No. 08-530

IN THE

Supreme Court of the United States

CITY OF NEW YORK, *et al.*,

Petitioners,

v.

BERETTA U.S.A. CORP., *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Second Circuit correctly applied the settled standard for review of federal statutes under the Tenth Amendment in holding that the Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§ 1701-1703 ("PLCAA" or the "Act") – which Petitioners concede was a proper exercise of Congress's commerce clause powers – does not violate the Tenth Amendment.

2. Whether the Second Circuit correctly construed the PLCAA to preclude Petitioners action seeking to hold Respondents liable for an alleged nuisance created by the misuse of firearms by third parties.

CORPORATE DISCLOSURE STATEMENT

Colt's Manufacturing Company LLC, is a wholly-owned subsidiary of New Colt Holding Corp., which is not a publicly held company. There are no publicly held companies that own ten percent or more of Colt's Manufacturing Company LLC's stock.

Beretta U.S.A. Corp. is majority owned by Beretta Holding S.p.A. There are no publicly held companies that own ten percent or more of Beretta U.S.A. Corp.'s stock.

Browning Arms Company's parent corporation is Browning, whose parent is BWA, Inc. There are no publicly held companies that own ten percent or more of Browning Arms Company's stock.

Glock, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Forjas Taurus, S.A. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Phoenix Arms has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Sigarms, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Sigarms Sauer GMBH has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Smith & Wesson Corp. is a wholly-owned subsidiary of Smith & Wesson Holding Corporation, which is a publicly held company. There are no

publicly held companies that own ten percent or more of Smith & Wesson Corp.'s stock.

Sturm Ruger & Co., Inc. is a publicly held company. There are no publicly held companies that own ten percent or more of its stock.

Taurus Holdings, Inc. is the parent company of Taurus International Manufacturing, Inc. There are no publicly held companies that own ten percent or more of Taurus Holdings, Inc.'s stock.

Tanfoglio Fratelli S.n.c. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

AcuSport Corporation has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Alamo Leather Goods, Inc. is no longer an active business and has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Bangers, LP has no parent corporations and is not a publicly held company. Bangers Enterprises, Inc. of Atlanta, Georgia is a general partner of Bangers, LP. LOR, Inc. and BHC, Inc. are limited partners of Bangers, LP.

Bill Hicks & Co. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Brazas Sporting Arms, Inc. is no longer an active business and has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Camfour, Inc. is a subsidiary of Camfour Holding, LLP. There are no publicly held companies that own ten percent or more of Camfour, Inc.'s stock.

Chattanooga Shooting Supplies, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Davidson's, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Dixie Shooters Supply, Inc. is no longer an active business and has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Ellett Brothers, LLC has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Euclid Avenue Sales Co. is no longer an active business and has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Faber Brothers, Inc. is no longer an active business and has no parent corporations and is not a publicly held company. There are no publicly held companies that own ten percent or more of it stock.

Glen Zanders Fur and Sporting Goods, Co. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Hicks, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Kiesler's Police Supply, Inc. has no parent corporations. There are no publicly held companies that own ten percent of or more of its stock.

Lew Horton Distributing Company, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Lipsey's, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

MKS Supply, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Riley's Inc. has no parent corporation and is not a publicly held company. There are no publicly held companies that own ten percent or more of it stock.

Ron Shirk's Shooters Supply, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

RSR Group, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Southern Ohio Gun, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Sports South, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Valor Corporation has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

Walter Craig, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

William Shooters Supply, Inc. has no parent corporations. There are no publicly held companies that own ten percent or more of its stock.

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BRIEF IN OPPOSITION

Respondents Beretta U.S.A. Corp., Colt's Manufacturing Co., LLC, Browning Arms Company, Glock, Inc., Forjas Tauras, S.A., Phoenix Arms, Sigarms, Inc., Sigarms Sauer GMBH, Smith & Wesson Corp., Sturm Ruger & Co., Inc., Taurus International Manufacturing, Inc. Tanfoglio Fratelli S.n.c., AcuSport Corporation, Alamo Leather Goods, Inc., Bangers, LP, Bill Hicks & Co., Brazas Sporting Arms, Inc., Camfour, Inc., Chattanooga Shooting Supplies, Inc., Davidson's, Inc., Dixie Shooters Supply, Inc., Ellett Brothers, Inc., Euclid Avenue Sales Co., Faber Brothers, Inc., Glen Zanders Fur and Sporting Goods, Co., Hicks, Inc., Keisler's Police Supply, Inc., Lew Horton Distributing Company, Inc., Lipsey's Inc., MKS Supply, Inc., Riley's Inc., Ron Shirk's Shooters Supply, Inc., RSR Group, Inc., Southern Ohio Gun, Inc., Sports South, Inc., Valor Corporation, Walter Craig, Inc., and William Shooters Supply, Inc. ("Respondents") respectfully request that the Court deny the City of New York's (the "City") petition for a writ of certiorari for three fundamental reasons:

First, contrary to the City's contention, there is no conflict between the Second Circuit and the precedent of this Court or other circuits regarding the standard for resolving Petitioners' Tenth Amendment challenge to the Protection of Lawful Commerce in Arms Act ("PLCAA" or "Act").

Second, the Second Circuit's conclusion that the PLCAA does not violate the Tenth Amendment was correct under this Court's precedent and under the authority cited by Petitioners from other Circuits.

Third, Petitioners cite no authority suggesting that the "plain statement rule" countermands the Second Circuit's holding that the City's action is barred by the PLCAA. That holding, in any event, is plainly correct.

In short, the City has presented no compelling reason for certiorari.

INTRODUCTION

Congress enacted the PLCAA to address the wave of lawsuits brought in recent years against manufacturers and sellers of firearms for harm resulting from the criminal misuse of their products by others, citing the burdens to interstate and foreign commerce imposed by such suits. *See* 15 U.S.C. §§ 7901(a)(3) - (8); §§ 7901(b)(1), (4). The Act requires courts to immediately dismiss any "qualified civil liability action" pending on the date of the PLCAA's enactment. *Id.* at § 7902(b). The City's case falls squarely within the definition of a prohibited "qualified civil liability action" under § 7903(5)(A). The City is suing defendants, all of which are out-of-state manufacturers and distributors of firearms, for injunctive relief and abatement of an alleged public nuisance resulting from the criminal and unlawful misuse of firearms by third parties in New York City.

Faced with the clear application of the Act to its case, the City's only argument was that its suit fit within one of the exceptions set forth in the Act. Through the exceptions in § 7903(5)(A)(i)-(vi), Congress set forth the grounds on which any plaintiff – private or public – can bring or maintain a lawsuit against a firearm manufacturer, distributor or retailer based on a third party's criminal acts. Some of the claims preserved in the six exceptions to a

"qualified civil liability action" are common law claims, *see, e.g.,* § 7903(5)(A)(iv) (breach of contract or warranty), and some are statute-based, *see, e.g.*, § 7903(5)(A)(i) (violation of 18 U.S.C. § 924(h) or comparable State felony law).

The City rested its entire attempt to circumvent the Act on § 7903(5)(A)(iii), which preserves from dismissal actions in which a manufacturer or seller "knowingly violated a State or Federal statute applicable to the sale or marketing of [a firearm], and the violation was a proximate cause of the harm for which relief is sought." The statute on which the City purported to rely for this exception was New York Penal Law § 240.45 (McKinney 2005) (criminal nuisance in the second degree) ("PL 240.45"), a statute of general applicability which, on its face, says nothing about "firearms" or "sales." Indeed, New York courts have explicitly rejected § 240.45 as a statute applicable to defendants' sales or marketing of firearms. *See Spitzer v. Sturm, Ruger & Co., Inc.*, No. 4502586/00, 8/17/2001 N.Y.L.J. 18, slip op. at 12 (N.Y. Sup. Ct. Aug. 10, 2001) (A-234 below), *aff'd on other grounds*, 309 A.D.2d 91, 761 N.Y.S.2d 192 (1st Dep't), *leave to appeal denied*, 769 N.Y.S.2d 200 (N.Y. 2003).

REASONS FOR DENYING THE WRIT

The Court will expend its limited resources to consider a case on the merits only where there are "compelling reasons" for doing so, such as a conflict on "an important federal question" between lower courts or between the holding of the court below and the decisions of this Court. Supreme Court Rule 10. A case is not suitable for review where the petition merely seeks error-correction with respect to an

alleged misapplication of settled law. *See id.*; *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting) ("error-correction is a disfavored basis for granting review"); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting from denial of certiorari) ("we cannot act as a court of simple error correction"). A genuine conflict in authority meriting this Court's review arises only "when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Robert L. Stern, *et al.*, *Supreme Court Practice* § 4.3, at 242 (9th ed. 2007). This case does not qualify for Supreme Court review under these standards: In finding that the City's nuisance claim against respondents was barred by the PLCAA, and in holding that the PLCAA does not run afoul of the Tenth Amendment, the Second Circuit correctly applied settled legal principles, creating neither any new principle of law nor any conflict with decisions of other courts.

I. The Second Circuit Applied Settled Tenth Amendment Standards In Its Review Of The PLCAA.

The Second Circuit held that the PLCAA does not violate the Tenth Amendment, recognizing that it "'does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.'" App. 24a (quoting *Conn. v. Physicians Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir. 2002)). Petitioners do not challenge the correctness of this conclusion.

This Court's Tenth Amendment jurisprudence is entirely consistent with the Second Circuit's

approach. That jurisprudence is established in a series of recent cases, which set out the standard the Second Circuit applied. In *New York v. United States*, 505 U.S. 144 (1992), the Court held: "We have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." 505 U.S. at 166. This principle was further explained in *Printz v. United States*, 521 U.S. 898 (1997), where the Court held that the "Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program … [because] such commands are fundamentally incompatible with our constitutional system of dual sovereignty." 521 U.S. at 935.

In *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003), the Court reconfirmed its approach to Tenth Amendment issues:

> In examining congressional enactments for infirmity under the Tenth Amendment, this Court has focused its attention on laws that commandeer the States and state officials in carrying out federal regulatory schemes.

Id. at 186. In *McConnell*, there was no "contention that Congress has overstepped its Elections Clause power," 540 U.S. at 187, just as the City here makes no argument that Congress's passage of the PLCAA was not authorized by the Commerce Clause.

In the Court's most recent Tenth Amendment opinion, plaintiffs challenged the authority of the

Office of the Controller of the Currency to regulate, to the exclusion of state authorities, the mortgage business of national banks, even where that business was conducted through the banks' state-licensed operating subsidiaries. *See Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 127 S. Ct. 1559, 1564-65 (2007). In rejecting plaintiffs' Tenth Amendment challenge, the Court held:

> As we have previously explained, "[i]f a power is delegated to Congress in the Constitution, the Tenth Amendment expressly disclaims any reservation of that power to the States." *New York v. United States,* 505 U.S. 144, 156, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992). Regulation of national bank operations is a prerogative of Congress under the Commerce and Necessary and Proper Clauses. *See Citizens Bank v. Alafabco, Inc.,* 539 U.S. 52, 58, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003) *(per curiam)*. The Tenth Amendment, therefore, is not implicated here.

Watters, 127 S. Ct. at 1573. Because the City here does not dispute that the Commerce Clause authorized Congress to pass the PLCAA, "[t]he Tenth Amendment, therefore, is not implicated." *Id.* That should end the analysis.

In an effort to avoid this result, however, the City attempts to manufacture a conflict with the decisions of other Circuits, but the fact is that no genuine conflict exists. First, in the face of multiple constitutional challenges to the PLCAA in other actions, virtually every court has found that the Act is constitutional. *See, e.g., Ileto v. Glock, Inc.*, 421 F. Supp. 2d 1274 (C.D. Cal. 2006) (rejecting due process, bill of attainder, and equal protection arguments),

app. docketed; *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 172-82 (D.C. 2008) (rejecting separation of powers, due process, and takings challenges). Indeed, Respondents are aware of only one court that has ruled that the Act is unconstitutional (on other grounds), and even that Court rejected the very Tenth Amendment argument Petitioners make here. *See City of Gary v. Smith & Wesson Corp.*, Cause No. 45D05-00005-CT-00243, slip op. (Oct. 23, 2006) (rejecting Tenth Amendment challenge because PLCAA "is not commandeering" of state action), *aff'd on other grounds,* 875 N.E.2d 422 (Ind. Ct. App. 2007), *pet. to transfer denied*.[1]

Second, Petitioners' claim that the Second Circuit's approach conflicts with the analysis of the Fourth

[1] Because the Court of Appeals in *City of Gary* concluded that the PLCAA did not bar the City's suit, it did not reach the constitutional issues addressed by the trial court. 875 N.E.2d at 434-35. Although not addressed in its Petition, the City of New York has since indicated that it intends to argue in its reply that the *City of Gary* decision is in conflict with the Second Circuit's decision regarding the application – rather than the constitutionality – of the PLCAA. Not only should that argument be rejected because it is improperly raised by the City on reply (*see* Supreme Court Rule 15(6)), but it also is erroneous. Based on its tortured reading of the convoluted allegations in the complaint there, the Indiana Court of Appeals held that "even assuming that the PLCAA requires an underlying violation of a statute directly applicable to the sale or marketing of a firearm, the City alleged such violations in their complaint." 875 N.E.2d at 432-33. While the City of New York argued for the first time on appeal that it had alleged similar violations of firearms statutes, the Second Circuit necessarily found otherwise. The Second Circuit's interpretation of the City's complaint as compared to the Indiana courts' interpretation of the City of Gary's complaint is hardly a decision on "an important federal question" that would justify certiorari. *See* Supreme Court Rule 10(a).

Circuit as expressed in *United States v. Johnson,* 114 F.3d 476 (4th Cir. 1997), the First Circuit in *United States v. Bongiorno,* 106 F.3d 1027 (1st Cir. 1997), and the Tenth Circuit in *United States v. Hampshire*, 95 F.3d 999 (10th Cir. 1996), is similarly mistaken. Each of those opinions reviewed and upheld the constitutionality of the Child Support Recovery Act of 1992 ("CSRA") in a manner entirely consistent with the standard applied by the Second Circuit here. In *Hampshire*, the Court held: "In light of our holding that congressional enactment of the CSRA does not violate the Commerce Clause, Mr. Hampshire's Tenth Amendment argument fails." 95 F.3d at 1004. Similarly, the Court in *Bongiorno* held that the Tenth Amendment "is not applicable to situations in which Congress properly exercises its authority under an enumerated constitutional power. … Inasmuch as Congress passed the CSRA pursuant to the valid exercise of such an enumerated power (the power to regulate interstate commerce), that tenet governs here." 106 F.3d at 1027. In *Johnson*, the Court rejected appellants' contention that the CSRA "infringe[d] on two traditional areas of state sovereignty: criminal law and family law," and that it inappropriately regulated "'states as states' by interfering with their *parens patriae* roles in relation to minors." 114 F.3d at 480-81.

Despite this consistent body of precedent, Petitioners argue that the Second Circuit was required to go further to determine if there was interference with state sovereignty. Petitioners rely on the "three-part test" referenced in *Johnson* and set out more fully in *Hodel v. Virginia Surface Mining & Reclam. Ass'n, Inc.*, 452 U.S. 264, 287-88 (1981). *Hodel,* in turn, relied on the Court's opinion in

National League of Cities v. Usery, 426 U.S. 833 (1976), for the requirement to examine whether a federal statute "addressed matters that are indisputably 'attribute[s] of state sovereignty.'" *Hodel*, 425 U.S. at 288 (quoting *National League of Cities*, 426 U.S. at 845). The Court in *Hodel* found that the Tenth Amendment was not implicated in that case because the Surface Mining Act regulated private parties rather than the "States as States," 452 U.S. at 288. *Hodel* has since come to stand for the proposition that the Tenth Amendment bars a statute that "commandeers the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program." *See New York*, 505 U.S. at 176 (quoting *Hodel*, 452 U.S. at 288). That is the test applied by the Second Circuit in this case.

Petitioners point to the *Johnson* court's analysis of whether the CSRA interfered with "traditional areas of state sovereignty," 114 F.3d at 480, to argue that the Second Circuit improperly failed to consider this purported additional element. The "traditional government functions" analysis in *Johnson* grew out of the test enunciated in *National League of Cities*, which was explicitly overturned in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).

In *Garcia*, the Court acknowledged that *National League of Cities* "did not explain what aspects of such [State] decisions made them such an 'undoubted attribute [of state sovereignty],' and the Court since then has remarked on the uncertain scope of the concept." *Garcia*, 469 U.S. at 548. The Court described the problems inherent in the approach

Petitioners claim the Second Circuit should have followed here:

> We doubt that courts ultimately can identify principled constitutional limitations on the scope of Congress' Commerce Clause powers over the States merely by relying on *a priori* definitions of state sovereignty. In part, this is because of the elusiveness of objective criteria for "fundamental" elements of state sovereignty, a problem we have witnessed in the search for "traditional governmental functions." There is, however, a more fundamental reason: the sovereignty of the States is limited by the Constitution itself. A variety of sovereign powers, for example, are withdrawn from the States by Article I, § 10. Section 8 of the same Article works an equally sharp contraction of state sovereignty by authorizing Congress to exercise a wide range of legislative powers and (in conjunction with the Supremacy Clause of Article VI) to displace contrary state legislation. … By providing for final review of questions of federal law in this Court, Article III curtails the sovereign power of the States' judiciaries to make authoritative determinations of law.

Garcia, 469 U.S. at 548-49. In light of the fact that the "traditional areas of state sovereignty" test is "unsound in principle and unworkable in practice," 469 U.S. at 546, the Court overturned the holding of *National League of Cities* and held:

> [W]e are convinced that the fundamental limitation that the constitutional scheme imposes on the Commerce Clause to protect the "States as States" is one of process rather than

> one of result. Any substantive restraint on the exercise of Commerce Clause powers must find its justification in the procedural nature of this basic limitation, and it must be tailored to compensate for possible failings in the national political process rather than to dictate a "sacred province of state autonomy."

Garcia, 469 U.S. at 554. Thus, to the extent Petitioners rely on an analysis of interference with "traditional governmental functions," that approach is simply outdated.

Petitioners have not and cannot show any genuine conflict between the standard applied by the Second Circuit and the decisions of this Court or any other Circuit court.

II. Even Under Petitioners' Approach, The PLCAA Would Not Violate The Tenth Amendment

As noted above, Petitioners do not challenge the Second Circuit's conclusion that the PLCAA does not involve any commandeering of State legislative processes or officials. Instead, Petitioners claim that the Court should have proceeded to engage in the three-step analysis championed by *National League of Cities* and ultimately rejected by *Garcia*. But even under that framework, Petitioners cannot point to any authority that would support a finding that the PLCAA violates the Tenth Amendment. Indeed, the PLCAA does not regulate the "States as States" at all. Rather, it establishes a federal standard for the predicate circumstances in which firearm manufacturers, distributors and retailers can be sued and potentially held liable for the third party criminal misuse of a firearm. One of those grounds is

the knowing violation of a federal or state statute applicable to the sale or marketing of a firearm. *See* 15 U.S.C. § 7903(5)(A)(iii). Other grounds are breach of contract, negligent entrustment or negligence *per se*. *id.* § 7903(5)(A)(ii), (iv). The PLCAA is hardly startling in this respect.

According to the City, the Tenth Amendment also prohibits the federal government from interfering with the structure and operation of state government, and the PLCAA violates this prohibition by dictating which branch of state government will be recognized as the authoritative expositor of the State's pertinent laws. Not only is that argument outdated, as demonstrated in the prior section, but it is without merit.

First, none of the cases cited by the City supports its novel expansion of the Tenth Amendment to Congressional enactments that neither facially nor in practice coerce the States to do anything.[2] Second, the City's contention that the PLCAA interferes with states' allocation of authority between their judicial and legislative branches by permitting statutory but not common law claims is premised on a fundamental

[2] Most of the cases cited by the City do not even involve the Tenth Amendment. *See, e.g., Alden v. Maine*, 527 U.S. 706 (1999) (state immunity from private suit under FLSA); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456 (1981) (equal protection challenge); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608 (1937) (delegation of state authority to commission raised no federal constitutional issues). The issue in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), was a state's fundamental right to establish qualifications for its own governing officials, and even then, the Court recognized that "[a]s long as it is acting within the powers granted it under the Constitution, Congress may impose its will on the States." *Id.* at 460.

misreading of the PLCAA. The Act does not favor statutory law over common law and, indeed, contains exceptions permitting specified common law claims to proceed. *See, e.g.,* 15 U.S.C. § 7903(5)(A)(iv) (breach of contract or warranty). Nor does the Act dictate which branch of state government may articulate state law. The PLCAA sets a single federal standard that governs what claims may and may not be brought against firearm manufacturers and sellers – a standard that applies equally to preempt conflicting state law claims, whether those claims are based on common law or state statute.

When Congress exercises its enumerated powers, as it did under the Commerce Clause in passing the PLCAA, its enactments have preemptive force under the Supremacy Clause, U.S. CONST. art. VI. Congress's authority to legislate where interstate commerce is affected clearly includes the authority to preempt state tort law. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571 ("[O]ne State's power to impose burdens on the inter-state 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 . . . ."). Examples of Congress preempting state tort causes of action are commonplace. *See*, *e.g.*, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 516 (1992) (express preemption of state common-law failure-to-warn claims by Federal Cigarette Labeling Act) (plurality); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884-86 (2000) (conflict preemption of state statutory and common-law negligent design claims by federal minimum safety standards); *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 673-76 (1993) (preemption of state negligence standard by federal regulations of

maximum speed on railways). The power to preempt causes of action and to establish the parameters of any exceptions to that preemption – as Congress has done in the PLCAA – is a proper exercise of the constitutional authority delegated to it.

III. The Second Circuit Correctly Determined That The City's Action Is Barred By The PLCAA And The "Plain Statement Rule" Does Not Require A Different Result

Petitioners' final argument, premised on the "plain statement rule," is that no federal court should "read federal statutes to intrude upon state governance unless they are 'absolutely certain that Congress intended such an exercise.'" Pet. at 21 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 464 (1991)). Petitioners argue that the Second Circuit's decision interferes with "States' arrangements for conducting their own governments," *id.* (quoting *Nixon v. Mo. Mun. League*, 541 U.S. 125, 140 (2004)), and claim that such interference results here because the Second Circuit decision would preclude state courts from determining if their statutes are "applicable to the sale or marketing of [a firearm]."

In this action, the Second Circuit correctly determined that PL 240.25, as a statute of general applicability, does not fall within the PLCAA exception found at § 7903(5)(A)(iii). To the extent the Second Circuit's decision creates the possibility that, in the future, a statute of general applicability could be construed by state courts as applying to firearms manufacturers and sellers and, as a result of that state court interpretation, come within the PLCAA exception, this case is not an appropriate vehicle to address that hypothetical problem. Review here

would serve only to address perceived error in the Second Circuit's decision, contrary to this Court's rules. *See* Supreme Court Rule 10.

Moreover, while the Second Circuit reached the correct result in finding that PL 240.25 does not come within the exception in § 7903(5)(A)(iii), this is true because the PLCAA's exception would not encompass such a statute of general applicability even if there had been a prior state court ruling applying the statute to a firearm manufacturer or seller. The meaning of statutory language, plain or not, depends on context and, in determining a provision's meaning, the court must look to the language of the provision itself, the context in which it appears, and the broader context and purpose of the statute as a whole.

Reading the phrase "statute applicable to the sale or marketing of [a firearm]" in the context of the remaining language of § 7903(5)(A)(iii), it is clear that the phrase is limited to statutes regulating the manner in which a firearm is sold or marketed – *i.e.*, statutes specifying when, where, how, and to whom a firearm may be sold or marketed. Indeed, in drafting § 7903(5)(A)(iii), Congress did not stop with the phrase "violated a State or Federal statute applicable to the sale or marketing of [a firearm]," but went on to add subparts (I) and (II), which explain what is meant by the preceding phrase. Each of the statutory violations set forth in § 7903(5)(A)(iii)(I) and (II) involves the violation of a statute specifically governing the manner in which a specific firearm is sold or marketed. PL 240.45 bears no resemblance to those regulatory statutes. Instead, it is a statute of general applicability which could be, and has been,

applied to a wide range of conduct completely unrelated to firearms.

The conclusion that the City's claim under PL 240.45 does not fit within the exception of § 7903(5)(A)(iii) finds additional support in the findings and purpose of the Act as a whole. The findings address the lawsuits brought in recent years against manufacturers and sellers of firearms for harm resulting from the criminal misuse of their products when those products operate as designed and intended, *see* § 7901(a)(3) – (8), and the Act's first purpose is to prohibit such suits, § 7901(b)(1). The lawsuits to which Congress was referring include more than twenty lawsuits brought by various municipalities across the country, as well as by the only state to sue (New York), all of which included public nuisance claims legally indistinguishable from the one asserted by the City here. It would be absurd to interpret the Act as permitting to proceed, through an exception, the very lawsuits that prompted the passage of the PLCAA in the first place.

CONCLUSION

The petition should be denied.

FEBRUARY 4, 2009

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