No. 08-530

In the Supreme Court of the United States

CITY OF NEW YORK, NEW YORK, ET AL., PETITIONERS

v.

BERETTA U.S.A. CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7903(5)(A)(iii), violates the Tenth Amendment.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-50a) is reported at 524 F.3d 384. The opinion of the district court (Pet. App. 51a-188a) is reported at 401 F. Supp. 2d 244.

JURISDICTION

The judgment of the court of appeals was entered on April 30, 2008. A petition for rehearing was denied on August 20, 2008 (Pet. App. 189a-191a). The petition for a writ of certiorari was filed on October 20, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In June 2000, petitioners, which are the City of New York and various local officials and entities, filed a complaint against the major manufacturers and distributors of handguns in the United States. Petitioners sought injunctive relief and abatement of the alleged public nuisance caused by respondents' distribution and marketing practices. The action was stayed after the September 11, 2001 attacks on the World Trade Center, and then pending the outcome of a state court proceeding by the State of New York against many of the same manufacturers and distributors. Pet. App. 4a-5a; see *Spitzer* v. *Sturm, Ruger & Co.*, 761 N.Y.S. 2d 192 (App. Div.), leave to appeal denied, 801 N.E.2d 421 (N.Y. 2003) (affirming dismissal of state's common-law public nuisance action). After the stay was lifted, petitioners filed an amended complaint in January 2004 against respondents, which are 14 manufacturers and 27 distributors of firearms. Pet. App. 5a.

2. On October 26, 2005, the Protection of Lawful Commerce in Arms Act (PLCAA), 15 U.S.C. 7901 *et seq.*, was enacted into law. Congress enacted the PLCAA after finding that suits against firearm manufacturers and distributors for the unlawful acts of third parties threatened to place "an unreasonable burden on interstate and foreign commerce of the United States." 15 U.S.C. 7901(a)(6). The Act provides that any "qualified civil liability action that is pending" on the date of its enactment "shall be immediately dismissed by the court in which the action was brought or is currently pending." 15 U.S.C. 7902(b). The Act defines a "qualified civil liability action" as "a civil action * * * brought by any person against a manufacturer or seller of a [firearm distributed in interstate or foreign commerce]

* * * for damages, punitive damages, injunctive or declaratory relief, abatement, * * * or other relief, resulting from the criminal or unlawful misuse of [such a firearm] by the person or a third party." 15 U.S.C. 7903(5)(A).

Respondents immediately moved to dismiss petitioners' complaint pursuant to the PLCAA. Petitioners argued that their action fell within the Act's so-called "predicate exception," Pet. App. 6a, because it alleged that a "manufacturer or seller of [firearms transported in interstate or foreign commerce] knowingly violated a State or Federal statute applicable to the sale or marketing of [such firearms], and the violation was a proximate cause of the harm for which relief is sought." 15 U.S.C. 7903(5)(A)(iii). In the alternative, petitioners challenged the Act's constitutionality on several grounds. The United States therefore intervened to defend the Act's constitutionality, without taking any position on whether the Act applies to the present action.

3. On December 2, 2005, the district court denied respondents' motion to dismiss. Pet. App. 51a-188a. The court held that petitioners' action does fall within the PLCAA's predicate exception, because it alleges that respondents knowingly violated New York Penal Law § 240.45 (McKinney 2008), the state's criminal nuisance statute. Pet. App. 103a-106a. The court also found that, if the PLCAA were to apply, it would be constitutional. *Id.* at 106a-169a. The court then certified to the court of appeals, pursuant to 28 U.S.C. 1292(b), the question of whether the PLCAA bars the present action. Respondents appealed the denial of their motion to dismiss, and petitioners cross-appealed the denial of their constitutional challenges.

4. On April 30, 2008, a divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 1a-50a. The panel upheld the PLCAA's constitutionality. *Id.* at 12a-26a. It further concluded that the PLCAA bars the present action, because New York's criminal nuisance statute is not "applicable to the sale or marketing of [firearms]" within the meaning of 15 U.S.C. 7903(5)(A)(iii). Pet. App. 26a-41a. Judge Katzmann dissented and would have certified to the New York Court of Appeals the question of the applicability of New York's criminal nuisance statute. *Id.* at 42a-50a.

ARGUMENT

The decision of the court of appeals upholding the constitutionality of the PLCAA is correct and does not conflict with any decision of this Court or of any court of appeals.[1] Further review is therefore not warranted.

1. The court of appeals held that the PLCAA does not violate the Tenth Amendment because it does not "commandeer the states' executive officials * * * or legislative processes." Pet. App. 23a (quoting *Connecticut* v. *Physician Health Servs. of Conn., Inc.*, 287 F.3d 110, 122 (2d Cir.), cert. denied, 537 U.S. 878 (2002)). Petitioners do not argue otherwise. As petitioners effectively concede, the PLCAA is permissible under this Court's decisions in *New York* v. *United States*, 505 U.S. 144 (1992), and *Printz* v. *United States*, 521 U.S. 898 (1997), because it does not impose any affirmative duty on, let alone commandeer, state and local governments. Pet. App. 22a-24a.

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[1] Before this Court, as before the lower courts, the United States takes no position on whether the PLCAA applies to bar the present action. See Pet. 19-22.

2. Petitioners argue, however, that the Tenth Amendment requires a "deeper inquiry into a federal statute's impact on key elements of state sovereignty." Pet. 13. Specifically, they contend that the court of appeals should have evaluated whether the PLCAA "regulate[s] the 'States as States,'" "concern[s] attributes of state sovereignty," and "[is] of such a nature that compliance with it would impair a state's ability 'to structure integral operations in areas of traditional governmental functions.'" Pet. 12 (quoting *United States* v. *Bongiorno*, 106 F.3d 1027, 1033 (1st Cir. 1997), and *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 287-288 (1981)).

That three-part test, of course, originated with this Court's decision in *National League of Cities* v. *Usery*, 426 U.S. 833, 845, 852-854 (1976); was applied by this Court in cases like *Hodel*, 452 U.S. at 287-288; and was expressly discarded by this Court in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 546-547 (1985). See 1 Ronald D. Rotunda & John E. Nowak, *Treatise on Constitutional Law* § 4.10, at 674-687 (4th ed. 2007). In *Garcia*, this Court concluded that inquiring into whether a federal statute encroaches upon "integral" or "traditional" state governmental functions is "unsound in principle and unworkable in practice." 469 U.S. at 546-547. Petitioners thus attempt to resurrect, *sub silentio*, an approach to the Tenth Amendment that this Court rejected nearly a quarter-century ago.

Petitioners point (Pet. 12) to two decisions involving challenges under the Tenth Amendment to the Child Support Recovery Act of 1992 (CSRA), 18 U.S.C. 228. See *Bongiorno*, 106 F.3d at 1033-1034; *United States* v. *Hampshire*, 95 F.3d 999, 1004 (10th Cir. 1996), cert. denied, 519 U.S. 1084 (1997). Although those decisions

recited the three-part test above from *Hodel*, which was in turn drawn from *National League of Cities*, those decisions *rejected* the Tenth Amendment challenges, relying in substantial part on the ground that the CSRA fell within Congress's enumerated powers under the Commerce Clause. Petitioners in this Court do not challenge Congress's power under the Commerce Clause to enact the PLCAA. Moreover, those two appellate decisions pre-date *Printz, supra*, and *Reno* v. *Condon*, 528 U.S. 141 (2000), which clarified this Court's Tenth Amendment jurisprudence. Petitioners do not point to any decisions since *Printz* and *Condon* that take their approach to the Tenth Amendment, let alone that declare the PLCAA unconstitutional under the Tenth Amendment.

3. Even assuming petitioners' approach to the Tenth Amendment were viable, their claim of unconstitutionality is insubstantial. Petitioners contend (Pet. 15-19) that the PLCAA violates the Tenth Amendment because it preempts duties imposed by state judiciaries but not by state legislatures. Specifically, petitioners argue that the PLCAA's predicate exception in 15 U.S.C. 7903(5)(A)(iii) permits States to create liability "through statutes 'applicable to the sale or marketing' of firearms,'" Pet. 15 (quoting 15 U.S.C. 7903(5)(A)(iii)), but does not allow them to do so "through common law developed by state courts," *ibid.*

Petitioners did not clearly base their argument in the court of appeals on an objection that the PLCAA's predicate exception does not encompass true common law claims. Rather, petitioners argued that the PLCAA's predicate exception does not encompass judicial interpretation of a generally applicable state statute (like New York Penal Law § 240.45 (McKinney 2008)) to ap-

ply to the sale or marketing of firearms. Pet. C.A. Br. 10 ("This lawsuit is within the predicate exception [because] the Complaint further alleges that Appellants themselves knowingly violate New York PL § 240.45."); *id.* at 39 ("But if, instead, the New York Court of Appeals held that the public nuisance statute in its present form already applies to the sale or distribution of firearms, Appellants have argued that the original case could not be reinstated.").

The court of appeals apparently understood petitioners' contention to be that the PLCAA violates the Tenth Amendment because the PLCAA enables a state legislature to come within the predicate exception by enacting a statute expressly applicable to the sale of firearms, but does not afford an exception where a state court interprets a general statute as applicable to the sale of firearms. See Pet. App. 21a; *id.* at 22a. That is the argument the court of appeals addressed, and the court *rejected* that interpretation of the PLCAA. It concluded instead that a state statute need not expressly refer to the regulation of firearms in order to fall within the exception, and that the PLCAA does not foreclose the possibility of a state statute coming within the exception by virtue of judicial interpretation. *Ibid.* The court of appeals simply concluded that the general criminal nuisance statute on which petitioners rely does not qualify.[2]

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[2] In a recent decision, the Indiana Court of Appeals held that Indiana's public nuisance statute falls within the PLCAA's predicate exception. *Smith & Wesson Corp.* v. *City of Gary*, 875 N.E.2d 422 (Ind. Ct. App. 2007), leave to appeal denied, 2009 Ind. LEXIS 12 (Ind. Jan. 12, 2009). That decision has no bearing on petitioners' Tenth Amendment claim, and the United States takes no position here on whether any particular state statute falls within the PLCAA's predicate exception.

Id. at 30a-41a. In any event, even assuming that petitioners preserved an argument with respect to common law claims, they do not cite any decision of this Court or of any court of appeals holding that the Tenth Amendment places limits on which state-law causes of action Congress may preempt in the exercise of its enumerated powers.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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