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January 22, 2021

VIA E-MAIL

Austin Evers
(records@americanoversight.org)

Dear Mr. Evers:

Attached please find documents responsive to your public records requests for the following:

“All email communications (including emails, complete email chains, calendar invitations, and attachments thereto) sent by any of the Florida Office of the Attorney General officials listed in Column A, and containing any of the key terms listed in Column B:

Column A

- a. Ashley Moody, Attorney General, or anyone communicating on her behalf (such as an assistant or scheduler)**
- b. John Guard, Chief Deputy Attorney General**
- c. Richard Martin, General Counsel [sic]**
- d. Lauren Schenone, Director of Public Affairs**

Column B

- i. Bloomberg**
- ii. ‘\$16 million’**
- iii. ‘16 million’**
- iv. \$16M**
- v. 16M**
- vi. McPherson**
- vii. ‘Florida Rights Restoration Coalition’**
- viii. FRRC**
- ix. Meade**
- x. ‘More Than a Vote’**
- xi. LeBron**
- xii. ‘Federal Elections Commission’**

Please note that sections 817.568 and 817.569, Florida Statutes, impose criminal penalties for the unauthorized use of personal identification information for fraudulent or harassment purposes, and for the criminal use of a public record or public records’ information.

xiii. ‘Violations of election law’

xiv. Gaetz

Please provide all responsive records from September 1, 2020, through date of search.”

This office has compiled the responsive non-exempt public records materials, as of the date of the requests, and has attached the records to this email for production. In connection with your requests, please note that six pages are withheld because only the Governor, and no other member of the Clemency Board, nor any other state entity that may be in the possession of Clemency Board materials, has the discretion to allow such records and documents to be inspected or copied. *See* Rule 16, State of Florida Rules of Executive Clemency; *Chavez v. State*, 132 So. 3d 826, 831 (Fla. 2014) (“Rule of Executive Clemency 16, which provides that *all* records in the clemency process are confidential, controls” access to clemency records).

The attached documents will serve to complete your public records requests to this office. Please do not hesitate to contact me directly at (850) 414-3634 should you have any questions.

Sincerely,

s/ Nicholas J. Weilhammer

Nicholas J. Weilhammer

Attachments: Records

Please note that sections 817.568 and 817.569, Florida Statutes, impose criminal penalties for the unauthorized use of personal identification information for fraudulent or harassment purposes, and for the criminal use of a public record or public records’ information.

From: [Lauren Cassedy](#)
To: ggerber@bloombergindustry.com
Subject: Bloomberg Law interview request
Date: Tuesday, September 15, 2020 12:33:26 PM

Hello,

Thanks for chatting yesterday. Unfortunately, we have a scheduling conflict and will not be able to attend the interview event.

Thank for for thinking of our office.

Lauren Schenone Cassedy

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From: [John Guard](#)
To: [Amit Agarwal](#)
Subject: FW: Gustafson v Springfield Armory - PA Appellate Court - PLCAA Ruled Unconstitutional
Date: Thursday, October 8, 2020 3:08:00 PM
Attachments: [image004.png](#)
[Gustafson v. Springfield, Inc. -- United States Brief.pdf](#)
[2019-07-02 Plaintiffs' Reply Appellate Brief.pdf](#)
[2019-06-17 Defendants' Appellate Brief.pdf](#)
[2019-05-21 - Reproduced Record.pdf](#)
[2019-05-21 - Brief.pdf](#)
[Gustafson v Springfield Inc - PA Superior Court Appellate Decision \(09-29-20\).docx](#)

See below. I would like your team's assessment.

John Guard

From: Elizabeth Guzzo <Elizabeth.Guzzo@myfloridalegal.com>
Sent: Thursday, October 8, 2020 9:33 AM
To: John Guard <John.Guard@myfloridalegal.com>; Richard Martin <Richard.Martin@myfloridalegal.com>; Charles Trippe <Charles.Trippe@myfloridalegal.com>
Subject: Fwd: Gustafson v Springfield Armory - PA Appellate Court - PLCAA Ruled Unconstitutional

Hey guys-

Here is the info I mentioned on the call, I haven't responded other than saying thank you for sharing this information. Please let me know if anything else I should do or if you need anything else.

Thanks!

Libby Guzzo

From: Trevor Santos <tsantos@nssf.org>
Sent: Wednesday, October 7, 2020 3:28:55 PM
To: Elizabeth Guzzo <Elizabeth.Guzzo@myfloridalegal.com>
Subject: Gustafson v Springfield Armory - PA Appellate Court - PLCAA Ruled Unconstitutional

Good afternoon Libby:

I wanted to bring to your attention a very troubling decision by an appellate court in Pennsylvania striking down a federal tort reform law as an unconstitutional violation of the 10th Amendment. The statute at issue is the Protection of Lawful Commerce in Arms Act (PLCAA) passed in 2005 with broad bipartisan support. Every other appellate court – and there have been several - to address the constitutionality of the PLCAA has held that the law passes muster and is a valid exercise of Congress' Commerce Clause power and it does not violate Due Process. I have attached a copy of the decision for your consideration in addition to other relevant documents.

The PLCAA applies specifically to members of the firearms industry so, obviously, this decision and its implications if allowed to stand is of acute interest to the National Shooting Sports Foundation. The decision is also a threat to the Second Amendment. If the industry can be driven out of business by a new wave of frivolous litigation the PLCAA was expressly intended to stop, then the ability of law abiding Americans to obtain firearms

becomes illusion.

However, we believe the decision has broader implications for the rule of law. The court's reasoning undermines core constitutional principles like the Supremacy Clause and the Commerce Clause power.

The defendant manufacturer, Springfield Armory, will be filing a petition with the Pennsylvania Supreme Court to review the case and the NSSF will naturally be filing an amicus brief in support of that petition. The defendant/appellee Springfield Armory's petition for allowance of appeal is due thirty days after the appellate court decision, which is October 28. Pursuant to Rule 531(b)(4) of the Pennsylvania Rules of Appellate Procedure, amicus briefs in support of the petition for allowance of appeal are also due on October 28. It would be best if amicus briefs in support of the petition for allowance of appeal to the Pennsylvania Supreme Court were filed, in addition to separate briefs supporting the constitutionality of the PLCAA if the court grants the petition and agrees to hear the appeal on the merits.

We would certainly welcome an amicus brief from General Moody due to the broader implications to the rule of law, and as many had done in the past to protect and defend the Second Amendment.

Thank you,
Trevor

Trevor W. Santos
Director, Government Relations - State Affairs

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Trade Association*

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 **tsantos@nssf.org**

AMERICAN
OVERSIGHT

FL-AG-20-2516-A-000004

**IN THE SUPERIOR COURT
OF PENNSYLVANIA**

MARK AND LEAH GUSTAFSON, individually and as
Administrators and Personal Representatives of the
ESTATE OF JAMES ROBERT GUSTAFSON,

Plaintiffs-Appellants,

v.

SPRINGFIELD, INC., and SALOOM DEPT. STORE, LLC,

Defendants-Appellees.

On Appeal from the Court of Common Pleas of
Westmoreland County

BRIEF FOR THE UNITED STATES AS INTERVENOR

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TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION.....	1
STATEMENT OF JURISDICTION	2
ORDER IN QUESTION.....	2
SCOPE AND STANDARD OF REVIEW.....	2
STATEMENT OF THE CASE	3
A. Statutory Background	3
B. Factual and Procedural Background	5
SUMMARY OF ARGUMENT	6
ARGUMENT	7
I. The PLCAA does not violate the Tenth Amendment.	7
II. The PLCAA does not violate the Fifth Amendment.	13
III. The PLCAA is a valid exercise of Congress’s power.	18
IV. This Court should interpret the PLCAA in light of its text.	20
CONCLUSION	23
CERTIFICATE OF COMPLIANCE	
CERTIFICATE OF SERVICE	

TABLE OF AUTHORITIES

Cases:	<u>Page(s)</u>
<i>Adames v. Sheahan</i> , 909 N.E.2d 742 (Ill. 2009)	2, 8, 10
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996)	18
<i>Bond v. United States</i> , 572 U.S. 844 (2014)	20, 21
<i>Bourke v. Kazaras</i> , 746 A.2d 642 (Pa. 2000)	5
<i>Carr v. United States</i> , 422 F.2d 1007 (4th Cir. 1970)	14
<i>City of Gary v. Smith & Wesson Corp.</i> , No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006), <i>aff'd on other grounds</i> , 875 N.E.2d 422 (Ind. Ct. App. 2007)	15
<i>City of New York v. Beretta U.S.A. Corp.</i> : 401 F. Supp. 2d 244 (E.D.N.Y. 2005)	11
524 F.3d 384 (2d Cir. 2008)	1, 7, 8, 9, 10, 11
<i>City of Spokane v. Federal Nat'l Mortg. Ass'n</i> , 775 F.3d 1113 (9th Cir. 2014)	9
<i>Commonwealth v. Otero</i> , 860 A.2d 1052 (Pa. Super. Ct. 2004)	18
<i>Connecticut v. Physicians Health Servs. of Conn., Inc.</i> , 287 F.3d 110 (2d Cir. 2002)	9
<i>Delana v. CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016)	1-2, 8, 13, 21
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008)	2, 13, 16

<i>Ducharme v. Merrill-National Labs.</i> , 574 F.2d 1307 (5th Cir. 1978)	14
<i>Duke Power Co. v. Carolina Env'tl Study Grp., Inc.</i> , 438 U.S. 59 (1978)	14, 16
<i>Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council</i> , 485 U.S. 568 (1988)	20
<i>Erie R. Co. v. Tompkins</i> , 304 U.S. 64 (1938)	13
<i>Estate of Kim v. Coxe</i> , 295 P.3d 380 (Alaska 2013)	2, 8, 10, 13
<i>FCC v. Beach Commc'ns, Inc.</i> , 508 U.S. 307 (1993)	17
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	20, 21
<i>Heller v. Doe ex rel. Doe</i> , 509 U.S. 312 (1993)	17
<i>Hughes v. Talen Energy Mktg., LLC</i> , 136 S. Ct. 1288 (2016)	19
<i>Ileto v. Glock, Inc.</i> , 565 F.3d (9th Cir. 2009)	1, 4, 13, 14, 16, 20
<i>Lehman Brothers v. Schein</i> , 416 U.S. 386 (1974)	13
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> , 410 U.S. 356 (1973)	17
<i>Maine Mun. Ass'n v. Maine Dep't of Health & Human Servs.</i> , No. AP1439, 2015 WL 4070311 (Me. Super. Ct. June 9, 2015)	12

<i>Martinez v. California</i> , 444 U.S. 277 (1980)	15
<i>Mazur v. Trinity Area Sch. Dist.</i> , 961 A.2d 96 (Pa. 2008)	2
<i>Miller v. French</i> , 530 U.S. 327 (2000)	12
<i>Minneci v. Pollard</i> , 565 U.S. 118 (2012)	16
<i>Murphy v. NCAA</i> , 138 S. Ct. 1461 (2018)	10
<i>Mutual Pharm. Co. v. Bartlett</i> , 570 U.S. 472 (2013)	19
<i>National Mining Ass’n v. Kempthorne</i> , 512 F.3d 702 (D.C. Cir. 2008)	20
<i>New York Cent. R.R. Co. v. White</i> , 243 U.S. 188 (1917)	14
<i>New York v. United States</i> , 505 U.S. 144 (1992)	7
<i>Patchak v. Zinke</i> , 138 S. Ct. 897 (2018)	15
<i>Pierce County v. Guillen</i> , 537 U.S. 129 (2003)	19
<i>Printz v. United States</i> , 521 U.S. 898 (1997)	7
<i>Providence & N.Y.S.S. Co. v. Hill Mfg. Co.</i> , 109 U.S. 578 (1883)	15
<i>Riegel v. Medtronic</i> , 552 U.S. 312 (2008)	19, 21

<i>Schmidt v. Ramsey</i> , 860 F.3d 1038 (8th Cir. 2017)	14
<i>Silver v. Silver</i> , 280 U.S. 117 (1929)	14, 15
<i>Singer v. Sheppard</i> , 346 A.2d 897 (Pa. 1975)	14
<i>Smith & Wesson Corp. v. City of Gary</i> , 875 N.E.2d 422 (Ind. Ct. App. 2007)	15
<i>Sprietsma v. Mercury Marine</i> , 537 U.S. 51 (2002)	11
<i>In re TMI</i> , 89 F.3d 1106 (3d Cir. 1996)	14
<i>United States v. Bass</i> , 404 U.S. 336 (1971)	21
<i>United States v. Lopez</i> , 514 U.S. 549 (1995)	18, 19
<i>In re Vargas</i> , 10 N.Y.S.3d 579 (N.Y. App. Div. 2015)	12
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017)	16
U.S. Constitution:	
Art. I, § 8, cl. 3	18
Amend. V	13
Amend. X	7

Federal Statutes:

Protection of Lawful Commerce in Arms Act,

Pub. L. No. 109-92, 119 Stat. 2095 (2005):

15 U.S.C. §§ 7901-7903	1
15 U.S.C. § 7901(a)(3)	3
15 U.S.C. § 7901(a)(6)	1, 3, 18
15 U.S.C. § 7901(a)(7)	18
15 U.S.C. § 7901(b)(1)	22
15 U.S.C. § 7902(a)	3, 22
15 U.S.C. § 7903(2)	4, 19
15 U.S.C. § 7903(4)	3, 4, 19
15 U.S.C. § 7903(5)(A)	1, 3
15 U.S.C. § 7903(5)(A)(i)-(vi)	16
15 U.S.C. § 7903(5)(A)(i)	4
15 U.S.C. § 7903(5)(A)(ii)	4, 10
15 U.S.C. § 7903(5)(A)(iii)	4, 11
15 U.S.C. § 7903(5)(A)(iv)	4, 10
15 U.S.C. § 7903(5)(A)(v)	5
15 U.S.C. § 7903(5)(A)(vi)	5
15 U.S.C. § 7903(6)	4, 19
8 U.S.C. § 1621	12
18 U.S.C. § 924(h)	4
28 U.S.C. § 2403(a)	1
29 U.S.C. § 49c	11
43 U.S.C. § 870(b)	11

State Statutes:

D.C. Code Ann. § 7-2551.02 (rev. 1994)	3
42 Pa. Cons. Stat. § 742	2
Va. Code Ann. § 15.2-915.1 (enacted 2000)	3

Rule:

Pa. R. Civ. P. 1028(a)(4).....	6
--------------------------------	---

Legislative Material:

H.R. Rep. No 109-124 (2005).....	3, 18
----------------------------------	-------

INTRODUCTION

This case involves a constitutional challenge to the Protection of Lawful Commerce in Arms Act, Pub. L. No. 109-92, 119 Stat. 2095 (2005) (PLCAA) (codified at 15 U.S.C. §§ 7901-7903), a federal statute limiting the extent to which firearms manufacturers and distributors may be held liable for the actions of third parties. The statute reflects Congress’s determination that holding firearms manufacturers and distributors liable for “harm that is solely caused by others” constitutes “an unreasonable burden on interstate and foreign commerce of the United States.” 15 U.S.C. § 7901(a)(6). The PLCAA therefore preempts certain tort lawsuits against gun manufacturers and distributors based on the “criminal or unlawful misuse” of a firearm. *Id.* § 7903(5)(A).

Plaintiffs, the parents of a minor child shot and killed by another minor in 2016, have sued a gun manufacturer and seller on a variety of tort-law theories. The defendants have argued that suit is barred by the PLCAA. In response, plaintiffs have argued that the PLCAA is unconstitutional and that it would not preclude their suit in any event. The United States has intervened solely to defend the constitutionality of the PLCAA. *Cf.* 28 U.S.C. § 2403(a). The United States takes no position on whether the PLCAA forecloses this suit.

Every state or federal appellate court to consider the constitutionality of the PLCAA has upheld the statute. *Ileto v. Glock, Inc.*, 565 F.3d 1138 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008); *Delana v. CED Sales*,

Inc., 486 S.W.3d 316 (Mo. 2016); *Estate of Kim v. Cox*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008). The United States Supreme Court has repeatedly made clear that Congress, in the exercise of its Commerce Clause power, can preempt state tort laws without raising Tenth Amendment concerns or infringing due process. Plaintiffs’ constitutional contentions provide no basis for setting aside the statute or for interpreting its provisions to avoid serious constitutional concerns.

STATEMENT OF JURISDICTION

The Court of Common Pleas dismissed plaintiffs’ complaint on January 15, 2019. R.292a. Plaintiffs filed a timely notice of appeal on February 7, 2019. R.2a. This Court has jurisdiction under 42 Pa. Cons. Stat. § 742.

ORDER IN QUESTION

Plaintiffs have appealed the Court of Common Pleas’ January 15, 2019 order sustaining defendants’ preliminary objections in the nature of a demurrer and dismissing plaintiffs’ complaint with prejudice. That order is reproduced at R.292a-307a.

SCOPE AND STANDARD OF REVIEW

“When an appellate court rules on whether preliminary objections in the nature of a demurrer were properly sustained, the standard of review is *de novo* and the scope of review is plenary.” *Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96, 101 (Pa. 2008).

STATEMENT OF THE CASE

A. Statutory Background

Congress enacted the Protection of Lawful Commerce in Arms Act at a time when States' tort law concerning firearms was in flux. In the years preceding the PLCAA, neighboring jurisdictions adopted competing legislative measures: by 2006, some States restricted lawsuits against firearms manufacturers, *see, e.g.*, Va. Code Ann. § 15.2-915.1 (enacted 2000), while other jurisdictions imposed absolute liability on manufacturers for any injuries caused by certain weapons, *see, e.g.*, D.C. Code Ann. § 7-2551.02 (rev. 1994). As Congress explained in enacting the PLCAA, plaintiffs were thus able to commence lawsuits against “manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended,” seeking relief for harm caused by the “misuse of firearms by third parties, including criminals.” 15 U.S.C. § 7901(a)(3). The possibility of such tort suits, Congress found, “erodes public confidence in our Nation’s laws, threatens the diminution of a basic constitutional right and civil liberty . . . and constitutes an unreasonable burden on interstate and foreign commerce of the United States.” *Id.* § 7901(a)(6); *see* H.R. Rep. No. 109-124, at 21-22 (2005) (further criticizing these suits as “efforts at extraterritorial regulation”).

To address these concerns, the PLCAA generally preempts tort actions brought “by any person against a manufacturer or seller” of firearms for injuries “resulting from the criminal or unlawful misuse of [a firearm] by the person or a third party.” 15 U.S.C. §§ 7902(a), 7903(4), (5)(A). The statute 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).

The PLCAA contains various exceptions that allow certain tort actions that would otherwise be preempted. In addition to these exceptions, the PLCAA does not prohibit suits against individual users of firearms for the injuries they may cause.

First, the PLCAA permits suits against sellers that transfer firearms knowing that those weapons will be used to commit a crime of violence. 15 U.S.C. § 7903(5)(A)(i); *see* 18 U.S.C. § 924(h).

Second, it allows actions against sellers for negligent entrustment or negligence per se. 15 U.S.C. § 7903(5)(A)(ii).

Third, it allows suits alleging knowing violations of “a State or Federal statute applicable to the sale or marketing of the product,” so long as that violation was a proximate cause of the harm for which relief is sought. 15 U.S.C. § 7903(5)(A)(iii). This exception is often referred to as the “predicate exception,” because a plaintiff must allege a knowing violation of a “predicate statute,” *i.e.*, a statute applicable to the sale or marketing of firearms. *Ileto*, 565 F.3d at 1132.

Fourth, the PLCAA does not bar claims for breach of contract or warranty. 15 U.S.C. § 7903(5)(A)(iv).

Fifth, it permits claims based on defective design or manufacturing, so long as the product was used as intended or in a “reasonably foreseeable manner” and the

discharge of the product was not “caused by a volitional act that constituted a criminal offense.” 15 U.S.C. § 7903(5)(A)(v).

And *sixth*, it does not bar the Attorney General of the United States from enforcing federal firearms laws. 15 U.S.C. § 7903(5)(A)(vi).

B. Factual and Procedural Background

This case arises from the fatal shooting of James Robert (“J.R.”) Gustafson by a fourteen-year-old boy. R.11a (Compl. ¶ 23). In 2016, while both J.R. and the boy were visiting a home in Mt. Pleasant, the boy discovered a handgun and, believing the gun to be unloaded, pointed it at J.R. and pulled the trigger.¹ R.12a (Compl. ¶¶ 25-26). The handgun contained a live round, which struck and killed J.R. *Id.* (Compl. ¶ 28). The friend subsequently pled guilty to involuntary manslaughter in juvenile court. *Id.* (Compl. ¶ 29).

Plaintiffs are J.R.’s parents. R.10a (Compl. ¶ 12). In 2018, they commenced this action against Springfield, Inc., which manufactured the firearm, and Saloom Department Store, which sold the handgun at retail. R.10a-11a (Compl. ¶¶ 18-19). Plaintiffs’ complaint alleged that the handgun was defectively designed, negligently designed and sold, and lacked appropriate marketing and warnings. R.20a-25a (Compl. ¶¶ 76-103); *see* R.25a-31a (Compl. ¶¶ 104-135).

¹ The United States accepts all facts in plaintiffs’ complaint as true for purposes of this appeal. *See Bourke v. Kazaras*, 746 A.2d 642, 643 (Pa. 2000).

Defendants filed a demurrer seeking dismissal of the complaint, contending that the PLCAA barred each of the causes of action asserted. R.35a-38a; *see* Pa. R. Civ. P. 1028(a)(4). Plaintiffs responded by arguing that the PLCAA did not preempt their suit and, if it did, that the PLCAA was unconstitutional. R.73a. On October 19, 2018, the United States intervened for the limited purpose of defending the PLCAA's constitutionality. R.144a.

The trial court sustained defendants' demurrer and dismissed the case. R.292a. The court held that the PLCAA governed this suit, R.299a, and rejected Appellants' constitutional objections to the law, R.307a. The court explained that the PLCAA does not violate the Tenth Amendment and principles of federalism or plaintiffs' substantive due process and equal protection rights; it further noted that the PLCAA fell within Congress's Commerce Clause authority. R.300a-07a.

SUMMARY OF ARGUMENT

As every federal or state appellate court to consider these questions has held, the PLCAA does not violate the United States Constitution. Plaintiffs' arguments to the contrary should be rejected, and this Court should interpret the PLCAA in accordance with its text.

The PLCAA simply preempts certain tort claims against firearms manufacturers and distributors. The United States Supreme Court has long made clear that such legislation falls well within Congress's authority and does not infringe on any protected property interest. The statute does not require any part of any State

to act or refrain from acting, and thus does not implicate the Tenth Amendment.

That Congress limited the scope of the preemption with respect to some state legislative enactments in no sense commandeers any State or otherwise implicate the Tenth Amendment.

ARGUMENT

I. The PLCAA does not violate the Tenth Amendment.

A. 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 v. United States*, 505 U.S. 144, 161 (1992). The federal statute at issue in *New York v. United States* unconstitutionally “commandeer[ed]” state governments” by forcing them to enact regulation according to Congress’s instructions. 505 U.S. at 175. And in *Printz v. United States*, 521 U.S. 898, 935 (1997), the federal statute “conscript[ed]” local law enforcement officials by requiring them to perform background checks in connection with firearms sales.

Thus, “the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states.” *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396 (2d Cir. 2008). As that court and the trial court in this case concluded, it plainly does not. The statute simply preempts certain claims while imposing “no

affirmative duty of any kind” on “any branch of state government.” *Id.* at 397. For these reasons, every appellate court to consider the issue has held that the PLCAA comports with the Tenth Amendment because it does not commandeer state powers. *See Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016); *Estate of Kim v. Cox*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009). And, as one of those courts observed, “where Congressional action does not commandeer states or state actors, the Tenth Amendment reflects Congress’s limitation to act within its enumerated powers.” *Estate of Kim*, 295 P.3d at 389.

Indeed, plaintiffs do not contend that the PLCAA’s preemption of state tort remedies violates the Tenth Amendment. That should be the beginning and end of the Court’s inquiry.

B. Plaintiffs urge, however, that Congress violated the Tenth Amendment by including an exception to preemption for certain statutory claims. A limitation on the scope of federal preemption does not implicate the Tenth Amendment in any sense. That Congress did not extend the exception to certain common-law claims has no bearing on the constitutional analysis.

Plaintiffs nevertheless argue (Br. 34, 37) that the Tenth Amendment “does not merely prohibit ‘commandeering’” and that the PLCAA violates the Tenth Amendment by “interfering with the authority of states to decide how to make and apply their law.” The Supreme Court has never endorsed this proposition. As the Second Circuit has explained, “federal statutes validly enacted under one of Congress’

enumerated powers . . . cannot violate the Tenth Amendment unless they commandeer the states’ executive officials or legislative processes.” *City of New York v. Beretta*, 524 F.3d at 396 (quoting *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002) (citation and alteration omitted)). Because the PLCAA fits squarely within Congress’s Commerce Clause authority (*see infra* Part III), it cannot violate the Tenth Amendment unless it commandeers the States.

The principal case that plaintiffs cite (Br. 37) as authority for bringing a Tenth Amendment challenge “distinct from a ‘commandeering’ claim” does not support plaintiffs’ view. In *City of Spokane v. Federal Nat’l Mortg. Ass’n*, the Ninth Circuit rejected a non-commandeering Tenth Amendment challenge because the statute at issue was a straightforward application of Congress’s Commerce Clause power. 775 F.3d 1113, 1117-18 (9th Cir. 2014). Thus, *City of Spokane* is consistent with the principle that a statute that is “validly enacted under one of Congress’ enumerated powers” and does not commandeer state officials cannot violate the Tenth Amendment. *City of New York v. Beretta*, 524 F.3d at 396.

Even on its own terms, plaintiffs’ contention that the PLCAA’s exception interferes with the States’ authority to decide how to make their law reflects multiple errors. First, the PLCAA does not dictate which branch of state government must make law. Under the Act, States are free to allocate their decision-making authority as they see fit. Pennsylvania may regulate (or decline to regulate) firearms through whichever branch of government it chooses; Congress’s enactment of the PLCAA

simply means that different choices by States may have different effects in subsequent lawsuits. *See City of New York v. Beretta*, 524 F.3d at 396-97; *Estate of Kim*, 295 P.3d at 388-89; *Adames*, 909 N.E.2d at 764-65.

The Supreme Court’s most recent Tenth Amendment case underscores the PLCAA’s constitutionality. In *Murphy v. NCAA*, the Court explained that the Tenth Amendment applies both when Congress commands affirmative action and when it imposes a prohibition. 138 S. Ct. 1461, 1478 (2018). Thus, Congress cannot “prohibit[] a State from enacting new laws.” *Id.* But just as the PLCAA does not require States to legislate, it also does not prohibit States from doing so. Instead, it simply preempts certain laws, as many other federal statutes do.²

Second, as the trial court detailed (R.301a), plaintiffs misconstrue the scope of the PLCAA’s exceptions. The Act does not preserve every claim authorized by a legislature and preempt every rule adopted by a court. For example, the PLCAA preserves some claims that may be created by either the legislature or the judiciary, such as negligent entrustment, negligence per se, and breach of contract. 15 U.S.C. § 7903(5)(A)(ii),(iv). The PLCAA leaves it up to the States to decide whether to recognize those claims by statute, common law, or not at all. Similarly, the predicate exception does not reach every effort by a legislature to create statutory liability.

² Plaintiffs are incorrect to aver (Br. 47) that the PLCAA does not “regulate private conduct.” The PLCAA regulates private conduct by preempting private tort suits that fall within its scope.

Congress limited the exception to *knowing* violations of the subset of statutes that are “applicable to the sale” of firearms. *Id.* § 7903(5)(A)(iii). Because the PLCAA preempts a variety of both common-law and statutory claims, it does not create the wholesale shift between the state judiciary and legislature that plaintiffs allege.

Third, plaintiffs are quite wrong to assert (Br. 35) that the PLCAA’s exception is without precedent. Indeed, other statutes expressly require States’ legislatures—not their governors or judicial officers—to act in order to benefit from a federal program. *E.g.*, 29 U.S.C. § 49c (employment); 43 U.S.C. § 870(b) (land grants); *cf. Sprietsma v. Mercury Marine*, 537 U.S. 51, 63-64 (2002) (explaining that it “would be perfectly rational for Congress not to pre-empt common-law claims,” but to preempt “positive enactments” in state statutes).

Finally, the PLCAA does not prohibit state courts from altering or creating common law, or from interpreting state statutes. As the Second Circuit held, the PLCAA does not “foreclose[] the possibility” that state-court interpretations of state legislation may bear on whether a state law falls within the PLCAA’s exception. *City of New York v. Beretta*, 524 F.3d at 396 (quoting *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 266 (E.D.N.Y. 2005)). And, of course, state courts are free to recognize whichever common-law causes of action they wish; the PLCAA simply preempts some claims from going forward if they involve firearms manufacturers. And it is uncontroversial that state courts, like federal courts, are bound to recognize

the supremacy of federal law and dismiss preempted claims. *See, e.g., Miller v. French*, 530 U.S. 327, 349 (2000).

Plaintiffs cite (Br. 35) a decision of the intermediate New York appellate court as holding that “[t]he most similar statute” to the PLCAA violated the Tenth Amendment. *See In re Vargas*, 10 N.Y.S.3d 579 (N.Y. App. Div. 2015). The statute in that case prohibited States from issuing professional licenses to undocumented immigrants absent a new state enactment authorizing the license grant. *Id.* at 582; *see* 8 U.S.C. § 1621. The New York state court found that statute unconstitutional to the “limited” extent it governed attorney admissions, where New York law provided that only the judiciary could wield the “sovereign authority” of the State. *In re Vargas*, 10 N.Y.S.3d at 582. And the only other court to consider such a challenge rejected it. *See Maine Mun. Ass’n v. Maine Dept. of Health and Human Serv.*, No. AP1439, 2015 WL 4070311, at *8 (Me. Super. Ct. June 9, 2015).

This case is entirely dissimilar. Plaintiffs have not argued that the law of this Commonwealth precludes the legislature from enacting tort laws. Nor have plaintiffs argued that the PLCAA prohibits any State from taking any action. Their argument here, by contrast, is that Congress could not constitutionally except certain state laws

from the scope of preemption without excepting others. That decision presents no Tenth Amendment problem.³

II. The PLCAA does not violate the Fifth Amendment.

Plaintiffs contend (Br. 39-47) that the PLCAA violates the Fifth Amendment's Due Process Clause, as well as that Amendment's equal-protection component. Again, every appellate court to consider these arguments has rejected them. *See Ileto v. Glock, Inc.*, 565 F.3d 1138, 1140-42 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 175-80 (D.C. 2008); *Estate of Kim*, 295 P.3d at 390-91; *Delana*, 486 S.W.3d at 323-24.

A. To succeed in a due process challenge, 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. As the trial court recognized (R.302a-03a), plaintiffs lack any property right in this litigation. And, even if they had such a right, the PLCAA does not violate any due-process guarantee.

There is no constitutional property right in pending or unfilled tort litigation. The Constitution “does not forbid the creation of new rights, or the abolition of old

³ Plaintiffs' invocation (Br. 35) of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), is wholly out of place. That case, which stands for the proposition that “[t]here is no federal general common law,” does not concern the Tenth Amendment. *Id.* 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 here. *Id.*; see *Lehman Brothers v. Schein*, 416 U.S. 386, 389 (1974) (under *Erie*, a state is free to make its own common law, “providing there is no overriding federal rule which pre-empt[s] state law by reason of federal curbs on trading in the stream of commerce”).

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.” *New York Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917); see *Duke Power Co. v. Carolina Emt’l Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978) (“[A] person has no property, no vested interest, in any rule of the common law.”). It is only when a “final unreviewable judgment” is obtained that a litigant acquires a constitutionally protected property right. *Ileto*, 565 F.3d at 1141.

For this reason, the Supreme Court of this Commonwealth has recognized that neither the U.S. nor Pennsylvania Constitutions “prevent[] the legislature from extinguishing a cause of action.” *Singer v. Sheppard*, 346 A.2d 897, 903 (Pa. 1975); see *id.* (“Any conclusion that an individual has a vested right in the continued existence of an immutable body of negligence law . . . would [result in] the stagnation of the law in the face of changing societal conditions.”). And numerous courts of appeals have rejected due-process challenges to legislation affecting pending tort claims. See, e.g., *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996); see also *Schmidt v. Ramsey*, 860 F.3d 1038, 1048-49 (8th Cir. 2017); *Ducharme v. Merrill-National Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978); *Carr v. United States*, 422 F.2d 1007, 1010-11 (4th Cir. 1970).

This principle resolves plaintiffs’ due-process challenge. At the time the PLCAA was enacted, plaintiffs had not filed their suit, much less obtained a final and

unreviewable judgment.⁴ Accordingly, they have no property right in this litigation, and so cannot state a due-process claim.

Even if plaintiffs had a cognizable property right, their due-process challenge would fail. Plaintiffs complain (Br. 39) that the PLCAA violates due process because it “extinguishe[s] tort actions without providing a reasonable alternative remedy.” But the Constitution does not require such remedies. *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 v. Silver*, 280 U.S. at 121-22; *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578, 580 (1883); *cf. 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.

In any event, such remedies exist here. Plaintiffs may sue the individual who “pled guilty to . . . involuntary manslaughter in juvenile court” for committing the shooting. R.12a (Compl. ¶ 29). They may also sue any other individual whose negligent or intentional conduct proximately led to J.R.’s death. And they may sue the

⁴ This suit 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 sole trial-court decision finding the PLCAA unconstitutional. In that case, the PLCAA was signed into law after plaintiffs brought their suit. *See* Pl. Br. Ex. E, at 2. The Court of Appeals of Indiana ultimately held that the PLCAA did not bar the suit, without reaching the constitutional issue. 875 N.E.2d at 434-45.

manufacturers, distributors, and sellers of the firearm used in the shooting under any claim that falls within the Act’s multiple exceptions. *See* 15 U.S.C. § 7903(5)(A)(i)-(vi). Thus, the Ninth Circuit correctly held that “the PLCAA does not completely abolish Plaintiffs’ ability to seek redress.” *Ileto*, 565 F.3d at 1143; *see also District of Columbia v. Beretta*, 940 A.2d at 177 n.8 (similar).

Plaintiffs resist this conclusion by suggesting (Br. 43) that those alternatives are inadequate because they might not permit them to bring the precise claim asserted here. But, as the Supreme Court has emphasized in other constitutional contexts, alternatives may be adequate even though they are not “perfectly congruent” to the existing statutory scheme, and even though they may not “provide complete relief.” *Minneeci v. Pollard*, 565 U.S. 118, 129 (2012); *see Ziglar v. Abbasi*, 137 S. Ct. 1843, 1858 (2017). That the PLCAA might force plaintiffs to reconsider their litigation strategy is not relevant for constitutional purposes.

In the absence of case law to support their argument, plaintiffs ask this Court (Br. 40-41) to draw a negative inference from *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59 (1978). There, the Court observed that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.” *Id.* at 88. But it held that it “need not resolve this question” because the challenged act did “provide a reasonably just substitute for the common-law or state tort law remedies it replaces.” *Id.* All that the Court said, therefore, was

that the *Duke Power* plaintiffs—just like the plaintiffs here—would lose their due-process challenge even were their view about adequate remedies correct. Accordingly, the Court correctly declined to reach this issue, just as this Court can properly do in this case.

B. Plaintiffs are on no firmer ground in arguing (Br. 44-47) that the PLCAA violates equal protection because it discriminates among various classes of tort victims. As plaintiffs acknowledge, this claim could succeed only if they could 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); *see id.* (“[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.” (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973))).

As the trial court explained (R.303a-04a), plaintiffs cannot meet that heavy burden here. Plaintiffs urge that in enacting the PLCAA, Congress irrationally distinguished between victims of knowing violations of state statutes and victims of knowing violations of state common law. Rational-basis review “is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.” *Heller*, 509 U.S. at 319 (quoting *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 313 (1993)). And, insofar as federal preemption applies more broadly to common-law tort actions, Congress could rationally conclude that the unpredictability of common-law tort actions could pose a greater threat to the firearms industry than would defined and codified

legislative enactments that are necessarily passed by democratically accountable actors.

See 15 U.S.C. § 7901(a)(7).

III. The PLCAA is a valid exercise of Congress’s power.

The PLCAA is a straightforward exercise of (at a minimum) Congress’s authority “[t]o regulate commerce . . . among the several states.”⁵ U.S. Const. art. I, § 8, cl. 3. The Supreme Court has “upheld a wide variety of congressional Acts regulating intrastate economic activity where we have concluded that the activity substantially affected interstate commerce.” *United States v. Lopez*, 514 U.S. 549, 559 (1995). If Congress acts to regulate “economic activity” that “substantially affect[s] interstate commerce,” then “legislation regulating that activity will be sustained.” *Id.* at 560.

The PLCAA plainly regulates economic activity that substantially affects interstate commerce. Congress determined in enacting the statute that the possibility of suits against gun manufacturers and sellers “constitute[] an unreasonable burden on interstate and foreign commerce.” 15 U.S.C. § 7901(a)(6). In order to protect that economic activity, Congress determined to combat States’ “efforts at extraterritorial regulation [that] aim to reduce interstate commerce.” H.R. Rep. No. 109-124, at 22; *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (“[O]ne State’s power to

⁵ The trial court also held (R.306a-07a) that the PLCAA could be upheld as an exercise of Congress’s Fourteenth Amendment powers. Plaintiffs do not challenge that independent holding in their opening brief. *See Commonwealth v. Otero*, 860 A.2d 1052, 1054 (Pa. Super. Ct. 2004).

impose burdens on the interstate market . . . is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.” (citation omitted)).

At the same time, Congress took care to ensure that the required “nexus to interstate commerce” was present. *See Lopez*, 514 U.S. at 562. The PLCAA’s bar on tort lawsuits applies only to suits against manufacturers and sellers who manufacture or sell firearms “in interstate or foreign commerce.” 15 U.S.C. § 7903(2), (6).

Similarly, it preempts only those suits concerning firearms “that [have] been shipped or transported in interstate or foreign commerce.” *Id.* § 7903(4). Those protections ensure that Congress does not regulate commerce that is “truly local,” and therefore beyond the federal government’s ambit. *Lopez*, 514 U.S. at 568.

Plaintiffs urge (Br. 47) that the Commerce Clause “does not empower Congress to regulate the lawmaking functions of states.” But it is axiomatic that Congress can preempt state statutes under its Commerce Clause powers. *See, e.g., Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016); *Mutual Pharm. Co. v. Bartlett*, 570 U.S. 472, 480 (2013). The Supreme Court has made clear that the power to preempt includes federal statutes that preempt state tort laws, *see Riegel v. Medtronic*, 552 U.S. 312, 323 (2008), and that preempt laws governing the use of evidence in state and federal courts, *Pierce County v. Guillen*, 537 U.S. 129, 146 (2003).

IV. This Court should interpret the PLCAA in light of its text.

Because the PLCAA is constitutional in all respects, this Court should affirm the trial court's order if it concludes that the PLCAA bars this suit. The United States takes no position on that underlying statutory question. But the Court should answer that question in light of the PLCAA's text, structure, history, and purpose. Principles of constitutional avoidance, urged by plaintiffs, should have no bearing on the resolution of this case.

A. Under principles of constitutional avoidance, a court may adopt a plausible interpretation of an ambiguous statute if a different interpretation would raise “serious constitutional concerns.” *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988). For the reasons explained above, there are no serious constitutional problems with the PLCAA, and the constitutional-avoidance principle does not apply. *National Mining Ass'n v. Kemphorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (noting that the canon of constitutional avoidance does not apply “at the mere mention of a possible constitutional problem”); *see Ileto*, 565 F.3d at 1144 (declining “to apply the doctrine of constitutional avoidance” in interpreting the PLCAA).

B. Equally without merit is plaintiffs' insistence that their preferred reading is compelled by the Supreme Court's decisions in *Bond v. United States*, 572 U.S. 844 (2014), and *Gregory v. Ashcroft*, 501 U.S. 452 (1991). Like the constitutional avoidance doctrine generally, those cases stand for the proposition 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; *see Bond*, 572 U.S. at 858, 860. In *Gregory*, the Supreme Court expressed concern that interpreting the Age Discrimination in Employment Act to apply to state judges would undermine the “authority of a State’s people to determine their government officials’ qualifications,” an authority that the Court suggested “may be inviolate.” 501 U.S. at 464. In *Bond*, the constitutional risk inhered because applying a federal criminal statute to petitioner’s behavior would have “dramatically intrude[d] upon traditional state criminal jurisdiction” by permitting federal prosecution of “purely local crimes.” *Id.* at 857, 860 (quoting *United States v. Bass*, 404 U.S. 336, 350 (1971)).

This case presents no such problem. As previously discussed, the PLCAA is an unremarkable exercise of Congress’s power to regulate interstate commerce, and does not in any way undermine the ability of any State’s voters to choose their governing officials. Instead, the PLCAA effects a simple preemption of state tort law, an act that raises no serious constitutional question. *See Riegel*, 552 U.S. at 326. There is therefore no need to consider these precedents.

In any event, the trial court correctly concluded that, even if *Gregory* and *Bond* bore on this case, the “text of the statute makes manifest Congress’s intent to preempt state tort law.” R.295a; *see Delana*, 486 S.W.3d at 323 (“Because Congress has expressly and unambiguously exercised its constitutionally delegated authority to

preempt state law negligence actions against sellers of firearms, there is no need to employ a narrow construction to avoid federalism issues.”). The PLCAA clearly indicates Congress’s intention to “prohibit causes of action” brought under state tort law. 15 U.S.C. § 7901(b)(1); *see id.* § 7902(a) (providing that certain tort actions “may not be brought in any Federal or State court”). What particular actions are or are not barred by the PLCAA is a question of statutory interpretation, on which the United States takes no position in this action. But there is no question that, in enacting the PLCAA, Congress unambiguously preempted state law.

CONCLUSION

The Court should uphold the constitutionality of the PLCAA and interpret that statute in accordance with its text.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of Pennsylvania Rule of Appellate Procedure 2135(d) because it contains 5377 words. I further certify that this filing complies with the provisions of the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania that require filing confidential information and documents differently than non-confidential information and documents.

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**CASE NO. 207 WDA 2019
SUPERIOR COURT OF PENNSYLVANIA**

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

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD ARMORY, and SALOOM
DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC d/b/a SALOOM
DEPARTMENT STORE, *Defendants, Appellees*.

**On Appeal from the Order of the Court of Common Pleas of
Westmoreland County, entered on January 15, 2019 in the Civil
Division, No. 1126 of 2018, Harry F. Smail, Jr., Judge**

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Contents

Summary of Argument	1
Argument	6
I. The Clear Statement Rule Requires That PLCAA Be Read To Allow This Case.....	6
A. PLCAA’s Product Liability Exception Does Not Clearly Express An Intent To Bar Claims Like Appellants’	6
1. PLCAA’s Products Liability Exception Allows Appellants’ Claims Because It Is Not Clear That Congress, By Excluding “Criminal Offense[s],” Intended To Bar Cases Involving Shootings Treated As Acts Of Juvenile Delinquency	7
2. Congress Did Not Express An Unmistakable Intent To Treat Unintentional Shootings Like The Juvenile Delinquent’s As Disqualifying “Volitional” Acts	11
B. PLCAA’s General Definition Of “A Prohibited Qualified Civil Liability Action” Does Not Unmistakably Bar These Claims	13
1. Statutory Interpretation and Federalism Principles Require Reading PLCAA’s General Definition In § 7903(5)(A) As Only Barring Claims Where Harm Is “Solely Caused” By Criminal or Unlawful Misuse	13
2. PLCAA’s Legislative History Confirms That Congress Did Not Intend To Bar Appellants’ Case	20
C. The Clear Statement Rule Applies Independent Of The Doctrine Of Constitutional Avoidance	23

D. The Clear Statement Rule Applies Even Where Congress Has Expressly Mandated Some Preemption	23
II. PLCAA Is Unconstitutional If It Bars This Case	26
A. PLCAA Violates The Tenth Amendment	26
B. PLCAA Violates Due Process.....	30
C. PLCAA Violates Equal Protection Principles	37
D. PLCAA Is Not A Permissible Exercise Of Congress’s Commerce Clause Authority	39
Conclusion	40

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adames v. Shaheen</i> , 909 N.E. 2d. 742 (Ill. 2009)	11
<i>Astoria Fed. Sav. & Loan Ass’n v. Solimino</i> , 501 U.S. 104 (1991)	9, 17
<i>Bond v. United States</i> , 134 S. Ct. 2077 (2014)	1, <i>Passim</i>
<i>Cipollone v. Liggett Group</i> , 505 U.S. 504 (1992)	1, <i>Passim</i>
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985)	37
<i>City of New York v. Beretta U.S.A. Corp.</i> , 401 F. Supp. 2d 244 (E.D.N.Y. 2008)	35
<i>City of Spokane v. Fannie Mae</i> , 775 F.3d 1113 (9th Cir. 2014)	29
<i>Minn. v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	27
<i>Conroy v. Aniskoff</i> , 507 U.S. 511 (1993)	16
<i>Delana v. CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016)	24, 35
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163	35

<i>Duke Power Co. v. Carolina Envtl. Study Grp.</i> , 438 U.S. 59 (1978)	31
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938)	27
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	1, <i>Passim</i>
<i>Habecker v. Nationwide Ins. Co.</i> , 299 Pa. Super. 463 (1982)	9, 17
<i>Highland Farms Dairy, Inc. v. Agnew</i> , 300 U.S. 608 (1937)	27
<i>Hill v. Slippery Rock Univ.</i> , 138 A.3d 673 (Pa. Super. 2016)	4
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9th Cir. 2009)	35
<i>Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals</i> , 572 Pa. 240 (2002)	8
<i>JP Morgan Chase Bank N.A. v. Taggart</i> , 203 A.3d 187 (2019)	14
<i>Kelley v. R.G. Industries, Inc.</i> , 497 A.2d 1143 (Md. 1985)	21
<i>Kim ex rel. Alexander v. Coxe</i> , 295 P.3d 380	35
<i>Marbury v. Madison</i> , 5 U.S. 137	31
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	32

<i>Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York (“Vargas,”</i> 131 A.D.3d 4 (N.Y. App. Div. 2015).....	28, 34
<i>McBride v. General Motors Corp.,</i> 737 F. Supp. 1563 (M.D. Ga. 1990).....	37, 38
<i>Medtronic, Inc. v. Lohr,</i> 518 U.S. 470.....	19, 24, 25
<i>Minecci v. Pollard,</i> 565 U.S. 118 (2012)	36
<i>Murphy v. NCAA,</i> 138 S.Ct. 1461 (2018)	39
<i>New York v. United States,</i> 505 U.S. 144 (1992)	29
<i>Patchak v. Zinke,</i> 138 S. Ct. 897 (2018)	37
<i>Providence & N.Y.S.S. Co. v. Hill Mfg. Co.,</i> 109 U.S. 578 (1883) (1883).....	37
<i>Pruneyard Shopping Ctr. v. Robins,</i> 447 U.S. 74 (1980).....	32
<i>Rodgers v. United States,</i> 185 U.S. 83 (1902).....	14, 16, 20
<i>Ryan v. Hughes-Ortiz,</i> 959 N.E.2d 1000 (Ma. Ct. App. 2012).....	11
<i>Silver v. Silver,</i> 280 U.S. 117 (1929)	37

<i>Soto v. Bushmaster Firearms Int’l, LLC</i> , 331 Conn. 53 (2019).....	7, <i>Passim</i>
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	27
<i>Me. Mun. Ass’n v. Me. HHS</i> , 2015 Me. Super. LEXIS 197 (Jun. 9, 2015).....	28, 29
<i>Truax v. Corrigan</i> , 257 U.S. 312 (1921)	31
<i>United States v. Toviave</i> , 761 F.3d 623 (6th Cir. 2014).....	25
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017)	36

Statutes

15 U.S.C. § 7903(5)(A)(iii)	25
15 U.S.C. § 7903(5)(A)(v).....	3, 7
15 U.S.C. §§ 7901-7903	1
Md. Ann. Code art. 27 § 36.....	21
§ 7901(a)(6), (b)(1)	5, 10
§ 7901(a)(7)	10
§§ 7903(5)(A)	5, 8

Other Authorities

151 Cong. Rec. S9061	20
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Summary of Argument

At this stage this Court must accept the allegations that Appellants' son, J.R., was killed when a juvenile unintentionally shot him with a gun he thought was unloaded because it lacked long-feasible safety features and adequate warnings. Appellees cannot deny that, under well-established Pennsylvania common law, they can be held liable, entitling Appellants to compensation from them -- unless Congress has deprived Pennsylvania courts of the authority to grant the Gustafsons civil justice in the Protection of Lawful Commerce in Arms Act ("PLCAA," 15 U.S.C. §§ 7901-7903). But Congress has not done so.

Supreme Court precedent requires this Court to interpret PLCAA through a federalism lens, applying the "clear statement" rule. Under *Bond v. United States*, 134 S. Ct. 2077 (2014); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) and *Cipollone v. Liggett Group*, 505 U.S. 504 (1992), PLCAA may not be read to require dismissal of Appellants' claims unless Congress clearly and unmistakably expressed its intent to bar such cases. This Court must "not [be] looking for a plain statement that [common law

claims like Appellants’] are excluded” from the coverage of PLCAA’s bar, but instead, should “not read [PLCAA] to [bar common law claims like Appellants’] unless Congress has made it clear that [they] are *included*.” See *Gregory*, 501 U.S. at 467 (emphasis in original).

PLCAA lacks the required clear statement of intent to bar Appellants’ claims. Contrary to Appellees’ claims that Congress intended sweeping immunity for the gun industry, PLCAA’s text and legislative history indicate that Congress did not clearly intend to bar claims like Appellants that are based on well-established common law products liability principles and where one cause of harm was a gun company’s tortious conduct. In fact, it appears that Congress intended to permit precisely such claims. Hence, PLCAA may not be read to deprive Pennsylvania courts of the authority to grant the Gustafsons relief. This reading of PLCAA is reinforced by other principles of statutory interpretation, and best furthers Congress’s intent.

Implicitly recognizing that they cannot prevail if the interpretative principles announced in *Bond*, *Gregory*, and *Cipollone* are applied to PLCAA, Appellees urge this court to simply not apply the required federalism lens. They claim that the clear statement rule only applies if a statute raises substantial constitutional concerns and lacks any express preemption provisions. See Appellees' Brief ("Appellees' Br.") at 10-11, 15. That assertion is not the law and is wholly contrary to *Bond*, *Gregory*, and *Cipollone*. Those cases demonstrate that the clear statement rule applies whenever state authority may be infringed, regardless of whether the statute raises substantial constitutional concerns or expressly preempts state law to some degree. Federalism principles govern every step in this Court's analysis of PLCAA's statutory language.

PLCAA permits this case for at least two independent reasons. First, PLCAA expressly allows products liability cases, except where the discharge of the gun "was caused by a volitional act that constituted a criminal offense." See 15 U.S.C. §

7903(5)(A)(v). This Court must accept the (accurate) allegations that J.R.'s shooting was unintentional, and was not treated as a crime but was adjudicated under the juvenile justice system. See *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 677 (Pa. Super. Ct. 2016). Appellees' inaccurate assertions that Plaintiffs' son was killed by a volitional criminal act must be rejected. Because it is not absolutely certain that Congress intended to treat a Juvenile Delinquent's unintentional shooting as a "criminal" and "volitional" act that would preclude application of the products liability exception, PLCAA provides no basis to dismiss this case. See *Gregory*, 501 U.S. at 464 (court must be "absolutely certain" about Congress's intent to preempt state law in a given circumstance to find preemption); see also *id.* at 467.

Second, the clear statement rule precludes reading Appellants' claims as falling within the general definition of a prohibited "qualified civil liability action." PLCAA's first Purpose and one Finding state that Congress only intended to prohibit actions in which harm was "solely caused" by the criminal or

unlawful use of a firearm. See §§ 7903(5)(A); 7901(b)(1), (a)(6). That statutory language makes it far from unmistakable that Congress intended to bar cases such as this, where the harm was also caused by Appellees' tortious conduct.

While Appellees invite the Court to ignore this statutory language, claiming it cannot "override" the rest of PLCAA, that is not Appellants' argument. See Appellees' Br. at 4. Rather, this Court may not ignore the "solely caused" language especially as it was critical to PLCAA's passage – because this language is critical to determining whether, under *Bond, Gregory and Cipollone*, the general definition of "qualified civil liability action" reflects a clear statement of intent to bar cases in which one cause of harm was a gun company's tortious conduct. Appellees also ignore PLCAA's legislative history, which indicates that Congress did not intend to deprive states of authority to hold negligent gun companies accountable.

This Court should reverse the trial court's dismissal of Appellants' claims. If this Court finds that PLCAA bars Appellants' claims, this Court should find PLCAA unconstitutional.

Argument

I. The Clear Statement Rule Requires That PLCAA Be Read To Allow This Case.

A. PLCAA's Product Liability Exception Does Not Clearly Express An Intent To Bar Claims Like Appellants'.

Under the required clear statement rule, the question before the Court is not whether Appellants' interpretation of PLCAA is more or less reasonable than the trial court's or Appellees'; the question is whether this Court is "*absolutely certain*" that Congress intended to bar claims like Appellants'. *Gregory* 501 U.S. at 464 (emphasis added); *see also id.* at 467. Only then can PLCAA be read to require dismissal. Here, PLCAA's text and legislative history demonstrate that reading PLCAA's products liability exception and general definition of a prohibited "qualified civil liability action" to allow Appellants' claims is not merely plausible, but that it is the most reasonable interpretation of PLCAA that best effects Congress's intent.

1. PLCAA's Products Liability Exception Allows Appellants' Claims Because It Is Not Clear That Congress, By Excluding "Criminal Offense[s]," Intended To Bar Cases Involving Shootings Treated As Acts Of Juvenile Delinquency

Appellees cannot effectively rebut the argument that, applying the clear statement rule, PLCAA may not bar the Gustafsons' case because it is not unmistakable that Congress intended to bar products liability cases involving an unintentional act of juvenile delinquency. § 7903(5)(A)(v). *see also Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 137-138 (2019) ("in the absence of a clear statement in the statutory text or legislative history [of PLCAA] that Congress intended to supersede the states' traditional authority . . . *we are compelled to resolve any textual ambiguities in favor of the plaintiffs*")(emphasis added)(referencing Cipollone); *id.* at 137 n. 58 (referencing *Bond*).

Section 7903(5)(A)(v) of PLCAA generally permits products liability claims, *except* where the "discharge of the [gun] was caused by a volitional act that constituted a criminal offense." *Id.* Congress intended for the definition of "criminal" in the

exclusionary phrase to be narrow: while PLCAA's general definition of "qualified civil liability action" includes actions where harm results from a "criminal or unlawful" misuse of a firearm (§ 7903(5)(A)), the disqualifying provision in the products liability exception only bars cases involving a "criminal" – but not an "unlawful" – offense.

This distinction is significant. Exclusion of one term from a list of terms indicates an intent to exclude the omitted term from the scope of the provision. *See Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals*, 572 Pa. 240, 247 (2002). One obvious category of products liability cases that Congress appears to have recognized as involving "unlawful" – but not "criminal" -- shootings are cases like these, involving juvenile incidents adjudicated under the criminal justice system. While Appellees oppose that interpretation, they offer no explanation for what "unlawful" but not "criminal" cases Congress intended to exclude.

Appellees would have this Court impermissibly ignore "unlawful" as surplusage. However, "[c]ourts must [] construe a

statute, if possible, so as to give effect to every word.” *Habecker v. Nationwide Ins. Co.*, 299 Pa. Super. 463, 471 (1982). See also *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991) (same); Antonin Scalia & Bryan A. Gardner, *Reading The Law: The Interpretation Of Legal Texts* (2012), (“*Reading the Law*”) at 174-180 (same).

Appellees also ignore the required clear statement rule. But under *Bond/Gregory*, the products liability exception must be read to allow Appellants’ case unless the “criminal” exclusion is a clear statement of intent to bar juvenile offense cases like this. Rather than clearly state an intent to bar such cases, it is hard to imagine what other types of “unlawful” discharge cases Congress could have intended to allow by limiting the exclusion to “criminal” offenses. Because PLCAA allows products liability cases involving “unlawful” but not “criminal” discharges, it is far from certain that Congress intended to bar claims such the Gustafsons.¹

¹ Appellees cite a Pennsylvania statute that defines acts of delinquency as crimes. See Appellees’ Br. at 39. But the relevant question is whether

Appellees also falsely claim that Appellants “concede[d]” that the shooting constituted a “criminal offense.” See Appellees’ Br. at 38. In fact, the cited section of the Complaint says, accurately, that “the [Juvenile Delinquent] pled guilty to [] delinquency involuntary manslaughter in juvenile court,” which makes clear it was not an offense under the criminal justice system. R. at 12a (Compl. ¶ 29)).

A narrow reading of the disqualifying phrase in the products liability exception is also consistent with PLCAA’s “solely caused” language (§ 7901(a)(6), (b)(1); *Soto*, 331 Conn. at 131),² Congress’s focus on barring cases unsupported by established common law (§ 7901(a)(7)), and the narrow protections PLCAA’s legislative supporters intended. See *infra* at 21-22. Appellees have no answer to that evidence of Congressional intent either.

Congress, in PLCAA, unmistakably indicated that such acts be deemed crimes.

²While attempting to distinguish *Soto*, Appellees concede that *Soto* read PLCAA’s “solely caused” language in support of reading one of PLCAA’s exceptions –the predicate exception – broadly so as to permit one of plaintiffs’ claims. See Appellees’ Br. at 24, 24 n. 6. The same logic supports Appellants’ position here.

Appellees rely on a few non-binding, inapposite and/or flawed cases. They falsely claim that Appellants “are unable to distinguish” *Adames v. Shaheen* 909 N.E. 2d. 742 (Ill. 2009). See Appellees’ Br. at 37-38. But Appellants did distinguish the case in their trial court briefing, which explained that *Adames* failed to apply the *Bond/Gregory* federalism principles, rendering its analysis of PLCAA fatally flawed. See R. at 92a.

Appellants also distinguished the only other case that Appellees cite regarding the products liability exception, *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Mass. App. Ct. 2012). See R. at 92a n. 6. *Ryan* did not consider whether a juvenile offense constituted a crime under PLCAA, and the decedent’s acts in *Ryan* involved the *intentional* infliction of harm to another (theft) as opposed to the *unintentional* shooting at issue here.

2. Congress Did Not Express An Unmistakable Intent To Treat Unintentional Shootings Like The Juvenile Delinquent’s As Disqualifying “Volitional” Acts

PLCAA does not bar this case for another, independent reason. Congress’s exclusion of cases involving “volitional” discharges from the products liability exception did not express a

clear intent to bar cases involving the unintentional shooting of a gun thought to be unloaded. See § 7903(5)(A)(v).

Congress's exclusion of "volitional" discharges from the exception does not indicate a clear statement of intent to bar unintentional shooting cases – and Appellees are unable to explain how it does. Instead, they resort to hyperbole, calling Appellants' argument that the shooting of J.R. was not "volitional" "incredulous" (see Appellees' Br. at 29 n. 10). But there is nothing "incredulous" about concluding that a "volitional" discharge of a gun requires some intent to fire a bullet, rather than simply to pull a piece of metal (a trigger of what one believes to be an unloaded, harmless gun).

Appellees also fail in their attempt to distinguish an analogy (made in Appellants' initial brief, "Appellants' Br.") of an individual who could not be deemed to "volitionally" trigger a bomb because he (volitionally) answered a phone that, without his knowledge, terrorists had wired to detonate a bomb if answered. See Appellants' Br. at 33. Appellees cannot dispute

the core point of the analogy, so they simply assert that “[t]o discharge a bullet is the reason why someone pulls the trigger of a firearm, and it is the normal and foreseeable result.” Appellees’ Br. at 29 n. 10. Appellees’ assertion is not only wrong, but it must be rejected because it is counter to the allegations that J.R.’s shooter did not intend to discharge a bullet. See R. at 12a (Cmpl. at ¶¶ 25-26) (minor believed gun to be unloaded); see *also* R. at 13a (Cmpl. at ¶¶ 37-38) (frequency of accidental shootings of minors).

B. PLCAA’s General Definition Of “A Prohibited Qualified Civil Liability Action” Does Not Unmistakably Bar These Claims

Appellees also fail to explain how Appellants’ case can be deemed a prohibited “qualified civil liability action” under applicable principles of statutory construction and the required *Bond/Gregory/Cippoline* federalism lens. As a result, Appellants’ case is not barred even if it did not come within the products liability exception.

1. Statutory Interpretation and Federalism Principles Require Reading PLCAA’s General Definition In § 7903(5)(A) As Only Barring Claims Where Harm Is

“Solely Caused” By Criminal or Unlawful Misuse

PLCAA generally prohibits, absent application of a listed exception, “qualified civil liability actions.” In pertinent part these are defined as actions for damages “resulting from the criminal or unlawful misuse” of a gun by a third party. § 7903(5)(A).

“Resulting from” is undefined, and is ambiguous because it is susceptible to multiple “reasonable interpretations.” *JP Morgan Chase Bank N.A. v. Taggart*, 203 A.3d 187, 194 (Pa. 2019) (internal quotation omitted).³ This Court must construe what “resulting from” means in PLCAA. Applying the clear statement rule, the Court should “not read [PLCAA] to [bar Appellants’ claims] unless Congress has made it clear that [they] are *included*” within the scope of PLCAA’s general definition.

Gregory, 501 U.S. at 467 (emphasis in original). As “[t]he primary rule of statutory construction is . . . to give effect to the intention of the legislature” (*Rodgers v. United States*, 185

³ See Appellants’ Br. at 21-22 for the multiple possible definitions of this term. Appellees suggest that Appellants improperly use quotation marks around the first alternative definition provided in Appellants’ appellate briefing See Appellees’ Br. at 16. But these quotation marks simply

U.S. 83, 86 (1902)), “resulting from” should be read to further legislative intent. Appellees do not apply either of these principles, because they both require reading “resulting from” consistently with “solely caused by” and thereby allowing Appellants’ case under PLCAA because their injury was caused in part by gun company misconduct.

The general definition of qualified action does not clearly state that PLCAA bars cases such as this where one cause of harm is gun company negligence – though Congress easily could have included such language. Congress did, however, include language that informs the meaning of “resulting from.” PLCAA’s first Purpose and one Finding express Congress’s intent to only limit liability where harm was “solely caused” by criminal or unlawful misuse. § 7901(b)(1), (a)(6). Another Finding states Congress’s intent to prevent actions “based on theories without foundation in hundreds of years of the common law,” § 7901(a)(7). This is the opposite of a statement of intent to

demarcate the definition from the rest of the text. See Appellants’ Br. at 21-22.

deprive states of authority to impose well established principles of tort-liability on gun companies whose negligence was one cause of Appellant's injury; it indicates an intent to allow cases like Appellants'.

Appellees invite the Court to disregard this statutory language, claiming that it cannot "override" "clear . . . operative provisions". Appellees' Br. at 4. But Appellants are merely applying principles of statutory construction and the clear statement rule, which this Court must apply. A statute must be read as a whole", *Conroy v. Aniskoff*, 507 U.S. 511, 515-16 (1993) (internal quotation omitted); *Reading the Law* at 167-170 (same)), and preambles and prefatory language are valid indicators of meaning. *Id.* at 167-170; 217-221; *see also id.* at 63-66 (interpretation that advances overall goal of statute is favored); *Rodgers v. United States*, 185 U.S. 83, 86 (same). To further Congress's intent, the "solely caused by" language should inform the meaning of "resulting from." Indeed, the United States, intervening to defend PLCAA's constitutionality,

recognized that PLCAA’s text is properly interpreted as reflecting an intent to immunize firearms manufacturers and distributors for “harm that is solely caused by others.” See Intervenor’s Brief (“Int. Br.”) at 1 (quoting § 7901(a)(6)).

Reading “solely” into the general definition of a prohibited “qualified civil liability action” in § 7903(5)(A) is particularly indicative of Congress’s intent because its addition appears to have been critical to PLCAA’s passage. The inclusion of “solely” was one of the few changes made to an earlier version of PLCAA that failed to pass. *Compare* S. 1805, 108th Cong. § (b)(1)(2003) (Ex. B. to Appellants’ Br.) *with* § 7901(b)(1) (Ex. C to Appellants’ Br.) and S. 397, 109th Cong. (2005) (Ex. D. to Appellants’ Br.). No statutory word should be treated as superfluous (*see Astoria*, 501 U.S. at 112; *Habecker*, 299 Pa. Super. at 471; *Reading the Law* at 174-180), especially one that appears to have been essential to PLCAA’s enactment. Appellees have no response to why Congress made this critical change.

Appellees invite the Court to disregard these statements of Congressional intent, ignore the critical word “solely,” and instead adopt a fictitious assertion that “Congress found” that in any shooting injury or death related to a third party’s criminal or unlawful misuse of a firearm, “the harm is ‘solely caused’ by the criminal or unlawful misuse of the firearm, and the manufacturers and sellers of the firearm should not be held liable.” See Appellees’ Br. at 20-21. There is no citation to support Appellees’ assertion because Congress did not make this finding. Appellees would treat “solely” as superfluous, with “solely caused by” having the same meaning as “caused by” – which this Court may not do. It also begs the question, why did Congress add “solely” to the first Purpose of PLCAA after the previous version failed to pass if it was meaningless?

Soto, as conceded by Appellees (see Appellees’ Br. at 24, 24 n. 6), cited PLCAA’s “solely caused” language to support its conclusion that one of plaintiffs’ claims survived under PLCAA’s predicate exception. See 331 Conn. at 131 (quoting §

7901(b)(1), (a)(6)). Appellees contend that it is inappropriate for Appellants to rely upon *Soto*'s embrace of PLCAA's "solely caused" language because *Soto* did not hold that this language must be read into the general definition of "qualified civil liability action." See Appellees' Br. at 24, 24 n. 6. But that is because the plaintiffs in *Soto* did not press the argument that "solely caused" should be read into PLCAA's general definition of a prohibited "qualified civil liability action." See *Soto* at 131 (*discussing claims*). Further, *Soto* cited to *Cipollone* (see 331 Conn. at 137-138) which makes clear that the federalism lens must apply to all stages of the analysis of PLCAA – including interpretation of the general definition. See *Cippollone*, 505 U.S. at 516-18; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (*discussing Cippollone*).⁴*Medtronic* 518 U.S. at 485 (emphasis omitted) (*discussing Cipollone*). And the *Soto* court emphasized that "any textual ambiguities" in PLCAA had to be resolved in

⁴ See *infra*.

favor of the plaintiffs. *See id.* 331 Conn. at 137-138 (emphasis added).

There is, at minimum, uncertainty as to whether Appellants' claims fall within the scope of PLCAA's general definition. Hence, *Bond, Gregory, and Cipollone* dictate that this case must be allowed to proceed.

2. PLCAA's Legislative History Confirms That Congress Did Not Intend To Bar Appellants' Case

Reading the general definition of a "qualified civil liability action" as allowing claims against negligent actors is consistent with the overriding principle of statutory interpretation – to give effect to legislative intent. *See Rodgers v. United States*, 185 U.S. 83, 86; *Reading the Law* at 63-66. Yet Appellees ignore the fact that PLCAA's author and supporters all agreed that Appellants' interpretation is not merely a plausible but the best reading of PLCAA's language. *See* Appellant Br. at 27-29; and *e.g.*, 151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005) (Chief Sponsor Sen. Craig: "If manufacturers or dealers break the law or commit negligence, they are still liable."). The Supreme

Court of Connecticut recognized that many legislators debating PLCAA – including multiple PLCAA sponsors – indicated that “the only actions that would be barred by PLCAA would be ones in which a defendant bore absolutely no responsibility or blame for a plaintiff's injuries.” See *Soto*, 331 Conn. at 148.

Further, Senator Craig said, “[t]he only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle.” 151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005). Established products liability claims are not “novel” or ungrounded.

The claims which PLCAA was intended to prevent were those like the claims in *Kelley v. R.G. Industries, Inc.* 497 A.2d 1143 (Md. 1985), *superseded by statute*, Md. Ann. Code art. 27 § 36-I(h), which allowed strict liability for making certain guns used by criminals even when the gun companies engaged in *no negligent or unlawful misconduct*. Appellees’ only response is that Congress cannot have “enacted the PLCAA in 2005 solely to address a single case [*Kelley*] from twenty years earlier that had

long been legislatively overruled.” Appellees’ Br. 18 n. 4. However, Congress was concerned with prohibiting absolute liability cases *nationally*, not simply in Maryland. Far from *Kelley* being a one-of-a-kind case, the United States notes that multiple jurisdictions – including the District of Columbia – enacted statutes that allowed “plaintiffs . . . to commence lawsuits” on theories of “absolute liability” paralleling *Kelley* in the years preceding PLCAA. See Int. Br. at 3. Indeed, one of PLCAA’s sponsors expressly identified these strict liability claims as the actions meant to be targeted by PLCAA. See Soto 331 Conn. 53, 148 (quoting Senator Sessions’s statement that PLCAA was enacted “out of fear and concern that we have mayors and cities passing laws that create strict liability”).

Reading PLCAA to bar only absolute liability actions is the only reading that is consistent with PLCAA’s “solely caused by” Purpose, its Finding targeting “theories without foundation,” the clear legislative history, and PLCAA’s historical context. The fact that Congress expressed an intent to bar absolute liability actions

also refutes Appellees' claim that Appellants' interpretation would give PLCAA no effect. See Appellees' Br. at 17-18.

It is doubtful – and certainly far from unmistakable – that Congress intended PLCAA's general definition of a "qualified civil liability action" to apply to this case.

C. The Clear Statement Rule Applies Independent Of The Doctrine Of Constitutional Avoidance

Appellees incorrectly suggest that this Court should not apply the clear statement rule because *Bond* and *Gregory* represent a principle of constitutional avoidance. See Appellees' Br. at 15. Appellees' claim is contradicted by *Gregory*, *Bond* and *Cipollone*. None of those cases suggest that a federalism lens is only applied to laws that present constitutional concerns. They reflect a separate principle that federal statutes, regardless of any constitutional challenge, must be interpreted so as not to divest states of authority unless Congress has made its intent to override state law in a given case unmistakable. See *Gregory* 501 U.S. at 464, 467.

D. The Clear Statement Rule Applies Even Where Congress Has Expressly Mandated Some Preemption

Appellees also incorrectly contend that this Court is not bound to apply the clear statement rule because PLCAA expressly preempts state law to some degree and *Bond* and *Gregory* involved only implied preemption. See Appellees' Br. at 42-43. *Bond*, *Gregory*, and *Cipollone* refute this claim.⁵

In *Bond* and *Gregory*, the Supreme Court recognized that the clear statement rule applies to all statutes which, like PLCAA, expressly preempt state law *to some degree* but *leave the exact extent of the preemption unspecified*. For example, the federal age discrimination law at issue in *Gregory* expressly preempted state laws that discriminated on the basis of age to some degree, which is precisely why the court – compelled by the federalism lens – could only uphold a state age limit for judges by reading state judges into a statutory “exception” for “appointee[s] on the policymaking level” to whom the statute’s general preemptive effect did not apply. See 501 U.S. at 466-67 (internal citation

⁵ *Delana v. CED Sales, Inc.*, 486 S.W.3d 316 (Mo. 2016), cited by Appellees (see Appellees' Br. at 14, 15, 22, 44), incorrectly concluded that *Bond* and *Gregory* involved only implied preemption.

omitted); *see also Bond*, 134 S. Ct. at 2090 (limiting scope of preemption); *United States v. Toviave*, 761 F.3d 623, 627-629 (6th Cir. 2014) (applying *Bond* to cabin expansive language which could be read as having some preemptive effect).

Similarly, *Cipollone* found that even when a statute's "express language" mandates some degree of preemption, the "presumption [against preemption] reinforces the appropriateness of a narrow reading" of the "scope" of the preemption. *See Cipollone*, 505 U.S. at 516-18; *Medtronic*, 518 U.S. at 485. The presumption against preemption applies not only "to the question whether Congress intended any pre-emption at all," but "to questions concerning the *scope* of its intended invalidation of state law." *Medtronic* 518 U.S. at 485 (emphasis omitted) (summarizing *Cipollone*). Thus, the fact that PLCAA expressly preempts state law to some degree does not obviate the need to apply the clear statement rule in narrowly defining the "scope" of the preemption. As illustrated by *Cipollone*, the

federalism lens applies to every step of the analysis of PLCAA's text. *See also Soto* 331 Conn. at 137-138.

II. PLCAA Is Unconstitutional If It Bars This Case⁶

A. PLCAA Violates The Tenth Amendment

Appellees cannot credibly deny that under their reading of PLCAA, Congress has deprived states of the authority to impose liability on negligent gun companies if states choose to have their judiciaries establish the relevant liability standards through common law, while allowing states to impose liability for identical claims if the states use their legislatures. *See* 15 U.S.C. § 7903(5)(A)(iii). For example, if the Appellees had violated a hypothetical Pennsylvania statute requiring that “firearms sold in Pennsylvania have magazine disconnect safeties, or other safety features or warnings”⁷ – they would have triggered the predicate exception and PLCAA would not limit liability. *See* Appellants’ Br. at 12-13. But because Pennsylvania relies upon its judiciary to

⁶ These arguments assume, *arguendo*, that PLCAA bars Appellants’ claims.

⁷ While Appellees claim that the hypothetical statute would not trigger the predicate exception because the predicate statutes must apply to the sale or marketing of firearms (*see* Appellee’s Br. at 27 n. 7), Appellants’ hypothetical statute regulates sales.

define liability standards applicable to the firearms industry, PLCAA bars Appellants from any form of redress. Congress, in PLCAA, thus dictates which branch of state government must be used to make liability law applicable to the firearms industry – the legislative branch.

This scheme violates established principles of federalism. Congress has no authority to infringe on state lawmaking authority, or to deprive a state of its right to choose which branch of government to use to make law. See Appellants Br. at 13, 14, 34-38; *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938); *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n. 6 (1981); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937); *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J. concurrence). PLCAA violates the Tenth Amendment, which enshrines these principles.

Appellees cannot dispute this authority. Nor do they offer examples of statutes that have been upheld despite such a severe intrusion on state sovereignty. And they ignore the case

dealing with the most similar statute of which Appellants are aware—*Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York* (“*Vargas*”), 131 A.D.3d 4 (N.Y. App. Div. 2015) -- which recognized that Congress “cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its authority to determine which coequal branch of government should exercise the power of the sovereign.” *Id.* at 26-27.

The United States attempts to distinguish *Vargas* by noting that a state statute referenced in *Vargas* provided that only the judiciary could wield the power of the state in regards to attorney admissions. See Int. Br. at 12. This is a meaningless distinction. PLCAA suffers the same constitutional flaw as the statute in *Vargas* because it infringes on states’ sovereign right to choose which branch of their governments to utilize.⁸

⁸ The United States claims *Me. Mun. Ass’n v. Me. HHS*, 2015 Me. Super. LEXIS 197 (Jun. 9, 2015), “rejected” the theory advanced in *Vargas*. See Int. Br. at 12. But the Maine court summarily rejected a Tenth Amendment challenge without ever engaging in any analysis of whether the Tenth

Appellees cite a number of non-binding – and incorrect -- cases which suggest that the Tenth Amendment only prohibits the federal government from “commandeering” state officials. See Appellees’ Br. at 43-44. But nowhere does the Tenth Amendment state that it is so limited, nor has the Supreme Court imposed such a limitation.

On the contrary, precedent from the Supreme Court and other courts makes clear that the Tenth Amendment is not limited to a prohibition on “commandeering.” The Supreme Court has made clear that “[t]he Constitution [] leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment,” and that “the outer limits of that sovereignty” are as yet undefined, rather than limited to a prohibition on “commandeering.” See *New York v. United States*, 505 U.S. 144, 188 (1992) (internal quotations omitted); see also *City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1117-18 (9th Cir. 2014) (conducting a substantive analysis of the

Amendment provides protections beyond a prohibition on “commandeering.” *Me. Mun.* at *22.

claim that federal action “transgress[ed] general principles of federalism” protected by the Tenth Amendment *as distinct from a “commandeering” claim*, but ultimately rejecting claims on the facts);⁹ *Vargas*, 31 A.D.3d 4. Appellees have no response to this authority.

Limiting the Tenth Amendment to a prohibition on “commandeering” would undermine our federalist system in fundamental ways. PLCAA violates the Tenth Amendment by impermissibly infringing on state sovereignty.

B. PLCAA Violates Due Process

Appellees miss the point in suggesting that Appellants’ Due Process argument hinges on their having a vested, “protected property right” in their Pennsylvania tort claims. See Appellees’ Br. at 44; see *also* Int. Br. 13-14. PLCAA violates Due Process because it eliminates any remedy against negligent gun

⁹ The United States incorrectly argues that *Spokane* is consistent with limiting the Tenth Amendment to “commandeering.” See Int. Br. at 9. If the Tenth Amendment only prohibited “commandeering” the Ninth Circuit would have dismissed the non-“commandeering” Tenth Amendment claim out of hand rather than entertaining a substantive analysis of the claim.

companies under Appellees' interpretation, regardless of whether Appellants had "vested rights" in specific claims.

Appellees have no response to the fact that, regardless of the question of "vested rights," "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (quoting Sir William Blackstone, Commentaries 23 (1869)); see also *Truax v. Corrigan*, 257 U.S. 312, 330 (1921). According to Appellees, the Constitution provides no impediment to Congress eradicating all rights to redress for victims of any negligent industry that happens to be favored by the majority in power. That runs counter to *Marbury's* time-honored wisdom.

Authority on which Appellees rely – *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978) – highlights how the Due Process Clause has never been held to allow eradication of all remedies for harm. See Appellees' Br. at 44-45. If there was no Due Process right to any remedy, the Supreme Court would have simply upheld the liability-limiting law in *Duke Power*

with no analysis of the alternative remedy Congress provided. Instead, the Court carefully analyzed the substitute remedies provided by Congress and found that “[t]his panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by [the act].” 438 U.S. at 93. And, subsequently, Justice Marshall explained that “our cases demonstrate that there are limits on governmental authority to abolish ‘core’ common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy.” *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (J. Marshall concurring).

Appellees also cite *Martinez v. California*, 444 U.S. 277 (1980) to suggest that there is no requirement for a reasonable alternative remedy. *Martinez* is inapposite. *Martinez* rejected a Due Process challenge to a state law which provided immunity to the state and its officials for granting parole to offenders who then caused harm. *Martinez* did not even involve a federal law

restricting state common law rights, and the Court relied on the state's paramount interest in fashioning its own liability law – which is precisely what PLCAA impermissibly restricts. *Id.* at 282 (“But even if one characterizes the immunity defense as a statutory deprivation, it would remain true that the State's interest in fashioning its own rules of tort law is paramount to any discernible federal interest***.”). Further, the law in *Martinez* re-asserted sovereign immunity, which was recognized at common law. That is the opposite of depriving Appellants of a remedy long recognized under traditional principles of American jurisprudence.

Appellees fail to distinguish the multiple courts that have found that PLCAA did or would present Due Process concerns if read to bar various claims. See Appellants’ Br. at 41-42. Appellees attack *City of Gary v. Smith & Wesson Corp.*, No. 45D05005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (Ex. E. to Appellants’ Br.) because it was later affirmed on non-constitutional grounds, because *Gary* found a due process

violation in part because PLCAA functioned as an *ex post facto* law, and because of a subsequent court's passing comment. See Appellees' Br. at 45-46. None of that undercuts the trial court's reasoning that "Due Process is violated when Congress abolishes an existing remedy and provides no alternative." *Gary*, No. 45D05005-CT-00243 at 4. Appellees attack *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, (Wis. Cir. Ct. Mar. 24, 2014)(Ex. F to Appellants' Br.) because it is a transcript of an oral decision (see Appellees' Br. at 46-47), but that does not diminish the decision or its logic.

Appellees also have no response to the fact that Congress has traditionally respected the need for some reasonably just alternative compensation scheme in statutes – except for PLCAA. See Appellants' Br. at 40. Appellees – and the United States – cannot provide any counterexamples of Congress enacting another statute limiting plaintiffs' claims *without* providing a reasonable alternative remedy procedure and/or preserving access to the courts.

Appellees' citations to adverse authority suggesting that PLCAA does not raise Due Process concerns are inapplicable and/or flawed. See *id.* at 44. *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, expressly refused to consider the alternative remedy argument. See *id.* at 177 n. 8 ("we need not consider the plaintiffs' subsidiary claim that due process at least requires Congress to supply an alternative remedy before it may eliminate a cause of action retroactively") In *City of New York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244 (E.D.N.Y. 2008) *aff'd in part and rev'd in part* at 524 F.3d 384 (2nd Circ. 2008), the court did not address whether due process required an alternative remedy. See *id.* at 294. *Delana*, 486 S.W.3d 316 and *Kim*, 295 P.3d 380 both reversed dismissals and allowed some of plaintiffs' claims to *proceed* – thereby not presenting the absolute bar to suit and the substantial Due Process concerns here at bar. Finally, *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009) unconvincingly noted that Congress, by carving out exceptions in PLCAA, had, in any event, provided sufficient alternative

remedies. See *id.* at 1143. But if this Court determines that none of the exceptions enumerated in PLCAA apply, then they cannot offer the Gustafsons actual alternative remedies.

The United States claims that a few cases deny the reasonable alternative remedy requirement, but some do not concern Due Process,¹⁰ and the others *support* Appellants. See Int. Br. at 15-16. *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017), considered an implied constitutional claim under *Bivens*, and expressly noted that the provision of an alternative remedy procedure weighed against finding such an implied claim. See *id.* at 1849 (plaintiffs “may have had available ‘other alternative forms of judicial relief’”) (*quoting Minecci v. Pollard*, 565 U.S. 118, 124 (2012); see also *id.* at 124-125 (referencing multiple Supreme Court cases – including at least one involving a Due Process claim – which allowed claims after focusing on the “unavailability” of alternative forms of redress in court or the fact that alternatives remedies were “no[t] meaningful”) (but finding

no claim in the case at bar). Similarly, the absence of any other alternative form of redress under PLCAA weighs in favor of preserving a judicial remedy for harmful misconduct.

PLCAA violates Appellants' Due Process rights.

C. PLCAA Violates Equal Protection Principles

Rational basis is deferential, but it is not the rubber stamp suggested by Appellees. *Compare* Appellants' Br. at 49 *with McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (striking down tort statute on rational basis review); *and City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985) (striking down zoning ordinance on rational basis review). To survive rational basis review, a justification for discrimination within a statute must not be patently illogical and insufficient to explain the differential treatment. Like in *McBride*, PLCAA impermissibly discriminates between two classes of tort victims without any rational basis. There is no rational basis for PLCAA's permitting unlimited recovery against gun manufacturers and

¹⁰ *Silver v. Silver*, 280 U.S. 117 (1929), *Providence & N.Y.S.S. Co. v. Hill Mfg. Co.*, 109 U.S. 578 (1883), and *Patchak v. Zinke*, 138 S. Ct. 897, 905

sellers where state legislatures have codified liability standards, while barring application of identical liability standards if states rely entirely on their judicial branch to make law.¹¹

Appellees make no effort to distinguish *McBride*. They simply ignore Appellants' authority, and hope the Court will treat rational basis review as a rubber stamp for an unjust, irrational law. But just as the state's proffered justification of raising revenue could not rationally explain taking *no money* from one class of plaintiffs in *McBride* (see 737 F. Supp. at 1578), a desire to limit liability for the firearms industry cannot rationally explain leaving *unlimited* liability in states which have codified products liability standards while eliminating it in states which rely only on common law. Appellees and Intervenor do not advance any

(2018) do not even reference the words "Due Process."

¹¹ Appellees complain that the predicate exception is not implicated in this case. See Appellees' Br. 47-48. However, the products liability exception and predicate exception are inextricably related. If Appellees violated a state products liability statute (like the one discussed *supra* n. 7), all state law products liability claims could proceed under the predicate exception. See § 7903(5)(A)(iii).

explanation¹² for why PLCAA's discrimination is rational or permissible.

D. PLCAA Is Not A Permissible Exercise Of Congress's Commerce Clause Authority

Appellees also have no response to the fact that PLCAA is not permissible preemption because "every form of [permissible] preemption is based on a federal law that regulates the conduct of private actors, not the States." *See Murphy v. NCAA*, 138 S.Ct. 1461, 1481 (2018).¹³ Congress may not use Commerce Clause authority to regulate the lawmaking functions of the states. Not only does PLCAA thus fall clearly outside of Congress's Commerce Clause powers under *Murphy*, but the lawmaking functions of the states cannot be classified as "commerce."

Appellees simply ignore *Murphy*. The United States references *Murphy* but does not dispute that all valid preemption must regulate private conduct. While the United States asserts

¹² Appellees cite a number of cases which reject equal protection challenges to PLCAA, but none provide any persuasive rationale for why PLCAA leaves unlimited liability in some states while curtailing it in others for actions based on identical standards of liability. *See Appellees' Br.* at 49-50.

that PLCAA regulates private conduct (see Int. Br. at 10 n. 2), PLCAA’s text makes clear it is only directed to courts and states.

Appellees mischaracterize Appellants’ Commerce Clause argument as “a repeat of [Appellants’] argument that the PLCAA is unconstitutional on the basis that it allegedly violates the Tenth Amendment and principles of federalism.” See Appellees’ Br. at 50. Although *related* to PLCAA’s Tenth Amendment flaw, this Commerce Clause argument is distinct.

PLCAA exceeds Congress’s Commerce Clause authority.

Conclusion

Appellants respectfully request that this Court reverse the January 15, 2019, Order and Opinion of the Westmoreland County Court of Common Pleas, overrule Appellees’ preliminary objections, and remand this case to the trial court for further proceedings.

¹³ The only two cases Appellees cite to support the proposition that PLCAA is a valid exercise of PLCAA’s commerce clause authority – *Ileto* and *City of New York* – were decided *before Murphy*.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

The undersigned hereby certifies that this brief contains 6,954 words, excluding the table of contents and table of authorities.

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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CASE NO. 207 WDA 2019
SUPERIOR COURT OF PENNSYLVANIA

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

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD ARMORY, and SALOOM
DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC d/b/A
SALOOM DEPARTMENT STORE, Defendants, Appellees.

On Appeal from the Order of the Court of Common Pleas of
Westmoreland County, entered on January 15, 2019 in the Civil
Division, No. 1126 of 2018, Harry F. Smail, Jr., Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. COUNTERSTATEMENT OF THE CASE.....	1
II. SUMMARY OF THE ARGUMENT.....	3
III. ARGUMENT.....	6
A. THE TRIAL COURT PROPERLY DISMISSED PLAINTIFFS’ COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT.....	6
1. Purpose of the Protection of Lawful Commerce in Arms Act.....	6
2. This Case is a Qualified Civil Liability Action.....	8
3. The Supreme Court’s Decisions in <i>Gregory</i> and <i>Bond</i> are Inapplicable to the Construction of the PLCAA Because it Involves Express Preemption of Qualified Civil Liability Actions that are Otherwise Valid Pursuant to State Law.....	11
4. The PLCAA Bars All Qualified Civil Liability Actions Regardless of Whether Plaintiffs Claim that the Alleged Negligence of a Manufacturer or Seller of Firearms is also a Cause of Their Damages.....	16
B. NONE OF THE EXCEPTIONS TO THE DEFINITION OF A QUALIFIED CIVIL LIABILITY ACTION ARE APPLICABLE TO THIS CASE.....	25

C.	The PLCAA EASILY PASSES CONSTITUTIONAL MUSTER.....	41
1.	The PLCAA Does not Violate the Tenth Amendment or Principles of Federalism.....	43
2.	The PLCAA Does not Violate Plaintiffs' Right to Due Process.....	44
3.	The PLCAA Does not Violate Plaintiffs' Right to Equal Protection.....	47
4.	Congress had the power to enact the PLCAA Pursuant to the Commerce Clause.....	50
IV.	CONCLUSION.....	51
	CERTIFICATE OF COMPLIANCE WITH RULE 2135(d).....	53
	CERTIFICATE OF COMPLIANCE WITH RULE 127.....	54
	CERTIFICATE OF SERVICE.....	55

TABLE OF AUTHORITIES

Cases

<i>Adames v. Sheahan</i> , 909 N.E.2d 742 (Ill. 2009).....	30, 31, 32, 33, 34, 37, 38, 39, 44
<i>Bond v. United States</i> , 572 U.S. 844 (2014).....	10, 13, 14
<i>Chavez v. Glock, Inc.</i> , 207 Cal. App. 4th 1283 (Cal. Ct. App. 2012).....	28
<i>City of Gary v. Smith & Wesson Corp.</i> , ___ N.E.3d ___, No. 18A-CT-181, 2019 WL 2222985 (Ind. Ct. App. May 23, 2019).....	46
<i>City of Gary v. Smith & Wesson Corp.</i> , No. 4505005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006).....	45
<i>City of New York v. Beretta U.S.A. Corp.</i> , 401 F. Supp. 2d 244 (E.D.N.Y. 2008).....	44, 49
<i>City of New York v. Beretta U.S.A. Corp.</i> , 524 F.3d 384 (2d Cir. 2008).....	43, 51
<i>Commonwealth v. Bonner</i> , 135 A.3d 592 (Pa. Super. Ct. 2016).....	40
<i>Commonwealth v. Carnes</i> , 82 Pa. Super. 335 (Pa. Super. Ct. 1923).....	40
<i>Copier By and Through Lindsey v. Smith & Wesson Corp.</i> , 138 F.3d 833 (10th Cir. 1998).....	18

<i>Delana v. CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016).....	14, 15, 22, 44
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008).....	44, 50
<i>Duke Power C. v. Carolina Envt’l Study Group</i> , 438 U.S. 59 (1978).....	45
<i>Estate of Kim ex rel. Alexander v. Coxe</i> , 295 P.3d 380 (Alaska 2013).....	16, 22, 44, 50
<i>Gilland v. Sportsmen’s Outpost, Inc.</i> , No. X04CV095032765S, 2011 WL 2479693 (Conn. Super. Ct. May 26, 2011).....	23
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	10, 11, 12
<i>H.J. Inc. v. Northwestern Bell Telephone Co.</i> , 492 U.S. 229 (1989).....	21
<i>Heller v. Doe by Doe</i> , 509 U.S. 312 (1993).....	49
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9th Cir. 2009).....	15, 44, 49, 51
<i>Ileto v. Glock, Inc.</i> , 421 F. Supp. 2d 1274, (C.D. Cal. 2006).....	18
<i>In re Miller</i> , 439 A.2d 1222 (Pa. Super. Ct. 1982).....	40
<i>Interest of Brown</i> , 417 A.2d 1188 (Pa. Super. Ct. 1980).....	40

<i>Interest of G.T.,</i> 597 A.2d 638 (Pa. Super. Ct. 1991).....	40
<i>Interest of Smith,</i> 579 A.2d 889 (Pa. Super. Ct. 1990).....	40
<i>Jeffries v. District of Columbia,</i> 916 F. Supp. 2d 42, 46 (D.D.C. 2013).....	28
<i>Kelley v. R.G. Industries, Inc.,</i> 497 A.2d 1143 (Md. 1985).....	18
<i>Lopez v. Badger Guns, Inc.,</i> No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014).....	47
<i>Martinez v. California,</i> 444 U.S. 277 (1980).....	45
<i>Phillips v. Lucky Gunner, LLC,</i> 84 F. Supp. 3d 1216 (D. Colo. 2015).....	22
<i>Ryan v. Hughes-Ortiz,</i> 959 N.E.2d 1000 (Ma. Ct. App. 2012).....	34, 35, 36
<i>Smith & Wesson Corp. v. City of Gary,</i> 875 N.E.2d 422 (Ind. Ct. App. 2007).....	46
<i>Soto v. Bushmaster Firearms Int’l, Inc.,</i> No. FBTCV156048103S, 2016 WL 8115354 (Conn. Super. Ct. Oct. 14, 2016).....	28
<i>Soto v. Bushmaster Firearms Int’l, LLC,</i> ___ A.3d ___, 331 Conn. 53 (2019).....	23, 24

Statutes

15 U.S.C. §§ 7901-7903.....	<i>passim</i>
-----------------------------	---------------

18 U.S.C. §§ 921(a)(3)(A) & (B).....	9
18 U.S.C. § 921(a)(10).....	8
18 U.S.C. § 921(a)(11)(A).....	9
18 U.S.C. § 921(a)(21).....	8
18 U.S.C. § 921(a)(21)(A).....	8
18 U.S.C. § 921(a)(21)(C).....	9
18 U.S.C. § 922(g) & (n).....	27
29 U.S.C. § 630(f).....	12
Md. Code art. 27 § 36–I(h), recodified at Md. Public Safety Code § 5-402(b)(1).....	18
42 Pa. Stat. § 6302.....	39
18 Pa. Stat. § 2504(a).....	39

Other Authorities

2A Sutherland, Statutes and Statutory Construction § 47.04, at 146 (5th ed. 1992, Norman Singer ed.).....	22
Black’s Law Dictionary 1605 (8th ed. 2004).....	36
Patricia Foster, <i>Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional</i> , 72 U. Cin. L. Rev. 1739, 1750-56 (Summer 2004).....	47

I. COUNTERSTATEMENT OF THE CASE

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

The Subject Pistol was manufactured by defendant Springfield Amory, Inc. s/h/a Springfield, Inc. d/b/a Springfield Armory (“Springfield”) and sold by defendants Saloom Department Store, and Saloom Department Store, LLC d/b/a Saloom Department Store (collectively “Saloom”). R. 7a-11a, 21a, 27a (Compl.

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

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

R. 20a (Compl. ¶ 77). In their wrongful death and survival action against Springfield and Saloom, plaintiffs raised causes of action for products liability (design defect and failure to warn), negligent design and sale, negligent warnings and marketing, and sought compensatory damages, punitive damages, interest and costs, and such other relief as the court may deem appropriate. R. 31a (Compl. at 25).

II. SUMMARY OF THE ARGUMENT

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

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

15 U.S.C. § 7903(5)(A).

Plaintiffs’ complaint is considered to be a qualified civil liability action for purposes of the PLCAA because it is a civil action through which they are seeking to recover damages, punitive damages, and other relief against the manufacturer and seller of a

firearm that a third party criminally and unlawfully used to kill their son, and who subsequently pled guilty to involuntary manslaughter in juvenile court.

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

None of the six narrow exceptions to the PLCAA's definition of an otherwise prohibited qualified civil liability action applies to plaintiffs' claims. Plaintiffs' claims do not satisfy the product defect exception provided in 15 U.S.C. § 7903(5)(A)(v). The Juvenile Delinquent pointing the Subject Handgun at plaintiffs' decedent and intentionally pulling the trigger was a volitional act that constituted the criminal offense of manslaughter. The product defect exception to the PLCAA therefore declares the acts of the Juvenile Delinquent to be the "sole proximate cause" of the death of plaintiff's decedent and their resulting claims for damages. The acts of the Juvenile Delinquent constitute the criminal offense of manslaughter, and it does not matter whether he was charged with, or convicted of, a criminal offense for the product defect exception not to apply.

Finally, the PLCAA easily passes constitutional muster and its constitutionality has been repeatedly upheld by federal and state courts throughout the country in response to similar constitutional challenges. The trial court properly applied clear and binding

federal law that prohibits plaintiffs' claims and its decision should be affirmed.

III. ARGUMENT

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

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

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

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

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.
- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

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

2. This Case is a Qualified Civil Liability Action

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

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

(Saloom)² of a qualified product (the Subject Handgun)³ for damages and other relief based on the criminal use (the shooting of plaintiff's decedent) of the qualified product (the Subject Handgun) by a third party (the Juvenile Delinquent). R. 7a-11a, 21a, 27a (Compl. ¶¶ 1, 5, 18-20, 22-29, 83-84, 115-16). The claims in the Complaint are therefore considered to constitute a

² The PLCAA defines a "seller," with respect to a qualified product, as "a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18." 15 U.S.C. § (6)(B). Pursuant to 18 U.S.C. § 921(a)(11)(A), a "dealer" is defined as "any person engaged in the business of selling firearms at wholesale or retail." The term "engaged in the business," relative to a seller of firearms, is defined as "a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms." 18 U.S.C. § 921(a)(21)(C). As a federally licensed dealer of firearms, Saloom is a "seller" pursuant to the terms of the PLCAA. R. 21a, 27a (Compl. ¶¶ 83-84, 115-16).

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

qualified civil liability action, which the PLCAA prohibits from being “brought in any Federal or State court.”

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

Plaintiffs’ reference to “absolutely certain” is taken from *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991), a Supreme Court decision addressing the issue of constitutional avoidance in cases involving implied preemption. That case, and the case of *Bond v. United States*, 572 U.S. 844 (2014), are inapplicable to the issues in this case because the PLCAA involves express preemption that clearly and unambiguously prohibits plaintiffs’ claims. They are also inapplicable for the separate and independent reason that

there are no serious doubts about the constitutionality of the PLCAA. The constitutionality of the PLCAA has been repeatedly challenged for more than a decade, but has been upheld by every single appellate court to have considered the issue.

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

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

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

501 U.S. at 460 (citation and quotation marks omitted).

Nevertheless, the Court explained that as long as it is “acting

within the powers granted it under the Constitution, Congress may impose its will on the States.” *Id.* See also *id.* at 464 (questioning whether the power of Congress to regulate interstate commerce can override the “authority of the people of the States to determine the qualifications of their government officials”).

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

cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.” *Id.* at 467.

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

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

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

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

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

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

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

The Supreme Court's decisions in *Gregory* and *Bond* address the issue of constitutional avoidance. Although not addressing those specific decisions, other courts have held that the doctrine of constitutional avoidance is inapplicable to construction of the PLCAA because its intent to bar qualified civil liability actions is clearly expressed and because there are no serious doubts about its constitutionality. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1143 (9th Cir. 2009) (holding that the doctrine of constitutional avoidance is not applicable to interpreting the PLCAA because "congressional intent is clear from the text and purpose of the statute" and there

are no grave doubts over its constitutionality); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013).

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

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

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

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

Improperly relying on the Supreme Court's decisions in *Bond* and *Gregory*, plaintiffs contend that the PLCAA's definition of a qualified civil liability action as one seeking damages or other relief "resulting from the criminal or unlawful misuse" of a firearm by a third party should be interpreted so that it "only bars actions where third-party misuse was the 'sole cause' of harm - and not actions like this case where gun industry negligence was also a cause of the harm." Pls.' Brief at 23. There is no support for this argument in the operative provisions of the PLCAA.

If plaintiffs' argument were to be accepted, it would mean that Congress passed the PLCAA for no reason, and it does not

prohibit any causes of action.⁴ If plaintiffs argued that the harm of which they complain was solely caused by the criminal or unlawful misuse of a firearm, they would not name as defendants and seek damages from the manufacturers and sellers of that firearm. Instead, Congress specifically explained that it was passing the PLCAA because of its findings that:

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the

⁴ Plaintiffs suggest that the PLCAA was only intended to prohibit novel cases like *Kelley v. R.G. Industries, Inc.*, 497 A.2d 1143 (Md. 1985). Pls.' Brief at 29. The *Kelley* decision held that "manufacturers and marketers of Saturday Night Special handguns [could be held] strictly liable to innocent persons who suffer gunshot injuries from the criminal misuse of their products." *Id.* at 1159. The *Kelley* decision defined "Saturday Night Specials" as a limited class of handguns that "are too inaccurate, unreliable and poorly made" for legitimate uses, and were described by the manufacturer's representative as "most assuredly a ghetto gun" and "a piece of crap." *Id.* at 1158. Despite the limited definition of "Saturday Night Specials" to which strict liability applied, no other states adopted a similar rule, and the Maryland legislature enacted a statute to overrule the decision. *See Copier By and Through Lindsey v. Smith & Wesson Corp.*, 138 F.3d 833, 8376 n.3 (10th Cir. 1998); Md. Code art. 27 § 36-I(h), recodified at Md. Public Safety Code § 5-402(b)(1). Plaintiffs offer no explanation as to why Congress would have enacted the PLCAA in 2005 solely to address a single case from twenty years earlier that had long been legislatively overruled. In addition, Congress rejected a proposed amendment to the PLCAA that would have provided an exception for claims involving the alleged gross negligence and recklessness of a manufacturer or seller, further disproving plaintiffs' argument that the PLCAA does not prohibit claims in which a seller's alleged mere negligence is alleged to be a cause of the harm. *Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006), *aff'd* 565 F.3d 1126 (9th Cir. 2009).

harm caused by the misuse of firearms by third parties, including criminals.

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

- The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.
- The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

15 U.S.C. §§ 7901(a)(3), (5)-(8).

Regardless of whether plaintiffs agree, Congress found that when someone is shot or killed with a firearm in circumstances related to the criminal or unlawful misuse of that firearm by a third party, the harm is “solely caused” by the

criminal or unlawful misuse of the firearm, and the manufacturers and sellers of the firearm should not be held liable. In fact, Congress specifically determined that holding manufacturers and sellers liable for the harm caused by firearms under such circumstances, even if they could otherwise be held liable under applicable state tort law, would threaten separation of powers and principles of federalism. *Id.* § 7901(a)(8).

The operative provision of the PLCAA therefore simply prohibits the filing of a qualified civil liability action, which is defined as any action “resulting from the criminal or unlawful misuse” of a firearm by a third party, 15 U.S.C. § 7903(5)(A), regardless of whether the alleged negligence of the manufacturer or seller of the firearm is also alleged to be a cause of the harm for which plaintiff is suing. Language regarding the purpose for which a statute is enacted cannot be used to limit the clear terms used in the operative provisions of that statute. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 245 (1989) (rejecting argument that the expansive coverage of the operative provisions of the Racketeer Influenced and

Corrupt Organizations Act should be narrowly read to apply only to organized crime based on statements regarding the purpose of the Act). *See also* 2A Sutherland, Statutes and Statutory Construction § 47.04, at 146 (5th ed. 1992, Norman Singer ed.) (“The preamble cannot control the enacting part of the statute in cases where the enacting part is expressed in clear, unambiguous terms.”).

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

(rejecting plaintiffs’ argument that the PLCAA only protects defendants against claims for harm “solely caused” by the criminal or unlawful misuse of firearms for the reasons stated in the *Estate of Kim* case); *Gilland v. Sportsmen’s Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *15-*16 (Conn. Super. Ct. May 26, 2011) (holding that the PLCAA “includes cases where it is alleged that gun sellers negligently cause harm” despite the reference to “solely caused” in 15 U.S.C. § 7901(b)(1)).

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

CUTPA constitutes a predicate statute for purposes of 15 U.S.C. § 7903 (5)(A)(iii).” *Soto*, 331 Conn. at 85.⁵

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

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

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

liability action, rather than determining whether any of their claims fell within an exception.

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

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

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

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

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

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including –

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

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

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

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

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

15 U.S.C. § 7903(5)(A).

The only one of the six exceptions that could remotely be applicable based on the allegations in the Complaint is 15 U.S.C. § 7903(5)(A)(v) (“product defect exception”).⁷ The product defect exception to the PLCAA excludes from the definition of a prohibited qualified civil liability action:

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

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

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

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

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

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

Recognizing that the exception to the product defect exception bars their claims, plaintiffs argue that “it is not

⁸ See also *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (*sua sponte* dismissing case pursuant to the PLCAA when it was “uncontroverted that a third party discharged the assault rifle, during the commission of a criminal act,” where only the product defect exception could possibly apply because that “exception does not apply ‘where the discharge of the product was caused by a volitional act that constituted a criminal offense.’”); *Soto v. Bushmaster Firearms Int’l, Inc.*, No. FBTCV156048103S, 2016 WL 8115354, at *21 n.31 (Conn. Super. Ct. Oct. 14, 2016) (noting that the product defect exception would not apply because the plaintiffs’ injuries resulted from the discharge of the firearm by a third party during the commission of a criminal act), reversed in part on other grounds, 331 Conn. 53 (2019).

'absolutely certain'"⁹ that the discharge of the Subject Handgun was "caused by a volitional act" that constituted a criminal offense." Pls.' Brief at 30. The primary basis for plaintiffs' argument is that the Juvenile Delinquent was a minor at the time and was therefore charged in a juvenile delinquency proceeding instead of criminal court. Pls.' Brief at 30-31.¹⁰ Plaintiffs therefore

⁹ As discussed in Section III.A.3., plaintiffs' reference to "absolutely certain" is based on their arguments that the PLCAA must be interpreted as not applying to their claims based on the Supreme Court's decisions in *Bond* and *Gregory*. Those decisions involved implied preemption and issues of constitutional avoidance that are not relevant to the express preemption at issue in the PLCAA. In addition, as discussed in Section III.C., there is no doubt as to the constitutionality of the PLCAA.

¹⁰ Plaintiffs also make an incredulous argument that it is "also far from certain that Congress intended to view a minor's firing of a gun he believed was unloaded as a discharge 'caused by a volitional act.' Even if pulling the trigger was 'volitional,' that does not make a discharge 'caused by a volitional act' any more than an explosion would be 'caused by [the] volitional act' of answering a cell phone if, unbeknownst to you, terrorists had wired your phone to a remote bomb. In both cases, there was 'volition' to engage in a seemingly nondangerous act, but not to cause an unforeseen dangerous result. Pls.' Brief at 33. In the present case, the Juvenile Delinquent pointed the Subject Handgun at plaintiff's decedent and pulled the trigger. That constituted a "volitional act." Such volitional act constituted a "criminal offense" because the Juvenile Delinquent had not checked to see whether a round of ammunition was loaded in the chamber, and the death of plaintiffs' decedent was a reasonably foreseeable result of his actions. To discharge a bullet is the reason why someone pulls the trigger of a firearm, and it is the normal and foreseeable result. By no means can pointing a firearm at another person and pulling the trigger be considered a "seemingly nondangerous act," like simply answering a cell phone. In contrast, a terrorist bomb detonating is not a normal and foreseeable result of answering a cell phone.

contend that the requirement of a criminal offense has not been satisfied.

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

The product defect exception to the PLCAA was first construed by the Illinois Supreme Court in its unanimous decision in *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009). The facts in the *Adames* case are almost identical to those alleged in the Complaint in the present case: On May 5, 2001, Billy Swan, then thirteen years old, was playing with his father's semi-automatic Beretta 92FS pistol when he accidentally shot and killed his friend, Josh Adames. 909 N.E.2d at 745. "Billy pushed the button on the Beretta, took the

magazine out and put it in his pocket.¹¹ * * * * Billy pretended he was firing the gun, then pulled the trigger, discharging the gun. *Id.* at 746. When Billy realized that he had shot Josh, he called 911 and stated that he had “found a gun and accidentally shot his friend while playing”; he conceded that he “knew he was handling a real firearm and real ammunition when he shot Josh.” *Id.* In juvenile court proceedings arising from the shooting of Josh, Billy was found to be delinquent for committing involuntary manslaughter and reckless discharge of a firearm. *Id.*

Plaintiffs sued Beretta, raising claims for:

product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. Specifically, plaintiffs alleged that the Beretta was inherently dangerous and defective because it did not incorporate safety features, including: a magazine disconnect safety that would prevent the gun from being fired if the magazine is removed; an effective chamber-loaded indicator to make users aware of when

¹¹ “When Billy picked up the Beretta, he pushed a button that released the magazine. Billy could see the bullets in the magazine. Billy then put the magazine back in the Beretta. Billy moved the slide at the top of the gun and a bullet popped out. Billy again removed the magazine and put the bullet back in the magazine. Billy repeatedly removed and replaced the bullets and magazine from the gun. Billy knew that the Beretta was loaded when the magazine was in the gun, but thought it was unloaded when the magazine was taken out. He thought that the bullet came out the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber.” *Adames*, 909 N.E.2d at 745.

a bullet is loaded into the gun's chamber; and other safety devices such as a built-in lock, a child-resistant manual safety, a grip-safety, and personalized gun technology that would have prevented unauthorized users, such as children, from firing the gun.

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

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

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

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

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

Id. (taking judicial notice of Billy's adjudication as a juvenile delinquent) (internal citations omitted). Relative to the product defect exception, the court held that Section 7903(5)(A)(v) also does not require a conviction, "only that the volitional act

constitute a criminal offense.” *Id.* at 763. The court further held that the product defect exception did not require that “Billy intended to shoot Josh or understand the ramifications of his conduct,” because “he did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger,” therefore acting in a volitional manner that constituted a criminal offense. *Id.* Pursuant to the product defect exception to the PLCAA, therefore, Billy’s actions were considered as a matter of law to be the sole proximate cause of plaintiffs’ injuries, mandating the dismissal of their claims against Beretta. *Id.* at 763-64.

The next court to substantively address the product defect exception to the PLCAA was the Appeals Court of Massachusetts in the case of *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Ma. Ct. App. 2012). In the *Ryan* case, Charles Milot, a convicted felon who was on probation after having served eighteen months in jail, stole two handguns, including a Glock Model 17 pistol, and some ammunition from the home of Thomas Hughes, for whom he was doing various odd jobs. *Id.* at 1002-03, 1008. Charles Milot showed the handguns to his sister, who convinced him to return them. *Id.*

Charles Milot attempted to return the stolen firearms and ammunition and apparently shot himself in the left thigh, severing his femoral artery and causing him to bleed to death, when he attempted to place the Glock pistol in its storage case. *Id.* at 1003.

Elizabeth Ryan, as Administratrix of the Charles Milot's estate, sued Thomas Hughes and Glock, Inc. ("Glock"). *Ryan*, 959 N.E.2d at 1002. Plaintiff raised claims against Glock for breach of the implied warranty of merchantability, negligence, wrongful death, and unfair and deceptive acts and practices, alleging that the Glock pistol and its storage case were defective because the trigger must be in the fully rearward position in order to insert it in the storage case, *i.e.*, you have to pull the trigger before putting the pistol in the storage case. *Id.* at 1006-07. The superior court dismissed plaintiff's claims against Glock pursuant to the PLCAA. *Id.* at 1006.

The Appeals Court of Massachusetts affirmed the dismissal of plaintiff's claims against Glock, concluding that the case constituted a "'civil action or proceeding' brought by a 'person'

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

In the present case, plaintiffs’ claims also fail to satisfy the requirements of the product defect exception to the PLCAA because the Juvenile Delinquent’s shooting of plaintiffs’ decedent was a volitional¹² act that constituted the criminal offenses of involuntary

¹² Volition is defined as: “1. The ability to make a choice or determine something. 2. The act of making a choice or determining something. 3. The choice or determination that someone makes.” Black’s Law Dictionary 1605 (8th ed. 2004).

manslaughter and is therefore considered as a matter of law to be the sole proximate cause of plaintiff's injuries. R. 12a (Compl. ¶ 26 (the Juvenile Delinquent "pulled the trigger of the handgun")), and (Compl. ¶ 29 (the Juvenile Delinquent pled guilty to manslaughter in juvenile court.)).

Plaintiffs respond by claiming that "Juvenile offenses - such as the Juvenile Delinquent's involuntary manslaughter adjudication - are 'unlawful' but not criminal," as they are not subject to the criminal justice system. The 'discharge' that killed J.R. was therefore not a disqualifying 'criminal offense' under § 7903(5)(A)(v)." Pls.' Brief at 31.

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

they are unable to distinguish its well-reasoned and unanimous holding.

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

Just like with the Juvenile Delinquent in this case, in the *Adames* case, Billy Swan was charged in a juvenile delinquency proceeding and adjudged to have committed an act that constituted the criminal offense of involuntary manslaughter. *Adames*, 909 N.E.2d at 761-62. The Illinois Supreme Court unanimously and correctly held that plaintiffs' claims against the

manufacturer of the firearm for damages under such circumstances are barred by the PLCAA because the volitional act causing the discharge of the firearm constitutes the criminal offense of involuntary manslaughter and it does not matter if the shooter is not charged with a criminal offense because he is a juvenile and is charged through juvenile delinquency proceedings. *Id.*

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

Acts that are committed by juveniles that would constitute the crime of involuntary manslaughter if committed by an adult can be handled through delinquency proceedings in juvenile court. *See,*

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

Accordingly, the Juvenile Delinquent’s shooting of plaintiffs’ decedent is considered to be a volitional act (pointing the Subject Handgun at him and intentionally pulling the trigger) that constituted the criminal offense of involuntary manslaughter. It is

therefore considered as a matter of law to be the sole proximate cause of the death of plaintiffs' decedent, rendering the product defect exception to the PLCAA inapplicable and requiring the dismissal of their case.

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

C. The PLCAA EASILY PASSES CONSTITUTIONAL MUSTER

Recognizing that the PLCAA prohibits their claims, plaintiffs argue that it is unconstitutional. Plaintiffs contend that the PLCAA is unconstitutional on four grounds: (1) that it violates the Tenth Amendment and principles of federalism; (2) that it violates due process; (3) that it violates equal protection; and (4) that it exceeds the authority granted to Congress pursuant to the

Commerce Clause. Plaintiffs contend that only a “handful of courts have upheld PLCAA as constitutional” and claim that those decisions are both distinguishable and incorrect. Pls.’ Brief at 38. There is no support for plaintiffs’ claims.

In the more than decade long period since it was first enacted, the constitutionality of the PLCAA has been repeatedly challenged. The PLCAA has been found to be constitutional by each and every appellate court to have addressed the issue, including the United States Courts of Appeals for the Second and Ninth Circuits, and the highest courts of Alaska, District of Columbia, Illinois, and Missouri. Other than their claim that all of these courts incorrectly held that the PLCAA is unconstitutional, plaintiffs’ only attempt to distinguish them is based on the fact that certain of the decisions did not address each of the constitutional challenges that they raise in this case (Pls.’ Brief at 38), or did not address the Supreme Court’s decisions in *Bond* and *Gregory* (*id.* at 43). As explained in Section III.A.3., the Supreme Court’s decisions in *Bond* and *Gregory* apply only to cases of implied preemption, and are not applicable to

construction of the PLCAA, which involves the clear and express preemption of qualified civil liability actions.

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

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

All other courts to have issued decisions on the issue have agreed that the PLCAA does not violate the Tenth Amendment or principles of federalism because it does not commandeer the executive or legislative branches of the states to administer a federal program, but rather changes the applicable law, which state courts are required to apply pursuant to the Supremacy Clause. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-97 (2d

Cir. 2008); *Estate of Kim*, 295 P.3d at 388-89; *Adames*, 909 N.E.2d at 764-65; *Delana*, 486 S.W.3d at 323-24.

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

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

eliminate one that was previously available. *Martinez v. California*, 444 U.S. 277, 282 (1980); *Duke Power C. v. Carolina Env't'l Study Group*, 438 U.S. 59, 88 (1978).

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

exception applied so that the City of Gary's claims were not barred by the PLCAA, and therefore did not address its constitutionality. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007). For that reason, in a later decision, the Indiana Court of Appeals held that citations to the trial court's decision holding the PLCAA to be unconstitutional are "not well taken." *City of Gary v. Smith & Wesson Corp.*, ___ N.E.3d ___, No. 18A-CT-181, 2019 WL 2222985, at *3 n.5 (Ind. Ct. App. May 23, 2019).¹³

Plaintiffs' remaining authority for their claim that the PLCAA violates their right to due process is even less persuasive. They rely on the transcript of an oral decision from a trial judge suggesting in dicta that he would find the PLCAA to be unconstitutional if it applied to the claims of the plaintiffs in that case because he does "not think that it is proper to bar people from coming to court because something has been lobbied by some groups to persuade Congress

¹³ The trial court had dismissed the City's case pursuant to the PLCAA in January 2018 based on subsequent developments in the law, necessarily holding it to be constitutional, despite not even addressing the City's renewed challenges to the constitutionality of the PLCAA. *City of Gary*, 2019 WL 2222985, at *4.

to do something,”¹⁴ and a student law review article arguing that an earlier version of the PLCAA that was not passed by Congress would be unconstitutional.¹⁵ Pls.’ Brief at 42. The fact that plaintiffs would even cite to such feeble “authority” demonstrates the lack of support for their claim that the PLCAA violates their right to due process.

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

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

Plaintiffs contend that the:

PLCAA creates a discriminatory judicial system in which persons injured by gun industry negligence in states with legislation codifying judicially-created liability standards can recover damages; those harmed on identical facts in states which rely on common law standards cannot recover; and those injured from identical negligence from unlicensed gun sellers or from defectively designed bb guns can recover everywhere.

¹⁴ *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014), attached as Exhibit F to Plaintiffs-Appellants’ Brief.

¹⁵ Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72 U. Cin. L. Rev. 1739, 1750-56 (Summer 2004).

Pls.' Brief at 44.

Plaintiffs' differentiation between the first two categories, legislative and common law claims, relate to the predicate exception to the PLCAA (*see supra* footnote 7), not the product defect exception that they argue applies to their claims. The product defect exception does not differentiate between manufacturing or design defect claims that are based on product liability statutes or the common law, 15 U.S.C. § 7903(5)(A)(v), and therefore plaintiffs' argument does not apply. Relative to the third category, Congress had ample reason to differentiate between federally licensed manufacturers and sellers of firearms and persons who do not have a federal firearms license. Federal law requires anyone engaged in the business of manufacturing or selling firearms to be licensed and, by passing the PLCAA, Congress was protecting these legitimate businesses from what it deemed to be unjustifiable lawsuits seeking to blame them for the criminal or unlawful misuse of firearms. 15 U.S.C. § 7901(a)(3)-(5). Congress had a rational basis to exclude individuals manufacturing a firearm for personal use or occasionally selling a firearm in their collection, or persons

illegally engaged in the business of selling firearms without a federal firearms license. *Id.* Similarly, Congress had a rational basis in making the PLCAA applicable to firearms, as opposed to BB guns or other types of products that were not being targeted by the predatory lawsuits that the PLCAA is designed to preempt. *Id.*

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

2d at 294-95 (plaintiff did not even raise an equal protection claim on appeal); *Estate of Kim*, 295 P.3d at 391-92; *District of Columbia v. Beretta U.S.A. Corp.*, No. 2000 CA 000428 B, 2006 WL 1892023, at *18 (D.C. Super. Ct. May 22, 2006) (plaintiff did not even raise an equal protection claim on appeal).

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

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

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

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

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

IV. CONCLUSION

For the above reasons, Defendants respectfully request that this Court affirm the January 15, 2019 decision of the Court of Common Pleas sustaining their preliminary objections pursuant to the PLCAA and dismissing plaintiffs’ Complaint in its

entirety with prejudice, and grant such other relief as it deems just and proper.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 2135(d)

This brief complies with the word limit of Rule 2135(a)(1) of the Pennsylvania Rules of Appellate Procedure because it contains 10,968 words as measured by Microsoft Word.

/s/ John K. Greiner
John K. Greiner

CERTIFICATE OF COMPLIANCE WITH RULE 127

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. mail and/or email on June 19, 2019, upon the following:

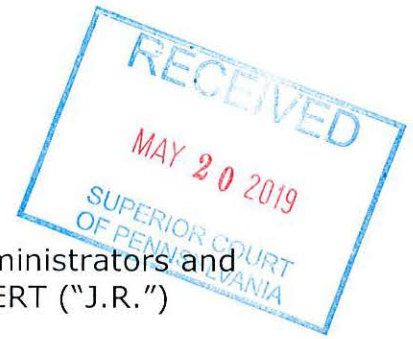
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**CASE NO. 207 WDA 2019
SUPERIOR COURT OF PENNSYLVANIA**



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

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD ARMORY, and SALOOM
DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC d/b/a SALOOM
DEPARTMENT STORE, *Defendants, Appellees.*

**On Appeal from the Order of the Court of Common Pleas of
Westmoreland County, entered on January 15, 2019 in the Civil
Division, No. 1126 of 2018, Harry F. Smail, Jr., Judge**

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Table of Contents

Docket, Gustafson v. Sprifield, Inc. d/b/a Springfield Armory, et al., Case No. 1126 of 2018	1a
Complaint, Gustafson v. Sprifield, Inc. d/b/a Springfield Armory, et al., Case No. 1126 of 2018, Filed March 19, 2018	5a
Defendants’ Preliminary Objections	34a
Defendants’ Brief In Support Of Their Preliminary Objections to the Complaint Pursuant To The Protection of Lawful Commerce In Arms Act.....	42a
Plaintiff’s Answer To Preliminary Objections Of Defendants Springfield, Inc., Saloom Department Store, And Saloom Dept. Store, LLC.....	58a
Memorandum Of Law In Support Of Plaintiffs’ Answer To The Preliminary Objections Of Defendants Springfield, Inc., Saloom Department Store and Saloom Dept. Store, LLC	64a
Exhibit 1 To Memorandum Of Law In Support Of Plaintiffs’ Answer To The Preliminary Objections Of Defendants Springfield, Inc., Saloom Department Store and Saloom Dept. Store, LLC....	103a
Exhibit 2 To Memorandum Of Law In Support Of Plaintiffs’ Answer To The Preliminary Objections Of Defendants Springfield, Inc., Saloom Department Store and Saloom Dept. Store, LLC	111a
United States’ Motion To Intervene And Memorandum In Support Of the Constitutionality Of the Protection Of Lawful Commerce In Arms Act	144a
Defendants’ Reply Brief In Further Support Of Their Preliminary Objections To The Complaint Pursuant To The Protection Of Lawful Commerce In Arms Act	179a

Transcript of Oral Argument Before Honorable Harry F. Smail, Jr., October 31, 2018	196a
Opinion And Order Of Court, January 15, 2019	292a
Order Of Court, February 11, 2019	308a

[Skip to main content \(\)](#)

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DEFENDANT	SPRINGFIELD ARMORY	420 WEST MAIN STREET, GENESEO, IL, USA																														
DEFENDANT	SALOOM DEPT STORE LLC/DBA	508 WEST MAIN STREET, MT PLEASANT, PA, USA																														
DEFENDANT	SALOOM DEPARTMENT STORE	508 WEST MAIN STREET, MT PLEASANT, PA, USA																														
INTERESTED PTY	UNITED STATES OF AMERICA																															
PLAINTIFF	MARK GUSTAFSON	25 N SHUPE STREET, MT PLEASANT, PA, USA																														
PLAINTIFF	LEAH GUSTAFSON	25 N SHUPE STREET, MT PLEASANT, PA, USA																														
PLAINTIFF ATTY	GARY F LYNCH	1133 PENN AVENUE 5TH FLOOR, PITTSBURGH, PA, 15222, USA																														

PLAINTIFF JAMES ROBERT
GUSTAFSON/EST

Events

Action Date ▲	Action Description	Action Name	View Document
Apr/05/2019	NOTICE SENT TO ALL COUNSEL & UNREPRESENTED PARTIES/PER PA RA	NOTICE SENT TO ALL COUNSEL & UNREPRESENTED PARTIES/PER PA RA	
Feb/15/2019	NOTICE APPEAL FROM THE SUPERIOR COURT	NOTICE APPEAL FROM THE SUPERIOR COURT	View
Feb/12/2019	ORDER PURSUANT TO RULE 1925(A)	ORDER FEBRUARY 11, 2019	View
Feb/12/2019	TRANSCRIPT OF PROCEEDINGS	HEARD ON OCTOBER 31, 2018	View
Feb/07/2019	*NOTICE APPEAL TO THE SUPERIOR COURT	*NOTICE APPEAL TO THE SUPERIOR COURT	View
Jan/16/2019	OPINION AND ORDER	OPINION AND ORDER JANUARY 15, 2019 THAT DEFTS PRELIMINARY OBJECTIONS IS SUSTAINED AND PLFFS COMPLAINT IS DISMISSED WITH PREJUDGED AS SET FORTH N236	View
Dec/11/2018	TRANSCRIPT OF PROCEEDINGS	HEARD ON OCTOBER 31, 2018	View
Oct/26/2018	REPLY - DEFENDANT'S	DEFTS REPLY BRIEF IN FURTHER SUPPORT OF THEIR PRELIMINARY OBJECTIONS TO THE COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT	View
Oct/26/2018	REPLY - DEFENDANT'S	DEFTS REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION FOR LEAVE TO FILE A REPLY BRIEF IN FURTHER SUPPORT OF PRELIMINARY OBJECTIONS	View
Oct/26/2018	MOTION/PETITION	MOTION FOR LEAVE TO FILE REPLY BRIEF AND ORDER GRANTED AS SET FORTH	View

Oct/19/2018	MOT/PET INTERVENE	UNITED STATES MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT OF THE CONSTITUTIONALITY OF THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT	View
Oct/19/2018	MOT/PET INTERVENE	UNITED STATES PETITION TO INTERVENE PURSUANT TO PARCIVP 23274	View
Oct/17/2018	ORDER	OCT 16 2018 UPON THE CONSENT MOTIN FILED BY THE US THE US SHALL FILE ITS REPSONSE TO THE NOITCE OF CONSTITUTIONAL CHALLENGE ON OR BEFORE OCT 19 2018	View
Oct/12/2018	MOT/PET EXTENSION OF TIME	EMERGENCY CONSENT MOTION FOR EXTENSION OF TIME TO FILE UNITED STATES RESPONSE TO NOTICE OF CONSTITUTIONAL CHALLENGE	View
Sep/28/2018	MOT/PET ORAL ARGUMENT	CONSENT MOTION REQUESTING ORAL ARGUMENT ON PRELIMINARY OBJECTIONS AND ORDER ORAL ARGUMENT IS SCHEDULED FOR OCTOBER 31, 2018	View
Aug/17/2018	MOT/PET ADMISSION PRO HAC VICE	CONSENTED TO PLFFS MOTION FOR ADMISSION PRO HAC VICE OF ROBERT M CROSS AND ORDER AUGUST 15, 2018 THAT ROBERT M CROSS IS ADMITTED PRO HAC VICE TO PRACTICE BEFORE THIS COURT AS SCOUNSEL FOR PLFFS	View
Aug/07/2018	MEMORANDUM OF LAW	IN SUPPORT OF PLFFS ANSWER TO THE PRELIMINARY OBJECTIONS OF DEFTS SPRINGFIELD INC SALOOM DEPARTMENT STORE AND SALOOM DEPT STORE LLC	View
Aug/07/2018	ANSWER PRELIMINARY OBJECTIONS	OF DEFTS SPRINGFIELD INC SALOOM DEPARTMENT STORE AND SALOOM DEPT STORE LLC	View
Jul/23/2018	STIPULATION	FOR EXTENSION OF TIME TO ANSWER AND FILE OPPOSITION TO DEFTS PRELIMINARY OBJECTIONS AND ORDER THAT STIPULATION OF COUNSEL FOR THE PARTIES AS SET FORTH ON OR BEFORE AUG 7 2018	View

Jul/13/2018	MISCELLANEOUS	CONSENTED TO DEFTS MOTION FOR ADMISSION PRO HAC VICE OF CHRISTOPHER RENZULLI AND ORDER THAT CHRISTOPHER RENZULLI IS ADMITTED PRO HAC VICE TO PRACTICE BEFORE THIS COURT AS COUNSEL FOR DEFTS	View
Jun/29/2018	BRIEF IN SUPPORT OF PRELIMINARY OBJECTIONS	TO THE COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT	View
Jun/29/2018	PRELIMINARY OBJECTIONS		View
Jun/29/2018	APPEARANCE ENTERED BY	JOHN K GREINER ESQ	View
Apr/24/2018	MISCELLANEOUS	CONSENTED TO PLFFS MOTION FOR ADMISSION PRO HAC VICE OF JONATHAN E LOWY AND ORDER APRIL 23, 2018 THAT JONATHAN E LOWY IS ADMITTED PRO HAC VICE TO PRACTICE BEFORE THIS COURT AS COUNSEL FOR PLFFS IN THE ABOVE CAPTIONED MATTER	View
Apr/20/2018	ACCEPTANCE OF SERVICE	OF COMPLAINT	View
Apr/09/2018	AFFIDAVIT OF SERVICE	COMPLAINT	View
Apr/09/2018	SHERIFF'S RETURN NOT FOUND	SHERIFF'S RETURN NOT FOUND	View
Mar/19/2018	*COMPLAINT CIVIL ACTION	*COMPLAINT CIVIL ACTION	View

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY
COMMONWEALTH OF PENNSYLVANIA

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

Plaintiffs,

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD
ARMORY,

and

SALOOM DEPARTMENT. STORE; and
SALOOM DEPT. STORE, LLC d/b/a
SALOOM DEPARTMENT STORE,

Defendants.

CIVIL DIVISION

Case No. 1124 of 2018

COMPLAINT

FILED ON BEHALF OF PLAINTIFFS

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PARTY:

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VIOLENCE**

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Washington, DC 20002
Telephone: (202) 370-8104

FILED IN
PROTHONOTARY'S OFFICE

MAR 19 2018

BY: _____

CLERK

**IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY
COMMONWEALTH OF PENNSYLVANIA**

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

CIVIL ACTION

Case No. _____

Plaintiffs,

v.

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

Defendants.

NOTICE TO DEFEND

YOU HAVE BEEN SUED IN COURT. If you wish to defend against the claims set forth in the following pages, you must take action within **TWENTY (20)** days after this Complaint and Notice are served, by entering a written appearance personally or by attorney and filing in writing with the court your defenses or objections to the claims set forth against you. You are warned that if you fail to do so the case may proceed without you and a judgment may be entered against you by the court without further notice for any money claimed in the Complaint or for any claim or relief requested by the Plaintiff. You may lose money or property or other rights important to you.

YOU SHOULD TAKE THIS PAPER TO YOUR LAWYER AT ONCE. IF YOU DO NOT HAVE A LAWYER, GO TO OR TELEPHONE THE OFFICE SET FORTH BELOW TO FIND OUT. THIS OFFICE CAN PROVIDE YOU WITH INFORMATION ABOUT HIRING A LAWYER.

IF YOU CANNOT AFFORD TO HIRE A LAWYER, THIS OFFICE MAY BE ABLE TO PROVIDE YOU WITH INFORMATION ABOUT AGENCIES THAT MAY OFFER LEGAL SERVICES TO ELIGIBLE PERSONS AT A REDUCED FEE OR NO FEE.

LAWYER REFERRAL SERVICE
The Westmoreland County Bar Association
PO Box 565
Greensburg PA 15601
Telephone: (724) 834-8490

**IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY
COMMONWEALTH OF PENNSYLVANIA**

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

CIVIL ACTION

Case No. _____

Plaintiffs,

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD
ARMORY,

and

SALOOM DEPARTMENT. STORE; and
SALOOM DEPT. STORE, LLC d/b/a
SALOOM DEPARTMENT STORE,

Defendants.

COMPLAINT

Plaintiffs Mark and Leah Gustafson, as Administrators of the Estate of James Robert Gustafson, deceased, and in their own right, by the undersigned counsel, hereby allege as follows.

Nature of the Action

1. This is a civil action arising from the decision of a product manufacturer, Springfield Armory, to design, market and sell to the general public a lethal product without feasible, life-saving safety features; the decision of a retail dealer, Saloom Department Store, to sell that unsafe product; and the tragic shooting death of James Robert ("J.R.") Gustafson, a thirteen-year-old boy, who was foreseeably killed as a result.

2. For over a century, the firearms industry, including Defendants, has been well aware of the grave risk of injury and death their products pose to gun owners, their families, visitors

to their homes, and others. The industry has known that many of its customers will store guns unlocked and loaded, accessible to children; many children and adults die from those firearms; guns could easily been made and sold with safety features that would prevent some of these deaths, and would greatly reduce the risk that people will be injured or killed from unintentional shootings by children.

3. For example, the firearms industry has known for over a century that many children – and adults – often are deceived by the design of semiautomatic firearms to believe that they are unloaded after the ammunition magazine is removed, even though a live round may remain in the chamber. The industry has known that many people, often children, die or are seriously wounded when someone fires a gun he or she thinks is unloaded because there is no magazine in the gun, but, unbeknownst to the person handling the gun, a bullet is in the chamber.

4. The industry has known for over a century that magazine disconnect safeties are an easy and inexpensive fix to this problem that would save lives. Magazine disconnect safeties are devices that prevent a gun from firing when the magazine is removed. Magazine disconnect safeties were invented over a century ago precisely to prevent the risks – well known even then – that people are killed in unintentional shootings with guns that were thought to be unloaded.

5. When Defendants Springfield Armory and Saloom Department Store made and sold the gun that caused the death of J.R. Gustafson, they knew or should have known all of the above. Defendants knew or should have known that a substantial number of people who possessed their products (their customers, or persons to whom their customers transferred guns) would store their guns unlocked and loaded; that children would gain possession of those guns; that unless they included feasible safety devices and warnings in and with their guns, children could discharge a

gun they thought was unloaded after the magazine was removed; and that people – including many children – would die or be seriously injured as a result.

6. Despite this knowledge, Defendants chose to make and sell firearms without feasible safety features that would prevent foreseeable deaths and injuries. These safety features would eliminate the unsafe character of the firearm (and the high degree of risk associated with it) without impairing its usefulness or making it too expensive to maintain its utility.

7. As a result of Defendants' actions and choices, they placed the lives of their customers, their families, visitors, and others at risk.

8. As a result of Defendants' actions and choices, J.R. Gustafson was inadvertently and unnecessarily killed at the age of thirteen, and Mark and Leah Gustafson lost their son.

9. To be clear, Defendants are not liable because they made and sold a gun, a product that is capable of causing lethal injury. Defendants are liable because they chose to make and sell that product unreasonably and unnecessarily dangerous, without feasible safety features and warnings that would have prevented J.R.'s death.

10. Pennsylvania law provides a redress to Plaintiffs for their losses. Under Pennsylvania law, the firearm used to shoot and kill J.R. was negligently designed, marketed, and sold, and its design and warnings were defective, unreasonably dangerous, and negligently made and sold. The death of J.R. was foreseeably caused by Defendants' negligence and defective design, warnings and marketing.

11. J.R.'s parents bring this suit to hold these companies accountable for their wrongful actions that caused the death of their son.

Parties

12. Plaintiffs Mark and Leah Gustafson are the parents of J.R. Gustafson, deceased, who was a resident of 25 N. Shupe Street, Mt. Pleasant, Pennsylvania, at the time of his death on March 20, 2016.

13. Mark and Leah Gustafson, authorized personal representatives and Administrators of the Estate of James Robert Gustafson, are adult individuals who are and at all times relevant hereto were residents of Mt. Pleasant, Pennsylvania.

14. On or about March 14, 2018, Plaintiffs were appointed Administrators of the Estate of James Robert Gustafson, by the Register of Wills of the County of Westmoreland, Pennsylvania at No. 6518-0516.

15. Plaintiffs, as Administrators of the Estate of James Robert Gustafson, bring this action on behalf of all persons entitled to recover damages under Pennsylvania's Wrongful Death and Survival Statutes. Pa. Cons. Stat. §§ 8301-02.

16. By virtue of their parental relationship to the decedent, persons entitled to recover damages pursuant to both § 8301 and § 8302 include:

- a. Mark Gustafson (Father), 25 N. Shupe Street, Mt. Pleasant, Pennsylvania.
- b. Leah Gustafson (Mother), 25 N. Shupe Street, Mt. Pleasant, Pennsylvania.

17. J.R. Gustafson did not bring any action during his lifetime to recover damages for the injuries alleged herein and no other action has been filed to recover damages for the wrongful death of J.R. Gustafson.

18. Defendant Springfield, Inc. d/b/a Springfield Armory ("Springfield Armory") is a corporation organized and existing under the laws of Illinois, with its principal place of business

at 420 West Main Street, Geneseo, Illinois. Springfield Armory designed, manufactured, and sold the handgun.

19. Defendant Saloom Dept. Store, LLC d/b/a Saloom Department Store is a limited liability company organized and existing under the laws of Pennsylvania, with its principal place of business at 508 West Main Street, Mt. Pleasant, Pennsylvania. Prior to the 2017 registration of Saloom Dept. Store, LLC, Defendant operated, upon information and belief, as an unregistered business in Pennsylvania under the name Saloom Department Store. Defendant Saloom Dept. Store, LLC and Defendant Saloom Department Store will be collectively referred to herein as “Saloom.” No fictitious name registration was on file with the Pennsylvania Department of State at the time of Saloom’s sale of the handgun at issue in this Complaint. Saloom sold the handgun at retail.

Factual Allegations

A. The Shooting Death of J.R Gustafson.

20. On March 20, 2016, a Springfield Armory semiautomatic handgun, model XD-9 (“the handgun”), was in the home of Joshua Hudec in Mt. Pleasant, Westmoreland County, Pennsylvania.

21. The handgun had not been modified in any significant way from the time it was manufactured by Springfield Armory and sold by Saloom, and had the same safety features – and lack of safety features – as it did when it was manufactured by Springfield Armory and sold by Saloom.

22. J.R. was visiting the Hudec home.

23. A fourteen-year old boy (“the boy”), who was also visiting the home and was friends with J.R., came to possess the handgun.

24. The boy knew that the ammunition magazine of the handgun had been removed.

25. The boy thought that the handgun was unloaded, because the magazine was removed and there were no adequate indicators or warnings to inform him that a live round remained in the chamber.

26. Thinking the handgun was unloaded, the boy pulled the trigger of the handgun.

27. Unbeknownst to the boy, a live round remained in the chamber.

28. The live round discharged, killing the boy's friend and Mark and Leah's son, J.R.

29. Upon information and belief, the boy pled guilty to a delinquency involuntary manslaughter in juvenile court in connection with J.R.'s death.

B. Defendants Were Aware Of The Need To Include Safety Features In Order To Prevent Foreseeable Injuries or Deaths

30. Defendants could reasonably foresee that guns they sold will be stored, carried, and used in environments that include those in which children will be present and will gain access to these deadly weapons, such as family homes. Guns are not products, such as sophisticated industrial machines, intended and expected to be used only by specially educated and trained users in situations where children are not expected to be present and able to obtain access to them.

31. As Defendants knew or should have known, it is common and highly foreseeable to gun manufacturers and sellers that guns will be stored accessible to children.

32. For example, a study of data from the National Center for Health Statistics indicated that a majority of gun owners living with children do not store their guns locked, unloaded, and separate from ammunition, and that approximately 40 percent do not store their guns locked in any manner. The study estimated that 8.3 million children in the U.S. live in homes where a firearm is stored unlocked, and 2.6 million live in a home where the firearm is also stored loaded or with ammunition.

33. Other studies have reached similar conclusions about high levels of unsecure gun storage where guns are accessible to children.

34. Although there have been important initiatives to change the behavior of parents concerning guns and firearms storage, such efforts have not eliminated the problem of children accessing unsecure guns. Gun manufacturers and sellers know or should know that guns they sell will be stored unlocked and accessible to children.

35. As Defendants knew or should have known at all relevant times, failure to incorporate the safety features and warnings discussed herein results in many unintentional shootings every year, such as when a child finds a gun and fires it, injuring or killing himself or another child.

36. Data indicates that every day in the United States, an average of more than one person is killed, and 45 more are injured, in unintentional shootings.

37. A study by the federal Center for Disease Control found that the U.S. leads the industrialized world in rates of gun-related deaths among children, with unintentional fatal shootings of children 0 to 14 years of age occurring here at rates 11 times higher than in the other 25 industrialized nations studied.

38. Studies have found that most of these incidents occur when children obtain access to a loaded, unlocked gun without adult supervision. A substantial number of these deaths and injuries would be prevented if gun manufacturers equipped guns with safety features to prevent children from discharging them.

39. As Defendants knew or should have known at all relevant times, handguns are involved in a disproportionately high number of unintentional shooting deaths, as compared to rifles and shotguns, and handguns are particularly likely to be stored unsafely.

40. Defendants knew or should have known that messaging from the firearms industry misleads many people into incorrectly thinking that guns in the home enhance safety and are more likely to save lives, even though studies have consistently shown for years that a gun in the home greatly increases the risk of injury and death and is more likely to be used against family members than in their defense.

41. Defendants knew or should have known that these misperceptions lead some people to buy and possess guns, and bring guns into their homes, with an inaccurately low assessment of the risks those guns pose, compared to an inaccurately high assessment of their safety benefits.

42. Defendants knew or should have known that these misperceptions make it more likely that people will store guns unsafely, accessible to children.

43. Defendants knew or should have known that advertising, marketing and messaging by the firearms industry suggests that people need guns immediately accessible and useable in order to defend themselves and their families, and that these communications lead people to store guns unsafely, accessible to children.

44. For example, Defendant Springfield Armory advertises some handguns for use, “When the police are minutes away and the threat is seconds away.”

45. Defendants knew or should have known that users of guns, and particularly children, would be deceived by its design to think that it was unloaded even though a live round was in the chamber. And as a result, many people, including children, would be killed or seriously injured as a result.

C. The Springfield Armory Handgun’s Lack of Safety Features.

46. This tragedy resulted from the unnecessarily and unreasonably dangerous actions of Defendants, including their design, marketing and sale of a handgun without a magazine

disconnect safety, an effective loaded chamber indicator, an internal lock, or other feature that that would have prevented it from being fired by a child or any other person who did not have proper authority to use it, or effective warnings. Any one of these would have prevented the shooting and J.R.'s death.

47. The handgun did not include feasible features in its design that could have prevented it from being fired when users were led to believe that it was unloaded because the ammunition magazine was removed.

48. The handgun did not include feasible features that would prevent it from being fired by a child or other person without authorization to use it.

49. The handgun did not include feasible features and warnings that would effectively alert users that a live round was in the chamber.

50. It has long been technologically and economically feasible to design guns so that they include any of these features.

51. Magazine disconnect safeties have been used in firearms for over 100 years, to prevent guns from firing when users think that the gun is unloaded because the ammunition magazine has been removed.

52. A 1910 patent for the magazine disconnect stated its intention “to insure absolutely against the dangerous unintentional firing sometimes liable to occur if the trigger is pulled after the magazine has been withdrawn in the belief that all cartridges have been removed from the arm with the magazine.”

53. At least as early as January 1958, the National Rifle Association has recognized the life-saving potential of magazine disconnect safeties. January 1958 issue of the NRA's *American Rifleman* magazine stated: “There is a magazine safety to prevent the gun being fired unless the

magazine is in place, the idea being to prevent accidents caused by people thinking they have unloaded the gun when they have merely removed the magazine and left a cartridge in the chamber.”

54. For years the firearms industry has been well aware that magazine disconnect safeties are feasible, inexpensive, and successful at saving lives, without detrimental effects to the proper, legitimate use of firearms. Magazine disconnect safeties are used by many manufacturers, without incident or harm to legitimate, appropriate users.

55. Loaded chamber indicators are also feasible and, if effectively made, can alert foreseeable users that a round is in the chamber, even if the magazine is removed.

56. Adequate warnings, on the firearm and/or in other materials, can make the loaded chamber indicator more effective in warning users of a live round in the chamber.

57. The recognition that a gun can and should be made so that children cannot operate it has been well known in the gun industry for more than a century.

58. At the time of the manufacture of the handgun, it was feasible to incorporate a lock into the gun that would secure it against unintentional use. Feasible locking devices include key-operated or push button locks similar to those that have been used on briefcases for decades. These and other locking devices have been successfully incorporated into guns, and would have prevented the shooting and death of J.R. Gustafson.

59. Locking systems that are internal or integrated into the gun are more effective and more likely to be used than locks that are a separate, external device that is not part of the gun, such as a “trigger block” device that attaches over the gun’s trigger to prevent it from being pulled or a bicycle-style “cable lock” device that is threaded through the gun barrel or chamber. Unlike internal locks, an external lock is not always available to the gun user or reminding the gun user

of its availability, can be installed incorrectly, defeated by cutting or prying apart the lock, or lost after being removed from the gun.

60. It was also feasible at the time of the manufacture of the handgun to incorporate “user recognition” technology in the gun, which prevents the gun from firing unless it “recognizes” the user.

61. Childproof safeties, internal locking systems, user recognition systems, and other safety features to prevent the unintentional use of guns by children have been proposed and available to gun manufacturers for many years and were feasible and known and available to Springfield Armory at the time it manufactured the handgun. Despite this fact, Springfield Armory failed to equip the handgun with any safety feature to prevent its unintentional use by children.

62. For example, a trigger lock was patented in 1969.

63. For over a decade, Taurus has sold firearms with features that “engage[] with the turn of a special key to render the firearm inoperative, and is entirely contained within the firearm, with no parts to misplace.” Only inserting and rotating the special key will render the gun ready to fire. Unlike a “trigger lock” that is not an integrated part of the gun, this integral lock cannot be installed incorrectly, pried apart, or lost after it is removed. Taurus has stated that the Taurus Security System was implemented “to help prevent unauthorized use by children,” and that it is superior to “trigger block” style devices and other locks that are a separate, external device and not an integrated part of the gun and which can be lost when not in use.

64. Taurus describes the internal lock as providing “additional security for home and family,” as follows:

Focusing on an ever-increasing awareness of firearms safety, Taurus International introduced in 1997 the internationally patented TAURUS SECURITY SYSTEM.

This system renders a firearm inoperable by use of a special key. Taurus listened carefully to its customers and believes the TAURUS SECURITY SYSTEM responds to their desire for additional security for their home and personal defense handguns. This system, a world's first, gives the owner the option of storing their firearm in a locked condition, without cumbersome external devices.

65. Technology equally or more effective than the Taurus Security System was feasible at the time the handgun was made and sold, and would have secured the handgun against the unintentional use that occurred here.

D. The Negligent Warnings and Marketing of the Springfield Armory Handgun.

66. Studies have repeatedly shown that a gun in the home increases the risk of death or injury to those in the household and visitors. For example, studies have found that:

- a. An estimated 41% of gun-related homicides and 94% of gun-related suicides would not occur under the same circumstances had no guns been present.
- b. The risk of homicide is three times higher in homes with firearms.
- c. Higher gun ownership puts both men and women at a higher risk for homicide, particularly gun homicide.
- d. Keeping a firearm in the home increases the risk of suicide by a factor of 3 to 5 and increases the risk of suicide with a firearm by a factor of 17.
- e. The association between firearm ownership and increased risk of suicide cannot be explained by a higher risk of psychiatric disorders in homes with guns.
- f. It is 11 times more likely that a gun will be used for completed and attempted suicides than to be used in self-defense.
- g. It is 7 times more likely that a gun will be used in criminal assaults and homicides than to be used in self-defense.

h. It is 4 times more likely that a gun will be used to cause unintentional shooting deaths or injuries than to be used in self-defense.

67. There are many additional studies that demonstrate the increased dangers created by bringing a gun into the home.

68. Nonetheless, Defendants do not inform customers or potential users of any of these studies, or the general fact that they demonstrate that guns increase the risk of harm, rather than increase safety.

69. On the contrary, Defendants exaggerate the safety benefits of guns, and minimize the documented data as to their risks.

70. The warnings and instructions provided by Defendants, both in the manual and on the firearm, fail to adequately educate and alert people as to the risks posed by guns, including the foreseeable risks that children will obtain possession of guns, that users will mistakenly believe that a gun is unloaded when the magazine is removed, and that shooting injuries and deaths will result.

71. Defendants' actions in selling guns, including the handgun, despite their defective design were outrageous, undertaken for bad motives including putting financial gain above safety, and undertaken with conscious disregard or reckless indifference to the interests of others and known dangers.

WRONGFUL DEATH ACTION
COUNTS 1 THROUGH 3

72. Plaintiffs hereby incorporate the previous paragraphs.

73. Plaintiffs, as Administrators of the Estate of James Robert Gustafson and in their own right, bring this action on behalf of the beneficiaries of J.R. Gustafson under and by virtue of the Pennsylvania Wrongful Death Act, 42 Pa. C.S.A. § 8301, on Counts 1 through 3 listed below.

74. As the result of the wrongful death of J.R. Gustafson, his parents have been deprived of the love, companionship, comfort, aid, assistance, support, society, and services they would have received from him for the remainder of his natural life.

75. Plaintiffs also claim damages for the pecuniary loss suffered by reason of their son's death, including the loss of contributions and the replacement value of J.R.'s services, as well as reimbursement for medical bills, funeral and burial expenses, expenses of administration, and other expenses incurred in connection therewith.

Count 1
(Products Liability – All Defendants)

76. Plaintiffs hereby incorporate all previous paragraphs.

77. The handgun was defective in design, unreasonably dangerous, and lacked an element necessary to make it safe for its intended use because it lacked safety features including a magazine disconnect safety, an effective loaded chamber indicator, an internal locking system or other safety system that would prevent it from being unintentionally fired by a child, a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users, or a child-proof or child-resistant safety device, and effective and appropriate warnings.

78. The risks of harm resulting from the defective design of the handgun were reasonably foreseeable. Alternative designs existed at the time of design, manufacture, and sale of the handgun that were safer, feasible, practical, and cost efficient.

79. The danger posed by the defective design is severe, because injuries resulting from it are likely to be extremely serious, including catastrophic physical injuries or death. This danger has been known to manufacturers of the product for many years. The likelihood that the danger would occur is great, because it is common and foreseeable for guns to be stored in an unsecure manner that enables children to obtain access to them and unintentionally discharge them.

80. The safer design is feasible, there are no adverse consequences to the product or to the consumer that would result from the safer design, the safer design can eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility, and it is feasible for the manufacturer to spread the cost through the price of the product or liability insurance.

81. A reasonable person would conclude that the probability and seriousness of harm caused by the handgun outweigh the burden of cost of taking the safety precautions addressed herein. Defendants failed to adopt safety precautions proportionate to the magnitude of the expected risk of the handgun.

82. The defective design of the handgun was a direct, legal, and proximate cause of and substantial factor in causing the shooting death of J.R. Gustafson and all the injuries alleged herein. J.R. Gustafson would not have been shot with the handgun if the alternative design had been used, because a child would not have been able to fire the handgun, and/or the shooter would have become aware that the handgun was loaded and would not have fired it, and therefore all injuries suffered by J.R. Gustafson and Plaintiffs alleged herein are attributable to the defective design.

83. Springfield Armory engaged in the business of manufacturing and selling guns, and Saloom engaged in the business of selling guns.

84. Springfield Armory designed, manufactured, and sold the handgun, and Saloom sold the handgun.

85. The defect in the design of the handgun existed at the time it left the possession of Springfield Armory, at the time it left the possession of Saloom, and at the time it came into the possession of the boy who shot J.R. Gustafson.

86. The handgun did not undergo any substantial change after the time of its manufacture, and was expected to and did reach the public without substantial change.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants and an award of: (a) compensatory damages in excess of fifty thousand dollars (\$50,000.00), plus interests and costs; (b) punitive damages based on defendants' outrageous, intentional, and reckless conduct; and (c) such other and further relief as the Court may deem appropriate.

Count 2
(Negligent Design and Sale – All Defendants)

87. Plaintiffs hereby incorporate all previous paragraphs.

88. At all relevant times, Defendants were subject to the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury. Springfield Armory had a duty to exercise reasonable care in designing and selling its product to protect against foreseeable risk of injury, and Saloom Department Store had a duty to exercise reasonable care in selling products to protect against foreseeable risk of injury.

89. Springfield Armory breached its duty not to expose others to reasonably foreseeable risks of injury by designing and selling the handgun without safety features including a magazine disconnect safety, an effective loaded chamber indicator, an internal locking system, or other safety system that would prevent it from being fired by a child or other unauthorized person, a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users, or a child-proof or child-resistant safety device, and effective and appropriate warnings.

90. Saloom breached its duties not to expose others to reasonably foreseeable risks of injury by selling the handgun despite knowing or having reason to know of its dangerous condition and lack of such safety features.

91. Defendants' breaches of their duties not to expose others to reasonably foreseeable risk of injury were direct, legal, and proximate causes of and substantial factors in causing the shooting death of J.R. Gustafson and all the injuries to him and to Plaintiffs alleged herein.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants and an award of: (a) compensatory damages in excess of fifty thousand dollars (\$50,000.00), plus interests and costs; (b) punitive damages based on defendants' outrageous, intentional, and reckless conduct; and (c) such other and further relief as the Court may deem appropriate.

Count 3
(Negligent Warnings and Marketing – All Defendants)

92. Plaintiffs hereby incorporate all previous paragraphs.

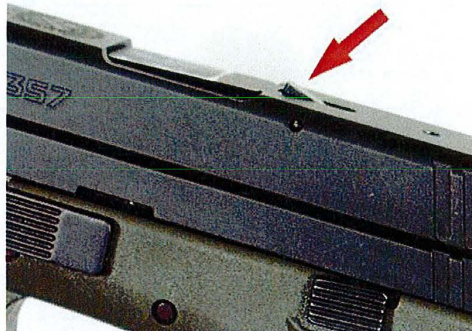
93. At all relevant times, Defendants were subject to the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury. Defendants therefore had a duty to exercise reasonable care in distributing and selling guns and to refrain from engaging in any affirmative activity creating reasonably foreseeable risks of injury to others.

94. Springfield Armory and Saloom breached their duty not to expose others to reasonably foreseeable risks of injury by negligently marketing guns, and by misleading consumers as to the risks and benefits of handguns.

95. Defendants could have and should have included stronger, more detailed, and more prominent language and materials to effectively inform potential users as to the risks of firearms and the need to store them safely.

96. Defendants also negligently provided inadequate warnings on the firearm itself, including by failing to inform foreseeable users that a live round could be in the chamber and could be fired after the magazine is removed, and to have a loaded chamber indicator prominently and clearly inform and alert users when the chamber was loaded.

97. For example, Defendants' handgun's loaded chamber indicator is barely noticeable and, certainly to a child, unintelligible, as pictured in the exemplar below:



98. Whereas, it was feasible to place a specific warning on the handgun itself to identify the loaded chamber indicator's purpose and to identify when the chamber is loaded, as pictured in the exemplar below:



99. Placing such a warning on the loaded chamber indicator is feasible, there are no adverse consequences to the product or to the consumer that would result from the safer design that includes such a warning, the safer design can eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility, and it is feasible for the manufacturer to spread the cost through the price of the product or liability insurance.

100. Here, the boy thought the handgun was unloaded because the magazine clip was not in it. Had the loaded chamber indicator provided the requisite warning to the boy that the handgun was loaded, the death of J.R. Gustafson would not have occurred.

101. A reasonable person would conclude that the probability and seriousness of harm caused by the handgun outweigh the burden of cost of taking the safety precautions and warnings addressed herein. Defendants failed to adopt safety precautions and warnings proportionate to the magnitude of the expected risk of the handgun.

102. The defective design of the handgun was a direct, legal, and proximate cause of and substantial factor in causing the shooting death of J.R. Gustafson and all the injuries alleged herein.

103. J.R. Gustafson would not have been shot with the handgun if Defendants had not been negligent in their marketing and warnings.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants and an award of: (a) compensatory damages in excess of fifty thousand dollars (\$50,000.00), plus interests and costs; (b) punitive damages based on defendants' outrageous, intentional, and reckless conduct; and (c) such other and further relief as the Court may deem appropriate.

SURVIVAL ACTION
COUNTS 4 THROUGH 6

104. Plaintiffs hereby incorporates all previous paragraphs.

105. Plaintiffs, also bring this action on behalf of the Estate of James Robert Gustafson, under and by virtue of the Pennsylvania Survival Act, 42 Pa. C.S.A. § 8302, on Counts 4 through 6 listed below.

106. As a result of the death of J.R. Gustafson, his Estate has been deprived of the economic value of his life including potential earnings and prospective net accumulations of his

estate, and Plaintiffs claim damages for the pecuniary loss sustained by the Estate as a result of his death.

107. Plaintiffs also claim damages on behalf of the Estate of James Robert Gustafson for pain and suffering undergone by J.R. Gustafson between the time he sustained injury and his death.

Count 4
(Products Liability – All Defendants)

108. Plaintiffs hereby incorporates all previous paragraphs.

109. The handgun was defective in design, unreasonably dangerous, and lacked an element necessary to make it safe for its intended use because it lacked safety features including a magazine disconnect safety, an effective loaded chamber indicator, an internal locking system or other safety system that would prevent it from being unintentionally fired by a child, a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users, or a child-proof or child-resistant safety device, and effective and appropriate warnings.

110. The risks of harm resulting from the defective design of the handgun were reasonably foreseeable. Alternative designs existed at the time of design, manufacture, and sale of the handgun that were safer, feasible, practical, and cost efficient.

111. The danger posed by the defective design is severe, because injuries resulting from it are likely to be extremely serious, including catastrophic physical injuries or death. This danger has been known to manufacturers of the product for many years. The likelihood that the danger would occur is great, because it is common and foreseeable for guns to be stored in an unsecure manner that enables children to obtain access to them and unintentionally discharge them.

112. The safer design is feasible, there are no adverse consequences to the product or to the consumer that would result from the safer design, the safer design can eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain

its utility, and it is feasible for the manufacturer to spread the cost through the price of the product or liability insurance.

113. A reasonable person would conclude that the probability and seriousness of harm caused by the handgun outweigh the burden of cost of taking the safety precautions addressed herein. Defendants failed to adopt safety precautions proportionate to the magnitude of the expected risk of the handgun.

114. The defective design of the handgun was a direct, legal, and proximate cause of and substantial factor in causing the shooting death of J.R. Gustafson and all the injuries alleged herein. J.R. Gustafson would not have been shot with the handgun if the alternative design had been used, because a child would not have been able to fire the handgun, and therefore all injuries suffered by J.R. Gustafson and Plaintiffs alleged herein are attributable to the defective design.

115. Springfield Armory engaged in the business of manufacturing and selling guns, and Saloom engaged in the business of selling guns.

116. Springfield Armory designed, manufactured, and sold the handgun, and Saloom sold the handgun.

117. The defect in the design of the handgun existed at the time it left the possession of Springfield Armory, at the time it left the possession of Saloom, and at the time it came into the possession of the boy who shot J.R. Gustafson.

118. The handgun did not undergo any substantial change after the time of its manufacture, and was expected to and did reach the public without substantial change.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants and an award of: (a) compensatory damages in excess of fifty thousand dollars (\$50,000.00), plus interests

and costs; (b) punitive damages based on defendants' outrageous, intentional, and reckless conduct; and (c) such other and further relief as the Court may deem appropriate.

Count 5
(Negligent Design and Sale – All Defendants)

119. Plaintiffs hereby incorporate all previous paragraphs.

120. At all relevant times, Defendants were subject to the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury. Springfield Armory had a duty to exercise reasonable care in designing and selling its product to protect against foreseeable risk of injury, and Saloom Department Store had a duty to exercise reasonable care in selling products to protect against foreseeable risk of injury.

121. Springfield Armory breached its duty not to expose others to reasonably foreseeable risks of injury by designing and selling the handgun without safety features including a magazine disconnect safety, an effective loaded chamber indicator, an internal locking system, or other safety system that would prevent it from being fired by a child or other unauthorized person, a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users, or a child-proof or child-resistant safety device, and effective and appropriate warnings.

122. Saloom breached its duties not to expose others to reasonably foreseeable risks of injury by selling the handgun despite knowing or having reason to know of its dangerous condition and lack of such safety features.

123. Defendants' breaches of their duties not to expose others to reasonably foreseeable risk of injury were direct, legal, and proximate causes of and substantial factors in causing the shooting death of J.R. Gustafson and all the injuries to him and to Plaintiffs alleged herein.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants and an award of: (a) compensatory damages in excess of fifty thousand dollars (\$50,000.00), plus interests and costs; (b) punitive damages based on defendants' outrageous, intentional, and reckless conduct; and (c) such other and further relief as the Court may deem appropriate.

Count 6
(Negligent Warnings and Marketing – All Defendants)

124. Plaintiffs hereby incorporate all previous paragraphs.

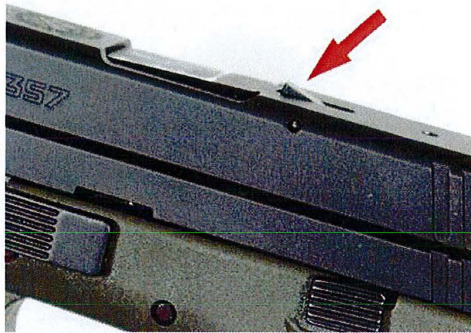
125. At all relevant times, Defendants were subject to the general duty imposed on all persons not to expose others to reasonably foreseeable risks of injury. Defendants therefore had a duty to exercise reasonable care in distributing and selling guns and to refrain from engaging in any affirmative activity creating reasonably foreseeable risks of injury to others.

126. Springfield Armory and Saloom breached their duty not to expose others to reasonably foreseeable risks of injury by negligently marketing guns, and by misleading consumers as to the risks and benefits of handguns.

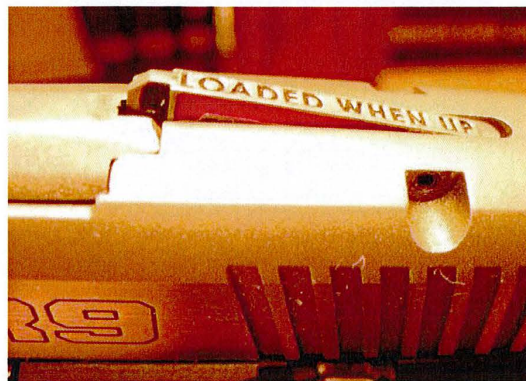
127. Defendants could have and should have included stronger, more detailed, and more prominent language and materials to effectively inform potential users as to the risks of firearms and the need to store them safely.

128. Defendants also negligently provided inadequate warnings on the firearm itself, including by failing to inform foreseeable users that a live round could be in the chamber and could be fired after the magazine is removed, and to have a loaded chamber indicator prominently and clearly inform and alert users when the chamber was loaded.

129. For example, Defendants' handgun's loaded chamber indicator is barely noticeable and, certainly to a child, unintelligible, as pictured in the exemplar below:



130. Whereas, it was feasible to place a specific warning on the handgun itself to identify the loaded chamber indicator's purpose and to identify when the chamber is loaded, as pictured in the exemplar below:



131. Placing such a warning on the loaded chamber indicator is feasible, there are no adverse consequences to the product or to the consumer that would result from the safer design that includes such a warning, the safer design can eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility, and it is feasible for the manufacturer to spread the cost through the price of the product or liability insurance.

132. Here, the boy thought the handgun was unloaded because the magazine clip was not in it. Had the loaded chamber indicator provided the requisite warning to the boy that the handgun was loaded, the death of J.R. Gustafson would not have occurred.

133. A reasonable person would conclude that the probability and seriousness of harm caused by the handgun outweigh the burden of cost of taking the safety precautions and warnings addressed herein. Defendants failed to adopt safety precautions and warnings proportionate to the magnitude of the expected risk of the handgun.

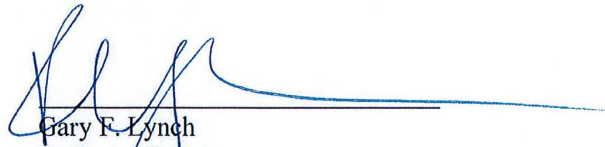
134. The defective design of the handgun was a direct, legal, and proximate cause of and substantial factor in causing the shooting death of J.R. Gustafson and all the injuries alleged herein.

135. J.R. Gustafson would not have been shot with the handgun if Defendants had not been negligent in their marketing and warnings.

WHEREFORE, Plaintiffs request judgment in their favor and against Defendants and an award of: (a) compensatory damages in excess of fifty thousand dollars (\$50,000.00), plus interests and costs; (b) punitive damages based on defendants' outrageous, intentional, and reckless conduct; and (c) such other and further relief as the Court may deem appropriate.

Dated: March 19, 2018

Respectfully submitted,



Gary F. Lynch
R. Bruce Carlson
Kelly K. Iverson

**CARLSON LYNCH SWEET KILPELA &
CARPENTER, LLP**

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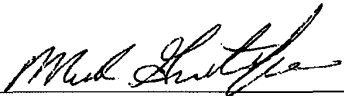
To be Admitted *Pro Hac Vice*:

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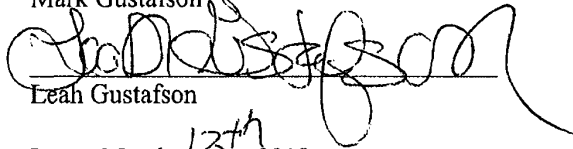
VERIFICATION

I, Mark and Leah Gustafson, hereby verify that the statements made in the foregoing complaint are true and correct to the best of my knowledge, information and belief.

I understand that the statements made herein are subject to the penalty provisions of 18 Pa. C.S. § 4904 relating to unsworn falsification to authorities.



Mark Gustafson



Leah Gustafson

Date: March 13th, 2018

IN THE COURT OF COMMON PLEAS WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARK AND LEAH GUSTAFSON,	) NO. 1126 OF 2018
Individually and as Administrators	)
And Person Representatives of the	)
ESTATE OF JAMES ROBERT ("J.R.")	)
GUSTAFSON,	)
	)
	)
Plaintiffs,	)
	)
v.	)
	)
SPRINGFIELD, INC. d/b/a/	)
SPRINGFIELD ARMORY, and	)
	)
SALOOM DEPARTMENT STORE; and	)
SALOOM DEPT. STORE, LLC d/b/a/	)
SALOOM DEPARTMENT STORE,	)
	)
	)
Defendants.	)

PRELIMINARY OBJECTIONS

Defendants Springfield Armory, Inc. s/h/a Springfield, Inc. d/b/a Springfield Armory ("Springfield"), Saloom Department Store and Saloom Dept. Store, LLC d/b/a/ Saloom Department Store (collectively "Saloom") respectfully submit the following Preliminary Objections in the nature of demurrer, seeking dismissal of the Plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure and respectfully represent the following:

1. The Plaintiffs commenced this action on March 19, 2018, asserting wrongful death and survival claims.

2. The Plaintiffs have named Springfield as a Defendant, alleging that a model XD-9 semi-automatic handgun (“Subject Handgun”) manufactured by Springfield was used by a minor, who intentionally pulled the trigger of the Subject Handgun, shooting and killing the Plaintiffs’ decedent in Mount Pleasant Township, Westmoreland County, Pennsylvania (Compl. ¶¶ 1, 5, 18, 20, 22-23, 26-28, 83-84, 115-116).
3. Saloom has also been named as a Defendant. It is alleged that Saloom is the retailer that sold the Subject Handgun. (Compl. ¶¶ 83-84, 115-16).
4. The pertinent events giving rise to this action are that on March 20, 2016, a fourteen-year-old boy (“Juvenile Delinquent”) intentionally pulled the trigger of the Subject Handgun, shooting and killing the Plaintiffs’ decedent in Mount Pleasant, Westmoreland County, Pennsylvania (Compl. ¶¶ 20, 22-23, 26-28).
5. The Plaintiffs allege that the Juvenile Delinquent believed that the Subject Handgun had been unloaded because the magazine had been removed, even though there was a live round in the chamber (Compl. ¶¶ 24-27).
6. The Juvenile Delinquent was charged with, and pled guilty to, involuntary manslaughter in a delinquency proceeding in juvenile court for having shot the Plaintiffs’ decedent with the Subject Handgun (Compl. ¶ 29).
7. The wrongful death and survival claims asserted by the Plaintiffs seek relief pursuant to Section 402A of the Restatement of Torts 2d, negligent design and sale and negligent warnings and marketing.
8. The PLCAA, enacted on October 26, 2005, prohibits the institution of a “qualified civil liability action” in any state or federal court and states that any such “action that is

pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.” 15 U.S.C. §§ 7902(a) & (b).

9. One of the stated purposes of the PLCAA is to “prohibit causes of action against manufacturers . . . for the harm solely caused by the criminal or unlawful misuse of firearm[s] . . . by others when the product functioned as designed and intended.” 15 U.S.C. § 7901(b)(1).
10. This case is a “qualified civil liability action” within the meaning of the PLCAA, 15 U.S.C. § 7903(5)(A), as it is a:

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

11. Springfield is a manufacturer as defined in the PLCAA and Saloom is a seller as defined in the PLCAA 15 U.S.C. §§ 7903(2) & 6(B).
12. The Subject Handgun is a qualified product, as defined in the PLCAA. 15 U.S.C. § 7903(4).
13. None of the exceptions to the definition of a qualified civil liability action under the PLCAA are applicable to this case. The only exception which could arguably have relevance is found at 15 U.S.C. § 7903(5)(a)(v):

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

14. As noted above, the Plaintiffs specifically aver that on March 20, 2016, the Juvenile Delinquent intentionally pulled the trigger of the Subject Handgun, shooting and killing

Plaintiff's decedent. (Compl. ¶¶ 20, 22-23, 26-28). It is further alleged that the Juvenile Delinquent was charged with, and pled guilty to, involuntary manslaughter in a delinquency proceeding in juvenile court for having shot the Plaintiff's decedent with the Subject Handgun (Compl. ¶ 29).

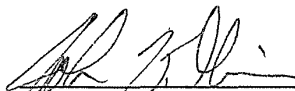
15. Based upon the foregoing, the PLCAA clearly bars each of the causes of action asserted against each of the Defendants in this case and dismissal of the Complaint with prejudice is required.

WHEREFORE, your Defendants respectfully request that this Honorable Court enter an Order dismissing the Plaintiffs' Complaint in its entirety, pursuant to 15 U.S.C. §§ 7901 *et seq.* and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

Respectfully Submitted,

Date: June 29, 2018

By:



John K. Greiner, Esq.

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302 West Otterman Street

Greensburg, PA 15601

Telephone: (724) 838-7600

Facsimile: (724) 838-8870

– and –

Christopher Renzulli, Esq. (*pro hac vice* to be filed)

RENZULLI LAW FIRM, LLP

One Broadway, Suite 1005

White Plains, NY 10601

Telephone: (914) 285-0700

Facsimile: (914) 285-1213

Attorneys for Defendants Springfield Armory, Inc. s/h/a
Springfield, Inc. d/b/a Springfield Armory, Saloom Department
Store, and Saloom Dept Store, LLC d/b/a Saloom
Department Store

IN THE COURT OF COMMON PLEAS WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARK AND LEAH GUSTAFSON,	) NO. 1126 OF 2018
Individually and as Administrators	)
And Person Representatives of the	)
ESTATE OF JAMES ROBERT ("J.R.")	)
GUSTAFSON,	)
	)
	)
PLAINTIFF,	)
	)
v.	)
	)
SPRINGFIELD, INC. d/b/a/	)
SPRINGFIELD ARMORY, and	)
	)
SALOOM DEPARTMENT STORE; and	)
SALOOM DEPT. STORE, LLC d/b/a/	)
SALOOM DEPARTMENT STORE,	)
	)
	)
DEFENDANTS.	)

ORDER

AND NOW, to wit, this _____ day of _____, 2018, it is hereby
ORDERED, ADJUDGED and DECREED that the Plaintiffs' Complaint is dismissed with
prejudice in its entirety, pursuant to 15 U.S.C. §§ 7901 *et seq.* and Rule 1028(a)(4) of the
Pennsylvania Rules of Civil Procedure.

BY THE COURT:

_____. J.

ATTEST:

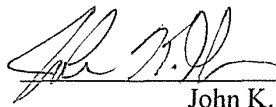
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Defendants' Preliminary Objections was served by United States First Class Mail, postage prepaid, addressed to Counsel of Record for Plaintiff, as follows:

Gary F. Lynch, Esq.
R. Bruce Carlson, Esq.
Kelly K. Iverson, Esq.
Carlson Lynch Sweet Kilpela & Carpenter, LLP
1133 Penn Avenue, 5th Floor
Pittsburgh, PA 15222

Jonathan E. Lowy, Esq.
Joshua B. Scharff, Esq.
840 First Street, N.E., Suite 400
Washington, DC 20002

Date: June 29, 2018

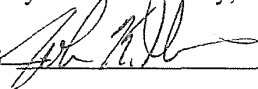


John K. Greiner, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing 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 and documents differently than non-confidential information and documents.

Submitted by: Tremba Kinney, LLC

Signature: _____

Name: John K. Greiner

Attorney No. 43583

IN THE COURT OF COMMON PLEAS WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARK AND LEAH GUSTAFSON,) NO. 1126 OF 2018
Individually and as Administrators)
And Person Representatives of the)
ESTATE OF JAMES ROBERT ("J.R."))
GUSTAFSON,)
)
)
Plaintiffs,)
)
v.)
)
SPRINGFIELD, INC. d/b/a/)
SPRINGFIELD ARMORY, and)
)
SALOOM DEPARTMENT STORE; and)
SALOOM DEPT. STORE, LLC d/b/a/)
SALOOM DEPARTMENT STORE,)
)
)
Defendants.)

FILED IN
PROTHONOTARY'S OFFICE

JUN 29 2018

BY: 
CLERK

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR PRELIMINARY OBJECTIONS
TO THE COMPLAINT PURSUANT TO THE PROTECTION OF LAWFUL
COMMERCE IN ARMS ACT**

Defendants Springfield Amory, Inc. s/h/a Springfield, Inc. d/b/a Springfield Amory ("Springfield"), Saloom Department Store, and Saloom Department Store, LLC d/b/a Saloom Department Store (collectively "Saloom") respectfully submit their preliminary objections seeking to dismiss plaintiffs Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA"), and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

I. SUMMARY OF THE ARGUMENT

The PLCAA is a federal law that prohibits a "civil action . . . against a manufacturer and seller . . . of [a firearm that has been shipped or transported in interstate commerce] . . . for damages,

punitive damages . . . or other relief resulting from the criminal or unlawful misuse of [the firearm] by . . . a third party” from being “brought in any Federal or State court,” unless one of six narrow exceptions apply. 15 U.S.C. § 7903(5)(A). Plaintiffs’ complaint must be immediately dismissed pursuant to the PLCAA because it is a civil action through which they are seeking to recover damages, punitive damages, and other relief against the manufacturer and seller of a firearm that a third party criminally and unlawfully used to kill their son, and who subsequently pled guilty to involuntary manslaughter in juvenile court.

II. BACKGROUND

Plaintiffs commenced this action on March 19, 2018. Plaintiffs stipulated to an extension until June 29, 2018 for defendants to respond to the complaint. The following facts are taken from the Complaint, and are assumed to be true for purposes of this motion only. Springfield manufactured and sold a model XD-9 semi-automatic handgun (“Subject Handgun”). Compl. ¶¶ 1, 5, 18, 20, 83-84, 115-16. Saloom sold the Subject Handgun. *Id.* ¶¶ 1, 5, 19, 20, 83-84, 115-16. On March 20, 2016, a fourteen year old boy (“Juvenile Delinquent”) intentionally pulled the trigger of the Subject Handgun, shooting and killing plaintiffs’ decedent in Mt. Pleasant, Westmoreland County, Pennsylvania. *Id.* ¶¶ 20, 22-23, 26-28. Plaintiffs allege that the Juvenile Delinquent believed that the Subject Handgun had been unloaded because the magazine had been removed, even though there was a live round in the chamber. *Id.* at 24-27. The Juvenile Delinquent was charged with, and pled guilty to, involuntary manslaughter in a delinquency proceeding in juvenile court for having shot plaintiffs’ decedent with the Subject Handgun. *Id.* ¶ 29. Plaintiffs claim that the Subject Pistol is defective because it did not have a:

magazine disconnect safety, an effective loaded chamber indicator, an internal locking system or other safety system that would prevent it from being

unintentionally fired by a child, a safety feature that would personalize the gun and allow it to be fired only by recognized and authorized users,¹ or a child-proof or child-resistant safety device, or effective and appropriate warnings.

Compl. ¶ 77.

Based on the above, plaintiffs brought a wrongful death and survival action against Springfield and Saloom, raising causes of action for products liability (design defect and failure to warn), negligent design and sale, negligent warnings and marketing, and seeking compensatory damages, punitive damages, interest and costs, and such other relief as the court may deem appropriate.

III. ARGUMENT

A. PLAINTIFFS COMPLAINT MUST BE IMMEDIATELY DISMISSED PURSUANT TO THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT

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

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

¹ See Compl. ¶ 60 (claiming that it was “feasible at the time of the manufacture of the handgun to incorporate ‘user recognition’ technology in the gun, which prevents the gun from firing unless it ‘recognizes’ the user”).

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

- Lawsuits have been commenced against manufacturers, distributors, dealers and importers of firearms that operate as designed and intended which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act, and the Arms Export Control Act.
- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

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

2. This Case is a Qualified Civil Liability Action

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

Subject Handgun) for damages and other relief based on the criminal use (the shooting of plaintiff's decedent) of the qualified product (the Subject Handgun) by a third party (the Juvenile Delinquent). Compl. ¶¶ 1, 5, 18-20, 22-29, 83-84, 115-16.

3. **Springfield is a Manufacturer and Saloom is a Seller**

The PLCAA defines a “manufacturer,” with respect to a qualified product, as “a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.” 15 U.S.C. § 7903(2). Chapter 44 of title 18 of the United States Code, in turn, defines a manufacturer as “any person engaged in the business² of manufacturing firearms . . . for purposes of sale or distribution; and the term ‘licensed manufacturer’ means any such person licensed under the provisions of this chapter.” 18 U.S.C. § 921(a)(10). As a federally licensed manufacturer of firearms, Springfield is a “manufacturer” pursuant to the terms of the PLCAA. Compl. ¶¶ 83-84, 115-16.

The PLCAA defines a “seller,” with respect to a qualified product, as “a dealer (as defined in section 921(a)(11) of Title 18) who is engaged in the business as such a dealer in interstate or foreign commerce and who is licensed to engage in business as such a dealer under chapter 44 of Title 18.”

15 U.S.C. § (6)(B). Pursuant to 18 U.S.C. § 921(a)(11)(A), a “dealer” is defined as “any person

² The PLCAA defines the term “engaged in the business” with reference to 18 U.S.C. § 921(a)(21). The term “engaged in the business,” relative to a manufacturer of firearms, is defined as “a person who devotes time, attention, and labor to manufacturing firearms as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of the firearms manufactured.” 18 U.S.C. § 921(a)(21)(A).

engaged in the business³ of selling firearms at wholesale or retail.” As a federally licensed dealer of firearms, Saloom is a “seller” pursuant to the terms of the PLCAA. Compl. ¶¶ 83-84, 115-16.

4. The Subject Handgun is a Qualified Product

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

5. Plaintiffs’ Injuries Resulted from the Criminal Use of a Qualified Product by a Third Party

According to the allegations in the Complaint, plaintiffs’ decedent was shot with the Subject Handgun. Compl. ¶¶ 1, 5, 23, 26-29. As alleged in the Complaint, Juvenile Delinquent was prosecuted for and pled guilty to involuntary manslaughter in a delinquency proceeding in juvenile court for shooting plaintiffs’ decedent. *Id.* ¶ 29. Accordingly, plaintiff’s injuries resulted from the criminal use (the shooting of plaintiffs’ decedent) of a qualified product (the Subject Handgun) by a third party (Juvenile Delinquent). The claims in the Complaint are

³ The term “engaged in the business,” relative to a seller of firearms, is defined as “a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms.” 18 U.S.C. § 921(a)(21)(C).

therefore considered to constitute a qualified civil liability action, which the PLCAA prohibits from being “brought in any Federal or State court,” unless one of the narrow exceptions is shown to apply.

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

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

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

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

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including –

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

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

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

(v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the product, when used as intended or in a reasonably foreseeable manner, except that where the discharge of the product was

caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or

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

15 U.S.C. § 7903(5)(A). The only one of the six exceptions that could remotely be applicable based on the allegations in the Complaint — although it is not — is 15 U.S.C. § 7903(5)(A)(v) (“product defect exception”).

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

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

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

For that reason, there have been very few cases in which plaintiffs have sought to use the product defect exception to avoid the PLCAA’s general prohibition on bringing a civil action against

⁴ See also *Jeffries v. District of Columbia*, 916 F. Supp. 2d 42, 46 (D.D.C. 2013) (*sua sponte* dismissing case pursuant to the PLCAA when it was “uncontroverted that a third party discharged the assault rifle, during the commission of a criminal act,” where only the product defect exception could possibly apply because that “exception does not apply ‘where the discharge of the product was caused by a volitional act that constituted a criminal offense.’”); *Soto v. Bushmaster Firearms Int’l, Inc.*, No. FBTCV156048103S, 2016 WL 8115354, at *21 n.31 (Conn. Super. Ct. Oct. 14, 2016) (noting that the product defect exception would not apply because the plaintiffs’ injuries resulted from the discharge of the firearm by a third party during the commission of a criminal act).

manufacturers and sellers of firearms for damages resulting from the criminal or unlawful misuse of a firearm by a third party.

The product defect exception to the PLCAA was first construed by the Illinois Supreme Court in its unanimous decision in *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009). The facts in the *Adames* case are almost identical to those alleged in the Complaint in the present case: On May 5, 2001, Billy Swan, then thirteen years old, was playing with his father's semi-automatic Beretta 92FS pistol when he accidentally shot and killed his friend, Josh Adames. 909 N.E.2d at 745. "Billy pushed the button on the Beretta, took the magazine out and put it in his pocket."⁵ * * * * Billy pretended he was firing the gun, then pulled the trigger, discharging the gun. *Id.* at 746. When Billy realized that he had shot Josh, he called 911 and stated that he had "found a gun and accidentally shot his friend while playing"; he conceded that he "knew he was handling a real firearm and real ammunition when he shot Josh." *Id.* In juvenile court proceedings arising from the shooting of Josh, Billy was found to be delinquent for committing involuntary manslaughter and reckless discharge of a firearm. *Id.*

Plaintiffs sued Beretta, raising claims for:

product liability design defect, negligent design, failure to warn, and breach of the implied warranty of merchantability. Specifically, plaintiffs alleged that the Beretta was inherently dangerous and defective because it did not incorporate safety features, including: a magazine disconnect safety that would prevent the gun from being fired if the magazine is removed; an effective chamber-loaded indicator to make users aware of when a bullet is loaded into the gun's chamber; and other

⁵ "When Billy picked up the Beretta, he pushed a button that released the magazine. Billy could see the bullets in the magazine. Billy then put the magazine back in the Beretta. Billy moved the slide at the top of the gun and a bullet popped out. Billy again removed the magazine and put the bullet back in the magazine. Billy repeatedly removed and replaced the bullets and magazine from the gun. Billy knew that the Beretta was loaded when the magazine was in the gun, but thought it was unloaded when the magazine was taken out. He thought that the bullet came out the top of the magazine when the handgun was fired, and did not know that a bullet remained in the chamber." *Adames*, 909 N.E.2d at 745.

safety devices such as a built-in lock, a child-resistant manual safety, a grip-safety, and personalized gun technology that would have prevented unauthorized users, such as children, from firing the gun.

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

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

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

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

In addition, involuntary manslaughter and reckless discharge of a firearm are criminal offenses. It follows, then, that Billy's use of the Beretta in this case also had the

character of a crime and was “in the nature of a crime” and, therefore, was a criminal misuse.

Id. (taking judicial notice of Billy’s adjudication as a juvenile delinquent) (internal citations omitted). Relative to the product defect exception, the court held that section 7903(5)(A)(v) also does not require a conviction, “only that the volitional act constitute a criminal offense.” *Id.* at 763. The court further held that the product defect exception did not require that “Billy intended to shoot Josh or understand the ramifications of his conduct,” because “he did choose and determine to point the Beretta at Josh and did choose and determine to pull the trigger,” therefore acting in a volitional manner that constituted a criminal offense. *Id.* Pursuant to the product defect exception to the PLCAA, therefore, Billy’s actions were considered as a matter of law to be the sole proximate cause of plaintiffs’ injuries, mandating the dismissal of their claims against Beretta. *Id.* at 763-64.

The next court to substantively address the product defect exception to the PLCAA was the Appeals Court of Massachusetts in the case of *Ryan v. Hughes-Ortiz*, 959 N.E.2d 1000 (Ma. Ct. App. 2012). In the *Ryan* case, Charles Milot, a convicted felon who was on probation after having served eighteen months in jail, stole two handguns, including a Glock Model 17 pistol, and some ammunition from the home of Thomas Hughes, for whom he was doing various odd jobs. *Id.* at 1002-03, 1008. Charles Milot showed the handguns to his sister, who convinced him to return them. *Id.* Charles Milot attempted to return the stolen firearms and ammunition and apparently shot himself in the left thigh, severing his femoral artery and causing him to bleed to death, when he attempted to place the Glock pistol in its storage case. *Id.* at 1003.

Elizabeth Ryan, as Administratrix of the Charles Milot’s estate, sued Thomas Hughes and Glock, Inc. (“Glock”). *Ryan*, 959 N.E.2d at 1002. Plaintiff raised claims against Glock for breach of

the implied warranty of merchantability, negligence, wrongful death, and unfair and deceptive acts and practices, alleging that the Glock pistol and its storage case were defective because the trigger must be in the fully rearward position in order to insert it in the storage case, *i.e.*, you have to pull the trigger before putting the pistol in the storage case. *Id.* at 1006-07. The superior court dismissed plaintiff's claims against Glock pursuant to the PLCAA. *Id.* at 1006.

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

In the present case, plaintiff's claims also fail to satisfy the requirements of the product defect exception to the PLCAA because Juvenile Delinquent's shooting of plaintiffs' decedent was a volitional⁶ act that constituted the criminal offenses of involuntary manslaughter⁷ and is therefore

⁶ Volition is defined as: "1. The ability to make a choice or determine something. 2. The act of making a choice or determining something. 3. The choice or determination that someone makes." Black's Law Dictionary 1605 (8th ed. 2004).

⁷ "A person is guilty of involuntary manslaughter when as a direct result of the doing of an unlawful act in a reckless or grossly negligent manner, or the doing of a lawful act in a reckless or grossly negligent manner, he causes the death of another person." Pa. Stat. § 2504(a). Acts that are

considered as a matter of law to be the sole proximate cause of plaintiff's injuries. *See* Compl. ¶ 26 (the Juvenile Delinquent "pulled the trigger of the handgun"), and 29 (the Juvenile Delinquent pled guilty to manslaughter in juvenile court.").

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

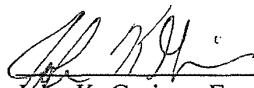
IV. CONCLUSION

For the above reasons, defendants respectfully request that this Court sustain their preliminary objections pursuant to the PLCAA, dismiss plaintiffs' Complaint in its entirety with prejudice, and grant such other relief as it deems just and proper.

Respectfully Submitted,

Date: June 29, 2018

By:



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– and –

committed by juveniles that would constitute the crime of involuntary manslaughter if committed by an adult can be handled through delinquency proceedings in juvenile court. *See, e.g., Interest of Smith*, 579 A.2d 889, 891-92, 895-97 (Pa. Super. Ct. 1990); *In re Miller*, 439 A.2d 1222, 1223 (Pa. Super. Ct. 1982); *Interest of Brown*, 417 A.2d 1188, 1189-90 (Pa. Super. Ct. 1980); *Commonwealth v. Carnes*, 82 Pa. Super. 335, 337-41 (Pa. Super. Ct. 1923).

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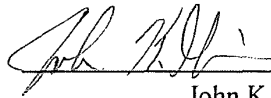
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Defendants' Brief in Support of Their Preliminary Objections was served by United States First Class Mail, postage prepaid, addressed to Counsel of Record for Plaintiff, as follows:

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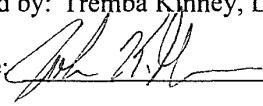


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CERTIFICATE OF COMPLIANCE

I certify that this filing 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 and documents differently than non-confidential information and documents.

Submitted by: Tremba Kinney, LLC

Signature: _____

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Attorney No. 43583

**IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY
COMMONWEALTH OF PENNSYLVANIA**

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

CIVIL DIVISION

Case No. 1126 of 2018

Plaintiffs,

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD
ARMORY,

and

SALOOM DEPARTMENT STORE; and
SALOOM DEPT. STORE, LLC d/b/a
SALOOM DEPARTMENT STORE,

Defendants.

FILED IN
PROTHONOTARY'S OFFICE

AUG - 7 2018

BY: 
CLERK

**PLAINTIFF'S ANSWER TO PRELIMINARY OBJECTIONS
OF DEFENDANTS SPRINGFIELD, INC., SALOOM DEPARTMENT STORE,
AND SALOOM DEPT. STORE, LLC**

The Plaintiffs, by their undersigned counsel, hereby files this Answer to the Preliminary Objections of Defendants Springfield Inc., Saloom Department Store, and Saloom Department Store, LLC (the "Answer").

1. Admitted.
2. The Complaint is a document that speaks for itself and Plaintiffs deny any attempt to characterize its meaning or allegations. In response, Plaintiffs expressly incorporate by reference the paragraphs of the Complaint cited in this paragraph of

Defendants' Preliminary Objections, and note that the minor did not intentionally fire the Handgun because he thought it was unloaded.

3. Admitted.
4. The Complaint is a document that speaks for itself and Plaintiffs deny any attempt to characterize its meaning or allegations. In response, Plaintiffs expressly incorporate by reference the paragraphs of the Complaint cited in this paragraph of Defendants' Preliminary Objections, and note that the minor did not intentionally fire the Handgun because he thought it was unloaded.
5. The Complaint is a document that speaks for itself and Plaintiffs deny any attempt to characterize its meaning or allegations. In response, Plaintiffs expressly incorporate by reference the paragraphs of the Complaint cited in this paragraph of Defendants' Preliminary Objections.
6. The Complaint is a document that speaks for itself and Plaintiffs deny any attempt to characterize its meaning or allegations. In response, Plaintiffs expressly incorporate by reference the paragraphs of the Complaint cited in this paragraph of Defendants' Preliminary Objections.
7. Admitted.
8. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs admit that PLCCA was enacted on October 26, 2005 and that the quoted language is a portion of the language within the act. Plaintiffs deny any attempt by Defendant to characterize PLCCA's meaning or terms

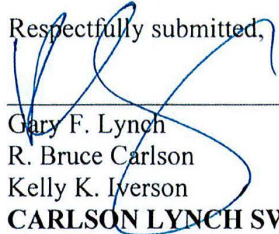
that is inconsistent with Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections.

9. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs admit that the quoted language is a portion of the language within the act. Plaintiffs deny any attempt by Defendant to characterize PLCCA's meaning or terms that is inconsistent with Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections.
10. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs admit that the quoted language is a portion of the language within the act. Plaintiffs deny any attempt by Defendant to characterize PLCCA's meaning or terms that is inconsistent with Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections. Plaintiffs deny that this is a qualified civil liability action, as explained in detail in their Brief in Opposition to Defendants' Preliminary Objections.
11. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs admit only that Springfield is a manufacturer of and Saloom is a seller of a qualified product, but deny that PLCAA applies for the reasons set forth in Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections.

12. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs admit only that the Handgun is a qualified product, but deny that PLCAA applies for the reasons set forth in Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections.
13. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs deny that this is a qualified civil liability action for the reasons set forth in Plaintiffs' Brief in Opposition to Defendants' Preliminary Objections.
14. The Complaint is a document that speaks for itself and Plaintiffs deny any attempt to characterize its meaning or allegations. In response, Plaintiffs expressly incorporate by reference the paragraphs of the Complaint cited in this paragraph of Defendants' Preliminary Objections, and note that the minor did not intentionally fire the Handgun because he thought it was unloaded.
15. The allegations in this paragraph of Defendants' Preliminary Objections constitute conclusions of law for which no response is required. To the extent a response is deemed necessary, Plaintiffs deny the allegations and incorporate by reference their Brief in Opposition to Defendants' Preliminary Objections that PLCAA provides no basis to dismiss this case.

Dated: August 7, 2018

Respectfully submitted,



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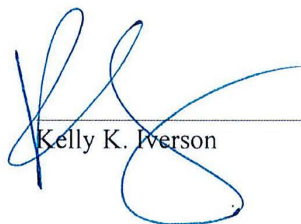
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**IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY
COMMONWEALTH OF PENNSYLVANIA**

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

CIVIL DIVISION

Case No. 1126 of 2018

Plaintiffs,

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

Defendants.

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PROTHONOTARY'S OFFICE

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BY: _____

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**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' ANSWER TO THE PRELIMINARY OBJECTIONS
OF DEFENDANTS SPRINGFIELD, INC., SALOOM DEPARTMENT STORE
AND SALOOM DEPT. STORE, LLC**

TABLE OF CONTENTS

	Page(s)
I. INTRODUCTION	1
II. SUMMARY OF THE FACTS	3
III. STANDARD OF REVIEW	6
IV. PLAINTIFFS' CLAIMS ARE FULLY SUPPORTED BY PENNSYLVANIA PRODUCTS LIABILITY LAW	6
V. PLCAA DOES NOT BAR ANY OF PLAINTIFFS' CLAIMS	8
A. Supreme Court Precedent Requires That PLCAA Be Read To Minimize Intrusion On Pennsylvania's Sovereignty and Governance.....	8
B.	
1. PLCAA Intrudes On Pennsylvania's Sovereignty And Governance.....	9
2. Supreme Court Precedent Requires That Statutes Purporting To Intrude On State Sovereignty Be Interpreted To Minimize This Intrusion	13
3. This Court Must Apply Bond And Gregory And Read PLCAA To Minimize Intrusion on Pennsylvania Sovereignty And Self-Governance.....	16
C. Applying Supreme Court Precedent, This Case Is Not Barred By PLCAA Because It Is Not A "Qualified Civil Liability Action"	17
1. This Case Is Not Barred By PLCAA Because Congress Did Not Intend To Prohibit States From Imposing Liability Where One Cause Of The Harm Was Gun Manufacturer Negligence	17
2. This Case Is Not A "Qualified Civil Liability Action" Because PLCAA's Product Liability Exception (§7903(5)(a)(v)) Applies As There Was No "Volitional Act That Constituted A Criminal Offense"	19
a. There Was No "Criminal Offense"	19
b. <i>Bond</i> and <i>Gregory</i> Require That PLCAA Be Read To Allow Plaintiffs' Claims Even Should The Court Find The Relevant PLCAA Provisions Ambiguous.....	20

c.	Defendants’ Sole Contradictory Authority Does Not Address <i>Bond and Gregory</i>	21
3.	PLCAA’s Legislative History Supports Finding That This Is Not A Barred Action, And Is Inconsistent With The View That Congress Intended The Broad Immunity Advocated By Defendants.....	21
D.	If PLCAA Bars Plaintiffs’ Case It Is Unconstitutional	22
1.	Constitutional Avoidance Supports Allowing This Case	22
2.	PLCAA Violates Principles Of Federalism And The Tenth Amendment	23
3.	PLCAA Violates Due Process By Depriving Plaintiffs Of All Remedies Against Defendants	25
4.	PLCAA Violates Equal Protection Because It Discriminates Against Certain Gun Violence Victims Without Rational Basis	26
5.	PLCAA Is Not A Legitimate Exercise Of Commerce Authority	29
6.	Courts Upholding PLCAA Are Distinguishable Or Incorrect	29
VI.	CONCLUSION.....	30

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Adames v. Shaheen</i> , 909 N.E. 2d. 742 (Ill. 2009).....	21
<i>Astoria Fed. Sav. & Loan Ass’n v. Solimino</i> , 501 U.S. 104 (1991).....	18
<i>Bolling v. Sharpe</i> , 347 U.S. 497 (1954).....	27
<i>Bond v. United States</i> , 134 S. Ct. 2077 (2014).....	14-18, 20, 21, 29
<i>Breazeale v. Victim Servs.</i> , 198 F. Supp. 3d 1070 (N.D. Cal. 2016).....	15
<i>Chiapperini v. Gander Mountain Co.</i> , 13 N.Y.S.3d 777 (NY Sup Ct Monroe Cnty Dec. 23, 2014)	9
<i>City of Gary v. Smith & Wesson Corp.</i> , No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006), <i>affirmed on other</i> <i>grounds by Smith & Wesson Corp. v. City of Gary</i> , 875 N.E 2d 422 (Ind. Ct. App. 2007).....	26
<i>City of New York v. A-1 Jewelry & Pawn, Inc.</i> , 247 F.R.D. 296 (EDNY 2007).....	9
<i>Clark v. Martinez</i> , 543 U.S. 371, 125 S. Ct. 716 (2005).....	23
<i>Comm’ns Imp. Exp. S.A. v. Republic of the Congo</i> , 757 F.3d 321 (D.C. Cir. 2014).....	15, 16
<i>Commonwealth v. Bonner</i> , 135 A.3d 592 (Pa. Super. 2016).....	20
<i>Conroy v. Aniskoff</i> , 507 U.S. 511 (1993).....	17, 18
<i>Corporan v. Wal-Mart Stores East, LP</i> , 2016 US Dist LEXIS 93307 (D Kan July 18, 2016).....	9

<i>Delana v. CED Sales</i> , 486 S.W.3d 316 (Mo. 2016)	29
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008)	29
<i>Duke Power Co. v. Carolina Env'tl. Study Grp.</i> , 438 U.S. 59 (1978).....	26, 28
<i>Englund v. World Pawn Exchange</i> , 2017 Ore. Cir. Lexis 3 (Mult. Cty., 4 th Jud. Dist. June 30, 2017).....	9
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938).....	10, 11
<i>FERC v Mississippi</i> , 456 U.S. 742 (1982).....	11, 23
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	10, 13-18, 20, 21, 23, 29
<i>Highland Farms Dairy, Inc. v. Agnew</i> , 300 U.S. 608 (1937).....	11, 23
<i>Hill v. Slippery Rock Univ.</i> , 138 A.3d 673 (Pa. Super. 2016).....	6
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9 th Cir. 2009)	29
<i>In Interest of G.T.</i> , 409 Pa. Super. 15 (Pa. Super. 1990)	19, 20
<i>In re C.M.T.</i> , 2004 PA Super 418 (Pa. Super. Ct. 2004)	20
<i>In the Interest of R.M.</i> , 2015 Pa. Super. Unpub. LEXIS 2820 (Pa. Super. 2015).....	20
<i>Kim v. Coxe</i> , 295 P.3d 380 (Ak. 2013).....	29
<i>Lopez v. Badger Guns, Inc.</i> , No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 24:19-25:3 (Wis. Cir. Ct. Mar. 24, 2014).....	10, 26

<i>Marbury v. Madison</i> , 5 U.S. 137 (quoting Sir William Blackstone, Commentaries 23 (1869))	25
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	12
<i>Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York</i> (“Vargas”), 131 A.D.3d 4, 10 N.Y.S.3d 579 (N.Y. App. Div., 2 nd Dep’t, 2015)	24, 25
<i>McBride v. General Motors Corp.</i> , 737 F. Supp. 1563 (M.D. Ga. 1990)	27, 28
<i>Minn. v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	11
<i>Murphy v. NCAA</i> , 138 S.Ct. 1461 (2018)	12, 29
<i>New York v. United States</i> , 505 U.S. 144 (1992)	11, 24
<i>Norberg v. Badger Guns</i> , No. 10-CV-20655, Tr of Oral Ruling at 7-8 (Wis Cir Ct Jan 30, 2014)	9, 10
<i>Pennsylvania Liquor Control Board v. Rapistan, Inc.</i> , 472 Pa. 36 (Pa. 1976)	6
<i>Romah v. Hygienic Sanitation Co.</i> , 705 A.2d 841 (Pa. Super. Ct. 1997)	14
<i>Ryan vs. Hughes-Ortiz</i> , 959 N.E.2d 1000 (Ma. Ct. App. 2012)	21
<i>Sherk v. Daisy-Heddon, Div. of Comptometer Corp.</i> , 450 A.2d 615 (Pa. 1982)	7
<i>Smith & Wesson Corp. v. City of Gary</i> , 875 N.E.2d 422 (Ind Ct App 2007)	9
<i>Snyder v. City of Philadelphia.</i> , 564 A.2d 1036 (Pa. Commw. Ct. 1989)	8
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957)	11, 23

<i>Tincher v. Omega Flex, Inc.</i> , 104 A.3d 328 (Pa. 2014) <i>citing Webb v. Zern</i> , 220 A.2d 853 (Pa. 1966)).....	6, 7
<i>Torcasio v. Murray</i> , 57 F.3d 1340 (4 th Circ. 1995).....	18
<i>Truax v. Corrigan</i> , 257 U.S. 312 (1921).....	25
<i>United States v. Bass</i> , 404 U.S. 336 (1971).....	13
<i>United States v. Toviave</i> , 61 F.3d 623 (6 th Cir. 2014)	15
<i>Wheeling & Lake Erie Ry. Co. v. PUC</i> , 778 A.2d 785 (Pa. Comm. Ct. 2001)	14
<i>Williams v. Beemiller, Inc.</i> , 100 A.D.3d 143 (NY App Div 4th Dep’t 2012), <i>amended by</i> 103 A.D.3d 1191 (NY App Div 4th Dep’t 2013)	9

Statutes, Regulations, and other Authorities	Page(s)
8 USC § 1621 (a)	24
8 USC § 1621 (d).....	24
15 U.S.C. § 7901(a)(6).....	17
15 U.S.C. § 7901(a)(7).....	10, 29, 30
15 U.S.C. § 7901(b)(1)	16-18
15 U.S.C. § 7903(5)(A).....	17, 19
15 U.S.C. § 7903(5)(a)(iii).....	9
15 U.S.C. § 7903(5)(a)(v)	2, 16, 17, 19, 20, 22
108 th Cong. § (b)(1)(2003).....	18
151 Cong. Rec. S9061 (daily ed. July 27, 2005)	22
151 Cong. Rec. S9077 (daily ed. July 27, 2005)	22

151 Cong. Rec. S9107 (daily ed. July 27, 2005)	22
151 Cong. Rec. S9389 (daily ed. July 29, 2005)	22
Pa. Con. Art. I, §11	12
Patricia Foster, <i>Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional</i> , 72 U. Cin. L. Rev. 1739 (Summer 2004)	26
Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903	2
S. 397, 109th Cong. (2005)	18
U.S. Const. amend. X	10, 23

Plaintiffs, Mark and Leah Gustafson, individually and as Administrators and Personal Representatives of the estate of their deceased son, James Robert (“J.R.”) Gustafson, file this memorandum in opposition to Defendants Springfield, Inc. (“Springfield”) and Saloom Department Store and LLC (“Saloom”) (collectively “Defendants”).

I. INTRODUCTION

Defendants, a gun manufacturer (Springfield) and a gun dealer (Saloom), knew or should have known of the significant risk that their guns would be obtained by children, that their guns would be fired by people who thought the gun was unloaded, and that people – often children – would die as a result. (Compl. at 1-2 ¶ 2, 2-3 ¶¶ 3, 5, 6-7 ¶¶ 30-35, 8 ¶ 45). Defendants also knew or should have known of long-feasible, inexpensive safety features that could prevent these tragedies and should have provided warnings designed to prevent such unintentional shootings. (See *id.* at 8-12 ¶¶ 46-65). Nonetheless, Defendants chose to design, market and/or sell a handgun – a Springfield Armory XD-9 (“the handgun”) -- without those reasonable, feasible, and long-known safety features or adequate warnings. (*Id.* at 3 ¶ 6, 9, 5 ¶ 21, 8-9 ¶¶ 46-50). Further, although gun owners often misperceive the risks and benefits of guns and store guns unlocked and accessible to children, Defendant Springfield engaged in intentionally misleading messaging about the purported security benefits of firearms ownership, which exacerbated the risk that guns would be stored unsafely, accessible to children. (*Id.* at 7-8 ¶¶ 35-44, 12-13 ¶¶ 66-71).

Plaintiffs’ son, “J.R.” Gustafson, died as a result of Defendants’ reckless and negligent decisions and actions. (*Id.* at 3 ¶¶ 9-11, *passim*). J.R. was killed at the age of thirteen in an unintentional shooting by a fourteen year-old boy (“the Juvenile Delinquent”) who thought the handgun was unloaded. (*Id.* at 5-6 ¶¶ 20-28). The Juvenile Delinquent would not have fired the

gun if Defendants met their duties in designing, marketing, and/or selling the handgun as safely as reasonably possible. (*See id.* at 6 ¶ 25, 15 ¶ 82).

Defendants do not dispute that Plaintiffs state unassailable claims under Pennsylvania's products liability law. As a result, Defendants focus the entirety of their Preliminary Objections on their only potential refuge—the limited immunity the Protection of Lawful Commerce in Arms Act (“PLCAA”) provides to firearms manufacturers and dealers. *See* 15 U.S.C. §§ 7901-7903. Defendants argue that regardless of whether Pennsylvania law allows the Gustafsons to seek civil justice against Defendants, Congress, in PLCAA, has prohibited Pennsylvania courts from hearing their case. The sole issues before the court are: 1) should PLCAA be read as barring Plaintiffs' claims and 2) if PLCAA does bar Plaintiffs' claims, is PLCAA constitutional.

Contrary to Defendants' assertions in their Preliminary Objections, PLCAA does not preclude Plaintiffs' claims. First, none of the claims constitutes a “qualified civil liability action” which is purportedly barred by PLCAA, both because 1) the harm to Plaintiffs was not “solely caused” by third party criminal misuse of a firearm but is also rooted in Defendants' tortious conduct and 2) Plaintiffs' claim falls within an exception to immunity provided for product liability cases in § 7903(5)(a)(v). Plaintiffs' arguments are supported by PLCAA's statutory language and purposes, Supreme Court precedent on principles of federalism and statutory interpretation, the legislative history of PLCAA, and the principle of constitutional avoidance.

In the alternative, if PLCAA is read to require this Court to dismiss Plaintiffs' valid Pennsylvania claims, PLCAA is unconstitutional because it violates 1) the Tenth Amendment to the United States Constitution and principles of federalism by infringing on Pennsylvania's sovereignty; 2) Plaintiffs' due process rights and 3) Plaintiffs' equal protection rights.

II. SUMMARY OF THE FACTS

Firearms manufacturers and dealers like Defendants have known for over a century that when they sell a firearm, especially a handgun, there is a great likelihood that it will be stored in a home accessible to children and others who cannot be expected to safely use the weapon. (Compl. 1-2 ¶ 2, 2-3 ¶¶ 3, 5, 6-7 ¶¶ 30-35, 39, 8 ¶ 45). Defendants have also long been aware that the design of semi-automatic firearms frequently deceives individuals into falsely believing that a gun is unloaded after the ammunition magazine is removed (despite the fact that a bullet remains in the chamber), and that many people – often children – are killed as a result. (*Id.* at 1-2 ¶ 2, 2-3 ¶¶ 3, 5, 6-7 ¶¶ 30-35, 8 ¶ 45).

Other manufacturers design products to alert users to important risks latent in their products, and to prevent foreseeable misuse of their products. For example, car manufacturers design their vehicles to inform users when oil or gas is needed and when seat belts are not buckled. Film cameras told people how many “shots” were left on a roll. Toasters and cell phones include lights, buzzers, and vibrations that can help inform a user when a battery is low or toast is ready to eat. However, despite the life-or-death consequences when a user misunderstands whether Defendants’ products are loaded or unloaded, Defendants chose to design and sell the handgun without a magazine disconnect safety, other safety features, or sufficient warnings that adequately inform and alert users when a magazine is removed and a live round remains in the chamber of the gun. (*See id.* at 3 ¶ 6, 9, 5 ¶ 21, 8-12 ¶¶ 46-65). Defendants have long known that as a result of their design choices in excluding reasonable and feasible safety features and warnings, many people—often children—will die or be seriously wounded when someone unintentionally fires a gun they falsely believe is unloaded after the magazine has been removed. (*Id.* at 1-2 ¶ 2, 2-3 ¶¶ 3, 5, 6-7 ¶¶ 30-35, 8 ¶ 45).

For example, magazine disconnect safeties that prevent a gun from firing when the ammunition magazine is removed are an easy and inexpensive design fix that could solve the above problem and save lives. (*Id.* at 10 ¶ 54). Magazine disconnect safeties were invented over a century ago and have long been technologically and economically feasible for manufacturers like Springfield to include in their firearms in order to reduce the risk of unintentional shootings. (*Id.* 9-10 ¶¶ 51-54). Effective loaded chamber indicators—especially when coupled with adequate warnings about the risks of unintentional shootings—can also alert users when a round is in the chamber. (*Id.* at 10 ¶¶ 55-56). Built-in locks, child-proof safeties, user recognition technology and other safety features, can prevent unauthorized users—like juveniles—from firing guns. (*Id.* at 10-12 ¶¶ 58-65). Nevertheless, Defendants have continued to design, market and/or sell firearms without magazine disconnect safeties or other applicable safety features, and without adequate warnings about the risk of unintentional shootings caused by the false belief that removal of the magazine renders the gun harmless. (*Id.* at 3 ¶ 6, 9, 5 ¶ 21, 8-12 ¶¶ 46-65).

Rather than disclosing relevant risks, Defendant Springfield is an active participant in a pattern of intentionally deceptive messaging from the firearms industry that misinforms consumers about the risks and benefits of firearms ownership by overstating the benefits and understating (or not mentioning) the significant risks. (*Id.* at 7-8 ¶¶ 35-44, 12-13 ¶¶ 66-71). The firearms industry—including Springfield—has known for years that studies have consistently shown that a gun in the home greatly increases the risk of injury and death and is more likely to be used against family members than in their defense. (*See id.* at 7-8 ¶¶ 35-44, 12-13 ¶¶ 66-71). Yet Springfield continues to give firearms consumers false impressions about the risks and benefits of firearms ownership through misleading advertising that does not mention well-established risks—such as by suggesting that its products will improve security by providing

protection “[w]hen the police are minutes away and the threat is seconds away,” without mentioning far-more likely events, like the tragic death of J.R. (*Id.* at 8 ¶¶ 40-45).

Defendants knew or should have known that 1) most gun owners living with children do not store their guns locked, unloaded and separate from ammunition, 2) it is four times more likely that a gun will be used in an unintentional shooting than in self-defense and 3) a gun in the home increases a host of other lethal risks. (*See id.* at 6-7 ¶¶ 31-33, 7-8 ¶¶ 37-42, 12-13 ¶¶ 66-71). Misleading marketing like the above-referenced Springfield advertisement emphasizing the need to have weapons readily available for protection makes it even more likely that their guns and ammunition will be stored in a manner that makes them accessible to children, and with live rounds in the chamber. (*See id.* at 8 ¶¶ 42-44). Defendants knew or should have known that tragedies exactly like this shooting have been happening for years. (*See id.* at 7 ¶¶ 35-39). But Defendants chose to design, manufacture, market and/or sell handguns without any of the feasible and effective safety features or warnings that could prevent these tragedies. (*See id.* at 3 ¶ 6, 9, 5 ¶ 21, 8-12 ¶¶ 46-65).

On March 20, 2016, J.R. was visiting the Hudec home along the Juvenile Delinquent. (*Id.* at 5 ¶¶ 20, 22-23). The Juvenile Delinquent came to possess the handgun. (*Id.* at 5 ¶ 23). The handgun had not been modified in any significant way from the time it was manufactured by Springfield and sold by Saloom.¹ (*Id.* at 5 ¶ 21). As a result, it lacked a magazine disconnect safety, a built-in lock, an effective loaded chamber indicator, other feasible and economically reasonable safety features, or adequate warnings. (*Id.* at 8-12 ¶¶ 46-65).

Upon observing that the magazine had been removed from the handgun, the Juvenile Delinquent believed it to be unloaded. (*Id.* at 6 ¶¶ 24-25). As a result, the Juvenile Delinquent

pulled the trigger of the handgun. (*Id.* at 6 ¶ 26). The handgun discharged and the bullet struck and killed J.R. (*Id.* 6 ¶ 28). The Juvenile Delinquent later pled guilty to involuntary manslaughter in a juvenile delinquency proceeding. (*Id.* at 6 ¶ 29). The Juvenile Delinquent would not have accidentally shot J.R. had Defendants included reasonable safety features and/or warnings about the risk of an accidental shooting stemming from a mistaken belief that the handgun was unloaded once the magazine was removed. (*See id.* at 6 ¶ 25, 15 ¶ 82).

III. STANDARD OF REVIEW

Defendants’ preliminary objections requesting dismissal of the complaint due to failure to state a valid cause of action are in the nature of a demurrer, so “the question presented . . . is whether, on the facts averred, the law says with certainty that no recovery is possible.” *Hill v. Slippery Rock Univ.*, 138 A.3d 673, 677 (Pa. Super. 2016) (internal quotations omitted) (reversing trial court’s decision to sustain a demurrer). In evaluating whether to sustain preliminary objections in the nature of a demurrer, “[a]ll material facts set forth in the pleading and all inferences reasonably deducible therefrom must be admitted as true.” *Id.* (internal quotations omitted); *Pennsylvania Liquor Control Board v. Rapistan, Inc.*, 472 Pa. 36, 42 (Pa. 1976) (same) (reversing dismissal of a count in the complaint). “Where a doubt exists as to whether a demurrer should be sustained, this doubt should be resolved in favor of overruling it.” *Hill*, 138 A.3d at 677 (internal quotations omitted).

IV. PLAINTIFFS’ CLAIMS ARE FULLY SUPPORTED BY PENNSYLVANIA PRODUCTS LIABILITY LAW

“In Pennsylvania, the question of whether those who make or market products have duties in strict liability (in addition to negligence) has been answered in the affirmative by the

¹ Unless otherwise specified “Saloom” or “the Saloom Defendants” is used collectively to encompass all defendants with Saloom as part of their name.

1966 decision in *Webb*”; “[t]he risk of injury is placed . . . upon the supplier of products.” *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 382-84 (Pa. 2014) *citing Webb v. Zern*, 220 A.2d 853 (Pa. 1966)). A plaintiff may prove the defective condition of a product by showing “**either** that (1) the danger is unknowable and unacceptable to the average ordinary consumer, **or** that (2) a reasonable person would conclude that the probability and seriousness of harm caused by the product outweigh the burden or costs of taking precautions.” *Tincher*, 104 A.3d at 335 (emphasis added).

Pennsylvania has a strong government interest in protecting its citizens from the negligence of product manufacturers and suppliers. As articulated in *Tincher*:

Strict liability in tort for product defects is a cause of action which **implicates the social and economic policy of this Commonwealth**. The policy was articulated by the concurring and dissenting opinion of Justice Jones in *Miller*, upon which the *Webb* Court relied in “adopting” the strict liability theory as a distinct cause of action in tort: those who sell a product (*i.e.*, profit from making and putting a product in the stream of commerce) are held responsible for damage caused to a consumer by the reasonable use of the product. The risk of injury is placed, therefore, upon the supplier of products. **No product is expressly exempt** and, as a result, the presumption is that **strict liability may be available with respect to any product**, provided that the evidence is sufficient to prove a defect.

Id. at 381-82 (internal citations omitted).

Here, Plaintiff is not alleging a failure to warn of the Product’s inherent lethal propensity. *See Sherk v. Daisy-Heddon, Div. of Comptometer Corp.*, 450 A.2d 615 (Pa. 1982). What Plaintiff does challenge is Defendants’ failure to take feasible and cost effective safety precautions and/or failure to include adequate warnings in order to avert foreseeable danger in light of the type and magnitude of risk posed by the handgun’s sale. *See Tincher*, 104 A.3d at 397-98. For example, J.R.’s death would have been avoided if the handgun included a magazine disconnect safety, which would not permit the Product to discharge with the magazine removed. Additionally, despite the availability and use of prominent and clearly understandable loaded

chamber indicators on similar products, the warning on this handgun was barely noticeable and were wholly inadequate to alert the Juvenile Delinquent to the risk. These and other inexpensive safety features are available to mitigate the immense risk associated with the handgun; however, Defendants placed the handgun without these features.

Importantly, it is a latent and not a generally known risk that the Product would discharge a live round when the magazine was removed. Such a hidden risk inherent in firearms can serve as a valid foundation for products liability actions in Pennsylvania. *See Snyder v. City of Philadelphia*, 564 A.2d 1036 (Pa. Commw. Ct. 1989) (reversing the grant of defendant’s preliminary objections because there was no basis to conclude as a matter of law that hearing loss from long-term exposure to gun fire was an obvious or generally recognized danger). Indeed, the Defendants do not challenge that these allegations in the Complaint state a viable cause of action under Pennsylvania’s products liability laws.

V. PLCAA DOES NOT BAR ANY OF PLAINTIFFS’ CLAIMS

The language of PLCAA, Supreme Court precedent governing how federal laws must be read to not infringe on principles of federalism, the principle of constitutional avoidance, and PLCAA’s legislative history all demonstrate that PLCAA should be read to permit Plaintiffs’ claims. Applying these principles and analyzing the statute’s text and history—as the Court must—none of Plaintiffs’ claims constitute a “qualified civil liability action” barred by PLCAA.

A. Supreme Court Precedent Requires That PLCAA Be Read To Minimize Intrusion On Pennsylvania’s Sovereignty and Governance

Supreme Court precedent clearly instructs courts how they must construe a federal statute that purports to infringe on state sovereignty or governance or alter the federal-state balance of authority. Unless there is an expressly stated intent to so intrude on state sovereignty, the law must be read to protect and preserve state authority to the maximum extent possible. Applying

these principles, PLCAA does not bar Plaintiffs' claims.

1. PLCAA Intrudes On Pennsylvania's Sovereignty And Governance

PLCAA unquestionably intrudes on Pennsylvania's sovereignty and governance in fundamental ways. Throughout its history, Pennsylvania has exercised its sovereign right to establish and apply its civil justice law through its courts. Pennsylvania has generally chosen to provide victims of wrongdoing a right to seek compensation for their injuries, and to treat victims of negligence by different industries equally. Further, Pennsylvania has traditionally chosen to use its judicial branch to establish and apply, through common law, standards of civil liability. PLCAA purports to prohibit Pennsylvania from exercising its authority -- for victims of gun industry negligence.

PLCAA impermissibly dictates to Pennsylvania how it must allocate authority between the legislative and judicial branches of its government in order to administer civil justice in gun industry liability cases. Under PLCAA's negligence per se or "predicate exception," (15 U.S.C. § 7903(5)(a)(iii)), PLCAA allows Pennsylvania courts to apply Pennsylvania tort law without restriction if Defendants violate an applicable state or federal statute that proximately caused harm to the plaintiff.² For example, if the Pennsylvania legislature enacted a statute requiring

² See, e.g., *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 151 (NY App Div 4th Dep't 2012), *amended by* 103 A.D.3d 1191 (NY App Div 4th Dep't 2013) ("this action falls within the PLCAA's predicate exception and therefore is not precluded by the Act ***"); *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 434-45 (Ind Ct App 2007) (permitted negligence, public nuisance, products claims against manufacturers and dealers based on predicate violation of state public nuisance law); *Chiapperini v. Gander Mountain Co.*, 13 N.Y.S.3d 777, 784-791 (NY Sup Ct Monroe Cnty Dec. 23, 2014) ("as long as one PLCAA exception applies to one claim the entire action continues."); *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 351 (EDNY 2007) (PLCAA "inapplicable" to the action because plaintiff alleged violations of law); *Englund v. World Pawn Exchange*, 2017 Ore. Cir. Lexis 3 (Mult. Cty., 4th Jud. Dist. June 30, 2017); *Corporan v. Wal-Mart Stores East, LP*, 2016 US Dist LEXIS 93307 at *5-13 (D Kan July 18, 2016) ("because the court finds the predicate exception applicable to this action, it declines to engage in the claim-by-claim analysis advanced by defendants."); *Norberg v. Badger Guns*, No.

that handguns sold or shipped into Pennsylvania have magazine disconnect safeties, Congress would allow this Court to apply Pennsylvania tort law and hold Defendants liable for failing to design and market products that conformed to this standard.

However, according to Defendants, PLCAA prohibits this Court from hearing an identical claim if Defendants violated an identical standard established by judicially-created Pennsylvania common law. In other words, Congress has dictated to Pennsylvania that, in order to have its courts hear civil justice cases against gun companies in such cases, Pennsylvania must use its legislature—and not the courts—to establish standards of liability. Congress has thus not preempted Pennsylvania from imposing liability on gun companies, but rather it has prohibited Pennsylvania from using its chosen branch of government to establish civil justice claims.³

In our federalist system of “dual sovereigns,” *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991), it is impermissible for the federal government to dictate to Pennsylvania how to allocate power between the judicial and legislative branches of the state. The Constitution provides no Congressional authority to influence Pennsylvania’s decision about how to allocate its lawmaking functions between its judicial and legislative branches, and “[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.

In another Pennsylvania tort case, the Supreme Court famously made clear that common law is law, and it is solely the province of the state to decide how to make it:

10-CV-20655, Tr of Oral Ruling at 7-8 (Wis Cir Ct Jan 30, 2014); *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 24:19-25:3 (Wis. Cir. Ct. Mar. 24, 2014).

³ Congress made its animus toward the judicial branch of state governments clear in PLCAA. See 15 U.S.C. § 7901(a)(7) (“The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States . . .”).

whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie R.R. v. Tompkins, 304 U.S. 64, 78 (1938).

The Supreme Court has repeatedly recognized that allocation of powers between the various branches of state government is a core prerogative of the states as sovereign entities. *See Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 (1981) (internal citations omitted) (“[T]he States are free to allocate the lawmaking function to whatever branch of state government they may choose.”); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937) (“How power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself.”); *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J. concurrence) (“It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the [] States.”); *FERC v. Mississippi*, 456 U.S. 742, 761 (1982) (“[H]aving the power to make decisions and to set policy is what gives the State its sovereign nature.”).

Congress, in PLCAA, nevertheless purports to intervene in a core area of Pennsylvania’s self-governance and determine the balance of lawmaking power between Pennsylvania’s legislature and judiciary in determining gun industry liability. Even if there are constitutional methods by which Congress could limit or preempt gun industry liability, it cannot do so by impermissible means. *See New York v. United States*, 505 U.S. 144, 188 (1992). “The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress’ instructions.” *Id.* at 162. PLCAA is not permissible preemption

because “every form of [permissible] preemption is based on a federal law that regulates the conduct of private actors, not the States.” *Murphy v. NCAA*, 138 S.Ct. 1461, 1481 (2018). PLCAA does not set a standard of conduct for gun companies—it simply dictates to the states how to fashion liability standards.

Additionally, PLCAA’s intrusion on state sovereignty is particularly startling because “the State’s interest in fashioning its own rules of tort law is paramount to any discernible federal interest, except perhaps an interest in protecting the individual citizen from state action that is wholly arbitrary or irrational.” *Martinez v. California*, 444 U.S. 277, 282 (1980).

PLCAA would intrude on Pennsylvania’s sovereignty even if it required that *all* state tort liability be conditioned on a statutory violation. But PLCAA further infringes on Pennsylvania’s choice to protect the rights of people to seek justice in the courts in its constitution. Pa. Con. Art. I, §11 (“All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law . . .”) By imposing this statutory hurdle only for victims of gun industry negligence, PLCAA further infringes on Pennsylvania’s self-governance by over-riding Pennsylvania’s choice to apply principles of civil justice equally to all and not to exempt any industry from the fundamental duty to use reasonable care to prevent foreseeable danger to others.

Pennsylvania’s application of equal justice under the law to all victims and wrongdoers is a core value. Applying this principle, Pennsylvania law holds manufacturers and sellers of opioids, cigarettes, tuna fish sandwiches, or firearms equally liable to victims for harm foreseeably cause by their negligence. PLCAA, according to Defendants’ interpretation, requires Pennsylvania to jettison its equal justice principles and make victims of gun industry negligence second-class citizens without the same rights to seek civil redress from negligent tortfeasors.

2. **Supreme Court Precedent Requires That Statutes Purporting To Intrude On State Sovereignty Be Interpreted To Minimize This Intrusion**

Given that PLCAA is a federal statute that can be read to intrude into areas of governance traditionally left for the states, Supreme Court precedent demands that PLCAA be read in a way that minimizes the scope of this intrusion into Pennsylvania’s self-governance and sovereignty.

In *Gregory v. Ashcroft*, the Supreme Court explained that courts construing a federal statute that could supplant a power traditionally within the ambit of the states must apply the “plain statement rule,” under which “it is incumbent upon the [] courts to be certain of Congress’ intent before finding that federal law overrides [the usual constitutional balance of federal and state powers].” 501 U.S. at 464; *see also United States v. Bass*, 404 U.S. 336, 349 (1971).

Courts may be required to go out of their way to interpret a statute to avoid infringing on state sovereignty. In *Gregory*, a provision of the Missouri Constitution required judges to retire at age 70 appeared to violate the federal Age Discrimination in Employment Act of 1967 (“ADEA”). 501 U.S. at 455-56. To prevent intrusion into Missouri’s sovereign right to structure its government (by setting retirement ages for judges), the Court rejected a statutory construction that was more consistent with the plain text of the statute, and read the ADEA to exempt judges under an exception for “appointee[s] on the policymaking level.” *Id.* at 465. The Court recognized that its interpretation was “an odd way for Congress to exclude judges,” “particularly in the context of the other exceptions that surround [the exclusion applicable to judges].” *Id.* at 467. However, the Court would not construe the federal law as displacing Missouri’s law unless it was “absolutely certain” about Congress’ intent. *Id.* at 464. The Court was “not looking for a plain statement that judges are excluded” from the coverage of the federal statute, but instead, it “[would] not read the ADEA to cover state judges unless Congress has made it clear that judges are *included*” in its coverage. *Id.* at 467 (emphasis in original).

Pennsylvania courts have similarly cautioned against finding Congressional intent to preempt state law in the absence of clear statements to that effect—especially when federal law would supplant state police powers such as the regulation of tort law. *Romah v. Hygienic Sanitation Co.*, 705 A.2d 841 (Pa. Super. Ct. 1997), stated that: “Absent express preemption, courts are not to infer preemption lightly, ***particularly in areas traditionally of core concern to the states such as tort law***. This is because the preemption doctrine presumes that police powers historically left to the states are not supplanted by federal law.” *Id.* at 849 (but finding that this high standard for preemption was met) (internal quotations and citations omitted) (emphasis added); *Wheeling & Lake Erie Ry. Co. v. PUC*, 778 A.2d 785, 792 (Pa. Comm. Ct. 2001) (finding that a federal statute did not preempt the “states’ traditional police power over the public safety of the rail-highway crossings” where Congress did not “expressly” state an intent to preempt). *Wheeling*, in addition, also directs the Court to look to legislative history to determine if there was an intent to preempt. *See id.* (internal quotations omitted).

In *Bond v. United States*, 134 S. Ct. 2077 (2014), the Supreme Court went even further than *Gregory* in reinforcing that, in the absence of a plain statement, courts should look beyond the plain text of a federal statute that would otherwise intrude on state sovereignty and self-governance in order to minimize the intrusion. *Bond* considered a federal law that appeared to criminalize chemical weapons use, without exceptions for local crimes of the sort generally covered by state law (which happened to be Pennsylvania’s). Justice Scalia stated that “it is clear beyond doubt that [the act] cover[ed] what Bond did . . .” *Id.* at 2094 (Scalia J., concurrence). Nonetheless, because a plain reading would lead to the federal government “‘dramatically intrud[ing] upon traditional state criminal jurisdiction . . .’”, the Court read ambiguity into otherwise unambiguous language, finding that the “ambiguity derives from the

improbably broad reach of the key statutory definition . . .”. *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350); *Bond*, 134 S. Ct. at 2090. The Court held that the law could not constitutionally be applied to *Bond* because “[t]he Government’s reading of [a federal statute] would ‘alter sensitive federal-state relationships,’ convert an astonishing amount of ‘traditionally local criminal conduct’ into a ‘matter for federal enforcement,’ and involve a ‘substantial extension of federal police resources.’” *Id.* at 2091-92 (quoting an earlier decision in the *Bond* case).

Lower courts have consistently applied the interpretative rules announced in *Bond* and *Gregory* to read limitations into federal statutes that either unambiguously or arguably appear to cover conduct where otherwise giving effect to the broad statutory scope would substantially intrude into state sovereignty. For example, in *United States v. Toviave*, the court, applying *Bond*, cabined the expansive reach of unambiguous statutory language because of the lack of “a clear expression of Congressional intent” to “make[] it a crime for a person *in loco parentis* to require household chores, or makes child abuse a federal crime.” 761 F.3d 623, 627-629 (6th Cir. 2014). Cabining this plain language was necessary under *Bond* so that the federal statute would not “override . . . the usual constitutional balance of federal and state powers” in terms of supplanting the state’s police power to regulate “local criminal activity.” *Id.* at 628 (internal quotations omitted).

Similarly, in *Breazeale v. Victim Servs.*, 198 F. Supp. 3d 1070 (N.D. Cal. 2016), the court, applying *Bond* and *Gregory*, read the Federal Arbitration Act (“FAA”) to limit the statute’s application because “[c]ourts must refer to basic principles of federalism embodied in the Constitution to resolve ambiguity in a federal statute, and insist on a clear indication of Congressional intent before interpreting the statute’s expansive language in a way that intrudes on the police power of the States.” *See id.* at 1077-1078 (internal quotation omitted) (emphasis

added). *Comm'ns Imp. Exp. S.A. v. Republic of the Congo* applied the *Gregory* “clear statement” rule and observed that a finding of no preemption in regards to enforcement of foreign judgements was particularly appropriate “[a]gainst the historical backdrop of state law on the enforcement of foreign judgments” 757 F.3d 321, 332 (D.C. Cir. 2014).

Similarly, the “clear statement” rule is particularly relevant where, as with tort law, there is a history of the state taking the lead in a specific area of regulation.

3. **This Court Must Apply *Bond* And *Gregory* And Read PLCAA To Minimize Intrusion on Pennsylvania Sovereignty And Self-Governance**

Because PLCAA purports to intrude on Pennsylvania’s authority to distribute law-making functions between branches of its government and its enforcement of tort law under its traditional police powers, the court must apply the *Gregory* and *Bond* principles in interpreting PLCAA. Congress does not come close, in PLCAA, to stating a clear intent to prevent Pennsylvania from applying products liability law in this case. On the contrary, PLCAA states a purpose to prohibit liability where harm is “solely caused” by third party criminal acts (not where another cause of harm is gun company negligence), §7901(b)(1), and it expressly *permits* products liability law to apply to a claim against a firearms manufacturer or seller unless there is a “volitional act that constituted a criminal offense” (not juvenile offenses). §7903(5)(a)(v).

Applying *Bond* and *Gregory*, the “volitional act that constituted a criminal offense” exclusion does not clearly express a Congressional intent to fundamentally deprive Pennsylvania courts of the authority to hear common law products liability cases, so does not meet the “plain statement” requirement of *Gregory*. In order to minimize PLCAA’s intrusion on the sovereignty of Pennsylvania under our federalist system, this Court should find that:

- 1) this case is not a “qualified civil liability action” because the harm was not “solely

caused” by the criminal misuse of a firearm, but was caused, at least in part, by Defendants’ own tortious conduct; and

- 2) this case is not a “qualified civil liability action” because *Bond* dictates that this court should read PLCAA’s product liability exception in § 7903(5)(a)(v) expansively and, consistent with Congressional intent, as not including juvenile misdeeds as crimes.

Reading PLCAA in this way is far more supported than the Supreme Court’s tortured statutory readings in *Bond* and *Gregory*.

B. Applying Supreme Court Precedent, This Case Is Not Barred By PLCAA Because It Is Not A “Qualified Civil Liability Action”

1. This Case Is Not Barred By PLCAA Because Congress Did Not Intend To Prohibit States From Imposing Liability Where One Cause Of The Harm Was Gun Manufacturer Negligence

PLCAA dictates that a claim should be barred only if it constitutes a “qualified civil liability action”—which is defined, in relevant part, as an action for damages “resulting from the criminal or unlawful misuse” of a gun by a third party. 15 U.S.C. § 7903(5)(A). A claim is not barred if it fails to meet this definition, or if it does and falls within one of the enumerated exceptions. *Id.* If a claim is not a “qualified civil liability action,” PLCAA provides no protection to a firearms manufacturer or dealer.

“Resulting from” in the definition of “qualified civil liability action” is not defined in PLCAA, so its meaning is informed by PLCAA’s Purposes and Findings—which indicate Congress’s intent to prohibit lawsuits only where the injury was “*solely caused*” by third party criminal conduct. 15 U.S.C. § 7901(a)(6); §7901(b)(1)(emphasis added). Reading “resulting from the criminal or unlawful misuse” consistently with PLCAA’s purpose, PLCAA precludes only actions where the harm was “solely caused by” third party criminal conduct—not where

gun industry negligence was another cause of the harm. *See Conroy v. Aniskoff*, 507 U.S. 511, 515-16 (1993) (statute must be read as a whole).

The word “solely” was of particular importance to Congress – one of the few changes made when an earlier version of PLCAA failed to pass the 108th Congress. *Compare* S. 1805, 108th Cong. § (b)(1)(2003) *with* 15 U.S.C. § 7901(b)(1) and S. 397, 109th Cong. (2005) (enacted). No statutory word should be treated as superfluous, *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991), especially a word that may well have been critical to the enactment of PLCAA.

This reading is required under *Gregory*, as PLCAA’s stated purpose to only bar cases where the harm was “solely caused” by third party criminal misuse is the opposite of clear statement of intent to deprive Pennsylvania courts of authority to hear cases where one cause was gun industry negligence. Under *Bond*, “ambiguity derives from the improbably broad reach of the key statutory definition . . .”. as a contrary reading would lead to the federal government “‘dramatically intrud[ing] upon traditional state [civil justice] jurisdiction . . .’” 134 S.Ct. at 2088, 2090 (*quoting Bass*, 404 U.S. at 350). The Court should find that this case does not meet the general definition of “qualified civil liability action” and is not barred by PLCAA.⁴

⁴ At least one court applying *Bond* has recognized that, in assessing whether “broad” language actually constitutes a “clear statement” that certain conduct is within the scope of a federal statute, the broad language “must . . . be read in conjunction with the other operative provisions” of the statute--such as those provisions of PLCAA containing the critical “solely caused.” *See Torcasio v. Murray*, 57 F.3d 1340, 1344-1347 (4th Circ. 1995) (reading narrower sections of the act to undercut the broad scope of the plain language in sections cited to support preemption).

2. **This Case Is Not A “Qualified Civil Liability Action” Because PLCAA’s Product Liability Exception (§7903(5)(a)(v)) Applies As There Was No “Volitional Act That Constituted A Criminal Offense”**

This case is also not a “qualified civil liability action,” because it is expressly permitted under PLCAA’s product liability exception, § 7903(5)(a)(v). PLCAA does not prohibit a valid products liability action except where “discharge of the [gun] was caused by a volitional act that constituted a criminal offense.” *Id.* Defendants fail to demonstrate that the shooting of JR. was “caused by a volitional act that constituted a criminal offense.”

a. **There Was No “Criminal Offense”**

J.R. was unintentionally shot by a juvenile, who was not subjected to the criminal justice system. The “discharge” that killed him was not a “criminal offense.”

Congress clearly intended “criminal” in the product liability exception to apply narrowly to the criminal justice system. PLCAA’s definition of “qualified civil liability action” includes “criminal or unlawful” misuse, but the product liability exception did not include merely “unlawful” conduct. *Compare* 15 U.S.C. § 7903(5)(A) and (A)(v). Hence, Congress intended to allow product liability cases where the offense was “unlawful” but not “criminal.” Juvenile offenses—such as the Juvenile Delinquent’s involuntary manslaughter adjudication—meet this definition of “unlawful” but not “criminal” conduct.

Not only are “[d]elinquency proceedings . . . not criminal in nature,” but some Pennsylvania courts have recognized that the “aberrant” behavior of a juvenile that would count as a crime if committed by an adult *does not count as a crime if committed by a juvenile*. *See In Interest of G.T.*, 409 Pa. Super. 15, 22 (Pa. Super. 1990) (“The purpose of determining delinquency under the Juvenile Act is to identify those children who have committed an act *which would be a crime if it had been committed as an adult* and who are, therefore, in need of

special treatment, supervision and rehabilitation.”) (emphasis added); *In re C.M.T.*, 2004 PA Super 418, P9 (Pa. Super. Ct. 2004) (same). *But see Commonwealth v. Bonner*, 135 A.3d 592, 602 (Pa. Super. 2016); *In the Interest of R.M.*, 2015 Pa. Super. Unpub. LEXIS 2820, *33 (Pa. Super. 2015). Thus, under Pennsylvania law, the juvenile’s conduct was not a “criminal offense” that would prohibit application of §7903(5)(a)(v).⁵

b. ***Bond and Gregory Require That PLCAA Be Read To Allow Plaintiffs’ Claims Even Should The Court Find The Relevant PLCAA Provisions Ambiguous***

While Plaintiffs’ construction of PLCAA is fully supported by unambiguous statutory language, *Bond* and *Gregory* require this court to adopt a construction of PLCAA that does not prohibit Plaintiffs’ claims even if it is not the most plain reading of the text . The Court should not dismiss the case unless: 1) the court is “absolutely certain” of Congress’s intent to deprive Pennsylvania of the authority to hear this case; 2) PLCAA cannot be read to respect Pennsylvania authority over its civil justice cases. Under *Gregory*, this court should “not [be] looking for a plain statement that [common law cases] are excluded” from the coverage of PLCAA, but instead, “not read [PLCAA] to cover [common law cases] unless Congress has made it clear that [they] are *included*” in PLCAA’s coverage. *Id.* at 467 (emphasis in original) (paraphrasing to refer to PLCAA instead of ADEA). At minimum, Congress’s inclusion of “solely caused” and allowing product liability cases unless there is a “volitional act that constituted a criminal offense” does not state a clear intent to prohibit cases where the tortious acts of a gun industry actor were also a cause the only allegedly “criminal” misuse is a juvenile

⁵ Adopting such an interpretation is particularly important because this Court must read this provision through the *Bond/Gregory* lens and Congress, at minimum, was not unambiguous in declaring that the “criminal” volitional act should include a volitional offense.

offense. PLCAA can—and must—be read under Plaintiffs’ interpretations to preserve Pennsylvania sovereignty and allow Plaintiffs’ claims. *See infra* at IV.A.3.

c. **Defendants’ Sole Contradictory Authority Does Not Address *Bond* and *Gregory***

Defendants ignore the Supreme Court precedent that governs how this court must construe PLCAA. Instead, they rely on only one relevant case -- *Adames v. Shaheen*, 909 N.E. 2d. 742 (Ill. 2009).⁶ While *Adames* appears to endorse Defendants’ positions, *Adames* is an Illinois case that is not controlling on this Court and was incorrectly reasoned. For one, *Adames* did not consider *Gregory*, and was decided before the Supreme Court clarified in *Bond* how courts should interpret laws like PLCAA to prevent intrusions on state sovereignty and authority. As a result, *Adames* failed to sufficiently analyze the words “criminal offense” and “solely caused” and thereby misinterpreted the scope of the immunity provided by PLCAA. *Adames* is inconsistent with *Bond* and *Gregory*, and should not be followed.

3. **PLCAA’s Legislative History Supports Finding That This Is Not A Barred Action, And Is Inconsistent With The View That Congress Intended The Broad Immunity Advocated By Defendants**

Statements by PLCAA’s author and chief sponsor, Senator Larry Craig make clear that Congress did not intend for the firearms industry to be able to use PLCAA as a broad shield from liability for its own tortious conduct. In fact, PLCAA’s chief sponsor and floor leader, Senator Craig emphasized that:

[PLCAA] is not a gun industry immunity bill because it *does not protect firearms or ammunition manufacturers, sellers, or trade*

⁶ Defendants also cite to *Ryan vs. Hughes-Ortiz*, 959 N.E.2d 1000 (Ma. Ct. App. 2012) to support their erroneous position that the Juvenile Delinquent’s juvenile misdeed in PLCAA was a “volitional act that constitutes a criminal offense.” *See* Defendants’ Brief in Support of Their Preliminary Objections to the Complaint Pursuant to the Protection of Lawful Commerce in Arms Act (filed June 29, 2018) at 12-13 (hereafter “Defs’ Br.”). But *Ryan* does not discuss or analyze whether a juvenile offense should count as a crime.

associations from any other lawsuits based on their own negligence or criminal conduct . . . As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . If manufacturers or dealers break the law or commit negligence, they are still liable . . . The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle.

151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005) (emphasis added) (hereafter “Statements of Sen. Craig”). Other co-sponsors of the bill closely echoed Sen. Craig’s Comments in describing their view of the legislation, including Sen. Orrin Hatch: “[T]his bill carefully preserves the rights of individuals to have their day in court with civil liability actions where negligence is truly an issue.” 151 Cong. Rec. S9077 (daily ed. July 27, 2005); Sen. Max Baucus: “This bill . . . will not shield the industry from its own wrongdoing or from its negligence . . .” 151 Cong. Rec. S9107 (daily ed. July 27, 2005); Sen. George Allen: “This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [sic] the firearms dealer or manufacturer” 151 Cong. Rec. S9389 (daily ed. July 29, 2005).

Adopting Defendants’ overly-broad reading of “qualified civil liability action” (and its overly-narrow interpretation of the exception in § 7903(5)(a)(v) (*see supra* at V.B.)) would allow gun manufacturers and sellers to escape liability even in situations like the present case where their own negligence and wrongdoing causes harm. Forcing Pennsylvania to immunize such misconduct is flatly inconsistent with Congressional intent.

C. If PLCAA Bars Plaintiffs’ Case It Is Unconstitutional

1. Constitutional Avoidance Supports Allowing This Case

“[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of

constitutional problems, the other should prevail--whether or not those constitutional problems pertain to the particular litigant before the Court.” *Clark v. Martinez*, 543 U.S. 371, 380-381, 125 S. Ct. 716, 724 (2005). Plaintiffs’ more-than-plausible construction of PLCAA would minimize its constitutional problems. *See infra* at V. Defendants’ construction exacerbates these potential concerns. The principle of constitutional avoidance further supports rejecting Defendants’ arguments and construing PLCAA as not barring Plaintiffs’ claims.

2. PLCAA Violates Principles Of Federalism And The Tenth Amendment

If PLCAA is read to prohibit Pennsylvania courts from applying Pennsylvania law to grant civil justice to these Pennsylvania residents whose child was wrongfully killed as a result of Defendants’ wrongdoing, PLCAA is unconstitutional. Congress has no authority to so drastically intrude on state sovereignty and governance, and has never before attempted such an invasion. Nor has the Supreme Court ever approved of such extraordinary federal authority.

As explained above, *see supra* at IV.A.1, PLCAA intrudes on Pennsylvania’s authority in fundamental and unprecedented ways by prohibiting Pennsylvania courts from hearing civil justice claims against the gun industry that arise from violations of judicially-created common law but permitting those same actions to exist if codified as a statute by the Pennsylvania legislature. The federal government dictating to the state of Pennsylvania how to allocate power between the judicial and legislative branches of the state is impermissible in our federalist system of “dual sovereigns,” *Gregory*, 501 U.S. at 457, and violates the Tenth Amendment. U.S. Const. amend. X. Allocation of powers between the branches of state government is a core prerogative of the states as sovereign entities. *See Minn. Creamery Co.*, 449 U.S. at 461; *Highland Farms Dairy, Inc.* 300 U.S. 608 at 612; *Sweezy v. New Hampshire*, 354 U.S. at 256 (Frankfurter, J. concurring); *FERC v Mississippi*, 456 US at 761. Even if there are constitutional methods by

which Congress could limit or preempt gun industry liability, it cannot attempt to do so by impermissible means, and "[t]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." *New York v. United States*, 505 U.S. at 162, 188.

The Appellate Division of New York applied these same principles to hold that a similarly constructed federal statute would violate the Tenth Amendment. *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York* ("Vargas"), 131 A.D.3d 4, 10 N.Y.S.3d 579 (N.Y. App. Div., 2nd Dep't, 2015). Like PLCAA, the federal law at issue in *Vargas* could have supported a reading that Congress was requiring a legislative enactment as the only process by which an opt-out from the law's restrictions could be completed. While "recogniz[ing] that it is unusual for a state court to pass judgment on the constitutionality of some aspect of a federal statute," the Court held that "a...reading of 8 USC § 1621 (d), so as to require a state legislative enactment to be the sole mechanism by which the State of New York exercises its authority granted in 8 USC § 1621 (d) to opt out of the restrictions on the issuance of licenses imposed by 8 USC § 1621 (a), unconstitutionally infringes on the sovereign authority of the State to divide power among its three coequal branches of government" and would therefore violate the Tenth Amendment. *See id.*, 131 A.D.3d at 6, 23-24. It further held that,

the processes by which a state chooses to exercise, by one of its coequal branches of government, the authority granted by the federal legislation is not a legitimate concern of the federal government.

The ability, indeed the right, of the states to structure their governmental decision-making processes as they see fit is essential to the sovereignty protected by the Tenth Amendment.

Id., 131 A.D.3d at 24-26, 10 N.Y.S.3d at 594-596 (emphasis added). PLCAA suffers the same constitutional flaw if read to bar Plaintiffs' claims.

For the same reasons, PLCAA violates the Tenth Amendment.

3. PLCAA Violates Due Process By Depriving Plaintiffs Of All Remedies Against Defendants

In PLCAA, Congress purports to do something no federal law has ever previously done -- and which the Supreme Court has never approved. It purports to deprive a class of negligence victims to seek redress in civil court without affording them a sufficient alternative remedy. If this were allowed, Congress could simply command state courts to dismiss all claims against classes of wrongdoers protected by Congress's favored special interests, and immunize all future actions. Once states received their directive from politicians in Washington, D.C., states would be powerless to provide civil justice to victims or to impose liability on those companies, regardless of the damage they cause. The Constitution does not allow such deprivation of civil justice rights under our federalist system. As a result, PLCAA violates the Due Process clause of the Fifth Amendment of the United States Constitution.

The Supreme Court has long recognized that "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (quoting Sir William Blackstone, Commentaries 23 (1869)); *see also Truax v. Corrigan*, 257 U.S. 312, 330 (1921) ("a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive the person suffering the loss of due process of law.").

When Congress has preempted tort liability, it has always provided an alternate remedy.⁷ The presence of alternative remedies is critical to the constitutionality of a statute that attempts to extinguish pre-existing remedies. Indeed, the Supreme Court has predicated its approval of liability-limiting legislation on a careful analysis of the substitute remedies provided by Congress and a finding that “[t]his panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by [the Act].” *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 63-64 (1978).

PLCAA provides no “reasonably just substitute.” One court found PLCAA to be violative of the Due Process Clause of the Fifth Amendment for failing to provide an adequate alternative remedy to replace the common law causes of action it extinguishes. *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (attached as Exhibit 1), *affirmed on other grounds by Smith & Wesson Corp. v. City of Gary*, 875 N.E 2d 422 (Ind. Ct. App. 2007). And another court stated that if PLCAA barred a particular negligence case, it would be unconstitutional as violative of Due Process for not providing a sufficient alternative remedy. *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 24:19-25:3 (Wis. Cir. Ct. Mar. 24, 2014) (attached as Exhibit 2). This court should follow the reasoning of these persuasive authorities.

4. PLCAA Violates Equal Protection Because It Discriminates Against Certain Gun Violence Victims Without Rational Basis

PLCAA also violates the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution because PLCAA irrationally discriminates

⁷ See Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72 U. Cin. L. Rev. 1739 at 1750-56 (Summer 2004) (discussing federal legislation that limited causes of action, but provided an alternate remedy).

among victims of gun industry negligence. PLCAA eliminates many pre-existing common law causes of action developed by state courts, but permits these exact same causes of action to be revived if the relevant state legislatures codify the elements of these same causes of action. This results in a bifurcated civil justice system in which a victim of gun industry negligence who suffers an injury as a result of a manufacturer's tortious conduct in a state which has enacted relevant codifying legislation has a legal remedy, but a victim of the same conduct by the same actor in a state without the legislation has no remedy.

Since the federal government forced this bifurcated system upon the country, it is responsible for the discrimination between these two classes of gun violence victims and must have a rational basis for this differential treatment. Such a rational basis is simply not present. It is neither rational nor legitimate for the federal government to discriminate in favor of victims in states that utilize their legislative branch over victims in states that rely on judicially-created common law.

One federal court has addressed and invalidated irrational discrimination in the treatment of classes of tort victims, albeit under the Due Process Clause of the Fourteenth Amendment to the United States Constitution rather than the Fifth Amendment to the United States Constitution.⁸ *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), held a Georgia tort reform statute was unconstitutional on equal protection grounds under both the state and federal constitutions because it discriminated between claimants in products liability and non-products liability cases by affording them starkly different legal remedies without a rational basis. Of particular importance was a provision of a state statute which allowed the state to

⁸ The equal protection component of the Due Process clause of the Fifth Amendment is co-extensive with the equal protection provided by the Fourteenth Amendment. *See, e.g., Bolling v. Sharpe*, 347 U.S. 497 (1954). Hence, this is not a point of significant distinction.

recover 75% of any punitive damages award in a products liability case but permitted plaintiffs in non-products liability case to retain 100% of punitive damages awards. Applying rational basis scrutiny, the court found that this provision “denie[d] equal protection to product liability punitive damage plaintiffs in its discrimination in favor of other nonproduct liability punitive damage claimants” and also observed that “there is no rational basis under the reasoning advanced by the State that the 75% award is a revenue producing measure *inasmuch as it would be arbitrary to fail to assess all punitive damage awards if the purpose of assessing any award was to raise revenue for the State.*” *Id.* at 1578 (emphasis added).

Similarly, here, PLCAA irrationally discriminates between gun violence victims in states which have codified judicially-developed standards of liability (who can bring suit) and victims in states which have not codified those standards (who cannot sue). If PLCAA were rationally protecting lawful commerce in firearms, it would not allow *these exact same causes of action in states whose legislatures establish causes of action*. Even assuming, *arguendo*, that Congress could impose a blanket ban on gun industry liability in state court (provided that sufficient alternative remedies were provided), it cannot reduce gun violence victims in states without relevant statutes into second class citizens who do not enjoy the same legal rights as gun violence victims in states with relevant statutes.

While *Duke Power*, 438 U.S. at 93-94, upheld a statutory compensation scheme against an equal protection challenge, that liability limitation was held to be a rational exercise of Congress’s Commerce Clause authority to further the growth of that industry. PLCAA, however, does not rationally protect the industry as it allows limitless liability on gun companies if there is a violation of a statute.

5. PLCAA Is Not A Legitimate Exercise Of Commerce Authority

The only possible Congressional authority for PLCAA is the Commerce Clause. But PLCAA is not a legitimate exercise of Commerce Clause authority. PLCAA does not only regulate conduct of the gun industry at all; it simply restricts liability. For that reason, PLCAA is not permissible preemption because “every form of [permissible] preemption is based on a federal law that regulates the conduct of private actors, not the States.” *Murphy v. NCAA*, 138 S.Ct. 1461, 1481 (2018). PLCAA simply dictates to the states how to fashion liability standards. Regardless, PLCAA is not a rational exercise of Commerce Clause authority since it does not even limit liability, so long as a state (or Congress) establishes a statutory predicate.⁹

6. Courts Upholding PLCAA Are Distinguishable Or Incorrect

While a handful of courts have upheld PLCAA as constitutional, those cases are distinguishable and incorrect. *See, e.g., Iletto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *Kim v. Coxe*, 295 P.3d 380 (Ak. 2013); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008). All of these cases failed to consider the *Gregory* rule, all were decided prior to *Bond*, and none thus considered critical Supreme Court precedent that requires that courts read federal statutes to minimize intrusion on state sovereignty. Some of these cases did not even consider a Tenth Amendment challenge. Additionally, several of the cases allowed some of plaintiffs’ claims to survive, so the constitutional deprivations were far less severe than in this case. *See, e.g., Kim, supra; Delana v. CED Sales*, 486 S.W.3d 316 (Mo. 2016). Third, these courts gave short shrift to the due process rights of victims. *See, e.g., id.* Those non-binding cases should not be followed.

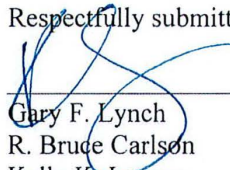
⁹ Congress made its animus toward the judicial branch of state governments clear in PLCAA. *See* 15 U.S.C. § 7901(a)(7) (“The possible sustaining of these actions by a maverick judicial

VI. CONCLUSION

PLCAA should be read as allowing Plaintiffs' claims under Pennsylvania law, without requiring a predicate violation. In the alternative, PLCAA should be held unconstitutional, and not applied in this case for that reason.

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Respectfully submitted,



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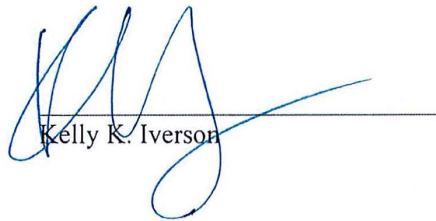
officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States . . .").

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served
via email and U.S. First Class Mail on August 7, 2018 upon the following:

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Kelly K. Iverson

Exhibit 1

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)
LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM FIVE
HAMMOND, INDIANA

CITY OF GARY, INDIANA, by its Mayor,)
SCOTT L. KING,)
 Plaintiff,)
vs.)
SMITH & WESSON CORP., et al.,)
 Defendants.)

CAUSE NO. 45D05-0005-CT-00243

Filed in Open Court

OCT 23 2006

ORDER OF OCTOBER 23, 2006

Thomas R. Philpot
CLERK LAKE SUPERIOR COURT

INTRODUCTION

This matter came before the Court upon the Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings, filed by the following Defendant Manufacturers: SMITH & WESSON CORP., BERETTA U.S.A. CORP., COLT'S MANUFACTURING COMPANY, INC., BROWNING ARMS COMPANY, B.L. JENNINGS, INC., BRYCO ARMS CORPORATION, GLOCK INC., BEEMILLER, INC., d/b/a HI-POINT FIREARMS i/s/h/a HI-POINT FIREARMS CORP., PHOENIX ARMS, STURM, RUGER & COMPANY, INC., and TAURUS INTERNATIONAL MANUFACTURING, INC. (hereinafter, "Manufacturers").

The basis for Manufacturers' motion is the Protection of Lawful Commerce in Arms Act (hereinafter, "PLCAA"). The PLCAA, codified at 15 U.S.C. § 7901 et seq., became law on October 26, 2005. Manufacturers contend that the PLCAA applies to this case and that the PLCAA provides for the immediate dismissal of this matter.

The Plaintiff, City of Gary, (hereinafter, "City") has filed a Memorandum in Opposition to the Manufacturer's motions and contends that the PLCAA does not apply or is unconstitutional.

FACTS

On August 27, 1999, the City brought this action against the Manufacturers and asserted

various claims, including public nuisance and negligence claims. One of the remedies sought by the City was compensatory damages. The City also requested injunctive relief and punitive damages. The City charged that the Manufacturers engaged in “wilful, deliberate, reckless, and negligent distribution of guns” to criminals and high-risk gun dealers, that the Manufacturers refused to take reasonable steps to control the distribution of their hand guns and the Manufacturers negligently designed unsafe hand guns. The Manufacturers moved to dismiss the original complaint for failure to state a claim. The trial court granted the Manufacturers’ motion. The City appealed.

Ultimately, the Indiana Supreme Court held that the City presented valid claims for public nuisance, negligent sales, and negligent design. The case was remanded for further proceedings. See, City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). During the pendency of this case, Congress enacted, and the President signed into law, the PLCAA. The PLCAA became law on October 26, 2005. In a nutshell, the PLCAA provided a bar to the commencement of a “qualified civil liability action” in state or federal court, and required state and federal courts to immediately dismiss any pending actions or those subsequently brought. The Manufacturers claim this case falls within the purview of the PLCAA and moved to dismiss this case pursuant to the mandate of the act. The City challenges the constitutionality of the PLCAA on the following grounds.

- I. The PLCAA is unlawful preemption;
- II. The PLCAA’s retroactive abolition of pending state court cases violates Due Process;
- III. The PLCAA violates the Principles of Separation of Powers;
- IV. The PLCAA violates the Tenth Amendment and Eleventh Amendments.

ISSUES

I. Whether the PLCCA is Unlawful Preemption

The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land” U.S. Const. art. VI, cl.2. As such, Congress has the power to trump state legislation in an area where there is federal regulatory authority. Preemption may be expressly provided for in a federal statute or implied. Further, preemption may be complete or partial. In order for the federal action to be a valid exercise of preemption, it must first be a valid exercise in federal power. Thus, the first inquiry is whether Congress had the power to pass the PLCAA. With regard to this threshold inquiry, the Commerce Clause, U.S. Const. art I §8, confers upon congress the power to regulate activities that substantially impact interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195 (2005). Clearly, this case implicates interstate commerce and therefore the Commerce Clause provides Congress with legislative power in this area. Further, the language of the PLCAA is clear that Congress expressly intended to preempt state tort law in the area of gun manufacturers state tort liability. Since the Commerce Clause provides Congress power to enact the PLCAA to preempt state tort law then preemption is of no moment. The inquiry next turns to whether the PLCAA is constitutionally firm on the other challenged grounds.

II. Whether the PLCAA’S Retroactive Abolition of Pending State Court Cases Violates Due Process

Due Process Clauses of the Fifth Amendment guarantee a right to a remedy for injuries to life, liberty, and/or property rights. United States Supreme Court has recognized that laws that eliminate common law causes of action may violate due process. In *Poindexter v Greenhow*, the Court held, “it is not within the powers of the state to deny a person all redress for a deprivation of rights secured by the constitution and that to take away a remedy is to take away the right

itself.” *Poindexter v Greenhow*, 114 U.S. 270 (1885). Under the PLCAA gun manufacturers would not have any responsibility for foreseeable harm caused by negligence in producing and distributing weapons and those harmed, past, present, and future would be wholly without a remedy in state and federal court. Under the Fifth Amendment, the City had a substantial, protectable interest in its tort claim. Inherent in the Due Process Clause, is a “separate and distinct right to seek judicial relief for some wrong.” *Christopher v. Harbury*, 536 U.S. 403 (2002). It is acknowledged that Congress may regulate remedies or even limit state court remedies. Due Process is violated when Congress abolishes an existing remedy and provides no alternative. To deprive the City of its right in interest deprives the City of a vested cause of action without just compensation; thereby, the PLCAA is violative of the Due Process Clause and, therefore, unconstitutional.

Further, our Supreme Court has long recognized laws that are applied retroactively and/or laws that serve as a deprivation of existing rights are particularly unsuited to a democracy such as ours. Our sovereign’s distaste for retroactivity was discussed in *Landgraf v USI Film Prods.*, 114 S.Ct. 1483 (1994). In *Landgraf*, the Court stated:

“The presumption against retroactive legislation is deeply rooted in our jurisprudence, it embodies a legal doctrine centuries older than the Republic.”

Our founding fathers were very aware of the pit-falls of retroactive legislation and have safeguarded the Republic with various provisions of the Constitution, including the *Ex-Post Facto* clause, the Fifth Amendment’s Takings Clause, prohibitions on Bills of Attainder, and our Due Process clause. In discussing these principles against retroactive statutes, the *Landgraf* Court stated:

“These provisions demonstrate that retroactive statutes raise particular concerns the legislatures unmatched power allow it to sweep away settled expectations suddenly and without individualized

consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals...restricts governmental power by restraining arbitrary and potentially vindictive legislation.” Landgraf, 114 S.Ct. 1483.

While it is recognized that *Landgraf* was a case involving an analysis as to whether or not retroactive application was implied by the statute in question rather than expressly provided for, *Landgraf* nevertheless sets forth sound reasons for close review of statutes with retroactive affect. Additionally, the suspect and unjust nature of retrospective legislation was examined in *Kaiser Aluminum & Chemical Corp. v Bonjorno*, as follows:

“The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law and prohibits (or requires compensation for) all retroactive laws that destroy vested rights.”

Kaiser Aluminum & Chemical Corp. v Bonjorno, 110 S.Ct. 1570, 1587 (1990). (Internal citations omitted). Further, the *Kaiser* Court recognized that retrospective laws are highly injurious, oppressive, and unjust, and that retrospective laws should not be made either for the decision of civil causes or the punishment of offenses.

In the case at bar, the retroactive legislation may not be a means of retribution against unpopular groups or individuals; however, it is clearly an act which was passed in response to pressure from the gun industry. Further, it is clear that the PLCAA destroys the City’s cause of action and valid state court remedies. These vested rights may not be destroyed by legislative fiat without violating our Constitution. As such, the retroactive abolition of an existing state cause of action is unconstitutional since its retroactive affect is an unconstitutional deprivation of existing

rights, and is an unconstitutional *Ex-Post Facto* law.

III. Whether the PLCAA Violates Principles of Separation of Powers

Further, in *United States v Klein*, 80 U.S. 128 (1872), the United States Supreme Court established an Article III limitation on congressional law making power. The holding in *Klein* was simply that Congress cannot, through legislation, direct the outcome of pending cases since to do so would infringe upon the judiciary's role in deciding cases and violate the Separation of Powers as guaranteed by the Constitution. The scope of the PLCAA clearly and unmistakably directs the outcome of this pending case; and, therefore, is a clear and unmistakable violation of the Separation of Powers as guaranteed by the Constitution; and is, therefore, unconstitutional.

IV. Whether the PLCAA Violates the Tenth Amendment and Eleventh

Amendment

The Tenth Amendment sets forth: "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." Recent Supreme Court decisions have set forth an increased protection of state sovereignty through restrictions on congressional law making power where congressional acts are deemed "commandeering of state governments." See *Printz v United States*, 117 S.Ct. 2365 (1997). In *Printz*, the Supreme Court held that federal legislation known as the Brady Handgun Violence Prevention Act (hereinafter, "Brady Act") was unconstitutional because it required state law enforcement officers to temporarily work for the federal government. The Brady Act created a national system of instant background checks with regard to gun purchases. The Brady Act required local law enforcement to process identification forms in an attempt to verify the legality of gun purchases. The Supreme Court held that:

"Congress cannot compel the States to enact or enforce a federal

regulatory program...[or] circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Prinz*, 521 U.S. at 935.

Under the Tenth Amendment, the federal government may not dictate that state court officers take action to enforce a federal program; to do so would be commandeering of state power. The PLCAA, in the instant case, is not commandeering of state judicial power because, amongst other things, it allows the state court judge to determine whether the act applies in first instance. Further, the PLCAA does not implicate any state immunity from suit. As such, the PLCAA does not violate the Tenth or Eleventh Amendments.

CONCLUSION

Upon the points and authorities cited herein, the PLCAA is unconstitutional; and, therefore, the Motion to Dismiss and Motion for Judgment on the Pleadings filed by the Defendant Manufacturers are DENIED

ALL OF WHICH IS ORDERED October 23, 2006.



ROBERT A. PETE, JUDGE

Exhibit 2

1 STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
2 BRANCH 32

3
4 JOSE LOPEZ III and ALEJANDRO ARCE,
5 Plaintiffs,

6 v. Case No. 10-CV-18530

7 BADGER GUNS, INC., BADGER OUTDOORS, INC.,
8 ADAM ALLAN, WALTER ALLAN, MILTON BEATOVIC,
9 and WEST BEND MUTUAL INSURANCE COMPANY,
10 Defendants.

11 MOTION HEARING PROCEEDINGS

12 March 24, 2014 Honorable Michael D. Guolee
13 Circuit Court Judge Presiding

14 A P P E A R A N C E S:

15 CANNON & DUNPHY, S.C. by Attorney Patrick Dunphy
16 and Attorney Brett Eckstein, 595 North Barker Road,
17 Brookfield, Wisconsin 53008, appear on behalf of the
18 Plaintiffs.

19 Attorney Jonathan Lowy, Esq., Brady Center to
20 Prevent Gun Violence Legal Action Project, 1225 Eye Street,
21 N.W. Ste. 1100, Washington, D.C. 20005, appears as
22 co-counsel for the Plaintiffs, pro hac vice.

23 VON BRIESEN & ROPER, S.C. by Attorney Philip Reid,
24 411 East Wisconsin Avenue, Ste. 700, Milwaukee, Wisconsin
25 53202, appears on behalf of Defendant West Bend Mutual
Insurance Company.

SWANSON, MARTIN & BELL, LLP, by Attorney James
Vogts, 330 North Wabash, Ste. 3300, Chicago, Illinois 60611,
appears on behalf of the Defendants, pro hac vice.

Phyllis Peoples, Official Court Reporter, RMR, CMR, Br. 32

1 PROCEEDINGS

2 THE CLERK: Case No. 10-CV-18530, Jose
3 Lopez III and others versus Badger Guns Inc. and
4 others. State your appearance.

5 MR. DUNPHY: For the plaintiffs Attorney
6 Pat Dunphy, Jon Lowy, Brett Eckstein, and I also have
7 at my left, Attorney Rob Maxwell (sic). He's not yet
8 been admitted pro hac vice, so he won't enter an
9 appearance. I asked him to sit at counsel table with
10 us.

11 THE COURT: All right.

12 MR. REID: Good afternoon, your Honor.
13 Philip Reid of von Briesen & Roper representing West
14 Bend Mutual Insurance Company.

15 MR. VOGTS: James Vogts on behalf of
16 Badger Guns, Badger Outdoors, Walter Allan, Adam Allan
17 and Milton Beatovic.

18 THE COURT: Let me catch your name again?

19 MR. VOGTS: James Vogts, V as in Victor
20 o-g-t-s.

21 THE COURT: Thank you. All right, I read
22 your materials, and we have the benefit of similar
23 facts of Judge Conen. Is there anything the plaintiff,
24 or defendants are bringing the motion I guess.
25 Defendant, anything you'd like to add to your

1 materials?

2 MR. VOGTS: Well, you know --

3 THE COURT: Use your microphone, please.

4 You are very far away. My reporter has to hear you.

5 Thank you.

6 MR. VOGTS: Well, as your Honor knows,
7 based on the briefs, the issues before the Court are
8 issues primarily of statutory construction and
9 statutory interpretation which are questions of law for
10 the Court's determination. Those questions involve the
11 Protection of Lawful Commerce in Arms Act, which I am
12 sure you have read and studied. That statute was
13 passed by Congress in 2005 to protect firearms
14 manufacturers and sellers against claims for damages
15 like claims in this case arising from criminal or
16 unlawful misuse of firearms. The operative provision
17 of the PLCAA is section 7902, which very plainly states
18 all qualified civil liability action may not be brought
19 in any federal or state court. The statute then goes
20 on to define what a civil, qualified civil liability
21 action is, and that is an action like this case -- a
22 case for personal injury damages arising from a third
23 party's criminal or unlawful use, misuse of a firearm.

24 There is really no dispute up to this
25 point on those facts. Where the dispute lies is how to

1 interpret the six exceptions that Congress created to a
2 qualified civil liability action. Those six exceptions
3 are -- in those six exceptions, Congress first
4 specifically described certain claims by label; for
5 example, breach of contract, breach of warranty,
6 negligent entrustment, negligence per se, then
7 described a couple of them with greater language,
8 understood by label. One of those was marketed a
9 strict liability claim for design or manufacturing
10 defect. Another requires a knowing violation of a law
11 applicable to the sale or marketing firearms provided
12 that violation is a proximate cause of the harm. So in
13 creating the general rule that firearm sellers are
14 immune from suit, with the exception of those six type
15 of claims that they define, that's really where we are
16 right here. And where, where the parties fundamentally
17 differ is whether stating a claim under one of the six
18 exceptions, specifically the third exception, which
19 some courts have called predicate exception, opens the
20 door to any and all claims against the firearm seller.

21 Whether Congress just intended, you know,
22 each of these six exceptions identify specific claims
23 that you may bring within the contours of how they
24 describe those claims, or how the common law may
25 describe those claims. One of the claims the

1 plaintiffs bring in this case is an ordinary negligence
2 claim. And it doesn't take much effort to look through
3 the six exceptions and see that there is no exception
4 for an ordinary negligence claim. And, in fact, two
5 federal appellate courts sitting in the 9th Circuit, DC
6 Circuit upheld that there is no exception for an
7 ordinary negligence claim.

8 State Supreme Court in Alaska also held
9 that Congress did not create an exception for ordinary
10 negligence, so what Congress did was create exceptions
11 for various of ordinary negligence, specifically
12 negligence per se and negligent entrustment. That's
13 how they tried to treat negligence claims. But they did
14 not open the door to ordinary negligence claims. And
15 as your Honor knows, when interpreting a statute, you
16 are to first look at the plain ordinary meaning of the
17 words. You are to look at the purpose of the statute,
18 structure and the context. With those guideposts in
19 mind, you simply can't find room in this statutory
20 provision for ordinary negligence.

21 Plaintiffs, however, as I have already
22 alluded, believe that provided they can state a claim
23 that the defendants knowingly violated a firearms
24 statute, they are now free to plead negligence claim.
25 Quite frankly any claim whatsoever. I think that's a

1 fundamentally incorrect way to interpret the statute,
2 and no published decision has even addressed that
3 argument, much less accepted that argument. So the
4 ordinary negligence claim against Badger Guns and Adam
5 Allan should be dismissed because there is simply not
6 an exception for that kind of claim.

7 Another claim the plaintiffs make is a
8 public nuisance claim. The public nuisance claim like
9 ordinary negligence is not found in the six
10 exceptions. The plain language doesn't allow for
11 public nuisance. The plaintiffs argue again that,
12 well, they can plea a knowing violation of federal
13 firearm statutes, so the doors are blown off, and they
14 can allege public nuisance. Again there is no published
15 decision allowing for that interpretation of this
16 statute. And any attempt to shoehorn a statutory
17 public nuisance claim into the third exception, knowing
18 violation of a statute applicable to the sale,
19 marketing of a firearm should also fail, because the
20 Wisconsin Nuisance Statute is not on its face
21 applicable to the sale and marketing of firearms. In
22 fact, there is no language in that statute whatsoever
23 that could be construed to be applicable to sale or
24 marketing of firearms. So those two claims clearly
25 should be dismissed. There is simply no place for them

1 under this statute.

2 With regard to plaintiff's negligence per
3 se claim, plaintiffs allege that defendants violated
4 numerous federal firearms laws, all found in under the
5 Gun Control Act, 18 U.S.C. 922, 923, 924. But the law
6 in Wisconsin is that there is no civil liability under
7 those criminal statutes. The Olson v. Ratzel case
8 speaks to that directly.

9 THE COURT: Spell that, please. Go ahead.

10 MR. REID: Olson v. Ratzel speaks to that
11 directly. In Wisconsin, in order to find a civil cause
12 of action under criminal statute, three requirements
13 have to be met. One, the harm inflicted has to be the
14 type of harm that the statute was intended to protect
15 against. The injured person has to be within the class
16 of persons that the statute was intended to protect.
17 Most importantly, there has to be very clear expression
18 of legislative intent in the statute to create a civil
19 cause of action.

20 THE COURT: Counsel, much of this has been
21 in your briefs and so on. I'd really like you to
22 highlight anything different you want to bring out. I
23 do read these materials. So just to recite it again
24 into the record takes up the reporter's time, the
25 Court's time, and so on. Is there anything specific

1 above and beyond your briefing that you'd like the
2 Court to note?

3 MR. VOGTS: As you know, the parties
4 briefed these issues exhaustively. I don't believe
5 there is anything that I haven't touched on already in
6 our briefs. I certainly would be willing to answer any
7 questions you have regarding the defendant's position
8 on any of these issues.

9 THE COURT: Let me ask you. Were you the
10 attorney before Judge Conen also?

11 MR. VOGTS: Yes, sir.

12 THE COURT: What's the status of that
13 case?

14 MR. VOGTS: Well, the status of that case,
15 we have a trial date on September 2nd.

16 THE COURT: So it's been scheduled.

17 MR. VOGTS: It's been scheduled. Yes,
18 sir.

19 THE COURT: Thank you. Anything else?

20 MR. VOGTS: No, sir.

21 THE COURT: All right, Mr. Reid.

22 MR. REID: Judge, Phil Reid for West
23 Bend. I just want to put on the record we join in
24 Mr. Vogts' arguments. If the Court will indulge me for
25 one minute, I have a little bit to add that's not in

1 the briefs.

2 As Mr. Vogts correctly pointed out, the
3 defense in this case does not believe that the
4 negligence action is permitted. The plaintiffs cite
5 three cases for the proposition it is. I read those
6 cases in the last week because we are briefing a
7 similar issue right now in front of Judge Conen. None
8 of those cases support the proposition of plaintiff's,
9 say it supports. One is called the City of Gary ex
10 rel. King. That's a 2003 Indiana case. The fact is
11 that was decided two years before the PLCAA even
12 existed, so it simply did not address the issue whether
13 post that act a negligence claim is permitted.

14 A second case they cite is City of New
15 York v. A-1 Jewelry & Pawn Inc. I don't know, I don't
16 want the Court to take my words for it, so I will read
17 from that decision. One of the headnotes says, "The
18 city was entitled to leave to amend the Complaint
19 against the firearms retailer where amended Complaint
20 was identical to the original Complaint, except that
21 the three negligence claims had been deleted." So the
22 negligence was not even in that case any longer.

23 The third case they cite to that
24 proposition is one called Williams v. Beemiller. The
25 important point for the Court's purposes in deciding

1 our motion is the fact that that case was decided at
2 the Motion to Dismiss stage. And again, for reading
3 from the case, the Court there said, the defendant's
4 remedy was to serve a demand for a Bill of Particulars
5 under New York law, not to move for dismissal of the
6 Complaint. That was decided on procedural grounds. It
7 didn't touch on this question at all. So for those
8 specific reasons, plus all those reasons Mr. Vogts put
9 in his brief, we join in his motion.

10 THE COURT: Let me ask you. Are you
11 familiar with Judge Cooper's decision in this case, in
12 the Norberg case?

13 MR. REID: I am not. I have not read that
14 recently. I was not at that hearing.

15 THE COURT: All right. Thank you. All
16 right. Plaintiff.

17 MR. LOWY: Your Honor, Jon Lowy for the
18 plaintiffs.

19 THE COURT: Pull the microphone close to
20 you again, please. Thank you.

21 MR. LOWY: And I will try to be very
22 brief. A number of courts across the country have
23 considered issues very similar to this, actually have
24 addressed the central argument of Badger Guns. That
25 is, the argument of whether if a gun dealer engages in

1 unlawful commerce, whether they have special immunity
2 under the Protection of Lawful Commerce in Arms Act.
3 Every single court in the country that has considered
4 this issue has considered, has held that the gun dealer
5 engages in unlawful commerce. If they knowingly
6 violate a gun law, they have absolutely no special
7 protection from the law.

8 THE COURT: And in this case, what was the
9 violation?

10 MR. LOWY: In this case, well first of
11 all, there is no dispute for purposes of this motion
12 that there was a violation. I am not asking for
13 purposes of this motion they are. There were a number
14 of violations. One was the sale of a firearm to a
15 prohibited person, in this case a person who was an
16 unlawful user of controlled substance, and Badger knew
17 or had reasonable cause to believe that that person was
18 a user of unlawful substances. Also essentially a
19 straw purchase, that is the person Badger sold the gun
20 to was someone who was not the intended buyer;
21 therefore, Badger accepted false information in the
22 documentation. And we cite the statutory provisions in
23 our brief.

24 But as your Honor noted, or intimated in
25 this very courthouse, these identical arguments have

1 been raised and rejected three times already before
2 judge -- most notably by Judge Conen's decision.
3 Norberg's case provides a perfect road map for this
4 case. But also Judge Cooper in the Motion to Dismiss
5 stage, and Judge Dugan in the Motion to Dismiss stage
6 here. Even though this is not a Motion to Dismiss, it
7 essentially actually is because of the way Badger has
8 formed this Summary Judgment argument as Badger notes
9 its totally legal arguments. So actually from their
10 perspective, nothing has changed. They decided not to
11 rely on the facts.

12 THE COURT: But Judge Cooper did eliminate
13 some of the claims, right?

14 MR. LOWY: That's exactly correct. I
15 would like to address those. But just briefly, because
16 I think that the description of the case law is with
17 all due respect was incorrect. City of Gary case,
18 there was a decision after the Protection of Lawful
19 Commerce in Arms Act. The Court of Appeals counsel
20 cited to a different decision which is not the only one
21 that we rely on. The Court of Appeals in Indiana held
22 after the Protection of Lawful Commerce in Arms Act was
23 enacted that the case could go forward because the
24 court held that the defendant's violation of Indiana's
25 public nuisance statute constituted a knowing violation

1 of applicable law which came under the predicate
2 exception. And that decision was, the Supreme Court of
3 Indiana denied review of that decision. And that
4 appellate decision allowed negligence claims to go
5 forward as well. They weren't discussed in the opinion
6 except to say they remained in the case. So negligence
7 cases were allowed.

8 The Williams case, that was a Motion to
9 Dismiss. The Williams case, as Judge Conen noted, is
10 the most similar to this. There is another appellate
11 court in New York, New York Appellate Division, 4th
12 Department. In there, the Court held that where there
13 was an allegation of a known violation of law, there is
14 therefore no special immunity for gun dealers. That
15 shouldn't be so controversial. That isn't saying that
16 gun dealers are necessarily liable. It is just that if
17 they knowingly violate the law, they are treated like
18 every other litigant, and they don't get a get-out-of-
19 court free card, which PLCAA, the Protection of Lawful
20 Commerce in Arms Act gives them.

21 THE COURT: Say that again, please?

22 MR. LOWY: The Protection of Lawful
23 Commerce in Arms Act. In the Shirley v. Glass case,
24 which was decided both by the Kansas Court of Appeals
25 and the Supreme Court of Kansas, the court did not

1 discuss the Protection of Lawful Commerce in Arms Act
2 specifically; however, it was a post-Protection of
3 Lawful Commerce in Arms Act case, and the court allowed
4 negligence claims to go forward. So we have at least
5 six decisions going the way of saying you get no
6 special immunity, and zero. The entire country zero
7 cases holding that if you knowingly violate gun laws,
8 you still get special immunity of some form. Every
9 single case that Badger relies on, as Judge Conen
10 points out in his decision, every single one of those
11 cases do not involve a knowing violation of gun laws.
12 So the most those cases say is that if a gun company
13 does not violate the law, then they get immunity from
14 basic negligence claims. None of them say that if you
15 do violate the law, you get protection from special
16 negligence claims.

17 THE COURT: Let me ask you. Are you still
18 attacking the constitutionality of this law?

19 MR. LOWY: Well we are, but, your Honor,
20 that's an argument that would not be addressed unless
21 you decide in Badger's favor.

22 THE COURT: It's an alternative argument.

23 MR. LOWY: It is an alternative. In fact,
24 the doctrine of constitutional avoidance, if you can
25 avoid that constitutional ruling, you should. The only

1 way you would do that is to deny the Motion for Summary
2 Judgment.

3 THE COURT: Thank you.

4 MR. LOWY: So because there is known
5 violation of law, there is no special protection for
6 the negligence claim, and for the public nuisance
7 claim. And we also come under the negligence per se,
8 negligent entrustment exceptions, and those are dealt
9 with at length in the briefs and also in Judge Conen's
10 decision.

11 Now to address the two points that were,
12 the two cause of actions that were dismissed by --

13 THE COURT: Judge Cooper.

14 MR. LOWY: Judge Cooper, yeah. With all
15 due respect, I think those were incorrect. And, in
16 fact, in the transcript of that hearing, there is not
17 really a clear reasoning set forth as to why those two
18 causes of action were dismissed.

19 Negligence per se, Badger relies almost
20 entirely on this Olson case. And that case is
21 distinguishable for a number of reasons. One, what
22 Olson deals with is a plaintiff who in the court's
23 words were seeking to impose a duty beyond that imposed
24 by the common law. That is not the case here in our
25 negligence per se count.

1 THE COURT: Doesn't it imply a private
2 right of action? Doesn't the statute, the federal
3 statute want to do away with that type of thing in
4 general?

5 MR. LOWY: Your Honor, I think there is
6 in, that is, I think another point because there is a
7 distinction between negligence per se and private
8 rights of action. The Olson case is much more similar
9 to a private right of action. We are not claiming a
10 private right of action. Private right of action would
11 be if we were saying we don't have a negligence claim;
12 however, we are, our cause of action derives from
13 simply from this violation of the statute. That would
14 be a right of implied right of action. What we are
15 seeking is negligence per se, which is a negligence
16 cause of action.

17 THE COURT: Excuse me. Did Judge Conen
18 address that, that issue once Cooper, Judge Cooper put
19 it out there?

20 MR. LOWY: We did not, we did not appeal
21 or seek reconsideration of that decision. Essentially
22 we won on most counts, and we decided rather than delay
23 the case, we would live with it, even though we didn't
24 agree with it. And so, I think Olson, another reason
25 that Olson is distinguishable is the court in Olson

1 noted that that case involved an accidental shooting by
2 a minor. And the court basically looked at the
3 purposes of the Gun Control Act and said that really
4 wasn't what the Gun Control Act was about. That wasn't
5 the intended purpose of the act. The intended purpose
6 was, I am paraphrasing, to prevent criminals from
7 getting guns. And that is, that wasn't that case.
8 That is this case. This, the evidence is that this was
9 a buyer for the Latin Kings, the notorious Latin Kings
10 street gang who was buying guns from Badger, actually
11 putting back into what is essentially a lending library
12 for guns in that, in a gang house. That's actually
13 what the shooter says that's how he got the guns from
14 this. I am using the term "lending library." That's
15 the way he describes it. So that goes at the heart
16 what that criminal act is all about.

17 Finally, and this is a key point, if the
18 Court looks at the intent of the Olson case was I
19 believe 1979 I think.

20 THE COURT: Yes, it was.

21 MR. LOWY: The length of intent to allow
22 negligence per se actions is now crystal clear. In
23 fact, undeniable because of PLCAA itself. PLCAA does
24 not create cause of action. I am not suggesting that
25 it does. However, PLCAA creates, it says there is an

1 express exception for negligence per se actions, and it
2 also in other exceptions specifies cause of action
3 available for other violations of the Gun Control Act.
4 Well clearly Congress is perfectly fine with causes of
5 action for negligence per se and for other violations
6 of the Gun Control Act. Congress could not be saying,
7 PLCAA, we allow for, we specifically allow the
8 negligence per se actions and other actions based on
9 violations of gun laws, except that we don't intend for
10 there to be cause of action, those exact causes of
11 action.

12 THE COURT: Move on to some other issue if
13 you want to. Keep it as short as you can.

14 MR. LOWY: Okay. Well, your Honor, I, I
15 think that addresses the negligence per se claim. I
16 would note that the Williams' decision, which is a New
17 York appellate decision, allowed the negligence per se
18 claim to go forward. In Shirley, the Kansas Supreme
19 Court, this is another straw purchase case against gun
20 dealer. Very similar. And that is more current, post-
21 Protection of Lawful Commerce in Arms Act law. Thank
22 you, your Honor.

23 THE COURT: Any reply, short reply?

24 MR. VOGTS: Yes, your Honor. Just
25 briefly. I hope it doesn't get lost in the morass of

1 briefing that you read and the argument here, but
2 Mr. Lowy did acknowledge that the PLCAA does not create
3 causes of action through these exceptions. They are
4 merely saying claims falling within these exceptions
5 are not preempted by federal law. If you are within
6 the exception, we then have to look to state law to see
7 whether there is such a claim under state law. And the
8 Olson case speaks for itself. There is no negligence
9 per se claim under the Gun Control Act or under the
10 Wisconsin Firearms Statutes that were at issue in this
11 case under the same statutes essentially that the
12 plaintiffs raise here.

13 There is no question that under the third
14 exception, a knowing violation, knowing is important
15 violation of a law applicable to the sale and marketing
16 of firearms. It is not subject to preemption. Again,
17 you have to look to the state law to see whether that
18 claim can be pled. And the defendant's argument is
19 that the statutes, the plaintiffs attempt to plead
20 under that exception are not statute that you can plead
21 in a civil court as a basis for damages.

22 Lastly, your Honor, the point that we
23 didn't brief, but I want to raise now because I know
24 the plaintiffs make this argument. There are
25 individuals in this case that were named defendants.

1 And the named defendants, not in any sort of
2 shareholder capacity or vicarious capacity, but as
3 direct defendants who are alleged to have negligently
4 sold the gun to Jose Fernandez. The plaintiffs have
5 argued both here and in Judge Conen's courtroom that
6 those individuals are not entitled to protection under
7 the PLCAA, that the statute only protects federal
8 licensees, the gun store. Well, actually individuals
9 who work at the gun stores have the same protections
10 afforded to the licensee, a seller.

11 THE COURT: Isn't that the issue about
12 piercing the corporate veil, getting after the actual
13 people who did the, or really running this company?

14 MR. VOGTS: I think that's a separate
15 issue. The plaintiffs do seek to pierce the corporate
16 veil. They also seek to hold these individuals
17 directly responsible in the first instance, not for the
18 corporate act, but for their own act. The plaintiffs
19 allege that, that those people are not protected under
20 the PLCAA because they are not sellers. Only sellers
21 have protection. But the statute defines a seller as a
22 dealer. It refers the reader to the section of the Gun
23 Control Act defining a dealer. A dealer is defined as
24 any person who's engaged in the business of selling
25 firearms at wholesale or retail for a livelihood and

1 for profit. So the people who are selling guns, the
2 people who own gun stores are entitled to the same
3 protection under the PLCAA as their employer, the
4 licensee itself.

5 THE COURT: Mr. Reid.

6 MR. REID: Nothing further, your Honor.

7 THE COURT: All right. It's interesting,
8 the comment brought up, "the lending library." I have
9 been around long enough that I remember when there were
10 not a lot of guns here in Milwaukee available to street
11 criminals, and I prosecuted people who would lend guns
12 for robbers. They would bring them back when they were
13 done. It was interesting. So we had kind of a lending
14 situation, because this guy had guns and other people
15 wanted to commit crimes didn't. Anyway, interesting
16 sidelight. I guess there are enough guns around. You
17 don't have to worry about that, or they are available.

18 Well, it's interesting. I think the
19 Court has to take cognizant of Judge Conen's decision.
20 We must be mindful it's in the same district. We
21 should try to have some continuity in this particular
22 district. If, in fact, the matter is appealed at some
23 point, there should be some continuity. I am not
24 saying I wouldn't make my own decision, but I have read
25 his decision. I have read the materials in the other

1 case and the arguments, the briefing and so on. I
2 think I am in position to, in fact, stay pretty much in
3 accord with Judge Conen on many of the issues. So I
4 ask the plaintiff to draft an order consistent with
5 this Court's decision. And I am telling you, I don't
6 want a long decision trying to say what I said. You
7 might say something like the motion is denied. On
8 these parts of the motion are denied based on the
9 statements made by the Court in his oral decision,
10 which is there, will be there. My reporter I am sure
11 at some point will type it up.

12 Now there are a lot of parallels in this
13 case with the facts of the other case. Apparently two
14 officers were shot in that case also. Two officers
15 were shot here. So we have two police officers who
16 were shot, Jose Lopez III, and Alejandro Arce, I guess
17 it is A-r-c-e, were police officers, were shot by
18 Victor, last name V-e-l-o-z with a gun purchased by
19 Jose Fernandez. And they seek to hold Badger Guns and
20 others legally liable for the shooting under various
21 series. They claim that Badger Guns sale of the
22 firearm to Fernandez was the cause of their injuries.
23 And they allege various grounds and various claims;
24 negligence, negligent entrustment, et cetera, and we
25 will deal with each one of those.

1 The defendant seeks Summary Judgment on
2 all these claims and these cases are so similar in many
3 ways to the facts in the Norberg v. Badger Guns, the
4 case decided by Judge Conen. And it is interesting.
5 He had an opportunity to decide it before I decided it,
6 so I can in fact look at his reasoning and in many ways
7 parallel it.

8 Apparently the public nuisance and
9 negligence per se claim were dismissed on the
10 pleadings, and they were not part of that argument and
11 apparently were not, that issue was not appealed as
12 Mr. Lowy has indicated. And I believe Judge Cooper was
13 the one who did that.

14 This case is not about the individual's
15 right to keep or bear arms. It is about a gun
16 retailer's obligation to follow federal and state law
17 applicable to sales and marketing of firearms. At
18 issue is the scope of the Protection of Lawful Commerce
19 in Arms Act. Later we will talk about PLCAA, which was
20 enacted by Congress to protect federally licensed
21 manufacturers and sellers from civil liability asserted
22 by victims of crime and so on. And it's very clear why
23 that was done, and it is the law that is dealt with.
24 And I will indicate that I am not going to get involved
25 in the constitutionality except to say as far as I can

1 see, it is in fact constitutional. That would be the
2 Court's ruling if in fact we went beyond. I really
3 don't have to make that ruling at this point.

4 Now this act, the real question is in
5 this case is undisputed that the matter falls within
6 the PLCAA's general definition of qualified civil
7 liability actions. At issue is whether one or more of
8 the statutory exceptions apply. And relevant to this
9 case, the PLCAA, does not preclude claims for negligent
10 entrustment or negligence per se, nor does the PLCAA
11 preclude an action in which a manufacturer or seller of
12 qualified products knowingly violates state or federal
13 statute. So that's really the important issue here.

14 It has been talked about as a predicate
15 exception, which is a very interesting way of stating
16 it, but I think it is. We look for that predicate in
17 the facts here when we are deciding whether to grant
18 Summary Judgment and grant the defendant's immunity.
19 You see, immunity is a very strong bar for a plaintiff
20 if it in fact has no exceptions, or no discretion left
21 to parties reviewing the record to give someone, as
22 someone said, "a free pass." No matter what they do,
23 it would be improper. I don't think any act should in
24 fact, could in fact allow that. And if it did, I would
25 find it unconstitutional. Because I don't think that

1 is proper to bar people from coming to court because
2 something has been lobbied by some groups to persuade
3 Congress to do something. So that's a little editorial
4 comment, but. So the question is do they, the
5 plaintiffs fall, their claim fall within the safe
6 harbor of the PLCAA. So let's go on.

7 The Gun Control Act makes it unlawful for
8 dealers to transfer firearms based upon information in
9 that act and knowingly that they know is as reason to
10 believe is false. The act also makes it unlawful for
11 dealers to sell or transfer firearms if they know the
12 purchaser is an unlawful user of controlled
13 substances. In this case, the plaintiff has provided
14 evidence that Fernandez was a dealer of illegal drugs.
15 A jury could reasonably find Fernandez was under the
16 influence of illegal drugs each time he went to Badger
17 Guns. His drug use was evident from his behavior,
18 appearance and smell. Therefore, there is reasonable
19 inference could be made that the defendants knew that
20 Fernandez was an illegal drug user, and that he lied
21 when he filled out the Form 4473. In other words, a
22 reasonable inference could be made that the defendant
23 knowingly violated the Gun Control Act when he sold,
24 when they sold him firearms. So the plaintiff's claim
25 for negligent entrustment meets the definition of

1 negligent entrustment under PLCAA.

2 Defendants argue that the negligent
3 entrustment claim does not meet that definition, but
4 the Court will find it does. Judge Conen considered
5 and rejected this argument. Judge Conen concluded that
6 the use of the word "use" is broader than "discharge,"
7 especially since Congress used the word "discharge" in
8 a different subsection. I am persuaded by Judge
9 Conen's conclusion, and I agree with it. I think it's
10 well reasoned. Accordingly, Summary Judgment will be
11 denied on the negligent entrustment claim.

12 Then we look at the negligence per se. I
13 have already dealt with that. Judge Conen dismissed
14 that. The Court's not going to consider that in this
15 particular case. Again, it's a judge in the same
16 district. So negligence per se will not be considered
17 by this Court, and if I were requested a Motion to
18 Dismiss, I would in fact do so.

19 Now Summary Judgment will also be denied
20 in the civil conspiracy claim. Judge Conen again found
21 material issues of fact, and I think in this particular
22 case, we can do so to state a claim for civil
23 conspiracy the Complaint must allege certain things,
24 and we have talked about that, or you have argued those
25 things. And I think 79 Wis. 2d 241 allows for that

1 particular type of claim under, if there are
2 violations, or it is shown that these, number one, that
3 the formation, operation of a conspiracy, the wrongful
4 act or acts done pursuant thereto, and the damages
5 resulted from such act.

6 Now it is interesting when we look at what
7 happened here, you know, I don't know how this is going
8 to sell to a jury, but it is very damning I think. And
9 the defendants argue that it can't be a basis for civil
10 conspiracy. And there is no evidence of conspiracy to
11 sell. Judge Conen considered that and rejected similar
12 arguments, found material issues of fact. Whether the
13 defendant formed or operated a conspiracy to maintain
14 the unlawful sales practice at Badger Guns after ATF
15 threatened to revoke their license; whether the lawful
16 sale was a civil wrong; and three, whether the
17 plaintiff's injury was a foreseeable result. I am
18 persuaded by his reasoning. And accordingly, Summary
19 Judgment shall be denied under the civil conspiracy
20 claim.

21 You know, we will get into more of this
22 piercing the corporate veil, but it is an interesting
23 phenomena what happened here with the transfer of this
24 property, or this licensing and so on. It smacks of
25 really maybe even underhand activity.

1 So did they aid and abet? In light of
2 Judge Conen's ruling on similar facts, Summary Judgment
3 will be denied on that also. They transferred Badger
4 Outdoors Inventory to Adam Allan for no money down;
5 facilitating the operation of Badger Guns; three,
6 continuing Badger Guns with the same employees and
7 utilizing the same unlawful sales practices. It is
8 interesting that there was this, as I indicated
9 earlier, potential conspiracy or aiding and abetting.
10 Let's just keep doing what we were doing before. We
11 will just change the owner, the name.

12 And that dovetails right into the
13 piercing the corporate veil. Judge Conen ruled under
14 similar facts. It may be unclear at this stage of the
15 proceedings whether fraud was committed in order to
16 sell guns illegally. In this case, the plaintiff
17 submitted evidence that Allan Adam or Adam Allan had
18 complete domination over Badger Guns as the sole
19 shareholder. And it's interesting. So we will in fact
20 allow the issue of piercing the corporate veil, and
21 it'll be interesting jury instructions and verdicts on
22 that. But I can tell you right now some other judge
23 will have to worry about that I think because I am
24 leaving here July 31st, retiring after 38 years. And
25 Judge DiMotto will be the judge who will probably take

1 up this issue, or this trial and how it's going to be
2 tried.

3 In light of Judge Conen's ruling, Summary
4 Judgment is denied with respect to plaintiff's claim
5 against Allan Adam, or Adam Allan individually. And he
6 declined to dismiss the plaintiff's claim against him
7 as an individual. And the Court will rule the same.
8 Thus, the defendant's Motion for Summary Judgment is
9 granted in part on the negligence per se claim, and it
10 is not granted, or it is granted, I'm sorry, and denied
11 in part under all the other claims I have indicated.
12 So I guess the next thing should be is that you should
13 get together with my clerk and find a date that's
14 convenient for all of you. I will schedule this case,
15 get you moving. But I can tell you, with my vacation
16 time and things coming up, I am not going to be trying
17 this case. I am sure you will do a lot of discovery
18 anyway.

19 MR. VOGTS: Your Honor, if I may, your
20 Honor, I don't believe you addressed the public
21 nuisance claim that Judge Cooper dismissed.

22 THE COURT: I guess I didn't. Yeah.
23 Well, it was dismissed by Judge Cooper. I will in fact
24 do the same here. That hasn't really been argued that
25 greatly here.

1 Okay. All right, plaintiff is to draft an
2 order consistent with the Court's decision under the
3 five-day rule. And you sit with my clerk and your
4 calendars, find a good date for a -- that can fit my
5 calendar for scheduling. We will get you all together.
6 Those that are out of town may be able to appear by
7 phone, but I would like to have most of the main
8 parties here so we can fully discuss the time, timing
9 you need. Okay, so we will go off the record now and
10 get together with my clerk.

11 MR. DUNPHY: Judge, we can stay off the
12 record for this.

13 (Discussion held off the record).

14 THE COURT: Let's do this. Set it for
15 pretrial with Judge DiMotto after the trial before
16 Judge Conen. Hopefully that trial will go on and won't
17 be adjourned.

18 We are going to do a scheduling order
19 right now off the record.

20 (Whereupon further proceedings were held
21 off the record and the proceedings concluded).

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CERTIFICATE PAGE

STATE OF WISCONSIN)

)
MILWAUKEE COUNTY)

I, Phyllis Peoples, Court Reporter, do hereby
certify that I am a shorthand reporter; that I was present
at the taking of the foregoing proceedings, and that I
recorded the said proceedings on the Stenograph machine;
that the above and foregoing proceedings is a full, true and
correct copy, in typewritten longhand, of my original
machine shorthand notes taken at said hearing.

Dated this 27th day of March, 2014,
Milwaukee, Wisconsin.

Phyllis Peoples (Digital Signature Permitted)
Phyllis Peoples, RPR, CMR
Circuit Court Reporter
Branch 32

COURT OF COMMON PLEAS WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARK AND LEAH GUSTAFSON	)	No. 1126 of 2018
Individually and as Administrators	)	
And Person Representatives of the	)	
ESTATE of JAMES ROBERT ("J.R.")	)	
GUSTAFSON,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	
SPRINGFIELD, Inc. d/b/a/	)	
SPRINGFIELD ARMORY, and	)	
	)	
SALOOM DEPARTMENT STORE;	)	
and SALOOM DEPT. STORE, LLC	)	
	)	
Defendants.	)	

**UNITED STATES' MOTION TO INTERVENE AND MEMORANDUM IN SUPPORT
OF THE CONSTITUTIONALITY OF THE PROTECTION OF LAWFUL COMMERCE
IN ARMS ACT**

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TABLE OF CONTENTS

INTRODUCTION	1
STATUTORY BACKGROUND.....	3
ARGUMENT	5
I. The PLCAA Is a Valid Exercise of Congress’s Power Under the Commerce Clause, the Supremacy Clause, and Other Authorities.....	5
II. The PLCAA Does Not Deprive Plaintiffs of Any Rights Without the Due Process of Law.	11
A. Plaintiffs Have No Property Interest Protected by the Fifth Amendment.	11
B. Plaintiffs’ Claim That Due Process is Violated By the Absence of a Substitute Remedy is in Error.	13
C. The PLCAA Does Not Violate Equal Protection.	16
III. The PLCAA Comports with the Tenth Amendment and Principles of Federalism.	19
IV. Principles of Constitutional Interpretation Require Giving Full Effect to the Text of the PLCAA.....	21
CONCLUSION.....	25

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<i>Adames v. Sheahan</i> , 909 N.E.2d 742 (Ill. 2009), <i>cert. denied</i> , 130 S. Ct. 1014 (2009)	1, 2, 20
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<i>Almendarez-Torres v. United States</i> , 523 U.S. 224 (1998)	22
<i>Am. Trucking Ass’n v. Smith</i> , 496 U.S. 167 (1990)	9
<i>BMW of N. Am., Inc. v. Gore</i> , 517 U.S. 559 (1996)	6, 7, 23
<i>Bond v. United States</i> , 134 S. Ct. 2077 (2014)	21
<i>Breazeale v. Victim Svcs., Inc.</i> , 198 F. Supp. 3d 1070 (N.D. Cal. 2016)	23
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<i>City of Boerne v. Flores</i> , 521 U.S. 507 (1997)	9
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<i>City of N.Y. v. Beretta</i> , 524 F.3d 384 (2d Cir. 2008), <i>cert. denied</i> , 129 S. Ct. 1579 (2009)	<i>passim</i>
<i>Comm’n Imp. Exp., S.A. v. Rep. of Congo</i> , 757 F.3d 321 (D.C. Cir. 2014)	23
<i>Connecticut v. Physicians Health Servs. of Conn., Inc.</i> , 287 F.3d 110 (2d Cir. 2002)	20

<i>Delana v. CED Sales, Inc.</i> , 486 S.W. 3d 316 (Mo. 2016)	<i>passim</i>
<i>DiPippa v. U.S.</i> , 687 F.2d 14 (3d Cir. 1982).....	15, 16, 17
<i>District of Columbia v. Beretta</i> , 940 A.2d 163 (D.C. 2008), <i>cert. denied</i> , 129 S. Ct. 1579 (2009)	1, 2, 14, 15
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<i>Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council</i> , 485 U.S. 568 (1988).....	22, 24
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<i>Ezell v. City of Chi.</i> , 651 F.3d 684 (7th Cir. 2011)	10
<i>FCC v. Beach Comms.</i> , 508 U.S. 307 (1993).....	17, 18
<i>Gonzales v. Raich</i> , 545 U.S. 1 (2005).....	5
<i>Gray v. First Winthrop Corp.</i> , 989 F.2d 1564 (9th Cir. 1993)	16
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991).....	21, 22
<i>Gronne v. Abrams</i> , 793 F.2d 74 (2d Cir. 1986).....	15

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<i>Healy v. Beer Inst., Inc.</i> , 491 U.S. 324 (1989).....	25
<i>Heller v. Doe</i> , 509 U.S. 312 (1993).....	16, 17
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<i>Ileto v. Glock</i> , 421 F. Supp. 2d 1274 (C.D. Cal. 2006)	18, 19
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<i>Logan v. Zimmerman Brush Co.</i> , 455 U.S. 422 (1982).....	2, 15
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<i>Martinez v. California</i> , 444 U.S. 277 (1980).....	14, 15
<i>McBride v. General Motors Corp.</i> , 737 F. Supp. 1563 (M.D. Ga. 1990)	19
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<i>Murphy v. NCAA</i> , 138 S. Ct. 1461 (2018).....	7
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<i>N.Y. Cent. R.R. Co. v. White</i> , 243 U.S. 188 (1917).....	12
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<i>Silver v. Silver</i> , 280 U.S. 117 (1929).....	10, 14
<i>Singer v. Sheppard</i> , 346 A.2d 897 (Pa. 1975).....	13
<i>Teixeira v. Cty. of Alameda</i> , 873 F.3d 670 (9th Cir. 2017)	10, 18
<i>Town of Castle Rock v. Gonzales</i> , 545 U.S. 748 (2005).....	12
<i>Truax v. Corrigan</i> , 257 U.S. 312 (1921).....	14
<i>U.S. v. Morrison</i> , 529 U.S. 598 (2000).....	8
<i>Wyeth v. Levine</i> , 555 U.S. 555 (2009).....	6, 22, 23
<i>Ziglar v. Abbasi</i> , 137 S. Ct. 1843 (2017).....	19

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 8.....	5, 22
U.S. Const. art. VI.....	5, 6

STATUTES

5 U.S.C. § 7901.....	<i>passim</i>
15 U.S.C. § 7903.....	<i>passim</i>

15 U.S.C. §§ 7901-7903	1
15 U.S.C. § 7902.....	4, 6
18 U.S.C. § 229.....	23
28 U.S.C. § 2403.....	1
42 Pa.C.S. § 6302 (West).....	23, 24
D.C. Code Ann. §§ 7-2551.01-.03 (2006)	25
PLCAA § 5	20
Surface Transportation and Uniform Relocation Assistance Act of 1987, 101 Stat. 170	8
Va. Code Ann. § 15.2-915.1 (2006).....	25

STATE RULES

Pa. R. Civ. P. 2327	1
Pa. R. Civ. P. 2328.....	1

OTHER AUTHORITIES

151 Cong. Rec. S9059 (July 27, 2005)	8, 10, 11, 25
H.R. Rep. No. 109-124 (2005).....	6, 11, 15, 25

INTRODUCTION

Pursuant to 28 U.S.C. § 2403(a) and consistent with Rules 2327 and 2328 of the Pennsylvania Rules of Civil Procedure, the United States of America hereby intervenes in this case for argument on the constitutional challenge to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (“PLCAA” or “Act”) contained in Plaintiffs’ August 7, 2018 Answer to the Preliminary Objections of Defendants (“Pls. Ans.”).

“The PLCAA generally preempts claims against manufacturers and sellers of firearms and ammunition resulting from the criminal use of those products.” *Ileto v. Glock*, 565 F.3d 1126, 1131 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 3320 (2010). The PLCAA stands on firm constitutional footing: “Every federal and state appellate court to address the constitutionality of the PLCAA has found it constitutional.” *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1222 (D. Colo. 2015). Virtually identical arguments to those advanced by Plaintiffs here have already been rejected by numerous courts in previous PLCAA litigation. *See, e.g., id.*; *Ileto*, 565 F.3d 1138 (9th Cir. 2009); *City of New York v. Beretta*, 524 F.3d 384, 392-98 (2d Cir. 2008), *cert. denied*, 129 S. Ct. 1579 (2009); *Jefferies v. Dist. of Col.*, 916 F. Supp. 2d 42 (D.D.C. 2013); *Estate of Charlot v. Bushmaster Firearms, Inc.*, 628 F. Supp. 2d 174 (D.D.C. 2009); *Delana v. CED Sales, Inc.*, 486 S.W. 3d 316 (Mo. 2016); *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), *cert. denied*, 130 S. Ct. 1014 (2009); *District of Columbia v. Beretta*, 940 A.2d 163 (D.C. 2008), *cert. denied*, 129 S. Ct. 1579 (2009).

Nevertheless, Plaintiffs argue that the PLCAA is either unconstitutional, or should be interpreted narrowly in light of principles of federalism and constitutional avoidance to bar application of the Act’s explicit terms to Plaintiffs’ claims. *See* Pl. Ans. at 8-22. As explained in many of the prior

PLCAA cases—and as elaborated below—Plaintiffs’ constitutional claims each fail for reasons specific to that claim:

- Due Process. Plaintiffs cannot succeed on their due process claim because: 1) they “do not have a constitutionally protected property interest in their unlitigated common law claims,” *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 88 n.32 (1978) (internal quotation marks and alterations omitted)); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (“statutes 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, e.g., Ileto*, 565 F.3d at 1140-44 (rejecting similar due process argument); *District of Columbia v. Beretta*, 940 A.2d at 177 n.8.
- Equal Protection. Plaintiffs’ Fifth Amendment equal protection argument fails because they concede that the easily-satisfied rational basis standard applies to this claim, and there is a rational basis for Congress to have reasonably concluded that “nationwide commerce in firearms was particularly imperiled by the threat” of the lawsuits restricted by the Act. *City of N.Y. v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 295 (E.D.N.Y. 2005) (Weinstein, J.) (rejecting equal protection challenge to PLCAA; finding that exception to PLCAA applied), *rev’d on other grounds, Beretta*, 524 F.3d 384 (2009) (equal protection not addressed).
- Tenth Amendment and Federalism. The PLCAA does not violate the Tenth Amendment or otherwise interfere with the sovereign rights of the Commonwealth of Pennsylvania. The Act merely preempts certain inconsistent state laws, consistent with constitutional principles of federalism. *See, e.g. Beretta*, 524 F.3d at 397; *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 very premise of Plaintiffs’ federalism claims is incorrect: the PLCAA does not implement a wall of separation between common law

and statutory claims, as Plaintiffs contend. Rather, the 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).

- Congressional Authority. The 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 County v. Guillen*, 537 U.S. 129, 147 (2003). Congress took care to specifically limit the scope of the PLCAA to interstate or foreign commerce. *See* 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.

In short, the PLCAA is constitutional and Plaintiffs’ arguments to the contrary should be rejected, has this brief explains in further detail.

STATUTORY BACKGROUND

The PLCAA bars certain tort actions that threaten to interfere with interstate and foreign commerce in firearms and disrupt Americans’ ability to exercise the individual right to keep and bear

arms recognized in the Second Amendment to the United States Constitution. The PLCAA provides that “[a] qualified civil liability action” against the manufacturers or sellers of firearms “may not be brought in any Federal or State court.” 15 U.S.C. §§ 7902, 7903(5)(A). The Act defines a “qualified civil liability action” to include “a[ny] 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 provides exceptions that allow certain classes of actions to continue to be brought. *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 the PLCAA for three primary reasons. First, Congress acted to protect the constitutional “rights of individuals . . . to keep and bear arms,” as recognized by the Second Amendment to the United States Constitution, against the “diminution of [this] basic constitutional right and civil liberty” by “[t]he possibility of imposing liability” in qualified civil liability actions. 15 U.S.C. §§ 7901(a)(1)-(2); 7901(a)(6); *see also id.* § 7901(b)(2) (“preserv[ing] a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting [and] self-defense”). Second, 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 . . . are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products. . . .” *Id.* § 7901(a)(5). Third, Congress recognized

that qualified civil liability actions, which carry “[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others” are “an abuse of the legal system . . . and constitute[] an unreasonable burden on interstate and foreign commerce of the United States.” *Id.* § 7901(a)(6).

ARGUMENT

I. The PLCAA Is a Valid Exercise of Congress’s Power Under the Commerce Clause, the Supremacy Clause, and Other Authorities.

As courts have repeatedly recognized, the PLCAA is an entirely valid exercise of congressional authority under the Commerce Clause and the Supremacy Clause. *See* U.S. Const. art. I, § 8; *id.* art. VI. The Constitution grants Congress the authority “[t]o regulate commerce with foreign nations, and among the several states,” *id.* art. I, § 8. That enumeration entails “the power to regulate activities that substantially affect interstate commerce,” as the PLCAA does. *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). Congress explained that it enacted the PLCAA because it concluded, in relevant part, that “[l]awsuits [that] have been 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); *see Ileto*, 565 F.3d at 1140-41 (“We have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected”). As the Second Circuit concluded, “Congress has not exceeded its authority . . . where there can be no question of the interstate character of the industry in question and where Congress rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail.” *City of New York*, 524 F.3d at 395.

While state tort law issues are generally left to the states, Congress can, pursuant to the 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 (“[T]he Laws of the United States . . . shall be the [S]upreme Law of the Land.”); *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). The 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”); 5 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.”).

In *BMW*, the Court noted 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 the 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.” In addition, Congress has explained that the purpose of the 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, the 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.” *BMW*, 517 U.S. at 571-72 (citation and internal marks omitted).¹

As noted above, courts have relied on: 1) this well-established law; 2) Congress’s findings in the PLCAA regarding the effect of firearms liability on interstate and foreign commerce; and 3) Congress’s explicit limitation of the PLCAA’s scope to interstate and foreign commerce to hold that Congress lawfully acted within its authority in preempting qualified civil liability actions through the PLCAA. *See Beretta*, 524 F.3d at 394-95 (“Congress explicitly found that the third-party suits that the Act bars are a direct threat to the firearms industry,” and “rationally perceived a substantial effect on the industry of the litigation that the Act seeks to curtail.”); *Ileto*, 565 F.3d at 1141 (having “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”). This Court should reach the same result.

Notwithstanding these precedents, Plaintiffs contend that language in *Murphy v. NCAA*, 138 S. Ct. 1461, 1481 (2018) has imposed a new restriction on Congress’s exercise of Commerce Clause authority in the PLCAA because, in Plaintiffs’ view, the Act “does not regulate conduct of the gun industry at all; it simply restricts liability.” But it is well-established that liability rules are a form of economic regulation. *See, e.g., Riegel v. Medtronic*, 552 U.S. 312, 323-25 (2008) (recognizing that “[s]tate tort law,” including “common-law duties,” imposes regulatory standards on manufacturers);

¹ Congress took particular care to limit the scope of the PLCAA to interstate or foreign commerce. *See* 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).

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”). Plaintiffs’ argument therefore proceeds from an erroneous premise, because the adjustment of the rules of liability under the PLCAA is a type of regulation of economic activity within the core of Congress’s Commerce Clause power. *See U.S. v. Morrison*, 529 U.S. 598, 613 (2000) (reaffirming longstanding authority for “Commerce Clause regulation of intrastate activity . . . where that activity is economic in nature”).²

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 134.³ 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

² Congress made clear that it intended its exercise of Commerce Clause authority in the PLCAA to be based on the economic nature of 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.A. § 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.”).

³ 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).

nexus to interstate commerce. *See Guillen v. Pierce County*, 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. Here, Congress has 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’n 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.”).

Plaintiffs are also in error when they assert, without authority or argument, that “[t]he only possible Congressional authority for PLCAA is the Commerce Clause.” Pls. Ans. at 29. As explained above, the PLCAA is readily sustained on the basis of the Commerce Clause, but Plaintiffs fail to note that the PLCAA directly identifies multiple other valid sources of Congressional authority. Among these, Congress placed particular importance on the need 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.” 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] 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 PLCAA. As Congress explained, limiting the “expansion of the common law” to qualified civil liability actions was necessary because such actions carry the “possibility of imposing liability on an entire industry for harm that is solely caused by others.” 15 U.S.C. §§ 7901(a)(6), (7). The link between the firearms industry and the right to keep and bear arms is self-evident: the Second Amendment protects those “rights necessary to the realization of the core right to possess a firearm for self-defense,” including the right to acquire firearms through purchase or manufacture. *Teixeira v. Cty. of Alameda*, 873 F.3d 670, 676 (9th Cir. 2017) (*en banc*) (collecting cases); *see District of Columbia v. Heller*, 554 U.S. 570, 617-18 (2008) (“to bear arms implies something more than the mere keeping” (internal quotation omitted); *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). Individuals cannot purchase firearms and ammunition absent those who are able to sell them, and thus, reasonable for Congress to protect manufacturers and sellers from liability.⁴

In addition, the legislative history reflects numerous specific examples of the threat to the rights protected by the Second Amendment that Congress sought to counteract.⁵ In the PLCAA, Congress

⁴ Nor is it correct that the possibility a State could create “limitless liability” through a statutory exception to the PLCAA, *see* Pls. Ans. at 28, renders the PLCAA irrational. When Congress has identified a problem that needs solving—whether a disruption of interstate and foreign commerce, a threat to the right to keep and bear arms, or a deprivation of the “rights, privileges, and immunities” guaranteed by the Fourteenth Amendment, *see* 15 U.S.C. § 7901(a)(7)—“there is no constitutional requirement that a regulation . . . must reach every class to which it might be applied—that the Legislature must be held rigidly to the choice of regulating all or none.” *Silver v. Silver*, 280 U.S. 117, 123 (1929).

⁵ *See, e.g.*, 151 Cong. Rec. 104 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

incorporated specific findings about this threat to the right to keep and bear arms, *see* 15 U.S.C. § 7901(a), and indeed, Plaintiffs’ lawsuit is precisely the type of effort to “force [manufacturers] to change the way they make and sell guns” that Congress sought to address. *Compare* 151 Cong. Rec. 104 at S9074 (Statement of Sen. Frist) *with* Complaint at ¶ 66-69. In addition, by restricting only qualified civil liability actions, the specific type of lawsuits that Congress determined to pose a threat to the right to keep and bear arms, Congress further ensured that it was acting in a proportional and congruent manner. *See Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 738-39 (2003) (“find[ing] significant the . . . limitations that Congress placed on the scope” of remedial legislation).

II. The PLCAA Does Not Deprive Plaintiffs of Any Rights Without the Due Process of Law.

A. Plaintiffs Have No Property Interest Protected by the Fifth Amendment.

Plaintiffs’ due process claims are premised on the assumption that they have a constitutionally protected property right in unlitigated tort claims. *See* Pls. Ans. at 25-26. However, as the Supreme Court and numerous other courts have made clear, a claim does not become a vested property right until it has been reduced to a final and unreviewable judgment, which is not the case here. Property

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”; *id.* 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. Firearm 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”); H.R. Rep. No. 109-124 at 11 n.48 (2005) (enumerating 18 different lawsuits filed in the late 1990s and early 2000s). These and other examples in the legislative history belie the statement in *City of N.Y. v. Beretta*, 401 F. Supp. 2d 244 (E.D.N.Y. 2005), 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.

interests protected by the United States Constitution “‘are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.’” *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 756 (2005) (quoting *Paul v. Davis*, 424 U.S. 693, 709 (1976)) (internal quotation marks omitted)). Nevertheless, “[a]lthough the underlying substantive interest is created by an independent source such as state law, federal constitutional law determines whether that interest rises to the level of a legitimate claim of entitlement protected by the Due Process Clause.” *Castle Rock*, 545 U.S. at 757 (quoting *Memphis Light, Gas & Water v. Craft*, 436 U.S. 1, 9 (1978)).

Federal law holds that no property right exists here. *See N.Y. Cent. R.R. Co. v. White*, 243 U.S. 188, 198 (1917) (“No person has a vested interest in any rule of law, entitling him to insist that it shall remain unchanged”). Indeed, *Duke Power*, the most recent federal precedent plaintiffs cite, states that it is: “clearly established that [a] person has no property, no vested interest, in any rule of the common law.” 438 U.S. at 88 n.32 (internal quotation marks omitted). Numerous federal circuit courts have repeatedly agreed that legislation affecting tort claims is permissible under the Fifth Amendment, because rights in tort only vest and create a property interest once there is a final, unreviewable judgment. *See, e.g., In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996) (“Under the United States Constitution, legislation affecting a pending tort claim is not subject to ‘heightened scrutiny’ due process review because a pending tort claim does not constitute a vested right”); *Schmidt v. Ramsey*, 860 F.3d 1038, 1048 (8th Cir. 2017), *cert. denied*, sub nom. *Schmidt v. Bellevue Med. Ctr.*, 138 S. Ct. 506 (2017) (“We decline to extend *Duke Power* to hold its inverse: that a statute violates due process when it curtails a common law remedy without providing a just substitute”); *Carr v. U.S.*, 422 F.2d 1007, 1010-11 (4th Cir. 1970) (no “vested right in being which was sought to be abrogated” and therefore “no interest entitled to constitutional protection” where claim arose after enactment of statute abolishing common law cause of action). As the Fifth Circuit Court of Appeals has emphasized, there is

“no prior vested right in a cause of action” like that asserted by Plaintiffs, which “did not arise until after passage” of the PLCAA. *Ducharme v. Merrill-Nat’l Labs.*, 574 F.2d 1307, 1310 (5th Cir. 1978).⁶

TMI is particularly relevant to this case because the United States Court of Appeals for the Third Circuit held that non-final state and common law claims arising under state tort laws can be retroactively abrogated due to congressional legislation, *see* 89 F.3d at 1112, and that no due process violation occurs upon their abrogation. *See id.* at 1113-14. *TMI* reasoned that “legislation affecting a pending tort claim is not subject to ‘heightened scrutiny’ due process review because a pending tort claim does not constitute a vested right.” *Id.* at 1113. Similarly, there was no “vested right in being” which was abrogated by the PLCAA, and so Plaintiffs “had no interest entitled to constitutional protection.” *Carr*, 422 F.2d at 1011.⁷

B. Plaintiffs’ Claim That Due Process is Violated By the Absence of a Substitute Remedy is in Error.

Even if Plaintiffs could establish that a property right exists in a cause of action abolished prior to the events at issue in this litigation, Plaintiffs’ contention that the PLCAA must “provid[e] an alternate remedy” or else violate the Due Process Clause is without merit. Pls. Ans. at 26. There is no due process right to limitless common law claims against a specific Defendant or type of defendant for a specific theory of liability, as Plaintiffs contend here, and so it is not a violation of due process to

⁶ The Pennsylvania Supreme Court has also held that neither the Pennsylvania Constitution nor the United States Constitution bars legislation “extinguishing a cause of action” or “partially eliminating tort action as a legal injury.” *Singer v. Sheppard*, 346 A.2d 897, 903 (Pa. 1975) (finding no violation of due process, equal protection, or state constitutional rights in statute “limiting damages recoverable by motor vehicle accident victims”).

⁷ In this way, tort claims differ from contract claims, which may be protectable property, because “[u]nlike contract claims, [a] tort claim[] asserted [] lack[s] ‘investment-backed expectations.’” *In re Consolidated United States Atmospheric Testing Litig.*, 820 F.2d 982, 989 (9th Cir. 1987) (citations omitted). *See also Hammond v. U.S.*, 786 F.2d 8, 11 (1st Cir. 1986) (discussing the distinction between tort claims, which create no vested property interest and other sorts of claims that create property rights).

circumscribe some forms of such liability.

At the outset, almost every court in the country that has faced this exact same claim has rejected it. *See Delana*, 486 S.W. 3d at 323-24, *Ileto*, 565 F.3d at 1140; *District of Columbia v. Beretta*, 940 A.2d at 177 n.8.⁸ And for good reason, as this contention is foreclosed by binding case law. Plaintiffs rely on the Supreme Court’s opinion in *Duke Power*, *see* Pls. Ans. at 26, but that case creates no requirement of a substitute remedy. To the contrary, the Court in *Duke Power* stated explicitly that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy.” 438 U.S. at 88; *see Schmidt*, 860 F.3d at 1048 (analyzing *Duke Power* and rejecting similar argument). Indeed, for nearly a century, it has been clear that legislatures may abolish common law tort remedies or create immunity for pending claims without providing an alternate remedy. *See Silver*, 280 U.S. at 122.⁹

Any doubts about the effect of *Duke Power* on this longstanding principle were conclusively removed just two years later in *Martinez v. California*, 444 U.S. 277 (1980). In *Martinez*, the survivors of a woman murdered by a released parolee brought a tort action against the state officials who approved the parolee’s release, who argued that such claims were extinguished by a statute that barred liability, without any exceptions, for any injury resulting from a decision to parole a prisoner. Although the state statute provided no alternate remedy, the Supreme Court rejected a due process challenge, holding that the statute “merely provides a defense to potential state tort-law liability” and “neither

⁸ The sole exception are a pair of holdings by lower state courts. But those decisions are clearly in error in light of the federal precedent discussed in this section.

⁹ As the Supreme Court of Alaska explained in rejecting a similar claim, Plaintiffs’ resort to *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) and *Truax v. Corrigan*, 257 U.S. 312, 330 (1921), is unavailing: “[E]ach discusses the elimination of a previously vested property right.” *Coxe*, 295 P.3d at 391; *compare* Pls. Ans. at 25.

authorized nor immunized the deliberate killing of any human being.” *Id.* at 281. *See also Gronne v. Abrams*, 793 F.2d 74, 78 (2d Cir. 1986) (“The authority of the legislature to abolish entirely a common law right to sue . . . is well established.”) (citations omitted); *Ducharme*, 574 F.2d at 1310 (collecting cases upholding liability-limiting legislation “where no remedy was substituted in place of the cause of action that was taken away”).¹⁰

Moreover, the PLCAA does leave Plaintiffs with remedies for the harms caused by the unlawful use of firearms. Plaintiffs may sue the individual who “pled guilty to . . . involuntary manslaughter in juvenile court” for committing the shooting. Compl. at ¶ 29. Plaintiffs may also sue manufacturers, distributors, and sellers under any claim that falls within the Act’s multiple exceptions. *See* 15 U.S.C. § 7903(5)(A)(i)-(vi). The Act thus merely limits the particular claims that Congress found to impose an undue burden on interstate commerce; in no way does it eliminate the right to recover altogether. *See Ilto*, 565 F.3d at 1143 (explaining that the Act “does not completely abolish Plaintiffs’ ability to seek redress”); *id.* at 1144 (noting that “Congress has left in place a number of substitute remedies”); *District of Columbia v. Beretta*, 940 A.2d at 177 n.8 (declining to consider claim that due process requires Congress to supply an alternative remedy because “Congress did not deprive injured persons of all potential remedies against manufacturers or sellers of firearms that discharge causing them injuries”). The fact that Plaintiffs wish to sue particular entities or to advance particular theories of liability and are barred from doing so does not mean Plaintiffs have no remedy altogether. *See DiPippa v. U.S.*, 687

¹⁰ The Court again reaffirmed this principle in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). In *Logan*, the plaintiff challenged the procedures under which his state-law claim for unlawful termination was denied. *Id.* at 426-29. The property right at issue was an existing state-law claim, which Logan argued could not be extinguished without fair procedures. In agreeing with that argument, the Supreme Court in no way suggested that the elimination of Logan’s state-law claim by a legislature would implicate any property interests. To the contrary: “[T]he State remains free . . . to eliminate its statutorily created causes of action altogether.” *Id.* at 432. When it does so, “the legislative determination provides all the process that is due.” *Id.* at 433 (citation omitted).

F.2d 14, 18 (3d Cir. 1982) (discussing statutory schemes where Congress has substituted the United States as a defendant for other parties).

C. The PLCAA Does Not Violate Equal Protection.

The 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, but the PLCAA merely preempts certain state law causes of action and the so-called “classes” identified by Plaintiffs are not cognizable under equal protection. *See Lyon v. Agusta S.P.A.*, 252 F.3d 1078, 1086 (9th Cir. 2001) (explaining that plaintiff’s equal protection challenge to economic regulation on the basis of statute’s disparate treatment of different classes of litigants was “stymied by precedent,” and discussing *Gray v. First Winthrop Corp.*, 989 F.2d 1564, 1573-74 (9th Cir. 1993)). Plaintiffs have therefore not identified a classification drawn by the statute that can be the subject of an equal protection challenge.

Even if an equal protection classification of this sort is cognizable, the statute easily withstands rational basis review, which Plaintiffs acknowledge would apply.¹¹ *See* Pls. Ans. at 26-27; *compare*, e.g., *Duke Power*, 438 U.S. at 83-84 (rejecting application of any “more elevated standard of review” to a “liability-limit[ing] provision” with a stated economic purpose). As a general rule, equal protection principles do not require the legislature to treat all types of tort lawsuits identically. *See DiPippa*, 687 F.2d at 19 (“disparity in treatment between persons compensated under FECA [substitute tort liability

¹¹ Importantly, “the federal rational basis test differs significantly from [Pennsylvania’s] own in terms of the degree of deference it affords to legislative judgment . . . ‘a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification. A State, moreover, has no obligation to produce evidence to sustain the rationality of a statutory classification 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.’” *Shoul v. Commonwealth, Dep’t of Trans.*, 173 A.3d 669, 677 (Pa. 2017) (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

statute] and those who are not” does not violate equal protection); *Alexander v. Beech Aircraft*, 952 F.2d 1215, 1226 (10th Cir. 1991) (rejecting equal protection claim where different discovery rules “applie[d] to [different] classes of torts”) *Robson v. Penn Hills Sch. Dist.*, 437 A.2d 1273, 1276 (Pa. Commw. Ct. 1981) (no equal protection violation in tort classifications that “serve to define clearly the extent of the risk” to tortfeasors). And “barring certain types of tort suits while allowing others is a rational way” for Congress to achieve its aims in the PLCAA. *Coxe*, 295 P.3d at 392.

In this case, Congress rationally concluded that the unpredictability of common law tort actions could pose a greater threat to the firearms industry than would defined legislative enactments resulting from democratic processes. *See* 15 U.S.C. § 7901(a)(7).¹² This conclusion is all that is required, because “rational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” *Heller v. Doe*, 509 U.S. at 319 (quoting *FCC v. Beach Comms.*, 508 U.S. 307, 313 (1993)). Indeed, there is no obligation to produce evidence to sustain the rationality of a statutory judgment, because “a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.” *Beach Comms.*, 508 U.S. at 315 (citation omitted).

Congress’s findings and the legislative history of the PLCAA further demonstrate in several ways that the PLCAA is neither an irrational nor arbitrary way of accomplishing its purposes. First, Congress explained that one basis for the PLCAA is its determination that firearms manufacturers and distributors liable for the unlawful acts of third parties “constitutes an unreasonable burden on interstate and foreign commerce of the United States.” 15 U.S.C. § 7901(a)(6). The PLCAA directly prevents

¹² As the Seventh Circuit Court of Appeals has explained, such 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. *Martin v. Harrington and Richardson*, 743 F.2d 1200, 1204 (7th Cir. 1984).

such burdens by prohibiting specified causes of action that could result in crippling liability for the firearms industry, a well-established basis for congressional action. *See, e.g., Duke Power*, 438 U.S. at 93-94 (statute that limited the liability of nuclear power companies furthered the legitimate purpose of encouraging the production of nuclear power); *N.Y. v. Beretta*, 401 F. Supp. 2d at 295 (finding that Congress’s desire to insulate firearms manufacturers and dealers from threat of qualified civil liability actions provided rational basis for enacting the PLCAA). There can be no question that the PLCAA advances 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.” *Ileto v. Glock*, 421 F. Supp. 2d 1274, 1301 (C.D. Cal. 2006).

Second, Congress enacted the PLCAA to protect 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). As explained above, Congress set forth a reason for its action that is not only rational, but congruent to Congress’s exercise of its authority. The “expansion of the common law” to avoid the “possibility of imposing liability” on the entire firearms industry, 15 U.S.C. §§ 7901(a)(6), (7), would be likely to affect the exercise of the right to keep and bear arms. This is true because the Second Amendment protects those “rights necessary to the realization of the core right to possess a firearm for self-defense,” such as the right to acquire firearms from manufacturers and retailers. *See Teixeira*, 873 F.3d at 676.

In addition, Congress amply explained its reasoning for categorizing some tort actions as “qualified civil liability actions,” differentiating between legislative “contemplat[ion],” including that of the “legislatures of the several States,” and the use of “theories without foundation in hundreds of years of the common law and jurisprudence . . . [to] expand civil liability.” 15 U.S.C. §§ 7901(a)(7), 7903(5)(A). Congress grounded these findings in its actual knowledge of “liability actions commenced or contemplated” that sought “to use the judicial branch to circumvent the Legislative branch of

government to regulate interstate and foreign commerce through judgments and judicial decrees.” 15 U.S.C. § 7901(a)(8). As the district court in *Ileto* recognized, the PLCAA’s “legislative history contains repeated references about the dire consequences of . . . ‘predatory’ lawsuits” and it cannot be disputed that Congress saw fit to avoid those dire consequences by enacting the PLCAA. *Ileto*, 421 F. Supp. 2d at 1302; *see also id.* at n.34 (gathering citations to legislative history).

Finally, the Supreme Court has repeatedly stated that there is a constitutional preference for legislative remedies over those created by the judiciary, holding that “the creation of new rights ought to be left to legislatures, not courts.” *Musick, Peeler, & Garrett v. Emp’rs Ins. of Wausau*, 508 U.S. 286, 291 (1993). This is because “the Legislature is in the better position to consider if the public interest would be served by imposing a new substantive legal liability.” *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (rejecting extension of *Bivens* liability because “when an issue involves a host of considerations that must be weighed and appraised, it should be committed to those who write the laws rather than those who interpret them”) (internal quotations omitted).¹³ *Musick* and *Ziglar* make clear that Congress can rationally conclude that qualified civil liability actions, and not others, pose a unique threat to interstate commerce and to the right to keep and bear arms.

III. The PLCAA Comports with the Tenth Amendment and Principles of Federalism.

Plaintiffs maintain that the PLCAA violates the Tenth Amendment by including an exception for certain statutory claims, but not equivalent common-law claims, thus infringing on “a core prerogative of the states as sovereign entities,” which Plaintiffs identify as “[a]llocation of powers

¹³ A legislature has the ability to carry out public debate over the issues relating to the economic viability of the firearms industry and the protection of the right to keep and bear arms in a manner that appropriately balances these societal considerations with those of litigants in a single case. This distinguishes *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990), where the legislature indicated no basis for the distinction it drew.

between the branches of state government.” Pls. Ans. at 23. Multiple federal circuit and state supreme courts have rejected this exact argument. *See Beretta*, 524 F.3d at 396-97; *Delana*, 486 S.W. 3d at 323-24; *Coxe*, 295 P.3d at 388-92; *Adames v. Sheahan*, 909 N.E.2d 742, 764-65 (Ill. 2009). As the Second Circuit explained, the PLCAA “does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.”¹⁴ *N.Y. v. Beretta*, 524 F.3d at 397 (internal citations and quotation marks omitted); *see also Adames*, 909 N.E.2d at 764-65.; *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002) (“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 the PLCAA); *Adames*, 909 N.E.2d at 764-65 (adopting the Second Circuit’s reasoning in *Beretta*). 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.

Nor does the PLCAA effect the wholesale shift of power between the state judiciary and legislature that Plaintiffs allege. First, the exceptions to the 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. Second, the

¹⁴ Nothing in the PLCAA commandeers Pennsylvania by prescribing rules of state law, nor does anything in the PLCAA place an affirmative obligation upon a court applying state law to construe or apply state law in any particular manner or to achieve any particular result under state law. Nothing in the PLCAA places an affirmative obligation upon a state to establish or modify any common law principle. For example, the PLCAA expressly permits certain types of state law claims against manufacturers and distributors of firearms, PLCAA § 5(A) (i)-(vi), 15 U.S.C. § 7903(5) (A) (i)-(vi), but does not require that states recognize that these claims constitute a valid cause of action under state law.

provision that the Plaintiffs label as the “predicate exception” on which their argument is premised, *see* Pls. Ans. at 9, does *not* reach every effort by a legislature to create statutory liability. Rather, Congress limited this exception to “knowing[]” violations, and to the subset of statutes that are “applicable to the sale or marketing” of firearms. 15 U.S.C. § 7903(5)(A)(iii). Thus, it is simply not the case, as Plaintiffs assert, that every claim sanctioned by a legislature is preserved, while every rule adopted by a court is preempted, or that the PLCAA “dictat[es] to the state of Pennsylvania how to allocate power between the judicial and legislative branches of the state.” *See* Pls. Ans. at 23-24. Plaintiffs’ Tenth Amendment and federalism challenges rely on this assumption and therefore fall with this error.

IV. Principles of Constitutional Interpretation Require Giving Full Effect to the Text of the PLCAA.

Plaintiffs argue that this Court should adopt their interpretation of the statutory meaning of the PLCAA under “[t]he principle of constitutional avoidance,” Pls. Ans. at 22-23, and contend that *Bond v. United States*, 134 S. Ct. 2077 (2014) and *Gregory v. Ashcroft*, 501 U.S. 452 (1991) require interpreting the PLCAA narrowly to avoid constitutional problems of federalism. Although the United States takes no position on the merits of Plaintiffs’ claim, neither the doctrine of constitutional avoidance nor the constitutional federalism cases cited by Plaintiffs should influence this Court’s interpretation of the Congressionally-enacted text of the PLCAA. *See Ileto*, 565 F.3d at 1142-43 (rejecting application of constitutional avoidance to PLCAA because the “doctrine does not apply where, as here, congressional intent is clear from the text and purpose of the statute”). To the contrary, as explained above, the PLCAA is a proper exercise of federal authority, presents no constitutional doubts, and protects core constitutional rights and principles of federalism, and the Supreme Court of Missouri has rejected nearly-identical claims. *See Delana*, 486 S.W. 3d at 322-23 (“*Gregory* and *Bond*

are not applicable to this case because the PLCAA expressly and unambiguously preempts state tort law, subject to the enumerated exceptions.”).

The canon of constitutional avoidance provides only that, when one plausible interpretation of an ambiguous statute would cause “serious constitutional concerns,” courts should construe the statute to avoid those problems by adopting another plausible interpretation, if one is available. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 577 (1988). Thus, courts do not invoke the doctrine “at the mere mention of a possible constitutional problem.” *Nat’l Mining Ass’n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008); *see also Almendarez-Torres v. United States*, 523 U.S. 224, 238-39 (1998) (noting that “the ‘constitutional doubt’ doctrine does not apply mechanically whenever there arises a significant constitutional question the answer to which is not obvious”). Here, because plaintiffs’ constitutional arguments are devoid of merit, the canon of constitutional avoidance is inapplicable. *See Ileto*, 565 F.3d at 1144 (“declin[ing] to apply the doctrine of constitutional avoidance”).

Plaintiffs have also failed to identify a serious question of federalism that would render either *Gregory* or *Bond* apposite to the interpretation of the PLCAA. In *Gregory*, the Supreme Court construed the Age Discrimination in Employment Act (“ADEA”) narrowly where it threatened “the authority of the people of the States to determine the qualifications of their most important government officials . . . an authority that lies at the heart of representative government.” 501 U.S. at 463. Recognizing that the Constitution itself explicitly guarantees “a Republican Form of Government” in which the citizens of the States choose their elected officials, the Supreme Court stated that, “[a]s against Congress’ . . . Commerce [Clause powers]. . . the authority of the people of the States to determine the qualifications of their government officials may be inviolate.” *Id.* at 463-64 (citing U.S. Const., Art. I, § 8, cl. 3). In contrast, the Supreme Court has routinely recognized Congress’s authority

to preempt state tort law, an act that raises no serious constitutional question. *See Wyeth*, 555 U.S. at 564-66; *BMW*, 517 U.S. at 571-72; *Medtronic*, 518 U.S. at 485.¹⁵

Nor does *Bond* require a narrow interpretation of the PLCAA. In *Bond*, the question was whether an ambiguous phrase in a criminal statute reached certain conduct. *See id.* at 2090 (describing ambiguity with respect to the definition of “chemical weapon” in 18 U.S.C. § 229. After observing that one interpretation might risk intrusion on the states’ police power, *id.* at 2089-90, 2091-92, the Supreme Court chose an interpretation that would not test the outer reaches of Congress’s Article I authority. *Id.* at 2093-94. Here, there is neither an ambiguity nor an enactment that tests the outer reaches of Congress’s authority. The only ambiguity that Plaintiffs have identified is premised on their claim that a “volitional act that constituted a criminal offense,” 15 U.S.C. § 7903(5)(A)(v), could purportedly be interpreted to exclude a juvenile offense. *See* Pls. Ans. at 16; *id.* at 17 (characterizing involuntary manslaughter, to which a guilty plea was entered, *see* Pls. Ans. at 6, as a “misdeed”). But Congress cleared up any ambiguity in its statements of findings and purposes, where it established that the 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). Further, Pennsylvania law makes clear that the term “delinquent act”, *i.e.*, what Plaintiffs label a “juvenile offense,” “means an act designated a crime under the law of this Commonwealth.” 42 Pa.C.S. §

¹⁵ Neither of the two lower-court cases cited by Plaintiffs suggest otherwise. In *Breazeale v. Victim Svcs., Inc.*, 198 F. Supp. 3d 1070 (N.D. Cal. 2016), Defendants urged a tortured construction of a statute that the court held did “not fall within the plain meaning of those words,” and relied on *Gregory* for the unremarkable point—in dicta—that the court should not strain to adopt an interpretation contrary to Congress’s plain text and statement of intent. *Id.* at 1077-78. And in *Comm’n’s Imp. Exp., S.A. v. Rep. of Congo*, 757 F.3d 321 (D.C. Cir. 2014), the Court cited *Gregory* as a basis not to overcome Congressional *silence* not as a basis to construe written text narrowly. *See id.* at 332; *see id.* at 328 (emphasizing legislative history stating that the law in question did not intend “to make any changes with respect to matters that are traditionally within the jurisdiction of the 50 States of the Union”).

6302.¹⁶ Finally, as explained above, the PLCAA does not raise any federalism question comparable to that in *Bond* because the PLCAA does not commandeer state officials or push the boundaries of Congress’s Article I authority. *See Riegel*, 552 U.S. at 326 (no serious issue of federalism raised by pre-emption of tort laws where “the statute itself speaks clearly to the point”); *Delana*, 486 S.W. 3d at 323.

Finally, the importance of the other constitutional principles explicitly protected by the PLCAA counsel against a narrow construction of the PLCAA’s preemption of liability. First, Congress enacted the PLCAA 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). When Congress legislates to “extend[]” a constitutional right rather than to “restrict or deny one,” greater deference to Congress’s actions is warranted, particularly where Congress has chronicled in its findings and legislative history state actions that threaten the right, as it has done here. *See, e.g., Katzenbach v. Morgan*, 384 U.S. 641, 657 (1966); *cf. Hibbs*, 538 U.S. 721, 738 (2003) (relying on congressional determinations to affirm constitutionality of Family and Medical Leave Act).¹⁷ Second, Congress enacted the PLCAA to preclude individual states from regulating

¹⁶ Moreover, to the extent Plaintiffs are arguing that *Bond* requires this Court to read PLCAA as not barring states from applying common law against negligent firearms companies because such negligence means “third party criminal acts” are not the “sole[] cause[]” of harm, that interpretation would read the central purpose out of the statute. Pls. Ans. at 16. The central operative provision of the PLCAA is a prohibition on bringing qualified civil liability actions that would impose liability on businesses in the firearms industry for the acts of “those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.” 15 U.S.C. § 7901(a)(5). But adopting Plaintiffs’ reading *would* impose such liability. Doctrines of constitutional avoidance do not authorize a “construction . . . plainly contrary to the intent of Congress.” *DeBartolo*, 485 U.S. at 575; *CFTC v. Schor*, 478 U.S. 833, 841 (1986) (canon of constitutional avoidance “does not give a court the prerogative to ignore the legislative will”).

¹⁷ Significantly, Plaintiffs have placed the precise right Congress sought to protect at issue in this lawsuit, asserting in their Complaint claims of negligence that would have the same effect as unconstitutional regulations of firearms. *Compare Heller*, 554 U.S. at 630 (the “core lawful purpose” of the right to keep and bear arms is “self-defense” and required inclusion of “a trigger lock or similar device” would “make[] [self-defense] impossible” and is therefore unconstitutional) *with* Compl. at ¶¶ 58-60 (alleging negligence in failure to incorporate a lock) *and id.* at ¶ 66 (alleging negligence in promoting self-defense as purpose of firearms ownership).

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 municipality “efforts at extraterritorial regulation”).¹⁸ Where Congress acts to prevent States from transgressing on the system of constitutional federalism by “project[ing] of one [S]tate regulatory regime into the jurisdiction of another State,” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989), Plaintiffs’ claims that constitutional federalism preclude such regulation ring particularly hollow. For these reasons, the constitutional authorities cited by Plaintiffs do not properly inform the interpretation of the text of the PLCAA.

CONCLUSION

For the foregoing reasons, the Court should uphold the constitutionality of the PLCAA and interpret the PLCAA in accordance with its text.

The legislative history of the PLCAA makes clear that Congress enacted the PLCAA with claims of this type in mind. *See* 151 Cong. Rec. 104 at S9076 (Statement of Sen. Hatch) (July 27, 2005) (purpose of PLCAA is to address “the growing problem of unfounded lawsuits filed against gun manufacturers and sellers . . . being filed in no small part with the intention of trying to drive them out of business . . . [and] claim[ing] that sellers give the false impression that gun ownership enhances personal safety. . . . That is pure bunk”); H.R. Rep. 109-124 at 27 (2005) (“over a dozen studies have estimated that citizens use firearms in self-defense between 764,000 and 3.6 million times annually”).

¹⁸ This is well illustrated by the competing legislative measures adopted by neighboring jurisdictions during the years preceding enactment of the 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, 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-.03 (2006). Congress enacted the PLCAA against this state legislative backdrop in which the liability regimes of some states, as Congress recognized, risked thwarting the efforts of other sovereign states to protect their commercial interests and citizens’ rights.

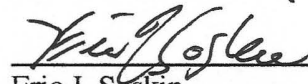
Dated: October 19, 2018

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IN THE COURT OF COMMON PLEAS WESTMORELAND COUNTY, PENNSYLVANIA
CIVIL DIVISION

MARK AND LEAH GUSTAFSON,) NO. 1126 OF 2018
Individually and as Administrators)
And Person Representatives of the)
ESTATE OF JAMES ROBERT ("J.R."))
GUSTAFSON,)
)
)
Plaintiffs,)
)
v.)
)
SPRINGFIELD, INC. d/b/a/)
SPRINGFIELD ARMORY, and)
)
SALOOM DEPARTMENT STORE; and)
SALOOM DEPT. STORE, LLC d/b/a/)
SALOOM DEPARTMENT STORE,)
)
)
Defendants.)

FILED IN
PROTHONOTARY'S OFFICE
OCT 26 2018
BY: J.B.
CLERK

**DEFENDANTS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR
PRELIMINARY OBJECTIONS TO THE COMPLAINT PURSUANT TO
THE PROTECTION OF LAWFUL COMMERCE IN ARMS ACT**

Defendants Springfield Amory, Inc. s/h/a Springfield, Inc. d/b/a Springfield Amory ("Springfield"), Saloom Department Store, and Saloom Department Store, LLC d/b/a Saloom Department Store (collectively "Saloom") respectfully submit this reply brief in further support of their preliminary objections seeking to dismiss plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA"), and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

I. SUMMARY OF THE ARGUMENT

The PLCAA is a federal law enacted pursuant to the authority of Congress to regulate interstate commerce that expressly preempts state law to the extent that state law would otherwise

allow a prohibited “civil action . . . against a manufacturer and seller . . . of [a firearm that has been shipped or transported in interstate commerce] . . . for damages, punitive damages . . . or other relief resulting from the criminal or unlawful misuse of [the firearm] by . . . a third party” to proceed. 15 U.S.C. § 7903(5)(A). Based on the express intent of Congress to preempt contrary state law pursuant to the Supremacy Clause, there is no requirement to narrowly read the PLCAA not to preempt state law, and it would be inappropriate to do so. The allegations in plaintiffs’ complaint constitute a classic qualified civil liability action that is barred by the express operative provisions of the PLCAA. The PLCAA bars actions arising from the criminal or unlawful misuse of firearms regardless of whether plaintiffs claim that the negligence of defendants also caused their injuries, and does not require a criminal conviction for it to apply. Similarly, the product defect exception does not apply when the discharge of the firearm was caused by a volitional act that constituted a criminal offense, regardless of whether the person who discharged the firearm was not criminally charged because of his age. Finally, the PLCAA easily passes constitutional muster and its constitutionality has been repeatedly upheld by federal and state courts throughout the country in response to similar constitutional challenges.

II. ARGUMENT

Subject to six limited exceptions, the PLCAA prohibits a:

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

15 U.S.C. § 7903(5)(A). Plaintiffs do not dispute that they are persons bringing a civil action

seeking damages, punitive damages or other relief through this case. Plaintiffs do not dispute that the model XD-9 semi-automatic handgun manufactured by Springfield and sold by Saloom (“Subject Handgun”) is a qualified product for purposes of the PLCAA. Nor do they dispute that Springfield is a manufacturer and Saloom is a seller of a qualified product for purposes of the PLCAA. Finally, plaintiffs do not dispute that the Juvenile Delinquent intentionally pulled the trigger of the Subject Pistol and “pled guilty to involuntary manslaughter in a juvenile delinquency proceeding” for killing their son. Pls.’ Opp’n at 5-6. The only one of the six exceptions to the PLCAA that plaintiffs contend applies to their claims is 15 U.S.C. § 7903(5)(A)(v) (“product defect exception”), which allows:

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

(Emphasis added).

Based on these admitted facts, plaintiffs’ claims are barred by the PLCAA. In an attempt to avoid the required dismissal of their claims, plaintiffs argue that the PLCAA does not apply because: (1) the death of their son was not “solely caused” by the criminal or unlawful misuse of the Subject Handgun by the Juvenile Delinquent, but also by the allegedly defective design of the Subject Handgun; and (2) the discharge of the Subject Handgun was not “caused by a volitional act that constituted a criminal offense” because the Juvenile Delinquent was charged in a juvenile delinquency proceeding because of his age. Pls.’ Opp’n at 17-20. There is no support for these arguments in the operative provisions of the PLCAA, and plaintiffs resort to inapplicable statutory construction cases in an attempt to avoid the PLCAA’s express prohibition of their claims.

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

In *Gregory v. Ashcroft*, the Supreme Court addressed the issue of whether a provision in the Missouri Constitution providing that all “judges other than municipal judges shall retire at the age of seventy years” violates the Age Discrimination in Employment Act (“ADEA”) and comports with equal protection pursuant to the federal constitution. 501 U.S. 452, 455 (1991).

The Court noted that:

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

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

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

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

In *Bond v. United States*, the Supreme Court interpreted the Chemical Weapons Convention Implementation Act (“CWCIA”), a federal statute passed to effectuate the terms of a treaty known as the Convention on the Prohibition of the Development, Production, Stockpiling, and Use of Chemical Weapons and on Their Destruction. 572 U.S. 844, 134 S. Ct. 2077, 2083–85 (2014). The Court held that the CWCIA did not apply to the conduct of a woman who applied legal, commercially available chemicals to various surfaces hoping that her best friend, who was pregnant by her husband, would come into contact with them and “develop an uncomfortable rash,” which resulted in the intended victim suffering a “minor chemical burn on her thumb, which she treated by rinsing with water.” *Id.* at 2085. The Court noted that the CWCIA was designed to implement a treaty about the use of chemical weapons in “war crimes and acts of terrorism,” *id.* at 2087, and there was no clear indication that Congress intended it to apply to local criminal offenses, explaining that:

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

Id. at 2093 (noting that the case is unusual and the analysis appropriately limited).

Plaintiffs argue that the Supreme Court’s decisions in *Gregory* and *Bond* require the PLCAA to be interpreted as not preempting traditional state law claims, and contend that in passing the PLCAA, Congress did not come close to “stating a clear intent to prevent Pennsylvania

from applying products liability law in this case.” Pls.’ Opp’n at 16. Counsel for plaintiffs has unsuccessfully raised this argument before.

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

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

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

The Supreme Court’s decisions in *Gregory* and *Bond* address the issue of constitutional avoidance. Although not addressing those specific decisions, other courts have held that the doctrine of constitutional avoidance is inapplicable to construction of the PLCAA because its intent to bar qualified civil liability actions is clearly expressed and because there are no serious doubts about its constitutionality. *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1143 (9th Cir. 2009) (holding that the doctrine of constitutional avoidance is not applicable to interpreting the PLCAA because “congressional intent is clear from the text and purpose of the statute” and there are no grave doubts over its constitutionality); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 388 (Alaska 2013).

Because the very purpose of Congress in enacting the PLCAA was to expressly preempt

qualified civil liability actions, such as the present, the Supreme Court’s decisions in *Gregory* and *Bond* are simply inapplicable to construing the clear terms of the PLCAA in an attempt to avoid its specifically intended application.

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

One of Congress’ stated purposes in enacting the PLCAA was to “prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms . . . for the harm solely caused by the criminal or unlawful misuse of firearm[s] . . . by others when the product functioned as designed and intended.” 15 U.S.C. § 7901(b)(1) (emphasis added). Plaintiffs argue that the PLCAA’s reference to harm that is “solely caused by the criminal or unlawful misuse of firearm[s]” means that the PLCAA does not apply to cases, such as the present, in which plaintiffs contend that their harm was also caused by the negligence of manufacturers and sellers of firearms. Pls.’ Opp’n at 16-18. There is no support for this argument in the operative provisions of the PLCAA.

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

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

- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.
- Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.
- The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.
- The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment to the United States Constitution.
- The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

15 U.S.C. §§ 7901(a)(3), (5)-(8).

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

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

reference by Congress to “solely caused” in the purposes section of the PLCAA can be used to narrow the operative language of the PLCAA. *Delana*, 486 S.W.3d at 322 (holding that the “statement of purpose does not overcome the fact that the specific substantive provisions of the PLCAA expressly preempt all qualified civil liability actions against firearms sellers, including claims of negligence);¹ *Estate of Kim*, 295 P.3d at 387 (unanimously rejecting plaintiffs’ argument on the basis that it would “elevate the preamble over the substantive portion of the statute, giving effect to one word in the preamble at the expense of making the enumerated exceptions meaningless”); *Phillips v. Lucky Gunner, LLC*, 84 F.Supp.3d 1216, 1223-24 (D. Colo. 2015) (rejecting plaintiffs’ argument that the PLCAA only protects defendants against claims for harm “solely caused” by the criminal or unlawful misuse of firearms for the reasons stated in the *Estate of Kim* case); *Gilland v. Sportsmen’s Outpost, Inc.*, No. X04CV095032765S, 2011 WL 2479693, at *15-*16 (Conn. Super. Ct. May 26, 2011) (holding that the PLCAA “includes cases where it is alleged that gun sellers negligently cause harm” despite the reference to “solely caused” in 15 U.S.C. § 7901(b)(1)).

Accordingly, plaintiffs’ claims against defendants constitute a qualified civil liability action that is expressly barred by the PLCAA unless they can satisfy the requirements of the product defect exception.

C. The Product Defect Exception to the PLCAA Does Not Apply to Plaintiffs’ Claims Because the Discharge of the Subject Handgun Was Caused by a Volitional Act that Constituted a Criminal Offense

¹ Plaintiffs apparently made the exact same arguments against application of the PLCAA in the *Delana* case as they do in this case. Compare Pls.’ Opp’n at 18 (arguing that the word “solely” was of particular importance to Congress and should not be treated as superfluous), with *Delana*, 486 S.W.2d at 322 (unanimously rejecting such argument).

The product defect exception to the PLCAA excludes from the definition of a prohibited qualified civil liability action:

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

15 U.S.C. § 7903(5)(A)(v) (emphasis added). The PLCAA is very clear that the product defect exception does not apply when the discharge of the firearm was caused by a volitional act that constituted a criminal offense. Plaintiffs therefore argue that their claims fall within the product defect exception because the discharge of the handgun was not caused by a volitional act that constituted a “criminal offense,” because the Juvenile Delinquent was a minor at the time and therefore charged in a juvenile delinquency proceeding instead of criminal court. Pls.’ Opp’n at 19-21.

As defendants explained in their opening brief, the Illinois Supreme Court unanimously rejected plaintiffs’ argument in the case of *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009). Although plaintiffs complain that defendants “rely on only one relevant case,” Pls.’ Opp’n at 21, *Adames* is the only case that has construed the product defect exception to the PLCAA in the context of a minor being the person whose volitional act caused the discharge of the firearm and was therefore charged as a juvenile. Plaintiffs contend *Adames* was “incorrectly reasoned” and “misinterpreted the scope of the immunity provided” by the PLCAA because it did not analyze the terms “criminal offense” and “solely caused” based on the Supreme Court’s decision in *Gregory*. Pls.’ Opp’n at 20. As explained above in Section II.A., the Supreme Court’s decision in *Gregory* applies only to implied preemption, and the PLCAA expressly preempts common law

product liability claims when the discharge of the firearm is caused by a volitional act that constituted a criminal offense. 15 U.S.C. § 7903(5)(A)(v). The PLCAA's focus in the product defect exception is on whether the volitional act that caused the discharge of the firearm constituted a criminal offense, not on whether the person committing such act was, or could be, charged with a criminal offense. As plaintiffs concede, the volitional act that led to the discharge of the Subject Handgun and the death of their son constituted the criminal offense of involuntary manslaughter. The fact that the Juvenile Delinquent was charged in juvenile court does not change the nature of the act or the PLCAA's reason for deciding that the product defect exception does not apply under such circumstances.

Just like with the Juvenile Delinquent in this case, in the *Adames* case, Billy Swan was charged in a juvenile delinquency proceeding and adjudged to have committed an act that constituted the criminal offense of involuntary manslaughter. *Adames*, 909 N.E.2d at 761-62. The Illinois Supreme Court unanimously and correctly held that plaintiffs' claims against the manufacturer of the firearm for damages under such circumstances are barred by the PLCAA because the volitional act causing the discharge of the firearm constitutes the criminal offense of involuntary manslaughter and it does not matter if the shooter is not charged with a criminal offense because he is a juvenile and is charged through juvenile delinquency proceedings. *Id.* Similarly, Pennsylvania law specifically defines a "delinquent act" as an "act designated a crime under the law of this Commonwealth, or of another state if the act occurred in that state, or under Federal law" 42 Pa. Stat. § 6302 (emphasis added). Although "delinquency proceedings are not criminal in nature," delinquent acts such as involuntary manslaughter are crimes, and Pennsylvania allows a juvenile to be prosecuted in criminal court for the same act if it is determined that the "rehabilitative goals" of adjudicating him as a juvenile delinquent instead cannot be met. *In Interest of G.T.*, 597

A.2d 638, 641-42 (Pa. Super. Ct. 1991). Because the acts for which a juvenile can be adjudicated as a juvenile delinquent are considered to be crimes, they can be used for purposes of establishing a prior criminal conviction for sentencing purposes. *Commonwealth v. Bonner*, 135 A.3d 592, 600-03 (Pa. Super. Ct. 2016).

Accordingly, the Juvenile Delinquent's shooting of plaintiffs' decedent is considered to be a volitional act that constituted the criminal offense of involuntary manslaughter. It is therefore considered as a matter of law to be the sole proximate cause of the death of plaintiffs' decedent, rendering the product defect exception to the PLCAA inapplicable and requiring the dismissal of their case.

C. The PLCAA Easily Passes Constitutional Muster

Apparently recognizing that the PLCAA requires the dismissal of their case, plaintiffs argue that it is unconstitutional. Plaintiffs contend that the PLCAA is unconstitutional on four grounds: (1) that it violates principles of federalism and the Tenth Amendment; (2) that it violates due process; (3) that it violates equal protection; and (4) that it exceeds the authority granted to Congress pursuant to the commerce clause. Plaintiffs contend that only a "handful of courts have upheld the PLCAA as constitutional" and claim that those decisions are both distinguishable and incorrect. Pls.' Opp'n at 29. In fact, the constitutionality of the PLCAA has been repeatedly challenged and has been found to be constitutional by every appellate court to have addressed the issue, including the United States Courts of Appeals for the Second and Ninth Circuits, and the highest courts of Alaska, District of Columbia, Illinois, and Missouri.

The PLCAA does not violate principles of federalism or the Tenth Amendment because it does not commandeer the executive or legislative branches of the states to administer a federal program, but rather changes the applicable law, which state courts are required to apply pursuant to

the Supremacy Clause. *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 396-97 (2d Cir. 2008); *Estate of Kim*, 295 P.3d at 388-89; *Adames*, 909 N.E.2d at 764-65; *Delana*, 486 S.W.3d at 323-24. Similarly, the PLCAA does not violate plaintiffs' right to due process because they do not have a protected property right in an unvested common law claim and because the PLCAA contains exceptions allowing certain claims against manufacturers and sellers to proceed. *Ileto*, 565 F.3d at 1140-41; *City of New York v. Beretta U.S.A. Corp.*, 401 F.Supp.2d 244, 294 (E.D.N.Y. 2008) (plaintiff did not even raise due process claim on appeal); *Estate of Kim*, 295 P.3d at 390-91; *Delana*, 486 S.W.3d at 324; *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 173-82 (D.C. 2008).

The PLCAA does not violate equal protection because Congress had a rational basis to conclude that the firearms industry needed protection from qualified civil liability actions. *Ileto*, 565 F.3d at 1141; *City of New York*, 401 F.Supp.2d at 294-95 (plaintiff did not even raise an equal protection claim on appeal); *Estate of Kim*, 295 P.3d at 391-92; *District of Columbia v. Beretta U.S.A. Corp.*, No. 2000 CA 000428 B, 2006 WL 1892023, at *18 (D.C. Super. Ct. May 22, 2006) (plaintiff did not even raise an equal protection claim on appeal). Finally, Congress had the authority to enact the PLCAA pursuant to the Commerce Clause because it found that the qualified civil liability actions it bars are a threat to the firearms industry, which is of an interstate (and international) character, and it only applies to firearms that have been shipped or transported in interstate or international commerce. *Ileto*, 565 F.3d at 1140-41 ("Congress carefully constrained the Act's reach to the confines of the Commerce Clause."); *City of New York*, 524 F.3d at 393-95.

IV. CONCLUSION

For the above reasons, defendants respectfully request that this Court sustain their preliminary objections pursuant to the PLCAA, dismiss plaintiffs' Complaint in its entirety with

prejudice, and grant such other relief as it deems just and proper.

Respectfully Submitted,

Date: October 19, 2018

By:



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Springfield, Inc. d/b/a Springfield Armory, Saloom Department
Store, and Saloom Dept Store, LLC d/b/a Saloom
Department Store

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Defendants' Reply Brief in Further Support of Their Preliminary Objections was served by United States First Class Mail, postage prepaid, addressed to Counsel of Record for Plaintiff, as follows:

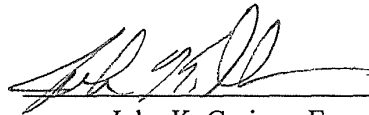
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and addressed to Counsel of Record for intervenor the United States of America, as follows:

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Date: October ²⁶~~19~~, 2018
JKG

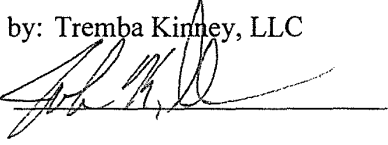


John K. Greiner, Esq.

CERTIFICATE OF COMPLIANCE

I certify that this filing 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 and documents differently than non-confidential information and documents.

Submitted by: Tremba Kinney, LLC

Signature: 

Name: John K. Greiner

Attorney No. 43583

1 IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY, PA.

2 CIVIL DIVISION

3 * * *

4 MARK AND LEAH GUSTAFSON,)
Individually and as)
5 Administrators and Person)
Representatives of the ESTATE)
6 of JAMES ROBERT ("J.R."))
GUSTAFSON,)

7 Plaintiffs,)

8 vs.)

9 SPRINGFIELD, Inc. d/b/a)
10 SPRINGFIELD ARMORY, and)
SALOOM DEPARTMENT STORE; AND)
11 SALOOM DEPT. STORE, LLC,)

12 Defendants.)

No. 1126 of 2018

13 * * *

14 HEARD: October 31, 2018

15
16 BEFORE: HONORABLE HARRY F. SMAIL, JR.

17 * * *

18 ORAL ARGUMENT

19 * * *

20 A P P E A R A N C E S

21 On behalf of the Plaintiffs:

Robert Lowy, Esquire

22 Kelly Iverson, Esquire

23 On behalf of the Defendants:

Christopher Renzulli, Esquire

24 John K. Greiner, Esquire

25 On behalf of the Intervenor, United States:

Eric Soskin, Esquire

1 October 31, 2018 - 1:51 p.m.
2 P R O C E E D I N G S
3 * * *

4 THE COURT: Call the case of Mark and
5 Leah Gustafson, Individually and as Administrators and
6 Personal Representatives of the Estate of James Robert,
7 in parenthesis, JR, Gustafson, plaintiffs, versus
8 Springfield Incorporated, doing business as Springfield
9 Armory, and Saloom Department Store, and Saloom
10 Department Store, LLC, doing business as Saloom
11 Department Store as defendants, Case No. 1126 of 2018.

12 Will counsel all please enter their
13 appearance and for whom they represent?

14 MR. LOWY: Jonathan Lowy for the
15 plaintiffs, Mark and Leah Gustafson. Mr. Gustafson is
16 in the courtroom here today, Your Honor.

17 MS. IVERSON: Kelly Iverson with Carlson,
18 Lynch, Sweet, Kilpela & Carpenter also on behalf of
19 plaintiffs.

20 MR. RENZULLI: Good afternoon, Your
21 Honor. Christopher Renzulli from Renzulli Law Firm out
22 of New York on behalf of Springfield, Inc., doing
23 business as Springfield Armory, Saloom Department Store,
24 Saloom Department Store, LLC.

25 MR. GREINER: Afternoon, Your Honor.
John K. Greiner from Tremba, Kinney, Greiner & Kerr,

1 here as co-counsel for the defendants with Mr. Renzulli.

2 MR. SOSKIN: Good afternoon. Eric Soskin
3 from the United States Department of Justice. I am here
4 representing the limited intervenors, the United States
5 of America.

6 THE COURT: Thank you. At this time
7 then, we will proceed with regard to the preliminary
8 objections. We may proceed with whichever counsel
9 defense wants to utilize first. I will allow all of you
10 to speak. Obviously, if both of you want to contribute
11 as well, you may as well with regard to plaintiffs'
12 answer. Go ahead.

13 MR. RENZULLI: Good afternoon, again,
14 Your Honor. I appreciate you have having me out here
15 from New York. This case, tragedy as it is, is a
16 classic qualified civil liability action that is barred
17 by the expressed provisions of the Protection of Lawful
18 Commerce in Arms Act.

19 Very briefly, 2005, this statute was
20 enacted. It prohibits qualified civil liability actions
21 in any court against the manufacturer or seller of a
22 firearm, that has been shipped in interstate or
23 international commerce, the damages that result from
24 criminal or unlawful misuse of the firearm by a third
25 party, unless one of six very specific, very pointed,

1 exceptions apply.

2 So what's not in dispute here? Well, we
3 have a civil action filed by the plaintiffs. What's not
4 in dispute? It's against the manufacturer, Springfield
5 Armory, and the seller, Saloom Department Store. Not in
6 dispute. It's a qualified product. It's a firearm that
7 went through -- transported in interstate commerce. Not
8 in dispute. The injuries resulted from the criminal or
9 unlawful misuse of that qualified product by a third
10 party.

11 The complaint gives us everything we need
12 to dismiss this case on PLCAA grounds. Paragraph 29 of
13 the complaint, the juvenile delinquent was prosecuted
14 for and pled guilty to involuntary manslaughter in a
15 delinquency proceeding in juvenile court for the
16 shooting. Therefore, plaintiffs' injuries resulted from
17 the criminal misuse of a qualified product by the third
18 party accordingly.

19 Plaintiffs' claims are a civil liability
20 action. They must be dismissed by the Court. Any cases
21 brought to state or federal court cannot be brought in
22 state or federal court, and any that are pending at the
23 time of the enactment in 2005 must be dismissed. That's
24 what Congress is putting in the statute.

25 So let's look briefly at the exceptions.

1 It's a product liability exception. More importantly,
2 there's an exception to the exception. What does the
3 statute tell us? Well, the product liability exception
4 applies except when the discharge of the product was
5 caused by a volitional act that constituted a criminal
6 offense, then such act shall be considered the sole
7 proximate cause of any resulting death, et cetera.

8 A volitional act -- a juvenile delinquent
9 shooting of decedent certainly was a volitional act. He
10 chose to pull the trigger on that pistol. It's a choice
11 that someone makes, and he made it. It's conceded that
12 the juvenile pulled the trigger of the handgun and was
13 guilty of manslaughter and plead guilty to manslaughter
14 in juvenile court. Paragraphs 26 and 29 of the
15 complaint, all of the facts are there.

16 Moreover, Pennsylvania Statute Section
17 2504(a) reads: A person is guilty of involuntary
18 manslaughter when, as a direct result of the doing of an
19 unlawful act in a reckless or grossly negligent manner,
20 he causes the death of another person. That's what we
21 have here. So what I think is particularly instructive,
22 is the Adames case. Your Honor, it is directly on point
23 with this case. Almost word for word.

24 Illinois Supreme Court, highest court in
25 Illinois, looked at a situation where a 13-year-old boy

1 is playing with his father's Beretta semi-automatic
2 pistol, some of the same features as this gun at issue
3 here, shoots and kills his friend. It is the same
4 factual predicate that we have here. A 13-year-old
5 believes the gun is unloaded when the magazine is out,
6 he pulls the magazine out of the gun, and he didn't
7 anticipate that a bullet would be in the chamber. The
8 same claims, almost word for word, of a product defect
9 that we have in this case. Product liability design
10 defect, failure to warn.

11 The plaintiffs in that case said the
12 pistol was defective. It didn't include a magazine
13 disconnect. It didn't have an effective loaded chamber
14 indicator. Same similarities here. Both Beretta in
15 that case and Springfield in this case do have a loaded
16 chamber indicator, but the claim was it wasn't effective
17 enough. They also talk about these built in locks and
18 specialized personalized gun technology. Same
19 allegations here.

20 So the Illinois Supreme Court looked at
21 this and said this is clearly barred by the PLCAA. It
22 only requires the criminal or unlawful misuse of a
23 firearm. It doesn't require criminal intent. It
24 doesn't require criminal conviction. It doesn't even
25 require an intention to discharge the gun. It's not

1 what it requires.

2 In that case, they looked at the
3 exception, just like we are looking at here. They found
4 the involuntary manslaughter, reckless discharge of the
5 firearm. Those were criminal offenses. Use of the
6 firearm had a characteristic -- a character of a crime,
7 was in the nature of a crime; therefore, we have the
8 criminal misuse. That case is right on point.

9 You know, other cases around the country
10 -- and we have argued this throughout the country -- is
11 the Ryan case, which is another case in appellate court
12 in Massachusetts. Your Honor, that one didn't even have
13 these types of facts. In that one, we had a fellow who
14 was a convicted felon. He goes to his buddy's house to
15 do some electrical work and steals a couple of guns and
16 brings them home. He's convinced by a member of his
17 family, you better bring those back, you are on parole,
18 you can go to jail. He goes back to the house to do
19 some work and shoots himself.

20 The product defect case there was not
21 only for the gun, but it was also for the storage
22 container. He goes to put it back in the storage
23 container and shoots himself. The appellate court said,
24 that's all you need. The possession of the pistol alone
25 by that felon, that was the criminal or unlawful misuse

1 of the firearm. The PLCAA didn't require a criminal
2 conviction or anything. The product defect exception
3 did not apply. The volitional act, in that case, was
4 the unlawful possession of the pistol alone. So that's
5 another one that's right on point here.

6 The next issue that was brought up by the
7 plaintiffs in this case was the issue of harm solely
8 caused. There's some language in the purpose section of
9 the statute which uses that language. The PLCAA is a
10 bar, regardless of whether the plaintiffs' claim that
11 there was some negligence of the manufacturer or the
12 seller -- was an additional cause of the damage.

13 Well, why? There's no support in the
14 PLCAA for this argument. This argument has been raised
15 in many different courts around the country, and no
16 court has adopted this argument. But why? If the harm
17 was caused by -- solely caused by the criminal or
18 unlawful misuse of the firearm, well then the
19 manufacturer and the seller would never be sued because
20 they would have no claim. That doesn't make sense.

21 The Supreme Court has told us that
22 language in the preface of a statute can't be used to
23 limit the clear terms and the operative provisions of
24 the statute. So there's no support in the PLCAA for
25 that. There's no support in the case law that has

1 addressed these issues around the country. It just
2 doesn't make sense. There would be no need for PLCAA if
3 that were the law.

4 Well, what has Congress done? Congress
5 has told us why they passed the PLCAA. They were
6 concerned with these lawsuits being brought all around
7 the country for money damages, for third parties' misuse
8 of firearms that operated as designed. They were
9 concerned that industry businesses were being held
10 liable for harm caused by others, by criminals, who
11 unlawfully used firearms that functioned as designed.
12 They thought that these lawsuits were an abuse of the
13 legal system. It's an unreasonable burden on interstate
14 and foreign commerce.

15 They thought the lawsuits were an attempt
16 to use the judicial branch to circumvent the legislative
17 branch creating an issue of separation of powers. They
18 determined that when someone is shot or killed, or a
19 firearm is criminally or unlawfully misused, the harm is
20 solely caused by the criminal or unlawful misuse of the
21 firearm. These arguments for these briefs were
22 addressed right on point in the Delana case, which is
23 argued by these plaintiffs, Estate of Kim, Phillips
24 versus Lucky Gunner, Gilland versus Sportsmen's Outpost.
25 It's never been any other way.

1 There's some argument here that there was
2 some federalism concerns that the plaintiffs had -- and
3 I don't want to go too deeply into that, because I know
4 we do have the government with us here today -- but
5 there's no reason to narrowly read the PLCAA to not
6 preempt state law, because Congress' stressed intent is
7 in the statute. It's right there. Gregory versus
8 Ashcroft and Bond versus U.S.A. are inapplicable. And
9 these exact issues were in the Delana case, which went
10 to Missouri Supreme Court. The Missouri Supreme Court
11 said no.

12 This preemption is accomplished pursuant
13 to Congress' constitutional power to regulate interstate
14 commerce. Because Congress had expressly and
15 unambiguously exercised its constitutionally delegated
16 authority to preempt state law negligence actions
17 against sellers of firearms, there is no need to employ
18 a narrow instruction to avoid federalism issues.

19 So I stress this Court should adopt what
20 every other court, who has looked at these issues, found
21 and say no, Congress has spoken here. This is a classic
22 civil liability action and should be dismissed.

23 The defendants have raised -- opposed the
24 questions of unconstitutionality that was raised by the
25 plaintiffs. We adopt and defer to the Department of

1 Justice who is here today and all of their arguments.
2 But the bottom line is that every appellate court in
3 this country, and there have been many that have looked
4 at this issue, have found that the PLCAA is
5 constitutional.

6 Does the Court have any questions for me?

7 THE COURT: Well, let's go to the
8 plaintiffs' arguments about the Tenth Amendment and how
9 there's an overreach by the federal government under the
10 statute that does not allow the states to utilize their
11 empowerment to craft how they wish to deal with their
12 individual cases, per se, under the mandate of the
13 federal statute.

14 MR. RENZULLI: Yeah, Tenth Amendment
15 arguments, I'm going to defer to the Department of
16 Justice on this one --

17 THE COURT: Oh, okay.

18 MR. RENZULLI: -- but we did address that
19 in our brief.

20 THE COURT: He traveled clear up here to
21 do that.

22 MR. RENZULLI: Yes, that's exactly it.
23 Basically, it doesn't commandeer the executive or the
24 legislative branches of the states to administer a
25 federal program here, but rather it changes the law

1 which state courts are required to apply pursuant to the
2 supremacy clause. That is the argument, but I will let
3 counsel do a much better job --

4 THE COURT: Then let's go back to the
5 other issue that I find rather detailed. Design
6 development, as old as 50 years ago, could have changed
7 the way and the fashion semi-automatic pistols are
8 produced that would incorporate these apparent
9 indicators or protections. Why does that not carry any
10 weight with Springfield as far as why it's not crafting,
11 if you will, a magazine disconnect, a marker that
12 indicates once you chamber a round it could be -- some
13 indicator on the back part of the gun where you are
14 looking down the sights, something of that nature?
15 Because that's what I glean from the plaintiffs'
16 arguments that the capabilities are there, but now you
17 should be at fault for not using that ability or
18 capability. And that, of course, is something I guess
19 you can indicate and defend as to that accusation. I
20 kind of understand, I think, in my mind where you are
21 going to go with that, but go ahead.

22 MR. RENZULLI: Your Honor, I can spend
23 hours talking to Your Honor about magazine disconnects
24 and how detrimental they can be for self-defense
25 purposes, law enforcement purposes. I can go into

1 specifics of how it makes that gun less safe. I can go
2 into specifics about loaded chamber indicators, which
3 this pistol had. Not many have them, but this pistol
4 had one. Not only did it have a loaded chamber
5 indicator, it had a cocking indicator. So it had two
6 things on it.

7 But most importantly, the slide was
8 closed. When a slide is closed, that means be careful,
9 there could be a round in the chamber. Anyone knows --
10 anyone that's been around firearms ever, the only full
11 proof way to determine whether a firearm is loaded is to
12 open the slide and look inside. It's very, very simple
13 to do. I can sit up here and talk about what a
14 13-year-old boy should or shouldn't know about
15 indicators on a gun and whether they should have them in
16 their hands. I can spend a lot of time talking about
17 that, but we don't even get there, Your Honor, because
18 the PLCAA prevents that. They preempt that. They say
19 with the exception to the exception, it doesn't matter
20 what your argument is, see Adames, see Ryan . It
21 doesn't matter. We are saying legislative fiat, the
22 sole proximate cause was that volitional act, and the
23 case law supports that.

24 So I would love to spend a lot of time
25 talking with you about it, but if we look at the

1 pleadings, clearly the PLCAA prevents that. But I could
2 talk about how magazine disconnects are detrimental,
3 that no law enforcement agencies in the country that use
4 firearms with them, whether people using them for
5 self-defense purposes do not want magazines --

6 THE COURT: Well, I think the attack is
7 on the business plan or strategy of what Springfield
8 sells, and should they be forced to design within a
9 certain parameter? And apparently plaintiffs are
10 indicating that they want that done state by state.

11 Any response to that?

12 MR. RENZULLI: That happens on election
13 day, and not in this courtroom. That is a legislative
14 issue. If the legislature wants to mandate certain
15 features on a firearm, that's up to us as the voters to
16 decide.

17 THE COURT: And that has to be a federal
18 statute because of the fact that you sell nationally and
19 internationally?

20 MR. RENZULLI: There are some states that
21 have certain requirements for certain purchasers to have
22 certain features on their firearms.

23 THE COURT: Well, in addition to what you
24 put out. But you are saying that if the actual core
25 firearm has to have a standard requirement, that would

1 go out in manufacturing, it would have to come from the
2 federal congressional development through both the house
3 and the senate?

4 MR. RENZULLI: Or I guess under certain
5 situations it would be state legislation, Your Honor.
6 But at the end of the day --

7 THE COURT: That's only if it's an
8 add-on, though, that a certain state -- over and above
9 the standard firearm.

10 MR. RENZULLI: I'm not sure there are any
11 particular -- I can't give you any particular federal
12 regulations out there.

13 THE COURT: Well, we have some states
14 that limit size of the clip as far as ammunition --

15 MR. RENZULLI: Oh, sure.

16 THE COURT: -- and so, you know, you have
17 to make the gun be able to fit a ten-clip as opposed to
18 a fifteen-clip.

19 MR. RENZULLI: Understood. That's
20 exactly right. But Congress has spoken here. We are
21 not getting involved in that. We are not doing that.
22 The exception -- product liability has an exception, and
23 it's a strong one. That exception has been looked at by
24 every court in this country, has looked at that issue,
25 has come out this way. The volitional act was the

1 tragedy of this boy pulling the trigger -- made the
2 determination when he pulled that trigger. It certainly
3 is a criminal offense; there's no argument there.

4 So Congress has spoken. They said
5 there's a separation of powers here. We don't want to
6 leave it to the judiciary here because of what's going
7 on in interstate commerce, firearm companies going out
8 of business, they're being sued for every criminal use.
9 It's very pointed language. We are right on point.
10 It's a tragedy. Absolutely horrible. But this is the
11 exact case that the PLCAA was enacted to prevent.

12 THE COURT: Thank you.

13 MR. RENZULLI: I defer to the Department
14 of Justice on the constitutionalizing. We adopt all of
15 the arguments raised therein.

16 THE COURT: Okay. Mr. Soskin?

17 MR. SOSKIN: Good afternoon, Your Honor.
18 I have not had the pleasure of appearing in your lovely
19 courthouse before or in front of you. I appreciate the
20 welcome that you and your clerks and the staff and
21 everyone has given me here as a, kind of, wayward sheep,
22 a long lost member of the Pennsylvania bar, showing up
23 back in Pennsylvania after being somewhat far afield.

24 THE COURT: We appreciate that
25 considering the courthouses you must see in your

1 travels.

2 MR. SOSKIN: Some of them are lovely and
3 some of them are less.

4 THE COURT: Correct. We understand that.

5 MR. SOSKIN: The United States is
6 appearing here today not to present any argument on the
7 objections that defendants have presented. Those are
8 not our objections. Rather, we are here for the limited
9 purpose of responding to the challenge to the
10 constitutionality of the PLCAA as set forth in
11 plaintiffs' papers.

12 Time and again, courts have ruled that
13 the PLCAA is constitutional, including as against the
14 complete set of arguments that plaintiffs have resembled
15 here in challenges that closely resemble these.

16 I appreciate Mr. Renzulli being up here
17 and stating the names and pronunciation of some of these
18 cases with which the other counsel are familiar, because
19 reading the title off of a page, I would have not known
20 that it was Adames and not Adams, or Delina and not
21 Delana.

22 But it should come as no surprise that
23 State Supreme Courts from Alaska to Missouri, Federal
24 Appellate Courts from the Second Circuit in New York to
25 the Ninth Circuit in California, have all held this

1 statute to be constitutional. That is because Congress
2 has the authority, and has used that authority in
3 numerous context, to regulate efforts to use the law of
4 one state to regulate interstate commerce activity and
5 to intrude on commerce being carried out in other states
6 or internationally importing industries.

7 That is particularly true, whereas here,
8 the firearms industry contributes not only to the
9 economy, but to the national defense and to the exercise
10 of an important core right enshrined in the Bill of
11 Rights, the right to keep and bear arms. Principally
12 for self-defense, but also for other lawful purposes.
13 There is nothing in Congress' exercise of its authority
14 here or any of the other issues raised by plaintiffs
15 that raise serious doubts about the PLCAA.

16 Let's begin by talking about the commerce
17 clause. Article 1 Section 8 of the U.S. Constitution
18 provides Congress the power to regulate commerce among
19 the several states. In Section 7901(a)(3), Congress
20 found that it was important to do that here because
21 lawsuits, including those against manufacturers and
22 distributors and sellers, constituted an unreasonable
23 burden on such commerce. All the Court is to consider
24 is the basis for the PLCAA's authority have found that
25 to be sufficient, Your Honor, in conjunction with the

1 supremacy clause, of course, that allows Congress to
2 make federal law that trumps state law.

3 This is an unremarkable exercise of
4 Congress' authority. It is no different than Congress'
5 limitation of liability against light aircraft makers in
6 the General Aviation Revitalization Act, the aircraft
7 tort statute noted in the Ninth Circuit opinion in Lyon
8 that we cited in our brief. It's really no different
9 than the limitation of twelve recovery for nuclear
10 accident victims discussed in the Supreme Court case of
11 Duke Power, or limitation of recovery for swine flu
12 sufferers and those vaccinated for swine flu in the
13 Third Circuit DiPippa case and the Fifth Circuit
14 Ducharme case, or the limitation on liability for
15 medical-device related torts in the Supreme Court case
16 in Riegel. Indeed, as the Supreme Court Pierce County
17 case shows, this authority lets Congress not only set
18 substantive laws, but even reached down into state court
19 cases and prescribed rules of evidence in those cases.

20 In Pierce County, the Congress stepped in
21 and said certain types of studies carried out by
22 municipalities and by state governments could not in
23 turn be used for evidentiary purposes, even in state
24 tort cases. The Supreme Court of Washington in that
25 case found that to go too far into upsetting the state

1 and federal balance and to be too attenuated from
2 interstate commerce. But the Supreme Court reversed and
3 said there was a logical link between the use of those
4 studies and improvements of the roads that effect
5 interstate commerce. So the Supreme Court reversed and
6 said Congress may set those procedural rules.

7 Now, the only conceivable novelty between
8 this case and Comm. versus authority here, and the other
9 cases that have affirmed the PLCAA's validity, is the
10 2018 Supreme Court decision in Murphy, the NCAA sports
11 betting case arising out of New Jersey. That's what
12 distinguishes plaintiffs federalism related challenge
13 here from others. But the law in that case, the
14 Professional and Amature Sports Protection Act, PASPA,
15 is nothing like the PLCAA. That statute operated
16 directly on state legislatures in part. It stated that
17 shall be unlawful for a governmental entity to authorize
18 by law sports betting. That literally says it is
19 against the law for the legislature for New Jersey or
20 wherever to pass a law.

21 That's why Justice Alito wrote in the
22 deciding opinion there that this was not just about
23 sports betting, it was about the federal government
24 doing the equivalent of posting federal officers in
25 state legislative chambers who were armed to stop

1 legislators from voting.

2 That's not what's going on here, Your
3 Honor. Nothing like that, in fact. Pennsylvania is
4 not -- it is not made unlawful for Pennsylvania to pass
5 laws. Rather, the federal government has prescribed,
6 Congress has prescribed, what the substantive law will
7 be for certain types of tort liability.

8 To be sure, federal preemption does
9 require courts to apply a rule of decision. But that is
10 not commandeering of the judiciary, because that
11 operates through the supremacy clause itself in Article
12 6 of the Constitution, which states a judiciary-specific
13 command that federal law will apply, that the judges in
14 every state shall be bound by the laws of the United
15 States.

16 Your Honor asked a question about whether
17 this by prescribing or by setting forth, that some
18 statutes or some torts could come from the judiciary and
19 some have to come from legislatures, if that is
20 impermissible meddling in state government operations in
21 derogation of federalism principles; but, it is not,
22 Your Honor.

23 For one thing, although plaintiffs try
24 very hard to cast it as a bar on judicially created
25 remedies and an affirmation that only legislatures can

1 prescribe torts in the firearms context, that's not the
2 case at all. Some common law and judicially created
3 torts can't survive. The negligent entrustment
4 exception, for example, applies regardless of what
5 branch of a state government originated that. Nor is it
6 the case that state courts, that any state legislation,
7 necessarily satisfies the predicate exception here or
8 the other exceptions. Some state torts will continue to
9 be precluded by the PLCAA regardless of which branch of
10 state government enacted that.

11 But more importantly is the big picture.
12 Congress has the authority under the commerce clause and
13 other authorities and the supremacy clause to preempt
14 all state tort liability in this area. The fact that it
15 has chosen to exercise that power more narrowly, to
16 allow for state legislatures to debate and the political
17 processes to operate to potentially create torts in some
18 areas, and the fact it has allowed some judicially
19 created torts to persist by exercising less of its
20 authority rather than more, that does not create a
21 federalism problem. To hold otherwise would create an
22 incentive for Congress to act larger with the use of its
23 powers interfering much more heavily with state law.

24 If there are no questions, or more
25 questions than the one that Mr. Renzulli -- about

1 Congress's authority, I'll turn briefly to plaintiffs'
2 other constitutionality challenges.

3 THE COURT: Correct. Go ahead.

4 MR. SOSKIN: First, plaintiffs raise a
5 due process challenge asserting that the due process
6 clause precludes Congress from extinguishing plaintiffs'
7 right to recover in a tort suit. This claim was
8 rejected in *Delana*, *Ileto*, and several of the various
9 *Beretta* cases, including *D.C. versus Beretta*
10 specifically. This claim has been consistently rejected
11 because the Supreme Court has been rejecting the idea
12 for nearly a hundred years that there is a
13 constitutionally protected property right in unlitigated
14 or nonfinal tort claims.

15 The first case along that line -- there
16 are, in fact, earlier cases -- but the first very clear
17 expression of that was in *Silver versus Silver* in 1929.
18 The *Duke Power* case, which plaintiffs cited to here,
19 actually reiterates that principle. I think it's
20 Footnote 32 that says, of course, Congress can
21 extinguish common law rights. Legislatures can
22 extinguish common law rights.

23 The very comparable propositions to those
24 that plaintiffs put forth here that somehow the
25 discussion in *Duke Power* suggests that there needs to be

1 a substitute remedy, that point was rejected just last
2 year in a persuasive discussion by the Eighth Circuit
3 Court of Appeals. That's the Schmidt case, Your Honor,
4 which says, we decline to extend Duke Power to hold its
5 inverse.

6 The law is clear in this regard. There's
7 no due process rights. There's no need for a substitute
8 remedy. But if the Court had any doubt it could
9 recognize out of both Iletto and -- I think the Second
10 Circuit -- Beretta case did, that there are, in fact,
11 still remedies remaining to those who are victims of
12 tragedies like these.

13 The PLCAA did not extinguish all
14 remedies. It did not extinguish suits against the
15 tortfeasors, for example. It did not extinguish all
16 types of suits. The two courts I cited found that that
17 was enough even to avoid the question of whether there
18 is a due process problem here of the kind plaintiffs
19 have postulated.

20 Plaintiffs also raise an equal protection
21 challenge suggesting that the distinctions drawn by
22 Congress in the statute are irrational, and they have
23 to -- and concede that rational basis review applies to
24 these claims. Rational basis -- the most deferential
25 standard of review. And as we pointed out in our

1 papers, this is the federal rational basis standard, not
2 the state -- not the Commonwealth of Pennsylvania
3 rational basis standard, but the Supreme Court of
4 Pennsylvania applies. That, although deferential, is
5 not quite as deferential as the federal standard. This
6 easy standard has been recognized as being met by the
7 PLCAA in opinions even by skeptical judges, such as
8 Judge Weinstein in the Eastern District of New York. He
9 wrote an opinion replete with rejoinders about the
10 policy wisdom of the PLCAA, but nevertheless recognized
11 that Congress had a rational basis to draw the lines it
12 did here.

13 Congress has met that standard because it
14 provided evidence in the legislative history in the
15 finding section, and it explained its choices, including
16 that the qualified civil liability actions here are the
17 ones most likely to present a threat to interstate
18 commerce or to burden firearms manufacturers with the
19 expenses of litigation, even if they prevail, and the
20 tremendous costs in instances where they do not.

21 Congress explained that -- the Court
22 could recognize that Congress could reasonably leave in
23 place some of the exceptions it did, because those are
24 ones where some degree of culpability would be on the
25 part of a seller, like negligent entrustment. It's

1 reasonable to leave that standing because -- look, a guy
2 walks in, they run his name through the NIC system, and
3 he fails the background check, and you sell to him
4 anyway -- well, I guess that's not the negligent
5 entrustment exception, that's the specific violation
6 exception -- but if a guy walks in and passes the
7 background check, but says I'm going to take this gun
8 and I'm going to go shoot my wife because she made a
9 bad, you know -- she did something wrong to me, that's
10 the kind of thing where you want a seller to retain
11 liability.

12 Congress also explained its decision to
13 permit some torts to survive if directly enacted by
14 legislatures. It's a well established federal law
15 principle that the creation of rights and remedies
16 should be left to legislatures. That's the Musick case,
17 and it was reiterated just last year by the Supreme
18 Court in Abbasi, which restricted the enactment of new
19 forms of Bivens tort liability.

20 It is readily explained that this
21 preference exists, because when you are balancing what
22 are difficult questions of interests, how do we permit
23 people to recover for wrongs with the constitutional
24 rights at stake here? The right to keep and bear arms,
25 the right to protect oneself, to protect one's family at

1 home and out on the street, those kind of difficult
2 judgment balancing measures benefit from having the
3 public input that the legislative process affords.

4 And to the extent that restrictions may
5 run afoul of federal constitutional protections in the
6 Second Amendment, it is much easier for courts to review
7 their affect on individual rights when what you are
8 talking about is a legislatively enacted statute and not
9 a judicial opinion in a particular tort case.

10 In addition, rational basis review
11 permits legislatures to regulate partially and not
12 fully. So to the extent that there are distinctions
13 here, well, that is because, as the Fourth Circuit
14 explained in the Carr case, Congress may, quote, strike
15 at the evil where it's felt most strongly, or in the
16 cases which it most frequently occurs. This also goes
17 back to Silver versus Silver, a regulate all or regulate
18 none principle in the equal protection context, not when
19 the standard is rational basis reviewed.

20 That's why the Court is to consider the
21 PLCAA distinction like courts considering distinctions
22 in all those other statutes, light aircraft, vaccines,
23 even different tort liability schemes for different
24 counties in New York State. In the Gronne versus Adams
25 case -- I think that one is Adams -- there the

1 legislature literally had a different system for
2 recovery in certain counties, and not in other directly
3 adjacent counties. And that survived rational basis
4 review based on nothing more than the volume of cases in
5 different counties.

6 We discussed the Tenth Amendment in
7 federalism issues. Plaintiffs did point to one case in
8 its brief that we did not have a chance to address in
9 our briefing. I appreciate the extension of time that
10 Your Honor granted for our filing of the brief. The
11 government's response to the Vargas case, a State
12 Appellate Court in New York, is a difficult one. That's
13 a case that involves the application of DACA, which I'm
14 sure Your Honor is aware is a sensitive subject for the
15 government.

16 What we would like to say about that case
17 is that there was a wholesale shift in power that is not
18 present here. It took admission of attorneys entirely
19 from judicial control, and indeed that is considered to
20 be a traditional judicial function that we leave to
21 courts in virtually every state, and transferred it to
22 legislative control. To the extent that that case is
23 not wrongly decided, and it may be, that wholesale shift
24 in the traditional judicial role does make a difference
25 here. We would also note that the rationale in that

1 case has not been picked up by any other court in a
2 subsequent case since then.

3 Finally, Bond and Gregory, and the bigger
4 picture question of constitutional avoidance that
5 infuses plaintiffs' brief in this case. Gregory --
6 that's Gregory versus Ashcroft, 1991, case about whether
7 Congress could prescribe age limitations for state --
8 elected state judicial officers, and Bond, the 2014 case
9 about the chemical weapons with treaty enactment
10 statutes and whether it reached the application of
11 chemicals to a doorknob. As Mr. Renzulli pointed out,
12 one key difference from these cases that renders them
13 inapplicable, as the Missouri Court recognized in
14 Delana, is that both of those cases involved implied
15 preemption. Whereas here, Congress has been very clear.
16 It intends to preempt state tort liability. Where you
17 have implied preemption instead of that explicit command
18 of Congress, there's much more latitude for
19 interpretation.

20 It becomes much harder to apply the
21 principle that controls all preemption cases, which is
22 what is Congress' intent and purpose as expressed in the
23 text and legislative history? Here, this much is clear:
24 Congress intended to preempt state tort liabilities and
25 intended to do so broadly. It did not intend for the

1 exceptions to be interpreted to the point where they
2 would swallow the PLCAA's protection.

3 But Gregory and Bond are also different
4 in the seriousness of the state interest at issue. As
5 the Court wrote in Gregory, the choice of elected
6 officials is an authority that lies at the heart of
7 representative government. That accounts for why the
8 bar needs to be set particularly high for action in that
9 area, for implied preemption in that area. In Bond,
10 this was -- the specific facts of that case involved an
11 incident where the woman treated the chemical weapons
12 attack with soap and water by washing her hands in the
13 sink.

14 The Supreme Court there thought that
15 federalizing that kind of minor, perhaps, misdemeanor
16 level offense as a federal crime would essentially
17 permit Congress to supersede all state criminal
18 regulation against striking at the core of the identity
19 and the powers of states.

20 Where Congress is exercising a commonly
21 used and core power of its own to regulate commerce by
22 preempting tort liability, there simply are not the same
23 kinds of concerns about the core identity of a state.
24 Nor is there any need to invoke broader doctrines of
25 constitutional avoidance. Those broader doctrines do

1 infuse Gregory and Bond. And those make clear that
2 there must be a serious doubt about the
3 constitutionality of a statute before we start resorting
4 to canons of constitutional avoidance or other
5 interpretative canons to restrict what Congress said in
6 the text.

7 That is not the case here. As we know
8 every court to consider the constitutionality of a
9 statute -- and I think the Phillips versus Lucky Gunner
10 case from Colorado contains that exact text -- has found
11 it to be constitutional. There are no serious doubts
12 here.

13 And indeed, as the Federal District Court
14 and the District of Columbia recognized not so long ago
15 in the Jefferies case, the PLCAA is so clear and so
16 constitutional that, where a case falls plainly within
17 one of its exceptions, courts are justified dismissing
18 that case, even sua sponte, based on the clear
19 prohibition and clear constitutionality of the PLCAA.

20 THE COURT: Has a court ever sua sponte
21 done that, and if so, has it been upheld in any
22 appellate court that you know of?

23 MR. SOSKIN: The Jefferies in the
24 District of Columbia did sua sponte dismiss a case. I'm
25 sure it was not --

1 THE COURT: Was that upheld by the
2 circuit court in the district?

3 MR. SOSKIN: I'm sure it was not reversed
4 by the circuit court, but I don't know if there was an
5 appeal in that case. That is something I can look into
6 if you would like.

7 THE COURT: That's okay. I was just
8 curious. Go ahead.

9 MR. SOSKIN: Here, that's obviously not
10 an issue because we have full briefing by the parties.
11 So there is no such need to act. If there are any
12 questions about the constitutional issues, I would be
13 happy to address them at this time, Your Honor.

14 THE COURT: I think you were very clear
15 in your paperwork that you mailed and in the extension
16 on that brief. I think you have hit all of the major
17 points. I'm satisfied with that. I think I know where
18 to find you.

19 MR. SOSKIN: All right. Thank you, Your
20 Honor.

21 THE COURT: Mr. Lowy?

22 MR. LOWY: Thank you, Your Honor. I will
23 also compliment you on your courtroom and courthouse.

24 THE COURT: Thank you very much.

25 MR. LOWY: Mr. Renzulli began on some of

1 the facts that are undisputed. I want to begin on some
2 other facts that are undisputed in this case. In
3 undisputed, I say for this stage of litigation, the
4 motions, preliminary objections, where the allegations
5 are all taken as true.

6 THE COURT: Right.

7 MR. LOWY: So at this stage, he may have
8 defenses -- certainly will, but not at this stage. At
9 this stage, it's undisputed that defendants knew, not
10 just for 50 years but actually over a hundred years,
11 that a common problem with firearms was that people,
12 often children, came to the mistaken belief that, when
13 the magazine had been removed, the gun was therefore
14 unloaded. And that there was a round in the chamber,
15 and people, many people, including children, have died
16 as a result. There's a simple fix which was created
17 over a hundred years ago, magazine disconnect safety,
18 which is extremely expensive, which would save many
19 lives of children, and would have saved the life --
20 prevented the death of JR Gustafson. That's undisputed.

21 On the record, there is no good reason
22 Springfield did not include that device other than to
23 make money. Other than there was more profit in not
24 including the device, and they were not bearing the cost
25 of the death of victims like JR Gustafson. I'm not

1 saying that's what the record will show. I'm not saying
2 that discovery will show it. I'm saying at this stage,
3 that is the record before Your Honor.

4 To be clear, there will be rationales.
5 Mr. Renzulli brought up some, but at this stage, those
6 are not before Your Honor.

7 It is also undisputed at this stage that
8 under Pennsylvania law, the gun that resulted in the
9 death of JR Gustafson was defective. It's also
10 undisputed that defendant's conduct was negligent, and
11 that their negligence was a legal cause of the death of
12 JR Gustafson. It is also undisputed that Pennsylvania
13 has chosen to allow for civil justice claims for people
14 like Mark and Leah Gustafson, whose children are killed
15 as a result of gun industry or other industries'
16 negligence or defective products. And Pennsylvania has
17 chosen to provide those people with a forum in which
18 they can recover money damages for those losses.

19 I would say, Your Honor, that that policy
20 is not about forcing manufacturers to put in safety
21 devices. Only government can force companies to put in
22 safety devices. But that policy is just like it is with
23 any other product liability case in this Commonwealth,
24 which is, one, to provide compensation for people who
25 have suffered losses, and also by way to incentivize

1 responsible behavior. So if you have a company that
2 puts profits ahead of people, and they internalize some
3 of the human costs of their negligence, that maybe they
4 will change their behavior. That's not a mandate, but
5 it's a financial incentive.

6 Pennsylvania has chosen to embrace all of
7 that. It didn't have to. There are states that have
8 chosen to give the gun industry and state legislation
9 sweeping immunity from tort actions. They may have
10 their own constitutional problems as well, but there are
11 states that have made that decision. Pennsylvania is
12 not one of them. And, in fact, as we cite in our brief,
13 products liability law has been accepted in Pennsylvania
14 as part of a social and economic policy of this
15 Commonwealth.

16 Also undisputed is that no Supreme Court
17 decision and no Pennsylvania Court decision has decided
18 any of the issues before Your Honor. So while there are
19 cases that have dealt with some of them, none of them
20 are binding authority. The decision in this case will
21 determine the precedent -- some precedent, at least for
22 the time being, in the Commonwealth of Pennsylvania.

23 What I'll call PLCAA, which is
24 P-L-C-A-A -- what Congress has done in PLCAA is to
25 deprive Your Honor and every other judge in Pennsylvania

1 from applying the law and granting the civil justice
2 that this state has chosen to provide. In its place,
3 Congress has provided absolutely nothing to the
4 Gustafsons.

5 Now, the government said this law is
6 similar to other liability-limiting laws. Completely
7 inaccurate statement. Completely. Every other federal
8 legislation that limits liability that's been cited by
9 the defendant or the government has almost always simply
10 modified the form of recovery. It has not totally left
11 victims out in the cold. What I mean by that is the
12 government mentioned that this is no different than the
13 statute at issue in Duke Power, most relevant Supreme
14 Court case.

15 Let's take a look at that statute. That
16 statute came in when the government wanted to encourage
17 the nuclear power industry. They were afraid that if
18 something went wrong, a lawsuit could drive this
19 burgeoning industry out of business. So they -- and
20 actually, the price -- it's called the Price-Anderson
21 Act, which protected the industry. But what it did was,
22 it created a federal compensation system for victims of
23 nuclear power accidents, which actually would completely
24 compensate victims. They wouldn't be able to sue in
25 state court, but they would get full compensation. It

1 was a multimillion -- and I believe in the hundreds of
2 millions -- compensation fund that was available to
3 them.

4 The other cases that are relied on are
5 similar. They don't throw victims out in the cold.
6 They don't shut the courthouse door to victims. So
7 PLCAA is entirely unique in that way.

8 PLCAA is unique in some other ways. One,
9 there was some discussion of what's known as the
10 predicate exception in PLCAA. That is Section 15 U.S.C.
11 7903, Paragraph 5, Paragraph capital A, Paragraph Three.
12 The predicate exception, as it has been construed by the
13 courts, has said that if a gun industry defendant -- for
14 instance, one of these defendants -- were to knowingly
15 violate a state or federal law applicable to the sale or
16 marketing of firearms, they are not protected by PLCAA.

17 So in other words, in this case, if the
18 Pennsylvania legislature were to enact a law which would
19 require manufactures to have magazine disconnect
20 safeties, and that was not done in this case, there
21 would be a knowing violation of a statute. And as it's
22 been interpreted by the courts, PLCAA would provide no
23 protection. So then we could -- Gustafsons could bring
24 their case under Pennsylvania law.

25 So what the predicate exception has done,

1 what it has implicitly and clearly done, it said to
2 Pennsylvania, if you want to grant the Gustafsons -- and
3 I'm assuming defendants' argument is accepted, but I
4 disagree with it on that note too -- but if defendants'
5 argument is right, it said if Pennsylvania wants to
6 grant civil justice to the Gustafsons, then they need
7 to -- then Pennsylvania needs to enact a statutory law
8 in legislature to create a standard saying you have to
9 put in magazine disconnects.

10 However, Pennsylvania makes the choice,
11 which Pennsylvania has made, which is, we think, cases
12 like this, like most product defect cases, should be
13 decided by common law, which is law. And Erie v.
14 Tompkins law says common law is law, just like statutory
15 law is law. But Pennsylvania chooses to use its
16 judicial branch instead of the legislature.

17 Congress is saying we won't allow your
18 courts to hear those Pennsylvania cases. In fact, we
19 are going to require -- we, Congress, are going to
20 require Pennsylvania judges to throw out valid
21 Pennsylvania cases and leave injured Pennsylvanians
22 without any remedy against these defendants. Maybe they
23 have remedies against other defendants with no assets
24 and meaningless judgments, but against these defendants
25 they have no remedy.

1 So PLCAA is unique in that way. That
2 also is completely unprecedented. There is absolutely
3 no law remotely like that -- except maybe DACA -- no law
4 where Congress has basically told states how to govern,
5 how to make law. The U.S. said, well, if Congress can
6 give complete immunity to the gun industry, then they
7 can do this lesser type of immunity. That's not true.
8 Congress can't interfere with how states choose to make
9 law. They can't do it. So, in fact, it's impossible.

10 I will assume arguendo that there are
11 other problems with a broader immunity statute, but it
12 is possible that Congress could enact a sweeping
13 immunity statute that says Pennsylvania can't hear any
14 gun cases, and yet Congress would not be allowed to do
15 something like this.

16 In fact, if Congress could, there's all
17 sorts of crazy statutes I can come up with that
18 according to the government, I think, would be
19 completely constitutional. Then Congress, I assume,
20 could say you can't bring a case against the gun
21 industry unless the governor approved it, or unless the
22 state legislature unanimously approved it, or the state
23 legislature unanimously enacted a statute which
24 establishes the governing standard.

25 Or maybe Congress could do the reverse

1 and say we trust courts more than legislatures. We
2 think legislatures are hostage to special interests, so
3 we are going to say that Pennsylvania courts can hear
4 civil liability cases, except when they are relying on
5 state laws. We won't allow that because we don't trust
6 them. That is up to the state to decide what branch of
7 government they use. Again, absolutely no precedent.

8 The only precedent that I can see is the
9 elements of DACA, which the one report in the case that
10 I am aware of is Vargas where the Appellate Division of
11 New York held it was unconstitutional. It violated the
12 Tenth Amendment. I would recommend -- there's a
13 mountain of cases before Your Honor, but that's one
14 certainly to put on the top of the list because that
15 goes into exactly the sort of argument, and why it is a
16 Tenth Amendment problem.

17 Another thing unique about PLCAA, there
18 is no alternative remedy provided to the Gustafsons.
19 Another is there is no regulation, and that is extremely
20 important. Most of the other federal laws that the
21 government and defendants point to are true preemption
22 laws. They are laws where the government enters into a
23 space, regulates it, like medical devices or other
24 things. They said, okay, here are regulations; these
25 are uniform regulations we are going to make for the

1 country, and manufacturers have to -- and sellers have
2 to abide by these regulations, and we are not going to
3 allow state tort actions that conflict with those
4 regulations. That's traditional preemption. This
5 doesn't do that. This asks nothing of the gun industry.
6 All PLCAA is is a free pass.

7 The reason that the Murphy versus NCAA
8 case is so important is not for the reason that the
9 government said. It's because what Murphy said -- and
10 this was the Supreme Court just earlier this year -- was
11 that the only permissible federal preemption legislation
12 is on -- and I'm paraphrasing here, but I'm paraphrasing
13 pretty close -- the only permissible federal preemption
14 is one that regulates private actors, not states.
15 That's a big difference between the cases that they rely
16 on and PLCAA. PLCAA does not regulate private actors.
17 It asks nothing of them. Its only command is to judges.
18 Throw out these cases, because we in Congress, in
19 Washington, D.C., have decided that we don't want
20 Pennsylvania courts to give the Gustafsons civil
21 justice. You have to listen to us. So in all of those
22 ways it's unique.

23 Again, this Court would be setting new
24 grounds. This Court should not arrive there, and it
25 doesn't need to. And in our view, this Court should not

1 reach that interpretation under the applicable statutory
2 interpretation principles. There are a number of them.

3 One is if a statute abrogates the common
4 law as PLCAA does, it should narrowly construe. There's
5 no question this abrogates the common law in some way.
6 It's just a question of how much. I point Your Honor to
7 the Romah case, which is 705 A.2d 841 at 849, which says
8 that.

9 Another is the Court -- the rule of
10 constitutional avoidance, which is that if the Court is
11 faced with competing plausible interpretations of a
12 statute -- plausible -- and one would avoid serious
13 constitutional questions and the other one wouldn't, the
14 Court must accept the one that would avoid the
15 constitutional problems. I repeat plausible because it
16 doesn't have to be the interpretation that Your Honor
17 would otherwise have chosen.

18 It's just -- the standard is not -- is
19 our interpretation the best argument, best
20 interpretation? I think it is. But that's not the
21 question. The question is, is it a plausible law? And
22 unless you feel it is a slam dunk that Congress can do
23 whatever it wants to essentially -- with the lawmaking
24 powers of Pennsylvania, as well as -- and then eradicate
25 all of the due process rights for injured Pennsylvanians

1 and the other constitutional flaws, then this raises
2 constitutional issues.

3 Another thing is you should interpret the
4 law to further legislative intent and to avoid an absurd
5 result that would counter legislative intent. I will
6 get to what is intent, but that intent is clear, that
7 PLCAA was intended to preserve claims where gun
8 companies acted negligently and that were based on
9 established common law principles. And that PLCAA was
10 intended to do -- it was not intended to be a novelty.
11 What it was intended to do it, and it says that in the
12 statute itself and legislative history, was to prevent
13 novel -- what they call novel actions without foundation
14 in hundreds of years of common law.

15 What that was trying -- what PLCAA was
16 trying to do -- and this is straight from Senator Larry
17 Craig, who was the chief sponsor and author and spoke at
18 length about this -- he was trying to prevent lawsuits
19 where a gun company did nothing wrong, and yet someone
20 was suing and saying you should be liable for this bad
21 thing that happened. There were such lawsuits.

22 In fact, one of them -- and I point Your
23 Honor to Kelley versus R.G. Industries, which is 497
24 A.2d 1143, which was a case in Maryland where the
25 Maryland Appellate Court said we don't think that

1 this -- I believe it was against the Saturday Night
2 Special manufacturer -- we don't think they would be
3 liable under existing law, but we are going to create a
4 new rule which says if someone gets hurt from a Saturday
5 Night Special, then the manufacturer pays. Absolutely
6 liability.

7 Well, that was an injury that was solely
8 caused by a criminal misuse. The gun company did
9 nothing, didn't act negligently, didn't have a defect or
10 lack of safety device. It was solely caused by the
11 criminal, yet they were tagged with liability. There
12 were many of other cases similar. Most of them, if not
13 all of them, failed. That was the concern.

14 THE COURT: Isn't that an overreach,
15 though, to control the gun industry and control access
16 by saying simply because a preferred criminal weapon
17 that is made by a certain manufacturer should not be
18 left unpunished because they know it will ultimately end
19 up in criminal hands?

20 MR. LOWY: That was Congress' view. I
21 agree. That was the motivating force behind PLCAA. And
22 read properly, PLCAA would prohibit those sorts of cases
23 because, again, all the gun company did was they sold a
24 gun that was frequently used by criminals, let's say.
25 But that was the end. Congress wanted to shut the door

1 to those sorts of cases because the injury there was
2 solely caused by --

3 THE COURT: But in Pennsylvania, which is
4 a state that allows for the purchase of Springfield
5 products here, clearly, across the Commonwealth, aren't
6 you asking for the Court to ignore, if you will, the
7 protection of that 2005 statute under PLCAA in lieu of
8 common law, because Pennsylvania is embracing product
9 liability in reference to common law, but to the
10 detriment of just one specific industry, as opposed to
11 all industries? Because even you said PLCAA is
12 protecting a manufacturer for making a product, not for
13 who ultimately buys it. I guess where I'm concerned is,
14 is how does Pennsylvania differ from all of these other
15 states where courts have reviewed it, and PLCAA appears
16 to have met judicial scrutiny for the purpose of
17 addressing product liability where there is an
18 underlying criminal event, no matter summary to felony,
19 that has occurred?

20 MR. LOWY: I think the key distinction --
21 there are a number of them. The key one is that almost
22 all of the cases that have upheld PLCAA do not address
23 the federalism arguments stated in the Bond and Gregory
24 cases. That's the most critical interpretive principle
25 that Your Honor should apply. Every single one of them

1 ignores that principle. Some of them predate the Bond
2 case.

3 The only case, I believe, upholding PLCAA
4 that deals with Bond and Gregory is the Delana case, and
5 that was -- one, that was not a product liability case.
6 It was a negligent sale case. And, two, that was a case
7 where the Supreme Court of Missouri was reversing the
8 dismissal of a case. The trial court had dismissed the
9 case saying it's barred by PLCAA. The Supreme Court
10 reversed and said no it's not barred by PLCAA.

11 In the context of that, the Supreme Court
12 also said, however, you can bring a negligent
13 entrustment claim, but you can't bring a negligence
14 claim. And then in that context, it says that PLCAA is
15 constitutional and we don't have these federalism
16 concerns. But that was a limited effect of PLCAA in
17 that case.

18 Again, the plaintiffs -- I was counsel in
19 the case, and the heart of the case was allowed to go
20 forward. And it did. It was just one cause of action,
21 one count, couldn't go forward. The heart of the case
22 was negligent entrustment, and that did go forward. So
23 no product liability cases dealt with Bond and Gregory.
24 Bond and Gregory, that's the critical issue. In Bond
25 and Gregory, they both make crystal clear --

1 THE COURT: But you don't have negligent
2 entrustment, per se, here.

3 MR. LOWY: That's exactly right. That's
4 why I think Delana is of limited value here, because
5 that was a negligent entrustment case. We are in the
6 products liability realm, and there are no product
7 liability cases dealing with PLCAA that accept the
8 responsibility that the supreme courts impose to
9 construe cases under Bond and Gregory, and that is when
10 you are faced with a statute --

11 THE COURT: Well, I guess where I am
12 concerned is -- and certainly I'm just looking to
13 investigate this so you can clarify for me to defend
14 against these PO's -- if there's no negligent
15 entrustment, you have an underlying charge in juvenile
16 court that ultimately succeeded by either entry of a
17 plea or litigation -- and I believe it was plea in this
18 particular case -- how do you avoid PLCAA?

19 MR. LOWY: Two ways, Your Honor.

20 THE COURT: That's what -- I am trying to
21 get to the heart of the matter.

22 MR. LOWY: The first way is in the
23 general definition of a qualified civil liability
24 action. And the second way is, even if we meet that
25 general definition, we come within the product liability

1 exception, and that's -- I have a different reading of
2 that exception than defense counsel.

3 So, first, we don't meet the initial
4 definition of qualified civil liability action. And
5 that is because for that definition, that's their
6 general threshold for is a case -- might a case be
7 barred by PLCAA. The relevant provision, that part of
8 the definition, says that the harm has to be resulting
9 from the criminal or unlawful misuse of a qualified
10 product. Okay, resulting from. The term resulting from
11 is not defined in PLCAA. So the question is, what does
12 resulting from mean?

13 Two, in coming up with that meaning, Your
14 Honor, one has to look to the rest of the statute. But
15 also under Bond and Gregory, you have to look for an
16 interpretation which would preserve state authority.
17 And that's what the Supreme Court did in both Bond and
18 Gregory.

19 THE COURT: But under that federalism
20 theory, resulting from is not specifically defined
21 sufficiently, you believe, for PLCAA to apply here to
22 the Gustafson case?

23 MR. LOWY: Yes. The reason, Your Honor,
24 is because what did Congress mean by resulting from?
25 One part is in the first purpose -- this is in the

1 statute itself -- the number one purpose of PLCAA was --
2 I'm not going to read the whole thing -- it says to
3 prohibit cause of action -- and then skipping -- for the
4 harm solely caused by the criminal or unlawful misuse of
5 a firearms product by others. Solely caused by.

6 Now, the word solely was of particular
7 importance to Congress. Why do I say that? Because
8 when PLCAA failed to pass Congress in 2004, Congress
9 then made a few small changes in the bill. Just a few.
10 One of them was to add the word solely to the first
11 purpose. They did that and did a few other little
12 things, and then it was that legislation that then
13 passed Congress in 2005 and became law.

14 So the Court is required to not treat any
15 word in legislation as a nullity; however, you should
16 pay particular attention to one -- that was one word
17 inserted in between sections of Congress to enable its
18 passage. And so by solely caused, Congress is making
19 clear -- look, our concern is these absolute liability
20 cases. These cases like against the Saturday Night
21 Special manufacturers where the gun company did nothing
22 wrong, harm was solely caused by criminal misuse, and
23 yet you are holding a big gun company liable.

24 There was also concern that some suits
25 brought by cities -- even though that wasn't the theory

1 on them -- there was concern that that was the same
2 theory. I don't think the concern was accurate, but
3 that was stated. And so if you --

4 THE COURT: So their concern was that to
5 outlaw the absolute liability of the particular
6 manufacturers across the board for the misuse or
7 criminal use of their product?

8 MR. LOWY: Yes. If you look at Senator
9 Craig, we cite some of his statements from the senate
10 floor. I could have gone on for pages of Senator Craig
11 saying the same thing over and over again. Saying we
12 are not barring the courthouse doors to victims of gun
13 company negligence. We are not. We are allowing it to
14 go forward. We are concerned about novel actions.

15 THE COURT: But your essential argument
16 is that they have barred the courthouse doors without a
17 compensation fund to deal with the victim damage of
18 assertions therein made?

19 MR. LOWY: If the defendants accept --

20 THE COURT: If I go back to your
21 example -- and I just want to look at this
22 Price-Anderson Act -- did you have to apply for
23 resulting injuries of a certain nuclear event to access
24 that fund? Is that how citizens got relief with regard
25 to the protection given then to the nuclear industry at

1 the time?

2 MR. LOWY: I can't tell you definitively.
3 I'm forgetting all the details of that act; however, I
4 believe it was something like that. Similar to the --
5 9/11 there was a similar fund. It was something like
6 that. The point is there was a -- Congress was not
7 denying remedy, was not denying relief. They were
8 prohibiting certain causes of action.

9 That's why I think that the government is
10 partly correct when they say that there's precedent
11 saying that Congress can eliminate causes of action, you
12 don't have a right to a cause of action. That may be
13 true, but that doesn't mean that Congress can deny all
14 relief. What they did in Duke Powers, they say we are
15 going to deny -- you know, you can't -- if you are
16 injured in Pennsylvania, you can't bring a Pennsylvania
17 negligence case anymore if it was Three Mile Island, but
18 you can go to the fund and you are not being denied
19 relief.

20 THE COURT: So you are saying that PLCAA
21 itself creates an unconstitutional circumstance because
22 there is no avenue to recovery for the purported victims
23 of this product liability?

24 MR. LOWY: That's one of several
25 constitutional problems. That's part of due process

1 flaw. The Tenth Amendment, I think, is the largest law
2 which is the interfering of the state lawmaking. Then
3 there is also equal protections law.

4 But in going back to the interpretation
5 of why PLCAA -- why you should read PLCAA in a way which
6 allows this case, in addition to the first purpose, the
7 sixth finding of PLCAA also refers to harm solely caused
8 by others.

9 The seventh finding of PLCAA -- this is
10 in the statute itself -- talks about liability actions
11 based on theories without foundation, and hundreds of
12 years of the common law jurisprudence of the United
13 States, and do not represent the bona fide expansion of
14 the common law.

15 That was their concern. They say it
16 right there. That's absolute liability cases. That's
17 not product liability cases that have been around since
18 even when I went to law school. That was not their
19 concern. So if you inform -- if you use those
20 provisions, plus legislative history, to inform what
21 resulting from means, then you read it as solely caused
22 by.

23 I would say, Your Honor, that argument I
24 am making has been rejected in a number of courts, and
25 they are cited. They are not binding authority for Your

1 Honor. Again, most importantly, except for the Delana
2 case, which was a different -- negligent entrustment,
3 the case that was actually allowing the case to go
4 forward, other than that --

5 THE COURT: Well, don't I have a
6 responsibility to perfect even Pennsylvania rationale
7 review of what the law is, even if there is not
8 precedential to me, just to understand the rationale
9 review denials, even if it is outside of the
10 Commonwealth of Pennsylvania --

11 MR. LOWY: The rational review --

12 THE COURT: -- denials by the Court with
13 regard to PLCAA?

14 MR. LOWY: I think Your Honor has a duty
15 to independently analyze the constitutionality and
16 proper implementation of PLCAA --

17 THE COURT: But to gain an independent
18 review, should I not be reviewing all that is submitted
19 with regard to that?

20 MR. LOWY: Absolutely.

21 THE COURT: Even -- and as you have
22 already admitted, they have already reviewed it and
23 denied it?

24 MR. LOWY: There's no question Your Honor
25 should be considering it. I just don't think you should

1 be --

2 THE COURT: Well, I guess where I am
3 trying to get in your argument is, how do I overcome
4 that trend of judicial review?

5 MR. LOWY: Well, there is no trend as far
6 as applying Bond and Gregory. There is no trend.

7 THE COURT: Okay.

8 MR. LOWY: There's the one case, the
9 Delana case. That's not a trend. The Bond and
10 Gregory -- the Bond case, I think, is particularly
11 important where there was no question whatsoever that
12 this federal law -- if you just read it -- this chemical
13 weapons law, if you read it, applied to this woman in
14 Pennsylvania who was trying to go after the woman who
15 cheated with her husband, actually. And the -- in fact,
16 Justice Scalia, in his concurring opinion, says there's
17 absolutely no question that this federal law applies.
18 Justice Scalia would have struck down the law as
19 unconstitutional. Majority, however, says no we are
20 going to read this law in a way to protect state
21 authorities. In that case, to protect Pennsylvania's
22 criminal jurisdiction over local courts.

23 A few things that are important: One is
24 both defendant and the U.S.A. -- well, Bond and Gregory
25 don't apply to PLCAA because they only concern implied

1 preemption cases. And that, in fact, is -- Delana says
2 that. Delana is completely incorrect in saying that
3 Bond and Gregory only applies to implied preemption
4 cases. We know that because, one, they don't say that
5 neither Bond or Gregory says it relates to implied
6 preemption cases, but also Bond is not even a preemption
7 case. Bond does not preempt Pennsylvania law. The
8 system that Bond has is Bond creates a federal crime for
9 this chemical weapon offense, and there are also
10 concurrent state crimes for the same conduct. That's
11 not preemption. So it can't be implied preemption if it
12 isn't preemption.

13 Bond and Gregory are basic principles
14 that we apply, required to apply, to preserve state
15 authority, and it's because -- the balance of federal
16 state powers. Of course, it has nothing to do with this
17 particular issue of guns. These are principles that
18 prepare for the next Congress and the Congress after
19 that. So you know it's not a question of, you know,
20 people who are happy with this decision may be unhappy
21 with the next one if these principles are allowed to go
22 forward.

23 So that's the first argument, that
24 resulting from should be read as solely caused by. And
25 that, in this case, there was -- one cause was the

1 juvenile and the other cause was the defendant. So this
2 harm was not solely caused by criminal pled unlawful
3 misuse.

4 Second point is, we don't meet the
5 products liability exception to the exception. As
6 Mr. Renzulli explained, PLCAA allows for certain types
7 of product liability cases. And yet, then it has what
8 he called correctly an exception to the exception. I
9 agree that that's the critical language. The exception
10 to the exception says that PLCAA is not allowing product
11 liability cases where the discharge of the product was
12 caused by a volitional act that constituted a criminal
13 offense.

14 The first thing that's important in that,
15 that makes this case not applicable, is it says that
16 constituted a criminal offense. Now, that is different
17 from the language that Congress used in the general
18 definition of qualified civil liability action, where
19 there it refers to criminal pled unlawful misuse. So
20 for some reason, Congress knows about this phrase
21 criminal pled unlawful, and yet in the exception to the
22 exception, it only is talking about criminal.

23 In other words, what Congress is saying
24 in this product liability exception to the exception is
25 if the conduct was unlawful but not criminal, we are not

1 barring this case and you can hear the case. Unlawful
2 but not criminal. That almost perfectly describes
3 juvenile delinquent proceedings, unlawful but not in the
4 criminal justice system. In fact, I am not sure what
5 else it could refer to. Maybe it refers to something
6 else. Probably it does and I'm not thinking about it,
7 but I can't think of what else it's talking about.

8 So clearly the fact that they didn't use
9 the pled unlawful phrase has to mean something. I
10 didn't see anything in either the defendants' initial
11 brief or in the reply brief, pled the U.S. brief that
12 addresses that point. You can't ignore that language
13 and interpret criminal as being the same thing as
14 criminal pled unlawful.

15 THE COURT: So is it your belief that
16 simply because the case was pursued due to the age of
17 the individual that utilized the weapon, and was
18 therefore in a juvenile case which was for
19 rehabilitation as opposed to punishment, that that
20 excludes the use of PLCAA?

21 MR. LOWY: Yes, because that makes it
22 unlawful but not criminal. That's what the exception to
23 the exception is referring to by deleting the pled
24 unlawful language. So, yes, that is exactly our
25 argument.

1 Even if this were a criminal offense,
2 which it isn't, but even if it were, it has to be
3 discharge that was caused by a volitional act. Was this
4 a volitional act? There is -- it is undisputed, at this
5 stage, that the boy, the shooter, thought this gun was
6 unloaded. For all intents and purposes, he thought it
7 was a toy. I'm not saying he thought it was a toy, but
8 he thought it was something that was not going to fire
9 anything.

10 THE COURT: That contradicts what he
11 plead to in the juvenile system.

12 MR. LOWY: Well, that's -- not
13 necessarily, Your Honor. It can be --

14 THE COURT: Because the documentation in
15 the case would reflect he knowingly made admission for
16 the disposition of the juvenile court relative to the
17 charge against the juvenile. He had to sign something
18 to support that he had some competency in understanding
19 what he was entering into, even if it's a program of
20 rehabilitation.

21 MR. LOWY: But it's my understanding that
22 the -- that negligently not checking the slide --
23 Mr. Renzulli is perfectly right, one can check the
24 slide. One should check the chamber. There's no
25 question about that. It's my understanding that

1 negligently failing to check could be sufficient to plea
2 to the juvenile offense that he pled to. The fact that
3 he pled to that offense does not suggest that he
4 actually thought there was a round in the chamber.

5 So to me, yes, he volitionally pulled the
6 trigger. No question about that -- or I don't think
7 there's a question about that, I should say. But he did
8 not volitionally discharge the gun. If he did, that
9 would be like, if I see some trash on a field and I pick
10 it up, and in doing so I trigger the explosion of a land
11 mine that's buried in the ground, if they are right
12 about it being volitional, that means I have just
13 engaged in a volitional act that caused the explosion of
14 a land mine. You can argue that.

15 I don't think that's the meaning of
16 volitional. Volition requires some sort of intent, not
17 simply the volition of pulling the trigger of a gun that
18 someone thought was harmless. The sentence does refer
19 to discharge caused by a volitional act. In my view,
20 there's some relation between volitional and discharge,
21 not just volitional and --

22 THE COURT: So the entry of the juvenile
23 plea could be done with the notice given that there was
24 no intent?

25 MR. LOWY: It could have been. Yes, Your

1 Honor. I would note that in the Adames case that was
2 discussed, which is the one similar product liability
3 case --

4 THE COURT: The Illinois one.

5 MR. LOWY: -- the Illinois case. I mean
6 that discussion of -- the Supreme Court of Illinois'
7 opinion is accurate. But also in that case, the
8 Appellate Division in Illinois that was reversed held
9 that there was a jury question of whether this was
10 criminal or not, the juvenile's conduct.

11 The point is -- I mean that was reversed,
12 but it was something of a close call because the
13 appellate division came to a different view. I mention
14 that because the fact that it's a close call actually
15 counts in this area. Because what the Supreme Court
16 tells us in Bond and Gregory is when Congress is
17 depriving state authority, as they unquestionably are in
18 this case, they are telling -- according to
19 defendants -- they are telling Your Honor I don't care
20 what Pennsylvania law says, you have to dismiss the
21 case. They are telling Pennsylvania, the government,
22 you want cases like this, you want judges to hear these
23 cases, go to your legislative branch. We don't listen
24 to your judicial branch.

25 Congress is clearly -- you know, whether

1 you think it's constitutional pled not, I think it's
2 unconstitutional. They are clearly interfering with
3 state authority. When that happens, you should be
4 looking for a way to read the statute to avoid that and
5 to preserve state authority. And unless Congress is
6 crystal clear that they really address this issue and
7 thought about, do we want to take away state authority
8 in this area, and then made it clear that yes we do,
9 unless they have done that, then the Court should read
10 the statute as preserving state authority.

11 That's extremely relevant because for all
12 of these issues, it's not -- I think we have the better
13 side of the argument of what the statute means, but that
14 isn't even the standard under Bond and Gregory. The
15 question is, in Congress, in using this volitional,
16 criminal discharge, resulting from, solely caused by,
17 all this confusing stuff that we talked about, is that a
18 clear statement by Congress that we don't want
19 Pennsylvania courts applying Pennsylvania product
20 liability when Pennsylvanian children are killed? That
21 is not a clear statement. It is a -- there are good
22 arguments on both sides. We think we have a better
23 argument, but it is absolutely not clear.

24 So I think for those reasons, Your Honor,
25 PLCAA should be interpreted to allow this case to go

1 forward. If it does not, if Your Honor concludes that
2 PLCAA does prohibit this case, then you have to address
3 is it constitutional.

4 It is unconstitutional -- and I'm not
5 going to repeat things I have said in the past -- but it
6 is unconstitutional for a few reasons. The first is the
7 Tenth Amendment argument that we have discussed. Again,
8 there is absolutely no precedent whatsoever for Congress
9 doing anything like this, where it's implicitly pled
10 explicitly telling states this is how you have to make
11 law, this is how you have to govern, you have to use the
12 branch of government that we want.

13 In fact, the government, in their
14 argument, seemed to be defending that. I heard he was
15 saying why that makes sense, why Congress might feel
16 that they don't trust courts. Congress can feel that
17 until the cows come home. It's not their business.
18 It's Pennsylvania's business to decide how Pennsylvania
19 makes law. Common law is law. Statutes are law. Civil
20 justice is law. It's not up to Congress, whatever they
21 feel. And, yes, they did have animus towards the
22 judicial branch. That shows how unconstitutional this
23 law is.

24 So the Tenth Amendment -- I think it is
25 unconstitutional as far as the Tenth Amendment. Again,

1 the Vargas case, even though it's not a PLCAA case,
2 accepts these basic arguments.

3 Next, it's unconstitutional for due
4 process. Also unprecedented only -- federal law that
5 completely prohibits any sort of remedy in a case like
6 this if defendants are right, and the Supreme Court
7 actually has spoken on this issue. This is in our brief
8 on Page 25 where we cite the Truax, which is T-r-u-a-x,
9 versus Corrigan case, 257 U.S. 312 at 330, where the
10 court set a statute whereby serious losses inflicted by
11 such unlawful means are in effect made remediless,
12 bracket, would disregard fundamental rights of liberty
13 and property and, bracket, deprive the person suffering
14 the loss of due process of law -- person in effect made
15 remediless, violation of due process of law.

16 While the court has allowed limitations
17 in cause of action, it has not allowed complete
18 deprivation of remedy on the federal level. Then there
19 are a couple cases that they cite which are state laws,
20 which are more broad and do deprive people of remedy.
21 Those are state laws where the Supreme Court said one of
22 the reasons we are allowing this is because states have
23 special interest in fashioning their own tort laws.
24 Congress does not have that interest at all. In fact,
25 Congress has no business fashioning state tort laws.

1 Equal protection is another issue in the
2 McBride case, Your Honor. Struck down a tort reform
3 statute which classified victims of product liability
4 versus other victims. I think it capped some damages,
5 but not others. The court held that that did not pass
6 the rational basis test to violate equal protection and
7 so to here.

8 Rational basis is not a rubber stamp. It
9 doesn't mean that whatever Congress says that the court
10 has to accept. PLCAA -- reading PLCAA to prohibit a
11 case like this does not survive rational basis. It does
12 not protect the Second Amendment rights or the gun
13 industry. For one, because PLCAA allows for unlimited
14 liability. PLCAA allows for Pennsylvania, pled
15 California, to enact a statute which would provide the
16 basis of a claim under the predicate violation, and you
17 can sue the gun industry out of business. Not saying
18 you should, but if you actually wanted to protect the
19 gun industry in a rational way, you would do what the
20 Congress has done in which to protect other industries.
21 Cap the damages. Create a controlled system. Do things
22 like that, which they did for nuclear powers and others.
23 They didn't do that.

24 It's not rational to say if you are in a
25 state like Pennsylvania that doesn't have a law

1 requiring magazine disconnect safeties, pled loaded
2 chamber indicators, you have no right to recover; but if
3 you are in exactly the same situation in California
4 where there is a state that requires some of these
5 devices, you do have a right to recover. Pennsylvania
6 doesn't have to make the same choices as California, but
7 Congress has no business discriminating against people
8 from different states with different state lawmaking.

9 So I don't believe this survives rational
10 basis. It violates equal protection, and Congress does
11 not have Congress clause authority to simply regulate
12 state governments. It can, in some cases, preempt
13 liability litigation. That's true. But when it does
14 so, it does so while it's requiring some standards, but
15 that is not what it did in PLCAA. It simply just gave
16 it a free pass to some gun companies. And that is not a
17 valid exercise in the Commonwealth's authority.

18 Lastly, there have been a couple of
19 courts that have stated that PLCAA is unconstitutional.
20 Trial court in Gary case in Indiana held that PLCAA
21 violated due process. It was then upheld on other
22 grounds, unconstitutional grounds. And then a trial
23 court in Lopez, which is Wisconsin, stated that if the
24 judge read that PLCAA prohibited the case, he would find
25 it unconstitutional; however, he let the case go

1 forward. So he did not reach that issue.

2 Your Honor, if there are any questions?

3 THE COURT: I think not. I posed them as
4 you went.

5 MR. LOWY: Okay. Thank you.

6 THE COURT: Any response?

7 MR. RENZULLI: Please. Your Honor, I
8 appreciate all of the time and energy. This is an
9 important issue for everyone in this room. I originally
10 planned to start out by saying that what is missing from
11 my adversary's argument were the cases, whether they
12 were from Pennsylvania pled anywhere from around this
13 country, which support his theories.

14 The PLCAA has been around since 2005,
15 Your Honor. It has been around a really long time. And
16 there have been a lot of courts around this country that
17 have addressed the PLCAA. And because it has been
18 addressed in this courtroom, that doesn't mean anything.
19 Those decisions, although they are not binding upon Your
20 Honor, I leave it up to Your Honor, and the defendants
21 leave this up to Your Honor, to decide whether or not
22 they make sense, whether or not the opinions reached in
23 those cases make sense because there is no other cases
24 going the other way. There aren't cases that adopt the
25 arguments presented by the plaintiffs today.

1 He mentioned one case at the very end
2 about a trial court in Indiana that said it was
3 unconstitutional. Guess what? It went a different way,
4 and for other reasons in the trial court. But all the
5 other courts in this country, you know, some are in
6 these briefs, some aren't in these briefs, some are in
7 plaintiffs' briefs, they don't find the way the
8 plaintiffs are pleading for Your Honor to find. They
9 just don't.

10 None of these arguments -- none of them
11 are new. None of them are groundbreaking. Judge Smail,
12 you are the first one to hear this argument. Judges all
13 over the country have heard this argument. State court,
14 federal court, appeals court, the Supreme Court of a
15 couple different states have addressed these issues and
16 disagree with the arguments presented to you today.

17 The complaint is the complaint, and we
18 all know we live with the complaint for the basis of
19 today. We are doing that. We are saying, Your Honor,
20 we accept as true, for today's purposes, all of those
21 allegations in the complaint, whether they were relevant
22 pled not. The defendants are negligent. Guns need
23 loaded chamber indicators. Guns need sirens when
24 someone picks it up to tell them they are loaded.
25 Accept all that is true for the purposes of today. That

1 is not what we are here for.

2 We are not here to argue that because
3 Congress tells us you can't argue that. The PLCAA
4 prevents you from arguing that. Plain, simple, concise
5 language. I know we are trying to throw up a lot of
6 smoke in saying what does solely mean, and what does it
7 not mean, and what is a volitional act, is pulling a
8 trigger a volitional act? Of course it's a volitional
9 act. Every court that has looked at it has said it is a
10 volitional act. So that's a lot of smokescreen.

11 We accept as true the allegations in the
12 complaint and we move from there. We say, okay, does
13 the PLCAA apply, and do any of the exceptions apply? I
14 think we have hit that. You have heard enough of that.
15 You have heard us talk about it. It's all in the
16 papers.

17 Pennsylvania is not that different from
18 the other states in the country. There's product
19 liability law, there's common law that addresses it,
20 there's statutory law that addresses it. It's no
21 different here than there. The other judges that have
22 addressed these issues understood that, yeah, there is
23 product liability law. Perhaps it can survive a motion
24 to dismiss or demur, and perhaps it can't. But we are
25 not looking at that today.

1 We are not looking at whether it's better
2 to have a magazine disconnect on it pled not. We are
3 not looking at whether a loaded chamber indicator needs
4 to be something different than what's on this gun pled
5 not. We are not saying whether or not there should be
6 some kind of smart gun technology, which no one even
7 knows what that means, should be on a gun or not.
8 That's not why we are here.

9 They have made that claim. It's in their
10 complaint. We accept it as true, and we move to the
11 statute. Does the statute apply? All of the courts in
12 the country that have addressed this show this statute
13 applies. This case should be dismissed.

14 So the argument about folks being left
15 out in the cold -- I think Your Honor brought this up
16 too -- they are not being left in the cold. Congress is
17 saying you don't have viable causes of action here. In
18 this case alone, we have got a true tortfeasor. We have
19 got someone who pulled the trigger of a loaded gun to
20 the plaintiffs. There were other issues not in the
21 case, but there were other people that were culpable
22 here that have been addressed in criminal courts. So no
23 one is being left out in the cold here.

24 His arguments about the predicate
25 exception, Delana comes in and that's a way to

1 distinguish it, because there was a predicate exception
2 argument, pled a negligent entrustment argument, that's
3 all smoke. None of that is here. That's not even a
4 distinction that would be worthy of bringing the facts
5 of this case into some kind of an exception to the
6 PLCAA.

7 This is not a negligent entrustment case.
8 There is no allegation that Springfield pled Saloom
9 somehow violated a statute applicable to the sale or
10 marketing of firearms. Because if they did violate a
11 statute, there would be criminal conduct against them,
12 and we all know that there wasn't.

13 I understand I am going outside the
14 pleadings, but that just shows how the arguments here
15 don't make sense. The problem is, if the Court were to
16 allow this case to go forward pursuant to Pennsylvania
17 law -- there's a lot of talk about Pennsylvania law,
18 product liability law, that would be in the front --
19 federal law, that would be the front for the PLCAA.
20 There is no sweeping immunity statute here. There are
21 numerated exceptions. And, clearly, the complaint does
22 not adequately prove or plead one of those viable
23 exceptions here.

24 As far as the language solely caused,
25 it's real simple there. Every court that has looked at

1 the solely caused argument that has been presented by my
2 adversary here in court today, pled others, is that if
3 the harm was solely caused by the criminal conduct, then
4 we wouldn't be before Your Honor. Springfield wouldn't
5 be here. Saloom wouldn't be here. Because it was
6 solely cause by them, there would be no claim of
7 negligence against the seller. So the PLCAA would just
8 be a piece of paper with no meaning. So there is no
9 support for that. And every court that has looked has
10 said that.

11 This is not a Saturday Night Special.
12 This is not a case where someone is saying, well, just
13 because it's small and could fit in your pocket, the gun
14 is defective. Look at all of the cases that are
15 presented to Your Honor by both plaintiffs and
16 defendants. They are not Saturday Night Special cases.
17 These are cases, you know, that look at these issues and
18 analyze these issues and say, no, federal government has
19 spoken, you don't have a viable cause of action unless
20 you come within the exception. There's been no argument
21 here, I don't think, that's new and novel. There is no
22 exception here.

23 As far as whether or not involuntary
24 manslaughter juvenile is a criminal offense, well -- and
25 this is in the paperwork -- but look at the In the

1 Interest of G.T. matter. Although a delinquency
2 proceeding is not criminal in nature, delinquent acts
3 such as involuntary manslaughter are crimes.
4 Pennsylvania allows a juvenile to be prosecuted in
5 criminal court for the same act if it is determined that
6 the rehabilitative goals of adjudicating them as a
7 juvenile delinquent instead cannot be met. Is there
8 really a question here of whether or not this is
9 criminal? There can't be. Adames looks directly right
10 at point in that and says the obvious. Of course this
11 is.

12 Look at the Commonwealth of Bonner case,
13 because Commonwealth versus Bonner -- because the acts
14 for which a juvenile can be adjudicated as a juvenile
15 delinquent are considered to be crimes, they could be
16 used for the purposes of establishing a prior criminal
17 conviction for sentencing purposes. There is no
18 question here that this is a criminal offense. We can't
19 say that there's a big distinction because it was held
20 in juvenile court. It's a criminal offense.

21 THE COURT: Well, wait a minute. Isn't
22 it true -- I just want to ask this question. Isn't it
23 the selection of the prosecution, being the District
24 Attorney per county in the Commonwealth of Pennsylvania,
25 who then selects which avenue they wish to pursue with

1 regard to whether it is a juvenile adjudication and
2 unlawful, pled it's a criminal prosecution per se under
3 Title 18 of the Crimes Code, as opposed to simply it's
4 seen as juvenile? Because really the judge doesn't get
5 that opportunity to make that decision pled selection.
6 That's the prosecution that, by motion maybe of the
7 defense, to move it to juvenile either concedes to it
8 pled denies it, but it's ultimately separated, if you
9 will, and not in equal context to each other.

10 MR. RENZULLI: Well, it's a criminal
11 defense. We start with that. It's a criminal defense.
12 If it's determined that the juvenile can be
13 rehabilitated perhaps, then maybe they'll go down that
14 road. If they say he can't be rehabilitated, he sits in
15 the same chair that you and I would if we were in the
16 same position. So the distinction has no merit here.
17 That's not a good distinction to use. It was a
18 volitional act, and it doesn't matter --

19 THE COURT: So the mere ability to
20 prosecute it criminally as the Commonwealth allows makes
21 it fall underneath the defined wording of the PLCAA?

22 MR. RENZULLI: Clearly. It's a criminal
23 offense. I haven't seen one court in the country that
24 has looked at it any other way. Adames just hits it out
25 of the park. It's kind of basic stuff, that it is a

1 criminal offense. The volitional act is not, oh, I have
2 this pistol and I know it's loaded, and I know if I pull
3 the trigger there is going to be something bad that
4 happens. That's not the volitional act. The volitional
5 act is actually pulling the trigger on a firearm and
6 pointing it at someone else's head. It's not a piece of
7 paper on the ground or a piece of trash, and I pick it
8 up. That's not the point. The point is a volitional
9 act was done.

10 Remember in the Ryan case, in the
11 Appellate Court in Massachusetts, what theirs said was
12 the volitional act was just having it in your hand.
13 You're a convicted felon, you shouldn't have a gun in
14 your hand. Never mind that you need to pull the
15 trigger. Was it the box that pulled the trigger? Was
16 it his hand that pulled the trigger? The court said,
17 we're not getting involved in that. The volitional act
18 was when you made a decision to put that gun in your
19 hand. That's exactly what it was. But he went even
20 further.

21 THE COURT: So it's your position that
22 the mere possession by the other juvenile -- mere
23 possession was a volitional act?

24 MR. RENZULLI: Could have been. But we
25 not only have that, we go further than the court did in

1 Massachusetts. Then he goes and pulls the trigger while
2 pointed it at his friend. It's clear, crystal clear,
3 here. There's no case law, nothing, that disputes that
4 anywhere in the country.

5 There was a lot of talk of Bond and
6 Gregory. I'm going to defer to the Department of
7 Justice on those issues.

8 Does the Court have any further questions
9 from the defendant?

10 THE COURT: I do not. Thank you.

11 MR. RENZULLI: Okay. I will let counsel
12 address those important issues, Your Honor.

13 THE COURT: Response, Counsel?

14 MR. SOSKIN: Just a couple of points,
15 Your Honor. We have been here a while, and many of
16 these issue are discussed quite thoroughly in the papers
17 that the parties have presented.

18 I would like to focus on a couple of
19 places where plaintiffs' counsel stood up and attempted
20 to stress the uniqueness of the PLCAA, and suggested
21 that the precedence permitting Congress the power to
22 regulate in this area do not apply because of something
23 purportedly unique about this statute.

24 One area that my esteemed colleague
25 pointed to was the suggestion that in other due process

1 cases, affirming the elimination of tort liability, that
2 elimination was not entire, that there were substitute
3 remedies available. And it is correct that in the Duke
4 Power case, Congress had legislated a 560-million-dollar
5 fund for recoveries from nuclear power accidents. But
6 it should be obvious that 560 million dollars is
7 actually a drop in the bucket relative to the potential
8 liabilities from a nuclear accident. That statute did
9 not assure with its fund that every potential plaintiff
10 would be entitled to a recovery. But Duke Power is not
11 the best example for this, because, there at least,
12 there was a fund.

13 Other cases including many that we have
14 cited involve plaintiffs that were entirely cut off from
15 any remedy by Congress' enactment of a tort preclusion
16 system. The Lyon case which I mentioned involving
17 aircraft, the plaintiffs there could not recover because
18 their claims arose on one side of a strict dateline.
19 Before, there was a substitute or alternative recovery.
20 After, no such thing.

21 In the Carr case, the Fourth Circuit case
22 that I mentioned earlier, some potential plaintiffs were
23 cut off entirely there. In fact, under Pennsylvania
24 law, the same sort of cut-off that precludes some
25 plaintiffs from recovering entirely has been affirmed.

1 We cited to the Robson case. That's a
2 Pennsylvania Commonwealth Court case. It was addressing
3 a Pennsylvania tort reform statute in which plaintiffs
4 who suffered an injury below a certain threshold, they
5 were cut off from pursuing certain claims entirely.
6 Similarly -- oh, I misstated, I think. The point I wish
7 to make from the Carr case there, and that is that what
8 is illustrated in Carr is that some defendants were
9 eliminated entirely.

10 So just like in the PLCAA, tort claims
11 remained against some categories of tortfeasors,
12 including there a substitute recovery from the United
13 States government. But claims against other negligent,
14 I think, drivers in that case, those were barred
15 entirely. And the court of appeals there, the Fourth
16 Circuit Court of Appeals, said there is no problem with
17 excising certain categories of defendants from tort
18 liability.

19 The question of whether it is
20 unprecedented to address the legislative and judicial
21 balance in this way, it is the case that of the cases
22 cited here, only Delana discusses the Gregory and Bond
23 cases. But many of the other courts that have heard
24 PLA -- PLCAA cases -- and now I see why my esteemed
25 colleague calls it PLCAA -- several of those other

1 courts have heard precisely this same argument as a
2 Tenth Amendment in federalism argument. Those include
3 Adames and the D.C. District Court in Jefferies that I
4 mentioned, and the Eastern District of New York in the
5 City of New York versus Beretta. All of those courts
6 held and discussed how it was entirely proper for
7 Congress to base its actions and to set the parameters
8 of the PLCAA based on their concerns about causes of
9 action arising out of the judiciary on one hand and out
10 of the legislature in the other hand.

11 This is not animus towards the judiciary,
12 but rather it is a recognition of a greater
13 unpredictability of claims that do not arise
14 legislatively. And it is a recognition that, where an
15 individual constitutional right that is available to
16 virtually all citizens of our republic is at issue, a
17 legislature provides a better forum for their interests
18 to be heard.

19 Gregory, itself, by the way talks a lot
20 about when Congress may alter the usual balance between
21 the federal government and the state governments' roles.
22 And Congress may do so when it makes it, quote, clear in
23 the language of the statute that that is what it is
24 intended to do. In there it is quoting an earlier
25 Supreme Court case, the Atascadero case, that went to

1 Eleventh Amendment immunity of the states, whether
2 states can be sued in courts in their own state, and
3 whether Congress can abrogate that power.

4 And that is one of the most sensitive
5 federalism issues. It is an area where the Supreme
6 Court has repeatedly reached out and set a higher
7 standard than elsewhere for Congress to interfere in
8 that realm. And yet, when Congress states that it
9 clearly intends to do so, and when it provides evidence
10 that is congruent and proportionate that there is a
11 threat being posed by the state, it may do so even in
12 that situation. And we have discussed some of that case
13 law in our brief as well.

14 The final point that I wanted to make
15 just relates to the Truax case, which Mr. Lowy
16 mentioned. There is a discussion of that case. It's an
17 argument that, like many arguments as Mr. Renzulli
18 points out, has been raised before. There's a
19 discussion of that case, I believe, in the Alaska
20 Supreme Court decision rejecting a similar claim that
21 Truax and, I believe, Marbury guarantees you a recovery
22 in every incident.

23 They do not -- until you have a final
24 unreviewable claim, you simply do not have a due process
25 interest, a federal due process interest, in a tort

1 recovery.

2 I appreciate your time and also your
3 engagement with all of the issues here. Thank you.

4 THE COURT: You're welcome.

5 Any further response from you?

6 MR. LOWY: Very briefly, Your Honor.

7 One, the Truax case discussed in the
8 Alaska Supreme Court, that was another case like Delana
9 where the Supreme Court reversed dismissal of a case.
10 So it was sending the case back to be tried, yet holding
11 that some claims were barred. So it was a different
12 constitutional setting, because the plaintiff was
13 entitled to its day in court, even though it wasn't with
14 all the claims that they --

15 THE COURT: I can certainly review them
16 and compare them and make that judgment.

17 MR. LOWY: The argument that this
18 Bond/Gregory federalism argument was heard by other
19 courts, or addressed by other courts besides Delana,
20 that's not accurate. They award Tenth Amendment
21 federalism arguments made in the courts besides the
22 Delana court. But all of those arguments were arguments
23 that PLCAA should be struck down as unconstitutional.
24 That's very different than the Bond/Gregory argument,
25 which is not that PLCAA should be struck down, but that

1 should be narrowly construed to allow for this case.
2 It's entirely a different argument. That's the Tenth
3 Amendment argument that was addressed by the courts
4 besides Delana.

5 And as far as the due process, if you
6 look at all of the cases discussed by the government,
7 they are all very different. None of them are really
8 frontal -- federal laws that give you frontal sweeping
9 immunity. There are differences in each of them, but
10 they are -- maybe somebody ran afoul of the statute of
11 limitations that didn't have a claim. That's very
12 different from saying if you get hurt by the class of
13 negligent actors, you get no right to recovery.

14 That's all.

15 THE COURT: Okay. Thank you. I will
16 take it under advisement. There is a lot to consider.
17 It is much appreciated. Have a good afternoon.

18 MR. RENZULLI: Thank you. We appreciate
19 your time.

20 MR. LOWY: Thank you.

21 THE COURT: Thank you.

22 MR. SOSKIN: Thank you, Your Honor.

23 (PROCEEDINGS ADJOURNED - 3:55 P.M.)
24
25

C E R T I F I C A T E

* * *

I hereby certify that the proceedings are
contained fully and accurately in the notes taken by me
at the hearing of the within cause and that this copy is
a true and correct transcript of the same.

Blake Schaum

Blake Schaum, Court Reporter

1	841 [1] - 42:7 849 [1] - 42:7	74:17, 74:23 acted [1] - 43:8 action [17] - 3:16, 4:3, 4:20, 10:22, 30:8, 46:20, 47:24, 48:4, 49:3, 51:8, 51:11, 51:12, 56:18, 63:17, 69:17, 71:19, 78:9 actions [9] - 3:20, 10:16, 25:16, 35:9, 41:3, 43:13, 50:14, 52:10, 78:7 activity [1] - 18:4 actors [3] - 41:14, 41:16, 81:13 acts [2] - 72:2, 72:13 actual [1] - 14:24 Adames [7] - 5:22, 13:20, 17:20, 60:1, 72:9, 73:24, 78:3 Adams [3] - 17:20, 27:24, 27:25 add [2] - 15:8, 49:10 add-on [1] - 15:8 addition [3] - 14:23, 27:10, 52:6 additional [1] - 8:12 address [8] - 11:18, 28:8, 32:13, 45:22, 61:6, 62:2, 75:12, 77:20 addressed [10] - 9:1, 9:22, 66:17, 66:18, 67:15, 68:22, 69:12, 69:22, 80:19, 81:3 addresses [3] - 57:12, 68:19, 68:20 addressing [2] - 45:17, 77:2 adequately [1] - 70:22 adjacent [1] - 28:3 ADJOURNED [1] - 81:23 adjudicated [1] - 72:14 adjudicating [1] - 72:6 adjudication [1] - 73:1 administer [1] - 11:24 Administrators [2] - 1:5, 2:4 admission [2] - 28:18, 58:15 admitted [1] - 53:22 adopt [4] - 10:19, 10:25, 16:14, 66:24 adopted [1] - 8:16 adversary [1] - 71:2 adversary's [1] - 66:11 advisement [1] -	81:16 affect [1] - 27:7 affirmation [1] - 21:25 affirmed [2] - 20:9, 76:25 affirming [1] - 76:1 affords [1] - 27:3 afield [1] - 16:23 afoul [2] - 27:5, 81:10 afraid [1] - 36:17 afternoon [6] - 2:19, 2:24, 3:2, 3:13, 16:17, 81:17 age [2] - 29:7, 57:16 agencies [1] - 14:3 ago [3] - 12:6, 31:14, 33:17 agree [2] - 44:21, 56:9 ahead [5] - 3:12, 12:21, 23:3, 32:8, 35:2 aircraft [4] - 19:5, 19:6, 27:22, 76:17 Alaska [3] - 17:23, 79:19, 80:8 Alito [1] - 20:21 allegation [1] - 70:8 allegations [4] - 6:19, 33:4, 67:21, 68:11 allow [10] - 3:9, 11:10, 22:16, 34:13, 38:17, 40:5, 41:3, 61:25, 70:16, 81:1 allowed [6] - 22:18, 39:14, 46:19, 55:21, 63:16, 63:17 allowing [4] - 50:13, 53:3, 56:10, 63:22 allows [8] - 19:1, 45:4, 52:6, 56:6, 64:13, 64:14, 72:4, 73:20 almost [5] - 5:23, 6:8, 36:9, 45:21, 57:2 alone [3] - 7:24, 8:4, 69:18 alter [1] - 78:20 alternative [2] - 40:18, 76:19 Amature [1] - 20:14 Amendment [15] - 11:8, 11:14, 27:6, 28:6, 40:12, 40:16, 52:1, 62:7, 62:24, 62:25, 64:12, 78:2, 79:1, 80:20, 81:3 America [1] - 3:5 ammunition [1] - 15:14 analyze [2] - 53:15, 71:18	AND [2] - 1:4, 1:10 Anderson [2] - 36:20, 50:22 animus [2] - 62:21, 78:11 answer [1] - 3:12 anticipate [1] - 6:7 anyway [1] - 26:4 apparent [1] - 12:8 appeal [1] - 32:5 appeals [2] - 67:14, 77:15 Appeals [2] - 24:3, 77:16 appearance [1] - 2:12 appearing [2] - 16:18, 17:6 Appellate [6] - 17:24, 28:12, 40:10, 43:25, 60:8, 74:11 appellate [5] - 7:11, 7:23, 11:2, 31:22, 60:13 applicable [4] - 37:15, 42:1, 56:15, 70:9 application [2] - 28:13, 29:10 applied [1] - 54:13 applies [7] - 5:4, 22:4, 24:23, 25:4, 54:17, 55:3, 69:13 apply [16] - 4:1, 8:3, 12:1, 21:9, 21:13, 29:20, 45:25, 48:21, 50:22, 54:25, 55:14, 68:13, 69:11, 75:22 applying [3] - 36:1, 54:6, 61:19 appreciate [8] - 3:14, 16:19, 16:24, 17:16, 28:9, 66:8, 80:2, 81:18 appreciated [1] - 81:17 approved [2] - 39:21, 39:22 area [8] - 22:14, 30:9, 60:15, 61:8, 75:22, 75:24, 79:5 areas [1] - 22:18 argue [3] - 59:14, 68:2, 68:3 argued [2] - 7:10, 9:23 arguendo [1] - 39:10 arguing [1] - 68:4 ARGUMENT [1] - 1:18 argument [37] - 8:14, 8:16, 10:1, 12:2, 13:20, 16:3, 17:6, 38:3, 38:5, 40:15,
2	2004 [1] - 49:8 2005 [5] - 3:19, 4:23, 45:7, 49:13, 66:14 2014 [1] - 29:8 2018 [5] - 1:7, 1:14, 2:1, 2:10, 20:10 25 [1] - 63:8 2504(a) [1] - 5:17 257 [1] - 63:9 26 [1] - 5:14 29 [2] - 4:12, 5:14	74:17, 74:23 acted [1] - 43:8 action [17] - 3:16, 4:3, 4:20, 10:22, 30:8, 46:20, 47:24, 48:4, 49:3, 51:8, 51:11, 51:12, 56:18, 63:17, 69:17, 71:19, 78:9 actions [9] - 3:20, 10:16, 25:16, 35:9, 41:3, 43:13, 50:14, 52:10, 78:7 activity [1] - 18:4 actors [3] - 41:14, 41:16, 81:13 acts [2] - 72:2, 72:13 actual [1] - 14:24 Adames [7] - 5:22, 13:20, 17:20, 60:1, 72:9, 73:24, 78:3 Adams [3] - 17:20, 27:24, 27:25 add [2] - 15:8, 49:10 add-on [1] - 15:8 addition [3] - 14:23, 27:10, 52:6 additional [1] - 8:12 address [8] - 11:18, 28:8, 32:13, 45:22, 61:6, 62:2, 75:12, 77:20 addressed [10] - 9:1, 9:22, 66:17, 66:18, 67:15, 68:22, 69:12, 69:22, 80:19, 81:3 addresses [3] - 57:12, 68:19, 68:20 addressing [2] - 45:17, 77:2 adequately [1] - 70:22 adjacent [1] - 28:3 ADJOURNED [1] - 81:23 adjudicated [1] - 72:14 adjudicating [1] - 72:6 adjudication [1] - 73:1 administer [1] - 11:24 Administrators [2] - 1:5, 2:4 admission [2] - 28:18, 58:15 admitted [1] - 53:22 adopt [4] - 10:19, 10:25, 16:14, 66:24 adopted [1] - 8:16 adversary [1] - 71:2 adversary's [1] - 66:11 advisement [1] -	AND [2] - 1:4, 1:10 Anderson [2] - 36:20, 50:22 animus [2] - 62:21, 78:11 answer [1] - 3:12 anticipate [1] - 6:7 anyway [1] - 26:4 apparent [1] - 12:8 appeal [1] - 32:5 appeals [2] - 67:14, 77:15 Appeals [2] - 24:3, 77:16 appearance [1] - 2:12 appearing [2] - 16:18, 17:6 Appellate [6] - 17:24, 28:12, 40:10, 43:25, 60:8, 74:11 appellate [5] - 7:11, 7:23, 11:2, 31:22, 60:13 applicable [4] - 37:15, 42:1, 56:15, 70:9 application [2] - 28:13, 29:10 applied [1] - 54:13 applies [7] - 5:4, 22:4, 24:23, 25:4, 54:17, 55:3, 69:13 apply [16] - 4:1, 8:3, 12:1, 21:9, 21:13, 29:20, 45:25, 48:21, 50:22, 54:25, 55:14, 68:13, 69:11, 75:22 applying [3] - 36:1, 54:6, 61:19 appreciate [8] - 3:14, 16:19, 16:24, 17:16, 28:9, 66:8, 80:2, 81:18 appreciated [1] - 81:17 approved [2] - 39:21, 39:22 area [8] - 22:14, 30:9, 60:15, 61:8, 75:22, 75:24, 79:5 areas [1] - 22:18 argue [3] - 59:14, 68:2, 68:3 argued [2] - 7:10, 9:23 arguendo [1] - 39:10 arguing [1] - 68:4 ARGUMENT [1] - 1:18 argument [37] - 8:14, 8:16, 10:1, 12:2, 13:20, 16:3, 17:6, 38:3, 38:5, 40:15,	
3	31 [2] - 1:14, 2:1 312 [1] - 63:9 32 [1] - 23:20 330 [1] - 63:9 3:55 [1] - 81:23	74:17, 74:23 acted [1] - 43:8 action [17] - 3:16, 4:3, 4:20, 10:22, 30:8, 46:20, 47:24, 48:4, 49:3, 51:8, 51:11, 51:12, 56:18, 63:17, 69:17, 71:19, 78:9 actions [9] - 3:20, 10:16, 25:16, 35:9, 41:3, 43:13, 50:14, 52:10, 78:7 activity [1] - 18:4 actors [3] - 41:14, 41:16, 81:13 acts [2] - 72:2, 72:13 actual [1] - 14:24 Adames [7] - 5:22, 13:20, 17:20, 60:1, 72:9, 73:24, 78:3 Adams [3] - 17:20, 27:24, 27:25 add [2] - 15:8, 49:10 add-on [1] - 15:8 addition [3] - 14:23, 27:10, 52:6 additional [1] - 8:12 address [8] - 11:18, 28:8, 32:13, 45:22, 61:6, 62:2, 75:12, 77:20 addressed [10] - 9:1, 9:22, 66:17, 66:18, 67:15, 68:22, 69:12, 69:22, 80:19, 81:3 addresses [3] - 57:12, 68:19, 68:20 addressing [2] - 45:17, 77:2 adequately [1] - 70:22 adjacent [1] - 28:3 ADJOURNED [1] - 81:23 adjudicated [1] - 72:14 adjudicating [1] - 72:6 adjudication [1] - 73:1 administer [1] - 11:24 Administrators [2] - 1:5, 2:4 admission [2] - 28:18, 58:15 admitted [1] - 53:22 adopt [4] - 10:19, 10:25, 16:14, 66:24 adopted [1] - 8:16 adversary [1] - 71:2 adversary's [1] - 66:11 advisement [1] -	AND [2] - 1:4, 1:10 Anderson [2] - 36:20, 50:22 animus [2] - 62:21, 78:11 answer [1] - 3:12 anticipate [1] - 6:7 anyway [1] - 26:4 apparent [1] - 12:8 appeal [1] - 32:5 appeals [2] - 67:14, 77:15 Appeals [2] - 24:3, 77:16 appearance [1] - 2:12 appearing [2] - 16:18, 17:6 Appellate [6] - 17:24, 28:12, 40:10, 43:25, 60:8, 74:11 appellate [5] - 7:11, 7:23, 11:2, 31:22, 60:13 applicable [4] - 37:15, 42:1, 56:15, 70:9 application [2] - 28:13, 29:10 applied [1] - 54:13 applies [7] - 5:4, 22:4, 24:23, 25:4, 54:17, 55:3, 69:13 apply [16] - 4:1, 8:3, 12:1, 21:9, 21:13, 29:20, 45:25, 48:21, 50:22, 54:25, 55:14, 68:13, 69:11, 75:22 applying [3] - 36:1, 54:6, 61:19 appreciate [8] - 3:14, 16:19, 16:24, 17:16, 28:9, 66:8, 80:2, 81:18 appreciated [1] - 81:17 approved [2] - 39:21, 39:22 area [8] - 22:14, 30:9, 60:15, 61:8, 75:22, 75:24, 79:5 areas [1] - 22:18 argue [3] - 59:14, 68:2, 68:3 argued [2] - 7:10, 9:23 arguendo [1] - 39:10 arguing [1] - 68:4 ARGUMENT [1] - 1:18 argument [37] - 8:14, 8:16, 10:1, 12:2, 13:20, 16:3, 17:6, 38:3, 38:5, 40:15,	
4	497 [1] - 43:23	74:17, 74:23 acted [1] - 43:8 action [17] - 3:16, 4:3, 4:20, 10:22, 30:8, 46:20, 47:24, 48:4, 49:3, 51:8, 51:11, 51:12, 56:18, 63:17, 69:17, 71:19, 78:9 actions [9] - 3:20, 10:16, 25:16, 35:9, 41:3, 43:13, 50:14, 52:10, 78:7 activity [1] - 18:4 actors [3] - 41:14, 41:16, 81:13 acts [2] - 72:2, 72:13 actual [1] - 14:24 Adames [7] - 5:22, 13:20, 17:20, 60:1, 72:9, 73:24, 78:3 Adams [3] - 17:20, 27:24, 27:25 add [2] - 15:8, 49:10 add-on [1] - 15:8 addition [3] - 14:23, 27:10, 52:6 additional [1] - 8:12 address [8] - 11:18, 28:8, 32:13, 45:22, 61:6, 62:2, 75:12, 77:20 addressed [10] - 9:1, 9:22, 66:17, 66:18, 67:15, 68:22, 69:12, 69:22, 80:19, 81:3 addresses [3] - 57:12, 68:19, 68:20 addressing [2] - 45:17, 77:2 adequately [1] - 70:22 adjacent [1] - 28:3 ADJOURNED [1] - 81:23 adjudicated [1] - 72:14 adjudicating [1] - 72:6 adjudication [1] - 73:1 administer [1] - 11:24 Administrators [2] - 1:5, 2:4 admission [2] - 28:18, 58:15 admitted [1] - 53:22 adopt [4] - 10:19, 10:25, 16:14, 66:24 adopted [1] - 8:16 adversary [1] - 71:2 adversary's [1] - 66:11 advisement [1] -	AND [2] - 1:4, 1:10 Anderson [2] - 36:20, 50:22 animus [2] - 62:21, 78:11 answer [1] - 3:12 anticipate [1] - 6:7 anyway [1] - 26:4 apparent [1] - 12:8 appeal [1] - 32:5 appeals [2] - 67:14, 77:15 Appeals [2] - 24:3, 77:16 appearance [1] - 2:12 appearing [2] - 16:18, 17:6 Appellate [6] - 17:24, 28:12, 40:10, 43:25, 60:8, 74:11 appellate [5] - 7:11, 7:23, 11:2, 31:22, 60:13 applicable [4] - 37:15, 42:1, 56:15, 70:9 application [2] - 28:13, 29:10 applied [1] - 54:13 applies [7] - 5:4, 22:4, 24:23, 25:4, 54:17, 55:3, 69:13 apply [16] - 4:1, 8:3, 12:1, 21:9, 21:13, 29:20, 45:25, 48:21, 50:22, 54:25, 55:14, 68:13, 69:11, 75:22 applying [3] - 36:1, 54:6, 61:19 appreciate [8] - 3:14, 16:19, 16:24, 17:16, 28:9, 66:8, 80:2, 81:18 appreciated [1] - 81:17 approved [2] - 39:21, 39:22 area [8] - 22:14, 30:9, 60:15, 61:8, 75:22, 75:24, 79:5 areas [1] - 22:18 argue [3] - 59:14, 68:2, 68:3 argued [2] - 7:10, 9:23 arguendo [1] - 39:10 arguing [1] - 68:4 ARGUMENT [1] - 1:18 argument [37] - 8:14, 8:16, 10:1, 12:2, 13:20, 16:3, 17:6, 38:3, 38:5, 40:15,	
5	5 [1] - 37:11 50 [2] - 12:6, 33:10 560 [1] - 76:6 560-million-dollar [1] - 76:4	74:17, 74:23 acted [1] - 43:8 action [17] - 3:16, 4:3, 4:20, 10:22, 30:8, 46:20, 47:24, 48:4, 49:3, 51:8, 51:11, 51:12, 56:18, 63:17, 69:17, 71:19, 78:9 actions [9] - 3:20, 10:16, 25:16, 35:9, 41:3, 43:13, 50:14, 52:10, 78:7 activity [1] - 18:4 actors [3] - 41:14, 41:16, 81:13 acts [2] - 72:2, 72:13 actual [1] - 14:24 Adames [7] - 5:22, 13:20, 17:20, 60:1, 72:9, 73:24, 78:3 Adams [3] - 17:20, 27:24, 27:25 add [2] - 15:8, 49:10 add-on [1] - 15:8 addition [3] - 14:23, 27:10, 52:6 additional [1] - 8:12 address [8] - 11:18, 28:8, 32:13, 45:22, 61:6, 62:2, 75:12, 77:20 addressed [10] - 9:1, 9:22, 66:17, 66:18, 67:15, 68:22, 69:12, 69:22, 80:19, 81:3 addresses [3] - 57:12, 68:19, 68:20 addressing [2] - 45:17, 77:2 adequately [1] - 70:22 adjacent [1] - 28:3 ADJOURNED [1] - 81:23 adjudicated [1] - 72:14 adjudicating [1] - 72:6 adjudication [1] - 73:1 administer [1] - 11:24 Administrators [2] - 1:5, 2:4 admission [2] - 28:18, 58:15 admitted [1] - 53:22 adopt [4] - 10:19, 10:25, 16:14, 66:24 adopted [1] - 8:16 adversary [1] - 71:2 adversary's [1] - 66:11 advisement [1] -	AND [2] - 1:4, 1:10 Anderson [2] - 36:20, 50:22 animus [2] - 62:21, 78:11 answer [1] - 3:12 anticipate [1] - 6:7 anyway [1] - 26:4 apparent [1] - 12:8 appeal [1] - 32:5 appeals [2] - 67:14, 77:15 Appeals [2] - 24:3, 77:16 appearance [1] - 2:12 appearing [2] - 16:18, 17:6 Appellate [6] - 17:24, 28:12, 40:10, 43:25, 60:8, 74:11 appellate [5] - 7:11, 7:23, 11:2, 31:22, 60:13 applicable [4] - 37:15, 42:1, 56:15, 70:9 application [2] - 28:13, 29:10 applied [1] - 54:13 applies [7] - 5:4, 22:4, 24:23, 25:4, 54:17, 55:3, 69:13 apply [16] - 4:1, 8:3, 12:1, 21:9, 21:13, 29:20, 45:25, 48:21, 50:22, 54:25, 55:14, 68:13, 69:11, 75:22 applying [3] - 36:1, 54:6, 61:19 appreciate [8] - 3:14, 16:19, 16:24, 17:16, 28:9, 66:8, 80:2, 81:18 appreciated [1] - 81:17 approved [2] - 39:21, 39:22 area [8] - 22:14, 30:9, 60:15, 61:8, 75:22, 75:24, 79:5 areas [1] - 22:18 argue [3] - 59:14, 68:2, 68:3 argued [2] - 7:10, 9:23 arguendo [1] - 39:10 arguing [1] - 68:4 ARGUMENT [1] - 1:18 argument [37] - 8:14, 8:16, 10:1, 12:2, 13:20, 16:3, 17:6, 38:3, 38:5, 40:15,	
6	6 [1] - 21:12	74:17, 74:23 acted [1] - 43:8 action [17] - 3:16, 4:3, 4:20, 10:22, 30:8, 46:20, 47:24, 48:4, 49:3, 51:8, 51:11, 51:12, 56:18, 63:17, 69:17, 71:19, 78:9 actions [9] - 3:20, 10:16, 25:16, 35:9, 41:3, 43:13, 50:14, 52:10, 78:7 activity [1] - 18:4 actors [3] - 41:14, 41:16, 81:13 acts [2] - 72:2, 72:13 actual [1] - 14:24 Adames [7] - 5:22, 13:20, 17:20, 60:1, 72:9, 73:24, 78:3 Adams [3] - 17:20, 27:24, 27:25 add [2] - 15:8, 49:10 add-on [1] - 15:8 addition [3] - 14:23, 27:10, 52:6 additional [1] - 8:12 address [8] - 11:18, 28:8, 32:13, 45:22, 61:6, 62:2, 75:12, 77:20 addressed [10] - 9:1, 9:22, 66:17, 66:18, 67:15, 68:22, 69:12, 69:22, 80:		

42:19, 50:15, 52:23, 54:3, 55:23, 57:25, 61:13, 61:23, 62:7, 62:14, 66:11, 67:12, 67:13, 69:14, 70:2, 71:1, 71:20, 78:1, 78:2, 79:17, 80:17, 80:18, 80:24, 81:2, 81:3
arguments [19] - 9:21, 11:1, 11:8, 11:15, 12:16, 16:15, 17:14, 45:23, 61:22, 63:2, 66:25, 67:10, 67:16, 69:24, 70:14, 79:17, 80:21, 80:22
arise [1] - 78:13
arising [2] - 20:11, 78:9
armed [1] - 20:25
Armory [3] - 2:8, 2:22, 4:5
ARMORY [1] - 1:10
arms [2] - 18:11, 26:24
Arms [1] - 3:18
arose [1] - 76:18
arrive [1] - 41:24
Article [1] - 21:11
article [1] - 18:17
Ashcroft [2] - 10:8, 29:6
asserting [1] - 23:5
assertions [1] - 50:18
assets [1] - 38:23
assume [2] - 39:10, 39:19
assuming [1] - 38:3
assure [1] - 76:9
Atascadero [1] - 78:25
attack [2] - 14:6, 30:12
attempt [1] - 9:15
attempted [1] - 75:19
attention [1] - 49:16
attenuated [1] - 20:1
Attorney [1] - 72:24
attorneys [1] - 28:18
author [1] - 43:17
authorities [2] - 22:13, 54:21
authority [23] - 10:16, 18:2, 18:13, 18:24, 19:4, 19:17, 20:8, 22:12, 22:20, 23:1, 30:6, 35:20, 48:16, 52:25, 55:15, 60:17, 61:3, 61:5, 61:7, 61:10, 65:11, 65:17
authorize [1] - 20:17
automatic [2] - 6:1, 12:7

available [3] - 37:2, 76:3, 78:15
avenue [2] - 51:22, 72:25
Aviation [1] - 19:6
avoid [7] - 10:18, 24:17, 42:12, 42:14, 43:4, 47:18, 61:4
avoidance [4] - 29:4, 30:25, 31:4, 42:10
award [1] - 80:20
aware [2] - 28:14, 40:10

B

background [2] - 26:3, 26:7
bad [3] - 26:9, 43:20, 74:3
balance [4] - 20:1, 55:15, 77:21, 78:20
balancing [2] - 26:21, 27:2
bar [4] - 8:10, 16:22, 21:24, 30:8
barred [8] - 3:16, 6:21, 46:9, 46:10, 48:7, 50:16, 77:14, 80:11
barring [2] - 50:12, 57:1
base [1] - 78:7
based [5] - 28:4, 31:18, 43:8, 52:11, 78:8
basic [3] - 55:13, 63:2, 73:25
basis [15] - 18:24, 24:23, 24:24, 25:1, 25:3, 25:11, 27:10, 27:19, 28:3, 64:6, 64:8, 64:11, 64:16, 65:10, 67:18
bear [2] - 18:11, 26:24
bearing [1] - 33:24
became [1] - 49:13
becomes [1] - 29:20
BEFORE [1] - 1:16
began [1] - 32:25
begin [2] - 18:16, 33:1
behalf [5] - 1:21, 1:23, 1:25, 2:17, 2:21
behavior [2] - 35:1, 35:4
behind [1] - 44:21
belief [2] - 33:12, 57:15
believes [1] - 6:5
below [1] - 77:4
benefit [1] - 27:2

Beretta [6] - 6:1, 6:14, 23:9, 24:10, 78:5
best [3] - 42:19, 76:11
better [6] - 7:17, 12:3, 61:12, 61:22, 69:1, 78:17
betting [3] - 20:11, 20:18, 20:23
between [6] - 20:3, 20:7, 41:15, 49:17, 59:20, 78:20
big [4] - 22:11, 41:15, 49:23, 72:19
bigger [1] - 29:3
Bill [1] - 18:10
bill [1] - 49:9
binding [3] - 35:20, 52:25, 66:19
Bivens [1] - 26:19
Blake [1] - 82:11
board [1] - 50:6
bona [1] - 52:13
Bond [29] - 10:8, 29:3, 29:8, 30:3, 30:9, 31:1, 45:23, 46:1, 46:4, 46:23, 46:24, 47:9, 48:15, 48:17, 54:6, 54:9, 54:10, 54:24, 55:3, 55:5, 55:6, 55:7, 55:8, 55:13, 60:16, 61:14, 75:5, 77:22
bond [1] - 46:24
Bond/Gregory [2] - 80:18, 80:24
Bonner [2] - 72:12, 72:13
bottom [1] - 11:2
bound [1] - 21:14
box [1] - 74:15
boy [4] - 5:25, 13:14, 16:1, 58:5
bracket [2] - 63:12, 63:13
branch [10] - 9:16, 9:17, 22:5, 22:9, 38:16, 40:6, 60:23, 60:24, 62:12, 62:22
branches [1] - 11:24
brief [12] - 11:19, 19:8, 28:8, 28:10, 29:5, 32:16, 35:12, 57:11, 63:7, 79:13
briefing [2] - 28:9, 32:10
briefly [4] - 3:19, 4:25, 23:1, 80:6
briefs [4] - 9:21, 67:6, 67:7
bring [6] - 7:17, 37:23,

39:20, 46:12, 46:13, 51:16
bringing [1] - 70:4
brings [1] - 7:16
broad [1] - 63:20
broader [3] - 30:24, 30:25, 39:11
broadly [1] - 29:25
brought [7] - 4:21, 8:6, 9:6, 34:5, 49:25, 69:15
bucket [1] - 76:7
buddy's [1] - 7:14
built [1] - 6:17
bullet [1] - 6:7
burden [3] - 9:13, 18:23, 25:18
burgeoning [1] - 36:19
buried [1] - 59:11
business [11] - 2:7, 2:9, 2:22, 14:7, 16:8, 36:19, 62:17, 62:18, 63:25, 64:17, 65:7
businesses [1] - 9:9
buys [1] - 45:13

C

California [4] - 17:25, 64:15, 65:3, 65:6
cannot [2] - 4:21, 72:7
canons [2] - 31:4, 31:5
cap [1] - 64:21
capabilities [1] - 12:16
capability [1] - 12:18
capital [1] - 37:11
capped [1] - 64:4
care [1] - 60:19
careful [1] - 13:8
Carlson [1] - 2:16
Carpenter [1] - 2:17
Carr [4] - 27:14, 76:21, 77:7, 77:8
carried [2] - 18:5, 19:21
carry [1] - 12:9
case [152] - 2:3, 3:15, 4:12, 5:22, 5:23, 6:9, 6:11, 6:15, 7:2, 7:8, 7:11, 7:20, 8:3, 8:7, 8:25, 9:22, 10:9, 13:23, 16:11, 19:10, 19:13, 19:14, 19:15, 19:17, 19:25, 20:8, 20:11, 20:13, 22:2, 22:6, 23:15, 23:18, 24:3, 24:10, 26:16,

27:9, 27:14, 27:25, 28:7, 28:11, 28:13, 28:16, 28:22, 29:1, 29:2, 29:5, 29:6, 29:8, 30:10, 31:7, 31:10, 31:15, 31:16, 31:18, 31:24, 32:5, 33:2, 34:23, 35:20, 36:14, 37:17, 37:20, 37:24, 39:20, 40:9, 41:8, 42:7, 43:24, 46:2, 46:3, 46:4, 46:5, 46:6, 46:8, 46:9, 46:17, 46:19, 46:21, 47:5, 47:18, 48:6, 48:22, 51:17, 52:6, 53:2, 53:3, 54:8, 54:9, 54:10, 54:21, 55:7, 55:25, 56:15, 57:1, 57:16, 57:18, 58:15, 60:1, 60:3, 60:5, 60:7, 60:18, 60:21, 61:25, 62:2, 63:1, 63:5, 63:9, 64:2, 64:11, 65:20, 65:24, 65:25, 67:1, 69:13, 69:18, 69:21, 70:5, 70:7, 70:16, 71:12, 72:12, 74:10, 75:3, 76:4, 76:16, 76:21, 77:1, 77:2, 77:7, 77:14, 77:21, 78:25, 79:12, 79:15, 79:16, 79:19, 80:7, 80:8, 80:9, 80:10, 81:1
Case [1] - 2:10
cases [60] - 4:20, 7:9, 11:12, 17:18, 19:19, 19:24, 20:9, 23:9, 23:16, 27:16, 28:4, 29:12, 29:14, 29:21, 35:19, 37:4, 38:11, 38:12, 38:18, 38:21, 39:14, 40:4, 40:13, 41:15, 41:18, 44:12, 44:22, 45:1, 45:22, 45:24, 46:23, 47:7, 47:9, 49:20, 52:16, 52:17, 55:1, 55:4, 55:6, 56:7, 56:11, 60:22, 60:23, 63:19, 65:12, 66:11, 66:23, 66:24, 71:14, 71:16, 71:17, 76:1, 76:13, 77:21, 77:23, 77:24, 81:6
cast [1] - 21:24
categories [2] - 77:11, 77:17

caused [25] - 5:5, 8:8, 8:17, 9:10, 9:20, 44:8, 44:10, 45:2, 49:4, 49:5, 49:18, 49:22, 52:7, 52:21, 55:24, 56:2, 56:12, 58:3, 59:13, 59:19, 61:16, 70:24, 71:1, 71:3
causes [5] - 5:20, 51:8, 51:11, 69:17, 78:8
certain [17] - 14:9, 14:14, 14:21, 14:22, 15:4, 15:8, 19:21, 21:7, 28:2, 44:17, 50:23, 51:8, 56:6, 77:4, 77:5, 77:17
certainly [6] - 5:9, 16:2, 33:8, 40:14, 47:12, 80:15
certify [1] - 82:5
cetera [1] - 5:7
chair [1] - 73:15
challenge [4] - 17:9, 20:12, 23:5, 24:21
challenges [2] - 17:15, 23:2
chamber [13] - 6:7, 6:13, 6:16, 12:12, 13:2, 13:4, 13:9, 33:14, 58:24, 59:4, 65:2, 67:23, 69:3
chambers [1] - 20:25
chance [1] - 28:8
change [1] - 35:4
changed [1] - 12:6
changes [2] - 11:25, 49:9
character [1] - 7:6
characteristic [1] - 7:6
charge [2] - 47:15, 58:17
cheated [1] - 54:15
check [5] - 26:3, 26:7, 58:23, 58:24, 59:1
checking [1] - 58:22
chemical [4] - 29:9, 30:11, 54:12, 55:9
chemicals [1] - 29:11
chief [1] - 43:17
children [5] - 33:12, 33:15, 33:19, 34:14, 61:20
choice [3] - 5:10, 30:5, 38:10
choices [2] - 25:15, 65:6
choose [1] - 39:8
chooses [1] - 38:15

chose [1] - 5:10
chosen [7] - 22:15, 34:13, 34:17, 35:6, 35:8, 36:2, 42:17
Christopher [2] - 1:23, 2:20
Circuit [10] - 17:24, 17:25, 19:7, 19:13, 24:2, 24:10, 27:13, 76:21, 77:16
circuit [2] - 32:2, 32:4
circumstance [1] - 51:21
circumvent [1] - 9:16
cite [4] - 35:12, 50:9, 63:8, 63:19
cited [8] - 19:8, 23:18, 24:16, 36:8, 52:25, 76:14, 77:1, 77:22
cities [1] - 49:25
citizens [2] - 50:24, 78:16
City [1] - 78:5
civil [15] - 3:16, 3:20, 4:3, 4:19, 10:22, 25:16, 34:13, 36:1, 38:6, 40:4, 41:20, 47:23, 48:4, 56:18, 62:19
CIVIL [1] - 1:2
claim [13] - 6:16, 8:10, 8:20, 23:7, 23:10, 46:13, 46:14, 64:16, 69:9, 71:6, 79:20, 79:24, 81:11
claims [13] - 4:19, 6:8, 23:14, 24:24, 34:13, 43:7, 76:18, 77:5, 77:10, 77:13, 78:13, 80:11, 80:14
clarify [1] - 47:13
class [1] - 81:12
classic [2] - 3:16, 10:21
classified [1] - 64:3
clause [8] - 12:2, 18:17, 19:1, 21:11, 22:12, 22:13, 23:6, 65:11
clear [23] - 8:23, 11:20, 23:16, 24:6, 29:15, 29:23, 31:1, 31:15, 31:18, 31:19, 32:14, 34:4, 43:6, 46:25, 49:19, 61:6, 61:8, 61:18, 61:21, 61:23, 75:2, 78:22
clearly [10] - 6:21, 14:1, 38:1, 45:5, 57:8, 60:25, 61:2,

70:21, 73:22, 79:9
clerks [1] - 16:20
clip [3] - 15:14, 15:17, 15:18
close [3] - 41:13, 60:12, 60:14
closed [2] - 13:8
closely [1] - 17:15
co [1] - 3:1
co-counsel [1] - 3:1
cocking [1] - 13:5
Code [1] - 73:3
cold [5] - 36:11, 37:5, 69:15, 69:16, 69:23
colleague [2] - 75:24, 77:25
Colorado [1] - 31:10
Columbia [2] - 31:14, 31:24
coming [1] - 48:13
Comm [1] - 20:8
command [3] - 21:13, 29:17, 41:17
commandeer [1] - 11:23
commandeering [1] - 21:10
Commerce [1] - 3:18
commerce [15] - 3:23, 4:7, 9:14, 10:14, 16:7, 18:4, 18:5, 18:16, 18:18, 18:23, 20:2, 20:5, 22:12, 25:18, 30:21
COMMON [1] - 1:1
common [16] - 22:2, 23:21, 23:22, 33:11, 38:13, 38:14, 42:3, 42:5, 43:9, 43:14, 45:8, 45:9, 52:12, 52:14, 62:19, 68:19
commonly [1] - 30:20
Commonwealth [11] - 25:2, 34:23, 35:15, 35:22, 45:5, 53:10, 72:12, 72:13, 72:24, 73:20, 77:2
Commonwealth's [1] - 65:17
companies [4] - 16:7, 34:21, 43:8, 65:16
company [7] - 35:1, 43:19, 44:8, 44:23, 49:21, 49:23, 50:13
comparable [1] - 23:23
compare [1] - 80:16
compensate [1] - 36:24
compensation [5] -

34:24, 36:22, 36:25, 37:2, 50:17
competency [1] - 58:18
competing [1] - 42:11
complaint [10] - 4:11, 4:13, 5:15, 67:17, 67:18, 67:21, 68:12, 69:10, 70:21
complete [3] - 17:14, 39:6, 63:17
completely [7] - 36:6, 36:7, 36:23, 39:2, 39:19, 55:2, 63:5
compliment [1] - 32:23
concede [1] - 24:23
conceded [1] - 5:11
concedes [1] - 73:7
conceivable [1] - 20:7
concern [9] - 44:13, 49:19, 49:24, 50:1, 50:2, 50:4, 52:15, 52:19, 54:25
concerned [5] - 9:6, 9:9, 45:13, 47:12, 50:14
concerns [4] - 10:2, 30:23, 46:16, 78:8
concise [1] - 68:4
concludes [1] - 62:1
concurrent [1] - 55:10
concurring [1] - 54:16
conduct [6] - 34:10, 55:10, 56:25, 60:10, 70:11, 71:3
conflict [1] - 41:3
confusing [1] - 61:17
Congress [89] - 4:24, 9:4, 10:14, 10:21, 15:20, 16:4, 18:1, 18:18, 18:19, 19:1, 19:17, 19:20, 20:6, 21:6, 22:12, 22:22, 23:6, 23:20, 24:22, 25:11, 25:13, 25:21, 25:22, 26:12, 27:14, 29:7, 29:15, 29:18, 29:24, 30:17, 30:20, 31:5, 35:24, 36:3, 38:17, 38:19, 39:4, 39:5, 39:8, 39:12, 39:14, 39:16, 39:19, 39:25, 41:18, 42:22, 44:25, 48:24, 49:7, 49:8, 49:13, 49:17, 49:18, 51:6, 51:11, 51:13, 55:18, 56:17, 56:20, 56:23, 60:16, 60:25, 61:5, 61:15,

61:18, 62:8, 62:15, 62:16, 62:20, 63:24, 63:25, 64:9, 64:20, 65:7, 65:10, 65:11, 68:3, 69:16, 75:21, 76:4, 78:7, 78:20, 78:22, 79:3, 79:7, 79:8
Congress' [8] - 10:6, 10:13, 18:13, 19:4, 29:22, 44:20, 76:15
Congress's [1] - 23:1
congressional [1] - 15:2
congruent [1] - 79:10
conjunction [1] - 18:25
consider [4] - 18:23, 27:20, 31:8, 81:16
considered [3] - 5:6, 28:19, 72:15
considering [3] - 16:25, 27:21, 53:25
consistently [1] - 23:10
constituted [4] - 5:5, 18:22, 56:12, 56:16
Constitution [2] - 18:17, 21:12
constitutional [25] - 10:13, 11:5, 17:13, 18:1, 26:23, 27:5, 29:4, 30:25, 31:4, 31:11, 31:16, 32:12, 35:10, 39:19, 42:10, 42:13, 42:15, 43:1, 43:2, 46:15, 51:25, 61:1, 62:3, 78:15, 80:12
constitutionality [6] - 17:10, 23:2, 31:3, 31:8, 31:19, 53:15
constitutionalizing [1] - 16:14
constitutionally [2] - 10:15, 23:13
construe [2] - 42:4, 47:9
construed [2] - 37:12, 81:1
contained [1] - 82:6
container [2] - 7:22, 7:23
contains [1] - 31:10
context [6] - 18:3, 22:1, 27:18, 46:11, 46:14, 73:9
continue [1] - 22:8
contradicts [1] - 58:10
contribute [1] - 3:10

contributes [1] - 18:8
control [4] - 28:19, 28:22, 44:15
controlled [1] - 64:21
controls [1] - 29:21
convicted [2] - 7:14, 74:13
conviction [3] - 6:24, 8:2, 72:17
convinced [1] - 7:16
copy [1] - 82:7
core [5] - 14:24, 18:10, 30:18, 30:21, 30:23
correct [5] - 17:4, 23:3, 51:10, 76:3, 82:8
correctly [1] - 56:8
Corrigan [1] - 63:9
cost [1] - 33:24
costs [2] - 25:20, 35:3
counsel [9] - 2:11, 3:1, 3:8, 12:3, 17:18, 46:18, 48:2, 75:11, 75:19
Counsel [1] - 75:13
count [1] - 46:21
counter [1] - 43:5
counties [4] - 27:24, 28:2, 28:3, 28:5
country [17] - 7:9, 7:10, 8:15, 9:1, 9:7, 11:3, 14:3, 15:24, 41:1, 66:13, 66:16, 67:5, 67:13, 68:18, 69:12, 73:23, 75:4
counts [1] - 60:15
County [2] - 19:16, 19:20
county [1] - 72:24
COUNTY [1] - 1:1
couple [6] - 7:15, 63:19, 65:18, 67:15, 75:14, 75:18
course [6] - 12:18, 19:1, 23:20, 55:16, 68:8, 72:10
Court [64] - 4:20, 5:24, 6:20, 8:21, 10:10, 10:19, 11:6, 18:23, 19:10, 19:15, 19:16, 19:24, 20:2, 20:5, 20:10, 23:11, 24:3, 24:8, 25:3, 25:21, 26:18, 27:20, 28:12, 29:13, 30:5, 30:14, 31:13, 35:16, 35:17, 36:14, 41:10, 41:23, 41:24, 41:25, 42:9, 42:10, 42:14, 43:25,

45:6, 46:7, 46:9, 46:11, 48:17, 49:14, 53:12, 60:6, 60:15, 61:9, 63:6, 63:21, 67:14, 70:15, 74:11, 75:8, 77:2, 77:16, 78:3, 78:25, 79:6, 79:20, 80:8, 80:9, 82:11
COURT [57] - 1:1, 2:3, 3:6, 11:7, 11:17, 11:20, 12:4, 14:6, 14:17, 14:23, 15:7, 15:13, 15:16, 16:12, 16:16, 16:24, 17:4, 23:3, 31:20, 32:1, 32:7, 32:14, 32:21, 32:24, 33:6, 44:14, 45:3, 47:1, 47:11, 47:20, 48:19, 50:4, 50:15, 50:20, 51:20, 53:5, 53:12, 53:17, 53:21, 54:2, 54:7, 57:15, 58:10, 58:14, 59:22, 60:4, 66:3, 66:6, 72:21, 73:19, 74:21, 75:10, 75:13, 80:4, 80:15, 81:15, 81:21
court [46] - 3:21, 4:15, 4:21, 4:22, 5:14, 5:24, 7:11, 7:23, 8:16, 10:20, 11:2, 15:24, 19:18, 29:1, 31:8, 31:20, 31:22, 32:2, 32:4, 36:25, 46:8, 47:16, 58:16, 63:10, 63:16, 64:5, 64:9, 65:20, 65:23, 67:2, 67:4, 67:13, 67:14, 68:9, 70:25, 71:2, 71:9, 72:5, 72:20, 73:23, 74:16, 74:25, 77:15, 80:13, 80:22
courthouse [5] - 16:19, 32:23, 37:6, 50:12, 50:16
courthouses [1] - 16:25
courtroom [4] - 2:15, 14:13, 32:23, 66:18
Courts [2] - 17:23, 17:24
courts [35] - 8:15, 12:1, 17:12, 21:9, 22:6, 24:16, 27:6, 27:21, 28:21, 31:17, 37:13, 37:22, 38:18, 40:1, 40:3, 41:20,

45:15, 47:8, 52:24, 54:22, 61:19, 62:16, 65:19, 66:16, 67:5, 69:11, 69:22, 77:23, 78:1, 78:5, 79:2, 80:19, 80:21, 81:3
cows [1] - 62:17
craft [1] - 11:11
crafting [1] - 12:10
Craig [3] - 43:17, 50:9, 50:10
crazy [1] - 39:17
create [6] - 22:17, 22:20, 22:21, 38:8, 44:3, 64:21
created [5] - 21:24, 22:2, 22:19, 33:16, 36:22
creates [2] - 51:21, 55:8
creating [1] - 9:17
creation [1] - 26:15
crime [4] - 7:6, 7:7, 30:16, 55:8
Crimes [1] - 7:3
crimes [3] - 55:10, 72:3, 72:15
criminal [56] - 3:24, 4:8, 4:17, 5:5, 6:22, 6:23, 6:24, 7:5, 7:8, 7:25, 8:1, 8:17, 9:20, 16:3, 16:8, 30:17, 44:8, 44:11, 44:16, 44:19, 45:18, 48:9, 49:4, 49:22, 50:7, 54:22, 56:2, 56:12, 56:16, 56:19, 56:21, 56:22, 56:25, 57:2, 57:4, 57:13, 57:14, 57:22, 58:1, 60:10, 61:16, 69:22, 70:11, 71:3, 71:24, 72:2, 72:5, 72:9, 72:16, 72:18, 72:20, 73:2, 73:10, 73:11, 73:22, 74:1
criminally [2] - 9:19, 73:20
criminals [2] - 9:10, 44:24
crit [1] - 45:24
critical [2] - 46:24, 56:9
crystal [3] - 46:25, 61:6, 75:2
culpability [1] - 25:24
culpable [1] - 69:21
curious [1] - 32:8
cut [4] - 76:14, 76:23, 76:24, 77:5

cut-off [1] - 76:24

D

D.C [3] - 23:9, 41:19, 78:3
d/b/a [1] - 1:9
DACA [3] - 28:13, 39:3, 40:9
damage [2] - 8:12, 50:17
damages [5] - 3:23, 9:7, 34:18, 64:4, 64:21
dateline [1] - 76:18
deal [2] - 11:11, 50:17
dealing [1] - 47:7
deals [1] - 46:4
dealt [2] - 35:19, 46:23
death [6] - 5:7, 5:20, 33:20, 33:25, 34:9, 34:11
debate [1] - 22:16
decedent [1] - 5:9
decide [4] - 14:16, 40:6, 62:18, 66:21
decided [4] - 28:23, 35:17, 38:13, 41:19
deciding [1] - 20:22
decision [11] - 20:10, 21:9, 26:12, 35:11, 35:17, 35:20, 55:20, 73:5, 74:18, 79:20
decisions [1] - 66:19
decline [1] - 24:4
deeply [1] - 10:3
defect [6] - 6:8, 6:10, 7:20, 8:2, 38:12, 44:9
defective [4] - 6:12, 34:9, 34:16, 71:14
defend [2] - 12:19, 47:13
defendant [5] - 36:9, 37:13, 54:24, 56:1, 75:9
defendant's [1] - 34:10
Defendants [2] - 1:12, 1:23
defendants [18] - 2:10, 3:1, 10:23, 17:7, 33:9, 37:14, 38:22, 38:23, 38:24, 40:21, 50:19, 60:19, 63:6, 66:20, 67:22, 71:16, 77:8, 77:17
defendants' [3] - 38:3, 38:4, 57:10
defending [1] - 62:14

defense [9] - 3:9, 12:24, 14:5, 18:9, 18:12, 48:2, 73:7, 73:11
defenses [1] - 33:8
defer [4] - 10:25, 11:15, 16:13, 75:6
deferential [3] - 24:24, 25:4, 25:5
defined [3] - 48:11, 48:20, 73:21
definition [6] - 47:23, 47:25, 48:4, 48:5, 48:8, 56:18
definitively [1] - 51:2
degree [1] - 25:24
Delana [17] - 9:22, 10:9, 17:21, 23:8, 29:14, 46:4, 47:4, 53:1, 54:9, 55:1, 55:2, 69:25, 77:22, 80:8, 80:19, 80:22, 81:4
delegated [1] - 10:15
deleting [1] - 57:23
Delina [1] - 17:20
delinquency [2] - 4:15, 72:1
delinquent [6] - 4:13, 5:8, 57:3, 72:2, 72:7, 72:15
demur [1] - 68:24
denials [2] - 53:9, 53:12
denied [2] - 51:18, 53:23
denies [1] - 73:8
deny [2] - 51:13, 51:15
denying [2] - 51:7
DEPARTMENT [1] - 1:10
Department [11] - 2:8, 2:9, 2:10, 2:22, 2:23, 3:3, 4:5, 10:25, 11:15, 16:13, 75:6
deprivation [1] - 63:18
deprive [3] - 35:25, 63:13, 63:20
depriving [1] - 60:17
DEPT [1] - 1:11
derogation [1] - 21:21
describes [1] - 57:2
design [3] - 6:9, 12:5, 14:8
designed [2] - 9:8, 9:11
detailed [1] - 12:5
details [1] - 51:3
determination [1] - 16:2

AMERICAN
OVERSIGHT

failure ^[1] - 6:10
fall ^[1] - 73:21
falls ^[1] - 31:16
familiar ^[1] - 17:18
family ^[2] - 7:17, 26:25
far ^[9] - 12:10, 15:14, 16:23, 19:25, 54:5, 62:25, 70:24, 71:23, 81:5
fashion ^[1] - 12:7
fashioning ^[2] - 63:23, 63:25
father's ^[1] - 6:1
fault ^[1] - 12:17
features ^[3] - 6:2, 14:15, 14:22
federal ^[38] - 4:21, 4:22, 11:9, 11:13, 11:25, 14:17, 15:2, 15:11, 19:2, 20:1, 20:23, 20:24, 21:5, 21:8, 21:13, 25:1, 25:5, 26:14, 27:5, 30:16, 36:7, 36:22, 37:15, 40:20, 41:11, 41:13, 54:12, 54:17, 55:8, 55:15, 63:4, 63:18, 67:14, 70:19, 71:18, 78:21, 79:25, 81:8
Federal ^[2] - 17:23, 31:13
federalism ^[13] - 10:2, 10:18, 20:12, 21:21, 22:21, 28:7, 45:23, 46:15, 48:19, 78:2, 79:5, 80:18, 80:21
federalizing ^[1] - 30:15
fellow ^[1] - 7:13
felon ^[3] - 7:14, 7:25, 74:13
felony ^[1] - 45:18
felt ^[1] - 27:15
few ^[5] - 49:9, 49:11, 54:23, 62:6
fiat ^[1] - 13:21
fide ^[1] - 52:13
field ^[1] - 59:9
fifteen ^[1] - 15:18
fifteen-clip ^[1] - 15:18
Fifth ^[1] - 19:13
filed ^[1] - 4:3
filing ^[1] - 28:10
final ^[2] - 79:14, 79:23
finally ^[1] - 29:3
financial ^[1] - 35:5
fire ^[1] - 58:8
firearm ^[16] - 3:22, 3:24, 4:6, 6:23, 7:5,

7:6, 8:1, 8:18, 9:19, 9:21, 13:11, 14:15, 14:25, 15:9, 16:7, 74:5
firearms ^[13] - 9:8, 9:11, 10:17, 13:10, 14:4, 14:22, 18:8, 22:1, 25:18, 33:11, 37:16, 49:5, 70:10
Firm ^[1] - 2:20
first ^[13] - 3:9, 23:4, 23:15, 23:16, 47:22, 48:3, 48:25, 49:10, 52:6, 55:23, 56:14, 62:6, 67:12
fit ^[2] - 15:17, 71:13
fix ^[1] - 33:16
flaw ^[1] - 52:1
flaws ^[1] - 43:1
floor ^[1] - 50:10
flu ^[2] - 19:11, 19:12
focus ^[1] - 75:18
folks ^[1] - 69:14
Footnote ^[1] - 23:20
force ^[2] - 34:21, 44:21
forced ^[1] - 14:8
forcing ^[1] - 34:20
foreign ^[1] - 9:14
forgetting ^[1] - 51:3
form ^[2] - 36:10, 78:17
forms ^[1] - 26:19
forth ^[3] - 17:10, 21:17, 23:24
forum ^[1] - 34:17
forward ^[9] - 46:20, 46:21, 46:22, 50:14, 53:4, 55:22, 62:1, 66:1, 70:16
foundation ^[2] - 43:13, 52:11
Fourth ^[3] - 27:13, 76:21, 77:15
free ^[2] - 41:6, 65:16
frequently ^[2] - 27:16, 44:24
friend ^[2] - 6:3, 75:2
front ^[3] - 16:19, 70:18, 70:19
frontal ^[2] - 81:8
full ^[3] - 13:10, 32:10, 36:25
fully ^[2] - 27:12, 82:6
function ^[1] - 28:20
functioned ^[1] - 9:11
fund ^[8] - 37:2, 50:17, 50:24, 51:5, 51:18, 76:5, 76:9, 76:12
fundamental ^[1] - 63:12

G

G.T ^[1] - 72:1
gain ^[1] - 53:17
Gary ^[1] - 65:20
General ^[1] - 19:6
general ^[4] - 47:23, 47:25, 48:6, 56:17
Gilland ^[1] - 9:24
given ^[3] - 16:21, 50:25, 59:23
glean ^[1] - 12:15
goals ^[1] - 72:6
govern ^[2] - 39:4, 62:11
governing ^[1] - 39:24
government ^[27] - 10:4, 11:9, 20:23, 21:5, 21:20, 22:5, 22:10, 28:15, 30:7, 34:21, 36:5, 36:9, 36:12, 36:16, 39:18, 40:7, 40:21, 40:22, 41:9, 51:9, 60:21, 62:12, 62:13, 71:18, 77:13, 78:21, 81:6
government's ^[1] - 28:11
governmental ^[1] - 20:17
governments ^[2] - 19:22, 65:12
governments' ^[1] - 78:21
governor ^[1] - 39:21
grant ^[2] - 38:2, 38:6
granted ^[1] - 28:10
granting ^[1] - 36:1
greater ^[1] - 78:12
Gregory ^[25] - 10:7, 29:3, 29:5, 29:6, 30:3, 30:5, 31:1, 45:23, 46:4, 46:23, 46:24, 46:25, 47:9, 48:15, 48:18, 54:6, 54:10, 54:24, 55:3, 55:5, 55:13, 60:16, 61:14, 75:6, 77:22
gregory ^[1] - 78:19
Greiner ^[3] - 1:24, 2:25
GREINER ^[1] - 2:24
Gronne ^[1] - 27:24
grossly ^[1] - 5:19
ground ^[2] - 59:11, 74:7
groundbreaking ^[1] - 67:11
grounds ^[4] - 4:12, 41:24, 65:22

guarantees ^[1] - 79:21
guess ^[7] - 12:18, 15:4, 26:4, 45:13, 47:11, 54:2, 67:3
guilty ^[4] - 4:14, 5:13, 5:17
gun ^[43] - 6:2, 6:5, 6:6, 6:18, 6:25, 7:21, 12:13, 13:1, 13:15, 15:17, 26:7, 33:13, 34:8, 34:15, 35:8, 37:13, 39:6, 39:14, 39:20, 41:5, 43:7, 43:19, 44:8, 44:15, 44:23, 44:24, 49:21, 49:23, 50:12, 58:5, 59:8, 59:17, 64:12, 64:17, 64:19, 65:16, 69:4, 69:6, 69:7, 69:19, 71:13, 74:13, 74:18
Gunner ^[2] - 9:24, 31:9
guns ^[4] - 7:15, 55:17, 67:22, 67:23
Gustafson ^[10] - 2:4, 2:6, 2:14, 33:20, 33:25, 34:9, 34:12, 34:14, 48:22
GUSTAFSON ^[2] - 1:4, 1:6
Gustafsons ^[6] - 36:4, 37:23, 38:2, 38:6, 40:18, 41:20
guy ^[2] - 26:1, 26:6

H

hand ^[6] - 74:12, 74:14, 74:16, 74:19, 78:9, 78:10
handgun ^[1] - 5:12
hands ^[3] - 13:16, 30:12, 44:19
happy ^[2] - 32:13, 55:20
hard ^[1] - 21:24
harder ^[1] - 29:20
harm ^[10] - 8:7, 8:16, 9:10, 9:19, 48:8, 49:4, 49:22, 52:7, 56:2, 71:3
harmless ^[1] - 59:18
HARRY ^[1] - 1:16
head ^[1] - 74:6
hear ^[6] - 38:18, 39:13, 40:3, 57:1, 60:22, 67:12
HEARD ^[1] - 1:14
heard ^[8] - 62:14,

67:13, 68:14, 68:15, 77:23, 78:1, 78:18, 80:18
hearing ^[1] - 82:7
heart ^[4] - 30:6, 46:19, 46:21, 47:21
heavily ^[1] - 22:23
held ^[8] - 9:9, 17:25, 40:11, 60:8, 64:5, 65:20, 72:19, 78:6
hereby ^[1] - 82:5
high ^[1] - 30:8
higher ^[1] - 79:6
highest ^[1] - 5:24
himself ^[2] - 7:19, 7:23
history ^[4] - 25:14, 29:23, 43:12, 52:20
hit ^[2] - 32:16, 68:14
hits ^[1] - 73:24
hold ^[2] - 22:21, 24:4
holding ^[2] - 49:23, 80:10
home ^[3] - 7:16, 27:1, 62:17
Honor ^[59] - 2:15, 2:20, 2:24, 3:14, 5:22, 7:12, 12:22, 12:23, 13:17, 15:5, 16:17, 18:25, 21:3, 21:16, 21:22, 24:3, 28:10, 28:14, 32:13, 32:20, 32:22, 34:3, 34:6, 34:19, 35:18, 35:25, 40:13, 42:6, 42:16, 43:23, 45:25, 47:19, 48:14, 48:23, 52:23, 53:1, 53:14, 53:24, 58:13, 60:1, 60:19, 61:24, 62:1, 64:2, 66:2, 66:7, 66:15, 66:20, 66:21, 67:8, 67:19, 69:15, 71:4, 71:15, 75:12, 75:15, 80:6, 81:22
HONORABLE ^[1] - 1:16
horrible ^[1] - 16:10
hostage ^[1] - 40:2
hours ^[1] - 12:23
house ^[3] - 7:14, 7:18, 15:2
human ^[1] - 35:3
hundred ^[3] - 23:12, 33:10, 33:17
hundreds ^[3] - 37:1, 43:14, 52:11
hurt ^[2] - 44:4, 81:12
husband ^[1] - 54:15

I ical ^[1] - 45:24 idea ^[1] - 23:11 identity ^[2] - 30:18, 30:23 ignore ^[2] - 45:6, 57:12 ignores ^[1] - 46:1 lletto ^[2] - 23:8, 24:9 Illinois ^[6] - 5:24, 5:25, 6:20, 60:4, 60:5, 60:8 Illinois' ^[1] - 60:6 illustrated ^[1] - 77:8 immunity ^[8] - 35:9, 39:6, 39:7, 39:11, 39:13, 70:20, 79:1, 81:9 impermissible ^[1] - 21:20 implementation ^[1] - 53:16 implicitly ^[2] - 38:1, 62:9 implied ^[7] - 29:14, 29:17, 30:9, 54:25, 55:3, 55:5, 55:11 importance ^[1] - 49:7 important ^[9] - 18:10, 18:20, 40:20, 41:8, 54:11, 54:23, 56:14, 66:9, 75:12 importantly ^[4] - 5:1, 13:7, 22:11, 53:1 importing ^[1] - 18:6 impose ^[1] - 47:8 impossible ^[1] - 39:9 improvements ^[1] - 20:4 IN ^[1] - 1:1 inaccurate ^[1] - 36:7 inapplicable ^[2] - 10:8, 29:13 Inc ^[2] - 1:9, 2:21 incentive ^[2] - 22:22, 35:5 incentivize ^[1] - 34:25 incident ^[2] - 30:11, 79:22 include ^[3] - 6:12, 33:22, 78:2 including ^[8] - 17:13, 18:21, 23:9, 25:15, 33:15, 33:24, 76:13, 77:12 incorporate ^[1] - 12:8 Incorporated ^[1] - 2:7 incorrect ^[1] - 55:2 indeed ^[3] - 19:16,	28:19, 31:13 independent ^[1] - 53:17 independently ^[1] - 53:15 Indiana ^[2] - 65:20, 67:2 indicate ^[1] - 12:19 indicates ^[1] - 12:12 indicating ^[1] - 14:10 indicator ^[6] - 6:14, 6:16, 12:13, 13:5, 69:3 indicators ^[5] - 12:9, 13:2, 13:15, 65:2, 67:23 individual ^[4] - 11:12, 27:7, 57:17, 78:15 Individually ^[2] - 1:4, 2:4 industries ^[3] - 18:6, 45:11, 64:20 Industries ^[1] - 43:23 industries' ^[1] - 34:15 industry ^[17] - 9:9, 18:8, 34:15, 35:8, 36:17, 36:19, 36:21, 37:13, 39:6, 39:21, 41:5, 44:15, 45:10, 50:25, 64:13, 64:17, 64:19 inflicted ^[1] - 63:10 inform ^[2] - 52:19, 52:20 infuse ^[1] - 31:1 infuses ^[1] - 29:5 initial ^[2] - 48:3, 57:10 injured ^[3] - 38:21, 42:25, 51:16 injuries ^[3] - 4:8, 4:16, 50:23 injury ^[3] - 44:7, 45:1, 77:4 input ^[1] - 27:3 inserted ^[1] - 49:17 inside ^[1] - 13:12 instance ^[1] - 37:14 instances ^[1] - 25:20 instead ^[3] - 29:17, 38:16, 72:7 instruction ^[1] - 10:18 instructive ^[1] - 5:21 intend ^[1] - 29:25 intended ^[7] - 29:24, 29:25, 43:7, 43:10, 43:11, 78:24 intends ^[2] - 29:16, 79:9 intent ^[9] - 6:23, 10:6, 29:22, 43:4, 43:5,	43:6, 59:16, 59:24 intention ^[1] - 6:25 intents ^[1] - 58:6 Interest ^[1] - 72:1 interest ^[5] - 30:4, 63:23, 63:24, 79:25 interests ^[3] - 26:22, 40:2, 78:17 interfere ^[2] - 39:8, 79:7 interfering ^[3] - 22:23, 52:2, 61:2 internalize ^[1] - 35:2 international ^[1] - 3:23 internationally ^[2] - 14:19, 18:6 interpret ^[2] - 43:3, 57:13 interpretation ^[8] - 29:19, 42:1, 42:2, 42:16, 42:19, 42:20, 48:16, 52:4 interpretations ^[1] - 42:11 interpretative ^[1] - 31:5 interpreted ^[3] - 30:1, 37:22, 61:25 interpretive ^[1] - 45:24 interstate ^[9] - 3:22, 4:7, 9:13, 10:13, 16:7, 18:4, 20:2, 20:5, 25:17 Intervenor ^[1] - 1:25 Intervenor ^[1] - 3:4 intrude ^[1] - 18:5 inverse ^[1] - 24:5 investigate ^[1] - 47:13 invoke ^[1] - 30:24 involuntary ^[5] - 4:14, 5:17, 7:4, 71:23, 72:3 involve ^[1] - 76:14 involved ^[4] - 15:21, 29:14, 30:10, 74:17 involves ^[1] - 28:13 involving ^[1] - 76:16 irrational ^[1] - 24:22 Island ^[1] - 51:17 issue ^[20] - 6:2, 8:6, 8:7, 9:17, 11:4, 12:5, 14:14, 15:24, 30:4, 32:10, 36:13, 46:24, 55:17, 61:6, 63:7, 64:1, 66:1, 66:9, 75:16, 78:16 issues ^[19] - 9:1, 10:9, 10:18, 10:20, 18:14, 28:7, 32:12, 35:18,	43:2, 61:12, 67:15, 68:22, 69:20, 71:17, 71:18, 75:7, 75:12, 79:5, 80:3 itself ^[6] - 21:11, 43:12, 49:1, 51:21, 52:10, 78:19 IVERSON ^[1] - 2:16 Iverson ^[2] - 1:22, 2:16 J J.R ^[1] - 1:6 jail ^[1] - 7:18 James ^[1] - 2:5 JAMES ^[1] - 1:6 Jefferies ^[3] - 31:15, 31:23, 78:3 Jersey ^[2] - 20:11, 20:19 job ^[1] - 12:3 John ^[2] - 1:24, 2:25 Jonathan ^[1] - 2:13 JR ^[6] - 1:16, 2:6, 33:20, 33:25, 34:9, 34:12 Judge ^[2] - 25:8, 67:11 judge ^[3] - 35:25, 65:24, 73:4 judges ^[7] - 21:13, 25:7, 38:20, 41:17, 60:22, 67:12, 68:21 judgment ^[2] - 27:2, 80:16 judgments ^[1] - 38:24 judicial ^[12] - 9:16, 27:9, 28:19, 28:20, 28:24, 29:8, 38:16, 45:16, 54:4, 60:24, 62:22, 77:20 judicially ^[3] - 21:24, 22:2, 22:18 judiciary ^[6] - 16:6, 21:10, 21:12, 21:18, 78:9, 78:11 judiciary-specific ^[1] - 21:12 jurisdiction ^[1] - 54:22 jurisprudence ^[1] - 52:12 jury ^[1] - 60:9 justice ^[7] - 34:13, 36:1, 38:6, 41:21, 54:18, 57:4, 62:20 Justice ^[7] - 3:3, 11:1, 11:16, 16:14, 20:21, 54:16, 75:7 justified ^[1] - 31:17	juvenile ^[25] - 4:13, 4:15, 5:8, 5:12, 5:14, 47:15, 56:1, 57:3, 57:18, 58:11, 58:16, 58:17, 59:2, 59:22, 71:24, 72:4, 72:7, 72:14, 72:20, 73:1, 73:4, 73:7, 73:12, 74:22 juvenile's ^[1] - 60:10 K keep ^[2] - 18:11, 26:24 Kelley ^[1] - 43:23 Kelly ^[2] - 1:22, 2:16 Kerr ^[1] - 2:25 key ^[3] - 29:12, 45:20, 45:21 killed ^[3] - 9:18, 34:14, 61:20 kills ^[1] - 6:3 Kilpela ^[1] - 2:17 Kim ^[1] - 9:23 kind ^[9] - 12:20, 16:21, 24:18, 26:10, 27:1, 30:15, 69:6, 70:5, 73:25 kinds ^[1] - 30:23 Kinney ^[1] - 2:25 knowing ^[1] - 37:21 knowingly ^[2] - 37:14, 58:15 known ^[2] - 17:19, 37:9 knows ^[3] - 13:9, 56:20, 69:7 L lack ^[1] - 44:10 land ^[2] - 59:10, 59:14 language ^[11] - 8:8, 8:9, 8:22, 16:9, 56:9, 56:17, 57:12, 57:24, 68:5, 70:24, 78:23 larger ^[1] - 22:22 largest ^[1] - 52:1 Larry ^[1] - 43:16 last ^[2] - 24:1, 26:17 lastly ^[1] - 65:18 latitude ^[1] - 29:18 law ^[87] - 8:25, 9:3, 10:6, 10:16, 11:25, 12:25, 13:23, 14:3, 18:3, 19:2, 20:13, 20:18, 20:19, 20:20, 21:6, 21:13, 22:2, 22:23, 23:21, 23:22, 24:6, 26:14, 34:8,
---	--	---	--	---

35:13, 36:1, 36:5,
37:15, 37:18, 37:24,
38:7, 38:13, 38:14,
38:15, 39:3, 39:5,
39:9, 42:4, 42:5,
42:21, 43:4, 43:9,
43:14, 44:3, 45:8,
45:9, 49:13, 52:1,
52:3, 52:12, 52:14,
52:18, 53:7, 54:12,
54:13, 54:17, 54:18,
54:20, 55:7, 60:20,
62:11, 62:19, 62:20,
62:23, 63:4, 63:14,
63:15, 64:25, 68:19,
68:20, 68:23, 70:17,
70:18, 70:19, 75:3,
76:24, 79:13
Law [1] - 2:20
Lawful [1] - 3:17
lawful [1] - 18:12
lawmaking [3] - 42:23,
52:2, 65:8
laws [13] - 19:18, 21:5,
21:14, 36:6, 40:5,
40:20, 40:22, 63:19,
63:21, 63:23, 63:25,
81:8
lawsuit [1] - 36:18
lawsuits [6] - 9:6,
9:12, 9:15, 18:21,
43:18, 43:21
Leah [3] - 2:4, 2:14,
34:14
LEAH [1] - 1:4
least [2] - 35:21, 76:11
leave [7] - 16:6, 25:22,
26:1, 28:20, 38:21,
66:20, 66:21
left [6] - 26:16, 36:10,
44:18, 69:14, 69:16,
69:23
legal [2] - 9:13, 34:11
legislate [1] - 39:23
legislated [1] - 76:4
legislation [7] - 15:5,
22:6, 35:8, 36:8,
41:11, 49:12, 49:15
legislative [15] - 9:16,
11:24, 13:21, 14:13,
20:25, 25:14, 27:3,
28:22, 29:23, 43:4,
43:5, 43:12, 52:20,
60:23, 77:20
legislatively [2] - 27:8,
78:14
legislators [1] - 21:1
legislature [9] - 14:14,
20:19, 28:1, 37:18,
38:8, 38:16, 39:22,

78:10, 78:17
legislatures [10] -
20:16, 21:19, 21:25,
22:16, 23:21, 26:14,
26:16, 27:11, 40:1,
40:2
length [1] - 43:18
less [3] - 13:1, 17:3,
22:19
lesser [1] - 39:7
level [2] - 30:16, 63:18
liabilities [2] - 29:24,
76:8
liability [55] - 3:16,
3:20, 4:19, 5:1, 5:3,
6:9, 10:22, 15:22,
19:5, 19:14, 21:7,
22:14, 25:16, 26:11,
26:19, 27:23, 29:16,
30:22, 34:23, 35:13,
36:6, 36:8, 40:4,
44:6, 44:11, 45:9,
45:17, 46:5, 46:23,
47:6, 47:7, 47:23,
47:25, 48:4, 49:19,
50:5, 51:23, 52:10,
52:16, 52:17, 56:5,
56:7, 56:11, 56:18,
56:24, 60:2, 61:20,
64:3, 64:14, 65:13,
68:19, 68:23, 70:18,
76:1, 77:18
liability-limiting [1] -
36:6
liable [4] - 9:10, 43:20,
44:3, 49:23
liberty [1] - 63:12
lies [1] - 30:6
lieu [1] - 45:7
life [1] - 33:19
light [2] - 19:5, 27:22
likely [1] - 25:17
limit [2] - 8:23, 15:14
limitation [4] - 19:5,
19:9, 19:11, 19:14
limitations [3] - 29:7,
63:16, 81:11
limited [4] - 3:4, 17:8,
46:16, 47:4
limiting [1] - 36:6
limits [1] - 36:8
line [2] - 11:2, 23:15
lines [1] - 25:11
link [1] - 20:3
list [1] - 40:14
listen [2] - 41:21,
60:23
literally [2] - 20:18,
28:1
litigation [4] - 25:19,

33:3, 47:17, 65:13
live [1] - 67:18
lives [1] - 33:19
LLC [3] - 1:11, 2:9,
2:23
loaded [11] - 6:13,
6:15, 13:2, 13:4,
13:11, 65:1, 67:23,
67:24, 69:3, 69:19,
74:2
local [1] - 54:22
locks [1] - 6:17
logical [1] - 20:3
look [16] - 4:25, 13:12,
13:25, 26:1, 32:5,
36:15, 48:14, 48:15,
49:19, 50:8, 50:21,
71:14, 71:17, 71:25,
72:12, 81:6
looked [11] - 5:25,
6:20, 7:2, 10:20,
11:3, 15:23, 15:24,
68:9, 70:25, 71:9,
73:24
looking [7] - 7:3,
12:14, 47:12, 61:4,
68:25, 69:1, 69:3
looks [1] - 72:9
Lopez [1] - 65:23
loss [1] - 63:14
losses [3] - 34:18,
34:25, 63:10
lost [1] - 16:22
love [1] - 13:24
lovely [2] - 16:18, 17:2
Lowy [2] - 1:21, 2:13
LOWY [29] - 2:13,
32:22, 32:25, 33:7,
44:20, 45:20, 47:3,
47:19, 47:22, 48:23,
50:8, 50:19, 51:2,
51:24, 53:11, 53:14,
53:20, 53:24, 54:5,
54:8, 57:21, 58:12,
58:21, 59:25, 60:5,
66:5, 80:6, 80:17,
81:20
lowy [2] - 32:21, 79:15
Lucky [2] - 9:24, 31:9
Lynch [1] - 2:17
Lyon [2] - 19:7, 76:16

M

magazine [12] - 6:5,
6:6, 6:12, 12:11,
12:23, 14:2, 33:13,
33:17, 37:19, 38:9,
65:1, 69:2
magazines [1] - 14:5

mailed [1] - 32:15
major [1] - 32:16
Majority [1] - 54:19
makers [1] - 19:5
mandate [3] - 11:12,
14:14, 35:4
manner [1] - 5:19
manslaughter [7] -
4:14, 5:13, 5:18, 7:4,
71:24, 72:3
manufacturer [8] -
3:21, 4:4, 8:11, 8:19,
44:2, 44:5, 44:17,
45:12
manufacturers [6] -
18:21, 25:18, 34:20,
41:1, 49:21, 50:6
manufactures [1] -
37:19
manufacturing [1] -
15:1
Marbury [1] - 79:21
Mark [3] - 2:3, 2:14,
34:14
MARK [1] - 1:4
marker [1] - 12:11
marketing [2] - 37:16,
70:10
Maryland [2] - 43:24,
43:25
Massachusetts [3] -
7:12, 74:11, 75:1
matter [6] - 13:19,
13:21, 45:18, 47:21,
72:1, 73:18
Mcbride [1] - 64:2
mean [11] - 36:11,
48:12, 48:24, 51:13,
57:9, 60:5, 60:11,
64:9, 66:18, 68:6,
68:7
meaning [3] - 48:13,
59:15, 71:8
meaningless [1] -
38:24
means [6] - 13:8,
52:21, 59:12, 61:13,
63:11, 69:7
measures [1] - 27:2
meddling [1] - 21:20
medical [2] - 19:15,
40:23
medical-device [1] -
19:15
meet [3] - 47:24, 48:3,
56:4
member [2] - 7:16,
16:22
mention [1] - 60:13
mentioned [6] - 36:12,

67:1, 76:16, 76:22,
78:4, 79:16
mere [3] - 73:19, 74:22
merit [1] - 73:16
met [4] - 25:6, 25:13,
45:16, 72:7
might [2] - 48:6, 62:15
Mile [1] - 51:17
million [1] - 76:6
millions [1] - 37:2
mind [2] - 12:20,
74:14
mine [2] - 59:11, 59:14
minor [1] - 30:15
minute [1] - 72:21
misdemeanor [1] -
30:15
missing [1] - 66:10
Missouri [5] - 10:10,
17:23, 29:13, 46:7
misstated [1] - 77:6
mistaken [1] - 33:12
misuse [16] - 3:24,
4:9, 4:17, 6:22, 7:8,
7:25, 8:18, 9:7, 9:20,
44:8, 48:9, 49:4,
49:22, 50:6, 56:3,
56:19
misused [1] - 9:19
modified [1] - 36:10
money [3] - 9:7, 33:23,
34:18
moreover [1] - 5:16
most [12] - 13:7,
24:24, 25:17, 27:15,
27:16, 36:13, 38:12,
40:20, 44:12, 45:24,
53:1, 79:4
motion [2] - 68:23,
73:6
motions [1] - 33:4
motivating [1] - 44:21
mountain [1] - 40:13
move [3] - 68:12,
69:10, 73:7
MR [60] - 2:13, 2:19,
2:24, 3:2, 3:13,
11:14, 11:18, 11:22,
12:22, 14:12, 14:20,
15:4, 15:10, 15:15,
15:19, 16:13, 16:17,
17:2, 17:5, 23:4,
31:23, 32:3, 32:9,
32:19, 32:22, 32:25,
33:7, 44:20, 45:20,
47:3, 47:19, 47:22,
48:23, 50:8, 50:19,
51:2, 51:24, 53:11,
53:14, 53:20, 53:24,
54:5, 54:8, 57:21,

58:12, 58:21, 59:25, 60:5, 66:5, 66:7, 73:10, 73:22, 74:24, 75:11, 75:14, 80:6, 80:17, 81:18, 81:20, 81:22 MS [1] - 2:16 multimillion [1] - 37:1 municipalities [1] - 19:22 Murphy [3] - 20:10, 41:7, 41:9 Musick [1] - 26:16 must [5] - 4:20, 4:23, 16:25, 31:2, 42:14	44:4, 67:11, 71:21 next [4] - 8:6, 55:18, 55:21, 63:3 NIC [1] - 26:2 Night [5] - 44:1, 44:5, 49:20, 71:11, 71:16 Ninth [2] - 17:25, 19:7 none [7] - 27:18, 35:19, 67:10, 67:11, 70:3, 81:7 nonfinal [1] - 23:14 note [3] - 28:25, 38:4, 60:1 noted [1] - 19:7 notes [1] - 82:6 nothing [12] - 18:13, 20:15, 21:3, 28:4, 36:3, 41:5, 41:17, 43:19, 44:9, 49:21, 55:16, 75:3 notice [1] - 59:23 novel [4] - 43:13, 50:14, 71:21 novelty [2] - 20:7, 43:10 nuclear [8] - 19:9, 36:17, 36:23, 50:23, 50:25, 64:22, 76:5, 76:8 nullity [1] - 49:15 number [4] - 42:2, 45:21, 49:1, 52:24 numerated [1] - 70:21 numerous [1] - 18:3	one [62] - 3:25, 7:12, 7:13, 8:5, 11:16, 13:4, 15:23, 18:4, 21:23, 22:25, 27:25, 28:7, 28:12, 29:12, 31:17, 34:24, 35:12, 37:8, 37:14, 40:9, 40:13, 41:14, 42:3, 42:12, 42:13, 42:14, 43:22, 45:10, 45:21, 45:25, 46:5, 46:20, 46:21, 48:14, 48:25, 49:1, 49:10, 49:16, 51:24, 54:8, 54:23, 55:4, 55:21, 55:25, 58:23, 58:24, 60:2, 60:4, 63:21, 64:13, 67:1, 67:12, 69:6, 69:23, 70:22, 73:23, 75:24, 76:18, 78:9, 79:4, 80:7 one's [1] - 26:25 ones [2] - 25:17, 25:24 oneself [1] - 26:25 open [1] - 13:12 operate [1] - 22:17 operated [2] - 9:8, 20:15 operates [1] - 21:11 operations [1] - 21:20 operative [1] - 8:23 opinion [6] - 19:7, 20:22, 25:9, 27:9, 54:16, 60:7 opinions [2] - 25:7, 66:22 opportunity [1] - 73:5 opposed [5] - 10:23, 15:17, 45:10, 57:19, 73:3 ORAL [1] - 1:18 originally [1] - 66:9 originated [1] - 22:5 otherwise [2] - 22:21, 42:17 outlaw [1] - 50:5 Outpost [1] - 9:24 outside [2] - 53:9, 70:13 overcome [1] - 54:3 overreach [2] - 11:9, 44:14 own [4] - 30:21, 35:10, 63:23, 79:2	Page [1] - 63:8 page [1] - 17:19 pages [1] - 50:10 paper [2] - 71:8, 74:7 papers [4] - 17:11, 25:1, 68:16, 75:16 paperwork [2] - 32:15, 71:25 paragraph [1] - 4:12 Paragraph [3] - 37:11 Paragraphs [1] - 5:14 parameter [1] - 14:9 parameters [1] - 78:7 paraphrasing [2] - 41:12 parenthesis [1] - 2:6 park [1] - 73:25 parole [1] - 7:17 part [7] - 12:13, 20:16, 25:25, 35:14, 48:7, 48:25, 51:25 partially [1] - 27:11 particular [8] - 15:11, 27:9, 47:18, 49:6, 49:16, 50:5, 55:17 particularly [4] - 5:21, 18:7, 30:8, 54:10 parties [2] - 32:10, 75:17 parties' [1] - 9:7 partly [1] - 51:10 party [3] - 3:25, 4:10, 4:18 PASPA [1] - 20:14 pass [6] - 20:20, 21:4, 41:6, 49:8, 64:5, 65:16 passage [1] - 49:18 passed [2] - 9:5, 49:13 passes [1] - 26:6 past [1] - 62:5 pay [1] - 49:16 pays [1] - 44:5 pending [1] - 4:22 Pennsylvania [57] - 5:16, 16:22, 16:23, 21:3, 21:4, 25:2, 25:4, 34:8, 34:12, 34:16, 35:6, 35:11, 35:13, 35:17, 35:22, 35:25, 37:18, 37:24, 38:2, 38:5, 38:7, 38:10, 38:11, 38:15, 38:18, 38:20, 38:21, 39:13, 40:3, 41:20, 42:24, 45:3, 45:8, 45:14, 51:16, 53:6, 53:10, 54:14, 55:7, 60:20, 60:21, 61:19, 62:18, 64:14, 64:25,	65:5, 66:12, 68:17, 70:16, 70:17, 72:4, 72:24, 76:23, 77:2, 77:3 Pennsylvania's [2] - 54:21, 62:18 Pennsylvanian [1] - 61:20 Pennsylvanians [2] - 38:21, 42:25 people [13] - 14:4, 26:23, 33:11, 33:15, 34:13, 34:17, 34:24, 35:2, 55:20, 63:20, 65:7, 69:21 per [4] - 11:12, 47:2, 72:24, 73:2 perfect [1] - 53:6 perfectly [2] - 57:2, 58:23 perhaps [4] - 30:15, 68:23, 68:24, 73:13 permissible [2] - 41:11, 41:13 permit [3] - 26:13, 26:22, 30:17 permits [1] - 27:11 permitting [1] - 75:21 persist [1] - 22:19 Person [1] - 1:5 person [4] - 5:17, 5:20, 63:13, 63:14 Personal [1] - 2:5 personalized [1] - 6:18 persuasive [1] - 24:2 Phillips [2] - 9:23, 31:9 phrase [2] - 56:20, 57:9 pick [2] - 59:9, 74:7 picked [1] - 29:1 picks [1] - 67:24 picture [2] - 22:11, 29:4 piece [3] - 71:8, 74:6, 74:7 Pierce [2] - 19:16, 19:20 pistol [8] - 5:10, 6:2, 6:12, 7:24, 8:4, 13:3, 74:2 pistols [1] - 12:7 PLA [1] - 77:24 place [2] - 25:23, 36:2 places [1] - 75:19 plain [1] - 68:4 plainly [1] - 31:16 plaintiff [2] - 76:9, 80:12
N				
name [1] - 26:2 names [1] - 17:17 narrow [1] - 10:18 narrowly [4] - 10:5, 22:15, 42:4, 81:1 national [1] - 18:9 nationally [1] - 14:18 nature [3] - 7:7, 12:14, 72:2 NCAA [2] - 20:10, 41:7 nearly [1] - 23:12 necessarily [2] - 22:7, 58:13 need [12] - 4:11, 7:24, 9:2, 10:17, 24:7, 30:24, 32:11, 38:6, 41:25, 67:22, 67:23, 74:14 needs [4] - 23:25, 30:8, 38:7, 69:3 negligence [9] - 8:11, 10:16, 34:11, 34:16, 35:3, 46:13, 50:13, 51:17, 71:7 negligent [17] - 5:19, 22:3, 25:25, 26:4, 34:10, 46:6, 46:12, 46:22, 47:1, 47:5, 47:14, 53:2, 67:22, 70:2, 70:7, 77:13, 81:13 negligently [4] - 43:8, 44:9, 58:22, 59:1 never [3] - 8:19, 9:25, 74:14 nevertheless [1] - 25:10 New [11] - 2:21, 3:15, 17:24, 20:11, 20:19, 25:8, 27:24, 28:12, 40:11, 78:4, 78:5 new [5] - 26:18, 41:23,				
O				
objections [4] - 3:8, 17:7, 17:8, 33:4 obvious [2] - 72:10, 76:6 obviously [2] - 3:10, 32:9 occurred [1] - 45:19 occurs [1] - 27:16 October [2] - 1:14, 2:1 OF [2] - 1:1 offense [14] - 5:6, 16:3, 30:16, 55:9, 56:13, 56:16, 58:1, 59:2, 59:3, 71:24, 72:18, 72:20, 73:23, 74:1 offenses [1] - 7:5 officers [2] - 20:24, 29:8 officials [1] - 30:6 often [1] - 33:12 old [1] - 12:6 once [1] - 12:12				
P				
p.m [1] - 2:1 P.M [1] - 81:23 PA [1] - 1:1				

plaintiffs [30] - 2:6, 2:14, 2:18, 4:3, 6:11, 8:7, 9:23, 10:2, 10:25, 14:9, 17:14, 18:14, 20:12, 21:23, 23:4, 23:18, 23:24, 24:18, 24:20, 28:7, 46:18, 66:25, 67:8, 69:20, 71:15, 76:14, 76:17, 76:22, 76:25, 77:3 Plaintiffs [2] - 1:7, 1:21 plaintiffs' [12] - 3:11, 4:16, 4:19, 8:10, 11:8, 12:15, 17:11, 23:1, 23:6, 29:5, 67:7, 75:19 plan [1] - 14:7 planned [1] - 66:10 plausible [4] - 42:11, 42:12, 42:15, 42:21 playing [1] - 6:1 PLCAA [96] - 4:12, 6:21, 8:1, 8:9, 8:14, 8:24, 9:2, 9:5, 10:5, 11:4, 13:18, 14:1, 16:11, 17:10, 17:13, 18:15, 20:15, 22:9, 24:13, 25:7, 25:10, 27:21, 31:15, 31:19, 35:23, 35:24, 37:7, 37:8, 37:10, 37:16, 37:22, 39:1, 40:17, 41:6, 41:16, 42:4, 43:7, 43:9, 43:15, 44:21, 44:22, 45:7, 45:11, 45:15, 45:22, 46:3, 46:9, 46:10, 46:14, 46:16, 47:7, 47:18, 48:7, 48:11, 48:21, 49:1, 49:8, 51:20, 52:5, 52:7, 52:9, 53:13, 53:16, 54:25, 56:6, 56:10, 57:20, 61:25, 62:2, 63:1, 64:10, 64:13, 64:14, 65:15, 65:19, 65:20, 65:24, 66:14, 66:17, 68:3, 68:13, 70:6, 70:19, 71:7, 73:21, 75:20, 77:10, 77:24, 77:25, 78:8, 80:23, 80:25 PLCAA's [3] - 18:24, 20:9, 30:2 plea [4] - 47:17, 59:1, 59:23 plead [3] - 5:13, 58:11, 70:22	pleading [1] - 67:8 pleadings [2] - 14:1, 70:14 PLEAS [1] - 1:1 pleasure [1] - 16:18 pled [24] - 4:14, 56:2, 56:19, 56:21, 57:9, 57:11, 57:14, 57:23, 59:2, 59:3, 61:1, 62:9, 64:14, 65:1, 66:12, 67:22, 69:2, 69:4, 70:2, 70:8, 71:2, 73:2, 73:5, 73:8 plus [1] - 52:20 PO's [1] - 47:14 pocket [1] - 71:13 point [20] - 5:22, 7:8, 8:5, 9:22, 16:9, 24:1, 28:7, 30:1, 40:21, 42:6, 43:22, 51:6, 56:4, 57:12, 60:11, 72:10, 74:8, 77:6, 79:14 pointed [6] - 3:25, 16:9, 24:25, 29:11, 75:2, 75:25 pointing [1] - 74:6 points [3] - 32:17, 75:14, 79:18 policy [4] - 25:10, 34:19, 34:22, 35:14 political [1] - 22:16 posed [2] - 66:3, 79:11 position [2] - 73:16, 74:21 possession [4] - 7:24, 8:4, 74:22, 74:23 possible [1] - 39:12 posting [1] - 20:24 postulated [1] - 24:19 potential [3] - 76:7, 76:9, 76:22 potentially [1] - 22:17 power [10] - 10:13, 18:18, 22:15, 28:17, 30:21, 36:17, 36:23, 75:21, 76:5, 79:3 Power [7] - 19:11, 23:18, 23:25, 24:4, 36:13, 76:4, 76:10 powers [7] - 9:17, 16:5, 22:23, 30:19, 42:24, 55:16, 64:22 Powers [1] - 51:14 precedence [1] - 75:21 precedent [6] - 35:21, 40:7, 40:8, 51:10,	62:8 precedential [1] - 53:8 precisely [1] - 78:1 precluded [1] - 22:9 precludes [2] - 23:6, 76:24 preclusion [1] - 76:15 predate [1] - 46:1 predicate [8] - 6:4, 22:7, 37:10, 37:12, 37:25, 64:16, 69:24, 70:1 preempt [8] - 10:6, 10:16, 13:18, 22:13, 29:16, 29:24, 55:7, 65:12 preempting [1] - 30:22 preemption [17] - 10:12, 21:8, 29:15, 29:17, 29:21, 30:9, 40:21, 41:4, 41:11, 41:13, 55:1, 55:3, 55:6, 55:11, 55:12 preface [1] - 8:22 preference [1] - 26:21 preferred [1] - 44:16 preliminary [2] - 3:7, 33:4 prepare [1] - 55:18 prescribe [2] - 22:1, 29:7 prescribed [3] - 19:19, 21:5, 21:6 prescribing [1] - 21:17 present [3] - 17:6, 25:17, 28:18 presented [6] - 17:7, 66:25, 67:16, 71:1, 71:15, 75:17 preserve [4] - 43:7, 48:16, 55:14, 61:5 preserving [1] - 61:10 pretty [1] - 41:13 prevail [1] - 25:19 prevent [3] - 16:11, 43:12, 43:18 prevented [1] - 33:20 prevents [3] - 13:18, 14:1, 68:4 Price [2] - 36:20, 50:22 price [1] - 36:20 Price-Anderson [2] - 36:20, 50:22 principally [1] - 18:11 principle [6] - 23:19, 26:15, 27:18, 29:21, 45:24, 46:1	principles [6] - 21:21, 42:2, 43:9, 55:13, 55:17, 55:21 private [2] - 41:14, 41:16 problem [6] - 22:21, 24:18, 33:11, 40:16, 70:15, 77:16 problems [4] - 35:10, 39:11, 42:15, 51:25 procedural [1] - 20:6 proceed [2] - 3:7, 3:8 proceeding [2] - 4:15, 72:2 PROCEEDINGS [1] - 81:23 proceedings [2] - 57:3, 82:5 process [15] - 23:5, 24:7, 24:18, 27:3, 42:25, 51:25, 63:4, 63:14, 63:15, 65:21, 75:25, 79:24, 79:25, 81:5 processes [1] - 22:17 produced [1] - 12:8 product [35] - 4:6, 4:9, 4:17, 5:1, 5:3, 5:4, 6:8, 6:9, 7:20, 8:2, 15:22, 34:23, 38:12, 45:8, 45:12, 45:17, 46:5, 46:23, 47:6, 47:25, 48:10, 49:5, 50:7, 51:23, 52:17, 56:7, 56:10, 56:11, 56:24, 60:2, 61:19, 64:3, 68:18, 68:23, 70:18 products [5] - 34:16, 35:13, 45:5, 47:6, 56:5 Professional [1] - 20:14 profit [1] - 33:23 profits [1] - 35:2 program [2] - 11:25, 58:19 prohibit [4] - 44:22, 49:3, 62:2, 64:10 prohibited [1] - 65:24 prohibiting [1] - 51:8 prohibition [1] - 31:19 prohibits [2] - 3:20, 63:5 pronunciation [1] - 17:17 proof [1] - 13:11 proper [2] - 53:16, 78:6 properly [1] - 44:22	property [2] - 23:13, 63:13 proportionate [1] - 79:10 propositions [1] - 23:23 prosecute [1] - 73:20 prosecuted [2] - 4:13, 72:4 prosecution [3] - 72:23, 73:2, 73:6 protect [7] - 26:25, 54:20, 54:21, 64:12, 64:18, 64:20 protected [3] - 23:13, 36:21, 37:16 protecting [1] - 45:12 protection [9] - 24:20, 27:18, 30:2, 37:23, 45:7, 50:25, 64:1, 64:6, 65:10 Protection [2] - 3:17, 20:14 protections [3] - 12:9, 27:5, 52:3 prove [1] - 70:22 provide [5] - 34:17, 34:24, 36:2, 37:22, 64:15 provided [3] - 25:14, 36:3, 40:18 provides [3] - 18:18, 78:17, 79:9 provision [1] - 48:7 provisions [3] - 3:17, 8:23, 52:20 proximate [2] - 5:7, 13:22 public [1] - 27:3 pull [3] - 5:10, 74:2, 74:14 pulled [6] - 5:12, 16:2, 59:5, 69:19, 74:15, 74:16 pulling [4] - 16:1, 59:17, 68:7, 74:5 pulls [2] - 6:6, 75:1 punishment [1] - 57:19 purchase [1] - 45:4 purchasers [1] - 14:21 purported [1] - 51:22 purportedly [1] - 75:23 purpose [8] - 8:8, 17:9, 29:22, 45:16, 48:25, 49:1, 49:11, 52:6 purposes [10] - 12:25, 14:5, 18:12, 19:23,
---	---	--	--	--

58:6, 67:20, 67:25, 72:16, 72:17 pursuant [3] - 10:12, 12:1, 70:16 pursue [1] - 72:25 pursued [1] - 57:16 pursuing [1] - 77:5 put [8] - 7:22, 14:24, 23:24, 34:20, 34:21, 38:9, 40:14, 74:18 puts [1] - 35:2 putting [1] - 4:24	48:1, 64:10 reads [1] - 5:17 real [1] - 70:25 really [6] - 19:8, 61:6, 66:15, 72:8, 73:4, 81:7 realm [2] - 47:6, 79:8 reason [6] - 10:5, 33:21, 41:7, 41:8, 48:23, 56:20 reasonable [1] - 26:1 reasonably [1] - 25:22 reasons [4] - 61:24, 62:6, 63:22, 67:4 reckless [2] - 5:19, 7:4 recognition [2] - 78:12, 78:14 recognize [2] - 24:9, 25:22 recognized [4] - 25:6, 25:10, 29:13, 31:14 recommend [1] - 40:12 record [3] - 33:21, 34:1, 34:3 recover [6] - 23:7, 26:23, 34:18, 65:2, 65:5, 76:17 recoveries [1] - 76:5 recovering [1] - 76:25 recovery [11] - 19:9, 19:11, 28:2, 36:10, 51:22, 76:10, 76:19, 77:12, 79:21, 80:1, 81:13 refer [2] - 57:5, 59:18 reference [1] - 45:9 referring [1] - 57:23 refers [3] - 52:7, 56:19, 57:5 reflect [1] - 58:15 reform [2] - 64:2, 77:3 regard [7] - 3:7, 3:11, 24:6, 50:24, 53:13, 53:19, 73:1 regardless [3] - 8:10, 22:4, 22:9 regulate [11] - 10:13, 18:3, 18:4, 18:18, 27:11, 27:17, 30:21, 41:16, 65:11, 75:22 regulates [2] - 40:23, 41:14 regulation [2] - 30:18, 40:19 regulations [5] - 15:12, 40:24, 40:25, 41:2, 41:4 rehabilitated [2] - 73:13, 73:14	rehabilitation [2] - 57:19, 58:20 rehabilitative [1] - 72:6 reiterated [1] - 26:17 reiterates [1] - 23:19 rejected [4] - 23:8, 23:10, 24:1, 52:24 rejecting [2] - 23:11, 79:20 rejoinders [1] - 25:9 related [2] - 19:15, 20:12 relates [2] - 55:5, 79:15 relation [1] - 59:20 relative [2] - 58:16, 76:7 relevant [4] - 36:13, 48:7, 61:11, 67:21 relied [1] - 37:4 relief [4] - 50:24, 51:7, 51:14, 51:19 rely [1] - 41:15 relying [1] - 40:4 remained [1] - 77:11 remaining [1] - 24:11 remedies [6] - 21:25, 24:11, 24:14, 26:15, 38:23, 76:3 remediless [2] - 63:11, 63:15 remedy [10] - 24:1, 24:8, 38:22, 38:25, 40:18, 51:7, 63:5, 63:18, 63:20, 76:15 remember [1] - 74:10 remotely [1] - 39:3 removed [1] - 33:13 renders [1] - 29:12 RENZULLI [19] - 2:19, 3:13, 11:14, 11:18, 11:22, 12:22, 14:12, 14:20, 15:4, 15:10, 15:15, 15:19, 16:13, 66:7, 73:10, 73:22, 74:24, 75:11, 81:18 Renzulli [12] - 1:23, 2:20, 3:1, 17:16, 22:25, 29:11, 32:25, 34:5, 56:6, 58:23, 79:17 repeat [2] - 42:15, 62:5 repeatedly [1] - 79:6 replete [1] - 25:9 reply [1] - 57:11 report [1] - 40:9 Reporter [1] - 82:11 represent [2] - 2:12,	52:13 representative [1] - 30:7 Representatives [2] - 1:5, 2:5 representing [1] - 3:4 republic [1] - 78:16 require [8] - 6:23, 6:24, 6:25, 8:1, 21:9, 37:19, 38:19, 38:20 required [3] - 12:1, 49:14, 55:14 requirement [1] - 14:25 requirements [1] - 14:21 requires [4] - 6:22, 7:1, 59:16, 65:4 requiring [2] - 65:1, 65:14 resemble [1] - 17:15 resembled [1] - 17:14 resorting [1] - 31:3 responding [1] - 17:9 response [5] - 14:11, 28:11, 66:6, 75:13, 80:5 responsibile [1] - 35:1 responsibility [2] - 47:8, 53:6 rest [1] - 48:14 restrict [1] - 31:5 restricted [1] - 26:18 restrictions [1] - 27:4 result [5] - 3:23, 5:18, 33:16, 34:15, 43:5 resulted [3] - 4:8, 4:16, 34:8 resulting [11] - 5:7, 48:8, 48:10, 48:12, 48:20, 48:24, 50:23, 52:21, 55:24, 61:16 retain [1] - 26:10 reverse [1] - 39:25 reversed [7] - 20:2, 20:5, 32:3, 46:10, 60:8, 60:11, 80:9 reversing [1] - 46:7 review [11] - 24:23, 24:25, 27:6, 27:10, 28:4, 53:7, 53:9, 53:11, 53:18, 54:4, 80:15 reviewed [3] - 27:19, 45:15, 53:22 reviewing [1] - 53:18 Revitalization [1] - 19:6 Riegel [1] - 19:16 rights [9] - 23:21,	23:22, 24:7, 26:15, 26:24, 27:7, 42:25, 63:12, 64:12 Rights [1] - 18:11 road [1] - 73:14 roads [1] - 20:4 ROBERT [1] - 1:6 Robert [2] - 1:21, 2:5 Robson [1] - 77:1 role [1] - 28:24 roles [1] - 78:21 Romah [1] - 42:7 room [1] - 66:9 round [4] - 12:12, 13:9, 33:14, 59:4 rubber [1] - 64:8 rule [3] - 21:9, 42:9, 44:4 ruled [1] - 17:12 rules [2] - 19:19, 20:6 run [2] - 26:2, 27:5 Ryan [3] - 7:11, 13:20, 74:10
Q				
qualified [10] - 3:16, 3:20, 4:6, 4:9, 4:17, 25:16, 47:23, 48:4, 48:9, 56:18 questions [9] - 10:24, 11:6, 22:24, 22:25, 26:22, 32:12, 42:13, 66:2, 75:8 quite [2] - 25:5, 75:16 quote [2] - 27:14, 78:22 quoting [1] - 78:24				
R				
R.G [1] - 43:23 raise [3] - 18:15, 23:4, 24:20 raised [6] - 8:14, 10:23, 10:24, 16:15, 18:14, 79:18 raises [1] - 43:1 ran [1] - 81:10 rather [6] - 11:25, 12:5, 17:8, 21:5, 22:20, 78:12 rational [15] - 24:23, 24:24, 25:1, 25:3, 25:11, 27:10, 27:19, 28:3, 53:11, 64:6, 64:8, 64:11, 64:19, 64:24, 65:9 rationale [3] - 28:25, 53:6, 53:8 rationales [1] - 34:4 reach [2] - 42:1, 66:1 reached [4] - 19:18, 29:10, 66:22, 79:6 read [12] - 10:5, 44:22, 49:2, 52:5, 52:21, 54:12, 54:13, 54:20, 55:24, 61:4, 61:9, 65:24 readily [1] - 26:20 reading [3] - 17:19,				
S				
				safe [1] - 13:1 safeties [2] - 37:20, 65:1 safety [4] - 33:17, 34:20, 34:22, 44:10 sale [3] - 37:15, 46:6, 70:9 SALOOM [2] - 1:10, 1:11 Saloom [7] - 2:8, 2:9, 2:22, 2:23, 4:5, 70:8, 71:5 Saloon [1] - 2:8 satisfied [1] - 32:17 satisfies [1] - 22:7 Saturday [5] - 44:1, 44:4, 49:20, 71:11, 71:16 save [1] - 33:18 saved [1] - 33:19 Scalia [2] - 54:16, 54:18 Schaum [1] - 82:11 schemes [1] - 27:23 Schmidt [1] - 24:3 school [1] - 52:18 scrutiny [1] - 45:16 se [3] - 11:12, 47:2, 73:2 Second [4] - 17:24, 24:9, 27:6, 64:12 second [2] - 47:24, 56:4 Section [4] - 5:16,

18:17, 18:19, 37:10
section [2] - 8:8, 25:15
sections [1] - 49:17
see [7] - 13:20, 16:25, 40:8, 57:10, 59:9, 77:24
selection [2] - 72:23, 73:5
selects [1] - 72:25
self [3] - 12:24, 14:5, 18:12
self-defense [3] - 12:24, 14:5, 18:12
sell [2] - 14:18, 26:3
seller [7] - 3:21, 4:5, 8:12, 8:19, 25:25, 26:10, 71:7
sellers [3] - 10:17, 18:22, 41:1
sells [1] - 14:8
semi [2] - 6:1, 12:7
semi-automatic [2] - 6:1, 12:7
senate [2] - 15:3, 50:9
Senator [3] - 43:16, 50:8, 50:10
sending [1] - 80:10
sense [6] - 8:20, 9:2, 62:15, 66:22, 66:23, 70:15
sensitive [2] - 28:14, 79:4
sentence [1] - 59:18
sentencing [1] - 72:17
separated [1] - 73:8
separation [2] - 9:17, 16:5
serious [5] - 18:15, 31:2, 31:11, 42:12, 63:10
seriousness [1] - 30:4
set [8] - 17:10, 17:14, 19:17, 20:6, 30:8, 63:10, 78:7, 79:6
setting [3] - 21:17, 41:23, 80:12
seventh [1] - 52:9
several [4] - 18:19, 23:8, 51:24, 77:25
shall [3] - 5:6, 20:17, 21:14
sheep [1] - 16:21
shift [2] - 28:17, 28:23
shipped [1] - 3:22
shoot [1] - 26:8
shooter [1] - 58:5
shooting [2] - 4:16, 5:9
shoots [3] - 6:3, 7:19,

7:23
shot [1] - 9:18
show [3] - 34:1, 34:2, 69:12
showing [1] - 16:22
shows [3] - 19:17, 62:22, 70:14
shut [2] - 37:6, 44:25
side [2] - 61:13, 76:18
sides [1] - 61:22
sights [1] - 12:14
sign [1] - 58:17
Silver [4] - 23:17, 27:17
similar [7] - 36:6, 37:5, 44:12, 51:4, 51:5, 60:2, 79:20
similarities [1] - 6:14
similarly [1] - 77:6
simple [4] - 13:12, 33:16, 68:4, 70:25
simply [9] - 30:22, 36:9, 44:16, 57:16, 59:17, 65:11, 65:15, 73:3, 79:24
single [1] - 45:25
sink [1] - 30:13
sirens [1] - 67:23
sit [1] - 13:13
sits [1] - 73:14
situation [3] - 5:25, 65:3, 79:12
situations [1] - 15:5
six [1] - 3:25
sixth [1] - 52:7
size [1] - 15:14
skeptical [1] - 25:7
skipping [1] - 49:3
slam [1] - 42:22
slide [5] - 13:7, 13:8, 13:12, 58:22, 58:24
SMAIL [1] - 1:16
Smail [1] - 67:11
small [2] - 49:9, 71:13
smart [1] - 69:6
smoke [2] - 68:6, 70:3
smokescreen [1] - 68:10
soap [1] - 30:12
social [1] - 35:14
sold [1] - 44:23
sole [2] - 5:6, 13:22
solely [22] - 8:7, 8:17, 9:20, 44:7, 44:10, 45:2, 49:4, 49:5, 49:6, 49:10, 49:18, 49:22, 52:7, 52:21, 55:24, 56:2, 61:16, 68:6, 70:24, 71:1, 71:3, 71:6

someone [9] - 5:11, 9:18, 43:19, 44:4, 59:18, 67:24, 69:19, 71:12, 74:6
somewhat [1] - 16:23
sort [4] - 40:15, 59:16, 63:5, 76:24
sorts [3] - 39:17, 44:22, 45:1
Soskin [3] - 1:25, 3:2, 16:16
SOSKIN [11] - 3:2, 16:17, 17:2, 17:5, 23:4, 31:23, 32:3, 32:9, 32:19, 75:14, 81:22
space [1] - 40:23
Special [5] - 44:2, 44:5, 49:21, 71:11, 71:16
special [2] - 40:2, 63:23
specialized [1] - 6:18
specific [5] - 3:25, 21:12, 26:5, 30:10, 45:10
specifically [2] - 23:10, 48:20
specifics [2] - 13:1, 13:2
spend [3] - 12:22, 13:16, 13:24
spoken [5] - 10:21, 15:20, 16:4, 63:7, 71:19
sponsor [1] - 43:17
sponte [3] - 31:18, 31:20, 31:24
sports [3] - 20:10, 20:18, 20:23
Sports [1] - 20:14
Sportsmen's [1] - 9:24
Springfield [12] - 2:7, 2:21, 2:22, 4:4, 6:15, 12:10, 14:7, 33:22, 45:4, 70:8, 71:4
SPRINGFIELD [2] - 1:9, 1:10
staff [1] - 16:20
stage [8] - 33:3, 33:7, 33:8, 33:9, 34:2, 34:5, 34:7, 58:5
stake [1] - 26:24
stamp [1] - 64:8
standard [14] - 14:25, 15:9, 24:25, 25:1, 25:3, 25:5, 25:6, 25:13, 27:19, 38:8, 39:24, 42:18, 61:14,

79:7
standards [1] - 65:14
standing [1] - 26:1
start [3] - 31:3, 66:10, 73:11
State [3] - 17:23, 27:24, 28:11
state [68] - 4:21, 4:22, 10:6, 10:16, 12:1, 14:10, 15:5, 15:8, 18:4, 19:2, 19:18, 19:22, 19:23, 19:25, 20:16, 20:25, 21:14, 21:20, 22:5, 22:6, 22:8, 22:10, 22:14, 22:16, 22:23, 25:2, 28:21, 29:7, 29:8, 29:16, 29:24, 30:4, 30:17, 30:23, 35:8, 36:2, 36:25, 37:15, 39:22, 40:5, 40:6, 41:3, 45:4, 48:16, 52:2, 54:20, 55:10, 55:14, 55:16, 60:17, 61:3, 61:5, 61:7, 61:10, 63:19, 63:21, 63:25, 64:25, 65:4, 65:8, 65:12, 67:13, 78:21, 79:2, 79:11
statement [3] - 36:7, 61:18, 61:21
statements [1] - 50:9
States [7] - 1:25, 3:3, 3:4, 17:5, 21:15, 52:13, 77:13
states [22] - 11:10, 11:24, 14:20, 15:13, 18:5, 18:19, 21:12, 30:19, 35:7, 35:11, 39:4, 39:8, 41:14, 45:15, 62:10, 63:22, 65:8, 67:15, 68:18, 79:1, 79:2, 79:8
stating [1] - 17:17
statue [1] - 42:3
statute [48] - 3:19, 4:24, 5:3, 8:9, 8:22, 8:24, 10:7, 11:10, 11:13, 14:18, 18:1, 19:7, 20:15, 24:22, 27:8, 31:3, 31:9, 36:13, 36:15, 36:16, 37:21, 39:11, 39:13, 39:23, 42:12, 43:12, 45:7, 47:10, 48:14, 49:1, 52:10, 61:4, 61:10, 61:13, 63:10, 64:3, 64:15, 69:11, 69:12, 70:9, 70:11, 70:20, 75:23, 76:8,

77:3, 78:23, 81:10
Statute [1] - 5:16
statutes [5] - 21:18, 27:22, 29:10, 39:17, 62:19
statutory [4] - 38:7, 38:14, 42:1, 68:20
steals [1] - 7:15
stepped [1] - 19:20
still [1] - 24:11
stood [1] - 75:19
stop [1] - 20:25
storage [2] - 7:21, 7:22
Store [6] - 2:8, 2:9, 2:10, 2:22, 2:23, 4:5
STORE [2] - 1:10, 1:11
straight [1] - 43:16
strategy [1] - 14:7
street [1] - 27:1
stress [2] - 10:19, 75:20
stressed [1] - 10:6
strict [1] - 76:18
strike [1] - 27:14
striking [1] - 30:18
strong [1] - 15:23
strongly [1] - 27:15
struck [4] - 54:18, 64:2, 80:23, 80:25
studies [2] - 19:21, 20:4
stuff [2] - 61:17, 73:25
sua [3] - 31:18, 31:20, 31:24
subject [1] - 28:14
submitted [1] - 53:18
subsequent [1] - 29:2
substantive [2] - 19:18, 21:6
substitute [5] - 24:1, 24:7, 76:2, 76:19, 77:12
succeeded [1] - 47:16
sue [2] - 36:24, 64:17
sued [3] - 8:19, 16:8, 79:2
suffered [2] - 34:25, 77:4
sufferers [1] - 19:12
suffering [1] - 63:13
sufficient [2] - 18:25, 59:1
sufficiently [1] - 48:21
suggest [1] - 59:3
suggested [1] - 75:20
suggesting [1] - 24:21
suggestion [1] - 75:25
suggests [1] - 23:25

suing ^[1] - 43:20 suit ^[1] - 23:7 suits ^[3] - 24:14, 24:16, 49:24 summary ^[1] - 45:18 supersede ^[1] - 30:17 support ^[6] - 8:13, 8:24, 8:25, 58:18, 66:13, 71:9 supports ^[1] - 13:23 supremacy ^[4] - 12:2, 19:1, 21:11, 22:13 supreme ^[1] - 47:8 Supreme ^[34] - 5:24, 6:20, 8:21, 10:10, 17:23, 19:10, 19:15, 19:16, 19:24, 20:2, 20:5, 20:10, 23:11, 25:3, 26:17, 30:14, 35:16, 36:13, 41:10, 46:7, 46:9, 46:11, 48:17, 60:6, 60:15, 63:6, 63:21, 67:14, 78:25, 79:5, 79:20, 80:8, 80:9 surprise ^[1] - 17:22 survive ^[4] - 22:3, 26:13, 64:11, 68:23 survived ^[1] - 28:3 survives ^[1] - 65:9 swallow ^[1] - 30:2 sweeping ^[4] - 35:9, 39:12, 70:20, 81:8 Sweet ^[1] - 2:17 swine ^[2] - 19:11, 19:12 system ^[9] - 9:13, 26:2, 28:1, 36:22, 55:8, 57:4, 58:11, 64:21, 76:16	3:6, 11:7, 11:17, 11:20, 12:4, 14:6, 14:17, 14:23, 15:7, 15:13, 15:16, 16:12, 16:16, 16:24, 17:4, 23:3, 31:20, 32:1, 32:7, 32:14, 32:21, 32:24, 33:6, 44:14, 45:3, 47:1, 47:11, 47:20, 48:19, 50:4, 50:15, 50:20, 51:20, 53:5, 53:12, 53:17, 53:21, 54:2, 54:7, 57:15, 58:10, 58:14, 59:22, 60:4, 66:3, 66:6, 72:21, 73:19, 74:21, 75:10, 75:13, 80:4, 80:15, 81:15, 81:21 theirs ^[1] - 74:11 theories ^[2] - 52:11, 66:13 theory ^[3] - 48:20, 49:25, 50:2 therefore ^[4] - 4:16, 7:7, 33:13, 57:18 therein ^[2] - 16:15, 50:18 thinking ^[1] - 57:6 third ^[4] - 3:24, 4:9, 4:17, 9:7 Third ^[1] - 19:13 thoroughly ^[1] - 75:16 threat ^[2] - 25:17, 79:11 Three ^[2] - 37:11, 51:17 threshold ^[2] - 48:6, 77:4 throughout ^[1] - 7:10 throw ^[4] - 37:5, 38:20, 41:18, 68:5 Title ^[1] - 73:3 title ^[1] - 17:19 today ^[10] - 2:15, 10:4, 11:1, 17:6, 66:25, 67:16, 67:19, 67:25, 68:25, 71:2 today's ^[1] - 67:20 Tompkins ^[1] - 38:14 took ^[1] - 28:18 top ^[1] - 40:14 tort ^[23] - 19:7, 19:24, 21:7, 22:14, 23:7, 23:14, 26:19, 27:9, 27:23, 29:16, 29:24, 30:22, 35:9, 41:3, 63:23, 63:25, 64:2, 76:1, 76:15, 77:3, 77:10, 77:17, 79:25	tortfeasor ^[1] - 69:18 tortfeasors ^[2] - 24:15, 77:11 torts ^[8] - 19:15, 21:18, 22:1, 22:3, 22:8, 22:17, 22:19, 26:13 totally ^[1] - 36:10 towards ^[2] - 62:21, 78:11 toy ^[2] - 58:7 traditional ^[3] - 28:20, 28:24, 41:4 tragedies ^[1] - 24:12 tragedy ^[3] - 3:15, 16:1, 16:10 transcript ^[1] - 82:8 transferred ^[1] - 28:21 transported ^[1] - 4:7 trash ^[2] - 59:9, 74:7 traveled ^[1] - 11:20 travels ^[1] - 17:1 treat ^[1] - 49:14 treated ^[1] - 30:11 treaty ^[1] - 29:9 Tremba ^[1] - 2:25 tremendous ^[1] - 25:20 trend ^[4] - 54:4, 54:5, 54:6, 54:9 trial ^[5] - 46:8, 65:20, 65:22, 67:2, 67:4 tried ^[1] - 80:10 trigger ^[15] - 5:10, 5:12, 16:1, 16:2, 59:6, 59:10, 59:17, 68:8, 69:19, 74:3, 74:5, 74:15, 74:16, 75:1 Truax ^[4] - 63:8, 79:15, 79:21, 80:7 TRUAX ^[1] - 63:8 true ^[13] - 18:7, 33:5, 39:7, 40:21, 51:13, 65:13, 67:20, 67:25, 68:11, 69:10, 69:18, 72:22, 82:8 trumps ^[1] - 19:2 trust ^[3] - 40:1, 40:5, 62:16 try ^[1] - 21:23 trying ^[7] - 43:15, 43:16, 43:18, 47:20, 54:3, 54:14, 68:5 turn ^[2] - 19:23, 23:1 twelve ^[1] - 19:9 two ^[5] - 13:5, 24:16, 46:6, 47:19, 48:13 type ^[1] - 39:7 types ^[5] - 7:13, 19:21,	21:7, 24:16, 56:6 U U.S ^[4] - 18:17, 39:5, 57:11, 63:9 U.S.A ^[2] - 10:8, 54:24 U.S.C ^[1] - 37:10 ultimately ^[4] - 44:18, 45:13, 47:16, 73:8 unambiguously ^[1] - 10:15 unanimously ^[2] - 39:22, 39:23 unconstitutional ^[14] - 40:11, 51:21, 54:19, 61:2, 62:4, 62:6, 62:22, 62:25, 63:3, 65:19, 65:22, 65:25, 67:3, 80:23 unconstitutionality ^[1] - 10:24 under ^[17] - 11:9, 11:12, 15:4, 22:12, 34:8, 37:24, 42:1, 44:3, 45:7, 47:9, 48:15, 48:19, 61:14, 64:16, 73:2, 76:23, 81:16 underlying ^[2] - 45:18, 47:15 underneath ^[1] - 73:21 understood ^[2] - 15:19, 68:22 undisputed ^[10] - 33:1, 33:2, 33:3, 33:9, 33:20, 34:7, 34:10, 34:12, 35:16, 58:4 unhappy ^[1] - 55:20 uniform ^[1] - 40:25 unique ^[6] - 37:7, 37:8, 39:1, 40:17, 41:22, 75:23 uniqueness ^[1] - 75:20 United ^[7] - 1:25, 3:3, 3:4, 17:5, 21:14, 52:12, 77:12 unlawful ^[24] - 3:24, 4:9, 5:19, 6:22, 7:25, 8:4, 8:18, 9:20, 20:17, 21:4, 48:9, 49:4, 56:2, 56:19, 56:21, 56:25, 57:1, 57:3, 57:9, 57:14, 57:22, 57:24, 63:11, 73:2 unlawfully ^[2] - 9:11,	9:19 unless ^[7] - 3:25, 39:21, 42:22, 61:5, 61:9, 71:19 unlimited ^[1] - 64:13 unlitigated ^[1] - 23:13 unloaded ^[3] - 6:5, 33:14, 58:6 unprecedented ^[3] - 39:2, 63:4, 77:20 unpredictability ^[1] - 78:13 unpunished ^[1] - 44:18 unquestionably ^[1] - 60:17 unreasonable ^[2] - 9:13, 18:22 unremarkable ^[1] - 19:3 unreviewable ^[1] - 79:24 up ^[21] - 8:6, 11:20, 13:13, 14:15, 16:22, 17:16, 29:1, 34:5, 39:17, 40:6, 44:19, 48:13, 59:10, 62:20, 66:20, 66:21, 67:24, 68:5, 69:15, 74:8, 75:19 upheld ^[4] - 31:21, 32:1, 45:22, 65:21 upholding ^[1] - 46:3 upsetting ^[1] - 19:25 uses ^[1] - 8:9 usual ^[1] - 78:20 utilize ^[2] - 3:9, 11:10 utilized ^[1] - 57:17
T tagged ^[1] - 44:11 talks ^[2] - 52:10, 78:19 technology ^[2] - 6:18, 69:6 ten ^[1] - 15:17 ten-clip ^[1] - 15:17 Tenth ^[12] - 11:8, 11:14, 28:6, 40:12, 40:16, 52:1, 62:7, 62:24, 62:25, 78:2, 80:20, 81:2 term ^[1] - 48:10 terms ^[1] - 8:23 test ^[1] - 64:6 text ^[3] - 29:23, 31:6, 31:10 THE ^[57] - 1:1, 2:3,			V vaccinated ^[1] - 19:12 vaccines ^[1] - 27:22 valid ^[2] - 38:20, 65:17 validity ^[1] - 20:9 value ^[1] - 47:4 Vargas ^[3] - 28:11, 40:10, 63:1 various ^[1] - 23:8 versus ^[18] - 2:6, 9:24, 10:7, 10:8, 20:8, 23:9, 23:17, 27:17, 27:24, 29:6, 31:9, 41:7, 43:23, 63:9, 64:4, 72:13, 78:5 viable ^[3] - 69:17, 70:22, 71:19 victim ^[1] - 50:17 victims ^[12] - 19:10, 24:11, 33:25, 36:11,	

36:22, 36:24, 37:5, 37:6, 50:12, 51:22, 64:3, 64:4 view ^[4] - 41:25, 44:20, 59:19, 60:13 violate ^[3] - 37:15, 64:6, 70:10 violated ^[3] - 40:11, 65:21, 70:9 violates ^[1] - 65:10 violation ^[4] - 26:5, 37:21, 63:15, 64:16 virtually ^[2] - 28:21, 78:16 volition ^[2] - 59:16, 59:17 volitional ^[28] - 5:5, 5:8, 5:9, 8:3, 13:22, 15:25, 56:12, 58:3, 58:4, 59:12, 59:13, 59:16, 59:19, 59:20, 59:21, 61:15, 68:7, 68:8, 68:10, 73:18, 74:1, 74:4, 74:8, 74:12, 74:17, 74:23 volitionally ^[2] - 59:5, 59:8 volume ^[1] - 28:4 voters ^[1] - 14:15 voting ^[1] - 21:1 vs ^[1] - 1:8	whereby ^[1] - 63:10 whichever ^[1] - 3:8 whole ^[1] - 49:2 wholesale ^[2] - 28:17, 28:23 wife ^[1] - 26:8 Wisconsin ^[1] - 65:23 wisdom ^[1] - 25:10 wish ^[3] - 11:11, 72:25, 77:6 woman ^[3] - 30:11, 54:13, 54:14 word ^[8] - 5:23, 6:8, 49:6, 49:10, 49:15, 49:16 wording ^[1] - 73:21 words ^[2] - 37:17, 56:23 worthy ^[1] - 70:4 wrongly ^[1] - 28:23 wrongs ^[1] - 26:23 wrote ^[3] - 20:21, 25:9, 30:5
Y	
year ^[3] - 24:2, 26:17, 41:10 years ^[7] - 12:6, 23:12, 33:10, 33:17, 43:14, 52:12 York ^[9] - 2:21, 3:15, 17:24, 25:8, 27:24, 28:12, 40:11, 78:4, 78:5	
W	
wait ^[1] - 72:21 walks ^[2] - 26:2, 26:6 wants ^[4] - 3:9, 14:14, 38:5, 42:23 warn ^[1] - 6:10 washing ^[1] - 30:12 Washington ^[2] - 19:24, 41:19 water ^[1] - 30:12 ways ^[3] - 37:8, 41:22, 47:19 wayward ^[1] - 16:21 weapon ^[3] - 44:16, 55:9, 57:17 weapons ^[3] - 29:9, 30:11, 54:13 weight ^[1] - 12:10 Weinstein ^[1] - 25:8 welcome ^[2] - 16:20, 80:4 WESTMORELAND ^[1] - 1:1 whatsoever ^[2] - 54:11, 62:8 whereas ^[2] - 18:7, 29:15	

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA
CIVIL ACTION - LAW

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

Plaintiffs,)

v.)

No. 1126 of 2018

SPRINGFIELD, INC. d/b/a)
SPRINGFIELD ARMORY, and)

SALOOM DEPARTMENT STORE; and)
SALOOM DEPT. STORE, LLC, d/b/a)
SALOOM DEPARTMENT STORE,)

Defendants.)

OPINION AND ORDER OF COURT

AND NOW, to wit, this 15th day of January, 2019, with the attorneys of record for all parties having been present for argument on Defendants' *Preliminary Objections to the Complaint, Brief in Support* and *Reply Brief*; along with Plaintiffs' *Complaint, Answer* and *Memorandum of Law in Support of Plaintiff's Answer*; as well as the United States' *Memorandum in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act*; and upon careful consideration of all of the foregoing by this Court, it is hereby ORDERED, ADJUDGED and DECREED, as follows:

Defendants' preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. 1028(a)(4), requesting dismissal of the Plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") is SUSTAINED, for the reasons elaborated upon below.

The matter presently at issue is the legal sufficiency of Plaintiffs' complaint. Defendants claim that Plaintiffs' present complaint fails to state a valid cause of action as all claims fall squarely within the category of state civil lawsuits prohibited by federal law under the PLCAA, and that the complaint must therefore be dismissed. Plaintiffs state that all claims raised in the complaint are supported by Pennsylvania products liability law and that none of the claims raised are barred by the PLCAA. Plaintiffs also claim that the PLCAA must be interpreted according to principles of constitutional avoidance. In the alternative, Plaintiffs argue that the PLCAA is unconstitutional. The United States has intervened in a limited capacity in this matter to argue for the applicability and constitutionality of the PLCAA, and it is joined by Defendants in this argument.

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

A complaint comprised of survival and wrongful death claims was filed by Plaintiffs on March 19, 2018. The complaint asserts negligent design and sale as well as negligent warnings and marketing with regard to manufacture and sale of the subject handgun. The present preliminary objections asserting that the complaint fails to state a valid cause of action were filed by the

Defendants on June 29, 2018. On October 19, 2018, the United States of America petitioned to intervene in the case, as the constitutionality of a federal law has been implicated. The intervention petition was granted, and all parties participated in oral argument in this matter on October 31, 2018.

CONSTITUTIONAL AVOIDANCE

As a preliminary matter, Plaintiffs argue that the principle of constitutional avoidance is implicated in this case. Defendants and the United States argue that the doctrine of constitutional avoidance does not apply in this case, as the PLCAA is an appropriate exercise of federal authority which presents no constitutional issues. The doctrine of constitutional avoidance is utilized in situations “where an otherwise acceptable construction of a statute would raise serious constitutional problems.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). In such situations, “the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.*

Plaintiffs claim that state sovereignty is being infringed upon by the federal government in a way that renders a narrow reading of the PLCAA necessary. Plaintiffs first point to the United States Supreme Court case of *Gregory v. Ashcroft*, which sets out the “plain statements rule” under which “it is incumbent upon the [] courts to be certain of Congress’ intent before finding that federal law overrides ‘the traditional constitutional balance of federal and state power.’” 501 U.S. 452, 464 (1991). The Supreme Court noted that “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States...” *Id.* at 461 (1991). Plaintiffs also cite to the Pennsylvania Superior Court case of *Romah v. Hygenic Sanitation Co.* for the related principle that “[a]bsent express preemption, courts are not to infer preemption lightly, particularly in areas traditionally of core concern to the states such as tort law.” 705 A.2d 841, 849 (Pa. Super. Ct. 1997). Plaintiffs additionally reference the case of *Bond v. United States* which extended the

principles set out in *Gregory*. *Bond v. United States*, 572 U.S. 844 (2014). The holding in *Bond* allowed for a reading of ambiguity into otherwise unambiguous language in the absence of a direct statement of Congressional intent, where a plain reading would “alter sensitive federal-state relationships.” *Id.* at 863.

This exact issue with regard to the PLCAA has been addressed by the Supreme Court of Missouri in the 2016 *Delana v. CED Sales, Inc.* case. 486 S.W.3d 316, 322-23 (Mo. 2016). The *Delana* Court addressed the issue of *Gregory* and *Bond*’s application to the PLCAA, noting the above referenced standards for the application of the constitutional avoidance doctrine. *Id.* at 322. The Missouri Supreme Court found that Congress “expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms,” rendering a narrow reading of the statute unnecessary. *Id.* at 3233.

Although not binding upon this Court, the reasoning of the Missouri Supreme Court is persuasive, and this Court similarly finds no need to narrowly construe the PLCAA in this case where the intention to preempt Pennsylvania tort law is “clear and manifest” in the terms of the statute. The present analysis does not even reach the *Gregory* and *Bond* constitutional avoidance doctrine, because the text of the statute makes manifest Congress’ intent to preempt state tort law. Congress explicitly stated in the PLCAA that it intended to “prohibit causes of action” as defined in the PLCAA to “prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.” 15 U.S.C. § 7901. Throughout the PLCAA, Congress unambiguously and without question states its intention to definitively preempt state tort law. Additionally, as described below, the Court finds no constitutional issues which require avoidance, as Congress has appropriately utilized its authority in enacting the PLCAA. As such, the doctrine of constitutional avoidance is not implicated in the case at bar.

APPLICABILITY OF PLCAA TO THE PRESENT CASE

It is undisputed that Plaintiffs set out adequate *prima facie* claims under Pennsylvania products liability law which would survive preliminary objections. The Court must thus assess the applicability of the PLCAA to Plaintiff's claims. The PLCAA states that "[a] qualified civil liability action [under the PLCCA] may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). A qualified civil liability action is generally defined by the PLCAA as "a civil action... brought by any person against a manufacturer or seller of a qualified product... for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party..." subject to certain enumerated exceptions. 15 U.S.C. § 7903(5)(A). The exception at issue in this case reads as follows:

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

15 U.S.C. § 7903(5)(A)(v). It is undisputed that Springfield is a "manufacturer" and Saloom is a "seller" as defined under 15 U.S.C. § 7903. It is also clear that the subject handgun is a "qualified product" under the statute.

Plaintiffs argue that the PLCAA is inapplicable because the present case is not a civil action "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party..." 15 U.S.C. § 7903(5)(A). Plaintiffs argue that the phrase "resulting from" in the definition of qualified civil liability action is not explicitly defined in the PLCAA, and so the meaning must be found in the PLCAA's Purposes and Findings section. 15 U.S.C. § 7901. Plaintiffs point to the language which states a congressional finding that "[t]he possibility of imposing liability on an entire industry for the harm that is solely caused by others is an abuse of the legal system" is

problematic, and that one of the purposes of the PLCAA is “[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products...” 15 U.S.C. § 7901(a)(6); 15 U.S.C. § 7901(b)(1). Plaintiffs argue that the use of the phrase “solely caused” implies that a qualified civil liability action cannot be one in which gun manufacturer negligence was a cause of harm in addition to third party unlawful misuse. Plaintiffs additionally point out that an earlier version of the PLCAA did not use the word “solely” in its purposes and findings section. Plaintiffs note the proposition that statutes should be treated, where possible, to avoid construing any part as superfluous. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

Defendants argue that the United States Supreme Court has made clear that it is inappropriate to narrowly read the broad language of a statute to be entirely consistent with the stated purposes and legislative history of the statute when this reading would contradict the actual statutory text. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243-45 (1989). Defendants also point out that Plaintiff’s argument regarding the “solely caused” language has been rejected by various other courts throughout the country, including the Supreme Courts of Missouri and Alaska, and the United States District Court for the District of Colorado. *See e.g., Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387 (Alaska 2013); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1223-24 (D. Colo. 2015).

The Court finds the logic set forth by the Defendants and elaborated upon by other Courts persuasive. Here, the plain language of the statute bars civil liability actions “resulting from” criminal or unlawful use of a qualified product. Although it is true that “resulting from” is not defined in the statutory definition section of the PLCAA, the phrase on its face has a plain meaning

that does not require further definition. To emphasize the addition of one word in the Purposes and Findings section over the actual substantive text of the statute would run contrary to the United States Supreme Court's directive in *H.J. Inc.* 492 U.S. at 243-45. The Court additionally finds convincing the argument of Supreme Court of Alaska: that to allow a general negligence claim to persist would render the negligence *per se* and negligent entrustment provision of the PLCAA a surplusage. 15 U.S.C. § 7903(5)(A)(ii); *Estate of Kim*, 295 P.3d at 386. This reading of the statute would render an entire operative section of the statute superfluous, which is entirely undesirable under United States Supreme Court precedent. *Astoria*, 501 U.S. at 112. As such, this Court declines to adopt Plaintiff's reading of the statute wherein the present action does not fall under the prohibition on qualified civil liability actions based on their reading of "solely caused" and "resulting from."

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

The *Adames* case concerned a minor who shot and killed another minor using a handgun belonging to his father. *Id.* at. 761. The minor was adjudicated delinquent through the Illinois juvenile delinquency process, with the court in the juvenile proceeding finding that the minor

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

Based upon the foregoing rationale, the Court finds that the present action is a “qualified civil liability action” under the PLCAA. The Court will next address Plaintiffs’ constitutionality concerns.

CONSTITUTIONALITY OF PLCAA

Plaintiffs argue that if the PLCAA is found to apply to the case at bar, the PLCAA is unconstitutional. Defendants and the United States argue that the PLCAA is a valid exercise of Congress’ power under the United States Constitution.

PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT

Plaintiffs first argue that the PLCAA is violative of principles of federalism and the Tenth Amendment to the United States Constitution because it bars certain common law claims without barring equivalent statutory claims, intruding upon states' inherent powers. Defendants and the United States argue that the PLCAA does not violate these principles because it is a valid exercise of one of Congress' enumerated powers, and it does not force action by state actors.

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. amend. X. The issue of the PLCAA's interaction with the Tenth Amendment and principles of federalism has been addressed in the Second Circuit case of *City of New York v. Beretta U.S.A. Corp.* 524 F.3d 384, 396-97 (2d Cir. 2008). In its reasoning, the Second Circuit explains that where Congress is acting within the scope of its enumerated powers, “the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states...” *Id.* at 396. If a properly enacted federal law does not “commandeer the states' executive officials or legislative processes” then it is not violative of the Tenth Amendment under Supreme Court precedent. *Id.*

This Court agrees with the analysis of the Second Circuit in *Beretta*. As explained below, the PLCAA is a valid exercise of Congress' authority under the Commerce and Supremacy Clauses of the United States Constitution. As the PLCAA is properly enacted, we must consider whether the law commandeers state powers. Here, the operative provision provides that statutorily defined “qualified civil liability action[s] may not be brought in any Federal or State court,” and that the statute applies retroactively to any applicable cases pending at the time of the enactment of the statute, requiring their dismissal. 15 U.S.C. § 7902(a). No portion of the PLCAA involves

commandeering the powers of state executive officials or legislative processes in any manner. The PLCAA merely allows certain statutory and judicial remedies while disallowing others.

The United States additionally argues that the PLCAA does not shift the balance of power between the state legislatures and courts as dramatically as indicated by the Plaintiffs. The United States correctly notes that some traditional common law causes of action are preserved under the PLCAA, while certain statutory claims are preempted. The PLCAA, therefore, does not impermissibly dictate the balance of power between the states' judicial and legislative branches, but merely disallows certain civil actions, whether created through common law or through statute. For the foregoing reasons, this Court finds the PLCAA constitutional with regard to the Tenth Amendment and principles of federalism.

DUE PROCESS RIGHTS

Plaintiffs next argue that the PLCAA violates the Plaintiffs' substantive due process rights by depriving them of a cause of action without providing them with a substitute remedy. Defendants and the United States argue that the Plaintiffs have not been deprived of due process because they do not have a valid and vested property interest at stake. They additionally argue that even if such a property interest existed, that Plaintiffs are not deprived of all remedies at law.

The Fifth Amendment to the United States Constitution reads in relevant part: "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Plaintiffs note the longstanding legal principle that "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (1869) (citation omitted). The United States Supreme Court has held, however, that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law." *Silver v. Silver*, 280 U.S. 117, 122 (1929) (citation omitted).

“The procedural component of the Due Process Clause does not protect everything that might be described as a ‘benefit’: ‘To have a property interest in a benefit, a person clearly must have more than an abstract need or desire’ and ‘more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.’” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, (2005). The *Duke Power* case instructs that when dealing with liability limiting legislation, “[o]ur cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’” *Duke Power Co v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (U.S. 1978). (citations omitted). In fact, the Third Circuit case of *In re TMI* explains that “[u]nder the United States Constitution, legislation affecting a pending tort claim is not subject to ‘heightened scrutiny’ due process review because a pending tort claim does not constitute a vested right.” *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996).

Here, this Court finds the case of *In re TMI* instructive. If a pending tort claim does not constitute a vested property right, then it only stands to reason that a potential tort claim, not yet realized or filed at the time of the enactment of legislation would certainly not constitute a vested property right. This logic is reinforced by the United States Supreme Courts’ notations in *Duke Power* that reinforces that no property interest exists in any common law rule, and that liability limiting statutes are not unusual and are routinely enforced by the Courts. 438 U.S. at 88 n.32. As such, this Court finds that Plaintiffs do not have a constitutionally protected property right in their tort claim in this matter, and so a due process analysis is inapplicable.

Assuming *arguendo* that a vested property right does exist, Plaintiffs argue that the PLCAA deprives them of due process without providing an alternate remedy. The United States points again to the *Duke Power* case for the proposition that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy” in a case which involved

imposition of a monetary liability limitation on causes of action resulting from accidents at federally licensed nuclear power plants. 438 U.S. at 88. In further support, the United States points to the later case of *Martinez v. California*, in which the United States Supreme Court upheld a state liability-limiting statute, which provided immunity to officials responsible for decisions regarding paroling inmates, without any available equivalent remedy at law. 444 U.S. 277, 282 (1980).

Defendants additionally argue that Plaintiffs are not entirely without redress, as they may sue the individual who committed the criminal misuse of the firearm, and they additionally may sue any manufacturer, distributor or seller as long as the claim falls appropriately within one of the PLCAA's exceptions. This issue of procedural due process as applied to the PLCAA has been addressed by the Ninth Circuit Court in the case of *Ileto v. Glock, Inc.* 565 F.3d 1126, 1141-42 (9th Cir. 2009). The Ninth Circuit found that "the PLCAA does not completely abolish Plaintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule." *Id.* at 1143. The Court here finds the Ninth Circuit's reasoning persuasive, and that even if a vested property right did exist in this case, the PLCAA does not deprive Plaintiffs of due process, and is thus constitutional.

EQUAL PROTECTION

Plaintiffs additionally argue that the PLCAA is violative of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiffs claim that the PLCAA discriminates against certain gun violence victims without a rational basis, with Congress favoring gun violence victims in states utilizing legislative remedies over victims in states utilizing judicial remedies. Defendants and the United States argue that the rational basis standard is easily satisfied in this matter.

In assessing an equal protection claim, the appropriate standard must be utilized, and all parties in this matter agree that rational basis review is the appropriate standard here. Under rational basis review, a statutorily imposed difference in treatment of two groups “cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). It is also important to note that rational basis review is an extraordinarily deferential standard, and “a classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Id.* (citation omitted).

The PLCAA’s Findings and Purposes section sets out an ample rational basis for any differential treatment found here. 15 U.S.C. § 7901. Congress cites to its important interests in protecting the Second Amendment rights of American citizens to keep and bear arms, as well as the avoidance of an unreasonable burden on interstate and foreign commerce. 15 U.S.C. § 7901(a)(2); 15 U.S.C. § 7901(a)(6). Congress then expresses its belief that judicial remedies might be used to circumvent the democratic legislative processes, and so gives preference to legislatively enacted remedies over judicially created remedies, subject to certain exceptions. 15 U.S.C. § 7901(a)(7); 15 U.S.C. § 7901(a)(8). This rationale easily passes rational basis review. Even if this Court were to disagree with Congress’ logic, “rational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” *Heller* at 319. As such, PLCAA cannot be found unconstitutional based on an equal protection analysis.

COMMERCE CLAUSE AND CONGRESSIONAL AUTHORITY

Plaintiffs finally argue that the PLCAA is not a legitimate exercise of Congressional Commerce Clause authority. Plaintiffs claim that this is because the PLCAA does not actually regulate the conduct of the gun industry, but instead limits liability. Plaintiffs additionally point out

that the PLCAA does not even go as far as to limit liability, so long as a statutory remedy is enacted. The United States argues that the PLCAA is a valid exercise of Congressional authority under both the Commerce Clause and the Supremacy Clause of the U.S. Constitution.

The Commerce Clause provides Congress with the authority “[t]o regulate commerce with foreign nations, and among the several states...” U.S. Const. art. I § 8, cl. 3. The Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

In the PLCAA’s Findings and Purposes, Congress specifically noted that the availability of certain qualified civil liability actions in both state and federal courts could have a potentially chilling effect on interstate commerce. 15 U.S.C. § 7901(a)(6). The Supreme Court of the United States has repeatedly reaffirmed that “one State’s power to impose burdens on the interstate market... is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (citation omitted).

In the *Ileto* case, the Ninth Circuit addressed the applicability of the Commerce Clause to the PLCAA, stating “[w]e have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected.” *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140–41 (9th Cir. 2009). This Court agrees with the assessment of the Ninth Circuit, in that it is entirely reasonable that the PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce. It is not unreasonable for Congress to find that limiting liability in certain situations

would directly affect and bolster interstate trade in firearms, and the Commerce Clause, together with the Supremacy Clause, allows Congress the specifically enumerated authority to do so.

Plaintiffs argue that the United States Supreme Court case of *Murphy v. National Collegiate Athletic Association* renders the PLCAA unconstitutional, as the act restricts liability instead of directly regulating the gun industry. 38 S. Ct. 1461 (2018). This Court can find nothing in *Murphy*, however, that overcomes the binding cases set out by the United States which indicate a longstanding position that regulating and limiting liability is a form of economic regulation permissible under the Commerce Clause. See, e.g., *Riegel v. Medtronic*, 552 U.S. 312, 323-25 (2008); *Kurns v. A.W. Chesterton*, 620 F.3d 392, 398 (3d Cir. 2010). This reasoning is bolstered by the United States Supreme Court's admonition that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (citation omitted). As such, as the Supreme Court did not explicitly disallow the restriction of liability as a method of utilizing Congress' Commerce Clause powers, *Murphy* is inapplicable here.

Defendants point to additional Congressional authority for the PLCAA pursuant to Congress' right "to enforce constitutional rights against the States and to use 'preventative rules... [as] appropriate remedial measures,' where there is 'a congruence between the means used and the ends to be achieved.'" *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In the case of the PLCAA, Congress explicitly set out to enforce the constitutional right to keep and bear arms under the Second Amendment. 15 U.S.C. § 7901(a)(1). Defendants point out the obvious link between the right to keep and bear arms and the obvious need for manufacturers and sellers to be able to produce and sell the same in interstate commerce. As such, this Court finds that Congress' exercise of its commerce power works directly in concert here with its power to enforce protected Second

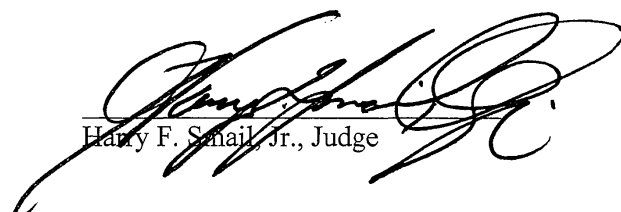
Amendment rights, bolstering the argument that Congress has acted in an entirely valid and appropriate manner pursuant to its enumerated powers in enacting the PLCAA.

Based upon the foregoing analysis, the Court finds that the PLCAA applies to Plaintiffs claims as set out in their complaint in this matter. The Court further finds that the doctrine of constitutional avoidance is not implicated in this case, rendering a narrow reading which would allow Plaintiffs claims to proceed inappropriate. The Court additionally finds that the PLCAA is in no way in violation of the United States Constitution.

Accordingly, Defendants' Preliminary Objection is SUSTAINED. Plaintiffs' Complaint is DISMISSED with prejudice in its entirety pursuant to 15 U.S.C. § 7901 et seq. and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:


Harry F. Smail, Jr., Judge

ATTEST:

Prothonotary

cc: Gary F. Lynch, Esq., for Plaintiffs
Jonathan E. Lowy, Esq. for Plaintiffs
John K. Greiner, Esq. for Defendants
Christopher Renzulli, Esq. for Defendants
Eric J. Soskin, Esq. for United State of America

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA
CIVIL ACTION - LAW

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

Plaintiffs,

vs.

SPRINGFIELD, INC. d/b/a
SPRINGFIELD ARMORY,

No. 1126 of 2018

and

SALOOM DEPARTMENT STORE; and
SALOOM DEPT. STORE, LLC d/b/a
SALOOM DEPARTMENT STORE,

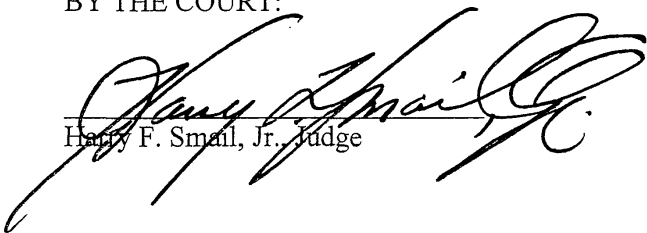
Defendants.

ORDER OF COURT

AND NOW, to wit, this 11th day of February, 2019, with it appearing to the Court that a Notice of Appeal has been filed in the above-captioned matter on February 7, 2019 by Plaintiffs, it is hereby noted that the reasons for the Opinion and Order entered in this matter on January 15, 2019 were set forth amply in the same. This Order is being entered to comply with Pennsylvania Rule of Appellate Procedure 1925(a).

BY THE COURT:

ATTEST:


Harry F. Smail, Jr., Judge

Prothonotary

cc: Gary F. Lynch, Esq.
Johnathan E. Lowy, Esq.
John K. Greiner, Esq.
Christopher Renzulli, Esq.
Eric J. Soskin, Esq.

**CASE NO. 207 WDA 2019
SUPERIOR COURT OF PENNSYLVANIA**

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

v.

SPRINGFIELD, INC. d/b/a SPRINGFIELD ARMORY, and SALOOM
DEPARTMENT STORE; and SALOOM DEPT. STORE, LLC d/b/a SALOOM
DEPARTMENT STORE, *Defendants, Appellees.*

**On Appeal from the Order of the Court of Common Pleas of
Westmoreland County, entered on January 15, 2019 in the Civil
Division, No. 1126 of 2018, Harry F. Smail, Jr., Judge**

BRIEF FOR PLAINTIFFS/APPELLANTS



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May 20, 2019

TABLE OF AUTHORITIES	iii
I. STATEMENT OF JURISDICTION.....	1
II. ORDER IN QUESTION.....	1
III. SCOPE AND STANDARD OF REVIEW	1
IV. STATEMENT OF QUESTIONS INVOLVED.....	3
V. STATEMENT OF THE CASE	3
A. Factual Allegations.....	3
B. Procedural History.....	6
VI. SUMMARY OF ARGUMENT.....	7
VII. ARGUMENT.....	10
A. This Case Is Not A Prohibited “Qualified Civil Liberty Action” Under PLCAA.....	10
1. Federalism Principles And The Presumption Against Preemption Require Reading PLCAA To Allow This Case.....	10
a. Federalism Principles Require Reading PLCAA To Allow Appellants’ Claims.....	10
b. The Presumption Against Preemption Requires Reading PLCAA To Permit Appellants’ Claims	18

2. PLCAA Fails To Make A Plain Statement Of Intent To Bar Claims Like Appellants’	20
a. At Minimum, PLCAA Is Ambiguous As To Whether Appellants’ Claims Meet The General Definition Of Prohibited “Qualified Civil Liability Action[s]”	21
i. PLCAA’s “Solely Caused” Language Indicates That PLCAA Was Not Intended To Bark Claims Like Appellants’	21
ii. PLCAA’s Legislative History Supports Allowing Appellants’ Claims	27
b. PLCAA Is Not Clear That The Juvenile Delinquent Committed A “Criminal” “Volitional” Act That Prevents Application Of PLCAA’s Product Liability Exception (§ 7903(5)(A)(v)).	29
B. PLCAA Is Unconstitutional If It Bars This Case	34
1. PLCAA Violates the Tenth Amendment	34
2. PLCAA Violates Due Process	38
3. PLCAA Violates Equal Protection Principles.....	43
4. PLCAA Is Not A Permissible Exercise of Congress’s Commerce Clause Authority	47
C. The Principle of Constitutional Avoidance Further Supports Appellants’ Interpretation of PLCAA.....	49
VII. CONCLUSION	50

Table of Authorities

Cases

<i>Astoria Fed. Sav. & Loan Ass’n v. Solimino</i> , 501 U.S. 104 (1991).....	23
<i>Bolling v. Sharpe</i> 347 U.S. 497 (1954).....	45
<i>Bond v. United States</i> , 134 S. Ct. 2077 (2014)	8, passim
<i>Breazeale v. Victim Servs.</i> , 198 F. Supp. 3d 1070 (N.D. Cal. 2016)	30
<i>Cipollone v. Liggett Group</i> , 505 U.S. 504 (1992).....	8, 19
<i>City of Cleburne v. Cleburne Living Ctr.</i> , 473 U.S. 432 (1985) ...	44
<i>City of Gary v. Smith & Wesson Corp.</i> , No. 45D05005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006)	41
<i>City of New York v. A-1 Jewelry & Pawn, Inc.</i> , 247 F.R.D. 296, (E.D.N.Y. 2007)	12
<i>City of Spokane v. Fannie Mae</i> , 775 F.3d 1113, 1117-1118 (9 th Cir. 2014).....	37
<i>Clark v. Martinez</i> , 543 U.S. 371 (2005).....	49
<i>Coker v. S.M. Flickinger Co., Inc.</i> , 625 A.2d 1181 (Pa. 1993)	3
<i>Conroy v. Aniskoff</i> , 507 U.S. 511 (1993).....	22

<i>Corporan v. Wal-Mart Stores East, LP</i> , 2016 U.S. Dist. LEXIS 93307 (D. Kan. 2016).....	13
<i>Delana v. CED Sales</i> , 486 S.W.3d 316 (Mo. 2016).....	26, 38
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008).....	38
<i>Duke Power Co. v. Carolina Envtl. Study Grp.</i> , 438 U.S. 59 (1978)	40
<i>Erie R.R. v. Tompkins</i> , 304 U.S. 64 (1938).....	13, 35
<i>FERC v Mississippi</i> , 456 U.S. 742 (1982).....	14, 35, 47
<i>Gregory v. Ashcroft</i> , 501 U.S. 452 (1991)	8, passim
<i>Highland Farms Dairy, Inc. v. Agnew</i> , 300 U.S. 608 (1937).....	14, 35, 47
<i>Ileto v. Glock, Inc.</i> , 565 F.3d 1126 (9 th Cir. 2009)	38, 43
<i>Indep. Oil & Gas Ass'n of Pa. v. Bd. of Assessment Appeals</i> , 572 Pa. 240 (2002)	31
<i>Joyce v. Erie Ins. Exch.</i> , 74 A.3d 157 (Pa. Super. 2013).....	2
<i>JP Morgan Chase Bank N.A. v. Taggart</i> , 203 A.3d 187 (2019).....	21, 27, 33
<i>Kelley v. R.G. Industries, Inc.</i> 497 A.2d 1143 (Md. 1985)	29

<i>Kim v. Coxe</i> , 295 P.3d 380 (Ak. 2013)	26, 38
<i>Little Mountain Community Ass’n, Inc. v. Southern Columbia Corp.</i> , 92 A.3d 1191 (Pa. Super. 2014)	2
<i>Lopez v. Badger Guns, Inc.</i> , No. 10-cv-18530 (Wis. Cir. Ct. Mar. 24, 2014)	42
<i>Marbury v. Madison</i> , 5 U.S. 137 (1869)	39, 43
<i>Martinez v. California</i> , 444 U.S. 277 (1980)	19
<i>Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York (“Vargas”)</i> , 131 A.D.3d 4 (N.Y. App. Div. 2015)	35, 36, 37
<i>McBride v. General Motors Corp.</i> , 737 F. Supp. 1563 (M.D. Ga. 1990)	44, 45
<i>McClellan v. HMO</i> , 413 Pa. Super. 128 (1992)	2
<i>Medtronic, Inc. v. Lohr</i> , 518 U.S. 470 (1996)	19, 26
<i>Minn. v. Clover Leaf Creamery Co.</i> , 449 U.S. 456 (1981)	13, 35, 47
<i>Murphy v. NCAA</i> , 138 S.Ct. 1461 (2018)	47
<i>Mut. Pharm. Co. v. Bartlett</i> , 570 U.S. 472 (2013)	48
<i>New York v. United States</i> , 505 U.S. 144 (1992)	37, 38, 49

<i>Pruneyard Shopping Ctr. v. Robins</i> , 447 U.S. 74 (1980)	41
<i>Riegel v. Medtronic, Inc.</i> , 552 U.S. 312 (2007)	48
<i>Romah v. Hygienic Sanitation Co.</i> , 705 A.2d 841, 849 (Pa. Super. Ct. 1997)	18
<i>Smith & Wesson Corp. v. City of Gary</i> , 875 N.E 2d 422 (Ind. Ct. App. 2007)	12, 42
<i>Snyder v. Phila.</i> , 564 A.2d 1036 (Pa. Commw. Ct. 1989)	11
<i>Soto v. Bushmaster Firearms Int’l, LLC</i> , 331 Conn. 53 (2019)	9, passim
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234, 256 (1957) ..	14, 35, 47
<i>Tennessee v. Lane</i> , 541 U.S. 509 (2004)	39
<i>Tincher v. Omega Flex, Inc.</i> , 104 A.3d 328 (Pa. 2014)	11, 15
<i>Truax v. Corrigan</i> , 404 U.S. 336 (1971)	39
<i>United States v. Bass</i> , 257 U.S. 312 (1921)	15, 17, 24
<i>United States v. Toviave</i> , 761 F.3d 623 (6 th Cir. 2014)	17
<i>Werner v. Plater-Zyberk</i> , 799 A.2d 776 (Pa. Super. 2002)	2
<i>Wheeling & Lake Erie Ry. Co. v. PUC</i> , 778 A.2d 785 (Pa. Commw. Ct. 2001)	19, 27
<i>Williams v. Beemiller, Inc.</i> , 100 A.D.3d 143	

(N.Y. App. Div. 2012)	12
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Statutes

<i>15 U.S.C. §§ 7901-7903</i>	<i>1, passim</i>
<i>42 Pa.C.S.A. § 742</i>	<i>1</i>
<i>Pa. Con. art. I, § 11</i>	<i>14</i>
<i>Pa.R.A.P 903(a)</i>	<i>1</i>
<i>U.S. Constit. amend. X, V; art. I, § 8, cl. 3</i>	<i>10</i>

Other Authorities

<i>Antonin Scalia & Bryan A. Gardner, Reading The Law: The Interpretation Of Legal Texts (2012)</i>	<i>22, 23, 49</i>
<i>Biomaterials Access Assurance Act of 1998, 21 U.S.C. § 1604...</i>	<i>40</i>
<i>Md. Ann. Code art. 27 § 36- I(h)</i>	<i>29</i>
<i>Patricia Foster, Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional, 72 U. Cin. L. Rev. 1739, 1750-56 (Summer 2004)</i>	<i>42</i>
<i>September 11th Victims Compensation Fund, Pub. L., 49 U.S.C. § 40101</i>	<i>40</i>

The National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1
to 300aa-34 40

I. STATEMENT OF JURISDICTION

This Court has jurisdiction to consider “all appeals from final orders of the courts of common pleas” 42 Pa.C.S.A. § 742. The trial court entered a final Opinion and Order dismissing this case on January 15, 2019. Plaintiffs/Appellants (“Appellants”) filed a timely notice of appeal on February 6, 2019 under Pa.R.A.P 903(a).

II. ORDER IN QUESTION

The trial court entered the following Order:

AND NOW, to wit, this 15th day of January, 2019 . . . Defendants’ preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. 1028(a)(4), requesting dismissal of the Plaintiffs’ Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 (“PLCAA”) is SUSTAINED, for the reasons elaborated upon below.

The Opinion and Order are attached as Exhibit A (“Ex. A”).

III. SCOPE AND STANDARD OF REVIEW

In an appeal from an order that sustains preliminary objections in the nature of a demurrer and dismisses a complaint, the Superior Court exercises plenary review. *See Little Mountain*

Community Ass’n, Inc. v. Southern Columbia Corp., 92 A.3d 1191, 1195 (Pa. Super. 2014). The Court reviews the record, accepting as true all well-pled facts and giving the plaintiffs all reasonable inferences that the Court could deduce from these facts. *See Joyce v. Erie Ins. Exch.*, 74 A.3d 157, 162 (Pa. Super. 2013); *McClellan v. HMO*, 413 Pa. Super. 128, 138 (1992).

Preliminary objections in the nature of a demurrer test the legal sufficiency of the complaint . . . Preliminary objections which seek the dismissal of a cause of action should be sustained only in cases in which it is clear and free from doubt that the pleader will be unable to prove facts legally sufficient to establish the right to relief. If any doubt exists as to whether a demurrer should be sustained, it should be resolved in favor of overruling the preliminary objections.

Joyce, 74 A.3d 157 at 162 (internal quotation omitted).

This Court must consider whether the trial court committed an error of law or abused its discretion in sustaining a defendant’s preliminary objections. *See Werner v. Plater-Zyberk*, 799 A.2d 776, 783 (Pa. Super. 2002). “[A]n inquiry into an abuse of discretion is operationally equivalent as one into the merit of the

trial court's decision." *Coker v. S.M. Flickinger Co., Inc.*, 625 A.2d 1181, 1182 (Pa. 1993).

IV. STATEMENT OF QUESTIONS INVOLVED

1) Does the Protection of Lawful Commerce in Arms Act ("PLCAA"), 15 U.S.C. §§ 7901-7903, bar Appellants' claims?

Trial Court's Answer: Yes.

2) Does the United States Constitution permit PLCAA to bar Pennsylvania courts from applying Pennsylvania law to provide civil justice to Appellants?

Trial Court's Answer: Yes.

V. STATEMENT OF THE CASE

A. Factual Allegations

Defendants/Appellees Springfield and Saloom¹ ("Appellees"), respectively, made and sold a semi-automatic handgun ("the Handgun") without feasible safety features and warnings that prevent unintentional shootings of and by children. James Robert

¹ Saloom collectively refers to Appellees with "Saloom" in their names.

(“J.R.”) Gustafson, a thirteen-year old boy, was killed as a result of Appellees’ negligent actions. Appellants are J.R.’s parents.

Appellees had every reason to expect that their guns would be used in scenarios like that which resulted in J.R.’s death, and they could have designed and marketed their guns with safety features to prevent such injuries and deaths. But they chose not to. Appellees have long known that: (1) there is a great likelihood that firearms they sell – especially handguns – will be accessible to children and others who cannot be expected to safely use the weapons (Complaint filed March 19, 2018 (“Cmpl.”) at at 1-3 ¶¶ 5-8 ¶¶ 30-37, 38-39, ¶ 45); (2) the design of semi-automatic firearms frequently deceives people into falsely believing that a gun is unloaded after the ammunition magazine is removed (although a bullet may remain in the chamber) (*id.*); (3) many people – often children – are killed as a result (*id.*); and (4) guns can be made and sold with inexpensive, feasible safety features that prevent many of these tragedies. (*Id.* at 8-12 ¶¶ 46-65).

Appellees could have prevented foreseeable deaths like J.R.'s by manufacturing and selling guns with magazine disconnect safeties, that were developed over a century ago to prevent a gun from firing when the magazine is removed (*id.* 9-10 ¶¶ 51-54); loaded chamber indicators that alert users when a round is in the weapon (*id.* at 10 ¶¶ 55-56); or built-in locks and other features that prevent unauthorized users from firing guns. (*Id.* at 10-12 ¶¶ 58-65). But Appellees chose to design, market and sell the Handgun without these safety features or adequate warnings. (*Id.* at 3 ¶ 5-6, 9, ¶¶ 21, 8-12 ¶¶ 46-65).

Springfield exacerbated the risks it created in its design failures with deceptive messaging that misled consumers by overstating the benefits of firearms and understating (or not mentioning) the risks associated with firearm ownership. (*Id.* at 7-8, 12-13 ¶¶ 35-44 ¶¶ 66-71). For example, Springfield encouraged people to buy guns to keep readily accessible for “[w]hen the police are minutes away and the threat is seconds away,” without mentioning that a gun in the home is more likely

to be used against family members than in their defense, especially when stored unsafely. (*Id.* at 44)

In precisely the sort of scenario Appellees knew would likely happen, a fourteen-year-old boy (“the Juvenile Delinquent”) obtained the Handgun in the home, thought it was unloaded after the magazine was removed, and pulled the trigger of what he thought was an unloaded gun. (*Id.* at 5-6, 15 ¶¶ 20-28 ¶ 82).² Because Appellees chose not to include a magazine disconnect or other feasible safety features, the bullet that remained hidden in the chamber killed J.R. (*Id.*) J.R. would not have died if Appellees had satisfied the duty imposed by Pennsylvania law to manufacture and sell the Handgun in the safest manner reasonably possible.

B. Procedural History

Appellants timely filed their Complaint, alleging products liability claims under Pennsylvania tort law, on March 19, 2018. Before any discovery, Appellees responded with preliminary objections seeking dismissal of the Complaint on June 29, 2018.

Appellees did not contest that Appellants had adequately pled their claims under Pennsylvania law, but argued that Congress, in PLCAA, required Pennsylvania courts to dismiss the case.

Appellants filed a brief in opposition on August 7, 2018 in which they argued that 1) PLCAA did not bar their claims and 2) in the alternative, if it did bar their claims, PLCAA was unconstitutional.

The United States Department of Justice intervened to defend PLCAA's constitutionality. Following oral argument, on January 15, 2019, the trial court dismissed Appellants' case, ruling that PLCAA extinguished Appellants' claims and that PLCAA was constitutional. Appellant timely appealed to this Court.

VI. SUMMARY OF ARGUMENT

Pennsylvania tort law provides Appellants with a right to seek civil justice against Appellees for wrongfully causing the death of their son, and PLCAA does not deprive Pennsylvania's authority to apply its common law and hear this case. Under Supreme Court federalism precedent, such state authority cannot

² The boy pled guilty in a juvenile delinquency proceeding. (*Id.* at 8 ¶ 29).

be taken away unless Congress meets a heavy burden to unmistakably state an intent to do so. *See Bond v. United States*, 134 S. Ct. 2077 (2014); *Gregory v. Ashcroft*, 501 U.S. 452 (1991); *Cipollone v. Liggett Group*, 505 U.S. 504 (1992). PLCAA does not approach expressing that clear intent.

In dismissing Appellants' case, the trial court failed to read PLCAA in accord with this precedent. PLCAA must be read narrowly through this federalism lens since, read broadly, it deprives Pennsylvania of its traditional sovereign authority to allocate lawmaking functions between branches of government and to make state law as it chooses. According to the trial court, PLCAA bars Pennsylvania from providing civil justice for certain wrongfully-injured Pennsylvanians where there was a violation of Pennsylvania common law. However, PLCAA unquestionably permits Pennsylvania to impose liability in identical cases under its "predicate exception," 15 U.S.C. § 7903(5)(A)(iii), for a violation of standards established by the legislature – such as laws requiring certain safety features or warnings. By dictating to

Pennsylvania which branch of government it must use to impose liability in gun industry cases such as this, PLCAA infringes on Pennsylvania's sovereign lawmaking authority.

Bond and *Gregory* make clear that courts may only read a federal law to so upset the federal-state balance of powers if Congress expressed an unmistakably clear intent to do so, and that intrusive reading cannot be avoided. But PLCAA does not approach stating a clear intent to bar cases like this. On the contrary, PLCAA's stated Purposes and Findings express an intent to only bar claims against gun companies where the harm is "solely caused" by third party criminal or unlawful conduct (see 15 U.S.C. § 7901(b)(1), (a)(6)) – not cases like this, where another cause was gun industry negligence. See *Soto v. Bushmaster Firearms Int'l, LLC*, 331 Conn. 53, 131, 137-138 (2019) (referencing "solely caused" language).

PLCAA also permits products liability actions unless caused by a "criminal," "volitional" act – which is far from a clear statement of intent to bar cases in incidents like J.R.'s which

involved juvenile misconduct and unintentional harm. See § 7903(5)(A)(v). Without a clear statement as to whether such cases are barred, PLCAA must be read to allow Appellants' case so as to minimize the intrusion on state authority. See *Soto*, 331 Conn. at 131, 137-138 n. 58.

If PLCAA is read to require dismissal, it is unconstitutional because it violates the Tenth Amendment, Due Process and Equal Protection and exceeds Congress's Commerce Clause authority. U.S. Constit. amend. X, V; art. I, § 8, cl. 3. The trial court erred in giving short shrift to these constitutional principles.

This Court should reverse the trial court's decision.

VII. ARGUMENT

A. This Case Is Not A Prohibited "Qualified Civil Liability Action" Under PLCAA

1. Federalism Principles And The Presumption Against Preemption Require Reading PLCAA To Allow This Case
 - a. Federalism Principles Require Reading PLCAA To Allow Appellants' Claims

Supreme Court precedent requires courts to read federal statutes through a federalism lens which preserves the traditional

powers of state governments and the federal-state balance of powers unless Congress explicitly and clearly states its intent to deprive states of their authority. PLCAA does not include the clear statement of intent required to bar Appellants' claims.

PLCAA purports to intrude on Pennsylvania's core sovereign authority to decide how to allocate lawmaking authority between its governmental branches. Pennsylvania has chosen to apply common law standards to impose liability on makers and sellers of all unreasonably dangerous products – including guns. See *Snyder v. Phila.*, 564 A.2d 1036 (Pa. Commw. Ct. 1989).

Common law products liability is an important state policy:

Strict liability in tort for product defects is a cause of action which ***implicates the social and economic policy of this Commonwealth . . .*** The risk of injury is placed, therefore, upon the supplier of products. ***No product is expressly exempt*** and, as a result, the presumption is that ***strict liability may be available with respect to any product***, provided that the evidence is sufficient to prove a defect.

Tincher v. Omega Flex, Inc., 104 A.3d 328, 381-82 (Pa. 2014)

(internal citations omitted) (emphasis added).

According to the trial court, PLCAA bars Pennsylvania from effectuating this policy and imposing liability here for harm caused by Appellees' violation of judicially-created **common law**. Yet PLCAA would allow Pennsylvania to apply its liability law to precisely the same conduct if the legislature created the applicable law – if Appellees knowingly violated a **statute** applicable to the sale and marketing of firearms. See § 7903(5)(A)(iii).

For example, if a Pennsylvania statute required that firearms sold in Pennsylvania have magazine disconnect safeties, or other safety features or warnings, PLCAA would allow Pennsylvania courts to hear Appellants' case under the "predicate" exception. *Id*; see also, e.g., *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 350-52 (E.D.N.Y. 2007) (claims survived under predicate exception); *Williams v. Beemiller, Inc.*, 100 A.D.3d 143, 147-148 (N.Y. App. Div. 2012), *amended by* 103 A.D.3d 1191 (N.Y. App. Div. 2013) (similar); *Smith & Wesson Corp. v. City of*

Gary, 875 N.E.2d 422, 432-435 (Ind. App. 2007), *transfer denied* 915 N.E.2d 978 (Ind. 2009) (similar); *Corporan v. Wal-Mart Stores East, LP*, 2016 U.S. Dist. LEXIS 93307, *6-*11 (D. Kan. 2016) (similar). Hence, under PLCAA, Pennsylvania must utilize its legislature – not its courts – if it wishes to impose liability on certain conduct by gun companies.

This is an impermissible intrusion on state sovereignty.

“[W]hether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938). The Supreme Court has repeatedly emphasized that how states choose to allocate lawmaking power between the branches of state government is a core prerogative of the states as sovereign entities. “[T]he States are free to allocate the lawmaking function to whatever branch of state government they may choose.” *Minn. v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n. 6 (1981). “How power shall be distributed by a state among its governmental organs is commonly, if not always, a

question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612 (1937). "It would make the deepest inroads upon our federal system for this Court now to hold that it can determine the appropriate distribution of powers and their delegation within the . . . States." *Sweezy v. New Hampshire*, 354 U.S. 234, 256 (1957) (Frankfurter, J. concurrence). "Indeed, having the power to make decisions and to set policy is what gives the State its sovereign nature." *FERC v Mississippi*, 456 U.S. 742, 761 (1982). If read to bar Pennsylvania from using its judiciary to establish liability standards in cases such as this, PLCAA improperly interferes with Pennsylvania's right to allocate lawmaking authority.³

Under the trial court's ruling, PLCAA also infringes on Pennsylvania's choice to apply its civil justice law equally. See Pa. Con. art. I, § 11 ("All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall

³ Congress was open about its animus to the judiciary in PLCAA, stating that federal law was needed to prevent "judicial officer[s]" from acting as "maverick[s]" in permitting certain gun litigation. See § 7901(a)(7).

have remedy by due course of law . . ."); *Tincher*, 104 A.3d a 381-82.

The Supreme Court in *Gregory* emphasized that courts must avoid construing a federal statute as supplanting state authority, and should only do so when the law satisfies the “plain statement rule,” which requires Congress to clearly and unambiguously express its intent to override state law. “[I]t is incumbent upon the . . . courts to be certain of Congress’ intent before finding that federal law overrides [the usual constitutional] balance [of federal and state powers].” 501 U.S. at 460 (internal quotation omitted); see also *United States v. Bass*, 404 U.S. 336, 339 (1971). In the absence of such a plain statement, courts must interpret statutes in a way that minimizes the intrusion on state sovereignty.

Gregory demonstrated how courts may be required to avoid a more straightforward statutory interpretation if it would infringe on state authority. *Gregory* involved a challenge to Missouri’s mandatory retirement age for judges, which appeared to violate a

federal law that barred age discrimination in employment.

Deeming restricting ages for judges as within Missouri's sovereign right to structure its government, the Court read the federal bar on age discrimination as exempting judges under an exception for "appointee[s] on the policymaking level." *Id.* at 466-67. The Court recognized that its statutory interpretation was "an odd way for Congress to exclude judges," "particularly in the context of the other exceptions that surround [the exclusion applicable to judges]." *Id.* at 467. However, the Court would not construe the federal law as displacing Missouri law unless it was "absolutely certain" about Congress' intent. *Id.* at 464. Reading the law through the required federalism lens, the Court was "not looking for a plain statement that judges are excluded" from the coverage of the federal statute, but, instead, "[would] not read [the federal law] to cover state judges unless Congress ha[d] made it clear that judges [we]re *included*" in the scope of its coverage. *Id.* at 467 (emphasis in original).

In *Bond*, the Supreme Court went further in rejecting a plain reading of a federal statute to avoid intruding on state sovereignty. 134 S. Ct. 2077. Bond was charged with violating a federal law that criminalized chemical weapons use, with no exceptions for local crimes generally covered by state law. “[I]t [was] clear beyond doubt that [the act] cover[ed] what [the defendant] Bond did,” (*id.* at 2094 (Scalia J., concurrence)), which was a traditionally local crime. But because a plain reading would lead to the federal government “dramatically intrud[ing] upon traditional state criminal jurisdiction,” the Court held that the federal law did not apply to Bond. *Id.* at 2088 (quoting *Bass*, 404 U.S. at 350). Importantly, the Court did not find the statutory language ambiguous, but found that “ambiguity derives from the improbably broad reach of the key statutory definition.” *Bond*, 134 S. Ct. at 2090. The Court rejected a plain reading because that “would ‘alter sensitive federal-state relationships.’” *Id.* at 2091-92 (quoting earlier *Bond* decision). *See also United*

States v. Toviave, 761 F.3d 623, 627-629 (6th Cir. 2014)

(applying *Bond* to cabin expansive language).

As explained below, PLCAA does not include a clear statement of intent to deprive states of their authority to hear cases such as this. Applying the federalism principles articulated in *Bond/Gregory* is particularly appropriate here since one of PLCAA's stated purposes is "[t]o preserve and protect . . . important principles of federalism [and] State sovereignty . . ." § 7901(b)(6).

b. The Presumption Against Preemption Requires Reading PLCAA To Permit Appellants' Claims

The presumption against preemption further demands reading PLCAA to permit Appellants' claims. The "doctrine presumes that police powers historically left to the states are not supplanted by federal law." *Romah v. Hygienic Sanitation Co.*, 705 A.2d 841, 849 (Pa. Super. Ct. 1997). "Absent express preemption, courts are not to infer preemption lightly, particularly in areas traditionally of core concern to the states such as tort law." *Id.* at 849 (but finding that this high standard for

preemption was met) (internal quotation omitted); *see also* *Wheeling & Lake Erie Ry. Co. v. PUC*, 778 A.2d 785, 792 (Pa. Commw. Ct. 2001) (federal statute did not “preempt the states’ traditional police power over the public safety of the rail-highway crossings” where Congress did not “expressly” state intent to preempt) (internal quotation omitted).

Even when a statute’s “express language” mandates some preemption, the “presumption [against preemption] reinforces the appropriateness of a narrow reading” of the “scope” of the preemption. *See Cipollone*, 505 U.S. at 517-18; *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (emphasis omitted). This “approach is consistent with both federalism concerns and the historic primacy of state regulation of matters of health and safety.” *Id.* These principles have special resonance when tort law may be preempted, for “the State’s interest in fashioning its own rules of tort law is paramount to any discernible federal interest.” *Martinez v. California*, 444 U.S. 277, 282 (1980).

Here, as explained below, the scope of PLCAA preemption is, at most, ambiguous. In resolving that ambiguity, the presumption against preemption requires narrowly construing the scope of PLCAA's protection. Appellees cannot overcome the heavy burdens imposed by *Bond*, *Gregory*, and *Cipollone* to support the broad protection they seek.

2. PLCAA Fails To Make A Plain Statement Of Intent To Bar Claims Like Appellants'

Bond/Gregory principles and the presumption against preemption require allowing Appellants' Pennsylvania tort case, since Congress, in PLCAA, did not clearly state an intent to bar states from hearing such claims.

Congress stated the cases it wished to bar in § 7903, which establishes that for a case to be barred by PLCAA, a case must **both** meet the general definition of a "qualified civil liability action" in § 7903(5)(A) **and** fail to satisfy an exception. Congress did not come close to making the required "plain statement" which can make this Court "absolutely certain" that PLCAA intended to either include claims like Appellants' in the

general definition of prohibited claims (§ 7903(5)(A)) or to exclude claims like Appellants' from the product liability exception (§ 7903(5)(A)(v)).

- a. At Minimum, PLCAA Is Ambiguous As To Whether Appellants' Claims Meet The General Definition Of Prohibited "Qualified Civil Liability Action[s]"
 - i. PLCAA's "Solely Caused" Language Indicates That PLCAA Was Not Intended To Bar Claims Like Appellants'

It is far from "absolutely certain" that Appellants' claims are included in the general definition of a prohibited "qualified civil liability action." A qualified action, in pertinent part, is an action for damages "resulting from the criminal or unlawful misuse" of a gun by a third party. § 7903(5)(A). "Resulting from" is undefined in PLCAA and is ambiguous because it is susceptible to multiple "reasonable interpretations." *JP Morgan Chase Bank N.A. v. Taggart*, 203 A.3d 187, 194 (2019) (internal quotation omitted).

The trial court held that "resulting from criminal or unlawful misuse" meant, "where one cause is criminal or unlawful misuse."

But that is not the only – or even the most – reasonable interpretation of this phrase. PLCAA’s text and legislative history support reading “resulting from criminal or unlawful misuse” as “*solely caused by*” criminal or unlawful misuse, thereby permitting cases such as this, where Appellees’ tortious conduct was another cause of harm.

Congress’s intent “[t]o prohibit causes of action *** for the harm solely caused by” third party misuse is stated in PLCAA’s first stated Purpose and one of its Findings. § 7901(b)(1); see *also* (a)(6) (expressing concern for “[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others”). To further Congress’s intent, the “solely caused by” language should inform the meaning of “resulting from the criminal or unlawful misuse.” See *Conroy v. Aniskoff*, 507 U.S. 511, 515-16 (1993) (statute must be read as a whole); Antonin Scalia & Bryan A. Gardner, *Reading The Law: The Interpretation Of Legal Texts* (2012), (“*Reading the Law*”) at 167-170 (same); *id.* at 217-221 (preambles and prefatory language are valid

indicators of meaning); *id.* at 63-66 (interpretation that advances overall goal of statute is favored).

The word “solely” is particularly indicative of Congress’s intent, as it was one of the few changes made to an earlier version of PLCAA that failed to pass. *Compare* S. 1805, 108th Cong. § (b)(1)(2003) (Exhibit B) *with* § 7901(b)(1) (Exhibit C) and S. 397, 109th Cong. (2005) (Exhibit D). No statutory word should be treated as superfluous (*Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991); *Reading the Law* at 174-180), especially a word that may well have been critical to PLCAA’s enactment. Further, when Congress amends statutory language, a noteworthy change in content is presumed to reflect a change in meaning. *See Reading the Law* at 256-261.

Applying these principles to effectuate Congress’s intent, PLCAA’s general definition only bars actions where third-party misuse was the “sole cause” of harm – and not actions like this case where gun industry negligence was also a cause of the harm.

Not only is this reading of “qualified civil liability action” reasonable and mandated by canons of construction, it is required under *Bond/Gregory*. Under *Gregory*, this Court should “not [be] looking for a plain statement that [common law claims like Appellants’] are excluded” from the coverage of PLCAA’s bar, but instead, should “not read [PLCAA] to [bar common law claims like Appellants’] unless Congress has made it clear that [they] are *included*.” 501 U.S. at 467 (emphasis in original). PLCAA’s expressed intent to bar cases where the harm was “solely caused” by third party misuse is the *opposite* of a clear statement of intent to bar cases, like this case, where the harm was ***not*** solely caused by a third party.

The trial court’s expansive reading of “qualified civil liability action” should also be rejected because it would lead to the federal government “dramatically intrud[ing] upon traditional state [civil justice] jurisdiction.” *Bond*, 134 S.Ct. at 2088 (quoting *Bass*, 404 U.S. at 350)); *id.* at 2090. In accord with *Bond* and *Gregory*, PLCAA should be read to avoid dramatic

intrusions on state sovereignty by construing “qualified civil liability action” to not include this case.

The trial court’s decision is further undermined by the subsequently-decided *Soto* case, in which the Supreme Court of Connecticut engaged in the most extensive analysis of PLCAA to date. *Soto* applied the plain statement rule and *Bond/Gregory* principles to PLCAA, finding that “[t]hese principles apply with particular force to congressional legislation that potentially intrudes into a field . . . traditionally . . . occupied by the states.” *Soto*, 331 Conn. at 137-138 n. 58. *Soto* reversed a ruling dismissing all of plaintiffs’ claims as barred by PLCAA because, “in the absence of a clear statement in the statutory text or legislative history that Congress intended to supersede the states’ traditional authority . . . *we are compelled to resolve any textual ambiguities in favor of the plaintiffs.*” *Id.* at 138 (emphasis added). *Soto* cited PLCAA’s “solely caused” language to support its conclusion that one of plaintiffs’ claims survived. *Id.* at 131. While previous courts did not accept this construction of PLCAA,

they, unlike *Soto*, did not properly consider Supreme Court federalism precedent. See, e.g., *Delana v. CED Sales*, 486 S.W.3d 316, 323 (Mo. 2016), and *Kim v. Coxe*, 295 P.3d 380, 389 (Ak. 2013). *Delana* and *Kim* also allowed some claims to proceed, so the intrusion on state authority was less severe.

The trial court misunderstood *Bond/Gregory* as a “constitutional avoidance doctrine” (Ex. A at 4). It is not. *Bond/Gregory* is a federalism principle that governs how federal statutes must be construed. The court also appeared to conclude that these principles do not apply if Congress expressed an intent to preempt state law in some way. See *id.* But, in fact, these principles function to limit the scope of preemption where it exists to prevent “the improbably broad reach of the key statutory definition,” *Bond*, 134 S. Ct at 2090; cf. *Medtronic*, 518 U.S. at 485.

The trial court also erroneously concluded that allowing Appellants’ claims would render PLCAA’s negligence per se and negligent entrustment exceptions meaningless surplusage. Ex. A

at 6-7. Appellants' products liability claims have distinct elements from negligent entrustment or negligence per se claims, so those provisions are not superfluous. And regardless, *Bond* and *Gregory* demand construing laws to avoid infringing on state authority even if those readings are "odd." See 501 U.S. at 467.

ii. PLCAA's Legislative History Supports Allowing Appellants' Claims

When a statute is ambiguous, the court must "consider matters other than the statutory language" – including the legislative history. See *JP Morgan*, 203 A.3d at 191 n. 3, 194. This is especially true when determining the scope of statutory language that purports to preempt state law to some degree. See *Wheeling*, 778 A.2d at 792 (examining legislative history of ambiguous statute purporting to preempt state law). PLCAA's legislative history indicates an intent to not bar cases like this.

PLCAA's author and chief sponsor, Senator Larry Craig, made clear that Congress did not intend PLCAA to immunize gun industry actors from liability when their own tortious conduct was one cause of harm. Senator Craig emphasized that:

[PLCAA] is not a gun industry immunity bill because it *does not protect firearms or ammunition manufacturers, sellers, or trade associations from any other lawsuits based on their own negligence or criminal conduct* . . . As we have stressed repeatedly, this legislation will not bar the courthouse doors to victims who have been harmed by the negligence or misdeeds of anyone in the gun industry . . . *If manufacturers or dealers break the law or commit negligence, they are still liable.*

151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005)

(emphasis added). Other co-sponsors similarly expressed an intent to preserve cases like these: “[T]his bill carefully preserves the rights of individuals to have their day in court with civil liability actions where negligence is truly an issue.” (151 Cong. Rec. S9077 (daily ed. July 27, 2005) (Sen. Hatch)); “This bill . . . will not shield the industry from its own wrongdoing or from its negligence.” (151 Cong. Rec. S9107 (daily ed. July 27, 2005) (Sen. Baucus)); “This legislation does carefully preserve the right of individuals to have their day in court with civil liability actions for injury or danger caused by negligence on [*sic*] the firearms

dealer or manufacturer.” 151 Cong. Rec. S9389 (daily ed. July 29, 2005) (Sen. Allen).

The Supreme Court of Connecticut recognized that many legislators indicated that “the only actions that would be barred by PLCAA would be ones in which a defendant bore *absolutely no responsibility or blame* for a plaintiff’s injuries.” *Soto*, 331 Conn. at 148 (emphasis added). As Senator Craig said, “The only lawsuits this legislation seeks to prevent are novel causes of action that have no history or grounding in legal principle.” 151 Cong. Rec. S9061, S9099 (daily ed. July 27, 2005).

An example of the “novel” actions that Congress intended to bar – where harm was “solely caused by” criminal misuse -- is *Kelley v. R.G. Industries, Inc.* 497 A.2d 1143 (Md. 1985), superseded by statute, Md. Ann. Code art. 27 § 36- I(h), which allowed strict liability for making certain guns used by criminals even when the gun companies engaged in *no negligent or unlawful misconduct*. Congress did not intend to bar negligence cases like this.

b. PLCAA Is Not Clear That The Juvenile Delinquent Committed A “Criminal,” “Volitional” Act That Prevents Application Of PLCAA’s Product Liability Exception (§ 7903(5)(A)(v))

Even if this case met the general definition of a prohibited “qualified civil liability action,” it is still not a prohibited “qualified civil liability action” because it is exempt under PLCAA’s products liability exception. § 7903(5)(A)(v). More precisely, it is not “absolutely certain” that this case falls outside of the products liability exception, as required by *Bond/Gregory*.

Section 7903(5)(A)(v) allows products liability actions *except* where “discharge of the [gun] was caused by a volitional act that constituted a criminal offense.” *Id.* There is at least ambiguity as to whether J.R.’s death was “caused by a volitional act that constituted a criminal offense,” and any ambiguity must be resolved in favor of allowing Appellants’ suit. See *Soto*, 331 Conn. at 138; *cf. Breazeale v. Victim Servs.*, 198 F. Supp. 3d 1070, 1077-1078 (N.D. Cal. 2016).

For one, the shooting of J.R. was subject to juvenile, not criminal, proceedings, and, thus, was not “criminal.” Congress

intended for the definition of “criminal” to be narrow in this provision. While PLCAA’s general definition of “qualified civil liability action” bars actions where harm results from a “criminal or unlawful” misuse of a firearm (15 U.S.C. § 7903(5)(A)), the disqualifying provision in the products liability exception only bars cases involving a “criminal” act. § 7903(5)(A)(v). When a legislature excludes one term from a list of terms, it is excluding that term from its scope. *Indep. Oil & Gas Ass’n of Pa. v. Bd. of Assessment Appeals*, 572 Pa. 240, 247 (2002). Thus, Congress intended to allow products liability claims involving “unlawful” but not “criminal” acts.

Juvenile offenses – such as the Juvenile Delinquent’s involuntary manslaughter adjudication – are “unlawful” but not “criminal,” as they are not subject to the criminal justice system. The “discharge” that killed J.R. was therefore not a disqualifying “criminal offense” under § 7903(5)(A)(v).

The trial court disagreed, finding that while juvenile delinquency proceedings are not criminal, delinquent acts are still

acts defined as “crimes” under Pennsylvania law. Ex. A at 8. The trial court erred. For one, it was an error to apply Pennsylvania’s definition of “criminal” when interpreting this federal law; what *Congress* meant by disqualifying “criminal” acts in § 7903(5)(A)(v) governs. Regardless of how Pennsylvania categorizes the Juvenile Delinquent’s actions, PLCAA did not clearly intend for acts of juvenile delinquency to be viewed as “criminal.”

Under *Bond/Gregory*, the Court must allow Appellants’ action unless Congress clearly intended to include this juvenile delinquent as a “criminal” disqualifying offense. By excluding “unlawful” acts from the disqualifying phrase of the products liability exception, Congress did not make the required clear statement that products liability claims involving juvenile offenses are barred. Indeed, it is hard to imagine a more apt example of an “unlawful” but not “criminal” “discharge” of a firearm than the one at bar.

It is also far from certain that Congress intended to view a minor's firing of a gun he believed was unloaded as a discharge "caused by a volitional act." Even if pulling the trigger was "volitional," that does not make a discharge "caused by a volitional act" any more than an explosion would be "caused by [the] volitional act" of answering a cell phone if, unbeknownst to you, terrorists had wired your phone to a remote bomb. In both cases, there was "volition" to engage in a seemingly non-dangerous act, but not to cause an unforeseen dangerous result. Allowing Appellees to be held liable also comports with Congressional intent, as their failure to include safety features and warnings facilitated J.R.'s death.

At minimum, there are multiple "reasonable interpretation[s]" of "criminal" and "volitional" in PLCAA's products liability exception which make it at least ambiguous as to whether the disqualifying phrase in § 7903(5)(A)(v) applies to the Juvenile Delinquent's unintentional shooting of J.R. See *J.P. Morgan*, 203 A.3d at 194. This Court should "not read [PLCAA]

to cover [common law claims like Appellants'] unless Congress has made it clear that [they] are *included*" in PLCAA's coverage. 501 U.S. at 467 (emphasis in original). As the products liability exception does not clearly bar Appellants' claims, this Court must construe it to permit these claims.

B. PLCAA Is Unconstitutional If It Bars This Case⁴

1. PLCAA Violates The Tenth Amendment

If PLCAA is read to bar Appellants' claims, it violates the Tenth Amendment and principles of federalism by interfering with the authority of states to decide how to make and apply their law.

Under the trial court's reading, PLCAA bars states from imposing liability on negligent gun companies if states have chosen to have their judiciaries establish the relevant liability standards through common law (like Pennsylvania), while allowing identical claims if the states used their legislatures to establish the relevant liability standards. See 15 U.S.C. § 7903(5)(A)(iii) and *supra* at 12-13. However, Congress has no permissible authority to infringe on a state's decision of which

branch of government it chooses to make law. Indeed, “whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern.” *Erie R.R.*, 304 U.S. at 78. See also *Clover Leaf Creamery Co.*, 449 U.S. at 461; *Highland Farms Dairy*, 300 U.S. at 612; *Sweezy*, 354 U.S. at 256; *FERC v Mississippi*, 456 US at 761. PLCAA contravenes these principles.

There is no precedent for PLCAA’s severe intrusion on state sovereignty and lawmaking authority. The most similar statute of which Appellants are aware was held to potentially violate the Tenth Amendment in *Matter of Application of Cesar Adrian Vargas for Admission to the Bar of the State of New York* (“*Vargas*”), 131 A.D.3d 4 (N.Y. App. Div. 2015). Like PLCAA, that federal law could have been read to require a state legislative enactment to opt out of the law’s restrictions. The *Vargas* court held that such an interpretation would violate the Tenth Amendment because:

a . . . reading of 8 U.S.C. § 1621 (d), so as to require a state legislative enactment to be the sole

⁴ These arguments assume, *arguendo*, that PLCAA bars Appellants’ claims.

mechanism by which the State of New York exercises its authority granted in 8 U.S.C. § 1621 (d) to opt out of the restrictions on the issuance of licenses imposed by 8 U.S.C. § 1621 (a), unconstitutionally infringes on the sovereign authority of the State to divide power among its three coequal branches of government.

Id. at 6. The court noted that Congress “cannot, consistent with the core principles of state sovereignty guaranteed by the Tenth Amendment, vest in the federal government the right to take away from the state its authority to determine which coequal branch of government should exercise the power of the sovereign.” *Id.* at 26-27. *Vargas* explained, “[t]he ability, indeed the right, of the states to structure their governmental decision-making processes as they see fit is essential to the sovereignty protected by the Tenth Amendment.” *Id.* at 24.

The trial court did not engage with *Vargas* or the Supreme Court precedent that protects the authority of states to allocate their lawmaking authority. Instead, the court erroneously held that the Tenth Amendment only protects against the “commandeering” of state officials. Ex. A at 9. This is incorrect.

The Tenth Amendment does not merely prohibit “commandeering.” The Supreme Court, in *New York v. United States*, 505 U.S. 144, 188 (1992) stated that: “The Constitution [] leaves to the several States a residuary and inviolable sovereignty, reserved explicitly to the States by the Tenth Amendment. *Whatever the outer limits of that sovereignty may be, one thing is clear*: The Federal Government may not compel the States to enact or administer a federal regulatory program.” *Id.* at 188 (internal quotations omitted) (emphasis added); see also *City of Spokane v. Fannie Mae*, 775 F.3d 1113, 1117-1118 (9th Cir. 2014) (considering claim that federal action “transgress[ed] general principles of federalism” protected by the Tenth Amendment *as distinct from a “commandeering” claim*,” but ultimately rejecting both claims on the facts presented); *Vargas*, 31 A.D.3d 4.

If the Tenth Amendment only protected states from federal “commandeering,” then Congress could permissibly restrict how states structure their governments and make law in a myriad of

ways. For example, federal law could neuter state judiciaries by requiring dismissal of any cases against an industry favored by a majority in Congress – or any cases at all – unless the lawsuits were approved by the governor, or by the legislature. Those laws may sound absurd, but since they do not “commandeer” state officials any more than PLCAA, they would be constitutional, according to the trial court. It is hard to fathom, then, what “residuary and inviolable sovereignty” the Tenth Amendment would protect. *New York*, 505 U.S. at 188.

While a handful of courts have upheld PLCAA as constitutional, those cases are distinguishable and incorrect. *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009), and *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163 (D.C. 2008) did not consider Tenth Amendment challenges. *Delana*, 486 S.W.3d at 323, and *Kim*, 295 P.3d at 389 erroneously held that the Tenth Amendment only prohibited “commandeering.” And *Delana* and *Kim* allowed some claims to proceed, so PLCAA’s preemption of state authority was far less severe than here.

PLCAA violates the Tenth Amendment.

2. PLCAA Violates Due Process

PLCAA violates the Due Process Clause of the Fifth Amendment because, according to the trial court, it eliminates any remedy for victims of gun industry negligence like Appellants. Congress has never before, or since, extinguished tort actions without providing a reasonable alternative remedy, nor has the Supreme Court ever held that that is permissible.

The Supreme Court has long recognized that “[w]here there is a legal right, there is also a legal remedy by suit or action at law.” *Marbury v. Madison*, 5 U.S. 137, 163 (*quoting* Sir William Blackstone, Commentaries 23 (1869)); *see also Truax v. Corrigan*, 257 U.S. 312, 330 (1921) (“a statute whereby serious losses inflicted by such unlawful means are in effect made remediless [would] disregard fundamental rights of liberty and property and [] deprive the person suffering the loss of due process of law”); *Tennessee v. Lane*, 541 U.S. 509, 533-34 (2004) (access to the courts is a fundamental right).

Congress has always provided a reasonably just alternative compensation scheme or preserved some meaningful access to judicial redress when it has limited potential plaintiffs' legal actions. For example, Congress created the September 11th Victims Compensation Fund, Pub. L., 49 U.S.C. § 40101, to provide an incentive for victims of the terrorist attacks to seek a no-fault guaranteed remedy rather than pursuing civil litigation. The National Childhood Vaccine Injury Act, 42 U.S.C. §§ 300aa-1 to 300aa-34, set up a vaccine court where plaintiffs could accept or reject a remedy in lieu of pursuing traditional tort remedies. The Biomaterials Access Assurance Act of 1998, 21 U.S.C. § 1604, limited liability of certain suppliers of materials for implants but preserved judicial remedies by allowing for the impleading of the suppliers in certain cases.

Authority on which the trial court relied – *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59 (1978) – actually highlights how PLCAA violates Due Process. While the trial court focused on the Supreme Court's expression of doubt about

whether the Due Process Clause requires an alternative compensation scheme (see Ex. A at 11-12), the Court would have simply upheld the liability-limiting law if there was no Due Process right to any remedy. Instead, the Court predicated its approval of the statute on a careful analysis of the substitute remedies provided by Congress and a finding that "[t]his panoply of remedies and guarantees is at the least a reasonably just substitute for the common-law rights replaced by [the act]." 438 U.S. at 93. And, subsequently, Justice Marshall explained that "our cases demonstrate that there are limits on governmental authority to abolish 'core' common-law rights, including rights against trespass, at least without a compelling showing of necessity or a provision for a reasonable alternative remedy." *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 94 (1980) (J. Marshall concurring).

One trial court held that PLCAA violates due process. *City of Gary v. Smith & Wesson Corp.*, No. 45D05005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (Exhibit E), *affirmed on other grounds*

by *Smith & Wesson Corp. v. City of Gary*, 875 N.E 2d 422 (Ind. Ct. App. 2007). Another court held PLCAA would violate due process if it barred plaintiffs' claims. *Lopez v. Badger Guns, Inc.*, No. 10-cv-18530, Tr. of Hearing on Mot. for SJ, 24:19-25:3 (Wis. Cir. Ct. Mar. 24, 2014) (Exhibit F). A commentator has also argued that PLCAA is unconstitutional for eliminating any right to redress. See Patricia Foster, *Good Guns (and Good Business Practices) Provide All the Protection They Need: Why Legislation to Immunize the Gun Industry from Civil Liability is Unconstitutional*, 72 U. Cin. L. Rev. 1739, 1750-56 (Summer 2004) (discussing precursor bill to PLCAA).

The trial court relied on cases which suggest that there is no right to a common law claim until there is a final, non-reviewable judgment. See Ex. A at 11. But regardless of when rights vest, this does not refute Appellants' primary Due Process argument. For even if Appellants had no vested right in a Pennsylvania product liability claim, they have a right to *some* "remedy."

If there is no Due Process right to a remedy, then Congress could, for example, prohibit state courts from granting any relief for tortious acts or require state courts to send their civil dockets to the Speaker of the House or the Senate Majority Leader every morning for that legislator to choose which cases must be dismissed. These absurd laws would render the language of *Marbury v. Madison*, and other cited precedent, meaningless.

The trial court disregarded these authorities, and relied on *Ileto*, 565 F.3d. 1126. See Ex. A at 12. *Ileto* is non-binding and inapposite. While *Ileto* held that PLCAA does not extinguish rights to a remedy because it contains exceptions, the trial court decided that none of PLCAA's exceptions applied, so they cannot provide any redress. Additionally, *Ileto* did not consider *Gregory*, or *Bond* (which had not been decided); it gave short shrift to due process rights; it did not involve PLCAA's products liability exception; and it did not even state that the action was supported by common law. This Court should not follow this inapplicable case.

PLCAA violates Appellants' Due Process rights.

3. PLCAA Violates Equal Protection Principles

PLCAA violates the Equal Protection guaranteed by the Fifth Amendment by discriminating between classes of tort plaintiffs without any rational basis. PLCAA creates a discriminatory judicial system in which persons injured by gun industry negligence in states with legislation codifying judicially-created liability standards can recover damages; those harmed on identical facts in states which rely on common law standards cannot recover; and those injured from identical negligence from unlicensed gun sellers or from defectively designed bb guns can recover everywhere. No rational basis supports such discrimination.

Rational basis is deferential, but it is not a rubber stamp. *See McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (striking down tort statute on rational basis review); *and City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)

(striking down zoning ordinance on rational basis review).⁵ To survive rational basis review, a justification for discrimination within a statute must not be patently illogical and insufficient to explain the differential treatment.

In *McBride*, a state statute allowed the state to recover 75% of punitive damages awards in products liability cases but permitted plaintiffs in non-products liability cases to retain 100% of punitive damages awards. The court held that the law “denie[d] equal protection to product liability punitive damage plaintiffs in its discrimination in favor of other nonproduct liability punitive damage claimants” without rational basis. 737 F. Supp. at 1578. The court emphasized that “there is no rational basis under the reasoning advanced by the State that the 75% award is a revenue producing measure inasmuch as it would be arbitrary to fail to assess all punitive damage awards if the purpose of assessing any award was to raise revenue for the State.” *Id.*

⁵ *McBride* and *Cleburne* relied on the Equal Protection Clause of the 14th Amendment, which is co-extensive with the protection provided by the 5th Amendment. See *Bolling v. Sharpe* 347 U.S. 497 (1954).

The trial court's attempts to validate PLCAA's discrimination highlights its lack of a rational basis. The court suggested that PLCAA's discrimination between classes of plaintiffs was supported by Congress's desire to protect Second Amendment rights by limiting liability, and by Congress's fear that state judicial officers might override more "democratic" legislatures. See Ex. A at 13. Neither basis withstands scrutiny.

If PLCAA were rationally protecting the Second Amendment by limiting liability, Congress would not have permitted unlimited liability where legislatures have codified liability standards. See § 7903(5)(A)(iii). Just as the state's proffered justification of raising revenue could not rationally explain taking *no money* from one class of plaintiffs in *McBride*, a desire to limit liability cannot explain leaving *unlimited* liability in some states.

Congress's purported preference for supposedly more "democratic" legislatures also cannot support PLCAA's discrimination between classes of plaintiffs. Congress's preference is not a permissible justification because it is up to

states to decide how to allocate their lawmaking authority. See also *Clover Leaf Creamery Co.*, 449 U.S. at 461; *Highland Farms Dairy*, 300 U.S. at 612; *Sweezy*, 354 U.S. at 256; *FERC v Mississippi*, 456 US at 761. Further, in many states judges are elected by, and can be voted out by, the people. And states can choose to have legislators appointed, making their courts more “democratic” – yet PLCAA’s anti-courts bias would remain.

PLCAA’s discrimination between different classes of tort victims fails under rational basis review.

4. PLCAA Is Not A Permissible Exercise Of Congress’s Commerce Clause Authority

Congress has no legitimate authority to enact legislation such as PLCAA. Congress’s only purported authority for PLCAA is the Commerce Clause, but that does not empower Congress to regulate the lawmaking functions of states. PLCAA is not permissible preemption because “every form of [permissible] preemption is based on a federal law that regulates the conduct of private actors, not the States.” *Murphy v. NCAA*, 138 S.Ct. 1461, 1481 (2018). PLCAA does not regulate private conduct.

An example of permissible preemption is *Riegel v. Medtronic, Inc.*, 552 U.S. 312 (2007), in which the Court found that federal premarket approval of a product preempted state common law claims against the manufacturer because the approval process imposed design standards which adequately balanced public safety and effectiveness. *See id.* at 323-325; *see also Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472 (2013). In contrast, PLCAA does not set a standard of conduct for gun companies. It simply dictates to states which branch of government they must use to make law on which to base liability for the gun industry.

The trial court did not explain how its decision comports with *Murphy's* requirement that permissible preemption involve regulation of private actors, not sovereign *states* – or how allowing unlimited liability in states with codified liability standards, but no liability in states that rely on common law, is a rational regulation of interstate commerce. Even if there are constitutional methods by which Congress could preempt gun

industry liability, it cannot do so by impermissible means. "The Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." See *New York*, 505 U.S. at 162.

PLCAA exceeds Congress's Commerce Clause authority.

C. The Principle Of Constitutional Avoidance Further Supports Appellants' Interpretation Of PLCAA

The principle of constitutional avoidance also supports construing PLCAA to not bar Appellants' case. "[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court." *Clark v. Martinez*, 543 U.S. 371, 380-381 (2005); see also *Reading the Law* at 247-252. As detailed above, PLCAA would present severe constitutional problems if read to bar Appellants' claims, so that reading should be avoided. Appellants' more than plausible

interpretation of PLCAA would avoid these problems and should be adopted.

The trial court failed to appreciate that constitutional avoidance requires a court to adopt a “plausible” statutory construction if that construction would avoid constitutional issues. *See id.* Appellants’ reading of PLCAA more than meets this test.

VIII. CONCLUSION

Appellants respectfully request that this Court reverse the January 15, 2019, Order and Opinion of the Westmoreland County Court of Common Pleas, overrule Appellees’ preliminary objections, and remand this case to the trial court for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Mark and Leah Gustafson

Signature: /s/ Kelly K. Iverson

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CERTIFICATE OF COMPLIANCE WITH RULE 2135(D)

This brief complies with the length-of-brief limitation of Pa. R.A.P. 2135, because the brief contains 8,465 words. This Certificate is based upon the word count of the word processing system used to prepare this Brief.

/s/ Kelly K. Iverson

Kelly K. Iverson

Date: May 20, 2019

Exhibit A

IN THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY,
PENNSYLVANIA
CIVIL ACTION - LAW

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

Plaintiffs,)

v.)

No. 1126 of 2018

SPRINGFIELD, INC. d/b/a)
SPRINGFIELD ARMORY, and)

SALOOM DEPARTMENT STORE; and)
SALOOM DEPT. STORE, LLC, d/b/a)
SALOOM DEPARTMENT STORE,)

Defendants.)

OPINION AND ORDER OF COURT

AND NOW, to wit, this 15th day of January, 2019, with the attorneys of record for all parties having been present for argument on Defendants' *Preliminary Objections to the Complaint, Brief in Support and Reply Brief*; along with Plaintiffs' *Complaint, Answer and Memorandum of Law in Support of Plaintiff's Answer*; as well as the United States' *Memorandum in Support of the Constitutionality of the Protection of Lawful Commerce in Arms Act*; and upon careful consideration of all of the foregoing by this Court, it is hereby ORDERED, ADJUDGED and DECREED, as follows:

Defendants' preliminary objection in the nature of a demurrer pursuant to Pa.R.C.P. 1028(a)(4), requesting dismissal of the Plaintiffs' Complaint with prejudice pursuant to the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 7901-7903 ("PLCAA") is SUSTAINED, for the reasons elaborated upon below.

The matter presently at issue is the legal sufficiency of Plaintiffs' complaint. Defendants claim that Plaintiffs' present complaint fails to state a valid cause of action as all claims fall squarely within the category of state civil lawsuits prohibited by federal law under the PLCAA, and that the complaint must therefore be dismissed. Plaintiffs state that all claims raised in the complaint are supported by Pennsylvania products liability law and that none of the claims raised are barred by the PLCAA. Plaintiffs also claim that the PLCAA must be interpreted according to principles of constitutional avoidance. In the alternative, Plaintiffs argue that the PLCAA is unconstitutional. The United States has intervened in a limited capacity in this matter to argue for the applicability and constitutionality of the PLCAA, and it is joined by Defendants in this argument.

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

A complaint comprised of survival and wrongful death claims was filed by Plaintiffs on March 19, 2018. The complaint asserts negligent design and sale as well as negligent warnings and marketing with regard to manufacture and sale of the subject handgun. The present preliminary objections asserting that the complaint fails to state a valid cause of action were filed by the

Defendants on June 29, 2018. On October 19, 2018, the United States of America petitioned to intervene in the case, as the constitutionality of a federal law has been implicated. The intervention petition was granted, and all parties participated in oral argument in this matter on October 31, 2018.

CONSTITUTIONAL AVOIDANCE

As a preliminary matter, Plaintiffs argue that the principle of constitutional avoidance is implicated in this case. Defendants and the United States argue that the doctrine of constitutional avoidance does not apply in this case, as the PLCAA is an appropriate exercise of federal authority which presents no constitutional issues. The doctrine of constitutional avoidance is utilized in situations “where an otherwise acceptable construction of a statute would raise serious constitutional problems.” *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988). In such situations, “the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.” *Id.*

Plaintiffs claim that state sovereignty is being infringed upon by the federal government in a way that renders a narrow reading of the PLCAA necessary. Plaintiffs first point to the United States Supreme Court case of *Gregory v. Ashcroft*, which sets out the “plain statements rule” under which “it is incumbent upon the [] courts to be certain of Congress’ intent before finding that federal law overrides ‘the traditional constitutional balance of federal and state power.’” 501 U.S. 452, 464 (1991). The Supreme Court noted that “Congress should make its intention ‘clear and manifest’ if it intends to pre-empt the historic powers of the States...” *Id.* at 461 (1991). Plaintiffs also cite to the Pennsylvania Superior Court case of *Romah v. Hygenic Sanitation Co.* for the related principle that “[a]bsent express preemption, courts are not to infer preemption lightly, particularly in areas traditionally of core concern to the states such as tort law.” 705 A.2d 841, 849 (Pa. Super. Ct. 1997). Plaintiffs additionally reference the case of *Bond v. United States* which extended the

principles set out in *Gregory*. *Bond v. United States*, 572 U.S. 844 (2014). The holding in *Bond* allowed for a reading of ambiguity into otherwise unambiguous language in the absence of a direct statement of Congressional intent, where a plain reading would “alter sensitive federal-state relationships.” *Id.* at 863.

This exact issue with regard to the PLCAA has been addressed by the Supreme Court of Missouri in the 2016 *Delana v. CED Sales, Inc.* case. 486 S.W.3d 316, 322-23 (Mo. 2016). The *Delana* Court addressed the issue of *Gregory* and *Bond*’s application to the PLCAA, noting the above referenced standards for the application of the constitutional avoidance doctrine. *Id.* at 322. The Missouri Supreme Court found that Congress “expressly and unambiguously exercised its constitutionally delegated authority to preempt state law negligence actions against sellers of firearms,” rendering a narrow reading of the statute unnecessary. *Id.* at 3233.

Although not binding upon this Court, the reasoning of the Missouri Supreme Court is persuasive, and this Court similarly finds no need to narrowly construe the PLCAA in this case where the intention to preempt Pennsylvania tort law is “clear and manifest” in the terms of the statute. The present analysis does not even reach the *Gregory* and *Bond* constitutional avoidance doctrine, because the text of the statute makes manifest Congress’ intent to preempt state tort law. Congress explicitly stated in the PLCAA that it intended to “prohibit causes of action” as defined in the PLCAA to “prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.” 15 U.S.C. § 7901. Throughout the PLCAA, Congress unambiguously and without question states its intention to definitively preempt state tort law. Additionally, as described below, the Court finds no constitutional issues which require avoidance, as Congress has appropriately utilized its authority in enacting the PLCAA. As such, the doctrine of constitutional avoidance is not implicated in the case at bar.

APPLICABILITY OF PLCAA TO THE PRESENT CASE

It is undisputed that Plaintiffs set out adequate *prima facie* claims under Pennsylvania products liability law which would survive preliminary objections. The Court must thus assess the applicability of the PLCAA to Plaintiff's claims. The PLCAA states that "[a] qualified civil liability action [under the PLCCA] may not be brought in any Federal or State court." 15 U.S.C. § 7902(a). A qualified civil liability action is generally defined by the PLCAA as "a civil action... brought by any person against a manufacturer or seller of a qualified product... for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party..." subject to certain enumerated exceptions. 15 U.S.C. § 7903(5)(A). The exception at issue in this case reads as follows:

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

15 U.S.C. § 7903(5)(A)(v). It is undisputed that Springfield is a "manufacturer" and Saloom is a "seller" as defined under 15 U.S.C. § 7903. It is also clear that the subject handgun is a "qualified product" under the statute.

Plaintiffs argue that the PLCAA is inapplicable because the present case is not a civil action "resulting from the criminal or unlawful misuse of a qualified product by the person or a third party..." 15 U.S.C. § 7903(5)(A). Plaintiffs argue that the phrase "resulting from" in the definition of qualified civil liability action is not explicitly defined in the PLCAA, and so the meaning must be found in the PLCAA's Purposes and Findings section. 15 U.S.C. § 7901. Plaintiffs point to the language which states a congressional finding that "[t]he possibility of imposing liability on an entire industry for the harm that is solely caused by others is an abuse of the legal system" is

problematic, and that one of the purposes of the PLCAA is “[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products...” 15 U.S.C. § 7901(a)(6); 15 U.S.C. § 7901(b)(1). Plaintiffs argue that the use of the phrase “solely caused” implies that a qualified civil liability action cannot be one in which gun manufacturer negligence was a cause of harm in addition to third party unlawful misuse. Plaintiffs additionally point out that an earlier version of the PLCAA did not use the word “solely” in its purposes and findings section. Plaintiffs note the proposition that statutes should be treated, where possible, to avoid construing any part as superfluous. *Astoria Fed. Sav. & Loan Ass’n v. Solimino*, 501 U.S. 104, 112 (1991).

Defendants argue that the United States Supreme Court has made clear that it is inappropriate to narrowly read the broad language of a statute to be entirely consistent with the stated purposes and legislative history of the statute when this reading would contradict the actual statutory text. *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 243-45 (1989). Defendants also point out that Plaintiff’s argument regarding the “solely caused” language has been rejected by various other courts throughout the country, including the Supreme Courts of Missouri and Alaska, and the United States District Court for the District of Colorado. *See e.g., Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 322 (Mo. 2016); *Estate of Kim ex rel. Alexander v. Coxe*, 295 P.3d 380, 387 (Alaska 2013); *Phillips v. Lucky Gunner, LLC*, 84 F. Supp. 3d 1216, 1223-24 (D. Colo. 2015).

The Court finds the logic set forth by the Defendants and elaborated upon by other Courts persuasive. Here, the plain language of the statute bars civil liability actions “resulting from” criminal or unlawful use of a qualified product. Although it is true that “resulting from” is not defined in the statutory definition section of the PLCAA, the phrase on its face has a plain meaning

that does not require further definition. To emphasize the addition of one word in the Purposes and Findings section over the actual substantive text of the statute would run contrary to the United States Supreme Court's directive in *H.J. Inc.* 492 U.S. at 243-45. The Court additionally finds convincing the argument of Supreme Court of Alaska: that to allow a general negligence claim to persist would render the negligence *per se* and negligent entrustment provision of the PLCAA a surplusage. 15 U.S.C. § 7903(5)(A)(ii); *Estate of Kim*, 295 P.3d at 386. This reading of the statute would render an entire operative section of the statute superfluous, which is entirely undesirable under United States Supreme Court precedent. *Astoria*, 501 U.S. at 112. As such, this Court declines to adopt Plaintiff's reading of the statute wherein the present action does not fall under the prohibition on qualified civil liability actions based on their reading of "solely caused" and "resulting from."

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

The *Adames* case concerned a minor who shot and killed another minor using a handgun belonging to his father. *Id.* at. 761. The minor was adjudicated delinquent through the Illinois juvenile delinquency process, with the court in the juvenile proceeding finding that the minor

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

Based upon the foregoing rationale, the Court finds that the present action is a “qualified civil liability action” under the PLCAA. The Court will next address Plaintiffs’ constitutionality concerns.

CONSTITUTIONALITY OF PLCAA

Plaintiffs argue that if the PLCAA is found to apply to the case at bar, the PLCAA is unconstitutional. Defendants and the United States argue that the PLCAA is a valid exercise of Congress’ power under the United States Constitution.

PRINCIPLES OF FEDERALISM AND THE TENTH AMENDMENT

Plaintiffs first argue that the PLCAA is violative of principles of federalism and the Tenth Amendment to the United States Constitution because it bars certain common law claims without barring equivalent statutory claims, intruding upon states' inherent powers. Defendants and the United States argue that the PLCAA does not violate these principles because it is a valid exercise of one of Congress' enumerated powers, and it does not force action by state actors.

The Tenth Amendment provides that “[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.” U.S. Const. amend. X. The issue of the PLCAA's interaction with the Tenth Amendment and principles of federalism has been addressed in the Second Circuit case of *City of New York v. Beretta U.S.A. Corp.* 524 F.3d 384, 396-97 (2d Cir. 2008). In its reasoning, the Second Circuit explains that where Congress is acting within the scope of its enumerated powers, “the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the states...” *Id.* at 396. If a properly enacted federal law does not “commandeer the states’ executive officials or legislative processes” then it is not violative of the Tenth Amendment under Supreme Court precedent. *Id.*

This Court agrees with the analysis of the Second Circuit in *Beretta*. As explained below, the PLCAA is a valid exercise of Congress' authority under the Commerce and Supremacy Clauses of the United States Constitution. As the PLCAA is properly enacted, we must consider whether the law commandeers state powers. Here, the operative provision provides that statutorily defined “qualified civil liability action[s] may not be brought in any Federal or State court,” and that the statute applies retroactively to any applicable cases pending at the time of the enactment of the statute, requiring their dismissal. 15 U.S.C. § 7902(a). No portion of the PLCAA involves

commandeering the powers of state executive officials or legislative processes in any manner. The PLCAA merely allows certain statutory and judicial remedies while disallowing others.

The United States additionally argues that the PLCAA does not shift the balance of power between the state legislatures and courts as dramatically as indicated by the Plaintiffs. The United States correctly notes that some traditional common law causes of action are preserved under the PLCAA, while certain statutory claims are preempted. The PLCAA, therefore, does not impermissibly dictate the balance of power between the states' judicial and legislative branches, but merely disallows certain civil actions, whether created through common law or through statute. For the foregoing reasons, this Court finds the PLCAA constitutional with regard to the Tenth Amendment and principles of federalism.

DUE PROCESS RIGHTS

Plaintiffs next argue that the PLCAA violates the Plaintiffs' substantive due process rights by depriving them of a cause of action without providing them with a substitute remedy. Defendants and the United States argue that the Plaintiffs have not been deprived of due process because they do not have a valid and vested property interest at stake. They additionally argue that even if such a property interest existed, that Plaintiffs are not deprived of all remedies at law.

The Fifth Amendment to the United States Constitution reads in relevant part: "[n]o person shall be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V. Plaintiffs note the longstanding legal principle that "[w]here there is a legal right, there is also a legal remedy by suit or action at law." *Marbury v. Madison*, 5 U.S. 137, 163 (1869) (citation omitted). The United States Supreme Court has held, however, that "the Constitution does not forbid the creation of new rights, or the abolition of old ones recognized by the common law." *Silver v. Silver*, 280 U.S. 117, 122 (1929) (citation omitted).

“The procedural component of the Due Process Clause does not protect everything that might be described as a ‘benefit’: ‘To have a property interest in a benefit, a person clearly must have more than an abstract need or desire’ and ‘more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.’” *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, (2005). The *Duke Power* case instructs that when dealing with liability limiting legislation, “[o]ur cases have clearly established that ‘[a] person has no property, no vested interest, in any rule of the common law.’” *Duke Power Co v. Carolina Envtl. Study Group*, 438 U.S. 59, 88 n.32 (U.S. 1978). (citations omitted). In fact, the Third Circuit case of *In re TMI* explains that “[u]nder the United States Constitution, legislation affecting a pending tort claim is not subject to ‘heightened scrutiny’ due process review because a pending tort claim does not constitute a vested right.” *In re TMI*, 89 F.3d 1106, 1113 (3d Cir. 1996).

Here, this Court finds the case of *In re TMI* instructive. If a pending tort claim does not constitute a vested property right, then it only stands to reason that a potential tort claim, not yet realized or filed at the time of the enactment of legislation would certainly not constitute a vested property right. This logic is reinforced by the United States Supreme Courts’ notations in *Duke Power* that reinforces that no property interest exists in any common law rule, and that liability limiting statutes are not unusual and are routinely enforced by the Courts. 438 U.S. at 88 n.32. As such, this Court finds that Plaintiffs do not have a constitutionally protected property right in their tort claim in this matter, and so a due process analysis is inapplicable.

Assuming *arguendo* that a vested property right does exist, Plaintiffs argue that the PLCAA deprives them of due process without providing an alternate remedy. The United States points again to the *Duke Power* case for the proposition that “it is not at all clear that the Due Process Clause in fact requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy” in a case which involved

imposition of a monetary liability limitation on causes of action resulting from accidents at federally licensed nuclear power plants. 438 U.S. at 88. In further support, the United States points to the later case of *Martinez v. California*, in which the United States Supreme Court upheld a state liability-limiting statute, which provided immunity to officials responsible for decisions regarding paroling inmates, without any available equivalent remedy at law. 444 U.S. 277, 282 (1980).

Defendants additionally argue that Plaintiffs are not entirely without redress, as they may sue the individual who committed the criminal misuse of the firearm, and they additionally may sue any manufacturer, distributor or seller as long as the claim falls appropriately within one of the PLCAA's exceptions. This issue of procedural due process as applied to the PLCAA has been addressed by the Ninth Circuit Court in the case of *Ileto v. Glock, Inc.* 565 F.3d 1126, 1141-42 (9th Cir. 2009). The Ninth Circuit found that "the PLCAA does not completely abolish Plaintiffs' ability to seek redress. The PLCAA preempts certain categories of claims that meet specified requirements, but it also carves out several significant exceptions to that general rule." *Id.* at 1143. The Court here finds the Ninth Circuit's reasoning persuasive, and that even if a vested property right did exist in this case, the PLCAA does not deprive Plaintiffs of due process, and is thus constitutional.

EQUAL PROTECTION

Plaintiffs additionally argue that the PLCAA is violative of the equal protection component of the Due Process Clause of the Fifth Amendment to the United States Constitution. Plaintiffs claim that the PLCAA discriminates against certain gun violence victims without a rational basis, with Congress favoring gun violence victims in states utilizing legislative remedies over victims in states utilizing judicial remedies. Defendants and the United States argue that the rational basis standard is easily satisfied in this matter.

In assessing an equal protection claim, the appropriate standard must be utilized, and all parties in this matter agree that rational basis review is the appropriate standard here. Under rational basis review, a statutorily imposed difference in treatment of two groups “cannot run afoul of the Equal Protection Clause if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose.” *Heller v. Doe by Doe*, 509 U.S. 312, 320 (1993). It is also important to note that rational basis review is an extraordinarily deferential standard, and “a classification ‘must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.’” *Id.* (citation omitted).

The PLCAA’s Findings and Purposes section sets out an ample rational basis for any differential treatment found here. 15 U.S.C. § 7901. Congress cites to its important interests in protecting the Second Amendment rights of American citizens to keep and bear arms, as well as the avoidance of an unreasonable burden on interstate and foreign commerce. 15 U.S.C. § 7901(a)(2); 15 U.S.C. § 7901(a)(6). Congress then expresses its belief that judicial remedies might be used to circumvent the democratic legislative processes, and so gives preference to legislatively enacted remedies over judicially created remedies, subject to certain exceptions. 15 U.S.C. § 7901(a)(7); 15 U.S.C. § 7901(a)(8). This rationale easily passes rational basis review. Even if this Court were to disagree with Congress’ logic, “rational-basis review in equal protection analysis ‘is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.’” *Heller* at 319. As such, PLCAA cannot be found unconstitutional based on an equal protection analysis.

COMMERCE CLAUSE AND CONGRESSIONAL AUTHORITY

Plaintiffs finally argue that the PLCAA is not a legitimate exercise of Congressional Commerce Clause authority. Plaintiffs claim that this is because the PLCAA does not actually regulate the conduct of the gun industry, but instead limits liability. Plaintiffs additionally point out

that the PLCAA does not even go as far as to limit liability, so long as a statutory remedy is enacted. The United States argues that the PLCAA is a valid exercise of Congressional authority under both the Commerce Clause and the Supremacy Clause of the U.S. Constitution.

The Commerce Clause provides Congress with the authority “[t]o regulate commerce with foreign nations, and among the several states...” U.S. Const. art. I § 8, cl. 3. The Supremacy Clause declares that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. Const. art. VI, cl. 2.

In the PLCAA’s Findings and Purposes, Congress specifically noted that the availability of certain qualified civil liability actions in both state and federal courts could have a potentially chilling effect on interstate commerce. 15 U.S.C. § 7901(a)(6). The Supreme Court of the United States has repeatedly reaffirmed that “one State’s power to impose burdens on the interstate market... is not only subordinate to the federal power over interstate commerce, but is also constrained by the need to respect the interests of other States.” *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 (1996) (citation omitted).

In the *Ileto* case, the Ninth Circuit addressed the applicability of the Commerce Clause to the PLCAA, stating “[w]e have no trouble concluding that Congress rationally could find that, by insulating the firearms industry from a specified set of lawsuits, interstate and foreign commerce of firearms would be affected.” *Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140–41 (9th Cir. 2009). This Court agrees with the assessment of the Ninth Circuit, in that it is entirely reasonable that the PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce. It is not unreasonable for Congress to find that limiting liability in certain situations

would directly affect and bolster interstate trade in firearms, and the Commerce Clause, together with the Supremacy Clause, allows Congress the specifically enumerated authority to do so.

Plaintiffs argue that the United States Supreme Court case of *Murphy v. National Collegiate Athletic Association* renders the PLCAA unconstitutional, as the act restricts liability instead of directly regulating the gun industry. 38 S. Ct. 1461 (2018). This Court can find nothing in *Murphy*, however, that overcomes the binding cases set out by the United States which indicate a longstanding position that regulating and limiting liability is a form of economic regulation permissible under the Commerce Clause. See, e.g., *Riegel v. Medtronic*, 552 U.S. 312, 323-25 (2008); *Kurns v. A.W. Chesterton*, 620 F.3d 392, 398 (3d Cir. 2010). This reasoning is bolstered by the United States Supreme Court's admonition that "[o]ur decisions remain binding precedent until we see fit to reconsider them, regardless of whether subsequent cases have raised doubts about their continuing vitality." *Hohn v. United States*, 524 U.S. 236, 252-53 (1998) (citation omitted). As such, as the Supreme Court did not explicitly disallow the restriction of liability as a method of utilizing Congress' Commerce Clause powers, *Murphy* is inapplicable here.

Defendants point to additional Congressional authority for the PLCAA pursuant to Congress' right "to enforce constitutional rights against the States and to use 'preventative rules... [as] appropriate remedial measures,' where there is 'a congruence between the means used and the ends to be achieved.'" *City of Boerne v. Flores*, 521 U.S. 507, 530 (1997). In the case of the PLCAA, Congress explicitly set out to enforce the constitutional right to keep and bear arms under the Second Amendment. 15 U.S.C. § 7901(a)(1). Defendants point out the obvious link between the right to keep and bear arms and the obvious need for manufacturers and sellers to be able to produce and sell the same in interstate commerce. As such, this Court finds that Congress' exercise of its commerce power works directly in concert here with its power to enforce protected Second

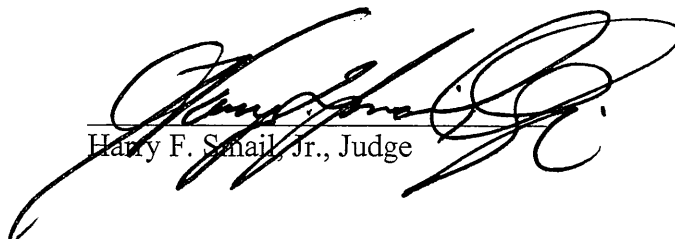
Amendment rights, bolstering the argument that Congress has acted in an entirely valid and appropriate manner pursuant to its enumerated powers in enacting the PLCAA.

Based upon the foregoing analysis, the Court finds that the PLCAA applies to Plaintiffs claims as set out in their complaint in this matter. The Court further finds that the doctrine of constitutional avoidance is not implicated in this case, rendering a narrow reading which would allow Plaintiffs claims to proceed inappropriate. The Court additionally finds that the PLCAA is in no way in violation of the United States Constitution.

Accordingly, Defendants' Preliminary Objection is SUSTAINED. Plaintiffs' Complaint is DISMISSED with prejudice in its entirety pursuant to 15 U.S.C. § 7901 et seq. and Rule 1028(a)(4) of the Pennsylvania Rules of Civil Procedure.

In accord with Pa.R.C.P. 236(a)(2)(b), the Prothonotary is DIRECTED to note in the docket that the individuals listed below have been given notice of this Order.

BY THE COURT:



Harry F. Smail, Jr., Judge

ATTEST:

Prothonotary

cc: Gary F. Lynch, Esq., for Plaintiffs
Jonathan E. Lowy, Esq. for Plaintiffs
John K. Greiner, Esq. for Defendants
Christopher Renzulli, Esq. for Defendants
Eric J. Soskin, Esq. for United State of America

Exhibit B

Calendar No. 363

108TH CONGRESS
1ST SESSION

S. 1805

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

IN THE SENATE OF THE UNITED STATES

OCTOBER 31, 2003

Mr. CRAIG introduced the following bill; which was read the first time

NOVEMBER 3, 2003

Read the second time and placed on the calendar

A BILL

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages resulting from the misuse of their products by others.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Protection of Lawful
5 Commerce in Arms Act”.

1 **SEC. 2. FINDINGS; PURPOSES.**

2 (a) FINDINGS.—The Congress finds the following:

3 (1) Citizens have a right, protected by the Sec-
4 ond Amendment to the United States Constitution,
5 to keep and bear arms.

6 (2) Lawsuits have been commenced against
7 manufacturers, distributors, dealers, and importers
8 of firearms that operate as designed and intended,
9 which seek money damages and other relief for the
10 harm caused by the misuse of firearms by third par-
11 ties, including criminals.

12 (3) The manufacture, importation, possession,
13 sale, and use of firearms and ammunition in the
14 United States are heavily regulated by Federal,
15 State, and local laws. Such Federal laws include the
16 Gun Control Act of 1968, the National Firearms
17 Act, and the Arms Export Control Act.

18 (4) Businesses in the United States that are en-
19 gaged in interstate and foreign commerce through
20 the lawful design, manufacture, marketing, distribu-
21 tion, importation, or sale to the public of firearms or
22 ammunition that has been shipped or transported in
23 interstate or foreign commerce are not, and should
24 not, be liable for the harm caused by those who
25 criminally or unlawfully misuse firearm products or

1 ammunition products that function as designed and
2 intended.

3 (5) The possibility of imposing liability on an
4 entire industry for harm that is solely caused by oth-
5 ers is an abuse of the legal system, erodes public
6 confidence in our Nation's laws, threatens the dimi-
7 nution of a basic constitutional right and civil lib-
8 erty, invites the disassembly and destabilization of
9 other industries and economic sectors lawfully com-
10 peting in the free enterprise system of the United
11 States, and constitutes an unreasonable burden on
12 interstate and foreign commerce of the United
13 States.

14 (6) The liability actions commenced or con-
15 templated by the Federal Government, States, mu-
16 nicipalities, and private interest groups are based on
17 theories without foundation in hundreds of years of
18 the common law and jurisprudence of the United
19 States and do not represent a bona fide expansion
20 of the common law. The possible sustaining of these
21 actions by a maverick judicial officer or petit jury
22 would expand civil liability in a manner never con-
23 templated by the framers of the Constitution, by
24 Congress, or by the legislatures of the several
25 States. Such an expansion of liability would con-

1 stitute a deprivation of the rights, privileges, and
2 immunities guaranteed to a citizen of the United
3 States under the Fourteenth Amendment to the
4 United States Constitution.

5 (b) PURPOSES.—The purposes of this Act are as fol-
6 lows:

7 (1) To prohibit causes of action against manu-
8 facturers, distributors, dealers, and importers of
9 firearms or ammunition products for the harm
10 caused by the criminal or unlawful misuse of firearm
11 products or ammunition products by others when
12 the product functioned as designed and intended.

13 (2) To preserve a citizen's access to a supply of
14 firearms and ammunition for all lawful purposes, in-
15 cluding hunting, self-defense, collecting, and com-
16 petitive or recreational shooting.

17 (3) To guarantee a citizen's rights, privileges,
18 and immunities, as applied to the States, under the
19 Fourteenth Amendment to the United States Con-
20 stitution, pursuant to section 5 of that Amendment.

21 (4) To prevent the use of such lawsuits to im-
22 pose unreasonable burdens on interstate and foreign
23 commerce.

24 (5) To protect the right, under the First
25 Amendment to the Constitution, of manufacturers,

1 distributors, dealers, and importers of firearms or
2 ammunition products, and trade associations, to
3 speak freely, to assemble peaceably, and to petition
4 the Government for a redress of their grievances.

5 **SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL**
6 **LIABILITY ACTIONS IN FEDERAL OR STATE**
7 **COURT.**

8 (a) IN GENERAL.—A qualified civil liability action
9 may not be brought in any Federal or State court.

10 (b) DISMISSAL OF PENDING ACTIONS.—A qualified
11 civil liability action that is pending on the date of enact-
12 ment of this Act shall be immediately dismissed by the
13 court in which the action was brought.

14 **SEC. 4. DEFINITIONS.**

15 In this Act, the following definitions shall apply:

16 (1) ENGAGED IN THE BUSINESS.—The term
17 “engaged in the business” has the meaning given
18 that term in section 921(a)(21) of title 18, United
19 States Code, and, as applied to a seller of ammuni-
20 tion, means a person who devotes, time, attention,
21 and labor to the sale of ammunition as a regular
22 course of trade or business with the principal objec-
23 tive of livelihood and profit through the sale or dis-
24 tribution of ammunition.

1 (2) MANUFACTURER.—The term “manufac-
2 turer” means, with respect to a qualified product, a
3 person who is engaged in the business of manufac-
4 turing the product in interstate or foreign commerce
5 and who is licensed to engage in business as such a
6 manufacturer under chapter 44 of title 18, United
7 States Code.

8 (3) PERSON.—The term “person” means any
9 individual, corporation, company, association, firm,
10 partnership, society, joint stock company, or any
11 other entity, including any governmental entity.

12 (4) QUALIFIED PRODUCT.—The term “qualified
13 product” means a firearm (as defined in subpara-
14 graph (A) or (B) of section 921(a)(3) of title 18,
15 United States Code), including any antique firearm
16 (as defined in section 921(a)(16) of such title), or
17 ammunition (as defined in section 921(a)(17)(A) of
18 such title), or a component part of a firearm or am-
19 munition, that has been shipped or transported in
20 interstate or foreign commerce.

21 (5) QUALIFIED CIVIL LIABILITY ACTION.—

22 (A) IN GENERAL.—The term “qualified
23 civil liability action” means a civil action
24 brought by any person against a manufacturer
25 or seller of a qualified product, or a trade asso-

1 ciation, for damages resulting from the criminal
2 or unlawful misuse of a qualified product by the
3 person or a third party, but shall not include—

4 (i) an action brought against a trans-
5 feror convicted under section 924(h) of
6 title 18, United States Code, or a com-
7 parable or identical State felony law, by a
8 party directly harmed by the conduct of
9 which the transferee is so convicted;

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

13 (iii) an action in which a manufac-
14 turer or seller of a qualified product vio-
15 lated a State or Federal statute applicable
16 to the sale or marketing of the product,
17 and the violation was a proximate cause of
18 the harm for which relief is sought, includ-
19 ing—

20 (I) any case in which the manu-
21 facturer or seller knowingly made any
22 false entry in, or failed to make ap-
23 propriate entry in, any record re-
24 quired to be kept under Federal or
25 State law;

1 (II) any case in which the manu-
2 facturer or seller aided, abetted, or
3 conspired with any person in making
4 any false or fictitious oral or written
5 statement with respect to any fact
6 material to the lawfulness of the sale
7 or other disposition of a qualified
8 product; or

9 (III) any case in which the man-
10 ufacturer or seller aided, abetted, or
11 conspired with any other person to
12 sell or otherwise dispose of a qualified
13 product, knowing, or having reason-
14 able cause to believe, that the actual
15 buyer of the qualified product was
16 prohibited from possessing or receiv-
17 ing a firearm or ammunition under
18 subsection (g) or (n) of section 922 of
19 title 18, United States Code;

20 (iv) an action for breach of contract
21 or warranty in connection with the pur-
22 chase of the product; or

23 (v) an action for physical injuries or
24 property damage resulting directly from a
25 defect in design or manufacture of the

1 product, when used as intended or in a
2 manner that is reasonably foreseeable.

3 (B) NEGLIGENCE ENTRUSTMENT.—As used
4 in subparagraph (A)(ii), the term “negligent en-
5 trustment” means the supplying of a qualified
6 product by a seller for use by another person
7 when the seller knows, or should know, the per-
8 son to whom the product is supplied is likely to,
9 and does, use the product in a manner involving
10 unreasonable risk of physical injury to the per-
11 son or others.

12 (C) REASONABLY FORESEEABLE.—As used
13 in subparagraph (A)(v), the term “reasonably
14 foreseeable” does not include any criminal or
15 unlawful misuse of a qualified product, other
16 than possessory offenses.

17 (D) RULE OF CONSTRUCTION.—The excep-
18 tions described in subparagraph (A) shall be
19 construed so as not to be in conflict and no pro-
20 vision of this Act shall be construed to create
21 a Federal private cause of action or remedy.

22 (6) SELLER.—The term “seller” means, with
23 respect to a qualified product—

24 (A) an importer (as defined in section
25 921(a)(9) of title 18, United States Code) who

1 is engaged in the business as such an importer
2 in interstate or foreign commerce and who is li-
3 censed to engage in business as such an im-
4 porter under chapter 44 of title 18, United
5 States Code;

6 (B) a dealer (as defined in section
7 921(a)(11) of title 18, United States Code) who
8 is engaged in the business as such a dealer in
9 interstate or foreign commerce and who is li-
10 censed to engage in business as such a dealer
11 under chapter 44 of title 18, United States
12 Code; or

13 (C) a person engaged in the business of
14 selling ammunition (as defined in section
15 921(a)(17) of title 18, United States Code) in
16 interstate or foreign commerce at the wholesale
17 or retail level, who is in compliance with all ap-
18 plicable Federal, State, and local laws.

19 (7) STATE.—The term “State” includes each of
20 the several States of the United States, the District
21 of Columbia, the Commonwealth of Puerto Rico, the
22 Virgin Islands, Guam, American Samoa, and the
23 Commonwealth of the Northern Mariana Islands,
24 and any other territory or possession of the United

1 States, and any political subdivision of any such
2 place.

3 (8) TRADE ASSOCIATION.—The term “trade as-
4 sociation” means any association or business organi-
5 zation (whether or not incorporated under Federal
6 or State law)—

7 (A) that is not operated for profit;

8 (B) of which 2 or more members are man-
9 ufacturers or sellers of a qualified product; and

10 (C) that is involved in promoting the busi-
11 ness interests of its members, including orga-
12 nizing, advising, or representing its members
13 with respect to their business, legislative or
14 legal activities in relation to the manufacture,
15 importation, or sale of a qualified product.

16 (9) UNLAWFUL MISUSE.—The term “unlawful
17 misuse” means conduct that violates a statute, ordi-
18 nance, or regulation as it relates to the use of a
19 qualified product.

Exhibit C

15 USCS § 7901

Current through PL 115-338, approved 12/20/18, with a gap of 115-334.

United States Code Service - Titles 1 through 54 > TITLE 15. COMMERCE AND TRADE > CHAPTER 105. PROTECTION OF LAWFUL COMMERCE IN ARMS

§ 7901. Findings; purposes

(a) Findings. Congress finds the following:

- (1) The [Second Amendment to the United States Constitution](#) provides that the right of the people to keep and bear arms shall not be infringed.
- (2) The [Second Amendment to the United States Constitution](#) protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.
- (3) Lawsuits have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek money damages and other relief for the harm caused by the misuse of firearms by third parties, including criminals.
- (4) The manufacture, importation, possession, sale, and use of firearms and ammunition in the United States are heavily regulated by Federal, State, and local laws. Such Federal laws include the Gun Control Act of 1968, the National Firearms Act [[26 USCS §§ 5801](#) et seq.], and the Arms Export Control Act [[22 USCS §§ 2751](#) et seq.].
- (5) Businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.
- (6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.
- (7) The liability actions commenced or contemplated by the Federal Government, States, municipalities, and private interest groups and others are based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States and do not represent a bona fide expansion of the common law. The possible sustaining of these actions by a maverick judicial officer or petit jury would expand civil liability in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States. Such an expansion of liability would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the *Fourteenth Amendment to the United States Constitution*.
- (8) The liability actions commenced or contemplated by the Federal Government, States, municipalities, private interest groups and others attempt to use the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce through judgments and judicial decrees thereby threatening the Separation of Powers doctrine and weakening and undermining important principles of federalism, State sovereignty and comity between the sister States.

(b)Purposes. The purposes of this Act are as follows:

- (1)To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.
- (2)To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.
- (3)To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the *Fourteenth Amendment to the United States Constitution*, pursuant to section 5 of that Amendment.
- (4)To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.
- (5)To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.
- (6)To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.
- (7)To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

History

(Oct. 26, 2005, *P.L. 109-92*, § 2, *119 Stat. 2095*.)

UNITED STATES CODE SERVICE

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End of Document

Exhibit D

Public Law 109-92
109th Congress

An Act

To prohibit civil liability actions from being brought or continued against manufacturers, distributors, dealers, or importers of firearms or ammunition for damages, injunctive or other relief resulting from the misuse of their products by others.

Oct. 26, 2005

[S. 397]

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Protection of Lawful Commerce in Arms Act”.

Protection of
Lawful
Commerce in
Arms Act.
15 USC 7901
note.

SEC. 2. FINDINGS; PURPOSES.

15 USC 7901.

(a) FINDINGS.—Congress finds the following:

(1) The Second Amendment to the United States Constitution provides that the right of the people to keep and bear arms shall not be infringed.

(2) The Second Amendment to the United States Constitution protects the rights of individuals, including those who are not members of a militia or engaged in military service or training, to keep and bear arms.

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

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

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

(6) The possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system, erodes public confidence in our Nation's laws, threatens the diminution of a basic constitutional right and civil liberty, invites the disassembly and destabilization of other industries and economic sectors lawfully competing

in the free enterprise system of the United States, and constitutes an unreasonable burden on interstate and foreign commerce of the United States.

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

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

(b) PURPOSES.—The purposes of this Act are as follows:

(1) To prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.

(2) To preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(3) To guarantee a citizen's rights, privileges, and immunities, as applied to the States, under the Fourteenth Amendment to the United States Constitution, pursuant to section 5 of that Amendment.

(4) To prevent the use of such lawsuits to impose unreasonable burdens on interstate and foreign commerce.

(5) To protect the right, under the First Amendment to the Constitution, of manufacturers, distributors, dealers, and importers of firearms or ammunition products, and trade associations, to speak freely, to assemble peaceably, and to petition the Government for a redress of their grievances.

(6) To preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States.

(7) To exercise congressional power under article IV, section 1 (the Full Faith and Credit Clause) of the United States Constitution.

15 USC 7902.

SEC. 3. PROHIBITION ON BRINGING OF QUALIFIED CIVIL LIABILITY ACTIONS IN FEDERAL OR STATE COURT.

(a) IN GENERAL.—A qualified civil liability action may not be brought in any Federal or State court.

(b) **DISMISSAL OF PENDING ACTIONS.**—A qualified civil liability action that is pending on the date of enactment of this Act shall be immediately dismissed by the court in which the action was brought or is currently pending.

SEC. 4. DEFINITIONS.

15 USC 7903.

In this Act:

(1) **ENGAGED IN THE BUSINESS.**—The term “engaged in the business” has the meaning given that term in section 921(a)(21) of title 18, United States Code, and, as applied to a seller of ammunition, means a person who devotes time, attention, and labor to the sale of ammunition as a regular course of trade or business with the principal objective of livelihood and profit through the sale or distribution of ammunition.

(2) **MANUFACTURER.**—The term “manufacturer” means, with respect to a qualified product, a person who is engaged in the business of manufacturing the product in interstate or foreign commerce and who is licensed to engage in business as such a manufacturer under chapter 44 of title 18, United States Code.

(3) **PERSON.**—The term “person” means any individual, corporation, company, association, firm, partnership, society, joint stock company, or any other entity, including any governmental entity.

(4) **QUALIFIED PRODUCT.**—The term “qualified product” means a firearm (as defined in subparagraph (A) or (B) of section 921(a)(3) of title 18, United States Code), including any antique firearm (as defined in section 921(a)(16) of such title), or ammunition (as defined in section 921(a)(17)(A) of such title), or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.

(5) **QUALIFIED CIVIL LIABILITY ACTION.**—

(A) **IN GENERAL.**—The term “qualified civil liability action” means a civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party, but shall not include—

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

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

(iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required

to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

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

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

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

(vi) an action or proceeding commenced by the Attorney General to enforce the provisions of chapter 44 of title 18 or chapter 53 of title 26, United States Code.

(B) **NEGLIGENT ENTRUSTMENT.**—As used in subparagraph (A)(ii), the term “negligent entrustment” means the supplying of a qualified product by a seller for use by another person when the seller knows, or reasonably should know, the person to whom the product is supplied is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others.

(C) **RULE OF CONSTRUCTION.**—The exceptions enumerated under clauses (i) through (v) of subparagraph (A) shall be construed so as not to be in conflict, and no provision of this Act shall be construed to create a public or private cause of action or remedy.

(D) **MINOR CHILD EXCEPTION.**—Nothing in this Act shall be construed to limit the right of a person under 17 years of age to recover damages authorized under Federal or State law in a civil action that meets 1 of the requirements under clauses (i) through (v) of subparagraph (A).

(6) **SELLER.**—The term “seller” means, with respect to a qualified product—

(A) an importer (as defined in section 921(a)(9) of title 18, United States Code) who is engaged in the business as such an importer in interstate or foreign commerce and who is licensed to engage in business as such an importer under chapter 44 of title 18, United States Code;

(B) a dealer (as defined in section 921(a)(11) of title 18, United States Code) who is engaged in the business as such a dealer in interstate or foreign commerce and

who is licensed to engage in business as such a dealer under chapter 44 of title 18, United States Code; or

(C) a person engaged in the business of selling ammunition (as defined in section 921(a)(17)(A) of title 18, United States Code) in interstate or foreign commerce at the wholesale or retail level.

(7) STATE.—The term “State” includes each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands, and any other territory or possession of the United States, and any political subdivision of any such place.

(8) TRADE ASSOCIATION.—The term “trade association” means—

(A) any corporation, unincorporated association, federation, business league, professional or business organization not organized or operated for profit and no part of the net earnings of which inures to the benefit of any private shareholder or individual;

(B) that is an organization described in section 501(c)(6) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of such Code; and

(C) 2 or more members of which are manufacturers or sellers of a qualified product.

(9) UNLAWFUL MISUSE.—The term “unlawful misuse” means conduct that violates a statute, ordinance, or regulation as it relates to the use of a qualified product.

SEC. 5. CHILD SAFETY LOCKS.

(a) SHORT TITLE.—This section may be cited as the “Child Safety Lock Act of 2005”.

(b) PURPOSES.—The purposes of this section are—

(1) to promote the safe storage and use of handguns by consumers;

(2) to prevent unauthorized persons from gaining access to or use of a handgun, including children who may not be in possession of a handgun; and

(3) to avoid hindering industry from supplying firearms to law abiding citizens for all lawful purposes, including hunting, self-defense, collecting, and competitive or recreational shooting.

(c) FIREARMS SAFETY.—

(1) MANDATORY TRANSFER OF SECURE GUN STORAGE OR SAFETY DEVICE.—Section 922 of title 18, United States Code, is amended by inserting at the end the following:

“(z) SECURE GUN STORAGE OR SAFETY DEVICE.—

“(1) IN GENERAL.—Except as provided under paragraph (2), it shall be unlawful for any licensed importer, licensed manufacturer, or licensed dealer to sell, deliver, or transfer any handgun to any person other than any person licensed under this chapter, unless the transferee is provided with a secure gun storage or safety device (as defined in section 921(a)(34)) for that handgun.

“(2) EXCEPTIONS.—Paragraph (1) shall not apply to—

“(A)(i) the manufacture for, transfer to, or possession by, the United States, a department or agency of the United

Child Safety
Lock Act of 2005.
18 USC 921 note.

18 USC 922 note.

States, a State, or a department, agency, or political subdivision of a State, of a handgun; or

“(ii) the transfer to, or possession by, a law enforcement officer employed by an entity referred to in clause (i) of a handgun for law enforcement purposes (whether on or off duty); or

“(B) the transfer to, or possession by, a rail police officer employed by a rail carrier and certified or commissioned as a police officer under the laws of a State of a handgun for purposes of law enforcement (whether on or off duty);

“(C) the transfer to any person of a handgun listed as a curio or relic by the Secretary pursuant to section 921(a)(13); or

“(D) the transfer to any person of a handgun for which a secure gun storage or safety device is temporarily unavailable for the reasons described in the exceptions stated in section 923(e), if the licensed manufacturer, licensed importer, or licensed dealer delivers to the transferee within 10 calendar days from the date of the delivery of the handgun to the transferee a secure gun storage or safety device for the handgun.

“(3) LIABILITY FOR USE.—

“(A) IN GENERAL.—Notwithstanding any other provision of law, a person who has lawful possession and control of a handgun, and who uses a secure gun storage or safety device with the handgun, shall be entitled to immunity from a qualified civil liability action.

“(B) PROSPECTIVE ACTIONS.—A qualified civil liability action may not be brought in any Federal or State court.

“(C) DEFINED TERM.—As used in this paragraph, the term ‘qualified civil liability action’—

“(i) means a civil action brought by any person against a person described in subparagraph (A) for damages resulting from the criminal or unlawful misuse of the handgun by a third party, if—

“(I) the handgun was accessed by another person who did not have the permission or authorization of the person having lawful possession and control of the handgun to have access to it; and

“(II) at the time access was gained by the person not so authorized, the handgun had been made inoperable by use of a secure gun storage or safety device; and

“(ii) shall not include an action brought against the person having lawful possession and control of the handgun for negligent entrustment or negligence per se.”.

(2) CIVIL PENALTIES.—Section 924 of title 18, United States Code, is amended—

(A) in subsection (a)(1), by striking “or (f)” and inserting “(f), or (p)”; and

(B) by adding at the end the following:

“(p) PENALTIES RELATING TO SECURE GUN STORAGE OR SAFETY DEVICE.—

“(1) IN GENERAL.—

“(A) **SUSPENSION OR REVOCATION OF LICENSE; CIVIL PENALTIES.**—With respect to each violation of section 922(z)(1) by a licensed manufacturer, licensed importer, or licensed dealer, the Secretary may, after notice and opportunity for hearing—

“(i) suspend for not more than 6 months, or revoke, the license issued to the licensee under this chapter that was used to conduct the firearms transfer; or

“(ii) subject the licensee to a civil penalty in an amount equal to not more than \$2,500.

“(B) **REVIEW.**—An action of the Secretary under this paragraph may be reviewed only as provided under section 923(f).

“(2) **ADMINISTRATIVE REMEDIES.**—The suspension or revocation of a license or the imposition of a civil penalty under paragraph (1) shall not preclude any administrative remedy that is otherwise available to the Secretary.”.

(3) **LIABILITY; EVIDENCE.**—

18 USC 922 note.

(A) **LIABILITY.**—Nothing in this section shall be construed to—

(i) create a cause of action against any Federal firearms licensee or any other person for any civil liability; or

(ii) establish any standard of care.

(B) **EVIDENCE.**—Notwithstanding any other provision of law, evidence regarding compliance or noncompliance with the amendments made by this section shall not be admissible as evidence in any proceeding of any court, agency, board, or other entity, except with respect to an action relating to section 922(z) of title 18, United States Code, as added by this subsection.

(C) **RULE OF CONSTRUCTION.**—Nothing in this paragraph shall be construed to bar a governmental action to impose a penalty under section 924(p) of title 18, United States Code, for a failure to comply with section 922(z) of that title.

(d) **EFFECTIVE DATE.**—This section and the amendments made by this section shall take effect 180 days after the date of enactment of this Act.

18 USC 922 note.

SEC. 6. ARMOR PIERCING AMMUNITION.

(a) **UNLAWFUL ACTS.**—Section 922(a) of title 18, United States Code, is amended by striking paragraphs (7) and (8) and inserting the following:

“(7) for any person to manufacture or import armor piercing ammunition, unless—

“(A) the manufacture of such ammunition is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

“(B) the manufacture of such ammunition is for the purpose of exportation; or

“(C) the manufacture or importation of such ammunition is for the purpose of testing or experimentation and has been authorized by the Attorney General;

“(8) for any manufacturer or importer to sell or deliver armor piercing ammunition, unless such sale or delivery—

“(A) is for the use of the United States, any department or agency of the United States, any State, or any department, agency, or political subdivision of a State;

“(B) is for the purpose of exportation; or

“(C) is for the purpose of testing or experimentation and has been authorized by the Attorney General;”.

(b) PENALTIES.—Section 924(c) of title 18, United States Code, is amended by adding at the end the following:

“(5) Except to the extent that a greater minimum sentence is otherwise provided under this subsection, or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries armor piercing ammunition, or who, in furtherance of any such crime, possesses armor piercing ammunition, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime or conviction under this section—

“(A) be sentenced to a term of imprisonment of not less than 15 years; and

“(B) if death results from the use of such ammunition—

“(i) if the killing is murder (as defined in section 1111), be punished by death or sentenced to a term of imprisonment for any term of years or for life; and

“(ii) if the killing is manslaughter (as defined in section 1112), be punished as provided in section 1112.”.

(c) STUDY AND REPORT.—

(1) STUDY.—The Attorney General shall conduct a study to determine whether a uniform standard for the testing of projectiles against Body Armor is feasible.

(2) ISSUES TO BE STUDIED.—The study conducted under paragraph (1) shall include—

(A) variations in performance that are related to the length of the barrel of the handgun or center-fire rifle from which the projectile is fired; and

(B) the amount of powder used to propel the projectile.

(3) REPORT.—Not later than 2 years after the date of enactment of this Act, the Attorney General shall submit a report containing the results of the study conducted under this subsection to—

(A) the chairman and ranking member of the Committee on the Judiciary of the Senate; and

(B) the chairman and ranking member of the Committee on the Judiciary of the House of Representatives.

Approved October 26, 2005.

LEGISLATIVE HISTORY—S. 397:

CONGRESSIONAL RECORD, Vol. 151 (2005):

July 27–29, considered and passed Senate.

Oct. 20, considered and passed House.

WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 41 (2005):

Oct. 26, Presidential statement.

○

Exhibit E

STATE OF INDIANA)
) SS:
COUNTY OF LAKE)

LAKE SUPERIOR COURT
CIVIL DIVISION, ROOM FIVE
HAMMOND, INDIANA

CITY OF GARY, INDIANA, by its Mayor,)
SCOTT L. KING,)
Plaintiff,)
vs.)
SMITH & WESSON CORP., et al.,)
Defendants.)

CAUSE NO. 45D05-0005-CT-00243

Filed in Open Court

OCT 23 2006

ORDER OF OCTOBER 23, 2006

Thomas R. Philcox
CLERK LAKE SUPERIOR COURT

INTRODUCTION

This matter came before the Court upon the Motion to Dismiss, or in the alternative, Motion for Judgment on the Pleadings, filed by the following Defendant Manufacturers: SMITH & WESSON CORP., BERETTA U.S.A. CORP., COLT'S MANUFACTURING COMPANY, INC., BROWNING ARMS COMPANY, B.L. JENNINGS, INC., BRYCO ARMS CORPORATION, GLOCK INC., BEEMILLER, INC., d/b/a HI-POINT FIREARMS i/s/h/a HI-POINT FIREARMS CORP., PHOENIX ARMS, STURM, RUGER & COMPANY, INC., and TAURUS INTERNATIONAL MANUFACTURING, INC. (hereinafter, "Manufacturers").

The basis for Manufacturers' motion is the Protection of Lawful Commerce in Arms Act (hereinafter, "PLCAA"). The PLCAA, codified at 15 U.S.C. § 7901 et seq., became law on October 26, 2005. Manufacturers contend that the PLCAA applies to this case and that the PLCAA provides for the immediate dismissal of this matter.

The Plaintiff, City of Gary, (hereinafter, "City") has filed a Memorandum in Opposition to the Manufacturer's motions and contends that the PLCAA does not apply or is unconstitutional.

FACTS

On August 27, 1999, the City brought this action against the Manufacturers and asserted

various claims, including public nuisance and negligence claims. One of the remedies sought by the City was compensatory damages. The City also requested injunctive relief and punitive damages. The City charged that the Manufacturers engaged in “wilful, deliberate, reckless, and negligent distribution of guns” to criminals and high-risk gun dealers, that the Manufacturers refused to take reasonable steps to control the distribution of their hand guns and the Manufacturers negligently designed unsafe hand guns. The Manufacturers moved to dismiss the original complaint for failure to state a claim. The trial court granted the Manufacturers’ motion. The City appealed.

Ultimately, the Indiana Supreme Court held that the City presented valid claims for public nuisance, negligent sales, and negligent design. The case was remanded for further proceedings. See, City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222 (Ind. 2003). During the pendency of this case, Congress enacted, and the President signed into law, the PLCAA. The PLCAA became law on October 26, 2005. In a nutshell, the PLCAA provided a bar to the commencement of a “qualified civil liability action” in state or federal court, and required state and federal courts to immediately dismiss any pending actions or those subsequently brought. The Manufacturers claim this case falls within the purview of the PLCAA and moved to dismiss this case pursuant to the mandate of the act. The City challenges the constitutionality of the PLCAA on the following grounds.

- I. The PLCAA is unlawful preemption;
- II. The PLCAA’s retroactive abolition of pending state court cases violates Due Process;
- III. The PLCAA violates the Principles of Separation of Powers;
- IV. The PLCAA violates the Tenth Amendment and Eleventh Amendments.

ISSUES

I. Whether the PLCCA is Unlawful Preemption

The Supremacy Clause provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; ... shall be the supreme Law of the Land” U.S. Const. art. VI, cl.2. As such, Congress has the power to trump state legislation in an area where there is federal regulatory authority. Preemption may be expressly provided for in a federal statute or implied. Further, preemption may be complete or partial. In order for the federal action to be a valid exercise of preemption, it must first be a valid exercise in federal power. Thus, the first inquiry is whether Congress had the power to pass the PLCAA. With regard to this threshold inquiry, the Commerce Clause, U.S. Const. art I §8, confers upon congress the power to regulate activities that substantially impact interstate commerce. Gonzales v. Raich, 125 S.Ct. 2195 (2005). Clearly, this case implicates interstate commerce and therefore the Commerce Clause provides Congress with legislative power in this area. Further, the language of the PLCAA is clear that Congress expressly intended to preempt state tort law in the area of gun manufacturers state tort liability. Since the Commerce Clause provides Congress power to enact the PLCAA to preempt state tort law then preemption is of no moment. The inquiry next turns to whether the PLCAA is constitutionally firm on the other challenged grounds.

II. Whether the PLCAA’S Retroactive Abolition of Pending State Court Cases Violates Due Process

Due Process Clauses of the Fifth Amendment guarantee a right to a remedy for injuries to life, liberty, and/or property rights. United States Supreme Court has recognized that laws that eliminate common law causes of action may violate due process. In *Poindexter v Greenhow*, the Court held, “it is not within the powers of the state to deny a person all redress for a deprivation of rights secured by the constitution and that to take away a remedy is to take away the right

itself.” *Poindexter v Greenhow*, 114 U.S. 270 (1885). Under the PLCAA gun manufacturers would not have any responsibility for foreseeable harm caused by negligence in producing and distributing weapons and those harmed, past, present, and future would be wholly without a remedy in state and federal court. Under the Fifth Amendment, the City had a substantial, protectable interest in its tort claim. Inherent in the Due Process Clause, is a “separate and distinct right to seek judicial relief for some wrong.” *Christopher v. Harbury*, 536 U.S. 403 (2002). It is acknowledged that Congress may regulate remedies or even limit state court remedies. Due Process is violated when Congress abolishes an existing remedy and provides no alternative. To deprive the City of its right in interest deprives the City of a vested cause of action without just compensation; thereby, the PLCAA is violative of the Due Process Clause and, therefore, unconstitutional.

Further, our Supreme Court has long recognized laws that are applied retroactively and/or laws that serve as a deprivation of existing rights are particularly unsuited to a democracy such as ours. Our sovereign’s distaste for retroactivity was discussed in *Landgraf v USI Film Prods.*, 114 S.Ct. 1483 (1994). In *Landgraf*, the Court stated:

“The presumption against retroactive legislation is deeply rooted in our jurisprudence, it embodies a legal doctrine centuries older than the Republic.”

Our founding fathers were very aware of the pit-falls of retroactive legislation and have safeguarded the Republic with various provisions of the Constitution, including the *Ex-Post Facto* clause, the Fifth Amendment’s Takings Clause, prohibitions on Bills of Attainder, and our Due Process clause. In discussing these principles against retroactive statutes, the *Landgraf* Court stated:

“These provisions demonstrate that retroactive statutes raise particular concerns the legislatures unmatched power allow it to sweep away settled expectations suddenly and without individualized

consideration. Its responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals...restricts governmental power by restraining arbitrary and potentially vindictive legislation.” *Landgraf*, 114 S.Ct. 1483.

While it is recognized that *Landgraf* was a case involving an analysis as to whether or not retroactive application was implied by the statute in question rather than expressly provided for, *Landgraf* nevertheless sets forth sound reasons for close review of statutes with retroactive affect. Additionally, the suspect and unjust nature of retrospective legislation was examined in *Kaiser Aluminum & Chemical Corp. v Bonjorno*, as follows:

“The United States Constitution itself so far reflects these sentiments that it proscribes all retroactive application of punitive law and prohibits (or requires compensation for) all retroactive laws that destroy vested rights.”

Kaiser Aluminum & Chemical Corp. v Bonjorno, 110 S.Ct. 1570, 1587 (1990). (Internal citations omitted). Further, the *Kaiser* Court recognized that retrospective laws are highly injurious, oppressive, and unjust, and that retrospective laws should not be made either for the decision of civil causes or the punishment of offenses.

In the case at bar, the retroactive legislation may not be a means of retribution against unpopular groups or individuals; however, it is clearly an act which was passed in response to pressure from the gun industry. Further, it is clear that the PLCAA destroys the City’s cause of action and valid state court remedies. These vested rights may not be destroyed by legislative fiat without violating our Constitution. As such, the retroactive abolition of an existing state cause of action is unconstitutional since its retroactive affect is an unconstitutional deprivation of existing

rights, and is an unconstitutional *Ex-Post Facto* law.

III. Whether the PLCAA Violates Principles of Separation of Powers

Further, in *United States v Klein*, 80 U.S. 128 (1872), the United States Supreme Court established an Article III limitation on congressional law making power. The holding in *Klein* was simply that Congress cannot, through legislation, direct the outcome of pending cases since to do so would infringe upon the judiciary's role in deciding cases and violate the Separation of Powers as guaranteed by the Constitution. The scope of the PLCAA clearly and unmistakably directs the outcome of this pending case; and, therefore, is a clear and unmistakable violation of the Separation of Powers as guaranteed by the Constitution; and is, therefore, unconstitutional.

IV. Whether the PLCAA Violates the Tenth Amendment and Eleventh

Amendment

The Tenth Amendment sets forth: "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." Recent Supreme Court decisions have set forth an increased protection of state sovereignty through restrictions on congressional law making power where congressional acts are deemed "commandeering of state governments." See *Printz v United States*, 117 S.Ct. 2365 (1997). In *Printz*, the Supreme Court held that federal legislation known as the Brady Handgun Violence Prevention Act (hereinafter, "Brady Act") was unconstitutional because it required state law enforcement officers to temporarily work for the federal government. The Brady Act created a national system of instant background checks with regard to gun purchases. The Brady Act required local law enforcement to process identification forms in an attempt to verify the legality of gun purchases. The Supreme Court held that:

"Congress cannot compel the States to enact or enforce a federal

regulatory program...[or] circumvent that prohibition by conscripting the State's officers directly. The Federal Government may neither issue directives requiring the states to address particular problems, nor command the State's officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Prinz*, 521 U.S. at 935.

Under the Tenth Amendment, the federal government may not dictate that state court officers take action to enforce a federal program; to do so would be commandeering of state power. The PLCAA, in the instant case, is not commandeering of state judicial power because, amongst other things, it allows the state court judge to determine whether the act applies in first instance. Further, the PLCAA does not implicate any state immunity from suit. As such, the PLCAA does not violate the Tenth or Eleventh Amendments.

CONCLUSION

Upon the points and authorities cited herein, the PLCAA is unconstitutional; and, therefore, the Motion to Dismiss and Motion for Judgment on the Pleadings filed by the Defendant Manufacturers are DENIED

ALL OF WHICH IS ORDERED October 23, 2006.



ROBERT A. PETE, JUDGE

Exhibit F

1 STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY
2 BRANCH 32

3
4 JOSE LOPEZ III and ALEJANDRO ARCE,
5 Plaintiffs,

6 v. Case No. 10-CV-18530

7 BADGER GUNS, INC., BADGER OUTDOORS, INC.,
8 ADAM ALLAN, WALTER ALLAN, MILTON BEATOVIC,
9 and WEST BEND MUTUAL INSURANCE COMPANY,
10 Defendants.

11 MOTION HEARING PROCEEDINGS

12 March 24, 2014 Honorable Michael D. Guolee
13 Circuit Court Judge Presiding

14 A P P E A R A N C E S:

15 CANNON & DUNPHY, S.C. by Attorney Patrick Dunphy
16 and Attorney Brett Eckstein, 595 North Barker Road,
17 Brookfield, Wisconsin 53008, appear on behalf of the
18 Plaintiffs.

19 Attorney Jonathan Lowy, Esq., Brady Center to
20 Prevent Gun Violence Legal Action Project, 1225 Eye Street,
21 N.W. Ste. 1100, Washington, D.C. 20005, appears as
22 co-counsel for the Plaintiffs, pro hac vice.

23 VON BRIESEN & ROPER, S.C. by Attorney Philip Reid,
24 411 East Wisconsin Avenue, Ste. 700, Milwaukee, Wisconsin
25 53202, appears on behalf of Defendant West Bend Mutual
Insurance Company.

SWANSON, MARTIN & BELL, LLP, by Attorney James
Vogts, 330 North Wabash, Ste. 3300, Chicago, Illinois 60611,
appears on behalf of the Defendants, pro hac vice.

Phyllis Peoples, Official Court Reporter, RMR, CMR, Br. 32

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PROCEEDINGS

THE CLERK: Case No. 10-CV-18530, Jose Lopez III and others versus Badger Guns Inc. and others. State your appearance.

MR. DUNPHY: For the plaintiffs Attorney Pat Dunphy, Jon Lowy, Brett Eckstein, and I also have at my left, Attorney Rob Maxwell (sic). He's not yet been admitted pro hac vice, so he won't enter an appearance. I asked him to sit at counsel table with us.

THE COURT: All right.

MR. REID: Good afternoon, your Honor. Philip Reid of von Briesen & Roper representing West Bend Mutual Insurance Company.

MR. VOGTS: James Vogts on behalf of Badger Guns, Badger Outdoors, Walter Allan, Adam Allan and Milton Beatovic.

THE COURT: Let me catch your name again?

MR. VOGTS: James Vogts, V as in Victor o-g-t-s.

THE COURT: Thank you. All right, I read your materials, and we have the benefit of similar facts of Judge Conen. Is there anything the plaintiff, or defendants are bringing the motion I guess. Defendant, anything you'd like to add to your

1 materials?

2 MR. VOGTS: Well, you know --

3 THE COURT: Use your microphone, please.

4 You are very far away. My reporter has to hear you.

5 Thank you.

6 MR. VOGTS: Well, as your Honor knows,
7 based on the briefs, the issues before the Court are
8 issues primarily of statutory construction and
9 statutory interpretation which are questions of law for
10 the Court's determination. Those questions involve the
11 Protection of Lawful Commerce in Arms Act, which I am
12 sure you have read and studied. That statute was
13 passed by Congress in 2005 to protect firearms
14 manufacturers and sellers against claims for damages
15 like claims in this case arising from criminal or
16 unlawful misuse of firearms. The operative provision
17 of the PLCAA is section 7902, which very plainly states
18 all qualified civil liability action may not be brought
19 in any federal or state court. The statute then goes
20 on to define what a civil, qualified civil liability
21 action is, and that is an action like this case -- a
22 case for personal injury damages arising from a third
23 party's criminal or unlawful use, misuse of a firearm.

24 There is really no dispute up to this
25 point on those facts. Where the dispute lies is how to

1 interpret the six exceptions that Congress created to a
2 qualified civil liability action. Those six exceptions
3 are -- in those six exceptions, Congress first
4 specifically described certain claims by label; for
5 example, breach of contract, breach of warranty,
6 negligent entrustment, negligence per se, then
7 described a couple of them with greater language,
8 understood by label. One of those was marketed a
9 strict liability claim for design or manufacturing
10 defect. Another requires a knowing violation of a law
11 applicable to the sale or marketing firearms provided
12 that violation is a proximate cause of the harm. So in
13 creating the general rule that firearm sellers are
14 immune from suit, with the exception of those six type
15 of claims that they define, that's really where we are
16 right here. And where, where the parties fundamentally
17 differ is whether stating a claim under one of the six
18 exceptions, specifically the third exception, which
19 some courts have called predicate exception, opens the
20 door to any and all claims against the firearm seller.

21 Whether Congress just intended, you know,
22 each of these six exceptions identify specific claims
23 that you may bring within the contours of how they
24 describe those claims, or how the common law may
25 describe those claims. One of the claims the

1 plaintiffs bring in this case is an ordinary negligence
2 claim. And it doesn't take much effort to look through
3 the six exceptions and see that there is no exception
4 for an ordinary negligence claim. And, in fact, two
5 federal appellate courts sitting in the 9th Circuit, DC
6 Circuit upheld that there is no exception for an
7 ordinary negligence claim.

8 State Supreme Court in Alaska also held
9 that Congress did not create an exception for ordinary
10 negligence, so what Congress did was create exceptions
11 for various of ordinary negligence, specifically
12 negligence per se and negligent entrustment. That's
13 how they tried to treat negligence claims. But they did
14 not open the door to ordinary negligence claims. And
15 as your Honor knows, when interpreting a statute, you
16 are to first look at the plain ordinary meaning of the
17 words. You are to look at the purpose of the statute,
18 structure and the context. With those guideposts in
19 mind, you simply can't find room in this statutory
20 provision for ordinary negligence.

21 Plaintiffs, however, as I have already
22 alluded, believe that provided they can state a claim
23 that the defendants knowingly violated a firearms
24 statute, they are now free to plead negligence claim.
25 Quite frankly any claim whatsoever. I think that's a

1 fundamentally incorrect way to interpret the statute,
2 and no published decision has even addressed that
3 argument, much less accepted that argument. So the
4 ordinary negligence claim against Badger Guns and Adam
5 Allan should be dismissed because there is simply not
6 an exception for that kind of claim.

7 Another claim the plaintiffs make is a
8 public nuisance claim. The public nuisance claim like
9 ordinary negligence is not found in the six
10 exceptions. The plain language doesn't allow for
11 public nuisance. The plaintiffs argue again that,
12 well, they can plea a knowing violation of federal
13 firearm statutes, so the doors are blown off, and they
14 can allege public nuisance. Again there is no published
15 decision allowing for that interpretation of this
16 statute. And any attempt to shoehorn a statutory
17 public nuisance claim into the third exception, knowing
18 violation of a statute applicable to the sale,
19 marketing of a firearm should also fail, because the
20 Wisconsin Nuisance Statute is not on its face
21 applicable to the sale and marketing of firearms. In
22 fact, there is no language in that statute whatsoever
23 that could be construed to be applicable to sale or
24 marketing of firearms. So those two claims clearly
25 should be dismissed. There is simply no place for them

1 under this statute.

2 With regard to plaintiff's negligence per
3 se claim, plaintiffs allege that defendants violated
4 numerous federal firearms laws, all found in under the
5 Gun Control Act, 18 U.S.C. 922, 923, 924. But the law
6 in Wisconsin is that there is no civil liability under
7 those criminal statutes. The Olson v. Ratzel case
8 speaks to that directly.

9 THE COURT: Spell that, please. Go ahead.

10 MR. REID: Olson v. Ratzel speaks to that
11 directly. In Wisconsin, in order to find a civil cause
12 of action under criminal statute, three requirements
13 have to be met. One, the harm inflicted has to be the
14 type of harm that the statute was intended to protect
15 against. The injured person has to be within the class
16 of persons that the statute was intended to protect.
17 Most importantly, there has to be very clear expression
18 of legislative intent in the statute to create a civil
19 cause of action.

20 THE COURT: Counsel, much of this has been
21 in your briefs and so on. I'd really like you to
22 highlight anything different you want to bring out. I
23 do read these materials. So just to recite it again
24 into the record takes up the reporter's time, the
25 Court's time, and so on. Is there anything specific

1 above and beyond your briefing that you'd like the
2 Court to note?

3 MR. VOGTS: As you know, the parties
4 briefed these issues exhaustively. I don't believe
5 there is anything that I haven't touched on already in
6 our briefs. I certainly would be willing to answer any
7 questions you have regarding the defendant's position
8 on any of these issues.

9 THE COURT: Let me ask you. Were you the
10 attorney before Judge Conen also?

11 MR. VOGTS: Yes, sir.

12 THE COURT: What's the status of that
13 case?

14 MR. VOGTS: Well, the status of that case,
15 we have a trial date on September 2nd.

16 THE COURT: So it's been scheduled.

17 MR. VOGTS: It's been scheduled. Yes,
18 sir.

19 THE COURT: Thank you. Anything else?

20 MR. VOGTS: No, sir.

21 THE COURT: All right, Mr. Reid.

22 MR. REID: Judge, Phil Reid for West
23 Bend. I just want to put on the record we join in
24 Mr. Vogts' arguments. If the Court will indulge me for
25 one minute, I have a little bit to add that's not in

1 the briefs.

2 As Mr. Vogts correctly pointed out, the
3 defense in this case does not believe that the
4 negligence action is permitted. The plaintiffs cite
5 three cases for the proposition it is. I read those
6 cases in the last week because we are briefing a
7 similar issue right now in front of Judge Conen. None
8 of those cases support the proposition of plaintiff's,
9 say it supports. One is called the City of Gary ex
10 rel. King. That's a 2003 Indiana case. The fact is
11 that was decided two years before the PLCAA even
12 existed, so it simply did not address the issue whether
13 post that act a negligence claim is permitted.

14 A second case they cite is City of New
15 York v. A-1 Jewelry & Pawn Inc. I don't know, I don't
16 want the Court to take my words for it, so I will read
17 from that decision. One of the headnotes says, "The
18 city was entitled to leave to amend the Complaint
19 against the firearms retailer where amended Complaint
20 was identical to the original Complaint, except that
21 the three negligence claims had been deleted." So the
22 negligence was not even in that case any longer.

23 The third case they cite to that
24 proposition is one called Williams v. Beemiller. The
25 important point for the Court's purposes in deciding

1 our motion is the fact that that case was decided at
2 the Motion to Dismiss stage. And again, for reading
3 from the case, the Court there said, the defendant's
4 remedy was to serve a demand for a Bill of Particulars
5 under New York law, not to move for dismissal of the
6 Complaint. That was decided on procedural grounds. It
7 didn't touch on this question at all. So for those
8 specific reasons, plus all those reasons Mr. Vogts put
9 in his brief, we join in his motion.

10 THE COURT: Let me ask you. Are you
11 familiar with Judge Cooper's decision in this case, in
12 the Norberg case?

13 MR. REID: I am not. I have not read that
14 recently. I was not at that hearing.

15 THE COURT: All right. Thank you. All
16 right. Plaintiff.

17 MR. LOWY: Your Honor, Jon Lowy for the
18 plaintiffs.

19 THE COURT: Pull the microphone close to
20 you again, please. Thank you.

21 MR. LOWY: And I will try to be very
22 brief. A number of courts across the country have
23 considered issues very similar to this, actually have
24 addressed the central argument of Badger Guns. That
25 is, the argument of whether if a gun dealer engages in

1 unlawful commerce, whether they have special immunity
2 under the Protection of Lawful Commerce in Arms Act.
3 Every single court in the country that has considered
4 this issue has considered, has held that the gun dealer
5 engages in unlawful commerce. If they knowingly
6 violate a gun law, they have absolutely no special
7 protection from the law.

8 THE COURT: And in this case, what was the
9 violation?

10 MR. LOWY: In this case, well first of
11 all, there is no dispute for purposes of this motion
12 that there was a violation. I am not asking for
13 purposes of this motion they are. There were a number
14 of violations. One was the sale of a firearm to a
15 prohibited person, in this case a person who was an
16 unlawful user of controlled substance, and Badger knew
17 or had reasonable cause to believe that that person was
18 a user of unlawful substances. Also essentially a
19 straw purchase, that is the person Badger sold the gun
20 to was someone who was not the intended buyer;
21 therefore, Badger accepted false information in the
22 documentation. And we cite the statutory provisions in
23 our brief.

24 But as your Honor noted, or intimated in
25 this very courthouse, these identical arguments have

1 been raised and rejected three times already before
2 judge -- most notably by Judge Conen's decision.
3 Norberg's case provides a perfect road map for this
4 case. But also Judge Cooper in the Motion to Dismiss
5 stage, and Judge Dugan in the Motion to Dismiss stage
6 here. Even though this is not a Motion to Dismiss, it
7 essentially actually is because of the way Badger has
8 formed this Summary Judgment argument as Badger notes
9 its totally legal arguments. So actually from their
10 perspective, nothing has changed. They decided not to
11 rely on the facts.

12 THE COURT: But Judge Cooper did eliminate
13 some of the claims, right?

14 MR. LOWY: That's exactly correct. I
15 would like to address those. But just briefly, because
16 I think that the description of the case law is with
17 all due respect was incorrect. City of Gary case,
18 there was a decision after the Protection of Lawful
19 Commerce in Arms Act. The Court of Appeals counsel
20 cited to a different decision which is not the only one
21 that we rely on. The Court of Appeals in Indiana held
22 after the Protection of Lawful Commerce in Arms Act was
23 enacted that the case could go forward because the
24 court held that the defendant's violation of Indiana's
25 public nuisance statute constituted a knowing violation

1 of applicable law which came under the predicate
2 exception. And that decision was, the Supreme Court of
3 Indiana denied review of that decision. And that
4 appellate decision allowed negligence claims to go
5 forward as well. They weren't discussed in the opinion
6 except to say they remained in the case. So negligence
7 cases were allowed.

8 The Williams case, that was a Motion to
9 Dismiss. The Williams case, as Judge Conen noted, is
10 the most similar to this. There is another appellate
11 court in New York, New York Appellate Division, 4th
12 Department. In there, the Court held that where there
13 was an allegation of a known violation of law, there is
14 therefore no special immunity for gun dealers. That
15 shouldn't be so controversial. That isn't saying that
16 gun dealers are necessarily liable. It is just that if
17 they knowingly violate the law, they are treated like
18 every other litigant, and they don't get a get-out-of-
19 court free card, which PLCAA, the Protection of Lawful
20 Commerce in Arms Act gives them.

21 THE COURT: Say that again, please?

22 MR. LOWY: The Protection of Lawful
23 Commerce in Arms Act. In the Shirley v. Glass case,
24 which was decided both by the Kansas Court of Appeals
25 and the Supreme Court of Kansas, the court did not

1 discuss the Protection of Lawful Commerce in Arms Act
2 specifically; however, it was a post-Protection of
3 Lawful Commerce in Arms Act case, and the court allowed
4 negligence claims to go forward. So we have at least
5 six decisions going the way of saying you get no
6 special immunity, and zero. The entire country zero
7 cases holding that if you knowingly violate gun laws,
8 you still get special immunity of some form. Every
9 single case that Badger relies on, as Judge Conen
10 points out in his decision, every single one of those
11 cases do not involve a knowing violation of gun laws.
12 So the most those cases say is that if a gun company
13 does not violate the law, then they get immunity from
14 basic negligence claims. None of them say that if you
15 do violate the law, you get protection from special
16 negligence claims.

17 THE COURT: Let me ask you. Are you still
18 attacking the constitutionality of this law?

19 MR. LOWY: Well we are, but, your Honor,
20 that's an argument that would not be addressed unless
21 you decide in Badger's favor.

22 THE COURT: It's an alternative argument.

23 MR. LOWY: It is an alternative. In fact,
24 the doctrine of constitutional avoidance, if you can
25 avoid that constitutional ruling, you should. The only

1 way you would do that is to deny the Motion for Summary
2 Judgment.

3 THE COURT: Thank you.

4 MR. LOWY: So because there is known
5 violation of law, there is no special protection for
6 the negligence claim, and for the public nuisance
7 claim. And we also come under the negligence per se,
8 negligent entrustment exceptions, and those are dealt
9 with at length in the briefs and also in Judge Conen's
10 decision.

11 Now to address the two points that were,
12 the two cause of actions that were dismissed by --

13 THE COURT: Judge Cooper.

14 MR. LOWY: Judge Cooper, yeah. With all
15 due respect, I think those were incorrect. And, in
16 fact, in the transcript of that hearing, there is not
17 really a clear reasoning set forth as to why those two
18 causes of action were dismissed.

19 Negligence per se, Badger relies almost
20 entirely on this Olson case. And that case is
21 distinguishable for a number of reasons. One, what
22 Olson deals with is a plaintiff who in the court's
23 words were seeking to impose a duty beyond that imposed
24 by the common law. That is not the case here in our
25 negligence per se count.

1 THE COURT: Doesn't it imply a private
2 right of action? Doesn't the statute, the federal
3 statute want to do away with that type of thing in
4 general?

5 MR. LOWY: Your Honor, I think there is
6 in, that is, I think another point because there is a
7 distinction between negligence per se and private
8 rights of action. The Olson case is much more similar
9 to a private right of action. We are not claiming a
10 private right of action. Private right of action would
11 be if we were saying we don't have a negligence claim;
12 however, we are, our cause of action derives from
13 simply from this violation of the statute. That would
14 be a right of implied right of action. What we are
15 seeking is negligence per se, which is a negligence
16 cause of action.

17 THE COURT: Excuse me. Did Judge Conen
18 address that, that issue once Cooper, Judge Cooper put
19 it out there?

20 MR. LOWY: We did not, we did not appeal
21 or seek reconsideration of that decision. Essentially
22 we won on most counts, and we decided rather than delay
23 the case, we would live with it, even though we didn't
24 agree with it. And so, I think Olson, another reason
25 that Olson is distinguishable is the court in Olson

1 noted that that case involved an accidental shooting by
2 a minor. And the court basically looked at the
3 purposes of the Gun Control Act and said that really
4 wasn't what the Gun Control Act was about. That wasn't
5 the intended purpose of the act. The intended purpose
6 was, I am paraphrasing, to prevent criminals from
7 getting guns. And that is, that wasn't that case.
8 That is this case. This, the evidence is that this was
9 a buyer for the Latin Kings, the notorious Latin Kings
10 street gang who was buying guns from Badger, actually
11 putting back into what is essentially a lending library
12 for guns in that, in a gang house. That's actually
13 what the shooter says that's how he got the guns from
14 this. I am using the term "lending library." That's
15 the way he describes it. So that goes at the heart
16 what that criminal act is all about.

17 Finally, and this is a key point, if the
18 Court looks at the intent of the Olson case was I
19 believe 1979 I think.

20 THE COURT: Yes, it was.

21 MR. LOWY: The length of intent to allow
22 negligence per se actions is now crystal clear. In
23 fact, undeniable because of PLCAA itself. PLCAA does
24 not create cause of action. I am not suggesting that
25 it does. However, PLCAA creates, it says there is an

1 express exception for negligence per se actions, and it
2 also in other exceptions specifies cause of action
3 available for other violations of the Gun Control Act.
4 Well clearly Congress is perfectly fine with causes of
5 action for negligence per se and for other violations
6 of the Gun Control Act. Congress could not be saying,
7 PLCAA, we allow for, we specifically allow the
8 negligence per se actions and other actions based on
9 violations of gun laws, except that we don't intend for
10 there to be cause of action, those exact causes of
11 action.

12 THE COURT: Move on to some other issue if
13 you want to. Keep it as short as you can.

14 MR. LOWY: Okay. Well, your Honor, I, I
15 think that addresses the negligence per se claim. I
16 would note that the Williams' decision, which is a New
17 York appellate decision, allowed the negligence per se
18 claim to go forward. In Shirley, the Kansas Supreme
19 Court, this is another straw purchase case against gun
20 dealer. Very similar. And that is more current, post-
21 Protection of Lawful Commerce in Arms Act law. Thank
22 you, your Honor.

23 THE COURT: Any reply, short reply?

24 MR. VOGTS: Yes, your Honor. Just
25 briefly. I hope it doesn't get lost in the morass of

1 briefing that you read and the argument here, but
2 Mr. Lowy did acknowledge that the PLCAA does not create
3 causes of action through these exceptions. They are
4 merely saying claims falling within these exceptions
5 are not preempted by federal law. If you are within
6 the exception, we then have to look to state law to see
7 whether there is such a claim under state law. And the
8 Olson case speaks for itself. There is no negligence
9 per se claim under the Gun Control Act or under the
10 Wisconsin Firearms Statutes that were at issue in this
11 case under the same statutes essentially that the
12 plaintiffs raise here.

13 There is no question that under the third
14 exception, a knowing violation, knowing is important
15 violation of a law applicable to the sale and marketing
16 of firearms. It is not subject to preemption. Again,
17 you have to look to the state law to see whether that
18 claim can be pled. And the defendant's argument is
19 that the statutes, the plaintiffs attempt to plead
20 under that exception are not statute that you can plead
21 in a civil court as a basis for damages.

22 Lastly, your Honor, the point that we
23 didn't brief, but I want to raise now because I know
24 the plaintiffs make this argument. There are
25 individuals in this case that were named defendants.

1 And the named defendants, not in any sort of
2 shareholder capacity or vicarious capacity, but as
3 direct defendants who are alleged to have negligently
4 sold the gun to Jose Fernandez. The plaintiffs have
5 argued both here and in Judge Conen's courtroom that
6 those individuals are not entitled to protection under
7 the PLCAA, that the statute only protects federal
8 licensees, the gun store. Well, actually individuals
9 who work at the gun stores have the same protections
10 afforded to the licensee, a seller.

11 THE COURT: Isn't that the issue about
12 piercing the corporate veil, getting after the actual
13 people who did the, or really running this company?

14 MR. VOGTS: I think that's a separate
15 issue. The plaintiffs do seek to pierce the corporate
16 veil. They also seek to hold these individuals
17 directly responsible in the first instance, not for the
18 corporate act, but for their own act. The plaintiffs
19 allege that, that those people are not protected under
20 the PLCAA because they are not sellers. Only sellers
21 have protection. But the statute defines a seller as a
22 dealer. It refers the reader to the section of the Gun
23 Control Act defining a dealer. A dealer is defined as
24 any person who's engaged in the business of selling
25 firearms at wholesale or retail for a livelihood and

1 for profit. So the people who are selling guns, the
2 people who own gun stores are entitled to the same
3 protection under the PLCAA as their employer, the
4 licensee itself.

5 THE COURT: Mr. Reid.

6 MR. REID: Nothing further, your Honor.

7 THE COURT: All right. It's interesting,
8 the comment brought up, "the lending library." I have
9 been around long enough that I remember when there were
10 not a lot of guns here in Milwaukee available to street
11 criminals, and I prosecuted people who would lend guns
12 for robbers. They would bring them back when they were
13 done. It was interesting. So we had kind of a lending
14 situation, because this guy had guns and other people
15 wanted to commit crimes didn't. Anyway, interesting
16 sidelight. I guess there are enough guns around. You
17 don't have to worry about that, or they are available.

18 Well, it's interesting. I think the
19 Court has to take cognizant of Judge Conen's decision.
20 We must be mindful it's in the same district. We
21 should try to have some continuity in this particular
22 district. If, in fact, the matter is appealed at some
23 point, there should be some continuity. I am not
24 saying I wouldn't make my own decision, but I have read
25 his decision. I have read the materials in the other

1 case and the arguments, the briefing and so on. I
2 think I am in position to, in fact, stay pretty much in
3 accord with Judge Conen on many of the issues. So I
4 ask the plaintiff to draft an order consistent with
5 this Court's decision. And I am telling you, I don't
6 want a long decision trying to say what I said. You
7 might say something like the motion is denied. On
8 these parts of the motion are denied based on the
9 statements made by the Court in his oral decision,
10 which is there, will be there. My reporter I am sure
11 at some point will type it up.

12 Now there are a lot of parallels in this
13 case with the facts of the other case. Apparently two
14 officers were shot in that case also. Two officers
15 were shot here. So we have two police officers who
16 were shot, Jose Lopez III, and Alejandro Arce, I guess
17 it is A-r-c-e, were police officers, were shot by
18 Victor, last name V-e-l-o-z with a gun purchased by
19 Jose Fernandez. And they seek to hold Badger Guns and
20 others legally liable for the shooting under various
21 series. They claim that Badger Guns sale of the
22 firearm to Fernandez was the cause of their injuries.
23 And they allege various grounds and various claims;
24 negligence, negligent entrustment, et cetera, and we
25 will deal with each one of those.

1 The defendant seeks Summary Judgment on
2 all these claims and these cases are so similar in many
3 ways to the facts in the Norberg v. Badger Guns, the
4 case decided by Judge Conen. And it is interesting.
5 He had an opportunity to decide it before I decided it,
6 so I can in fact look at his reasoning and in many ways
7 parallel it.

8 Apparently the public nuisance and
9 negligence per se claim were dismissed on the
10 pleadings, and they were not part of that argument and
11 apparently were not, that issue was not appealed as
12 Mr. Lowy has indicated. And I believe Judge Cooper was
13 the one who did that.

14 This case is not about the individual's
15 right to keep or bear arms. It is about a gun
16 retailer's obligation to follow federal and state law
17 applicable to sales and marketing of firearms. At
18 issue is the scope of the Protection of Lawful Commerce
19 in Arms Act. Later we will talk about PLCAA, which was
20 enacted by Congress to protect federally licensed
21 manufacturers and sellers from civil liability asserted
22 by victims of crime and so on. And it's very clear why
23 that was done, and it is the law that is dealt with.
24 And I will indicate that I am not going to get involved
25 in the constitutionality except to say as far as I can

1 see, it is in fact constitutional. That would be the
2 Court's ruling if in fact we went beyond. I really
3 don't have to make that ruling at this point.

4 Now this act, the real question is in
5 this case is undisputed that the matter falls within
6 the PLCAA's general definition of qualified civil
7 liability actions. At issue is whether one or more of
8 the statutory exceptions apply. And relevant to this
9 case, the PLCAA, does not preclude claims for negligent
10 entrustment or negligence per se, nor does the PLCAA
11 preclude an action in which a manufacturer or seller of
12 qualified products knowingly violates state or federal
13 statute. So that's really the important issue here.

14 It has been talked about as a predicate
15 exception, which is a very interesting way of stating
16 it, but I think it is. We look for that predicate in
17 the facts here when we are deciding whether to grant
18 Summary Judgment and grant the defendant's immunity.
19 You see, immunity is a very strong bar for a plaintiff
20 if it in fact has no exceptions, or no discretion left
21 to parties reviewing the record to give someone, as
22 someone said, "a free pass." No matter what they do,
23 it would be improper. I don't think any act should in
24 fact, could in fact allow that. And if it did, I would
25 find it unconstitutional. Because I don't think that

1 is proper to bar people from coming to court because
2 something has been lobbied by some groups to persuade
3 Congress to do something. So that's a little editorial
4 comment, but. So the question is do they, the
5 plaintiffs fall, their claim fall within the safe
6 harbor of the PLCAA. So let's go on.

7 The Gun Control Act makes it unlawful for
8 dealers to transfer firearms based upon information in
9 that act and knowingly that they know is as reason to
10 believe is false. The act also makes it unlawful for
11 dealers to sell or transfer firearms if they know the
12 purchaser is an unlawful user of controlled
13 substances. In this case, the plaintiff has provided
14 evidence that Fernandez was a dealer of illegal drugs.
15 A jury could reasonably find Fernandez was under the
16 influence of illegal drugs each time he went to Badger
17 Guns. His drug use was evident from his behavior,
18 appearance and smell. Therefore, there is reasonable
19 inference could be made that the defendants knew that
20 Fernandez was an illegal drug user, and that he lied
21 when he filled out the Form 4473. In other words, a
22 reasonable inference could be made that the defendant
23 knowingly violated the Gun Control Act when he sold,
24 when they sold him firearms. So the plaintiff's claim
25 for negligent entrustment meets the definition of

1 negligent entrustment under PLCAA.

2 Defendants argue that the negligent
3 entrustment claim does not meet that definition, but
4 the Court will find it does. Judge Conen considered
5 and rejected this argument. Judge Conen concluded that
6 the use of the word "use" is broader than "discharge,"
7 especially since Congress used the word "discharge" in
8 a different subsection. I am persuaded by Judge
9 Conen's conclusion, and I agree with it. I think it's
10 well reasoned. Accordingly, Summary Judgment will be
11 denied on the negligent entrustment claim.

12 Then we look at the negligence per se. I
13 have already dealt with that. Judge Conen dismissed
14 that. The Court's not going to consider that in this
15 particular case. Again, it's a judge in the same
16 district. So negligence per se will not be considered
17 by this Court, and if I were requested a Motion to
18 Dismiss, I would in fact do so.

19 Now Summary Judgment will also be denied
20 in the civil conspiracy claim. Judge Conen again found
21 material issues of fact, and I think in this particular
22 case, we can do so to state a claim for civil
23 conspiracy the Complaint must allege certain things,
24 and we have talked about that, or you have argued those
25 things. And I think 79 Wis. 2d 241 allows for that

1 particular type of claim under, if there are
2 violations, or it is shown that these, number one, that
3 the formation, operation of a conspiracy, the wrongful
4 act or acts done pursuant thereto, and the damages
5 resulted from such act.

6 Now it is interesting when we look at what
7 happened here, you know, I don't know how this is going
8 to sell to a jury, but it is very damning I think. And
9 the defendants argue that it can't be a basis for civil
10 conspiracy. And there is no evidence of conspiracy to
11 sell. Judge Conen considered that and rejected similar
12 arguments, found material issues of fact. Whether the
13 defendant formed or operated a conspiracy to maintain
14 the unlawful sales practice at Badger Guns after ATF
15 threatened to revoke their license; whether the lawful
16 sale was a civil wrong; and three, whether the
17 plaintiff's injury was a foreseeable result. I am
18 persuaded by his reasoning. And accordingly, Summary
19 Judgment shall be denied under the civil conspiracy
20 claim.

21 You know, we will get into more of this
22 piercing the corporate veil, but it is an interesting
23 phenomena what happened here with the transfer of this
24 property, or this licensing and so on. It smacks of
25 really maybe even underhand activity.

1 So did they aid and abet? In light of
2 Judge Conen's ruling on similar facts, Summary Judgment
3 will be denied on that also. They transferred Badger
4 Outdoors Inventory to Adam Allan for no money down;
5 facilitating the operation of Badger Guns; three,
6 continuing Badger Guns with the same employees and
7 utilizing the same unlawful sales practices. It is
8 interesting that there was this, as I indicated
9 earlier, potential conspiracy or aiding and abetting.
10 Let's just keep doing what we were doing before. We
11 will just change the owner, the name.

12 And that dovetails right into the
13 piercing the corporate veil. Judge Conen ruled under
14 similar facts. It may be unclear at this stage of the
15 proceedings whether fraud was committed in order to
16 sell guns illegally. In this case, the plaintiff
17 submitted evidence that Allan Adam or Adam Allan had
18 complete domination over Badger Guns as the sole
19 shareholder. And it's interesting. So we will in fact
20 allow the issue of piercing the corporate veil, and
21 it'll be interesting jury instructions and verdicts on
22 that. But I can tell you right now some other judge
23 will have to worry about that I think because I am
24 leaving here July 31st, retiring after 38 years. And
25 Judge DiMotto will be the judge who will probably take

1 up this issue, or this trial and how it's going to be
2 tried.

3 In light of Judge Conen's ruling, Summary
4 Judgment is denied with respect to plaintiff's claim
5 against Allan Adam, or Adam Allan individually. And he
6 declined to dismiss the plaintiff's claim against him
7 as an individual. And the Court will rule the same.
8 Thus, the defendant's Motion for Summary Judgment is
9 granted in part on the negligence per se claim, and it
10 is not granted, or it is granted, I'm sorry, and denied
11 in part under all the other claims I have indicated.
12 So I guess the next thing should be is that you should
13 get together with my clerk and find a date that's
14 convenient for all of you. I will schedule this case,
15 get you moving. But I can tell you, with my vacation
16 time and things coming up, I am not going to be trying
17 this case. I am sure you will do a lot of discovery
18 anyway.

19 MR. VOGTS: Your Honor, if I may, your
20 Honor, I don't believe you addressed the public
21 nuisance claim that Judge Cooper dismissed.

22 THE COURT: I guess I didn't. Yeah.
23 Well, it was dismissed by Judge Cooper. I will in fact
24 do the same here. That hasn't really been argued that
25 greatly here.

1 Okay. All right, plaintiff is to draft an
2 order consistent with the Court's decision under the
3 five-day rule. And you sit with my clerk and your
4 calendars, find a good date for a -- that can fit my
5 calendar for scheduling. We will get you all together.
6 Those that are out of town may be able to appear by
7 phone, but I would like to have most of the main
8 parties here so we can fully discuss the time, timing
9 you need. Okay, so we will go off the record now and
10 get together with my clerk.

11 MR. DUNPHY: Judge, we can stay off the
12 record for this.

13 (Discussion held off the record).

14 THE COURT: Let's do this. Set it for
15 pretrial with Judge DiMotto after the trial before
16 Judge Conen. Hopefully that trial will go on and won't
17 be adjourned.

18 We are going to do a scheduling order
19 right now off the record.

20 (Whereupon further proceedings were held
21 off the record and the proceedings concluded).

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CERTIFICATE PAGE

STATE OF WISCONSIN)
)
MILWAUKEE COUNTY)

I, Phyllis Peoples, Court Reporter, do hereby
certify that I am a shorthand reporter; that I was present
at the taking of the foregoing proceedings, and that I
recorded the said proceedings on the Stenograph machine;
that the above and foregoing proceedings is a full, true and
correct copy, in typewritten longhand, of my original
machine shorthand notes taken at said hearing.

Dated this 27th day of March, 2014,
Milwaukee, Wisconsin.

Phyllis Peoples (Digital Signature Permitted)
Phyllis Peoples, RPR, CMR
Circuit Court Reporter
Branch 32

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via U.S. mail and/or email on May 20, 2019 upon the following:

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Kelly K. Iverson

2020 WL 5755493
Superior Court of Pennsylvania.

Mark and Leah GUSTAFSON,
Individually and as Administrators and
Personal Representatives of the Estate of
James Robert ("J.R.") Gustafson,
Appellants

v.

SPRINGFIELD, INC. d/b/a Springfield
Armory and Saloom Department Store
and Saloom Dept. Store, LLC d/b/a
Saloom Department Store; Appellees
The United States of America, Intervenor

No. 207 WDA 2019

Filed September 28, 2020

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

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

Opinion

OPINION BY KUNSELMAN, J.:

*1 In this appeal, we must decide whether the trial court erred by finding that a federal statute, the **Protection of Lawful Commerce in Arms Act** of 2005 ("the **PLCAA**"), 15 U.S.C. §§ 7901-7903, bars a state lawsuit arising from the shooting death of Mark and Leah Gustafson's 13-year-old son, James Robert ("J.R.") Gustafson. The Gustafsons claim that the **PLCAA** should not apply to their lawsuit or, alternatively, that it is unconstitutional.

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

"Thinking the handgun was unloaded, the boy pulled the trigger." *Id.* The chambered bullet fired and unintentionally killed J.R. The District Attorney of Westmoreland County charged J.R.'s friend with general homicide under the Pennsylvania Crimes Code. The friend eventually pleaded delinquent to involuntary manslaughter² in juvenile court.

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

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

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

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

The Gustafsons raise two appellate issues:

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

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

Gustafsons' Brief at 3.

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

I.

First, we consider whether the trial court correctly concluded that the text of the **PLCAA** bars the Gustafsons' lawsuit. Where, as here, the language of a federal statute is clear and unambiguous, statutory analysis "begins, and pretty much ends, with the text." *Lomax v. Ortiz-Marquez*, 590 U.S. —, —, 140 S. Ct. 1721, 1724 (2020).

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

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

civil action or proceeding or an administrative proceeding brought by any person against a manufacturer or seller of a [firearm or an ammunition that moved through interstate commerce] for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief,

resulting from the criminal or unlawful misuse of [that firearm or ammunition] by the [plaintiff] or a third party, but ***shall not include*** (i) an action brought against a transferor convicted under section 924(h) of Title 18, or a comparable or identical State felony law, by a party directly harmed by the conduct of which the transferee is so convicted; (ii) an action brought against a seller for negligent entrustment or negligence *per se*; (iii) an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the [firearm or ammunition], and the violation was a proximate cause of the harm for which relief is sought ... (iv) an action for breach of contract or warranty in connection with the purchase of the product; (v) an action for death, physical injuries or property damage resulting directly from a defect in design or manufacture of the [firearm or ammunition], when used as intended or in a reasonably foreseeable manner, except that where the discharge of the [firearm or ammunition] was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries or property damage; or (vi) an action or proceeding commenced by the Attorney General [of the United States] to enforce the provisions of chapter 44 of Title 18 or chapter 53 of Title 26 [of the United States Code].

*3 15 U.S.C. § 7903(5)(A) (emphasis added).

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

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

Other courts, however, have read the plain language in the

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

Unlike the trial court, we adopt the latter construction. The definition of “qualified-civil-liability action” does not mention “cause of action,” “theory of liability,” “count,” or “claim.” Instead, Congress defined “qualified-civil-liability action” as a “civil action or proceeding or an administrative proceeding.” 15 U.S.C. § 7903(5)(A) (emphasis added). Thus, the term refers to a plaintiff’s lawsuit or proceeding as a whole, not to specific causes of action advanced within that lawsuit. If a plaintiff’s civil action falls within an exception to the definition of “qualified-civil-liability action,” the civil action is not a “qualified-civil-liability action.” The **PLCAA** commands trial courts to dismiss a “qualified-civil-liability action that is pending on October 26, 2005,” but 15 U.S.C. § 7902(b) makes no mention of “causes of action.” Nor does the definition of “qualified-civil-liability action.” 15 U.S.C. § 7903(5)(A).

*4 In fact, that very term — qualified-civil-liability *action* — supports our interpretation. Otherwise, Congress, which used the phrase “cause of action” elsewhere in the **PLCAA**, *e.g.*, 15 U.S.C. § 7903(5)(C), would have coined the term as “qualified-civil-liability *cause of action*,” rather than “qualified-civil-liability *action*.” When “Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.” **Russello v. United**

States, 464 U.S. 16, 23, (1983). Thus, the plain text of the **PLCAA** dictates that either the gun industry has immunity from the entire lawsuit or no immunity at all. The Act does not immunize the industry from individual causes of action.

Therefore, the trial court erred when it applied the **PLCAA** on a claim-by-claim basis rather than to the entire lawsuit. Its reliance upon *Kim, supra*, was therefore misplaced.⁶ The **PLCAA** requires dismissal of a plaintiff’s entire lawsuit if *the facts of the case* meet the definition of a qualified-civil-liability action.

Regarding the “criminal or unlawful misuse” that brings a lawsuit within the general definition of a “qualified-civil-liability action,” the “term ‘unlawful misuse’ means conduct that violates a statute, ordinance, or regulation as it relates to the use of a [firearm or ammunition].” 15 U.S.C. § 7903(9). Any crime will suffice, even the unlawful possession of the gun itself.

For instance, in **Ryan v. Hughes-Ortiz**, 959 N.E.2d 1000, (Ma. App. 2012), a man was returning a Glock to his employer’s display case, when the handgun accidentally discharged and killed him. The administratrix of his estate sued Glock for defectively designing both the gun and the display case that had failed to stop the stray bullet. The plaintiff argued the **PLCAA** did not apply, because the decedent had not “misused” the handgun in any way. 15 U.S.C. § 7903(5)(A). The appellate court disagreed. It opined that the decedent had been a convicted felon who had unlawfully possessed the gun and committed a federal offense⁷ by holding the weapon — *i.e.*, a “criminal or unlawful misuse” of the gun under the **PLCAA**. **Ryan**, 959 N.E.2d at 1008. The **PLCAA** therefore immunized Glock from liability that might have otherwise attached under Massachusetts law.

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

The Gustafsons, however, claim the text of the **PLCAA** is unclear. They assert the Act does not apply, because: (1) its first section indicates that Congress only sought to bar cases for harm *solely* caused by the criminal acts of others, (2) the legislative history shows Senators did not intend to eliminate cases like the one at bar, and (3) **PLCAA** Exception (v) applies. Alternatively, they claim we should

narrowly construe the **PLCAA** to avoid the possibility of unconstitutional federal encroachment into the States' police power – specially, the law of torts. *See* Gustafson's Brief at 7-8 (citing *Bond v. United States*, 572 U.S. 844 (2014); and *Gregory v. Ashcroft*, 501 U.S. 452 (1991)).

A. The Purposes & Findings

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

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

The Supreme Court of the United States has long held that, “[R]ecitals ... in section 1 (which [are] simply a preamble to the act) ... do not constitute an exertion of the will of Congress which is legislation, but a recital of considerations, which, in the opinion of [Congress], existed and justified the expression of its will in the present act.” *Carter v. Carter Coal Co.*, 298 U.S. 238, 290, (1936). Thus, while findings and purposes may assist a court in deciding if Congress legislated constitutionally, that section does not trump a law’s unambiguous, operative terms. *See id.* *see also Lomax, supra*. The Gustafsons’ first statutory-construction theory therefore fails to convince us that the plain language of **Sections 7902** and **7903** should not apply.

B. The Congressional Record

Second, the Gustafsons’ arguments regarding the legislative history of the Act are equally unpersuasive. They maintain that the trial court erred in dismissing this

case, because the “legislative history indicates an intent not to bar cases like this.” Gustafsons’ Brief at 27.

To be sure, Senator Larry Craig, the author and lead sponsor of the **PLCAA**, told Congress his bill would *not* protect gun-industry members if they had broken any laws. He said that the **PLCAA** “prohibits one narrow category of lawsuits: suits against the firearms industry for damages resulting from the criminal or unlawful misuse of a firearm or ammunition by a third party.” 151 Cong. Rec. S9,061 (daily ed. July 27, 2005) (Sen. Craig). “Over two dozen suits have been filed on a variety of theories, but all seek the same goal of forcing *law-abiding businesses* selling a *legal product* to pay for damages from the criminal misuse of that product.” *Id.* (emphasis added). The **PLCAA** “is not a gun-industry-immunity bill, because it does not protect firearms or ammunition manufacturers, sellers, or trade associations from *any other lawsuits based on their own negligence or criminal conduct.*” *Id.* (emphasis added).⁶

⁶ Despite these statements from Senator Craig, we may not consider the intentions of individual Members of Congress when interpreting unambiguous text, even if that text produces a result that the drafters failed to anticipate. For example, in the recent Supreme Court case of *Bostock v. Clayton County, Georgia*, 590 U.S. —, 140 S. Ct. 1731 (2020), the Court held that Title VII of the Civil Rights Act of 1964 protects the LGBTQ+ community from employment discrimination even though the Congress that passed that law neither intended nor foresaw such an outcome.

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

Those who adopted the Civil Rights Act might not have anticipated their work would lead to this particular result. Likely, they weren’t thinking about many of the Act’s consequences that have become apparent over the years, including its prohibition against discrimination on the basis of motherhood or its ban on the sexual harassment of male employees. But the limits of the drafters’ imagination supply no reason to ignore the law’s demands. When the express terms of a statute give us one answer and extratextual considerations suggest another, it’s no contest. *Only the written word is the law*

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

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

C. The PLCAA's Product-Defect Exception

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

Congress, as explained above, listed six exceptions to the definition of a “qualified-civil-liability action.” Of the six exceptions, only the fifth could arguably apply to the allegations in the Gustafsons’ complaint. Exception (v) seemingly allows lawsuits to proceed if the firearm or ammunition was “used as intended or in a reasonably foreseeable manner” 15 U.S.C. § 7903(5)(A)(v). This Exception, however, contains a critical caveat that if “the discharge of the product was caused by a volitional act that constituted a criminal offense, then such act shall be considered the sole proximate cause of any resulting death, personal injuries, or property damage.” *Id.* That caveat renders Exception (v) toothless, because *all* criminal offenses require a *volitional* act.⁹ Any time a defective gun causes harm and a criminal offense also occurs, Exception (v) cannot apply. This is true even when, as here, the result of that act is unintentional. *See Ryan*, 959 N.E.2d 1000 (dismissing lawsuit, despite the fact that the gun discharged on its own and no criminal charges were filed against decedent).

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

⁹ This exact scenario occurred in *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009), cert. denied sub nom. *Adames v. Beretta U.S.A. Corp.*, 558 U.S. 1100 (2009). There, on facts identical to those in the Gustafsons’ complaint, Exception (v) failed to save the plaintiffs’ lawsuit from dismissal. In *Adames*, a teenager found a handgun inside a home. The boy knew the gun was loaded if the magazine was connected, but he thought it was unloaded without it. He removed the magazine and pointed what he believed was an unloaded gun at his friend, jokingly pulled the trigger, and killed him. A juvenile court found the shooter

delinquent of involuntary manslaughter and reckless discharge of a firearm. The victim’s parents sued the manufacturer of the gun for product liability (design defect and failure to warn about the bullet concealed in the chamber). While the case was proceeding, Congress passed the PLCAA.

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

Adames demonstrates the hollowness of Exception (v). The criminal act that implicates the definition of a “qualified-civil-liability action,” will also *always* be a violation criminal act that nullifies Exception (v). Thus, this claim affords the Gustafsons no relief.

D. The Canon of Constitutional Avoidance

Finally, citing to *Bond v. United States* and *Gregory v. Ashcroft*, *supra*, the Gustafsons request that we narrowly construe the PLCAA pursuant to the canon of statutory construction of constitutional avoidance.¹⁰ When that canon applies, even the plain text of a statute may yield to a presumption that the legislature does not willingly test constitutional limits. Based on that presumption, the Supreme Court has said, “Unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.” *Solid Waste Agency of N. Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159, 173, (2001) (some punctuation omitted). Hence, if “a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *MCI WorldCom, Inc. v. Pennsylvania Public Utility Commission*, 844 A.2d 1239, 1249 (Pa. 2004) (citing *Harris v. United States*, 536 U.S. 545, 555, (2002) and *United States ex rel. Attorney General v. Delaware Hudson Co.*, 213 U.S. 366, 408, (1909)).

In *Bond*, pursuant to a treaty the United States had entered, Congress criminalized the possession and use of chemical weapons. No one doubted Congress’s power to make the treaty or to enforce it by criminal statute. Several years later,

a scorned wife harassed her husband's mistress by putting a non-lethal amount of chemicals on the other woman's car door and in her mailbox. When the District Attorney of Montgomery County refused to press charges, the Federal Government indicted Bond for violating its anti-chemical-weapons statute. The district court convicted her, and Bond's appeals reached the Supreme Court, twice.

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

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

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

Exception (i), for instance, purportedly allows lawsuits against a gun-industry "transferor" if the Federal Government convicts it of "transferring a firearm, knowing that such firearm will be used to commit a crime of violence ... or drug trafficking crime," 18 U.S.C. § 924(h), or after any State convicts the "transferor" under "a comparable or identical state felony law." 15 U.S.C. § 7903(5)(A)(i). Thus, the victim's harm must be "directly caused by the conduct of which the transferee is so convicted." *Id.* (emphasis added). The exception applies only if the gun industry knowingly acted in concert with another criminal in violation of a criminal statute, and they are both convicted. Moreover, such a victim would be entitled to a judgment of restitution at the gun industry's sentencing and, therefore, would not need a lawsuit to

recover. Our research reveals no court ever permitting a lawsuit to proceed under Exception (i) or any plaintiffs even arguing that it applied. Exception (i) might look good on paper, but it has no real-world implications.

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

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

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

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

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

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

The **PLCAA** therefore grants total immunity from common-law liability to the gun industry. Congress has

dictated that responsibility under state tort law must fall solely on criminals and the victims of gun injuries whenever the **PLCAA** applies.¹⁴ Before the **PLCAA**, under States' laws, gun-shot victims could be both victims of crime and victims of gun-industry torts.

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

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

The Gustafsons' first appellate is meritless.

II.

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

The Tenth Amendment and Congress's *Article I* powers are interrelated. They, along with other constitutional provisions, create the system known as federalism and checks and balances within the government. Federalism divides sovereign authority between the Federal Government and the States, based on the "unique insight [of the Founders] that freedom is enhanced by the creation of two governments, not one." *Alden v. Maine*, 527 U.S.

706, 758 (1999). Thus, the Founders gave the Federal Government specific, limited powers and reserved all other powers to the several States. If the Constitution does not explicitly provide Congress with authority to pass a bill, then Congress may not enact it. "In short, a law beyond the power of Congress, for any reason, is no law at all." *Bond v. United States*, 564 U.S. 211, 227–28, (2011) (Ginsburg, J., concurring) (quoting *Nigro v. United States*, 276 U.S. 332, 341, (1928)) (some punctuation omitted).

The Founders feared fully centralized government. They therefore left most governance of daily life to the States. Courts, as a result, "always have rejected readings of the Constitution of the United States that would permit Congress to exercise a police power." *United States v. Morrison*, 529 U.S. 598, 618–19, (2000). As such, "federalism secures to citizens the liberties that derive from the diffusion of sovereign power." *New York v. United States*, 505 U.S. 144, (1992) (quotation marks omitted).

The Federal Government believes Congress could pass the **PLCAA** under Article I of the Constitution. That Article gives Congress the power to enact certain types of laws, including statutes that "regulate Commerce with foreign Nations, and among the several States" *U.S. Const. art. I, § 8 cl. 3*. In defining "Commerce," Chief Justice Marshall said, "Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse." *Gibbons v. Ogden*, 22 U.S. 1, 189–90 (1824). This definition of commerce ensures that the "authority of the Federal Government may not be pushed to such an extreme as to destroy the distinction, which the Commerce Clause itself establishes, between commerce 'among the several States' and the internal concerns of a State." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30, (1937). "That distinction between what is national and what is local in the activities of commerce is vital to the maintenance of our federal system." *Id.*

*11 Under the Tenth Amendment of the Bill of Rights, local matters fall under the authority of the individual States. That Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." *U.S. Const. amnd. X*.

In addition to their concerns regarding centralized government, the Founders also distrusted a government where power resided in only one institution or individual. They therefore created a tripartite system with built-in checks and balances. Under that system, when a litigant

claims a federal statute is unconstitutional, only the courts may decide whether Congress had the constitutional authority to pass the challenged law. *Marbury v. Madison*, 1 Cranch 137, 176, (1803).

A. The Tenth Amendment and the Commerce Clause

Here, the Gustafsons challenge the constitutionality of the **PLCAA** on the grounds that Congress exceeded its enumerated powers. When confronting such a challenge, the “Federal Government ... must show that a constitutional grant of power authorizes each of its actions.” *National Federation of Indep. Bus. v. Sebelius*, 567 U.S. 519, 535, (2012). Such a showing “does not apply to the States, because the Constitution is not the source of their power ... state governments do not need constitutional authorization to act.” *Id.* “Proper respect for a coordinate branch of the government requires that we strike down an Act of Congress only if the lack of constitutional authority to pass the act in question is clearly demonstrated.” *Id.* at 538 (quoting *United States v. Harris*, 106 U.S. 629, 635, (1883)). “Our deference in matters of policy cannot, however, become abdication in matters of law. ‘The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written.’ ” *Id.* (quoting *Marbury*, 1 Cranch at 176).

“Congress needs only a rational basis for concluding that the regulated activity substantially affects interstate commerce ... But it must be *activity* affecting commerce that is regulated” *NFIB* at 657–58 (Scalia, J., dissenting) (emphasis in original). “Simply because Congress may conclude that a particular activity substantially affects interstate commerce does not necessarily make it so.” *Lopez*, 514 U.S. at 557 n.2. “Whether particular operations affect interstate commerce sufficiently to come under the constitutional power of Congress to regulate them is ultimately a judicial rather than a legislative question, and can be settled finally only by this Court.” *Id.* And even “modern-era precedents which have expanded Congressional power under the Commerce Clause confirm that this power is subject to outer limits.” *Id.* at 556–57.

Under the Commerce Clause, Congress may only regulate activity that falls into one of three categories:

First, Congress may regulate the use of the channels of interstate commerce. Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce,

even though the threat may come only from intrastate activities. Finally, Congress’s commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce, *i.e.*, those activities that substantially affect interstate commerce. *12 *Id.* at 558–59 (citations omitted).

Although Congress “is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce, ... congressional findings ... enable us to evaluate the legislative judgment that the activity in question substantially affected interstate commerce” *Id.* at 562–63. *See also Carter, supra* (discussing the role that Congress’s findings and purposes play in courts’ determinations that Congress aimed an enactment at constitutionally permissible ends). Our “determination whether an intrastate activity is commercial or noncommercial may in some cases result in legal uncertainty.” *Lopez*, 514 U.S. at 566. “The Constitution mandates this uncertainty by withholding from Congress a plenary police power that would authorize enactment of every type of legislation.” *Id.*

Whether a rational link between the congressionally regulated activity and interstate commerce exists presents a pure question of constitutional law for the courts. In assessing that connection, we may not “pile inference upon inference in a manner that would ... convert Congressional Commerce Clause authority to a general police power of the sort held only by the States.” *Id.* at 549–50.

Moreover, “the Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States.” *New York v. United States*, 505 U.S. 144, 166, (1992). “The allocation of power contained in the Commerce Clause, for example, authorizes Congress to regulate interstate commerce directly; it does not authorize Congress to regulate state governments’ regulation of interstate commerce.” *Id.*

The Gustafsons contend that the **PLCAA** violates the Tenth Amendment and those principles of federalism, because it interferes with the authority of States to decide how to allocate lawmaking functions between their various branches of state government. *See* Gustafsons’ Brief at 34. Specifically, they claim that “the **PLCAA** bars states from imposing liability on negligent gun companies if states have chosen to have their judiciaries establish the relevant liability standards through common law (like Pennsylvania), while allowing identical claims if the states used their legislatures to establish the relevant liability standards.” *Id.* (citing 15 U.S.C. §§ 7903(5)(A)(iii)). However, Congress has “no permissible authority to infringe upon a State’s decision of which branch of

government it chooses to make law.” *Id.*

To support their claim, the Gustafsons rely upon *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Under *Erie R.R. Co.*, the Gustafsons argue that Congress may not disfavor the common law and, at the same time, prefer the enactments of state legislatures. In other words, whether States choose to regulate the negligence and product liability of the gun industry by common law or by statute is purely a state concern. The Gustafsons allege Congress unconstitutionally disfavored and extinguished the common law of torts in the States’ courts and impermissibly recodified it as federal law, solely for the gun industry.

*13 The Gun-Industry Defendants do not rebut the Gustafsons’ argument. Instead, they insist that “the PLCAA does not violate the Tenth Amendment and principles of federalism, because it does not involve ‘commandeering the powers of state executive officials or legislative processes in any manner.’ ” Gun Industry’s Brief at 43 (quoting Trial Court Opinion, 1/15/19, at 9-10). The Gun-Industry Defendants assert this Court must apply the statute under the Supremacy Clause,¹⁶ Congress did not “commandeer” the legislative and executive branches by passing the PLCAA.

This argument is a strawman; the Defendants do not answer the Gustafsons’ theory. The Gustafsons never alleged the PLCAA commandeers political branches. They asserted Congress usurped the States’ police powers embodied in the common law and the allocation of lawmaking authority between the branches of state government. Therefore, the Gun-Industry Defendants’ response misses its target.

Similarly, the Federal Government contends the PLCAA comports with the Tenth Amendment, because it is a valid exercise of the Commerce Clause power and does not commandeer a State’s political branches. It relies on *City of New York v. Beretta U.S.A. Corp. et al.*, 524 F.3d 384 (2d Cir. 2008), cert. denied, 556 U.S. 1104 (2009), where a 2-1 majority of the Second Circuit said, “the critical inquiry with respect to the Tenth Amendment is whether the PLCAA commandeers the States.” *Id.* at 7 (quoting *City of New York* at 396). The Second Circuit rooted this conclusion upon its prior holding that the PLCAA was a permissible exercise of Commerce Clause power. However, as we explain, we disagree with the *City of New York* Court’s analysis of the Commerce Clause; therefore, its Tenth Amendment analysis is unpersuasive.

Additionally, the Federal Government asserts that we should reject the Gustafsons’ Tenth Amendment argument

out of hand. It views their challenge as claiming that Congress violated the Constitution by what it elected not to do, rather than by what Congress did. It argues the Gustafsons “urge ... that Congress violated the Tenth Amendment by including an exception [in the PLCAA] for certain statutory claims.” *Id.* at 8. “That Congress did not extend the expectation to certain common-law claims has no bearing on the constitutional analysis.” *Id.* The Federal Government says that “[b]ecause the PLCAA fits squarely within Congress’s Commerce Clause authority, it cannot violate the Tenth Amendment unless it commandeers the States.” *Id.* at 9 (citing *City of New York*, *supra* (quoting *Connecticut v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002))).

The Federal Government claims Congress properly exercised Commerce Clause authority, because “Congress determined that, in enacting the PLCAA, the possibility of suits against gun manufacturers and sellers constituted an unreasonable burden on interstate and foreign commerce.” Federal Government’s Brief at 18 (quoting 15 U.S.C. § 7901(a)(6) (some punctuation omitted)). It offers no further rationale to connect the regulation of state-based lawsuits to interstate commerce.

Accepting the Federal Government’s assertion, the trial court cited *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009), and agreed with the Ninth Circuit “that it is entirely reasonable that the PLCAA would have a direct and immediate effect on the regulation of interstate and foreign commerce.” Trial Court’s Opinion, 1/15/19, at 14.¹⁷ The court concluded it was “reasonable for Congress to find that limiting liability in certain situations would directly affect and bolster interstate trade in firearms” *Id.* at 14-15. The trial court offered no further analysis to support this proposition.

*14 Additionally, the case upon which that court relied was not a Commerce Clause case. In *Ileto*, the plaintiffs did not challenge, and the Ninth Circuit did not consider, whether Congress had the authority to pass the PLCAA under the Commerce Clause. Instead, the plaintiffs in *Ileto* challenged the PLCAA under the Fifth Amendment, as applied retroactively to their pending lawsuit. See *Ileto*, 565 F.3d at 1141. Unlike *Ileto*, the Gustafsons’ instant challenge is not based on retroactivity under the Fifth Amendment. They bring a facial challenge that asserts the PLCAA falls outside Congress’s enumerated powers.

“When no enumerated power authorizes Congress to pass a certain law, that law may not be enacted, even if it would not violate *any of the express prohibitions in the Bill of Rights* or elsewhere in the Constitution.” *NFIB*, 567 U.S. 519 at 535 (emphasis added). In cases such as this, we do

not ask whether the law is rationally related to a legitimate governmental interest, as we would under the Fifth Amendment. Instead, we ask whether Congress had constitutional authority pass the bill *at all*.

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

The trial court erred by blindly accepting Congress’s own interpretation of its Commerce Clause authority. Merely because Congress titled this Act the Protection of Lawful Commerce in Arm Act does not necessarily mean that the statute regulates “commerce,” as a matter of constitutional law. *See, e.g., Lopez, supra* at 557 n.2. The trial court’s excessive deference granted Congress license to interpret the Constitution, *i.e.*, the power “to say what the law is.” *See Marbury*, 1 Cranch at 177. Congress has no such power. *Id.*; *see also* U.S. Constitution, Art. I, § 1.

In our constitutional system, only the courts may determine whether Congress has acted within the scope of its enumerated powers. In reviewing any statute, courts are “clothed by [the Constitution] with complete judicial power and, by the very nature of the power, required to ascertain and apply the law to the facts” and to “apply the [Constitution] and reject the inferior statute whenever the two conflict.” *Carter* 298 U.S. at 296-97 (some punctuation omitted). Deferring completely to Congress without probing its Commerce Clause assertion of power would be an abdication of judicial duty.

Instead of the Fifth Amendment analysis from *Ileto, supra*, upon which the trial court erroneously relied, the proper constitutional inquiry is whether Congress has the power to regulate state-based, tort lawsuits, filed in state courts, against the gun industry, under the Commerce Clause. The Federal Government offers no justification to support

Congress’s bald assertion that lawsuits against the gun industry substantially affect interstate and foreign commerce. And it cites only one decision¹⁸ analyzing the **PLCAA** under the Commerce Clause – *City of New York v. Beretta, supra*.

*15 In *City of New York*, the City, former-Mayor Michael Bloomberg, and others filed a lawsuit against numerous members of the gun industry in federal court. They sought an injunction based on public nuisance to abate harm resulting from the gun industry’s alleged negligent and reckless marketing and distribution practices. While the suit was before the district court, Congress passed the **PLCAA**, and the gun industry moved for immediate dismissal. The City opposed the motion, claiming that Exception (iii) to the definition of “qualified-civil-liability action” excluded the lawsuit from the **PLCAA**’s scope.¹⁹ Additionally, the City attacked the law’s constitutionality.

The district court refused to dismiss and certified an immediate appeal. The Second Circuit’s panel majority reversed. It concluded the **PLCAA** applied. On the constitutional question, the appellate court found the **PLCAA** was a valid exercise of Commerce Clause power and permissible under the Tenth Amendment.²⁰

The City contended the **PLCAA** regulated local activities outside of the three, permissible categories of Commerce Clause power. It relied on the Supreme Court decisions in *Lopez, supra* (declaring a federal law barring the possession of firearms in school zones unconstitutional, because Congress had regulated activity too-far removed from the stream of interstate commerce) and *Morrison, supra* (declaring the Violence Against Women Act, 42 U.S.C. § 13981, unconstitutional, because it criminalized local activity).

The Second Circuit disagreed. It held that the **PLCAA** fit into the third category of Commerce Clause regulation, due to the substantial economic affect that lawsuits might have on the gun industry. The court distinguished *Morrison* and *Lopez*, because it found a closer “connection between the regulated activity and interstate commerce under the [PLCAA]” than existed in the statutes in those cases. *City of New York*, 524 F.3d at 394. Because Congress only applied the **PLCAA** to a firearm or ammunition “*that has been shipped or transported in interstate or foreign commerce*,” the Second Circuit reasoned the **PLCAA** raises “no concerns about Congressional intrusion into truly local matters.” *Id.* (quoting 15 U.S.C. § 7903(4)) (emphasis by Second Circuit) (some quotation marks omitted). In other words, the Second Circuit opined that the **PLCAA**’s definition of a “qualified product” sufficiently limited the Act’s reach. *City of New York* concluded that

“there can be no question of the interstate character of the [gun] industry” and “Congress rationally perceived a substantial effect on *the industry*” *Id.* (emphasis added).

We find this reasoning erroneous. Whether a law regulates *an industry* engaged in interstate or foreign commerce is *not* one of the three categories of Congressional authority under the Commerce Clause. Whether a law regulates *private activity that substantially affects interstate commerce* is. *See Lopez, supra* at 558-59; *see also NFIB, supra*. Merely because a statute impacts an interstate industry, does not automatically mean that statute regulates activity substantially affecting interstate commerce. Thus, the analysis of *City of New York* (and the three state courts that followed it) is flawed.

*16 Instead, the constitutional rule that the Supreme Court of the United States announced seven years later in *NFIB, supra*, controls. There, five Justices rejected the Federal Government’s contention that regulating an industry of interstate character equates to regulating activity that substantially affects interstate commerce. The plaintiffs asked whether Congress had power under the Commerce Clause to mandate that individuals buy health insurance²¹ when Congress passed the Affordable Care Act (a.k.a., “Obamacare” or “the ACA”), 124 Stat. 119-1025.

The Federal Government defended the individual mandate in two ways. First, it claimed the mandate was a valid exercise of Commerce Clause power. Second, the Federal Government argued the mandate was also valid under Congress’s taxation power.²² “The individual mandate,” the Federal Government believed, was “within Congress’s [Commerce Clause] power, because the failure to purchase insurance has a substantial and deleterious effect on interstate commerce by creating a cost-shifting problem.” *NFIB*, 567 U.S. at 548-49.

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

However, Chief Justice Roberts explained that the Founders wrote the Commerce Clause under the presumption that “commerce” meant activity, not inactivity. Congress may regulate the former, but not the latter. In declaring the individual mandate an impermissible exercise of the Commerce Clause, the Chief

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

The Chief Justice observed that courts “have ‘always recognized that the power to regulate commerce, though broad indeed, has limits.’ ” *Id.* at 554 (quotation omitted). One such limit is that Congress may only regulate active conduct and that conduct must, at a minimum, constitute “existing commercial activity.” *Id.* at 552.

In a separate opinion, Justices Scalia, Kennedy, Thomas, and Alito agreed. They added, “If Congress can reach out and command even those furthest removed from an interstate market to participate in the market, then the Commerce Clause becomes a font of unlimited power, or, in Hamilton’s words, ‘the hideous monster whose devouring jaws spare neither sex nor age, nor high nor low, nor sacred nor profane.’ ” *Id.* at 652-53 (Scalia, J., dissenting) (quoting *The Federalist* No. 33, p. 202 (C. Rossiter ed. 1961)). Because the individual mandate regulated inactivity, those five Justices agreed that the Federal Government could not support the mandate under the Commerce Clause.²³ Through the individual mandate, Congress sought to command “those furthest removed from an interstate market to participate in the market” *Id.* It tried to force those who did not participate in the health-insurance market to serve as its financial supporters. Thus, the ACA unconstitutionally shifted the costs of health insurance from the industry onto persons who had not entered into a commercial transaction with it.

*17 Congress commits the same constitutional overreach in the *PLCAA*. The Act regulates the inactivity of individuals who may *never* have engaged in a commercial transaction with the gun industry. As this case demonstrates, the *PLCAA* reaches out and pulls J.R. Gustafson and his parents into the financial service of the gun market. It forces them to serve as financial sureties for the negligent acts and omissions of the industry by barring the Gustafsons from filing an otherwise valid lawsuit under the common law of Pennsylvania. Critically, neither J.R. nor his parents purchased the gun used to kill him, *i.e.*, they did not engage in commerce of *any* kind. Hence, there was no *existing* commercial activity between the Gustafsons and the gun industry at the time of J.R.’s death for Congress to regulate. Any relation between Josh Hudec’s gun and interstate commerce had clearly ended by the time Mr. Hudec brought it into his home for personal use. We hold that merely because, at some point in time, that gun passed through interstate commerce, does not give Congress perpetual authority to regulate any harm it may cause.

There is a beginning and an ending point to Congressional authority over activities that substantially affect interstate commerce. Eventually, interstate commerce must cease, because all commerce has ceased. “The federal regulatory power ceases when interstate commercial intercourse ends” *Carter*, 298 U.S. at 309. At that point, the activity surrounding the use or misuse of products reverts to a local matter, subject to state, not federal, regulation. This is especially true where, as here, the product kills someone who did not even purchase it.

The Federal Government believes Congress included a constitutionally sufficient limiting clause in the **PLCAA**, namely the definition of “qualified products” 15 U.S.C. § 7903(4). It asserts that this provision keeps the scope of the **PLCAA** within the bounds of the Commerce Clause. We disagree.

The quintessential example of a valid, limiting clause appears in the National Labor Relations Act (“NLRA”).²⁴ In the landmark case of *N.L.R.B. v. J&L Steel Corp.*, 301 U.S. 1 (1937), the Supreme Court ruled Congress properly enacted the NLRA under the Commerce Clause, because Congress limited the reach of the NLRA to only those activities that substantially affect interstate commerce.

That case involved labor activities at J&L Steel Corp.’s Aliquippa factory in Beaver County, Pennsylvania. The Aliquippa workers began unionizing. In response, J&L fired twelve members of the local union. The union filed charges with the National Labor Relations Board. J&L opposed the Board’s jurisdiction and claimed the NLRA was unconstitutional. The Board concluded the firings were unfair labor practices in violation of the NLRA and that those firings “affected commerce” as Congress had defined that term. It therefore asserted federal jurisdiction and ordered J&L to reinstate the workers with backpay and to stop interfering with unionization rights. The case eventually reached the Supreme Court.

The Court ruled that the NLRA and the Board’s assertion of jurisdiction were constitutional, because the NLRA empowered the Board to act only in cases where unfair labor practices are “*affecting commerce*.” 29 U.S.C. § 160(a) (emphasis added). The limiting phrase “affecting commerce” was critical to the statute’s constitutional success. Congress tailored that term to ensure that the NLRA only reached local activities truly impacting interstate commerce. In writing for the Majority, Chief Justice Hughes explained, the NLRA did not “impose collective bargaining upon all *industry* regardless of effects upon interstate or foreign commerce.” *J&L Steel Corp.*, 301 U.S. at 31 (emphasis added). Instead, the NLRA

covered *only activities* that “may be deemed to burden or obstruct that commerce and, thus qualified, it must be construed as contemplating the exercise of control within constitutional bounds.” *Id.* The Supreme Court agreed with the Board that the Aliquippa labor dispute closely and intimately connected to interstate commerce.

*18 “Although activities may be intrastate in character when separately considered, if they have such a close and substantial relation to interstate commerce that their control is essential or appropriate to protect that commerce from burdens and obstructions, Congress cannot be denied the power to exercise that control.” *Id.* at 37 (citing *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)). But the Court warned Congressional “power must be considered in the light of our dual system of government and may not be extended so as to embrace effects upon interstate commerce so indirect and remote that to embrace them, in view of our complex society, would effectually obliterate the distinction between what is national and what is local and create a completely centralized government.” *Id.* “The question is necessarily *one of degree*.” *Id.* (emphasis added).

Unlike the NLRA, the jurisdictional limitation clause of the **PLCAA** (*i.e.*, its “qualified product” definition) is not similarly restrictive. The definition reaches strictly local events unrelated to interstate commerce; it permits the **PLCAA** to adjust the common-law rights and remedies of tort victims who were not market participants with the gun industry. The **PLCAA** thereby immunizes the gun industry from any common-law liability that arises *anytime* after the firearm or ammunition has crossed state lines. This immunity attaches regardless of the degree to which the incidents resulting in liability affect interstate or foreign commerce. And neither Congress nor the Federal government has provided an explanation for how local crimes and local torts burden or obstruct interstate commerce.

Thus, whereas the NLRA is limited in scope to events actively affecting commerce, the **PLCAA** encompasses local activities involving *any* “firearm, including any antique firearm, or ammunition, or a component part of a firearm or ammunition that *has been shipped or transported* in interstate or foreign commerce,” forever. 15 U.S.C. § 7903(4) (emphasis added) (citations omitted). This so-called “jurisdictional limitation” is essentially no limitation at all. Once **PLCAA** immunity attaches to a qualified product under Section 7903(4), that immunity lasts *into perpetuity*, even if the product has ceased its transportation, injures someone who never entered any commercial transaction, and never again returns to interstate commerce. The assertion that

adequately restrains the reach of the **PLCAA** to events that substantially affect interstate commerce fails.

Contrary to Congress's assertion in 15 U.C.S. § 7901(6), the filing of a state lawsuit, in state court, based on state tort law, "is in no sense *an economic activity* that might, through repetition elsewhere, substantially affect any sort of interstate commerce." *Lopez*, 514 U.S. at 567 (emphasis added). Even though lawsuits cost money and may result in the exchange of money, that monetary exchange is *not* commerce. The money is not transactional. It is lawful compensation for the redress of grievances between citizens under the substantive laws and sovereign power of the States. Even where, as here, the lawsuit involves parties from different states, that lawsuit does not become interstate commerce. It is interstate litigation. When the Gustafsons filed this civil complaint in Westmoreland County, they engaged in no "commercial intercourse." *Gibbons*, 22 U.S. at 189-90. They petitioned this Commonwealth for the redress of grievances for the civil wrongs that the Gun-Industry Defendants allegedly perpetrated against their son. Although Congress may dictate the forum for interstate litigation,²⁵ it may not dictate a States' substantive law regarding such lawsuits.²⁶

*19 The **PLCAA** undoubtedly mandates the substantive law of tort lawsuits for the States. Thus, the Act is a Congressional tort-reform bill, a fact that the historical background of the Act and Congress's purposes for it reveal.

The gun industry lobbied Congress strongly for the **PLCAA**, because it faces inherent liability risks at common law. Guns "kill approximately 30,000 people annually and injure another 60,000 to 84,000." Crow, *Shooting Blanks: The Ineffectiveness of the Protection of Lawful Commerce in Arms Act*, 59 SMU L. Rev. 1813 (2006). "[E]very day in the United States, an average of more than one person is killed, and 45 more are injured, in unintentional shootings." Gustafsons' Complaint at 7. Moreover, the Federal Government's Center for Disease Control "found that the U.S. leads the industrialized world in rates of gun-related deaths among children, with unintentional fatal shootings of children 0 to 14 years of age occurring here at rates 11 times higher than in the other 25 industrialized nations studied." *Id.*

"The financial burden of [gun] violence, approximately \$20 billion per year, falls largely upon two groups: individuals who must care for their injured family members and cities that spend millions every year in an attempt to combat this violence." Crow, at 1813. Because many gun users "are often penniless," *id.*, in the 1980s and 90s, victims, cities, States, and even the Federal Government

began suing the gun industry for compensation and injunctions to alleviate the harm that their products caused. Those plaintiffs raised various common-law theories, such as negligent marketing, negligent supervision, ultra-hazardous activity, public nuisance, and design defect. *See* Lytton, *Suing the Gun Industry: A Battle at the Cross Roads of Gun Control & Mass Tort* at 5-15 (U. MI. Press 2005).

"The increased volume and success of lawsuits against the gun industry prompted firearms sellers and manufacturers to lobby Congress for a law protecting them from this onslaught of litigation." Crow, at 1813. Supporters of the **PLCAA** argued that plaintiffs were "misusing the tort system, seeking through litigation gun-control regulation that they [were] unable to achieve legislatively" Lytton, *supra*, at 152. The gun industry believed municipalities were filing "suits *en masse* in order to create overwhelming defense costs that [would] force the industry to settle, regardless of the legal merit of the claims against it." *Id.*

In advocating for the **PLCAA**, Senator Craig explained that, because of this increase in civil actions:

legal, law-abiding [gun] manufacturers have increasingly had to pay higher and higher legal costs to defend themselves in lawsuit after lawsuit that have, in almost every instance, been denied and thrown out of court by the judges when filed largely by municipalities who, obviously frustrated by gun violence in their communities, chose this route. Instead of insisting that their communities and prosecutors and law enforcement go after the criminal element, they, in large part, in their frustration, looked for an easy way out. That has brought this legislation to the floor to limit the ability of junk or abusive kinds of lawsuits in a very narrow and defined way, but in no way — and I have said it very clearly — denying the recognition that if a gun dealer or a manufacturer acted in an illegal *or irresponsible way or produced a product that was faulty and caused harm or damage, this bill would not preempt or in any way protect them or immune them from the appropriate and necessary legal sentence.*

*20 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig) (emphasis added).

But Senator Craig's promise has proved illusory. As *Ryan*, *Adames*, and the Gustafsons' case show, **PLCAA** immunity is not "very narrow." *Id.* The Act immunizes the gun industry from every conceivable type of joint and comparable liability known to the common law. In fact, the statute protects gun manufacturers and sellers who, like these Gun-Industry Defendants, allegedly acted in an "irresponsible way or produced a product that was faulty and caused harm or damage." *Id.*

As Senator Craig admitted, the **PLCAA** is federal, tort-reform legislation. “The Wall Street Journal ... put it very clearly as to the reality of [the **PLCAA**,] recognizing that *tort reform* is necessary.” *Id.* (emphasis added). In the next breath, he acknowledged the elephant in the Senate Chamber – Congressional tort reform is not constitutional. “Congress can’t do it in sweeping ways, [so] we have chosen targeted ways to get at the misuse of our court system in large part by the trial bar.” *Id.*

The Senator’s recognition that the **PLCAA** is tort reform comports with Congress’s findings and purposes for the Act. Congress sought to eliminate the ability of a “*maverick* judicial officer or petit jury [to] expand civil liability [for the gun industry] in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States.” 15 U.S.C. § 7901(a)(7) (emphasis added). But state legislation on the subject undercuts upon Congress’s finding that state legislatures uniformly opposed gun-industry liability. If they were, Congress would not have needed to pass the **PLCAA**; the state legislatures could have enacted it themselves. And the gun industry previously attempted that route with mixed results.

“In response to the wave of lawsuits against the gun industry, the [National Rifle Association] launched a nationwide lobbying campaign in *state legislatures* and Congress to secure statutory immunity for the industry.” Lytton, *supra* at 166 (emphasis added). Despite nationwide lobbying, only 32 States passed immunity legislation. *See id.* Furthermore, those 32 States did not enact model statutes. Thus, gun-industry immunity from the common law varied widely in scope. *See id.* Some state legislatures, like the General Assembly of Pennsylvania,²¹ only prohibited municipalities from suing the gun industry. Others granted **PLCAA**-like “blanket immunity from suit with narrow exceptions for guns that malfunction (for example, guns that backfire) and breach of contract” *Id.* Still others jurisdictions took the opposite course. Three years prior to the **PLCAA**, “the California legislature *repealed* a provision of [its] Civil Code granting immunity to the gun industry against product-liability claims” *Id.* at 170 (emphasis added). And the District of Columbia “imposed absolute liability on [gun] manufacturers for any injury caused by certain weapons.” Federal Government’s Brief at 3 (citing D.C. Code Ann. § 7-2551.02 (rev. 1994)).

^{*21} When it comes to holding the gun industry civilly liable, “Americans have never been of one mind” *Murphy v. National Collegiate Athletic Association, Inc.*, 584 U.S. —, —, 138 S. Ct. 1461, 1468, (2018). Despite widespread disagreement among state legislatures,

Congress gave the gun industry what it could not achieve State by State – a nationwide moratorium on common-law, joint-and-comparative-liability claims. Congress pronounced such lawsuits to be “based on theories without foundation in hundreds of years of the common law and jurisprudence of the United States that [did] not represent a *bona fide* expansion of the *common law*.” 15 U.S.C. § 7901(a)(7) (emphasis added). It called the litigation “an abuse of the legal system [that] constitute[d] an unreasonable burden on interstate and foreign commerce of the United States.” 15 U.S.C. § 7901(a)(6).

Even if forbidding States’ judiciaries from developing and applying their own common laws were within Congress’s grasp, distrust of novel theories of liability does not explain why Congress extinguished the public nuisance, negligence, or product-liability claims upon which most pre-**PLCAA** plaintiffs founded their lawsuits. Such causes of action had existed for centuries.²² Yet, the **PLCAA** extinguished these historically rooted causes of action in the name of blocking unprecedented developments in the common law of torts.

^{*22} Congress’s use of the language of torts throughout the **PLCAA** serves as additional proof that the Act is tort reform. For instance, product-defect claims require that the product be “used as intended or in a *reasonably foreseeable manner*” 15 U.S.C. § 7903(5)(A)(v) (emphasis added). Furthermore, a crime “shall be considered the sole *proximate cause* of any resulting” damages. *Id.* (emphasis added). Congress did not define “reasonably foreseeable manner” or “proximate cause,” likely because it did not need to do so. Such terms are the lingo of torts.

Phrases like “sole proximate cause,” amend the substantive common law of torts. In Pennsylvania, for instance, proximate cause is critical to maintain a tort action. A defendant’s conduct “is a proximate cause of the plaintiff’s harm where the conduct was a substantial factor in bringing about the harm inflicted upon a plaintiff.” *Straw v. Fair*, 187 A.3d at 993. The Supreme Court of Pennsylvania has explained that proximate cause expresses this Commonwealth’s “policy related to social and economic considerations.” *Vattimo v. Lower Bucks Hosp., Inc.*, 465 A.2d 1231, 1233 (Pa. 1983). It is a legal question of whether Pennsylvania “will extend the responsibility for the conduct to the consequences which have in fact occurred.” *Id.* (quoting Prosser, The Law of Torts § 42 (4th Ed.) (emphasis removed)).

By declaring that an individual’s criminal act “shall be considered the sole proximate cause of any resulting death, personal injuries, or property damage,”

7903(5)(A)(v), Congress commands where the States must draw the line of liability. The **PLCAA** thereby reforms the law of torts and converts it from state to federal law. The Act replaces the local policy decisions of the Supreme Court of Pennsylvania and other state supreme courts regarding local torts with Congress's policy preferences on local issues.

Furthermore, Senator Craig's logic regarding the **PLCAA**, if taken to its rational ends, would permit Congress's total assumption of police power. He stated that gun-industry members "have increasingly had to pay higher and higher legal costs to defend themselves in lawsuit after lawsuit ..." 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig) (emphasis added). This is irrelevant under the Commerce Clause.

Litigation costs money for nearly everyone who must appear in a court or administrative proceeding, not just the gun industry.²⁹ Indeed, if we accept the theory that this lawsuit (or lawsuits in the aggregate) affect interstate commerce, simply because litigation costs money, then **every case** in state court – including criminal prosecutions, property disputes, and family law matters – would instantly fall under Congressional control. We are unable and unwilling to surrender the whole body of Pennsylvania law and sovereignty to Congress on such weak grounds. Under Congress's lawsuits-cost-money theory, it would also seem that Congress could simply regulate the practice of law directly, a power traditionally reserved to the supreme courts of each State. Hence, if allowed to play out fully, Senator Craig's reasoning would render States' judiciaries mere administrative law judges for Congress. Under his view of the Commerce Clause, it "is as if federal officers were installed in" the filing offices of every state courthouse "and were armed with the authority to stop" any lawsuit Congress disfavored. *Murphy*, 138 S. Ct. at 1478. "A more direct affront to state sovereignty is not easy to imagine." *Id.*

*23 And Congress's concern with prohibiting frivolous lawsuits makes no sense when, as Senator Craig observed, the state judiciaries barred meritless suits under their respective tort laws **prior to** the **PLCAA**. He said, "in almost every instance, [suits against the gun industry have] been denied and thrown out of court **by the judges** when filed largely by municipalities who, obviously frustrated by gun violence in their communities, chose this route." 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig) (emphasis added). Who then were these "**maverick** judicial officers and petit juries" of which Congress spoke? 15 U.S.C. § 7901(7) (emphasis added). Even if the common law of a State exceeded the bounds tolerable to the citizens of that State, the gun industry's recourse was either the

legislature of that State or to the People of that State, not Congress.

As noted, the gun industry attempted that route with varying success. *See Lytton, supra*. Some legislatures, such as our General Assembly, barred state courthouse doors to lawsuits by municipalities. But, the refusal of most legislatures to immunize gun industry as fully as it wished "brought [the **PLCAA**] to the [Congress] floor" 151 Cong. Rec. S9,218 (daily ed. July 28, 2005) (Sen. Craig). Through the **PLCAA**, Congress irrationally believed "that, if a gun dealer or a manufacturer acted in an illegal or irresponsible way or produced a product that was faulty and caused harm or damage, [the **PLCAA**] would not preempt or in any way protect them or immune them from the appropriate and necessary legal sentence." *Id.* The **PLCAA** does precisely that and regulates the rights and liability of passive individuals such as J.R. Gustafson and his parents.

We therefore disagree with the trial court and the Second Circuit's view that the **PLCAA** falls within one of the three categories of constitutional Commerce Clause legislation. Congress did not rationally link the **PLCAA** to any burden upon interstate commerce that the Constitution recognizes. In fact, the **PLCAA** greatly resembles the Gun-Free School Zone Act of 1990, which the Supreme Court of the United States declared unconstitutional. In that statute, Congress attempted to criminalize the local conduct of possessing a gun near a school. Congress and the Federal Government rationalized the statute under the Commerce Clause, because they believed that guns near schools would negatively impact education, and therefore the quality of the future workforce, and therefore interstate commerce.

In *Lopez, supra*, a criminal defendant, whom the Federal Government charged with violating the statute, challenged his conviction on constitutional grounds. He claimed Congress lacked the power to enact the law. The High Court found the statute unsustainable under the Commerce Clause, because there was "no indication that [Lopez], who merely possessed a gun near a school, had **recently** moved in interstate commerce, and there [was] no requirement that his possession of the firearm have any **concrete tie** to interstate commerce." *Id.* (emphasis added).

The **PLCAA**, just like the Gun-Free School Zones Act, is unsustainable; it grants the gun industry immunity regardless of how far removed from interstate commerce the harm arises. Congress's attempted exercise of its Commerce Clause power in the **PLCAA**, without a recent or concrete tie to interstate commerce, puts every victim of a crime or tort within the reach of Congressional regulation. Every state criminal prosecution and civil action impacts a

defendant's finances and, potentially, insurance rates. And casualty insurance is an industry operating in interstate commerce, as are criminal and civil defense law firms. However, imposing state-court judgments and executing those judgments are not commercial activities; they are the manifestation of the States' inherent police power to execute, uphold, and enforce their laws.

*24 Ignoring this simple truth, the Federal Government would instead have us "pile inference upon inference in a manner that would ... require us to conclude that the Constitution's enumeration of powers does not presuppose something not enumerated, and that there never will be a distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567–68. Like the Supreme Court in *Lopez*, "This we are unwilling to do." *Id.* at 568.

We instead conclude the trial court erred in finding Congress legislated rationally when Congress asserted that the *PLCAA* regulates interstate commerce. The Act regulates litigation. Any impact that litigation might have upon interstate commerce, constitutionally speaking, is too remote to displace State sovereignty over the local torts and the local crimes at issue in those lawsuits.

Having rejected the Federal Government's Commerce Clause argument, we return to the Gustafsons claim that the Act violates the Tenth Amendment. It does.

In *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, the Supreme Court of the United States said, "Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or 'general,' be they commercial law or a part of the law of torts." *Erie R.R. Co.*, 304 U.S. at 78 (emphasis added). The Federal Government contends that the Gustafsons' invocation of *Erie R.R.* "is wholly out of place." Federal Government's Brief at 13 n.3. It believes "That case, which stands for the proposition that 'there is no federal general common law,' does not concern the Tenth Amendment." *Id.* (quoting *Erie R.R. Co.* at 78). The Federal Government grasps at straws.

While the High Court did not name the Tenth Amendment in *Erie R.R.*, no one seriously doubts that the case is constitutional jurisprudence and that it divides power between the States and Federal Government. *Erie R.R.* has *blatant* Tenth Amendment implications; the case speaks in Tenth Amendment language. "[T]here stands, as a perpetual protest against [a federal law of torts], the Constitution of the United States, which recognizes and preserves the autonomy and independence of the States – independence in their legislative and independence in their judicial departments." *Erie R.R. Co.* at 78-79 (quoting *Baltimore & Ohio R.R. Co. v. Baugh*, 149 U.S. 368 at 401

(1893) (Field, J., dissenting)). "Supervision over either the legislative or the judicial action of the States is in no case permissible except as to matters by the Constitution specifically authorized or delegated to the United States. Any interference with either, except as thus permitted, is an invasion of the authority of the States" *Id.* at 79 (emphasis added).

The declaration that "there is no federal general common law," was the holding in *Erie R.R.*, as the Federal Government observes. But the Supreme Court built that holding upon the constitutional premise at the heart of the Gustafsons' challenge – namely, that common law (and tort law, in particular) is state law. Therefore, Congress may not nationalize tort law, as it did under the *PLCAA*. We have no federal common law, because, (1) "Congress has no power to declare substantive rules of common law" and (2) "no clause in the Constitution purports to confer such a power upon the federal courts." *Id.*

Thus, rather than the Gustafsons' reliance upon *Erie R.R.* being "wholly out of place," Federal Government's Brief at 13 n.3, it is spot-on. Congress had "no power" to pass the *PLCAA*, because, as our above review of the statute has revealed, the *PLCAA* is tort reform. By defining a "qualified-civil-liability action," Congress pronounced substantive rules of common law and therefore exercised a police power reserved for the several States under the Tenth Amendment.

*25 The Federal Government's claim that the *PLCAA* does not rewrite the common law for the gun industry, while convenient for its current defensive purposes, inaccurately portrays the Act's practical application. Its exceptions to the definition of "qualified-civil-liability action" only allow lawsuits based on state or federal statutes. As our review of the Act reveals, Congress abolished the common law dating back centuries for the gun industry. Thus, we agree with the Gustafsons' Tenth Amendment claim. Congress aimed the *PLCAA*-tort-reform bill directly at the common law and expressly disapproved such causes of action while favoring the statutes of state legislatures and its own.

We are compelled to hold that the definition of "qualified-civil-liability action," 15 U.S.C. § 7093(5), is unconstitutional under the Tenth Amendment and without the force or effect of law.

Also, Section 7902(a) of the *PLCAA* provides that a "qualified civil-liability action may not be brought in any federal or state court." Because the definition of a "qualified-civil-liability action" is without the force or effect of law, 15 U.S.C. § 7902(a) has no teeth. Nothing is

a “qualified-civil-liability action” under the **PLCAA**. The Act’s operable section is therefore equally without the force or effect of law.

Section 7902(b), which directs courts to dismiss any “qualified-civil-liability action,” also violates the Tenth Amendment in its own right. To enact a valid statute, Congress must direct the regulation at the activities of private citizens. *See NFIB, supra*, and *Murphy v. NCAA, supra*. The Federal Government argues **Section 7902** is viable, because it regulates the supposedly “private conduct” of the Gustafsons filing of a complaint, under the Pennsylvania Rules of Civil Procedure, in the public records of the publicly elected Prothonotary of Westmoreland County. In the Federal Government’s view, such civil filings, in the aggregate, take a substantial toll on the gun industry, an industry that ships goods in interstate and foreign commerce.

If we accept the Federal Government’s theory that filing a state action, in a state court, is within Congress’s reach, then the 50 States must forfeit all their sovereignty to the Federal Government. If given enough latitude to pile inference upon inference upon inference, Congress could eventually connect any state-court proceeding to some impact upon one party’s finances and therefore interstate commerce. We would thereby poise Congress to consume everything the Tenth Amendment reserves to the States.

For example, in Pennsylvania, every adoption proceeding begins by filing a petition with the Clerk of the Orphan’s Court. Every divorce and custody case begins with a filing in the Office of the Prothonotary. The same is true of every property and contract dispute. And, of course, as this case shows, actions based in tort begin with a complaint filed with the Prothonotary. Every state statute and common law is worthwhile, because citizens can file public complaints and public petitions alleging violations of those laws in a trial court or administrative agency. If Congress can declare, as it did in **Section 7901** of the **PLCAA**, that filing a petition or complaint in a state court to vindicate state rights substantially burdens interstate commerce, then what remains for the States to govern under the Tenth Amendment?

Reforming the judicial systems of the States from top to bottom in such a manner goes far afield from the enumerated, limited powers of Congress. This is definitely *not* the vision that Hamilton, Madison, and the other Founders had in mind when they authored the Constitution. The Federal Government’s claim that filing a state lawsuit, based on a state tort, which arose within the boundaries of that state, is private conduct rising to the level of interstate commerce must fail. The Commerce Clause simply does

not stretch that far, and the Tenth Amendment forbids it.

B. The Second/Fourteenth Amendments & Severability

*26 Having addressed the issues that the parties argued and that the trial court ruled upon, we recall that this Court “may affirm the trial court’s order on any valid basis.” *Plasticert, Inc. v. Westfield Ins. Co.*, 923 A.2d 489, 492 (Pa. Super. 2007). Even though the Federal Government and the Gun-Industry Defendants have not asserted an alternative basis for affirmation, Congress claimed it could pass the **PLCAA** under the Fourteenth Amendment to enforce the Second Amendment. *See 15 U.S.C. § 7901(b)*. It could not.

The Second Amendment safeguards “the right of *the people* to keep and bear Arms” U.S. Const. amnd. II. (emphasis added). When Madison wrote those words, he vested the right in “the people,” not in associations, firms, partnerships, corporations, other entities, or – in the all-encompassing language of the Fourteenth Amendment – “persons.”³⁰ The distinction between “people” (*i.e.*, real, living, and breathing humans from whom all sovereignty and consent to governance spring) and “persons” (a term of art that includes legal fictions, such as business entities) is crucial in constitutional law. *See Santa Clara Cty. v. S. Pac. R. Co.*, 118 U.S. 394, (Syllabus of Slip Opinion) (1886) (applying the Fourteenth Amendment to corporate defendants based upon the word “person” in that amendment).

Three years after Congress passed the **PLCAA**, Justice Scalia explained in *District of Columbia v. Heller*, 554 U.S. 570 (2008), what “the people” in the Second Amendment means. “People” refers to “*a class of persons* who are part of a national community or who have otherwise developed sufficient connection with this country,” that is, “all Americans.” *Id.* at 581. While these Defendants are American corporations, they are not “Americans” as *Heller* used that term. *Heller* referred to the American People. The Gun-Industry Defendants are “persons” but not “people.” Accordingly, they have no Second Amendment rights.

Also, “Like most rights, the right secured by the Second Amendment is not unlimited.” *Id.* at 626; *see also id.* at 627 n. 26. The right to keep and bear arms does not include a right to make and sell defective arms or ammunition, to engage in negligent design or marketing, to fail to warn consumers or end users of latent dangers within a product, or to otherwise inflict public nuisance within the several States. There is no constitutional right to negligently or defectively manufacture or sell firearms or ammunition.

Nor is there a right to make or sell them in conditions that are less safe than an alternative design, any more than there is a constitutional right to manufacturer or sell, say, a Ford Pinto with an exploding gas tank. The **PLCAA** does not survive on this alternative basis.

Finally, having determined that **Section 7902** and the definitions of “qualified-civil-liability action” and “qualified product” in **Section 7903** of the **PLCAA** are unconstitutional, we reach the question of severability. If Congress would not have enacted a statute’s constitutional provisions without its unconstitutional terms, then the constitutional provisions are not severable; the entire statute must be declared unconstitutional. *See Seila Law LLC v. C.F.P.B.*, 591 U.S. —, —, 140 S. Ct. 2183, 2209 (2020) (quoting *Free Enterprise Fund v. Public Company Accounting Oversight Board*, 561 U.S. 477, 508, (2010)).

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

Hence, the trial court erred by holding that the **PLCAA** is constitutional and by sustaining the Gun-Industry Defendants’ preliminary objections to the complaint.

In sum, the constitutional safeguards that override the

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

Order reversed. Case remanded for further proceedings consistent with this Opinion and for entry of a declaratory judgment in favor of the Gustafsons and against Springfield, Inc., Saloom Department Store, LLC, and the United States of America, declaring that the **Protection of Lawful Commerce in Arms Act**, 15 U.S.C. §§ 7901-7903, is repugnant to the Constitution of the United States and, therefore, without the force or effect of law.

Jurisdiction relinquished.

All Citations

--- A.3d ---, 2020 WL 5755493, 2020 PA Super 239

Footnotes

- 1 We take these facts from the Gustafsons’ complaint, because the trial court sustained the defendants’ preliminary objections in the nature of a demurrer. Hence, we must accept the Gustafsons’ factual allegations as true for purposes of this appeal. *See Mazur v. Trinity Area Sch. Dist.*, 961 A.2d 96 (Pa. 2008). The complaint does not indicate what role, if any, Mr. Hudec played in these events or whether he was at home when they occurred.
- 2 18 Pa.C.S.A. § 2504(a).
- 3 Springfield Armory, which made the gun, has its principal place of business and incorporation in Illinois. Springfield Armory did not contest the trial court’s *in personam* jurisdiction. Saloom Department Store, the Pennsylvania corporation that sold the handgun, operates in Westmoreland County. All parties agree they are a “Manufacturer” and a “Seller” as Congress defined those terms in the **PLCAA**.
- 4 The Gun-Industry Defendants’ assertion of immunity was premature, and they erroneously raised it as a preliminary objection. The Pennsylvania Rules of Civil Procedure require defendants to raise affirmative defenses, such as immunity from a lawsuit, as new matter in their answer to a complaint. *See Pa.R.C.P. 1030(a)*. However, because the Gustafsons did not file a preliminary objection to the Gun-Industry Defendants’ preliminary objections in the nature of a demurrer, they waived any objection to the Defendants’ procedural error. Thus, the issues of **PLCAA** immunity and the Act’s constitutionality are properly before us in this appeal.

5 U.S. Const. art. I, § 8, cl. 3.

6 We find the logic of the Supreme Court of Alaska in *Kim* unpersuasive. That court erroneously believed that allowing claims for ordinary negligence (or any other cause of action based in negligence) would render the PLCAA's exception for claims of negligence *per se* and negligent entrustment surplusage. That court and the trial court misunderstood the PLCAA's goal, which is to protect only those members of the gun industry who obey state or federal statutes from common-law liability. As we will explain below, Congress passed the PLCAA to immunize what they considered to be *law-abiding* members of the industry — in Congress's mind, those who follow federal and state statutes.

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

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

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

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

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

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

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

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

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

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

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

16 See U.S. Const. art. VI, cl. 2.

17 The trial court also mentioned the Second Amendment in an attempt to bolster its Commerce Clause theory. Despite the Federal Government's suggestion, the Second Amendment was not an independent basis for the trial court's decision. See Federal Government's Brief at 18 n.5. The trial court did not independently analyze the Second and Fourteenth Amendments. Further, the Federal Government does not argue that the PLCAA may be upheld under those Amendments, which we discuss in detail below.

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

19 As we indicated above, Exception (iii) to the PLCAA permits actions based on "a state or federal statute applicable to the sale or marketing of the product." 15 U.S.C. § 7903(5)(A)(iii). The plaintiffs argued that because New York Penal Law statutorily criminalizes public nuisances, the statute met the exception to immunity. N.Y. Penal Law § 240.45.

20 The dissent believed the majority should not address the constitutional issues. Rather, they should have transferred the case to the Court of Appeals of New York to interpret the New York statute.

21 See 26 U.S.C. § 5000A.

22 See U.S. Const. art. I, § 8, cl. 1. The United States Court of Appeals for the Fifth Circuit recently declared the taxation argument constitutionally deficient, because Congress reduced the tax to \$0. *Texas v. United States*, 945 F.3d 355 (5th Cir. 2019), as revised (Jan. 9, 2020), cert. granted sub nom. *California v. Texas*, — U.S. —, 140 S. Ct. 1262, (2020), and cert. granted sub nom. *Texas v. California*, — U.S. —, 140 S. Ct. 1262, (2020).

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

24 29 U.S.C. §§ 151-168.

25 See 28 U.S.C. § 1332.

26 See *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). We discuss the *Erie R.R. Co.* in detail below.

27 See 18 Pa.C.S.A. § 6120(a.1).

28 For example, this Commonwealth recognized claims for "a public nuisance" prior to the Civil War. *Lancaster Tpk. Co. v. Rogers*, 2 Pa. 114, 115 (1845) (applying Blackstone, Commentaries on the Laws of England, Vol. 3 § 215). Likewise, claims for bodily injury arising from negligence are not new. See, e.g., *Allen v. Willard*, 57 Pa. 374 (1868); *Monongahela City v. Fisher*, 2 A. 87 (Pa. 1886). And the "youngest" of these torts, strict liability for defective products, existed in Pennsylvania for 39 years before the PLCAA. See *Webb v. Zern*, 220 A.2d 853 (Pa. 1966). Other States had recognized that tort for nearly a century. Eg., *MacPherson v. Buick*, 111 N.E. 1050 (NY 1916) (imposing product liability upon the auto industry). Since 1916, Congress has not attempted to supplant product liability for the auto industry. As the Federal Government explains on one of its websites:

Congress [created] the National Highway Traffic Safety Administration (NHTSA), which has the power to promulgate safety standards for automobiles... including those that require seat belts, air bags, and conspicuous brake lights. Importantly, these

are seen as *minimum* safety standards, establishing a floor but not a ceiling for vehicle safety.

In fact, motor vehicle manufacturers routinely provide greater safety than the standards require. The threat of lawsuits provides one incentive for manufacturers to exceed safety standards. For example, before air bags were required, numerous lawsuits were filed by people injured in crashes of cars without air bags. Plaintiffs argued that their injuries would have been less severe had the car been equipped with air bags...

Some have criticized the traditional liability system, exemplified by motor vehicles and many other products, as unfair to manufacturers and costly for consumers... Since the 1960s, however, there has been an impressive reduction in the number of deaths from motor vehicle crashes in the United States. From 1966 to 2004, the rate of such deaths per million miles traveled declined by 74%.

Vernick, Rutkow, & Salmon, *Availability of Litigation as a Public Health Tool for Firearm Injury Prevention: Comparison of Guns, Vaccines, and Motor Vehicle*, 97 Am. J. Public Health 1991, 1997 (2007), United States Department of Health and Human Services (National Institute of Health) available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2040374/> (last visited July 16, 2020) (emphasis in original). Congress never explains why the honest car dealer, whose goods are *not intended* to inflict harm on anyone or anything, faces stiffer regulations than an industry that produces weapons.

29 The only exception to the filing fees are *pro se* litigants who proceed *in forma pauperis*, but this is a very small percentage of all civil actions. We also recognize that indigent criminal defendants have a right to free legal representation. Perhaps those classes of cases would remain beyond the reach of Congressional legislation under Senator Craig's theory, because the litigants cannot afford to hire attorneys.

30 The Fourteenth Amendment provides, in relevant parts, that no State shall "deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws" and "Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. Const. amnd. XIV.

From: [Richard Martin](#)
To: [Sabrina Donovan](#); [Dardene Faris](#)
Subject: FW: Information Request from House Judiciary Committee: PACER Costs
Date: Thursday, October 8, 2020 8:23:00 AM
Attachments: [image001.png](#)
[image002.png](#)
[6872687027103727616.pdf](#)
[BGOV- U.S. Court Records Would Be Free Under House Judiciary Bill.pdf](#)

See below. Any idea how much we spend each year on PACER?

From: Ryan Greenstein <rgreenstein@naag.org>
Sent: Wednesday, October 7, 2020 4:45 PM
To: Ryan Greenstein <rgreenstein@naag.org>
Subject: Information Request from House Judiciary Committee: PACER Costs

This is being sent to all Chief Deputies/Chiefs of Staff:

NAAG received the below request from the House Judiciary Committee. The committee is considering H.R. 8235 Open Courts Act of 2020, a bipartisan bill introduced by Rep. Doug Collins (R) and Rep. Hank Johnson (D), that would gradually make the Public Access to Court Electronic Records (PACER) system free to the public while also requiring several functionality and accessibility improvements to the system. Attached is the bill text and a brief Bloomberg Law article on the bill.

If available, the committee staff are requesting information on how much each attorney general office spends annually on PACER. If your office is able to share that information, please email it to Ryan Greenstein at rgreenstein@naag.org by October 14th.

NAAG has not taken a stance on the bill.

Ryan Greenstein
Legislative Director and
Special Assistant to the Executive Director

National Association of Attorneys General
1850 M Street NW, 12th Floor
Washington, DC 20036
202.326.6262
rgreenstein@naag.org
www.naag.org



Sent: Wednesday, October 7, 2020 9:48 AM
Subject: PACER

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello –

I'm a counsel on the majority side of the House Judiciary Committee; I wonder if you could help me run something down. The committee marked up a bill to make PACER* free, and I'm trying to get a better sense of the cost savings, as I understand that some state AGs are major PACER users. Do you think you could help me find out how much NAAG members spend on PACER each year?

Thanks,

Matt

Matt Robinson

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives



AMERICAN
OVERSIGHT



AMERICAN
OVERSIGHT

116TH CONGRESS
2D SESSION

H. R. 8235

To provide for the modernization of electronic case management systems,
and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

SEPTEMBER 14, 2020

Mr. JOHNSON of Georgia (for himself and Mr. COLLINS of Georgia) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide for the modernization of electronic case
management systems, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Open Courts Act of
5 2020”.

6 **SEC. 2. MODERNIZATION OF ELECTRONIC COURT RECORDS**
7 **SYSTEMS.**

8 (a) CONSOLIDATION.—Not later than the date speci-
9 fied in subsection (e), the Director of the Administrative
10 Office of the United States Courts, in coordination with

1 the Administrator of General Services, shall establish,
2 maintain, and operate, consistent with the requirements
3 of this section and section 3, one system for all public
4 court records.

5 (b) REQUIREMENTS OF SYSTEM.—The system devel-
6 oped under subsection (a) shall comply with the following
7 requirements:

8 (1) The system shall provide search functions,
9 developed in coordination with the Administrator of
10 General Services, for use by the public and by par-
11 ties before the court.

12 (2) Any information that is prohibited from
13 public disclosure by law or court order shall be re-
14 dacted.

15 (3) Any information made available through a
16 website established pursuant to section 205 of the
17 E–Government Act of 2002 shall be included in the
18 system.

19 (4) Any website for the system shall substan-
20 tially comply with the requirements under sub-
21 sections (b) and (c) of section 205 of the E–Govern-
22 ment Act of 2002.

23 (5) To the extent practicable, external websites
24 shall be able to link to documents on the system.
25 Each website established pursuant to section 205 of

1 the E–Government Act of 2002 shall contain a link
2 to the system.

3 (c) DATA STANDARDS.—

4 (1) ESTABLISHMENT OF DATA STANDARDS.—

5 The Director of the Administrative Office of the
6 United States Courts, in coordination with the Ad-
7 ministrator of General Services and the Archivist of
8 the United States, shall establish data standards for
9 the system established under subsection (a).

10 (2) REQUIREMENTS.—The data standards es-
11 tablished under paragraph (1) shall, to the extent
12 reasonable and practicable—

13 (A) incorporate widely accepted common
14 data elements;

15 (B) incorporate a widely accepted, non-
16 proprietary, full text searchable, platform-inde-
17 pendent computer-readable format; and

18 (C) be capable of being continually up-
19 graded as necessary.

20 (3) DEADLINES.—Not later than 6 months
21 after the date of enactment of this Act, the Director
22 of the Administrative Office of the United States
23 Courts shall issue guidance to all Federal courts on
24 the data standards established under this section.

1 (d) USE OF TECHNOLOGY.—In developing the system
2 under subsection (a), the Director shall use modern tech-
3 nology in order—

4 (1) to improve security, data accessibility, af-
5 fordability, and performance; and

6 (2) to minimize the burden on pro se litigants.

7 (e) DATE SPECIFIED.—The date specified in this
8 subsection is the date that is 2 years after the date of
9 the enactment of this Act, unless the Administrator of
10 General Services certifies to Congress, by not later than
11 90 days after such date of enactment, that an additional
12 period of time is required. If the Administrator so cer-
13 tifies, the date specified in this subsection is the date that
14 is 3 years after the date of enactment of this Act.

15 (f) FUNDS FOR ESTABLISHMENT, OPERATION, AND
16 MAINTENANCE OF MODERNIZED COURT RECORDS SYS-
17 TEM.—

18 (1) SHORT TERM ACCESS FEES TO FUND ES-
19 TABLISHMENT OF MODERNIZED COURT RECORDS
20 SYSTEM.—

21 (A) IN GENERAL.—Section 303 of the Ju-
22 diciary Appropriations Act, 1992 (title III of
23 Public Law 102–140; 105 Stat. 807) (28
24 U.S.C. 1913 note) is amended—

1 (i) in subsection (a), by inserting
2 “The Judicial Conference shall prescribe a
3 schedule of additional fees for any person
4 who accrues such fees for access in an
5 amount of \$25,000 or greater in any quar-
6 ter. All fees collected shall be deposited as
7 offsetting collections to the Judiciary In-
8 formation Technology Fund pursuant to
9 section 612(c)(1)(A) of title 28, United
10 States Code, to reimburse expenses in-
11 curred in carrying out section 2 of the
12 Open Courts Act of 2020.” before “The
13 Director of the Administrative Office of
14 the United States Courts”; and

15 (ii) in subsection (b), by striking “All
16 fees hereafter” and inserting “Except as
17 otherwise provided in this section, all fees
18 hereafter”.

19 (B) EXCESS FEES.—Amounts deposited in
20 the Judiciary Information Technology Fund
21 pursuant to the amendments made by subpara-
22 graph (A) and not used to reimburse expenses
23 incurred in carrying out section 2 of this Act
24 may be used pursuant to section 612(a) of title
25 28, United States Code.

1 (C) EFFECTIVE DATE.—The amendment
2 made by subparagraph (A) shall take effect on
3 the date of enactment of this Act.

4 (2) FILING FEES TO FUND OPERATION AND
5 MAINTENANCE OF MODERNIZED COURT RECORDS
6 SYSTEM.—

7 (A) IN GENERAL.—Section 303 of the Ju-
8 diciary Appropriations Act, 1992 (title III of
9 Public Law 102–140; 105 Stat. 807) (28
10 U.S.C. 1913 note) is amended by striking sub-
11 sections (a) and (b), and inserting the fol-
12 lowing:

13 “(a) To cover the costs of carrying out section 2 of
14 the Open Courts Act of 2020, the Judicial Conference
15 may, only to the extent necessary—

16 “(1) prescribe reasonable filing fees, pursuant
17 to sections 1913, 1914, 1926, 1930, and 1932 of
18 title 28, United States Code, for collection by the
19 courts under those sections, which—

20 “(A) shall be based on the extent of the
21 use by the person filing of the system estab-
22 lished under such section 2 for purposes of such
23 action;

24 “(B) shall in addition be adjusted based on
25 factors including the nature of the action and

1 claim for relief, the amount of damages de-
2 manded, the estimated complexity of the type of
3 action, and the interests of justice;

4 “(C) may be prescribed for the filing of a
5 counterclaim; and

6 “(D) shall not apply in the case of a pro
7 se litigant or litigant who certifies their finan-
8 cial hardship; and

9 “(2) prescribe a reasonable fee for the filing of
10 a proof of claim or interest under Rule 3002 and
11 Rule 3003 of the Rules of Bankruptcy Procedure,
12 which may be adjusted proportionately to the
13 amount of the claim, the status of the claim, and the
14 type of proceeding in which the claim is filed, and
15 interests of justice.

16 “(b) The Judicial Conference and the Director shall
17 transmit each schedule of fees prescribed under subsection
18 (a) to Congress at least 90 days before the schedule be-
19 comes effective. All fees collected under subsection (a)
20 shall be deposited as offsetting collections to the Judiciary
21 Information Technology Fund pursuant to section
22 612(c)(1)(A) of title 28, United States Code, to reimburse
23 expenses incurred in carrying out section 2 of the Open
24 Courts Act of 2020.

1 “(c) The Judicial Conference shall review a schedule
2 of fees prescribed under subsection (a) three years after
3 it becomes effective and every three years thereafter to
4 ensure that the fees meet the requirements of this section.
5 If the fees do not meet the requirements of this section,
6 the Judicial Conference shall prescribe a new schedule of
7 fees pursuant to subsection (a) and submit the new sched-
8 ule of fees to Congress pursuant to subsection (b).

9 “(d) Amounts deposited to the Judiciary Information
10 Technology Fund pursuant to this section and not used
11 to reimburse expenses incurred in carrying out section 2
12 of the Open Courts Act of 2020 may be used pursuant
13 to section 612(a) of title 28, United States Code.”.

14 (B) EFFECTIVE DATE.—The amendment
15 made by subparagraph (A) shall take effect on
16 the date specified in subsection (e).

17 **SEC. 3. PUBLIC ACCESS TO ELECTRONIC COURT RECORDS**
18 **SYSTEM REQUIREMENT.**

19 (a) IN GENERAL.—Not later than the date specified
20 in subsection (d), the Director of the Administrative Office
21 of the United States Courts, in coordination with the Ad-
22 ministrator of General Services, shall make all materials
23 in the system established under section 2 publicly acces-
24 sible, free of charge.

1 (b) AUTHORITY FOR SHORT TERM DELAYS OF PUB-
2 LIC ACCESS TO CERTAIN RECORDS.—The Judicial Con-
3 ference, after appropriate public notice and opportunity
4 for comment, may designate categories of records which
5 are not automatically made publicly accessible under sub-
6 section (a). Any such category shall be no broader than
7 necessary, based on a determination of a specific and sub-
8 stantial interest in restricting the public right of access
9 to court records, and subject to no more than a 5-day
10 delay before being made publicly accessible under sub-
11 section (a). Any such designation shall expire after 3 years
12 unless renewed pursuant to the requirements of this sub-
13 section.

14 (c) USE OF TECHNOLOGY.—In providing public ac-
15 cess under subsection (a), the Director shall, in coordina-
16 tion with the Administrator of General Services, use mod-
17 ern technology in order—

18 (1) to improve security, data accessibility, ease
19 of public access, affordability, and performance; and

20 (2) to minimize the burden on pro se litigants.

21 (d) DATE SPECIFIED.—The date specified in this
22 subsection is the date that is 2 years after the date of
23 the enactment of this Act, unless the Administrator of
24 General Services certifies to Congress, by not later than
25 90 days after such date of enactment, that an additional

1 period of time is required. If the Administrator so cer-
2 tifies, the date specified in this subsection is the date that
3 is 3 years after the date of enactment of this Act.

4 (e) FUNDING FOR PUBLIC ACCESS TO MODERNIZED
5 ELECTRONIC COURT RECORDS SYSTEM.—

6 (1) IN GENERAL.—Section 303 of the Judiciary
7 Appropriations Act, 1992 (title III of Public Law
8 102–140; 105 Stat. 807) (28 U.S.C. 1913 note) is
9 amended by adding at the end the following:

10 “(c)(1) To cover the costs of ensuring the public ac-
11 cessibility, free of charge, of all materials in the system
12 established under section 2 of the Open Courts Act of
13 2020 in accordance with section 3 of such Act, the Judi-
14 cial Conference shall collect an annual fee from the De-
15 partment of Justice equal to the Public Access to Court
16 Electronic Records access fees paid by the Department of
17 Justice in 2018, as adjusted for inflation. All fees collected
18 under this subsection shall be deposited as offsetting col-
19 lections to the Judiciary Information Technology Fund
20 pursuant to section 612(c)(1)(A) of title 28, United States
21 Code, to reimburse expenses incurred in providing services
22 in accordance with section 3 of the Open Courts Act of
23 2020.

24 “(2) To cover any additional marginal costs of ensur-
25 ing the public accessibility, free of charge, of all materials

1 in the system established under section 2 of the Open
2 Courts Act of 2020 in accordance with section 3 of such
3 Act, the Judicial Conference may prescribe reasonable fil-
4 ing fees, pursuant to sections 1913, 1914, 1926, 1930,
5 and 1932 of title 28, United States Code, for collection
6 by the courts under those sections. The filing fees—

7 “(A) shall be based on the extent of the use by
8 the person filing of the system established under
9 such section 2 for purposes of such action;

10 “(B) shall be adjusted based on factors includ-
11 ing the nature of the action and claim for relief, the
12 amount of damages demanded, the estimated com-
13 plexity of the type of action, and the interests of jus-
14 tice;

15 “(C) may be prescribed for the filing of a coun-
16 terclaim; and

17 “(D) shall not apply to a pro se litigant or a
18 litigant who certifies their financial hardship.

19 “(3)(A) The Judicial Conference and the Director
20 shall transmit each schedule of fees prescribed under this
21 subsection to Congress at least 90 days before the sched-
22 ule becomes effective. All fees collected under this sub-
23 section shall be deposited as offsetting collections to the
24 Judiciary Information Technology Fund pursuant to sec-
25 tion 612(c)(1)(A) of title 28, United States Code, to reim-

1 burse expenses incurred in providing services in accord-
2 ance with section 3 of the Open Courts Act of 2020.

3 “(B) The Judicial Conference shall review a schedule
4 of fees prescribed under this paragraph three years after
5 it becomes effective and every three years thereafter to
6 ensure that the fees meet the requirements of this para-
7 graph. If the fees do not meet the requirements of this
8 paragraph, the Judicial Conference shall prescribe a new
9 schedule of fees pursuant to this paragraph and submit
10 the new schedule of fees to Congress pursuant to subpara-
11 graph (A).

12 “(C) Amounts deposited to the Judiciary Information
13 Technology Fund pursuant to this subsection and not used
14 to reimburse expenses incurred in carrying out section 3
15 of the Open Courts Act of 2020 may be used to reimburse
16 expenses incurred in carrying out section 2 of the Open
17 Courts Act of 2020. Amounts not used to reimburse ex-
18 penses incurred in carrying out section 2 of the Open
19 Courts Act of 2020 may be used pursuant to section
20 612(a) of title 28, United States Code.”.

21 (2) EFFECTIVE DATE.—The amendment made
22 by paragraph (1) shall take effect beginning on the
23 date specified in subsection (d).

1 **SEC. 4. RULE OF CONSTRUCTION.**

2 Nothing in this Act, or the amendments made by this
3 Act, shall be construed to—

4 (1) affect the filing fees or other filing proce-
5 dures for prisoners; or

6 (2) abrogate, limit, or modify the requirements
7 described in section 1915 of title 28, United States
8 Code.

9 **SEC. 5. DIGITAL ACCESSIBILITY STANDARDS.**

10 The systems established under sections 2 and 3 of
11 this Act or the amendments made by such sections shall
12 comply with relevant digital accessibility standards estab-
13 lished pursuant to section 508 of the Rehabilitation Act
14 of 1973.

○

From: [Richard Martin](#)
To: [Rachel Kamoutsas](#)
Subject: FW: Urgent: Commissioner Final Chapter Review
Date: Thursday, September 24, 2020 2:29:00 PM
Attachments: [Juvenile Justice and Youth Crime 9 21 2020.docx](#)
[Law Enforcement Health and Wellness 9 21 2020.docx](#)
[Reduction of Crime 9 21 2020.docx](#)
[Reentry Programs and Initiatives 9 21 2020.docx](#)
[Data and Reporting 9 21 2020.docx](#)
Importance: High

We missed this (my fault) because of cabinet and clemency. Can you look these over or run a comparison to see what, if anything, has been changed compared to the last version. (FYI – there is a feature in Word and Adobe Acrobat DC which allows you to compare documents).

From: COPS Director <COPS.Director@usdoj.gov>
Sent: Monday, September 21, 2020 1:45 PM
To: COPS Director <COPS.Director@usdoj.gov>
Subject: Urgent: Commissioner Final Chapter Review
Importance: High

Hello, Commissioners –

Over the last several weeks, we have been busy editing the chapters to ensure that the recommendations are as high-level and impactful as possible. We are still on track for a Commission report release in October, however we would appreciate one final round of Commissioner review and comment on these drafts. Please note that these chapters will go through additional copy editing and layout, so we ask that you please reserve your comments to any significant suggestions or questions. After copy editing and layout, the chapter and recommendation numbers will change in the final report once it is finalized.

We plan for sequencing this final review by sending you the first five chapters today, the second five chapters this Wednesday, and the final five chapters Friday. Because of the limited number of days remaining before the release of the report, we are asking that any comments on chapters for all three batches be provided back to this email address **within two business days or sooner, and no later than Wednesday, September 23 at 12 PM ET** for these five chapters.

I understand your many competing priorities, however this final review is a critical step in completing the Commission's report, which is a culmination of the last eight months of your work. I continue to appreciate your commitment and dedication to the work of this Commission. Please do not hesitate to let me know if you have any questions.

Regards,

Phil Keith, Chair
President's Commission on Law Enforcement and the Administration of Justice

Chapter 11: Juvenile Justice and Youth Crime

Overview

In 1992 when he was Attorney General of the United States for the first time, Attorney General Barr stated, “Society’s concern over how we deal with juveniles should not start after the juvenile has already gone astray.”¹ This remains an undeniable truth in a system of justice that does not start at the courthouse. Instead, it starts with a “constellation of private and public institutions that socialize the child and shape his or her moral character.”² That constellation includes families, schools, religious leaders, and community-serving agencies. The Attorney General has observed: “Smart punishments are those which seek to instill in a young offender the values, the discipline, and the responsibility that are necessary for self-control.”³

Juvenile justice systems differ by state and territory, and each present a range of challenges to law enforcement officers, judges, prosecutors, defenders, and juvenile justice professionals in probation, detention, and child/youth/family services. These challenges call for innovative approaches to addressing juvenile justice.

The juvenile justice system is vital to creating safe, secure, and successful communities. It is in this arena that social interventions and law enforcement contacts are likely to have the most lasting impact towards preventing crime, as sound juvenile justice policy can prevent mistakes made in youth from hardening into a criminal career in adulthood. To support our nation’s youth, it is essential that we have an effective, efficient, and balanced juvenile justice system that prevents juvenile crime and delinquency, examines the causes of youth crime and violence, and supports law enforcement’s role in both the apprehension of juvenile offenders and, when appropriate, diversion and community-based resources. Our nation must continue to develop qualified juvenile justice professionals who can enhance the awareness and knowledge of all stakeholders, fostering collaboration vital to crime prevention and community safety.

Juvenile justice systems include the courts, which must hold young people accountable when they commit serious and violent crimes in our communities.⁴ This includes creating, enhancing, and using diversionary programs for youth who commit low-level offenses that can be handled swiftly and consistently.⁵ As the officers of the juvenile court, probation officers act as the linchpin of the juvenile justice system and should be supported appropriately at both the state and local levels. Gregory Stuber, senior deputy probation officer and president of the Sacramento County Probation Association, notes that the “arrest and sentencing of a youth are usually completed within a few months, depending upon the alleged crime, but a youth may be placed on probation supervision for three to five years. Thus, the vast majority of interaction a youth has with the juvenile justice system is through their probation officer.”⁶ Because of their unique vantage point, probation officers can be both a social worker and a law enforcement officer, which allows them the opportunity to be highly effective in producing positive outcomes for youth and their families.

States should continue to collect data as part of the formal court process, which is used to explore what works and help intelligently and intentionally guide reform.⁷ Placing a juvenile in a well-designed treatment

¹ William P. Barr, U.S. Attorney General, “Remarks of the U.S. Attorney General as Prepared for Delivery,” presented at the Governor’s Conference on Juvenile Crime, Drugs, and Gangs, Milwaukee, WI, April 1, 1992, <https://www.justice.gov/sites/default/files/ag/legacy/2011/08/23/04-01-1992.pdf>.

² Barr, “Remarks of the U.S. Attorney General.”

³ Barr, “Remarks of the U.S. Attorney General,” 16.

⁴ James Backstrom, “The Proper Intersection of Restorative Justice and Public Safety in Juvenile,” *The Prosecutor* 54, no. 2 (2020).

⁵ Marty Beyer, *Best Practices in Juvenile Accountability: Overview* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2003), 1, <https://www.ncjrs.gov/pdffiles1/ojdp/184745.pdf>.

⁶ Gregory Stuber, Senior Deputy Probation Officer, Sacramento County Probation Association, in discussion with Juvenile Justice and Youth Crime Working Group, virtual meeting, May 27, 2020.

⁷ Edward J. Latessa, “From Theory to Practice: What Works in Reducing Recidivism?,” in *State of Crime and Justice in Ohio* (Columbus, OH: Ohio Office of Criminal Justice Services, 2004), https://www.uc.edu/content/dam/uc/ccjr/docs/articles/Theory_Practice.pdf.

Deliberative and Pre-decisional

plan focused on changing the juvenile's individual behavior and teaching core skills may prevent future delinquency and encourage successful reentry into the community.⁸

Different types of youth assessments should be applied at different points in the juvenile justice system, including diversion, pre-adjudication, adjudication, and reentry. Instruments and measurements need to be in place and encouraged so that every state studies, tests, and implements standardized assessment tools that will help determine risk and needs for the young people entering the juvenile justice system. The end result is to reduce recidivism and ensure public safety. These systems should use consistent assessments to discover and address the risks and needs of the young people they encounter.⁹ All parts of juvenile justice systems must come together to hold youth who commit crimes and endanger the public accountable, use appropriate risk and needs assessments to inform supervision levels and programming types and dosages, and engage key stakeholders in the efforts to prevent youth crime with early intervention.

A well-functioning juvenile justice system can reduce crime by preventing youths from becoming criminals in the first place. While juveniles comprise a segment of the criminal population, they are more corrigible and receptive to social programs and interventions. Law enforcement must receive distinct training to protect and serve juveniles in all contexts of criminal justice—as offenders, witnesses, or victims. The juvenile justice system should instill accountability by imposing consequences for behavior, which may include less punitive options such as diversion programs and probation.

Ultimately, consistent with the theme of juvenile justice as a system that functions to preempt future crime more than punish present actions, the objective is to keep youths out of the criminal justice system in the first place, and to that end the Commission also emphasizes the importance of social outreach and interventions as key elements of any juvenile justice.

Encouragingly, in recent years there has been a decline in the number of juveniles entering the justice system. According to 2018 data from the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting (UCR) program, arrests of juveniles that year reached their lowest levels in nearly four decades.¹⁰ The decline in arrests since 1996 was greater for juveniles than for adults. As a result, juveniles accounted for 7 percent of arrests in 2018.¹¹

11.1 The Role of Law Enforcement and Detention/ Corrections Staff

⁸ Latessa, "From Theory to Practice."

⁹ Jennifer Pealer and Edward J. Latessa, "Technology Transfer-A Case Study in Implementing the Principles of Effective Cognitive and Behavioral Interventions for At-Risk Juveniles," in *Cognitive Behavioral Interventions for At-Risk Youth*, ed. Barry Glick (Kingston, NJ: Civic Research Institute, 2006).

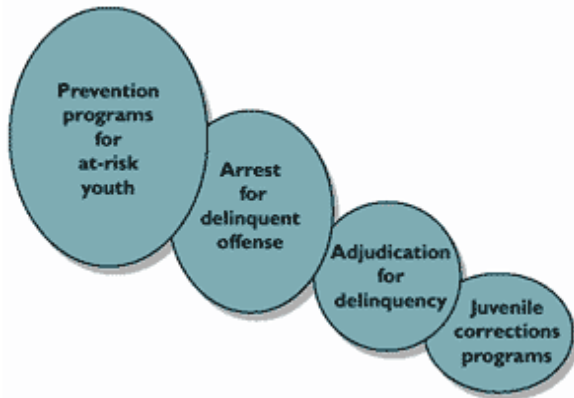
¹⁰ Charles Puzzanchera, *Arrest Characteristics of Older Juveniles and Young Adults* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2019), https://www.ojjdp.gov/ojstatbb/snapshots/DataSnapshot_UCR2017.pdf.¹¹ Puzzanchera, *Arrest Characteristics of Older Juveniles*, 1.

¹¹ Puzzanchera, *Arrest Characteristics of Older Juveniles*, 1.

Deliberative and Pre-decisional

Approximately 25 percent of the U.S. population is age 17 or younger, the age group commonly referred to as juveniles. This percentage has grown since the mid-1980s and is projected to continue its growth until at least 2060.¹²

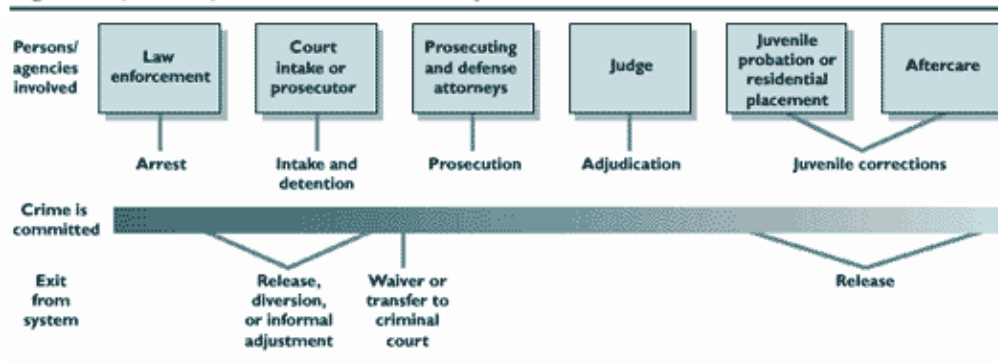
Figure 2:a Juvenile Justice System



Source: Ann H. Crowe, Jurisdictional Technical Assistance Package for Juvenile Corrections (Washington, DC: U.S. Department of Justice, Office of Juvenile Justice and Delinquency Prevention, 2000), https://www.ncjrs.gov/hTml/ojjdp/juris_Tap_report/.

Although statistics are available on both juvenile offenses and juveniles as victims, “often, law enforcement statistics are used as a proxy for examining trends in juvenile crime and offending. Law enforcement provides ‘input’ for the rest of the juvenile justice system, and thus understanding these inputs is critical for examining how the system responds to juvenile crime.”¹³ Over the past few decades, arrest statistics have been used as the main barometer of juvenile delinquent activity, yet juvenile offenses often go unreported.¹⁴

Figure 2:b Juvenile Justice Process and Components



Source: Office of Juvenile Justice and Delinquency Prevention, Jurisdictional Technical Assistance Package for Juvenile Corrections, 2000

[BEGIN TEXT BOX]

Children Exposed to Violence and Childhood Trauma: A Toolkit for Law Enforcement

¹² “Juvenile Population Characteristics: Overview,” Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book, accessed August 11, 2020, <https://www.ojjdp.gov/ojstatbb/population/overview.html>.

¹³ “Offending by Juveniles: Overview,” Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book, accessed June 4, 2020, <https://www.ojjdp.gov/ojstatbb/offenders/overview.html>.

¹⁴ Office of Juvenile Justice and Delinquency Prevention Statistical Briefing Book, “Offending by Juveniles.”

Deliberative and Pre-decisional

When given the tools to provide trauma-informed, developmentally appropriate responses to children exposed to violence, law enforcement officers can

- provide a safe environment to assist youth in re-establishing a sense of security and stability
- help youth and their families begin to heal
- support and reshape attitudes towards law enforcement¹⁵

[END TEXT BOX]

Whether addressing the needs of youth at scenes of domestic violence, interacting with youth of different ages who have experienced traumatic stress, or providing death notifications to children, specific protocols and training will greatly assist a law enforcement officer's ability to properly protect and serve the juvenile community.

Law enforcement agencies should enhance their capacity to respond to children exposed to violence by completing an organizational self-assessment.¹⁶

11.1.1 Criminal justice professionals who interact with juvenile offenders should receive specialized training.

Agencies should ensure that employees, who will interact with juveniles or be responsible for engaging in the juvenile justice system, receive specialized training on the unique aspects of juvenile justice. Youth who enter the juvenile justice system require specific handling to ensure minimization of harm. Additionally, specialized training is required to identify signs of trauma, abuse, or exploitation. Identification of gang involvement or human trafficking is also essential and can provide for early intervention. If the needs of the juveniles are appropriately identified, as a result of specific training, and appropriate services provided, positive outcomes increase exponentially. This will greatly reduce the percent of recidivism. This training can also ensure compliance with policies and procedures based on best practices.

11.2 The Need for Accountability

Our youth who violate the law need to be held accountable to improve the quality of life in our communities. The traditional juvenile justice system defined accountability as punishment or adherence to rules laid down by the system, a similar approach to that taken with adults. For juvenile offenders to take responsibility for their actions, they "must be helped to think beyond their first response to the perceived or real unfairness of adults, lack of opportunity, or rivalry with another group and assisted in understanding consequences."¹⁷

Given the way adolescent brains develop,¹⁸ sometimes a juvenile who commits an offense may feel that their behavior, although illegal, is an appropriate response. This is why the Balanced and Restorative Justice model was created. It defines accountability as an obligation or willingness to accept responsibility for one's actions and taking certain steps to repair the harm. This includes a combination of building skills, repairing the harm done to victims, and protecting the community. This approach encourages positive development of youth so that they can become productive members of our communities.¹⁹

¹⁵ International Association of Chiefs of Police and Yale Child Study Center, *Enhancing Law Enforcement Response to Children Exposed to Violence and Childhood Trauma: A Toolkit for Law Enforcement* (Alexandria, VA: International Association of Chiefs of Police, 2018), <https://www.theiacp.org/sites/default/files/2018-08/CEVToolkit.pdf>.

¹⁶ International Association of Chiefs of Police and Yale Child Study Center, *Enhancing Law Enforcement Response*.

¹⁷ Beyer, *Best Practices in Juvenile Accountability*.

¹⁸ Sarah Spinks, "Adolescent Brains Are A Work In Progress: Here's Why," Frontline, accessed July 8, 2020, <https://www.pbs.org/wgbh/pages/frontline/shows/teenbrain/work/adolescent.html>.

¹⁹ D. Maloney, T. Armstrong, and D. Romig, "Juvenile Probation: The Balanced Approach," Centre for Justice and Conciliation, April 23, 2002, <http://restorativejustice.org/rj-library/juvenile-probation-the-balanced-approach/757/#sthash.CZ0kq7i.TQ0xLTp9.dpbs>.

Deliberative and Pre-decisional

PULL QUOTE: “The glue that makes community-based programming work is accountability. Through accountability . . . trust is earned. These trusting relationships are achieved by fostering an informed and communicative environment that promotes clear follow-through. And, with trust, comes freedom.”²⁰ - Timothy E. Irwin, Juvenile Court Judge of Knox County, Tennessee.

The juvenile court system helps hold juveniles accountable and provides the structure for needed change when other influences haven’t worked. Juvenile court judges can be a strong tool for holding youth accountable and helping them make positive changes in their lives. Another successful tool courts have is the use of probation. Probation officers are responsible for the community supervision of youth assigned to them and provide an immediate law enforcement response when necessary. Probation officers also act as the rehabilitative conduit by assessing the risk and needs of a youth and their families and then implementing a strategic plan for them, which includes referrals into county-provided programs or community-based organizations.

States should adopt OJDP’s mission statement to “support the efforts of states, tribes, and communities to develop and implement effective and equitable juvenile justice systems that enhance public safety, ensure youth are held appropriately accountable to both crime victims and communities, and empower youth to live productive, law abiding lives.”²¹ This includes creating, enhancing, and using diversionary programs for youth that commit low-level offenses which can be handled swiftly and consistently.²²

And as part of holding juveniles accountable, states should also ensure that their Victims Bill of Rights provides the same protections to victims of juvenile crime as to those of adult crime. Regardless of the age of the offender, victims should be protected and offenders held accountable for their harms to victims.

[CROSS REFERENCE TO VICTIM S]

11.2.1 Congress should reinstitute funding for the Juvenile Accountability Block Grants program.

The Juvenile Accountability Block Grants (JABG) program, originally established in 1998, was renamed and authorized under the Omnibus Crime Control and Safe Streets Act, 34 U.S.C. § 10401 (2002).²³ With a goal of “reducing juvenile offending through accountability-based programs focused on both the juvenile offender and the juvenile justice system, the JABG program supported states and territories in implementing graduated sanctions that were proportionate to the offenses, both as a matter of basic justice and as a way to combat juvenile delinquency and improve the quality of life in the nation’s communities.”²⁴

In 1998, JABG had an initial appropriation of \$250 million dollars, and was funded at decreasing amounts in subsequent years. No federal funding has been allocated to JABG since 2013.²⁵

11.2.3 Law enforcement agencies should implement the Office of Juvenile Justice and Delinquency Prevention’s Comprehensive Gang Model.

In an effort to highlight the administration’s commitment to addressing gang-related threats to public safety, President Donald J. Trump has proclaimed a National Gang Violence Prevention Week for the past several years. The proclamations have renewed the administration’s “dedication to identifying and dismantling the

²⁰ Timothy E. Irwin, Juvenile Court Judge, Knox County, TN, in discussion with Juvenile Justice and Youth Crime Working Group, virtual meeting, May 29, 2020.

²¹ Office of Juvenile Justice and Delinquency Prevention, “About OJDP: Mission Statement.”

²² Beyer, *Best Practices in Juvenile Accountability*.

²³ Safe Streets Act of 2002, 34 U.S.C. § 10401 (2020), <https://www.govinfo.gov/content/pkg/USCODE-2017-title34/html/USCODE-2017-title34.htm>.

²⁴ Office of Justice Programs, *JABG Award Language for Recipients* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2013).

²⁵ Coalition for Juvenile Justice, *Protecting Our Children and Communities: The Essential Role of Funding Under the Juvenile Justice and Delinquency Prevention Act* (Washington, DC: Coalition for Juvenile Justice, 2017), <http://www.juvjustice.org/sites/default/files/resource-files/JJPA%20Funding%20Final.pdf>.

Deliberative and Pre-decisional

criminal networks that seek to wreak havoc on our communities and to bringing the individuals who participate in them to justice” and reaffirmed support “for the heroes of law enforcement who have taken a sacred pledge to defend the Nation and its people.”²⁶

A 2015 study that appeared in the *Journal of Adolescent Health* estimates that there are more than one million juvenile gang members in the United States, which is more than three times the number estimated by law enforcement.²⁷ Youth gang membership challenges many popular demographic stereotypes about gangs in the nation. The study found that an average of 2 percent of youth are gang members, and youth age 14 have the highest gang involvement (5 percent).²⁸ Additionally, the study found that youth in gangs come from all types of backgrounds.

Law enforcement severely undercounts juvenile gang members. National estimates place the number of youth in gangs at 300,000, which is less than a third of what the study found.²⁹ Author David Pyrooz says, “law enforcement uses a top-down strategy, recording older and more criminally-involved youth as gang members, which ignores younger and more peripherally gang-involved youth, all of whom are captured in the bottom-up strategy we use in this study.”³⁰

While law enforcement plays a critical role in addressing gang problems, it alone will not stem the flow of youth gang involvement. A community simply cannot arrest its way out of serious, violent, and entrenched youth gang problems. Law enforcement agencies may collaborate with citizens and organizations to implement strategies that address both the immediate threat of youth gangs and the conditions that allow them to exist. As Attorney General Barr stated in 1992, “the first part of any meaningful juvenile justice reform must involve the strengthening of society’s most important socializing institutions -- the family, schools, community associations and religious institutions. These are the primary vehicles by which values and ethics are instilled in our children, and their importance cannot be overstated.”³¹

Agencies should also consider creating specialized units in the juvenile field to address the specific needs of certain youth offenders, including units focused on home supervision and electronic monitoring, juvenile justice diversion programs, commercially sexually exploited children, sex offenders, arson, and gang suppression.

11.2.4 States should delay the automatic expungement of juvenile arrest and court records until adulthood. Instead, states should implement limited access relief, which allows criminal justice system stakeholders access to offender history while maintaining confidentiality.

When a juvenile reoffends, automatic expungement blinds the system, taking away the law enforcement’s ability to see the inherent risks presented by previous behavior.³²

Unless a juvenile delinquency matter has been dismissed for failing to establish probable cause or guilt, or expungement is based upon a change in the substantive criminal law of that jurisdiction, automatic expungement for juveniles goes against the goals of the juvenile justice system. As Thomas Lemmer, member of the Fraternal Order of Police Lodge #7 and deputy chief of the Chicago Police Department, states,

²⁶ Donald J. Trump, President of the U.S., “Presidential Proclamation on National Gang Violence Prevention Week, 2019,” Washington, DC, September 13, 2019, <https://www.whitehouse.gov/presidential-actions/presidential-proclamation-national-gang-violence-prevention-week-2019/>.

²⁷ David C. Pyrooz and Gary Sweeten, “Gang Membership Between Ages 5 and 17 Years in the United States,” Abstract, *Journal of Adolescent Health* 56, no. 414 (2015), <https://doi.org/10.1016/j.jadohealth.2014.11.018>.

²⁸ Sam Houston State University, “Juvenile Gang Members in US Top 1 Million, New Study Finds,” ScienceDaily, February 12, 2015, <https://www.sciencedaily.com/releases/2015/02/150212131817.htm>.

²⁹ Pyrooz and Sweeten, “Gang Membership Between Ages.”

³⁰ Pyrooz and Sweeten, “Gang Membership Between Ages.”

³¹ Barr, “Remarks of the U.S. Attorney General.”

³² President’s Commission on Law Enforcement and the Administration of Justice: *Hearing on Social Problems Impacting Public Safety* (May 6, 2020) (written statement of Thomas J. Lemmer, Member, Chicago Lodge 7, Fraternal Order of Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

Deliberative and Pre-decisional

“expunging these records while youth are still youth is problematic, as it leaves police and social service workers blinded, as they seek to identify the intervention approaches appropriate for those youth.”³³ It also gives juveniles a false confidence that they continue in criminal behaviors without serious consequence.

Juvenile justice is a system that requires knowledge and information about young people so as to properly assess and ultimately provide effective intervention. That cannot be accomplished if the system is not aware of the underlying challenges facing that young person, including prior arrests and dispositions. A system based on a balanced approach to justice would be designed to enhance public safety, ensure that youth are held appropriately accountable to both crime victims and communities, and empower youth to live productive, law-abiding lives.³⁴

Crime victims may suffer the consequences as well, as orders designed for their protection may disappear or become inaccessible. The youth will also suffer because of the inability to match services with needs. Providers—those most expected to have information on the services needed to provide appropriate intervention—will be unable to do so. To that end, “Expunging juvenile arrest records does nothing to lower the victimization risk for the involved youth; it only conceals that risk from police and others seeking to identify the need for intervention approaches. An expungement process that leaves youth vulnerable to victimization is not in their best interests.”³⁵ Instead, states should implement another form of relief for juveniles called limited access. This relief seals the juvenile’s record, allowing only stakeholders in the juvenile justice system to have access to their entire history of adjudication.

11.3 Risk and Needs Assessment

A standardized risk and needs assessment helps identify a youth’s risk of reoffending and any factors that, if addressed, would help reduce the likelihood of re-offense.³⁶ These assessment findings also assist with developing treatment and service plans to treat the youth’s individual needs, which will in turn help ensure the best possible outcome.³⁷ Once the youth’s risk of reoffending and their criminological needs—such as family issues, competency, level of education, and self-esteem issues—have been identified, then the appropriate response can be administered by the juvenile justice system.³⁸

PULL QUOTE: “Smart punishments are those which seek to instill in a young offender the values, the discipline, and the responsibility that are necessary for self-control.”³⁹ - Attorney General William P. Barr

11.3.1 States should study, test, and implement a standardized assessment tool at both the state and local levels to determine risk and needs for juveniles entering a juvenile justice system.

Many assessment instruments are used by researchers, juvenile justice professionals, and other experts. These assessments may range from brief screening for early determination of the juvenile’s risk factors for reoffending to a comprehensive assessment covering both the level of risk and the needs of the juvenile.

³³ Lemmer, *President’s Commission on Law*, May 6, 2020.

³⁴ Office of Juvenile Justice and Delinquency Prevention, “About OJJDP: Mission Statement.”

³⁵ Lemmer, *President’s Commission on Law*, May 6, 2020.³⁶ Gina Vincent et al., *Studying Drivers of Risk and Needs Assessment Instrument Implementation in Juvenile Justice* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, December 1, 2018), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251809.pdf>.

³⁶ Gina Vincent et al., *Studying Drivers of Risk and Needs Assessment Instrument Implementation in Juvenile Justice* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, December 1, 2018), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251809.pdf>.

³⁷ Vincent et al., *Studying Drivers of Risk and Needs Assessment*.³⁸ Edward J. Latessa, Professor and Director, School of Criminal Justice, University of Cincinnati, in discussion with Juvenile Justice and Youth Crime Working Group, virtual meeting, April 14, 2020.³⁹ Barr, “Remarks of the U.S. Attorney General.”⁴⁰ Development Services Group, Inc., *Risk and Needs Assessment for Youths*.

³⁸ Edward J. Latessa, Professor and Director, School of Criminal Justice, University of Cincinnati, in discussion with Juvenile Justice and Youth Crime Working Group, virtual meeting, April 14, 2020.³⁹ Barr, “Remarks of the U.S. Attorney General.”⁴⁰ Development Services Group, Inc., *Risk and Needs Assessment for Youths*.

³⁹ Barr, “Remarks of the U.S. Attorney General.”⁴⁰ Development Services Group, Inc., *Risk and Needs Assessment for Youths*.

Deliberative and Pre-decisional

Risk and needs assessments are not only designed to inform and guide decisions about estimating a juvenile's likelihood to recidivate.⁴⁰ These measures are also helpful when creating plans for appropriate treatment or services. They allow juvenile justice professionals and practitioners to classify offenders and target limited resources to juveniles who may need intensive supervision and services.⁴¹

11.4 Enhancing Engagement in Support of Prevention and Early Intervention

A justice system, schools, and the community should openly communicate to keep the children who intersect with them safe and healthy. Youth who are harmed or victimized often then harm and victimize in return. Thus, protecting our youth in our schools and from online threats, as well as prevention and early intervention efforts all serve critical roles in keeping youth from becoming offenders and entering the justice system in the first place. Courts and law enforcement cannot provide a balanced approach to juvenile justice on their own. Instead, families and communities need to be actively engaged in breaking down barriers in these systems. Often, coordination between community service-based agencies and the juvenile justice systems has been difficult because of agency barriers that impede communication.⁴²

Internet safety and victimization also need to be addressed through the lens of bullying and cyber harassment. First Lady Melania Trump's BE BEST Initiative focuses on online safety as a key pillar that requires tools and skills in support of the emotional, social, and physical health of our nation's youth.⁴³ While bullying has always been an issue among young people, the rise of social media has allowed new forms of anonymous bullying to occur. This bullying and the resulting trauma needs to be addressed through a detailed internet safety agenda.

Many youth who commit crimes present with co-occurring issues that require multiple services to communicate regarding their care.⁴⁴ To address this, local agencies and communities nationwide have developed multi-discipline coalitions that help plan and create solutions for sound juvenile development.

A critical partnership should exist between the school and law enforcement. Around the nation, these types of partnerships are only beginning, despite youth spending a significant amount of their day inside a school. Due to time spent with children during the school day, school resource officers (SROs) are in the unique position to positively influence, protect, and aid them during this vulnerable and formative time in their lives. SROs help create a safe learning environment which allows the children to thrive and school officials to concentrate on the education process.⁴⁵

11.4.1 Law enforcement and their local school system should create and implement a memorandum of understanding so that school resource officers and school personnel train, learn and respond collectively on issues confronting their individual school populations.

SROs play an integral role in contemporary school settings. Not only do they provide the first line of defense against threats, they are often part a school's culture because of their everyday presence on campus. SROs cultivate and strengthen relationships with students, staff, administrators, and parents. Building these relationships is key to resolving conflict, creative problem solving, and creating a positive, safe environment for students to learn and grow.⁴⁶ For both educators and law enforcement to be successful, their

⁴⁰ Development Services Group, Inc., *Risk and Needs Assessment for Youths*.

⁴¹ The Pew Center on the States, *Risk/Needs Assessment 101: Science Reveals New Tools to Manage Offenders* (Washington, DC: Pew Charitable Trusts, 2011), https://www.pewtrusts.org/~media/legacy/uploadedfiles/pcs_assets/2011/pewriskassessmentbriefpdf.

⁴² Christy K. Scott et al., "Juvenile Justice Systems of Care: Results of a National Survey of Community Supervision Agencies and Behavioral Health Providers on Services Provision and Cross-System Interactions," *Health and Justice* 7, no. 1 (2019), <https://doi.org/10.1186/s40352-019-0093-x>.

⁴³ "BE BEST: First Lady Melania Trump's Initiative," The White House, accessed August 18, 2020, <https://www.whitehouse.gov/bebest/>.

⁴⁴ Scott et al., "Juvenile Justice Systems of Care."

⁴⁵ National Association of School Resource Officers, *To Protect and Educate: The School Resource Officer and the Prevention of Violence at School* (Hoover, AL: National Association of School Resource Officers, 2018), <https://www.nasro.org/clientuploads/resources/NASRO-Protect-and-Educate.pdf>.

⁴⁶ Tim Evinger, "Succeeding as a School Resource Officer in a Changing World," *Lexipol* (blog), November 16, 2019, <https://www.lexipol.com/resources/blog/succeeding-as-a-school-resource-officer-in-a-changing-world/>.

Deliberative and Pre-decisional

memorandum of agreement should outline the appropriate response to mandatory and permissive referrals and clearly document when a law enforcement response is required. Additionally, it should outline mandatory joint training between school and law enforcement. Ideally, this school-justice partnership should require data collection to inform and guide future action and response from both the school and law enforcement agencies.

11.4.2 Law enforcement agencies should create selection panels that include school administrators and a representative from the prosecutor's office to select school resource officers.

To partner effectively, both the school and the law enforcement agency identified in the memorandum of agreement should be involved in the selection process for suitability of the SRO. Not all law enforcement officers have the attributes to work most effectively within a school setting. Accordingly, organizations such as schools and juvenile justice agencies should partner with law enforcement in the selection and assignment of SROs. Using this approach not only results in a better match for the critical partnership, but it also reinforces the shared responsibility of all parties to provide a safe learning environment for the children.

11.4.3 States should require training for school districts, law enforcement agencies, and other appropriate authorities on school-based policing and school law.

All school district personnel, law enforcement officers, and other appropriate authorities should be required to take training on school-based policing and school law. Both basic and advanced training courses promote the role of an SRO as a teacher, informal counselor, and law enforcement officer and stress the importance of active involvement from the partner organization.

11.4.4 Counties that are responsible for the prosecution of juvenile delinquency should form a youth service commission as part of their juvenile justice continuum.

Key stakeholders should consolidate to plan, implement, and evaluate the juvenile justice service system in their community. The resulting commission should serve as the primary advisory board on youth who are at risk, are involved with the family court or the child welfare system, or are on probation or parole. Further, it should mobilize the community to advance child, youth, and family well-being through planned, intentional collaboration.⁴⁷ These services should also focus on those youth identified to be at risk of entering a system.

These juvenile justice commissions can help reduce youth crime in local communities and increase the accountability, effectiveness, and efficiency of the youth justice system.⁴⁸ Local commission membership “should represent a broad coalition of government, nonprofit agencies, youth and parent advocates, sheriff’s department, prosecutor’s office, education, the family court, public defender, and probation with the purpose of bringing together key leaders of the local juvenile justice continuum.”⁴⁹

11.4.5 Law enforcement agencies, community partners, and the private sector should partner to create agency-wide mentoring initiatives that engage youth and promote law enforcement-youth interactions.

Mentoring is an excellent tool to engage the community and increase respect for law enforcement within it. Adult role models are often scarce in high-crime neighborhoods and mentorship is a practical solution to address this need. When the family disintegrates, mentorship is the last great hope. Law enforcement executives should encourage their officers—especially those in urban areas struggling with high crime rates—to engage as role models and mentors in youth development programs.⁵⁰ Through this support, an officer

⁴⁷ Anthony V. Pierro, Juvenile Chief, Prosecutor’s Office, Ocean County, NJ, email communication with Scott Pestridge, Federal Program Manager, Juvenile Justice and Youth Crime Working Group, June 26, 2020.

⁴⁸ Pierro, email communication with Scott Pestridge, June 26, 2020.

⁴⁹ Pierro, email communication with Scott Pestridge, June 26, 2020.

⁵⁰ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Juvenile Justice* (May 7, 2020) (statement of Steve Salem, President and Chief Executive Officer, Cal Ripken Senior Foundation), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

Deliberative and Pre-decisional

will help at-risk youth make healthy behavioral decisions, which in turn promotes trust building between law enforcement and youth. Probation officers serve as mentors to the youth assigned to them and are able to build rapport with them and provide guidance and counseling to them in their everyday activities.

Bigs in Blue, an OJDP-funded program of Big Brothers Big Sisters of America, matches police officers ("bigs") with children ("littles") who come largely from poor or single-parent homes or who have an incarcerated parent. Nationwide, there are 82 Bigs in Blue initiatives that have matched 1,090 police officers with children in the communities they patrol.⁵¹

11.4.7 Law enforcement and juvenile justice-serving agencies should include child internet safety education as a primary prevention tool.

Education and prevention are critical to addressing online exploitation and abuse, and key stakeholders need to be part of that solution. School-justice partnerships should prioritize education and training to both students and their guardians about internet safety and the ease with which dangerous situations occur.

Young people are often sought after by perpetrators on the internet. John F. Clark, president and chief executive officer of the National Center for Missing and Exploited Children (NCMEC), says, "After the internet became more accessible to the general public in the 1990s, NCMEC started to see a growing threat to children being sexually exploited, enticed, and groomed into abusive situations by online predators."⁵² Both young people and their parents and guardians must understand the dangers that lurk beyond their keyboard. One such danger is sextortion, which "occurs when someone threatens to distribute your private and sensitive material if you don't provide them images of a sexual nature, sexual favors, or money."⁵³ When an offender's goal is to obtain sexually explicit content from a child, the blackmail that happens after occurs almost immediately.⁵⁴ This trend highlights the urgency in detecting and reporting this victimization so that appropriate intervention can remove the child from the situation and safeguard them from continuing harm.

11.4.8 Law enforcement agencies should engage with their Internet Crimes Against Children task force to further protect youth from exploitation.

Internet Crimes Against Children (ICAC) is a national network of 61 coordinated task forces that represents more than 4,500 federal, state, and local law enforcement and prosecutorial agencies throughout the 50 states engaged in the proactive and reactive investigations and prosecutions of persons involved in child abuse and exploitation involving the internet.⁵⁵

ICAC was developed in response to the increasing number of children and teenagers using the internet and other technology, the proliferation of child sexual abuse images available electronically, and the increased online activity by predators who seek unsupervised contact with potential underage victims. Understanding that arrests are only one component of a coordinated strategy to address technology-facilitated child sexual exploitation, the ICAC program provides training to law enforcement officers and prosecutors and educates parents and youth about the potential dangers of online activity.

Law enforcement agencies should create a login on the ICAC Training and Technical Assistance website and, once verified, begin accessing the resources available there.⁵⁶

⁵¹ Office of Juvenile Justice and Delinquency Prevention, *Office of Juvenile Justice and Delinquency Prevention: 2019 Annual Report* (Washington, DC: Office of Juvenile Justice and Delinquency Prevention, 2019), 2, <https://ojdp.ojp.gov/library/publications/office-juvenile-justice-and-delinquency-prevention-fiscal-year-2019-annual>.

⁵² Clarke, *President's Commission on Law*, May 5, 2020.

⁵³ "What Is Sextortion?: An FBI Special Agent Defines Sextortion and Provides Tips to Avoid Falling Prey to Online Predators," Federal Bureau of Investigation, accessed June 12, 2020, <https://www.fbi.gov/video-repository/newss-what-is-sexortion/view>.

⁵⁴ Federal Bureau of Investigation, "What is Sextortion?"

⁵⁵ Office of Juvenile Justice and Delinquency Prevention, *2019 Annual Report*, 16.⁵⁶ "ICAC Training and Technical Assistance," Internet Crimes Against Children Task Force, accessed June 12, 2020, <https://www.icactaskforce.org/Pages/Home.aspx>.

⁵⁶ "ICAC Training and Technical Assistance," Internet Crimes Against Children Task Force, accessed June 12, 2020, <https://www.icactaskforce.org/Pages/Home.aspx>.

11.5 Training and Professionalizing the Juvenile Justice System

Juvenile justice is a specialty area of jurisprudence. It is a unique court system that has independent rules and requirements that are different than its adult counterpart, and inexperienced professionals are no match for the work that is required in juvenile courts. The lack of recognition that juvenile justice is a stand-alone specialty has negatively affected the profession in both staff retention and training, and juvenile professionals are often underappreciated in their workplace. Justice systems should recognize juvenile justice as an independent and unique area of jurisprudence, and training should be provided to those currently in the field. And while law enforcement officers are often highly trained in many aspects of their interface with society, such as tactics and crime recognition, that same training does not always cover how to deal with young people. In fact, most police are only trained in the basics of juvenile justice, including the laws of arrest of their state.

11.5.1 States should provide tailored training to prosecutors, law enforcement executives, and court personnel on the importance of juvenile justice, the impact juvenile justice has on community safety, and the unique role each has to play in addressing juvenile offending and effective adjudication.

Prosecutors, law enforcement executives, and judges, court personnel, and probation each have critical and multi-faceted roles that touch every aspect of the criminal justice system, and targeted training on maximizing their tools will strengthen the juvenile justice system.

Prosecutors are the gatekeepers to the courthouse. Everything that happens in a juvenile justice courtroom has occurred with the knowledge of a prosecutor. Therefore, the success of any juvenile justice system requires retaining the most experienced and well-balanced prosecutors to work on juvenile cases. Training topics for prosecutors should include how to appropriately prioritize juvenile prosecution in their offices, to include prosecution of online victimization. Similarly, law enforcement executives should understand how to support juvenile investigations with appropriate staffing, and the importance of selecting school resource officers in their department. While law enforcement officers are often highly trained in many aspects of their interface with society, such as tactics and crime recognition, that same training does not always cover how to deal with young people. Finally, judges, court personnel, and probation chiefs should receive training on prioritizing juvenile court dockets equally with adult criminal dockets, and in understanding the need for seasoned probation officers to their juvenile field divisions, youth detention facilities, and juvenile court divisions.

Deliberative and Pre-decisional

Chapter 14: Law Enforcement Health and Wellness

Law enforcement officers face more threats to their health and wellness than ever before. On a daily basis, their profession demands that they address difficult and dangerous situations that can injure their physical and mental health. The daily job stress, the regular encounters of traumatic incidents, and accumulated memories can lead to post-traumatic stress disorder (PTSD). The burdens on law enforcement to remedy an increasing range of social problems, the proliferation of ever more dangerous criminal threats, and in some corners of society, a failure to appreciate and respect the work of American police, all have correlatively strained officer health and morale.

PULL QUOTE: “Nothing is more important than the well-being—physically, mentally, and emotionally—of our men and women [in law enforcement]. They are the backbone of our department(s).”¹ - Commissioner William Gross, Boston Police Department

Maintaining both physical and mental health helps law enforcement officers sustain long and difficult careers that are filled with these stressors, which may take a toll on the individual. Some studies have indicated, moreover, that law enforcement officers suffer a significantly lower life expectancy than the general public. It is imperative to recognize that the extraordinary duties of law enforcement officers carry greater risks to their health and wellness than most professions, and that proper attention to and care for these issues is essential to sustaining officers and recruiting capable citizens to take on the important duties of law enforcement. In examining the issues confronting officer health and wellness, the Commission recommends laws and policies that establish programs for officer physical fitness and health, devote more resources and protections for the mental health conditions of police officers, and safeguard officers from both intentional (e.g. ambush killings) and accidental (e.g. traffic and firearms) harms.

4.1 Physical Health

Law enforcement is an extremely challenging and dangerous career. Officers routinely encounter high-stress situations, crime, human suffering, and death. Many elements of law enforcement work deteriorate an officer’s physical fitness level, including shift work, poor sleeping patterns, operational and organizational stress, and improper nutrition. This contributes to increased likelihood of heart disease, as well as substance abuse and overall poor health of the officer. Exhaustion and poor dietary habits can also lead to poor decision-making, which is a critical skill for law enforcement officers.

The International Association of Chiefs of Police (IACP), through a cooperative agreement with the Bureau of Justice Assistance (BJA), conducted a multi-department assessment of line-of-duty injuries. Eighteen different agencies tracked all reported injuries over the course of one year. The report found that 1,295 injuries resulted in 5,938 days missed, with an average of 4.5 days missed per incident and an average rehabilitation period of 3.5 days. The study found that officers who engaged in fitness training regimens were less likely to suffer an injury reportable to the Occupational Safety and Health Administration and defined as severe.²

Heart Disease

Law enforcement is a high-stress occupation that often leaves officers with an increasing prevalence and

¹ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of William Gross, Commissioner, Boston Police Department, MA), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.² International Association of Chiefs of Police and Bureau of Justice Assistance, *Reducing Officer Injuries, Final Report: A Summary of Data Findings and Recommendations From a Multi-Agency Injury Tracking Study* (Alexandria, VA: International Association of Chiefs of Police, 2012), <https://www.theiacp.org/resources/document/reducing-officer-injuries-final-report>.

² International Association of Chiefs of Police and Bureau of Justice Assistance, *Reducing Officer Injuries, Final Report: A Summary of Data Findings and Recommendations From a Multi-Agency Injury Tracking Study* (Alexandria, VA: International Association of Chiefs of Police, 2012), <https://www.theiacp.org/resources/document/reducing-officer-injuries-final-report>.

Deliberative and Pre-decisional

incident of cardiovascular disease.³ This prevalence is directly related to a number of standard risk factors, including high blood pressure, cigarette smoking, obesity, and a sedentary lifestyle.⁴ Moreover, officers encounter occupation-specific risk factors, such as sudden physical exertion, psychological stress, and shift work.⁵ This leads to an increased risk of a coronary event. One study reported that officers age 40 or older had a higher risk of a coronary event within 10 years than the same segment of the broader population.⁶ Despite well-known health issues facing law enforcement officers, exercise participation levels among officers remains low. A survey of Canadian police officers observed that only 17 percent of police officers engaged in regular physical activity a minimum of three times weekly.⁷

Jon Sheinberg, a board-certified cardiologist and police lieutenant for the Cedar Park Police Department in Texas, recently noted in a podcast with the Office of Community Oriented Policing Services (COPS Office), “Law enforcement has a very unique stress pattern. It’s a pattern which is what we call 98–97 percent boredom and . . . 2–3 percent of sheer terror. So, you have a situation in which the stress patterns are rapidly changing, and you add that to a population that experiences shift work, a population that is sedentary, a population that eats a diet of convenience.”⁸

Substance Use

Stress in law enforcement shows up everywhere: physical health (increased risk of heart disease), mental health, and substance use. Officers may encounter any number of crises in the course of their job duties, including domestic violence calls, fights, shootings, homicides, child abuse, and fatal car accidents. In any given day, officers may be required to make multiple instant life and death decisions that are nearly always analyzed and critiqued well after the fact.

Adding to this circumstance are difficult schedules with rotating or overtime shifts that leave officers sleep-deprived, which may negatively affect reaction times. While the attitude toward mitigating stress in law enforcement agencies is slowly changing, many officers will not seek treatment because they believe it will cost them future promotions.⁹ Instead, officers may opt to self-medicate through drug or alcohol use. Through his research, Dr. John Violanti, a 23-year veteran of the New York State Police and professor in the Department of Social and Preventive Medicine at the University at Buffalo, found that alcohol abuse among law enforcement officers in the United States is double that of the general population.¹⁰

Sleep and Fatigue

Shift work interferes with normal sleep patterns. When officers work at different or unnatural times of day, they often suffer from sleep loss.¹¹ That kind of fatigue can degrade performance, reduce an officer’s productivity, and put the officer’s safety at risk. Dr. Violanti found that police officers were much more likely than the general public to have higher than recommended cholesterol levels, higher than average pulse rates

³ Franklin Zimmerman, “Cardiovascular Disease and Risk Factors in Law Enforcement Personnel: A Comprehensive Review,” *Cardiology in Review* 20, no. 4 (2012).

⁴ Zimmerman, “Cardiovascular Disease.”

⁵ Zimmerman, “Cardiovascular Disease.”

⁶ Colleen Copple et al., *Law Enforcement Mental Health and Wellness Programs: Eleven Case Studies* (Washington, DC: Office of Community Oriented Policing Services, 2019), 24, <https://cops.usdoj.gov/RI/CPublications/cops-p371-pub.pdf>.

⁷ Jason Williams and Vincent Ramsey, “The Need for Law Enforcement Wellness Interventions: A Critical Review,” *The Sport Journal*, September 5, 2017, <http://thesportjournal.org/article/the-need-for-law-enforcement-wellness-interventions/>.

⁸ Office of Community Oriented Policing Services, “Mitigating the Risk of Heart Disease in Law Enforcement,” *The Beat* (podcast), December 2019, https://cops.usdoj.gov/html/podcasts/the_beat/12-2019/Transcript_Sheinberg.pdf.

⁹ Lewis Z. Schlosser and Gerard P. McAleer, “Opioid Use Disorders Among Police and Public Safety Personnel: What Law Enforcement Leaders Need to Know,” *Police Chief Magazine*, March 14, 2018, <https://www.policechiefmagazine.org/opioid-use-among-police-personnel/>.

¹⁰ John M. Violanti, “Alcohol Abuse in Policing: Prevention Strategies,” *FBI Law Enforcement Bulletin* 68, no. 1 (1999), <https://www.thefreelibrary.com/Alcohol+abuse+in+policing%3a+prevention+strategies.-a054036506>.

¹¹ Bryan Vila and Charles Samuels, “Sleep Deprivation: What Does It Mean for Public Safety Officers,” *NIJ Journal*, no. 262 (2009), <https://www.ncjrs.gov/pdffiles1/nij/225762.pdf>.

Deliberative and Pre-decisional

and diastolic blood pressure, and a higher prevalence of sleep disorders.¹²

Levels of sleep and fatigue are basic issues of survival for the human body. If these are not balanced, an already risky job becomes even more dangerous for law enforcement officers. According to an article in *Nature*, "Researchers have shown that being awake for 19 hours produces impairments that are comparable to having a blood alcohol concentration (BAC) of .05 percent. Being awake for 24 hours is comparable to having a BAC of roughly .10 percent."¹³ Put differently, just five hours less sleep basically doubles the impact.¹⁴ It should be noted that it is a crime to operate a motor vehicle with a BAC of .08 percent or above. Experts suggest 6.5 hours as the minimum amount of sleep necessary to prevent sleep deprivation; however, "53 percent of law enforcement officers average less. . . . More than 90 percent of officers report being routinely fatigued, and 85 percent reported driving while drowsy."¹⁵ Sleep is critical for law enforcement officer safety and wellness.

Diet and Nutrition

When there are no set times or places for officers to eat, maintaining a well-balanced diet becomes difficult. Nutritionists note that eating healthy on duty provides officers with stable energy levels throughout a shift and enables them to move faster in foot pursuits. A study that examines the relationship between officers' diets and injury found that heavier officers are often injured more than those who are not.¹⁶ Eating a well-balanced diet directly supports officer health and contributes to performance and fitness. Proper fitness is critical for officers to ensure excessive force is not used to compensate for their inability to use appropriate physical restraining methods.¹⁷ Fitness and wellness are just as important as any other required training, as they help lessen the potential for use of excessive force in addition to the costly lawsuits that result from it.¹⁸

Specifically, officers should be aware of the linkage between stress and food. A study by British researchers showed that people with high levels of stress were more likely than people with low stress levels to snack in response to daily hassles in their regular lives.¹⁹

Law Enforcement Stress and Trauma

Stress and trauma also have a negative impact on the health and well-being of law enforcement officers as they are exposed to traumatic incidents and extreme stress over the course of their career, which can average 30 to 35 years.²⁰ Some of this stress can also be attributed to high workloads that officers carry. A uniformed police psychologist with the New York City Police Department (NYPD) estimated that police officers might be exposed to at least 900 potentially traumatic incidents over the course of their careers.²¹

4.1.1 Law enforcement agencies should establish a department-wide health and fitness program with

¹² University at Buffalo, "Impact of Stress on Police Officers' Physical and Mental Health," Science Daily, September 29, 2008, <https://www.sciencedaily.com/releases/2008/09/080926105029.htm>.

¹³ Drew Dawson and Kathryn Reid, "Fatigue, Alcohol and Performance Impairment," *Nature* 388 (1997): 235, <https://www.nature.com/articles/40775.pdf>.

¹⁴ Vila and Samuels, "Sleep Deprivation."

¹⁵ National Law Enforcement and Corrections Technology Center, "No Rest for the Weary," *TECHBeat*, Winter 2008, <https://nij.ojp.gov/library/publications/no-rest-weary>.

¹⁶ James E. Guffey et al., "Police Officer Fitness, Diet, Lifestyle and Its Relationship to Duty Performance and Injury," *Journal of Legal Issues and Cases in Business*, no. 3 (2015), <https://www.aabri.com/manuscripts/131469.pdf>.

¹⁷ Guffey et al., "Police Officer Fitness."

¹⁸ Guffey et al., "Police Officer Fitness."

¹⁹ "How Stress Can Make Us Overeat," *Healthbeat*, September 2019, <https://www.health.harvard.edu/healthbeat/how-stress-can-make-us-overeat>.²⁰ Konstantinos Papazoglou and Brooke McQuerrey Tuttle, "Fighting Police Trauma: Practical Approaches to Addressing Psychological Needs of Officers," *SAGE Open* 8, no. 3 (2018), <https://doi.org/10.1177/2158244018794794>.

²⁰ Konstantinos Papazoglou and Brooke McQuerrey Tuttle, "Fighting Police Trauma: Practical Approaches to Addressing Psychological Needs of Officers," *SAGE Open* 8, no. 3 (2018), <https://doi.org/10.1177/2158244018794794>.

²¹ Daniel Rudofossi, *A Cop Doc's Guide to Public-Safety Complex Trauma Syndrome: Using Five Police Personality Styles* (Amityville, NY: Baywood Publishing Company, 2009), <http://site.ebrary.com/id/10615011>.²² Frazier, text communication with Matthew Varisco, May 1, 2020.

Deliberative and Pre-decisional

both financial and nonfinancial incentives.

Beyond standard fitness education, agencies should conduct regular education on stress management, sleep, hygiene, nutrition, substance use prevention, and positive lifestyle choices. An incentive-based voluntary program would cultivate more positive attitudes about the implementation than a mandatory approach. Both financial and nonfinancial incentives (e.g. health insurance discounts, monetary fitness bonuses, and on-duty fitness time) can be used to promote a program. Additionally, agencies should work with athletic trainers or training facilities within the community as partners in a health and fitness program to minimize costs to staff.

4.2 Mental Wellness

Staying physically healthy is not enough, officers must also receive psychological support to enable them to continue to perform their duties; however, not everyone seeks such support.²² Law enforcement is an extremely challenging and dangerous career. Officers routinely encounter high-stress situations, crime, human suffering, and death. Staying healthy is not enough, and these officers must receive psychological support to enable them to continue to perform their duties; however, not everyone seeks such support.²³ Law enforcement executives should promote the continued development of minds and bodies to make them stronger and more resilient. Policies and programs that support health and wellness are essential in building a balanced and prosperous agency. While many law enforcement agencies already recognize the need for health and wellness programs, the majority of departments focus on only the physical readiness of the employee. In recent years, more agencies have realized mental wellness should complement the physical component, but they often lack the resources and the critical guidance to start or improve a program that cares for their officers' mental health and wellness. Another challenge is how law enforcement culture can stigmatize self-care, including seeking professional mental health services.

These recommendations aim to help law enforcement agencies better care for the mental health of their officers. The Department of Justice should lead the development of a national strategy to remove the stigma of seeking mental health assistance and provide law enforcement officers with comprehensive mental health support that compliments the physical health strategies already in place in many agencies.

According to Attorney General William P. Barr, "nearly one in four officers experience thoughts of suicide at some point in their lives. At least 228 officers took their own lives in 2019—a 44 percent increase from the previous year. Not only is that higher than the number of line-of-duty deaths, it reflects a steady increase in officer suicides over the past several years."²⁴ Additionally, the risk of suicide among law enforcement officers is 54 percent higher than the general population.²⁵

PTSD is an often-unrecognized psychological injury law enforcement officers incur that can be just as debilitating as any physical injury. Undiagnosed or unaddressed PTSD negatively affects performance and quality of life. Intense mental trauma experienced in the field is not always based off a single incident. Instead, trauma often accumulates over a career. One in five officers is subject to PTSD, which can lead to

²² Frazier, text communication with Matthew Varisco, May 1, 2020.

²³ Frazier, text communication with Matthew Varisco, May 1, 2020.²⁴ William P. Barr, U.S. Attorney General, "Remarks as Prepared for Delivery," presented at the International Association of Chiefs of Police Officer Safety and Wellness Symposium, Miami, FL, February 20, 2020, <https://www.justice.gov/opa/video/attorney-general-barr-speaks-iacp-officer-safety-and-wellness-symposium>.

²⁴ William P. Barr, U.S. Attorney General, "Remarks as Prepared for Delivery," presented at the International Association of Chiefs of Police Officer Safety and Wellness Symposium, Miami, FL, February 20, 2020, <https://www.justice.gov/opa/video/attorney-general-barr-speaks-iacp-officer-safety-and-wellness-symposium>.

²⁵ Police Executive Research Forum, *An Occupational Risk: What Every Police Agency Should Do To Prevent Suicide Among Its Officers* (Washington, DC: Police Executive Research Forum, 2019), <https://www.policeforum.org/assets/PreventOfficerSuicide.pdf>.²⁶ "Ruderman White Paper on Mental Health and Suicide of First Responders," Ruderman Family Foundation, April 2018, https://rudermanfoundation.org/white_papers/police-officers-and-firefighters-are-more-likely-to-die-by-suicide-than-in-line-of-duty.

Deliberative and Pre-decisional

deteriorated heart health, hormonal imbalances, and depression or thoughts of suicide.²⁶

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Approximately 100,000 active police officers in the United States suffer from PTSD, and many also live with the comorbidities of depression, anxiety, and suicidal ideation.²⁷

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Many law enforcement agencies recognize the need for health and wellness programs. However, the majority of departments focus on one issue: the physical readiness of the employee.

In recent years, agencies have realized that mental wellness should complement the physical component. Agencies, however, often lack the resources and the critical guidance to start or improve a program that accounts for their officers' mental health and wellness. Mental Health First Aid programs are important tools that teach the signs of mental illness and substance use issues and the skills to respond.²⁸

PULL QUOTE: "We take care of others. Who takes care of us?"²⁹ - Commissioner James Clemmons, Jr., Richmond County Sheriff's Office, North Carolina

Law enforcement culture continues to stigmatize self-care, including seeking professional mental health services. Law enforcement officers fear losing everything they have worked for if they admit they are struggling. These issues are fueled by cultural expectations, often held by both the military and law enforcement professions (e.g., pride, toughness, and peer pressure), and a perceived lack of support from the command staff. Officers are not always aware of the available mental health program services and resources. In addition, they are hesitant to use available services even when they know leadership approves of their use.

Accessing mental health resources can be particularly challenging for men, who account for the largest part of the law enforcement workforce. In general, men pursue preventative screenings, maintain a regular source of care and get timely medical interventions much less often than women.³⁰ This is not because men are somehow programmed to avoid seeking help, although some research suggests that "men who score higher on measures assessing dimensions of masculinity norms generally have less favorable help-seeking attitudes, seek help for psychological problems less often, and in some cases fail to obtain routine health examinations."³¹ While the reasons behind this gender difference are not fully understood, research indicates that men who more strongly identify with masculine norms tend to show poorer mental health and

²⁶ "Ruderman White Paper on Mental Health and Suicide of First Responders," Ruderman Family Foundation, April 2018, https://rudermanfoundation.org/white_papers/police-officers-and-firefighters-are-more-likely-to-die-by-suicide-than-in-line-of-duty.

²⁷ Gerber and Holder Law, "Workers' Compensation for PTSD."

²⁸ "Mental Health First Aid," National Council for Behavioral Health, accessed July 31, 2020, <https://www.mentalhealthfirstaid.org/>.²⁹ James Clemmons, Jr., Sheriff, Richmond County Sheriff's Office, NC, in discussion with Law Enforcement Health and Wellness Working Group, meeting, February 26, 2020.

²⁹ James Clemmons, Jr., Sheriff, Richmond County Sheriff's Office, NC, in discussion with Law Enforcement Health and Wellness Working Group, meeting, February 26, 2020.

³⁰ Donald K. Cherry, David A. Woodwell, and Elizabeth A. Rechtsteiner, "National Ambulatory Medical Care Survey: 2005 Summary," *Advance Data from Vital and Health Statistics*, no. 387 (2007), <https://www.cdc.gov/nchs/data/ad/ad387.pdf>; David Sandman, Elisabeth Simantov, and Christina An, *Out of Touch: American Men and the Health Care System* (New York: Commonwealth Fund, 2000), <https://www.commonwealthfund.org/publications/fund-reports/2000/mar/out-touch-american-men-and-health-care-system>; Anthony J. Viera, Joshua M. Thorpe, and Joanne M. Garrett, "Effects of Sex, Age, and Visits on Receipt of Preventive Healthcare Services: A Secondary Analysis of National Data," *Abstract, BMC Health Services Research* 6, no. 1 (2006), <https://bmchealthservres.biomedcentral.com/articles/10.1186/1472-6963-6-15>; and Jeannine S. Schiller et al., "Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2010," *Vital and Health Statistics* 10, no. 252 (2012), https://www.cdc.gov/nchs/data/series/sr_10/sr10_252.pdf.

³¹ Wizdom Powell et al., "Masculinity and Race-Related Factors as Barriers to Health Help-Seeking Among African American Men," *Behavioral Medicine* 42, no. 3 (2016): 3, <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4979354/>.

Deliberative and Pre-decisional

are less likely to seek psychological help.³²

While men may not seek medical interventions as often as their female counterparts, the health and well-being of female officers cannot be overlooked. Data show that 23 percent of male officers reported more suicidal thoughts than the general population (13.5 percent), as do a comparable 25 percent of female officers.³³ It is critical for all law enforcement officers to seek the care they need.

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In addition, first responders and police officers may experience the following risk factors for suicide:

- occupational hazards and exposures
- access to firearms or other lethal weapons
- erratic work schedules resulting in sleep disturbances and disrupted family life
- personal and professional stigma related to accessing mental health services³⁴

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Post-Traumatic Stress Disorder

PTSD is an often-unrecognized psychological injury that can be just as debilitating as any physical injury. Undiagnosed or unaddressed PTSD negatively affects performance and quality of life, and in some cases may ultimately lead to suicide. One of the most effective mitigation factors is early and aggressive intervention using peer or professional counseling.

There are many signs that an officer is experiencing trauma, ranging from misperceptions of normal actions by others, to disengagement. Intense mental trauma is not always based off a single incident, but often accumulates over a career. One in five officers is subject to PTSD, which can lead to deteriorated heart health, hormonal imbalances, and depression or thoughts of suicide.³⁵ While there is no central repository for statistics on officer suicides, the number of officers who die by suicide each year exceeds the number who are killed feloniously and accidentally.³⁶

Crisis Lines

Telephone crisis services or hotlines have been effective in preventing suicide, both during the immediacy of the call and in the following weeks. In 2019, the Federal Communication Commission designated 988 as the National Suicide Prevention Hotline.³⁷ This three-digit number, like 911, will help to increase awareness, normalize calling for help, and aid those experiencing a mental health crisis.

[CROSS REFERENCE SOCIAL PROBLEM S]

Similar to law enforcement, firefighting is a physically and emotionally demanding profession. The fire service has established the Fire/EMS Helpline, which offers free 24-hour assistance with issues such as stress,

³² Y. Joel Wong et al., "Meta-Analyses of the Relationship between Conformity to Masculine Norms and Mental Health-Related Outcomes," *Journal of Counseling Psychology* 64, no. 1 (2017), <https://www.apa.org/pubs/journals/releases/cou-cou0000176.pdf>.

³³ Lois Baker, "Researchers Investigate Impact of Stress on Police Officers' Physical and Mental Health," University of Buffalo, September 25, 2008, <http://www.buffalo.edu/news/releases/2008/09/9660.html>.

³⁴ Ian H. Stanley, Melanie A. Hom, and Thomas E. Joiner, "A Systematic Review of Suicidal Thoughts and Behaviors among Police Officers, Firefighters, EMTs, and Paramedics," *Clinical Psychology Review* 44 (2016), <https://doi.org/10.1016/j.cpr.2015.12.002>.³⁵ "Ruderman White Paper on Mental Health and Suicide of First Responders," Ruderman Family Foundation, April 2018, https://rudermanfoundation.org/white_papers/police-officers-and-firefighters-are-more-likely-to-die-by-suicide-than-in-line-of-duty.

³⁵ "Ruderman White Paper on Mental Health and Suicide of First Responders," Ruderman Family Foundation, April 2018, https://rudermanfoundation.org/white_papers/police-officers-and-firefighters-are-more-likely-to-die-by-suicide-than-in-line-of-duty.

³⁶ Police Executive Research Forum, *An Occupational Risk*.

³⁷ Federal Communications Commission, "FCC Proposes Designating 988 as National Suicide Prevention and Mental Health Hotline," December 12, 2019, <https://docs.fcc.gov/public/attachments/DOC-361337A1.pdf>.

Deliberative and Pre-decisional

depression, addiction, and PTSD.³⁸ Based on the similarities between law enforcement and the fire service, a designated national crisis line would benefit the law enforcement community.

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Located on the Rutgers University Behavioral Health Management Campus, Cop2Cop (C2C) is a part of the Rutgers Behavioral Health Management System.³⁹ C2C a successful state legislated peer crisis response hotline. C2C offers peer support, clinical assessments, provider networks, crisis intervention, and other critical mental health services to law enforcement families 24/7 in New Jersey.⁴⁰

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Family Stressors

The toll that the law enforcement profession takes on companions and loved ones can also be exacting. According to the IACP, "Spouses, partners, children, and companions of law enforcement officers play a significant role in [the] officer's health and wellness and serve as an essential support system for their loved ones."⁴¹ Line officers have identified that programs aimed at financial literacy, improving interpersonal relationship, and support services and benefits are critically important to their well-being and professional success. In response, the COPS Office has provided funding to the Fraternal Order of Police to develop a standardized and nationally available training curriculum in law enforcement peer support, Power in Peers.⁴²

PULL QUOTE: "Law enforcement officers are society's problem solvers each and every day they come to work, and often times when they are off duty as well. Just as citizens expect assistance and service from law enforcement officers, our officers must also expect the same level of service and resources when they reach out for help. It is our hope that our law enforcement culture comes to 'normalize' requesting help from our members in need and in doing so, we can protect those whose life's calling has been to protect others."⁴³ - Colonel Patrick Callahan, New Jersey State Police

Resiliency

Resilience refers to a person's ability to recover from stressful situations.⁴⁴ Creating a culture of resiliency helps organizations maintain an effective workforce. Resiliency is key to the health of our law enforcement officers and the longevity of their careers. While there are ways to identify and hire candidates who are resilient by examining their background to determine how they have faced challenges in the past and might

³⁸ "Share the Load Program," National Volunteer Fire Council, accessed June 29, 2020, <https://www.nvfc.org/programs/share-the-load-program/>.

³⁹ Copple et al., *Law Enforcement Mental Health*.

⁴⁰ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of Cherie Castellano, Peer Support Program Director, Rutgers National Call Center and Cop 2 Cop Program), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

⁴¹ "Employee and Family Wellness Guide," International Association of Chiefs of Police, February 1, 2018, <https://www.theiacp.org/resources/document/employee-and-family-wellness-guide>.

⁴² *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of Sherri Martin, National Director of Wellness Services, Fraternal Order of Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

⁴³ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of Patrick Callahan, Colonel, New Jersey State Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁴⁴ Heather Craig, "Resilience in the Workplace: How to Be More Resilient at Work," *Positive Psychology* (blog), January 16, 2019, <https://positivepsychology.com/resilience-in-the-workplace/>.

⁴³ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of Patrick Callahan, Colonel, New Jersey State Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁴⁴ Heather Craig, "Resilience in the Workplace: How to Be More Resilient at Work," *Positive Psychology* (blog), January 16, 2019, <https://positivepsychology.com/resilience-in-the-workplace/>.

⁴⁴ Heather Craig, "Resilience in the Workplace: How to Be More Resilient at Work," *Positive Psychology* (blog), January 16, 2019, <https://positivepsychology.com/resilience-in-the-workplace/>.

Deliberative and Pre-decisional

in the future, resiliency can also be developed.⁴⁵ The VALOR Initiative for resilience training is a joint effort of BJA, the IACP, and the University of Pennsylvania's Positive Psychology Center.⁴⁶ The program has trained more than 50,000 law enforcement and highway patrol officers around the country on three areas for individual growth in resiliency: thinking positively and actively in stressful situations, managing energy day-to-day and long-term, and improving relationships at work and home.

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Wellness opportunities that can build resiliency

- on-site or departmental confidential psychological services
- employee assistance programs (EAP)
- 24-hour hotline for public safety employees
- peer support and addiction recovery programs
- embedded unit chaplain programs
- family support programs
- organizational consultant programs
- critical incident response management and response debriefing services
- suicide prevention hotlines
- training in how to enhance resiliency building skills based upon scientific research and evidence

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Messaging and Education

Law enforcement leaders should clearly communicate the programs and resources available to officers on mental health and suicide prevention. If leadership shows that it values mental health and wellness, officers are more encouraged to seek help. Additionally, current policies should improve transparency and clarify policies that relate to confidentiality and access to service. These messages will inform, allow, and support staff to help themselves and each other.

Service Providers

While some service providers are highly effective, others deliver services that do not meet the needs of law enforcement agencies. Agencies seeking to build effective resiliency programs can look to examples such as the Indianapolis Metropolitan Police Department's (IMPD) Office of Professional Development and Wellness (OPDW). They have established a comprehensive program that includes:

- mentoring for new officers
- training on resiliency skills in the basic academy and throughout officers' career
- a critical incident stress debriefing team
- counseling services from culturally competent vetted resources

⁴⁵ Andrew Shatté and Jan Bruce, *The Science Behind Resilience* (n.p.: New Life Solutions, Inc., 2015), <https://www.mequilibrium.com/wp-content/uploads/2016/01/The-Science-Behind-Resilience-12-22.pdf>.

⁴⁶ "BJA's VALOR Officer Safety And Wellness Program Trains Over 50,000 Officers," Bureau of Justice Assistance, November 20, 2018, <https://bjaojp.gov/feature/bja-valor-officer-safety-and-wellness-program-trains-over-50000-officers>.⁴⁷ Nicole Juday, Officer, Indianapolis Police Department, IN, email communications and discussions with Law Enforcement Health and Wellness Working Group, February 27–May 13, 2020.

Deliberative and Pre-decisional

- mental health and resiliency services
- suicide prevention
- physical health care
- financial health counseling
- a military transition support system
- family support
- therapy canine
- close partnership with chaplains⁴⁷

Upon request, the IMPD will share their wellness resources with other law enforcement agencies throughout the country. The IMPD has also helped organizations, such as the Metropolitan Nashville Police Department in Tennessee, create cultures of resiliency within their own departments. As a testament to their department, OPDW members have been intimately involved in assisting dozens of agencies implement successful wellness programs.⁴⁸

Recruitment and Training Deficits

Improvements to recruiting and training (both academy and continuing education) will improve staff health, wellness, and resiliency. Agencies that receive guidance and direction to make and offer such improvements will have a positive impact on staff, families, and the community.

[CROSS-REFERENCE RECRUITMENT AND TRAINING CHAPTER]

4.2.2 Law enforcement agencies should require mental health training, both in academy training and recurring in service training, for their personnel.

Providing mental health training to new recruits not only reinforces it as a priority of the agency, but it helps to establish a foundation for wellness. Training topics should help law enforcement officers respond to calls for services and successfully maintain their career. Training should include:

- the major categories of mental illness
- the signs and symptoms of a mental health crisis
- methods to de-escalate those experiencing a mental health crisis
- state and any locally relevant laws regarding the ability of an officer to forcibly detain a subject who is in a mental health crisis
- how to refer and methods of referring individuals for mental health services

Similarly, training topics related to a successful career as a first responder should include:

- executive support for those who access mental health services
- how to manage the signs and symptoms of cumulative stress
- signs and symptoms of PTSD⁴⁹
- how compassion fatigue is related to law enforcement encounters

⁴⁷ Nicole Juday, Officer, Indianapolis Police Department, IN, email communications and discussions with Law Enforcement Health and Wellness Working Group, February 27–May 13, 2020.

⁴⁸ Juday, email communications and discussions with Law Enforcement, February 27–May 13, 2020.

⁴⁹ Copple et al., *Law Enforcement Mental Health*.

Deliberative and Pre-decisional

- depression and suicide prevention
- how the position affects home life
- resiliency skills

4.2.4 Law enforcement agencies should ensure that mental health resources and services are accessible and confidential.

Resources that are easily accessible are more likely to be used. Agencies increase awareness and potential implementation when they use internal webpages, apps, and searchable tags to clearly message about and provide information on wellness services. In addition, staff may be more willing to locate resources if they do not have to engage an agency representative. Staff will also be more likely to use the services if they can be guaranteed confidentially when they seek mental health services connected to a work-related experience while on duty without being required to share the details directly to their supervisor.

4.2.5 Law enforcement agencies should establish policies that mandate an annual mental health check for all sworn law enforcement officers and relevant civilian staff. Similarly, mandatory mental health checks should be required after a critical incident or traumatic incident.

This recommendation has been widely discussed within the field of law enforcement; however, it has yet to be implemented across all law enforcement agencies. Law enforcement officers and other criminal justice personnel (e.g., prosecutors, civilian investigators, forensic examiners, dispatchers, evidence collection specialists, and victim witness staff) are regularly exposed to traumatic situations that negatively affect their resiliency. A mental health check is a narrowly defined nondiagnostic meeting that is conducted on agency time with a designated agency wellness representative (i.e., peer support officer) or mental health clinician. This type of mental health check should be used to inform law enforcement officers and other relevant criminal justice professionals about available wellness resources. The mental health check should also educate the officer about signs of and risk factors associated with psychological distress or impairment.

An annual mental health check is not a fitness-for-duty evaluation; it should remain mutually exclusive and separate. A person who has conducted the fitness-for-duty evaluation of a specific employee should not conduct annual mental health checks for the agency of that employee.⁵⁰ Additionally, there should be clearly defined policies related to what the annual mental health check involves and the responsibilities of those who conduct them.

4.2.6 States should provide funding for peer support training and set certification standards for peer support members and training.

Law enforcement agencies widely use peer-led critical incident stress debriefing after traumatic incidents; however, peer support training is not standard. As noted by Corey Nooner, Master Sergeant of the Oklahoma City Police Department, Oklahoma, “Deployment of trained peer support is an unmatched resource for law enforcement.”⁵¹ Standardizing this training through a curriculum and certification process will help peer support members understand their responsibilities and limitations.

4.2.7 Congress should enact legislation that protects the authority or commission that an officer has when they request assistance for mental health issues.

⁵⁰ Tom Coghlan, Owner, Blue Line Psychological Services, email communication with Corey Nooner, Master Sergeant, Oklahoma City Police Department, OK, April 6, 2020. ⁵¹ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement by Corey Nooner, Master Sergeant, Oklahoma City Police Department, OK), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁵² Fuchs, *President’s Commission on Law*, February 27, 2020.

⁵¹ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement by Corey Nooner, Master Sergeant, Oklahoma City Police Department, OK), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁵² Fuchs, *President’s Commission on Law*, February 27, 2020.

Deliberative and Pre-decisional

Based on self-reports of law enforcement personnel, staff do not seek mental health services because they fear losing their jobs and their ability to provide for themselves and their families. Legislation that protects law enforcement officers who ask for mental health assistance will provide more security and improve the use of mental health services. The legislation should ensure that a law enforcement officer's request for assistance will not be used as the sole basis for the removal of the officer's authority. This legislation would not eliminate the consequences of conviction for a criminal act and would not apply to those who are a danger to self and others.

4.2.8 Congress should strengthen Health Insurance Portability and Accountability Act provisions regarding medical records and treatment notes of first responders.

Law enforcement officers have encountered situations where treatment notes have been provided to agency representatives because the agency is paying for the treatment of the officer. A provision is needed in the Health Insurance Portability and Accountability Act (HIPAA) that clarifies that treatment notes are confidential regardless of who pays for the treatment.

4.2.10 The Department of Homeland Security should develop a wellness unit within the Incident Command System.

[CROSS-REFERENCE HOMELAND SECURITY]

The Department of Homeland Security developed a standardized approach to incident management known as the National Incident Management System (NIMS). The Incident Command System (ICS), which is a subpart of NIMS provides a standard response and operation procedures for critical incidents.⁵²

Currently, ICS does not specifically include a wellness function to address the needs of the personnel involved in the incident. Including a specific wellness unit within the ICS will ensure that scene commanders seek out the wellness resources available and provide a location for them to be accessed. This addition ensures that the wellness of responders is a priority to be addressed at significant incidents.⁵³ It also ensure that wellness is considered regardless of who is responding, which could include multiple agencies from across the region or county.

4.2.11 Congress should establish and fund a national law enforcement crisis hotline.

Currently, there is no national hotline to specifically assist public safety officers in crisis. The national crisis support lines that are available to the public are perceived to be not well equipped to effectively respond to those performing public safety duties. If an officer finally calls a hotline and gets the "wrong" person on the other end of the line, then they will likely never call again. Additionally, if an individual perceives that the hotline is not equipped to assist law enforcement, an individual in crisis may not attempt to access the service. A national hotline for public safety officers that is well marketed, has specifically skilled mental health professionals, and can direct the caller to locally specific resources will have an impact on an individual's willingness to access the hotline. Confidentiality and text messaging capabilities are also critical components of a national hotline, particularly for those who are emotional with limited speaking ability.

4.2.12 Congress should amend the definition of "injury" in the Federal Employees' Compensation Act to include post-traumatic stress disorder and other mental health issues incurred by employees in the performance of law enforcement public safety duties.

Research shows that a police officer will experience more traumatic events in six months than the average

⁵² Fuchs, *President's Commission on Law*, February 27, 2020.

⁵³ Fuchs, *President's Commission on Law*, February 27, 2020.⁵⁴ Tara Hartley et al., "PTSD Symptoms Among Police Officers: Associations with Frequency, Recency, and Types of Traumatic Events," Abstract, *International Journal of Emergency Mental Health* 15, no.4 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4734407/>.

Deliberative and Pre-decisional

person will experience in a lifetime.⁵⁴ Similarly, federal employees performing law enforcement and other public safety duties are also exposed to danger and trauma, yet PTSD is not a covered injury in the FECA OWCP coverage. The federal government and its workers compensation programs should ensure that FECA rules clearly account for PTSD or other similar diagnoses and provide proper guidance to federal employees and agencies to address mental health needs.⁵⁵

4.3 Law Enforcement Safety

The murder of a law enforcement officer in the line of duty is an assault on the entire community. There is no greater affront to the rule of law than deliberate attacks against police officers and deputy sheriffs entrusted with enforcing the law. Law Enforcement is an inherently dangerous profession as officers confront violent criminals and address public safety threats, putting their own lives and safety at risk. In addition to willful violence directed against law enforcement, they also confront threats to their safety incident to the job such as traffic and firearm accidents, as well as exposure to controlled substances.

The National Law Enforcement Officers Memorial Fund reports that law enforcement line-of-duty deaths increased by 12 percent from 2017 to 2018.⁵⁶ A total of 145 federal, state, and local law enforcement officers died in the line-of-duty in 2018, up from 129 officers in 2017. In the year 2018, firearms-related fatalities were the leading cause of officer deaths, with 53 officers shot and killed (up 15 percent from 2017); 50 officers were killed in traffic-related incidents (up 9 percent from 2017); 42 officers died from other causes (up 14 percent from 2017).⁵⁷

PULL QUOTE: "Too often, the badge and the shield have become targets and too many officers are paying the ultimate price for nothing more than the uniform they wear."⁵⁸ - Patrick Yoes, President, Fraternal Order of Police

An officer not wearing their ballistic vest is 14 times more likely to suffer a fatal injury than an officer who is wearing body armor.⁵⁹ In 2019, 293 officers were shot in the line of duty, 50 of whom were killed. Thirty officers were shot in an ambush attack, and seven of those officers were killed.⁶⁰ Enacting federal legislation that would make the targeting of a law enforcement officer with violence in certain, limited circumstances a federal crime would help protect law enforcement.⁶¹ This will not make every attack against an officer a federal crime, but it would give federal prosecutors a tool to fight back against targeted attacks.

The events of 9/11, increasing active shooter incidents, and targeted attacks on police officers have changed

⁵⁴ Tara Hartley et al., "PTSD Symptoms Among Police Officers: Associations with Frequency, Recency, and Types of Traumatic Events," Abstract, *International Journal of Emergency Mental Health* 15, no.4 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4734407/>.

⁵⁵ U.S. House Committee on the Judiciary: Oversight Hearing on Policing Practicing (September 19, 2019) (written statement of Patrick Yoes, National President, Fraternal Order of Police), <https://fop.net/CmsDocument/Doc/Yoes%20testimony%2019%20Sept.pdf>.⁵⁶ Bureau of Justice Assistance, "National Officer Safety Initiatives."

⁵⁶ Bureau of Justice Assistance, "National Officer Safety Initiatives."

⁵⁷ Bureau of Justice Assistance, "National Officer Safety Initiatives."⁵⁸ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of Patrick Yoes, President, Fraternal Order of Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁵⁹ Dan Tompkins, "Body Armor Safety Initiative: To Protect and Serve . . . Better," *NIJ Journal*, no. 254 (2006), <https://nij.ojp.gov/library/publications/body-armor-safety-initiative-protect-and-serve-better>.

⁵⁸ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Law Enforcement Health and Wellness* (February 27, 2020) (written statement of Patrick Yoes, President, Fraternal Order of Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁵⁹ Dan Tompkins, "Body Armor Safety Initiative: To Protect and Serve . . . Better," *NIJ Journal*, no. 254 (2006), <https://nij.ojp.gov/library/publications/body-armor-safety-initiative-protect-and-serve-better>.

⁵⁹ Dan Tompkins, "Body Armor Safety Initiative: To Protect and Serve . . . Better," *NIJ Journal*, no. 254 (2006), <https://nij.ojp.gov/library/publications/body-armor-safety-initiative-protect-and-serve-better>.

⁶⁰ Yoes, *President's Commission on Law*, February 27, 2020.

⁶¹ Yoes, *President's Commission on Law*, February 27, 2020.⁶² "Causes of Law Enforcement Deaths," National Law Enforcement Officers Memorial Fund, accessed May 22, 2020, <https://nleomf.org/facts-figures/causes-of-law-enforcement-deaths>.⁶³ Eun Young Noh, "Characteristics of Law Enforcement Officers' Fatalities in Motor Crashes," National Highway Traffic Safety Administration, January 2011, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811411>.⁶⁴ Eastman, *President's Commission on Law*, February 27, 2020.

Deliberative and Pre-decisional

the world of law enforcement. Often law enforcement may be the only resource to provide initial life-saving medical care to victims of these types of mass casualty situations.

Typically, motor vehicle-related incidents are the leading cause of death for law enforcement officers. From 2005 to 2017, 30 percent of 1,512 officers who died in the line of duty died as a result of vehicle-related crashes, while 9 percent were struck by a vehicle.⁶²

Wearing seatbelts prevents injuries and vehicular deaths. In a major study conducted by National Highway Traffic Safety Administration, for those cases where seatbelt status was known, only slightly more officers wore seatbelts than did not.⁶³ Additionally, distraction-free driving should be a standard for each officer to follow on duty.

Officers also confront health risks due to their exposure to potent controlled substances.

Fentanyl is a powerful synthetic drug similar to, yet much more potent than morphine and heroin, and can be deadly depending on the amount and time of exposure. As evidenced during the COVID-19 pandemic, law enforcement agencies are also exposed to significant health risks, as their interactions with the community are not limited in times of a health crisis. Protection and preparation against pandemics and exposure to illicit narcotics (e.g., fentanyl) are a concern for law enforcement officers.

4.3.1 The Department of Justice should further implement a national, comprehensive database for law enforcement officer injuries and treatment. The data should be analyzed and released in a timely manner.

While there has been considerable progress in revising the Law Enforcement Officers Killed and Assaulted (LEOKA) data set, it is still lacking specific medical information that would be required to study this topic appropriately. For law enforcement to make meaningful improvements based on the science of law enforcement injuries, there must be further solutions to capture comprehensive law enforcement injury-based data.⁶⁴ Finally, to make training and procedural improvements that save lives and prevent injuries, incidents and data need to be analyzed and assessed at the national level in a timely manner.

4.3.2 The Department of Justice should expand the National Blue Alert Network to all 50 states.

The National Blue Alert network is a program run by DOJ that gives law enforcement, the media, and the public an expanded early warning of threats against law enforcement officers, helps apprehend suspects who have killed or seriously injured an officer, and provides critical information when an officer is missing in the line of duty. Like AMBER Alerts, which are designed to speed actionable information about missing children to the public, Blue Alerts provide details about possible assailants, including physical descriptions, vehicle information, and other identifying characteristics. According to the COPS Office, 36 states currently participate in the National Blue Alert Network.⁶⁵ Expanding this program to all 50 states would further protect the lives of law enforcement officers.

4.3.3 Congress should pass legislation that would (1) create a new federal offense for those who deliberately target law enforcement officers with the intent to kill; and (2) limit the amount of damages that a criminal defendant could recover as a result of injuries that were incurred while

⁶² "Causes of Law Enforcement Deaths," National Law Enforcement Officers Memorial Fund, accessed May 22, 2020, <https://nleomf.org/facts-figures/causes-of-law-enforcement-deaths>.⁶³ Eun Young Noh, "Characteristics of Law Enforcement Officers' Fatalities in Motor Crashes," National Highway Traffic Safety Administration, January 2011, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811411>.⁶⁴ Eastman, *President's Commission on Law*, February 27, 2020.

⁶³ Eun Young Noh, "Characteristics of Law Enforcement Officers' Fatalities in Motor Crashes," National Highway Traffic Safety Administration, January 2011, <https://crashstats.nhtsa.dot.gov/Api/Public/ViewPublication/811411>.⁶⁴ Eastman, *President's Commission on Law*, February 27, 2020.

⁶⁴ Eastman, *President's Commission on Law*, February 27, 2020.

⁶⁵ Shanetta Outlar, Senior Counsel, and Vince E. Davenport, Supervisory Senior Policy Analyst, Office of Community Oriented Policing Services, email communication with Matthew Varisco, Federal Program Manager, Law Enforcement Health and Wellness Working Group, April 13, 2020.

Deliberative and Pre-decisional

committing or being apprehended for a felony or a violent crime.

The legislation should impose serious and specific penalties for the killing of law enforcement officers, judges, and other public safety officers in the line of duty. The legislation should also make the murder of a law enforcement officer who is employed by an agency that receives federal funds a capital offense. The bill should impose substantive limits on federal courts' review of habeas corpus petitions that challenge a state court conviction for killing a law enforcement officer, judge, or other public safety officer. Further, the legislation should also limit the amount of damages that a criminal defendant could recover as a result of injuries that were incurred while committing or being apprehended for a felony or a violent crime. Instead, the bill should allow only for the recovery of actual losses—medical expenses, lost wages, property damage, or other tangible loss—and prohibit the defendant from suing a law enforcement officer for punitive damages, emotional harm, other intangible damages, and attorney's fees.

4.3.5 A National Law Enforcement Safety Board should be established that investigates line-of-duty deaths. This board should effectively promote a higher level of safety in law enforcement.

Law enforcement agencies are required to report felonious and accidental killings and assaults upon law enforcement officers in the line of duty as part of the FBI's Uniform Crime Reporting (UCR) law Enforcement Officers Killed and Assaulted (LEOKA) program data. Additionally, other organizations review and report statistics for line-of-duty death incidents; however, there is no single entity that conducts thorough, accurate, and independent investigations and produces timely, well-considered recommendations to enhance law enforcement safety. A National Law Enforcement Safety Board, similar to the National Transportation Safety Board, would improve officer safety.

Deliberative and Pre-decisional

Chapter 9. Reduction of Crime

Overview

Crime is not simply a violation of the rules of civil society—it harms the safety and security of actual victims. No society can prosper where communities do not have faith that laws and the police who enforce them will keep them safe. Protecting American citizens from crime, therefore, is the paramount duty of law enforcement.

This duty is as difficult as ever. As discussed elsewhere in the report, criminals have adapted technology to commit and conceal their crimes in ever more inventive ways, and collateral social ills that predicate much of the criminal activity often divert police attention and resources from the fundamental task of crimefighting. New kinds of criminal threats involving homeland security, cyberattacks, and gun violence have also emerged.

Even where the nature of the criminal activity has not materially changed, there is still much work to be done. Despite notable decreases in national crime rates over the past three decades, there remain many communities—especially in rural, tribal, and urban jurisdictions—that suffer from disproportionately high levels of violence and victimization. No citizen, no community should be left behind from crime reduction efforts. The rule of law must apply everywhere and to all people for it to properly guarantee citizens peace and liberty. Unfortunately, violent gangs and drug trafficking organizations, empowered and armed by the illicit firearms trade, still terrorize their neighborhoods. Criminals continue to abuse vulnerable populations, including women and children, at unacceptable rates in the form of human trafficking, sex abuse, and domestic violence.

In studying the state of crime reduction efforts, the Commission has proposed several ways for law enforcement to better assess, address, and combat the salient criminal threats of our time. Yet crime itself is a social phenomena of many causes and forms. So while this chapter focuses on law enforcement capabilities, it should be remembered that the most effective program to reduce crime is a holistic concert of government and social programs, which intersect and correlate throughout this report, that address and prevent the root causes of crime.

Background

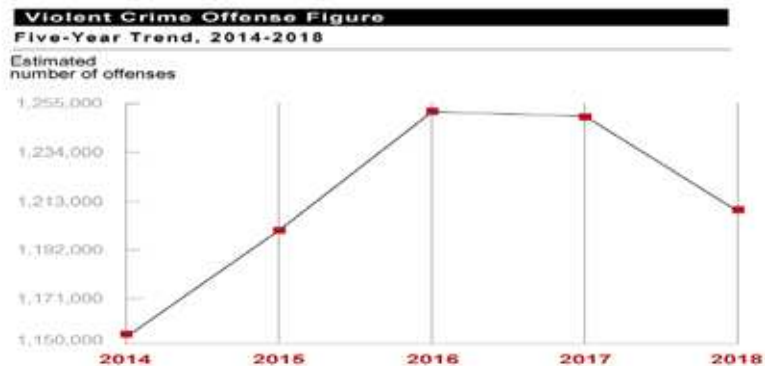
According to the Federal Bureau of Investigation's (FBI) Uniform Crime Reporting (UCR) program, approximately 1.2 million violent crimes were committed in the United States in 2018. Between 2017 and 2018, crime decreased across the board. The rate of violent crimes such as murder, robbery, and aggravated assault declined; rape was the only violent crime that increased (up 2.7 percent).¹ In 2018, the rate of violent crime was at 381 offenses per 100,000 people, a significant decline from 758 offenses per 100,000 people in 1991.²

¹ Federal Bureau of Investigation, "FBI Releases 2018 Crime Statistics," September 30, 2019, <https://www.fbi.gov/news/pressrel/press-releases/fbi-releases-2018-crime-statistics>.

² Samuel Stebbins, "Dangerous States: Which States Have the Highest Rates of Violent Crime and Most Murders?," *USA Today*, January 13, 2020, <https://www.usatoday.com/story/money/2020/01/13/most-dangerous-states-in-america-violent-crime-murder-rate/40968963/>.

Deliberative and Pre-decisional

Source: Federal Bureau of Investigation, Uniform Crime Reporting Program <https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/violent-crime>



The causes of violent crime are many and varied..., and while crime reduction strategies should be tailored to the problems facing different communities, certain general principles apply categorically. These principles include developing effective relationships between law enforcement and the communities they serve and encouraging proactive and strategic collaboration among federal, state, local, and tribal law enforcement.

As remarked above, there is a prominent need for crime reduction concentrated in certain American cities that suffer from crime rates several times the national average. [Have someone insert stat RE: Detroit, Baltimore crime rates]. In combatting such crime, Attorney General Barr has fashioned two distinct law enforcement initiatives—Operation Relentless Pursuit and Operation Legend—to target high crime areas in select cities using a tailored model of federal and state collaboration.

“Americans deserve to live in safety,” said Attorney General William P. Barr. “And while nationwide violent crime rates are down, many cities continue to see levels of extraordinary violence. Operation Relentless Pursuit seeks to ensure that no American city is excluded from the peace and security felt by the majority of Americans, while also supporting those who serve and protect in these communities with the resources, training, and equipment they need to stay safe.”³

These two examples, highlight a general strategy that Attorney General Barr has successfully implemented multiple times for addressing violent crime: establishing an operation or task force composed of all necessary law enforcement partners, federal, state, local, and tribal, to jointly combat a specific issue with dedicated resources and attention.

Another successful collaborative model to draw upon is Project Safe Neighborhoods (PSN), reinstituted by the Department of Justice in 2017. PSN is a nationwide initiative that brings together federal, state, local and tribal law enforcement officials, prosecutors, and community leaders to identify the most pressing violent crime problems in a community and develop comprehensive solutions to address them. PSN is implemented by each US Attorney’s office to address the particular violent crimes in that community.⁴

It is also important for law enforcement to partner with their communities to prevent crime before it occurs. Crime reduction strategies should consider community members’ perception of their local police and promote cooperation between police and community stakeholders. Such efforts are critical for programs to be implemented successfully, and they should be prioritized. Scott Thomson, retired chief from Camden

³ <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-relentless-pursuit>

⁴ <https://www.justice.gov/psn#:~:text=Project%20Safe%20Neighborhoods%20is%20a,comprehensive%20solutions%20to%20address%20them.>

Deliberative and Pre-decisional

County, New Jersey, states, “the only way to significantly reduce fear, crime, and disorder, and then sustain these gains is to leverage the greatest force multiplier: the people of the community themselves.”⁵

Successful reentry and juvenile justice programs are two primary means of how law enforcement can partner with their communities to prevent and reduce crime. The recommendations in this chapter draw on targeted deterrence approaches to reduce violent crime, and new and developing methodologies, technologies, and approaches to combat criminal activity, delinquency, and public disorder.

9.1 Gangs and Criminal Organizations

Gangs are one of the greatest crime threats to law enforcement today. In the 2019 National Threat Picture provided by the Major Cities Chiefs Association (MCCA), 65 percent of agencies placed criminal gangs and organizations as one of their top five major issues. The central region of the United States ranked gangs as its second greatest concern, and both the eastern and western regions ranked gangs as their third largest concern.⁶ In 2019, gang activity increased more than 25 percent.⁷ While drug and weapon trafficking have been major components of criminal activity in gangs, an increasing trend is gang involvement in human trafficking. Often, the internet helps gangs further human trafficking efforts for their own gain.⁸

Gangs are increasingly more numerous in number and in their membership. The number of gang members in the United States likely exceeds one million.⁹ The FBI states that “approximately 33,000 violent street gangs, motorcycle gangs, and prison gangs are criminally active in the U.S. today.”¹⁰ While some may be sophisticated and well organized, others are best described as cliques that control smaller territories or crews that engage in particular types of concerted criminal activity.

Gangs also vary in type, structure and organization. Prison gangs form and operate mainly in the prison system, but also continue their criminal activity outside of the prison system.¹¹ Outlaw motorcycle gangs are extremely structured, and their members participate in violent crime and weapons and drug trafficking. Their crimes are facilitated through motorcycle clubs. There are also nationwide gangs structured to operate with a formal hierarchy and set of rules. However, a substantial portion of gang violence results from provincial neighborhood gangs that operate by informal ties of kinship and locality rather than the organizational structure characteristic of national gangs.¹²

Gangs promote and sustain their existence through illegal sources of profit, including robbery, extortion, drug trafficking, gun trafficking, prostitution and human trafficking, and other theft and fraud schemes. These groups often exist for territorial dominance over specific neighborhoods, and direct violence against rival groups perceived to threaten their power, influence, or business.

⁵ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 7, 2020) (written statement of J. Scott Thomson, Chief of Police (Ret.), Camden County Police Department, NJ), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.⁶ “Measuring the Extent of Gang Problems Estimated Number of Gangs,” National Gang Center, accessed June 27, 2020, <https://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems>.

⁶ “Measuring the Extent of Gang Problems Estimated Number of Gangs,” National Gang Center, accessed June 27, 2020, <https://www.nationalgangcenter.gov/survey-analysis/measuring-the-extent-of-gang-problems>.

⁷ Major Cities Chiefs Association, *2019 National Threat Picture: Top Threat Issues of Major City Law Enforcement Agencies* (Washington, DC: Major Cities Chiefs Association, 2019), https://majorcitieschiefs.com/pdf/news/2019_mcca_us_national_threat_picture_report.pdf.

⁸ “Gangs and Human Trafficking,” *National Gang Center* (blog), January 31, 2020, <https://www.nationalgangcenter.gov/Blog/47/Gangs-and-Human-Trafficking>.

⁹ David C. Pyrooz and Gary Sweeten, “Gang Membership Between Ages 5 and 17 Years in the United States,” Abstract, *Journal of Adolescent Health* 56, no. 4 (2015), <https://doi.org/10.1016/j.jadohealth.2014.11.018>.

¹⁰ “Gangs,” Federal Bureau of Investigation, accessed June 19, 2020, <https://www.fbi.gov/investigate/violent-crime/gangs>.

¹¹ Drug Enforcement Administration, *2019 National Drug Threat Assessment* (Washington, DC: Drug Enforcement Administration, 2019), 126, https://www.dea.gov/sites/default/files/2020-01/2019-NDTA-final-01-14-2020_Low_Web-Dir-007-20_2019.pdf.

¹² Drug Enforcement Administration, *2019 National Drug Threat Assessment*.

Deliberative and Pre-decisional

According to the National Gang Center, gangs have “become more entrenched over the past 25 years,” but “gang activity is localized in nature and tends to follow a cyclical pattern with upswings followed by downturns.”¹³ The cycles largely emanate from the transient nature of conflict and competition with other gangs and criminal organizations. Gangs are mostly found in highly populated areas, as “more than 50 percent of the net increase in gangs and gang members over the past five years was due to overall increases in larger cities.”¹⁴

The available evidence demonstrates that a disproportionately small group of individuals is responsible for the majority of criminal activity. Preventing and reducing gang violence requires Intervention programs, not just law enforcement operations, to identify prolific criminal actors and use the support of community, law enforcement, and social services to offer a pathway to law-abiding behavior. With this model, criminals are offered social service assistance and notified of the consequences for any additional criminal activity.¹⁵

Accordingly, as noted above, law enforcement operations to reduce crime should proceed in concert with focused deterrence strategies (the “pulling levers” policing method) that have historically showed a significant decrease in violent crime, including a 44 percent decrease in gun assault offenses in Lowell, Massachusetts; a 42 percent decrease in gun homicides in Stockton, California; a 41 percent decrease in homicides of members of criminal organizations in Cincinnati, Ohio; and a 34 percent decrease in total homicides in Indianapolis, Indiana.¹⁶

The Tampa Police Department in Florida has used a modified focused deterrence approach and decided to target specific offenders who were the biggest contributors to local crime with greater efficiency and accuracy.¹⁷ As Dr. Briana Fox, an associate professor from the Department of Criminology at the University of South Florida, notes, “after a three-year evaluation, even when controlling for the decline in violent crime since 2016, Tampa still had an additional 23 percent reduction in violent crime and 47 percent reduction in gun violence, compared to the other agencies in the surrounding area.”¹⁸

Addressing gang violence, therefore, requires a comprehensive deployment of long term criminal investigations, focused deterrence programs, and governmental efforts to address how neighborhood social and physical disorder can serve as precursors to more serious forms of delinquent and criminal behavior, fear of crime, and neighborhood decline.¹⁹ Disorder policing maintains that visual signs of disorder (e.g., litter, graffiti, abandoned property, aggressive panhandling, or prostitution) signal to residents and nonresidents that mechanisms of informal social control within their communities have broken down, initiating a chain of events which leads to elevated levels of crime.²⁰

¹³ “Frequently Asked Questions About Gangs,” National Gang Center, accessed June 19, 2020, <https://www.nationalgangcenter.gov/about/FAQ>.

¹⁴ National Gang Center, “Frequently Asked Questions About Gangs.” ¹⁵ “Practice Profile: Focused Deterrence Strategies,” CrimeSolutions.gov, accessed June 19, 2020, <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=11>.

¹⁵ “Practice Profile: Focused Deterrence Strategies,” CrimeSolutions.gov, accessed June 19, 2020, <https://www.crimesolutions.gov/PracticeDetails.aspx?ID=11>.

¹⁶ The Bridgespan Group, *Needle-Moving Community Collaboratives Case Study: Boston* (Boston: The Bridgespan Group, 2012), 5, <https://www.bridgespan.org/bridgespan/Images/articles/needle-moving-community-collaboratives/profiles/community-collaboratives-case-study-boston.pdf>.

¹⁷ Briana Fox, Associate Professor, University of Florida Department of Criminology, in discussion with Reduction of Crime Working Group, virtual meeting, April 23, 2020.

¹⁸ Fox, in discussion with Reduction of Crime, April 23, 2020.

¹⁹ Anthony A. Braga, Brandon C. Welsh, and Cory Schnell, “Can Policing Disorder Reduce Crime? A Systematic Review and Meta-analysis,” *Crime & Delinquency* 52, no. 4 (2015), <https://journals.sagepub.com/doi/10.1177/0022427815576576>.

²⁰ Joshua C. Hinkle and David Weisburd, “The Irony of Broken Windows Policing: A Micro-Place Study of The Relationship Between Disorder, Focused Police Crackdowns And Fear Of Crime,” *Journal of Criminal Justice* 36, no. 6 (2008), <https://doi.org/10.1016/j.jcrimjus.2008.09.010>; and George L. Kelling and James Q. Wilson, “Broken Windows: The police and neighborhood safety,” *The Atlantic*, March 1982, <https://www.theatlantic.com/magazine/archive/1982/03/broken-windows/304465/>.

Deliberative and Pre-decisional

While gangs are a significant driver of crime in many areas, interventions are available to law enforcement to reduce gang activity.

9.1.2 Law enforcement agencies should fund crime analysts to identify violent crime trends among individuals and groups.

Law enforcement should focus on developing, gathering, and leveraging all available data and intelligence across jurisdictions and agencies, including correctional facility intelligence, to identify leaders of gangs or criminal organizations and the principal violent actors within such gangs by working with jail intelligence teams and sharing data between local jurisdictions of low level enforcement. In addition to coordinating information regarding gangs and violent organizations, an important aspect of crime reduction generally, and gang investigations specifically, involves developing and amassing the intelligence necessary for law enforcement to discern the best use of resources to dismantle violent gangs.

Crime analysts can provide accurate data (e.g., affiliations, current charges, or social media) to law enforcement officers whose areas are most likely affected by these individuals or groups. Even after commencement of an investigation, crime analysts can perform the vital role of digesting and assessing investigative data (e.g., wiretaps and other forms of electronic surveillance) to gather evidence against these organizations and organizational leaders. Technology companies should provide access to such information when law enforcement has lawful authority to obtain it, including using court orders. Crime gun intelligence (CGI) tools—such as the Bureau of Alcohol, Tobacco, Firearms and Explosives’s (ATF) National Integrated Ballistics Information Network (NIBIN), firearm tracing, and acoustic gunshot detection technology—are also essential analytical assets for the identification of the most violent criminal organizations and associates.

As an example, the FBI Cleveland Office initiated Operation Hadley’s Hope when they received intelligence from the Metropolitan Richland County drug task force. They used wiretaps, which resulted in the dismantling of three large drug trafficking organizations in October 2017, February 2019, and March 2020. According to Justin Herdman, U.S. attorney for the Northern District of Ohio, “the investigation resulted in the seizure of 51 firearms and the arrest of 145 individuals. And most importantly violent crime was reduced by 19 percent in 2018 following the first takedown and a further 6.2 percent decrease in 2019 following the second takedown.”²¹

[CROSS REFERENCE TECHNOLOGY]

9.1.3 Local law enforcement should coordinate joint strategies with other state and federal law enforcement agencies to combat gang violence, to include forming and participating in regionalized gang task forces.

Integrating multiple investigative approaches is essential to effective anti-gang initiatives. Law enforcement agencies often solely rely on their own personnel to combat gang-related violence and criminal enterprises.²² As a result, many agencies lack proper personnel and resources to control the accelerated growth of criminal street gangs.²³

Local law enforcement should coordinate their operations and strategy with other state and federal law enforcement agencies to collect, combine, and share all available resources in the fight against gang violence. In addition to general operational meetings to share information and coordinate strategies, law

²¹ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 7, 2020) (statement of Justin Herdman, U.S. Attorney, Northern District of Ohio), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

²² John McMahon, Sheriff, San Bernardino County Sheriff’s Office, CA, email communication with Kristie Brackens, Federal Program Manager, Reduction of Crime Working Group, May 29, 2020.

²³ McMahon, email communication with Kristie Brackens, May 29, 2020.

Deliberative and Pre-decisional

enforcement should formulate gang task forces, where possible, that include investigators from at least three local agencies within the affected region in addition to representatives from state parole, state police, prosecuting bodies, corrections and probation departments, the FBI, and the Department of Homeland Security (DHS).²⁴ The task force may increase its resources as well as its drug and gun expertise by partnering with ATF and DEA.²⁵

Combining and coordinating resources across law enforcement agencies empowers a gang task force to employ the kind of comprehensive investigation necessary to dismantle criminal organizations. Wiretaps, electronic surveillance, and other sophisticated investigative techniques can gather valuable criminal evidence and intelligence about the leadership of a criminal street gang. A task force is ideal for financing and staffing such measures because it can use resources from several involved agencies.²⁶ Additionally, the combination of federal and state participation in such investigations allows law enforcement to draw intelligence from a larger base.²⁷

Every gang task force should also deploy a corrections-based intelligence strategy. It is common practice for gang members to continue to facilitate criminal activity after incarceration. Bryan Stirling, director of South Carolina Department of Corrections, noted that “in the hands of inmates, cell phones undermine the foundation of the criminal justice system by allowing convicted criminals to further their criminal activities behind bars. Through the use of contraband cell phones, inmates are able to coordinate illegal drug shipments, direct acts of violence, perpetuate gang activity, commit acts of fraud, and plan escapes.”²⁸ Wiretaps used in correctional settings can assist in investigations into these criminal activities.

9.1.4 Local law enforcement, in collaboration with federal law enforcement, should implement targeted enforcement and patrols in designated and confined geographical areas to gather, collect, and share intelligence on known gang members for arrest and prosecution.

While gang task forces conduct covert investigations behind the scenes for periods of months, local law enforcement must still manage gang violence on the streets on a daily basis. Accordingly, using similar methods of identifying sources of violence, it is important for local law enforcement to direct resources to the hotspots that disproportionately contribute to violent crime. Hotspot mapping or risk terrain modeling are used to direct patrol assignments, allocate resources, and supplement initiatives that benefit the mission of violent crime reduction. Such techniques detect trends and patterns in crime displacement and crime diffusion that result from law enforcement crime control efforts.²⁹ These techniques should be incorporated into broader community-oriented approaches to crime prevention, as community members frequently exhibit positive reactions to such targeted police actions.³⁰

²⁴ Gang Intelligence Strategy Committee, *Guidelines for Establishing and Operating Gang Intelligence Units and Task Forces* (Washington, DC: Bureau of Justice Assistance, 2008), <https://it.ojp.gov/documents/d/guidelines%20for%20establishing%20Gang%20Intelligence%20units.pdf>.

²⁵ Gang Intelligence Strategy Committee, *Guidelines for Establishing and Operating Gang*.

²⁶ John Lausch, U.S. Attorney, Northern District of Illinois, email communication with Kristie Brackens, Federal Program Manager, Reduction of Crime Working Group, May 29, 2020.

²⁷ Lausch, email communication with Kristie Brackens, May 29, 2020.

²⁸ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 15, 2020) (statement of Bryan Stirling, Director, South Carolina Department of Corrections), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.²⁹ Kate Bowers et al., “Spatial Displacement and Diffusion of Benefits Among Geographically-Focused Policing Initiatives,” *Campbell Collaboration* 7, no. 1 (2011), <https://campbellcollaboration.org/better-evidence/geographically-focused-policing.html>; and Weisburd et al., “Does Crime Just Move Around the Corner? A Controlled Study of Spatial Displacement and Diffusion of Crime Control Benefits,” *Criminology* 44, no. 3 (2006), <https://doi.org/10.1111/j.1745-9125.2006.00057.x>.

²⁹ Kate Bowers et al., “Spatial Displacement and Diffusion of Benefits Among Geographically-Focused Policing Initiatives,” *Campbell Collaboration* 7, no. 1 (2011), <https://campbellcollaboration.org/better-evidence/geographically-focused-policing.html>; and Weisburd et al., “Does Crime Just Move Around the Corner? A Controlled Study of Spatial Displacement and Diffusion of Crime Control Benefits,” *Criminology* 44, no. 3 (2006), <https://doi.org/10.1111/j.1745-9125.2006.00057.x>.

³⁰ Anthony A. Braga, Andrew V. Papachristos, and David M. Hureau, “The Effects of Hot Spots Policing on Crime: An Updated Systematic Review and Meta-Analysis,” *Justice Quarterly* 31, no. 4 (2014), <https://doi.org/10.1080/07418825.2012.673632>; and Anthony Braga et al., “Hot Spots Policing and Crime Reduction,” *Journal of Experimental Criminology* 15 (2019), <https://link.springer.com/article/10.1007/s11292-019-09372-3>.

Deliberative and Pre-decisional

David Kennedy, professor at the John Jay College of Criminal Justice and the executive director of National Network for Safe Communities, explains that “there exist extreme concentrations of violence” within the country.³¹ He states, “The fact is one of extraordinary geographic and demographic concentration. One-half of the entire country’s homicides are committed in about only about twenty-five cities and towns. The concentrated areas of homicides are overwhelming committed in areas of color.”³²

Among other methods of identifying the source of gang violence discussed elsewhere in this chapter, Social Network Analysis (SNA) provides an analytical assessment of the connections among individuals and identifies gang structures, drug market networks, and key individuals to investigate. Social networks can explain criminal relationships, behaviors, and patterns that may exist. SNA reveals these links and allows researchers to understand criminal relationships, networks, and influences.³³

It is critical for local law enforcement to understand the structure of criminal networks to help them predict and disrupt future crimes. Many departments use SNA in conjunction with intelligence and data analysis to identify individuals to target for focused deterrence intervention. The real “concentration of risk, is not by demographic or community or neighborhood, but is of real small groups or networks within those communities.”³⁴

[CROSS REFERENCE BUSINESS AND COMMUNITY DEVELOPMENT CHAPTER]

9.1.6 Federal, state, local, and tribal governments should increase funding for community-oriented crime reduction programs focused on both adult and youth populations.

The honed enforcement of criminal laws by itself is unlikely to permanently abate the high levels of violence observed in many American communities. Just as criminal behavior generally derives for many reasons outside of the legal system, law enforcement is not the sole means to remedy gang violence. Many “intervention” programs can address crime reduction without punishment, and such programs include hospital-based violence intervention programs, place-centric or community-based crime reduction programs, programs designed to modify a community’s physical and social environment, and prevention and reentry programs.

Interventions that include street outreach address violence risk factors like community-level trauma and cultural or social norms that normalize violence as a way to resolve problems. Such interventions include having trained personnel reach out to community residents who are known to have engaged in or who may be at increased risk for violence, promoting nonviolence norms and nonviolent conflict mediation, and connecting community members to available social supports and services.³⁵

Long-term, comprehensive interventions for children with conduct and behavioral problems can reduce violent crime in adulthood. Youth violence, which includes fighting, bullying, gang activity, and dating violence, has been described by the Centers for Disease Control (CDC) as a significant public health

³¹ Stephen Lurie, “There’s No Such Thing as a Dangerous Neighborhood,” Bloomberg City Lab, February 25, 2019, <https://www.bloomberg.com/news/articles/2019-02-25/beyond-broken-windows-what-really-drives-urban-crime>.

³² Aliza Aufrichtig et al., “Want to Fix Gun Violence in America? Go Local,” *Guardian*, January 9, 2017, <http://www.theguardian.com/us-news/ng-interactive/2017/jan/09/special-report-fixing-gun-violence-in-america>.

³³ Jason Gravel and George E. Tita, “Network Perspectives on Crime,” *Oxford Research Encyclopedia of Criminology and Criminal Justice* (Oxford, UK: Oxford University Press, 2017), <https://oxfordre.com/criminology/view/10.1093/acrefore/9780190264079.001.0001/acrefore-9780190264079-e-251>.

³⁴ Aliza Aufrichtig et al., “Want to Fix Gun Violence.”

³⁵ National Network of Hospital-based Violence Intervention Programs, *Hospital-based violence intervention: Practices and Policies to End the Cycle of Violence* (Jersey City, NJ: National Network of Hospital-based Violence Intervention Programs, 2019), <https://static1.squarespace.com/static/5d6f61730a2b610001135b79/t/5d83c0d9056f4d4cbdb9acd9/1568915699707/NNHVIP+White+Paper.pdf>.

Deliberative and Pre-decisional

problem.³⁶ Local school districts should incorporate interventions to increase protective factors that can reduce crime for children, youth, and families, such as quality early childhood programs (e.g., early Head Start and Head Start), good school attendance programs (e.g., Check and Connect and Positive Action), after school and youth development programs (e.g., GEAR UP), literacy programs (e.g., READ 180), social-emotional interventions, and mentoring programs.³⁷ These programs have far-reaching, positive effects. Head Start programs, followed by effective and well-funded K-12 schools, are related to positive outcomes, including reduced adult incarceration.³⁸

[CROSS REFERENCE JUVENILE JUSTICE]

9.2 Illegal Possession, Use, and Trafficking of Firearms

The most significant instrument of violent crime is an illegal firearm. Criminals use illegal guns (those that are unlawfully obtained or possessed) more often to commit crimes.³⁹ Eighty-five percent of criminal firearm possessors are not the original purchaser.⁴⁰

Criminals arm themselves through firearm traffickers, thefts, illicit retail markets (i.e., lie-and-try), privately-made firearms (i.e., un-serialized firearms often referred to as “ghost guns”), and unlawful private market sales (e.g., gun shows and flea markets). A 2016 study conducted by the Bureau of Justice Statistics found that an estimated 287,400 state and federal prisoners had possessed a firearm during their offense, with more than half (56 percent) having acquired it by purchasing it “on the street” (43 percent), finding it at the crime scene (7 percent), or stealing it (6 percent).⁴¹ Research on gun violence illustrates the importance of focusing on the highest-risk places, people, and weapons.⁴²

PULL QUOTE: “In 2017, on average, there were 105 gun fatalities every day—a fact often overlooked in light of mass shootings, which amounted to 117 deaths over that entire year. The impact of gun violence extends well beyond those cases that end in death: any shooting results in serious and sometimes debilitating injury, often requiring life-long medical attention.”⁴³ - G. Zachary Terwilliger, U.S. Attorney for the Eastern District of Virginia

While criminal intelligence often focuses on the individuals driving the violence in a particular community, identifying and evaluating the use of firearms can and should factor into any crime analysis of where to devote law enforcement resources. Crime gun intelligence (CGI) is currently one of the most successful means available for law enforcement in combatting gun crimes, and more specifically within CGI is using the National Integrated Ballistics Information Network (NIBIN). ATF established NIBIN in 1997 with a

³⁶ Corinne David-Ferdon et al., *A Comprehensive Technical Package for the Prevention of Youth Violence and Associated Risk Behaviors* (Atlanta, GA: Centers for Disease Control and Prevention, 2016), <https://www.cdc.gov/violenceprevention/pdf/yv-technicalpackage.pdf>

³⁷ “Applying for the Head Start Program,” Early Childhood Learning and Knowledge Center, accessed June 19, 2020, <https://edlkc.ohs.acf.hhs.gov/how-apply>; “Gaining Early Awareness and Readiness for Undergraduate Programs (GEAR UP),” U.S. Department of Education, November 21, 2019, <https://www2.ed.gov/programs/gearup/index.html>; and “Read 180 Unlock Whole-Brain Reading Through Blended Learning Intervention,” Houghton Mifflin Harcourt, accessed June 26, 2020, <https://www.hmhco.com/programs/read-180-universal>.

³⁸ Rucker C. Johnson and C. Kirabo Jackson, “Reducing Inequality Through Dynamic Complementarity: Evidence from Head Start and Public School Spending,” *American Economic Journal: Economic Policy* 11, no. 4 (2019), <https://doi.org/10.1257/pol.20180510>.

³⁹ Anthony A. Braga et al., “The Illegal Supply of Firearms,” *Crime and Justice* 29 (2002), <https://doi.org/10.1086/652223>; National Research Council, *Understanding and Preventing Violence: Volume 1* (Washington, DC: The National Academies Press, 1993), <https://www.nap.edu/catalog/1861/understanding-and-preventing-violence-volume-1>; and James D. Wright and Peter H. Rossi, *Armed and Considered Dangerous: A Survey of Felons and Their Firearms* (Hawthorne, NY: Aldine de Gruyter Publishing Co., 1994), <https://www.ncjrs.gov/App/Publications/abstract.aspx?ID=155885>.

⁴⁰ Daniel W. Webster, Jon S. Vernick, and Maria T. Bulzacchelli (2009), “Effects of State-Level Firearm Seller Accountability Policies on Firearm Trafficking,” *Journal of Urban Health* 86, no. 4 (2009): 526, <https://dx.doi.org/10.1007%2Fs11524-009-9351-x>.

⁴¹ Mariel Alper and Lauren Glaze, *Source and Use of Firearms Involved in Crimes: Survey of Prison Inmates, 2016* (Washington, DC: Bureau of Justice Statistics, 2019), 1, <https://www.bjs.gov/content/pub/pdf/suficspi16.pdf>.

⁴² Lawrence W. Sherman and Dennis P. Rogan, “Effects of gun seizures on gun violence: ‘Hot spots’ patrol in Kansas City,” *Justice Quarterly* 12, no. 4 (1995), <https://doi.org/10.1080/07418829500096241>.

⁴³ Terwilliger, *President’s Commission on Law*, April 8, 2020.

Deliberative and Pre-decisional

mission to provide partner agencies around the country—local, state, and federal law enforcement—with an automated ballistic imaging network. NIBIN is the only national network for compiling ballistic evidence and is used to help solve violent crimes involving firearms comparing ballistics evidence from around the country. NIBIN provides investigators with the ability to determine potential links between crimes that they would not have been able to realize without it. NIBIN data, in conjunction with comprehensive firearms tracing, forms the cornerstone of CGI.⁴⁴

The ATF Forensic Science Laboratory and several other laboratories in the United States and Europe have also recently developed methods to successfully obtain DNA profiles from fired cartridge cases. Forensic DNA analysis compares DNA recovered from biological material deposited on items of evidence to individuals potentially related to the criminal investigation. DNA profiles that are developed from crime scene evidence can be compared to a national database of convicted offenders and other crime scene DNA profiles to generate leads (i.e., Combined DNA Index System, or CODIS). DNA analysis can now be combined with CGI tools to provide investigators more information to solve firearm-related crimes.⁴⁵

A constellation of federal and state laws regulates the possession, use, sale, and transfer of firearms, and otherwise prohibits many criminals from receiving firearms in the first place. It is not enough for law enforcement to simply punish criminals for using firearms in crimes. Law enforcement must proactively investigate and prevent criminals from illegally possessing firearms in the first place.

The recommendations that follow aim to enhance law enforcement's ability to reduce illegal firearms and crimes committed by them.

9.2.1 Federal and local law enforcement agencies should partner to increase investigations and prosecutions of individuals who illegally possess, use, and traffic firearms.

Gun traffickers, unlicensed dealers, and straw purchasers (i.e., individuals without a criminal record who purchase firearms for drug dealers, violent criminals, or persons who are prohibited by law from receiving firearms) should be investigated and prosecuted to deter the illegal use of firearms. Research indicates that offenders who use firearms in the commission of their crimes are more likely to recidivate than non-firearms offenders.⁴⁶ Additionally, when those offenders are rearrested, it is for more serious crimes than offenders who did not use a firearm during their initial offense.⁴⁷ Reoffenders who were firearms offenders are most commonly charged with assault (29 percent), followed by drug trafficking (13.5 percent) and public order crimes (12.6 percent).⁴⁸

Thus, it is critical that law enforcement investigates and apprehends individuals who illegally possess, transfer, or traffic firearms in order to preempt the flow of guns to communities engulfed by gun violence.

9.2.2 Law enforcement agencies should collect and quickly process ballistics evidence in all shootings and gun recoveries, regardless of whether there is an immediately identifiable offender or victim.

Comprehensive collection of all available firearms intelligence is the foundation of NIBIN. It maximizes the firearm data available to law enforcement to detect, track, and identify violent crimes and the individuals who commit them. Partner agencies should collect and submit all evidence suitable for entry into NIBIN, regardless of the severity of a crime. Evidence includes cartridge cases recovered from crime scenes and test fires from recovered crime guns. Shooting events tend to escalate, so agency policies should be

⁴⁴ "Fact Sheet - National Integrated Ballistic Information Network," Bureau of Alcohol, Tobacco, Firearms and Explosives, June 2020, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-national-integrated-ballistic-information-network>.

⁴⁵ Todd W. Bille et al., "An Improved Process for the Collection and DNA Analysis of Fired Cartridge Cases," *Forensic Science International: Genetics* 46 (2020), <https://doi.org/10.1016/j.fsigen.2020.102238>.

⁴⁶ U.S. Sentencing Commission, *Recidivism Among Federal Firearms Offenders* (Washington, DC: U.S. Sentencing Commission, 2019), <https://www.ussc.gov/research/research-reports/recidivism-among-federal-firearms-offenders>.

⁴⁷ U.S. Sentencing Commission, *Recidivism Among Federal Firearms*.

⁴⁸ U.S. Sentencing Commission, *Recidivism Among Federal Firearms*, 4.

Deliberative and Pre-decisional

instituted to recover all suitable ballistic evidence from crime scenes and process it through NIBIN. A Rutgers University study detailed that when three or more shooting events are linked by NIBIN, 50 percent of the time the third shooting occurred within 90 days of the second.⁴⁹ Low-priority shooting events routinely link with higher-priority events. Law enforcement should prioritize a victimless shot fired call with the same urgency and attention as a homicide case.⁵⁰ Nonfatal shootings constitute the majority of all gun assaults, occurring approximately four times as often as gun homicides.⁵¹

Timely turnaround is crucial, as violent crime investigations turn cold fast.⁵² As a result, timely intelligence and investigative leads gained through NIBIN are critical to solving violent crimes and stopping violent offenders before they can reoffend. Quick turnaround is vital during all phases of NIBIN analysis, including the entry and acquisition into NIBIN, correlation reviews, and the dissemination of NIBIN leads.⁵³

9.2.3 Congress should provide additional funding to the Department of Justice to increase the number of National Integrated Ballistic Information Network (NIBIN) sites, and the Department of Justice should provide additional grant funding to the Local Law Enforcement Crime Gun Intelligence Centers Integration Initiative.

The Crime Gun Intelligence Centers (CGICs) model is built on partnerships with local law enforcement, district attorney offices, and U.S. attorney's offices. CGICs use forensic science and data analysis to identify offenders and the sources of crime guns. The forensic technology used by CGICs to focus law enforcement investigations helps state and federal courts prosecute the most violent armed offenders.⁵⁴

There are currently 225 NIBIN sites in the country. In 2018, violent crime in rural areas increased above the national average for the first time in a decade.⁵⁵ To effectively navigate this increase in crime, NIBIN should be expanded to fill gaps across the country in urban and rural areas.

CGIC tools, such as gunshot detection, firearms tracing, and NIBIN, have been widely recognized as effective measures to reduce crime. CGICs help law enforcement disrupt criminal gangs. Comprehensive collection of ballistic evidence is critical for NIBIN to be successful, and gunshot detection technology alerts law enforcement to shooting incidents where there may not be a victim or witness. NIBIN can serve as a tool to point law enforcement towards violent gang members. A 2017 Police Foundation brief ranked ballistic imaging as the most useful federal resource in preventing gun violence through the expedited identification and arrest of shooters and gun traffickers.⁵⁶ In three years, the Cincinnati Police Department reduced the number of people shot in Cincinnati, Ohio, from 479 in 2015 to 333 in 2018, a 30 percent reduction.⁵⁷ Assistant Police Chief Paul Neudigate attributes this substantial reduction to a layered strategy based upon

⁴⁹ Sue Weston, "Ballistics Analysis Project Externship," University of Rutgers, accessed June 22, 2020, <https://mbs.rutgers.edu/articles/ballistics-analysis-project-externship>.

⁵⁰ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 16, 2020) (written statement of Christopher Amon, Division Chief, Firearms Operations Division, Bureau of Alcohol, Tobacco, Firearms and Explosives), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

⁵¹ Natalie K. Hipple and Lauren A. Magee, "The Difference Between Living and Dying: Victim Characteristics and Motive Among Nonfatal Shooting and Gun Homicides," *Violence and Victims* 32, no. 6 (2017), <https://doi.org/10.1891/0886-6708.vv-d-16-00150>.

⁵² Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet - National Integrated Ballistic."

⁵³ Amon, *President's Commission on Law*, April 16, 2020.

⁵⁴ National Police Foundation, *5 Things You Need To Know About Crime Gun Intelligence Centers* (Washington, DC: National Police Foundation, 2018), <https://www.policefoundation.org/publication/5-things-you-need-to-know-about-crime-gun-intelligence-centers-2/>.

⁵⁵ Shibani Mahtani, "Nothing But You and the Cows and the Sirens" - Crime Tests Sheriffs Who Police Small Towns," *Wall Street Journal*, May 12, 2018, <https://www.wsj.com/articles/nothing-but-you-and-the-cows-and-the-sirens-crime-tests-small-town-sheriffs-1526122800>.

⁵⁶ National Police Foundation and Major Cities Chiefs Association, *Reducing Violent Crime in American Cities: An Opportunity to Lead - Full Report* (Washington, DC: National Police Foundation, 2017), 38, <https://www.policefoundation.org/publication/reducing-violent-crime-in-american-cities-an-opportunity-to-lead-full-report/>.

⁵⁷ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 8, 2020) (written statement of Paul Neudigate, Assistant Chief of Police, Cincinnati Police Department, OH), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

Deliberative and Pre-decisional

the principles of CGI: NIBIN, e-Trace, gunshot detection systems, identifying priority offenders, enhanced federal prosecution, and strong relationships.⁵⁸

Additionally, to be the most effective, law enforcement agencies that have purchased or been provided NIBIN technology should share this tool with other state or local partners within their geographical area. These partnerships with both large and small law enforcement agencies leverage NIBIN technology beyond jurisdictional boundaries to combat firearm violence. One of ATF's first regional NIBIN joint initiative programs was established with the Frederick County Sheriff's Office in Maryland to serve all western Maryland law enforcement. All of the NIBIN equipment and the technicians are located at the Frederick County Law Enforcement Center, where they rapidly process the ballistic evidence for law enforcement officers from four western Maryland counties.

The CGIC program has great potential to reduce gun crime.⁵⁹ Departments should use NIBIN consistently and adhere to each phase of the CGIC model (i.e., comprehensive evidence collection, timeliness, follow-up, and implementing a feedback loop) to realize its full potential.⁶⁰

9.2.4 In addition, Congress should continue to fund the NIBIN National Correlation and Training Center.

NIBIN involves a multi-step process. The cartridge case must be acquired by law enforcement, uploaded into NIBIN via an acquisition machine, and reviewed via correlation review software. Through additional funding to the ATF's National Correlation and Training Center (NNCTC), local law enforcement partners would no longer be required to purchase their own correlation review equipment. Instead, they could focus on timely acquisitions.

Currently, NNCTC conducts ballistics image correlations and returns investigative leads to more than 500 law enforcement agencies across the nation within 48 to 72 hours. This alleviates an intensive funding and personnel burden thereby increasing efficiency and generating leads for investigators as quickly as possible.⁶¹ This accounts for approximately 35 percent of all ballistic image acquisitions in the United States.⁶² Working in tandem with local law enforcement, the NNCTC give sites the ability to concentrate limited resources on other critical aspects of the NIBIN process, thereby increasing their ability to provide critical violent gun crime leads to investigators in a timely fashion.⁶³

As of May 2020, the NNCTC has conducted 277,445 correlation reviews, resulting in more than 71,669 leads to partner sites while maintaining a 99.6 percent confirmation rate of the leads disseminated to partner sites.⁶⁴ NNCTC helps solve homicides, attempted homicides, robberies, and other shooting incidents.⁶⁵ Further funding of the NNCTC will aid both large and small law enforcement organizations to reduce firearm violence in their communities.⁶⁶

9.2.6 Congress should enact a federal firearms trafficking statute that strengthens penalties for fraudulent and illegal firearm transfers.

⁵⁸ Neudigate, *President's Commission on Law*, April 8, 2020.

⁵⁹ Christopher Koper, Heather Vovak, and Brett Cowell, *Evaluation of the Milwaukee Police Department's Crime Gun Intelligence Center* (Washington, DC: National Police Foundation, 2019), <https://www.policefoundation.org/new-report-the-evaluation-of-the-milwaukee-police-departments-cgic/>.

⁶⁰ National Police Foundation, "5 Things You Need To Know."

⁶¹ Bureau of Alcohol, Tobacco, Firearms and Explosives, "Fact Sheet - National Integrated Ballistic"; and Christopher Amon, Division Chief, Firearms Operations Division, Bureau of Alcohol, Tobacco, Firearms and Explosives, email communication with Kristie Brackens, Federal Program Manager, Reduction of Crime Working Group, July 10, 2020.

⁶² Amon, email communication with Kristie Brackens, July 10, 2020.

⁶³ National Police Foundation, "5 Things You Need To Know."

⁶⁴ Amon, email communication with Kristie Brackens, July 10, 2020.

⁶⁵ Amon, email communication with Kristie Brackens, July 10, 2020.

⁶⁶ Amon, email communication with Kristie Brackens, July 10, 2020.

Deliberative and Pre-decisional

The trafficking of firearms to violent criminals, gangs, and drug trafficking organizations—whether into our cities or across the U.S.–Mexico border—presents a grave threat to public safety. Straw purchasers (i.e., individuals without a criminal record who purchase firearms for drug dealers, violent criminals, or persons who are prohibited by law from receiving firearms) are the linchpin of most firearms trafficking operations. Straw purchasers may acquire firearms directly for prohibited persons or purchase them for other middlemen on behalf of violent criminals. Not only do straw purchasers allow prohibited persons to come into possession of firearms, they make it extremely difficult for law enforcement officers to trace firearms to aid law enforcement in the investigation of crimes.⁶⁷

Federal law could deter firearms traffickers by expressly prohibiting and imposing mandatory minimum penalties for straw purchasing and illicit diversion of firearms. Under current law, there is no statute specifically directed at straw purchasing or firearms trafficking. Instead, prosecutors rely primarily on 18 U.S.C. § 922(a)(6), which prohibits making a material false statement, typically on a Firearms Transaction Record (ATF Form 4473) in connection with the purchase of a firearm from an FFL. Prosecutors also rely on 18 U.S.C. § 924(a)(1)(A), which prohibits making a false statement with regard to any information that FFLs are required by law to keep on file, including the identity of the actual purchaser.⁶⁸

It is difficult to prove the intent of a straw purchaser or firearms trafficker to transfer a firearm to other persons; therefore, Congress should authorize the use of Title III electronic surveillance to investigate violations of such a firearm trafficking statute. Additionally, Congress should amend federal law to add straw purchasing and firearms trafficking as predicates for racketeering violations, including Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1970), and Violent Crimes in Aid of Racketeering, 18 U.S.C. § 1959 (2006), and make them specified unlawful activities for money laundering.⁶⁹ The effective use of such law enforcement tools could deter straw purchasers and other traffickers by depriving them and their organizations of the proceeds they use to acquire additional weapons or otherwise support their illicit activities.

Another way to stymie firearms traffickers is for Congress to mandate that federal firearm licensees (FFLs) immediately report any firearms theft, burglary, or robbery directly to the Bureau of Alcohol, Tobacco, Firearms and Explosives upon discovery. Current law permits FFLs to wait 48 hours before reporting the crime to ATF, which enables the criminals to gain a tremendous advantage over law enforcement. Reducing the time it takes to report this crime allows ATF to accelerate the deployment of federal resources including sending additional investigators to conduct interviews or surveillances, making timely requests for cell tower data, identifying witnesses, preserving evidence (e.g., video footage), and requesting forensic lab assistance. Additionally, the sooner ATF responds, the quicker the serial numbers of the stolen firearms can be documented and sent to the National Tracing Center (NTC), which then develops investigative leads when any of the stolen firearms are recovered by law enforcement.

9.2.7 The Department of Justice should increase the sworn complement of Bureau of Alcohol, Tobacco, Firearms and Explosives Special Agents.

Given the current focus on firearm-related violence across the United States, ATF shares an important mission with law enforcement to identify and arrest violent firearm offenders. ATF continues to accomplish this mission with a staff of approximately 5,100 employees, including 2,630 special agents and 842 industry operations investigators. Its 2018 budget was nearly \$1.3 billion. Since 1972, this represents an increase of only 1,272 employees.⁷⁰

⁶⁷ Eric M. Epstein, Senior Policy Counsel, Bureau of Alcohol, Tobacco, Firearms and Explosives, email communication with Reduction of Crime Working Group, May 1, 2020.

⁶⁸ Epstein, email communication with Reduction of Crime, May 1, 2020.

⁶⁹ Epstein, email communication with Reduction of Crime, May 1, 2020.

⁷⁰ “Fact Sheet – Staffing and Budget,” Bureau of Alcohol, Tobacco, Firearms and Explosives, May 2019, <https://www.atf.gov/resource-center/fact-sheet/fact-sheet-staffing-and-budget>.

Deliberative and Pre-decisional

Assistant Chief Neudigate recommends, "If addressing gun violence is a national priority, and as ATF has the most co-aligned mission with local law enforcement and the least amount of sworn agents of any of the major federal law enforcement agencies, increase the sworn complement of ATF field agents."⁷¹

9.2.9 Congress should provide additional funding and guidance to help state agencies improve the accuracy of reporting of mental health records and protection orders to the National Instant Check System (NICS).

NICS is critical to keeping firearms out of the hands of those who are legally prohibited from purchasing or possessing them. To function effectively, NICS requires access to complete, accurate, and timely information submitted by relevant agencies in all levels of government nationwide. However, key information on prohibiting factors is missing from NICS, including mental health adjudications. While significant improvements have been made, a background check is only as good as the records in the database, and further improvements are needed.

As detailed by the National Sports Shooting Foundation, states should improve the NICS database by submitting any and all records establishing an individual is a prohibited person (e.g., mental health records showing someone is an "adjudicated mental defective" or involuntarily committed to a mental institute) and official government records showing someone is the subject of a domestic violence protective order, has a substance use disorder, or is subject to another prohibited category.⁷² Including these missing records will help ensure more accurate and complete background checks.⁷³

[CROSS REFERENCE CRIMINAL JUSTICE INTERSECTION]

9.2.12 The Federal Bureau of Investigation should include nonfatal shootings as a separate category in the National Incident-Based Reporting System.

In 2021, the FBI will complete the transition from the UCR program to NIBRS. NIBRS provides an extensive view of crime in the United States by compiling comprehensive data on individual crime incidents in the country. An update to the Summary Reporting System, NIBRS offers greater flexibility in the compilation of data compilation and its analysis. NIBRS can identify details about the crime such as where and when a crime occurred, the characteristics of its victims and offenders, and whether it has been cleared.⁷⁴

Currently, murders are the only direct measure of local gun violence captured by UCR. Law enforcement agencies cannot extract nonfatal shooting incidents that meet the recommended definition. Adding nonfatal shootings as a UCR category will allow for a more accurate understanding of local gun violence and will allow agencies to better address community concerns and allocate resources. A person who has been involved in prior nonfatal shootings is at high risk for being involved in future shootings and homicides.⁷⁵ The ability to only capture murders does not provide an accurate picture of gun violence in communities. Natalie Hipple, associate professor of criminal justice at Indiana University, notes,

⁷¹ Neudigate, *President's Commission on Law*, April 8, 2020.

⁷² "NSSF Praises States for Record Submission of Disqualifying Mental Health Records to Background Check System," National Shooting Sport Foundation, September 25, 2019, <https://www.nssf.org/nssf-praises-states-for-record-submission-of-disqualifying-mental-health-records-to-background-check-system>.

⁷³ "NSSF, ATF Jointly Launch Operation Secure Store," National Shooting Sport Foundation, January 23, 2018, <https://www.nssf.org/nssf-atf-jointly-launch-operation-secure-store>.

⁷⁴ "National Incident-Based Reporting System (NIBRS)," Federal Bureau of Investigation, accessed July 27, 2020, <https://www.fbi.gov/services/cjis/ucr/nibrs>.

⁷⁵ Andrew V. Papachristos, Christopher Wildeman, and Elizabeth Roberto, "Tragic, But Not Random: The Social Contagion of Nonfatal Gunshot Injuries," *Social Science & Medicine* 125 (2015), <https://doi.org/10.1016/j.socscimed.2014.01.056>.

Deliberative and Pre-decisional

“Comprehensive nonfatal shooting data can assist law enforcement in understanding the context of local gun violence and serve to better inform policy and practice.”⁷⁶

9.3 Drug Trafficking

Criminals are trafficking deadly drugs into and throughout our country that are killing our citizens and wreaking havoc on our communities. Dramatic increases in drug overdoses have occurred as a result of opioids (such as fentanyl), and recently the U.S. has seen a dangerous resurgence in the trafficking of methamphetamine as well, which has particularly affected rural America.

Mexican transnational criminal organizations (TCOs) continue to control lucrative drug trafficking corridors, primarily across the U.S.–Mexico Border, and are responsible for the vast majority of illicit fentanyl, methamphetamine, cocaine, and heroin trafficked in the United States.⁷⁷ These TCOs work with transnational gangs, U.S.-based street gangs, and prison gangs to distribute deadly substances across the nation.⁷⁸ The gangs engage in and expand their drug operations through violent criminal activity that accompanies drug trafficking and distribution. The DEA notes, “Drug traffickers—including cartels and street gangs—will stop at nothing to turn a profit, often using violence and intimidation to expand their reach.”⁷⁹

The fundamental motivation of drug traffickers remains money, and TCOs will continue to adapt to make profits through drug production, trafficking, and money laundering. According to the DEA, Mexican TCOs remain the greatest criminal drug threat to the United States, and no other organizations are positioned to challenge them.⁸⁰ Mexican TCOs have increasingly shifted to producing and trafficking potent synthetic illicit substances: methamphetamine and fentanyl. These synthetic drugs can be produced in clandestine labs with precursor chemicals, which substantially reduces production costs that are associated with plant-based illicit drugs that require land, water, time, and labor to harvest them.

Traffickers of these highly potent substances frequently explore novel ways to hide their products as well as finding new routes into the country. Methamphetamine and fentanyl can be smuggled in modest amounts given their synthetic development and, therefore, can be more easily concealed than naturally derived narcotics, which tend to be bulkier. Synthetic drugs can also be found and bought on the dark web more cheaply by clients using cryptocurrencies and shipped through international mail or in express consignment. As the Office of National Drug Control Policy (ONDCP) found, this “combination of low production cost, the anonymity of the dark web and cryptocurrencies, and drugs with higher potency than their plant-based counterparts creates a favorable risk-reward structure.”⁸¹

The end result of these prolific drug trafficking crimes are the deaths of thousands of Americans. U.S. drug overdose deaths in 2018 totaled more than 67,000.⁸² These deaths were driven by fentanyl, of which fatal overdoses increased 10 percent in 2017. Additionally, between 2012 and 2018, deaths from cocaine overdose tripled and deaths from methamphetamine increased five-fold.⁸³ Over the past few years, deaths from cocaine and methamphetamine overdoses have risen due to drug trafficking organizations mixing fentanyl in these substances. Methamphetamine overdoses have also risen due to the low cost, high

⁷⁶ Edmund F. McGarrell et al., *Tale of Four Cities: Improving our Understanding of Gun Violence* (n.p., 2019), <https://www.ncjrs.gov/pdffiles1/nij/grants/254127.pdf>.

⁷⁷ Drug Enforcement Administration, *2019 National Drug Threat Assessment*.

⁷⁸ Drug Enforcement Administration, *2019 National Drug Threat Assessment*.

⁷⁹ Office of Public Affairs, “Attorney General William P. Barr Announces Launch of Operation Relentless Pursuit,” U.S. Department of Justice, December 18, 2019, <https://www.justice.gov/opa/pr/attorney-general-william-p-barr-announces-launch-operation-relentless-pursuit>.

⁸⁰ Drug Enforcement Administration, *2019 National Drug Threat Assessment*.

⁸¹ Executive Office of the President of the U.S., *National Drug Control Strategy Report by the Office of National Drug Control Policy*, (Washington, DC: Executive Office of the President of the U.S., 2020), 3, <https://www.whitehouse.gov/wp-content/uploads/2020/02/2020-NDCS.pdf>.

⁸² Holly Hedegaard, Arialdi M. Miniño, and Margaret Warner, *Drug Overdose Deaths in the United States, 1999–2018* (Washington, DC: National Center for Health Statistics, 2020), <https://www.cdc.gov/nchs/data/databriefs/db356-h.pdf>.

⁸³ Hedegaard, Miniño, and Warner, *Drug Overdose Deaths*.

Deliberative and Pre-decisional

purity, and high potency meth that the cartels are trafficking into the U.S. In addition, TCOs have been producing counterfeit controlled prescription drugs (e.g., oxycodone) as a way to capitalize on opioid addiction. These counterfeit pills are pressed with heroin and fentanyl and are virtually indistinguishable from licit opioid pills.

One useful tool in disrupting illegal enterprises is asset forfeiture, which deprives criminals of the proceeds of their illegal activity. It also helps to deter crime and the seizures can be used to restore property to the victims. The DOJ has made use of criminal and civil asset forfeiture as an effective mechanism to counter sophisticated criminal actors. Since 2002, the DOJ has transferred more than \$8.5 billion in forfeited funds to victims of crime, and notably, forfeited funds are reinvested back into state and local law enforcement through the Equitable Sharing Program to promote and enhance cooperation among federal, state, local, and tribal law enforcement agencies. In the last five years, the DOJ has equitably shared approximately \$1.75 billion with state, local, and tribal law enforcement agencies.⁸⁴

In order to save American lives and protect our communities from more crime, federal, state, and local law enforcement partners need to continue adapting their strategies to aggressively target, disrupt, and dismantle these TCOs.

One current initiative of the Department of Justice addressing drug trafficking is Operation Crystal Shield. This Operation run by the DEA directs enforcement resources to methamphetamine “transportation hubs” — areas where methamphetamine is often trafficked in bulk and then distributed across the country. While the DEA continues to focus on stopping drugs being smuggled across the border, Operation Crystal Shield has ramped up DEA’s enforcement to block their further distribution into America’s neighborhoods.

Operation Crystal Shield’s efforts are being concentrated in eight major methamphetamine transportation hubs identified by the DEA: Atlanta, Dallas, El Paso, Houston, Los Angeles, New Orleans, Phoenix, and St. Louis. Together, these DEA Field Divisions accounted for more than 75 percent of methamphetamine seized in the U.S. in 2019.⁸⁵

“While meth is not a new drug, it has seen a troubling resurgence over the past few years,” said Attorney General William P. Barr. “Manufactured mostly in Mexican labs and smuggled into the United States across the southwest border, meth is a drug that is both cheap and potent, creating a deadly combination. Just as the Trump Administration has acted swiftly to stem the tide of opioid fatalities, it will use every weapon in its arsenal – such as the DEA’s Operation Crystal Shield - to stop dangerous methamphetamine from reaching American neighborhoods and harming American families.”⁸⁶

These dangerous drugs are also linked to other violent crimes. U.S. Attorney Ron Parsons mentioned that the greatest threat to rural America right now is methamphetamine because of its presence in almost every crime law enforcement responds to in his district, like robbery, assault, domestic violence, homicides, etc. Thus, interdicting drugs that are being trafficked will not only reduce drug crimes but also other crimes as well.⁸⁷

The below recommendations offer ways for law enforcement to combat drug trafficking and dismantle drug trafficking networks.

9.3.1 Local law enforcement should actively participate in a regional high-intensity drug trafficking area (HIDTA) or task forces led by the Drug Enforcement Administration.

⁸⁴ Office of the Inspector General, *Audit of the Assets Forfeiture Fund*.

⁸⁵ <https://www.justice.gov/opa/pr/dea-announces-launch-operation-crystal-shield>

⁸⁶ <https://www.justice.gov/opa/pr/dea-announces-launch-operation-crystal-shield>

⁸⁷ *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Rural and Tribal Justice – Challenges Law Enforcement Face in Rural Areas* (May 19, 2020) (statement of U.S. Attorney Ron Parsons, South Dakota). <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>

Deliberative and Pre-decisional

DEA's Task Force Program builds on the successful collaboration of DEA with its state and local law enforcement partners. Because it has fewer than 5,000 DEA special agents, DEA could not effectively conduct its mission without the more than 3,000 sworn task force offices (TFOs).⁸⁸ As part of the TFO program, DEA funding supports overtime, training, and operational expenses for state and local TFOs. Since 2017, the DEA has increased the number of its TFOs by nearly 400 (20 percent).

The High Intensity Drug Trafficking Area (HIDTA) task force program is managed by the White House Office of National Drug Control Policy and coordinates and assists federal, state, local Tribal law enforcement across all 50 states to reduce regional drug threats and reduce drug trafficking and drug production.

Both of these federal programs offer local and state law enforcement support in confronting drug trafficking crimes.

9.3.2 Sheriffs should partner with local and state law enforcement to implement flexible cooperative criminal highway interdiction efforts in contiguous counties that cover major national or state highways designated as drug transportation corridors.

An interdiction unit is a cost-effective way to use one of a sheriff's key strengths—jurisdiction—to fight the smuggling of illegal narcotics, weapons, bulk cash, and victims of human trafficking by organized crime in a location they must use: highways and roads.⁸⁹ Highway interdiction is effective in terms of arrests; seizures of illegal drugs, weapons, and bulk cash; recovery of stolen vehicles; and the rescue of children and undocumented immigrants. This can be enhanced by the DOJ offering state law enforcement grants to fund highway criminal interdiction units.

The North Texas Criminal Interdiction Unit (NTXCIU) is a cooperative interdiction effort among sheriffs in eight counties in Northeast Texas. In just over two years of operations, the NTXCIU has arrested more than 130 smugglers; seized tons of illegal narcotics and marijuana, several military-style weapons, and more than \$1.5 million in bulk cash; and recovered approximately 100 stolen vehicles.⁹⁰ The NTXCIU's deputy sheriffs have also stopped three cargo loads of undocumented immigrants. More importantly, the NTXCIU has rescued three missing or abducted children in unrelated highway stops.⁹¹

9.3.3 Congress should permanently schedule the entire class of fentanyl and related analogues.

In response to the proliferation of fentanyl-related analogues coming predominately from China, the DEA scheduled the entire class of fentanyl and related analogues in February 2018 on a temporary emergency basis.⁹² On May 1, 2019—due largely to U.S. pressure—China permanently scheduled all fentanyl-related substances.⁹³ These controls, along with the U.S. temporary emergency scheduling order, successfully slowed the rate at which new fentanyl-related substances appeared on the illicit market. Specifically, there has been a significant decline in law enforcement reports to the National Forensic Laboratory Information System (NFLIS) of fentanyl-related substances. Amanda Liskamm, the director of DOJ's Opioid Enforcement Efforts, stated, "In the 24 months preceding the temporary order (February 2016 through January 2018), there were over 17,500 reports of these substances to NFLIS, excluding those controlled prior to 2016. . . .

⁸⁸ Shawn Miller, Chief, Intergovernmental Affairs, Drug Enforcement Administration, email communication with Kristie Brackens, Federal Program Manager, Reduction of Crime Working Group, July 7, 2020

⁸⁹ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 7, 2020) (statement of John Skinner, Sheriff, Collin County, TX). <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

⁹⁰ Skinner, *President's Commission on Law*, April 7, 2020.

⁹¹ Skinner, *President's Commission on Law*, April 7, 2020.

⁹² *U.S. House Committee on the Judiciary, Subcommittee on Crime, Terrorism, and Homeland Security: Hearing on Fentanyl Analogues: Perspective on Classwide Scheduling* (January 28, 2020) (written statement of Amanda Liskamm, Director of Opioid Enforcement Efforts, U.S. Department of Justice), <https://docs.house.gov/meetings/JU/JU08/20200128/110392/HHRG-116-JU08-Wstate-LiskammA-20200128.pdf>.

⁹³ "Statement on China's Class Scheduling of Fentanyl," White House, April 3, 2019, <https://www.whitehouse.gov/briefings-statements/statement-chinas-class-scheduling-fentanyl/>.

Deliberative and Pre-decisional

Since the temporary class control (February 2018 through December 2019), there were fewer than 8,800 reports to NFLIS for substances structurally related to fentanyl, a 50 percent reduction.”⁹⁴

In February 2020, Congress passed legislation that extended DEA’s temporary class scheduling of fentanyl and fentanyl analogues until May 6, 2021.⁹⁵ If that scheduling is allowed to lapse, drug traffickers would once again be able to create and traffic new fentanyl analogues with relative impunity. Fentanyl-related analogues should be permanently scheduled to prevent a re-emergence of fentanyl analogues by bad actors exploiting loopholes in U.S. and international law.

9.3.4 The federal government should develop a national automatic license plate reader clearinghouse for all data from automatic license plate readers.

Automatic license plate readers (ALPR) technology can serve as force multiplier for police departments.⁹⁶ ALPR data (i.e., an aggregate data set consisting of a license plate’s letters and number, location, and date and time of reading) is commonly used to detect stolen vehicles and license plates, and can help ongoing investigations.⁹⁷ ALPR data is especially useful in combatting smuggling and drug trafficking crimes.

Sheriff John Skinner notes that a national database for law enforcement ALPR data would bring “(1) uniform standards for the inclusion of data; (2) uniform policies for access to, maintenance of, and use or dissemination of data; (3) appropriate standards for data or cyber security such as CUIS compliance; (4) a single location for law enforcement—quality data, thus reducing the need for deputies to check multiple vendor databases . . . and (5) a platform for officers to communicate about their interdiction operations and investigations.”⁹⁸

A national database would combine the benefits of uniform standards and a platform for sharing intelligence. The uniform standards would provide guidance to states on storage of data, retention, and sharing of information to be used for law enforcement purposes. ALPR data can help ongoing investigations by providing information such as where a vehicle has been, whether it was at a crime scene, and its travel patterns.⁹⁹ ALPR data can be used to analyze crime patterns.

9.3.5 The U.S. Postal Service and private parcel delivery services should increase their ability to investigate the transportation of illegal drugs.

The most prevalent and commonly used method to transport illegal drugs domestically is the U.S. Postal Service (USPS).¹⁰⁰ The USPS processes more than 470 million pieces of mail each day.¹⁰¹ Narcotics traffickers view USPS as a safe and reliable method of shipping drugs due to the sheer volume of mail, drug interdiction being a low priority for the USPS, the ability to track their shipments, and the lack of federal prosecution for shipping drugs via the U.S. mail.¹⁰² The USPS is understaffed, technology does not exist to

⁹⁴ Liskamm, *U.S. House Committee on the Judiciary*, January 28, 2020, 3.

⁹⁵ Temporary Reauthorization and Study of the Emergency Scheduling of Fentanyl Analogues Act, <https://www.congress.gov/bills/116/congress/senate-bill/3201/text>.

⁹⁶ Keith Gierlack et al., *License Plate Readers for Law Enforcement: Opportunities and Obstacles* (Santa Monica, CA: RAND Corporation, 2014), https://www.rand.org/pubs/research_reports/RR467.html

⁹⁷ David J. Roberts and Meghann Casanova, *Automated License Plate Recognition Systems: Policy and Operational Guidance for Law Enforcement* (Washington, DC: International Association of Chiefs of Police, 2012), <https://www.ncjrs.gov/pdffiles1/nij/grants/239604.pdf>.

⁹⁸ Skinner, *President’s Commission on Law*, April 7, 2020.

⁹⁹ Roberts and Casanova, *Automated License Plate Recognition*.

¹⁰⁰ Office of Inspector General, *Use of Postal Service Network to Facilitate Illicit Drug Distribution* (Washington, DC: U.S. Postal Service, 2018), <https://www.oversight.gov/sites/default/files/oig-reports/SAT-AR-18-002.pdf>.

¹⁰¹ “One Day in the Life of the U.S. Postal Service,” U.S. Postal Service, accessed July 27, 2020, <https://facts.usps.com/one-day/>.

¹⁰² Joe Davidson, “Postal Service Preferred Shipper of Drug Dealers,” *Washington Post*, October 16, 2018, <https://www.washingtonpost.com/politics/2018/10/16/postal-service-preferred-shipper-drug-dealers/>.

Deliberative and Pre-decisional

effectively identify illegal drugs, and archaic USPS rules prevent local law enforcement being used as effectively as task force officers as they are in other federal law enforcement agencies.

The U.S. Postal Inspection Service's (USPIS) narcotics program, which investigates attempts to use the mail to traffic drugs, seized over 40,000 pounds of drugs in 2017, reflecting a continued increase in seizures since 2014.¹⁰³ In addition to USPS, traffickers use other methods such as human couriers, commercial flights, parcel services, and commercial buses.¹⁰⁴ For example, in December 2019, 11 individuals were indicted by Arizona Attorney General Mark Brnovich; they were accused of shipping illegal drugs and contraband across the country through the United Parcel Service.¹⁰⁵ Postal inspectors and federal agents working in conjunction with private parcel delivery services play a vital role in case-specific drug investigations to track and interdict illegal drugs; a systemic approach should be taken to prevent the uninhibited domestic shipment of these illegal drugs.

9.4 Human Trafficking and Child Exploitation

Human trafficking is a crime of global scale that victimizes many vulnerable populations. Worldwide, millions of children and adults are coerced or forced into performing labor or sex work. Women and girls make up the majority of trafficked and exploited victims.¹⁰⁶ In 2016, more than 40 million individuals were living in modern-day slavery.¹⁰⁷ Seen as low risk with high reward, "human trafficking is fueled by a demand for cheap labor, services, and for commercial sex."¹⁰⁸

According to DHS, most victims fall prey to promises of good jobs but are instead made to work in "legitimate and illegitimate labor industries, including sweatshops, massage parlors, agricultural fields, restaurants, hotels, and domestic service."¹⁰⁹ Congress described the trafficking of human beings as "a contemporary manifestation of slavery" that "involves grave violations of human rights" and is "abhorrent to the principles upon which the United States was founded."¹¹⁰

Traffickers keep their victims hidden, isolated, and dependent, which often diminishes any hope of escape or detection. Because of this, human trafficking is significantly underreported in the United States; and so, it is difficult to determine an exact number of victims.¹¹¹

The crime of human trafficking is often connected to other violent crimes like drug and illegal firearms trafficking. Thus, in targeting and apprehending human traffickers, law enforcement is often able to uncover and disrupt other criminal enterprises.

A further horrifying aspect of this crime is how children are being targeted by traffickers. Traffickers use the internet and social media to target and recruit victims. Online grooming is a preparatory phase in

¹⁰³ Office of Inspector General, *Use of Postal Service Network*.

¹⁰⁴ Drug Enforcement Administration, *2019 National Drug Threat Assessment*.

¹⁰⁵ "11 Defendants Arraigned in Drug Trafficking Ring Involving UPS Employees," Arizona Attorney General Mark Brnovich, accessed July 27, 2020, <https://www.azag.gov/press-release/11-defendants-arraigned-drug-trafficking-ring-involving-ups-employees>.

¹⁰⁶ "Report: Majority of Trafficking Victims Are Women and Girls; One-Third Children," *United Nations Sustainable Development* (blog), December 22, 2016, <https://www.un.org/sustainabledevelopment/blog/2016/12/report-majority-of-trafficking-victims-are-women-and-girls-one-third-children/>.

¹⁰⁷ International Labour Organization and Walk Free Foundation, *Global Estimates of Modern Slavery: Forced Labour and Forced Marriage* (Geneva, Switzerland: International Labour Organization, 2017), http://www.ilo.org/global/publications/books/WCMS_575479/lang-en/index.htm.

¹⁰⁸ "Human Trafficking," National Human Trafficking Hotline, accessed June 22, 2020, <https://humantraffickinghotline.org/type-trafficking/human-trafficking>.

¹⁰⁹ Blue Campaign, *Human Trafficking 101* (Washington, DC: U.S. Department of Homeland Security, 2016), <https://www.hsdl.org/?abstract&did=820007>.

¹¹⁰ Trafficking Victims Protection Act of 2000, 22 U.S. Code § 7101 (2006), <https://www.govinfo.gov/content/pkg/PLAW-106publ386/html/PLAW-106publ386.htm>.

¹¹¹ National Human Trafficking Resource Center, *Does Human Trafficking Exist In Your Community? Examining Reports and Reviewing Facts* (Washington, DC: Polaris Project, n.d.), https://humantraffickinghotline.org/sites/default/files/Human%20Trafficking%20in%20Your%20Community_0.pdf.

Deliberative and Pre-decisional

which offenders seek to build trust and rapport with a child or a third party (such as their guardian or sibling) in order to gain access to that child for the purposes of sexual activity. Sadly, traffickers are also preying upon children in the foster care system. Recent reports have consistently indicated that a large number of victims of child sex trafficking were at one time in the foster care system.¹¹²

The Trafficking Victims Protection Act, 22 U.S.C. § 7102 (2000), was enacted in 2000 and reauthorized in 2003, 2005, 2008, 2013 and 2018 to prevent human trafficking, protect those who were victims of trafficking, and prosecute those who participated in facilitating human trafficking.¹¹³ Additionally, all 50 states and the District of Columbia have human trafficking statutes.¹¹⁴ Although they vary by state, all these statutes criminalize trafficking and impose criminal penalties.

9.4.1 The Department of Justice should provide training and technical assistance for state, local, and tribal law enforcement related to the sexual exploitation and trafficking of children in order to assist the investigation and prosecution of traffickers and provide services to victims. This training should incorporate information on how traffickers are using technology.

Technology has become an effective tool for traffickers, as victims can be manipulated on social media and lured into dangerous situations.¹¹⁵ Training law enforcement on how traffickers are increasingly using technology to ensnare their victims will enable them to leverage their own technological capabilities to aid investigations and enhance prosecutions.

A successful example of such training is the Texas Department of Public Safety's "Interdiction for the Protection of Children" training program. The goal of this program is to augment the ability of law enforcement officers to combat child trafficking by training them to better identify victims of exploitation and factors that represent high-risk threats against children as well as registered sex offender violations. They are also taught to identify technology-facilitated crimes involving children.¹¹⁶ Texas Governor Gregg Abbot credited the program with training more than 9,000 individuals in Texas and other jurisdictions around the world, which has helped authorities rescue hundreds of children, including 424 by Texas state troopers.¹¹⁷

9.4.3 The federal government should develop a national database on juvenile human trafficking victims.

Runaways and missing juveniles are at a higher risk than the general public of becoming victims of human trafficking.¹¹⁸ Human trafficking victims often run away multiple times, and locations where juveniles with dependency cases are housed are often a source of human trafficking recruitment. Recovered missing juveniles often do not disclose that they are engaged in prostitution or commercial sex acts.

Establishing criteria for inclusion in a national database would alert a law enforcement officer recovering a runaway or missing juvenile of the potential for other crimes; these criteria might include a juvenile who self-identifies as a victim of human trafficking, was reported by parent or guardian as a runaway or identified as a previous or potential victim, or was previously listed in a law enforcement report as a victim. This would increase the opportunity to gather and document evidence of human trafficking that may be useful in future investigations. Using a database that is housed at an organization such as the NCM EC and

¹¹² U.S. Department of State, *Trafficking in Persons Report* (Washington, DC: U.S. Department of State, 2019), 4, <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf>.

¹¹³ "Summary of the Trafficking Victims Protection Act (TVPA) and Reauthorizations FY 2017," Alliance to End Slavery and Trafficking, January 11, 2017, <https://endslaveryandtrafficking.org/summary-trafficking-victims-protection-act-tvpa-reauthorizations-fy-2017-2/>.

¹¹⁴ "Human Trafficking State Laws," National Conference of State Legislatures, accessed July 27, 2020, <https://www.ncsl.org/research/civil-and-criminal-justice/human-trafficking-laws.aspx>.

¹¹⁵ Whiting, "How Traffickers Use Social Media."

¹¹⁶ "Training Operations (TOD): Interdiction for the Protection of Children (IPO)," Texas Department of Public Safety, accessed June 22, 2020, <https://www.dps.texas.gov/ETR/CAP/IPC.htm>.

¹¹⁷ "Interdiction for the Protection of Children Program Marks Anniversary," *Bay City Tribune* (Bay City, TX), May 6, 2019, https://baycitytribune.com/community/article_c5a50d36-703c-11e9-9805-a3c985e37931.html.

¹¹⁸ Jordan Greenbaum and Nia Bodrick, "Global Human Trafficking and Child Victimization," *Pediatrics* 140, no. 6 (2017), <https://pediatrics.aappublications.org/content/140/6/e20173138.long>.

Deliberative and Pre-decisional

is accessible to law enforcement could assist local law enforcement across the nation in providing help to victims and gathering evidence of crimes.¹¹⁹

[CROSS REFERENCE TO JUVENILE JUSTICE CHAPTER]

9.5 Domestic Violence and Sexual Assault

In the United States, an average of 20 people experience intimate partner physical violence every minute, which equates to more than 10 million abuse victims annually.¹²⁰

Domestic violence does not happen in a vacuum. Kim Garrett, chief executive officer and founder of Oklahoma City's Family Justice Center, states, "We know that 75 percent of children who witness domestic violence will grow up to repeat the same behavior. If one person in the family chooses to use violence, within four generations, 18 people will continue the cycle."¹²¹ According to the CDC, "at least one in seven children have experienced child abuse and/or neglect in the past year, and this is likely an understatement."¹²²

Individuals who experience physical violence often experience sexual violence. Intimate partner violence accounts for 15 percent of all violent crime; of those cases, 19 percent involve the use of a weapon.¹²³ Perpetrators of violence tend to have a history of domestic and family violence. Domestic violence can also turn deadly. 72 percent of all murder-suicides are perpetrated by intimate partners.¹²⁴

Law enforcement agencies should take a comprehensive look at their policies, procedures, and practices to ensure they hold offenders accountable for these crimes and strengthen safety for survivors of domestic violence.

9.5.1 Local law enforcement agencies should partner with victim service providers to develop or enhance safety protocols related to obtaining or enforcing orders of protection.

The most dangerous time for a victim of intimate partner violence is when they leave their partner. A study conducted by the National Coalition Against Domestic Violence with men who had killed their wives or partners found that the threat to leave or end the relationship often precipitated the murder.¹²⁵ Law enforcement should engage with victim service organizations to develop comprehensive safety plans for victims focused on their homes, employers, use of technology, and public spaces. The plan should enable the victim to identify ways to protect themselves and reduce the risk of serious injury.

Orders of protection are a critical aspect of a safety plan and give the victim the option of contacting law enforcement if the perpetrator violates the order.¹²⁶ Law enforcement agencies should consider applying for funding from the Office on Violence Against Women under the Improving Criminal Justice Responses to Sexual Assault, Domestic Violence, Dating Violence, and Stalking Grant Program (ICJR Program), formerly known as the Grants to Encourage Arrest Policies and Enforcement of Protection Orders Program (Arrest

¹¹⁹ John Mina, Sheriff, Orange County Sheriff's Office, CA, email communication with Kristie Brackens, Federal Program Manager, Reduction of Crime Working Group, April 23, 2020.

¹²⁰ "National Statistics," National Coalition Against Domestic Violence, accessed June 23, 2020, <https://ncadv.org/statistics>.

¹²¹ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 14, 2020) (statement of Kimberly Garrett, CEO and Founder, Palomar, Oklahoma City's Family Justice Center), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

¹²² "Violence Prevention: Fast Facts," Centers for Disease Control and Prevention, accessed August 4, 2020, <https://www.cdc.gov/violenceprevention/childabuseandneglect/fastfact.html>.

¹²³ National Coalition Against Domestic Violence, "Statistics."

¹²⁴ National Coalition Against Domestic Violence, "Statistics."

¹²⁵ "Why Do Victims Stay?," National Coalition Against Domestic Violence, accessed June 23, 2020, <https://ncadv.org/why-do-victims-stay>.

¹²⁶ Tami P. Sullivan et al., *Criminal Protective Orders as a Critical Strategy to Reduce Domestic Violence Final Summary Overview* (n.p., 2017), <https://www.ncjrs.gov/pdffiles1/nij/grants/250664.pdf>.

Deliberative and Pre-decisional

Program). The ICJR program can help law enforcement improve its response to domestic violence crimes for both victim safety and offender accountability.¹²⁷

9.5.2 U.S. Attorney's Offices should use 18 U.S.C. § 922(g)(8) and (9) to increase the prosecution of domestic violence-related firearms cases.

Intimate partner abusers who are subject to a victim protective order or who have been previously convicted of a misdemeanor crime of domestic violence are prohibited from possessing a firearm. This approach has been piloted with U.S. Attorney's Offices across the country.

A successful example is, the U.S. Attorney's Office in the Western District of Oklahoma that launched Operation 922 in 2018, as a collaboration between the U.S. Attorney's Office, ATF, the U.S. Marshal Services, and local law enforcement to prioritize firearm prosecutions related to domestic violence. To date, 99 cases have been charged, resulting in 85 guilty convictions or pleas, with an average sentence of 81 months.¹²⁸

9.5.3 States should establish laws and procedures for safe and accountable firearms transfer pursuant to domestic violence-related convictions or issuance of protective orders.

When an abuser has access to a gun, a domestic violence victim is five times more likely to be killed.¹²⁹ Laws that keep guns out of the hands of abusers save lives; however, without procedures, having federal and state prohibitions does not actually remove the firearm from the abuser. State and local procedures should be implemented for successful firearm dispossession. States that require abusers to provide proof that they actually relinquished their firearms (i.e., relinquishment laws) are linked to a 16 percent reduction in intimate partner gun homicides.¹³⁰

9.5.4 The Department of Justice should increase grant funding to provide assistance to forensic labs for personnel, training, and case management software to aid in the investigation and prosecution of criminal cases.

Strong forensic evidence helps with the successful investigation and prosecution of violent crimes. Forensic science is underused and underfunded. DOJ grants—such as Coverdell, DNA Capacity Enhancement and Backlog Reduction, and Laboratory Efficiency Improvement and Capacity Enhancement grants—should be authorized and appropriated at higher levels.¹³¹ In addition, traditional grants made available to law enforcement (e.g., the JAG program) should be increased and state administrative agencies should make more funding available to support forensic labs.¹³² In fiscal year 2016, forensic science services accounted for only 2.1 percent of JAG program spending, which was approximately \$3 million out of the more than \$400 million allocated to support state and local criminal justice systems annually.¹³³

¹²⁷ Office on Violence Against Women, *OVW Fiscal Year 2019 Improving Criminal Justice Responses to Domestic Violence, Dating Violence, Sexual Assault, and Stalking Grant Program Solicitation* (Washington, DC: Office on Violence Against Women, 2018), <https://www.justice.gov/ovw/page/file/1124261/download>.

¹²⁸ Garrett, *President's Commission on Law*, April 14, 2020.

¹²⁹ "Domestic Violence and Firearms," Giffords Law Center to Prevent Gun Violence, accessed July 27, 2020, <https://lawcenter.giffords.org/gun-laws/policy-areas/who-can-have-a-gun/domestic-violence-firearms/>.

¹³⁰ April M. Zeoli et al., "Analysis of the Strength of Legal Firearms Restrictions for Perpetrators of Domestic Violence and Their Associations with Intimate Partner Homicide," *American Journal of Epidemiology* 187, no. 11 (2018), <https://doi.org/10.1093/aje/kwy174>.

¹³¹ "FY 2020 Paul Coverdell Forensic Science Improvement Grants Program – Formula," Bureau of Justice Assistance, accessed June 23, 2020, <https://bia.ojp.gov/funding/opportunities/bja-2020-18434>.

¹³² *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reduction of Crime* (April 14, 2020) (statement of Matthew Gamette, Director, Forensic Services Laboratory System, Idaho State Police), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

¹³³ National Criminal Justice Association, *How States Invest Byrne JAG in Forensic Science* (Washington, DC: National Criminal Justice Association, 2016), https://370377fc-459c-47ec-b9a9-c25f410f7f94.filesusr.com/ugd/oda224_d1c24587ad1c42649cbb7339e8b4a878.pdf?index=true.

Chapter 14. Reentry Programs and Initiatives

The high rates at which criminals reoffend demonstrate that the criminal justice system is alone insufficient to deter and prevent crime. The specter of arrest and prosecution is important to criminal justice and discouraging crime, but recidivism remains a critical driver of crime: an estimated 68 percent of released prisoners are rearrested within three years, 79 percent within six years, and 83 percent within nine years.¹ As repeated elsewhere, law enforcement is but one aspect of any effort to prevent and reduce crime. It stands to reason, therefore, that crime prevention should not only focus on helping victims, but also on focusing on criminal offenders and the circumstances under which they commit and recommit crime.

Juvenile justice and social welfare programs are critical measures at the front end to do this, but once crime has occurred and the punishment has been served, these systems are not specifically tailored to help returning citizens later break the cycle of recidivism. Reentry programming serves that critical function by proactively engaging convicted offenders on their return to society, and focusing on what can be done to place them in a better situation than the one that led them to commit crime in the first place. Preventing offenders from reoffending is just as important to public safety as preventing crime at the outset.

As recounted above, former criminal offenders are an especially at-risk population to engage in criminal behavior.

Reentry programs and initiatives are critical to assisting law enforcement prevent and reduce crime. Since the reentering population is the population most likely to commit crime they must be directed towards support programs in the most effective manner while incarcerated and upon release to help divert these individuals away from returning to a life of crime. Law enforcement agencies should therefore be involved with and support reentry programs and initiatives in their communities in order to strengthen their crime prevention and reduction work.

Tony Lowden, executive director of the Federal Interagency Council on Crime Prevention and Improving Reentry (established by Exec. Order No. 13,826, 83 Fed. Reg. 10771 (2018)), says, “I believe making improvements in the way we prepare offenders to reenter society is critical. It’s a critical element for an effective crime prevention strategy—not just from what we do as staff, correction officers to reentry officers—but what we do for the aftercare, too, so that those individuals do not return back to our facilities.”²

It is important for law enforcement to recognize that reentry begins at arrest. Jails and corrections systems need to assess the criminogenic needs and factors of criminals when they enter the system. Proper assessment can help to ensure incarcerated persons have access to appropriate programming and services. These programs should have a strong focus on education and job skills training to ensure that once released, former offenders are ready to enter the workforce. Stable employment and housing are fundamental to successful reentry. These are cornerstones that provide new opportunities once released and provide pathways to success, instead of pathways back to crime.

Upon reentry, formerly incarcerated persons need a strong support network. This can consist of their families, communities, or other appropriate networks that can help ensure accountability. It may require a combination of support networks to be successful. This chapter focuses on four change points that affect successful reentry, (1) risk and needs assessments, (2) jail and prison programming, (3) transition planning and release, and (4) community reintegration and supervision.

¹ “Reentry Trends in the U.S.: Releases from State Prison,” Bureau of Justice Statistics, accessed June 16, 2020, <https://www.bis.gov/content/reentry/releases.cfm>.

² *President’s Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 23, 2020) (statement of Tony Lowden, Executive Director, Federal Interagency Council on Crime Prevention and Improving Reentry), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

14.1 Risk and Needs Assessment Tools

In December 2018, President Donald J. Trump signed into law the First Step Act³. The First Step Act requires the Attorney General in consultation with the Independent Review Committee authorized by the First Step Act of 2018, to develop and release publicly on the Department of Justice website a risk and needs assessment system. The legislation's prescribed risk and needs assessment system is to be used to determine the recidivism risk of each prisoner as part of the intake process and classify each prisoner as having minimum, low, medium, or high risk for recidivism; to assess and determine, to the extent possible, the risk of violent or serious misconduct of each prisoner; determine the type, amount, and intensity of evidence-based recidivism reduction programs that are appropriate for each prisoner, and assign each prisoner to such programs accordingly and based on the prisoner's specific criminogenic needs. Furthermore, this model legislation highlights the need to reassess the recidivism risk of each prisoner periodically and reassign the prisoner to appropriate evidence-based recidivism reduction programs or productive activities based on the revised determination. The assessment tool laid out in the First Step Act seeks to ensure that all prisoners at each risk level have a meaningful opportunity to reduce their risk classification during the period of incarceration, the specific criminogenic needs of the prisoner are addressed and all prisoners are able to successfully participate in such programs.

14.1.1 Jails and prisons should implement and standardize current, validated risk and needs assessment tools modeling the First Step Act to inform programming and increase public safety and positive reentry outcomes. These tools should be administered upon entry to correctional facilities and on a regular, recurring basis during and after incarceration, if released onto community supervision.

While examining the use of risk assessments to determine sentencing, researchers found, "Across the U.S., states are using risk assessment to inform decisions about the imprisonment of higher-risk offenders, the supervised release of lower-risk offenders, and the treatment of offenders in efforts to reduce risk."⁴ In this era of targeted criminal justice improvement, people who pose a low risk to public safety are often diverted to alternative settings so that increased time, money, and effort can be focused on those who pose a high risk to public safety.⁵

Risk assessment tools should be used to inform the reentry planning for all jail and prison populations, as they allow the correctional facilities to tailor programming and determine the best ways to target and allocate their resources. To reduce the risk of recidivism and improve the chances of successful reintegration into the community, prisons and jails must be responsible for implementing various risk and needs assessments for their populations. There are various considerations and options in selecting the best tool(s).⁶

While some corrections systems use the most current generation of assessment tools (e.g., Ohio, which uses the Ohio Risk Assessment System, and Georgia, which uses the Next Generation Assessment), the way systems implement these tools and use them to inform programming and practice varies widely.⁷

Currently, the Bureau of Justice Assistance (BJA) maintains a clearinghouse on public safety risk assessments tools.⁸ Agencies may use this tool to determine the best assessment for their jail or prison and to help ensure the assessment tool is as consistent, fair, and effective as possible.

³ First Step Act of 2018, 18 U.S.C. §§ 3621-3632 (2018), <https://www.congress.gov/115/plaws/publ391/PLAW-115publ391.pdf>

⁴ John Monahan and Jennifer L. Skeem, "Risk Assessment in Criminal Sentencing," *Annual Review of Clinical Psychology* 12, no. 1 (2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2662082.

⁵ Casey et al., *Offender Risk and Needs*.

⁶ Sarah L. Desmarais and Jay P. Singh, *Risk Assessment Instruments Validated and Implemented in Correctional Settings in the United States* (New York: Council of State Governments Justice Center, 2013), <https://csgjusticecenter.org/wp-content/uploads/2020/02/Risk-Assessment-Instruments-Validated-and-Implemented-in-Correctional-Settings-in-the-United-States.pdf>.

⁷ "Ohio Risk Assessment System," Ohio Department of Rehabilitation and Corrections, accessed June 16, 2020, <https://drc.ohio.gov/oras>; and "Assessment," Georgia Department of Corrections, accessed June 16, 2020, <http://dcor.state.ga.us/Divisions/InmateServices/RiskReduction/Assessment>.

⁸ "Using Risk Assessment for Safer Communities," Public Safety Risk Assessment Clearinghouse, accessed June 18, 2020, <https://psrac.bja.ojp.gov>.

[CROSS REFERENCE TO INTERSECTION OF CRIMINAL JUSTICE SYSTEM PERSONNEL]

Incarcerated individuals may experience significant changes both while in a facility and after release. To account for these changes and to proactively manage and plan reentry efforts, corrections systems should conduct regular reassessments to identify the effect of those changes and how to adjust for them. Reassessments should also be administered when a person experiences a significant life event, such as a death, birth, marriage, divorce, or job change.

Staff in jails and prisons should be trained to understand, effectively administer, and accurately interpret the assessment tool to obtain the most accurate results.

14.2 Reentry Programming for Jails and Prisons

Developing and implementing reentry programming requires facilities to allocate appropriate resources, leverage technology effectively, and meet the needs of the population served.

14.2.1 Jails and prisons should allocate resources to recidivism reduction programs.

As was cited in the chapter on social issues, mental health and substance use disorders are very prevalent in the jail and prison population and without case management, treatment and support programs, as well as the continuation of care upon reentry, those disorders will persist and may contribute to criminal behavior resulting in recidivism. For inmates with alcohol and opioid use disorders, there are FDA approved medications that can assist with treatment, and these inmates should be screened, assessed and started on medications prior to release and connected to community-based treatment providers for continued care post release.

[CROSS REFERENCE TO SOCIAL PROBLEM S]

Education and employment are two other programming areas that are vital to successful reentry and, therefore, key to programming in jails and prisons.

The Bureau of Justice Statistics reports that 65 percent of state prisoners do not have a high school degree.⁹ In another report, high school dropouts are 47 more times likely to be incarcerated than peers with a four-year degree.¹⁰

Programs addressing the family unit, such as parenthood/fatherhood programming, have also been a focus for many institutions as the family unit is key to the support of individuals upon reentry and key to breaking the cycle of criminal behavior in future generations.

[CROSS REFERENCE CRIMINAL JUSTICE SYSTEM INTERSECTION AND SOCIAL PROBLEM S]

Many recidivism reduction programs and other related productive activities have been shown not only to lower recidivism rates, but also to decrease behavior infractions while in jail or prison. Therefore, it is in the best interest of corrections institutions to allocate resources to and increase inmate participation in evidence-based and promising programs and activities. Various federal resources exist that catalogue such programs and activities and can serve as a resource for jails and prisons to identify programs to implement in their facilities including the Federal Interagency Reentry Council, DOJ's Crime Solutions.gov, the Bureau of Prisons list of Evidence-based Recidivism Reduction (EBRR) Programs and Productive Activities (PA), and the Substance Abuse and Mental Health Services Administration's Evidence-Based Practices Resource Center.¹¹

14.2.3 Jails and prisons should develop incentives to increase participation in recidivism reduction

⁹ Caroline Wolf Harlow, *Education and Correctional Populations* (Washington, DC: Bureau of Justice Statistics, 2003), 1, <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=814>.

¹⁰ Caitlin Curley, "How Education Deficiency Drives Mass Incarceration," GenFKD, November 18, 2016, <http://www.genfk.org/education-deficiency-drives-mass-incarceration>.

¹¹ "CrimeSolutions.Gov," National Institute of Justice, accessed June 16, 2020, <https://www.crimesolutions.gov>; https://www.bop.gov/inmates/fsa/docs/evidence_based_recidivism_reduction_programs.pdf; and "Evidence-Based Practices Resource Center," Substance Abuse and Mental Health Services Administration, accessed July 6, 2020, <https://www.samhsa.gov/ebp-resource-center>.

Deliberative and Pre-decisional

programs, and should also develop technology solutions to facilitate these programs. These could include tele-health and tele-therapy programs, as well as technologies that could support educational and job-related skill-building.

When populations in jails and prisons are allowed to decide whether to participate in recidivism reduction programming, the institution's ability to have a significant impact on recidivism decreases. Instead, jails and prisons should provide incentives to the population to participate in programming by developing strategies that encourage such participation (e.g., good time credits, improved housing, increased visitations, or program participation for work credits). The First Step Act seeks to improve recidivism reduction programming in the Federal Bureau of Prisons by using similar incentives. Jails and prisons may struggle with balancing using technology (e.g., internet access, cell phones, and tablets) and prioritizing security of both inmates and staff. Technology can help institutions increase their number of program offerings, which in turn reduces the amount of programming time lost due to lack of physical space, shortage of staff, or a short incarceration sentence. Jails and prisons should both maintain safety and security and improve the delivery of programs at the same time.

14.2.4 Jails and prisons should develop unique reentry and reintegration program offerings for specific populations, including veterans, parents, and women.

The population in jails and prisons encompasses a range of people. By addressing the needs of specific populations, prisons and jails can improve their reentry outcomes.

[BEGIN TEXT BOX]

In his testimony before the President's Commission on Law Enforcement, Dr. Jean Wright explained;

"What is often lost in the traditional reentry models is that the men and women returning to their communities often have children. This fact requires us to reframe our concept of "reentry" into a vision of "reintegration." Dr. Wright reminds us that "Reentry into community focuses on the requisite necessity to develop a marketable skill/vocation, etc. Whereas, reintegration into community requires we focus on more "quality of life" skills to assist returning citizens to develop a more well-rounded (i.e. "holistic") approach to include aspects of being that will anchor the returning citizen into community life."

One example of a reintegration program would be PA-Fathers and Children Together Program Inc. (PA-FACT). As Dr. Wright explains "PA-FACT Inc. is a unique program because while it provides services and supports to children and their families in the community; it also reconnects children to their father while he is incarcerated. This unique fatherhood program is designed to heal relationships between fathers and their children. The program teaches incarcerated fathers the importance of developing positive relationships with their children through one-to-one visitation and intensive parenting classes, and also provides individual and group counseling for incarcerated fathers, for the children, and for the primary caregiver (most often, mother). PA-FACT strives to end the generational cycle of incarceration and recidivism that plagues children of incarcerated parents."¹²

[END TEXT BOX]

PULL QUOTE: "At one time in their lives, these men took an oath to protect us. If they were willing to lay themselves on the line for us, we owe them this much."¹³ - Sheriff Peter J. Koutoujian, Middlesex County, Massachusetts

¹² *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 29, 2020) (testimony of Dr. Jean Wright, Director of Behavioral Health and Justice Related Services at the Philadelphia Department of Behavioral Health and Intellectual Disability Services), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

¹³ Middlesex Sheriff's Office, *Housing Unit for Military Veterans (HUMV) White Paper* (Medford, MA: Middlesex Sheriff's Office, 2019).

14.3 Transition Planning and Release

Successful reentry begins at arrest and, therefore, transition planning should begin on that first day.

This could be with the risk and needs assessments which leads to appropriate programming and services while incarcerated and awaiting trial. After the trial and as the individual serves their sentence and gets closer to their release date, transition planning is essential.

Transitional planning is a proactive way to link people to the necessary community services, but does require coordination among various agencies.

PULL QUOTE: “We must craft policies to ensure that Americans with criminal records have a fair shot at a decent life. We must remove barriers to employment, housing, public assistance, education, and building good credit.”¹⁴ - The Sentencing Project

The conditions that may have played a role in an individual being incarcerated in jail and prison are not likely to have changed upon release. Unstable housing, under or unemployment, lack of an education, lack of family ties or support, under or untreated mental health or substance use disorders, will all remain if not addressed while incarcerated and if no continuity of services exists upon release. The addition of a criminal record can have further and longer lasting effects on a person’s ability to successfully reenter and not recidivate. In addition to programming and services while incarcerated, is critical for jails and prisons to provide effective transition planning.

14.3.1 State legislatures, in collaboration with criminal justice leaders, should review, identify, and eliminate legislation and regulations that pose barriers to successful reentry.

According to the National Inventory of Collateral Consequences of Conviction, “collateral consequences are legal and regulatory restrictions that limit or prohibit people convicted of crimes from accessing employment, business and occupational licensing, housing, voting, education, and other rights, benefits, and opportunities.”¹⁵ Each state should review its laws and regulations in collaboration with representatives from corrections, courts, and community supervision agencies. By reviewing and eliminating such laws and regulations, states can remove unnecessary barriers to successful reintegration into the community.

According to a 2019 U.S. Commission on Civil Rights report, once an individual has completed the court-imposed sentence, there are often additional consequences that result in a worsened punishment, overlaying the initial criminal conviction. While some of these consequences are valid because they involve public safety, many are either not connected to the crime that led to the conviction or they have no bearing on public safety. Further, defendants, defense and prosecuting attorneys, and judges—and even the general public—often do not know the reach of these consequences. Such a lack of knowledge or awareness undoes any possible deterrent effect that might have resulted from connecting these consequences to criminal convictions.¹⁶

The 2019 commission report recommends, “Collateral consequences should be tailored to serve public safety. Policymakers should avoid punitive mandatory consequences that do not serve public safety, bear no rational relationship to the offense committed, and impede people convicted of crimes from safely reentering and becoming contributing members of society. Jurisdictions should periodically review the

¹⁴ Half in Ten, The Sentencing Project, and Community Legal Services, *Americans with Criminal Records* (Washington, DC: Half in Ten, 2015), <https://www.sentencingproject.org/wp-content/uploads/2015/11/Americans-with-Criminal-Records-Poverty-and-Opportunity-Profile.pdf>.

¹⁵ “What are Collateral Consequences?,” Council of State Governments Justice Center, accessed July 6, 2020, <https://niccc.csjjusticecenter.org/about/>.

¹⁶ U.S. Commission on Civil Rights, *Collateral Consequences: The Crossroads of Punishment, Redemption, and the Effects on Communities, Briefing Before the United States Commission on Civil Rights* (Washington, DC: U.S. Commission on Civil Rights, 2019), <https://www.usccr.gov/pubs/2019/06-13-Collateral-Consequences.pdf>.¹⁷ U.S. Commission on Civil Rights, *Collateral Consequences*.¹⁸ “Collateral Consequences of Conviction Act,” Uniform Law Commission, accessed July 9, 2020, <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a&tab=librarydocuments&LibraryFolderKey=&DefaultView=>.¹⁹ Jared Meyer, “States Need to Give Ex-Cons a Fresh Start,” *Forbes*, January 21, 2018, <https://www.forbes.com/sites/jaredmeyer/2018/01/21/states-need-to-give-ex-cons-a-fresh-start/#7b51cbcd2fad>.

consequences imposed by law or regulation to evaluate whether they are necessary to protect public safety and if they are related to the underlying offenses.”¹⁷

Changes to legislation can improve an individual’s chances for reentering the community successfully. Organizations like the National Center for State Courts extend assistance to help states restructure this type of legislation. In addition, the Uniform Law Commission offers a Uniform Collateral Consequences of Conviction Law for states to consider.¹⁸

14.3.2 States or counties should establish reentry councils—in collaboration with service agencies, nonprofit organizations, and private businesses—to enhance the development, coordination, and success of jail and prison reentry initiatives.

Reentry councils are a collaboration of a variety of community entities that all play a role in the successful reentry of incarcerated individuals, including, but not limited to housing, employment, education, and medical service providers; departments of motor vehicles; nonprofit organizations, such as faith-based groups; departments of corrections, jails, law enforcement, sheriffs, district attorneys, prosecutors, and community supervision agencies; legislators; and the courts. These councils should promote coordination across these entities, the importance of reducing recidivism and victimization, and should identify gaps in services and address barriers to reentry. Such councils currently operate locally and statewide across the country.

One such barrier can be the financial burden created by court fees and fines. People returning to their communities from jails and prisons are often unable to pay fines because it is often difficult for them to obtain employment that provides a living wage. An estimated 60–75 percent of persons previously incarcerated are still unemployed a year after release.¹⁹ As they continue to seek meaningful employment, fees and fines unjustly burden people with debt.²⁰

Tim Johnson, Founder and President of the Orlando Serve Foundation, whose Foundation’s mission is “Connecting communities and resources to provide systems of care to individuals and families in need in Central Florida” provides innovative ways to help lift burdens such as financial debt and suspended licenses from being obstacles limiting reentry. One of the Foundation’s innovative ways to support those returning to their communities is through the ‘He Got Up!’ campaign, which hosts events in the community. At the events, “guests register to determine their eligibility to restore their suspended driver’s licenses due to unpaid court costs, fees or fines. If eligible, they sign up for a reduced-cost payment plan that removes them from collections. The plan considers their ability to pay and offers lower minimum payments than typical. Depending on the county, they will see the Clerk at the event or at the Courthouse the following week. Alternatively, in Orange County, guests can sign up to perform community service hours in lieu of payment. In this case, they register at the event with the Department of Corrections and then see a judge in the weeks following to have the community service ordered. Upon sign-up for either plan, the suspension from the

¹⁷ U.S. Commission on Civil Rights, *Collateral Consequences*.¹⁸ “Collateral Consequences of Conviction Act,” Uniform Law Commission, accessed July 9, 2020, <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a&tab=librarydocuments&LibraryFolderKey=&DefaultView=>.¹⁹ Jared Meyer, “States Need to Give Ex-Cons a Fresh Start,” *Forbes*, January 21, 2018, <https://www.forbes.com/sites/jaredmeyer/2018/01/21/states-need-to-give-ex-cons-a-fresh-start/#7b51cbcd2fad>.

¹⁸ “Collateral Consequences of Conviction Act,” Uniform Law Commission, accessed July 9, 2020, <https://www.uniformlaws.org/committees/community-home/librarydocuments?communitykey=74d9914f-f15e-49aa-a5b0-f15f6e5f258a&tab=librarydocuments&LibraryFolderKey=&DefaultView=>.¹⁹ Jared Meyer, “States Need to Give Ex-Cons a Fresh Start,” *Forbes*, January 21, 2018, <https://www.forbes.com/sites/jaredmeyer/2018/01/21/states-need-to-give-ex-cons-a-fresh-start/#7b51cbcd2fad>.

¹⁹ Jared Meyer, “States Need to Give Ex-Cons a Fresh Start,” *Forbes*, January 21, 2018, <https://www.forbes.com/sites/jaredmeyer/2018/01/21/states-need-to-give-ex-cons-a-fresh-start/#7b51cbcd2fad>.

²⁰ Mathew Menendez et al., *The Steep Costs of Criminal Justice Fees and Fines* (New York: The Brennan Center, 2019), <https://www.brennancenter.org/our-work/research-reports/steep-costs-criminal-justice-fees-and-fines>.

guest's driver's license is removed, and if they honor their payment plan or community service agreement, their license remains valid.”²¹

14.3.5 The Departments of Justice, Housing and Urban Development, and Agriculture should develop housing strategies for people who were formerly incarcerated that increase positive reentry outcomes.

According to the Prison Policy Initiative, “formerly incarcerated people are almost 10 times more likely to be homeless than the general public.”²² Affordable housing and homelessness is a critical social problem for the larger community, which means people formerly incarcerated compete with the larger community for scarce resources. Currently, few jails and prisons have implemented housing strategies or programs, and that leads to negative reentry outcomes. Lack of housing can cause instability, which may lead to homelessness. Even if issues of substance use, mental health disorders, education, or employment are addressed, the lack of stable housing can be disruptive to reentry efforts.

In his testimony before the Commission, Secretary John Wetzel from the Pennsylvania Department of Corrections suggested that obtaining post release housing is the number one challenge upon release. In PA Secretary Wetzel testified they have found success with performance contracts that pay halfway housed based on recidivism rates. “Lower recidivism rates result in a bonus, one standard deviation of the average is normal pay, and an increase in two successive six month periods results in a contract loss. Incentives and accountability work when partnering with the private sector.”²³

[CROSS-REFERENCE SOCIAL PROBLEM S]

14.4 Community Reintegration and Supervision

Because a majority of people who were incarcerated will be placed on some level of community supervision after serving time in jail or prison, community supervision agencies become an integral part of the criminal justice system at the point of reentry and the community supervision agency must maintain public safety and ensure that those who were incarcerated are monitored and comply with conditions of release.

BJS reports that at least 95 percent of all state prisoners will be released from prison at some point and that nearly 80 percent will be released onto parole supervision.²⁴ By the end of 2016, more than 4.5 million people—1 in 55 adults—were on some type of community supervision.²⁵ At the same time, 2.3 million people were incarcerated in jail or state or federal prison, meaning two-thirds of people under correctional control in 2016 were in the community.²⁶

The large number of people on community supervision and high caseloads have made it difficult for supervision agencies to implement tailored recidivism-reduction strategies. In some states, community supervision officers are responsible for monitoring and managing the reentry needs of more than 100 people on supervision. Additionally, many people on community supervision are returned to jails and prisons for non-criminal violations. A quarter of all state admissions in 2017 were for breaking minor supervision rules known as technical violations—such as opening a credit account, missing an appointment, or failing a drug

²¹ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 29, 2020) (statement of Tim Johnson, Founder and President of the Orlando Serve Foundation), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

²² Lucius Couloute, “Nowhere to Go: Homelessness Among Formerly Incarcerated People,” Prison Policy Initiative, August 2018, <https://www.prisonpolicy.org/reports/housing.html>.

²³ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 28, 2020) (statement of John E. Wetzel, Secretary of Corrections, PA Department of Corrections), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

²⁴ Bureau of Justice Statistics, “Reentry Trends in the U.S.”

²⁵ Danielle Kaebler, *Probation and Parole in the United States, 2016* (Washington, DC: Bureau of Justice Statistics, 2018), <https://www.bjs.gov/index.cfm?ty=pbdetail&iid=6226>.

²⁶ Kaebler and Cowhig, *Correctional Populations*.²⁷ “The Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets,” Council of State Governments Justice Center, June 18, 2019, <https://csjjusticecenter.org/publications/confined-costly/>.²⁸ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 23, 2020) (statement of John Koufos, National Director of Reentry Initiatives, Right on Crime), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

test.²⁷

Finally, it is important that jails and prisons share case management information with community supervision so that it can be used to develop the supervision case plan. The jail or prison case management file provides the community supervision officer with information about the individual's adjustments, changes, and needs while that person was incarcerated. This collaboration helps build the roadmap for what the person needs upon reentry. They should also ensure people have primary identification documents and eligible benefits at least 60 days prior to release. Government benefits often require people to have a birth certificate, driver's license, and a social security card to obtain public benefits and employment, and a formal process to obtain peoples' identification documents, assess the types of benefits or services they are eligible for, and complete applications to secure those benefits can greatly smooth the transition back into the community.

John Koufos, Right on Crime National Director of Reentry Initiatives, says, "every inmate needs to leave incarceration with a DMV—a Department of Motor Vehicle—non-driver identification card or a driver's license, not a prison ID."²⁸

14.4.1 Community supervision agencies should adopt the case management model and initiate plans that are consistent with the plans developed by jails and prisons, tailored appropriately, and include engagement strategies to reduce recidivism.

Parolees who receive consistent and properly sequenced services throughout their time in the criminal justice system are significantly less likely to be rearrested or reconvicted for new crimes within 18 months of release.²⁹ Recidivists are most likely to commit their new offense within two years of release.³⁰ Therefore, community supervision agencies should increase officers' efforts, time, and resources during this most critical time frame. Because they serve as both a law enforcement officer and social worker, supervision officers are uniquely situated to engage the reentering offender at the earliest possible stage, facilitate support and opportunity, and hold the parolee accountable. To ensure success of the system, the supervision officer must be properly and continually trained to identify the programs of proven effectiveness in the community for a reentering individual. Positive social and community interactions help improve reentry outcomes and at the Iowa Department of Community Supervision, officers are trained to mitigate a person's risk for recidivism by using case management plans that are designed to maximize community interactions, provide needed support services, and decrease the probability a person will commit a new crime.³¹

²⁷ "The Confined and Costly: How Supervision Violations Are Filling Prisons and Burdening Budgets," Council of State Governments Justice Center, June 18, 2019, <https://csjjusticecenter.org/publications/confined-costly/>.²⁸ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 23, 2020) (statement of John Koufos, National Director of Reentry Initiatives, Right on Crime), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

²⁸ *President's Commission on Law Enforcement and the Administration of Justice: Hearing on Reentry* (April 23, 2020) (statement of John Koufos, National Director of Reentry Initiatives, Right on Crime), <https://www.justice.gov/ag/presidential-commission-law-enforcement-and-administration-justice/hearings>.

²⁹ Michael Ostermann and Jordan M. Hyatt, "When Frontloading Backfires: Exploring the Impact of Outsourcing Correctional Interventions on Mechanisms of Social Control," *Law & Social Inquiry* 43, no. 4 (2018), <https://doi.org/10.1111/lsi.12300>.³⁰ Bill Keller, "Seven Things to Know About Repeat Offenders," The Marshall Project, March 10, 2016, <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders>.

³⁰ Bill Keller, "Seven Things to Know About Repeat Offenders," The Marshall Project, March 10, 2016, <https://www.themarshallproject.org/2016/03/09/seven-things-to-know-about-repeat-offenders>.

³¹ Sally Kremer, Director, 5th Judicial District, Iowa Department of Correctional Services, in discussion with Reentry Working Group during virtual site visit of the Judicial District Community Supervision, May 13, 2020.

Chapter 12. Data and Reporting

PULL QUOTE: “Cops on the street need data; sometimes their safety depends on it. And what they need is data that are easy to digest, accurate, and timely.”¹ - Chief William Brooks, Norwood Police Department, Massachusetts

Overview

Effective policing requires comprehensive and credible data to identify criminal threats and determine where to best deploy limited resources. Law enforcement agencies cannot reach policy decisions or allocate manpower based on whim, anecdotes, or the individualized discretion of law enforcement officials. Rather, law enforcement must make a centralized and scientific determination of the state of crime in their jurisdiction, and that understanding can only occur through comprehensive and reliable data.

Foremost, data tells law enforcement the scale of a criminal problem and, no less importantly, the efficacy of operations to combat it. It can be difficult to even identify the existence of a criminal problem without data. Law enforcement cannot ascertain, for example, the magnitude of human trafficking without data of its frequency, location, and other patterns. In the fight against violent crime, moreover, the Commission has determined that law enforcement should no longer simply rely on “street intelligence,” but should use sophisticated crime data analysis, such as “hotspot mapping” and crime gun intelligence, to target the most violent criminal actors and their organizations.

On the macro-policy level, law enforcement officials employ data to distribute resources, including federal grant money, with a proper understanding of criminal activity relative to type, degree, and location.

But the mere acquisition of data is by itself, insufficient. The information must be shared, analyzed, and used effectively. A mosaic of federal, state, local, and tribal law enforcement agencies collect data, and need sound methods of reporting and sharing data for collective analysis and use. As noted elsewhere in this report, this is particularly vital in the realm of homeland security, where there is a pronounced need for law enforcement to share information and data in reliable and effective ways.

Background

Law enforcement has formally collected crime data since the establishment of the Uniform Crime Reporting (UCR) program in 1929. The need to share vital information about crime trends has not changed much since 1929, but the demand, timing, and types of data have changed. In the twenty-first century, our nation has become a vast consumer of data in nearly all aspects of life and professional sectors. Law enforcement has shifted from taking a reactive stance (i.e., moving from call to call) to a proactive position, such as using data to help reduce crime in their communities.

The use of law enforcement data has evolved from the early days of capturing basic crime counts to rigorous research practice through evidence-based policing (EBP). Data collection is no longer just aggregate counts; it now includes incident-based data, which provide detailed and granular information that fosters better crime reduction strategies. In addition to the analytical flexibility that incident-level data provides, standardized incident-level data provide a platform for law enforcement and other criminal justice professionals to maintain both transparency with and accountability to the communities they serve.

The federal government relies on federal, state, county, tribal, and local law enforcement agencies to enter data accurately. Law enforcement agencies striving to implement EBP strategies will be thwarted if the data analyzed are incomplete, inaccurate, or otherwise unreliable. Even when data have been accurately collected, people may misunderstand or misinterpret them if the context or baseline is unclear in reporting.

¹ William Brooks, Chief of Police, Norwood Police Department, MA, email communication with Shelley S. Hyland, Federal Program Manager, Data and Reporting Working Group, April 30, 2020. ² For this chapter, the terms federal criminal justice data collections and justice-related data collections are used interchangeably and include only statistical data collections where the primary objective is to collect new or existing data in order to provide statistical results. These collections are covered under the Paperwork Reduction Act. It does not include performance measurement data collected through grants, cooperative agreements, and other funding mechanisms.

The same data can be used to both defend and refute the same hypothesis. As such, all government agencies must continue their due diligence in collecting and reporting data that are reliable and objective.

13.1 Federal Data

The United States Government is the largest collector and custodian of data, and it analyzes this information to discern national crime trends and accordingly prioritize federal law enforcement efforts or allocate grant money to state and local jurisdictions. The Executive Branch of the United States government includes thirteen principal statistical agencies whose primary responsibility is to collect essential statistical information for public use. Since 1979, the Bureau of Justice Statistics (BJS) has served as the principal statistical agency for the Department of Justice (DOJ).

The federal government does not have a central system to collect criminal justice data. The Office of Information and Regulatory Affairs (OIRA) within the Office of Management and Budget (OMB) coordinates the decentralized federal statistical system. Within DOJ, a number of agencies engage in statistical data collection (figure 13.1). The methodology, size, and scope of these data collections vary widely. BJS oversees 53 percent of federal criminal justice data collections² within DOJ, followed by the Federal Bureau of Investigation (FBI; 15 percent), Office of Juvenile Justice and Delinquency Prevention (10 percent), and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF; 6 percent). Eleven other DOJ agencies oversee the remaining 16 percent of federal criminal justice data collections (see supplement 13.1).

Table 13.1

Table 1. Federal data collections by criminal justice area and federal agency.					
	Total	BJS	FBI	Other DOJ Agencies	Non-DOJ Agencies
Total	100.0 %	39.5 %	10.9 %	23.5 %	26.1 %
Crime	35.3	4.2	7.6	10.9	12.6
Law Enforcement	25.2	11.8	3.4	2.5	7.6
Courts	18.5	10.1	0.0	4.2	4.2
Corrections	18.5	12.6	0.0	5.9	0.0
Expenditures	2.5	0.8	0.0	0.0	1.7

Source: Supplement #.

The most prominent federal data collections that measure crime are the FBI's Uniform Crime Reporting (UCR) program and BJS's National Crime Victimization Survey (NCVS). The UCR focuses on collecting data regarding crimes reported to police, whereas the NCVS is the main data source that captures crimes not reported to police.

The FBI's UCR program has existed since 1930, when the Summary Reporting System (SRS) was created. In 1988, the FBI then created the National Incident-Based Reporting System (NIBRS) to move from the aggregate crime counts of the SRS to detailed incident-level crime information.³ Effective January 1, 2021, the FBI will retire the SRS and will transition exclusively to the NIBRS data collection.⁴ The NCVS is a

² For this chapter, the terms federal criminal justice data collections and justice-related data collections are used interchangeably and include only statistical data collections where the primary objective is to collect new or existing data in order to provide statistical results. These collections are covered under the Paperwork Reduction Act. It does not include performance measurement data collected through grants, cooperative agreements, and other funding mechanisms.

³ Paul Wormeli, "Criminal Justice Statistics: An Evolution," *Criminology and Public Policy* 17, no. 2 (2018).⁴ "National Incident-Based Reporting System (NIBRS)," Federal Bureau of Investigation, accessed July 21, 2020, <https://www.fbi.gov/services/cjis/ucr/nibrs>.⁵ National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 1: Defining and Classifying Crime* (Washington, DC: The National Academies Press, 2017), <https://doi.org/10.17226/23492>; National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 2: New Systems for Measuring Crime* (Washington, DC: The National Academies Press, 2018), <https://doi.org/10.17226/25035>; and National Research Council, *Ensuring the Quality*.

⁴ "National Incident-Based Reporting System (NIBRS)," Federal Bureau of Investigation, accessed July 21, 2020, <https://www.fbi.gov/services/cjis/ucr/nibrs>.⁵ National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 1: Defining and Classifying Crime* (Washington, DC: The National Academies Press, 2017), <https://doi.org/10.17226/23492>; National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 2: New Systems for Measuring Crime* (Washington, DC: The National Academies Press, 2018), <https://doi.org/10.17226/25035>; and National Research Council, *Ensuring the Quality*.

residential survey of victims and captures both reported and unreported crime. NCVS estimates have largely only been available at the national level. However, BJS is currently undergoing an extensive redesign of the survey to produce subnational estimates.

While BJS collects the majority of criminal justice data, a number of other federal agencies also capture justice-related data. More than 30 federal agencies collect criminal justice data through over 100 data collections (see supplement 13.1). One benefit of multiple agencies collecting data is that agencies with established access to certain types of subjects are better equipped to collect data from these agencies or persons. For example, the FBI has been collecting crime data from law enforcement agencies for 90 years with a well-established infrastructure to capture these data. It would take millions of dollars and years for another government agency to set up a similar frame to accomplish the same task. Additionally, the CDC is the primary collector of data on injury and death, with an established series of data collections in hospitals. These collections provide access to data on injury and death involving law enforcement officers that may not be tracked through law enforcement agencies.

However, there are a number of issues with this current structure of decentralized data collection, one primary being the difficulty of identifying the potential duplication of data collected. In addition, with decentralization there is a lack of communication among federal agencies about the programs they implement. OIRA oversees and reviews all information collected from the public, but it relies on federal agencies themselves to identify potential sources of duplication. Additionally, decentralization makes it difficult to identify gaps in the data being collected. A lack of clarity in what is being gathered across agencies and data collections makes it increasingly difficult to identify the knowledge gaps. There has never been a systematic review of all criminal justice collections by the federal government.⁵

This recommendation offers a way to address the issues caused by the decentralization of federal criminal justice data.

13.1.1 The president should direct the Office of Management and Budget to conduct a one-time review of criminal justice data collections across the government to identify duplication of data collection.

As previously discussed, the collection of criminal justice statistics is highly decentralized in the federal government. With more than 30 agencies collecting data pertaining to criminal justice issues, certain topics, such as victimization, have data that are collected through multiple studies by multiple organizations.⁶ For example, BJS collects information on victims of intimate partner violence through the NCVS regardless of whether the violence was reported to law enforcement.⁷ Information on victims of intimate partner violence can also be obtained from the CDC's National Intimate Partner and Sexual Violence Survey.⁸ To ensure the federal collection of criminal justice data does not unduly burden nonfederal entities, the government must be able to identify duplications of data collection efforts. An evaluation and report by OMB would identify overlap in efforts and help guide resource distributions going forward. OMB should consider the Department of Justice as the agency to advise and oversee federal justice-related data collections going forward to reduce duplication.

13.2 Data Collection and Reporting Methods

The 1967 President's Commission on Law Enforcement and Administration of Justice (Johnson Commission)

⁵ National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 1: Defining and Classifying Crime* (Washington, DC: The National Academies Press, 2017), <https://doi.org/10.17226/23492>; National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 2: New Systems for Measuring Crime* (Washington, DC: The National Academies Press, 2018), <https://doi.org/10.17226/25035>; and National Research Council, *Ensuring the Quality*.

⁶ See supplement 13.1.

⁷ Shannon Catalano, *Intimate Partner Violence: Attributes Of Victimization, 1993–2011* (Washington, DC: Bureau of Justice Statistics, 2013), <https://www.bjs.gov/content/pub/pdf/ipvav9311.pdf>.

⁸ S.G. Smith et al., *National Intimate Partner and Sexual Violence Survey (NISVS): 2015 Data Brief – Updated Release* (Atlanta, GA: Centers for Disease Control and Prevention, 2018), <https://www.cdc.gov/violenceprevention/pdf/2015data-brief508.pdf>.

noted that the greatest obstacle to the work of that commission was the lack of data.⁹ The Johnson Commission recommended the development of improved systems to collect data that would inform all aspects of the criminal justice system.

Since the Johnson Commission report, the federal government has made great strides to improve data collection and reporting. The creation of BJS a decade after the Johnson Commission report greatly expanded justice-related data collection and statistical reporting for DOJ. In addition, the FBI has adopted methods to improve and continually enhance its capabilities for data collection and publications.

Federal data collection and reporting would not be possible without the cooperation of states, counties, local, and tribal agencies. Similarly, these criminal justice agencies collect a myriad of data. Data sharing and reporting may be the most important aspect of data collection. There is little need to collect data if it will not be used. Law enforcement agencies collect data daily and use these data internally to help inform operations, policies, and procedures. The benefits of sharing and reporting data outweigh the negatives. Agencies may be rightly concerned about privacy issues, but data can be shared and reported so that sensitive information is not released. Sharing data with other agencies assists with investigations. Additionally, reporting data to the public can help build police-community relations and increase transparency and public trust. Researchers can also use these data to build EBP practices.¹⁰

Data collection and sharing among all criminal justice agencies is essential for day-to-day operations. Data reporting at all levels of government is necessary for maintaining transparency, informing policy, and understanding the current state of the criminal justice system. Two primary issues occur with data collection and reporting: mandatory reporting and standardization. These issues have an impact on all levels of government and its ability to provide reliable justice-related statistics.

Although the federal government cannot mandate participation, most respondents comply with data requests. BJS survey collections typically have a response rate of between 80 percent and 90 percent.¹¹ Additionally, 91 percent of law enforcement agencies report to the FBI's UCR program.¹² Crime reporting to the FBI is successful because the FBI has been collecting these data from agencies for 90 years; as of 2018, 43 states have legislation mandating local agencies to report crime data to the states.¹³ While crime reporting to the UCR is high, 51 percent of law enforcement agencies report via NIBRS, which has been in existence since 1988.¹⁴ NIBRS requires a significant system conversion from submitting monthly crime counts to providing detailed incident-level case data. The resulting slow adoption rate led to the development of BJS's National Crime Information Exchange (NCS-X) program in 2012, which provides funding to 400 law enforcement agencies and states to convert to NIBRS in order to achieve national representation.¹⁵ In addition to NCS-X, the FBI offers data integration support and provides technical assistance on NIBRS data specifications and reporting requirements. Since the implementation of these additional programs, agencies that report to NIBRS increased 46 percent (from 6,835 agencies in 2012 to 10,011 agencies in 2020).¹⁶ The FBI's goal is to have all 18,000 law enforcement agencies in the United States reporting crime to NIBRS by 2021. Based on state-reported agency commitments, the FBI forecasts that 75 percent of law enforcement agencies will be

⁹ U.S. President's Commission on Law Enforcement and the Administration of Justice, *The Challenge of Crime in a Free Society* (Washington, DC: U.S. Government Printing Office, 1967), <https://www.ncjrs.gov/pdffiles1/nij/42.pdf>.

¹⁰ "5 Things You Need to Know About Open Data in Policing," National Police Foundation, accessed June 3, 2020, <https://www.policefoundation.org/5-things-you-need-to-know-about-open-data-in-policing/>.

¹¹ National Research Council, *Ensuring the Quality*, 81.

¹² Trudy Ford, Section Chief, Criminal Justice Information Services, Federal Bureau of Investigation, email communication with Data and Reporting Working Group, February 28, 2020.

¹³ National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 2*, 63.

¹⁴ Amy Blasher, Unit Chief, Criminal Justice Information Services, Federal Bureau of Investigation, email communication with Data and Reporting Working Group, May 7, 2020.

¹⁵ Kevin J. Strom and Erica L. Smith, "The Future of Crime Data: The Case for the National Incident-Based Reporting System (NIBRS) as a Primary Data Source for Policy Evaluation and Crime Analysis," *Criminology & Public Policy* 16, no. 4 (2017).

¹⁶ Amy Blasher, Unit Chief, Criminal Justice Information Services, Federal Bureau of Investigation, email communication with Data and Reporting Working Group, May 13, 2020.

submitting to NIBRS by January 1, 2021, which will account for 83 percent of the population.¹⁷

The second issue that plagues data collection and reporting across all levels of government is the lack of standardization in the data being collected. This is largely due to the decentralized record management systems (RMS) kept by criminal justice agencies. Officers can query their own agency systems and separate federal and state systems, but often cannot access the RMS of neighboring departments. In cases where access is granted to the systems, they are not integrated, which means that separate queries must be run in each system. These software issues make it difficult for criminal justice agencies to share data with each other and nearly impossible to share data in real-time.

13.2.2 States should enact legislation that requires criminal justice agencies to collect standardized criminal justice data for reporting to the state and federal governments.

Because RMS systems are decentralized and vary widely across law enforcement agencies, data fields should be standardized so they can be collated at the state level. States and agencies that have converted to NIBRS will have standardized crime data that will be collated at the state and federal levels. However, law enforcement agencies also need to collect other key criminal justice data, such as those on use of force.

States should therefore enact legislation that, at a minimum, requires all law enforcement agencies within the state to report to the Federal Bureau of Investigation's National Incident Based Reporting System and National Use-of-Force Data Collection. The legislation should also include the collection of key data elements on a person from courts and corrections that covers their interaction with the criminal justice system from arrest to release. The legislation should include funding appropriations for the collection and reporting of these data.

While most state and local agencies report their crime data based on the FBI's Summary Reporting System (SRS) of the UCR program or NIBRS specifications, such reporting is not required because the federal government cannot mandate it under federal law. However, states can mandate that local agencies report to the state. At least 43 states have legislation that requires local law enforcement agencies to report crime data to the state.¹⁸ For decades, U.S. law enforcement agencies reported crime data to the FBI under the SRS of the UCR program. Effective January 1, 2021, all agencies will report under the NIBRS, as opposed to summary reporting through the SRS. However, as of April 2020, only 51 percent of law enforcement agencies in the United States were reporting to NIBRS.¹⁹ States should mandate NIBRS reporting so these data can be shared with the federal government and participating agencies for a comprehensive look at crime in the nation.

The lack of required reporting in all 50 states creates data voids that limit the full and accurate view of crime in America. The same holds true for use of force reporting. The FBI's National Use-of-Force Data Collection was developed to fill this void, but agencies are not required to submit their use of force statistics. As of April 2020, 40 percent of agencies were reporting to the National Use-of-Force Data Collection.²⁰ To provide accurate statistics on law enforcement use of force, states should mandate that all law enforcement agencies report to the FBI's National Use-of-Force Data Collection.²¹ Agencies benefit from reporting use of force as it increases transparency, which can build community trust.

¹⁷ Trudy Ford, Section Chief, Criminal Justice Information Services, Federal Bureau of Investigation, email communication with Shelley S. Hyland, Federal Program Manager, Data and Reporting Working Group, July 15, 2020.

¹⁸ National Academies of Sciences, Engineering, and Medicine, *Modernizing Crime Statistics: Report 2*, 63.

¹⁹ Blasher, email to Data and Reporting, May 7, 2020.²⁰ Amy Blasher, Unit Chief, Criminal Justice Information Services, Federal Bureau of Investigation, email communication with Data and Reporting Working Group, April 22, 2020.

²⁰ Amy Blasher, Unit Chief, Criminal Justice Information Services, Federal Bureau of Investigation, email communication with Data and Reporting Working Group, April 22, 2020.

²¹ This recommendation is also supported by the National Association for the Advancement of Colored People Legal Defense and Educational Fund, Inc., American Civil Liberties Union, and the Justice Roundtable. These agencies provided public comments for consideration to the Commission.

Federal law should also mandate the inclusion of federal crime data with data from state, local, and tribal law enforcement agencies, in order to provide a comprehensive view of crime in the United States while affording greater transparency and accountability. Congress enacted the Uniform Federal Crime Reporting Act (UFCRA) of 1988 to ensure federal participation in crime data collections.²² However, few federal agencies comply because of the lack of enforcement or a clear implementation strategy. Currently, only 6 of 114 eligible federal agencies (5 percent) submit NIBRS data.²³

Data from law enforcement agencies are important to analyze crime, but data from county jails and the courts are equally important to understand the origins of crime, crime trends, and the effectiveness of the criminal justice system. Standardizing the collection of electronic criminal history, court disposition, and corrections data will enable criminal justice practitioners to study the full impact of crime within our society.

State legislation should require all law enforcement agencies to report to NIBRS and the National Use-of-Force Data Collection; enable the collection of key data elements from courts and corrections on a person from arrest to release; ensure the existence of a clear compliance strategy; and provide appropriations to ensure the collection and reporting of these data.

13.3 Evidence-Based Policing

In 1998, Lawrence Sherman coined the term evidence-based policing (EBP) with the basic principle that “police practices should be based on scientific evidence about what works best.”²⁴ EBP intends to make policing as effective and efficient as possible.²⁵ EBP helps determine what works, what does not, and how to increase professionalism through valid, thorough, and scientific evaluation. Over the past three decades, American law enforcement has slowly moved in the direction of EBP.

Evidence Based Policing (EBP) is an approach used to identify effective solutions to many of the problems faced by police departments, sheriff’s offices and other law enforcement agencies. It is not one-size-fits-all; instead, it is adaptable to the types of issues routinely handled by law enforcement. EBP can be implemented regardless of agency size or type. While EBP emphasizes the use of scientific evidence, organizational evidence (data pertaining to the agency), professional evidence (pooled officer experience), and stakeholder evidence (groups that are likely to be affected by the research) should also be considered in order to develop policy and put it into practice.²⁶ EBP does not diminish experience or professional judgment; it enhances those valuable qualities with outcomes that can be measured and reinforced with data and analysis. Conversely, and perhaps most importantly, EBP can be used to identify ineffective programs and strategies that may actually increase harm.²⁷

There remains a reluctance to incorporate EBP in law enforcement practices today. Change is difficult for a variety of reasons including a cultural shift that threatens the status quo or the intuitive skill set of the experienced law enforcement officer. A common misconception is that EBP ignores or replaces experience; on the contrary, EBP works best when conducted by those who have both law enforcement and research experience,²⁸ or when law enforcement agencies partner with academic researchers.²⁹ EBP requires that

²² Uniform Federal Crime Reporting Act of 1988, 34 U.S.C. § 41303 (1989), <https://uscode.house.gov/view.xhtml?path=/prelim@title34/subtitle4/chapter413&edition=prelim>.

²³ Blasher, email to Data and Reporting, May 13, 2020.

²⁴ Lawrence Sherman, *Evidence-Based Policing* (Washington, DC: Police Foundation, 1998), 2, <https://www.policefoundation.org/publication/evidence-based-policing/>.

²⁵ Gary Cordner, *Evidence-Based Policing in 45 Small Bytes* (Washington, DC: National Institute of Justice, 2020), <https://www.ncjrs.gov/pdffiles1/nij/254326.pdf>. ²⁶ Jerry H. Ratcliffe, *Reducing Crime: A Companion for Police Leaders* (New York: Routledge, 2019).

²⁶ Jerry H. Ratcliffe, *Reducing Crime: A Companion for Police Leaders* (New York: Routledge, 2019).

²⁷ Jerry H. Ratcliffe, Professor, Temple University, “Evidence-based Policing” (PowerPoint presentation, Data and Reporting Working Group, virtual meeting, April 23, 2020).

²⁸ Ratcliffe, *Reducing Crime*.

²⁹ Cynthia Lum, *Translating Police Research into Practice* (Washington, DC: Police Foundation, 2009), https://www.policefoundation.org/wp-content/uploads/2015/06/Ideas_Lum_0.pdf.

police officers at every level possess a fundamental knowledge in research and evaluation. These two components form the foundation of determining what is evidence-based.

There is a solid body of evaluation and research in law enforcement, but police departments and sheriff's offices have been slow to adopt the translation of this research into practice for a number of reasons.³⁰ One of these may be confusion over what EBP is, because it overlaps with other popular practices: EBP complements intelligence-led policing and problem-oriented policing by providing an evidentiary foundation on which these two strategies are based.³¹ Additionally, rigorous research projects are costly and time consuming, and outcomes can be difficult to understand. Strained budgets can also negatively affect an agency's ability to staff analysts. In addition, law enforcement agencies may be resistant to collaborating with the outside research partners that are often necessary to help with evaluations. These academic researchers publish results in journals that are not accessible and easily digestible to practitioners, which contributes to the resistance.

However, the primary reason for the slow uptake is the limited number of law enforcement practices that have been systematically evaluated. Agencies are more apt to pick what is most commonly being done. The benefits of EBP include research knowledge and increase in academic-practitioner partnerships (see text box) technological advancements, improved police-citizen relations, and decreased crime.³²

Understanding what works and why it works may provide an avenue for increased interest and acceptance of EBP. A growing body of public safety practitioners, or graduate-level law enforcement officers who conduct research in collaboration with academic partners or on their own, appears to be gaining in popularity, as seen with the National Institute of Justice's Law Enforcement Advancing Data and Science (LEADS) Scholars program.³³ It is important to build capacity at the executive level of policing in the basic understanding of research design, bias, and other statistical principles. It is just as essential to imprint EBP at the beginning of the youngest staff members' careers. Familiarity and exposure to EBP through education could be one potential catalyst to overcoming resistance. Legitimizing EBP through education legitimizes policing—much like medical providers—as professionals who target, test, and track policy and strategy for effectiveness and harm.

13.3.1 Evidence-based policing should be incorporated into training curricula, as well as everyday practices, policies, and procedures, by law enforcement academies, state Peace Officer Training and Standards, and law enforcement agencies.

As the U.K. College of Policing describes, “in an evidence-based policing approach, police officers and staff create, review, and use the best available evidence to inform and challenge policies, practices, and decisions.”³⁴ EPB supplements and enhances experience with evidence to challenge assumptions and improve process and policy strategically to achieve better outcomes. As noted by Sherman (2020), “everything police agencies decide, from recruitment to assignments to discipline and dismissal, can be

³⁰ Cynthia Lum et al., “Receptivity to Research in Policing,” *Justice Research and Policy* 14, no. 1 (2012).

³¹ Ratcliffe, *Reducing Crime*.

³² Lum, *Translating Police Research*. ³³ “NIJ's Law Enforcement Advancing Data and Science Scholars Program for Law Enforcement Officers,” National Institute of Justice, March 4, 2020, <https://nij.ojp.gov/funding/nij-and-iacps-law-enforcement-advancing-data-and-science-leads-scholarships-law-enforcement>. ³⁴ “What Is Evidence-Based Policing?,” U.K. College of Policing, accessed June 24, 2020, <https://whatworks.college.police.uk/About/Pages/What-is-EBP.aspx>.

³⁵ Lawrence Sherman, “Evidence-Based Policing and Fatal Police Shootings: Promise, Problems, and Prospects,” *The ANNALS of the American Academy of Political and Social Science* 687, no. 1 (2020): 13.

³³ “NIJ's Law Enforcement Advancing Data and Science Scholars Program for Law Enforcement Officers,” National Institute of Justice, March 4, 2020, <https://nij.ojp.gov/funding/nij-and-iacps-law-enforcement-advancing-data-and-science-leads-scholarships-law-enforcement>. ³⁴ “What Is Evidence-Based Policing?,” U.K. College of Policing, accessed June 24, 2020, <https://whatworks.college.police.uk/About/Pages/What-is-EBP.aspx>. ³⁵ Lawrence Sherman, “Evidence-Based Policing and Fatal Police Shootings: Promise, Problems, and Prospects,” *The ANNALS of the American Academy of Political and Social Science* 687, no. 1 (2020): 13.

³⁴ “What Is Evidence-Based Policing?,” U.K. College of Policing, accessed June 24, 2020,

<https://whatworks.college.police.uk/About/Pages/What-is-EBP.aspx>. ³⁵ Lawrence Sherman, “Evidence-Based Policing and Fatal Police Shootings: Promise, Problems, and Prospects,” *The ANNALS of the American Academy of Political and Social Science* 687, no. 1 (2020): 13.

supported by better evidence.”³⁵ Protocols, policies, and strategies backed by science and research in areas like collecting, analyzing, and managing physical evidence and eyewitness identification can help investigators avoid arrests of innocent people, which could result in wrongful convictions.³⁶ Additionally, evidence-based practices using psychological testing during the hiring and selection phases have long been established.³⁷ Social science cannot solve all of policing’s problems, but data and analysis, which are the core of EBP, can provide the most logical and rational approach for police agencies moving forward. The state Peace Officer Standards and Training (POST) can assist in implementing practical and immediately operational national standards for evidence-based policing in basic academy and in-service trainings. Law enforcement agencies should ensure that civilian analysts have training and experience in EBP topics such as basic statistics and research design. This training should continually reinforced throughout officers’ careers through in-service training and promotional testing.

13.3.2 Congress should provide funding to create a College of Policing to provide and set standards for evidence-based policing education and training for law enforcement officers.

Law enforcement agencies should invest in the education of police personnel, both sworn and professional staff, to provide the essential level of expertise or proficiency in the components of EBP to those expected to use it. Additionally, any investment in the education of police staff will enhance the efficacy with which they fulfill their duties. Modeled after the U.K. College of Policing, the U.S. College of Policing should have three primary functions: developing research and providing infrastructure for improving EBP, setting education standards for law enforcement officers, and drawing on EBP to help set standards in law enforcement for agencies and officers.

The U.S. College of Policing should employ a national curriculum within a university setting to offer either (1) an executive master’s degree in the discipline of policing with an emphasis on EBP or (2) a certification program in the discipline of policing that provides a series of classes appropriate for basic EBP knowledge and application.³⁸ The executive master’s degree should provide police staff at the executive level a part-time, combined online and residential program of study concluding with a capstone or research thesis final and resulting in a master’s degree. The certification program—designed for line-level staff such as officers, detectives, sergeants, and analysts—should provide a professional certification at the conclusion of the course, and possibly credits for an undergraduate degree.

Funding should be provided in the form of grants, ideally administered through the Office of Community Oriented Policing Services (COPS Office) or BJA, in conjunction with one or more accredited universities and subject matter experts. Dedicated annual funding should be used to offer a combination of tuition assistance, scholarships, and small grants that could be coordinated in partnership with the COPS Office, BJA, and the

³⁵ Lawrence Sherman, “Evidence-Based Policing and Fatal Police Shootings: Promise, Problems, and Prospects,” *The ANNALS of the American Academy of Political and Social Science* 687, no. 1 (2020): 13.

³⁶ National Research Council, *Identifying the Culprit: Assessing Eyewitness Identification* (Washington, DC: The National Academies Press, 2014), <https://doi.org/10.17226/18891>.³⁷ Cary Mitchell, “Preemployment Psychological Screening of Police Officer Applicants: Basic Considerations and Recent Advances,” in *Police Psychology and Its Growing Impact on Modern Law Enforcement*, ed. Cary Mitchell and Edrick Dorian (Hershey, PA: IGI Global, 2017); Jonathan Lough and Michael Ryan, “Psychological Profiling of Australian Police Officers: A Longitudinal Examination of Post-Selection Performance,” *International Journal of Police Science and Management* 8, no. 2 (2005); and Geoffrey Alpert, “Hiring and Promoting Police Officers in Small Departments: The Role of Psychological Testing,” *Criminal Law Bulletin* 27, no. 3 (1991).

³⁷ Cary Mitchell, “Preemployment Psychological Screening of Police Officer Applicants: Basic Considerations and Recent Advances,” in *Police Psychology and Its Growing Impact on Modern Law Enforcement*, ed. Cary Mitchell and Edrick Dorian (Hershey, PA: IGI Global, 2017); Jonathan Lough and Michael Ryan, “Psychological Profiling of Australian Police Officers: A Longitudinal Examination of Post-Selection Performance,” *International Journal of Police Science and Management* 8, no. 2 (2005); and Geoffrey Alpert, “Hiring and Promoting Police Officers in Small Departments: The Role of Psychological Testing,” *Criminal Law Bulletin* 27, no. 3 (1991).

National Institute of Justice to ensure equity in participation for small, medium, and large agencies. Curriculum development and standards should be created through a coordinated effort among the COPS Office, BJA, IACP, the Federal Law Enforcement Training Center, the FBI National Academy, the National Police Foundation, the Police Executive Research Forum, the International Association of Directors of Law Enforcement Standards and Training, and other leadership and academic programs.

[INSERT SUPPLEMENT 13.1: List of Federal Data Collections]

(see Excel Workbook)

From: [Lauren Cassedy](#)
To: [Kylie Mason](#); [Gerald Whitney Ray](#)
Subject: Fw: Your request
Date: Friday, October 2, 2020 4:34:48 PM

From: Lauren Cassedy
Sent: Friday, October 2, 2020 4:33 PM
To: Gary Fineout <gfineout@politico.com>
Subject: Your request

Sorry we couldn't make an interview work for the piece today. I did want to circle back on a few of your questions from earlier this week.

Re: How the Governor and AG discussed the Bloomberg matter-
"Governor DeSantis brought this matter up to the Attorney General verbally."

Re: campaign violations referred to other agencies -
"This is Attorney General Moody's first general election cycle in this role. Attorney General Bondi referred elections related allegations in 2018."

From: Lauren Cassidy
Subject: Fwd: Fox & Friends
Date: Thursday, September 24, 2020 6:50:25 AM

From: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 6:25:45 AM
To: Lauren Cassidy; Murray, Andrew
Cc: Marsilio, Montana; Lewittes, Lee (Kushnir); Walker, Bailey; Valentine, Alexandria
Subject: Re: Fox & Friends

Thank you again for joining us!

From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 6:22 AM
To: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>; Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Fox & Friends

Hi Nicole,

We are looking forward to the 725AM hit. Thanks again for having us on!

Get Outlook for iOS <https://urldefense.proofpoint.com/v2/url?u=https-3A__aka.ms_o0ukef&d=DwMGaQ&c=enx1hd0QtepE0kpermZGwQ&r=aXG-HlflS1yHdF52OwNPBANiWstEg6D_5HP7A3CKA28&m=TCtmZkjHpzEtNszzW0b6Vj9hW84aU6uxLcD2eqZzys&s=Wt7CFb2nbd7zhUllwufnmf0wHFSmVsoYxhYtaSNhg7E&e=>

From: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 5:38:20 AM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>; Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: Fox & Friends

Good Morning Lauren,

This is Nicole from Fox and Friends, I hope your morning is off to a good start. We look forward to having Florida Attorney General Moody join us live at 7:25AM EST. Just wanted to touch base.

Thank you so much for making the time to come on this morning!

Best,

Nicole Croteau

Fox & Friends

From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 9:59 PM
To: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

THANKS!

Andrew Murray

Senior Political Producer

"Fox & Friends"

Fox News Channel

1211 Avenue of the Americas, 2nd Floor

New York, NY 10036

Cell # 1 (917) 539-4688

Cell # 2 (202) 253-0994

Email: andrew.murray@foxnews.com <<mailto:andrew.murray@foxnews.com>>

@andrewmurray1

From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 9:59 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

We will arrive by 645am for makeup, if that's ok with you.

My cell is 813.928.1150.

TPs on topic. I'll have more in the morning too

* As the Attorney General of Florida, I have requested the FBI and the Florida Department of Law Enforcement immediately investigate potential violations of election laws.

- * It is essential that we maintain a fair elections process and that's why this must be fully evaluated by the FBI and other law enforcement agencies.
- * And I have also instructed the Statewide Prosecutor in my office to work with law enforcement and any Statewide Grand Jury that the Governor may call.

Assorted background that may be helpful for building the segment

- * AG's office in Florida has prosecutorial authority - not investigatory.
- * AG was a judge in Tampa for over ten years before becoming Florida's AG and prior to that she was a federal prosecutor.

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<[<mailto:Andrew.Murray@FOXNEWS.COM>](mailto:Andrew.Murray@FOXNEWS.COM)>>
Sent: Wednesday, September 23, 2020 9:26:05 PM
To: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<[<mailto:Lauren.Cassedy@myfloridalegal.com>](mailto:Lauren.Cassedy@myfloridalegal.com)>>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM<[<mailto:Montana.Marsilio@FOXNEWS.COM>](mailto:Montana.Marsilio@FOXNEWS.COM)>>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM<[<mailto:Lee.lewittes@FOXNEWS.COM>](mailto:Lee.lewittes@FOXNEWS.COM)>>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM<[<mailto:Bailey.Walker@FOXNEWS.COM>](mailto:Bailey.Walker@FOXNEWS.COM)>>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM<[<mailto:alexandria.valentine@FOXNEWS.COM>](mailto:alexandria.valentine@FOXNEWS.COM)>>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM<[<mailto:Nicole.Croteau@FOXNEWS.COM>](mailto:Nicole.Croteau@FOXNEWS.COM)>>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Hi Lauren,

Here are the details for "Fox & Friends" tomorrow (Thursday)LIVE at 7:25am ET. I am copying the A.M. team who produce in the morning. Please forward some bullet points outlining what she will say about the topic.

"Fox & Friends"

DATE: Thursday, September 24th

ARRIVAL: 7:00AM ET (MAKE-UP - Steph Gimson)

LIVE INTERVIEW: 7:25AM ET with Steve Doocy

TOPIC: ATTORNEY GENERAL ASKS FOR AN INVESTIGATION INTO MICHAEL BLOOMBERG'S PLEDGE TO PAY FELONS' DEBTS

https://www.wesh.com/article/florida-ag-investigation-bloombergs-felon-debts-fbi/34131139#<https://urldefense.proofpoint.com/v2/url?u=https-3A_www.wesh.com_article_florida-2Dag-2Dinveatigation-2Dbloombergs-2Dfelon-2Ddebts-2Dfbi_34131139-23&d=DwQGaQ&c=VW5JLWXJaVcapeXcL_6RHSzucizybTRh72MzyhvSvo&r=U_dZ1qZ1fVQ_oCxyS6wCd5jAOQBnmhjNSQ4y6dzUp-XSXw2ec1rYlPafmCncwce&m=2Jc-sAhMWG-SYTBIDIXIGA4d-p-v7L2Zsj6HnNVKEwss&s=z9pmwtlyisArjtlue0inG6Cxv6uuX03CZQFcUg1V28&e=>

LOCATION: Yellowbird - West Shore Office Center

ADDRESS: 4842 West Gandy BLVD., Tampa, FL, 33634

A.M. STUDIO CONTACT: Scott Henderson camera 585-820-5683

THURSDAY A.M.CONTACT: Montana Marsilio cell: 718-772-3710 email: montana.marsilio@foxnews<[<mailto:montana.marsilio@foxnews>](mailto:montana.marsilio@foxnews)>

Thanks in advance,

Andrew Murray

Senior Political Producer

"Fox & Friends"

Fox News Channel

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New York, NY 10036

Cell # 1 (917) 539-4688

Cell # 2 (202) 253-0994

Email: andrew.murray@foxnews.com<[<mailto:andrew.murray@foxnews.com>](mailto:andrew.murray@foxnews.com)>

@andrewmurray1

From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<[<mailto:Lauren.Cassedy@myfloridalegal.com>](mailto:Lauren.Cassedy@myfloridalegal.com)>>
Sent: Wednesday, September 23, 2020 9:14 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<[<mailto:Andrew.Murray@FOXNEWS.COM>](mailto:Andrew.Murray@FOXNEWS.COM)>>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

We're set for makeup, correct?

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From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<[<mailto:Lauren.Cassedy@myfloridalegal.com>](mailto:Lauren.Cassedy@myfloridalegal.com)>>

Sent: Wednesday, September 23, 2020 9:01:53 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Awesome. We will be seated by 715am and arrive by 645am for makeup

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>
Sent: Wednesday, September 23, 2020 9:00:59 PM
To: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Yellow Bird!

Andrew Murray
Senior Political Producer
"Fox & Friends"
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1211 Avenue of the Americas, 2nd Floor
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Email: andrew.murray@foxnews.com<<mailto:andrew.murray@foxnews.com>>
@andrewmurray1

From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Sent: Wednesday, September 23, 2020 8:47 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Sorry to bother again -

We are available for hit at 725am from whichever Tampa studio is able to be booked. Let me know if we are still good to go.

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From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Sent: Wednesday, September 23, 2020 7:15:58 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Keep me posted on studio location when you have it

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From: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Sent: Wednesday, September 23, 2020 6:48:13 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Yes

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>
Sent: Wednesday, September 23, 2020 6:47:37 PM
To: Lauren Cassidy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Thanks, we had to make a few changes to the due to some other breaking news, would it be possible for her to start LIVE at 7:25am ET?

Andrew Murray
Producer, Politics

"Fox & Friends"

Fox News Channel

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Cell # 2 (202) 253-0994<tel:2%20(202)%20253-0994>

FAX: (212) 301-3421<tel:(212)%20301-3421>

Email: andrew.murray@foxnews.com<<mailto:andrew.murray@foxnews.com>>

@andrewmurray1

On Sep 23, 2020, at 6:21 PM, Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>> wrote:

Excited to be on with you guys at 815am.

Let me know when you know more about the studio location

Thank you!

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM<<mailto:Andrew.Murray@FOXNEWS.COM>>>

Sent: Wednesday, September 23, 2020 3:52:14 PM

To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>

Subject: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Hi Lauren,

Please let us know if we can schedule Florida Attorney General Moody to appear on "Fox & Friends" tomorrow (Thursday) for a LIVE 5-7 minute interview between 6am – 9am ET about the allegations that Bloomberg pays fines for 32,000 felons in Florida so they can vote.

Thanks in advance,

Andrew Murray

Senior Political Producer

"Fox & Friends"

Fox News Channel

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New York, NY 10036

Cell # 1 (917) 539-4688

Cell # 2 (202) 253-0994

Email: andrew.murray@foxnews.com<<mailto:andrew.murray@foxnews.com>>

@andrewmurray1

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From: Lauren Cassedy
Subject: Fwd: Friday 9/25 FL AG Moody hit
Date: Thursday, September 24, 2020 2:01:58 PM

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 1:43:35 PM
To: Lauren Cassedy
Subject: Re: Friday 9/25 FL AG Moody hit

And we're hoping to do this at 10:40am ET! Thanks!

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 1:16 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Friday 9/25 FL AG Moody hit

Awesome! Just want to make sure, can she talk about the lawsuit against Bloomberg? That's what we were hoping to focus on, and then any SCOTUS news if we get it tomorrow morning

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 1:11 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Friday 9/25 FL AG Moody hit

Hi Julie,

We're excited to be on the show tomorrow. Let me know when you have more details and if I can help get you any info.

AG will be in Tampa and the two closest studios to her are WEDU and Yellowbird.

Thanks,

Lauren Schenone Cassedy
813.928.1150

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From: Lauren Cassedy
Subject: Fwd: [EXTERNAL] FL AG Moody tonight 10/1
Date: Friday, October 2, 2020 11:47:23 AM

From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Thursday, October 1, 2020 8:35:49 PM
To: Lauren Cassedy
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Great!! Thx. Will have more info around 4p tomorrow

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, October 1, 2020 8:32 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Sorry I thought I responded back earlier! Yes we are open tomorrow

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From: McDonnell, Brigid Mary
<BrigidMary.McDonnell@FOXNEWS.COM<[<mailto:BrigidMary.McDonnell@FOXNEWS.COM>>](mailto:BrigidMary.McDonnell@FOXNEWS.COM)>
Sent: Thursday, October 1, 2020 5:02:09 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<[<mailto:Lauren.Cassedy@myfloridalegal.com>>](mailto:Lauren.Cassedy@myfloridalegal.com)>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Aghs so sorry unfort we cannot do tonight due to the debate change / back and forth on the rules. Could she do tomorrow night instead?? Thanks and my apologies!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<[<mailto:Lauren.Cassedy@myfloridalegal.com>>](mailto:Lauren.Cassedy@myfloridalegal.com)>
Sent: Thursday, October 1, 2020 3:52 PM
To: McDonnell, Brigid Mary
<BrigidMary.McDonnell@FOXNEWS.COM<[<mailto:BrigidMary.McDonnell@FOXNEWS.COM>>](mailto:BrigidMary.McDonnell@FOXNEWS.COM)>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Let me know when you have confirm on studio/ makeup and hit time. Looking forward to tonight!

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Sent: Thursday, October 1, 2020 2:41:25 PM
To: McDonnell, Brigid Mary
<BrigidMary.McDonnell@FOXNEWS.COM<<mailto:BrigidMary.McDonnell@FOXNEWS.COM>>>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Yes

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From: McDonnell, Brigid Mary
<BrigidMary.McDonnell@FOXNEWS.COM<<mailto:BrigidMary.McDonnell@FOXNEWS.COM>>>
Sent: Thursday, October 1, 2020 2:16:53 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Would this be Tampa Yellowbird studio?

From: McDonnell, Brigid Mary
Sent: Thursday, October 1, 2020 12:25 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Hey Lauren! We'd also like to touch on the Bloomberg bailing out felons and separating fact from fiction on that.

Sent from my iPhone

On Oct 1, 2020, at 11:15 AM, Lauren Cassedy
<Lauren.Cassedy@myfloridalegal.com<<mailto:Lauren.Cassedy@myfloridalegal.com>>> wrote:

Hi Brigid Mary,

We're so excited to come on tonight to discuss the ACB letter!

AG will be in Tampa. Nearest studios are WEDU and Yellowbird.

Lauren Schenone Cassedy

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From: [John Guard](#)
To: [Richard Martin](#)
Subject: John Guard shared "Letter re Bloomberg" with you.
Date: Wednesday, September 23, 2020 9:04:13 AM
Attachments: [AttachedImage](#)
[AttachedImage](#)
[AttachedImage](#)

Here's the document that John Guard shared with you.



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Letter re Bloomberg

Open



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From: [John Guard](#)
To: [Richard Martin](#)
Subject: John Guard shared "Letter re Bloomberg" with you.
Date: Wednesday, September 23, 2020 9:04:13 AM
Attachments: [AttachedImage](#)
[AttachedImage](#)
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From: [John Guard](#)
To: [John Guard](#)
Cc: [Richard Martin](#)
Subject: Mike Bloomberg raises \$16 million to allow former felons to vote in Florida from The Washington Post
Date: Tuesday, September 22, 2020 2:49:22 PM

https://wapo.st/360ulIn?tid=ss_mail

From: [John Guard](#)
To: [John Guard](#)
Cc: [Richard Martin](#)
Subject: Mike Bloomberg raises \$16 million to allow former felons to vote in Florida from The Washington Post
Date: Tuesday, September 22, 2020 2:49:00 PM

https://wapo.st/360ulIn?tid=ss_mail

From: [John Guard](#)
To: [John Guard](#)
Cc: [Richard Martin](#)
Subject: Mike Bloomberg raises \$16 million to allow former felons to vote in Florida from The Washington Post
Date: Tuesday, September 22, 2020 2:49:23 PM

https://wapo.st/360ulIn?tid=ss_mail

From: [Lauren Cassedy](#)
To: [Dara Kam](#); [Gerald Whitney Ray](#)
Subject: RE: Bloomberg investigation
Date: Wednesday, September 23, 2020 4:24:00 PM
Attachments: [image.pdf](#)

Hi Dara,

Please see the letter attached and the statement below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Dara Kam <darakam@gmail.com>
Sent: Wednesday, September 23, 2020 4:02 PM
To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Bloomberg investigation

Could you please provide the document you sent about an investigation into Bloomberg's contribution to the fees and fines fund?

Thanks

Dara

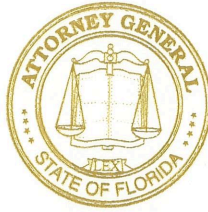
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Dara Kam

Senior Writer
The News Service of Florida

cell: 850.570.1592
darakam@gmail.com

[@TheDaraKam](#)



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

Coming up: Trump and Biden are scheduled to debate three times this fall; here's what to know about the 2020 presidential debates.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

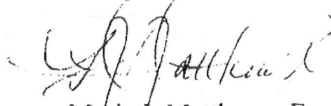
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A. Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A. Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Lauren Cassedy](#)
To: [Ceballos, Ana](#)
Subject: RE: Bloomberg investigation
Date: Wednesday, September 23, 2020 1:16:00 PM

Sorry I am unable to talk on the phone right now but wanted to let you know that I have your request and will keep you posted.

From: Ceballos, Ana <aceballos@miamiherald.com>
Sent: Wednesday, September 23, 2020 8:03 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Bloomberg investigation

Hi, Lauren,

Matt Gaetz said during a Fox News interview that he talked to Moody about Michael Bloomberg announcing plans to pay fine and fees for Floridians with felonies. Gaetz said that Moody "is all over this" and mentioned there may be a criminal investigation under way.

Can you please comment on what is going on? And whether Moody is thinking of investigating this? What would be the potential charge?

Thank you!

Ana

Ana Ceballos

State Government Reporter

Miami Herald

aceballos@miamiherald.com

Twitter: @anaceballos_

Cell: 619-348-8888

Miami Herald



From: [Lauren Cassedy](#)
To: [Dara Kam](#)
Subject: RE: Bloomberg investigation
Date: Wednesday, September 23, 2020 4:31:00 PM

Gotcha. I'll send you any updates I have on this issue.

We sent to anyone who inquired not a blast list

From: Dara Kam <darakam@gmail.com>
Sent: Wednesday, September 23, 2020 4:29 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Bloomberg investigation

thanks. I see you sent this to Jim Turner earlier. FYI I cover this issue.

On Wed, Sep 23, 2020 at 4:25 PM Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com> wrote:

Hi Dara,

Please see the letter attached and the statement below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy

Director of Public Affairs

Office of the Attorney General Ashley Moody

813.928.1150

Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol

Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Dara Kam <darakam@gmail.com>

Sent: Wednesday, September 23, 2020 4:02 PM

To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Lauren Cassedy
<Lauren.Cassedy@myfloridalegal.com>

Subject: Bloomberg investigation

Could you please provide the document you sent about an investigation into Bloomberg's contribution to the fees and fines fund?

Thanks

Dara

--

Dara Kam

Senior Writer
The News Service of Florida

cell: 850.570.1592
darakam@gmail.com

[@TheDaraKam](#)

--

Dara Kam

Senior Writer
The News Service of Florida

cell: 850.570.1592
darakam@gmail.com

[@TheDaraKam](#)

From: [Lauren Cassedy](#)
To: [Jonathan Levin](#)
Subject: RE: Bloomberg request
Date: Wednesday, September 23, 2020 4:28:00 PM
Attachments: [image.pdf](#)

Hi Jonathan,

Please see the letter attached and the statement below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

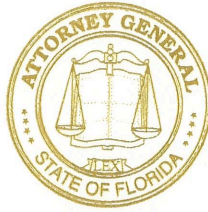
The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Jonathan Levin (BLOOMBERG/ MIAMI) <jlevin20@bloomberg.net>
Sent: Wednesday, September 23, 2020 4:15 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Bloomberg request

Hi Lauren,
This is Jonathan Levin from Bloomberg News. Would you kindly pass me the letter that several media orgs got this afternoon in which Florida AG Moody calls for looking into Mike Bloomberg?
Kind regards,
Jonathan

Jonathan Levin
Miami Bureau Chief, Bloomberg News

JLevin20@bloomberg.net
347-463-3162



STATE OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
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corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

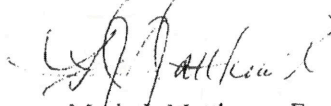
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A.Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A.Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

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From: [Lauren Cassedy](#)
To: [Sayers, Devon](#)
Subject: RE: CNN - Re FBI letter re Bloomberg
Date: Wednesday, September 23, 2020 3:41:00 PM
Attachments: [image.pdf](#)

Hi Devon,

Please see the letter attached and the statement below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

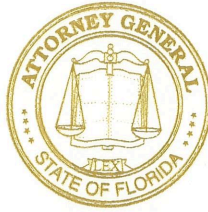
From: Sayers, Devon <Devon.Sayers@turner.com>
Sent: Wednesday, September 23, 2020 3:40 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: CNN - Re FBI letter re Bloomberg

good afternoon

I wanted to see if you could forward me a letter that the office has sent to the Tampa field office of the FBI re Mr. Bloomberg.

Thank you for your assistance

Devon M. Sayers
Senior Field Producer
CNN Atlanta Bureau
Cell (404) 543-7525



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

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Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)**ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES****104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—**

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
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corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

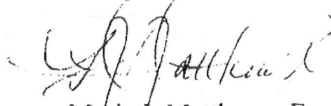
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996
Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A. Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A. Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Richard Martin](#)
To: [Darlene Faris](#)
Cc: [Sabrina Donovan](#); [Betsy Stupski](#)
Subject: RE: Information Request from House Judiciary Committee: PACER Costs
Date: Thursday, October 8, 2020 2:49:00 PM
Attachments: [image001.png](#)
[image002.png](#)

Thanks

From: Darlene Faris <Darlene.Faris@myfloridalegal.com>
Sent: Thursday, October 8, 2020 1:31 PM
To: Richard Martin <Richard.Martin@myfloridalegal.com>
Cc: Sabrina Donovan <Sabrina.Donovan@myfloridalegal.com>; Betsy Stupski <Betsy.Stupski@myfloridalegal.com>
Subject: RE: Information Request from House Judiciary Committee: PACER Costs

Hi Richard,

I pulled together the numbers for the past 5 fiscal years, along with what we have spent for this fiscal year. Included is an email from Betsy Stupski, that indicates the figures would not include the cost paid through our Westlaw bundle. Those figures would be impossible to pull out of the Westlaw cost but she did indicate the Westlaw bundle only allows for limited functionality. It does not allow users to view images.

Please let me know if you need anything else.

Darlene Faris
Finance and Accounting Administrator
Office of the Attorney General
Finance and Accounting
107 W. Gaines St
Collins Bldg, RM 243
Tallahassee, Florida 32399-1050
Phone: (850) 414-3431, VOIP 3431
Fax: (850) 922-7269
Email: darlene.faris@myfloridalegal.com

From: Richard Martin <Richard.Martin@myfloridalegal.com>
Sent: Thursday, October 8, 2020 8:24 AM
To: Sabrina Donovan <Sabrina.Donovan@myfloridalegal.com>; Darlene Faris <Darlene.Faris@myfloridalegal.com>
Subject: FW: Information Request from House Judiciary Committee: PACER Costs

See below. Any idea how much we spend each year on PACER?

From: Ryan Greenstein <rgreenstein@naag.org>
Sent: Wednesday, October 7, 2020 4:45 PM
To: Ryan Greenstein <rgreenstein@naag.org>
Subject: Information Request from House Judiciary Committee: PACER Costs

This is being sent to all Chief Deputies/Chiefs of Staff:

NAAG received the below request from the House Judiciary Committee. The committee is considering H.R. 8235 Open Courts Act of 2020, a bipartisan bill introduced by Rep. Doug Collins (R) and Rep. Hank Johnson (D), that would gradually make the Public Access to Court Electronic Records (PACER) system free to the public while also requiring several functionality and accessibility improvements to the system. Attached is the bill text and a brief Bloomberg Law article on the bill.

If available, the committee staff are requesting information on how much each attorney general office spends annually on PACER. If your office is able to share that information, please email it to Ryan Greenstein at rgreenstein@naag.org by October 14th.

NAAG has not taken a stance on the bill.

Ryan Greenstein
Legislative Director and
Special Assistant to the Executive Director

National Association of Attorneys General
1850 M Street NW, 12th Floor
Washington, DC 20036
202.326.6262

rgreenstein@naag.org

www.naag.org



Sent: Wednesday, October 7, 2020 9:48 AM
Subject: PACER

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello –

I'm a counsel on the majority side of the House Judiciary Committee; I wonder if you could help me run something down. The committee marked up a bill to make PACER* free, and I'm trying to get a better sense of the cost savings, as I understand that some state AGs are major PACER users. Do you think you could help me find out how much NAAG members spend on PACER each year?

Thanks,

Matt

Matt Robinson

Subcommittee on Courts, Intellectual Property, and the Internet

Committee on the Judiciary

U.S. House of Representatives



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From: [Richard Martin](#)
To: [Ryan Greenstein](#)
Subject: RE: Information Request from House Judiciary Committee: PACER Costs
Date: Friday, October 9, 2020 8:03:00 AM
Attachments: [Pacer.xlsx](#)
[image001.png](#)
[image002.png](#)

Ryan,

Attached are the expenditures for the Florida Office of the Attorney General for the past six full fiscal years, and fiscal year to date for FY 20-21. Over the past six fiscal years, the cost has averaged approximately \$43,000. The Florida state fiscal year goes from July 1-June 30. We use PACER for full access to filed documents (typically in cases in which our office is not a party). Docket information is included in our Westlaw bundled subscription.

Best,

Richard H. Martin
Chief of Staff
Florida Office of the Attorney General
PL-01, The Capitol | Tallahassee, FL 32399
850-245.0187
Richard.Martin@myfloridalegal.com

From: Ryan Greenstein <rgreenstein@naag.org>
Sent: Wednesday, October 7, 2020 4:45 PM
To: Ryan Greenstein <rgreenstein@naag.org>
Subject: Information Request from House Judiciary Committee: PACER Costs

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NAAG has not taken a stance on the bill.

Ryan Greenstein
Legislative Director and
Special Assistant to the Executive Director
National Association of Attorneys General

1850 M Street NW, 12th Floor
Washington, DC 20036
202.326.6262
rgreenstein@naag.org
www.naag.org



Sent: Wednesday, October 7, 2020 9:48 AM

Subject: PACER

CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Hello –

I'm a counsel on the majority side of the House Judiciary Committee; I wonder if you could help me run something down. The committee marked up a bill to make PACER* free, and I'm trying to get a better sense of the cost savings, as I understand that some state AGs are major PACER users. Do you think you could help me find out how much NAAG members spend on PACER each year?

Thanks,

Matt

Matt Robinson

Subcommittee on Courts, Intellectual Property, and the Internet
Committee on the Judiciary
U.S. House of Representatives

Row Labels	Sum of AMOUNT
2015	41334.8
2016	50023.5
2017	49224.02
2018	46117.7
2019	40795
2020	31037.6
2021	7402.6
Grand Total	265935.22



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From: [Lauren Cassedy](#)
To: [Mendoza, Claudia](#)
Cc: [Kylie Mason](#)
Subject: RE: Interview Request / Attorney General Ashley Moody
Date: Wednesday, September 23, 2020 2:58:00 PM
Attachments: [image.pdf](#)

Hi Claudia,

I will be in touch about availability for tomorrow. I am also sending you our latest information on this topic. Please see the statement below and letter attached.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thanks,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Mendoza, Claudia <ClaudiaMendoza@iheartmedia.com>
Sent: Wednesday, September 23, 2020 12:02 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: Interview Request / Attorney General Ashley Moody
Importance: High

Good afternoon,

It's Claudia Mendoza from WIOD.

We would like to schedule a live phone interview with AG Moody tomorrow morning to talk about the claims of Michael Bloomberg's buying felon votes illegally and Congressman Matt Gaetz asking her to look into this. The interview will be about 5-8 minutes and I have 10:05 and 10:35 am ET open tomorrow and Friday.

Please let me know if we can work something out ASAP.

Thank you and stay healthy,

Claudia Mendoza

Executive Producer Brian Mudd Show

iHeartMedia Miami

7601 Riviera Blvd.

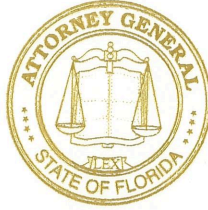
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STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

"We have identified a significant vote share that requires a nominal investment," the memo read. "The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%."

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group's president, said the group does not share Bloomberg's goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

Coming up: Trump and Biden are scheduled to debate three times this fall; here's what to know about the 2020 presidential debates.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

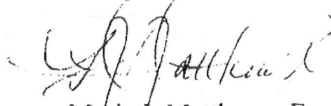
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A.Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A.Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307

Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

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From: [Lauren Cassedy](#)
To: [Edward Moreno](#)
Subject: RE: Media inquiry -- Mike Bloomberg donations
Date: Wednesday, September 23, 2020 4:28:00 PM
Attachments: [image.pdf](#)

Hello,

Please see the letter attached and the statement below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Edward Moreno <emoreno@thehill.com>
Sent: Wednesday, September 23, 2020 4:14 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Media inquiry -- Mike Bloomberg donations

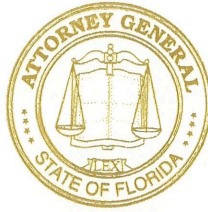
Hi Lauren,

My name is Edward Moreno and I'm a reporter at The Hill. I'm wondering if you could send me a copy of [this letter](#) or confirm that AG Moody is asking the FBI to investigate donations made by Mike Bloomberg to pay off fees for felons.

Thank you,

--

J. Edward Moreno
Breaking News Reporter, The Hill
(956) 960-7775
@edwrdmoreno



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

"We have identified a significant vote share that requires a nominal investment," the memo read. "The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%."

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group's president, said the group does not share Bloomberg's goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

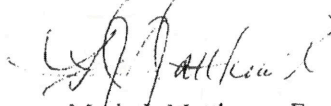
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A.Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A.Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. *United States* 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Lauren Cassedy](#)
To: [Edelman, Adam \(NBCUniversal\)](#)
Subject: RE: NBC News - questions on possible probe into Bloomberg?
Date: Wednesday, September 23, 2020 3:01:00 PM
Attachments: [image.pdf](#)

Hi Adam,

Please see the statement below and letter attached.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thanks,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Edelman, Adam (NBCUniversal) <Adam.Edelman@nbcuni.com>
Sent: Wednesday, September 23, 2020 10:09 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: NBC News - questions on possible probe into Bloomberg?
Importance: High

Hi Lauren,
Adam Edelman at NBC News here. Last night Rep. Matt Gaetz, R-Fla., said on Fox News that the Florida AG may be initiating a criminal probe into former NYC Mayor Michael Bloomberg over his efforts to pay the outstanding fines and fees of 32,000 convicted felons in Florida so they could regain their right to vote ahead of the November election.

Gaetz said last night on “Hannity” on Fox that he’d spoken to FL AG Ashley Moody about a possible probe, saying “I believe there may be a criminal investigation already underway of the Bloomberg-connected activities in Florida.”

“[Under Florida law] it’s a third-degree felony for someone to either directly or indirectly provide something of value to impact whether or not someone votes. So the question is whether or not paying off someone’s fines and legal obligations counts as something of value, and it clearly does. If Michael Bloomberg was offering to pay off people’s credit card debts, you would obviously see the value in that,” he said, regarding Bloomberg’s raising \$16M for the Florida Rights Restoration Coalition.

Can you confirm that AG Moody is launching an investigation into this? And if it’s true, can you provide any information about the probe? And if it’s not true, can you say so? Thanks so much for help on this.

Links:

<https://www.foxnews.com/politics/matt-gaetz-election-bribery-probe-bloomberg-florida>

<https://nypost.com/2020/09/23/rep-gaetz-bloomberg-may-face-criminal-probe-for-paying-felons-fines/>

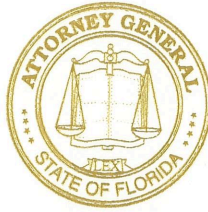
Thanks.

--

Adam Edelman | NBC News Digital

[917-355-9198](tel:917-355-9198) | [212-664-5279](tel:212-664-5279)

adam.edelman@nbcuni.com | [@abedelman](https://twitter.com/abedelman)



STATE OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

"We have identified a significant vote share that requires a nominal investment," the memo read. "The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%."

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group's president, said the group does not share Bloomberg's goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)**ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES****104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—**

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

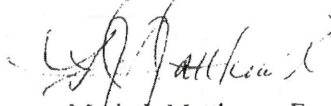
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A.Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A.Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307

Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term “votes more than once” does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Lauren Cassedy](#)
To: [jim turner](#); [Gerald Whitney Ray](#); [Kylie Mason](#)
Subject: RE: News Service of Florida
Date: Wednesday, September 23, 2020 3:55:00 PM
Attachments: [image.pdf](#)

Hi Jim,

Please see the letter attached and the statement below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: jim turner <jimturner23@gmail.com>
Sent: Wednesday, September 23, 2020 3:55 PM
To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Kylie Mason <Kylie.Mason@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: News Service of Florida

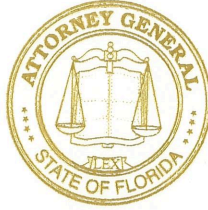
Lauren,

Can I get a copy of the letter to Rick Swearingen regarding Michael Bloomberg?

Thanks,

Jim Turner

News Service of Florida
772-215-9889



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

"We have identified a significant vote share that requires a nominal investment," the memo read. "The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%."

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group's president, said the group does not share Bloomberg's goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

Coming up: Trump and Biden are scheduled to debate three times this fall; here's what to know about the 2020 presidential debates.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

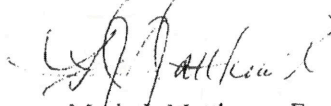
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996
Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A. Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A. Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Lauren Cassedy](#)
To: [Matthew Dixon](#)
Subject: RE: Question
Date: Wednesday, September 23, 2020 1:16:00 PM

I have your request and will keep you posted.

From: Matthew Dixon <mdixon@politico.com>
Sent: Wednesday, September 23, 2020 1:02 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Question

Wanted to make sure you got this.

From: Matthew Dixon
Sent: Wednesday, September 23, 2020 7:56 AM
To: Lauren Schenone <Lauren.Schenone@myfloridalegal.com>
Subject: Question

Hey Lauren,

I'm sure this isn't an exact quote from the congressman, but can you guys give me better sense of how you're engaged in looking at the Bloomberg money?

https://twitter.com/rt_dailey/status/1308585729421971457?s=21

Sent from my iPhone

From: [Lauren Cassedy](#)
To: [Greg Allen](#)
Subject: RE: Question on Bloomberg contribution to Florida Rights Restoration Coalition fund
Date: Wednesday, September 23, 2020 3:02:00 PM
Attachments: [image.pdf](#)
[image001.png](#)

Hi Greg,

Please see the letter attached and the statement below.

“Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

“And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call.” - Attorney General Ashley Moody

Thank you,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: Greg Allen <GAllen@npr.org>
Sent: Wednesday, September 23, 2020 10:49 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Question on Bloomberg contribution to Florida Rights Restoration Coalition fund

Hi Lauren,

Matt Gaetz said on Fox last night he’s spoken to the Attorney General and asked her to investigate Mike Bloomberg’s \$16 million sent to the Florida Rights Restoration Coalition to pay off

felon fines and court fees so they can register to vote.

Can you confirm they spoke?

Is the Attorney General investigating Bloomberg's contribution or the fund to pay off felon fines and fees?

Any information you have on this would be appreciated.

Greg Allen

National Correspondent, Miami

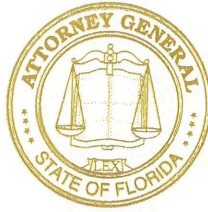
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c: 305 710 9195

twitter: @gallennpr





STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

"We have identified a significant vote share that requires a nominal investment," the memo read. "The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%."

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group's president, said the group does not share Bloomberg's goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

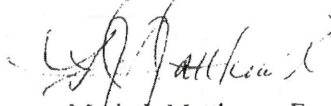
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996
Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A. Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A. Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term “votes more than once” does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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AMERICAN
OVERSIGHT

From: [Lauren Cassedy](#)
To: [Walpole, Melissa J](#); [Kylie Mason](#)
Subject: RE: Request for Interview with Attorney General Moody
Date: Wednesday, September 23, 2020 4:27:00 PM
Attachments: [image003.png](#)

Hi Melissa,

Thanks for reaching out. Unfortunately, we do not have availability for today.

I will look into availability for tomorrow and get back with you.



Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

****The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request****

From: Walpole, Melissa J <Melissa.Walpole@charter.com>
Sent: Wednesday, September 23, 2020 4:23 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Request for Interview with Attorney General Moody

Hello!

I'm the Special Projects Producer for Spectrum Bay News 9.

I was wondering if Attorney General Ashley Moody had any time today or tomorrow for an interview for our show Political Connections.

It runs Sundays at 11am and 8pm.

Our host Holly Gregory would want to talk about Michael Bloomberg trying to pay for felons' fees to restore their voting rights and the possibility of this violating election laws.

Thank you in advance,



Melissa Walpole | Special Projects Producer – Spectrum Bay News 9 | 727-329-2267
700 Carillon Pkwy | St. Petersburg, FL 33716

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000917

AMERICAN
OVERSIGHT

From: [Lauren Cassedy](#)
To: [Kylie Mason](#)
Subject: RE: Request for Interview with Attorney General Moody
Date: Wednesday, September 23, 2020 4:33:00 PM
Attachments: [image002.png](#)
[image003.png](#)

Already responded

From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 4:33 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: FW: Request for Interview with Attorney General Moody

Interview request

Kylie Mason

Press Secretary

Office of Attorney General Ashley Moody

The Capitol, Suite PL-01

Tallahassee, FL 32399-1050

Main: 850-245-0150

MyFloridaLegal.com



From: Walpole, Melissa J <Melissa.Walpole@charter.com>
Sent: Wednesday, September 23, 2020 4:23 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Request for Interview with Attorney General Moody

Hello!

I'm the Special Projects Producer for Spectrum Bay News 9.

I was wondering if Attorney General Ashley Moody had any time today or tomorrow for an interview for our show Political Connections.

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AMERICAN
OVERSIGHT



000921

AMERICAN
OVERSIGHT

From: [Lauren Cassedy](#)
To: [ROWAN SCARBOROUGH III](#)
Subject: RE: Washington Times query
Date: Wednesday, September 23, 2020 3:00:00 PM
Attachments: [image.pdf](#)

Hi Rowan,

Please see the statement below and letter attached.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thanks,

Lauren Schenone Cassedy
Director of Public Affairs
Office of the Attorney General Ashley Moody
813.928.1150
Lauren.Cassedy@MyFloridaLegal.com

PL-01, The Capitol
Tallahassee, FL 32399

The State of Florida has a broad public records law. Most written communications, including emails, to and from state officials are public records subject to disclosure upon request

From: ROWAN SCARBOROUGH III <rscarborough2@verizon.net>
Sent: Wednesday, September 23, 2020 9:05 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Washington Times query

Hello.

Michael Bloomberg is pledging 20m to pay off the fines and restitutions of felons so they can register to vote.

Rep. Gaetz raised the possibility this violates Fla.'s election laws.

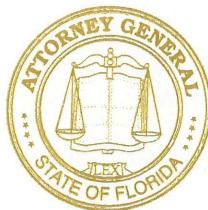
I see that one section makes it illegal to convey something of value to influence a person to register.

wondering if the AG office is looking into this?

thanks.

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Rowan Scarborough
National Security Reporter
The Washington Times
rscarborough2@verizon.net
rscarborough@washingtontimes.com
@roscarborough
2026695451



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

Coming up: Trump and Biden are scheduled to debate three times this fall; here's what to know about the 2020 presidential debates.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

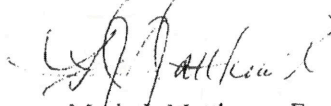
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A.Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A.Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Lauren Cassedy](#)
To: [Peel, Natalie](#)
Subject: Re: 60 Minutes follow-up
Date: Thursday, September 24, 2020 10:10:31 AM
Attachments: [image.pdf](#)

Good to talk with you just now. Please see the letter attached and statement (dated yesterday) below.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

From: Peel, Natalie <PeelN@cbsnews.com>
Sent: Wednesday, September 23, 2020 6:20 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: 60 Minutes follow-up

Hi Lauren, I'm seeing reports about the AG looking into Bloomberg fundraising for the felon vote. Here's one: <https://www.wesh.com/article/florida-ag-investigation-bloombergs-felon-debts-fbi/34131139#>

It is **my understanding** that Bloomberg has not donated any of his own personal money to FRRC. He has only encouraged others to. Can confirm whether the AG is looking into Bloomberg and why?

Best to you,
Natalie

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 10, 2020 4:30 PM
To: Peel, Natalie <PeelN@cbsnews.com>
Subject: RE: 60 Minutes follow-up

External Email

Hi Natalie,

I have included answers to your questions in blue below. Again, our office is not involved in any capacity in the Amendment Four litigation. Please let me know if you need additional information.

- **Perhaps, I misunderstood and apologies if so. I heard you say that the Attorney General would defend the Governor's position on SB 7066 regardless of her personal opinion because that is the function of her office. Is that correct?**
 - The Department of Legal Affairs has not been asked to represent the Governor in the Amendment Four litigation. It is the duty of our office to represent the State of Florida in legal matters when called upon, no matter the personal policy preference of the sitting Attorney General.
-
1. **Does Attorney General Ashley Moody agree or disagree with the view that SB 7066 is unconstitutional?**
 - Per section 16.01(3), Florida Statutes, does not authorize the Attorney General to render opinions or advice to private individuals.

 2. **Should Florida state attorneys prosecute individuals with felony convictions who believe they are eligible to vote through Amendment 4 -- and have made a good faith effort to confirm their eligibility -- but commit perjury on their voter registration forms because they have not paid off all of their sentence-related financial obligations?**
 - As noted above, Florida Statutes, does not authorize the Attorney General to render opinions or advice to private individuals. State Attorneys in Florida are independently elected and do not report to the Department of Legal Affairs. Inquiries regarding prosecutions in specific circuits should be directed to that circuit's elected State Attorney.

From: Peel, Natalie <PeelN@cbsnews.com>
Sent: Friday, September 4, 2020 12:58 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: 60 Minutes follow-up

Hey Lauren, yes and thanks for checking in. Have a great, long weekend!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Friday, September 4, 2020 11:39 AM
To: Peel, Natalie <PeelN@cbsnews.com>
Subject: Re: 60 Minutes follow-up

External Email

Hi Natalie - I'm so sorry I missed this earlier. Can I get you more info early next week

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From: Peel, Natalie <PeelN@cbsnews.com>
Sent: Monday, August 31, 2020 8:49:39 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: 60 Minutes follow-up

Hi Lauren, thank you! End of the week would be preferable. Let me know if you need more time.
Best, Natalie

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Monday, August 31, 2020 8:12 PM
To: Peel, Natalie
Subject: Re: 60 Minutes follow-up

External Email

I'll work on this request for you. What's your deadline?

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From: Peel, Natalie <PeelN@cbsnews.com>
Sent: Monday, August 31, 2020 6:29:04 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: 60 Minutes follow-up

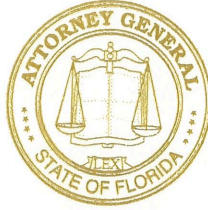
Lauren, thank you for a very informative conversation. I'm curious about something you said and wanted clarification. Perhaps, I misunderstood and apologies if so. I heard you say that the Attorney General would defend the Governor's position on SB 7066 regardless of her personal opinion because that is the function of her office. Is that correct?

And, I'd like to follow-up by requesting on-the-record responses to the below questions. I'm asking for on-the-record because her guidance as the principal legal officer for the state is, frankly, missing from the conversation and, as an elected official, Floridians are interested in her opinion on this.

1. Does Attorney General Ashley Moody agree or disagree with the view that SB 7066 is unconstitutional?
2. Should Florida state attorneys prosecute individuals with felony convictions who believe they are eligible to vote through Amendment 4 -- and have made a good faith effort to confirm their eligibility -- but commit perjury on their voter registration forms because they have not paid off all of their sentence-related financial obligations?

Thank you!

Best,
Natalie



STATE OF FLORIDA

ASHLEY MOODY
ATTORNEY GENERAL

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)**ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES****104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—**

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

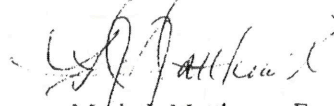
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996
Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A. Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A. Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term “votes more than once” does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: Lauren Cassedy
To: [Gerald Whitney Ray](#); [Richard Martin](#); [John Guard](#)
Cc: [Kylie Mason](#)
Subject: Re: Bloomberg
Date: Tuesday, September 29, 2020 11:12:50 AM
Attachments: [image001.png](#)

I will

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From: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Sent: Tuesday, September 29, 2020 11:12:16 AM
To: Richard Martin <Richard.Martin@myfloridalegal.com>; John Guard <John.Guard@myfloridalegal.com>
Cc: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: FW: Bloomberg

Good morning,

Please see the Politico PRR below. I will sent to the Public Records Office as well, but wanted to make sure you saw it now.

Given the number of questions and records requested, this doesn't appear to be something we will be able to respond to today.

Will leave the questions to you all and LC.

Thank you,
Whitney

Director of Communications
Office of the Attorney General
The Capitol, Suite PL-01
Tallahassee, Fla. 32399-1050
Office: (850) 245-0150
[MyFloridaLegal.com](#)



From: Gary Fineout <gfineout@politico.com>
Sent: Tuesday, September 29, 2020 11:04 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Kylie Mason <Kylie.Mason@myfloridalegal.com>; Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Subject: Bloomberg

Good day.

It's Gary Fineout with POLITICO.

I had some follow up questions related to the decision by the attorney general to send correspondence to FDLE and the FBI.

First off - have you all received any kind of official response or reply? If so, may I get a copy.

Then other questions:

The attorney general's letter says that Gov. Ron DeSantis reached out to her about the Bloomberg donations to the Florida Rights Restoration Coalition. Who in the governor's office did this, or was it the governor himself? Was this done over the phone, or was it done through via a letter or email or anything written? If there is anything written, under chapter 119 of Florida law I would like to receive a copy.

Did the attorney general's office attempt in anyway to reach out to Mr. Bloomberg or the coalition? If not, why not?

Can you point to any other potential campaign finance law violations that this office has referred over to FDLE? If not this attorney general, do you have any idea the last time there was a referral of this nature?

Lastly, I would like copies of any emails circulated by anyone in Attorney General Ashley Moody or her staff discussing the Bloomberg donation or the Florida Rights Restoration Coalition or the coalition's fees and fine fund that were written or sent and date Sept. 21 through Sept. 28. Additionally under chapter 119 I would like copies of anything Attorney General Moody may have written regarding this matter, including anything written by hand or typed.

Thanks.

I look forward to hearing from you.

Gary Fineout
POLITICO



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From: [Lauren Cassedy](#)
To: [Kylie Mason](#)
Subject: Re: CBS12 Request - Bloomberg investigation
Date: Thursday, September 24, 2020 11:16:02 AM
Attachments: [image002.png](#)

We do not have availability today.

I can respond to the reporter but didn't want to be redundant if you are already messaging her the statement

From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Thursday, September 24, 2020 10:51 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Subject: FW: CBS12 Request - Bloomberg investigation

Interview request

Kylie Mason

Press Secretary
Office of Attorney General Ashley Moody
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
Main: 850-245-0150
MyFloridallegal.com



From: Danielle Waugh <dlwaugh@sbgvtv.com>
Sent: Thursday, September 24, 2020 10:27 AM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: CBS12 Request - Bloomberg investigation

Good morning,

Danielle Waugh here from CBS12 News in West Palm Beach. We wanted to see if AG Moody could do a virtual interview today about the Bloomberg inquiry, and what happens next.

Does the AG have any time today for a Zoom conversation? Would only take 15 minutes!

If there's any new information you could pass along, that would be helpful as well. We are hearing something about a grand jury on this case so I'm not sure if that's anything you're aware of.

Danielle Waugh

Special Projects Reporter

WPEC-TV

1100 Fairfield Dr. West Palm Beach, FL 33407

(561) 596-0692

dlwaugh@cbs12.com





AMERICAN
OVERSIGHT

From: [Lauren Cassedy](#)
To: [Murray, Andrew](#)
Subject: Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?
Date: Wednesday, September 23, 2020 6:20:58 PM

Excited to be on with you guys at 815am.

Let me know when you know more about the studio location

Thank you!

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 3:52:14 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Hi Lauren,

Please let us know if we can schedule Florida Attorney General Moody to appear on "Fox & Friends" tomorrow (Thursday) for a LIVE 5-7 minute interview between 6am - 9am ET about the allegations that Bloomberg pays fines for 32,000 felons in Florida so they can vote.

Thanks in advance,

Andrew Murray
Senior Political Producer
"Fox & Friends"
Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
@andrewmurray1

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From: [Lauren Cassedy](#)
To: [McDuffie, Will](#)
Subject: Re: FL AG Moody office contact
Date: Tuesday, September 29, 2020 3:00:05 PM

No update at the moment. Would it be helpful for me to send you the letter? Not sure if you had it from last week.

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From: McDuffie, Will <Will.McDuffie@abc.com>
Sent: Tuesday, September 29, 2020 2:47 PM
To: Lauren Cassedy
Subject: Re: FL AG Moody office contact

Hey Lauren -- thanks so much for reaching out.

I mainly wanted to see whether there was an update on the possibility of an investigation into Michael Bloomberg's efforts to help pay the court fees of returning citizens. I know AG Moody sent a letter requesting that state and federal law enforcement open one, and thought I would see what the latest was there.

Happy to talk to someone on the phone (cell listed below) or correspond here -- whatever works!

Will

Will McDuffie
ABC News
O: 212.456.4440
C: 646.753.0757

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Monday, September 28, 2020 5:54 PM
To: McDuffie, Will <Will.McDuffie@abc.com>
Subject: FL AG Moody office contact

Hi Will,

Just got word you reached out for a story. How can I help?

Lauren Schenone Cassedy

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From: [Lauren Cassedy](#)
To: [Godinho, Joana](#)
Subject: Re: FL AG Moody tentative hit 9/24 9-930AM
Date: Wednesday, September 23, 2020 9:03:17 PM

Studio is Yellowbird in Tampa

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From: Godinho, Joana <Joana.Godinho@FOXBUSINESS.COM>
Sent: Wednesday, September 23, 2020 8:45:58 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: FL AG Moody tentative hit 9/24 9-930AM

This is the booking note

RECAP: 5min segment tomorrow for the Varney show. Stu is hosting. Booked on topics below + news of the day. Per sop we kindly ask no CNBC 24h prior.

LOGISTICS

- Need SKYPE ID + CELL (both at the same time please)
- Skype test: if she can we would like to test this at 8.30a
- Live skype: we call 10min prior
- Show poc: me

FOR CHYRON:

NAME: Ashley Moody (R)
TITLE: Florida Attorney General

TOPIC:

BREAKING: Florida Attorney General orders investigation into Bloomberg
<https://twitter.com/jayobtv/status/1308847648779186176?s=21>

Joana Godinho | **Fox Business Network**
Coordinating Booker, Varney & Co.
I am working from home: please call 612.644.8133

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 8:45 PM
To: Godinho, Joana <Joana.Godinho@FOXBUSINESS.COM>
Subject: [EXTERNAL] FL AG Moody tentative hit 9/24 9-930AM

Hi Joana,

I'll send you the studio location as soon as I get it.

Thanks!

Call anytime.

Lauren Cassedy
8139281150

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From: [Lauren Cassedy](#)
To: [Kylie Mason](#)
Cc: [Gerald Whitney Ray](#)
Subject: Re: Florida-Georgia water dispute
Date: Tuesday, September 8, 2020 2:09:59 PM
Attachments: [image001.png](#)

Got it. TY

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From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Tuesday, September 8, 2020 2:08:56 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Subject: FW: Florida-Georgia water dispute

Please see the request below.

Kylie Mason

Press Secretary

Office of Attorney General Ashley Moody

The Capitol, Suite PL-01

Tallahassee, FL 32399-1050

Main: 850-245-0150

MyFloridaLegal.com



From: Kay, Jennifer <jkay@bloombergindustry.com>
Sent: Tuesday, September 8, 2020 2:08 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; DEPNews@dep.state.fl.us
Subject: Florida-Georgia water dispute

Hello,

I wasn't sure whether the AG's office or DEP would be the best office to try for this question, so I'm emailing you both. I'm working on a story about water cases before the U.S. Supreme Court in the upcoming session, particularly the long-running dispute between Florida and Georgia over water flows into Apalachicola Bay.

My specific question for Florida is: What does the state make of Georgia's arguments in July court filings over the modelling used in the case, and is Florida looking to the court to clarify which water usage and water flow models are reliable or best consider the effects of climate change?

My deadline is Friday at 3pm, and my cell phone is 571-317-9193. Or please let me know the best person to contact directly.

Thank you,

.....

Jennifer Kay

Miami correspondent covering Florida, Mississippi & Louisiana

Bloomberg Law

Bloomberg Tax

Bloomberg Government

she/her

571-317-9193 mobile

jkay@bloombergindustry.com

Twitter:

@jnkay

@BLaw

@BGov

@tax

@environment



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From: [Lauren Cassedy](#)
To: jkay@bloomberglaw.com
Subject: Re: Florida-Georgia water dispute
Date: Friday, September 11, 2020 4:40:09 PM

Hi Jennifer,

Sorry for the delay. Our office represents DEP in this matter. Please contact the agency with inquiries.

Thanks,

Lauren Schenone Cassedy

From: Kay, Jennifer <jkay@bloombergindustry.com>
Sent: Tuesday, September 8, 2020 2:08 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>; DEPNews@dep.state.fl.us
Subject: Florida-Georgia water dispute

Hello,

I wasn't sure whether the AG's office or DEP would be the best office to try for this question, so I'm emailing you both. I'm working on a story about water cases before the U.S. Supreme Court in the upcoming session, particularly the long-running dispute between Florida and Georgia over water flows into Apalachicola Bay.

My specific question for Florida is: What does the state make of Georgia's arguments in July court filings over the modelling used in the case, and is Florida looking to the court to clarify which water usage and water flow models are reliable or best consider the effects of climate change?

My deadline is Friday at 3pm, and my cell phone is 571-317-9193. Or please let me know the best person to contact directly.

Thank you,

:

Jennifer Kay
Miami correspondent covering Florida, Mississippi & Louisiana

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Bloomberg Tax
Bloomberg Government

she/her
571-317-9193 mobile
jkay@bloombergindustry.com

Twitter:

@jnkay

@BLaw

@BGov

@tax

@environment

From: [Lauren Cassedy](#)
To: [Croteau, Nicole](#); [Murray, Andrew](#)
Cc: [Marsilio, Montana](#); [Lewittes, Lee \(Kushnir\)](#); [Walker, Bailey](#); [Valentine, Alexandria](#)
Subject: Re: Fox & Friends
Date: Thursday, September 24, 2020 6:52:00 AM

I'm sure this is a typo but the studio has us booked as "Florida Attorney General Lauren Moody" but the AG is "Florida Attorney General **Ashley** Moody"

There was probably a mix up of my name and AG Ashley Moody's name but wanted to double check with you so the Chyron doesn't have my name in it.

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From: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 6:25:45 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>; Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: Re: Fox & Friends

Thank you again for joining us!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 6:22 AM
To: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>; Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Fox & Friends

Hi Nicole,

We are looking forward to the 725AM hit. Thanks again for having us on!

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From: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 5:38:20 AM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: Fox & Friends

Good Morning Lauren,

This is Nicole from Fox and Friends, I hope your morning is off to a good start. We look forward to having Florida Attorney General Moody join us live at 7:25AM EST. Just wanted to touch base.

Thank you so much for making the time to come on this morning!

Best,
Nicole Croteau
Fox & Friends

From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 9:59 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

THANKS!

Andrew Murray
Senior Political Producer
"Fox & Friends"
Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
@andrewmurray1

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 9:59 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

We will arrive by 645am for makeup, if that's ok with you.

My cell is 813.928.1150.

TPs on topic. I'll have more in the morning too

- As the Attorney General of Florida, I have requested the FBI and the Florida Department of Law Enforcement immediately investigate potential violations of election laws.
- It is essential that we maintain a fair elections process and that's why this must be fully evaluated by the FBI and other law enforcement agencies.
- And I have also instructed the Statewide Prosecutor in my office to work with law enforcement and any Statewide Grand Jury that the Governor may call.

Assorted background that may be helpful for building the segment

- AG's office in Florida has prosecutorial authority - not investigatory.
- AG was a judge in Tampa for over ten years before becoming Florida's AG and prior to that she was a federal prosecutor.

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>

Sent: Wednesday, September 23, 2020 9:26:05 PM

To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>

Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>

Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Hi Lauren,

Here are the details for "Fox & Friends" tomorrow (Thursday)LIVE at 7:25am ET. I am copying the A.M. team who produce in the morning. Please forward some bullet points outlining what she will say about the topic.

"Fox & Friends"

DATE: Thursday, September 24th

ARRIVAL: 7:00AM ET (MAKE-UP - Steph Gimson)

LIVE INTERVIEW: 7:25AM ET with Steve Doocy

TOPIC: ATTORNEY GENERAL ASKS FOR AN INVESTIGATION INTO MICHAEL BLOOMBERG'S PLEDGE TO PAY FELONS' DEBTS
<https://www.wesh.com/article/florida-ag-investigation-bloombergs-felon-debts-fbi/34131139#>

LOCATION: Yellowbird - West Shore Office Center

ADDRESS: 4842 West Gandy BLVD., Tampa, FL, 33634

A.M. STUDIO CONTACT: Scott Henderson camera 585-820-5683

THURSDAY A.M.CONTACT: Montana Marsilio cell: 718-772-3710
email: montana.marsilio@foxnews

Thanks in advance,

Andrew Murray
Senior Political Producer
"Fox & Friends"
Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
@andrewmurray1

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 9:14 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

We're set for makeup, correct?

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 9:01:53 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Awesome. We will be seated by 715am and arrive by 645am for makeup

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 9:00:59 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Yellow Bird!

Andrew Murray
Senior Political Producer
"Fox & Friends"
Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
@andrewmurray1

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 8:47 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Sorry to bother again -

We are available for hit at 725am from whichever Tampa studio is able to be booked. Let me know if we are still good to go.

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 7:15:58 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Keep me posted on studio location when you have it

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 6:48:13 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Yes

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 6:47:37 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Thanks, we had to make a few changes to the due to some other breaking news, would it be possible for her to start LIVE at 7:25am ET?

Andrew Murray
Producer, Politics
"Fox & Friends"
Fox News Channel
[1211 Avenue of the Americas, 2nd Floor](#)
[New York, NY 10036](#)
Office: [\(212\) 301-3683](tel:(212)301-3683)
Cell # [1 \(917\) 539-4688](tel:(917)539-4688)
Cell # [2 \(202\) 253-0994](tel:(202)253-0994)
FAX: [\(212\) 301-3421](tel:(212)301-3421)
Email: andrew.murray@foxnews.com
@andrewmurray1

On Sep 23, 2020, at 6:21 PM, Lauren Cassedy
<Lauren.Cassedy@myfloridalegal.com> wrote:

Excited to be on with you guys at 815am.

Let me know when you know more about the studio location

Thank you!

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 3:52:14 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Hi Lauren,

Please let us know if we can schedule Florida Attorney General Moody to appear on "Fox & Friends" tomorrow (Thursday) for a LIVE 5-7 minute interview between 6am - 9am ET about the allegations that Bloomberg pays fines for 32,000 felons in Florida so they can vote.

Thanks in advance,

Andrew Murray
Senior Political Producer
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@andrewmurray1

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attachments are without defect.

From: [Lauren Cassedy](#)
To: [Croteau, Nicole](#); [Murray, Andrew](#)
Cc: [Marsilio, Montana](#); [Lewittes, Lee \(Kushnir\)](#); [Walker, Bailey](#); [Valentine, Alexandria](#)
Subject: Re: Fox & Friends
Date: Thursday, September 24, 2020 6:22:17 AM

Hi Nicole,

We are looking forward to the 725AM hit. Thanks again for having us on!

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From: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 5:38:20 AM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: Fox & Friends

Good Morning Lauren,

This is Nicole from Fox and Friends, I hope your morning is off to a good start. We look forward to having Florida Attorney General Moody join us live at 7:25AM EST. Just wanted to touch base.

Thank you so much for making the time to come on this morning!

Best,
Nicole Croteau
Fox & Friends

From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 9:59 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

THANKS!

Andrew Murray
Senior Political Producer
"Fox & Friends"

Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
@andrewmurray1

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TPs on topic. I'll have more in the morning too

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- AG was a judge in Tampa for over ten years before becoming Florida's AG and prior to that she was a federal prosecutor.

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"Fox & Friends"

DATE: Thursday, September 24th

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LIVE INTERVIEW: 7:25AM ET with Steve Doocy

TOPIC: ATTORNEY GENERAL ASKS FOR AN INVESTIGATION INTO MICHAEL BLOOMBERG'S PLEDGE TO PAY FELONS' DEBTS
<https://www.wesh.com/article/florida-ag-investigation-bloombergs-felon-debts-fbi/34131139#>

LOCATION: Yellowbird - West Shore Office Center

ADDRESS: 4842 West Gandy BLVD., Tampa, FL, 33634

A.M. STUDIO CONTACT: Scott Henderson camera 585-820-5683

THURSDAY A.M.CONTACT: Montana Marsilio cell: 718-772-3710
email: montana.marsilio@foxnews

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Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Awesome. We will be seated by 715am and arrive by 645am for makeup

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Yellow Bird!

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Sorry to bother again -

We are available for hit at 725am from whichever Tampa studio is able to be booked. Let me know if we are still good to go.

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Keep me posted on studio location when you have it

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Let me know when you know more about the studio location

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From: [Lauren Cassedy](#)
To: [Lewittes, Lee \(Kushnir\)](#); [Croteau, Nicole](#); [Murray, Andrew](#)
Cc: [Marsilio, Montana](#); [Walker, Bailey](#); [Valentine, Alexandria](#)
Subject: Re: Fox & Friends
Date: Thursday, September 24, 2020 6:56:28 AM

Thank you so much. Sorry for the confusion.

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From: Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 6:55:40 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>; Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: RE: Fox & Friends

That is a typo on their end, don't worry, we have the name 100% correct here

From: Lauren Cassedy [mailto:Lauren.Cassedy@myfloridalegal.com]
Sent: Thursday, September 24, 2020 6:52 AM
To: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>; Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Fox & Friends

I'm sure this is a typo but the studio has us booked as "Florida Attorney General Lauren Moody" but the AG is "Florida Attorney General Ashley Moody"

There was probably a mix up of my name and AG Ashley Moody's name but wanted to double check with you so the Chyron doesn't have my name in it.

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From: Croteau, Nicole <[Nicole.Croteau@FOXNEWS.COM](#)>
Sent: Thursday, September 24, 2020 6:25:45 AM
To: Lauren Cassedy <[Lauren.Cassedy@myfloridalegal.com](#)>; Murray, Andrew <[Andrew.Murray@FOXNEWS.COM](#)>
Cc: Marsilio, Montana <[Montana.Marsilio@FOXNEWS.COM](#)>; Lewittes, Lee (Kushnir) <[Lee.lewittes@FOXNEWS.COM](#)>; Walker, Bailey <[Bailey.Walker@FOXNEWS.COM](#)>; Valentine, Alexandria <[alexandria.valentine@FOXNEWS.COM](#)>
Subject: Re: Fox & Friends

Thank you again for joining us!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 6:22 AM
To: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>; Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
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Subject: [EXTERNAL] Re: Fox & Friends

Hi Nicole,

We are looking forward to the 725AM hit. Thanks again for having us on!

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From: Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 5:38:20 AM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>; Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>
Subject: Fox & Friends

Good Morning Lauren,

This is Nicole from Fox and Friends, I hope your morning is off to a good start. We look forward to having Florida Attorney General Moody join us live at 7:25AM EST. Just wanted to touch base.

Thank you so much for making the time to come on this morning!

Best,
Nicole Croteau
Fox & Friends

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A.M. STUDIO CONTACT: Scott Henderson camera 585-820-5683

THURSDAY A.M.CONTACT: Montana Marsilio cell: 718-772-3710
email: montana.marsilio@foxnews

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From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Friday 9/25 FL AG Moody hit
Date: Thursday, September 24, 2020 9:31:21 PM

Is Yellowbird confirmed?

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 6:24:26 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: Re: Friday 9/25 FL AG Moody hit

Great, thank you

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 5:19 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Friday 9/25 FL AG Moody hit

Should know shortly! We requested yellowbird

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
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To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Friday 9/25 FL AG Moody hit

Any word on studio and if makeup is available?

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 2:11 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Friday 9/25 FL AG Moody hit

AWESOME! Looking forward to it.

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Sent: Thursday, September 24, 2020 2:04 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Friday 9/25 FL AG Moody hit

She can discuss the investigation she has directed of the FBI and Florida Department of Law Enforcement. I'll send along the letter she sent those agencies with some background.

We will be ready to react on any breaking SCOTUS news.

We will plan on a 1040AM hit too!

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>

Sent: Thursday, September 24, 2020 1:43 PM

To: Lauren Cassedy

Subject: Re: Friday 9/25 FL AG Moody hit

And we're hoping to do this at 10:40am ET! Thanks!

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>

Sent: Thursday, September 24, 2020 1:16 PM

To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>

Subject: Re: Friday 9/25 FL AG Moody hit

Awesome! Just want to make sure, can she talk about the lawsuit against Bloomberg? That's what we were hoping to focus on, and then any SCOTUS news if we get it tomorrow morning

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>

Sent: Thursday, September 24, 2020 1:11 PM

To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>

Subject: [EXTERNAL] Friday 9/25 FL AG Moody hit

Hi Julie,

We're excited to be on the show tomorrow. Let me know when you have more details and if I can help get you any info.

AG will be in Tampa and the two closest studios to her are WEDU and Yellowbird.

Thanks,

Lauren Schenone Cassedy
813.928.1150

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 1:43 PM
To: Lauren Cassedy

Subject: Re: Friday 9/25 FL AG Moody hit

And we're hoping to do this at 10:40am ET! Thanks!

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AG will be in Tampa and the two closest studios to her are WEDU and Yellowbird.

Thanks,

Lauren Schenone Cassedy
813.928.1150

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From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Friday 9/25 FL AG Moody hit
Date: Thursday, September 24, 2020 5:19:00 PM

Any word on studio and if makeup is available?

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 2:11 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
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AWESOME! Looking forward to it.

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 2:04 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Friday 9/25 FL AG Moody hit

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From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Friday 9/25 FL AG Moody hit
Date: Thursday, September 24, 2020 2:04:08 PM

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From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Friday 9/25 FL AG Moody hit
Date: Thursday, September 24, 2020 9:33:19 PM

Awesome! We will arrive by 955/10am and will be in the chair with makeup done by 1030am

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 9:32:12 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Friday 9/25 FL AG Moody hit

It is! With makeup!

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 9:31:20 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Friday 9/25 FL AG Moody hit

Is Yellowbird confirmed?

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 6:24:26 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: Re: Friday 9/25 FL AG Moody hit

Great, thank you

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Thursday, September 24, 2020 5:19 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Friday 9/25 FL AG Moody hit

Should know shortly! We requested yellowbird

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, September 24, 2020 5:18:59 PM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Friday 9/25 FL AG Moody hit

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From: [Lauren Cassedy](#)
To: [Kylie Mason](#)
Subject: Re: Hi Kylie: A question from a reporter!
Date: Wednesday, September 30, 2020 10:46:11 AM
Attachments: [image001.png](#)

copy

From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Wednesday, September 30, 2020 9:54 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: FW: Hi Kylie: A question from a reporter!

Please see below

Kylie Mason

Press Secretary
Office of Attorney General Ashley Moody
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
Main: 850-245-0150
MyFloridaLegal.com



From: Kennedy, John <jkennedy@gatehousemedia.com>
Sent: Wednesday, September 30, 2020 9:47 AM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: Hi Kylie: A question from a reporter!

Can you help with an update on the AG's request for FDLE and FBI to investigate the Michael Bloomberg contribution to the Florida Rights Restoration Coalition to pay the legal financial obligations of felons?

Can you be more specific on what state law -- and I assume federal, if the FBI's attention is sought -- the AG thinks is potentially threatened by this action?

And does the AG think that these obligations will be paid only if the potential voter agrees to vote for Joe Biden in the presidential race?

I'm trying to include this in a story I'm filing tomorrow. So any help you can provide would be welcome!

Thanks!
John

John Kennedy

Gannett Capital Bureau

@JKennedyReport

jkennedy@gatehousemedia.com

850-321-0572

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AMERICAN
OVERSIGHT

From: [Lauren Cassedy](#)
To: [Gerald Whitney Ray](#)
Subject: Re: Hi Whitney: Hope you're doing well....and I've got a question!
Date: Wednesday, September 30, 2020 10:46:03 AM

copy

From: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Sent: Wednesday, September 30, 2020 10:18 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Fwd: Hi Whitney: Hope you're doing well....and I've got a question!

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From: Kennedy, John <jkennedy@gatehousemedia.com>
Sent: Wednesday, September 30, 2020 9:43:08 AM
To: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Subject: Hi Whitney: Hope you're doing well....and I've got a question!

Can you help with an update on the AG's request for FDLE and FBI to investigate the Michael Bloomberg contribution to the Florida Rights Restoration Coalition to pay the legal financial obligations of felons?

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John Kennedy
Gannett Capital Bureau
@JKennedyReport
jkennedy@gatehousemedia.com
850-321-0572

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From: [Lauren Cassedy](#)
To: [Kamp, Jon](#)
Subject: Re: Investigation Re. FRRC Donations
Date: Thursday, September 24, 2020 3:42:19 PM
Attachments: [image.pdf](#)

Hi Jon,

Thanks for reaching out. Please see the letter attached and the statement below.

"I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thanks,

Lauren Schenone Cassedy

From: Kamp, Jon <jon.kamp@wsj.com>
Sent: Thursday, September 24, 2020 3:35 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Investigation Re. FRRC Donations

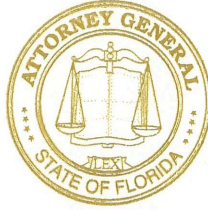
Hi Lauren,

I'm a reporter with The Wall Street Journal and I'm checking in because I'm working with a colleague on a story regarding voting rights for people with felony records. I had read that the AG's office had a statement and a letter regarding the fundraising effort to pay off fines. Could you send the statement and the letter sent to law-enforcement agencies, and confirm if this was requested by Gov. DeSantis? I may follow up with questions from there, but wanted to see that material first.

I'd be glad to be on your press list for any developments from here, too.

Thanks very much,

Jon Kamp
Reporter, Wall Street Journal
53 State Street, 12th Floor
Boston, MA 02109
617-654-6728
cell: 773-294-7673
jon.kamp@wsj.com
[@jon_kamp](#)



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

Live updates: Get the latest on the election and Supreme Court.

Polling from The Washington Post and ABC News shows former vice president Joe Biden with a narrow edge in the key battleground state of Wisconsin and a wide lead in Minnesota.

How to vote: Find out the rules in your state. Some states have already started sending out mail ballots; see how to make sure yours counts. Absentee and mail ballots are two terms for the same thing, mostly used interchangeably. Barring a landslide, we may not have a result in the presidential election on Nov. 3.

Electoral college map: Who actually votes, and who do they vote for? Explore how shifts in turnout and voting patterns for key demographic groups could affect the presidential race.

Policy: Where Biden and Trump stand on key issues defining the election.

Battlegrounds: Want to understand the swing states? Read about Michigan, Wisconsin, North Carolina, Florida, Pennsylvania and Minnesota, and sign up for The Trailer and get more states, plus more news and insight from the trail, in your inbox three days a week.

Coming up: Trump and Biden are scheduled to debate three times this fall; here's what to know about the 2020 presidential debates.

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
R.A. Gray Building, Suite 316 • 500 South Bronough Street • Tallahassee, Florida 32399
850.245.6200 • 850.245.6217 (Fax) • DOS.MyFlorida.com/elections



corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

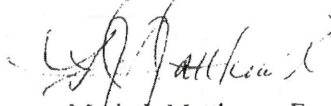
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A.Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A.Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term "votes more than once" does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

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From: [Lauren Cassedy](#)
To: [Michael Moline](#)
Subject: Re: Moody letter
Date: Thursday, September 24, 2020 10:26:42 AM
Attachments: [image.pdf](#)

Hi Michael,

Please see the letter attached and the statement below.

"I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thanks,

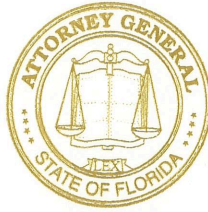
Lauren Schenone Cassedy

From: Michael Moline <michael@floridaphoenix.com>
Sent: Thursday, September 24, 2020 10:05 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Moody letter

Good morning. Could you send a copy of this letter about the Bloomberg investigation please?
Thanks.

--

Michael Moline
Florida Phoenix
850-765-0911
415-596-9943 (cell)



STATE OF FLORIDA

**ASHLEY MOODY
ATTORNEY GENERAL**

September 23, 2020

Mr. Michael F. McPherson
Special Agent in Charge
Federal Bureau of Investigation
5525 West Gray Street
Tampa, FL 33609

Mr. Richard L. Swearingen
Commissioner
Florida Department of Law Enforcement
P.O. Box 1489
Tallahassee, FL 32302-1489

Dear Commissioner Swearingen and Special Agent in Charge McPherson:

Governor DeSantis has asked that my office review recent allegations found in the enclosed September 22, 2020 *Washington Post* article and relevant law. My office has reviewed the following enclosed materials:

- *Washington Post* article, "Mike Bloomberg raises \$16 million to allow former felons to vote in Florida";
- Florida Not-for-Profit Corporation Annual Report of Florida Rights Restoration Coalition, Inc., dated June 23, 2020;
- Section 104.012, Florida Statutes;
- Section 104.061, Florida Statutes;
- Florida Department of State, Division of Elections, Advisory Opinion 16-02 "Voting-Offering Incentives to Vote; Political Committees Expenditures; §§ 104.045, 104.061, 104.0616, 106.011, and 106.11, Florida Statutes" (hereinafter "DE 16-02");
- Title 18, United States Code, Section 597; and
- Title 52, United States Code, Section 10307.

In DE 16-02, the Florida Department of State, Division of Elections, in responding to an inquiry by a political committee, stated:

Even otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending upon the circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner. In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another in casting his or her vote.”

DE 16-02, at 3 (footnote and citation omitted).

After preliminarily reviewing this limited public information and law, it appears further investigation is warranted. Accordingly, I request that your agencies further investigate this matter and take appropriate steps as merited.

Sincerely,



Ashley Moody
Attorney General

cc: Mrs. Maria Chapa Lopez, United States Attorney
Mr. Nick Cox, Statewide Prosecutor

The Washington Post

Democracy Dies in Darkness

Mike Bloomberg raises \$16 million to allow former felons to vote in Florida

By **Michael Scherer**

September 22, 2020 at 10:30 a.m. EDT

Former New York mayor Mike Bloomberg and his team have raised more than \$16 million to pay the court fines and fees of nearly 32,000 Black and Hispanic Florida voters with felony convictions, an effort aimed at boosting turnout for Democratic presidential candidate Joe Biden.

The money will fund a program organized by the Florida Rights Restoration Coalition to pay the fines, fees and restitution costs for former prisoners who are already registered to vote in Florida but barred by law from participating in the election because of those outstanding debts.

Bloomberg, who has committed at least \$100 million to electing Biden in the state, raised the money from individuals and foundations over the past week, his advisers said. He saw the donations as a more cost-effective way of adding votes to the Democratic column than investing money to persuade voters who already have the right to vote, a Bloomberg memo said.

“We have identified a significant vote share that requires a nominal investment,” the memo read. “The data shows that in Florida, Black voters are a unique universe unlike any other voting bloc, where the Democratic support rate tends to be 90%-95%.”

The memo noted that Biden was polling worse among Cuban American voters than Hillary Clinton, the 2016 nominee, while winning other Hispanic groups by a margin of 3 to 1.

The Florida Rights Restoration Coalition is a nonpartisan group that has been fundraising to return all former felons in the state to the voting rolls. Desmond Meade, the group’s president, said the group does not share Bloomberg’s goal of empowering only one political side in the upcoming election.

“Different people may give for different reasons, but we are in this for one reason, and that reason is to place people over politics,” Meade said. “We are concerned with people from all walks of life, from all sorts of politics.”

He said that through separate efforts, his organization has raised about \$7 million from about 44,000 donors to help pay the debts of citizens with felony convictions so they can return to the voting rolls. The average debt, the group said, is about \$1,000.

After organizing by Meade’s group, Florida voters passed a statewide constitutional amendment in 2018 that gave former felons, except those convicted of murder or felony sexual offenses, the opportunity to vote in upcoming elections. The Republican-controlled legislature subsequently passed, and the Republican governor signed, a law that conditioned their return to the voting rolls on the payment of all fees, fines and restitution that were part of their sentence.

Subsequent court challenges upheld the power of the legislature to condition voting rights on the payment of debts by former felons. Judge Barbara Lagoa, who is under consideration by President Trump as a possible replacement for Supreme Court justice Ruth Bader Ginsburg, cast a concurring opinion on the 11th Circuit Court of Appeals upholding the state law requiring payment of debts.

The Republican effort is expected to limit what some viewed as a political benefit to Democrats of the constitutional change, which passed by ballot initiative with 65 percent support. A study by the University of Florida found that nearly 775,000 former felons still owed money related to their convictions and would be barred from the voting booth by the law. The vast majority are too poor to pay their outstanding debts, according to evidence presented in court documents challenging the law.

Several philanthropic groups, including a nonprofit founded by the professional basketball player LeBron James, have since committed donations to pay the owed money. The Bloomberg effort, which his aides said will be pooled with about \$5 million already raised by the Florida Rights Restoration Coalition, is narrowly focused only on Black and Hispanic voters who are already registered to vote and whose debts are less than \$1,500.

Bloomberg’s advisers identified that group as both likely to vote for Biden and more likely to vote than other groups of former felons.

“Mike wanted to get this done for two reasons,” said a Bloomberg adviser, who spoke on the condition of anonymity to discuss private conversations. “One, because it’s the right thing to do for the democracy. And two, because it immediately activates tens of thousands of voters who are predisposed to vote for Joe Biden.”

Bloomberg aides said the former New York mayor, who is worth more than \$50 billion, had raised the money for this effort from others and that the sum would not count against the \$100 million or more he has personally committed to spend on behalf of Biden in the state.

The Bloomberg memo pointed out that the 31,790 targeted voters, including 25,548 who are Black, are nearly equivalent to the margin by which Gov. Ron DeSantis (R) won election in 2018, and about three times as big as the margin that elected Sen. Rick Scott (R-Fla.) that same year.

It said Florida voters have largely already made up their minds about the November election, leaving “only a small margin of voters that are targets for persuasion.”

“We know to win Florida we will need to persuade, motivate and add new votes to the Biden column,” the document read. “This means we need to explore all avenues for finding the needed votes when so many votes are already determined.”

Meade said his group would be in charge of spending the money raised by Bloomberg and will continue fundraising to enfranchise more Floridians with felony convictions.

“No person really dictates how we are operating,” he said.

Updated September 22, 2020

Election 2020: What to know

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2020 FLORIDA NOT FOR PROFIT CORPORATION ANNUAL REPORT

DOCUMENT# N11000011745

Entity Name: FLORIDA RIGHTS RESTORATION COALITION, INC.

Current Principal Place of Business:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811

Current Mailing Address:

4081 LB MCLEOD RD,
UNIT C
ORLANDO, FL 32811 US

FEI Number: 30-0714793

Certificate of Status Desired: No

Name and Address of Current Registered Agent:

MEADE, DESMOND
4081 LB MCLEOD RD
UNIT C
ORLANDO, FL 32811 US

The above named entity submits this statement for the purpose of changing its registered office or registered agent, or both, in the State of Florida.

SIGNATURE:

Electronic Signature of Registered Agent

Date

Officer/Director Detail :

Title P
Name MEADE, DESMOND B
Address P.O.BOX 555809
City-State-Zip: ORLANDO FL 32855

Title VP
Name YOUNTS, JESSICA
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title SECRETARY
Name NEIL, VOLZ
Address 4081 LB MCLEOD RD
City-State-Zip: ORLANDO FL 32811

Title TREASURER
Name ORLANDO, MICHAEL J
Address PO BOX 203
City-State-Zip: MIMS FL 32754

I hereby certify that the information indicated on this report or supplemental report is true and accurate and that my electronic signature shall have the same legal effect as if made under oath; that I am an officer or director of the corporation or the receiver or trustee empowered to execute this report as required by Chapter 617, Florida Statutes; and that my name appears above, or on an attachment with all other like empowered.

SIGNATURE: DESMOND MEADE

PRESIDENT

06/23/2020

Electronic Signature of Signing Officer/Director Detail

Date

Select Year: 2019 ▼ Go

The 2019 Florida Statutes

[Title IX](#)[Chapter 104](#)[View Entire Chapter](#)

ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.012 Consideration for registration; interference with registration; soliciting registrations for compensation; alteration of registration application.—

(1) Any person who gives anything of value that is redeemable in cash to any person in consideration for his or her becoming a registered voter commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). This section shall not be interpreted, however, to exclude such services as transportation to the place of registration or baby-sitting in connection with the absence of an elector from home for registering.

(2) A person who by bribery, menace, threat, or other corruption, directly or indirectly, influences, deceives, or deters or attempts to influence, deceive, or deter any person in the free exercise of that person's right to register to vote at any time, upon the first conviction, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), and, upon any subsequent conviction, commits a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(3) A person may not solicit or pay another person to solicit voter registrations for compensation that is based upon the number of registrations obtained. A person who violates the provisions of this subsection commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

(4) A person who alters the voter registration application of any other person, without the other person's knowledge and consent, commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#).

History.—s. 1, ch. 63-198; s. 20, ch. 71-136; s. 33, ch. 77-175; s. 39, ch. 94-224; s. 1394, ch. 95-147; s. 32, ch. 97-13; s. 23, ch. 98-129.

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Select Year: 2019

The 2019 Florida Statutes

[Title IX](#) [Chapter 104](#) [View Entire Chapter](#)
ELECTORS AND ELECTIONS ELECTION CODE: VIOLATIONS; PENALTIES

104.061 Corruptly influencing voting.—

(1) Whoever by bribery, menace, threat, or other corruption whatsoever, either directly or indirectly, attempts to influence, deceive, or deter any elector in voting or interferes with him or her in the free exercise of the elector's right to vote at any election commits a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#) for the first conviction, and a felony of the second degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#), for any subsequent conviction.

(2) No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person's or another's vote or to corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. [775.082](#), s. [775.083](#), or s. [775.084](#). However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

History.—ss. 1, 3, ch. 6470, 1913; RGS 5918; CGL 8182; s. 1, ch. 19617, 1939; s. 1, ch. 20934, 1941; s. 7, ch. 22858, 1945; s. 8, ch. 26870, 1951; s. 1, ch. 65-379; s. 25, ch. 71-136; s. 35, ch. 77-175; s. 51, ch. 79-400; s. 21, ch. 81-304; s. 22, ch. 90-315; s. 616, ch. 95-147; s. 29, ch. 98-129.

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FYI

FLORIDA DEPARTMENT of STATE

RICK SCOTT
Governor

KEN DETZNER
Secretary of State

January 21, 2016

Mr. Leonard Schmiede, Chairman
League of Voters, Extraordinaire
3024 25th Avenue North
St. Petersburg, Florida 33713

Re: DE 16-02 Voting – Offering Incentives
to Vote; Political Committees –
Expenditures; §§ 104.045, 104.061,
104.0616, 106.011, and 106.11, Florida
Statutes

Dear Mr. Schmiede:

You are the chairman of a Florida political committee and ask whether your political committee may legally pay electors to vote, among other related questions. The Division of Elections has the authority to issue you an advisory opinion pursuant to section 106.23(2), Florida Statutes.

FACTS

Your political committee proposes to increase voter turnout by offering cash, checks, or gift cards to persons in return for “completing the act of voting,” for “request[ing] to vote by mail,” or for convincing others to vote in person or by mail. You emphasize that the incentives your political committee proposes would only be to encourage others simply to vote, not to vote in a particular manner or for a particular candidate.

ANALYSIS

Florida law explicitly prohibits “vote-buying” and “vote-selling.” The prohibition against “vote-buying” is found in section 104.061(2), Florida Statutes, and reads as follows:

No person shall directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to

Division of Elections
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corruptly influence that person or another in casting his or her vote. Any person who violates this subsection is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084. However, this subsection shall not apply to the serving of food to be consumed at a political rally or meeting or to any item of nominal value which is used as a political advertisement, including a campaign message designed to be worn by a person.

§ 104.061(2), Fla. Stat.

The prohibition against “vote-selling” is found in section 104.045, which reads as follows:

Any person who:

- (1) Corruptly offers to vote for or against, or to refrain from voting for or against, any candidate in any election in return for pecuniary or other benefit; or
- (2) Accepts a pecuniary or other benefit in exchange for a promise to vote for or against, or to refrain from voting for or against, any candidate in any election,

is guilty of a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

§ 104.045, Fla. Stat.

Together, these two provisions make it illegal to pay a person to vote in a particular manner (in other words, to “vote-buy”), or to agree to vote or refrain from voting for or against a particular candidate in exchange for a “pecuniary or other benefit” (in other words, to “vote-sell”). Both of these provisions contemplate that the incentive offered must be connected to a vote that is cast *in a particular manner* (or, as the case may be, a vote that is *not* cast in a particular manner).

To support your political committee’s proposed incentives for voting, you cite to advisory opinion DE 87-08. In questions two and three of DE 87-08, the Division was asked whether it was permissible for a person to give an elector a gift certificate, paraphernalia, or other consideration not redeemable in cash, prior to or subsequent to the casting of the vote. *See Div. of Elections Op. 87-08* (Aug. 3, 1987). In answering both questions in the affirmative, the Division considered sections 104.045 and 104.061, Florida Statutes.¹ The Division concluded that section 104.045 does not prohibit a person from giving an elector “a gift certificate or other consideration if the consideration is not intended to buy or corruptly influence another’s vote,” apparently because that

¹ At the time the 1987 opinion was rendered, section 104.045 provided that “vote-selling” was a misdemeanor. Current Florida law makes “vote-selling” a felony. *See* § 104.045, Fla. Stat. (1987); § 104.045, Fla. Stat. (2015).

section contemplates the situation where a person is attempting to actually “buy” a person’s vote—that is, where the person offers the elector something of value in exchange for the elector’s promise to vote for or against a particular candidate. DE 87-08 further interpreted section 104.045 to prohibit a person from offering something of value to an elector in exchange for the elector’s promise to vote in a particular manner. The Division also noted that the “vote-buying” provisions of section 104.061(2), Florida Statutes, would not prohibit a candidate’s giving an item of value to a voter as long as the candidate was not attempting to “buy [the] person’s vote.” See *Div. of Elections Op. 87-08* (Aug. 3, 1987) (citing to *Div. of Elections Op. 83-7* (Apr. 22, 1983)).²

Consistent with sections 104.045 and 104.061, and DE 87-08, the Division reiterates that it is illegal to buy votes or sell votes, regardless of whether the “buying” or “selling” is accomplished by cash, check, gift card, gift, or other item of value. Even the otherwise innocuous offering of an incentive simply to vote could run afoul of section 104.045 or section 104.061, or both, depending on the particular circumstances involved. That is, incentives could be offered to a voter in a way that would be designed to directly or indirectly cause the voter or a larger group of voters to vote in a particular manner.³ In such a case, the person giving the incentive could be guilty of violating section 104.061, Florida Statutes, which makes it illegal to “directly or indirectly give or promise anything of value to another intending thereby to buy that person’s or another’s vote or to corruptly influence that person or another in casting his or her vote.” § 104.061(2), Fla. Stat. Similarly, in such a situation the voter could run afoul of the prohibition against “vote-selling” in section 104.045. Put a different way, incentives to a voter to cast a vote may not legally be offered in a manner that attempts to circumvent the prohibitions against “vote-buying” and “vote-selling” contained in sections 104.061 and 104.045.

In light of these proscriptions against “vote-buying” and “vote-selling,” your political committee could not legally pay an elector to vote and have that expenditure be a valid one under chapter 106. A political committee may only make expenditures. See § 106.11(1)(a), Fla. Stat. (limiting political committee primary depository to use “only for the purpose of depositing contributions and making expenditures”). “Expenditures,” by statutory definition, must only be made “for the purpose of influencing the results of an election.” § 106.011(10)(a), Fla. Stat. For

² It should be noted that section 104.061(2), Florida Statutes, has undergone some revision since 1987.

³ A non-exhaustive list of examples where the person offering incentives to voters simply to vote could run afoul of sections 104.045 and 104.061 include the following: (1) incentives to vote might be offered to a group of people known to be registered under a particular party affiliation; (2) incentives to vote might be offered to voters who live in a particular location where a disproportionate number of voters support a particular candidate or party; or (3) incentives to vote might be offered to a group of people attending a particular political event or rally. In such situations, it would be possible that the intent of the person offering the incentives could run afoul of section 104.061(2), Florida Statutes, in a way that would constitute “vote-buying” or corruptly influencing voting. Similarly, the person offering to vote or voting in exchange for the incentive could violate the prohibition against “vote-selling” in section 104.045.

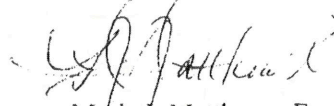
Leonard Schmiede
January 21, 2016
Page 4 of 4

a payment from your political committee to an elector to be a valid and permissible expenditure, it must be to influence the results of an election, i.e., to influence the elector to vote in a certain manner. But such a payment would be illegal under sections 104.045 and 104.061. Your political committee could not lawfully pay someone to vote without that expenditure being invalid under sections 106.11(1)(a) and 106.011(10)(a).

SUMMARY

Sections 104.045 and 104.061, Florida Statutes, explicitly prohibit "vote-buying" and "vote-selling." It would be illegal to offer incentives for voting if the intent were to circumvent the prohibitions against "vote-buying" and "vote-selling" in sections 104.045 and 104.061. A political committee can only spend money to influence the results of an election. A political committee's payment to an elector to vote could only be valid under chapter 106 if it were done to influence how that elector voted, which in turn would be illegal under sections 104.045 and 104.061. Therefore, a political committee could not lawfully make a valid expenditure to pay someone to vote.

Respectfully,



Maria J. Matthews, Esq.
Director, Division of Elections

United States Code Annotated - 2016

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 29. Elections and Political Activities

18 U.S.C.A. § 597

§ 597. Expenditures to influence voting

Effective: October 11, 1996

Currentness

Whoever makes or offers to make an expenditure to any person, either to vote or withhold his vote, or to vote for or against any candidate; and

Whoever solicits, accepts, or receives any such expenditure in consideration of his vote or the withholding of his vote--

Shall be fined under this title or imprisoned not more than one year, or both; and if the violation was willful, shall be fined under this title or imprisoned not more than two years, or both.

Credits

(June 25, 1948, c. 645, 62 Stat. 721; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 601(a)(12), Oct. 11, 1996, 110 Stat. 3498.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1948 Acts. Based on §§ 250, 252, of Title 2, U.S.C., 1940 ed., The Congress (Feb. 28, 1925, c. 368, Title III, §§ 311, 314, 43 Stat. 1073, 1074).

This section consolidates the provisions of §§ 250 and 252 of Title 2, U.S.C., 1940 ed., The Congress.

Reference to persons causing or procuring was omitted as unnecessary in view of definition of "principal" in § 2 of this title.

The punishment provisions of § 252 of Title 2, U.S.C., 1940 ed., The Congress, were incorporated at end of section upon authority of reference in such section making them applicable to this section.

Words "or both" were added to conform to the almost universal formula of the punishment provisions of this title.

Changes were made in phraseology.

1994 Acts. House Report No. 103-324, House Report No. 103-489, and House Conference Report No. 103-711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

1996 Acts. House Report No. 104-788, see 1996 U.S. Code Cong. and Adm. News, p. 4021.

Amendments

1996 Amendments. Pub.L. 104-294, § 601(a)(12), substituted “fined under this title” for “fined not more than \$10,000”.

1994 Amendments. Pub.L. 103-322, § 330016(1)(H), substituted “under this title” for “not more than \$1000”.

CROSS REFERENCES

Misdemeanors tried by United States magistrates as excluding offenses punishable under this section, see 18 USCA § 3401.

LIBRARY REFERENCES

American Digest System

Election Law § 691.

Key Number System Topic No. 142T.

RESEARCH REFERENCES

ALR Library

69 ALR 377, Constitutionality of Corrupt Practices Acts.

Encyclopedias

Am. Jur. 2d Elections § 450, Bribery.

Treatises and Practice Aids

Federal Procedure, Lawyers Edition § 28:325, Offenses Involving Influencing or Interfering With Voter.

NOTES OF DECISIONS

Constitutionality 1

Construction 2

Grand jury investigation 6

Indictment 8

Jurisdiction 7

Law governing 3

Mandamus 9

Perjury 5

Time of expenditure 4

1 Constitutionality

In determining the constitutionality of this section, the U.S.C.A. Const. Amend. 1 rights of corporations and labor unions must be weighed against the substantial governmental interests in preserving the integrity of the electoral process, in preventing corporate and union officials from using corporate assets or general union dues to promote political parties and candidates without the consent of stockholders or union members with differing political views, and in protecting individuals who may refuse to contribute to campaign funds against reprisals; the need for such safeguards is particularly acute in the labor field where labor union membership can be condition of employment. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 180; Election Law 181

This section did not violate U.S.C.A. Const. Amend. 1 rights of corporations and labor unions when balanced against the legitimate governmental interests involved and tested by the "least drastic means" test. U.S. v. Chestnut, S.D.N.Y.1975, 394 F.Supp. 581. Constitutional Law 1698; Constitutional Law 1700; Election Law 682

Provision of former § 250 of Title 2 [now this section] proscribing making of expenditures to influence voting made it a criminal offense for persons to make or cause an expenditure to be made to any person to vote at a general election, where official ballot contained names of candidates for Congress and person receiving expenditure proscribed voted the official ballot, and such legislation was within the power of Congress. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 682; Election Law 691

Former § 250 of Title 2 [now this section] prohibiting expenditures to influence voting was not unconstitutional on ground that such section covered elections over which Congress had no control, and that even if such section was limited to national elections, it was too uncertain to be sustained, since such section, read as a whole in light of former § 241 of Title 2 [now § 591 of this title] defining the term "candidate" as used in former chapter was limited to elections at which federal office candidates were presented for election. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Constitutional Law 1130.8; Election Law 682; Election Law 683

2 Construction

Under former § 250 of Title 2 [now this section] prohibiting the making or offering to make an expenditure to any person, "either to vote or withhold his vote, or to vote for or against any candidate", Congress intended the entire quoted phrase to be read as a whole and as so read such section was limited to those elections at which a "candidate", as the word was defined to include candidates for federal offices, was presented for election, in view of the clear purpose of such section to prevent corruption in public elections. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Election Law 691

3 Law governing

Federal statutes, in so far as prohibiting interference with right of suffrage and corrupt practices in connection with elections for Senators and Representatives in Congress, are paramount, and supersede any conflicting state legislation. In re Cohen, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. United States 217(2)

4 Time of expenditure

Absent some preelection agreement, payments made to voters after election would constitute no offense. U.S. v. Bruno, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691

5 Perjury

In perjury prosecution arising out of charge that defendant swore falsely that he did not pay any person for voting, where witnesses testifying that defendant paid them after voting further stated that they did not examine the ballots, such fact did not amount to failure to show that the witnesses had voted as ballots may have been blank, since it was immaterial whether they had actually voted, the question being whether defendant paid persons with intention that they should vote. *U.S. v. Palese*, C.C.A.3 (Del.) 1943, 133 F.2d 600. Perjury 29(2)

6 Grand jury investigation

Records of state election for Senators and Representatives, preserved under state law, were relevant to any investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Voting machines containing results of state election for Senators and Representatives in Congress were relevant to investigation by federal grand jury of interference with right of suffrage and corrupt practices. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. Grand Jury 33

Issuance of subpoenas duces tecum by federal grand jury investigating state election for Senators and Representatives in Congress, for production of records and voting machines in custody of state officials, was not in violation of U.S.C.A.Const. Art. I, § 4, cl. 1 authorizing state Legislatures to prescribe time, place, and manner of holding elections. *In re Cohen*, C.C.A.2 (N.Y.) 1932, 62 F.2d 249. *United States* 217(1)

Whether grand jury, before which perjury was allegedly committed, had been lawfully constituted was matter which defendant could only raise by proper motion supported by sufficient affidavits; and she could not successfully claim that statement in indictment, to effect that grand jury had been conducting investigation of possible voting irregularities during a general election, showed that grand jury had not been engaged in investigation of offenses against United States. *U.S. v. Kennefick*, N.D.Ill.1956, 144 F.Supp. 596. Perjury 22

7 Jurisdiction

Jurisdiction of federal court in case involving payment of money to voter does not follow simply because offense occurred in an election in which a federal officer was to be voted for, but indictment must charge facts from which it follows that election of federal officer either was influenced or was subject to probability of unlawful influence. *U.S. v. Blanton*, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

8 Indictment

Paying for vote for candidate for state office is a state offense and paying for a vote for candidate for federal office is federal offense; and indictment for federal offense of influencing votes at general election for both federal and state offices would have to charge that defendant had influenced vote for candidate for federal office or, in the alternative, that defendant had illegally induced vote at general election at which voter did in fact cast his ballot for federal office candidate. *U.S. v. Bruno*, N.D.Ill.1955, 144 F.Supp. 593. Election Law 691; Election Law 718

Indictments alleging an expenditure to any person either to vote or withhold his vote for United States Senator or Congressman or which alleged an acceptance of payment for the vote or the withholding thereof were within the purview of this section. *U.S. v. Viola*, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

An indictment charging that defendant did unlawfully make expenditures to claimed individuals to be expended by them to voters brought to the polls by them and in consideration of the voters casting their votes, but which did not allege that

§ 597. Expenditures to influence voting, 18 U.S.C.A. § 597

the defendant paid the individuals, either to vote or withhold their vote, and which contained no count for conspiracy, was insufficient to charge an offense under this section. U.S. v. Viola, W.D.Pa.1954, 126 F.Supp. 718. Election Law 718

Counts of indictment in language of former § 250 of Title 2 [now this section] charging expenditures to influence voters was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Indictment And Information 110(28)

Indictment charging conspiracy to commit offenses against laws of United States by making and causing to be made an expenditure and to pay and cause to be paid, certain sums of money to divers persons to vote in a general election at which names of candidates for United States Senate and United States House of Representatives appeared on official printed ballot was sufficient. U.S. v. Blanton, E.D.Mo.1948, 77 F.Supp. 812. Election Law 718

An indictment charging violation of former § 250 of Title 2 [now this section] was quashable as to the counts which charged defendant with bribery of persons unknown to the grand jury to vote for two "candidates" at a general election held in city of Wilmington on certain date and with bribery of persons unknown to the grand jury to vote at the election, since the place of commission of alleged offense was not confined to a definite area of such size as to clearly fix the crime, and conviction under such counts would not be a bar to a subsequent prosecution for bribery of a specified voter. U.S. v. Foote, D.C.Del.1942, 42 F.Supp. 717. Indictment And Information 137(6)

9 Mandamus

Under earlier acts relating to the same subject as this section it was held that the federal district courts had no power to compel rights thereunder by mandamus. In re Higdon, E.D.Mo.1920, 269 F. 150.

18 U.S.C.A. § 597, 18 USCA § 597

Current through P.L. 114-115 approved 12-28-2015

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KeyCite Yellow Flag - Negative Treatment

Proposed Legislation

United States Code Annotated
Title 52. Voting and Elections (Refs & Annos)
Subtitle I. Voting Rights
Chapter 103. Enforcement of Voting Rights

52 U.S.C.A. § 10307
Formerly cited as 42 USCA § 1973i

§ 10307. Prohibited acts

Currentness

(a) Failure or refusal to permit casting or tabulation of vote

No person acting under color of law shall fail or refuse to permit any person to vote who is entitled to vote under any provision of chapters 103 to 107 of this title or is otherwise qualified to vote, or willfully fail or refuse to tabulate, count, and report such person's vote.

(b) Intimidation, threats, or coercion

No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote, or intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for urging or aiding any person to vote or attempt to vote, or intimidate, threaten, or coerce any person for exercising any powers or duties under section 10302(a), 10305, 10306, or 10308(e) of this title or section 1973d or 1973g of Title 42.¹

(c) False information in registering or voting; penalties

Whoever knowingly or willfully gives false information as to his name, address or period of residence in the voting district for the purpose of establishing his eligibility to register or vote, or conspires with another individual for the purpose of encouraging his false registration to vote or illegal voting, or pays or offers to pay or accepts payment either for registration to vote or for voting shall be fined not more than \$10,000 or imprisoned not more than five years, or both: *Provided, however,* That this provision shall be applicable only to general, special, or primary elections held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(d) Falsification or concealment of material facts or giving of false statements in matters within jurisdiction of examiners or hearing officers; penalties

Whoever, in any matter within the jurisdiction of an examiner or hearing officer knowingly and willfully falsifies or conceals a material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing

or document knowing the same to contain any false, fictitious, or fraudulent statement or entry, shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(e) Voting more than once

(1) Whoever votes more than once in an election referred to in paragraph (2) shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

(2) The prohibition of this subsection applies with respect to any general, special, or primary election held solely or in part for the purpose of selecting or electing any candidate for the office of President, Vice President, presidential elector, Member of the United States Senate, Member of the United States House of Representatives, Delegate from the District of Columbia, Guam, or the Virgin Islands, or Resident Commissioner of the Commonwealth of Puerto Rico.

(3) As used in this subsection, the term “votes more than once” does not include the casting of an additional ballot if all prior ballots of that voter were invalidated, nor does it include the voting in two jurisdictions under section 10502 of this title, to the extent two ballots are not cast for an election to the same candidacy or office.

CREDIT(S)

(Pub.L. 89-110, Title I, § 11, Aug. 6, 1965, 79 Stat. 443; renumbered Title I, Pub.L. 91-285, § 2, June 22, 1970, 84 Stat. 314; amended Pub.L. 91-405, Title II, § 204(e), Sept. 22, 1970, 84 Stat. 853; Pub.L. 94-73, Title IV, §§ 404, 409, Aug. 6, 1975, 89 Stat. 404, 405.)

Notes of Decisions (54)

Footnotes

1 Repealed by Pub.L. 109-246, § 3(c), July 27, 2006, 120 Stat. 580.
52 U.S.C.A. § 10307, 52 USCA § 10307
Current through P.L. 116-158.

End of Document

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From: [Lauren Cassedy](#)
To: [Trevor DeGroot](#)
Cc: [Gerald Whitney Ray](#); [Kylie Mason](#)
Subject: Re: To add or confirm are on our distribution list
Date: Monday, September 28, 2020 5:50:46 PM

Thank you!

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From: Trevor DeGroot <Trevor.DeGroot@myfloridalegal.com>
Sent: Monday, September 28, 2020 5:15:46 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: RE: To add or confirm are on our distribution list

Levin has been added.

Mazzei confirmed already in distribution list.

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 4:35 PM
To: Trevor DeGroot <Trevor.DeGroot@myfloridalegal.com>
Cc: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>; Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: To add or confirm are on our distribution list

Jonathan Levin (BLOOMBERG/ MIAMI) jlevin20@bloomberg.net
Patricia Mazzei (NYT) patricia.mazzei@nytimes.com

From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Today on Newsroom
Date: Friday, September 25, 2020 10:56:37 AM

Any update on timing? Seeing the breaking news

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 8:44:29 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Today on Newsroom

Great. thanks!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Friday, September 25, 2020 8:43 AM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Today on Newsroom

Awesome. We are set on our end

Re: topic #1 - it's felons in FL

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 7:09 AM
To: Lauren Cassedy
Subject: Today on Newsroom

Good Morning Lauren!

We have AG Moody at 10:40am this morning, speaking with Trace Gallagher.

Topic #1) Florida AG calling for investigation into whether former NYC Mayor and billionaire Mike Bloomberg violated state law when he reportedly raised \$16M to pay fines and restitutions of 32,000 felons in NY to make them eligible to vote November 3rd...

Topic #2) President Trump in Florida today...
there has been a lot of buzz over Florida native Barbara Lagoa being on his short list to fill Ruth Bader Ginsburg's SCOTUS seat...

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From: Lauren Cassedy
To: [Talarico, Julie](#)
Subject: Re: Today on Newsroom
Date: Friday, September 25, 2020 10:55:48 AM

From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 8:44:29 AM
To: Lauren Cassedy
Subject: Re: Today on Newsroom

Great. thanks!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Friday, September 25, 2020 8:43 AM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Today on Newsroom

Awesome. We are set on our end

Re: topic #1 - it's felons in FL

Get Outlook for iOS <https://urldefense.proofpoint.com/v2/url?u=https-3A__aka.ms_o0ukef&d=DwMF-g&c=cnx1hdOOtepEQkpermZGwO&r=5Wp481veKbKxvCHHTan9uAJykC2PBjRtgchu1N5TGtc&m=8hIw3Jwt3-fVbNfXJOQQ3gUY5Ytw24f1OoKVxTYrhoo&s=pY58UfDJGXmIQRc36gLRsm_MbSS_HMhyhgsJS_4APXw&e=>>

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To: Lauren Cassedy
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From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Today on Newsroom
Date: Friday, September 25, 2020 8:43:47 AM

Awesome. We are set on our end

Re: topic #1 - it's felons in FL

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 7:09 AM
To: Lauren Cassedy
Subject: Today on Newsroom

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From: Lauren Cassedy
To: [Talarico, Julie](#)
Subject: Re: Today on Newsroom
Date: Friday, September 25, 2020 7:55:10 AM

Awesome. On #1 - it's felons in FL

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 7:09:16 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Today on Newsroom

Good Morning Lauren!

We have AG Moody at 10:40am this morning, speaking with Trace Gallagher.

Topic #1) Florida AG calling for investigation into whether former NYC Mayor and billionaire Mike Bloomberg violated state law when he reportedly raised \$16M to pay fines and restitutions of 32,000 felons in NY to make them eligible to vote November 3rd...

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From: [Lauren Cassedy](#)
To: [Talarico, Julie](#)
Subject: Re: Today on Newsroom
Date: Friday, September 25, 2020 11:13:58 AM

I think she got the update right after I sent the email. Totally understand. This morning has been crazy!

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 11:13:00 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Today on Newsroom

I am so sorry the control room has been chaos this morning because of all the breaking news, we unfortunately have to clear her today. I hope someone spoke to her in the control room and let her know this earlier!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Friday, September 25, 2020 10:56 AM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Today on Newsroom

Any update on timing? Seeing the breaking news

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From: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Sent: Friday, September 25, 2020 8:44:29 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: Today on Newsroom

Great. thanks!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Friday, September 25, 2020 8:43 AM
To: Talarico, Julie <Julie.Talarico@FOXNEWS.COM>
Subject: [EXTERNAL] Re: Today on Newsroom

Awesome. We are set on our end

Re: topic #1 - it's felons in FL

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Sent: Friday, September 25, 2020 7:09 AM

To: Lauren Cassedy

Subject: Today on Newsroom

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From: [Lauren Cassedy](#)
To: [McDonnell, Brigid Mary](#)
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1
Date: Thursday, October 1, 2020 8:32:06 PM

Sorry I thought I responded back earlier! Yes we are open tomorrow

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From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Thursday, October 1, 2020 5:02:09 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Aghs so sorry unfort we cannot do tonight due to the debate change / back and forth on the rules. Could she do tomorrow night instead?? Thanks and my apologies!

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, October 1, 2020 3:52 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Let me know when you have confirm on studio/ makeup and hit time. Looking forward to tonight!

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From: Lauren Cassedy <[Lauren.Cassedy@myfloridalegal.com](#)>
Sent: Thursday, October 1, 2020 2:41:25 PM
To: McDonnell, Brigid Mary <[BrigidMary.McDonnell@FOXNEWS.COM](#)>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Yes

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From: McDonnell, Brigid Mary <[BrigidMary.McDonnell@FOXNEWS.COM](#)>
Sent: Thursday, October 1, 2020 2:16:53 PM
To: Lauren Cassedy <[Lauren.Cassedy@myfloridalegal.com](#)>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Would this be Tampa Yellowbird studio?

From: McDonnell, Brigid Mary
Sent: Thursday, October 1, 2020 12:25 PM
To: Lauren Cassedy <[Lauren.Cassedy@myfloridalegal.com](#)>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Hey Lauren! We'd also like to touch on the Bloomberg bailing out felons and separating fact from fiction on that.

Sent from my iPhone

On Oct 1, 2020, at 11:15 AM, Lauren Cassedy
<Lauren.Cassedy@myfloridalegal.com> wrote:

Hi Brigid Mary,

We're so excited to come on tonight to discuss the ACB letter!

AG will be in Tampa. Nearest studios are WEDU and Yellowbird.

Lauren Schenone Cassedy

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From: [Lauren Cassedy](#)
To: [McDonnell, Brigid Mary](#)
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1
Date: Thursday, October 1, 2020 3:51:54 PM

Let me know when you have confirm on studio/ makeup and hit time. Looking forward to tonight!

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, October 1, 2020 2:41:25 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Yes

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From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Thursday, October 1, 2020 2:16:53 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Would this be Tampa Yellowbird studio?

From: McDonnell, Brigid Mary
Sent: Thursday, October 1, 2020 12:25 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

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Sent from my iPhone

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From: [Lauren Cassedy](#)
To: [McDonnell, Brigid Mary](#)
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1
Date: Thursday, October 1, 2020 2:41:26 PM

Yes

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From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Thursday, October 1, 2020 2:16:53 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

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Sent from my iPhone

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From: [Lauren Cassedy](#)
To: [McDonnell, Brigid Mary](#)
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1
Date: Friday, October 2, 2020 2:29:41 PM

Hi - unfortunately, we can't make the interview tonight. I'm so sorry for the change on our end.

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From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Thursday, October 1, 2020 8:35:49 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

Great!! Thx. Will have more info around 4p tomorrow

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, October 1, 2020 8:32 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Sorry I thought I responded back earlier! Yes we are open tomorrow

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From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Sent: Thursday, October 1, 2020 5:02:09 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, October 1, 2020 3:52 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>
Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Let me know when you have confirm on studio/ makeup and hit time. Looking forward to tonight!

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Thursday, October 1, 2020 2:41:25 PM
To: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>

Subject: Re: [EXTERNAL] FL AG Moody tonight 10/1

Yes

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From: McDonnell, Brigid Mary <BrigidMary.McDonnell@FOXNEWS.COM>

Sent: Thursday, October 1, 2020 2:16:53 PM

To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>

Subject: RE: [EXTERNAL] FL AG Moody tonight 10/1

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From: [Lauren Cassedy](#)
To: [Murray, Andrew](#)
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?
Date: Wednesday, September 23, 2020 9:14:14 PM

We're set for makeup, correct?

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 9:01:53 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Awesome. We will be seated by 715am and arrive by 645am for makeup

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 9:00:59 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Yellow Bird!

Andrew Murray
Senior Political Producer
"Fox & Friends"
Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
[@andrewmurray1](#)

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Sent: Wednesday, September 23, 2020 8:47 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
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From: Lauren Cassedy
To: [Murray, Andrew](#)
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?
Date: Wednesday, September 23, 2020 9:10:14 PM

Double checking

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To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
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From: [Lauren Cassedy](#)
To: [Murray, Andrew](#)
Cc: [Marsilio, Montana](#); [Lewittes, Lee \(Kushnir\)](#); [Walker, Bailey](#); [Valentine, Alexandria](#); [Croteau, Nicole](#)
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?
Date: Wednesday, September 23, 2020 9:58:51 PM

We will arrive by 645am for makeup, if that's ok with you.

My cell is 813.928.1150.

TPs on topic. I'll have more in the morning too

- As the Attorney General of Florida, I have requested the FBI and the Florida Department of Law Enforcement immediately investigate potential violations of election laws.
- It is essential that we maintain a fair elections process and that's why this must be fully evaluated by the FBI and other law enforcement agencies.
- And I have also instructed the Statewide Prosecutor in my office to work with law enforcement and any Statewide Grand Jury that the Governor may call.

Assorted background that may be helpful for building the segment

- AG's office in Florida has prosecutorial authority - not investigatory.
- AG was a judge in Tampa for over ten years before becoming Florida's AG and prior to that she was a federal prosecutor.

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 9:26:05 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Cc: Marsilio, Montana <Montana.Marsilio@FOXNEWS.COM>; Lewittes, Lee (Kushnir) <Lee.lewittes@FOXNEWS.COM>; Walker, Bailey <Bailey.Walker@FOXNEWS.COM>; Valentine, Alexandria <alexandria.valentine@FOXNEWS.COM>; Croteau, Nicole <Nicole.Croteau@FOXNEWS.COM>
Subject: RE: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Hi Lauren,

Here are the details for "Fox & Friends" tomorrow (Thursday)LIVE at 7:25am ET. I am copying the A.M. team who produce in the morning. Please forward some bullet points outlining what she will say about the topic.

"Fox & Friends"

DATE: Thursday, September 24th

ARRIVAL: 7:00AM ET (MAKE-UP - Steph Gimson)

LIVE INTERVIEW: 7:25AM ET with Steve Doocy

TOPIC: ATTORNEY GENERAL ASKS FOR AN INVESTIGATION INTO MICHAEL BLOOMBERG'S PLEDGE TO PAY FELONS' DEBTS
<https://www.wesh.com/article/florida-ag-investigation-bloombergs-felon-debts-fbi/34131139#>

LOCATION: Yellowbird - West Shore Office Center

ADDRESS: 4842 West Gandy BLVD., Tampa, FL, 33634

A.M. STUDIO CONTACT: Scott Henderson camera 585-820-5683

THURSDAY A.M.CONTACT: Montana Marsilio cell: 718-772-3710
email: montana.marsilio@foxnews

Thanks in advance,

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We're set for makeup, correct?

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Sent: Wednesday, September 23, 2020 7:15:58 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Keep me posted on studio location when you have it

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From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Sent: Wednesday, September 23, 2020 6:48:13 PM
To: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Yes

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 6:47:37 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: [EXTERNAL] Re: FL AG Moody Available for "Fox & Friends" Tomorrow (Thursday)?

Thanks, we had to make a few changes to the due to some other breaking news, would it be possible for her to start LIVE at 7:25am ET?

Andrew Murray
Producer, Politics

"Fox & Friends"
Fox News Channel
[1211 Avenue of the Americas, 2nd Floor](#)
[New York, NY 10036](#)
Office: [\(212\) 301-3683](#)
Cell # [1 \(917\) 539-4688](#)
Cell # [2 \(202\) 253-0994](#)
FAX: [\(212\) 301-3421](#)
Email: andrew.murray@foxnews.com
[@andrewmurray1](#)

On Sep 23, 2020, at 6:21 PM, Lauren Cassedy
<Lauren.Cassedy@myfloridalegal.com> wrote:

Excited to be on with you guys at 815am.

Let me know when you know more about the studio
location

Thank you!

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From: Murray, Andrew <Andrew.Murray@FOXNEWS.COM>
Sent: Wednesday, September 23, 2020 3:52:14 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: FL AG Moody Available for "Fox & Friends"
Tomorrow (Thursday)?

Hi Lauren,

Please let us know if we can schedule Florida Attorney
General Moody to appear on "Fox & Friends" tomorrow
(Thursday) for a LIVE 5-7 minute interview between 6am
- 9am ET about the allegations that Bloomberg pays
fines for 32,000 felons in Florida so they can vote.

Thanks in advance,

Andrew Murray
Senior Political Producer
"Fox & Friends"
Fox News Channel
1211 Avenue of the Americas, 2nd Floor
New York, NY 10036
Cell # 1 (917) 539-4688
Cell # 2 (202) 253-0994
Email: andrew.murray@foxnews.com
[@andrewmurray1](#)

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From: [Lauren Cassedy](#)
To: [Godinho, Joana](#)
Subject: Re: [EXTERNAL] Re: FL AG Moody tentative hit 9/24 9-930AM
Date: Thursday, September 24, 2020 6:30:56 AM

Totally understand. Keep us in mind for future opportunities.

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From: Godinho, Joana <Joana.Godinho@FOXBUSINESS.COM>
Sent: Thursday, September 24, 2020 6:05:34 AM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: Re: [EXTERNAL] Re: FL AG Moody tentative hit 9/24 9-930AM

Thank you for this
We will have to pass just because of timing. I can try to see if we can have her tomorrow in case she has any availability

Sent from my iPhone. I'm at 612.644.8133.

On Sep 23, 2020, at 9:06 PM, Godinho, Joana
<Joana.Godinho@foxbusiness.com> wrote:

Ok

Sent from my iPhone. I'm at 612.644.8133.

On Sep 23, 2020, at 9:03 PM, Lauren Cassedy
<Lauren.Cassedy@myfloridalegal.com> wrote:

Studio is Yellowbird in Tampa

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From: Godinho, Joana <Joana.Godinho@FOXBUSINESS.COM>
Sent: Wednesday, September 23, 2020 8:45:58 PM
To: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>
Subject: RE: FL AG Moody tentative hit 9/24 9-930AM

This is the booking note

RECAP: 5min segment tomorrow for the Varney show. Stu is hosting. Booked on topics below + news of the day. Per sop we kindly ask no CNBC 24h prior.

LOGISTICS

- Need SKYPE ID + CELL (both at the same time please)
- Skype test: if she can we would like to test this at 8.30a
- Live skype: we call 10min prior
- Show poc: me

FOR CHYRON:

NAME: Ashley Moody (R)

TITLE: Florida Attorney General

TOPIC:

BREAKING: Florida Attorney General orders investigation into Bloomberg

<https://twitter.com/jayobtv/status/1308847648779186176?s=21>

Joana Godinho | Fox Business Network

Coordinating Booker, Varney & Co.

I am working from home: please call 612.644.8133

From: Lauren Cassedy <Lauren.Cassedy@myfloridalegal.com>

Sent: Wednesday, September 23, 2020 8:45 PM

To: Godinho, Joana <Joana.Godinho@FOXBUSINESS.COM>

Subject: [EXTERNAL] FL AG Moody tentative hit 9/24 9-930AM

Hi Joana,

I'll send you the studio location as soon as I get it.

Thanks!

Call anytime.

Lauren Cassedy
8139281150

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endorsed by either of them. No representation is made that this email or its attachments are without defect.

From: [Richard Martin](#)
To: [Kylie Mason](#)
Subject: Re: [EXT] RE: CBS12 Request - Bloomberg investigation
Date: Thursday, September 24, 2020 12:56:49 PM
Attachments: [image002.png](#)

The legal authority and procedure for empaneling a statewide grand jury are set forth in Section 905.33, Florida Statutes. (Provide link)

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From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Thursday, September 24, 2020 12:37:47 PM
To: Richard Martin <Richard.Martin@myfloridalegal.com>
Cc: Gerald Whitney Ray <Whitney.Ray@myfloridalegal.com>
Subject: FW: [EXT] RE: CBS12 Request - Bloomberg investigation

Richard, please see a follow up below:

I am hoping you can clarify something in the statement you sent me regarding the Governor calling a grand jury. Is that something he could do on his own or is calling a grand jury contingent on the FDLE/FBI investigation?

Kylie Mason

Press Secretary
Office of Attorney General Ashley Moody
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
Main: 850-245-0150
MyFloridalLegal.com



From: Danielle Waugh <dlwaugh@sbgvtv.com>
Sent: Thursday, September 24, 2020 12:21 PM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: RE: [EXT] RE: CBS12 Request - Bloomberg investigation

Thanks, it looks like AG Moody will not be able to interview today. I am hoping you can clarify something in the statement you sent me regarding the Governor calling a grand jury. Is that something he could do on his own or is calling a grand jury contingent on the FDLE/FBI investigation?

Danielle Waugh
Special Projects Reporter
WPEC-TV

1100 Fairfield Dr. West Palm Beach, FL 33407
(561) 596-0692
dlwaugh@cbs12.com



From: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Sent: Thursday, September 24, 2020 10:54 AM
To: Danielle Waugh <dlwaugh@sbgvtv.com>
Subject: [EXT] RE: CBS12 Request - Bloomberg investigation

CAUTION: This email originated from outside of Sinclair. Do not click links or open attachments unless you recognize the sender and know the content is safe.

Danielle,

Please see the statement from yesterday below and the letter attached for more information. I forwarded your interview request to Lauren Cassedy in our office. She should be in touch with you soon.

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws.

"And I have instructed the Statewide Prosecutor to work with law enforcement and any Statewide Grand Jury that the Governor may call." - Attorney General Ashley Moody

Thank you,

Kylie

Kylie Mason

Press Secretary
Office of Attorney General Ashley Moody
The Capitol, Suite PL-01
Tallahassee, FL 32399-1050
Main: 850-245-0150
MyFloridaLegal.com



From: Danielle Waugh <dlwaugh@sbgvtv.com>

Sent: Thursday, September 24, 2020 10:48 AM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: RE: CBS12 Request - Bloomberg investigation

I also wanted to see if you could send over the same statement the Fox News received from the AG's office. Their article says:

"Today, I sent a letter to the Florida Department of Law Enforcement and the Federal Bureau of Investigation into potential violations of election laws," Moody said in a statement provided to Fox News.

"I have instructed the statewide prosecutor to work with law enforcement and any statewide grand jury that the governor may call," she said.

Danielle Waugh

Special Projects Reporter
WPEC-TV
1100 Fairfield Dr. West Palm Beach, FL 33407
(561) 596-0692
dlwaugh@cbs12.com



From: Danielle Waugh
Sent: Thursday, September 24, 2020 10:27 AM
To: Kylie Mason <Kylie.Mason@myfloridalegal.com>
Subject: CBS12 Request - Bloomberg investigation

Good morning,

Danielle Waugh here from CBS12 News in West Palm Beach. We wanted to see if AG Moody could do a virtual interview today about the Bloomberg inquiry, and what happens next.

Does the AG have any time today for a Zoom conversation? Would only take 15 minutes!

If there's any new information you could pass along, that would be helpful as well. We are hearing something about a grand jury on this case so I'm not sure if that's anything you're aware of.

Danielle Waugh

Special Projects Reporter
WPEC-TV
1100 Fairfield Dr. West Palm Beach, FL 33407
(561) 596-0692
dlwaugh@cbs12.com





AMERICAN
OVERSIGHT

From: [Lauren Cassedy](#)
To: [Trevor DeGroot](#)
Cc: [Gerald Whitney Ray](#); [Kylie Mason](#)
Subject: To add or confirm are on our distribution list
Date: Wednesday, September 23, 2020 4:34:00 PM

Jonathan Levin (BLOOMBERG/ MIAMI) jlevin20@bloomberg.net

Patricia Mazzei (NYT) patricia.mazzei@nytimes.com

From: [Lauren Cassidy](#)
To: [Gary Fineout](#)
Subject: Your request
Date: Friday, October 2, 2020 4:33:06 PM

Sorry we couldn't make an interview work for the piece today. I did want to circle back on a few of your questions from earlier this week.

Re: How the Governor and AG discussed the Bloomberg matter-

"Governor DeSantis brought this matter up to the Attorney General verbally."

Re: campaign violations referred to other agencies -

"This is Attorney General Moody's first general election cycle in this role. Attorney General Bondi referred elections related allegations in 2018."

The United States Law Week

U.S. Court Records Would Be Free Under House Judiciary Bill

By Madison Alder

Sept. 15, 2020, 7:57 PM

- PACER has come under fire for fees
- Bipartisan bill moves to House floor

The public would gain free access to the electronic database of federal court records known as PACER under bipartisan legislation approved Tuesday by the House Judiciary Committee.

The Open Courts Act (H.R. 8235) is sponsored by Georgia Reps. Hank Johnson (D) and Doug Collins (R).

“Convenient access to public records and public courthouses shouldn’t be a privilege just for the wealthy few and their silk stocking, tassel shoe wearing corporate lawyers,” Johnson said at the committee markup.

The PACER system’s fees have come under criticism for limiting public access. The U.S. Court of Appeals for the Federal Circuit ruled the cost to use the system was too high in a decision curbing the use of the fees as a revenue stream to help fund other court system programs.

Each search and each page of a document cost 10 cents, up to a maximum of \$3 per document. In September 2019, the judiciary doubled the user fee waiver, increasing the quarterly waiver of fees from \$15 to \$30, which allowed more free access.

In its February budget request to Congress, the judiciary said it anticipated PACER revenue would be about \$142 million in fiscal 2020 and 2021.

While there isn’t a companion bill in the Senate, lawmakers introduced a similar bipartisan bill last year. The Senate bill is sponsored by Sens. Rob Portman (R-Ohio), Ron Wyden (D-Ore.), Ted Cruz (R-Texas), and Mazie Hirono (D-Hawaii).

To contact the reporter on this story: Madison Alder in Washington at malder@bloomberglaw.com

To contact the editors responsible for this story: Seth Stern at sstern@bloomberglaw.com; John Crawley at jcrawley@bloomberglaw.com

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