IN THE SUPREME COURT OF MISSOURI

No. SC95013

JANET S. DELANA, INDIVIDUALLY, AND
AS WIFE OF DECEDENT TEX C. DELANA,
Appellant,

v.

CED SALES, INC. D/B/A ODESSA GUN & PAWN,
CHARLES DOLESHAL, AND DERRICK DADY,
Respondents,

UNITED STATES OF AMERICA,
Intervenor.

Appeal from the Circuit Court of Lafayette County, Missouri
The Honorable Dennis A. Rolf, Circuit Judge

BRIEF OF THE UNITED STATES AS INTERVENOR

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General
TAMMY DICKINSON
United States Attorney
CHARLES M. THOMAS
Mo. Bar No. 28522
Assistant United States Attorney

MARK B. STERN
MICHAEL S. RAAB
TARA S. MORRISSEY
(202) 353-9018
Attorneys, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Cases: **Page(s)**

Statutes:

STATEMENT OF INTEREST

The United States respectfully submits this *amicus curiae* brief for the limited purpose of defending the constitutionality of the Protection of Lawful Commerce in Arms Act (PLCAA or Act), Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-7903).

In this case, plaintiff challenges the constitutionality of the PLCAA, which bars certain state-law actions against manufacturers and sellers of firearms and ammunition for harm caused by third parties. 15 U.S.C. §§ 7902-7903. Congress enacted this statute to address the "unreasonable burden" that such actions impose "on interstate and foreign commerce of the United States." *Id.* § 7901(a)(6). The United States has a strong interest in defending the constitutionality of this and other federal statutes.

STATEMENT

A. Statutory Background

The Protection of Lawful Commerce in Arms Act limits the extent to which firearms manufacturers and distributors may be held liable for the actions of third parties. In enacting the statute, Congress found that holding 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).

Congress thus legislated a limited bar to certain types of tort actions. The Act provides that "[a] qualified civil liability action" against manufacturers or sellers of firearms "may not be brought in any Federal or State court." 15 U.S.C. §§ 7902, 7903(5)(A). A "qualified civil liability action" is defined 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 . . . 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). A "qualified product" includes firearms and ammunition that have been shipped or transported in interstate commerce. *Id.* § 7903(4).

This narrowly crafted limitation is not a general bar of civil actions against firearms manufacturers and sellers. The statute includes a safe harbor that allows several types of actions to go forward, including suits for negligent entrustment and negligence per se; certain actions alleging a design or manufacture defect; suits for breach of contract or warranty; and actions in which a manufacturer or seller knowingly violated a state or federal statute applicable to the sale or marketing of a product. 15 U.S.C. § 7903(5)(A).

B. Statement of Facts[1]

On June 27, 2012, Colby Weathers fatally shot her father, Tex Delana. L.F. 10-11. Weathers, who has a history of mental illness, substance abuse, and suicidal tendencies, purchased the gun from defendant CED Sales, Inc. d/b/a Odessa Gun & Pawn (Odessa), a retail store that sells firearms. L.F. 10-13. Two days before Weathers purchased the gun, her mother called Odessa to warn the store that Weathers was mentally unstable and that they should not sell her a gun. L.F. 12. Despite this warning, Odessa sold Weathers the gun that she used to shoot and kill her father. L.F. 11-12.

Janet Delana, the mother of Weathers and widow of Tex Delana, filed a petition for damages against Odessa and individual defendants associated with Odessa. L.F. 10. The petition asserted claims of negligence, negligent entrustment, and negligence per se. L.F. 22-27. Defendants moved for summary judgment, contending that the PLCAA barred plaintiff's state-law claims. L.F. 44-45. Defendants also argued that the PLCAA's exceptions for negligent entrustment and negligence per se were inapplicable because Missouri law does

[1] We take no position on plaintiff's statement of facts. For the convenience of the Court, we provide a brief recitation of facts, accepting as true the allegations in plaintiff's complaint.

not recognize negligent entrustment claims in this context and because the sale to Weathers violated no federal or state law. L.F. 44-46.

In opposing defendants' motion for summary judgment, plaintiff argued that the PLCAA does not bar her claims and that Missouri recognizes liability for negligent entrustment in this context. L.F. 72-93. In the alternative, plaintiff argued that if the court were to conclude that the PLCAA applies, it should hold that the statute violates numerous provisions of the U.S. Constitution, including the Tenth Amendment and the Due Process Clause of the Fifth Amendment. L.F. 94-100. The United States intervened for the limited purpose of defending the constitutionality of the PLCAA. L.F. 270-74.

The trial court granted summary judgment on the negligence and negligent entrustment claims. At the hearing on defendants' motion for summary judgment, the court concluded that the PLCAA barred plaintiff's negligence claim and that Missouri does not recognize negligent entrustment liability in this context. Pl. App. 18-20. The court also determined that the PLCAA is constitutional. Pl. App. 19-21. Plaintiff voluntarily dismissed her negligence per se claim, L.F. 294-95, and the trial court entered final judgment, Pl. App. 1.

On appeal, plaintiff principally argues that Missouri law permits her negligent entrustment claims, that the PLCAA does not bar her claims, and that the PLCAA is unconstitutional under the Tenth Amendment and the Due Process

Clause of the Fifth Amendment. The United States submits this brief for the limited purpose of addressing plaintiff's constitutional arguments and takes no position on the remaining issues.

POINTS RELIED ON

I. Response To Appellant's Point III: The PLCAA Is Consistent With The Tenth Amendment.

New York v. United States, 505 U.S. 144 (1992)

Estate of Kim v. Coxe, 295 P.3d 380 (Alaska 2013)

Adames v. Sheahan, 909 N.E.2d 742 (Ill. 2009)

City of New York v. Beretta U.S.A. Corp., 524 F.3d 384 (2d Cir. 2008)

II. Response to Appellant's Point IV: The PLCAA Is Consistent With The Fifth Amendment.

Duke Power Co. v. Carolina Envtl. Study Grp., Inc., 438 U.S. 59 (1978)

Estate of Kim v. Coxe, 295 P.3d 380 (Alaska 2013)

Ileto v. Glock, Inc., 565 F.3d 1126 (9th Cir. 2009)

District of Columbia v. Beretta U.S.A. Corp., 940 A.2d 163 (D.C. 2008)

III. Response to Appellant's Point II(C): The Constitutional Avoidance Canon Does Not Apply.

Clark v. Martinez, 543 U.S. 371, 381 (2005)

Rust v. Sullivan, 500 U.S. 173 (1991)

SUMMARY OF ARGUMENT

The Protection of Lawful Commerce in Arms Act bars certain tort actions that threaten to interfere with interstate and foreign commerce in firearms. The trial court correctly upheld the constitutionality of the PLCAA, a decision that accords with holdings of the Supreme Court of Alaska, the Supreme Court of Illinois, the highest court of the District of Columbia, and two federal appellate courts. *See, e.g.*, *Estate of Kim v. Coxe*, 295 P.3d 380 (Alaska 2013); *Adames v. Sheahan*, 909 N.E.2d 742 (Ill. 2009); *District of Columbia v. Beretta U.S.A.*, 940 A.2d 163 (D.C. 2008); *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009); *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008).[2]

[2] Only one court, a state trial court in Indiana, has concluded that the PLCAA is unconstitutional. *City of Gary v. Smith & Wesson Corp.*, No. 45D05-005-CT-00243 (Ind. Super. Ct. Oct. 23, 2006) (reproduced in Pl. App. 89-95). The trial court held that the Act was unconstitutional only insofar as it applied to a case that was pending when the statute was enacted, *id.* at 5-6—a situation not present here. On appeal, the court did not reach the constitutional question, and instead affirmed on alternative statutory grounds. *Smith & Wesson Corp. v. City of Gary*, 875 N.E.2d 422, 424 (Ind. Ct. App. 2007) ("Because we conclude that the PLCAA does not bar the City's claims, we need not address the constitutional issues.").

The trial court correctly rejected plaintiff's arguments that the PLCAA violates the Tenth Amendment and the Due Process Clause of the Fifth Amendment. Where, as here, Congress acts within its Commerce Clause power, it may preempt state causes of action without raising Tenth Amendment concerns. The PLCAA does not commandeer state governments by forcing them to enact or implement a regulatory scheme; rather, it is a classic example of Congress's "authority to regulate matters directly and to pre-empt contrary state regulation." *New York v. United States*, 505 U.S. 144, 178 (1992).

Plaintiff's due-process argument also lacks merit. Plaintiff has no protected property interest in her unlitigated common-law claims, which had not even accrued when the PLCAA was enacted in 2005. In any event, Congress is free to limit—or even to eliminate—state-law causes of action. The PLCAA's narrow scope allows plaintiffs ample alternative means of redressing their injuries and was a rational response to the problems identified by Congress.

The United States takes no position on plaintiff's statutory arguments regarding the scope and applicability of the PLCAA to the particular state-law claims in this case. We respectfully note, however, that it would be appropriate for this Court to address those arguments first, before deciding whether it is necessary to reach plaintiff's constitutional claims.

ARGUMENT

I. Response To Appellant's Point III: The PLCAA Is Consistent With The Tenth Amendment.

Plaintiff does not argue that the PLCAA exceeds Congress's authority under the Commerce Clause, but nevertheless asserts that the statute violates the Tenth Amendment. The trial court correctly rejected plaintiff's Tenth Amendment challenge. Pl. App. 20-21. Because the PLCAA is a valid exercise of Congress's Commerce Clause power and does not commandeer the States, it is consistent with the Tenth Amendment.

A. The Commerce Clause grants Congress "the power to regulate activities that substantially affect interstate commerce." *Gonzales v. Raich*, 545 U.S. 1, 17 (2005). This power encompasses the authority to preempt state law that imposes a burden on interstate commerce. *See Dennis v. Higgins*, 498 U.S. 439, 447 (1991) ("There is no doubt that the Commerce Clause is a power-allocating provision, giving Congress pre-emptive authority over the regulation of interstate commerce."); *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 290 (1981) ("A wealth of precedent attests to congressional authority to displace or pre-empt state laws regulating private activity . . . when these laws conflict with federal law. Moreover, it is clear that the Commerce Clause empowers Congress to prohibit all . . . state regulation of such activities").

The PLCAA is a valid exercise of the Commerce Clause power. As the Second Circuit has explained, "there can be no question of the interstate character" of the firearms industry, and "Congress rationally perceived" that litigation against firearms manufacturers and sellers for third-party harm would have "a substantial effect on the industry." *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008) (holding that the PLCAA is a valid exercise of Congress's Commerce Clause power); *see also Ileto v. Glock, Inc.*, 565 F.3d 1126, 1140-41 (9th Cir. 2009) ("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."). Congress expressly found 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). The PLCAA manifests Congress's clear intention to preempt such lawsuits. *Id.* § 7901(a)(3), (6); *id.* § 7902(b) ("A qualified civil liability action may not be brought in any Federal or State court."). Therefore, as several courts have held, the PLCAA is a valid exercise of the Commerce Clause power. *See Estate of Kim v. Coxe*, 295 P.3d 380, 389 (Alaska 2013); ("[T]he PLCAA . . . is within Congress's

enumerated powers"); *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009) ("[T]he PLCAA is a valid exercise of the federal power to regulate interstate commerce."); *Beretta*, 524 F.3d at 393-95 (holding that the PLCAA is valid under the Commerce Clause).

B. The PLCAA also is consistent with the principles of state sovereignty confirmed by the Tenth Amendment. *See Kim*, 295 P.3d at 388-89 (rejecting Tenth Amendment challenge); *Adames*, 909 N.E.2d at 765 (same); *Beretta*, 524 F.3d at 396-97 (same).

As the Supreme Court of the United States has explained, in the context of addressing a Tenth Amendment challenge, "[t]he Constitution enables the Federal Government to pre-empt state regulation contrary to federal interests." *New York v. United States*, 505 U.S. 144, 188 (1992). The Tenth Amendment's "anti-commandeering" principle does not call into doubt Congress's authority to preempt state law. Instead, as the Supreme Court concluded in *New York*, 505 U.S. at 175-76, and *Printz v. United States*, 521 U.S. 898, 933 (1997), it prohibits the federal government from directing state legislatures and executive branch officials to enact or implement a federal regulatory scheme.

In *New York*, the Court invalidated a federal law requiring state legislatures to enact a regulatory scheme to address problems related to low-level radioactive waste or else take title to the radioactive material. 505 U.S. at 174-75. The Court

concluded that both choices were impermissible; the former amounted to "a simple command to state governments to implement legislation enacted by Congress," and the latter "would 'commandeer' state governments into the service of federal regulatory purposes." *Id.* at 175-76. The Court drew a sharp distinction between federal laws that commandeer state governments and federal laws that merely preempt state law: It explained that "the Constitution simply does not give Congress the authority to require the States to regulate," but "instead gives Congress the authority to regulate matters directly and *to pre-empt contrary state regulation*." *Id.* at 178 (emphasis added); *see also id.* at 167 ("[W]here Congress has the authority to regulate private activity under the Commerce Clause, we have recognized Congress' power to offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation.")

Applying these principles, the Court in *Printz* held unconstitutional a federal law "commanding state and local law enforcement officers to conduct background checks on prospective handgun purchasers and to perform certain related tasks." 521 U.S. at 902. As the Court explained, Congress may not "command the States' officers . . . to administer or enforce a federal regulatory program." *Id.* at 935. Like *New York*, *Printz* involved federal commandeering of state governments, not federal preemption of state law.

Unlike the statutes at issue in *New York* and *Printz*, the PLCAA does not require States to enact or implement a federal regulatory scheme. Rather, it is a classic example of a statute that constitutionally preempts state law. *See New York*, 505 U.S. at 167, 178. As the Supreme Court of Alaska explained, "[t]he PLCAA does not *compel* [the state] legislature to enact any law, nor does it commandeer any branch of [state] government." *Kim*, 295 P.3d at 389. The Supreme Court of Illinois and the Second Circuit reached the same conclusion. *See Adames*, 909 N.E.2d at 765 (holding that the PLCAA "does not impermissibly commandeer the states or their officials in violation of the [T]enth [A]mendment"); *Beretta*, 524 F.3d at 397 ("The PLCAA does not commandeer any branch of state government because it imposes no affirmative duty of any kind on any of them.") (internal quotation marks omitted). Because the PLCAA does not commandeer the States, it is entirely consistent with the Tenth Amendment and principles of state sovereignty.

C. Resisting this conclusion, plaintiff advances the same argument that the Supreme Court of Alaska rejected in *Kim*. *See* 295 P.3d at 388-89. Plaintiff argues that the PLCAA "infring[es] on Missouri's sovereign right to allocate its lawmaking function among its governmental branches" because it preempts common law actions without also preempting actions predicated on state statutory law. Pl. Br. 46. The result, plaintiff claims, is that "the federal government has

impermissibly required Missouri . . . to employ its legislature in order to impose civil liability on gun companies in certain cases," while "barr[ing] Missouri from employing its judiciary in identical cases." *Id.*

Plaintiff is mistaken. The PLCAA does not dictate how a State must allocate its lawmaking authority. The statute merely preempts certain common-law claims; it does not mandate that a State "employ its legislature" to enact any laws. Pl. Br. 46. As the Supreme Court of Alaska explained, "the PLCAA *allows* [the state] legislature to create liability for harms proximately caused by knowing violations of statutes regulating firearm sales and marketing." *Kim*, 295 P.3d at 389. This freedom to regulate is dramatically different from a federal mandate to regulate, which was at issue in *New York*. Under the PLCAA, a State is free to regulate the industry through any branch of government, or to not regulate at all. The PLCAA may treat certain choices differently than others, but whether to regulate and what standards to impose are decisions left to the State.

Consistent with the Constitution, Congress has enacted many federal statutes that preempt *both* common law and statutory law. *See, e.g., Northwest, Inc. v. Ginsberg*, 134 S. Ct. 1422, 1429 (2014) (holding that federal statute preempting state "laws, regulations, or other provisions" also applies to state common-law rules) (alterations omitted). That Congress has taken a less restrictive approach in the PLCAA, by preempting only certain common-law claims, does not raise

constitutional concerns. It would be a strange result, indeed, if Congress were required to take an all-or-nothing approach to preemption, which could result in displacing even more state laws.

To the extent that plaintiff argues that Congress impermissibly "prohibited" the state judiciary "from applying traditional tort principles" in certain circumstances, Pl. Br. 48, plaintiff merely complains about the natural consequence of federal preemption under the Supremacy Clause. *See New York*, 505 U.S. at 178 ("Federal statutes enforceable in state courts do, in a sense, direct state judges to enforce them, but this sort of federal 'direction' of state judges is mandated by the text of the Supremacy Clause."). Federal preemption of state law does not "commandeer" the judiciary. *Kim*, 295 P.3d at 389.

Although plaintiff argues that the anti-commandeering argument rejected in *Kim*, *Adames*, and *Beretta*, provides only "one example" of a Tenth Amendment limitation, Pl. Br. 51 (emphasis omitted), she suggests no other basis for a Tenth Amendment challenge. Plaintiff argues, for example, that Congress has "required Missouri . . . to employ its legislature," *id.* at 46, and "dictat[ed] to Missouri how it must utilize and balance its branches of government," *id.* at 47; *see also id.* at 48 ("Congress . . . has dictated to Missouri that it must use its legislature . . . ."). This is the same argument that the Supreme Court of Alaska rejected in *Kim*, and it fails for the reasons discussed above.

Contrary to plaintiff's suggestion (Pl. Br. 50, 52), the decision in *Bond v. United States*, 134 S. Ct. 2077 (2014), is not relevant to plaintiff's Tenth Amendment challenge. *Bond* did not involve federal preemption of state law, and the Court decided the case on purely statutory grounds, holding that a federal criminal statute, which was designed to implement an international convention to prohibit chemical weapons, did not extend to local criminal conduct. *Id.* at 2083, 2087, 2093-94. Justice Scalia's concurring opinion, relied on by plaintiff, argued only that the federal statute did not fall within Congress's enumerated powers. *Id.* at 2098-2102 (Scalia, J., concurring in the judgment). Here, by contrast, plaintiff does not argue that the PLCAA exceeds Congress's power under the Commerce Clause. This Court should affirm the district court's ruling that the PLCAA is constitutional.

II. Response to Appellant's Point IV: The PLCAA Is Consistent With The Fifth Amendment.

Plaintiff contends (Pl. Br. 54-58) that the PLCAA violates the Due Process Clause of the Fifth Amendment because it deprives her of a property right in her state-law claims without providing a substitute remedy. Several courts have rejected this argument, *see Kim*, 295 P.3d at 390-91; *Ileto*, 565 F.3d at 1140-42; *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 175-78 (D.C. 2008), as the district court correctly did here. Pl. App. 20-21.

As an initial matter, plaintiff has no protected property interest in her unlitigated common-law claims, which had not even accrued when the PLCAA was enacted in 2005. *See Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 88 n.32 (1978) ("Our cases have clearly established that a person has no property, no vested interest, in any rule of the common law.") (internal quotation marks omitted). "Indeed, statutes limiting liability are relatively commonplace and have consistently been enforced by the courts." *Id.* Accordingly, courts addressing challenges to the PLCAA have declined to find a vested property interest in plaintiffs' state-law claims. *See Kim*, 295 P.3d at 391 ("A person has no property, no vested interest, in any rule of the common law.") (quoting *Duke Power*, 438 U.S. at 88 n.32) (alteration omitted); *Ileto*, 565 F.3d at 1141 (holding that plaintiffs had no "vested property right in their accrued state-law causes of action"). The absence of a property interest is unmistakably clear in this case because plaintiff's cause of action could not have accrued until 2012, seven years after the PLCAA was enacted. Plaintiff can have no property interest in a claim that never existed. This case bears no resemblance to *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), cited by plaintiff, where the State failed to follow proper procedural rules with respect to a pending claim. *Id.* at 426, 432-33.

Even assuming that plaintiff's potential common-law claims are a property interest protected by the Due Process Clause, Congress is free to eliminate that

interest through legislation. Were it otherwise, any federal statute preempting state law would raise due-process concerns. As the Supreme Court has explained, the legislature can "create substantive defenses or immunities for use in adjudication" or "eliminate its statutorily created causes of action altogether." *Logan*, 455 U.S. at 432; *see also Martinez v. California*, 444 U.S. 277, 280-83 (1980) (rejecting due-process challenge to state statute that categorically immunized the State and state officers from tort liability for injuries resulting from parole determinations). In general, "the legislative determination provides all the process that is due." *Logan*, 455 U.S. at 433.

In any event, the PLCAA does not eliminate all means of redress for a plaintiff's injury. *See Kim*, 295 P.3d at 391 ("[T]he PLCAA only limited, not eliminated, common law remedies."); *Ileto*, 565 F.3d at 1143 (explaining that the Act "does not completely abolish Plaintiffs' ability to seek redress"); *Beretta*, 940 A.2d at 177 n.8 ("Congress did not deprive injured persons of all potential remedies against manufacturers or sellers of firearms that discharge causing them injuries . . . ."). A plaintiff may sue the individual who committed the shooting, and she can pursue several types of actions against manufacturers and sellers, as provided by the statutory safe harbor. 15 U.S.C. § 7903(5)(A); *see also Ileto*, 565 F.3d at 1143 (noting that "[t]he PLCAA . . . carves out several significant exceptions"). Nothing more is required.

Acknowledging these exceptions, plaintiff complains that the PLCAA "raise[s] an irrational barrier to [plaintiff's] potential remedy." Pl. Br. 55. Plaintiff's "irrational barrier" theory is based on this Court's decision in *Kilmer v. Mun*, 17 S.W.3d 545 (Mo. banc 2000), which addressed the Missouri Constitution's guarantee of open courts, not the Due Process Clause of the Fifth Amendment. *Id.* at 547-48. In any event, the PLCAA easily satisfies the deferential rational-basis standard applicable to economic legislation under the federal Due Process Clause. *See Duke Power*, 438 U.S. at 83-84 (applying rational-basis review to economic legislation that limits industry liability). Congress reasonably determined that lawsuits against manufacturers and sellers of firearms for third-party harm "constitute[] an unreasonable burden on interstate . . . commerce." 15 U.S.C. § 7901(a)(6). Accordingly, Congress made the rational decision to shield firearms manufacturers and sellers from certain kinds of tort liability, and to do so in a way that has a limited effect on state law. *See Ileto*, 565 F.3d at 1140 ("There is nothing irrational or arbitrary about Congress' choice here.").

III. Response To Appellant's Point II(C): The Constitutional Avoidance Canon Does Not Apply.

The United States takes no position on plaintiff's statutory arguments (Pl. Br. 28-43) regarding the scope and applicability of the PLCAA to the particular

state-law claims in this case. In accordance with precedents of the U.S. Supreme Court and the Supreme Court of Missouri, this Court should first address these arguments before reaching the constitutional claims. *See Bond*, 134 S. Ct. at 2087 ("[N]ormally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case."); *Winfrey v. State*, 242 S.W.3d 723, 724 n.2 (Mo. banc 2008) ("A court will avoid the decision of a constitutional question if the case can be fully determined without reaching it.") (quoting *State ex rel. Union Elec. Co. v. Pub. Serv. Comm'n*, 687 S.W.2d 162, 165 (Mo. banc 1985); *see also* Pl. Br. 46 n.11 (recognizing this principle). Therefore, if plaintiff prevails on her statutory arguments, this Court need not address plaintiff's constitutional arguments.

We note that in interpreting the PLCAA, there is no need to construe the statute to avoid constitutional concerns. Under the canon of constitutional avoidance, "[a] statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Rust v. Sullivan*, 500 U.S. 173, 191 (1991). That canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises *serious* constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). The canon therefore only applies when a plaintiff makes a

serious constitutional challenge and the narrowing construction is not at odds with the evident scope of the statute and congressional intent. As discussed above, the PLCAA raises no constitutional concerns, much less the sort of "serious constitutional doubts" required to invoke the canon of constitutional avoidance. *Id.* Therefore, the canon is inapplicable here.

CONCLUSION

The circuit court's holding that the PLCAA is constitutional should be affirmed.

Respectfully submitted,

BENJAMIN C. MIZER
Principal Deputy Assistant Attorney General

TAMMY DICKINSON
United States Attorney

s/ Charles M. Thomas_____
CHARLES M. THOMAS
Mo. Bar No. 28522
Assistant United States Attorney
Charles Evans Whittaker Courthouse
400 East Ninth Street, Room 5510
Kansas City, MO 64106
Telephone: (816) 426-3122
Facsimile: (816) 426-3165
Email: Charles.Thomas@usdoj.gov

MARK B. STERN
MICHAEL S. RAAB
TARA S. MORRISSEY
(202) 353-9018
Attorneys, Appellate Staff
Civil Division, Room 7261
U.S. Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530

OCTOBER 2015

CERTIFICATE OF COMPLIANCE

I certify that the foregoing brief contains the information required by Supreme Court Rule 55.03; complies with the limitations contained in Rule 84.06(b); and contains 4,764 words. This brief was prepared using Times New Roman 14-point font. The electronic version of this brief has been scanned and is free of viruses.

s/ Charles M. Thomas
Charles M. Thomas
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that on October 16, 2015, I electronically filed the foregoing brief with the Clerk of the Court of the Missouri Supreme Court by using the Missouri eFiling system. I certify that all parties in the case are registered eFiling users and that service will be accomplished by the Missouri eFiling system.

s/ Charles M. Thomas
Charles M. Thomas
Assistant United States Attorney