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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF ORANGE

FRANCISCO GUDINO CARDENAS, an individual; and TROY MCFADYEN, in his Individual Capacity, and as Heir at Law and Successor in Interest to MICHELLE MCFADYEN, Deceased, ET AL.

Plaintiffs,

vs.

GHOST GUNNER INC., d/b/a GHOSTGUNNER.NET; DEFENSE DISTRIBUTED d/b/a GHOSTGUNNER.NET; CODY WILSON d/b/a GHOSTGUNNER.NET; BLACKHAWK MANUFACTURING GROUP INC., d/b/a 80PERCENTARMS.COM; RYAN BEEZLEY and BOB BEEZLEY d/b/a RBTACTICALTOOLING.COM; GHOST AMERICA LLC, d/b/a GHOSTGUNS.COM; GHOST GUNS LLC, d/b/a GRID DEFENSE and GHOSTRIFLES.COM; JUDGGERNAUT TACTICAL INC. d/b/a JTACTICAL.COM; MFY TECHNICAL SOLUTIONS LLC, d/b/a 5DTACTICAL.COM; TACTICAL GEAR

Case No. JCCP 5167

[*Coordinated Cases CIVDS 1935422, date filed 11/14/2019, and 30-2019-01111797-CU-PO-CJC, date filed 11/14/2019*]

[Assigned for all purposes to Honorable William Claster, Department CX 104]

Filing Date: March 22, 2021
Trial Date: Not Yet Set

REQUEST FOR JUDICIAL NOTICE IN FURTHER SUPPORT OF DEMURRER

Reservation ID: 73662206 (provided by Clerk)
Date: May 6, 2022
Time: 9:00 am
Dept: CX104
Honorable William Claster

HEADS LLC, d/b/a 80-LOWER.COM; AR-15LOWERRECEIVERS.COM and 80LOWERJIG.COM; JAMES TROMBLEE, JR., d/b/a USPATRIOTARMORY.COM; INDUSTRY ARMAMENT INC., d/b/a AMERICANWEAPONSCOMPONENTS.COM; THUNDER GUNS LLC, d/b/a THUNDERTACTICAL.COM; POLYMER80, INC.; and DOES 2 through 100, inclusive,

Defendants.

Defendant Polymer80, Inc. through its attorneys of record, requests that the Court take judicial notice pursuant to Evidence Code § 452 (d) of the following documents:

1. June 8, 2021 Brief of United States in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act, *Goldstein v. Earnest*, No. 37-2020-00016638-CU-PO-CTL (Super. Ct. San Diego Cty.), annexed hereto as Exhibit C.

2. March 15, 2022 Brief of the United States of America in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act, *Towner v. Gilroy Garlic Festival Ass'n, Inc.*, No. 19CV358256 (Super. Ct. Santa Clara Cty,), annexed hereto as Exhibit D.

Dated: April 4, 2022

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EXHIBIT C

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

YISROEL GOLDSTEIN, *et al.*,

Plaintiffs,

vs.

JOHN T. EARNEST, *et al.*,

Defendants.

Case No.: 37-2020-00016638-CU-PO-CTL

Judge: Hon. Kenneth J. Medel
Dept.: C-66

BRIEF OF UNITED STATES IN SUPPORT OF THE CONSTITUTIONALITY OF THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

Date: June 8, 2021
Time: 10:00 a.m.

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INTRODUCTION

Pursuant to California Code of Civil Procedure section 387(d) and Sections 517 and 2403(a) of Title 28 of the United States Code, the United States of America has intervened in this case to present argument on the constitutional challenges to the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), 15 U.S.C. §§ 7901–03, raised in Plaintiffs' Opposition to Defendant San Diego Guns' Demurrer to Plaintiffs' First Amended Complaint ("Pls.' S.D. Opp.") and Plaintiffs' Opposition to Defendant Smith & Wesson's Demurrer to Plaintiffs' First Amended Complaint ("Pls.' S.W. Opp.").[1]

Congress enacted PLCAA to "generally preempt[] claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009). The Act stands on firm constitutional ground: Essentially "[e]very federal and state appellate court to address the constitutionality of the PLCAA has found it [to be] constitutional."[2] *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1222 (D. Colo. 2015) (collecting cases). Indeed, in prior litigation challenging PLCAA's constitutionality, courts have rejected virtually identical arguments to those advanced by Plaintiffs here. *See, e.g.*, *Ileto*, 565 F.3d at 1138–42 (holding PLCAA to be a valid exercise of Commerce Clause authority and rejecting due-process and equal-protection challenges); *City of N.Y. v. Beretta*, 524 F.3d 384, 392 (2d Cir. 2008) (rejecting Commerce Clause and Tenth Amendment challenges); *Travieso v. Glock Inc.*, No. CV-20-0523, 2021 WL 913746, at *11–13 (D. Ariz. Mar. 10, 2021) (holding PLCAA to be a valid exercise of Commerce Clause authority and rejecting Tenth Amendment, due-process, and equal-protection challenges); *Prescott v. Slide*

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[1] The United States takes no position on whether PLCAA bars any claims asserted in the Plaintiffs' First Amended Complaint.

[2] The sole exception of which the United States is aware is a withdrawn opinion by an intermediate appellate court in Pennsylvania, in which the court departed from a wide body of case law by concluding that PLCAA was not a valid exercise of Congress's power under the Commerce Clause and that the Act violated the Tenth Amendment. *See Gustafson v. Springfield, Inc.*, No. 207 WDA 2019, slip op. at 55–56 (Penn. Super. Ct. 2020), *reh'g en banc granted and opinion withdrawn* (Dec. 3, 2020)).

Fire Sols., LP, 410 F. Supp. 3d 1123, 1146 (D. Nev. 2019) (rejecting due-process, equal-protection, and Tenth Amendment challenges); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016) (rejecting due-process and Tenth Amendment challenges); *Estate of Kim ex rel. Alexander v. Coxe* (*Coxe*), 295 P.3d 380, 390–91 (Alaska 2013) (rejecting due-process, equal-protection, and Tenth Amendment challenges); *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *18–20 (Conn. Super. Ct. May 26, 2011) (unpublished) (rejecting due-process and equal-protection challenges); *Adames v. Sheahan*, 909 N.E.2d 742, 764–65 (Ill. 2009) (rejecting Tenth Amendment challenge); *Dist. of Col. v. Beretta*, 940 A.2d 163, 172–82 (D.C. 2008) (rejecting due-process challenge).

Despite the weight of precedent to the contrary, Plaintiffs nevertheless contend that either PLCAA is unconstitutional or certain provisions of the Act should be construed narrowly in light of federalism principles to avoid barring any of Plaintiffs' claims—an argument that has likewise been squarely rejected. *See Travieso*, 2021 WL 913746, at *4–5; *Delana*, 486 S.W. 3d at 323; *Prescott*, 410 F. Supp. 3d at 1132 n.3; *see also Ileto*, 565 F.3d at 1143 (refusing to invoke the doctrine of constitutional avoidance in construing PLCAA). But Plaintiffs' constitutional arguments fail for the following reasons:

First, PLCAA does not exceed Congress's legislative authority. The Supreme Court has held that the Commerce Clause authorizes Congress to restrict litigation if Congress "could reasonably believe" that the restrictions would promote interstate commerce. *Pierce Cty. v. Guillen*, 537 U.S. 129, 147 (2003). "Congress carefully constrained [PLCAA's] reach to the confines of the Commerce Clause" by specifically limiting the preemptive scope of the Act to interstate or foreign commerce. *Ileto*, 565 F.3d at 1140; *see also* 15 U.S.C. § 7903(2) ("The term 'manufacturer' means . . . a person who is engaged in the business of manufacturing the product in interstate or foreign commerce[.]"); *id.* § 7903(4) ("The term 'qualified product' means a firearm . . . that has been shipped or transported in interstate or foreign commerce."); *id.* § 7903(6) (defining "[t]he term 'seller"' with reference to a three part, disjunctive definition, all three parts of which refer to interstate or foreign commerce). And "[t]here 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," while leaving others to proceed. *Ileto*, 565 F.3d at 1140–41 (citation omitted).

Second, PLCAA does not violate the Tenth Amendment or otherwise interfere with the sovereign rights of the State of California. The Act, as a constitutional exercise of Congress's enumerated authorities, merely preempts certain inconsistent state laws under the Supremacy Clause, consistent with constitutional principles of federalism. *See, e.g.*, *City of N.Y.*, 524 F.3d at 397; *Travieso*, 2021 WL 913746, at *12–13; *Delana*, 486 S.W. 3d at 322-23; *Coxe*, 295 P.3d at 388-89; *Adames*, 909 N.E.2d at 764-65. Indeed, the underlying premise of Plaintiffs' Tenth Amendment claim is incorrect: PLCAA does not create a wholesale difference in treatment between common law and statutory claims, as Plaintiffs suggest. Rather, PLCAA bars some categories of statutory claims and maintains some categories of judicially-created claims. *See* 15 U.S.C. § 7903(5)(A)(ii), (iv), (v).

Third, Plaintiffs cannot succeed on their due-process claim because: (1) they have "no property, no vested interest" in common-law tort claims that had yet to accrue or be litigated at the time of PLCAA's enactment, *see Duke Power Co. v. Carolina Envt'l Study Grp.*, 438 U.S. 59, 88 n.32 (1978) (internal quotation marks and citation omitted); *see id.* ("[S]tatutes limiting liability are relatively commonplace and have consistently been enforced by the courts."); and (2) even if Plaintiffs had such a property interest, they have not been deprived of all remedies. *See Ileto*, 565 F.3d at 1140–44 (rejecting due-process challenge because, *inter alia*, "Congress has left in place a number of substitute remedies"); *accord Dist. of Col.*, 940 A.2d at 177 n.8.

Fourth, Plaintiffs' Fifth Amendment equal-protection argument fails because, as they acknowledge, the easily-satisfied rational-basis standard applies to this claim, and "Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits," interstate commerce would be protected. *Ileto*, 565 F.3d at 1140–41; *see also City of N.Y. v. Beretta U.S.A. Corp*. ("*N.Y. v. Beretta*"), 401 F. Supp. 2d 244, 295 (E.D.N.Y. 2005) (determining

that Congress had a rational basis to find that "nationwide commerce in firearms was particularly imperiled by the threat" of the lawsuits restricted by the Act in rejecting equal-protection challenge to PLCAA, while finding that an exception to PLCAA applied to allow the suit), *rev'd on other grounds, City of N.Y.*, 524 F.3d at 384 (equal protection not addressed). Congress also could rationally find that state legislative processes would provide a forum in which the interests of other states, interstate commerce as a whole, or the effects of tort liability on the rights of Americans to keep and bear arms would more likely be considered.

Fifth, and finally, PLCAA need not be construed narrowly, as Plaintiffs contend. Plaintiffs' arguments that a narrow construction is required are grounded in a doctrine of constitutional avoidance, which authorizes a court to choose among competing interpretations of a genuinely ambiguous statute only to escape an interpretation that creates "serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988). As explained above, there are no serious constitutional concerns here. Moreover, because PLCAA's purposes include *protecting* federalism and comity among states, and protecting individual constitutional rights from animus at the state and municipal level, PLCAA should be interpreted in a manner that advances, not frustrates, its purposes.

In short, PLCAA is constitutional. Plaintiffs' arguments to the contrary should therefore be rejected.

STATUTORY BACKGROUND

PLCAA preempts certain tort actions that threaten to interfere with interstate and foreign commerce in firearms and to disrupt Americans' ability to exercise the individual right to keep and bear arms recognized in the Second Amendment to the United States Constitution. *See* 15 U.S.C. § 7901. The Act provides that "[a] qualified civil liability action" against the manufacturers or sellers of firearms "may not be brought in any Federal or State court." *Id.* § 7902. A "qualified civil liability action" is defined to include any "civil action or proceeding . . . against a manufacturer or seller of a qualified product . . . for damages, punitive damages, injunctive or declaratory relief . . . or other relief resulting from the criminal or unlawful misuse

of a qualified product by the person or a third party." *Id*. § 7903(5)(A). The Act's general bar on qualified civil liability actions applies only to suits concerning firearms that have "been shipped or transported in interstate or foreign commerce," *id.* § 7903(4), and it protects only manufacturers and sellers who engage in "interstate or foreign commerce," *id.* § 7903(2), (6).

PLCAA contains various exceptions that permit the filing of certain classes of actions that would otherwise be preempted.[3] *See id*. § 7903(5)(A)(i)-(vi). These include claims for negligent entrustment and negligence per se, *id*. § 7903(5)(A)(ii), claims for breach of contract or warranty, *id*. § 7903(5)(A)(iv), claims based on defective products when "not caused by a volitional act that constituted a criminal offense," *id*. § 7903(5)(A)(v), and claims based on knowing violations of statutes "applicable to the sale or marketing of the product," where "the violation was a proximate cause of the harm for which relief is sought," *id*. § 7903(5)(A)(iii).

Congress enacted PLCAA for three primary reasons, each of which are set forth in the statutory text. First, Congress acted to ensure that "[b]usinesses 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 . . . in interstate commerce" will not be held "liable for the harm caused by those who criminally or unlawfully misuse firearm products." *Id*. § 7901(a)(5). Second, Congress acted to protect the constitutional "rights of individuals . . . to keep and bear arms," as recognized by the Second Amendment, against the "diminution of [this] basic constitutional right and civil liberty" by "[t]he possibility of imposing liability" in qualified civil liability actions. *Id.* § 7901(a)(1)–(2), (a)(6); *see also id*. § 7901(b)(2) (explaining PLCAA's purpose to "preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting [and] self-defense"). And third, Congress acted to protect: (i) "the rights, privileges, and immunities guaranteed" by the Fourteenth Amendment; and (ii) "interstate and foreign commerce . . . [and] important principles of federalism, State sovereignty,

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[3] In addition to these enumerated exceptions, PLCAA does not prohibit suits against individual users of firearms for the injuries they may cause. *See* 15 U.S.C. § 7902 (preempting only civil actions brought against firearm manufacturers and dealers).

and comity between the sister States," from "liability actions commenced or contemplated" by, *inter alia*, "States, municipalities, and private interest groups and others" through an "expansion of the common law." *Id*. § 7901(a)(7), (a)(8).

ARGUMENT

I. PLCAA is a valid exercise of Congress's power under the Commerce Clause, the Supremacy Clause, and Other Enumerated Authority.

As courts have repeatedly recognized, PLCAA is a valid and straightforward exercise of congressional authority under the Commerce Clause and the Supremacy Clause. *See* U.S. Const. art. I, § 8; *id.* art. VI, cl. 2. The Constitution grants Congress the authority "[t]o regulate commerce . . . among the several states." *Id*. art. I, § 8. That enumeration entails "the power to regulate activities that substantially affect interstate commerce," as PLCAA does. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005). And where Congress has rationally determined that "economic activity substantially affects interstate commerce," the Supreme Court has made clear that "legislation regulating that activity will be sustained." *United States v. Lopez*, 514 U.S. 549, 560 (1995); *see also Gonzales*, 545 U.S. at 22 ("In assessing the scope of Congress' authority under the Commerce Clause, . . . [a court] need not determine whether . . . activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding.").

Congress explained that it enacted PLCAA because it concluded, in relevant part, that lawsuits "commenced against manufacturers, distributors, [and] dealers . . . 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[,] . . . constitute[] an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(3), (6). In light of Congress's findings, the Ninth Circuit "ha[d] 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 1140–41. Similarly, the Second Circuit concluded that Congress could not have "exceeded its authority" in enacting

PLCCA "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 N.Y.*, 524 F.3d at 395.

In preempting qualified civil liability actions to protect this commercial activity, Congress took care to ensure that the required "nexus to interstate commerce" was present in the text of the statute. *See Lopez*, 514 U.S. at 562. PLCAA prohibits only lawsuits brought against entities who manufacture or sell firearms "in interstate or foreign commerce," 15 U.S.C. § 7903(2), (6), and bars only those suits concerning firearms "that [have] been shipped or transported in interstate or foreign commerce," *id.* § 7903(4). These statutory provisions therefore ensure that Congress does not regulate "'truly local' matters," *City of N.Y.*, 524 F.3d at 394 (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)), and thus "carefully constrain[] the Act's reach to the confines of the Commerce Clause," *Ileto*, 565 F.3d at 1140.

Furthermore, while state tort law issues are generally left to the states, Congress can, by operation of the Supremacy Clause, preempt state tort law if the state law imposes a burden on interstate commerce and Congress clearly manifests an intent to preempt it. *See* U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the [S]upreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); *see also, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–72 (1996); *Medtronic, Inc. v. Lohr*, 518 U.S. 470 (1996). PLCAA expresses this clear intention for "qualified civil liability actions." *See Ileto*, 565 F.3d at 1135 (noting that "Congress clearly intended to preempt common-law claims, such as general tort theories of liability"); 15 U.S.C. § 7901(b)(1) (describing the statute's purpose "[t]o prohibit" victims of gun violence from bringing "causes of actions against manufacturers, distributors, [and] dealers . . . of firearms"); *id.* § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court.").

The Supreme Court noted in *BMW* that "one State's power to impose burdens on the interstate market . . . is not only subordinate to the [F]ederal power over interstate commerce, but is also constrained by the need to respect the interests of other States . . . ." 517 U.S. at 571. This

accords precisely with Congress's determinations in PLCAA that qualified civil liability actions "constitute[] an unreasonable burden on interstate and foreign commerce" and "undermin[e] important principles of . . . State sovereignty and comity between the sister States." 15 U.S.C. § 7901(a)(6), (8). In addition, Congress has explained that the purpose of PLCAA is to address states' "efforts at extraterritorial regulation [that] aim to reduce interstate commerce." H. R. Rep. No. 109-124 at 22 (2005). Thus, Congress is acting where interests in protecting national markets are at the peak: where one state seeks to apply its laws to a manufacturer of goods from another state in derogation of principles of unfettered interstate commerce, federalism, and comity. For these reasons, PLCAA is an appropriate limitation on state tort power that effectuates the Constitution's "special concern both with the maintenance of a national economic union unfettered by State-imposed limitations on interstate [and international] commerce and with the autonomy of the individual States within their respective spheres." *See BMW*, 517 U.S. at 571–72 (internal quotation marks and citation omitted).

As noted above, courts have relied on (i) Congress's findings in PLCAA regarding the effect of firearms liability on interstate and foreign commerce, (ii) the interstate nexus in the statutory text confining PLCAA's scope within the ambit of the Commerce Clause, and (iii) the well-establish law outlined above, to hold that Congress lawfully acted within its authority in preempting qualified civil liability actions through PLCAA. *See Ileto*, 565 F.3d at 1141–42; *City of N.Y.*, 524 F.3d at 394–95; *Travieso*, 2021 WL 913746, at *12; *Adames*, 909 N.E.2d at 764–65. This Court should reach the same result.

Against the weight of these precedents, however, Plaintiffs contend that *Murphy v. NCAA*, 138 S. Ct. 1461 (2018), somehow undermines their validity. Pls.' S.D. Opp. at 19. Plaintiffs rest this argument on *Murphy*'s recitation of the principle that "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States." 138 S. Ct. at 1481; *accord New York v. United States*, 505 U.S. 144, 166 (1992) ("[The] Constitution . . . confers upon Congress the power to regulate individuals, not States."). But as the Ninth Circuit has explained, "the only function of PLCAA is to preempt certain claims,"

namely, those brought by *private* litigants in federal or state court. *Ileto*, 565 F.3d at 1138; *see also Murphy*, 138 S. Ct. at 1479–80 (explaining that, under the Supremacy Clause, federal law "simply provides 'a rule of decision' . . . in case of a conflict with state law" (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).

To the extent Plaintiffs suggest that PLCAA's preemption of qualified civil liability actions is the equivalent of "regulat[ing] . . . the States," *see Murphy*, 138 S. Ct. at 1481, this contention is mistaken. It is axiomatic that Congress's Commerce Clause authority includes the power to preempt state tort laws. *See, e.g.*, *Riegel v. Medtronic*, 552 U.S. 312, 323–24 (2008). Liability rules—like those contained in PLCAA—are a form of economic regulation. *See id.* at 323–25 (recognizing that "[s]tate tort law," including "common-law duties," imposes regulatory standards on manufacturers); *Kurns v. A.W. Chesterton*, 620 F.3d 392, 398 (3d Cir. 2010) ("the purpose of" tort suits against companies, such as "state product liability suits against manufacturers . . . is, in part, to persuade [manufacturers] to comply with a standard of care established by the state"). Indeed, Congress made clear that it intended to exercise its Commerce Clause authority in PLCAA based on the economic nature of tort-liability actions, finding that qualified civil liability actions "seek money damages," threaten to "destabiliz[e] . . . industries and economic sectors," and "unreasonabl[y] burden . . . interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(3), (6); *see*, *e.g.*, 151 Cong. Rec. S9059, 9107 (daily ed. July 27, 2005) (statement of Sen. Baucus) ("[T]he time, expense, and effort that goes into defending these nuisance suits is a significant drain on the firearms industry, costing jobs and millions of dollars, increasing business operating costs . . . and threatening to put dealers and manufacturers out of business."). The adjustment of the rules of liability under PLCAA is thus a type of regulation of economic activity within the core of Congress's Commerce Clause power. *See Morrison*, 529 U.S. at 613 (reaffirming longstanding authority for "Commerce Clause regulation of intrastate activity . . . where that activity is economic in nature").

Further, the Supreme Court has long recognized that Congress's Commerce Clause authority includes the ability to regulate both substantive and procedural elements of liability in

state proceedings when justified by findings of an effect on interstate commerce. In *Pierce County*, for example, the Supreme Court rejected a Commerce Clause challenge to a restriction on the use of certain types of evidence in federal or state courts. *See* 537 U.S. at 134.[4] In that case, the Court overruled a decision by a state supreme court holding that this evidentiary rule, when applied to state-court litigation, lacked a nexus to interstate commerce. *See Guillen v. Pierce Cty.*, 144 Wash. 2d. 696, 742 (2001). In reversing, the Court explained that the evidentiary rules fell within Congress's Commerce Clause power "to assist state and local governments in reducing hazardous conditions" that, in turn, would affect "the Nation's channels of commerce." *Id.* at 147. In enacting PLCAA, Congress identified a far more direct effect on interstate commerce: The risk that litigation will disrupt an economically important industry essential to providing Americans with the means to enjoy a core individual right. And nothing in *Murphy* indicates that the Supreme Court intended to overrule *Pierce County*, *BMW*, and other precedents affirming Congress's authority to enact legislation to limit tort liability. *See Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 190 (1990) (explaining that there is no "*sub silentio* overrul[ing]" of prior Supreme Court precedent); *Hohn v. United States*, 524 U.S. 236, 252–53, (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

It is also worth noting that Plaintiffs do not challenge Congress's authority to enact PLCAA 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." *See* 15 U.S.C. § 7901(b)(3). As the Supreme Court has explained, Congress is entitled to enforce constitutional rights against the States and to use "preventive rules . . . [as]

[4] Specifically, the provision at issue barred from evidence "reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to [federal statutes] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds," in any "action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." *Pierce Cty.*, 537 U.S. at 134 (quoting Surface Transportation and Uniform Relocation Assistance Act of 1987, § 132, 101 Stat. 170).

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). Here, Congress's stated purpose of protecting the right of the people to keep and bear arms that is recognized in the Second Amendment, *see* 15 U.S.C. § 7901(a)(1), is logical and congruent to the operative provisions of the Act. The legislative history of PLCAA documents the manner in which state and local government entities had improperly wielded common-law litigation to interfere with the exercise of the right to keep and bear arms. *See* H.R. Rep. 108-59 at 10-12, 56-57.[5] And by restricting only qualified civil liability actions, *see Nev. Dep't of Hum. Res. v. Hibbs*, 538 U.S. 721, 738–39 (2003) ("find[ing] significant the . . . limitations that Congress placed on the scope" of remedial legislation), Congress targeted PLCAA proportionally and congruently to the threat it identified: that judicial decisions could "impos[e] liability on an entire industry for harm that is solely caused by others," 15 U.S.C. §§ 7901(a)(6), (7), thereby curtailing the right to acquire firearms through purchase or manufacture "necessary to the realization of the core right to possess a firearm for self-defense," *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676 (9th Cir. 2017) (collecting cases); *see also Dist. of Col. v. Heller*, 554 U.S. 570, 617–18 (2008) ("to bear arms implies something more than the mere keeping"); *Jackson v. City & Cty. of S.F.,* 746 F.3d 953, 967 (9th Cir. 2014); *Ezell v. City of Chi.*, 651 F.3d 684, 704 (7th Cir. 2011).

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[5] *See also*, *e.g.*, 151 Cong. Rec. at S9074 (Statement of Sen. Frist) ("Since 1997, more than 30 cities and counties have sued firearms companies in an attempt to force them to change the way they make and sell guns . . . manufacturers have already spent more than $200 million in legal fees to defend themselves . . . If the gun industry is forced into bankruptcy, the right to keep and bear arms will be a right in name only. Even if some gunmakers are able to hold on, the prices for firearms . . . will go sky-high."); *Id.* at S9062 (Statement of Sen. Coburn) (July 27, 2005) (describing the purpose of the bill as "in support of . . . the second amendment and the right to carry arms and against the attack on that right by [] frivolous lawsuits . . . attack[ing] the arms industry financially . . . . Since 1988, individuals and municipalities have filed dozens of novel lawsuits against members of the firearms industry . . . intended to drive the gun industry out of business by holding manufacturers and dealers liable for the intentional and criminal act of third parties over whom they have absolutely no control"); H.R. Rep. No. 109-124 at 11 n.48 (2005) (enumerating 18 different lawsuits filed in the late 1990s and early 2000s); Br. of Amicus Curiae Profs. Of Second Amendment Law, *et al*., *Remington Arms Co., LLC v. Soto*, No. 19-168, 2019 WL 4256978 (Sept. 4, 2019). These and other examples in the legislative history belie the statement in *N.Y. v. Beretta* that Congress had identified no "history or pattern of constitutional violations to remedy" in support of its legislative finding that qualified civil liability actions "threaten[ed] the diminution" of the right to keep and bear arms, constituting a violation of the Second and Fourteenth Amendments. *See* 401 F. Supp. 2d at 297.

II. PLCAA does not violate the Tenth Amendment.

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

Plaintiffs maintain that PLCAA violates the Tenth Amendment because it "infringe[s] on states' sovereign [lawmaking] authority" "by dictating which branch of state government the states must use to establish liability standards." Pls.' S.D. Opp. at 18. Although Plaintiffs do not articulate the statutory basis for this contention, it is presumably directed at Congress's choice to include an exception in PLCAA for certain statutory claims but not equivalent common-law claims. *See* 15 U.S.C. § 7903(5)(A)(iii).[6] In *City of New York*, the Second Circuit rejected this exact argument, *see* 524 F.3d at 396–97, as have multiple other courts, *see Travieso*, 2021 WL 913746, at *12–13; *Delana*, 486 S.W. 3d at 323–24; *Coxe*, 295 P.3d at 388–92; *Adames*, 909 N.E.2d 764–65. As the Second Circuit explained, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states," *City of N.Y.*, 524 F.3d at 396, and PLCAA "does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them," *id.* at 397 (internal quotation marks and citation omitted); *see also Connecticut v. Physicians Health Servs., Inc*., 287 F.3d 110, 122 (2d Cir. 2002)

[6] In *Ileto*, the Ninth Circuit explained this "predicate exception" in detail, noting that, to invoke the exception, a plaintiff must, *inter alia*, "allege a knowing violation of a 'predicate statute,'" *i.e.*, "a State or Federal statute applicable to the sale or marketing of the product." 565 F.3d 1132–33. The specifics of the "predicate exception" have no bearing on the error underlying Plaintiffs' contention, however.

("Federal statutes validly enacted under one of Congress's enumerated powers—here, the Commerce Clause—cannot violate the Tenth Amendment unless they commandeer the states' executive officials or legislative processes" (citation omitted)); *Delana*, 486 S.W. 3d at 323 (same reasoning with respect to PLCAA); *Adames*, 909 N.E.2d at 764–65 (adopting the Second Circuit's reasoning in *City of New York*). Because it "is within Congress's enumerated powers and does not commandeer state actors, the PLCAA does not violate the protections of the Tenth Amendment." *Coxe*, 295 P.3d at 389; *accord Travieso*, 2021 WL 913746, at *12.

Again, Plaintiffs' argument appears to suggest that Congress's enactment of PLCAA nevertheless violated the Tenth Amendment because, rather than preempt certain claims all together, it included an exception to PLCAA's statutory preemption for certain types of statutory claims. This limitation on the scope of federal preemption does not implicate the Tenth Amendment in any sense. *See City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1117 (9th Cir. 2014) ("nothing in the text or structure of the Constitution" precludes "federal preemption . . . when Congress properly exercises its enumerated powers").

As an initial matter, there is little logic to Plaintiffs' suggestion that the Tenth Amendment is offended because Congress chose to partially preempt state law (by providing an exception) rather than choosing to fully preempt state law. As explained above, Congress can, by operation of the Supremacy Clause, preempt state tort law if the state law imposes a burden on interstate commerce and Congress clearly manifests an intent to preempt it. *See supra* 7–10. If, as here, Congress chooses to limit the scope of preemption within a given state by exempting a certain category of claims, that hardly causes *greater* interference with state prerogatives.

Second, Plaintiffs' claim is notably deficient in legal support. Plaintiffs point to no authority invalidating a federal statute on the grounds they urge.[7] The state court decision in *In*

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[7] Indeed, the withdrawn opinion in *Gustafson*, *see supra* n.2, is the only source of "authority" Plaintiffs cite that supports their Tenth Amendment challenge. *See* Pls.' S.D. Opp. at 18. There, the court found that PLCAA violates the Tenth Amendment because "PLCAA is tort reform" rather than industry regulation. Slip op. at 57. But it is well-established that Congress may expressly preempt state tort laws to limit liability and promote federal interests. *See Garcia v. Vanguard Car Rental, Inc*., 540 F.3d 1242, 1252-53 (11th Cir. 2008) (rejecting challenge to

re Vargas, 10 N.Y.S.3d 579 (N.Y. App. Div. 2015), certainly does not indicate a constitutional flaw in PLCAA. *See Travieso*, 2021 WL 913746, at *13 (rejecting this precise argument). There, a statute prohibited states from issuing professional licenses to undocumented immigrants absent a new state enactment authorizing the license grant, *see* 8 U.S.C. § 1621, but New York law provided that only the judiciary could wield the "sovereign authority" of the State. *Vargas*, 10 N.Y.S.3d at 582. Here, Plaintiffs point to nothing in the law of California preventing the legislature from enacting tort laws, and Plaintiffs do not argue that PLCAA prevents the state government from taking such action, or any other action. Instead, PLCAA is a routine enactment by Congress that, *inter alia*, "adjust[s]. . . the burdens and benefits of economic life," *Ileto*, 565 F.3d at 1138–39, 1141, and it does not commandeer state officials. PLCAA therefore does not violate the Tenth Amendment.[8] *See City of Portland v. United States*, 969 F.3d 1020, 1049 (9th Cir. 2020) ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States.") (quoting *New York*, 505 U.S. at 156)).

Third, PLCAA does not effect a wholesale shift of power between the state judiciary and legislature, as Plaintiffs seem to imply. As noted above, the exceptions to PLCAA preserve claims that may be validly created by either the legislature or the judiciary, including negligent entrustment, negligence per se, breach of contract or warranty, and defective design or manufacture. 15 U.S.C. § 7903(5)(A)(ii), (iv), (v). The standards for all of these could come from either statutory or common law. It is simply not the case that PLCAA "dictat[es] which branch

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federal preemption of state tort liability for car-rental agencies); *Hammond v. United States*, 786 F.2d 8, 15 (1st Cir. 1986) (preemption of tort remedies under Atomic Weapons Testing Liability Act did not violate Tenth Amendment); *Sparks v. Wyeth Labs.*, 431 F. Supp. 411, 419 (W.D. Ok. 1977) (preemption of tort remedies under Swine Flu Act did not violate Tenth Amendment).

[8] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), cited by Plaintiffs, *see* Pls.' S.D. Opp. at 18–19, has no application here. That case, which stands for the proposition that "[t]here is no federal general common law," does not bar *preemption* of state tort law. *Erie*, 304 U.S. at 78. And the language that Plaintiffs cite does not apply where "matters [are] governed by the Federal Constitution or by acts of Congress," as is the case here. *Id.*; *see also Lehman Brothers v. Schein*, 416 U.S. 386, 389 (1974) (explaining that, under *Erie*, a state is free to make its own common law, "providing there is no overriding federal rule which pre-empts state law" through federal regulation of "the stream of commerce").

of state government the states must use to establish liability standards." *See* Pls.' S.D. Opp. at 18. For these reasons, too, PLCAA does not offend the Tenth Amendment.

III. PLCAA does not violate the Fifth Amendment.

Plaintiffs also contend that PLCAA violates the Fifth Amendment's due-process and equal-protection components. Identical claims have been rightly rejected by numerous courts for the reasons set forth below.

A. PLCAA does not violate due process.

To successfully advance a due-process claim, a plaintiff must demonstrate both a "depriv[ation] of life, liberty, or property" and that the deprivation was "without due process of law." U.S. Const. amend V; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[W]e are faced with what has become a familiar two-part inquiry: we must determine whether [the plaintiff] was deprived of a protected interest, and, if so, what process was his due."). Plaintiffs' claim that PLCAA violates due process by "eliminat[ing] any remedy," Pls.' S.D. Opp. at 19, is factually incorrect, and at any rate, this claim establishes neither a deprivation of property nor a lack of process.

As an initial matter, it is simply not the case that PLCAA "eliminate[s] any remedy" for Plaintiffs' injuries. *See id*. Indeed, Plaintiffs have sued several individuals—including "the self-admitted perpetrator" of the shooting and both of his parents—whose alleged negligence, Plaintiffs claim, caused their injuries. Pls.' First Am. Compl. ¶¶ 31, 261–67. Additionally, Plaintiffs have alleged claims of negligence against two state agencies. *Id.* ¶ 271–76. Plaintiffs may also sue the manufacturers, distributors, and sellers of the firearm used in the shooting under any claim that falls within the text of the Act's exceptions. *See* 15 U.S.C. § 7903(5)(A)(i)–(vi). For these reasons, the Ninth Circuit correctly held in *Ileto* that "PLCAA does not completely abolish Plaintiffs' ability to seek redress."[9] 565 F.3d at 1143; *accord Travieso*, 2021 WL 913746,

[9] In *Ileto*, the Ninth Circuit held that plaintiffs could "proceed on their claims" against only a single defendant and, in response to the dissent, explained that this possibility sufficiently ensured that the "ability to seek redress ha[d] been limited, but not abolished." 565 F.3d at 1143; *see id.* at 1144 (noting that the relevant analysis is whether the *statute* "contains . . . exceptions"

at *11; *Dist. of Col.*, 940 A.2d at 177 n.8; *Coxe*, 295 P.3d at 390–91; *Delana*, 486 S.W.3d at 324; *Gilland*, 2011 WL 2479693, at *18–20.

Second, it is black-letter law that there is no constitutional property right in common-law tort claims that have yet to accrue or be litigated, and thus, when Congress enacted PLCAA in 2005, it deprived Plaintiffs of no protected property interest. The Constitution "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122 (1929). Accordingly, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917); *accord Duke Power Co.*, 438 U.S. at 88 n.32 (1978). For this reason, the Ninth Circuit in *Ileto* held that "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." 565 F.3d 1141. Numerous other courts of appeals have likewise concluded that there are no protected property interests in pre-judgment tort claims, even those already pending. *See, e.g.*, *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1069 (10th Cir. 2019); *Schmidt v. Ramsey*, 860 F.3d 1038, 1046 (8th Cir. 2017); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *Ducharme v. Merrill-National Labs*., 574 F.2d 1307, 1309–10 (5th Cir. 1978); *Carr v. United States*, 422 F.2d 1007, 1010–11 (4th Cir. 1970). Because Plaintiffs have no property right in their tort claims, their due-process challenge must fail.[10]

Even if Plaintiffs could establish that a property right exists in a cause of action that had been abolished prior to the occurrence of an alleged tort, their contention that the Due Process Clause required Congress to provide "reasonably adequate alternative remed[ies]" in lieu of the

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and whether, at the statutory level, "Congress has left in place . . . substitute remedies").

[10] This action is therefore distinguishable from *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006), *aff'd on other grounds*, 875 N.E.2d 422 (Ind. Ct. App. 2007), the only case Plaintiffs cite as having "held that PLCAA is unconstitutional as a result of due process concerns." Pls.' S.D. Opp. at 20. In *City of Gary*, the plaintiffs had filed their lawsuit prior to the enactment of PLCAA, and thus the Act deprived them of a *pending* cause of action. *See City of Gary*, 875 N.E.2d at 424. The Court of Appeals of Indiana ultimately held that PLCAA did not bar the suit, without reaching the constitutional issue. *Id.* at 434–45.

"state tort claims" PLCAA preempted is meritless.[11] *See* Pls.' S.D. Opp. at 20. The Constitution imposes no such requirement. *See, e.g., Martinez v. California*, 444 U.S. 277, 280 (1980) (upholding statute barring tort suits over "[a]ny injury resulting from determining whether to parole or release a prisoner"); *Silver*, 280 U.S. at 121–22; *Schmidt*, 860 F.3d at 1048–49; *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (upholding against separation-of-powers challenge statute that provided that all actions relating to a single piece of property "shall be promptly dismissed"). Those cases are indistinguishable from this one. And in any event, as explained above, PLCAA does not completely abolish Plaintiffs' ability to seek redress" through other tort claims. *Ileto*, 565 F.3d at 1143.

B. PLCAA does not violate equal protection.

PLCAA cannot meaningfully be said to discriminate among classes of victims. Plaintiffs assert that the availability of different causes of action to plaintiffs in different states violates equal-protection principles. Pls.' S.D. Opp. at 21. But PLCAA merely preempts certain state law causes of action, and the so-called "classes" identified by Plaintiffs are not cognizable under equal protection. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring) (explaining that "the basic concern" of equal protection is with legislation "creat[ing] discrete and objectively identifiable classes"); *see also Boardman v. Inslee*, 978 F.3d 1092, 1117 (9th Cir. 2020) ("Our first step [in addressing an equal-protection claim] is to identify the [government's] classification of groups."); *cf. Hill v. Overton Cty.*, 205 F.3d 1340 at *1 (Table) (6th Cir. 2000) ("difference[s] in statutes of limitation do[] not implicate . . . equal protection"). Plaintiffs have therefore not identified a classification drawn by the statute that can be the subject of an equal-protection challenge. *See Boardman*, 978 F.3d at 1117 ("To prevail on their equal-protection claim, [the plaintiffs] must first show that a class that is similarly situated

[11] Plaintiffs' arguments on this score misapprehend the holding in *Duke Power Co*. *See* Pls.' S.D. Opp. at 20. As the Eighth Circuit has explained, "*Duke Power [Co.]* did not uphold the challenged act on the basis of a substitute remedy; it merely refused to strike the act for lacking one, because it did not lack one." *Schmidt*, 860 F.3d at 1049 (8th Cir. 2017); *accord Ileto*, 565 F.3d at 1144.

has been treated disparately." (alterations adopted and internal quotation marks and citations omitted)); *Wright v. Incline Vill. Gen. Improvement Dist.*, 665 F.3d 1128, 1140 (9th Cir. 2011) (holding that an "equal protection claim fail[ed] *ab initio*" because it did not identify disparately treated classes of individuals that were "alike in *all* relevant respects" (emphasis added)).

Further, even if an equal-protection challenge of this sort is cognizable, Plaintiffs' claim would be subject to rational-basis review (as Plaintiffs acknowledge, Pls.' S.D. Opp. at 21). *See Ileto*, 565 F.3d 1141 (there is no "suspect classification common to those adversely affected by the PLCAA"); *see also Minn. State Bd. For Comm. Colls. v. Knight*, 465 U.S. 271, 291 (1984) ("There being no . . . reason to invoke heightened scrutiny, the challenged [government] action need only" satisfy rational-basis review "to be valid under the Equal Protection Clause." (internal quotation marks and citation omitted)). Plaintiffs cannot show that PLCAA fails to "survive the exceedingly low level of judicial scrutiny mandated by the rational basis test," *see Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000), because, to do so, Plaintiffs must demonstrate that there is no "rational relationship between the disparity of treatment and some legitimate governmental purpose," *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993). Under rational-basis review, "[a] statute is presumed constitutional, and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *See id.* at 320–21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 364 (1973)). "Given the standard of review, it should come as no surprise that [courts] hardly ever strike[] down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

As a general rule, equal-protection principles do not require a legislature to treat all types of tort lawsuits identically when it acts to foreclose or limit tort liability. *See, e.g.*, *Miller v. United States*, 73 F.3d 878 (9th Cir. 1995); *Collins v. Schweitzer*, 21 F.3d 1491 (9th Cir. 1994). Here, "Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits," interstate commerce would be protected. *Ileto*, 565 F.3d at 1140–41; *see also N.Y. v. Beretta*, 401 F. Supp. 2d at 295. Congress also rationally concluded that the unpredictability of

common law tort actions could pose a greater threat to the firearms industry than would defined legislative enactments that are necessarily passed by democratically accountable actors. *See* 15 U.S.C. § 7901(a)(7) (expressing specific concern about the "expansion of liability" by a "judicial officer or petit jury"); *see also Martin v. Harrington & Richardson*, 743 F.2d 1200, 1204 (7th Cir. 1984) (judicially-created "liability for the sale of handguns . . . would in practice drive manufacturers out of business [and] produce a handgun ban by judicial fiat in the face" of constitutional and statutory protections of the right to keep and bear arms and associated rights). And Congress could rationally conclude that broad public interests, including the interests of federalism, comity among States, interstate commerce, and individual constitutional rights would be more likely to receive due consideration in a public legislative forum. *See Ziglar v. Abbasi,* 137 S. Ct. 1843, 1857 (2017). Any of these conclusions is all that is required under rational-basis review.[12] *See, e.g.*, *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1301 (C.D. Cal. 2006) (PLCAA advances a rational basis of "prevent[ing] a perceived undue burden on interstate commerce caused by what Congress has determined to be 'predatory' lawsuits against the firearms industry"); *see also Coxe*, 295 P.3d at 391–92; *Gilland*, 2011 WL 2479693, at *20–22.

IV. Federalism principles do not require that PLCAA be read narrowly.

Plaintiffs argue that principles of constitutional avoidance mandate the adoption of their particular, narrow interpretation of PLCAA. Pls.' S.W. Opp. at 18. Their interpretation may be correct, but if so, it is not for constitutional reasons. Constitutional avoidance requires "serious constitutional problems" of the sort not present here. *DeBartolo*, 485 U.S. 575, 587. Further, because core purposes of the statute are to *protect* federalism and constitutional rights, the statute should not be construed narrowly when doing so would frustrate those purposes. Finally, Plaintiffs' argument fails on its own terms because PLCAA makes explicit its intent to preempt state tort law.

[12] Indeed, it is *more* than is required under rational-basis review, because "a legislature that creates [non-suspect] categories need not actually articulate at any time the purpose or rationale supporting its classification." *Heller*, 509 U.S. at 320.

A. There is no serious constitutional question presented here.

As the Ninth Circuit explained in *Ileto*, courts "may invoke the doctrine" of constitutional avoidance "only [upon] 'grave doubts' about the constitutionality of [a] statute." 565 F.3d at 1143 (quoting *Almendarez–Torres v. United States*, 523 U.S. 224, 237–38 (1998)). This requires more than the "mere mention" of a constitutional problem, *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008), but "a *serious likelihood* that the statute will be held unconstitutional," *Ileto*, 565 F.3d at 1143 (internal quotation marks omitted). Here, as explained above, there are no serious constitutional problems with PLCAA, so avoidance principles do not apply. *See Ileto*, 565 F.3d at 1144 ("declin[ing] to apply the doctrine of constitutional avoidance").

Plaintiffs' authorities—*Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Bond v. United States*, 572 U.S. 844 (2014)—apply variations of the general constitutional-avoidance principle. In those cases, the Supreme Court explained that statutes should be narrowly construed if necessary to avoid "upset[ting] the usual constitutional balance of federal and state powers," thereby creating "a potential constitutional problem." *Gregory*, 501 U.S. at 460, 464; *accord Bond*, 572 U.S. at 858, 860. In *Gregory*, the Court expressed concern that interpreting federal law to invalidate a mandatory retirement age for state judges would undermine the "authority of a State's people to determine their government officials' qualifications," an authority "reserved to the States under the Tenth Amendment" that the Court suggested "may be inviolate." 501 U.S. at 463–64. In *Bond*, the constitutional risk existed because an expansive reading of the federal criminal statute would have permitted federal prosecution of "purely local crimes," a "dramatic[] intru[sion]" on "state criminal jurisdiction." *Id*. at 860, 863 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). The unremarkable preemption of state tort law in PLCAA raises no similar constitutional concern or federalism issue. *See Prescott*, 410 F. Supp. 3d at 1132 n.3 (rejecting argument that federalism principles stated in *Gregory* and *Bond* require "a narrower construction of the PLCAA"); *accord Travieso*, 2021 WL 913746, at *4–5; *Delana*, 486 S.W. 3d 322-23; *see Ileto*, 565 F.3d at 1135–46; *Riegel*, 552 U.S. at 326 (rejecting dissent and finding no serious

constitutional issue raised by preemption of tort laws where "the statute itself speaks clearly to the point").

B. A narrowing construction is not appropriate because PLCAA's core purposes include protecting principles of federalism and individual constitutional rights.

Plaintiffs' contention that the Court should deviate from the plain text of PLCAA in service of "federalism" rings hollow because Congress enacted PLCAA, in part, to *protect* federalism by precluding individual states from regulating commerce to the detriment of the sovereignty of other states, principles of federalism, and the Full Faith and Credit Clause. *See* 15 U.S.C. §§ 7901(b)(6),(7); H.R. Rep. No. 109-124 at 21–22 (2005) (documenting individual state and municipal "efforts at extraterritorial regulation").[13] In PLCAA, Congress recognized that this state-law backdrop presented a serious risk that the liability regimes of some states would thwart the commercial interests of other sovereign states and their protections for their citizens' rights to keep and bear arms. Where Congress acts to prevent States from transgressing on the system of constitutional federalism by "project[ing] . . . one [S]tate regulatory regime into the jurisdiction of another," such actions specifically advance the federal-state balance that "the Commerce Clause protects." *Healy v. Beer Inst.*, 491 U.S. 324, 336–37 (1989); *see also BMW*, 517 U.S. at 572 (discussing tort liability and "principles of state sovereignty").

Similarly, when Congress legislates to remedy the violation of constitutional rights, courts apply a presumption that the statute should be "broadly interpret[ed]" to effectuate its purpose, *Kang v. U. Lim Am. Inc.*, 296 F.3d 810, 816 (9th Cir. 2002), and greater deference to Congress's actions is warranted than where Congress acts to "restrict or deny" such rights, *Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966). At a minimum, such statutes are to be

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[13] This is well illustrated by the competing legislative measures adopted by neighboring jurisdictions during the years preceding enactment of PLCAA. For example, Virginia restricted municipal lawsuits against firearms manufacturers and others to ensure, *inter alia*, that the industry would remain capable of supporting the right to keep and bear arms. *See* Va. Code Ann. § 15.2-915.1 (2006). Meanwhile, at least one neighboring jurisdiction, the District of Columbia, imposed absolute liability on the makers of firearms for any injuries caused by some models of weapons. *See* D.C. Code Ann. §§ 7-2551.01 (2006).

interpreted according to their text, history, structure, and purpose, with reference to the findings and congressional determinations underpinning the statute. *See, e.g.*, *Nev. Dep't of Hum. Res.*, 538 U.S. at 738 (relying on statutory text and congressional determinations to affirm constitutionality of Family and Medical Leave Act); *Tennessee v. Lane*, 541 U.S. 509, 526-27 (relying on examples identified by Congress in upholding ADA).

Furthermore, as explained above, *see supra* 10–11, a major purpose of PLCAA is to protect the right to keep and bear arms recognized in the Second Amendment. *See* 15 U.S.C. § 7901(a)(1), (2), (b)(2). Because Congress reasonably acted to protect the right to keep and bear arms in light of the efforts by states, municipalities, and other litigants to interfere with that right by imposing liability on firearms retailers and manufacturers, the Constitution does not require interpreting PLCAA narrowly when doing so would frustrate the statutory purpose of protecting the right. *See CFTC v. Schor*, 478 U.S. 833, 841 (1986) (constitutional avoidance "does not give a court the prerogative to ignore the legislative will"); *Niece v. Fitzner*, 941 F. Supp. 1497, 1505 (E.D. Mich. 1996) ("[C]anon of statutory construction that remedial legislation should be construed broadly to effectuate its purposes . . . is also applied to civil rights statutes[.]").

C. Congress has plainly stated its intent to preempt state tort law.

In any event, PLCAA clearly indicates Congress's express intent to "prohibit causes of action" brought under state tort law. 15 U.S.C. § 7901(b)(1); *see id.* § 7902(a) (providing that covered tort actions "may not be brought in any Federal or State court"). The Ninth Circuit recognized this in *Ileto*, holding that "congressional intent [to preempt state tort claims] is clear from the text and purpose of the statute." 565 F.3d at 1142–43; *see also id.* at 1135–36; *accord Travieso*, 2021 WL 913746, at *5. Here, unlike in *Bond*, *see* 572 U.S. at 859–60, 863, it is well-established that Congress may preempt state tort causes of action, *see supra* 7–10, and there is therefore no reason to search for an ambiguity from which to override the statutory text. Likewise, Congress left no ambiguity in its statements of findings and purposes, where it established that PLCAA limits liability from "the harm caused by those who criminally or unlawfully misuse firearm products . . . that function as designed and intended." 15 U.S.C.

§ 7901(a)(5). Thus, "[b]ecause Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against [manufacturers and] sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues." *Delana*, 486 S.W.3d at 323; *accord Travieso*, 2021 WL 913746, at *4–5; *Prescott*, 410 F. Supp. 3d at 1132 n.3 ("reject[ing] . . . argument in favor of a narrower construction of the PLCAA").

CONCLUSION

For the foregoing reasons, the Constitution does not require the Court to invalidate PLCAA or to deviate from the text of PLCAA in construing the Act's terms.

Dated: June 8, 2021

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SANTA CLARA

WENDY TOWNER, *et al.*, Plaintiffs, v. GILROY GARLIC FESTIVAL ASSOCIATION, INC., *et al.*, Defendants.	Civil Case No. 19CV358256 Filing Fees Exempt for Federal Government Pursuant to Cal. Gov't Code § 6103 **BRIEF OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE CONSTITUTIONALITY OF THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT**

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INTRODUCTION

Pursuant to California Code of Civil Procedure section 387(d)(1) and sections 517 and 2403(a) of Title 28 of the United States Code, the United States of America has intervened in this case to present argument on the constitutional challenges to the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act"), 15 U.S.C. §§ 7901–7903, raised by Plaintiffs in their opposition to Defendant Century Arms, Inc.'s demurrer to Plaintiffs' fifth amended complaint ("Pls.' Opp."). At the outset, the United States takes no position on whether any claims asserted in Plaintiffs' complaint fall within the statutory scope of PLCAA or any of its exceptions. The principal arguments in Plaintiffs' opposition are statutory, and if the Court can resolve Defendant's motion without reaching the constitutional issues raised by Plaintiffs, it should do so. But if the Court reaches the question of PLCAA's constitutionality, it should uphold the law as constitutional.

Congress enacted PLCAA to "generally preempt[] claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products." *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1131 (9th Cir. 2009). Whatever the merits of those aims, it is well settled that the Act stands on firm constitutional ground:[1] Essentially "[e]very federal and state appellate court to address the constitutionality of the PLCAA has found it [to be] constitutional."[2] *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1222 (D. Colo. 2015) (collecting cases). Indeed, in prior litigation challenging PLCAA's constitutionality, courts have rejected virtually identical arguments to those advanced by Plaintiffs here. *See, e.g.*, *Ileto*, 565 F.3d at 1138–42 (holding PLCAA to be a valid exercise of Commerce Clause authority and rejecting due-process

[1] President Biden has called on Congress to repeal PLCAA—but whether Congress had the constitutional authority to enact PLCAA is distinct from the question whether this Administration thinks PLCAA remains good policy.

[2] The sole exception of which the United States is aware is a since-withdrawn opinion by an intermediate appellate court in Pennsylvania, in which the court departed from a wide body of case law by concluding that PLCAA was not a valid exercise of Congress's power under the Commerce Clause and that the Act violated the Tenth Amendment. *See Gustafson v. Springfield, Inc.*, No. 207 WDA 2019, slip op. at 55–56 (Pa. Super. Ct. Sept. 28, 2020), *reh'g en banc granted and opinion withdrawn* (Dec. 3, 2020).

and equal-protection challenges); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 392–93 (2d Cir. 2008) (rejecting Commerce Clause and Tenth Amendment challenges); *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533, 548–51 (D. Ariz. 2021) (holding PLCAA to be a valid exercise of Commerce Clause authority and rejecting Tenth Amendment, due-process, and equal-protection challenges); *Prescott v. Slide Fire Sols., LP*, 410 F. Supp. 3d 1123, 1146 (D. Nev. 2019) (rejecting due-process, equal-protection, and Tenth Amendment challenges); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 324 (Mo. 2016) (rejecting due-process and Tenth Amendment challenges); *Est. of Kim ex rel. Alexander v. Coxe* (*Coxe*), 295 P.3d 380, 390–91 (Alaska 2013) (rejecting due-process, equal-protection, and Tenth Amendment challenges); *Gilland v. Sportsmen's Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *18–20 (Conn. Super. Ct. May 26, 2011) (unpublished) (rejecting due-process and equal-protection challenges); *Adames v. Sheahan*, 909 N.E.2d 742, 764–65 (Ill. 2009) (rejecting Tenth Amendment challenge); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172–82 (D.C. 2008) (rejecting due-process challenge).

Despite the weight of precedent to the contrary, Plaintiffs contend that PLCAA is unconstitutional if construed to preempt their claims against Century Arms, *see* Pls.' Opp. at 8, 12, and that constitutional principles require certain provisions of the Act to be interpreted narrowly to avoid barring their claims, *see id.* at 6–8 & n.3—an argument that has likewise been squarely rejected, *see, e.g.*, *Ileto*, 565 F.3d at 1143 (refusing to invoke the doctrine of constitutional avoidance in construing PLCAA); *Travieso*, 526 F. Supp. 3d at 540–41; *Delana*, 486 S.W.3d at 323; *Prescott*, 410 F. Supp. 3d at 1132 n.3. As these courts have correctly held, Plaintiffs' constitutional arguments fail for the following reasons:

First, PLCAA does not exceed Congress's legislative authority. The Supreme Court has held that the Commerce Clause authorizes Congress to restrict litigation if Congress "could reasonably believe" that the restrictions would promote interstate commerce. *Pierce Cty. v. Guillen*, 537 U.S. 129, 147 (2003). "Congress carefully constrained [PLCAA's] reach to the confines of the Commerce Clause" by specifically limiting the preemptive scope of the Act to interstate or foreign commerce. *Ileto*, 565 F.3d at 1140; *see also* 15 U.S.C. § 7903(2) ("The term

'manufacturer' means . . . a person who is engaged in the business of manufacturing the product in interstate or foreign commerce[.]"); *id.* § 7903(4) ("The term 'qualified product' means a firearm . . . that has been shipped or transported in interstate or foreign commerce."); *id.* § 7903(6) (defining "[t]he term 'seller"' with reference to a three-part, disjunctive definition, all three parts of which refer to interstate or foreign commerce). And "[t]here 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," while leaving others to proceed. *Ileto*, 565 F.3d at 1140–41 (citation omitted).

Second, PLCAA does not violate the Tenth Amendment or otherwise interfere with the sovereign rights of the State of California. The Act, as a constitutional exercise of Congress's enumerated authorities, merely preempts certain state laws under the Supremacy Clause, consistent with constitutional principles of federalism. *See, e.g.*, *City of New York*, 524 F.3d at 397; *Travieso*, 526 F. Supp. 3d at 549–51; *Delana*, 486 S.W.3d at 322-23; *Coxe*, 295 P.3d at 388-89; *Adames*, 909 N.E.2d at 764-65. And because PLCAA does nothing more than provide state courts with "a rule of decision" in cases where state law conflicts with the Act's provisions, *see Kansas v. Garcia*, 140 S. Ct. 791, 801 (2020) (citation omitted), the Act does not violate the Tenth Amendment's anti-commandeering principle, which does not limit the obligation of state courts to faithfully apply federal law. *See* U.S. Const. art. VI, cl. 2; *Printz v. United States*, 521 U.S. 898, 928–29 (1997) ("[S]tate courts cannot refuse to apply federal law—a conclusion mandated by the terms of the Supremacy Clause.").

Third, Plaintiffs cannot succeed on their due-process claim because: (1) they have "no property, no vested interest" in common-law tort claims that had yet to accrue or be litigated at the time of PLCAA's enactment, *see Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978) (citation omitted); *see id.* ("[S]tatutes limiting liability are relatively commonplace and have consistently been enforced by the courts."); and (2) even if Plaintiffs had such a property interest, they have not been deprived of all remedies. *See Ileto*, 565 F.3d at 1140–44 (rejecting due-process challenge because, *inter alia*, "Congress has left in place a number of substitute remedies"); *accord District of Columbia*, 940 A.2d at 177 n.8.

Fourth, Plaintiffs' Fifth Amendment equal-protection argument fails because, as they acknowledge, the easily satisfied rational-basis standard applies to this claim, and "Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits," interstate commerce would be protected. *Ileto*, 565 F.3d at 1140–41; *see also City of New York v. Beretta U.S.A. Corp*. (*N.Y. v. Beretta*), 401 F. Supp. 2d 244, 295 (E.D.N.Y. 2005) (determining that Congress had a rational basis to find that "nationwide commerce in firearms was particularly imperiled by the threat" of the lawsuits restricted by the Act in rejecting equal-protection challenge to PLCAA, while finding that an exception to PLCAA applied to allow the suit), *rev'd on other grounds, City of New York*, 524 F.3d at 404 (equal protection not addressed). Congress also could rationally find that state legislative processes would provide a forum in which the interests of other states, interstate commerce as a whole, or the effects of tort liability would more likely be considered.

Fifth, and finally, the constitutional-avoidance doctrine is inapplicable here. That doctrine authorizes a court to choose among competing interpretations of a genuinely ambiguous statute only if necessary to avoid an interpretation that creates "serious constitutional problems." *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 238 (1998) ("[A court may] invoke the doctrine" of constitutional avoidance *only* when it finds there "is a serious likelihood that the statute will be held unconstitutional."). As explained above, there are no serious constitutional concerns with PLCAA, and therefore constitutional-avoidance principles are not implicated.

In short, PLCAA is constitutional. Plaintiffs' arguments to the contrary should therefore be rejected.

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STATUTORY BACKGROUND

PLCAA preempts certain tort actions that Congress determined would threaten to interfere with interstate and foreign commerce in firearms. *See* 15 U.S.C. § 7901. The Act provides that "[a] qualified civil liability action" against the manufacturers or sellers of firearms "may not be brought in any Federal or State court." *Id.* § 7902(a). A "qualified civil liability action" is defined to include any "civil action or proceeding . . . against a manufacturer or seller of a qualified product . . . for damages, punitive damages, injunctive or declaratory relief . . . or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party." *Id*. § 7903(5)(A). The Act's general bar on qualified civil liability actions applies only to suits concerning firearms that have "been shipped or transported in interstate or foreign commerce," *id.* § 7903(4), and it protects only manufacturers and sellers who engage in "interstate or foreign commerce," *id.* § 7903(2), (6).

PLCAA contains various exceptions that permit the filing of certain classes of actions that would otherwise be preempted.[3] *See id*. § 7903(5)(A)(i)–(vi). These include claims for negligent entrustment and negligence per se, *id*. § 7903(5)(A)(ii), claims for breach of contract or warranty, *id*. § 7903(5)(A)(iv), claims based on defective products when not "caused by a volitional act that constituted a criminal offense," *id*. § 7903(5)(A)(v), and claims based on knowing violations of statutes "applicable to the sale or marketing of the product," where "the violation was a proximate cause of the harm for which relief is sought," *id*. § 7903(5)(A)(iii).

By enacting PLCAA, Congress believed it was advancing three primary objectives, each of which is set forth in the statutory text. First, Congress had determined that the Act would ensure that "[b]usinesses 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 . . . in interstate or foreign commerce" will not be held "liable for the harm caused by those who criminally or unlawfully misuse firearm products." *Id*. § 7901(a)(5); *see also id.*

[3] In addition to these enumerated exceptions, PLCAA does not prohibit suits against individual users of firearms for the injuries they may cause. *See* 15 U.S.C. § 7902 (preempting only civil actions brought against firearm manufacturers and dealers).

§ 7901(b)(1). Second, Congress viewed the Act as protecting the "rights of individuals . . . to keep and bear arms," as recognized by the Second Amendment. *Id.* § 7901(a)(1)–(2); *see also id*. § 7901(b)(2). And third, Congress believed that the Act would protect certain "rights, privileges, and immunities guaranteed" by the Fourteenth Amendment, as well as "principles of federalism, State sovereignty and comity between the sister States." *Id*. § 7901(a)(7), (8); *see also id.* § 7901(b)(3), (6).

ARGUMENT

I. The Court should address Plaintiffs' constitutional challenges to PLCAA only if necessary to dispose of the pending motion.

Before reaching any question pertaining to PLCAA's constitutionality, the Court should first consider whether Century Arms' demurrer can be resolved on non-constitutional grounds. "It is a well established principle governing the prudent exercise" of a court's jurisdiction that a court "will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia Cty v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam); *accord Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). Application of this "fundamental rule of judicial restraint," *Jean v. Nelson*, 472 U.S. 846, 854 (1985) (citation omitted), is particularly appropriate here, where Plaintiffs oppose Century Arms' demurrer chiefly on statutory grounds, *see* Pls.' Opp. at 2–8, 12–14, and raise constitutional objections that are contingent on the Court rejecting their statutory arguments, *see id.* at 8 (asserting constitutional challenges to PLCAA "[i]n the [a]lternative"). Thus, if the Court can dispose of Century Arms' demurrer without reaching the constitutional issues raised by Plaintiffs, it should do so. *See N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) ("Before deciding [a] constitutional question, it [is] incumbent on [a] court[] to consider whether . . . statutory grounds might be dispositive.").

The United States takes no position on whether PLCAA or any of its exceptions apply to any of Plaintiffs' claims.

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II. PLCAA is a valid exercise of Congress's power under the Commerce Clause and the Supremacy Clause.

As courts have repeatedly recognized, PLCAA is a valid and straightforward exercise of congressional authority under the Commerce Clause and the Supremacy Clause. *See* U.S. Const. art. I, § 8; *id.* art. VI, cl. 2. The Constitution grants Congress the authority "[t]o regulate Commerce . . . among the several States," *id*. art. I, § 8, cl. 3, including "the power to regulate activities that substantially affect interstate commerce," as PLCAA does. *See Gonzales v. Raich*, 545 U.S. 1, 17 (2005). And where Congress has rationally determined that "economic activity substantially affects interstate commerce," the Supreme Court has made clear that "legislation regulating that activity will be sustained." *United States v. Lopez*, 514 U.S. 549, 560 (1995); *see also Gonzales*, 545 U.S. at 22 ("In assessing the scope of Congress' authority under the Commerce Clause, . . . [a court] need not determine whether . . . activities, taken in the aggregate, substantially affect interstate commerce in fact, but only whether a 'rational basis' exists for so concluding." (citation omitted)); *Hodel v. Va. Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) ("The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme.").

Congress enacted PLCAA because it concluded, in relevant part, that lawsuits "commenced against manufacturers, distributors, [and] dealers . . . 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, . . . constitute[] an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(3), (6). In light of Congress's findings, the Ninth Circuit "ha[d] 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 1140–41. And the Second Circuit concluded similarly that Congress could not have "exceeded its authority" in enacting PLCAA "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.

In preempting qualified civil liability actions to protect this commercial activity, Congress took care to ensure that the required "nexus to interstate commerce" was present in the text of the statute. *See Lopez*, 514 U.S. at 562. PLCAA prohibits only lawsuits brought against entities that manufacture or sell firearms "in interstate or foreign commerce," 15 U.S.C. § 7903(2), (6), and bars only those suits concerning firearms "that ha[ve] been shipped or transported in interstate or foreign commerce," *id.* § 7903(4). These statutory provisions ensure that Congress does not regulate "'truly local' matters," *City of New York*, 524 F.3d at 394 (quoting *United States v. Morrison*, 529 U.S. 598, 618 (2000)), and thus "carefully constrain[] the Act's reach to the confines of the Commerce Clause," *Ileto*, 565 F.3d at 1140.

Furthermore, while tort law issues are generally left to the states, Congress can, by operation of the Supremacy Clause, preempt state tort law if it imposes a burden on interstate commerce and Congress clearly manifests an intent to preempt it. *See* U.S. Const. art. VI, cl. 2 ("[T]he Laws of the United States . . . shall be the [S]upreme Law of the Land; and the Judges in every State shall be bound thereby . . . ."); *see also, e.g.*, *Wyeth v. Levine*, 555 U.S. 555, 565 (2009); *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 484–503 (1996). PLCAA expresses Congress's clear intention to preempt "qualified civil liability actions." *See Ileto*, 565 F.3d at 1135 (noting that "Congress clearly intended to preempt common-law claims, such as general tort theories of liability"); 15 U.S.C. § 7901(b)(1) (describing the statute's purpose "[t]o prohibit" victims of gun violence from bringing "causes of action against manufacturers, distributors, [and] dealers . . . of firearms"); *id.* § 7902(a) ("A qualified civil liability action may not be brought in any Federal or State court.").

As noted above, courts have relied on (i) Congress's findings in PLCAA regarding the effect of firearms liability on interstate and foreign commerce, (ii) the interstate nexus in the statutory text confining PLCAA's scope within the ambit of the Commerce Clause, and (iii) the well-established law outlined above, to hold that Congress lawfully acted within its authority in preempting qualified civil liability actions through PLCAA. *See, e.g.*, *Ileto*, 565 F.3d at 1141–42; *City of New York*, 524 F.3d at 394–95; *Travieso*, 526 F. Supp. 3d at 549–50; *Adames*, 909 N.E.2d at 764–65. This Court should reach the same result.

Against the weight of these precedents, however, Plaintiffs suggest that *Murphy v. National Collegiate Athletic Ass'n*, 138 S. Ct. 1461 (2018), requires a different result. *See* Pls.' Opp. at 9. Plaintiffs rest this argument on *Murphy*'s recitation of the established principle that "every form of preemption is based on a federal law that regulates the conduct of private actors, not the States." 138 S. Ct. at 1481; *see also, e.g.*, *New York v. United States*, 505 U.S. 144, 166 (1992) ("[The] Constitution . . . confers upon Congress the power to regulate individuals, not States."). In Plaintiffs' view, PLCAA is an impermissible form of preemption because it "regulates" state governments by "commanding" how they must apply state law and how state courts may exercise their authority. *See* Pls.' Opp. at 9–10. But as the Ninth Circuit has explained, "the *only* function of PLCAA is to preempt certain claims," namely, those brought by *private* litigants in federal or state court. *Ileto*, 565 F.3d at 1138 (emphasis added). It is thus by the simple operation of the Supremacy Clause that the Act "provides 'a rule of decision'" in cases where state law conflicts with the provisions of PLCAA. *See Murphy*, 138 S. Ct. at 1479–80 (quoting *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324 (2015)).

To the extent Plaintiffs suggest that PLCAA's mere preemption of qualified civil liability actions is the equivalent of "regulat[ing] . . . the States," *see Murphy*, 138 S. Ct. at 1481, this contention is mistaken. It is axiomatic that Congress's Commerce Clause authority includes the power to preempt state tort laws (as Plaintiffs appear to concede, *see* Pls.' Opp. at 9–10). *See, e.g.*, *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 323–24 (2008). Liability rules—like those contained in PLCAA—are a form of economic regulation. *See, e.g.*, *id.* at 323–25 (recognizing that "[s]tate tort law," including "common-law duties," imposes regulatory standards on manufacturers); *Kurns v. A.W. Chesterton Inc.*, 620 F.3d 392, 398 (3d Cir. 2010) (explaining that "the purpose of" tort suits against companies, such as "state product liability suits against manufacturers . . . is, in part, to persuade [manufacturers] to comply with a standard of care established by the state"), *aff'd sub nom. Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625 (2012). Indeed, Congress made clear that it intended to exercise its Commerce Clause authority in PLCAA based on the economic nature of tort-liability actions, finding that qualified civil liability actions "seek money damages," threaten to "destabiliz[e] . . . industries and economic sectors," and "unreasonabl[y] burden . . .

interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(3), (6). The adjustment of the rules of liability under PLCAA is thus a type of regulation of economic activity within the core of Congress's Commerce Clause power.[4] *See Morrison*, 529 U.S. at 613 (reaffirming longstanding authority for "Commerce Clause regulation of intrastate activity . . . where that activity is economic in nature"); *see also City of New York*, 524 F.3d at 393–95 (rejecting the contention that PLCAA regulates activity that "is not commercial in nature," because Congress could rationally conclude that qualified civil liability actions directly and substantially affect "the firearms industry").

Furthermore, the Supreme Court has long recognized that Congress's Commerce Clause authority includes the ability to regulate both substantive and procedural elements of liability in state proceedings when justified by findings of an effect on interstate commerce. In *Pierce County*, for example, the Supreme Court rejected a Commerce Clause challenge to a restriction on the use of certain types of evidence in federal or state courts. *See* 537 U.S. at 134.[5] In that case, the Court overruled a decision by a state supreme court holding that this evidentiary rule, when applied to state-court litigation, lacked a nexus to interstate commerce. *See Guillen v. Pierce Cty.*, 31 P.3d 628, 654 (Wash. 2001). In reversing, the Court explained that the evidentiary rules fell

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[4] Plaintiffs are thus incorrect to suggest that PLCAA exceeds Congress's Commerce Clause authority because it purportedly does not regulate "commercial" activity, *see* Pls.' Opp. at 9. This argument is premised on an erroneous line of reasoning from the withdrawn opinion in *Gustafson*, where the court determined that the plaintiff or third-party victim must also participate in interstate commerce (*i.e.*, "a commercial transaction with the gun industry") for PLCAA to constitute a valid enactment under the Commerce Clause. *Gustafson*, slip op. at 37–39. The court reached this conclusion by misapplying *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), which held that the Affordable Care Act's individual mandate, in compelling individuals who did not participate in the insurance market to purchase insurance, failed to regulate existing commercial activity. *Id.* at 561.

[5] Specifically, the provision at issue barred from evidence "reports, surveys, schedules, lists, or data compiled for the purpose of identifying[,] evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to [federal statutes] or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds," in any "action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data." *Pierce Cty.*, 537 U.S. at 134 (quoting Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, § 132, 101 Stat. 132, 170).

within Congress's Commerce Clause power "to assist state and local governments in reducing hazardous conditions" that, in turn, would affect "the Nation's channels of commerce." *Pierce Cty.*, 537 U.S. at 147. In enacting PLCAA, Congress identified a far more direct effect on interstate commerce: The risk that litigation will disrupt an economically significant industry. And nothing in *Murphy* indicates that the Supreme Court intended to overrule *Pierce County* and other precedents affirming Congress's authority to enact legislation to limit tort liability. *See Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 190 (1990) (explaining that there is no "*sub silentio* overrul[ing]" of prior Supreme Court precedent); *Hohn v. United States*, 524 U.S. 236, 252–53, (1998) ("Our decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality.").

III. PLCAA does not violate the Tenth Amendment.

As a valid exercise of Congress's power under the Commerce Clause, PLCAA does not invade an area of authority reserved to the states or otherwise contravene the Tenth Amendment. Plaintiffs' arguments to the contrary are without constitutional foundation, as numerous federal and state courts have held. *See, e.g.*, *City of New York*, 524 F.3d at 397; *Travieso*, 526 F. Supp. 3d at 549–51; *Delana*, 486 S.W.3d at 323–24; *Adames*, 909 N.E.2d at 764–65; *Coxe*, 295 P.3d at 388–89; *Prescott*, 410 F. Supp. 3d at 1146.

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 powers specifically delegated to Congress under Article I of the Constitution "are not powers that the Constitution 'reserved to the States.'" *United States v. Comstock*, 560 U.S. 126, 144 (2010); *accord New York*, 505 U.S. at 156 ("If a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States[.]"). As a result, the "inquiries" under the Commerce Clause and the Tenth Amendment are, in large part, "mirror images of each other." *New York*, 505 U.S. at 156; *see also Brackeen v. Haaland*, 994 F.3d 249, 298 (5th Cir. 2021) (en banc) (op. of Dennis, J.), *cert. granted*, --- S. Ct. ----, 2022 WL 585885 (2022) (Mem.). It is thus an axiom that Congress does not "invade[] areas reserved to the States by the Tenth Amendment simply

because it exercises *its* authority under the Commerce Clause," even "in a manner that displaces the States' exercise of their police powers." *Hodel*, 452 U.S. at 291 (emphasis added); *accord Brackeen*, 994 F.3d at 310 ("[T]he Federal Government, when acting within a delegated power, may override countervailing state interests, whether those interests are labeled traditional, fundamental, or otherwise." (cleaned up)); *see also United States v. Mikhel*, 889 F.3d 1003, 1024 (9th Cir. 2018) ("[I]f Congress acts under one of its enumerated powers . . . then there can be no violation of the Tenth Amendment." (internal quotation marks and citation omitted)).

Therefore, where (as here) a federal statute is validly enacted under one of Congress's constitutionally enumerated powers, the only relevant question under the Tenth Amendment is whether the statute unlawfully "commandeers" states' legislative processes or executive officials to enact or administer a federal regulatory program. *See, e.g.*, *Kelley v. United States*, 69 F.3d 1503, 1509 (10th Cir. 1995) ("Having concluded that [the statute] was a proper exercise of the commerce power by Congress, the only remaining question we must decide is whether Congress, in enacting [the statute], somehow commandeer[s] the legislative processes of the States." (cleaned up)); *accord Brackeen*, 994 F.3d at 299; *Connecticut v. Physicians Health Servs. of Conn., Inc*., 287 F.3d 110, 122 (2d Cir. 2002); *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 213–14 (4th Cir. 2002); *United States v. Kenney*, 91 F.3d 884, 891 (7th Cir. 1996); *cf. City of Portland v. United States*, 969 F.3d 1020, 1049 (9th Cir. 2020), *cert. denied sub nom. City of Portland v. FCC*, 141 S. Ct. 2855 (2021) (Mem.). As the Supreme Court has explained, the Tenth Amendment's anti-commandeering principle acknowledges a constitutional limitation of "the circumstances under which Congress may use the States as implements of [federal] regulation." *New York*, 505 U.S. at 161. For example, the federal statute at issue in *New York* unconstitutionally "'commandeer[ed]' state governments" by forcing state legislatures or executive officials to enact state regulation according to Congress's instructions. 505 U.S. at 175. In *Printz*, the federal statute comparably "conscript[ed]" local law enforcement officials by requiring them to perform background checks in connection with firearms sales. 521 U.S. at 935. And in *Murphy*, the federal statute "commandeered the state legislative process" by

"command[ing] state legislatures to . . . refrain from enacting [new] state law[s]." 138 S. Ct. at 1478–79.

PLCAA does none of these things, as its "only function . . . is to preempt certain [state tort] claims." *Ileto*, 565 F.3d at 1138. But Plaintiffs nevertheless maintain that PLCAA violates the Tenth Amendment because, they contend, it infringes on states courts' "ability . . . to exercise lawmaking authority in a given way." Pls.' Opp. at 10. The Second Circuit rejected this exact argument in *City of New York*, *see* 524 F.3d at 396–97, as have multiple other courts, *see Travieso*, 526 F. Supp. 3d at 550–51; *Delana*, 486 S.W.3d at 323–24; *Coxe*, 295 P.3d at 388–92; *Adames*, 909 N.E.2d at 764–65. As the Second Circuit explained, "the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states," *City of New York*, 524 F.3d at 396, and PLCAA "does not commandeer *any* branch of state government because it imposes no affirmative duty of any kind on any of them," *id.* at 397 (cleaned up with emphasis added); *see also, e.g.*, *Coxe*, 295 P.3d at 389 ("PLCAA does not *compel* Alaska's legislature to enact any law, nor does it commandeer any branch of Alaska's government."); *Delana*, 486 S.W.3d at 323 ("PLCAA does not commandeer the executive or legislative branch of Missouri government."). Rather, because PLCAA does nothing more than "expressly preempt[] conflicting state tort law," *Coxe*, 295 P.3d at 389, it "requires only that [a] state court[], *consistent with the Supremacy Clause*, immediately dismiss any preempted" qualified civil liability action, *Delana*, 486 S.W.3d at 323–24 (emphasis added).

Plaintiffs' arguments fail to appreciate that the Tenth Amendment does not limit the obligation of state *courts* to faithfully apply federal law, *contra* Pls.' Opp. at 10–11—an obligation enshrined in the text of the Supremacy Clause, under which federal law is the "supreme Law of the Land" and "the Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. And although "federal statues enforceable in state courts do, in a sense, direct state judges to enforce them, this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause" and does not implicate the Tenth Amendment. *Brackeen*, 994 F.3d at 317 (alterations adopted) (quoting *New York*, 505 U.S. at 178–79); *accord id.* at 402–03 (op. of Duncan, J.); *Printz*, 521 U.S. at 928–29 ("[S]tate courts cannot refuse to apply federal law—a

conclusion mandated by the terms of the Supremacy Clause."). Accordingly, "when considering whether a federal law violates the anticommandeering doctrine, the Supreme Court has consistently drawn a distinction between a state's *courts* and its *political branches*." *Brackeen*, 994 F.3d at 317 (emphasis added). And because PLCAA does nothing more than provide state courts with "a rule of decision" in cases where state law conflicts with the Act's provisions, *see Murphy*, 138 S. Ct. at 1479–80 (quoting *Armstrong*, 575 U.S. at 324), the Act does not violate the Tenth Amendment's anti-commandeering principle.

Plaintiffs' Tenth Amendment challenge to PLCAA fails for several additional reasons. *First*, PLCAA does not effect a wholesale shift of power between the state judiciary and the state legislature, as Plaintiffs appear to suggest.[6] *See* Pls. Opp. at 10–11, 12. As noted above, the exceptions to PLCAA preserve claims that may be validly created by either the legislature or the judiciary, including negligent entrustment, negligence per se, breach of contract or warranty, and defective design or manufacture. 15 U.S.C. § 7903(5)(A)(ii), (iv), (v). Because the standards for all of these could come from either statutory or common law, it is simply not the case that PLCAA "prohibit[s]" states from using "judicially-created common law" to "fashion[] liability standards applicable to the firearms industry." *See* Pls.' Opp. at 10. Instead, PLCAA leaves states free to allocate their decision-making authority as they see fit. States may regulate (or decline to regulate) firearms through whichever branch of government they choose, and state courts can recognize whichever common-law causes of action they wish. It is only in the context of a specific lawsuit that a state cause of action will be preempted by PLCAA where a court finds that the claim is in conflict with the Act's provisions. *See Kansas*, 140 S. Ct. at 801 ("The [Supremacy] Clause

[6] Plaintiffs presumably ground this contention in Congress's choice to include an exception in PLCAA for certain statutory claims but not equivalent common-law claims—a provision known as PLCAA's "predicate exception." *See* 15 U.S.C. § 7903(5)(A)(iii); *see also* Pls.' Opp. at 12 (citing 15 U.S.C. § 7903(5)(A)(iii)). In *Ileto*, the Ninth Circuit explained this "predicate exception" in detail, noting that, to invoke the exception, a plaintiff must, *inter alia*, "allege a knowing violation of a 'predicate statute,'" *i.e.*, "a State or Federal statute applicable to the sale or marketing of the product." 565 F.3d at 1132–33 (citations omitted). The specifics of the "predicate exception" have no bearing on the error underlying Plaintiffs' contention, however.

provides 'a rule of decision' for determining whether federal or state law applies in a particular situation." (citation omitted)).

Second, Plaintiffs' claim lacks legal support. Plaintiffs point to no authority invalidating a federal statute on the grounds they urge.[7] The state court decision in *In re Vargas*, 10 N.Y.S.3d 579 (N.Y. App. Div. 2015), does not indicate a constitutional flaw in PLCAA. *See Travieso*, 526 F. Supp. 3d at 551 (rejecting this precise argument). There, a federal statute prohibited states from issuing professional licenses to undocumented immigrants absent a new state enactment authorizing the license grant, *see* 8 U.S.C. § 1621, but New York law provided that only the judiciary could wield the "sovereign authority" of the state. *Vargas*, 10 N.Y.S.3d at 582. Here, Plaintiffs point to nothing in California law preventing the legislature from enacting tort laws, and Plaintiffs do not argue that PLCAA prevents the state legislature from taking such action.

Plaintiffs' reliance on *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is similarly misplaced. That case, which stands for the proposition that "[t]here is no federal general common law," does not bar *preemption* of state tort law. *Erie*, 304 U.S. at 78. And the language that Plaintiffs cite does not apply where "matters [are] governed by the Federal Constitution or by acts of Congress," as is the case here. *Id*.; *see also Lehman Bros. v. Schein*, 416 U.S. 386, 389 (1974) (explaining that, under *Erie*, a state is free to make its own common law, "providing there is no overriding federal rule which pre-empts state law" through federal regulation of "the stream of commerce"); *Franco v. Mabe Trucking Co.*, 3 F.4th 788, 798 (5th Cir. 2021) ("The *Erie* doctrine is not implicated when a valid federal rule or statute directly governs the matter at issue. When a valid federal rule or statute is directly controlling, it must be applied, for it preempts any contrary state

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[7] Indeed, the withdrawn opinion in *Gustafson*, *see supra* n.2, is the only purported source of authority Plaintiffs cite that supports their Tenth Amendment challenge. *See* Pls.' Opp. at 9, 11. There, the court found that PLCAA violates the Tenth Amendment because "PLCAA is tort reform" rather than industry regulation. *Gustafson*, slip op. at 57. But it is well-established that Congress may expressly preempt state tort laws to limit liability and promote federal interests. *See Garcia v. Vanguard Car Rental U.S.A., Inc*., 540 F.3d 1242, 1252–53 (11th Cir. 2008) (rejecting challenge to federal preemption of state tort liability for car-rental agencies); *Hammond v. United States*, 786 F.2d 8, 15 (1st Cir. 1986) (finding that preemption of tort remedies under Atomic Weapons Testing Liability Act did not violate Tenth Amendment); *Sparks v. Wyeth Lab'ys, Inc*., 431 F. Supp. 411, 419 (W.D. Okla. 1977) (finding that preemption of tort remedies under Swine Flu Act did not violate Tenth Amendment).

law, rule, or practice under the normal operation of the Supremacy Clause." (citations omitted)). For these reasons, too, PLCAA does not offend the Tenth Amendment.

IV. PLCAA does not violate the Fifth Amendment.

Plaintiffs also contend that PLCAA violates the Fifth Amendment's due-process and equal-protection components. *See* Pls.' Opp. at 11–12. Identical claims have been rightly rejected by numerous courts for the reasons set forth below.

A. PLCAA does not violate due process.

To successfully advance a due-process claim, a plaintiff must demonstrate both a "depriv[ation] of life, liberty, or property" and that the deprivation was "without due process of law." U.S. Const. amend. V; *see also Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) ("[W]e are faced with what has become a familiar two-part inquiry: we must determine whether [the plaintiff] was deprived of a protected interest, and, if so, what process was his due."). Plaintiffs' claim that PLCAA violates due process by "completely" depriving plaintiffs of "any remed[ies]" against the firearms industry, Pls.' Opp. at 11, is factually incorrect and, at any rate, establishes neither a deprivation of property nor a lack of process.

As an initial matter, it is simply not the case that PLCAA "utterly" denies Plaintiffs the ability to seek redress for their injuries. *See id*. Indeed, Plaintiffs have sought recovery from multiple entities whose alleged negligence and unlawful conduct, Plaintiffs claim, caused their injuries. *See* Fifth Am. Compl. ¶¶ 17–112; *see also* 15 U.S.C. § 7903(5)(A) (prohibiting only civil or administrative actions against manufacturers or sellers of qualified products, or trade associations representing such entities). And Plaintiffs may also sue the manufacturers, distributors, and sellers of the firearm used in the shooting under any claim that falls within the text of PLCAA's exceptions. *See* 15 U.S.C. § 7903(5)(A)(i)–(vi). For these reasons, the Ninth Circuit correctly held in *Ileto* that "PLCAA does not completely abolish Plaintiffs' ability to seek redress,"[8] 565 F.3d at 1143, and other courts have agreed, *see, e.g.*, *Travieso*, 526 F. Supp. 3d at

[8] In *Ileto*, the Ninth Circuit held that plaintiffs could "proceed on their claims" against only a single defendant and, in response to the dissent, explained that this possibility sufficiently ensured that the "ability to seek redress ha[d] been limited, but not abolished." 565 F.3d at 1143;

549 (finding an identical argument to be "plainly factually incorrect" because the plaintiff could "still pursue [other] remedies"); *District of Columbia*, 940 A.2d at 177 n.8 ("Congress did not deprive injured persons of all potential remedies against manufacturers or sellers of firearms that discharge causing them injuries."); *Coxe*, 295 P.3d at 390–91; *Delana*, 486 S.W.3d at 324; *Gilland*, 2011 WL 2479693, at *18–20 ("PLCAA contains numerous exceptions and comes nowhere near setting aside all common-law rules concerning firearm manufacturers.").

In any event, it is black-letter law that there is no constitutional property right in common-law tort claims that have yet to accrue or be litigated, and thus, when Congress enacted PLCAA in 2005, it deprived Plaintiffs of no protected property interest. The Constitution "does not forbid the creation of new rights, or the abolition of old ones recognized by the common law, to attain a permissible legislative object." *Silver v. Silver*, 280 U.S. 117, 122 (1929). Accordingly, "[n]o person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged for his benefit." *N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917); *accord Duke Power*, 438 U.S. at 88 n.32 ("[A] person has no property, no vested interest, in any rule of the common law." (quoting *Mondou v. N.Y., New Haven, & Hartford R.R. Co.*, 223 U.S. 1, 50 (1912)). For this reason, the Ninth Circuit in *Ileto* held that "a party's property right in any cause of action does not vest until a final unreviewable judgment is obtained." 565 F.3d at 1141 (citation omitted). Numerous other courts of appeals have likewise concluded that there are no protected property interests in pre-judgment tort claims, including those already pending. *See, e.g.*, *Scarlett v. Air Methods Corp.*, 922 F.3d 1053, 1069 (10th Cir. 2019); *Schmidt v. Ramsey*, 860 F.3d 1038, 1046 (8th Cir. 2017); *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); *Garcia v. Wyeth-Ayerst Lab'ys*, 385 F.3d 961, 968 (6th Cir. 2004); *Lucas v. United States*, 807 F.2d 414, 421–22 (5th Cir. 1986); *Carr v. United States*, 422 F.2d 1007, 1010–11 (4th Cir. 1970). Because Plaintiffs have no property right in their tort claims, their due-process challenge must fail.[9] *See Am. Mfrs. Mut. Ins.*

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see id. at 1144 (noting that the relevant analysis is whether the *statute* "contains . . . exceptions" and whether, at the statutory level, "Congress has left in place . . . substitute remedies").

[9] This action is therefore distinguishable from *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006), *aff'd on other grounds*, 875 N.E.2d 422

Co. v. Sullivan, 526 U.S. 40, 59 (1999) ("The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'").

Even if Plaintiffs could establish that they possess a protected property right in their tort claims, they fail to explain *how* a deprivation of that property right would violate due process. Plaintiffs' argument appears to assume that the Due Process Clause requires Congress to provide plaintiffs with some alternative method of recovery when it preempts state tort claims. *See* Pls.' Opp. at 11. But the Constitution imposes no such requirement, as courts have made clear in cases materially indistinguishable from this one. *See, e.g., Martinez v. California*, 444 U.S. 277, 280 (1980) (upholding against a due-process challenge a state statute barring tort suits over "[a]ny injury resulting from determining whether to parole or release a prisoner" (citation omitted)); *Silver*, 280 U.S. at 121–22; *Schmidt*, 860 F.3d at 1048–49; *see also Duke Power*, 438 U.S. at 87–88 (declining to decide whether "the Due Process Clause in fact requires" Congress to either "duplicate the recovery at common law or provide a reasonable substitute remedy" when it preempts common-law or state tort law remedies, finding that proposition "not at all clear" given the absence of a protected property interest in common-law rights); *Ileto*, 565 F.3d at 1144 ("[In *Duke Power*], the Court reiterated that it was an open question whether a legislature may abolish a common-law recovery scheme without providing a reasonable substitute remedy."); *cf. Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (upholding against a separation-of-powers challenge a statute that provided that all actions relating to a single piece of property "shall be promptly dismissed"). Plaintiffs have thus identified no authority to support their theory of due process.

B. PLCAA does not violate equal protection.

The Court need not subject PLCAA to any degree of equal-protection scrutiny because the Act cannot meaningfully be said to discriminate among various classes of tort victims. *See,*

(Ind. Ct. App. 2007), the only case Plaintiffs cite as having "held that the PLCAA is unconstitutional as a result of due process concerns." Pls.' Opp. at 11. In *City of Gary*, the plaintiffs had filed their lawsuit prior to the enactment of PLCAA, and thus the Act deprived them of a *pending* cause of action. *See City of Gary*, 875 N.E.2d at 424. The Court of Appeals of Indiana ultimately held that PLCAA did not bar the suit, without reaching the constitutional issue. *Id.* at 434–45.

e.g., *SECSYS, LLC v. Vigil*, 666 F.3d 678, 688 (10th Cir. 2012) ("Before a court may get to the business of assessing the rationality of a" government action challenged on equal-protection grounds, "some evidence of intentional discrimination against a particular class of persons must be present."). Plaintiffs assert, however, that the availability of different causes of action to potential plaintiffs in different states violates equal-protection principles. Pls.' Opp. at 12. But PLCAA's "only function" is to preempt certain state law causes of action, *Ileto*, 565 F.3d at 1138; it does not "create discrete and objectively identifiable classes" of tort victims. *See San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 60 (1973) (Stewart, J., concurring); *accord Corey Airport Servs., Inc. v. Clear Channel Outdoor, Inc.*, 682 F.3d 1293, 1296–97 (11th Cir. 2012) ("[N]o valid equal protection claim [can] exist[]" in the absence "of a discrete and identifiable group to which [the plaintiff] belonged and which the [government] treated in a discriminatory, prejudicial manner" under a "governmental classification[.]"). Plaintiffs have therefore not identified a classification drawn by the statute that can be the subject of an equal-protection challenge. *See Roy v. Barr*, 960 F.3d 1175, 1181 (9th Cir. 2020) ("To prevail on [an] equal-protection claim, [a plaintiff] must show that a class that is similarly situated has been treated disparately. In analyzing [the plaintiff's] claim, [a court] first identif[ies] the government's classification of groups in the statute." (cleaned up)).

But even assuming for argument's sake that Plaintiffs had identified similarly situated classes of tort victims who are treated disparately under PLCAA, their claim would be subject only to rational-basis review (as Plaintiffs appear to acknowledge, *see* Pls.' Opp. at 12). *See Boardman v. Inslee*, 978 F.3d 1092, 1118 (9th Cir. 2020) (explaining that a statute that does not "impinge[] upon a fundamental right" or "proceed[] along suspect lines" "need only rationally further a legitimate [government] purpose to be valid under the Equal Protection Clause" (internal quotation marks and citations omitted)); *accord Minn. State Bd. For Cmty. Colls. v. Knight*, 465 U.S. 271, 291 (1984); *see also Ileto*, 565 F.3d at 1141 (there is no "suspect classification common to those adversely affected by the PLCAA"). Plaintiffs cannot show that PLCAA fails to survive this "exceedingly low level of judicial scrutiny," *see Aleman v. Glickman*, 217 F.3d 1191, 1201 (9th Cir. 2000), because, to do so, Plaintiffs must demonstrate that there is no "rational

relationship between the disparity of treatment and some legitimate governmental purpose," *Heller v. Doe ex rel. Doe*, 509 U.S. 312, 320 (1993). Under rational-basis review, "[a] statute is presumed constitutional, and 'the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it,' whether or not the basis has a foundation in the record." *See id.* at 320–21 (quoting *Lehnhausen v. Lake Shore Auto Parts Co*., 410 U.S. 356, 364 (1973)). "Given the standard of review, it should come as no surprise that [courts] hardly ever strike[] down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

As a general rule, equal-protection principles do not require a legislature to treat all types of tort lawsuits identically when it acts to foreclose, limit, or otherwise adjust the rules of tort liability. *See, e.g.*, *Duke Power*, 438 U.S. at 93–94; *Gross v. United States*, 771 F.3d 10, 13–16 (D.C. Cir. 2014); *Miller v. United States*, 73 F.3d 878, 879–83 (9th Cir. 1995); *Collins v. Schweitzer*, 21 F.3d 1491, 1494 (9th Cir. 1994); *Benton v. United States*, 960 F.2d 19, 22–23 (5th Cir. 1992); *Vanderwater v. Hatch*, 835 F.2d 239, 243–44 (10th Cir. 1987); *Kranson v. Valley Crest Nursing Home*, 755 F.2d 46, 52–53 (3d Cir. 1985); *Schloss v. Matteucci*, 260 F.2d 16, 17–18 (10th Cir. 1958); *Carton v. Gen. Motors Acceptance Corp.*, 639 F. Supp. 2d 982, 991–92 (N.D. Iowa 2009)*, aff'd on other grounds*, 611 F.3d 451 (8th Cir. 2010); *M.D. v. United States*, 745 F. Supp. 2d 1274, 1278–81 (M.D. Fla. 2010). And here, "Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits," interstate commerce would be protected. *Ileto*, 565 F.3d at 1140–41; *see also N.Y. v. Beretta*, 401 F. Supp. 2d at 295. Congress also could rationally conclude that the unpredictability of common law tort actions could pose a greater threat to the firearms industry than would defined legislative enactments that are necessarily passed by democratically accountable actors. *See* 15 U.S.C. § 7901(a)(7) (expressing specific concern about the "expansion of liability" by a "judicial officer or petit jury"); *see also Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (judicially-created "liability for the sale of handguns . . . would in practice drive manufacturers out of business[and] produce a handgun ban by judicial fiat"). And Congress could rationally conclude that broad public interests, including the interests of federalism, comity among States, interstate commerce,

and individual interests would be more likely to receive due consideration in a public legislative forum. *See Ziglar v. Abbasi,* 137 S. Ct. 1843, 1857 (2017). Any one of these conclusions is all that is required under rational-basis review, as a number of courts have found.[10] *See, e.g.*, *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274, 1301 (C.D. Cal. 2006) (finding that PLCAA advances a rational basis of "prevent[ing] a perceived undue burden on interstate commerce caused by what Congress has determined to be 'predatory' lawsuits against the firearms industry"), *aff'd*, 565 F.3d 1126 (9th Cir. 2009); *Ileto*, 565 F.3d at 1140; *Travieso*, 526 F. Supp. 3d at 549; *Coxe*, 295 P.3d at 391–92; *Gilland*, 2011 WL 2479693, at *20–22.

Furthermore, it was not irrational or incongruous for Congress to prohibit only qualified civil liability actions while allowing other types of civil actions to proceed against firearm manufacturers and distributors. Although Congress enacted PLCAA to protect the firearm industry from liability "for the harm caused by those who criminally or unlawfully misuse firearm products," *see* 15 U.S.C. § 7901(a)(5), Congress was "free to address itself to what it believe[d] to be the most serious aspect of [the] broader problem," *see Michael M. v. Superior Ct. of Sonoma Cty.*, 450 U.S. 464, 481 n.13 (1981) (Stewart, J., concurring). Equal-protection principles therefore imposed no obligation on Congress to "choose between attacking every aspect of [the] problem or not attacking the problem at all." *See Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970); *accord Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 488–89 (1955) ("[R]eform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others." (citation omitted)).

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[10] Indeed, it is *more* than is required under rational-basis review, because "a legislature that creates [non-suspect] categories need not actually articulate at any time the purpose or rationale supporting its classification." *Heller*, 509 U.S. at 320 (citation omitted).

V. The canon of constitutional avoidance does not apply.

Plaintiffs argue that principles of constitutional avoidance mandate the adoption of their interpretation of PLCAA. Pls.' Opp. at 6–8 & n.3. The United States takes no position on whether Plaintiffs' interpretation is correct, but constitutional considerations should play no role in the Court's analysis of that question.

The canon of constitutional avoidance "is a tool for choosing between competing plausible interpretations of a statutory text," *Clark v. Martinez*, 543 U.S. 371, 381 (2005), but it may be invoked *only* where there exist "'grave doubts' about the constitutionality of [a] statute," *Ileto*, 565 F.3d at 1143 (quoting *Almendarez–Torres*, 523 U.S. at 237–38). This requires more than the "mere mention" of a constitutional problem, *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008), but rather "a *serious likelihood* that the statute will be held unconstitutional," *Almendarez-Torres*, 523 U.S. at 238 (emphasis added). Here, as explained above, there are no serious constitutional problems with PLCAA, so the Court should not apply constitutional-avoidance principles in its construction of the Act. *See Ileto*, 565 F.3d at 1144 ("[W]e do not doubt the constitutionality of the PLCAA, let alone have 'grave doubts.' . . . [W]e [thus] decline to apply the doctrine of constitutional avoidance.").

Plaintiffs' authorities—*Gregory v. Ashcroft*, 501 U.S. 452 (1991), and *Bond v. United States*, 572 U.S. 844 (2014)—apply variations of the general constitutional-avoidance principle. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 968 (D.C. Cir. 2021). In those cases, the Supreme Court explained that statutes should be narrowly construed if necessary to avoid "upset[ting] the usual constitutional balance of federal and state powers," thereby creating "a potential constitutional problem." *Gregory*, 501 U.S. at 460, 464; *accord Bond*, 572 U.S. at 858, 860. In *Gregory*, the Court expressed concern that interpreting federal law to invalidate a mandatory retirement age for state judges would undermine "the authority of the people of the States to determine the qualifications of their most important government officials," an authority "reserved to the States under the Tenth Amendment" that the Court suggested "may be inviolate." 501 U.S. at 463–64. In *Bond*, the constitutional risk existed because an expansive reading of the federal criminal statute would have permitted federal prosecution of "purely local crimes," a "dramatic[]

intru[sion]" on "state criminal jurisdiction." 572 U.S. at 857, 860 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)). PLCAA's unremarkable preemption of state tort law raises no similar constitutional concern or federalism issue. *See Prescott*, 410 F. Supp. 3d at 1132 n.3 (rejecting argument that federalism principles stated in *Gregory* and *Bond* require "a narrower construction of the PLCAA"); *accord Travieso*, 526 F. Supp. 3d at 540–41; *Delana*, 486 S.W.3d at 322-23; *see Ileto*, 565 F.3d at 1135–46; *Riegel*, 552 U.S. at 326 (rejecting dissent and finding no serious constitutional issue raised by preemption of tort laws where "the statute itself speaks clearly to the point").

Moreover, PLCAA reflects Congress's express intent to "prohibit causes of action" brought under state tort law. 15 U.S.C. § 7901(b)(1); *see id.* § 7902(a) (providing that covered tort actions "may not be brought in any Federal or State court"). The Ninth Circuit recognized this in *Ileto*, holding that "congressional intent [to preempt state tort claims] is clear from the text and purpose of the statute." 565 F.3d at 1142–43; *see also id.* at 1135–36; *accord Travieso*, 526 F. Supp. 3d at 541. Here, unlike in *Bond*, *see* 572 U.S. at 859–60, 863, it is well-established that Congress may preempt state tort causes of action, *see supra* 8–11, and there is therefore no reason to search for an ambiguity from which to override the statutory text. Likewise, Congress left no ambiguity in its statements of findings and purposes, where it established that PLCAA limits liability from "the harm caused by those who criminally or unlawfully misuse firearm products . . . that function as designed and intended." 15 U.S.C. § 7901(a)(5). Thus, "[b]ecause Congress has expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against [manufacturers and] sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues." *Delana*, 486 S.W.3d at 323; *accord Travieso*, 526 F. Supp. 3d at 540–41; *Prescott*, 410 F. Supp. 3d at 1132 n.3 ("reject[ing] . . . argument in favor of a narrower construction of the PLCAA").

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CONCLUSION

For the foregoing reasons, the Constitution does not require the Court to invalidate PLCAA, nor do constitutional-avoidance principles require the Court to adopt a narrow construction of the Act.

Dated: March 15, 2022

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that she is an employee of the United States Attorney's Office for the Northern District of California and is a person of such age and discretion to be competent to serve papers. The undersigned further certifies that on March 15, 2022, she caused copies of the following:

BRIEF OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE CONSTITUTIONALITY OF THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

to be served this date upon the parties in this action as follows:

[ ] **FIRST CLASS MAIL** by placing such envelope(s) with postage thereon fully prepaid in the designated area for outgoing U.S. mail in accordance with this office's practice.

[ ] PERSONAL SERVICE (BY MESSENGER)

[ ] FEDERAL EXPRESS via Priority Overnight

[x] **EMAIL** by e-mailing the documents to Plaintiff at the following e-mail address

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