Received 9/12/2022 9:17:08 PM Supreme Court Western District

Filed 9/12/2022 9:17:08 PM Supreme Court Western District
240 WAL 2022

No. 240 WAL 2022

IN THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA

SPRINGFIELD, INC. D/B/A SPRINGFIELD ARMORY AND SALOOM DEPARTMENT STORE AND SALOOM DEPT. STORE, LLC D/B/A SALOOM DEPARTMENT STORE,

Petitioners,

v.

MARK AND LEAH GUSTAFSON, INDIVIDUALLY AND AS ADMINISTRATORS AND PERSONAL REPRESENTATIVES OF THE ESTATE OF JAMES ROBERT ("J.R.") GUSTAFSON

Respondents,

v.

THE UNITED STATES OF AMERICA,

Intervenor.

APPEAL FROM THE ORDER ENTERED AUGUST 12, 2022, IN THE PENNSYLVANIA SUPERIOR COURT AT NO. 207 WDA 2019, REVERSING THE COURT OF COMMON PLEAS OF WESTMORELAND COUNTY AT NO. 1126 OF 2018

BRIEF OF AMICI CURIAE STATE OF MONTANA AND 11 OTHER STATES SUPPORTING PETITIONERS

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INTERESTS OF AMICI CURIAE

Amici Curiae States of Montana, Alabama, Alaska, Arkansas, Kentucky, Louisiana, Mississippi, Missouri, South Carolina, Texas, Utah, and West Virginia (the "States"), represented by their respective Attorneys General, submit this brief in support of Petitioners.

The States have strong interests in the constitutionality of the Protection of Lawful Commerce in Arms Act ("PLCAA"), both to protect the lawful firearms industry within their borders and to protect the rights of their citizens to keep and bear arms under the Second Amendment of the United States Constitution.

For these reasons, the States urge this Court to grant Petitioners' application for leave to appeal.

ALLOWANCE OF APPEAL

This Court should grant the allowance for appeal because the question presented is one of such substantial public importance as to require prompt and definitive resolution by the Pennsylvania Supreme Court and the Pennsylvania Superior Court has so far departed from the accepted judicial practices of courts in interpreting a federal statute.

INTRODUCTION

By its express language, the PLCAA, Pub. L. No. 109–92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-7903), preempts tort lawsuits against gun manufacturers and distributors premised on the "criminal or unlawful misuse" of their products. *Id.* § 7903(5)(A). For years, anti-gun groups challenged the PLCAA's constitutionality, and for years—without exception—courts across the Nation have uniformly declared it constitutional. Until now.

In a case that turned purely on federal law, the Superior Court of Pennsylvania ignored federal law and, in a per curiam order, reversed the trial court's determination that the PLCAA is constitutional and bars the underlying lawsuit at issue in this case. *Gustafson v. Springfield*, 2022 Pa. Super 140 (Pa. Super. Aug. 12, 2022) (en banc) (per curiam). Attached to the per curiam order were five separate opinions, explaining vastly different reasons for this decision. Seven judges appeared to agree with the trial court that the PLCAA bars this lawsuit.[1]

[1] See opinions written by Judge Kunselman (joined by Judge Panella and Judge Lazarus), Judge Murray, and Judge Olson (joined by Judge Bowes and Judge McCaffery).

And five would uphold the PLCAA as constitutional.[2] Despite the fact that a majority of the judges found that the PLCAA bars Plaintiffs' claims, and a majority of the judges found that the PLCAA is constitutional, the en banc court reversed the trial court's decision. When questioned about this absurd result, the en banc court doubled down on its decision to reverse the trial court, noting that "all reasoning reflected in the writing attached to the Order are *dicta*." *Gustafson v. Springfield*, 2022 Pa. Super 140 (Pa. Super. Aug. 19, 2022) (en banc) (per curiam).

Springfield and Saloom now seek leave from this Court to file an appeal from the Superior Court's decision. Granting this application will allow this Court to correct the Superior Court's apparent departure from constitutional fidelity.

ARGUMENT

I. The PLCAA falls within Congress' power to regulate interstate commerce.

The history of the Commerce Clause shows that the PLCAA regulates the very type of activity the Framers drafted the Clause to

[2] See opinions written by Judge Murray, Judge Olson (joined by Judge Bowes and Judge McCaffery), and Judge Dubow.

address. In fact, Congress regularly protects interstate commerce by limiting state tort causes of action. Any conclusion to the contrary would give any State veto power over lawful industries anywhere in the Nation. That, of course, is this lawsuit's entire purpose. But that's also why it must fail.

A. Firearms are items of interstate commerce.

The United States Constitution confers upon Congress the power "[t]o regulate Commerce … among the several States …." U.S. CONST. art. I, § 8, cl. 3. While the U.S. Supreme Court construes this power liberally in the modern era, even the Commerce Clause's original meaning grants Congress the authority to protect cross-state transactions.[3] In fact, the protection of those transactions seems to be the point.

Before ratification, the thirteen states freely imposed tariffs and trade restrictions on other states' goods and services. "The want of uniformity in the regulations of commerce was a source of perpetual strife and dissatisfaction, of inequalities, and rivalries, and retaliations

[3] *See* Randy E. Barnett, *The Original Meaning of the Commerce Clause*, U. CHI. L. REV 101, 147 (2001) ("In sum, Congress has power to specify rules to govern the manner by which people may exchange or trade goods from one state to another [and] to remove obstructions to domestic trade erected by states ….").

among the states." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION §1078 (1833). To quell this strife, the Framers lodged the power to regulate interstate commerce with the federal government.[4] They believed that doing so would advance "[a]n unrestrained intercourse bebetween the States" because it would "advance the trade of each." THE FEDERALIST NO. 11, at 89 (Alexander Hamilton) (Clinton Rossiter, ed, 1961).

In this sense, Congress may supersede state restrictions on interstate commerce by removing state-erected trade barriers. Early American case law reveals that this premise was relatively uncontroversial.[5] The principle is so well-engrained in American law that it is unclear whether any contemporary court has called it into question before the superior court's decisions in this case.

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[5] *See, e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 30 (1824) (ruling that a federal statute preempted New York's monopoly on ferry operators); *Houston, E. & W.T.R. Co. v. United States* [*Shreveport Rate Case*], 234 U.S. 342, 351–52 (1914) (sustaining congressional authority to prevent states from discriminating against interstate railroad traffic); *Brown v. Maryland*, 25 U.S. 419, 448 (1827). ("Any penalty inflicted on the importer for selling the article in his character of importer, must be in opposition to the act of Congress which authorizes importation.")

Under this basic understanding of the Commerce Clause, Congress passed the PLCAA. The PLCAA regulates items (guns) that travel in interstate commerce. By preventing states from imposing certain types of liability on individuals who sell these items across state lines, Congress removes substantial barriers to trade. This results in the creation of a uniform regulatory scheme that protects interstate industries from tort law innovations in different states—precisely what the Commerce Clause empowers Congress to do. In this way, no state may target the industry of another state by passing laws that subject that industry to liability within its borders. Congress routinely uses this power to supersede state tort law and did exactly that by passing the PLCAA.[6]

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[6] *See, e.g.*, The Employers Liability Act of 1908, 35 Stat. 65 (upheld under the Commerce Clause power in *Mondou v. New York, N.H. & H.R. Co.*, 223 U.S. 1, 49 (1912)); Price-Anderson Act, 42 U.S.C. § 221(e) (upheld in Duke Power Co. v. Carolina Env't Study Grp., 438 U.S. 59, 84 (1978)); General Aviation Revitalization Act, 49 U.S.C. § 40101 (barring some airplane product liability suits); Bill Emerson Good Samaritan Food Donation Act. 42 U.S.C. § 1791 (immunizing persons against suit for donating food). Aviation Medical Assistance Act of 1998. 49 U.S.C. § 44701 (limiting airline liability stemming from in-flight emergencies); 42 U.S.C. §§ 247d-6d, 247d-6e (insulating Pfizer and Moderna from liability for harms caused by their Covid-19 vaccines).

By preventing gun sellers and manufacturers from facing tort liability for selling guns that criminals misuse, Congress exercised the authority specifically granted to it under the Commerce Clause. Removing this protection for gun manufacturers upends the Commerce Clause's primary purpose and allows tort laws—as interpreted by one State's courts—to regulate, restrict, and destroy lawful firearm commerce in the remaining forty-nine.

B. The Superior Court's reversal of the trial court misapplied U.S. Supreme Court precedent.

The PLCAA acts on gunmakers and sellers at the point of sale. By immunizing those parties from liability for the possible misuse of their products later on, the PLCAA ensures that cross-state transactions don't create undue liability for such sellers. In regulating these sales, Congress indisputably exercised its power in a manner tied to interstate commerce.

Of particular concern, at least four of the judges here would shift the PLCAA's reference point from commercial sales to the commence-

ment of litigation.[7] In doing so, these opinions misapply *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012) and *United States v. Lopez*, 514 U.S. 549 (1995). *Sebelius*, of course, established that Congress may not force unwilling participants into an inter-interstate market and *Lopez* precludes Congress from regulating purely local activities under the Commerce Clause. *Sebelius*, 567 U.S. at 575; *Lopez*, 514 U.S. at 567–68.

Judge Kunselman's opinion supporting reversal correctly noted these essential holdings but misapplied both cases. First, the opinion made an apples-to-oranges analogy between tort suits and commerce. It argued that, just as Congress may not force individuals to enter the national health insurance market, Congress also may not force individuals to compensate for the harm caused by out-of-state firearms manufacturers. *Gustafson v. Springfield*, 2022 Pa. Super 140, slip op. at 22–23 (Pa. Super. Aug. 12, 2022) (Kunselman, J., supporting rever-

[7] See opinions by Judge Kunselman (joined by Judge Panella and Judge Lazarus) and Judge Bender (joining Judge Kunselman's discussion of the constitutionality of the PLCAA). Judge Kunselman's opinion set forth the most detailed reasoning for the finding of unconstitutionality, so for purposes of this specific discussion, the States will focus on Judge Kunselman's decision. *See Gustafson v. Springfield*, 2022 Pa. Super 140, slip op. at 22–23 (Pa. Super. Aug. 12, 2022) (Kunselman, J., supporting reversal).

sal). This is a misapplication of the *Sebelius* holding and is represents a misunderstanding of basic tort law. Unlike the ACA, which purported to force individuals to purchase insurance coverage, the PLCAA only immunizes firearm sellers from liability arising from their products. The PLCAA does not force injured parties to act as "financial sureties" either, since they may still recover from the party responsible for the criminal use of the firearm. The opinion's equivocation between cross-state tort suits and interstate commerce reflects a view unsupported in the law. Congress regularly forecloses remedies from state tort suits under its Commerce Clause power. *See supra* Section I.A (listing federal statutes that preempt state tort law).

Next, the opinion likened the PLCAA to the Gun-Free School Zones Act at issue in *Lopez*. *Gustafson*, slip op. at 25 (Kunselman, J., supporting reversal). It argued that Congress could not constitutionally pass the PLCAA because "it grants the gun industry immunity regardless of how far removed from interstate commerce the harm arises." *Id.* But this misapprehended how the PLCAA operates in this case.

Critically, Plaintiffs here allege that Springfield and Saloom sold a defective product in Pennsylvania, subjecting them to the state's prod-

uct liability laws. It is this sale, necessary to Plaintiffs' claims, that forms the nexus to invoke the Commerce Clause. Those seeking to reverse the trial court on the basis that the PLCAA is unconstitutional miss this point, believing that only the criminal misuse of the firearm gives rise to a claim against defendants. *Gustafson*, slip op. at 25 (Kunselman, J., supporting reversal). But actions by a third party alone, absent a principal-agent relationship, cannot establish liability in tort law. Unlike the Gun-Free School Zones Act at issue in *Lopez*, the PLCAA regulates a commercial action (sales) and not merely a local one (possession) when it comes to guns. *See Abramski v. United States*, 573 U.S. 169, 193 (2014) (upholding a federal conviction for making a false statement while purchasing a firearm). So unlike *Lopez*, Congress regulated commerce itself—not the substantial effects that local activities have on commerce—when it passed the PLCAA.

The PLCAA only removes a state tort remedy; it does not force the individuals to engage in interstate commerce.[8] Furthermore, Congress regulates a commercial sale and not a local activity when it precludes state tort suits based a product sold in interstate commerce.

II. Plaintiffs' lawsuit is designed to nullify Second Amendment rights.

Our Framers considered the right to keep and bear arms essential to a self-governing republic. In the view of the founding generation, the right to keep and bear arms was not just about individual protection—it was a check on tyranny.

The modern anti-gun lobby disagrees. But these groups have failed to take away guns from law-abiding citizens and they have failed to override the Constitution at the state level. Undiscouraged, they've now resorted to recycling failed legal challenges from the 80s and 90s,

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[8] Although Plaintiffs invoke *Marbury v. Madison*, 5 U.S. 137, 147 (1803) for the premise that "every right has a remedy," this is incorrect under American law. Chief Justice Marshall was paraphrasing Blackstone's Commentaries on the Laws of England when he invoked that statement. *See* 3 Blackstone's Commentaries on the Law of England ch. 3 ("that where there is a legal right, there is also a legal remedy"). But one of the ways that the American Constitutional order differs from England's is that Congress must create remedies for constitutional rights. Indeed, if plaintiffs had read just a few pages further in *Marbury*, they would have discovered that its storied protagonist had a right to his commission, but no remedy to receive it. *Id.* at 180.

which aim to disarm Americans by bankrupting gun manufacturers. But Congress foreclosed these suits by passing the PLCAA.

A. The Second Amendment is fundamental to a self-governed republic.

The Second Amendment declares that "the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. AMEND. II. This has made a lot of people very angry and has been widely regarded as a bad move among American elites.[9] But the Framers considered the Second Amendment right to keep and bear arms essential to republican self-governance, and for good reason. By purporting to strike down the PLCAA, the superior court failed to protect this essential right.

In 1328, the Statute of Northampton declared "that no man great nor small," except those who worked for the king, may "ride armed by night nor by day, in fairs, markets, … nor in no part elsewhere" lest they forfeit "their bodies to prison at the King's pleasure." Statute of Northampton 2 Edw. 3, c. 3 (1328). After a centuries-long political struggle, the English people attempted to supersede the Statute of

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[9] *See also* DOUGLAS ADAMS, THE RESTAURANT AT THE END OF THE UNIVERSE 1 (1981) ("In the beginning the Universe was created. This has made a lot of people very angry and has been widely regarded as a bad move.").

Northampton by adopting an English Bill of Rights, which provided "[t]hat the subjects which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." Bill of Rights, sec. 7, 2, 16 Dec. 1689. This right attempted to serve as "a public allowance, under due restrictions, of the natural right of resistance and self-preservation." William Blackstone, Commentaries on the Laws of England 1:139.

But the King's Bench reinterpreted this right, grasping on to the language "suitable to their condition" to effectively create an exception that swallowed the rule. St. George Tucker, Blackstone's Commentaries 1:App. 300. The result was that "not one man in five hundred c[ould] keep a gun in his house without being subject to a penalty." *Id.* The result: a disarmed citizenry became a subjugated citizenry, since wherever "the right of the people to keep and bear arms is … prohibited, liberty, if not already annihilated, is on the brink of destruction." *Id.*

That an armed populace and liberty go hand in hand was essential to the Framers' view of ordered liberty. That much is obvious even before constitutional ratification. To cite one example, this very State

declared "[t]hat *the people* have a right to bear arms for the defence of themselves and the state" in what served as a precursor to the Second Amendment. Pennsylvania Constitution of 1776, Declaration of Rights, art. 13 (emphasis added). The United States Constitution used similar language: "the right of *the people* to keep and bear Arms, shall not be infringed." U.S. CONST. AMEND. II (EMPHASIS ADDED). Substituting "Protestants" for "the people" precluded the government from picking favorites among factions. That's because "'the people' … unambiguously refers to all members of the political community, not an unspecified subset." *District of Columbia v. Heller*, 554 U.S. 570, 580 (2008). In this sense, the Second Amendment serves as "the palladium of the liberties of a republic" because it "offers a strong moral check against the usurpation and arbitrary power of rulers." JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION 3:§§1890–91 (1833).

The Second Amendment is not a mere liberty interest, subject to balancing against societal welfare. It is not an afterthought that the Framers included in the Bill of Rights to appease an interest group. Rather, the Second Amendment's individual guarantee that "the people" may keep and bear arms is the culmination of a centuries-long

struggle over who rules us. It is a clear vindication for democracy over those who would usurp self-governance for centralized power. The Framers declared that it is "We the People" who rule ourselves and it is we "the people" who may keep and bear arms.

B. The state tort regime tries where the anti-gun lobby failed.

Much like the King's Bench abroad, petty tyrants at home have tried to undermine the right of the people to keep and bear arms. As recently as this year, six states enforced "may issue" carry permits, which allowed state officials to bar law-abiding citizens from carrying firearms even when they met the statutory requirements to do so.[10] The laws lacked the colorful language of the Statute of Northampton, but the effect was the same. Of course, these laws blatantly violated the Second Amendment, and the Supreme Court enjoined them in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). So what does the anti-gun lobby do when their state laws are enjoined?

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[10] *See* Cal. Penal Code Ann., § 26150 (West 2021) ("Good cause"); Haw. Rev. Stat. §§ 134–2 (Cum. Supp. 2018), 134–9(a) (2011) ("exceptional case"); Md. Pub. Saf. Code Ann., § 5–306(a)(6)(ii) (2018) ("good and substantial reason"); Mass. Gen. Laws ch. 140, § 131(d) (2020) ("good reason"); N. J. Stat. Ann. § 2C:58–4(c) (West Cum. Supp. 2021) ("justifiable need"); 1913 N. Y. Laws ch. 608, § 1, p. 1629 ("proper cause").

They recycle their old tricks of taking guns from people by bankrupting the firearms industry writ large.[11] These groups now seek to impose liability on gun sellers and manufacturers for the criminal actions of third parties.

To be clear, Congress did not pass the PLCAA in a vacuum. In the 1980s, anti-gun groups tried to destroy the firearms industry by bringing strict liability claims against gun manufacturers. The courts uniformly rejected this tactic. *See* Andrew Jay McClurg, *The Tortious Marketing of Handguns: Strict Liability Is Dead, Long Live Negligence*, 19 Seton Hall Legis. J. 777 (1995) ("Courts have rejected strict liability. Legislatures have rejected it. Influential commentators have rejected it."). Defeated here, the anti-gun groups pivoted to novel theories of negligence, attacking the design, marketing, and sale of firearms. *See*

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[11] Targeting constitutional rights through tort litigation has a history beyond the Second Amendment. Segregationists used this lawfare tactic to silence civil rights leaders and members of the press who publicized the policies of officials during the civil rights movement. *See* Christopher W. Schmidt, New York Times v. Sullivan *and the Legal Attack on the Civil Rights Movement*, 66 Ala. L. Rev. 293, 304–06. Through massive jury awards, plaintiffs sought to scare newspapers away from reporting on civil rights issues. *Id.* The Supreme Court stepped in to end this assault on the First Amendment in *New York Times v. Sullivan*, 376 U.S. 254, 292 (1964).

id. at 796. The legal theories evolved, but the goal remained the same: to destroy the firearms industry.

That plaintiffs are looking for an end-around to the Second Amendment is not even subject to debate. In their own words, the anti-gun lobby tries to "divide, separate and weaken the gun manufacturers" because doing so "makes them stretch out their own financial resources." John Culhane, *Defining a Proper Role for Public Nuisance Law in Municipal Suits Against Gun Sellers: Beyond Rhetoric and Expedience*, 52 S.C. L. Rev. 287, 290 (2001). In other words, "plaintiff's attorneys simply want to eliminate []guns." *Patterson v. Gesellschaft*, 608 F. Supp. 1206, 1212 (N.D. Tex. 1985).

In the late 1990s, the anti-gun groups joined a coordinated strategy to bankrupt the firearms industry. Starting in 1998, more than 30 local governments sued firearm companies and trade associations. Rostron, Symposium: Armed Standoff: The Impasse in Gun Legislation and Litigation, supra, at 1054. It's estimated that each case sought damages ranging from $100 million to $800 million. Rostron, Symposium: Armed Standoff: The Impasse in Gun Legislation and Litigation, supra, at 1054. But merits aside, the cost of defending against these suits was

enormous. The firearms industry spent upward of $1 million *per day* in legal fees. *See* Peter Boyer, *Big Guns*, NEW YORKER, May 17, 1999. Designedly so. The anti-gun lobby knew that "the costs alone of defending these suits [would] eat up the gun companies." Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, New York Times, June 24, 1999.

And the suits did just that. Davis Industries, among the ten largest firearm manufacturers in the country, declared bankruptcy in 1999. Fox Butterfield, *Lawsuits Lead Gun Maker to File for Bankruptcy*, NEW YORK TIMES, June 24, 1999. Colt's Manufacturing Company could no longer secure financing because of the lawsuits, so it abandoned "its 144-year-old retail gun business in an effort to limit its liability." Mike Allen, *Colt's to Curtail Sale of Handguns*, NEW YORK TIMES, Oct. 11, 1999. It was under this environment that Congress stepped in to "preserve a citizen's access to a supply of firearms and ammunition for all lawful purposes" by putting an end to these predatory tort suits. 15 U.S.C. § 7901(b)(2).

But now, anti-gun groups—having failed to disarm Americans democratically and constitutionally—are asking Pennsylvania to adopt

the role of the King's Bench and reinterpret the law. Doing so would allow a means to an end clearly foreclosed by our Constitution. The superior court is the only appellate court in the United States that has taken this extraordinary step. This Court should correct its departure from constitutional fidelity.

C. The Second Amendment will not survive under this tort regime.

The Second Amendment protects the right to own effective weapons for self-defense. *Heller*, 554 U.S. at 635. The firearms industry supplies these lethal weapons, making the industry both necessary to a constitutional right and at risk for tort abuse.

In the right hands, these firearms allow law-abiding citizens to protect themselves and their loved ones. In the wrong hands, criminals can use them to hurt people. While tort lawsuits against the manufacturers of chainsaws, motorcycles, and trampolines might create safer products in the long run, no amount of litigation against the firearms industry will take criminals off the streets. These criminals will continue to misuse firearms for unlawful purposes no matter how often the firearms manufacturers are sued for their activities. Remedies for firearm violence include jailing criminals and authorizing lawsuits against

them—both of which are options here. But shifting liability from criminals to the gun industry for the criminal misuse of functional firearms will only undermine the Second Amendment.

But of course, that is the point. When balancing the interests of law-abiding citizens to protect themselves against the harms of gun violence, the anti-gun lobby believes that guns are not worth the cost. But even if the anti-gun lobby represented a majority of Americans, the Constitution still wouldn't be subject to public polling. The Constitution "is the very product of an interest balancing by the people," which "elevates above all other interests the right of law-abiding, responsible citizens to use arms." *Heller*, 554 U.S. at 635.

CONCLUSION

The PLCAA is a constitutional exercise of Congress' Commerce Clause power that protects an enumerated constitutional right. This Court should grant Petitioners' application for leave to appeal and correct the superior court's erroneous decision.

DATED this 12th day of September, 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Pennsylvania Rules of Appellate Procedure 127 and 531, David Dewhirst, an employee in the Office of the Attorney General of the Montana, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,312 words, excluding the parts of the document exempted by Pa. R. App. P. 2135.

/s/ *Jonathan S. Goldstein*
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