCAA under the Commerce Clause. Instead, Ileto involved a Fifth Amendment challenge to PLCAA's retroactivity provision. ***See Ileto***, 565 F.3d at 1141. The Ninth Circuit relied upon the regulation of commerce as Congress's rational basis for enacting PLCAA. Hence, that court did not actually consider whether the Act was a permissible exercise of Commerce Clause authority. Those are two entirely different issues.

Unlike ***Ileto***, the Gustafsons' challenge is not based on retroactivity under the Fifth Amendment. They bring a facial challenge that PLCAA falls outside

Congress's enumerated powers. Thus, I believe ***Ileto*** neither considered nor decided the issue at hand, and the trial court's reliance upon it was misplaced.

Instead, I turn to the Supreme Court's historical interpretation of the Commerce Clause. Chief Justice Marshall said, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." ***Gibbons v. Ogden***, 22 U.S. 1, 189–90 (1824). This definition of commerce ensures the "authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, 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). "That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." ***Id***. Congress may not rely upon the Commerce Clause to regulate purely local events.

The Commerce Clause has its limits. The High Court has recognized only three categories of activity that Congress may constitutionally regulate under the Commerce Clause:

> [1.] Congress may regulate the use of the channels of interstate commerce.
>
> [2.] Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in

> interstate commerce, even though the threat may come only from intrastate activities.
>
> [3.] Congress's commerce authority includes the power to regulate 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).

In PLCAA, Congress asserted that state lawsuits against members of the gun industry are local activities that burden interstate commerce. Therefore, Congress justified its enactment of PLCAA under the third category identified above.

Whether intrastate activities "affect 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 by [the courts]." ***Id***. at 557 n.2. "Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so." ***Id***.

When a party challenges Congress's Commerce Clause authority, courts must "evaluate the legislative judgment that the activity in question substantially affected interstate commerce . . . ." ***Id***. at 562–63. This raises a pure question of law. See id. To resolve it, courts may not "pile inference upon

inference in a manner that would . . . convert Congressional Commerce Clause authority to a general police power of the sort held only by the States." ***Id***. at 549–50.

As the Supreme Court of Pennsylvania observed over a century ago: "It is difficult to lay down a definite rule marking the division lines between intrastate [activity] and interstate commerce . . . to determine with precision and exactness in each case as it arises whether the injured [person] was or was not engaged in interstate commerce . . . ." ***Hench v. Pennsylvania R.R. Co.***, 91 A. 1056, 1058 (Pa. 1914). "To hold the scales evenly balanced, so as not to unduly limit the powers of Congress on one hand, nor yet encroach upon the proper exercise of state jurisdiction on the other, is not an easy task for any court." ***Id***. "But there must be a division line at some point in each case, and the facts must be the guide to determine where that line shall be drawn." ***Id***. Thus, our jurisprudence demonstrates that Congress may not draw the division lines of its own authority for itself. Otherwise, every federal statute would survive judicial review.

Here, the trial court did not analyze whether the intrastate activities that Congress sought to regulate under PLCAA substantially affect interstate commerce. Instead, it blindly accepted Congress's judgment of its own Commerce Clause authority. Merely because Congress titled this Act the Protection of Lawful ***Commerce*** in Arms Act does not mean it regulates "commerce," as a matter of constitutional law. ***See, e.g., Lopez, supra*** at 557 n.2. The trial

court's excessive deference licensed Congress to interpret the Constitution, in other words, "to say what the law is." ***Marbury v. Madison***, 5 U.S. 137, 177 (1803). Congress has no such power. ***Id***.; U.S. Const. art. I, § 1.

Likewise, the Federal Government offers no justification to support the claim that state lawsuits against gun manufacturers and sellers substantially affect interstate commerce. And it cites only one decision[9] analyzing PLCAA under the Commerce Clause – ***City of New York v. Beretta U.S.A. Corp.* et al.**, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009).

In ***City of New York***, the City, former-Mayor Michael Bloomberg, and others filed a lawsuit against several members of the gun industry in federal court. They sought an injunction under New York law based

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[9] The Defendants and Federal Government cite six appellate cases upholding the constitutionality of PLCAA. Of those six cases, however, two addressed Fifth Amendment and separation of powers questions. ***Ileto v. Glock, Inc.***, 565 F.3d, 1126, 1138 (9th Cir. 2009), and ***District of Columbia v. Beretta U.S.A. Corp.***, 940 A.2d 163 (D.C. 2008). Of the others, three addressed Tenth Amendment concerns, but they simply adopted the analysis of ***City of New York v. Beretta U.S.A. Corp.* et al.**, 524 F.3d 384 (2d Cir. 2008), *cert. denied*, 556 U.S. 1104 (2009), without independently analyzing PLCAA's constitutionality. ***See Adames v. Sheahan***, 909 N.E.2d 742 (Ill. 2009), *cert. denied* sub nom. ***Adames v. Beretta U.S.A. Corp.***, 558 U.S. 1100 (2009); ***Estate of Kim v. Cox***, 295 P.3d 380 (Ak. 2013); and ***Delana v. CED Sales***, 486 S.W.3d 316 (Mo. 2016). Thus, the only decision that truly analyzed the Commerce Clause and Tenth Amendment Claims was ***City of New York***. My review of that case encompasses the analyses of the other courts.

on public nuisance to abate harm resulting from alleged negligent marketing and distribution practices. While the suit was before the district court, Congress passed PLCAA, and the defendants moved for immediate dismissal. The City opposed the motion, claiming that exception (iii) to the definition of "qualified-civil- liability action" excluded the suit from PLCAA's scope. The City also attacked the Act's constitutionality.

The district court refused to dismiss and certified an immediate appeal. In a split decision, the Second Circuit reversed. The panel majority concluded PLCAA applied and that the Act was a valid exercise of Commerce Clause power. Based upon this conclusion, the majority found that PLCAA does not violate the Tenth Amendment.[10]

On the Commerce Clause issue, the City contended PLCAA regulated intrastate activities which fell outside the three Commerce Clause categories. The City relied upon ***Lopez, supra*** (declaring a federal statute barring the possession of firearms in school zones unconstitutional, because Congress had regulated intrastate activity too-far removed from the stream of interstate commerce) and ***United States v. Morrison***, 529 U.S. 598 (2000) (declaring part of the Violence Against Women Act, 34 U.S.C. § 12361, unconstitutional, because it criminalized intrastate activity).

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[10] The dissent did not address PLCAA's constitutionality. Instead, it wanted to certify the case to the Court of Appeals of New York for interpretation of the underlying New York statute.

The Second Circuit disagreed. It held that PLCAA falls within the third category of Commerce Clause regulation, due to the substantial economic effect that lawsuits may have on the gun industry. The court distinguished ***Morrison*** and ***Lopez***, because it found a closer "connection between the regulated activity and interstate commerce under the [PLCAA]" than existed in the statutes in those cases. ***City of New York***, 524 F.3d at 394.

According to the Second Circuit, PLCAA presents "no concerns about Congressional intrusion into truly local matters," because Congress only applied the statute to a firearm or ammunition "that has been shipped or transported in interstate or foreign commerce." ***Id***. (emphasis removed) (some punctuation omitted). The court based this holding upon the facts that "there can be no question of the interstate character of the [gun] industry" and that "Congress rationally perceived a substantial effect on ***the industry*** . . . ." ***Id***. (emphasis added). I find this reasoning unpersuasive considering more recent Supreme Court authority.

Seven years after ***City of New York***, when the Supreme Court of the United States decided ***National Federation of Indep. Bus. v. Sebelius***, 567 U.S. 519 (2012), it rejected the contention that a federal statute's substantial effect on an interstate industry equates to a regulation of local activity that substantially affects interstate commerce. In ***Sebelius***, the High Court reviewed the individual

mandate[11] of the Affordable Care Act[12] (a.k.a., "Obamacare" or "the ACA").

The Federal Government defended the ACA's individual mandate under the Commerce Clause and Congress's taxation power.[13] It believed the mandate came "within Congress's [Commerce Clause] 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.

The ACA's goals were "to increase the number of Americans covered by health insurance and decrease the cost of health care." ***Id***. at 538. No one questioned the health-insurance industry's interstate character or Congress's ability to regulate it. "We do not doubt that the buying and selling of health- insurance contracts is commerce generally subject to federal regulation." ***Id***. at 650 (Scalia, J., dissenting).

However, Chief Justice Roberts explained that the Founders wrote the Commerce Clause under the presumption that "commerce" meant activity. He observed that courts have "always recognized that the power to regulate commerce, though broad indeed, has limits." ***Id***. at 554 (quotation omitted). In declaring the ACA's individual mandate impermissible under the Commerce Clause, the Chief Justice opined that

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[11] ***See*** 26 U.S.C. § 5000A(a).

[12] ***See*** 124 Stat. 119-1025.

[13] ***See*** U.S. Const. art. I, § 8, cl. 1.

the mandate did not "regulate ***existing commercial activity***." ***Id***. at 552 (emphasis added). Instead, it compelled individuals "to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." ***Id***.

Writing separately, Justice Scalia (joined by Justices Kennedy, Thomas, and Alito) agreed with the Chief Justice. According to Justice Scalia, "If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or, in Hamilton's words, 'the hideous monster whose devouring jaws spare neither sex nor age, nor high nor low, nor sacred nor profane.'" ***Id***. at 652-53 (Scalia, J., dissenting) (quoting The Federalist No. 33, p. 202 (C. Rossiter ed. 1961)).

Because the ACA's individual mandate regulated people who were not active participants in the health-insurance market, five Justices held that the Commerce Clause could not sustain the mandate.[14] Congress had sought to command "those furthest removed from an interstate market to participate in the market . . . ." ***Id***. It tried to force those who chose not to participate in the health-insurance market to serve as the industry's financial sureties by mandating that they contribute to the national cost

[14] The Chief Justice rejected the Federal Government's Commerce Clause theory but accepted its alternative theory and upheld the individual mandate of the ACA under the taxation power. Justices Ginsburg, Breyer, Sotomayor and Kagan joined that part of his opinion.

of private health insurance. Thus, the ACA's individual mandate unconstitutionally shifted the costs of health insurance from the industry onto persons who had no existing commercial transactions with that industry.

Congress commits the same constitutional overreach in PLCAA. The Act regulates the inactivity of individuals who may ***never*** have engaged in a commercial transaction with the gun industry. As this case demonstrates, PLCAA reaches out and forces J.R. Gustafson and his parents to provide financial support for the gun industry by forgoing their tort claims against its members. It conscripts the Gustafsons to serve as financial sureties for the alleged-tortious acts and omissions of the industry by barring them from filing a lawsuit against its members under the common law of Pennsylvania. Whereas the ACA required uninsured individuals to support the insurance industry on the front end by mandating that they buy health insurance, PLCAA requires the gun industry's tort victims to support that industry on the back end by allowing the industry to retain money it would otherwise owe as damages. PLCAA turns tort victims into indemnifiers of the gun industry.

Critically, neither J.R. nor his parents purchased the gun used to kill him, i.e., they did not engage in commerce of ***any*** kind.[15] Hence, at the time of J.R.'s

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[15] In her Dissenting Opinion, Judge Olson attempts to distinguish ***National Federation of Indep. Bus. v. Sebelius***, 567 U.S. 519 (2012), based on her belief that the Gustafsons "chose to engage in commercial activity (i.e., litigation) that

death, there was no ***existing*** commercial activity between the Gustafsons and the gun industry for Congress to regulate. Any relation between Mr. Hudec's gun and interstate commerce had clearly ended by the time he brought the gun into his home for personal use. By regulating events that are well-removed from the interstate marketplace and individuals who never participated in that marketplace, I conclude that Congress exceeded its Commerce Clause authority when it enacted PLCAA.

Similarly, the High Court determined that Congress exceeded its Commerce Clause authority

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Congress found substantially affect interstate commerce." Olson Dissent at 19 (emphasis in original). I cannot agree.

Judge Olson offers no analysis or authority to support her claim that litigation is commercial activity. This unprecedented proposition violates the definition of commerce promulgated by the Supreme Court of the United States. ***See Gibbons v. Ogden***, 22 U.S. 1, 189-90 (1824). It is unfathomable how commerce — the free exchange of goods and services across state lines and intercourse between the parts of the nation — includes litigation — the "process of carrying on a lawsuit," i.e., a "proceeding instituted for the purpose of enforcing a right or otherwise seeking justice." BLACK'S LAW DICTIONARY at 1075, 1663 (10 ed. 2014) (quoting GARNER'S DICTIONARY OF LEGAL USAGE at 862-63 (3d ed. 2011)). Litigation is not commerce.

And, like the trial court, the Olson Dissent ultimately defers to Congress's assertion that this state litigation substantially affects interstate commerce. It never demonstrates how the Gustafson's lawsuit "has such a close and substantial relation to interstate commerce that [its] control is essential or appropriate to protect that commerce from burdens and obstructions." ***N.L.R.B. v. J&L Steel Corp***., 301 U.S. 37 (1937).

when it enacted the Gun-Free School Zones Act of 1990. There, Congress attempted to criminalize the possession of a gun near a school. Congress asserted its federal jurisdiction on the grounds that guns near schools would negatively impact education, and therefore the quality of the future workforce, which would substantially affect interstate commerce. In ***Lopez, supra***, the Supreme Court of the United States rejected Congress's assertion of federal jurisdiction.

There, a criminal defendant, who was convicted under the Gun-Free School Zones Act, challenged the statute's constitutionality. The High Court concluded that Congress could not pass the statute under the Commerce Clause, because there was "no indication that [Lopez], who merely possessed a gun near a school, had ***recently*** moved in interstate commerce . . . ." ***Lopez***, 514 U.S. at 567 (emphasis added). Additionally, the statute did not require that Lopez's "possession of the firearm have any ***concrete tie*** to interstate commerce." ***Id***. (emphasis added). Possessing a gun near a school was a local event, too-far removed from interstate commerce to affect that commerce in any substantial way.

PLCAA, like the Gun-Free School Zones Act, is unsustainable; it grants the gun industry immunity regardless of how far removed from interstate commerce the harm arises. As ***Lopez*** teaches, intrastate criminal misuse of firearms and ammunition (and, by extension, any tortious harm to which such intrastate misuse may contribute) are local events that are too-far removed from interstate

commerce to come within Congressional regulation. Without a recent or concrete link between federal legislation and interstate commerce, Congress's reliance upon the Commerce Clause puts every local victim of a crime or tort within federal regulatory reach. However, local crimes (such as involuntary manslaughter) and the law of torts have never been a federal concern. Rather, they are part of the States' sovereign police powers to protect their citizens from harm.

Ignoring this simple truth, the Federal Government would instead have us "pile inference upon inference in a manner that would . . . require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." ***Lopez***, 514 U.S. at 567–68. Like the Supreme Court in ***Lopez***, I am unwilling to find that Congress's Commerce Clause authority extends to an area of law too-far removed from interstate commerce. ***See id***. at 568.

Notwithstanding ***Lopez*** and ***Sebelius***, ***supra***, the Federal Government further contends that PLCAA falls within the Commerce Clause, because it only covers guns and ammunition that traveled across state lines. Specifically, the Act applies only to "qualified products," which the act defines as "a firearm, including any antique firearm, or ammunition, or a component part of a firearm or ammunition, that has been shipped or transported in

interstate or foreign commerce." 15 U.S.C. § 7903(4) (citations omitted).

While limiting the products covered, the Act does not limit the activity involving those products. PLCAA covers all uses of those products in perpetuity without any recent or "concrete tie to interstate commerce." ***Lopez***, 514 U.S. at 567. The Act immunizes the gun industry from any common-law liability that arises ***anytime*** after the firearm or ammunition has moved through and exited interstate commerce.[16]

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[16] In contrast to PLCAA, an example of a valid statute that constitutionally ties the activity being regulated to interstate commerce is the National Labor Relations Act ("the NLRA"), 29 U.S.C. §§ 151-168. In ***J&L Steel Corp., supra***, the Supreme Court ruled that both the NLRA and the National Labor Relations Board's assertion of federal jurisdiction over labor disputes were constitutional, because the NLRA only empowered the Board to act in cases where unfair labor practices are "***affecting commerce***." 29 U.S.C. § 160(a) (emphasis added). The NLRA did not "impose collective bargaining upon all ***industry*** regardless of effects upon interstate or foreign commerce." ***J&L Steel Corp.***, 301 U.S. at 31 (emphasis added). Instead, the NLRA covered only activities that "may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." ***Id***.

Even there, however, the High Court warned Congressional "power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." ***Id***. "The question is necessarily ***one of degree***." ***Id***. (emphasis added).

Neither Congress nor the Federal Government provides any explanation for how state civil lawsuits and local torts involving those products burden or obstruct the free flow of interstate commerce. The bill's lead sponsor, Senator Larry Craig, justified PLCAA on the basis that members of the gun industry "had to pay higher and higher legal costs to defend themselves in lawsuit after lawsuit . . ." 151 Cong. Rec. S9,218 (daily ed. July 28, 2005).[17]

However, history has shown that litigation against manufacturers and seller of products in other industries does ***not*** substantially affect the free flow of such products among the several States. The costs of such lawsuits and any damages imposed are ultimately folded into the cost of the products. In this way, tort victims receive compensation, manufacturers produce safer products, and the cost of litigation and subsequent improvements is shared by those who actively participate in the marketplace.

Additionally, the filing of a state lawsuit, in state court, based on state tort law, "is in no sense ***an***

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[17] I note that research from the Department of Health and Human Services refutes Senator Craig's justification. DHHS has stated, "there is simply no evidence that [pre-PLCAA] lawsuits were poised to eliminate the U.S. firearm industry." Vernick, Rutkow, & Salmon, Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicle, 97 Am. J. Public Health 1991, 1994 (2007), U.S. Department of Health and Human Services (National Institute of Health) available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374/ (last visited January 14, 2022).

economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." ***Lopez***, 514 U.S. at 567 (emphasis added). Even though lawsuits cost money and may result in the exchange of money, that monetary exchange is ***not*** commerce. The money at issue is not transactional; it is lawful compensation for the redress of grievances between citizens under the substantive laws and sovereign power of the States. Even where, as here, the lawsuit involves parties from different states, that lawsuit does not become interstate commerce. It is interstate litigation.

Our jurisprudence has never recognized that litigation costs justify an assertion of Commerce Clause authority. Litigation costs money for nearly every defendant who must appear in court or at an administrative proceeding, not just the gun industry. Thus, if one accepts Congress's assertion that state litigation affects interstate commerce — or is interstate commerce — simply because money is involved, then ***all cases*** in state court would instantly come within Congressional control. This assertion, if accepted, would obliterate American federalism as we know it. It would render the 50 several states provinces of the national government, a constitutional system similar to Canada's.

For example, when spouses divorce, litigation ensues to resolve equitable distribution of property, spousal and child support, and child custody. Under Congress's assertion, such domestic litigation could affect interstate commerce, because the parties involved are subject to awards that could negatively

affect their finances and property holdings. Like an industry held liable in tort, spouses involved in domestic litigation undoubtedly have their finances impacted. This in turn would affect their purchasing power and their ability to participate in interstate commerce, such as buying a new car, going on an out-of-state vacation, and shopping online. Therefore, if one accepts Congress's litigation-costs-money theory, Congress could easily justify nationalizing family law.

The same is true for zoning and land-use disputes, as well as property- tax assessments. All these local matters could be nationalized under the theory that they lead to litigation. When people challenge the zoning or tax assessment of their real property, they choose to commence litigation. This costs money. In turn, the litigants' purchasing power is affected in the same manner discussed above, and, in the aggregate, this could substantially impact interstate commerce. Hence, under Congress's assertion, it could regulate zoning, land use, and property-tax assessments.

The examples are endless. Every law or ordinance that any state, county or municipality adopts eventually leads to litigation, where at least one party will suffer a financial detriment. This is especially true in criminal law, where a defendant could lose virtually all ability to engage in commerce. The incarceration of thousands of individuals in state prisons across America substantially impacts interstate commerce due to the prisoners' absence from the marketplace. Does that mean Congress could regulate criminal litigation by passing a national

crimes code? The theory of the Federal Government and the Olson Dissent would suggest it could.

The above hypotheticals are no different than Congress relying on its claim that litigation affects commerce to justify PLCAA and thereby revamp tort law for the gun industry.

Under this breathtakingly expansive theory, it would be "as if federal officers were installed in" the filing offices of every state courthouse "and were armed with the authority to stop" any litigation Congress disfavored. ***Murphy v. National Collegiate Athletic Association, Inc.***, 584 U.S. ___, ___, 138 S. Ct. 1461, 1478 (2018). "A more direct affront to state sovereignty is not easy to imagine." ***Id***. I am unable and unwilling to surrender all of Pennsylvania law and sovereignty to Congress.

Indeed, as Justice Thomas warned in his ***Lopez*** concurrence, "if taken to its logical extreme, [the substantial-effects test] would give Congress a 'police power' over all aspects of American life." ***Lopez***, 514 U.S. at 584 (Thomas, J., concurring). The Supreme Court has "***always*** rejected readings of the Commerce Clause and the scope of federal power that would permit Congress to exercise a police power; our cases are quite clear that there are real limits to federal power." ***Id***. (emphasis in original).

Hence, I conclude the trial court erred by accepting Congress's claim that PLCAA regulates interstate commerce. The Federal Government has failed to tie the Act to any local activity that burdens interstate commerce for constitutional purposes.

Congress may not regulate those who do not actively participate in commerce with an interstate industry. Nor may it rely upon the Commerce Clause as a catchall to use any eventual economic impact upon an interstate industry as a pretext to legislate on purely state matters.[18]

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[18] In Judge Murray's Dissenting Opinion, she evaluates the constitutionality of this federal statute by applying the constitutional test for a state statute. ***See*** Murray Dissent, ***infra***, at 16-17 (quoting ***Commonwealth v. Snyder***, 251 A.3d 782, 792 (Pa. Super. 2021) (involving a constitutional challenge to a portion of the Pennsylvania Sentencing Code)). A challenger to a state statute must demonstrate that "the statute clearly, palpably, and plainly violates the constitution," ***id***., because "States have broad authority to enact legislation for the public good — what we have often called a 'police power.'" ***Bond v. United States***, 572 U.S. 844, 854 (2014). Unlike state legislatures, however, Congress "lack[s] a police power." ***Id***. Thus, the Federal Government "frequently ***defends*** . . . legislation on the ground that the legislation is authorized pursuant to Congress's power to regulate interstate commerce." ***Id***. (emphasis added).

Judge Murray's claim that I impermissibly shift the burden to the Federal Government to prove PLCAA's constitutionality mischaracterizes my analysis. ***See*** Murray Dissent, ***infra***, at 18. Instead, I only rebut the Federal Government's ***defense*** of PLCAA that Congress acted within its commerce- clause authority. Below and on appeal, the Federal Government advanced that defense to the Gustafsons' charge that Congress could not pass PLCAA under either the Tenth Amendment or the Commerce Clause. The Gustafsons made these claims of unconstitutionality before both the trial court and this Court. As such, they have not committed waiver.

Thus, I would rule that PLCAA is not a valid exercise of Congress's Commerce Clause authority.

C. The Tenth Amendment

Having rejected the Federal Government's approach to this issue, I now turn to the Gustafsons' argument. They take the second approach in their federalism challenge – namely, they assert PLCAA invades the province of state sovereignty reserved by the Tenth Amendment. That amendment provides, "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.

The Gustafsons contend PLCAA interferes with the autonomy of States to allocate lawmaking

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Moreover, I respectfully suggest that the Murray Dissent repeats the error of the trial court by merely taking Congress's assertion that PLCAA is authorized under the Commerce Clause at face value. ***See id***. at 19-22. Judge Murray acknowledges there are only three categories of activity that Congress may regulate pursuant to the Commerce Clause. ***See id***. at 22. However, rather than demonstrate how PLCAA falls within any of them, Judge Murray simply adopts Congress's conclusion "that targeted lawsuits 'constitute an unreasonable burden on interstate and foreign commerce of the United States.'" Murray Dissent at 22 (quoting 15 U.S.C. § 7901(a)(6)). Without any analysis, discussion, or evidence of such a burden, Congress, the Federal Government, the trial court, and the Murray Dissent never prove their hypothesis. In their view, lawsuits substantially effect interstate commerce simply because Congress says they do; that reasoning is circular.

functions between their various branches of state government. ***See*** Gustafsons' Brief at 34. Their argument stems from exception (iii) to the definition of "qualified-civil-liablity action." Exception (iii) permits lawsuits to proceed if they are based upon violations of state statutes, i.e., a law created by a state legislature. The Act, however, bars such lawsuits if they are based upon violations of the common law, i.e., decisional law created by state judiciaries.

The Gustafsons claim "PLCAA bars states from imposing liability on negligent gun companies if states have chosen to have their judiciaries establish the relevant liability standards through common law (like Pennsylvania), while allowing identical claims if the states used their legislatures to establish the relevant liability standards." ***Id***. (citing 15 U.S.C. §§ 7903(5)(A)(iii)). However, Congress has "no permissible authority to infringe upon a State's decision of which branch of government it chooses to make law." ***Id***.

To support their argument, the Gustafsons rely upon ***Erie R.R. Co. v. Tompkins***, 304 U.S. 64 (1938). In ***Erie R.R.***, the Supreme Court of the United States said, "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." ***Id***. at 78 (emphasis added).

The Gustafsons argue that, under ***Erie R.R.***, Congress may not disfavor the common law and, at the

same time, prefer the enactments of state legislatures. In other words, whether States choose to regulate the negligence and product liability of the gun industry by common law or by statute is purely a state concern. The Gustafsons allege Congress unconstitutionally disfavored and extinguished the common law of torts in the States' courts and impermissibly recodified it as federal law.

The Federal Government contends that the Gustafsons' invocation of ***Erie R.R.*** "is wholly out of place." Federal Government's Brief at 13 n.3. It believes "That case, which stands for the proposition that 'there is no federal general common law,' does not concern the Tenth Amendment." ***Id***. (quoting ***Erie R.R.*** at 78). I conclude the Federal Government is incorrect.

While the Supreme Court did not cite to the Tenth Amendment in ***Erie R.R.***, the decision has clear Tenth Amendment implications. ***Erie R.R.*** is a seminal decision of constitutional law on the allocation of powers between the States and Federal Government. The High Court held that the Constitution "recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments." ***Id***. at 78-79. "Any interference with either, except as thus permitted, is an invasion of the authority of the States . . . ." ***Id***. at 79.

Erie R.R. declared, "There is no federal general common law." ***Id***. at 78. This holding rests upon the constitutional premise at the heart of the Gustafsons'

challenge – namely, that common law (and tort law, in particular) is state law. We have no federal common law, because (1) "Congress has no power to declare substantive rules of common law applicable in a state whether they be . . . commercial law or a part of the law of torts. And [(2)] no clause in the Constitution purports to confer such a power upon the federal courts." ***Id***.

The Federal Government claims PLCAA does not rewrite the common law for the gun industry, because its six exceptions allow some common-law causes of action to proceed. My review of the six exceptions reveals that the Federal Government is incorrect.[19]

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[19] Exception (i) allows suits against a gun-industry "transferor" if under a state or federal criminal statute. ***See*** 15 U.S.C. § 7903(5)(A)(i). Accordingly, an underlying statutory violation is required for any tort claims to proceed.

Exception (ii) authorizes claims "for negligent entrustment or negligence per se." 15 U.S.C. § 7903(5)(A)(ii). Although typically a common-law tort, negligent entrustment is defined in PLCAA at 15 U.S.C. § 7903(5)(B). Thus, Congress set a ***statutory*** standard for negligent-entrustment claims against the gun industry. Likewise, negligence per se allows cases where the gun industry allegedly violated a statute. ***See, e.g., Bumbarger v. Kaminsky***, 457 A.2d 552, 555 (Pa. Super. 1983). Hence, only Congress and state legislatures define the duty of care under Exception (ii).

Exception (iii) permits actions to proceed if based on "a state or federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). Clearly, this exception is not based upon common-law claims.

When PLCAA applies, it eliminates all common-law-tort claims against the gun industry. Thus, I agree with the Gustafsons' Tenth Amendment claim. Congress aimed the PLCAA-tort-reform bill directly at the common law and expressly disapproved such causes of action while favoring the statutes of state legislatures and its own.

Tort law is decidedly a state issue. If courts allow Congress to regulate tort litigation involving these products, it could eventually regulate all litigation. This is not permitted under the Constitution of the United States' principles of federalism. As such, I

Exception (iv) allows lawsuits based on breach of contract and warranty relating to the sale of firearms. 15 U.S.C. § 7903(5)(A)(iv). This exception likewise requires plaintiffs to prove statutory violations, because all 50 States have adopted the Uniform Commercial Code ("the UCC"). Firearms and ammunition are "goods" under the UCC. ***See*** 13 Pa.C.S.A. § 2105(a); ***see also*** UCC, Art. II, § 105(a). Thus, the UCC applies to any "action for breach of contract or warranty in connection with the purchase of a qualified product," 15 U.S.C. § 7903(5)(A)(iv), not the common law of assumpsit.

Exception (v) never preserves the common law of product defect. As discussed above, the exception's caveat renders it a nullity.

Finally, Exception (vi) permits the Attorney General of the United States to bring lawsuits based upon "chapter 44 of Title 18 or chapter 53 of Title 26." 15 U.S.C. § 7903(5)(A)(vi). Obviously, this last exception allows no claims at common law, but only suits based on violations of the listed federal statutes.

PLCAA therefore grants total immunity from common-law liability to the gun industry whenever the Acts applies.

conclude that Section 7902(b) of PLCAA, which directs courts to dismiss common-law claims that fall within the definition of "qualified-civil-liability action," violates the Tenth Amendment.

Consequently, I would hold that Section 7902(b) of PLCAA is repugnant to the Constitution of the United States and declare PLCAA's dismissal mandate "void." ***Marbury***, 5 U.S. at 180.

C. Severability

Finally, having determined the dismissal mandate of PLCAA (Section 7902) is unconstitutional, I must address the question of severability. ***See Seila Law LLC v. C.F.P.B.***, 591 U.S. ___, ___, 140 S. Ct. 2183, 2209 (2020) (quoting ***Free Enterprise Fund v. Public Company Accounting Oversight Board***, 561 U.S. 477, 508, (2010)). If Congress would not have enacted a statute's constitutional provisions without its unconstitutional terms, then the constitutional provisions are not severable; the entire statute must be declared unconstitutional. ***See id***.

The only portions of PLCAA that do not offend the Constitution are its findings and purposes (in Section 7901) and its definitions (in Section 7903). These provisions have no force on their own. Accordingly, Congress would not have enacted the constitutional provisions of PLCAA standing alone. For this reason, I believe the rest of PLCAA is not severable and would declare the Act unconstitutional in its entirety.

CONCLUSION

The constitutional safeguards that override PLCAA are the structural pillars of American government. These principles ensure that local matters remain under the local authority of the States, and they prevent the Federal Government from becoming all powerful. While such principles may be "less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments," ***Sebelius***, 567 U.S. at 707, (Scalia, J. dissenting), federalism is fundamental to liberty. It permits the 50 Experiments in Democracy, which the People perform in their state legislatures and courthouses across this Nation on a daily basis. Congressional tort-reform bills, like PLCAA, have no place in that system; tort law and statutes reforming it are reserved to the States under the Tenth Amendment.

I recognize that state courts do not typically resolve claims involving the constitutionality of federal statutes. However, that is the issue presented by the facts of the case before us. The Gustafsons filed a product-liability lawsuit under Pennsylvania common law, which, but for a federal statute, would have proceeded through our state courts like every other civil action. When their claims were abruptly dismissed under PLCAA, the question of that federal law's constitutionality fell squarely before us, and we must answer it. ***See, e.g., Robb v. Connolly***, 111 U.S. 624, 637 (1884) (holding that state courts and federal courts coequally share the obligation to decide federal constitutional questions).

Although a Congressional statute would normally preempt state law, preemption only occurs if the statute comports with the Constitution of the United States. ***See Marbury***, 5 U.S. at 178. Here, I find the Constitution – the Supreme Law of the Land – did not authorize Congress to pass PLCAA. The Act is an exercise of police power that the Tenth Amendment reserves for the sovereign States. Thus, to discharge my judicial duty to follow the Supreme Law of the Land, I would declare the inferior PLCAA statute void. ***See id***. I express no opinion on the merits of the Gustafsons' lawsuit or whether the gun is defective. Likewise, my decision does not implicate the right to bear arms under the federal or Pennsylvania constitutions. I only conclude that, under the Constitution of the United States, the Gustafsons' products-liability lawsuit is a local matter that a jury in Westmoreland County, not Congress, must decide.

President Judge Panella and Judge Lazarus join this Opinion. Judgment Entered.

/s/ Joseph D. Seletyn, Esq.
Joseph D. Seletyn, Esq.
Prothonotary

Date: 8/12/2022

OPINION IN SUPPORT OF PER CURIAM ORDER TO REVERSE BY BENDER, P.J.E.:

I also vote to reverse the Order dismissing the Gustafsons' case and remand for the Defendants to file their Answer and New Matter. I write separately because I would reverse on both issues presented by

the Gustafsons: I find the PLCAA does not apply to the facts of this case, and that the PLCAA is unconstitutional.

I.

For the following reasons, and contrary to Part I of Judge Kunselman's Opinion in Support of *Per Curiam* Order to Reverse ("Judge Kunselman's Opinion"), I would reverse the trial court's order dismissing the Gustafson's lawsuit based on the applicability of the product-defect exception to the PLCAA's definition of a qualified civil liability action ("QCLA"). As is axiomatic,

> [t]he question presented by the demurrer is whether, on the facts averred, the law says with certainty that no recovery is possible. Accordingly, our standard of review is to determine whether the complaint adequately states a claim for relief under any theory of law. To evaluate a demurrer under this standard, the court must accept as true all material averments of the complaint and may sustain the demurrer only if the law will not permit a recovery. Where any doubt exists as to whether a demurrer should be sustained, it must be resolved in favor of overruling the demurrer.

Mistick, Inc. v. N.W. Nat. Cas. Co., 806 A.2d 39, 42 (Pa. Super. 2002) (cleaned up).

A.

I agree with Judge Kunselman that this case meets the general definition of a QCLA under the PLCAA.[20] I depart from her analysis with respect to the applicability of the exception to the definition of a QCLA set forth in Section 7903(5)(A)(v). Regarding that exception, the Gustafsons asserted before the trial court that the "discharge of the product" was not "caused by a volitional act that constituted a criminal offense[.]" 15 U.S.C. § 7903(5)(A)(v) (emphasis added). They maintained that the Juvenile Delinquent did not voluntarily discharge the weapon; rather, they posited that, while he may have intentionally pulled the trigger, he did not intend for the gun to discharge, as he believed the weapon was unloaded when its magazine had been removed. Additionally, because this case involved a juvenile offender adjudicated in the juvenile court system, and not in the criminal court, the Gustafsons maintained that even if there was a volitional act within the meaning of Section 7903(5)(A)(v), that act did not constitute a criminal offense within the meaning of the exception.

The trial court rejected the applicability of Section 7903(5)(A)(v) for the following reasons:

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[20] ***See*** 15 U.S.C. § 7903(5)(A) ("The term [QCLA] means 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, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party...."). "A [QCLA] may not be brought in any Federal or State court." 15 U.S.C. § 7902(a).

[The Gustafsons] next argue that the present case falls under the product[-defect] exception as there was no occurrence of a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). [They] first argue a lack of a criminal offense on the part of the Juvenile Delinquent, as "[d]elinquency proceedings are not criminal in nature ... [.]" *In Interest of G.T.*, 409 Pa.Super. 15, 597 A.2d 638, 641 (1991). [Springfield and Saloom] point out that a "delinquent act" is defined under Pennsylvania law specifically as "an act designated a crime under the law of this Commonwealth ... [.]" 42 Pa.C.S.[ ] § 6302[ ]. [Springfield and Saloom] additionally reference the Supreme Court of Illinois case of ***Adames v. Sheahan***[, 233 Ill.2d 276, 330 Ill.Dec. 720, 909 N.E.2d 742, 745 (2009),] as being the only case presently adjudicated which has addressed the issue of applying the PLCAA "criminal offense" provision to a minor.

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The ***Adames*** case concerned a minor who shot and killed another minor using a handgun belonging to his father. ***Id.*** at 761, 909 N.E.2d at 763. The minor was adjudicated delinquent through the Illinois juvenile delinquency process, with the court in the juvenile proceeding finding that the minor committed involuntary manslaughter. ***Id.*** The Illinois Supreme Court, when confronted with the applicability of the "criminal misuse"

> provision of the PLCAA, looked to the definition of "criminal" found in Black's Law Dictionary, which reads: "[h]aving the character of a crime; in the nature of a crime." ***Id.*** The Illinois Supreme Court found that, although the minor was not charged or adjudicated criminally, he certainly violated the Illinois Criminal Code based on his juvenile adjudication. ***Id.*** The act of shooting and killing another "was 'in the nature of a crime,' " and thus fell squarely within the categorization of criminal misuse under the PLCAA. ***Id.*** Here, the [c]ourt finds the ***Adames*** reasoning persuasive. Although [the Gustafsons] correctly point out that juvenile proceedings are not criminal in nature, delinquent acts in Pennsylvania are by definition "act[s] designated a crime under the law of the Commonwealth of Pennsylvania." 42 Pa.C.S.[ ] § 6302.
>
> Additionally, the focus of the PLCAA is on the "volitional act" and the criminal character thereof. As explained by the ***Adames*** Court, committing an act amounting to involuntary manslaughter, whether prosecuted criminally or not, still amounts to ... committing a criminal act and is thus applicable under the "criminal misuse" portion of the PLCAA. The [c]ourt thus declines to adopt [the Gustafsons'] reading [of the phrase,] "volitional act that constituted a criminal offense."

Trial Court Opinion, 1/15/19, at 7-8.

The trial court did not specifically address the other aspect of the Gustafsons' argument for the applicability of the products liability exception—that the at-issue act was not volitional in nature. However, a similar argument was also rejected in ***Adames***. The ***Adames*** Court held that the decision to point a gun and pull the trigger was volitional, even if the resulting injuries were not intended. ***See Adames***, 330 Ill.Dec. 720, 909 N.E.2d at 763. Here, relying in large part on ***Adames*** as well, my learned colleague brushes these arguments aside, concluding that "[w]henever a defective gun causes harm and a crime is involved, exception (v) cannot apply[,]" because "***all*** criminal offenses require a ***volitional*** act." Judge Kunselman's Opinion at 743 (citing 18 Pa.C.S. § 301) (emphasis in original).[21] This Court is not compelled to follow ***Adames***. Indeed, I would decline to do so, as I am unpersuaded by the ***Adames*** Court's analysis on both points.

B.

The product-defect exception to the PLCAA's general preemption of QCLAs contains a caveat for circumstances "where the discharge of the product was caused by a volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). It is important to note that Congress, in drafting the PLCAA, could have easily referred to discharges

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[21] The express terms of Section 301, however, also permit criminal liability based on "the omission to perform an act...." 18 Pa.C.S. § 301. Thus, there are at least some circumstances where proof of a voluntary act is not required to prove the commission of a criminal offense.

caused by 'criminal acts,' or to 'delinquent acts by juveniles,' or used similarly straightforward language, if they intended the caveat to encompass any discharge that occurs during the commission of any crime. I do not believe this Court can assume that Congress's word choice was accidental or inconsequential in this regard.

Nevertheless, Judge Kunselman invokes Section 301 of the Crimes Code in declaring that all criminal offenses arise necessarily from volitional acts.[22] But Section 301 itself demonstrates that this is not the case, as criminal offenses may also be premised on "the omission to perform an act of which [a person] is physically capable." 18 Pa.C.S. § 301(a). While an omission to do an act may itself be volitional, it is certainly not a **volitional act**. Indeed, it is not an act at all. Thus, Judge Kunselman's rejection of Appellant's attempt to invoke the product-defect exception, premised on the assumption that a plea to the commission of a crime (or to the equivalent in a juvenile court) is necessarily an admission to a "a volitional act that constituted a criminal offense," is flawed in my view. 15 U.S.C. § 7903(5)(A)(v).

Instead, I believe the exceptional circumstances of this case call into question whether the discharge of the firearm was caused by a volitional act, even though a criminal offense was committed. In typical circumstances, the intentional act of pulling a trigger is effectively identical to intentionally firing the gun,

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[22] Judge Kunselman admits her interpretation of this caveat to the product-defect exception renders the exception "toothless[.]" Judge Kunselman's Opinion at 743-44.

regardless of whether the resulting injury was intended. However, the factual averments of the Gustafsons suggest otherwise, as they contend that while the Juvenile Delinquent's pulling of the trigger was volitional, the firing of the gun was not, because he believed that the firearm was not loaded when the magazine was disengaged. I do not think the relevant criminal act of discharging the gun was volitional, even if it was criminal in nature. This is the essence of the product defect claims at issue: whether the gun could have been made safer such that a person in the Juvenile Delinquent's position would have been deterred from pulling the trigger when he, in fact, did not intend for the gun to discharge. This deterrent effect would be meaningless if the act of pulling the trigger was indistinguishable from the act of firing the gun for purposes of what constitutes a volitional act in the context of the product-defect exception. The Gustafsons provide an illustrative analogy:

> Even if pulling the trigger was "volitional," that does not make a discharge "caused by a volitional act" any more than an explosion would be "caused by [the] volitional act" of answering a cell phone if, unbeknownst to you, terrorists had wired your phone to a remote bomb. In both cases, there was "volition" to engage in a seemingly non-dangerous act, but not to cause an unforeseen dangerous result.

Appellants' Brief at 33.

I agree with the Gustafsons. Here, based upon the factual averments contained in their complaint, there is an atypical disconnect in the chain of causation

between pulling the trigger and discharging the weapon that is not present in archetypal criminal use or misuse of a firearm cases that Congress sought to address in the caveat to the product-defect exception. In my view, this distinction is factual, not legal. It is dependent on the specific circumstances of the case before us—issues of fact—that ultimately determine whether the underlying act that constitutes a criminal offense was volitional. It may be true that most criminal cases involving firearms do not involve these idiosyncratic fact patterns. However, based on the unique facts averred by the Gustafsons in this case, I cannot say "with certainty that no recovery is possible" due to preemption by the PLCAA. ***Mistick***, 806 A.2d at 42.[23]

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[23] I would note that the Juvenile Delinquent's adjudication for involuntary manslaughter does not adequately demonstrate that his adjudication was necessarily predicated on the commission of a volitional act based on a reading of the elements of that offense alone.

> Involuntary manslaughter, which differs from murder in that specific intent and malice are absent, encompasses[ ] the killing of another without malice and unintentionally, but in doing some unlawful act not amounting to a felony nor naturally tending to cause death or great bodily harm, or in negligently doing some act lawful in itself, or by the negligent omission to perform a legal duty.

Commonwealth v. Moore, 463 Pa. 317, 344 A.2d 850, 853 (1975) (quotation marks omitted).

Because the offense of involuntary manslaughter may be predicated on the negligent failure to perform a legal duty, it is

C.

Additionally, Pennsylvania's General Assembly has removed certain criminal acts from the class of criminal offenses, where the distinction between criminal acts that constitute criminal offenses, and criminal acts that do not, is the age of the perpetrator. As argued by the Gustafsons,

> [w]hile PLCAA's general definition of [QCLA] bars actions where harm results from a "criminal or unlawful" misuse of a firearm (15 U.S.C. § 7903(5)(A)), the disqualifying provision in the products liability exception only bars cases involving a "criminal" act. [15 U.S.C.] § 7903(5)(A)(v). When a legislature excludes one term from a list of terms, it is excluding that term from its scope. ***Indep. Oil & Gas Ass'n of Pa. v. Bd. Of Assessment Appeals***, 572 Pa. 240, 247, 814 A.2d 180 (2002). Thus, Congress intended to allow products liability claims involving "unlawful" but not "criminal" acts.
>
> Juvenile offenses—such as the Juvenile Delinquent's involuntary manslaughter

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not clear to me that the Juvenile Delinquent was adjudicated delinquent based on his commission of a volitional act, as the definition of that offense encompasses negligently omitting to perform a legal duty that resulted in a death. Thus, even if Appellant did not volitionally fire the gun, he could have committed the offense of involuntary manslaughter by negligently failing to verify if the gun was unloaded when he pulled the trigger under the belief that it would not fire.

> 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 [15 U.S.C.] § 7903(5)(A)(v).

Appellants' Brief at 31.

I agree with the Gustafsons. Even assuming that the Juvenile Delinquent's firing of the gun was a volitional act, the product-defect exception only excludes volitional acts of discharging a firearm that "constitute[ ] a criminal offense." 15 U.S.C. § 7903(5)(A)(v). The ***Adames*** Court reasoned that Billy's commission of a juvenile offense "had the character of a crime and was 'in the nature of a crime' and, therefore, was ... criminal...." ***Adames***, 330 Ill.Dec. 720, 909 N.E.2d at 761. Thus, the ***Adames*** Court held that because Billy had ostensibly violated a criminal statute (despite being tried as a juvenile), the underlying act was still criminal and constituted a criminal offense. However, I do not believe that whether the at-issue act was 'in the nature of a crime' is the relevant inquiry. Even if construed as a volitional criminal act, it 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. Because the Juvenile Delinquent was not tried as an adult in criminal court, the pertinent act of firing the handgun did not constitute a criminal offense under the undisputed facts of this case.

II

On the second issue raised by the Gustafson's, I join part II of Judge Kunselman's Opinion in Support of *Per Curiam* Order to Reverse. I agree with Judge Kunselman's conclusions and supporting analyses that the Protection of Lawful Commerce in Arms Act of 2005, 15 U.S.C. §§ 7901-7903 ("PLCAA"), "is not a valid exercise of Congress's Commerce Clause authority[,]" Judge Kunselman's Opinion at 754, that Section 7902(b) of the PLCAA violates the Tenth Amendment, ***id.*** at 756, and that the constitutionality of the PLCAA cannot be salvaged by severance of Section 7902(b), ***id.*** at 756. I find the PLCAA offends the United States Constitution and, therefore, it cannot bar the Gustafson's product-liability lawsuit.

CONCLUSION

In sum, I would reverse the trial court's order granting demurrer because I disagree with the court's determination that the product-defect exception did not apply in the circumstances of this case, for the reasons set forth above. I would also reverse because I wholeheartedly agree with Judge Kunselman's determinations that the PLCAA violates the Commerce Clause, that Section 7902(b) of the PLCAA violates the Tenth Amendment, and that Section 7902(b) is not severable, for reasons set forth in her opinion.

OPINION IN SUPPORT OF PER CURIAM ORDER TO REVERSE BY DUBOW, J.:

I agree with a majority of this Court that we should reverse the trial court's order sustaining Appellees' Preliminary Objections. I, however, write

separately because I respectfully disagree with the reasoning set forth in the Judge Kunselman's Opinion in Support of *Per Curiam* Order to Reverse. ("Judge Kunselman Opinion").

As an initial matter, I respectfully disagree with the conclusion of the Judge Kunselman Opinion that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901 *et seq*. ("PLCAA") is unconstitutional. Rather, I find PLCAA to be constitutional for the reasons discussed in the Dissenting Opinion of the Honorable Judith F. Olson.[24]

I, however, would reverse the trial court's order sustaining Appellees' Preliminary Objections because I interpret PLCAA as precluding Appellees from asserting the immunity in this case for the reasons set forth in Sections I.A, I.B, and I.C of President Judge Emeritus Bender's Opinion in Support of *Per Curiam* Order to Reverse.

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[24] I also respectfully disagree with the section of the Judge Kunselman Opinion that finds that PLCAA grants immunity to Appellees in this case.

DISSENTING OPINION BY OLSON, J.:

As I believe that the trial court was correct in dismissing this action, I must respectfully dissent from the Per Curium Order to Reverse.

I.

I agree with Part I of Judge Kunselman's Opinion in Support of Per Curium Order to Reverse. Specifically, I believe that the federal statute entitled the Protection of Lawful Commerce in Arms Act of 2005, 15 U.S.C. §§ 7901-7903 ("PLCAA"), bars the product liability lawsuit filed by Mark and Leah Gustafson against the Appellees as a result of the tragic death of their son, J.R. However, I part company with my colleagues who conclude that PLCAA is unconstitutional. Instead, I believe, as the many courts who have considered these constitutional arguments have concluded, that PLCAA is constitutional. Therefore, I would affirm the trial court's order sustaining the Appellees' preliminary objections and dismissing the Gustafsons' complaint with prejudice. I write separately to address the constitutional arguments raised by the Gustafsons.

II.

The Enactment of PLCAA

In the late 1990s and early 2000s, an increase in gun violence in the nation's municipalities prompted gun control advocates to seek stricter laws governing the manufacture and sale of firearms. When state legislatures failed to pass such laws, advocates for stricter firearms regulations turned to the courts for

redress resulting in an increase of lawsuits being filed against the firearms industry. In light of the increase in such lawsuits and the impact such suits would have on consumers and the marketplace, Congress enacted PLCAA in 2005. The purpose of PLCAA was to prevent lawsuits against "manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended ... for the harm caused by the misuse of firearms by third parties, including criminals". 15 U.S.C. § 7901(a)(3). In the lengthy debates that preceded the passage of PLCAA, Congress highlighted the extensive costs associated with litigation brought against the firearms industry and the impact those costs have on the industry and the consumers. Bankruptcy was perceived as a threat to the industry and the many workers employed therein. 151 Cong. Rec. S9807-01 (daily ed. June 27, 2005) (statement of Sen. Baucus) (the expenses associated with the lawsuits are "a significant drain on the firearms industry, costing jobs and millions of dollars, increasing business operating costs, including skyrocketing insurance costs, and threatening to put dealers and manufacturers out of business"). Moreover, concerns were expressed of the harm that could befall the United States military as domestic gun manufacturers supply the military with necessary firearms. ***Id.*** Thus, as noted by Senator Larry Craig of Idaho, one of the sponsors of the Act, PLCAA is intended to stop litigation "that attempt[s] to pin the blame and the cost of criminal behavior on businesspeople who are following the law and selling a legal product. In fact, the one consumer product where access is protected by nothing less than our Constitution itself is our firearms, and that is exactly

what is at stake [ ]: the right of law-abiding American consumers, American citizens, to have access to a robust and productive marketplace in the effective manufacturing and sale of firearms." 151 Cong. Rec. S9807-01 (daily ed. June 27, 2005) (statement of Sen. Craig).[1]

PLCAA specifically sets forth the findings upon which Congress based the passage of the Act. As expressly stated, Congress found, *inter alia*, that the Second Amendment of the United States Constitution protects the rights of individuals to keep and bear arms; lawsuits have been brought against the firearms industry seeking damages for harm caused by the misuse of firearms by third parties, including criminals; and such lawsuits are done for the purpose of having the judicial branch circumvent the legislative branch of government thereby threatening the separation of powers doctrine and the principles of federalism and comity between states. 15 U.S.C. § 7901(a). Thus,

> [t]he possibility of imposing liability on an entire industry for harm that is solely caused

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[1] During the debates, Senator Craig emphasized the limitations imposed by PLCAA as it "is not a gun industry immunity bill". 151 Cong. Rec. S9807-01 (daily ed. June 27, 2005) (statement of Sen. Craig). "This bill does not create a legal shield for anybody who manufactures or sells a firearm. It does not protect members of the gun industry from every lawsuit or legal action that could be filed against them. It does not prevent them from being sued for their own misconduct. This bill only stops one extremely narrow category of lawsuits, lawsuits that attempt to force the gun industry to pay for the crimes of third parties over whom they have no control." ***Id***.

> 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.

Id. at § 7901(a)(6).

Under PLCAA, "[a] qualified civil liability action[2] may not be brought in any Federal or State court". ***Id.*** at § 7902(a). However, six exceptions apply to this rule, including "an action for death ... 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 ...". ***Id.*** at § 7903(5)(A)(v). As Judge Kunselman correctly found, this exception does not apply in this case. ***See*** Kunselman Opinion at 741-45. Accordingly, PLCAA is applicable to the Gustafsons' claims and, so

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[2] A "qualified civil liability action" is defined in relevant part as "a civil action ... brought by any person against a manufacturer or seller of a qualified product ... for damages ... 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). The firearm and ammunition used in this case meet the definition of a "qualified product". ***See id***. at § 7903(4).

long as PLCAA is deemed constitutional, will bar said claims.

Constitutionality of PLCAA

Since its enactment in October 2005, the constitutionality of PLCAA has been challenged in various state and federal courts. Every appellate court that has addressed these issues have found that PLCAA passes constitutional muster.[3]

A. The Commerce Clause

In their original brief filed with this Court, the Gustafsons devote less than two pages to their argument that Congress had no authority under the Commerce Clause to enact PLCAA. Appellants' Brief

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[3] ***Ileto v. Glock, Inc.***, 565 F.3d 1126 (9th Cir. 2009), *cert. denied*, 560 U.S. 924, 130 S.Ct. 3320, 176 L.Ed.2d 1219 (2010); ***City of New York v. Beretta U.S.A. Corp.***, 524 F.3d 384 (2d Cir. 2008), *cert denied* 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009); ***Delana v. CED Sales, Inc.***, 486 S.W.3d 316 (Mo. 2016); ***Estate of Kim v. Coxe***, 295 P.3d 380 (Ak. 2013); ***Adames v. Sheahan***, 233 Ill.2d 276, 330 Ill.Dec. 720, 909 N.E. 2d 742 (2009), *cert. denied sub. nom.* ***Adames v. Beretta U.S.A. Corp.***, 558 U.S. 1100, 130 S.Ct. 1014, 175 L.Ed.2d 634 (2009); ***District of Columbia v. Beretta U.S.A. Corp.***, 940 A.2d 163 (D.C. 2008), *cert. denied sub. nom.* ***Lawson v. Beretta U.S.A. Corp***., 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009). I note that the United States Supreme Court has denied each of the writs of *certiorari* filed in the cases dealing with the constitutionality of PLCAA. I further note that this Court "is not bound by the decisions of federal courts, other than the United States Supreme Court, or the decisions of other states' courts ... [H]owever, we may use them for guidance to the degree we find them useful and not incompatible with Pennsylvania law." ***Eckman v. Erie Ins. Exch.***, 21 A.3d 1203, 1207 (Pa. Super. 2011) (internal citation omitted).

at 47-49. In their underdeveloped argument, the Gustafsons argue that the trial court did not explain how its decision "comports with [the] requirement that permissible preemption involve[s] regulation of private actors, not sovereign states – or how allowing unlimited liability in states with codified liability standards, but no liability in states that rely on common law, is a rational regulation of interstate commerce." ***Id.*** at 48. Following the order granting *en banc* consideration, the Gustafsons filed a supplemental brief in which they agree with the original panel's finding that the Commerce Clause prohibited Congress from enacting PLCAA; however they clarify their argument as follows:

> PLCAA's constitutional deficiency does not hinge on a finding that litigation is not sufficiently related to commercial activity. PLCAA violates the Commerce Clause because it targets *the states themselves*, rather than any private individuals or any arguably commercial activity, by dictating to the states how they must exercise their lawmaking functions. State decisions on how to distribute lawmaking functions among the branches of state government – namely, whether liability standards should be generated through judicial development of the common law or through legislation – are not commercial activity within the proper ambit of Congress's Commerce Clause authority.

Appellants' Supplemental Brief at 6 (emphasis in original).[4]

The Gustafsons' argument regarding the Commerce Clause is misplaced. Instead of arguing that Congress lacked authority under the Commerce Clause to regulate interstate and international commerce of firearms, the Gustafsons repackage their argument regarding the Tenth Amendment in terms of the Commerce Clause; *i.e.* state decisions on whether liability standards should be established via common law or through legislation is not commercial activity that may be regulated by Congress. As will be addressed *infra*, this argument is meritless.

Notwithstanding the Gustafson's faulty argument, Judge Kunselman concludes that "PLCAA is not a valid exercise of Congress's Commerce Clause authority". Kunselman Opinion at 754. In reaching this conclusion, Judge Kunselman ignores the cases that have expressly considered the application of the Commerce Clause to PLCAA, and instead, does her own analysis based upon the United State Supreme Court's "historical interpretation" of the Commerce Clause. ***Id.*** at 15. I believe that this "historical interpretation" is flawed.

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[4] In her dissenting opinion, Judge Murray suggests that we could find that the Gustafsons waived their argument regarding the Commerce Clause by failing to present "a cogent legal argument on this issue". Dissenting Opinion (Murray, J.) at 784. I agree the argument is underdeveloped, but I do not agree that the issue should be deemed to be waived.

The United States Constitution vests Congress with the power "[t]o make all Laws which shall be necessary and proper for carrying into Execution" its authority to "regulate Commerce with foreign Nations, and among the several States". U.S. Const. art. I, § 8. In determining whether Congress has authority to pass various pieces of legislation pursuant to the Commerce Clause, the United States Supreme Court acknowledges that "[t]he path of [the Court's] Commerce Clause decisions has not always run smooth". ***Nat'l Fed'n of Indep. Bus. v. Sebelius***, 567 U.S. 519, 549, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012). However, "it is now well established that Congress has broad authority under the Clause." ***Id.*** In assessing Congress' authority under the Commerce Clause, the Supreme Court "afford[s] Congress the leeway to undertake to solve national problems directly and realistically" and the approach to judge whether Congress properly exercised its authority is guided by two principles:

> First, Congress has the power to regulate economic activities that substantially affect interstate commerce. This capricious power extends even to local activities that, viewed in the aggregate, have a substantial impact on interstate commerce. [***Wickard v. Filburn***, 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942)] ("[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, *whatever its nature*, be reached by Congress if it exerts a substantial economic effect on interstate commerce.") (emphasis added)).

> Second, we owe a large measure of respect to Congress when it frames and enacts economic and social legislation. ***Pension Benefit Guaranty Corporation v. R.A. Gray & Co.***, 467 U.S. 717, 729 [104 S.Ct. 2709, 81 L.Ed.2d 601] (1984) ("[S]trong deference [is] accorded legislation in the field of national economic policy."); ***Hodel v. Indiana***, 452 U.S. 314, 326 [101 S.Ct. 2376, 69 L.Ed.2d 40] (1981) ("[The Supreme] Court will certainly not substitute its judgment for that of Congress unless the relation of the subject to interstate commerce and its effect upon it are clearly non-existent."). When appraising such legislation, we ask only (1) whether Congress had a rational basis for concluding that the regulated activity substantially affects interstate commerce, and (2) whether there is a reasonable connection between the regulatory means selected and the asserted ends.
>
> In answering these questions, we presume the statute under review is constitutional and may strike it down only on a plain showing that Congress acted irrationally.

Id. at 601-603, 132 S.Ct. 2566 (Ginsberg, J., concurring and dissenting) (some quotation marks, parentheticals, and citations omitted) (emphasis in original); ***see also N.L.R.B. v. Jones & Laughlin Steel Corp.***, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937) ("Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate

commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control."). Moreover, Congress' power under the Commerce Clause includes the power to regulate "purely local activities that are part of an economic 'class of activities' that have a substantial effect on interstate commerce". ***Gonzales v. Raich***, 545 U.S. 1, 17, 125 S.Ct. 2195, 162 L.Ed.2d 1 (2005) (Congress had power to regulate the growing and consumption of marijuana that took place entirely within a state). Congress' power under the Commerce Clause also extends to the imposition of restrictions on civil litigation if Congress concludes that the restrictions will promote interstate commerce. ***Pierce County v. Guillen***, 537 U.S. 129, 147, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003) (Congress had authority to pass federal statute that barred the use of documents in civil trials that were prepared or collected by state authorities pursuant to a federal program to identify hazardous sections of state highways).

PLCAA was enacted to promote interstate and foreign commerce in firearms. 15 U.S.C. § 7901(a)(6) (the possibility that manufacturers, distributors and sellers of firearms would be held liable in legal actions of the type foreclosed by the Act "constitutes an unreasonable burden on interstate and foreign commerce of the United States"). Courts "must defer" to the finding that the firearms industry operates in interstate and foreign commerce as long as there is a rational basis for the finding. ***Preseault v.***

I.C.C., 494 U.S. 1, 17, 110 S.Ct. 914, 108 L.Ed.2d 1 (1990).

The Second Circuit Court of Appeals followed the general guidelines noted above in holding that Congress had authority under the Commerce Clause to enact PLCAA. In ***City of New York v. Beretta U.S.A. Corp.***, 524 F.3d 384 (2d Cir. 2008), *cert. denied* 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009), the court noted that there are three general categories of regulation in which Congress is authorized to act under the Commerce Clause: 1) Congress may regulate the channels of interstate commerce; 2) Congress may regulate the instrumentalities of interstate commerce; and 3) Congress may regulate "those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce.[5]" ***Id.*** at 393. It is the third category of regulation that is implicated with respect to the enactment of PLCAA. ***Id.*** Relying on ***U.S. v. Lopez***, 514 U.S. 549, 115 S.Ct. 1624, 131 L.Ed.2d 626

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[5] In further defining the third category of regulation under the Commerce Clause, the Second Circuit Court of Appeals stated "[a]lthough activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." ***City of New York***, 524 F.3d at 393, *quoting* ***N.L.R.B. v. Jones & Laughlin Steel Corp.***, 301 U.S. 1, 37, 57 S.Ct. 615, 81 L.Ed. 893 (1937).

(1995)[6] and ***U.S. v. Morrison***, 529 U.S. 598, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000)[7], the City of New York argued that the activity that PLCAA seeks to regulate – civil lawsuits against the firearms industry for harm caused by the unlawful acts of third parties – was outside Congress' regulatory power. The Second Circuit rejected this argument, finding that "the connection between the regulated activity and interstate commerce under [PLCAA] is far more direct than that in ***Morrison*** and ***Lopez***." ***Id.*** at 394 (quotation marks, citations, and corrections omitted). The court went on to explain:

> When enacting [ ] PLCAA, Congress explicitly found that the third-party suits that [PLCAA] bars are a direct threat to the firearms industry, whose interstate character is not questioned. Furthermore, [ ] PLCAA only

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[6] In ***Lopez***, the Supreme Court held that Congress exceeded its authority in passing the Gun-Free School Zones Act of 1990, 18 U.S.C. § 922(q)(1)(A) (1988 & Supp. V), which criminalized the possession of a gun within a school zone. The Supreme Court found that the link between the possession of a gun by a local student in a local school zone and a substantial effect on interstate commerce was weak at best and, therefore, violative of the Commerce Clause.

[7] In ***Morrison***, the federal government argued that gender-motivated violence that prompted the passing of the Violence Against Women Act, 42 U.S.C. § 13981 affected interstate commerce by deterring potential victims from traveling interstate and engaging in interstate business employment. The Supreme Court rejected this argument as there was no basis to connect the initial occurrence of a violent crime against a woman to interstate commerce.

> reaches suits that have an explicit connection with or effect on interstate commerce. ... Accordingly, unlike the Gun-Free School Zones Act and Violence Against Women Act, [ ] PLCAA raises no concerns about Congressional intrusion into "truly local" matters. ...
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> We agree that the firearms industry is interstate – indeed, international – in nature. Of course, we acknowledge that simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so. We also should not and do not express any opinion as to the accuracy of the Congressional findings with respect to [PLCAA]. Nevertheless, due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds. There has been no such showing here. We find that Congress has not exceeded its authority in this case, where there can be no question of the interstate character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that [PLCAA] seeks to curtail.

Id. at 394-395 (citations, corrections, and some quotation marks omitted).

A year after the Second Circuit Court of Appeals found that Congress did not exceed its authority under the Commerce Clause in enacting PLCAA, the Ninth Circuit Court of Appeals likewise upheld the constitutionality of the Act. In ***Ileto v. Glock, Inc.***, 565 F.3d 1126 (9th Cir. 2009), *cert. denied* 560 U.S. 924, 130 S.Ct. 3320, 176 L.Ed.2d 1219 (2010), Bufford Furrow, who was carrying at least seven firearms which he possessed illegally, shot and injured five people at a summer camp and later that day shot and killed Joseph Ileto. The shooting victims and Mr. Ileto's wife filed a lawsuit pursuant to California common law tort statutes against the manufacturers, marketers, importers, distributors, and sellers of the firearms. Four years after the plaintiffs' lawsuit was filed, Congress passed PLCAA. The defendants sought the dismissal of the lawsuit in light of PLCAA's ban against such actions. The district court dismissed some of the claims against certain defendants but permitted claims against other defendants to proceed. On appeal, the plaintiffs argued that the district court erred in applying PLCAA to the California tort claims brought against the defendants and, alternatively, that PLCAA was unconstitutional. The Ninth Circuit disagreed with the plaintiffs, finding that PLCAA preempted the California tort claims and PLCAA was constitutional.

As to the constitutionality of PLCAA, the plaintiffs argued in part that PLCAA violated the equal protection and substantive due process principles embodied in the Constitution. In rejecting this argument, the Ninth Circuit noted that the plaintiffs faced "an uphill battle" since "barring irrational or

arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit. Indeed, the Supreme Court has not blanched when settled economic expectations were upset, as long as the legislature was pursuing a rational policy." ***Id.*** at 1140 (citations, quotation marks, and corrections omitted). The court went on to hold as follows:

> There is nothing irrational or arbitrary about Congress' choice here: It saw fit to "adjust the incidents of our economic lives" by preempting certain categories of cases brought against federally licensed manufacturers and sellers of firearms. In particular, Congress found that the targeted lawsuits "constitute an unreasonable burden on interstate and foreign commerce of the United States" and sought "to prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce". Congress carefully constrained [PLCAA's] reach to the confines of the Commerce Clause.

Id. at 1140 (citations and corrections omitted). In relying in part on the Second Circuit Court of Appeals' reasoning in ***City of New York*** and the District of Columbia Court of Appeals' decision in ***District of Columbia v. Beretta U.S.A. Corp.***, 940 A.2d 163 (D.C. 2008), *cert. denied sub. nom.,* ***Lawson v. Beretta U.S.A. Corp.***, 556 U.S. 1104, 129 S.Ct. 1579, 173 L.Ed.2d 675 (2009)[8], the Ninth Circuit explained:

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[8] In finding PLCAA constitutional, the ***District of Columbia*** case held in part: "PLCAA ... is reasonably viewed as an adjustment of the burdens and benefits of economic life by

> Plaintiffs disagree with Congress' judgment in this regard. In their view, the firearms industry is subject to relatively few lawsuits compared to other major industries and, in any event, the pending lawsuits could not possibly have an appreciable effect on the firearms industry (and, by extension, on interstate or foreign commerce). We need not tarry long on these considerations, because our only task is to consider whether Congress' chosen allocation was irrational or arbitrary. We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected.

Ileto, 565 F.3d at 1140-1141 (citations and quotation marks omitted).

I agree with the holdings of the Second and Ninth Circuit Courts of Appeal. There is no question that Congress considered the impact that multiple lawsuits filed against manufacturers, distributors, and sellers of firearms have on the industry. The costs associated with those lawsuits and the negative effect damages awards could have on the economic survival of the industry was rationally found to have an impact on interstate and foreign commerce.[9] Congress did not

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Congress, one it deemed necessary in exercising its power to regulate interstate commerce." ***District of Columbia***, 940 A.2d at 175 (quotation marks, citations, and corrections omitted).

[9] Judge Kunselman takes exception to Congress' findings that the cost of litigation against the firearms industry has a significant impact on interstate and foreign commerce. Specifically, she

act irrationally or arbitrarily in making this finding but gathered relevant data and considered input from stakeholders before enacting PLCAA.[10] Courts that have considered this issue have not "blindly accepted Congress'[ ] judgment of its own Commerce Clause authority", as Judge Kunselman suggests. Kunselman Opinion at 747. Instead, they followed the Supreme Court's prevailing jurisprudence when analyzing the Act. ***See Walters v. Nat'l Ass'n of Radiation Survivors***, 473 U.S. 305, 330 n.12, 105 S.Ct. 3180, 87 L.Ed.2d 220 (1985) ("When Congress makes findings on essentially factual issues such as these, those findings are of course entitled to a great deal of deference, inasmuch as Congress is an institution

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states "history has shown that litigation against manufacturers and seller[s] of products in other industries does ***not*** substantially affect the free flow of such products among the several States. The costs of such lawsuits and any damages imposed are ultimately folded into the cost of the products. In that way, tort victims receive compensation, manufacturers produce safer products, and the cost of litigation and subsequent improvements is shared by those who actively participate in the marketplace." Kunselman Opinion at 752 (emphasis in original). Not only does Judge Kunselman fail to cite to any support for these conclusions, but these findings directly conflict with well-established precedent that Congress' factual findings are entitled to great deference.

[10] Judge Kunselman implies that Congress had no evidence upon which to conclude that certain defined lawsuits against the firearms industry had an adverse impact on interstate and foreign commerce. Kunselman Opinion at 751-52. In refutation, I point to the record of the extensive debates of the 109th Congress that took place prior to the enactment of PLCAA.

better equipped to amass and evaluate the vast amounts of data bearing on such an issue.").[11]

Judge Kunselman dismisses out of hand the holdings of the Second and Ninth Circuit Courts of Appeal. First, she concludes that "***Ileto*** is not a Commerce Clause case" and, therefore is irrelevant to the "issue at hand." Kunselman Opinion at 746. I find this puzzling as the above-referenced discussion clearly establishes that, although the plaintiffs in ***Ileto*** argued that PLCAA violated the substantive due process and equal protection principles under the Fifth Amendment, the Ninth Circuit expressly addressed Congress' authority under the Commerce Clause in enacting PLCAA. ***See supra*** at 745-46; ***see also Ileto***, 565 F.3d at 1140 (declaring: "**Congress carefully constrained [PLCAA's] reach to the confines of the Commerce Clause**. ***See***, ***e.g.***, [15 U.S.C.] § 7903(2) (including an interstate- or foreign-commerce element in the definition of a 'manufacturer'); ***id.*** § 7903(4) (same: 'qualified product'); ***id.*** § 7903(6) (same: 'seller')") (emphasis added).

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[11] Judge Kunselman criticizes the trial court for not conducting its own analysis as to "whether the intrastate activities that Congress sought to regulate under PLCAA substantially affect interstate commerce." Kunselman Opinion at 747. However, such an analysis would be contrary to Supreme Court dictates. ***See Rostker v. Goldberg***, 453 U.S. 57, 72-83, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981) (critical of the trial court's review of the factual findings and legislative history compiled by Congress prior to enacting the statute, as it was "wrong in undertaking an independent evaluation of this evidence, rather than adopting an appropriately deferential examination of *Congress'* evaluation of that evidence") (emphasis in original).

Judge Kunselman's rejection of the Second Circuit's ***City of New York*** decision is even more perplexing. Although she acknowledges that the Second Circuit found that PLCAA did not violate the Commerce Clause, she found the court's "reasoning unpersuasive in light of more recent Supreme Court authority." Kunselman Opinion at 748. Judge Kunselman then relies on the Supreme Court's decision in ***National Federation of Independent Business v. Sebelius***, ***supra*** to conclude that Congress exceeded its authority under the Commerce Clause in enacting PLCAA. I find that her reliance on ***Sebelius*** is misplaced.

In ***Sebelius***, the Supreme Court held that the Patient Protection and Affordable Care Act ("Affordable Care Act") violated the Commerce Clause as the individual mandate provision of the Act required most Americans to maintain health insurance coverage. In finding that Congress lacked authority under the Commerce Clause to enact the Affordable Care Act's individual mandate, the Court found:

> The individual mandate [under the Affordable Care Act] does not regulate existing commercial activity. It instead compels individuals to *become* active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce. Construing the Commerce Clause to permit Congress to regulate individuals precisely *because* they are doing nothing would open a new and potentially vast domain

> to congressional authority. Every day individuals do not do an infinite number of things. In some cases they decide not to do something; in others they simply fail to do it. Allowing Congress to justify federal regulation by pointing to the effect of inaction on commerce would bring countless decisions an individual could *potentially* make within the scope of the federal regulation, and – under the Government's theory – empower Congress to make those decisions for him.

Sebelius, 567 U.S. at 552, 132 S.Ct. 2566 (emphasis in original). Thus, the Court held "[t]he Affordable Care Act is ... unconstitutional in part. The individual mandate cannot be upheld as an exercise of Congress's power under the Commerce Clause. That Clause authorizes Congress to regulate interstate commerce, not to order individuals to engage in it." ***Id.*** at 588, 132 S.Ct. 2566.

In concluding that ***Sebelius*** controls, Judge Kunselman finds that "Congress commits the same constitutional overreach in PLCAA. The Act regulates the inactivity of individuals who may ***never*** have engaged in a commercial transaction with the gun industry. As this case demonstrates, PLCAA reaches out and forces J.R. Gustafson and his parents to provide financial support for the gun industry by foregoing their tort claims against its members." Kunselman Opinion at 750 (emphasis in original). I cannot agree with this analysis (and I further note that the Gustafsons do not make this argument). Unlike the Affordable Care Act which was directed at individuals who chose **not** to engage in commercial

activity by failing to purchase health insurance, PLCAA is directed at those individuals, like the Gustafsons, who chose **to** engage in commercial activity (*i.e.* litigation) that Congress found substantially affects interstate commerce (a finding to which great deference must be given).[12] PLCAA does not force anyone to engage in commerce – instead, it prohibits certain limited commercial activities that have a substantial effect on interstate and foreign commerce. Hence, ***Sebelius*** lends no support to the conclusion that PLCAA violates the Commerce Clause.

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[12] Judge Kunselman takes exception to my analysis of ***Sebelius*** by pointing out the difference between litigation and commerce. As she cogently states, "[l]itigation is not commerce." Kunselman Opinion at 750 n. 15. I agree. I do not claim that litigation is commerce. Instead, I, like Congress, conclude that litigation can be an **economic activity** that **affects** commerce. As the Supreme Court has made abundantly clear "[E]ven if [an] activity be local **and though it may not be regarded as commerce**, it may still, whatever its nature, be reached by Congress **if it exerts a substantial economic effect** on interstate commerce." ***Wickard v. Filburn***, 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942) (emphasis added). In enacting PLCAA, Congress determined that certain targeted litigation against the gun industry was an activity, "whatever its nature", that exerted "a substantial economic effect on interstate commerce". Moreover, as already noted, we must defer to Congress in enacting economic legislation. ***Pension Benefit Guaranty Corp. v. R.A. Gray & Co.***, 467 U.S. 717, 729, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984) ("[s]trong deference [is] accorded legislation in the field of national economic policy.").

For the foregoing reasons, I conclude that Congress had the authority under the Commerce Clause to enact PLCAA.

B. The Tenth Amendment

The Gustafsons argue, and Judge Kunselman agrees, that PLCAA violates the Tenth Amendment by invading the province of state sovereignty. I disagree.

The Tenth Amendment to the United States Constitution provides, "[t]he powers not delegated to the United States by the Constitution ... are reserved to the States respectively, or to the people." U.S. CONST., amend. X. The Gustafsons contend that PLCAA violates this amendment because the Act "bars states from imposing liability on negligent gun companies if states have chosen to have their judiciaries establish the relevant liability standards through common law (like Pennsylvania), while allowing identical claims if the states used their legislatures to establish the relevant liability standards. However, Congress has no permissible authority to infringe on a state's decision of which branch of government it chooses to make law." Appellants' Brief at 34-35 (citation omitted). The Gustafsons' argument stems from one of the exceptions to PLCAA's ban on lawsuits against the firearms industry. Specifically, PLCAA permits lawsuits against the firearms industry to proceed if "a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of a product, and the violation was a proximate cause of the harm for which relief is sought". 15 U.S.C. § 7903(5)(A)(iii). The

Gustafsons argue (and Judge Kunselman agrees) that this exception eliminates all state common law tort claims against the firearms industry while permitting tort claims to proceed in states which have codified their tort laws; hence, the Act infringes on states' rights to enact their laws the way they see fit in violation of the Tenth Amendment. This analysis fails for several reasons.

First, the Gustafsons' argument – PLCAA allows lawsuits against the firearms industry to proceed in states with codified liability – is inapplicable to the product liability claims brought in this case. The exception to PLCAA's ban on qualified civil liability actions set forth in § 7903(5)(A)(iii) is known as the "predicate" exception and applies **only** to the knowing violation of a statute dealing with the sale or marketing of a firearm. ***Ileto v. Glock, Inc.***, 421 F. Supp. 2d 1274, 1296 (C.D. Cal. 2006), *aff'd* 565 F.3d 1126 (9th Cir. 2009). The predicate exception does not apply to statutes governing the design of firearms. The Gustafsons' claims allege design defects and, therefore, are governed by PLCAA's design defect exception codified in § 7903(5)(A)(v). The design defect exception does not differentiate between manufacturing or design defect claims based upon product liability statutes or common law. Thus, 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. As thoroughly addressed by Judge Kunselman in Part I of her opinion, the Gustafsons' design defect claims do not fall within PLCAA's design defect exception. Therefore, even if

Pennsylvania codified its product liability laws, the Gustafsons' claims would be barred under PLCAA. ***See Ileto***, 565 F.3d at 1137 ("PLCAA preempt[s] ... theories of liability even in jurisdictions ... that have codified such causes of action").

Even if the predicate exception applied, the Tenth Amendment would not bar the application of the Act to the Gustafsons' claims. As the Tenth Amendment expressly states, "**powers not delegated to the United States by the Constitution** ... are reserved to the States". U.S. CONST., amend. X (emphasis added). Here, PLCAA was enacted pursuant to the power to regulate interstate and foreign commerce and that power was expressly delegated to Congress through the Commerce Clause. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." ***New York v. U.S.***, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Hence, PLCAA cannot be deemed to violate the Tenth Amendment unless it violates the anticommandeering doctrine. ***Travieso v. Glock, Inc.***, 526 F. Supp. 3d 533, 549 (D. Ariz. 2021) ("when Congress passes a law pursuant to the enumerated powers delegated to it under the Constitution, the only applicable limitation to it is its anti-commandeering doctrine").

As the United States Supreme Court explained, "[t]he anticommandeering doctrine may sound arcane, but it is simply the expression of a fundamental structural decision incorporated into the Constitution, *i.e.*, the decision to withhold from Congress the power to issue orders directly to the

States." ***Murphy v. NCAA***, —— U.S. ——, 138 S. Ct. 1461, 1475, 200 L.Ed.2d 854 (2018). Under this doctrine, Congress is prohibited from commandeering state legislatures by requiring them to enact certain laws. ***New York v. U.S.***, 505 U.S. at 161, 112 S.Ct. 2408 ("Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program"). Secondly, the doctrine prohibits Congress from commanding executive branch members of a state to "administer or enforce a federal regulatory program." ***Printz v. U.S.***, 521 U.S. 898, 903, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).

Congress had the express authority to enact PLCAA under its enumerated powers granted by the Commerce Clause to regulate interstate and foreign commerce. Thus, the only way PLCAA could violate the Tenth Amendment is if the Act commands state legislatures to enact a particular law or state executive officials to administer a federal law. PLCAA does neither. As the Second Circuit Court of Appeals succinctly noted, "PLCAA does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them. [ ] PLCAA therefore does not violate the Tenth Amendment." ***City of New York v. Beretta U.S.A. Corp.***, 524 F.3d 384, 397 (2d Cir. 2008) (quotation marks and citations omitted); ***see also Adames v. Sheahan***, 233 Ill.2d 276, 330 Ill.Dec. 720, 909 N.E.2d 742, 765 (2009) ("[B]ecause PLCAA is a valid exercise of the federal power to regulate interstate commerce, Congress has not intruded upon an area of authority traditionally reserved to the states and does not

impermissibly commandeer the states or their officials in violation of the [T]enth [A]mendment."). Hence, PLCAA does not run afoul of the Tenth Amendment.[13]

C. Fifth Amendment – Due Process

The Gustafsons argue that PLCAA violates their right to due process guaranteed by the Fifth Amendment[14] because "it eliminates any remedy for victims of gun industry negligence like [the Gustafsons]" without "providing a reasonable alternative remedy". Appellants' Brief at 39. PLCAA does not violate the Gustafsons' right to due process because 1) they do not have a protected property right

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[13] Judge Kunselman relies on ***Erie Railroad Co. v. Tompkins***, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) to support her conclusion that PLCAA violates the Tenth Amendment as the Act disfavors common law and prefers statutes enacted by state legislatures. Kunselman Opinion at 755-56. ***Erie*** does not support this holding. ***Erie*** stands for the proposition that there is no federal general common law. **Erie**, 304 U.S. at 78, 58 S.Ct. 817. ***Erie*** makes clear that "[s]upervision over either the legislative or the judicial action of the states is in no case permissible except as to matters by the constitution specially authorized or delegated to the United States." ***Id***. at 79, 58 S.Ct. 817 (emphasis added). Hence, a state is free to make its own common law "providing there is no overriding federal rule which pre-empts state law by reason of federal curbs on trading in the stream of commerce." ***Lehman Bros. v. Schein***, 416 U.S. 386, 389, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974). Here, the Constitution specifically authorizes Congress to regulate interstate and foreign commerce; therefore, state law is permissibly preempted.

[14] The Due Process Clause of the Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. Const., amend. V.

in an unvested common law claim[15]; and 2) PLCAA contains exceptions that allow certain claims against the firearms industry to proceed; hence, the industry does not have complete immunity.

The Gustafsons do not assert that they have a protected property right in their unvested common law claim. Instead, they argue solely that, as a result of PLCAA, their access to the courts has been eliminated with no viable alternative. Yet, as the court in ***City of New York*** cogently stated "PLCAA immunizes a specific type of defendant from a specific type of suit. It does not impede, let alone entirely foreclose, general use of the courts by would-be plaintiffs". ***City of New York***, 524 F.3d at 398; ***see also Ileto***, 565 F.3d at 1143 ("PLCAA does not completely abolish [p]laintiffs' ability to seek redress. [The Act] preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to the general rule. Some claims are preempted, but many are not."); ***District of Columbia v. Beretta U.S.A. Corp.,*** 940 A.2d 163, 177 n.8 (D.C. 2008) (Congress did not deprive injured persons of all potential remedies); ***Estate of Kim v. Coxe***, 295 P.3d 380, 391 (Ak. 2013) (following other courts in concluding that plaintiffs' due process rights were not violated).

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[15] It is well established that, although a cause of action is a "species of property", a party's property right in a cause of action does not vest until a final, reviewable judgment is obtained. ***Ileto v. Glock, Inc.***, 421 F. Supp. 2d 1274, 1299, *aff'd* 565 F.3d 1126 (9th Cir. 2009) (citations omitted). Here, the Gustafsons have not obtained a final, reviewable judgment.

As noted by the other courts who have considered this issue, PLCAA does not foreclose all lawsuits against manufacturers and sellers of firearms. To the contrary, it only eliminates certain identified claims. Moreover, PLCAA does not prevent the Gustafsons from suing the young man who shot their son or the homeowner whose gun was used in the shooting. ***See Travieso***, 526 F. Supp. 3d at 549 ("Plaintiff may still pursue remedies against the owner of the gun and the actual shooter who caused him harm; he simply elected not to."). As such, the Gustafsons' rights under the Due Process Clause of the Fifth Amendment have not been violated.

D. Fifth Amendment – Equal Protection

The Gustafsons argue that their right to equal protection under the Fifth Amendment has been violated as PLCAA "discriminat[es] between classes of tort plaintiffs without any rational basis." Appellants' Brief at 44. Specifically, they assert "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". ***Id***. The Gustafsons' equal protection argument is similar to their Tenth Amendment argument and likewise fails.

Although the Fifth Amendment does not specifically refer to equal protection, the United States Supreme Court repeatedly has found there to be an "equal protection component of the Due Process Clause of the Fifth Amendment." ***U.S. v. Armstrong***, 517 U.S. 456, 464, 116 S.Ct. 1480, 134 L.Ed.2d 687 (1996). However,

> [w]hether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental

> constitutional rights 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.

F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 313, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993). As was succinctly stated by the Ninth Circuit Court of Appeals, "barring irrational or arbitrary conduct, Congress can adjust the incidents of our economic lives as it sees fit. Indeed, the Supreme Court has not blanched when settled economic exceptions were upset, as long as the legislature was pursuing a rational policy." ***Ileto***, 565 F.3d at 1140 (quotation marks, citations, and corrections omitted). As the Gustafsons concede, we must apply a rational basis review in determining whether PLCAA violates the Fifth Amendment's equal protection clause. Under this standard, "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." ***Heller v. Doe by Doe***, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (quotation marks and citations omitted). In applying this highly deferential standard to PLCAA, it is clear that Congress was pursuing a rational policy by enacting PLCAA. Congress determined that certain lawsuits "threatened constitutional rights, destabilized industry, and burdened interstate commerce. Protecting constitutional rights and interstate commerce is a legitimate purpose and barring certain types of tort suits while allowing others is a rational way to pursue

this legitimate purpose." ***Estate of Kim***, 295 P.3d at 392 (footnote omitted).

Moreover, as previously noted, the Gustafsons' claims allege design defects and, therefore, are governed by PLCAA's design defect exception codified in § 7903(5)(A)(v). This exception does not differentiate between manufacturing or design defect claims based upon product liability statutes or common law. Even if Pennsylvania codified its product liability laws, the Gustafsons' claims would be barred under PLCAA. ***Supra*** at 772. Hence, there is no due process violation.

III.

Conclusion

I agree with Judge Kunselman that PLCAA applies to the Gustafsons' product liability claims brought against the Appellees. However, I disagree that PLCAA is unconstitutional. Like the other courts that have addressed the constitutionality of this Act, I find that Congress had the express authority under the Commerce Clause to enact PLCAA; nothing in PLCAA commandeers the states' legislative or executive branches in violation of the Tenth Amendment; and there is no infringement of the Gustafsons' rights to due process and equal protection under the Fifth Amendment. Therefore, I would affirm the able trial court's order sustaining the Appellees' preliminary objections and dismissing the Gustafsons' complaint.

Judge Bowes and Judge McCaffery join.

Judge Murray concurs in the result.

DISSENTING OPINION BY MURRAY, J.:

After careful review, I agree with Appellees' argument that the Gustafsons' claims are barred by the federal Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. §§ 7901-7903. I therefore dissent.

Procedural and Factual History

The facts bear repeating. As the trial court summarized,

> on March 20, 2016, ... then thirteen-year-old [J.R.] Gustafson, was killed by a model XD-9 semi-automatic handgun ("subject handgun") manufactured by [Appellee] Springfield, Inc. ("Springfield") and sold by [Appellee] Saloom Department Store ("Saloom"). J.R. was visiting the home of a friend with another fourteen-year-old friend (the "Juvenile Delinquent") when the Juvenile Delinquent [was given] the unsecured subject handgun in the home. The Juvenile Delinquent believed that the subject handgun was unloaded because the magazine had been removed; however, a live round remained in the chamber. The Juvenile Delinquent pointed the subject handgun at J.R. and pulled the trigger. The subject handgun fired and J.R. was killed. The Juvenile Delinquent subsequently pled guilty to involuntary manslaughter in a delinquency proceeding in juvenile court.

Trial Court Opinion, 1/15/19, at 2.

In addition to initiating the proceeding against the Juvenile Delinquent, the Commonwealth filed criminal charges against three adults in connection with J.R.'s death. Christopher Lewis pled guilty to illegally selling the gun to Joshua Hudec, who pled guilty to child endangerment for leaving the gun unsecured in the home. Brooke Nelson, who was babysitting young children in the home when J.R. was shot, pled guilty to child endangerment, reckless endangerment, and a weapons offense for providing the gun to the Juvenile Delinquent.

In their civil complaint, "comprised of survival and wrongful death claims" against Appellees, the Gustafsons alleged "negligent design and sale as well as negligent warnings and marketing with regard to [the] manufacture and sale of the" handgun. Trial Court Opinion, 1/15/19, at 2. Appellees, in their preliminary objections, argued the Gustafsons failed to plead a valid cause of action because the claims are barred by the PLCAA. I agree.

On August 7, 2018, the Gustafsons replied to the preliminary objections, averring that the PLCAA did not bar their claims, and in the alternative, challenging the constitutionality of the PLCAA. Answer to Preliminary Objections, 8/7/18, at 2-4. The trial court sustained Appellees' preliminary objections and dismissed the Gustafsons' complaint with prejudice. Trial Court Opinion, 1/15/19, at 16. The trial court reasoned that the Juvenile Delinquent's act "amounts to ... committing a criminal act and is

thus applicable under the 'criminal misuse' portion of the PLCAA." ***Id.*** at 8. According to the trial court, the gun was discharged as the result of a volitional act that constituted a criminal offense, even though the discharge was unintentional. ***See id.*** The trial court concluded, "the PLCAA is in no way in violation of the United States Constitution." ***Id.*** at 16.

Standard of Review

As the Pennsylvania Supreme Court has explained,

> [o]ur standard of review in [an] appeal arising from an order sustaining preliminary objections in the nature of a demurrer is *de novo*, and our scope of review is plenary. We recognize a demurrer is a preliminary objection to the legal sufficiency of a pleading and raises questions of law; we must therefore accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts. A preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted.

Raynor v. D'Annunzio, —— Pa. ——, 243 A.3d 41, 52 (2020) (citations omitted).

The Gustafsons' Claims

In their supplemental brief, the Gustafsons claim the PLCAA infringes on the rights reserved to the states under the Tenth Amendment to the United States Constitution. Gustafsons' Supplemental Brief at 4. The Gustafsons argue the PLCAA exceeds the authority vested in the federal government under the Commerce Clause of the United States Constitution. ***Id.*** at 5. They assert the PLCAA targets "the states themselves, rather than any private individuals or any arguably commercial activity, by dictating to the states how they must exercise their lawmaking functions." ***Id.*** at 6.

The Gustafsons further argue that under federalism and statutory construction principles, the PLCAA does not apply to their products liability action. ***Id.*** at 7. Specifically, the Gustafsons assert there was no disqualifying "criminal" or "volitional" act precluding their tort claims. ***Id.*** They direct our attention to Congress's narrow reference to "criminal" acts as disqualifying state products liability actions. ***Id.*** at 11. According to the Gustafsons, Congress intentionally restricted products liability actions involving "criminal" acts, but not "unlawful" acts. ***Id.*** at 12. The Gustafsons also argue that federalism precedent requires that their action be allowed to proceed. ***Id.*** at 7.

I. Does the PLCAA Bar Appellants' Claim?

Federal Preemption

When addressing questions of express or implied preemption, we begin "with the assumption that the historic police powers of the States [are] not to be

superseded by the Federal Act unless that was the clear and manifest purpose of Congress." ***Altria Grp., Inc. v. Good***, 555 U.S. 70, 77, 129 S.Ct. 538, 172 L.Ed.2d 398 (2008).

I agree with Judge Kunselman's Opinion in Support of Per Curiam Order to Reverse (Kunselman Op.) that the PLCAA preempts state common law. ***See*** Kunselman Op. at 744-45.

> [I]n all preemption cases, and particularly in those in which Congress has legislated ... in a field in which the States have traditionally occupied, ... we start with the assumption that the historic police powers of the State 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, 129 S.Ct. 1187, 173 L.Ed.2d 51 (2009) (quotation marks omitted).

The doctrine of preemption is grounded in the United States Constitution:

> The Supremacy Clause of the United States Constitution prohibits states from enacting laws that are contrary to the laws of our federal government: "This Constitution and the Laws of the United States ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. It is through this clause that the

> United States Congress may preempt state law.

Office of Disciplinary Counsel v. Marcone, 579 Pa. 1, 855 A.2d 654, 664 (2004). If Congress "enacts a law that imposes restrictions or confers rights on private actors," and "a state law confers rights or imposes restrictions that conflict with the federal law," then "the federal law takes precedence and the state law is preempted." ***Murphy v. Nat'l Collegiate Athletic Ass'n***, —— U.S. ——, 138 S. Ct. 1461, 1480, 200 L.Ed.2d 854 (2018).

The United States Supreme Court has set forth "two cornerstones" of preemption jurisprudence. ***Wyeth***, 555 U.S. at 565, 129 S.Ct. 1187. First, the "ultimate touchstone" is "the purpose of Congress." ***Id.*** (citation omitted). Second, the Court must "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," especially when the case involves a "field which the states have traditionally occupied." ***Id.*** (citation omitted).

The United States Supreme Court recognizes three types of federal preemption:

> (1) [E]xpress preemption, where the federal law includes a provision that expressly preempts the state statute; (2) field preemption, where "Congress has legislated in a field so comprehensively that it has implicitly expressed an intention to occupy the given field to the exclusion of state law[ ]"; and

> (3) conflict preemption, where the state statute either precludes compliance with the federal law or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress[.]"

Krentz v. CONRAIL, 589 Pa. 576, 910 A.2d 20, 31-32 (2006) (quoting ***Marcone***, 855 A.2d at 664 (internal citations omitted)).

The United States Supreme Court adheres to "the cardinal rule that a statute is to be read as a whole ... since the meaning of statutory language, plain or not, depends on context." ***King v. St. Vincent's Hosp.***, 502 U.S. 215, 221, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991) (citation omitted).

> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that " '[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." ***Medtronic, Inc. v. Lohr***, 518 U.S. 470, 485, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (quoting ***Retail Clerks v. Schermerhorn***, 375 U.S. 96, 103, 84 S. Ct. 219, 11 L. Ed. 2d 179 (1963)). Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. ***See Jones v. Rath Packing Co.***, 430 U.S. 519, 525, 97 S. Ct. 1305, 51 L. Ed. 2d 604 (1977). If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of

> Congress' displacement of state law still remains.

Altria Grp., 555 U.S. at 76, 129 S.Ct. 538. The purpose and scope of preemption is "primarily [ ] discerned from the language of the pre-emption statute and the 'statutory framework' surrounding it." ***Medtronic***, 518 U.S. at 486, 116 S.Ct. 2240.

The parties do not dispute that the PLCAA expressly protects firearms and ammunition sellers from liability for "harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended," while "[p]reserv[ing] and protect[ing] ... State sovereignty[.]" 15 U.S.C. §§ 7901(a)(5), (6). As discussed *infra*, the PLCAA's preemption is accomplished pursuant to Congress's constitutional power to regulate interstate commerce. ***See*** 15 U.S.C. § 7901(b)(4) ("The purpose[ ] of this chapter ... [includes the prevention] of such lawsuits to impose unreasonable burdens on interstate and foreign commerce"); ***United States v. Lopez***, 514 U.S. 549, 561-62, 115 S.Ct. 1624, 131 L.Ed.2d 626 (1995) (the Commerce Clause authorizes congressional regulation of firearms possession).

Instantly, where there is express preemption, our role is to construe the scope of the preemption, considering the congressional purpose of the statute, as revealed by the text and statutory framework. ***Altria Group***, 555 U.S. at 77, 129 S.Ct. 538; ***Medtronic***, 518 U.S. at 485-86, 116 S.Ct. 2240. While we factor the presumption against preemption

of the states in our analysis, ***Medtronic***, 518 U.S. at 485, 116 S.Ct. 2240, the presumption is merely one factor in the Court's analysis. It will not override the intended purpose of Congress as revealed by the text and framework of the PLCAA. ***Altria Group***, 555 U.S. at 77, 129 S.Ct. 538.

The PLCAA expressly bars any civil cause of action, regardless of the underlying theory, when a plaintiff's injury results from "the criminal or unlawful misuse" of a person or a third party, unless a specific exception applies. 15 U.S.C. §§ 7902(a), 7903(5)(A). The Gustafsons rely on the PLCAA's purposes section, which states that the PLCAA was passed to "prohibit causes of action for the harm **solely** caused by the criminal or unlawful misuse of firearms." 15 U.S.C. § 7901(b)(1) (emphasis added). A similar statement in the PLCAA's findings section decries the "possibility of imposing liability ... for harm that is **solely** caused by others." 15 U.S.C. § 7901(a)(6) (emphasis added).

Contrary to the Gustafsons' assertion, the purpose section of the PLCAA does not redefine the plain language of the statute. Rather, we must "start with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used." ***H. J. Inc. v. Nw. Bell Tel. Co.***, 492 U.S. 229, 238, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (quoting ***Richards v. United States***, 369 U.S. 1, 9, 82 S.Ct. 585, 7 L.Ed.2d 492 (1962)). We look to the intent of Congress where the language is not "dispositive." ***Adams Fruit Co. v. Barrett***, 494 U.S. 638, 642, 110 S.Ct. 1384, 108 L.Ed.2d 585 (1990).

Here, the PLCAA's statement of purpose does not supplant the PLCAA's express preemption of qualified civil liability actions against firearms sellers, including those raised by the Gustafsons. Where the terms of a statute are unambiguous, judicial inquiry is complete. ***Id.***; ***Rubin v. United States***, 449 U.S. 424, 430, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981).

Finally, we are not persuaded by the Gustafsons' reliance on the Supreme Court decisions in ***Gregory v. Ashcroft***, 501 U.S. 452, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and ***Bond v. United States***, 572 U.S. 844, 134 S.Ct. 2077, 189 L.Ed.2d 1 (2014). ***See*** Gustafsons' Supplemental Brief at 20-21. ***Gregory*** and ***Bond*** involve **implied** preemption. In both cases, the Supreme Court held that expansive statutory definitions should be narrowly construed to avoid excessive federal intrusion into traditional issues of state concern. ***Gregory***, 501 U.S. at 460, 111 S.Ct. 2395; ***Bond***, 572 U.S. at 856-57, 861-64, 134 S.Ct. 2077. Instantly, the trial court concluded,

> [t]he present analysis does not even reach the ***Gregory*** and ***Bond*** constitutional avoidance doctrine, because the text of the statute makes manifest Congress' intent to preempt state tort law. Congress explicitly stated in the PLCAA that it intended to "prohibit causes of action" as defined in the PLCAA to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." 15 U.S.C. § 7901. Throughout the PLCAA, Congress unambiguously and without question states

> its intention to definitively preempt state tort law.

Trial Court Opinion, 1/15/19, at 4. Because 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.

Statutory Interpretation

Alternatively, the Gustafsons maintain their action does not fall under the scope of the PLCAA, stating that it "falls within [the] PLCAA's product liability exception (§ 7032(5)(A)(v)) because there was no disqualifying 'volitional' and 'criminal' act and it falls outside the scope of the general definition of a 'qualified civil liability action' in § 7903(5)(A)."[16] Gustafsons' Supp. Brief at 7; ***see also id.*** at 7-17.

Judge Kunselman disagrees with the Gustafsons, stating "it is undisputed that the Gustafsons filed a civil action against a gun manufacturer and/or seller and the damages arose from the criminal and/or unlawful misuse of a firearm by a third party." Kunselman Op. at 742. Judge Kunselman also concludes this case does not fall within the product

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[16] As noted, Section 7903(5)(A)(v) exempts product liability cases from the PLCAA except "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).

liability exception because, "the criminal act that triggers a 'qualified-civil-liability action' under PLCAA will ***always*** be a volitional, criminal act that nullifies exception (v)." ***Id.*** at 744 (emphasis in original).

In his Opinion in Support of Per Curiam Order to Reverse, President Judge Emeritus John Bender (Bender Opinion) disagrees, stating, "I believe the exceptional circumstances of this case call into question whether the discharge of the firearm was caused by a volitional act, even though a criminal offense was committed." Bender Op. at 6. The Bender Opinion accepts the Gustafsons' supposition that while the Juvenile Delinquent committed a volitional act when he pulled the trigger, the **firing** was not volitional, because the Juvenile Delinquent believed the gun was not loaded. ***Id.*** at 760. The Bender Opinion maintains the deterrence effect of product liability actions "would be meaningless if the act of pulling the trigger was indistinguishable from the act of firing the gun for purposes of what constitutes a volitional act in the context of the product-defection exception." ***Id.*** at 760. The Bender Opinion would find "an atypical disconnect in the chain of the causation between pulling the trigger and discharging the weapon[.]" ***Id.*** at 760-61.

The Bender Opinion additionally would determine, even if there was a volitional act, that act was not a crime. ***Id.*** at 761-62. The Bender Opinion posits, "because the Juvenile Delinquent was not tried as an adult in criminal court, the pertinent act of firing the handgun did not constitute a criminal offense

under the undisputed facts of this case." ***Id.*** I disagree.

"The construction of a federal statute is a matter of federal law." ***Samuel–Bassett v. Kia Motors Am., Inc.***, 613 Pa. 371, 34 A.3d 1, 51 (2011) (citation omitted). "Pursuant to federal rules of statutory construction, the courts consider the particular statutory language, as well as the design of the statute and its purposes in determining the meaning of a federal statute." ***Id.*** In analyzing a federal statute, "we must first determine whether the statutory text is plain and unambiguous." ***Carcieri v. Salazar***, 555 U.S. 379, 387, 129 S.Ct. 1058, 172 L.Ed.2d 791 (2009). Where the statute is clear, "We must enforce plain and unambiguous statutory language according to its terms." ***Hardt v. Reliance Standard Life Ins. Co.***, 560 U.S. 242, 251, 130 S.Ct. 2149, 176 L.Ed.2d 998 (2010). "[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." ***Griffin v. Oceanic Contractors, Inc.***, 458 U.S. 564, 575, 102 S.Ct. 3245, 73 L.Ed.2d 973 (1982).

The plain language of the PLCAA concerns a "volitional act"; it includes no *mens rea* requirement and does not reference an actor's acuity or state of mind. The dictionary defines the word "volition" as "the act of using the will; exercise of the will as in deciding what to do [ ] a conscious or deliberate decision or choice[.]" Webster's New World College Dictionary, 1620 (5th ed. 2020). Here, the Juvenile Delinquent acted volitionally in accepting the gun

from the babysitter, Brooke Nelson, aiming the gun at J.R., and pulling the trigger.

The Bender Opinion admits, "In typical circumstances, the intentional act of pulling a trigger is effectively identical to intentionally firing the gun, regardless of whether the resulting injury was intended." Bender Op. at 760. The Bender Opinion maintains, "while the Juvenile Delinquent's pulling of the trigger was volitional, the firing of the gun was not, because **he believed** that the firearm was not loaded when the magazine was discharged." ***Id.*** (emphasis added). However, under the plain language of the PLCAA, the Juvenile Delinquent's "belief" is not germane.

The PLCAA uses the word "volitional" not "intentional"; the terms are not interchangeable, and regardless, we may not substitute language chosen by Congress. ***See Woodford v. Ins. Dept.***, 243 A.3d 60, 73 (Pa. 2020) (citations omitted) ("When the plain language is clear and unambiguous we must not disregard it in pursuit of the law's spirit. When the text of the statute is ambiguous, then — and only then — do we advance beyond its plain language and look to other considerations to discern [Congress's] intent."). Moreover, the unambiguous language of the PLCAA focuses on whether the "act" was volitional. There is no statutory language qualifying the term "volitional" by the actor's state of mind. The Bender Opinion's attempt to distinguish the pulling of the trigger from the gun firing compels an absurd result. ***See Griffin***, ***supra*** ("interpretations of a statute which would produce absurd results are to be

avoided if alternative interpretations consistent with the legislative purpose are available."). I recognize the Juvenile Delinquent did not intend to kill his friend. However, the Juvenile Delinquent's understanding and intent is not relevant to the application of the PLCAA in this case.

The Bender Opinion would also conclude that, because the Juvenile Delinquent was not an adult, his unlawful act of possessing and firing the gun was not a criminal act for purposes of the PLCAA. Bender Op. at 761-62. Again, I disagree.

The PLCAA requires a "criminal offense"; it does not require a criminal charge or conviction, and does not exempt juveniles. 15 U.S.C. § 7903(5)(A)(v). ***See Adames v. Sheahan***, 233 Ill.2d 276, 330 Ill.Dec. 720, 909 N.E.2d 742, 761-62 (2009) (applying the PLCAA to a juvenile offender and stating 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[.]").[17] In ***Ryan v. Hughes-Ortiz***, 81 Mass.App.Ct. 90, 959 N.E.2d 1000 (2012), a convicted felon stole two guns; his sister persuaded him to return them, and while doing so, the felon shot himself in the femoral artery. ***Ryan***, 959 N.E.2d at 1003. When his estate sued the gun's owner and manufacturer, the Massachusetts Court of Appeals held that the estate's claims were barred by the PLCAA. ***Id.*** at 1007-08. The court noted that the

[17] "The decisions of courts of other states are persuasive, but not binding, authority." ***Huber v. Etkin***, 58 A.3d 772, 780 n.8 (Pa. Super. 2012) (citation omitted).

decedent's possession of the guns was unlawful because he was a convicted felon, and the "PLCAA does not require a criminal conviction in order for an activity to qualify as 'criminal or unlawful misuse. ***Id.*** at 1008.

In Pennsylvania, a "delinquent act [is] **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.C.S.A. § 6302 (emphasis added). Thus, **a juvenile can only be adjudicated delinquent if he or she commits a crime**. ***See id.*** The Legislature does not distinguish adults and juveniles in terms of the **acts** which constitute crimes, only the legal consequences of those acts.

In sum, the focus of the PLCAA is on the act, not the actor. Had Congress intended to exempt crimes committed by juveniles, it could have done so. Under the Bender Opinion's interpretation of the product liability exemption, enforcement of the PLCAA would not be uniform. Rather, it would vary based upon charging decisions of prosecutors — again, an absurd result. ***See Griffin***, 458 U.S. at 575, 102 S.Ct. 3245. I view the Bender Opinion's interpretation as inconsistent with the intent of Congress and in conflict with our standard of review. ***See Hardt***, 560 U.S. at 251, 130 S.Ct. 2149. I therefore agree with Judge Kunselman's opinion that the product liability exemption does not apply in this case.

II. Is the PLCAA Constitutional?

Constitutional Claims

The Gustafsons contend the PLCAA "violates the Tenth Amendment and exceeds Congress's Commerce Clause authority." Gustafsons' Supp. Brief at 4. They also maintain the PLCAA violates the Due Process and Equal Protection Clauses of the Fifth Amendment. Gustafsons' Brief at 39-47. Appellees counter that the PLCAA "easily passes constitutional muster." Appellees' Sub. Brief at 42. The United States as intervenor agrees, stating that the PLCAA "is a valid exercise of Congress's power." United States' Sub. Brief at 8.

Judge Kunselman, while not reaching the Gustafsons' Fifth Amendment claims, agrees with the Gustafsons that the PLCAA violates the Tenth Amendment and exceeds the authority delegated to Congress in the Commerce Clause. Kunselman Op. at 745-56. However, I agree with the Honorable Judith Olson. In her dissenting opinion, she accurately states, "Since its enactment in October 2005, the constitutionality of PLCAA has been challenged in various state and federal courts. Every appellate court that has addressed these issues have found that PLCAA passes constitutional muster." Diss. of J. Olson at 764 (footnote omitted).

Pertinently:

> The constitutionality of a statute presents a "pure question of law," over which our standard of review is *de novo* and our scope of review is plenary. Our Supreme Court has also offered the following discussion of the burden borne by those seeking to invalidate a statutory scheme on constitutional grounds:

> In addressing constitutional challenges to legislative enactments, we are ever cognizant that "[Congress] may enact laws which impinge on constitutional rights to protect the health, safety, and welfare of society," but also that "any restriction is subject to judicial review to protect the constitutional rights of all citizens." We emphasize that "**a party challenging a statute must meet the high burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution.**"

Commonwealth v. Snyder, 251 A.3d 782, 792 (Pa. Super. 2021) (citations omitted, emphasis added).

The Commerce Clause

The Gustafsons suggest, "Congress has no legitimate authority to enact legislation such as [the] PLCAA." Gustafsons' Brief at 47. They maintain the Commerce Clause "does not empower Congress to regulate the lawmaking functions of states." ***Id.*** Conversely, the United States maintains "the possibility of suits against gun manufacturers and sellers, 'constitute[s] an unreasonable burden on interstate and foreign commerce.' " United States Sub. Brief at 8 (citation omitted). As Judge Olson cogently notes,

> Instead of arguing that Congress lacked authority under the Commerce Clause to regulate interstate and international commerce of firearms, the Gustafsons repackage their argument regarding the Tenth Amendment in terms of the Commerce Clause; *i.e.* state decisions on whether liability standards should be established via common law or through legislation is not commercial activity that may be regulated by Congress.

Diss. of J. Olson at 765.

The Gustafsons' argument does not come close to meeting their "high burden of demonstrating that the statute clearly, palpably, and plainly violates the Constitution." ***Snyder***, 251 A.3d at 792. Likewise, the argument in their supplemental brief is primarily a summarization of this Court's decision from the 3-judge panel, which was withdrawn when the case

proceeded to *en banc* review. Gustafsons' Supp. Brief at 5-7.

Rather than finding waiver for the Gustafsons' failure to develop their legal argument,[18] Judge Kunselman impermissibly shifts the burden to the United States to prove the PLCAA's compliance with the Constitution. ***See*** Kunselman Op. at 745-51; ***Snyder***, 251 A.3d at 792. It is not our role to develop an appellant's argument. ***See Commonwealth v. Beshore***, 916 A.2d 1128, 1140 (Pa. Super. 2007) (*en banc*); ***see also Commonwealth v. Hardy***, 918 A.2d 766, 771 (Pa. Super. 2007) ("[I]t is an appellant's duty to present arguments that are sufficiently developed for our review."); ***Bombar v. West Am. Ins. Co.***, 932 A.2d 78, 94 (Pa. Super. 2007). The Gustafsons have not presented a cogent legal argument on this issue. Therefore, there is no basis for concluding that the PLCAA exceeds Congress's Commerce Clause authority.

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[18] We have explained,

> When an appellant cites no authority supporting an argument, this Court is inclined to believe there is none. ***See*** Pa. R.A.P. 2119(a) and (b) (requiring an appellant to discuss and cite pertinent authorities); ***Commonwealth v. Antidormi***, 84 A.3d 736, 754 (Pa. Super. 2014) (finding issue waived because the appellant "cited no legal authorities nor developed any meaningful analysis").

Commonwealth v. Reyes-Rodriguez, 111 A.3d 775, 781 (Pa. Super. 2015).

Regardless, the Constitution gives Congress the authority to "regulate commerce ... among the several States." U.S. Const. art. I, § 8, cl. 3. The United States Supreme Court has interpreted this authority broadly to "uph[o]ld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce." ***Lopez***, 514 U.S. at 559, 115 S.Ct. 1624. Actions of Congress are valid under the Commerce Clause when Congress acts to regulate "economic activity" that "substantially affects interstate commerce[.]" ***Id.*** at 560, 115 S.Ct. 1624; ***accord Nat'l Fed'n of Indep. Bus. v. Sebelius***, 567 U.S. 519, 549, 132 S.Ct. 2566, 183 L.Ed.2d 450 (2012).

The PLCAA regulates economic activity that substantially affects interstate commerce. ***See*** 15 U.S.C. § 7901(a)(6) (finding the possibility of lawsuits against gun manufacturers and sellers "constitute[ ] an unreasonable burden on interstate and foreign commerce."); ***see also Estate of Kim ex rel. Alexander v. Coxe***, 295 P.3d 380, 392 (Alaska 2013) ("Congress found certain types of tort suits threatened constitutional rights, destabilized industry, and burdened interstate commerce"); ***accord City of New York v. Beretta U.S.A. Corp.***, 524 F.3d 384, 394 (2d Cir. 2008).[19] Congress enacted the PLCAA to protect

[19] "While we recognize that federal court decisions are not binding on this court, we are able to adopt their analysis as it appeals to our reason." ***Kleban v. Nat. Union Fire Ins. Co. of***

interstate commerce. ***See BMW of N. Am., Inc. v. Gore***, 517 U.S. 559, 571, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996) ("[O]ne State's power to impose burdens on the interstate market ... is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." (citation omitted)).

In addition, a "nexus to interstate commerce" must be present. ***See Lopez***, 514 U.S. at 562, 115 S.Ct. 1624. "[T]he PLCAA only reaches lawsuits that 'have an explicit connection with or effect on interstate commerce.' " ***Beretta***, 524 F.3d at 394 (citation omitted). The statute bars tort lawsuits against manufacturers and sellers who manufacture or sell firearms "in interstate or foreign commerce," 15 U.S.C. § 7903(2), (6), and where firearms "ha[ve] been shipped or transported in interstate or foreign commerce." ***Id.*** § 7903(4). The PLCAA does not regulate "truly local" commerce, which is beyond the ambit of the federal government. ***Lopez***, 514 U.S. at 568, 115 S.Ct. 1624; ***see also Ileto v. Glock, Inc.***, 565 F.3d 1126, 1140 (9th Cir. 2009) (rejecting Equal Protection and Due Process challenges and noting "Congress carefully constrained the Act's reach to the confines of the Commerce Clause").

Moreover, unlike the federal prohibition on state authorization of sports gambling found invalid

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Pittsburgh, 771 A.2d 39, 43 (Pa. Super. 2001) (citation omitted).

in ***Murphy***, 138 S. Ct. at 1481,[20] the PLCAA governs private conduct through its preemption of select suits within its scope, "brought by any person against a manufacturer or seller of a qualified product[.]" 15 U.S.C. § 7903(5)(A).

The Gustafsons' contention that the PLCAA does not regulate the conduct of private actors, but instead "dictat[es] to the states how they must exercise their lawmaking functions," lacks merit. Gustafsons' Supp. Brief at 6. Congress has the ability to preempt state statutes under its Commerce Clause powers. ***See***, ***e.g.***, ***Hughes v. Talen Energy Mktg., LLC***, 578 U.S. 150, 165-66, 136 S.Ct. 1288, 1299, 194 L.Ed.2d 414 (2016) (citations omitted) (holding on Commerce Clause grounds that Maryland's state energy program was preempted by federal law even where state exercised its "traditional authority over energy retail rates"); ***Mutual Pharm. Co. v. Bartlett***, 570 U.S. 472, 480, 133 S.Ct. 2466, 186 L.Ed.2d 607 (2013) (citations omitted) (holding on Commerce Clause grounds that lawsuits based on state common law were preempted by federal statute, and stating, "it has long been settled that state laws that conflict with federal law are 'without effect.' ").

The United States Supreme Court has reinforced Congress's power to preempt, under the Commerce Clause, state statutes, tort laws, and even laws of evidence. ***See Riegel***, 552 U.S. at 323, 128 S.Ct. 999 (holding federal law preempts state law

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[20] The United States Supreme Court found the PLCAA did not "impose any federal restrictions on private actors." ***Murphy*** at 1481.

negligence and product liability claims); ***Pierce County v. Guillen***, 537 U.S. 129, 146, 123 S.Ct. 720, 154 L.Ed.2d 610 (2003) (finding federal statute was not in excess of authority granted to Congress under Commerce Clause; statute "was not intended to be an effort-free tool in litigation against state and local governments."). Accordingly, Congress did not exceed its authority under the Commerce Clause in enacting the PLCAA.

The Commerce Clause gives Congress authority to "regulate the use of the channels of interstate commerce." ***Lopez***, 514 U.S. at 558, 115 S.Ct. 1624. The Supreme Court recognizes three categories of activity that Congress may regulate under its commerce power: (1) "the use of the 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." ***Id.*** at 558-59, 115 S.Ct. 1624.

In enacting the PLCAA, Congress determined that targeted lawsuits "constitute[ ] an unreasonable burden on interstate and foreign commerce of the United States," 15 U.S.C. § 7901(a)(6). Congress acted "[t]o prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce," ***id.*** § 7901(b)(4). Congress further restricted the PLCAA's reach to the confines of the Commerce Clause. ***See***, ***e.g.***, ***id.*** § 7903(2) (including an interstate- or foreign-commerce element

in the definition of a "manufacturer"); ***id.*** § 7903(4) (including the same restriction to a "qualified product"); ***id.*** § 7903(6) (including the same restriction to a "seller").

Consequently, Congress — properly exercising its authority — determined that insulating the firearms industry from a specific class of lawsuits protected interstate and foreign commerce. As such, I disagree with the Majority's conclusion that the PLCAA was not a valid exercise of Congress's authority under the Commerce Clause.

The Tenth Amendment

The Gustafsons argue the PLCAA violates the Tenth Amendment based on its "severe intrusion on state sovereignty and lawmaking authority." Gustafsons' Brief at 35. Without citing any legal authority, the Gustafsons contend the "PLCAA interferes with the sovereign rights of the states to freely choose how to allocate lawmaking functions between the legislative and judicial branches and how to exercise general police powers reserved solely to the states." Gustafsons' Supp. Brief at 4-5.

Appellees counter:

> The PLCAA was enacted pursuant to the power to regulate interstate and international commerce that was specifically delegated to Congress through the Commerce Clause in Article I, Section 8 of the Constitution. "If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly

> disclaims any reservation of that power to the States." ***New York v. United States***, 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Accordingly, U.S. Supreme Court precedent holds that a federal statute does not violate the Tenth Amendment unless it commandeers either a state's executive officials or legislative process.

Appellees' Sub. Brief at 54-55.

> Similarly, the United States responds,
>
> > the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states.... [I]t plainly does not. The statute simply preempts certain claims while imposing no affirmative duty of any kind or any branch of the state government.

United States' Sub. Brief at 12 (quotation marks and citations omitted).

> The Tenth Amendment provides:
>
> > The powers delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the People.

U.S. CONST. amend. X. As the United States Supreme Court explained, state and federal governments are not "co-equal sovereigns." ***F.E.R.C. v. Mississippi***, 456 U.S. 742, 761, 102 S.Ct. 2126, 72 L.Ed.2d 532 (1982).

> While th[e United States Supreme] Court never has sanctioned explicitly a federal command to the States to promulgate and enforce laws and regulations, there are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions.

Id. at 761-62, 102 S.Ct. 2126 (citation omitted).

Judge Kunselman relies on ***Erie R.R. Co. v. Tompkins***, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938) as the sole support for concluding that the PLCAA violates the Tenth Amendment. Judge Kunselman concedes that ***Erie R.R.*** "did not cite to the Tenth Amendment," Kunselman Op. at 755. ***Erie R.R.*** is inapposite. Not only does the decision not mention the Tenth Amendment, it does not discuss the Commerce Clause or constitutionality of any federal statute. The case is an outlier — a narrow decision addressing law that **Federal Courts apply in diversity jurisdiction cases**. ***See Erie R.R.***, 304 U.S. at 71-80, 58 S.Ct. 817.

Previously, in ***Swift v. Tyson***, 41 U.S. 1, 16 Pet. 1, 10 L.Ed. 865 (1842), the Supreme Court held that federal courts, in diversity cases, were not obligated to apply state law, but rather, "general principles and doctrines of commercial jurisprudence." ***Id.*** at 2. In ***Erie R.R.***, the Supreme Court recognized this doctrine was "oft-challenged," and resulted in federal courts applying "general law," when no specific state statutes were at issue. ***Erie R.R.***, at 69-70, 58 S.Ct. 817. ***Erie R.R.*** **overruled** ***Swift***, finding

that ***Swift*** led to inconsistent results and forum-shopping, as litigants attempted to create diversity jurisdiction to remove themselves from state law. ***Id.*** at 72-75, 58 S.Ct. 817. The Supreme Court held:

> Except in matters **governed by the Federal Constitution or by acts of Congress**, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law.

Id. at 78, 58 S.Ct. 817 (emphasis added). Thus, ***Erie R.R.*** is not applicable.

There is no violation of the Tenth Amendment unless "the PLCAA commandeers the states." ***Id.*** at 742, 102 S.Ct. 2126. The anti-commandeering rule has two elements. ***See Murphy***, 138 S. Ct. at 1471. First, it prohibits Congress from requiring state legislatures to enact particular laws. ***See New York***, 505 U.S. at 175-79, 112 S.Ct. 2408 (overturning "take title" provision of the Low-Level Radioactive Waste Policy Act as violating the Tenth Amendment because Congress did not have power to force states to take title of waste properties). Second, Congress may not order executive branch employees of a state or municipality to "administer or enforce a federal regulatory program." ***Printz v. U.S.***, 521 U.S. 898, 903, 935, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997) (declaring a provision of the Brady Act violated

the Tenth Amendment because it required state employees to conduct background checks on gun purchasers). However, state courts must enforce federal law. ***Id.*** at 907, 117 S.Ct. 2365.

Here, the PLCAA does not impose an affirmative duty on states or "commandeer" state officials or the state legislative process. The PLCAA provides immunity for manufacturers and sellers of firearms from claims based on harm caused by third parties. The PLCAA does not create causes of action, but permits states to do so. ***See*** 15 U.S.C. § 7903(5)(C) ("[N]o provision of this Act shall be construed to create a public or private cause of action or remedy."). Thus, the PLCAA does not violate the Tenth Amendment. ***Beretta***, ***supra*** at 306; ***Adames***, ***supra*** at 743, 909 N.E.2d at 763; ***cf Printz***, 521 U.S. at 903, 907, 117 S.Ct. 2365; ***New York***, 505 U.S. at 178-79, 112 S.Ct. 2408.

The Fifth Amendment

The Gustafsons argue the PLCAA violates due process because it "extinguishe[s] tort actions without providing a reasonable alternative remedy." Gustafsons' Brief at 39. To succeed in a due process challenge, a plaintiff must demonstrate "depriv[ation] of life, liberty, or property ... without due process of law." U.S. CONST. amend. V; ***see also Washington v. Glucksberg***, 521 U.S. 702, 719-20, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (Due Process Clause of Fifth Amendment includes both a substantive and procedural component). Regarding claims of unconstitutional property taking, the United States Supreme Court has explained: "The Fifth

Amendment's Takings Clause prevents the Legislature (and other government actors) from depriving private persons of **vested** property rights[.]" ***Landgraf v. Usi Film Prods.***, 511 U.S. 244, 266, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (emphasis added); ***see also Town of Castle Rock v. Gonzales***, 545 U.S. 748, 756, 125 S.Ct. 2796, 162 L.Ed.2d 658 (2005) ("The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit': [ ]To have a property interest in a benefit, a person clearly must have ... a legitimate claim of **entitlement** to it." (emphasis added; citation omitted)).

Here, the trial court concluded that "a potential tort claim, not yet realized or filed at the time of the enactment of [the PLCAA,] would certainly not constitute a vested property right." Trial Court Opinion, 1/15/19, at 11 (citing ***Duke Power Co. v. Carolina Envtl. Study Grp.***, 438 U.S. 59, 88 n.32, 98 S.Ct. 2620, 57 L.Ed.2d 595 (1978) ("Statutes limiting liability are relatively commonplace and have consistently been enforced by the courts.") (citation omitted), and ***In re TMI***, 89 F.3d 1106, 1113 (3d Cir. 1996) ("Under the United States Constitution, legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right.")).

I agree the Gustafsons cannot establish a due process claim as they lack a vested property right. ***See Duke Power Co.***, ***supra***; ***Ileto***, 565 F.3d at 1141 (rejecting plaintiffs' Fifth Amendment challenge

to the PLCAA, stating, "although a cause of action is a species of property, a party's property right in any cause of action **does not vest until a final unreviewable judgment is obtained**." (emphasis added; citation omitted)); ***District of Columbia v. Beretta U.S.A. Corp.***, 940 A.2d 163, 176-77 (D.C. 2008) (same); ***see also Singer v. Sheppard***, 464 Pa. 387, 346 A.2d 897, 903 (1975) (citing ***Munn v. Illinois***, 94 U.S. 113, 4 Otto 113, 24 L.Ed. 77 (1877), and stating "due process was not violated when legislative action modified the common law.").

Even if the Gustafsons' tort claim constituted a vested property right, I agree with the trial court that the PLCAA "does not deprive [the Gustafsons] of due process, and is thus constitutional." Trial Court Opinion, 1/15/19, at 12. As the Ninth Circuit Court of Appeals expressed:

> [T]he PLCAA does not completely abolish [p]laintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule. Some claims are preempted, but many are not.... Plaintiffs' ability to seek redress has been limited, but not abolished.

Ileto, 565 F.3d at 1143 (footnote omitted); ***see also*** Trial Court Opinion, 1/15/19, at 12 (finding ***Ileto*** persuasive).

Finally, the Gustafsons argue the PLCAA violates their equal protection rights "guaranteed by the Fifth Amendment, by discriminating between classes of tort

plaintiffs without any rational basis." Gustafsons' Brief at 44. The Gustafsons claim 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[.]" ***Id.***

The trial court correctly observed, "In assessing an equal protection claim, the appropriate standard must be utilized, and all parties in this matter agree that rational basis review is the appropriate standard here." Trial Court Opinion, 1/15/19, at 13 (citing ***Heller v. Doe by Doe***, 509 U.S. 312, 320, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (under rational basis review, statutorily imposed difference in treatment of two groups "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.")); ***see also Heller***, 509 U.S. at 319, 320, 113 S.Ct. 2637 (statutory schemes are "accorded a strong presumption of validity," and "the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it" (citation omitted)).

The Pennsylvania Supreme Court explained,

> under the rational basis test, if any state of facts can be envisioned to sustain the classification, equal protection is satisfied. Moreover, courts are free to hypothesize reasons why the legislature created the

> particular classification at issue and if some reason for it exists, it cannot be struck down, even if the soundness or wisdom in creating the distinction is questioned.

Commonwealth v. Albert, 563 Pa. 133, 758 A.2d 1149, 1153 (2000) (citations omitted); ***see also FCC v. Beach Comm., Inc.***, 508 U.S. 307, 315, 113 S.Ct. 2096, 124 L.Ed.2d 211 (1993) ("[A] legislative choice is not subject to courtroom fact finding and may be based on rational speculation unsupported by evidence or empirical data.").

Here, the trial court reasoned:

> The PLCAA's Findings and Purposes section sets out an ample rational basis for any differential treatment found here. 15 U.S.C. § 7901. Congress cites to its important interests in protecting the Second Amendment rights of American citizens to keep and bear arms, as well as the avoidance of an unreasonable burden on interstate and foreign commerce. 15 U.S.C. § 7901(a)(2); 15 U.S.C. § 7901(a)(6). Congress then expresses its belief that judicial remedies might be used to circumvent the democratic legislative processes, and so gives preference to legislatively enacted remedies over judicially created remedies, subject to certain exceptions. 15 U.S.C. § 7901(a)(7); 15 U.S.C. § 7901(a)(8). This rationale easily passes rational basis review. Even if this Court were to disagree with Congress' logic, "rational-basis review in equal protection analysis 'is

> not a license for courts to judge the wisdom, fairness, or logic of legislative choices.' " ***Heller*** at 319 [113 S.Ct. 2637]. As such, PLCAA cannot be found unconstitutional based on an equal protection analysis.

Trial Court Opinion, 1/15/19, at 13. The trial court's reasoning is persuasive. ***See***, ***e.g.***, ***Ileto***, 565 F.3d at 1140-41 ("We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected."); ***District of Columbia***, 940 A.2d at 175 ("the PLCAA ... is reasonably viewed as an adjustment of the burdens and benefits of economic life by Congress, one it deemed necessary in exercising its power to regulate interstate commerce." (citation and brackets omitted)).

For all of the above reasons, I dissent.

Judge Bowes, Judge Olson and Judge McCaffery concur in the result.

APPENDIX C

2020 PA Super 239

MARK AND LEAH GUSTAFSON, INDIVIDUALLY AND AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON Appellants,

v.

SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE; Appellees

THE UNITED STATES OF AMERICA, Intervenor.

No. 207 WDA 2019. Superior Court of Pennsylvania.

Filed: September 28, 2020.

Appeal from the Order Entered January 15, 2019, In the Court of Common Pleas of Westmoreland County Civil Division at No(s): 1126 of 2018.

BEFORE: BENDER, P.J.E., KUNSELMAN, J., and MUSMANNO, J.

OPINION BY KUNSELMAN, J.

In this appeal, we must decide whether the trial court erred by finding that a federal statute, the

Protection of Lawful Commerce in Arms Act of 2005 ("the PLCAA"), 15 U.S.C. §§ 7901-7903, bars a state lawsuit arising from the shooting death of Mark and Leah Gustafson's 13-year-old son, James Robert ("J.R.") Gustafson. The Gustafsons claim that the PLCAA should not apply to their lawsuit or, alternatively, that it is unconstitutional.

On March 20, 2016, J.R. Gustafson and his 14-year-old friend visited a Westmoreland County home owned by Joshua Hudec.[1] J.R.'s friend obtained Mr. Hudec's Springfield Armory, semiautomatic handgun, model XD-9. ***See*** Gustafsons' Complaint at 5. The friend removed the handgun's clip and therefore believed it "was unloaded, because . . . there were no adequate indicators or warnings to inform him that a live round remained in the chamber." ***Id***. at 6.

"Thinking the handgun was unloaded, the boy pulled the trigger." ***Id***. The chambered bullet fired and unintentionally killed J.R. The District Attorney of Westmoreland County charged J.R.'s friend with general homicide under the Pennsylvania Crimes

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[1] We take these facts from the Gustafsons' complaint, because the trial court sustained the defendants' preliminary objections in the nature of a demurrer. Hence, we must accept the Gustafsons' factual allegations as true for purposes of this appeal. See ***Mazur v. Trinity Area Sch. Dist.***, 961 A.2d 96 (Pa. 2008). The complaint does not indicate what role, if any, Mr. Hudec played in these events or whether he was at home when they occurred.

Code. The friend eventually pleaded delinquent to involuntary manslaughter[2] in juvenile court.

Mark and Leah Gustafson, as Administrators of J.R.'s estate and in their own right as surviving kin, then sued Springfield Armory, Inc. and Saloom Department Store ("Gun-Industry Defendants").[3] The Gustafsons asserted that, under the common law of Pennsylvania, the Gun-Industry Defendants were negligent and strictly liable for manufacturing and/or selling the defective handgun that caused their son's death. ***See id***. at 13-25. They alleged a design defect, because the gun lacked a safety feature to disable it from firing without the clip attached. They believe this defect, along with the 14- year-old friend's criminal misuse of the handgun, caused J.R.'s death. The Gustafsons also averred the Gun-Industry Defendants did not adequately warn the 14-year-old that a live round was still in the chamber after he had removed the clip.

After receiving the complaint, the Gun-Industry Defendants immediately sought dismissal of the action through preliminary objections in the nature of

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[2] 18 Pa.C.S.A. § 2504(a).

[3] Springfield Armory, which made the gun, has its principal place of business and incorporation in Illinois. Springfield Armory did not contest the trial court's in personam jurisdiction. Saloom Department Store, the Pennsylvania corporation that sold the handgun, operates in Westmoreland County. All parties agree they are a "Manufacturer" and a "Seller" as Congress defined those terms in the PLCAA.

a demurrer.[4] They asserted immunity from all of the Gustafsons' common-law causes of action. ***See*** Preliminary Objections at 5. The Gun-Industry Defendants argued the PLCAA prevented the trial court from holding them civilly liable for J.R.'s death, even if the Gustafsons could convince a jury the Defendants had committed torts under Pennsylvania law.

The Gustafsons responded that the PLCAA does not apply here. In the alternative, they argued the Act is unconstitutional, because it (1) overrides Tenth Amendment principles of federalism, (2) cannot be sustained under the Commerce Clause,[5] and (3) violates the Fifth Amendment. Upon learning of the Gustafsons' constitutional attacks against its statute, the United States of America ("Federal Government") intervened to defend the PLCAA. It claimed Congress properly enacted the PLCAA under the Commerce Clause and Bill of Rights.

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[4] The Gun-Industry Defendants' assertion of immunity was premature, and they erroneously raised it as a preliminary objection. The Pennsylvania Rules of Civil Procedure require defendants to raise affirmative defenses, such as immunity from a lawsuit, as new matter in their answer to a complaint. ***See*** Pa.R.C.P. 1030(a). However, because the Gustafsons did not file a preliminary objection to the Gun- Industry Defendants' preliminary objections in the nature of a demurrer, they waived any objection to the Defendants' procedural error. Thus, the issues of PLCAA immunity and the Act's constitutionality are properly before us in this appeal.

[5] U.S. CONST. art. I, § 8. cl. 3.

The trial court concluded the PLCAA barred all of the Gustafsons' causes of action, upheld the Act as being constitutional, and sustained the preliminary objections. This timely appeal followed.

The Gustafsons raise two appellate issues:

> 1. Does [the PLCAA] bar [their] claims?
>
> 2. Does the United States Constitution permit [the] PLCAA to bar Pennsylvania courts from applying Pennsylvania law to provide [them] civil justice?

Gustafsons' Brief at 3.

Our scope and standard of review are the same for both issues. "When an appellate court rules on whether preliminary objections in the nature of a demurrer were properly sustained, the standard of review is de novo, and the scope of review is plenary." ***Mazur v. Trinity Area Sch. Dist.***, 961 A.2d 96, 101 (Pa. 2008). We affirm an order sustaining preliminary objections "only when, based on the facts pleaded, it is clear and free from doubt that the complainant will be unable to prove facts legally sufficient to establish a right to relief." Id. Also, this Court "must accept as true all well-pleaded, material, and relevant facts alleged in the complaint and every inference that is fairly deducible from those facts." ***Id***.

I.

First, we consider whether the trial court correctly concluded that the text of the PLCAA bars the

Gustafsons' lawsuit. Where, as here, the language of a federal statute is clear and unambiguous, statutory analysis "begins, and pretty much ends, with the text." ***Lomax v. Ortiz-Marquez***, 590 U.S. ___, ___, 140 S. Ct. 1721, 1724 (2020).

Congress divided the PLCAA into three sections: Section 7901 (findings and purposes), Section 7902 (the operable provisions), and Section 7903 (the definitional provisions). Section 7902 dictates that a "qualified-civil-liability action may not be brought in any federal or state court" against members of the gun industry. Such a lawsuit "shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. § 7902. To determine which types of lawsuits Congress mandated that courts dismiss, we turn to Section 7903 to ascertain the meaning of "qualified-civil- liability action."

Congress defined "qualified-civil-liability action," as any:

> civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm or an ammunition that moved through interstate commerce] for damages, punitive
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> damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of [that firearm or ammunition] by the [plaintiff] or a third party, but ***shall not include*** (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 [firearm or ammunition], and the violation was a proximate cause of the harm for which relief is sought . . . (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 [firearm or ammunition], when used as intended or in a reasonably foreseeable manner, except that where the discharge of the [firearm or ammunition] 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 [of the Untied States] to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26 [of the United States Code].

15 U.S.C. § 7903(5)(A) (emphasis added).

To date, all courts that have considered the PLCAA agree that if (1) none of those six exceptions apply, (2) the plaintiff or a third party commits any crime with the firearm or ammunition at issue, and (3) that firearm or ammunition has crossed state lines, then the PLCAA immunizes the gun industry from a plaintiff's lawsuit. However, if one or more of the exceptions applies, courts disagree on whether the PLCAA still bars a plaintiff's other causes of action.

Some courts, including the trial court here, have agreed with the gun industry that only the causes of actions allowed by the exceptions to the definition of "qualified-civil-liability action" remain viable. ***E.g., Delana v. CED Sales***, 486 S.W.3d 316 (Mo. 2016) (allowing plaintiff's negligent-entrustment count to proceed under Exception (ii) but not her negligence count). ***See also Estate of Kim ex rel. Alexander v. Coxe***, 295 P.3d 380, 386 (Ak. 2013) ("reading a general-negligence exception into the statute would make the negligence-per-se and negligent-entrustment exceptions a surplusage"). The trial court, finding Kim "convincing," followed this line of precedents. Trial Court Opinion, 1/15/19, at 7 (citations omitted).

Other courts, however, have read the plain language in the definition of "qualified-civil-liability action" literally. They have agreed with plaintiffs that "qualified-civil-liability action" refers to the "civil action" as a whole, not to specific causes of action within complaints. Those courts have concluded that, if the finder of fact determines that an exception to the definition of "qualified-civil-liability action" exists,

then the plaintiff's lawsuit is not a "qualified-civil-liability action." Hence, the PLCAA simply does not apply, and the gun industry receives no immunity from any of the individual counts. ***E.g., Williams v. Beemiller, Inc.***, 952 N.Y.S.2d 333, 363 (4th Dep't 2012) (permitting counts for negligent distribution, negligent entrustment, negligence per se, and public nuisance to proceed to trial, because plaintiff alleged gun-industry members violated "federal, state, and local legislative enactments" thereby implicating Exception (iii)). ***See also Norberg v. Badger Guns, Inc.***, WI 10- CV-20655 (C.C. Milwaukee 2014) (N.T., 1/30/14, at 7-8) (denying summary judgment to gun-industry defendants on counts of ordinary negligence, negligent entrustment, civil conspiracy, and aiding and abetting, because evidence existed from which a jury could find the defendants in violation of the Gun Control Act); and ***City of New York v. A-1 Jewelry & Pawn, Inc.***, 247 F.R.D. 296 (E.D.N.Y. 2007) (accord).

Unlike the trial court, we adopt the latter construction. The definition of "qualified-civil-liability action" does not mention "cause of action," "theory of liability," "count," or "claim." Instead, Congress defined "qualified-civil-liability action" as a "civil action or proceeding or an administrative proceeding." 15 U.S.C. § 7903(5)(A) (emphasis added). Thus, the term refers to a plaintiff's lawsuit or proceeding as a whole, not to specific causes of action advanced within that lawsuit. If a plaintiff's civil action falls within an exception to the definition of "qualified-civil-liability action," the civil action is not a "qualified-civil-liability action." The PLCAA commands trial courts to dismiss

a "qualified-civil-liability action that is pending on October 26, 2005," but 15 U.S.C. § 7902(b) makes no mention of "causes of action." Nor does the definition of "qualified-civil-liability action." 15 U.S.C. § 7903(5)(A).

In fact, that very term — qualified-civil-liability action — supports our interpretation. Otherwise, Congress, which used the phrase "cause of action" elsewhere in the PLCAA, e.g., 15 U.S.C. § 7903(5)(C), would have coined the term as "qualified- civil-liability cause of action," rather than "qualified-civil-liability action." When "Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." ***Russello v. United States***, 464 U.S. 16, 23, (1983). Thus, the plain text of the PLCAA dictates that either the gun industry has immunity from the entire lawsuit or no immunity at all. The Act does not immunize the industry from individual causes of action.

Therefore, the trial court erred when it applied the PLCAA on a claim-by-claim basis rather than to the entire lawsuit. Its reliance upon ***Kim, supra***, was therefore misplaced.[6][6] The PLCAA requires

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[6] We find the logic of the Supreme Court of Alaska in Kim unpersuasive. That court erroneously believed that allowing claims for ordinary negligence (or any other cause of action based in negligence) would render the PLCAA's exception for claims of negligence per se and negligent entrustment surplusage. That court and the trial court misunderstood the PLCAA's goal, which is to protect only those members of the gun industry who obey

dismissal of a plaintiff's entire lawsuit if the facts of the case meet the definition of a qualified-civil-liability action.

Regarding the "criminal or unlawful misuse" that brings a lawsuit within the general definition of a "qualified-civil-liability action," the "term `unlawful misuse' means conduct that violates a statute, ordinance, or regulation as it relates to the use of a [firearm or ammunition]." 15 U.S.C. § 7903(9). Any

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state or federal statutes from common-law liability. As we will explain below, Congress passed the PLCAA to immunize what they considered to be law-abiding members of the industry — in Congress's mind, those who follow federal and state statutes.

Because all of the exceptions in the definition of "qualified-civil-liability action" are statutory violations, Exception (ii) is not surplusage if, as we now hold, the gun industry's violation of it (or any other exception) renders the PLCAA inapplicable. Violators of any federal or state statute are not law-abiding industry members in Congress's view. Thus, if a member of the gun-industry violates a federal or state statute, Congress would naturally not wish to extend any PLCAA immunity to such a lawbreaker.

For example, once a plaintiff proves that a gun-industry member has violated the PLCAA's definition of "negligent entrustment," 15 U.S.C. § 7903(5)(B), it would not matter to Congress if that industry member were also liable for, say, ordinary negligence. That defendant is already liable to the plaintiff under the PLCAA's definition of "negligent entrustment," and the state judiciary need not expand the common law to impose liability or damages upon a law-abiding member of the gun industry.

crime will suffice, even the unlawful possession of the gun itself.

For instance, in ***Ryan v. Hughes-Ortiz***, 959 N.E.2d 1000, (Ma. App. 2012), a man was returning a Glock to his employer's display case, when the handgun accidentally discharged and killed him. The administratrix of his estate sued Glock for defectively designing both the gun and the display case that had failed to stop the stray bullet. The plaintiff argued the PLCAA did not apply, because the decedent had not "misused" the handgun in any way. 15 U.S.C. § 7903(5)(A). The appellate court disagreed. It opined that the decedent had been a convicted felon who had unlawfully possessed the gun and committed a federal offense[7] by holding the weapon — i.e., a "criminal or unlawful misuse" of the gun under the PLCAA. ***Ryan***, 959 N.E.2d at 1008. The PLCAA therefore immunized Glock from liability that might have otherwise attached under Massachusetts law.

Similar to the plaintiff in ***Ryan***, the Gustafsons urge that the PLCAA does not apply. But, as in ***Ryan***, the Act's plain language bars this lawsuit. J.R. died when his friend committed the Pennsylvania crime of involuntary manslaughter by unintentionally firing a bullet at him. Thus, this case meets the definition of a "qualified-civil-liability action." Also, because Mr. Hudec's handgun crossed state lines, it is a PLCAA "qualified product." ***See*** 15 U.S.C. § 7903(4).

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[7] 18 U.C.S. § 922(g)(1); ***see also United States v. Tann***, 577 F.3d 533, 534 (3d Cir. 2009).

The Gustafsons, however, claim the text of the PLCAA is unclear. They assert the Act does not apply, because: (1) its first section indicates that Congress only sought to bar cases for harm solely caused by the criminal acts of others, (2) the legislative history shows Senators did not intend to eliminate cases like the one at bar, and (3) PLCAA Exception (v) applies. Alternatively, they claim we should narrowly construe the PLCAA to avoid the possibility of unconstitutional federal encroachment into the States' police power — specially, the law of torts. See Gustafson's Brief at 7-8 (citing Bond v. United States, 572 U.S. 844 (2014); and Gregory v. Ashcroft, 501 U.S. 452 (1991)).

A. The Purposes & Findings

First, the Gustafsons claim Congress only desired dismissal of lawsuits where criminal actors "solely caused" the alleged harm. According to the Gustafsons, lawsuits such as theirs, where the gun industry's affirmative conduct or negligent omissions allegedly contributed to the harm, do not qualify. Thus, the Gustafsons believe the phrase "solely caused" in Section 7901(b)(1) refutes the trial court's decision to dismiss their case. They also contend that the adverb "solely" carries special weight, because its addition to Section 7901 helped the bill to pass.

Section 7901(b)(1) of the PLCAA indicates that one of Congress's goals under the PLCAA is "to prohibit causes of action against [the gun industry] for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others." 15 U.S.C. § 7901(b)(1) (emphasis added). However, we cannot rely on the findings and purposes of the Act to override plain text of its operable sections. Congressional findings and purposes are not law; only a statute's operable sections are law.

The Supreme Court of the United States has long held that, "[R]ecitals. . . in section 1 (which [are] simply a preamble to the act) . . . do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations, which, in the opinion of [Congress], existed and justified the expression of its will in the present act." ***Carter v. Carter Coal Co.***, 298 U.S. 238, 290, (1936). Thus, while findings and purposes may assist a court in deciding if Congress

legislated constitutionally, that section does not trump a law's unambiguous, operative terms. ***See id***; ***see also Lomax, supra***. The Gustafsons' first statutory-construction theory therefore fails to convince us that the plain language of Sections 7902 and 7903 should not apply.

B. The Congressional Record

Second, the Gustafsons' arguments regarding the legislative history of the Act are equally unpersuasive. They maintain that the trial court erred in dismissing this case, because the "legislative history indicates an intent not to bar cases like this." Gustafsons' Brief at 27.

To be sure, Senator Larry Craig, the author and lead sponsor of the PLCAA, told Congress his bill would not protect gun- industry members if they had broken any laws. He said that the PLCAA "prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party." 151 Cong. Rec. S9,061 (daily ed. July 27, 2005) (Sen. Craig). "Over two dozen suits have been filed on a variety of theories, but all seek the same goal of forcing law-abiding businesses selling a legal product to pay for damages from the criminal misuse of that product." Id. (emphasis added). The 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." ***Id***. (emphasis added).[8]

Despite these statements from Senator Craig, we may not consider the intentions of individual Members of Congress when interpreting unambiguous text, even if that text produces a result that the drafters failed to anticipate. For example, in the recent Supreme Court case of ***Bostock v. Clayton County, Georgia***, 590 U.S. ___, 140 S. Ct. 1731 (2020), the Court held that Title VII of the Civil Rights Act of 1964 protects the LGBTQ+ community from employment discrimination even though the Congress that passed that law neither intended nor foresaw such an outcome.

As Justice Gorsuch candidly stated at the outset of the decision:

> Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren't thinking about many of the Act's consequences that have become apparent over the years,

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[8] Other Senators expressed similar sentiments. "[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. S9,077 (daily ed. July 27, 2005) (Sen. Hatch)); "This bill . . . will not shield the industry from its own wrongdoing or from its negligence." (151 Cong. Rec. S9,107 (daily ed. July 27, 2005) (Sen. Baucus)); "This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence of the firearms dealer or manufacturer." 151 Cong. Rec. S9,389 (daily ed. July 29, 2005) (Sen. Allen).

> including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters' imagination supply no reason to ignore the law's demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. ***Only the written word is the law***. . . .

Id., 590 U.S. at ___, 140 S. Ct. at 1737 (emphasis added).

Like the shortsightedness of the 88th Congress that passed Title VII, the 109th Congress that passed the PLCAA (including its author) may not have envisioned the full breadth of immunity that the PLCAA would grant the gun industry. Even so, the "limits of the drafters' imagination supply no reason to ignore the law's demands." ***Id***.

C. The PLCAA's Product-Defect Exception

In their third argument, the Gustafsons claim their lawsuit does not meet the definition of a "qualified-civil-liability action," because Exception (v) within that definition applies. It does not.

Congress, as explained above, listed six exceptions to the definition of a "qualified-civil-liability action." Of the six exceptions, only the fifth could arguably apply to the allegations in the Gustafsons' complaint. Exception (v) seemingly allows lawsuits to proceed if the firearm or ammunition was "used as intended or in a reasonably foreseeable manner. . . ." 15 U.S.C. §

7903(5)(A)(v). This Exception, however, contains a critical caveat that if "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." ***Id***. That caveat renders Exception (v) toothless, because all criminal offenses require a volitional act.[9] Any time a defective gun causes harm and a criminal offense also occurs, Exception (v) cannot apply. This is true even when, as here, the result of that act is unintentional. ***See Ryan***, 959 N.E.2d 1000 (dismissing lawsuit, despite the fact that the gun discharged on its own and no criminal charges were filed against decedent).

At first blush, Exception (v) seems to allow lawsuits to proceed if the plaintiffs plead and prove a product defect. However, a caveat in Exception (v) dictates that the PLCAA-triggering offense must also be deemed the sole proximate cause of the harm. This caveat negates the proximate cause necessary for a product-defect claim against the gun industry to succeed. With one hand, Exception (v) excludes product-defect lawsuits from the definition of "qualified-civil-liability action," but, with the other hand, Exception (v) extinguishes the very tort that activates it.

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[9] This is basic criminal law. For example, in Pennsylvania, "A person is not guilty of an offense unless his liability is based on conduct which includes a voluntary act or the omission to perform an act of which he is physically capable." 18 Pa.C.S.A. § 301(a) (emphasis added). The courts may "not impose criminal liability on a person for an involuntary act." ***Commonwealth v. Lamonda***, 52 A.3d 365, 369 (Pa. Super. 2012).

This exact scenario occurred in ***Adames v. Sheahan***, 909 N.E.2d 742 (Ill. 2009), ***cert. denied*** **sub nom.** ***Adames v. Beretta U.S.A. Corp.***, 558 U.S. 1100 (2009). There, on facts identical to those in the Gustafsons' complaint, Exception (v) failed to save the plaintiffs' lawsuit from dismissal. In Adames, a teenager found a handgun inside a home. The boy knew the gun was loaded if the magazine was connected, but he thought it was unloaded without it. He removed the magazine and pointed what he believed was an unloaded gun at his friend, jokingly pulled the trigger, and killed him. A juvenile court found the shooter delinquent of involuntary manslaughter and reckless discharge of a firearm. The victim's parents sued the manufacturer of the gun for product liability (design defect and failure to warn about the bullet concealed in the chamber). While the case was proceeding, Congress passed the PLCAA.

The Supreme Court of Illinois held the general rule of the PLCAA applied and required dismissal. It reasoned that the shooter criminally misused the gun, because his actions were state crimes, regardless of his intent or the fact that he was tried as a juvenile instead of as an adult. Id. Also, rejecting the plaintiffs' reliance upon Exception (v), the court reasoned that the caveat in Exception (v) "requires only that the volitional act constitute a criminal offense. As discussed . . . shooting [the victim] constituted a criminal offense." ***Id***. at 763.

Adames demonstrates the hollowness of Exception (v). The criminal act that implicates the definition of a "qualified-civil- liability action," will also always be a

violation criminal act that nullifies Exception (v). Thus, this claim affords the Gustafsons no relief.

D. The Canon of Constitutional Avoidance

Finally, citing to Bond v. United States and Gregory v. Ashcroft, supra, the Gustafsons request that we narrowly construe the PLCAA pursuant to the canon of statutory construction of constitutional avoidance.[10] When that canon applies, even the plain text of a statute may yield to a presumption that the legislature does not willingly test constitutional limits. Based on that presumption, the Supreme Court has said, "Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." ***Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers***, 531 U.S. 159, 173, (2001) (some punctuation omitted). Hence, if "a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." ***MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission***, 844 A.2d 1239, 1249 (Pa. 2004) (citing ***Harris v. United States***, 536 U.S. 545, 555, (2002) and ***United States***

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[10] While similar, the canon of constitutional avoidance should not be confused with the principle of judicial restraint that requires courts to attempt to avoid constitutional questions. Under the latter practice, a court only reaches a constitutional issue if it cannot resolve a case on other grounds. ***See*** Nelson, *Avoiding Constitutional Questions Versus Avoiding Unconstitutionality*, 128 Harv. L. Rev. F. 331 (2015).

ex rel. Attorney General v. Delaware Hudson Co., 213 U.S. 366, 408, (1909)).

In ***Bond***, pursuant to a treaty the United States had entered, Congress criminalized the possession and use of chemical weapons. No one doubted Congress's power to make the treaty or to enforce it by criminal statute. Several years later, a scorned wife harassed her husband's mistress by putting a non-lethal amount of chemicals on the other woman's car door and in her mailbox. When the District Attorney of Montgomery County refused to press charges, the Federal Government indicted Bond for violating its anti-chemical-weapons statute. The district court convicted her, and Bond's appeals reached the Supreme Court, twice.

The High Court worried that the Federal Government's interpretation of the statute, although rooted in the plain text, raised grave Tenth Amendment questions and potentially usurped this Commonwealth's police power. The Court therefore construed the statute narrowly to exclude Bond's conduct from the federal act based on the presumption that Congress would not intend a constitutionally dubious result without clearly expressing an intention to invade Pennsylvania's sovereignty. Pursuant to the statutory-construction canon of constitutional avoidance, the Court narrowly construed the statute to maintain the traditional state-federal balance.

Here, unlike the statutes in ***Bond*** and ***Gregory***,[11] which Congress clearly had the power to enact, the PLCAA does not offer two interpretations, "by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided." ***MCI WorldCom, supra***. All applications of the PLCAA raise grave and doubtful constitutional questions, because it extinguishes every cause of action at common law.

The trial court and Federal Government suggest the Act only prohibits certain common-law claims, while permitting others under its six exceptions. We disagree. As this Court's review of those exceptions reveals, the PLCAA only permits a lawsuit to proceed if the gun industry violates a state or federal statute. The six exceptions do not involve any common-law causes of action.

Exception (i), for instance, purportedly allows lawsuits against a gun-industry "transferor" if the Federal Government convicts it of "transferring a firearm, knowing that such firearm will be used to commit a crime of violence. . . or drug trafficking crime," 18 U.S.C. § 924(h), or after any State convicts the "transferor" under "a comparable or identical state

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[11] In ***Gregory v. Ashcroft***, 501 U.S. 452 (1991), involved Missouri judges' unsuccessful allegations that mandatory retirement ages under that State's constitution violated the Age Discrimination in Employment Act ("ADEA"). No one argued that Congress lacked the power to enact the ADEA, but whether, under the Tenth Amendment, it could reform Missouri's judicial systems was another issue entirely. Because Congress had not clearly included state judges within the ADEA, the Court interpreted the act as excluding them.

felony law." 15 U.S.C. § 7903(5)(A)(i). Thus, the victim's harm must be "directly caused by the conduct of which the transferee is so convicted." Id. (emphasis added). The exception applies only if the gun industry knowingly acted in concert with another criminal in violation of a criminal statute, and they are both convicted. Moreover, such a victim would be entitled to a judgment of restitution at the gun industry's sentencing and, therefore, would not need a lawsuit to recover. Our research reveals no court ever permitting a lawsuit to proceed under Exception (i) or any plaintiffs even arguing that it applied. Exception (i) might look good on paper, but it has no real-world implications.

Exception (ii) authorizes actions "brought against a seller for negligent entrustment or negligence per se." 15 U.S.C. § 7903(5)(A)(ii). This exception would permit state courts to apply the common-law tort of negligent entrustment, if Congress had not defined "negligent entrustment" at 15 U.S.C. § 7903(5)(B). Congress therefore set a national, statutory standard for the gun industry, if a plaintiff alleges negligent entrustment.

Likewise, negligence per se allows cases to proceed only if the gun industry violated a statute. Regarding negligence per se, the "standard of conduct is taken over by the court from that fixed by the legislature" in statutes or ordinances. ***Bumbarger v. Kaminsky***, 457 A.2d 552, 555 (Pa. Super. 1983) (quoting Prosser, THE LAW OF TORTS § 36 at 200 (4th ed. 1971)). Hence, the legislature must define the gun industry's duty of care under Exception (ii), not the courts.

Exception (iii) permits actions to proceed if based on "a state or federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). Clearly, this exception is not based upon common-law claims.

Exception (iv) allows lawsuits based on breach of contract and warranty relating to the sale of firearms. 15 U.S.C. § 7903(5) (A)(iv). This exception likewise requires plaintiffs to prove statutory violations, because all 50 States have adopted the Uniform Commercial Code ("the UCC").[12] Contracts and warranties regarding the gun industry's "qualified products," 15 U.S.C. § 7903(5)(A), are not subject to the common law, as those "qualified products" are also "goods"[13] under the UCC. Thus, the UCC applies to any "action for breach of contract or warranty in connection with the purchase of a qualified product," 15 U.S.C. § 7903(5)(A)(iv), not the common law of assumpsit.

Exception (v) never preserves the common law of product defect. As Ryan, Adames, and this case demonstrate, the exception's caveat renders it a nullity.

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[12] Even Louisiana, America's only non-common-law State, has adopted parts of Article II of the UCC into its Civil Code of Sales. Rasmussen, *The Uneasy Case against the Uniform Commercial Code*, 62 La. L. Rev. 1097 n.1 (2002).

[13] "Goods" for purposes of Article II of the UCC are "things (including specially manufactured goods) which are movable at the time of identification to the contract." 13 Pa.C.S.A. § 2105(a); ***see also*** UCC, Art. II, § 105(a).

Finally, Exception (vi) permits the Attorney General of the United States to bring lawsuits based upon "chapter 44 of Title 18 or chapter 53 of Title 26." 15 U.S.C. § 7903(5)(A)(vi). Obviously, this last exception allows no claims at common law, because those suits are based on violations of federal statutes.

The PLCAA therefore grants total immunity from common-law liability to the gun industry. Congress has dictated that responsibility under state tort law must fall solely on criminals and the victims of gun injuries whenever the PLCAA applies.[14] Before the PLCAA, under States' laws, gun-shot victims could be both victims of crime and victims of gun-industry torts.

But now, if a State exercises its police power to criminalize a shooting, then the PLCAA strips that State of its tort-based police power to hold the gun industry financially responsible. The PLCAA therefore forces the States into a Hobson's choice: either punish local crimes or compensate victims fully for tortious wrongs. Congress, in the PLCAA, undoubtedly undertook a radical reformation of the traditional state-federal balance. Therefore the canon of constitutional avoidance that applied in Gregory and Bond does not extend to the PLCAA; federal

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[14] If the gun industry's tort victim commits a criminal offense, even a nonviolent one such as unlawful possession of a firearm, Congress revived "the harshest doctrine known to the common law of the nineteenth century," namely, contributory negligence, to put the victim or his heirs out of court. Shrager & Shepherd, ***History, Development, and Analysis of the Pennsylvania Comparative Negligence Act: An Overview***, 24 Vill. L. Rev. 422, 425 (1979).

overreach arises (and will continue to arise) in every PLCAA case.

Congress has therefore clearly rebutted the presumption of statutory construction that it avoids constitutional risk-taking. Hence, the trial court correctly ruled that the Gustafsons' lawsuit meets the definition of "qualified-civil-liability action" and that the PLCAA's plain language calls for the dismissal of their complaint. All contentions to the contrary fall short.

The Gustafsons' first appellate is meritless.

II.

For their second issue, the Gustafsons challenge the constitutionality of the PLCAA. Among other arguments, they claim that Congress violated the Tenth Amendment, because the PLCAA infringes on powers reserved to the States.[15] They further disagree with the Federal Government's contention that Congress properly enacted the PLCAA under its Commerce Clause power in Article I of the Constitution of the United States. Specifically, the Gustafsons argue that the PLCAA improperly regulates the States' abilities to apply their respective common laws, rather than the conduct of private individuals.

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[15] The Gustafsons also challenge the PLCAA under the Fifth Amendment, which we need not address given our decision on their other constitutional claims.

The Tenth Amendment and Congress's Article I powers are interrelated. They, along with other constitutional provisions, create the system known as federalism and checks and balances within the government. Federalism divides sovereign authority between the Federal Government and the States, based on the "unique insight [of the Founders] that freedom is enhanced by the creation of two governments, not one." ***Alden v. Maine***, 527 U.S. 706, 758 (1999). Thus, the Founders gave the Federal Government specific, limited powers and reserved all other powers to the several States. If the Constitution does not explicitly provide Congress with authority to pass a bill, then Congress may not enact it. "In short, a law beyond the power of Congress, for any reason, is no law at all." ***Bond v. United States***, 564 U.S. 211, 227-28, (2011) (Ginsburg, J., concurring) (quoting ***Nigro v. United States***, 276 U.S. 332, 341, (1928)) (some punctuation omitted).

The Founders feared fully centralized government. They therefore left most governance of daily life to the States. Courts, as a result, "always have rejected readings of the Constitution of the United States that would permit Congress to exercise a police power." ***United States v. Morrison***, 529 U.S. 598, 618-19, (2000). As such, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." ***New York v. United States***, 505 U.S. 144, (1992) (quotation marks omitted).

The Federal Government believes Congress could pass the PLCAA under Article I of the Constitution. That Article gives Congress the power to enact certain

types of laws, including statutes that "regulate Commerce with foreign Nations, and among the several States. . . ." U.S. CONST. art. I, § 8 cl. 3. In defining "Commerce," Chief Justice Marshall said,

"Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." ***Gibbons v. Ogden***, 22 U.S. 1, 189-90 (1824). This definition of commerce ensures that the "authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, 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). "That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." ***Id***.

Under the Tenth Amendment of the Bill of Rights, local matters fall under the authority of the individual States. That Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. CONST. amnd. X.

In addition to their concerns regarding centralized government, the Founders also distrusted a government where power resided in only one institution or individual. They therefore created a

tripartite system with built-in checks and balances. Under that system, when a litigant claims a federal statute is unconstitutional, only the courts may decide whether Congress had the constitutional authority to pass the challenged law. ***Marbury v. Madison***, 1 Cranch 137, 176, (1803).

A. The Tenth Amendment and the Commerce Clause

Here, the Gustafsons challenge the constitutionality of the PLCAA on the grounds that Congress exceeded its enumerated powers. When confronting such a challenge, the "Federal Government . . . must show that a constitutional grant of power authorizes each of its actions." ***National Federation of Indep. Bus. v. Sebelius,*** 567 U.S. 519, 535, (2012). Such a showing "does not apply to the States, because the Constitution is not the source of their power . . . state governments do not need constitutional authorization to act." ***Id***. "Proper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated." ***Id***. at 538 (quoting ***United States v. Harris***, 106 U.S. 629, 635, (1883)). "Our deference in matters of policy cannot, however, become abdication in matters of law. `The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.'" ***Id***. (quoting ***Marbury***, 1 Cranch at 176).

"Congress needs only a rational basis for concluding that the regulated activity substantially affects interstate commerce . . . But it must be activity affecting commerce that is regulated. . . ." ***NFIB*** at 657-58 (Scalia, J., dissenting) (emphasis in original). "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. "Whether particular operations affect 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 by this Court." ***Id***. And even "modern-era precedents which have expanded Congressional power under the Commerce Clause confirm that this power is subject to outer limits." ***Id***. at 556- 57.

Under the Commerce Clause, Congress may only regulate activity that falls into one of three categories:

> First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. Finally, Congress's commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, i.e., those activities that substantially affect interstate commerce.

Id. at 558-59 (citations omitted).

Although Congress "is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, . . . congressional findings . . . enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce. . . ." ***Id***. at 562-63. See also Carter, supra (discussing the role that Congress's findings and purposes play in courts' determinations that Congress aimed an enactment at constitutionally permissible ends). Our "determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty." ***Lopez***, 514 U.S. at 566. "The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation." ***Id***.

Whether a rational link between the congressionally regulated activity and interstate commerce exists presents a pure question of constitutional law for the courts. In assessing that connection, we may not "pile inference upon inference in a manner that would . . . convert Congressional Commerce Clause authority to a general police power of the sort held only by the States." ***Id***. at 549-50.

Moreover, "the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States." ***New York v. United States***, 505 U.S. 144, 166, (1992). "The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate

interstate commerce directly; it does not authorize Congress to regulate state governments' regulation of interstate commerce." ***Id***.

The Gustafsons contend that the PLCAA violates the Tenth Amendment and those principles of federalism, because it interferes with the authority of States to decide how to allocate lawmaking functions between their various branches of state government. See Gustafsons' Brief at 34. Specifically, they claim that "the PLCAA bars states from imposing liability on negligent gun companies if states have chosen to have their judiciaries establish the relevant liability standards through common law (like Pennsylvania), while allowing identical claims if the states used their legislatures to establish the relevant liability standards." ***Id***. (citing 15 U.S.C. §§ 7903(5)(A)(iii)). However, Congress has "no permissible authority to infringe upon a State's decision of which branch of government it chooses to make law." ***Id***.

To support their claim, the Gustafsons rely upon ***Erie R.R. Co. v. Tompkins***, 304 U.S. 64 (1938). Under ***Erie R.R. Co***., the Gustafsons argue that Congress may not disfavor the common law and, at the same time, prefer the enactments of state legislatures. In other words, whether States choose to regulate the negligence and product liability of the gun industry by common law or by statute is purely a state concern. The Gustafsons allege Congress unconstitutionally disfavored and extinguished the common law of torts in the States' courts and impermissibly recodified it as federal law, solely for the gun industry.

The Gun-Industry Defendants do not rebut the Gustafsons' argument. Instead, they insist 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.'" Gun Industry's Brief at 43 (quoting Trial Court Opinion, 1/15/19, at 9-10). The Gun-Industry Defendants assert this Court must apply the statute under the Supremacy Clause,[16] Congress did not "commandeer" the legislative and executive branches by passing the PLCAA.

This argument is a strawman; the Defendants do not answer the Gustafsons' theory. The Gustafsons never alleged the PLCAA commandeers political branches. They asserted Congress usurped the States' police powers embodied in the common law and the allocation of lawmaking authority between the branches of state government. Therefore, the Gun-Industry Defendants' response misses its target.

Similarly, the Federal Government contends the PLCAA comports with the Tenth Amendment, because it is a valid exercise of the Commerce Clause power and does not commandeer a State's political branches. It relies on ***City of New York v. Beretta U.S.A. Corp. et al***., 524 F.3d 384 (2d Cir. 2008), ***cert. denied***, 556 U.S. 1104 (2009), where a 2-1 majority of the Second Circuit said, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the States." ***Id***. at 7 (quoting

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[16] ***See*** U.S. CONST. art. VI, cl. 2.

City of New York at 396). The Second Circuit rooted this conclusion upon its prior holding that the PLCAA was a permissible exercise of Commerce Clause power. However, as we explain, we disagree with the City of New York Court's analysis of the Commerce Clause; therefore, its Tenth Amendment analysis is unpersuasive.

Additionally, the Federal Government asserts that we should reject the Gustafsons' Tenth Amendment argument out of hand. It views their challenge as claiming that Congress violated the Constitution by what it elected not to do, rather than by what Congress did. It argues the Gustafsons "urge . . . that Congress violated the Tenth Amendment by including an exception [in the PLCAA] for certain statutory claims." Id. at 8. "That Congress did not extend the expectation to certain common-law claims has no bearing on the constitutional analysis." Id. The Federal Government says that "[b]ecause the PLCAA fits squarely within Congress's Commerce Clause authority, it cannot violate the Tenth Amendment unless it commandeers the States." ***Id***. at 9 (citing ***City of New York, supra*** (quoting ***Connecticut v. Physicians Health Servs. of Conn., Inc.***, 287 F.3d 110, 122 (2d Cir. 2002))).

The Federal Government claims Congress properly exercised Commerce Clause authority, because "Congress determined that, in enacting the PLCAA, the possibility of suits against gun manufacturers and sellers constituted an unreasonable burden on interstate and foreign commerce." Federal Government's Brief at 18 (quoting

15 U.S.C. § 7901(a)(6) (some punctuation omitted)). It offers no further rationale to connect the regulation of state-based lawsuits to interstate commerce.

Accepting the Federal Government's assertion, the trial court cited ***Ileto v. Glock, Inc.***, 565 F.3d 1126 (9th Cir. 2009), and agreed with the Ninth Circuit "that it is entirely reasonable that the PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce." Trial Court's Opinion, 1/15/19, at 14.[17] The court concluded it was "reasonable for Congress to find that limiting liability in certain situations would directly affect and bolster interstate trade in firearms. . . ." ***Id***. at 14-15. The trial court offered no further analysis to support this proposition.

Additionally, the case upon which that court relied was not a Commerce Clause case. In ***Ileto***, the plaintiffs did not challenge, and the Ninth Circuit did not consider, whether Congress had the authority to pass the PLCAA under the Commerce Clause. Instead, the plaintiffs in Ileto challenged the PLCAA under the Fifth Amendment, as applied retroactively to their pending lawsuit. ***See Ileto***, 565 F.3d at 1141. Unlike ***Ileto***, the Gustafsons' instant challenge is not

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[17] The trial court also mentioned the Second Amendment in an attempt to bolster its Commerce Clause theory. Despite the Federal Government's suggestion, the Second Amendment was not an independent basis for the trial court's decision. See Federal Government's Brief at 18 n.5. The trial court did not independently analyze the Second and Fourteenth Amendments. Further, the Federal Government does not argue that the PLCAA may be upheld under those Amendments, which we discuss in detail below.

based on retroactivity under the Fifth Amendment. They bring a facial challenge that asserts the PLCAA falls outside Congress's enumerated powers.

"When no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate any of the express prohibitions in the Bill of Rights or elsewhere in the Constitution." ***NFIB***, 567 U.S. 519 at 535 (emphasis added). In cases such as this, we do not ask whether the law is rationally related to a legitimate governmental interest, as we would under the Fifth Amendment. Instead, we ask whether Congress had constitutional authority pass the bill at all.

As the Supreme Court of Pennsylvania observed over a century ago, "It is difficult to lay down a definite rule marking the division lines between intrastate [activity] and interstate commerce . . . to determine with precision and exactness in each case as it arises whether the injured [person] was or was not engaged in interstate commerce. . . ." ***Hench v. Pennsylvania R.R. Co.***, 91 A. 1056, 1058 (Pa. 1914). "To hold the scales evenly balanced, so as not to unduly limit the powers of Congress on one hand, nor yet encroach upon the proper exercise of state jurisdiction on the other, is not an easy task for any court." ***Id***. "But there must be a division line at some point in each case, and the facts must be the guide to determine where that line shall be drawn." ***Id***. (emphasis added). Thus, our jurisprudence makes clear that Congress may not draw the division line for itself. Otherwise, every federal law would survive judicial review under the Commerce Clause, because Congress will eventually

rationalize vesting all governmental authority in itself.

The trial court erred by blindly accepting Congress's own interpretation of its Commerce Clause authority. Merely because Congress titled this Act the Protection of Lawful Commerce in Arm Act does not necessarily mean that the statute regulates "commerce," as a matter of constitutional law. ***See, e.g., Lopez, supra*** at 557 n.2. The trial court's excessive deference granted Congress license to interpret the Constitution, i.e., the power "to say what the law is." ***See Marbury***, 1 Cranch at 177. Congress has no such power. ***Id***.; ***see also*** U.S. Constitution, Art. I, § 1.

In our constitutional system, only the courts may determine whether Congress has acted within the scope of its enumerated powers. In reviewing any statute, courts are "clothed by [the Constitution] with complete judicial power and, by the very nature of the power, required to ascertain and apply the law to the facts" and to "apply the [Constitution] and reject the inferior statute whenever the two conflict." ***Carter*** 298 U.S. at 296-97 (some punctuation omitted). Deferring completely to Congress without probing its Commerce Clause assertion of power would be an abdication of judicial duty.

Instead of the Fifth Amendment analysis from Ileto, supra, upon which the trial court erroneously relied, the proper constitutional inquiry is whether Congress has the power to regulate state-based, tort lawsuits, filed in state courts, against the gun

industry, under the Commerce Clause. The Federal Government offers no justification to support Congress's bald assertion that lawsuits against the gun industry substantially affect interstate and foreign commerce. And it cites only one decision[18] analyzing the PLCAA under the Commerce Clause — ***City of New York v. Beretta, supra***.

In ***City of New York***, the City, former-Mayor Michael Bloomberg, and others filed a lawsuit against numerous members of the gun industry in federal court. They sought an injunction based on public nuisance to abate harm resulting from the gun industry's alleged negligent and reckless marketing and distribution practices. While the suit was before the district court, Congress passed the PLCAA, and the gun industry moved for immediate dismissal. The

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[18] The Gun-Industry Defendants and the Federal Government cite six appellate cases upholding the constitutionality of the PLCAA. Of those six cases, however, two addressed Fifth Amendment and separation of powers questions. ***Ileto v. Glock, Inc***., 565 F.3d, 1126, 1138 (9th Cir. 2009), and ***District of Columbia v. Beretta U.S.A. Corp.***, 940 A.2d 163 (D.C. 2008). Of the four remaining cases, three addressed Tenth Amendment concerns. However, they merely adopted the analysis of ***City of New York v. Beretta U.S.A. Corp. et al.***, 524 F.3d 384 (2d Cir. 2008), ***cert. denied***, 556 U.S. 1104 (2009), on the Tenth Amendment issue, without independently analyzing the PLCAA's constitutionality. ***See Adames v. Sheahan***, 909 N.E.2d 742 (Ill. 2009), ***cert. denied*** **sub nom.** ***Adames v. Beretta U.S.A. Corp.***, 558 U.S. 1100 (2009); ***Estate of Kim v. Cox***, 295 P.3d 380 (Ak. 2013); and ***Delana v. CED Sales***, 486 S.W.3d 316 (Mo. 2016). Thus, the only decision that truly analyzed the Commerce Clause and Tenth Amendment Claims was ***City of New York***. Our review of that case encompasses the analyses of the other courts.

City opposed the motion, claiming that Exception (iii) to the definition of "qualified-civil-liability action" excluded the lawsuit from the PLCAA's scope.[19] Additionally, the City attacked the law's constitutionality.

The district court refused to dismiss and certified an immediate appeal. The Second Circuit's panel majority reversed. It concluded the PLCAA applied. On the constitutional question, the appellate court found the PLCAA was a valid exercise of Commerce Clause power and permissible under the Tenth Amendment.[20]

The City contended the PLCAA regulated local activities outside of the three, permissible categories of Commerce Clause power. It relied on the Supreme Court decisions in ***Lopez, supra*** (declaring a federal law barring the possession of firearms in school zones unconstitutional, because Congress had regulated activity too-far removed from the stream of interstate commerce) and ***Morrison, supra*** (declaring the Violence Against Women Act, 42 U.S.C. § 13981,

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[19] As we indicated above, Exception (iii) to the PLCAA permits actions based on "a state or federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). The plaintiffs argued that because New York Penal Law statutorily criminalizes public nuisances, the statute met the exception to immunity. N.Y. Penal Law § 240.45.

[20] The dissent believed the majority should not address the constitutional issues. Rather, they should have transferred the case to the Court of Appeals of New York to interpret the New York statute.

unconstitutional, because it criminalized local activity).

The Second Circuit disagreed. It held that the PLCAA fit into the third category of Commerce Clause regulation, due to the substantial economic affect that lawsuits might have on the gun industry. The court distinguished ***Morrison*** and ***Lopez***, because it found a closer "connection between the regulated activity and interstate commerce under the [PLCAA]" than existed in the statutes in those cases. ***City of New York***, 524 F.3d at 394. Because Congress only applied the PLCAA to a firearm or ammunition "that has been shipped or transported in interstate or foreign commerce," the Second Circuit reasoned the PLCAA raises "no concerns about Congressional intrusion into truly local matters." ***Id***. (quoting 15 U.S.C. § 7903(4)) (emphasis by Second Circuit) (some quotation marks omitted). In other words, the Second Circuit opined that the PLCAA's definition of a "qualified product" sufficiently limited the Act's reach. ***City of New York*** concluded that "there can be no question of the interstate character of the [gun] industry" and "Congress rationally perceived a substantial effect on the industry. . . ." ***Id***. (emphasis added).

We find this reasoning erroneous. Whether a law regulates an industry engaged in interstate or foreign commerce is not one of the three categories of Congressional authority under the Commerce Clause. Whether a law regulates private activity that substantially affects interstate commerce is. ***See Lopez, supra*** at 558-59; ***see also NFIB, supra***. Merely because a statute impacts an interstate

industry, does not automatically mean that statute regulates activity substantially affecting interstate commerce. Thus, the analysis of ***City of New York*** (and the three state courts that followed it) is flawed.

Instead, the constitutional rule that the Supreme Court of the United States announced seven years later in ***NFIB, supra***, controls. There, five Justices rejected the Federal Government's contention that regulating an industry of interstate character equates to regulating activity that substantially affects interstate commerce. The plaintiffs asked whether Congress had power under the Commerce Clause to mandate that individuals buy health insurance[21] when Congress passed the Affordable Care Act (a.k.a., "Obamacare" or "the ACA"), 124 Stat. 119-1025.

The Federal Government defended the individual mandate in two ways. First, it claimed the mandate was a valid exercise of Commerce Clause power. Second, the Federal Government argued the mandate was also valid under Congress's taxation power.[22] "The individual mandate," the Federal Government believed, was "within Congress's [Commerce Clause]

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[21] ***See*** 26 U.S.C. § 5000A.

[22] See U.S. CONST. art. I, § 8, cl. 1. The United States Court of Appeals for the Fifth Circuit recently declared the taxation argument constitutionally deficient, because Congress reduced the tax to $0. ***Texas v. United States***, 945 F.3d 355 (5th Cir. 2019), as revised (Jan. 9, 2020), ***cert. granted*** **sub nom.** ***California v. Texas***, ___ U.S. ___, 140 S. Ct. 1262, (2020), and ***cert. granted*** **sub nom.** ***Texas v. California***, ___ U.S ___, 140 S. Ct. 1262, (2020).

power, because the failure to purchase insurance has a substantial and deleterious effect on interstate commerce by creating a cost-shifting problem." ***NFIB***, 567 U.S. at 548-49.

The ACA's goals were "to increase the number of Americans covered by health insurance and decrease the cost of health care." ***Id***. at 538. No one questioned the health-insurance industry's interstate character or Congress's ability to regulate it. "We do not doubt that the buying and selling of health-insurance contracts is commerce generally subject to federal regulation." ***Id***. at 650 (Scalia, J., dissenting). Thus, just like the PLCAA, the ACA regulated an industry of an interstate character.

However, Chief Justice Roberts explained that the Founders wrote the Commerce Clause under the presumption that "commerce" meant activity, not inactivity. Congress may regulate the former, but not the latter. In declaring the individual mandate an impermissible exercise of the Commerce Clause, the Chief Justice opined that the mandate did not "regulate existing commercial activity." ***Id***. at 552 (emphasis added). Instead, it compelled individuals "to become active in commerce by purchasing a product, on the ground that their failure to do so affects interstate commerce." ***Id***. (emphasis added).

The Chief Justice observed that courts "have `always recognized that the power to regulate commerce, though broad indeed, has limits.'" ***Id***. at 554 (quotation omitted). One such limit is that Congress may only regulate active conduct and that

conduct must, at a minimum, constitute "existing commercial activity." ***Id***. at 552.

In a separate opinion, Justices Scalia, Kennedy, Thomas, and Alito agreed. They added, "If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or, in Hamilton's words, `the hideous monster whose devouring jaws spare neither sex nor age, nor high nor low, nor sacred nor profane.'" ***Id***. at 652-53 (Scalia, J., dissenting) (quoting The Federalist No. 33, p. 202 (C. Rossiter ed. 1961)). Because the individual mandate regulated inactivity, those five Justices agreed that the Federal Government could not support the mandate under the Commerce Clause.[23] Through the individual mandate, Congress sought to command "those furthest removed from an interstate market to participate in the market. . . ." ***Id***. It tried to force those who did not participate in the health-insurance market to serve as its financial supporters. Thus, the ACA unconstitutionally shifted the costs of health insurance from the industry onto persons who had not entered into a commercial transaction with it.

Congress commits the same constitutional overreach in the PLCAA. The Act regulates the

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[23] The Chief Justice rejected the Federal Government's Commerce Clause theory, but accepted its alternative theory and upheld the individual mandate under Congress's taxation power. Justices Ginsburg, Breyer, Sotomayor and Kagan joined him in that part of his opinion.

inactivity of individuals who may never have engaged in a commercial transaction with the gun industry. As this case demonstrates, the PLCAA reaches out and pulls J.R. Gustafson and his parents into the financial service of the gun market. It forces them to serve as financial sureties for the negligent acts and omissions of the industry by barring the Gustafsons from filing an otherwise valid lawsuit under the common law of Pennsylvania. Critically, neither J.R. nor his parents purchased the gun used to kill him, i.e., they did not engage in commerce of any kind. Hence, there was no existing commercial activity between the Gustafsons and the gun industry at the time of J.R.'s death for Congress to regulate. Any relation between Josh Hudec's gun and interstate commerce had clearly ended by the time Mr. Hudec brought it into his home for personal use. We hold that merely because, at some point in time, that gun passed through interstate commerce, does not give Congress perpetual authority to regulate any harm it may cause.

There is a beginning and an ending point to Congressional authority over activities that substantially affect interstate commerce. Eventually, interstate commerce must cease, because all commerce has ceased. "The federal regulatory power ceases when interstate commercial intercourse ends. . . ." ***Carter***, 298 U.S. at 309. At that point, the activity surrounding the use or misuse of products reverts to a local matter, subject to state, not federal, regulation. This is especially true where, as here, the product kills someone who did not even purchase it.

The Federal Government believes Congress included a constitutionally sufficient limiting clause in the PLCAA, namely the definition of "qualified products" 15 U.S.C. §7903(4). It asserts that this provision keeps the scope of the PLCAA within the bounds of the Commerce Clause. We disagree.

The quintessential example of a valid, limiting clause appears in the National Labor Relations Act ("NLRA").[24] In the landmark case ***of N.L.R.B. v. J&L Steel Corp***., 301 U.S. 1 (1937), the Supreme Court ruled Congress properly enacted the NLRA under the Commerce Clause, because Congress limited the reach of the NLRA to only those activities that substantially affect interstate commerce.

That case involved labor activities at J&L Steel Corp.'s Aliquippa factory in Beaver County, Pennsylvania. The Aliquippa workers began unionizing. In response, J&L fired twelve members of the local union. The union filed charges with the National Labor Relations Board. J&L opposed the Board's jurisdiction and claimed the NLRA was unconstitutional. The Board concluded the firings were unfair labor practices in violation of the NLRA and that those firings "affected commerce" as Congress had defined that term. It therefore asserted federal jurisdiction and ordered J&L to reinstate the workers with backpay and to stop interfering with unionization rights. The case eventually reached the Supreme Court.

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[24] 29 U.S.C. §§ 151-168.

The Court ruled that the NLRA and the Board's assertion of jurisdiction were constitutional, because the NLRA empowered the Board to act only in cases where unfair labor practices are "affecting commerce." 29 U.S.C. § 160(a) (emphasis added). The limiting phrase "affecting commerce" was critical to the statute's constitutional success. Congress tailored that term to ensure that the NLRA only reached local activities truly impacting interstate commerce. In writing for the Majority, Chief Justice Hughes explained, the NLRA did not "impose collective bargaining upon all industry regardless of effects upon interstate or foreign commerce." ***J&L Steel Corp.***, 301 U.S. at 31 (emphasis added). Instead, the NLRA covered only activities that "may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds." ***Id***. The Supreme Court agreed with the Board that the Aliquippa labor dispute closely and intimately connected to interstate commerce.

"Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control." ***Id***. at 37 (citing ***Schechter Poultry Corp. v. United States***, 295 U.S. 495 (1935)). But the Court warned Congressional "power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and

remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government." ***Id***. "The question is necessarily one of degree." ***Id***. (emphasis added).

Unlike the NLRA, the jurisdictional limitation clause of the PLCAA (i.e., its "qualified product" definition) is not similarly restrictive. The definition reaches strictly local events unrelated to interstate commerce; it permits the PLCAA to adjust the common-law rights and remedies of tort victims who were not market participants with the gun industry. The PLCAA thereby immunizes the gun industry from any common-law liability that arises anytime after the firearm or ammunition has crossed state lines. This immunity attaches regardless of the degree to which the incidents resulting in liability affect interstate or foreign commerce. And neither Congress nor the Federal government has provided an explanation for how local crimes and local torts burden or obstruct interstate commerce.

Thus, whereas the NLRA is limited in scope to events actively affecting commerce, the PLCAA encompasses local activities involving any "firearm, including any antique firearm, or ammunition, or a component part of a firearm or ammunition that has been shipped or transported in interstate or foreign commerce," forever. 15 U.S.C. § 7903(4) (emphasis added) (citations omitted). This so-called "jurisdictional limitation" is essentially no limitation at all. Once PLCAA immunity attaches to a qualified

product under Section 7903(4), that immunity lasts into perpetuity, even if the product has ceased its transportation, injures someone who never entered any commercial transaction, and never again returns to interstate commerce. The assertion that Section 7903(4) adequately restrains the reach of the PLCAA to events that substantially affect interstate commerce fails.

Contrary to Congress's assertion in 15 U.C.S. § 7901(6), the filing of a state lawsuit, in state court, based on state tort law, "is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." ***Lopez***, 514 U.S. at 567 (emphasis added). Even though lawsuits cost money and may result in the exchange of money, that monetary exchange is not commerce. The money is not transactional. It is lawful compensation for the redress of grievances between citizens under the substantive laws and sovereign power of the States. Even where, as here, the lawsuit involves parties from different states, that lawsuit does not become interstate commerce. It is interstate litigation. When the Gustafsons filed this civil complaint in Westmoreland County, they engaged in no "commercial intercourse." ***Gibbons***, 22 U.S. at 189-90. They petitioned this Commonwealth for the redress of grievances for the civil wrongs that the Gun-Industry Defendants allegedly perpetrated against their son. Although Congress may dictate the forum

for interstate litigation,[25] it may not dictate a States' substantive law regarding such lawsuits.[26]

The PLCAA undoubtedly mandates the substantive law of tort lawsuits for the States. Thus, the Act is a Congressional tort- reform bill, a fact that the historical background of the Act and Congress's purposes for it reveal.

The gun industry lobbied Congress strongly for the PLCAA, because it faces inherent liability risks at common law. Guns "kill approximately 30,000 people annually and injure another 60,000 to 84,000." Crow, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. Rev. 1813 (2006). "[E]very day in the United States, an average of more than one person is killed, and 45 more are injured, in unintentional shootings." Gustafsons' Complaint at 7. Moreover, the Federal Government's Center for Disease Control "found that the U.S. leads the industrialized world in rates of gun-related deaths among children, with unintentional fatal shootings of children 0 to 14 years of age occurring here at rates 11 times higher than in the other 25 industrialized nations studied." *Id.*

"The financial burden of [gun] violence, approximately $20 billion per year, falls largely upon two groups: individuals who must care for their

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[25] ***See*** 28 U.S.C. § 1332.

[26] ***See Erie R.R. Co. v. Tompkins***, 304 U.S. 64 (1938). We discuss the ***Erie R.R. Co.*** in detail below.

injured family members and cities that spend millions every year in an attempt to combat this violence." Crow, at 1813. Because many gun users "are often penniless," id., in the 1980s and 90s, victims, cities, States, and even the Federal Government began suing the gun industry for compensation and injunctions to alleviate the harm that their products caused. Those plaintiffs raised various common-law theories, such as negligent marketing, negligent supervision, ultra-hazardous activity, public nuisance, and design defect. ***See*** Lytton, SUING THE GUN INDUSTRY: A BATTLE AT THE CROSS ROADS OF GUN CONTROL & MASS TORT at 5-15 (U. MI. Press 2005).

"The increased volume and success of lawsuits against the gun industry prompted firearms sellers and manufacturers to lobby Congress for a law protecting them from this onslaught of litigation." Crow, at 1813. Supporters of the PLCAA argued that plaintiffs were "misusing the tort system, seeking through litigation gun-control regulation that they [were] unable to achieve legislatively. . . ." Lytton, ***supra***, at 152. The gun industry believed municipalities were filing "suits en masse in order to create overwhelming defense costs that [would] force the industry to settle, regardless of the legal merit of the claims against it." ***Id***.

In advocating for the PLCAA, Senator Craig explained that, because of this increase in civil actions:

> legal, law-abiding [gun] manufacturers have increasingly had to pay higher and higher

> legal costs to defend themselves in lawsuit after lawsuit that have, in almost every instance, been denied and thrown out of court by the judges when filed largely by municipalities who, obviously frustrated by gun violence in their communities, chose this route. Instead of insisting that their communities and prosecutors and law enforcement go after the criminal element, they, in large part, in their frustration, looked for an easy way out. That has brought this legislation to the floor to limit the ability of junk or abusive kinds of lawsuits in a very narrow and defined way, but in no way — and I have said it very clearly — denying the recognition that if a gun dealer or a manufacturer acted in an illegal or irresponsible way or produced a product that was faulty and caused harm or damage, this bill would not preempt or in any way protect them or immune them from the appropriate and necessary legal sentence.

151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig) (emphasis added).

But Senator Craig's promise has proved illusory. As Ryan, Adames, and the Gustafsons' case show, PLCAA immunity is not "very narrow." ***Id***. The Act immunizes the gun industry from every conceivable type of joint and comparable liability known to the common law. In fact, the statute protects gun manufacturers and sellers who, like these Gun-Industry Defendants, allegedly acted in an

"irresponsible way or produced a product that was faulty and caused harm or damage." ***Id***.

As Senator Craig admitted, the PLCAA is federal, tort-reform legislation. "The Wall Street Journal . . . put it very clearly as to the reality of [the PLCAA,] recognizing that tort reform is necessary." ***Id***. (emphasis added). In the next breath, he acknowledged the elephant in the Senate Chamber — Congressional tort reform is not constitutional. "Congress can't do it in sweeping ways, [so] we have chosen targeted ways to get at the misuse of our court system in large part by the trial bar." ***Id***.

The Senator's recognition that the PLCAA is tort reform comports with Congress's findings and purposes for the Act. Congress sought to eliminate the ability of a "maverick judicial officer or petit jury [to] expand civil liability [for the gun industry] in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States." 15 U.S.C. § 7901(a)(7) (emphasis added). But state legislation on the subject undercuts upon Congress's finding that state legislatures uniformly opposed gun-industry liability. If they were, Congress would not have needed to pass the PLCAA; the state legislatures could have enacted it themselves. And the gun industry previously attempted that route with mixed results.

"In response to the wave of lawsuits against the gun industry, the [National Rifle Association] launched a nationwide lobbying campaign in state legislatures and Congress to secure statutory

immunity for the industry." Lytton, ***supra*** at 166 (emphasis added). Despite nationwide lobbying, only 32 States passed immunity legislation. See id. Furthermore, those 32 States did not enact model statutes. Thus, gun-industry immunity from the common law varied widely in scope. See id. Some state legislatures, like the General Assembly of Pennsylvania,[27] only prohibited municipalities from suing the gun industry. Others granted PLCAA-like "blanket immunity from suit with narrow exceptions for guns that malfunction (for example, guns that backfire) and breach of contract. . . ." ***Id***. Still others jurisdictions took the opposite course. Three years prior to the PLCAA, "the California legislature repealed a provision of [its] Civil Code granting immunity to the gun industry against product-liability claims. . . ." ***Id***. at 170 (emphasis added). And the District of Columbia "imposed absolute liability on [gun] manufacturers for any injury caused by certain weapons." Federal Government's Brief at 3 (citing D.C. Code Ann. § 7- 2551.02 (rev. 1994).

When it comes to holding the gun industry civilly liable, "Americans have never been of one mind. . . ." ***Murphy v. National Collegiate Athletic Association, Inc.,*** 584 U.S. ___, ___, 138 S. Ct. 1461, 1468, (2018). Despite widespread disagreement among state legislatures, Congress gave the gun industry what it could not achieve State by State — a nationwide moratorium on common-law, joint-and-comparative-liability claims. Congress pronounced such lawsuits to be "based on theories without

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[27] ***See*** 18 Pa.C.S.A. § 6120(a.1).

foundation in hundreds of years of the common law and jurisprudence of the United States that [did] not represent a bona fide expansion of the common law." 15 U.S.C. § 7901(a)(7) (emphasis added). It called the litigation "an abuse of the legal system [that] constitute[d] an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(6).

Even if forbidding States' judiciaries from developing and applying their own common laws were within Congress's grasp, distrust of novel theories of liability does not explain why Congress extinguished the public nuisance, negligence, or product-liability claims upon which most pre-PLCAA plaintiffs founded their lawsuits. Such causes of action had existed for centuries.[28] Yet, the PLCAA extinguished these

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[28] For example, this Commonwealth recognized claims for "a public nuisance" prior to the Civil War. ***Lancaster Tpk. Co. v. Rogers***, 2 Pa. 114, 115 (1845) (applying Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND, Vol. 3 § 215). Likewise, claims for bodily injury arising from negligence are not new. ***See, e.g., Allen v. Willard***, 57 Pa. 374 (1868); ***Monongahela City v. Fisher***, 2 A. 87 (Pa. 1886). And the "youngest" of these torts, strict liability for defective products, existed in Pennsylvania for 39 years before the PLCAA. ***See Webb v. Zern***, 220 A.2d 853 (Pa. 1966). Other States had recognized that tort for nearly a century. ***E.g., MacPherson v. Buick***, 111 N.E. 1050 (NY 1916) (imposing product liability upon the auto industry).

Since 1916, Congress has not attempted to supplant product liability for the auto industry. As the Federal Government explains on one of its websites:

Congress [created] the National Highway Traffic Safety Administration (NHTSA), which has the power to promulgate safety standards for automobiles . . . including those that require seat belts, air bags, and conspicuous brake lights. Importantly, these are seen as minimum safety standards, establishing a floor but not a ceiling for vehicle safety.

In fact, motor vehicle manufacturers routinely provide greater safety than the standards require. The threat of lawsuits provides one incentive for manufacturers to exceed safety standards. For example, before air bags were required, numerous lawsuits were filed by people injured in crashes of cars without air bags. Plaintiffs argued that their injuries would have been less severe had the car been equipped with air bags . . .

Some have criticized the traditional liability system, exemplified by motor vehicles and many other products, as unfair to manufacturers and costly for consumers . . . Since the 1960s, however, there has been an impressive reduction in the number of deaths from motor vehicle crashes in the United States. From 1966 to 2004, the rate of such deaths per million miles traveled declined by 74%.

Vernick, Rutkow, & Salmon, *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicle*, 97 Am. J. Public Health 1991, 1997 (2007), United States Department of Health and Human Services (National Institute of Health) available at https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374/ (last visited July 16, 2020) (emphasis in original). Congress never explains why the honest car dealer, whose goods are not intended to inflict harm on anyone or anything, faces stiffer regulations than an industry that produces weapons.

historically rooted causes of action in the name of blocking unprecedented developments in the common law of torts.

Congress's use of the language of torts throughout the PLCAA serves as additional proof that the Act is tort reform. For instance, product-defect claims require that the product be "used as intended or in a reasonably foreseeable manner. . . ." 15 U.S.C. § 7903(5)(A)(v) (emphasis added). Furthermore, a crime "shall be considered the sole proximate cause of any resulting" damages. ***Id***. (emphasis added). Congress did not define "reasonably foreseeable manner" or "proximate cause," likely because it did not need to do so. Such terms are the lingo of torts.

Phrases like "sole proximate cause," amend the substantive common law of torts. In Pennsylvania, for instance, proximate cause is critical to maintain a tort action. A defendant's conduct "is a proximate cause of the plaintiff's harm where the conduct was a substantial factor in bringing about the harm inflicted upon a plaintiff." ***Straw v. Fair***, 187 A.3d at 993. The Supreme Court of Pennsylvania has explained that proximate cause expresses this Commonwealth's "policy related to social and economic considerations." ***Vattimo v. Lower Bucks Hosp., Inc***., 465 A.2d 1231, 1233 (Pa. 1983). It is a legal question of whether Pennsylvania "will extend the responsibility for the conduct to the consequences which have in fact occurred." Id. (quoting Prosser, THE LAW OF TORTS § 42 (4th Ed.) (emphasis removed)).

By declaring that an individual's criminal 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), Congress commands where the States must draw the line of liability. The PLCAA thereby reforms the law of torts and converts it from state to federal law. The Act replaces the local policy decisions of the Supreme Court of Pennsylvania and other state supreme courts regarding local torts with Congress's policy preferences on local issues.

Furthermore, Senator Craig's logic regarding the PLCAA, if taken to its rational ends, would permit Congress's total assumption of police power. He stated that gun-industry members "have increasingly had to pay higher and higher legal costs to defend themselves in lawsuit after lawsuit . . ." 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig) (emphasis added). This is irrelevant under the Commerce Clause.

Litigation costs money for nearly everyone who must appear in a court or administrative proceeding, not just the gun industry.[29] Indeed, if we accept the theory that this lawsuit (or lawsuits in the aggregate) affect interstate commerce, simply because litigation

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[29] The only exception to the filing fees are pro se litigants who proceed in forma pauperis, but this is a very small percentage of all civil actions. We also recognize that indigent criminal defendants have a right to free legal representation. Perhaps those classes of cases would remain beyond the reach of Congressional legislation under Senator Craig's theory, because the litigants cannot afford to hire attorneys.

costs money, then every case in state court — including criminal prosecutions, property disputes, and family law matters — would instantly fall under Congressional control. We are unable and unwilling to surrender the whole body of Pennsylvania law and sovereignty to Congress on such weak grounds. Under Congress's lawsuits-cost-money theory, it would also seem that Congress could simply regulate the practice of law directly, a power traditionally reserved to the supreme courts of each State. Hence, if allowed to play out fully, Senator Craig's reasoning would render States' judiciaries mere administrative law judges for Congress. Under his view of the Commerce Clause, it "is as if federal officers were installed in" the filing offices of every state courthouse "and were armed with the authority to stop" any lawsuit Congress disfavored. ***Murphy***, 138 S. Ct. at 1478. "A more direct affront to state sovereignty is not easy to imagine." ***Id***.

And Congress's concern with prohibiting frivolous lawsuits makes no sense when, as Senator Craig observed, the state judiciaries barred meritless suits under their respective tort laws prior to the PLCAA. He said, "in almost every instance, [suits against the gun industry have] been denied and thrown out of court by the judges when filed largely by municipalities who, obviously frustrated by gun violence in their communities, chose this route." 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig) (emphasis added). Who then were these "maverick judicial officers and petit juries" of which Congress spoke? 15 U.S.C. § 7901(7) (emphasis added). Even if the common law of a State exceeded the bounds tolerable to the citizens of that State, the gun

industry's recourse was either the legislature of that State or to the People of that State, not Congress.

As noted, the gun industry attempted that route with varying success. ***See*** Lytton, ***supra***. Some legislatures, such as our General Assembly, barred state courthouse doors to lawsuits by municipalities. But, the refusal of most legislatures to immunize gun industry as fully as it wished "brought [the PLCAA] to the [Congress] floor. . . ." 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig). Through the PLCAA, Congress irrationally believed "that, if a gun dealer or a manufacturer acted in an illegal or irresponsible way or produced a product that was faulty and caused harm or damage, [the PLCAA] would not preempt or in any way protect them or immune them from the appropriate and necessary legal sentence." ***Id***. The PLCAA does precisely that and regulates the rights and liability of passive individuals such as J.R. Gustafson and his parents.

We therefore disagree with the trial court and the Second Circuit's view that the PLCAA falls within one of the three categories of constitutional Commerce Clause legislation. Congress did not rationally link the PLCAA to any burden upon interstate commerce that the Constitution recognizes. In fact, the PLCAA greatly resembles the Gun-Free School Zone Act of 1990, which the Supreme Court of the United States declared unconstitutional. In that statute, Congress attempted to criminalize the local conduct of possessing a gun near a school. Congress and the Federal Government rationalized the statute under the Commerce Clause, because they believed that

guns near schools would negatively impact education, and therefore the quality of the future workforce, and therefore interstate commerce.

In ***Lopez, supra***, a criminal defendant, whom the Federal Government charged with violating the statute, challenged his conviction on constitutional grounds. He claimed Congress lacked the power to enact the law. The High Court found the statute unsustainable under the Commerce Clause, because there was "no indication that [Lopez], who merely possessed a gun near a school, had recently moved in interstate commerce, and there [was] no requirement that his possession of the firearm have any concrete tie to interstate commerce." ***Id***. (emphasis added).

The PLCAA, just like the Gun-Free School Zones Act, is unsustainable; it grants the gun industry immunity regardless of how far removed from interstate commerce the harm arises. Congress's attempted exercise of its Commerce Clause power in the PLCAA, without a recent or concrete tie to interstate commerce, puts every victim of a crime or tort within the reach of Congressional regulation. Every state criminal prosecution and civil action impacts a defendant's finances and, potentially, insurance rates. And casualty insurance is an industry operating in interstate commerce, as are criminal and civil defense law firms. However, imposing state-court judgments and executing those judgments are not commercial activities; they are the manifestation of the States' inherent police power to execute, uphold, and enforce their laws.

Ignoring this simple truth, the Federal Government would instead have us "pile inference upon inference in a manner that would . . . require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." ***Lopez*** 514 U.S. at 567-68. Like the Supreme Court in ***Lopez***, "This we are unwilling to do." ***Id***. at 568.

We instead conclude the trial court erred in finding Congress legislated rationally when Congress asserted that the PLCAA regulates interstate commerce. The Act regulates litigation. Any impact that litigation might have upon interstate commerce, constitutionally speaking, is too remote to displace State sovereignty over the local torts and the local crimes at issue in those lawsuits.

Having rejected the Federal Government's Commerce Clause argument, we return to the Gustafsons claim that the Act violates the Tenth Amendment. It does.

In ***Erie R.R. Co. v. Tompkins***, 304 U.S. 64, the Supreme Court of the United States said, "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. Co***., 304 U.S. at 78 (emphasis added). The Federal Government contends that the Gustafsons' invocation of Erie R.R. "is wholly out of place." Federal Government's Brief at 13 n.3. It

believes "That case, which stands for the proposition that `there is no federal general common law,' does not concern the Tenth Amendment." ***Id***. (quoting ***Erie R.R. Co***. at 78). The Federal Government grasps at straws.

While the High Court did not name the Tenth Amendment in Erie R.R., no one seriously doubts that the case is constitutional jurisprudence and that it divides power between the States and Federal Government. Erie R.R. has blatant Tenth Amendment implications; the case speaks in Tenth Amendment language. "[T]here stands, as a perpetual protest against [a federal law of torts], the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States — independence in their legislative and independence in their judicial departments." ***Erie R.R. Co***. at 78-79 (quoting ***Baltimore & Ohio R.R. Co. v. Baugh***, 149 U.S. 368 at 401 (1893) (Field, J., dissenting)). "Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the States. . . ." ***Id***. at 79 (emphasis added).

The declaration that "there is no federal general common law," was the holding in ***Erie R.R.***, as the Federal Government observes. But the Supreme Court built that holding upon the constitutional premise at the heart of the Gustafsons' challenge — namely, that common law (and tort law, in particular)

is state law. Therefore, Congress may not nationalize tort law, as it did under the PLCAA. We have no federal common law, because, (1) "Congress has no power to declare substantive rules of common law" and (2) "no clause in the Constitution purports to confer such a power upon the federal courts." ***Id***.

Thus, rather than the Gustafsons' reliance upon ***Erie R.R.*** being "wholly out of place," Federal Government's Brief at 13 n.3, it is spot-on. Congress had "no power" to pass the PLCAA, because, as our above review of the statute has revealed, the PLCAA is tort reform. By defining a "qualified-civil-liability action," Congress pronounced substantive rules of common law and therefore exercised a police power reserved for the several States under the Tenth Amendment.

The Federal Government's claim that the PLCAA does not rewrite the common law for the gun industry, while convenient for its current defensive purposes, inaccurately portrays the Act's practical application. Its exceptions to the definition of "qualified-civil-liability action" only allow lawsuits based on state or federal statutes. As our review of the Act reveals, Congress abolished the common law dating back centuries for the gun industry. Thus, we agree with the Gustafsons' Tenth Amendment claim. Congress aimed the PLCAA-tort-reform bill directly at the common law and expressly disapproved such causes of action while favoring the statutes of state legislatures and its own.

We are compelled to hold that the definition of "qualified-civil-liability action," 15 U.S.C. § 7093(5), is unconstitutional under the Tenth Amendment and without the force or effect of law.

Also, Section 7902(a) of the PLCAA provides that a "qualified civil-liability action may not be brought in any federal or state court." Because the definition of a "qualified-civil-liability action" is without the force or effect of law, 15 U.S.C. § 7902(a) has no teeth. Nothing is a "qualified-civil-liability action" under the PLCAA. The Act's operable section is therefore equally without the force or effect of law.

Section 7902(b), which directs courts to dismiss any "qualified-civil-liability action," also violates the Tenth Amendment in its own right. To enact a valid statute, Congress must direct the regulation at the activities of private citizens. ***See NFIB, supra***, and ***Murphy v. NCAA, supra***. The Federal Government argues Section 7902 is viable, because it regulates the supposedly "private conduct" of the Gustafsons filing of a complaint, under the Pennsylvania Rules of Civil Procedure, in the public records of the publicly elected Prothonotary of Westmoreland County. In the Federal Government's view, such civil filings, in the aggregate, take a substantial toll on the gun industry, an industry that ships goods in interstate and foreign commerce.

If we accept the Federal Government's theory that filing a state action, in a state court, is within Congress's reach, then the 50 States must forfeit all their sovereignty to the Federal Government. If given

enough latitude to pile inference upon inference upon inference, Congress could eventually connect any state-court proceeding to some impact upon one party's finances and therefore interstate commerce. We would thereby poise Congress to consume everything the Tenth Amendment reserves to the States.

For example, in Pennsylvania, every adoption proceeding begins by filing a petition with the Clerk of the Orphan's Court. Every divorce and custody case begins with a filing in the Office of the Prothonotary. The same is true of every property and contract dispute. And, of course, as this case shows, actions based in tort begin with a complaint filed with the Prothonotary. Every state statute and common law is worthwhile, because citizens can file public complaints and public petitions alleging violations of those laws in a trial court or administrative agency. If Congress can declare, as it did in Section 7901 of the PLCAA, that filing a petition or complaint in a state court to vindicate state rights substantially burdens interstate commerce, then what remains for the States to govern under the Tenth Amendment?

Reforming the judicial systems of the States from top to bottom in such a manner goes far afield from the enumerated, limited powers of Congress. This is definitely not the vision that Hamilton, Madison, and the other Founders had in mind when they authored the Constitution. The Federal Government's claim that filing a state lawsuit, based on a state tort, which arose within the boundaries of that state, is private conduct rising to the level of interstate commerce must

fail. The Commerce Clause simply does not stretch that far, and the Tenth Amendment forbids it.

B. The Second/Fourteenth Amendments & Severability

Having addressed the issues that the parties argued and that the trial court ruled upon, we recall that this Court "may affirm the trial court's order on any valid basis." ***Plasticert, Inc. v. Westfield Ins. Co.***, 923 A.2d 489, 492 (Pa. Super. 2007). Even though the Federal Government and the Gun-Industry Defendants have not asserted an alternative basis for affirmation, Congress claimed it could pass the PLCAA under the Fourteenth Amendment to enforce the Second Amendment. ***See*** 15 U.S.C. § 7901(b). It could not.

The Second Amendment safeguards "the right of the people to keep and bear Arms. . . ." U.S. CONST. amnd. II. (emphasis added). When Madison wrote those words, he vested the right in "the people," not in associations, firms, partnerships, corporations, other entities, or — in the all-encompassing language of the Fourteenth Amendment — "persons."[30] The distinction between "people" (i.e., real, living, and breathing humans from whom all sovereignty and consent to governance spring) and "persons" (a term of

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[30] The Fourteenth Amendment provides, in relevant parts, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws" and "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amnd. XIV.

art that includes legal fictions, such as business entities) is crucial in constitutional law. ***See Santa Clara Cty. v. S. Pac. R. Co***., 118 U.S. 394, (Syllabus of Slip Opinion) (1886) (applying the Fourteenth Amendment to corporate defendants based upon the word "person" in that amendment).

Three years after Congress passed the PLCAA, Justice Scalia explained in ***District of Columbia v. Heller,*** 554 U.S. 570 (2008), what "the people" in the Second Amendment means. "People" refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country," that is, "all Americans." ***Id***. at 581. While these Defendants are American corporations, they are not "Americans" as Heller used that term. Heller referred to the American People. The Gun-Industry Defendants are "persons" but not "people." Accordingly, they have no Second Amendment rights.

Also, "Like most rights, the right secured by the Second Amendment is not unlimited." ***Id***. at 626; ***see also id***. at 627 n. 26. The right to keep and bear arms does not include a right to make and sell defective arms or ammunition, to engage in negligent design or marketing, to fail to warn consumers or end users of latent dangers within a product, or to otherwise inflict public nuisance within the several States. There is no constitutional right to negligently or defectively manufacture or sell firearms or ammunition. Nor is there a right to make or sell them in conditions that are less safe than an alternative design, any more than there is a constitutional right to manufacturer or

sell, say, a Ford Pinto with an exploding gas tank. The PLCAA does not survive on this alternative basis.

Finally, having determined that Section 7902 and the definitions of "qualified-civil-liability action" and "qualified product" in Section 7903 of the PLCAA are unconstitutional, we reach the question of severability. If Congress would not have enacted a statute's constitutional provisions without its unconstitutional terms, then the constitutional provisions are not severable; the entire statute must be declared unconstitutional. ***See Seila Law LLC v. C.F.P.B.***, 591 U.S. ___, ___, 140 S. Ct. 2183, 2209 (2020) (quoting ***Free Enterprise Fund v. Public Company Accounting Oversight Board***, 561 U.S. 477, 508, (2010)).

The only portions of the PLCAA that do not offend the Constitution are its findings and purposes (in Section 7901) and a few definitions (in Section 7903). These provisions have no force on their own. Accordingly, Congress would not have enacted the constitutional provisions of the PLCAA standing alone. The rest of the PLCAA is not severable; the Act is unconstitutional in its entirety.

Hence, the trial court erred by holding that the PLCAA is constitutional and by sustaining the Gun-Industry Defendants' preliminary objections to the complaint.

In sum, the constitutional safeguards that override the PLCAA are the structural pillars of American government. These principles ensure that local matters remain under the local authority of the

States, and they prevent the Federal Government from becoming all powerful. While such principles may be "less romantic and have less obvious a connection to personal freedom than the provisions of the Bill of Rights or the Civil War Amendments," ***NFIB*** 567 U.S. at 707, (Scalia, J. dissenting), federalism is fundamental to liberty. It permits the 50 Experiments in Democracy, which the People perform every day in their statehouses and courthouses across this Nation. Congressional tort-reform bills, like the PLCAA, have no place within that system; tort law and statutes reforming it are an exercise of police power reserved to the States under the Tenth Amendment.

Order reversed. Case remanded for further proceedings consistent with this Opinion and for entry of a declaratory judgment in favor of the Gustafsons and against Springfield, Inc., Saloom Department Store, LLC, and the United States of America, declaring that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903, is repugnant to the Constitution of the United States and, therefore, without the force or effect of law.

Jurisdiction relinquished.

Judgment Entered.

APPENDIX D

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PENNSYLVANIA CIVIL ACTION – LAW

MARK and LEAH GUSTAFSON, Individually and as Administrators and Personal Representatives of the ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON,	)	
Plaintiffs,	)	
v.	)	No. 1126 of 2018
SPRINGFIELD, INC, d/b/a SPRINGFIELD ARMORY, and SALOOM DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC, d/b/a SALOOM DEPARTMENT STORE,	)	
Defendants	)	

OPINION AND ORDER OF COURT

AND NOW, to wit, this 15th day January, 2019, with the attorneys of record for all parties having been present for argument on Defendants' *Preliminary Objections to the Complaint, Brief in Support and Reply Brief*, along with Plaintiffs' *Complaint, Answer and Memorandum of Law in Support of Plaintiff's Answer*; as well as the United States' *Memorandum in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act*; and upon careful consideration of all of the foregoing by this Court, it is hereby ORDERED, ADJUDGED and DECREED, as follows:

Defendants' preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. 1028(a)(4), requesting dismissal of the Plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") is SUSTAINED, for the reasons elaborated upon below.

The matter presently at issue is the legal sufficiency of Plaintiffs' complaint. Defendants claim that Plaintiffs' present complaint fails to state a valid cause of action as all claims fall squarely within the category of state civil lawsuits prohibited by federal law under the PLCAA, and that the complaint must therefore be dismissed. Plaintiffs state that all claims raised in the complaint are supported by Pennsylvania products liability law and that none of the claims

raised are barred by the PLCAA. Plaintiffs also claim that the PLCAA must be interpreted according to principles of constitutional avoidance. In the alternative, Plaintiffs argue that the PLCAA is unconstitutional. The United States has intervened in a limited capacity in this matter to argue for the applicability and constitutionality of the PLCAA, and it is joined by Defendants in this argument.

Looking to the facts of the case, on Mar ch 20, 2016, Plaintiffs' decedent, then thirteen-year- old James Robert ("J.R.") Gustafson, was killed by a model XD-9 semi-automatic handgun ("subject handgun") manufactured by Defendant Springfield, Inc. ("Springfield") and sold by Defendant Saloom Department Store ("Saloom"). J.R. was visiting the home of a friend with another fourteen-year-old friend (the "Juvenile Delinquent") when the Juvenile Delinquent found the unsecured subject handgun in the home. The Juvenile Delinquent believed that the subject handgun was unloaded because the magazine had been removed, however a live round remained in the chamber. The Juvenile Delinquent pointed the subject handgun at J.R. and pulled the trigger. The subject handgun fired and J.R. was killed. The Juvenile Delinquent subsequently pled guilty to involuntary manslaughter in a delinquency proceeding in juvenile court.

A complaint comprised of survival and wrongful death claims was filed by Plaintiffs on March 19, 2018. The complaint asserts negligent design and sale as well as negligent warnings and marketing with regard to manufacture and sale of the subject handgun. The

present preliminary objections asserting that the complaint fails to state a valid cause of action were filed by the Defendants on June 29, 2018. On October 19, 2018, the United States of America petitioned to intervene in the case, as the constitutionality of a federal law has been implicated. The intervention petition was granted, and all parties participated in oral argument in this matter on October 31, 2018.

CONSTITUTIONAL AVOIDANCE

As a preliminary matter. Plaintiffs argue that the principle of constitutional avoidance is implicated in this case. Defendants and the United States argue that the doctrine of constitutional avoidance does not apply in this case, as the PLCAA is an appropriate exercise of federal authority which presents no constitutional issues. The doctrine of constitutional avoidance is utilized in situations "where an otherwise acceptable construction of a statute would raise serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). In such situations, "the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Id*.

Plaintiffs claim that state sovereignty is being infringed upon by the federal government in a way that renders a narrow reading of the PLCAA necessary. Plaintiffs first point to the United States Supreme Court case of *Gregory v. Ashcroft*, which sets out the "plain statements rule" under which "it is incumbent upon the [] courts to be certain of Congress'

intent before finding that federal law overrides 'the traditional constitutional balance of federal and state power. " 501 U.S. 452, 464 (1991). The Supreme Court noted that "Congress should make its intention 'clear and manifest' if it intends to pre-empt the historic powers of the States..." *Id*. at 461 (1991). Plaintiffs also cite to the Pennsylvania Superior Court case of *Romah v. Hygenic Sanitation Co*. for the related principle that "[ajbsent express preemption, courts are not to infer preemption lightly, particularly in areas traditionally of core concern to the states such as tort law." 705 A.2d 841, 849 (Pa. Super. Ct. 1997). Plaintiffs additionally reference the case of *Bond v. United States* which extended the principles set out in Gregory. *Bond v. United States*, 572 U.S. 844 (2014). The holding in Bond allowed for a reading of ambiguity into otherwise unambiguous language in the absence of a direct statement of Congressional intent, where a plain reading would "alter sensitive federal-state relationships." *Id*. at 863.

This exact issue with regard to the PLCAA has been addressed by the Supreme Court of Missouri in the 2016 *Delana v. CED Sales, Inc*. case. 486 S.W.3d 316, 322-23 (Mo. 2016). The Delana Court addressed the issue of Gregory and Bond's application to the PLCAA, noting the above referenced standards for the application of the constitutional avoidance doctrine. *Id*. at 322. The Missouri Supreme Court found that Congress "expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms," rendering a narrow reading of the statue unnecessary. *Id*. at 3233.

Although not binding upon this Court, the reasoning of the Missouri Supreme Court is persuasive, and this Court similarly finds no need to narrowly construe the PLCAA in this case where the intention to preempt Pennsylvania tort law is "clear and manifest" in the terms of the statute. The present analysis does not even reach the *Gregory* and *Bond* constitutional avoidance doctrine, because the text of the statute makes manifest Congress' intent to preempt state tort law. Congress explicitly stated in the PLCAA that it intended to "prohibit causes of action" as defined in the PLCAA to "prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce." 15 U.S.C. § 7901. Throughout the PLCAA, Congress unambiguously and without question states its intention to definitively preempt state tort law. Additionally, as described below, the Court finds no constitutional issues which require avoidance, as Congress has appropriately utilized its authority in enacting the PLCAA. As such, the doctrine of constitutional avoidance is not implicated in the case at bar.

APPLICABILITY OF PLCAA TO THE PRESENT CASE

It is undisputed that Plaintiffs set out adequate prima facie claims under Pennsylvania products liability law which would survive preliminary objections. The Court must thus assess the applicability of the PLCAA to Plaintiffs claims. The PLCAA states that "[a] qualified civil liability action [under the PLCCA] may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). A qualified civil

liability action is generally defined by the PLCAA as "a civil liability action… brought by any person against a manufacturer or seller of a qualified product... for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party..." subject to certain enumerated exceptions. 15 U.S.C. § 7903(5)(A). The exception at issue in this case reads as follows:

> [A]n 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). It is undisputed that Springfield is a "manufacturer" and Saloom is a "seller" as defined under 15 U.S.C. § 7903. It is also clear that the subject handgun is a "qualified product" under the statute.

Plaintiffs argue that the PLCAA is inapplicable because the present case is not a civil action "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 argue that the phrase "resulting from" in the definition of qualified civil liability action

is not explicitly defined in the PLCAA, and so the meaning must be found in the PLCAA's Purposes and Findings section. 15 U.S.C. § 7901. Plaintiffs point to the language which states a congressional finding that "(t)he possibility of imposing liability on an entire industry for the harm that is solely caused by others is an abuse of the legal system" is problematic, and that one of the purposes of the PLCAA is "[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products..." 15 U.S.C. § 7901(a)(6); 15 U.S.C. § 7901(b)(1). Plaintiffs argue that the use of the phrase "solely caused" implies that a qualified civil liability action cannot be one in which gun manufacturer negligence was a cause of harm in addition to third party unlawful misuse. Plaintiff's additionally point out that an earlier version of the PLCAA did not use the word "solely" in its purposes and findings section. Plaintiffs note the proposition that statutes should be treated, where possible, to avoid construing any part as superfluous. *Astoria Fed. Sav. & Loan Ass 'n v. Solimino*, 501 U.S. 104, 112 (1991).

Defendants argue that the United States Supreme Court has made clear that it is inappropriate to narrowly read the broad language of a statute to be entirely consistent with the stated purposes and legislative history of the statute when this reading would contradict the actual statutory text. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243-45 (1989). Defendants also point out that Plaintiffs argument regarding the "solely caused"

language has been rejected by various other courts throughout the country, including the Supreme Courts of Missouri and Alaska, and the United States District Court for the District of Colorado. *See e.g., Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387 (Alaska 2013); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1223-24 (D. Colo. 2015).

The Court finds the logic set forth by the Defendants and elaborated upon by other Courts persuasive. Here, the plain language of the statute bars civil liability actions "resulting from" criminal or unlawful use of a qualified product. Although it is true that "resulting from" is not defined in the statutory definition section of the PLCAA, the phrase on its face has a plain meaning that does not require further definition. To emphasize the addition of one word in the Purposes and Findings section over the actual substantive text of the statute would run contrary to the United States Supreme Court's directive in *H.J. Inc.* 492 U.S. at 243-45. The Court additionally finds convincing the argument of Supreme Court of Alaska: that to allow a general negligence claim to persist would render the negligence per se and negligent entrustment provision of the PLCAA a surplusage. 15 U.S.C. § 7903(5)(A)(ii); *Estate of Kim*. 295 P.3d at 386. This reading of the statute would render an entire operative section of the statute superfluous, which is entirely undesirable under United States Supreme Court precedent. *Astoria*, 501 U.S. at 112. As such, this Court declines to adopt Plaintiff's reading of the statute wherein the present action does not fall under the prohibition on qualified civil liability actions

based on their reading of "solely caused" and "resulting from."

Plaintiffs next argue that the present case falls under the products liability exception as there was no occurrence of a "volitional act that constituted a criminal offense." 15 U.S.C. § 7903(5)(A)(v). Plaintiffs first argue a lack of a criminal offense on the part of the Juvenile Delinquent, as "[delinquency proceedings are not criminal in nature..." *In Interest of G.T.*, 597 A.2d 638, 641 (Pa. Super. 1991). Defendants point out that a "delinquent act" is defined under Pennsylvania law specifically as "an act designated a crime under the law of this Commonwealth..." 42 Pa. C.S.A. § 6302 (West). Defendants additionally reference the case Supreme Court of Illinois case of *Adames v. Sheahan* as being the only case presently adjudicated which has addressed the issue of applying the PLCAA "criminal offense" provision to a minor. 909 N.E.2d 742 (Ill. 2009).

The *Adames* case concerned a minor who shot and killed another minor using a handgun belonging to his father. *Id*. at. 761. The minor was adjudicated delinquent through the Illinois juvenile delinquency process, with the court in the juvenile proceeding finding that the minor committed involuntary manslaughter. *Id*. The Illinois Supreme Court, when confronted with the applicability of the "criminal misuse" provision of the PLCAA, looked to the definition of "criminal" found in Black's Law Dictionary, which reads: "[h]aving the character of a crime; in the nature of a crime." *Id*. The Illinois Supreme Court found that, although the minor was

not charged or adjudicated criminally, he certainly violated the Illinois Criminal Code based on his juvenile adjudication. *Id*. The act of shooting and killing another "was 'in the nature of a crime,'" and thus fell squarely within the categorization of criminal misuse under the PLCAA. *Id*. Here, the Court finds the *Adames* reasoning persuasive. Although Plaintiffs correctly point out that juvenile proceedings are not criminal in nature, delinquent acts in Pennsylvania are by definition "act[s] designated a crime under the law of' the Commonwealth of Pennsylvania. 42 Pa. C.S.A. § 6302. Additionally, the focus of the PLCAA is on the "volitional act" and the criminal character thereof. As explained by the *Adames* Court, committing an act amounting to involuntary manslaughter, whether prosecuted criminally or not, still amounts to a committing a criminal act and is thus applicable under the "criminal misuse" portion of the PLCAA. The Court thus declines to adopt Plaintiffs' reading "volitional act that constituted a criminal offense."

Based upon the foregoing rationale, the Court finds that the present action is a "qualified civil liability action" under the PLCAA. The Court will next address Plaintiffs' constitutionality concerns.

CONSTITUTIONALITY OF PLCAA

Plaintiffs argue that if the PLCAA is found to apply to the case at bar, the PLCAA is unconstitutional. Defendants and the United States argue that the PLCAA is a valid exercise of Congress' power under the United States Constitution.

PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT

Plaintiffs first argue that the PLCAA is violative of principles of federalism and the Tenth Amendment to the United States Constitution because it bars certain common law claims without barring equivalent statutory claims, intruding upon states' inherent powers. Defendants and the United States argue that the PLCAA does not violate these principles because it is a valid exercise of one of Congress' enumerated powers, and it does not force action by state actors.

The Tenth Amendment provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." U.S. Const, amend. X. The issue of the PLCAA's interaction with the Tenth Amendment and principles of federalism has been addressed in the Second Circuit case of *City of New York v. Beretta U.S.A. Corp*. 524 F.3d 384, 396-97 (2d Cir. 2008). In its reasoning, the Second Circuit explains that where Congress is acting within the scope of its enumerated powers, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states..." *Id.* at 396. If a properly enacted federal law does not "commandeer the states' executive officials or legislative processes" then it is not violative of the Tenth Amendment under Supreme Court precedent. *Id*.

This Court agrees with the analysis of the Second Circuit in *Beretta*. As explained below, the PLCAA is a valid exercise of Congress' authority' under the Commerce and Supremacy Clauses of the United States Constitution. As the PLCAA is properly enacted, we must consider whether the law commandeers state powers. Here, the operative provision provides that statutorily defined "qualified civil liability' action[s] may not be brought in any Federal or State court," and that the statute applies retroactively to any applicable cases pending at the time of the enactment of the statute, requiring their dismissal. 15 U.S.C. § 7902(a). No portion of the PLCAA involves commandeering the powers of state executive officials or legislative processes in any manner. The PLCAA merely allows certain statutory and judicial remedies while disallowing others.

The United States additionally argues that the PLCAA does not shift the balance of power between the state legislatures and courts as dramatically as indicated by the Plaintiffs. The United States correctly notes that some traditional common law causes of action are preserved under the PLCAA, while certain statutory claims are preempted. The PLCAA, therefore, 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. For the foregoing reasons, this Court finds the PLCAA constitutional with regard to the Tenth Amendment and principles of federalism.

DUE PROCESS RIGHTS

Plaintiffs next argue that the PLCAA violates the Plaintiffs' substantive due process rights by depriving them of a cause of action without providing them with a substitute remedy. Defendants and the United States argue that the Plaintiffs have not been deprived of due process because they do not have a valid and vested property' interest at stake. They additionally argue that even if such a property interest existed, that Plaintiffs are not deprived of all remedies at law.

The Fifth Amendment to the United States Constitution reads in relevant part:"[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const, amend. V. Plaintiffs note the longstanding legal principle that "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (1869) (citation omitted). The United States Supreme Court has held, however, that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law." *Silver v. Silver*, 280 U.S. 117, 122 (1929) (citation omitted).

"The procedural component of the Due Process Clause does not protect everything that might be described as a 'benefit': 'To have a property interest in a benefit, a person clearly must have more than an abstract need or desire' and 'more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.'" *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, (2005). The *Duke Power* case instructs that when dealing with liability limiting legislation, "[o]ur cases have clearly established that

'[a] person has no property, no vested interest, in any rule of the common law.'" *Duke Power Co v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (U.S. 1978). (citations omitted). In fact, the Third Circuit case of *In re TMI* explains that "[u]nder the United States Constitution, legislation affecting a pending tort claim is not subject to 'heightened scrutiny' due process review because a pending tort claim does not constitute a vested right." *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996).

Here, this Court finds the case of *In re TMI* instructive. If a pending tort claim does not constitute a vested property right, then it only stands to reason that a potential tort claim, not yet realized or filed at the time of the enactment of legislation would certainly not constitute a vested property right. This logic is reinforced by the United States Supreme Courts' notations in *Duke Power* that reinforces that no property interest exists in any common law rule, and that liability limiting statutes are not unusual and are routinely enforced by the Courts. 438 U.S. at 88 n.32. As such, this Court finds that Plaintiffs do not have a constitutionally protected property right in their tort claim in this matter, and so a due process analysis is inapplicable.

Assuming arguendo that a vested property right does exist, Plaintiffs argue that the PLCAA deprives them of due process without providing an alternate remedy. The United States points again to the *Duke Power* case for the proposition that "it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either

duplicate the recovery at common law or provide a reasonable substitute remedy" in a case which involved imposition of a monetary liability limitation on causes of action resulting from accidents at federally licensed nuclear power plants. 438 U.S. at 88. In further support, the United States points to the later case of *Martinez v. California*, in which the United States Supreme Court upheld a state liability-limiting statute, which provided immunity to officials responsible for decisions regarding paroling inmates, without any available equivalent remedy at law. 444 U.S. 277, 282 (1980).

Defendants additionally argue that Plaintiffs are not entirely without redress, as they may sue the individual who committed the criminal misuse of the firearm, and they additionally may sue any manufacturer, distributor or seller as long as the claim falls appropriately within one of the PLCAA's exceptions. This issue of procedural due process as applied to the PLCAA has been addressed by the Ninth Circuit Court in the case of *Ileto v. Glock, Inc.* 565 F.3d 1126, 1141-42 (9th Cir. 2009). The Ninth Circuit found that "the PLCAA does not completely abolish Plaintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule." *Id.* at 1143. The Court here finds the Ninth Circuit's reasoning persuasive, and that even if a vested property right did exist in this case, the PLCAA does not deprive Plaintiffs of due process, and is thus constitutional.

EQUAL PROTECTION

Plaintiffs additionally argue that the PLCAA is violative of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiffs claim that the PLCAA discriminates against certain gun violence victims without a rational basis, with Congress favoring gun violence victims in states utilizing legislative remedies over victims in states utilizing judicial remedies. Defendants and the United States argue that the rational basis standard is easily satisfied in this matter.

In assessing an equal protection claim, the appropriate standard must be utilized, and all parties in this matter agree that rational basis review is the appropriate standard here. Under rational basis review, a statutorily imposed difference in treatment of two groups "cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." Heller v. Doe by Doe, 509 U.S. 312, 320 (1993). It is also important to note that rational basis review is an extraordinarily deferential standard, and "a classification 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.'" Id. (citation omitted).

The PLCAA's Findings and Purposes section sets out an ample rational basis for any differential treatment found here. 15 U.S.C. § 7901. Congress cites

to its important interests in protecting the Second Amendment rights of American citizens to keep and bear arms, as well as the avoidance of an unreasonable burden on interstate and foreign commerce. 15 U.S.C. § 7901(a)(2); 15 U.S.C. § 7901(a)(6). Congress then expresses its belief that judicial remedies might be used to circumvent the democratic legislative processes, and so gives preference to legislatively enacted remedies over judicially created remedies, subject to certain exceptions. 15 U.S.C. § 7901(a)(7); 15 U.S.C. § 7901(a)(8). This rationale easily passes rational basis review. Even if this Court were to disagree with Congress' logic, "rational-basis review in equal protection analysis 'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" *Heller* at 319. As such, PLCAA cannot be found unconstitutional based on an equal protection analysis.

COMMERCE CLAUSE AND CONGRESSIONAL AUTHORITY

Plaintiffs finally argue that the PLCAA is not a legitimate exercise of Congressional Commerce Clause authority. Plaintiffs claim that this is because the PLCAA does not actually regulate the conduct of the gun industry, but instead limits liability'. Plaintiffs additionally point out that the PLCAA does not even go as far as to limit liability, so long as a statutory remedy is enacted. The United States argues that the PLCAA is a valid exercise of Congressional authority under both the Commerce Clause and the Supremacy Clause of the U.S. Constitution.

The Commerce Clause provides Congress with the authority "[t]o regulate commerce with foreign nations, and among the several states..." U.S. Const, art. I § 8, cl. 3. The Supremacy Clause declares that "[tjhis Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const, art. VI, cl. 2.

In the PLCAA's Findings and Purposes, Congress specifically noted that the availability of certain qualified civil liability actions in both state and federal courts could have a potentially chilling effect on interstate commerce. 15 U.S.C. § 7901(a)(6). The Supreme Court of the United States has repeatedly reaffirmed that "one State's power to impose burdens on the interstate market... is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States." *BMW of N Am., Inc. v. Gore*, 517 U.S. 559,571 (1996) (citation omitted).

In the *Ileto* case, the Ninth Circuit addressed the applicability of the Commerce Clause to the PLCAA, stating "[w]e have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected." *Ileto v. Glock, Inc*., 565 F.3d 1126, 1140—41 (9th Cir. 2009). This Court agrees with the assessment of the

Ninth Circuit, in that it is entirely reasonable 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.

Plaintiffs argue that the United States Supreme Court case of *Murphy v. National Collegiate Athletic Association* renders the PLCAA unconstitutional, as the act restricts liability instead of directly regulating the gun industry. 38 S. Ct. 1461 (2018). This Court can find nothing in *Murphy*, however, that overcomes the binding cases set out by the United States which indicate a longstanding position that regulating and limiting liability is a form of economic regulation permissible under the Commerce Clause. See, e.g., *Riegel v. Medtronic*, 552 U.S. 312, 323-25 (2008); *Kurns v. A. W. Chesterton*, 620 F.3d 392, 398 (3d Cir. 2010). This reasoning is bolstered by the United States Supreme Court's admonition that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (citation omitted). As such, as the Supreme Court did not explicitly disallow the restriction of liability as a method of utilizing Congress' Commerce Clause powers, *Murphy* is inapplicable here.

Defendants point to additional Congressional authority for the PLCAA pursuant to Congress' right "to enforce constitutional rights against the States and to use 'preventative rules... [as] appropriate remedial measures,' where there is 'a congruence between the means used and the ends to be achieved.'" *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In the case of the PLCAA, Congress explicitly set out to enforce the constitutional right to keep and bear arms under the Second Amendment. 15 U.S.C. § 7901(a)(1). Defendants point out the obvious link between the right to keep and bear arms and the obvious need for manufacturers and sellers to be able to produce and sell the same in interstate commerce. As such, this Court finds that Congress' exercise of its commerce power works directly in concert here with its power to enforce protected Second Amendment rights, bolstering the argument that Congress has acted in an entirely valid and appropriate maimer pursuant to its enumerated powers in enacting the PLCAA.

Based upon the foregoing analysis, the Court finds that the PLCAA applies to Plaintiffs claims as set out in their complaint in this matter. The Court further finds that the doctrine of constitutional avoidance is not implicated in this case, rendering a narrow reading which would allow Plaintiffs claims to proceed inappropriate. The Court additionally finds that the PLCAA is in no way in violation of the United States Constitution.

Accordingly, Defendants' Preliminary Objection is SUSTAINED. Plaintiffs' Complaint is DISMISSED

with prejudice in its entirety pursuant to 15 U.S.C. § 7901 et seq. and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:

/s/ *Harry F. Smail, Jr.*
Harry F. Smail, Jr., Judge

ATTEST:

Christian O'Brien
Prothonotary

cc: Gary F. Lynch, Esq., for Plaintiffs
Jonathan E. Lowy, Esq. for Plaintiffs
John K. Greiner, Esq. for Defendants
Christopher Renzuili, Esq. for Defendants
Eric J. Soskin, Esq. for United State of America

APPENDIX E

CONSTITUTIONAL PROVISIONS INVOLVED

Article I, § 8, cl. 3 (Commerce Clause):

The Congress shall have power …

To regulate commerce with foreign nations, and among the several states, and with the Indian tribes; …

Tenth Amendment:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

APPENDIX F

PROTECTION OF LAWFUL COMMERCE IN ARMS ACT, 15 U.S.C. §§ 7901-7903

15 U.S. Code § 7901

(a) Findings

Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

(3) 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.

(4) 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.

(5) 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.

(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, 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.

(7) 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.

(8) 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.

(b) Purposes

The purposes of this chapter are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, 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.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to

petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

15 U.S. Code § 7902

(a) In general

A qualified civil liability action may not be brought in any Federal or State court.

(b) Dismissal of pending actions

A qualified civil liability action that is pending on October 26, 2005, shall be immediately dismissed by the court in which the action was brought or is currently pending.

15 U.S. Code § 7903

In this chapter:

(1) Engaged in the business

The term "engaged in the business" has the meaning given that term in section 921(a)(21) of Title 18, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) Manufacturer

The term "manufacturer" means, with respect to a qualified product, 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.

(3) Person

The term "person" means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) Qualified product

The term "qualified product" means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of Title 18), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) Qualified civil liability action

(A) In general

The term "qualified civil liability action" means 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, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

(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—

(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.

(B) Negligent entrustment

As used in subparagraph (A)(ii), the term "negligent entrustment" means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in

a manner involving unreasonable risk of physical injury to the person or others.

(C) Rule of construction

The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this chapter shall be construed to create a public or private cause of action or remedy.

(D) Minor child exception

Nothing in this chapter shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) Seller

The term "seller" means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of Title 18) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of Title 18;

(B) 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; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of Title 18) in interstate or foreign commerce at the wholesale or retail level.

(7) State

The term "State" includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) Trade association

The term "trade association" means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of Title 26 and exempt from tax under section 501(a) of such title; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) Unlawful misuse

The term "unlawful misuse" means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.