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IN THE SUPREME COURT OF PENNSYLVANIA

No. 7 WAP 2023

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

Appellees,

v.

SPRINGFIELD, INC., d/b/a SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE and SALOOM DEPT. STORE, LLC d/b/a SALOOM DEPARTMENT STORE,

Appellants,

and

THE UNITED STATES OF AMERICA,

Intervenor.

AMICI CURIAE BRIEF OF THE PHILADELPHIA ASSOCIATION OF DEFENSE COUNSEL AND THE PENNSYLVANIA DEFENSE INSTITUTE IN SUPPORT OF APPELLANTS

On Allowance of Appeal from the August 12, 2022 Order of the Superior Court in Case No. 207 WDA 2019, reversing the Order of the Court of Common Pleas of Westmoreland County, at No. 1126 of 2018

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Statement of Interest of Amici Curiae[1]

Pennsylvania Defense Institute (PDI). PDI was organized in 1969 as a nonprofit association of defense attorneys and insurance company executives. PDI is a forum for developing public policy initiatives, for the exchange of ideas and for the pursuit of its goals, including the prompt, fair, and just disposition of claims, preservation of the administration of justice, the enhancement of the legal profession's services to the public, the elimination of court congestion and delays in civil litigation, and the promotion of other public-minded activities. To achieve these ends, PDI represents its members in a wide array of matters, including legislation and litigation.

Philadelphia Association of Defense Counsel (PADC). PADC is a nonprofit association of around 350 lawyers from the five-county Philadelphia area. Organized in 1947, PADC is the oldest continuously operating local defense organization in the United States. PADC protects and advances the interests of civil defendants and their counsel, shares knowledge within the defense trial bar, speaks for civil defendants and

[1] No other person or entity other than PADC, PDI, their members, or their counsel, paid in whole or in part for preparing this Amici Curiae Brief. *See* Pa.R.A.P. 531(b)(2).

their interests in the administration of justice, and encourages the highest standards of professional conduct.

PADC and its members also have a substantial interest in the third question the Court has accepted for appeal, whether this statute, the Protection of Lawful Commerce in Arms Act ("PLCAA")[2] – and by extension all federal laws preempting state tort law – are constitutional exercises of congressional power. Issues concerning the express preemptive effect of provisions in federal statutes arise frequently in litigation involving PADC's members and their clients. The Superior Court's decision calls into question the preemptive effect of many federal statutes.

PADC submits this Brief in support of Appellants. A plurality of the Superior Court plainly and incorrectly interpreted federal constitutional law. If interpolated, that incorrect interpretation would nullify numerous federal laws that defendants raise as defenses in litigation.

[2] Pub. L No. 109-92, 119 Stat. 2095 (codified at 15 U.S.C. §§ 7901-03, and 18 U.S.C. § 922(a)(7) and (8), (b)(5), and (c)).

Summary of the Argument

This case turns on fundamental principles of federal constitutional law. In passing the PLCAA, Congress acted within its enumerated power "to regulate Commerce with foreign Nations, and among the several States." The PLCAA also comports with the Tenth Amendment.[3] The Superior Court's lead opinion ignores the presumption of constitutionality that all federal laws enjoy and misconstrues the Constitution to nullify the PLCAA. This ruling threatens many federal laws that preempt state law and thus threatens the availability of preemption defenses in litigation. The Supreme Court should correct the Superior Court's error and reverse its decision.

Argument

"The PLCAA generally preempts 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). Among other findings Congress made in passing the PLCAA, is that the

[3] In the lower courts, the plaintiffs raised a kitchen sink of constitutional challenges. This Court accepted appeal to consider only the Commerce Clause and Tenth Amendment issues.

firearms industry is heavily regulated and that certain lawsuits against firearms manufacturers negatively affect lawful interstate commerce:

> **(5)** Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.
>
> **(6)** The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

15 U.S.C. § 7901(a)(5) and (6). An extensive legislative record supports these findings. To effect Congress's end, the PLCAA preempts "qualified civil liability action[s]," those lawsuits that seek to hold firearms or ammunition manufacturers or sellers liable for the criminal use of such products. *Id.* §§ 7902-03. The PLCAA contains an exception for certain products liability claims. *Id.* § 7903(a)(5)(v). The exception does not apply if "discharge of the product was caused by a volitional act that constituted a criminal offense." *Id.* § 7903(a)(5)(v).

The trial court held that this lawsuit is a preempted "qualified civil liability action." J.R. Gustafson was shot and killed by a 14-year-old boy, who pointed and discharged a handgun at J.R., under the mistaken belief that the handgun was not loaded. The shooter was adjudicated delinquent by reason of involuntary manslaughter. J.R.'s parents sued Springfield, Inc. (the manufacturer) and Saloom Department store (the seller). The trial court sustained the defendants' preliminary objections, ruled that the handgun's discharge was a "volitional act" that constituted criminal misuse of the weapon, and rejected the plaintiffs' constitutional challenges to the PLCAA. (A.185-95.[4]) The Superior Court en banc reversed (A.3-4), with dueling opinions[5] holding that either the PLCAA is unconstitutional, or not (A.5-43, A.44-53); or that it does not preempt this lawsuit, or did (A.44-53, A.54-55.)

The Superior Court's lead plurality opinion (joined by four judges) asserted a novel rationale to find the PLCAA unconstitutional under the U.S. Constitution's Commerce Clause and Tenth Amendment. This

[4] Citations are of the Appendix to Appellants' Brief.

[5] Though a majority of Superior Court judges voted to reverse, that court cobbled together two different minorities of judges to create that majority.

ruling is wafer-thin on support and contradicts *all* other appellate authority. It would overturn the widely accepted application of the Supremacy Clause and with it, express federal preemption under numerous federal statutes. This Court should reject the Superior Court lead opinion's approach, and correct that perplexing, confusing, and misguided decision.

The ruling by four of the nine Superior Court judges flagrantly violates the first principle of legislative enactments: courts presume statutes to be constitutional. Statutes "are presumed constitutional, and the party challenging the constitutionality of a statute bears a heavy burden of persuasion." *Commonwealth v. Rollins*, 292 A.3d 873, 879 (Pa. 2023) (citations omitted). This Court "will not declare the provision unconstitutional 'unless it clearly, palpably, and plainly violates the Constitution; all doubts are to be resolved in favor of a finding of constitutionality.'" *In the Int. of: J.J.M.*, 265 A.3d 246, 263 (Pa. 2021) (quoting *Commonwealth v. Mayfield*, 832 A.2d 418, 421 (2003)); *accord*, *e.g.*, *Heller v. Doe*, 509 U.S. 312, 320 (1993) ("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.") (citations and quotation marks omitted).

The Superior Court plurality concluded that the PLCAA "clearly, palpably, and plainly" violates the U.S. Constitution, because it expressly preempts state tort law. (A.32 n.18.) The Superior Court plurality reached the unprecedented conclusion that state tort law enjoys some sort of preferred position under the Tenth Amendment[6] that overrides Congress' power to enact nationwide liability standards under the federal constitution's Commerce[7] and Supremacy[8] clauses.

No other court has found the PLCAA or any other preemptive federal statue to be unconstitutional under this rationale. *See Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1219 (D. Colo. 2015) ("Every federal and state appellate court to address the constitutionality of the PLCAA has found it constitutional."). The Tenth Amendment itself is a

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[6] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

[7] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States[.]" U.S. Const. art. I, § 8, cl. 3.

[8] "This Constitution, and the Law of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every Stat shall be bound thereby . . . ." U.S. Const. art. VI, para. 2.

residuary clause, preserving to the states whatever powers that the Constitution does not expressly assign to the federal government. *E.g.*, *Miller v. SEPTA*, 103 A.3d 1225, 1234 (Pa. 2014) (Tenth Amendment recognizes the "residual sovereignty of the States" and "merely confirms the state sovereignty that predates it"); *Printz v. United States*, 521 U.S. 898, 919 (1997) (Tenth Amendment is "express" recognition of "[r]esidual state sovereignty . . . in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones").

I. Congress validly passed the PLCAA using its commerce power.

"As long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States" and "may legislate in areas traditionally regulated by the States." *Miller*, 103 A.3d at 1235 (citation and quotation marks omitted). The Commerce Clause is an express grant of federal power, so the linchpin of the Superior Court's analysis is its unique conclusion that state tort law, *ipso facto*, does not affect interstate commerce.

Yet, Congress has broad power to regulate interstate commerce:

> Congress' commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them

> appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."

MCI WorldCom, Inc. v. Pa. Pub. Util. Comm'n, 844 A.2d 1239, 1250 (Pa. 2004) (quoting *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 281 (1981)); *accord Taylor v. United States*, 579 U.S. 301, 306 (2016) (same).

This Court in *MCI* rejected a similar contention that the Tenth Amendment restricted congressional Commerce Clause powers – there in the context of local utility regulation – and made several holdings equally applicable to this case:

- "[I]t is well-settled that the commerce power permits Congress to preempt the States entirely."
- "Legislation enacted under the Commerce Clause can only be invalidated if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce."
- "The notion that the [Constitution] requires that a Congressional act be 'absolutely necessary' has been rejected."
- As long as "the federal government is not compelling the states to act . . ., federal regulation . . . does not infringe on the state's sovereignty in violation of the Tenth Amendment."

MCI, 844 A.2d at 1250-51 (citations and quotation marks omitted).

The Superior Court's conclusion that preemption of state tort law is beyond the reach of the Commerce Clause has no basis in law or fact.

Factually, the plurality concluded that "history has shown that litigation against manufacturers and sellers of products in other industries does ***not*** substantially affect the free flow of such products among the several States." (A.31 (emphasis in original).) The plurality suggested that companies simply fold litigation expenses into the cost of their products. (*Id.*) The plurality further posited that filing a lawsuit in state court seeking money damages is not an "economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce." (*Id.* (quoting *United States v. Lopez*, 514 U.S. 549, 567 (1995)) (emphasis removed).)

Respectfully, the plurality's analysis defeats itself, because it proves the opposite of the point it tried to make. If state tort lawsuits force interstate product manufacturers to alter the prices of goods that they make and sell across state lines, then those lawsuits must constitute "commerce." The Constitution does not confine Congress's commerce power to "regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce or the exercise

of the power of Congress over it . . . ."[9] *Heart of Atlanta Motel v. United States*, 379 U.S. 241, 258 (1964) (quoting *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316, 321 (1819)).

In any event the plurality's supposition is incorrect, and plainly so. In numerous, well-publicized instances, manufacturers did not merely increase prices to account for litigation expenses. They went out of business. Just in the past couple years, the crush of state tort litigation has driven major national corporations to declare bankruptcy. *See, e.g.*, *In re Purdue Pharma L.P.*, 69 F.4th 45, --, 2023 WL 3700458, at *1, 2023 U.S. App. LEXIS 13236, at *7 (2d Cir. May 30, 2023) (nation's largest opioid manufacturer); *In re LTL Mgmt., LLC*, 64 F.4th 84, 93 (3d Cir. 2023) ("a global company and household brand well-known to the public for its wide range of products relating to health and well-being."); *In re Aearo Technologies LLC*, 2023 WL 3938436, at *2, 2023 Bankr. LEXIS 1519, at *7-8 (Bankr. S.D. Ind. June 9, 2023) ("a large multinational technology and manufacturing company that[its] products . . . are

[9] In characterizing Congress's commerce power, the plurality erroneously relied in part on *Hench v. Pa. R.R. Co.*, 91 A. 1056 (Pa. 1914), a case that this Court last cited almost a century ago in 1927—before the U.S. Supreme Court's modern Commerce Clause jurisprudence.

ubiquitous"). These companies have joined virtually the entire asbestos industry in bankruptcy due to tort litigation brought under state law. *See generally Roverano v. John Crane, Inc.*, 226 A.3d 526, 546 (Pa. 2020) (describing "tort system" driven bankruptcy of asbestos industry). Plainly, state tort litigation, whether "intrastate" or otherwise, has the potential to "affect interstate commerce," thereby "mak[ing] regulation [an] appropriate means" under the Commerce Clause. *MCI*, 844 A.2d at 1250. This is precisely the reason Congress found that certain lawsuits against firearms and ammunition manufacturers "constitute[d] an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. § 7901(a)(6).

The plurality tried to avoid the obvious, aggregative commercial effect of such litigation by declaring that filing a state lawsuit based on state tort law is not an economic activity. The plurality stated that the exchange of money that occurs in a lawsuit "is not commerce" because it is not transactional. (A.31-32.) Third-party litigation funding entities likely would beg to differ. In third-party litigation funding, nonparties to litigation "loan[] their own money simply to aid in the cost of the litigation, and in return, [a]re promised to be paid . . . out of the proceeds

of the litigation." *WFIC, LLC v. LaBarre*, 148 A.3d 812, 819 (Pa. Super. 2016).[10] Litigation funding thus treats litigated claims as assets that can be bought, sold, or loaned.

Further, most litigation, particularly tort litigation, ultimately settles. These settlements are also enforceable commercial transactions. "The enforceability of settlement agreements is governed by principles of contract law." *Pennsbury Village Assocs., LLC v. McIntyre*, 11 A.3d 906, 914 (Pa. 2011) (quoting *Mazzella v. Koken*, 739 A.2d 531, 536 (Pa. 1999)). "Parties with possible claims may settle their differences upon such terms as are suitable to them. They may include or exclude terms, conditions and parties as they can agree." *Buttermore v. Aliquippa Hosp.*, 561 A.2d 733, 735 (Pa. 1989).

State tort litigation constitutes commercial activity. Congress thus had a rational basis in passing the PLCAA to preempt state-law tort litigation that, in its estimation, threatened to do the same to the firearms manufacturers as to other industries before and since. Congress may use the Commerce Clause to pass legislation that preempts state

[10] *See also* Jayme Herschkopf, *Third-Party litigation Finance*, at 1 (Fed. Jud. Ctr. 2017, https://www.fjc.gov/sites/default/files/materials/34/Third-Party_Litigation_Finance.pdf.

law. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 188 (1824); *Miller*, 103 A.3d 1231-22; *MCI*, 844 A.2d at 1251. Beside state statutory and regulatory laws, federal laws may preempt state common law claims. *E.g.*, *Cipollone v. Liggett Grp.*, 505 U.S. 504, 522 (1992) (plurality opinion); *id.* at 548-49 (Scalia, J., concurring in the judgment in part and dissenting in part); *Green v. Dolsky*, 685 A.2d 110, 117 (Pa. 1996) (opinion announcing the judgment of the Court) (listing expressly preempted claims).

The Supremacy Clause expressly recognizes that federal law may preempt state common law, because it binds state court judges. *See Haaland v. Brackeen*, 143 S. Ct. 1609, Nos. 21-376, 377, 378, & 380, 2023 WL 4002951, 2023 U.S. LEXIS 2545, at *47 (June 15, 2023). When Congress enacts a valid statute under its Article I powers, state law is necessarily preempted. *See id.* "That a federal law modifies a state law cause of action does not limit its preemptive effect." *Id.* The plurality correctly acknowledged these longstanding principles. (A.14-15.)

The Superior Court plurality, however, departed from the path trod by every appellate court before it when it ruled that Congress lacked power under the Commerce Clause to enact the PLCAA. Despite the plurality opinion's equivocation, every other court has rejected this

argument expressly or by implication. *See Soto v. Bushmaster Firearms Int'l, LLC*, 139 F. Supp. 3d 560, 564 n.9 (D. Conn. 2015) (citing cases). These courts include multiple federal courts and three state supreme courts:

- *Travieso v. Glock Inc.*, 526 F. Supp. 3d 533, 549 (D. Ariz. 2021).
- *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322-23 (Mo. 2016).
- *Phillips*, 84 F. Supp. 3d at 1222.
- *Estate of Kim v. Coxe*, 295 P.3d 380, 388 (Alaska 2013).
- *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009).
- *Illeto*, 565 at 1140.
- *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 394-95 (2d Cir. 2008).
- *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 174 (D.C. 2008).

More generally, every other appellate court has rejected *all* constitutional challenges to the PLCAA. (A.60-61 & n.3 (Olson, J., dissenting) (collecting cases).) Thus, the Superior Court's plurality opinion stands alone in finding constitutional infirmities with the PLCAA.

The plurality's legal approach to the Commerce Clause is fatally flawed. Instead of following established law, it substituted its own novel,

ahistorical analysis. The plurality relies on no actual preemption precedent, and instead expresses troubling interpretations of non-binding concurrences and dissents from individual U.S. Supreme Court Justices. (A.16, A.17 (plurality opinion) (citing *NFIB v. OSHA*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring)); *id.* at A.25-26, A.42 (citing and quoting *NFIB v. Sebelius*, 567 U.S. 519, 651-52, 707 (2012) (Scalia, J., dissenting)).) Though such individual opinions may contribute to an argument where appropriate, they are not the law. Indeed, neither *OSHA* nor *Sebelius* was about preemption. *OSHA* was not even a constitutional-law case, but rather a *per curiam* decision from the U.S. Supreme Court's emergency docket about the regulatory power of a federal agency.

The plurality also invokes a parade of horribles, under which the federal government could reduce states to Canadian provinces by nationalizing family law, state zoning law, and criminal law. This analysis misses the mark, for Congress did not seek to "nationalize" state tort litigation. Rather, using its commerce power, Congress sought to preempt a specific subset of claims that it concluded could adversely impact interstate commerce. The plurality's analogies are particularly

inapt since many federal laws already curtail state law in these areas. *See, e.g.*, *Egelhoff v. Egelhoff*, 532 U.S. 141, 151-52 (2001) (ERISA preempts state law on economic consequences of divorce); *Lighthouse Inst. for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 261 (3d Cir. 2007) (Religious Land Use and Institutionalized Persons Act prevents state and local governments from implementing land use regulations that impose a substantial burden on religious exercise); *Krentz v. Conrail*, 910 A.2d 20, 36 (Pa. 2006) (Federal Railway Safety Act preempted provision of the Pennsylvania Crimes Code prohibiting railroads from blocking highway crossings).

II. The Tenth Amendment does not elevate state tort law over federal law.

The plurality also found the PLCAA to be an invalid exercise of the police power reserved to the states by the Tenth Amendment – once again without relying on precedent actually pertaining to that amendment. (A.38-39.) In support, the plurality cited only *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Although *Erie* nowhere discusses the Tenth Amendment, the plurality professed to find "clear Tenth Amendment implications" in *Erie*, which it characterized as a "seminal decision of constitutional law . . . ." (A.38 (emphasis removed).) Such "clarity" seems

to have escaped every other court in the nation for over eight decades. *Erie* was decided well over three quarters of a century ago, and no other court has divined such novel "implications" from it.

Erie is not a constitutional-law case. It is a civil-procedure case about whose common law federal courts must apply in diversity-jurisdiction cases. Constitutionally, Congress could have authorized creation of federal common law for diversity cases, but it has chosen not to.[11] Of course, *Erie* says nothing about torts, Congress, the Commerce Clause, or preemption. *Erie* instead holds that federal courts must apply state law "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress[.]" *Erie*, 304 U.S. at 78. Thus, under *Erie* and the Rules of Decision Act, a federal court would be obligated to apply the PLCAA to preempt state tort claims.

The Superior Court plurality cites nothing that could transmute *Erie* from civil-procedure lead into Tenth-Amendment, state-supremacy

[11] Indeed, because Congress has plenary authority under Article III, § 1 to establish inferior Courts, it could by statute abolish all claims against firearms (or any other product) in federal court by legislation. Instead, Congress passed the Rules of Decision Act, providing that "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652.

gold, proclaiming as invalid the very "Acts of Congress" *Erie* recognized as controlling. Rather, the plurality opinion stands the Supremacy Clause on its head by making federal statutory law subservient to state tort law. Though *Erie* is 84 years old, PADC has found no other decision that discovered the Tenth Amendment lurking in *Erie*'s shadow. When a litigant in another case raised the same argument as the plurality, the court summarily dismissed it as an "exercise in selective quotation." *Travieso*, 526 F. Supp. 3d at 550.

The PLCAA preempts state law by declaring that certain defined actions "may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). If that statute unconstitutionally violates some hitherto undiscovered state power to prevent federal interference with state common law, the plurality's rationale would strike at the heart of federal preemption. That seems to be the plurality's intent: "[T]ort law and statutes reforming it are reserved to the States under the Tenth Amendment." (A.42.) Again, it cites no authority for this astounding pronouncement.

III. The Superior Court plurality's ruling would upend tort litigation by nullifying federal preemption.

The Superior Court decision threatens many federal statutes in many areas that affect the lives of everyday Americans. Here are examples:

- **Title VII of the Civil Rights Act of 1964**. Title VII prevents states from requiring or permitting the doing of any act that would be an unlawful employment practice. 42 U.S.C. § 2000e-7. The U.S. Supreme Court has suggested that states cannot use tort law to further discrimination in the workplace in violation of Title VII. *Int'l Union v. Johnson Controls*, 499 U.S. 187, 210 (1991).

- **Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA")**. The FDCA has multiple preemption provisions. 21 U.S.C. § 360k preempts certain state and local laws that attempt to regulate medical devices. 21 U.S.C. § 343-1 generally preempts state requirements for food labeling that conflict with federal law. 21 U.S.C. § 379r prevents states from imposing certain requirements for nonprescription drugs. 21 U.S.C. § 379s preempts state requirements for labeling or packaging of a cosmetic different than federal law.

- **Public Readiness and Emergency Preparedness ("PREP") Act of 2005**. The PREP Act, invoked most recently during the COVID-19 pandemic, authorizes the Secretary of Health and Human Services to make declarations about certain covered countermeasures to fight a public health emergency. It provides immunity from suit to covered persons for "all claims for loss caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a covered countermeasure." 42 U.S.C. § 247d-6d(a).

- **National Labor Relations Act of 1935**. Sections 7 and 8 of this Act, 29 U.S.C. §§ 157-58 protect workers' collective bargaining rights and prohibit certain unfair labor practices. States may not regulate activity protected by the Act, including through injunctions or damage awards based on state tort law. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959); *cf. Glacier Nw., Inc. v. Int'l Bhd. Of Teamsters Local Union No. 174*, 143 S. Ct. 1404, 1413-14 (2023) (interpreting the act not to preempt state tort claims against striking labor union for destruction of property).

- **Communications Decency Act of 1996**. 47 U.S.C. § 230(c)(2) and (e)(3) provides some immunity from civil liability to certain internet service providers and prohibits inconsistent state and local laws.

- **Federal Arbitration Act of 1925 ("FAA")**. 9 U.S.C. § 2 makes agreements to arbitrate enforceable in contract. The U.S. Supreme Court has repeatedly held that this provision preempts state rules that discriminate on their face against arbitration. *Viking River Cruises, Inc. v. Moriana*, 142 S. Ct. 1906, 1917 (2022).

- **Federal Communications Act of 1934**. 47 U.S.C. § 315 requires TV and radio statutes licensed to operate by the FCC to provide equal access to competing political candidates. That provision grants licensees immunity from state libel lawsuits. *Farmers Educ. & Coop. Union v. WDAY*, 360 U.S. 525, 535 (1959).

- **National Childhood Vaccine Injury Act of 1986 ("Vaccine Act")**. In exchange for establishing a no-fault compensation program for persons injured by a vaccine, the Vaccine Act immunizes vaccine manufactures from state tort liability. 42 U.S.C. § 300aa-11(a)(2).

- **Airline Deregulation Act of 1978 ("ADA")**. It preempts state and local law "having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation . . . ." 49 U.S.C. § 41713(b)(1).

- **Federal Aviation Administration Amendments Act of 1994**. This law preempts state and local authorities from enacting or enforcing a "law, regulation, or other provision having the force and effect of law related to price, route, or service" of certain entities involved in the trucking industry. 49 U.S.C. § 14501(a)(1).

- **Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005**. This law's Graves Amendment preempts state and local laws that impose vicarious liability on certain owners or lessors of motor vehicles. 49 U.S.C. § 30106(a).

- **Federal Meat Inspection Act of 1906**. 21 U.S.C. § 678 preempts state and local regulations on the inspection, handling, and slaughter of livestock for human consumption.

- **Y2K Act of 1999**. 15 U.S.C. § 6603(e) preempted inconsistent state law and lawsuits about computer failures arising from the Y2K computing problem.

- **Federal Employers' Liability Act of 1908 ("FELA")**. FELA, 45 U.S.C. §§ 51-60, established compensation rules for railroad workers injured on the job. FELA impliedly preempts conflicting state law. *See Chicago, Milwaukee & St. Paul Ry. Co. v. Coogan*, 217 U.S. 472, 474 (1926).

- **Federal Railroad Safety Act**. 49 U.S.C. § 20106 preempts certain state laws and regulations related to railroad safety.

As can be seen, Congress has used its commerce power to pass many laws in many areas that preempt contrary state law. National uniformity in areas of commerce is permitted, and indeed is essential in the modern world. The Supreme Court has repeatedly held that federal law may expressly preempt state tort law. *See, e.g.*, *Northwest, Inc. v. Ginsberg*, 572 U.S. 273 (2014) (the ADA preempts passenger's state tort claims about a frequent flyer program); *Riegel v. Medtronic, Inc.*, 552 U.S. 312, 324-25 (2008) (the FDCA preempts state-law claims for fraud arising out of injuries resulting from the use of medical devices); *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 239-40 (2011) (the National Childhood Vaccine Injury Act preempts most vaccine-related product liability claims).

This Court has likewise recognized federal preemption in many tort-related areas of the law, including transportation, communications, labor relations, civil rights, and public health and safety. *See, e.g.*, *Taylor v. Extendicare Health Facilities, Inc.*, 147 A.3d 490, 512 (Pa. 2016) (the FAA preempts Pa.R.Civ.P. 213(e)); *Council 13, Am. Fed'n of State, Cnty. & Mun. Emps., AFL-CIO* ex rel. *Fillman v. Rendell*, 986 A.2d 63, 82 (Pa. 2009) (§ 6 of the Fair Labor Standards Act, 29 U.S.C. § 206 preempts Pa. Const. art. III, § 24); *Krentz*, 910 A.2d at 36 (the Federal Railroad Safety

Act, 49 U.S.C §§ 20101-20155 preempts 18 Pa.C.S. § 6907); *Stone Crushed P'ship v. Kassab Archbold Jackson & O'Brien*, 908 A.2d 875, 887 (Pa. 2006) (the federal Bankruptcy Code and Federal Rules of Civil Procedure preempt state-law claims for wrongful use of civil procedure and abuse of process); *Green*, 685 A.2d at 118 (opinion announcing the judgment of the Court) (Medical Device Amendments, 21 U.S.C. § 360k(a), preempts strict-liability claims against device manufacturer that underwent FDA premarket approval); *Allegheny Airlines, Inc. v. Philadelphia*, 309 A.2d 157, 186 (Pa. 1973) (Federal Aviation Act amendments preempts state or local intervention in the field of airport head taxes).

The Superior Court plurality's unprecedented and novel ruling would turn constitutional law upside-down. The opinion's logic renders state tort law immune from federal statutory law. This is not how the Constitution works.

Under the plurality's regime, states would be free to permit lawsuits against firearms and ammunition manufacturers. Some might consider this salutary, but the logic does not stop there. "A judicial holding by its very nature is not a restricted railroad ticket, good for one

day and train only." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 537-38 (2010) (Breyer, J., dissenting) (quotation omitted); *see also In the Int. of K.T.*, Nos. 37 & 38 WAP 2022, 2023 WL 4092986, 2023 Pa. LEXIS 829, at *104 n.145 (June 21, 2023) (Wecht, J., dissenting) ("The Majority may delude itself into thinking that its words will not impact anyone but the parties and the trial judge in this case, but the words it uses to convey its standards carry precedential effect and are not limited to this one dispute."). Since the Superior Court plurality reversed the trial court, that result potentially undermines all federal laws that preempt state tort law. The lead opinion expressly admits that its ruling compels such a result. (A.41-42.) This antediluvian view of federalism threatens a bevy of federal laws.

States could permit defamation lawsuits without actual malice as a defense. *Cf. N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964) (holding that the U.S. Constitution "delimits a State's power to award damages for libel in actions brought by public officials against critics of their official conduct"). They could fetter railroads with patchwork liability for violating local laws inconsistent with federal regulations. *Cf. Krentz*, 910 A.2d at 36 (holding that the Federal Railway Safety Act preempted

claims for negligence per se). Or they could impair public health by foisting tort liability on vaccine manufacturers. *Cf. Bruesewitz*, 562 U.S. at 243 (holding that the Vaccine act preempts all design-defect claims against vaccine manufacturers for claims arising from injury or death caused by vaccine side effects).

In the United States, the federal Constitution and laws are supreme. While the federal government has enumerated powers and lacks general police authority, laws passed using those enumerated powers are entitled to due deference. Respectfully, it is generally not the place of a state intermediate appellate court to seize upon a novel theory rejected by all other courts to declare a federal law – and potentially many federal statutes – unconstitutional.

Conclusion

This Court should reverse the Superior Court's decision, which is an exercise in nullification, and remand with directions to reinstate the trial court's judgment. The Court would thus join every other appellate court, in holding that the PLCAA is a constitutional exercise of Congressional power.

Respectfully submitted,

Dated: June 29, 2023

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Combined Certificates of Compliance

This Brief contains 5,335 words (exclusive of supplementary matter). In preparing this certification, we relied on the word count of the word processing system used to prepare the brief.

We certify that this Brief complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts* that require filing confidential information differently than non-confidential information.

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