No. 09-812

In the Supreme Court of the United States

LILIAN ILETO, PETITIONER

v.

GLOCK, INC., ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
MICHAEL S. RAAB
H. THOMAS BYRON III
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Protection of Lawful Commerce in Arms Act, 15 U.S.C. 7903(5)(A)(iii), by requiring the dismissal of certain pending suits against manufacturers and sellers of firearms, violates the Fifth Amendment or principles of federalism or separation of powers.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-72a) is reported at 565 F.3d 1126. The opinion of the district court (Pet. App. 73a-127a) is reported at 421 F. Supp. 2d 1274.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 2009. A petition for rehearing was denied on July 27, 2009 (Pet. App. 209a-212a). On October 14, 2009, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including December 16, 2009. On December 7, 2009, Justice Kennedy further extended the time to December 24, 2009, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In August 1999, petitioner's husband was killed during a shooting spree by a white supremacist, Buford Furrow. In August 2000, petitioner and other individuals harmed by Mr. Furrow's gun violence brought the present action against the manufacturers, importers, distributors, and sellers of the firearms involved in the shootings. Pet. App. 4a-5a, 80a. Pursuant to California Civil Code § 1714 (West 1998) and §§ 3479 and 3480 (West 1997), plaintiffs sought damages, injunctive relief, and abatement of the alleged public nuisance caused by defendants' distribution and marketing practices. The district court dismissed the case for failure to state a claim. 194 F. Supp. 2d 1040 (2002). The court of appeals, however, reversed in part. 349 F.3d 1191 (2003), cert. denied, 543 U.S. 1050 (2005). It held that plaintiffs had stated cognizable negligence and public nuisance claims under California law against defendants RSR Management Corporation and RSR Wholesale Guns Seattle, Inc. (collectively, RSR), Glock, Inc. (Glock), and China North Industries Corporation (China North). The court of appeals upheld dismissal of the action against all remaining defendants.

2. On October 26, 2005, while plaintiffs' action was pending, 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).

Defendants moved to dismiss plaintiffs' complaint pursuant to the PLCAA. Plaintiffs argued that their action fell within the Act's so-called "predicate exception," Pet. App. 9a—an exception triggered by violation of a predicate statute, see *ibid.*—because their action 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, plaintiffs 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. The district court granted defendants' motion to dismiss. Pet. App. 73a-127a. The court held that plaintiffs' action does not fall within the PLCAA's predicate exception, because "the clear purpose of the PLCAA was to shield firearms manufacturers and dealers from liability for injuries caused by third parties using non-defective, legally obtained firearms." *Id.* at 96a. According to the court, "[i]nterpreting * * * the predicate exception to mean any State or Federal statute

'capable of being applied' to the sale or marketing of firearms would undermine this clearly stated purpose." *Id.* at 97a. The court found that the PLCAA's legislative history and canons of statutory construction supported its interpretation. *Id.* at 101a-112a. The court then rejected plaintiffs' various constitutional challenges. *Id.* at 115a-127a.

4. a. A divided panel of the court of appeals affirmed. Pet. App. 1a-72a. First, the court held that the text of the predicate exception does not definitely resolve whether it extends to California's general tort statutes. *Id.* at 11a-15a. The court reasoned, however, that "[t]he purpose of the PLCAA leads" to the conclusion "that Congress intended to preempt general tort law claims such as [p]laintiffs', even though California has codified those claims in its civil code." *Id.* at 21a. The court noted that its "examination of the legislative history of the Act further confirms that conclusion." *Ibid.*

Second, the court rejected plaintiffs' various constitutional challenges. Pet. App. 21a-31a. The court held that the PLCAA does not violate principles of separation of powers, because it "amend[s] the applicable law," "applies only to pending and future cases," and "does not purport to undo final judgments of the judiciary." *Id.* at 24a-25a. The PLCAA does not violate the substantive component of the Due Process Clause of the Fifth Amendment, the court held, because "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." *Id.* at 27a. The court explained that because plaintiffs lacked any vested property right in the absence of a final judgment, the PLCAA neither required heightened scrutiny

nor effected an unconstitutional taking under the Takings Clause of the Fifth Amendment. *Id.* at 28a. The court further explained that the PLCAA does not violate the Due Process Clause's procedural component, because "the legislative determination" to create a new substantive rule of law "provide[d] all the process that [was] due." *Id.* at 30a (quoting *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982)).

Third, the court of appeals noted that the doctrine of constitutional avoidance did not apply, because "congressional intent is clear from the text and purpose of the statute." Pet. App. 31a. In any event, the court stated, its interpretation did not give rise to "'grave doubts' about the constitutionality of the statute." *Id.* at 32a. As it explained, "no decision by [the court of appeals], the Supreme Court, or any sister circuit has held that a statute violates substantive due process for the reasons asserted by [p]laintiffs." *Id.* at 33a. Nor was it even true, the court explained, that the PLCAA abolishes plaintiffs' ability to seek redress. The court noted that the PLCAA "carves out several significant exceptions" to its general rule of preemption, and thus "Congress has left in place a number of substitute remedies." *Id.* at 33a-35a.

Fourth and finally, the court held that although plaintiffs could not proceed with their claims against RSR and Glock, they could proceed with their claims against China North. The court reasoned that "[t]he PLCAA preempts only actions brought against federally licensed manufacturers and sellers of firearms," Pet. App. 35a (emphasis omitted), and "China North concedes that it is not a federally licensed manufacturer or seller of firearms," *id.* at 36a.

b. Judge Berzon concurred in part and dissented in part. Pet. App. 38a-72a. Judge Berzon would have held that the PLCAA did not require dismissal of plaintiffs' action, thus avoiding resolution of plaintiffs' constitutional claims. *Id.* at 72a.

5. Petitioner, but not the other plaintiffs, now seeks review of the court of appeals' decision insofar as it dismissed her claims against RSR and Glock. Petitioner's claims against China North are pending on remand before the district court.

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] This Court recently denied review in a pair of cases presenting similar issues, *City of N.Y.* v. *Beretta U.S.A. Corp.*, 129 S. Ct. 1579 (2009) (No. 08-530); *Lawson* v. *Beretta U.S.A. Corp.*, 129 S. Ct. 1579 (2009) (No. 08-545), and there is no reason for a different result in this case. Indeed, only a finite number of pending cases have been affected by the PLCAA, and thus petitioner's constitutional challenge is of limited future significance. Further review is not warranted.

1. The court of appeals concluded that the PLCAA does not violate the Due Process Clause of the Fifth Amendment, because petitioners' cause of action had not been reduced to a final judgment. Pet. App. 28a. That decision is not in conflict with any decision of this Court or of any court of appeals. Indeed, lower courts have

[1] Petitioner argues (Pet. 13-24) at length that the PLCAA does not apply to bar her claims against RSR and Glock. Before this Court, as before the lower courts, the United States takes no position on that question.

repeatedly rejected claims that the modification or abrogation of a pending state law cause of action by a federal statute violates federal due process. See, *e.g.*, *Hammond* v. *United States*, 786 F.2d 8, 12 (1st Cir. 1986) ("Because rights in tort do not vest until there is a final, unreviewable judgment, Congress abridged no vested rights * * * by * * * retroactively abolishing [plaintiff's] cause of action in tort."); see also *In re TMI*, 89 F.3d 1106, 1113-1115 (3d Cir. 1996), cert. denied, 519 U.S. 1077 (1997); *Salmon* v. *Schwarz*, 948 F.2d 1131, 1142-1143 (10th Cir. 1991); *Arbour* v. *Jenkins*, 903 F.2d 416, 420 (6th Cir. 1990); *Sowell* v. *American Cyanamid Co.*, 888 F.2d 802, 805 (11th Cir. 1989). In any event, no lower court has held that the PLCAA is unconstitutional under the Fifth Amendment. See *District of Columbia* v. *Beretta U.S.A. Corp.*, 940 A.2d 163, 177 (D.C. 2008) (upholding the PLCAA against a substantive due process challenge), cert. denied, 129 S. Ct. 1579 (2009).[2]

Petitioner argues (Pet. 24-27) that her state law negligence and public nuisance claims are a "species of property protected by the * * * Due Process Clause." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). But whether a cause of action has "accrued" under state law, Pet. 26, is a separate question from whether a property interest has vested under federal law, such that Congress may not apply a new law to pending, nonfinal claims. See *Beretta*, 940 A.2d at 176 (distinguishing "between causes of action that have reached final, unre-

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[2] Petitioner asserts (Pet. 25) that the PLCAA violates the Takings Clause of the Fifth Amendment; however, she does not develop (Pet. 26-29) any argument that the statute constitutes an unconstitutional taking distinct from her argument that the PLCAA violates due process by abrogating state law causes of action without providing adequate substitute remedies.

viewable judgment—and in *that* sense have vested—and all others, pending and future, which may be modified by rationally grounded retroactive legislation"). Because petitioner's claims had not been reduced to a final judgment, Congress's decision to preempt those causes of action was not "without due process" because "the legislative determination provides all the process that is due." *Logan*, 455 U.S. at 432-433. In enacting the PLCAA, Congress elected to "attach[] new legal consequences to events completed before its enactment," *Landgraf* v. *USI Film Products*, 511 U.S. 244, 270 (1994), and to bar pending actions as a rational way "to give comprehensive effect to a new law [that it] consider[ed] salutary," *id.* at 268.[3]

Petitioner contends that the PLCAA violates the Due Process Clause because it "completely and retroactively extinguishes an individual's ability to litigate an accrued common-law claim, as opposed to limiting recovery * * * or substituting one set of remedies for another." Pet. 27. But the PLCAA does not preempt claims against the person who was the most immediate cause of injury, *i.e.*, the person who unlawfully used the firearm. Moreover, as the court of appeals held, the PLCAA also does not extinguish all causes of action even against firearm manufacturers, distributors, and sellers. Pet. App. 33a ("The PLCAA preempts certain categories of claims

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[3] To give retroactive effect to its legislation, Congress must "make its intention clear" in order to "ensure that Congress itself has determined that the benefits of retroactivity outweigh the potential for disruption or unfairness." *Landgraf*, 511 U.S. at 268. Petitioner does not argue that Congress failed to make its intention clear in the PLCAA: the Act expressly applies to any "qualified civil liability action that is pending" on the date of its enactment. 15 U.S.C. 7902(b); see Pet. App. 21a.

that meet specified requirements, but it also carves out several significant exceptions to that general rule."). For instance, petitioner may proceed with her claims against China North, because it is not a federally licensed manufacturer or seller of firearms subject to the PLCAA. *Id.* at 35a-36a. The PLCAA also does not preempt certain actions against manufacturers and sellers of firearms for negligence, knowing violation of a statute applicable to the sale or marketing of firearms, breach of contract or warranty, or defective design or manufacture. 15 U.S.C. 7903(5)(A)(ii)-(v). This case therefore does not present the question of whether petitioner has been deprived of all potential remedies in violation of due process.[4]

In any event, petitioner's argument that the Due Process Clause requires Congress to substitute alternative remedies is inconsistent with modern preemption doctrine. Congress could not effectively preempt state law causes of action if it were forced to leave alternative

[4] Because the PLCAA does not deprive litigants of all potential remedies, petitioner questions the constitutionality of "prospective legislation that limits compensation but leaves causes of action otherwise intact." Pet. 28. As support, however, she cites (*ibid.*) the decision of a state court interpreting a state constitution. See *Morris* v. *Savoy*, 576 N.E.2d 765, 770-772 (Ohio 1991). Petitioner does not point to any court that has invalidated legislation on federal due process grounds for failure to replace a state law cause of action with adequate substitute remedies. She does point (Pet. 29) to *Greyhound Food Mgmt., Inc.* v. *City of Dayton*, 653 F. Supp. 1207 (S.D. Ohio 1986), aff'd, 852 F.2d 866 (6th Cir. 1988); but in that case, after invalidating a state statute on equal protection grounds, *id.* at 1215, the court stated that the statute also abridged the plaintiffs' vested right in a pending claim, *id.* at 1216. That dictum is at odds with settled case law in the courts of appeals, including the Sixth Circuit, holding that the modification or abrogation of a pending state law cause of action by a federal statute does not violate federal due process. See p. 7, *supra*.

remedies in their stead. That is one reason why, although this Court did not resolve the question in *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), it expressed doubt that the Due Process Clause "requires that a legislatively enacted compensation scheme either duplicate the recovery at common law or provide a reasonable substitute remedy." *Id.* at 88 n.32. If that was doubtful in a case where the federal statute (the Price-Anderson Act, 42 U.S.C. 2210 *et seq.*) was designed to establish a federal cause of action, it is even more dubious in this case where the federal statute (the PLCAA) is expressly designed to preempt state causes of action. Regardless, petitioner does not point (Pet. 28-29) to any lower court decision holding a federal statute unconstitutional for failure to provide adequate substitute remedies, let alone subjecting such a statute to any heightened level of scrutiny.[5]

2. Petitioner contends (Pet. 29-32) that the court of appeals' decision raises significant Commerce Clause, separation-of-powers, and federalism issues. That contention lacks merit.

a. Petitioner does not argue that Congress lacked the authority to enact the PLCAA under the Commerce Clause. Rather, she argues that "it is hard to see why abrogating causes of action relating to transactions and

[5] Petitioner cites (Pet. 27) this Court's decision in *New York Central Railroad* v. *White*, 243 U.S. 188 (1917), but *White* upheld the state statute at issue without deciding whether alternative remedies were necessary. *Id.* at 201. Petitioner also cites (Pet. 27) a concurring opinion in *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980), in which Justice Marshall stated that "[q]uite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way." *Id.* at 93-94. But as the court of appeals noted, the PLCAA does not extinguish all causes of action against firearm manufacturers, distributors, and sellers. Pet. App. 33a.

conduct that took place in the past * * * can have any meaningful effect on commerce." Pet. 30. Petitioner thus apparently challenges the court of appeals' holding that the PLCAA survives rational-basis review under the Due Process Clause, *i.e.*, that Congress had a rational legislative purpose for applying the PLCAA to both pending and future suits. Pet. App. 27a. Every court to consider the issue, however, has concluded that Congress reasonably found a connection in the PLCAA between pending lawsuits and interstate and foreign commerce.

In the PLCAA, Congress was concerned "with '[l]awsuits [that] have been commenced' seeking 'money damages and other relief' against manufacturers and sellers of firearms for harms caused by the misuse of their products by others, including criminals, 15 U.S.C. § 7901(a)(3), and with the threat to interstate commerce of thus 'imposing liability on an entire industry for harm . . . solely caused by others.' *Id.* § 7901(a)(6)." *Beretta*, 940 A.2d at 174 (emphasis omitted); see *City of N.Y.* v. *Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 287 (E.D.N.Y. 2005) ("[T]here is a rational basis for Congress' determination that the Act was necessary to protect [the firearms] industry."), aff'd in part and rev'd in part, 524 F.3d 384 (2008), cert. denied, 129 S. Ct. 1579 (2009). Having decided to shield certain firearms manufacturers and sellers from legal liability for third-party conduct, "it was eminently rational for Congress to conclude that the purposes of the [PLCAA] could be more fully effectuated if its * * * provisions were applied retroactively." Pet. App. 27a (internal quotation omitted); see *id.* at 122a ("Although one may disagree with Congress's predictions [about the effect of unchecked lawsuits], one

cannot credibly argue that the Act's retroactive provision does not further a legitimate legislative purpose.").

b. Petitioner claims that the PLCAA "violates the basic rule of judicial independence reflected in *United States* v. *Klein*, 80 U.S. (13 Wall.) 128 (1872)," because it attempts to direct the exercise of judicial power in particular cases. Pet. 30. But as this Court has explained, "later decisions [since *Klein*] have made clear that its prohibition does not take hold when Congress 'amend[s] applicable law.'" *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211, 218 (1995) (quoting *Robertson* v. *Seattle Audubon Soc'y*, 503 U.S. 429, 441 (1992)). The court of appeals correctly recognized that the PLCAA amends the current law applicable to pending actions against certain manufacturers and sellers of firearms. Pet. App. 24a. Because the PLCAA "'compel[s] changes in the law, not findings or results under [the] old law,' it merely amends the underlying law, and is therefore not subject to a *Klein* challenge." *Imprisoned Citizens Union* v. *Ridge*, 169 F.3d 178, 187 (3d Cir. 1999) (brackets in original) (quoting *Robertson*, 503 U.S. at 438). Accordingly, the other courts of appeals to consider the question have concluded that the PLCAA does not violate principles of separation of powers, because "the Act permissibly sets forth a new rule of law that is applicable both to pending actions and to future actions." *City of N.Y.* v. *Beretta U.S.A. Corp.*, 524 F.3d 384, 395 (2d Cir. 2008), cert. denied, 129 S. Ct. 1579 (2009); *Beretta U.S.A. Corp.*, 940 A.2d at 172-173.[6]

[6] Petitioner contends (Pet. 30-31) that although Congress may amend the law applicable to pending federal law causes of action, it violates principles of federalism for Congress to preempt pending state law causes of action. Petitioner cites nothing in support of the contention that Congress, in the valid exercise of its enumerated powers, may

3. The decision below upholding the constitutionality of the PLCAA does not conflict with any decision of this Court or of any court of appeals. This Court recently denied review in a pair of cases presenting similar issues, *City of N.Y.*, *supra* (2009) (No. 08-530); *Lawson*, *supra* (2009) (No. 08-545), and there is no reason for a different course here. Indeed, only a finite number of pending cases have been affected by the PLCAA, and thus the constitutional claims raised by petitioner are of limited future significance. Further review is therefore not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
MICHAEL S. RABB
H. THOMAS BYRON III
Attorneys

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not amend federal law in a manner that preempts pending state law cases.