

No. \_\_\_\_\_

---

In the  
**Supreme Court of the United States**

---

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,  
BERETTA U.S.A. CORP., DAVIDSON'S, INC., GLOCK INC.,  
CENTRAL TEXAS GUN WORKS, HORNADY  
MANUFACTURING COMPANY, LIPSEY'S LLC, OSAGE  
COUNTY GUNS LLC, RSR GROUP, INC., SHEDHORN  
SPORTS, INC., SIG SAUER, INC., SMITH & WESSON INC.,  
SPORTS SOUTH LLC, SPRAGUE'S SPORTS INC., STURM,  
RUGER & COMPANY, INC.,

*Petitioners,*

v.

LETITIA JAMES, in her official capacity as  
New York Attorney General,

*Respondent.*

---

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

---

**PETITION FOR WRIT OF CERTIORARI**

---

PAUL D. CLEMENT  
ERIN E. MURPHY  
*Counsel of Record*  
MATTHEW D. ROWEN  
NICHOLAS A. AQUART  
CLEMENT & MURPHY, PLLC  
706 Duke Street  
Alexandria, VA 22314  
(202) 742-8900  
erin.murphy@clementmurphy.com  
*Counsel for Petitioners*

February 20, 2026

---

## QUESTION PRESENTED

The Protection of Lawful Commerce in Arms Act, 15 U.S.C. §§7901-7903, was “enacted ... to halt a flurry of lawsuits attempting to make gun manufacturers pay for the downstream harms resulting from misuse of their products.” *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 298 (2025). To that end, the PLCAA generally bars lawsuits that seek to hold firearms industry members liable for harms caused by criminals who misuse products that they lawfully manufactured or sold. While that bar has some exceptions, including one that permits a narrow subset of lawsuits grounded in knowing violations of certain laws, this Court expressly cautioned against reading that so-called “predicate exception” to provide “a capacious way out of PLCAA.” *Id.* at 299. Yet in the decision below, the Second Circuit did just that. It held that the predicate exception green-lights the very same tort-style suits that Congress enacted the PLCAA to foreclose, so long as a state codifies general tort-law principles in a statute that singles out the firearms industry, instead of requiring parties to pursue such claims under common-law causes of action. That decision flouts bedrock interpretive principles, defies the explicit will of Congress, and creates a circuit split.

The question presented is:

Whether the PLCAA’s predicate exception allows parties to bring the same common-law-style suits against firearms industry members that Congress enacted the PLCAA to prohibit, so long as states codify those general common-law principles in a statute that applies to commerce in arms.

**PARTIES TO THE PROCEEDING**

Petitioners (plaintiffs and appellants below) are the National Shooting Sports Foundation, Inc., Beretta U.S.A. Corp., CTCHGC LLC d/b/a Central Texas Gun Works, Davidson's Inc., GLOCK, Inc., Hornady Manufacturing Company, Lipsey's, LLC, Osage County Guns, RSR Group, Inc., Shedhorn Sports Inc., SIG Sauer, Inc., Smith & Wesson Inc., Sports South LLC, Sprague's Sports Inc., and Sturm, Ruger & Company, Inc.

Respondent (defendant and appellee below) is Letitia James, in her official capacity as New York Attorney General.

## **CORPORATE DISCLOSURE STATEMENT**

National Shooting Sports Foundation, Inc. has no parent company, and no publicly held corporation owns 10% or more of NSSF stock.

Beretta Holdings S.A. is the parent company of plaintiff Beretta U.S.A. Corp. and owns more than 10% of Beretta U.S.A. Corp. Beretta U.S.A. Corp. is not publicly traded, and so there is no publicly held corporation that owns 10% or more of Beretta U.S.A. Corp. stock.

CTCHGC LLC d/b/a Central Texas Gun Works has no parent company. CTCHGC LLC d/b/a Central Texas Gun Works is not publicly traded, and so there is no publicly held corporation that owns 10% or more of CTCHGC LLC d/b/a Central Texas Gun Works stock.

Davidson's, Inc. has no parent company. Davidson's, Inc. is not publicly traded, and so there is no publicly held corporation that owns 10% or more of Davidson's, Inc. stock.

GLOCK, Inc. has no parent corporation, and there is no publicly held corporation that owns 10% or more of GLOCK, Inc. stock.

Hornady Manufacturing Company has no parent company, and there is no publicly held corporation that owns 10% or more of Hornady Manufacturing Company stock.

Lipsey's, LLC has no parent company. Lipsey's, LLC is not publicly traded, and so there is no publicly held corporation that owns 10% or more of Lipsey's, LLC stock.

Osage County Guns has no parent company, and there is no publicly held corporation that owns 10% or more of Osage County Guns stock.

RSR Group, Inc. has no parent company. RSR Group, Inc. is not publicly traded, and so there is no publicly held corporation that owns 10% or more of RSR Group, Inc. stock.

Shedhorn Sports Inc. has no parent company. Shedhorn Sports Inc. is not publicly traded, and so there is no publicly held corporation that owns 10% or more of Shedhorn Sports Inc. stock.

SIG Sauer, Inc. is a wholly owned subsidiary of SIG SAUER US Holding LP. No publicly held corporation owns 10% or more of SIG Sauer, Inc. stock.

Smith & Wesson Inc. is a wholly owned subsidiary of Smith & Wesson Brands, Inc. Smith & Wesson Brands, Inc. is publicly traded.

Sports South LLC has no parent company. Sports South LLC is not publicly traded, and so there is no publicly held corporation that owns 10% or more of Sports South LLC stock.

Sprague's Sports Inc. has no parent company. Sprague's Sports Inc. is not publicly traded, and so there is no publicly held corporation that owns 10% or more of Sprague's Sports Inc. stock.

Sturm, Ruger & Company, Inc. has no parent company, and no publicly held corporation owns 10% or more of Sturm, Ruger & Company, Inc. stock. Sturm, Ruger & Company, Inc. is publicly traded.

**STATEMENT OF RELATED PROCEEDINGS**

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *National Shooting Sports Foundation, Inc., et al. v. Letitia James*, No. 22-1374 (2d Cir.), opinion issued July 10, 2025.
- *National Shooting Sports Foundation, Inc., et al. v. Letitia James*, No. 21-cv-1348 (N.D.N.Y.), judgment entered May 25, 2022.

**TABLE OF CONTENTS**

QUESTION PRESENTED..... i  
PARTIES TO THE PROCEEDING ..... ii  
CORPORATE DISCLOSURE STATEMENT..... iii  
STATEMENT OF RELATED PROCEEDINGS..... v  
TABLE OF AUTHORITIES..... viii  
PETITION FOR WRIT OF CERTIORARI ..... 1  
OPINIONS BELOW ..... 4  
JURISDICTION ..... 5  
CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED..... 5  
STATEMENT OF THE CASE ..... 5  
    A. Legal and Factual Background..... 5  
    B. Procedural Background..... 13  
REASONS FOR GRANTING THE PETITION..... 16  
I. The Decision Below Creates A Circuit Split.... 18  
II. The Decision Below Defies Text, Context, And  
Common Sense, And It Green-Lights State  
Efforts To Nullify Federal Law ..... 22  
III. The Question Presented Is Exceptionally  
Important, And Time Is Of The Essence..... 30  
CONCLUSION ..... 35  
APPENDIX  
Appendix A  
Opinion, United States Court of Appeals  
for the Second Circuit, *Nat’l Shooting  
Sports Found., Inc. v. James*, No. 22-1374  
(July 10, 2025) ..... App-1

Appendix B

Order, United States Court of Appeals for  
the Second Circuit, *Nat'l Shooting Sports  
Found., Inc. v. James*, No. 22-1374 (Dec.  
2, 2025)..... App-45

Appendix C

Memorandum Decision & Order, United  
States District Court for the Northern  
District of New York, *Nat'l Shooting  
Sports Found., Inc. v. James*, No. 21-cv-  
1348 (May 25, 2022) ..... App-47

Appendix D

Relevant Constitutional and Statutory  
Provisions..... App-80  
U.S. Const. art. VI, cl. 2 ..... App-80  
N.Y. Gen. Bus. Law §898-a ..... App-80  
N.Y. Gen. Bus. Law §898-b ..... App-81  
N.Y. Gen. Bus. Law §898-c..... App-82  
N.Y. Gen. Bus. Law §898-d ..... App-82  
N.Y. Gen. Bus. Law §898-e ..... App-82

## TABLE OF AUTHORITIES

### Cases

<i>Adames v. Sheahan</i> , 909 N.E.2d 742 (Ill. 2009).....	9
<i>Burrage v. United States</i> , 571 U.S. 204 (2014).....	26
<i>Christopher v. SmithKline Beecham Corp.</i> , 567 U.S. 142 (2012).....	26
<i>City of Gary ex rel. King</i> <i>v. Smith &amp; Wesson Corp.</i> , 801 N.E.2d 1222 (Ind. 2003).....	33
<i>City of New York v. Beretta U.S.A. Corp.</i> , 315 F.Supp.2d 256 (E.D.N.Y. 2004) .....	10, 28
<i>City of New York v. Beretta U.S.A. Corp.</i> , 524 F.3d 384 (2d Cir. 2008) .....	10, 11, 14, 15, 29
<i>City of St. Louis v. Cernicek</i> , 145 S.W.3d 37 (Mo. Ct. App. 2004) .....	6
<i>Delana v. CED Sales, Inc.</i> , 486 S.W.3d 316 (Mo. 2016).....	9
<i>District of Columbia v. Beretta U.S.A. Corp.</i> , 940 A.2d 163 (D.C. 2008).....	3, 8, 9, 22
<i>District of Columbia v. Beretta, U.S.A., Corp.</i> , 847 A.2d 1127 (D.C. 2004).....	6
<i>District of Columbia v. Beretta, U.S.A., Corp.</i> , 872 A.2d 633 (D.C. 2005).....	32
<i>District of Columbia v. Heller</i> , 554 U.S. 570 (2008).....	5
<i>Ezell v. City of Chicago</i> , 651 F.3d 684 (7th Cir. 2011).....	5

<i>Fischer v. United States</i> , 603 U.S. 480 (2024).....	26
<i>Gustafson v. Alloyd Co.</i> , 513 U.S. 561 (1995).....	27
<i>Gustafson v. Springfield, Inc.</i> , 333 A.3d 651 (Pa. 2025).....	9
<i>Hillman v. Maretta</i> , 569 U.S. 483 (2013).....	27
<i>Ileto v. Glock</i> , 565 F.3d 1126 (9th Cir. 2009).....	3, 9, 10, 19, 20, 21, 33
<i>Ileto v. Glock, Inc.</i> , 349 F.3d 1191 (9th Cir. 2003).....	3, 19
<i>Kindred Nursing Ctrs. Ltd. P'ship v. Clark</i> , 581 U.S. 246 (2017).....	3, 23
<i>N.Y. State Rifle &amp; Pistol Ass'n, Inc. v. Bruen</i> , 597 U.S. 1 (2022).....	5, 31
<i>Penelas v. Arms Tech., Inc.</i> , 778 So.2d 1042 (Fla. Dist. Ct. App. 2001).....	6
<i>People ex rel. Spitzer v. Sturm, Ruger &amp; Co.</i> , 761 N.Y.S.2d 192 (N.Y. App. Div. 2003) .....	10, 28
<i>Roberts v. Smith &amp; Wesson Brands, Inc.</i> , 98 F.4th 810 (7th Cir. 2024) .....	31
<i>Sills v. Smith &amp; Wesson Corp.</i> , 2000 WL 33113806 (Del. Super. Ct. Dec. 1, 2000) .....	6
<i>Smith &amp; Wesson Brands, Inc.</i> <i>v. Estados Unidos Mexicanos</i> , 605 U.S. 280 (2025).....	2, 8, 22, 23, 24, 30

<i>Taurus Holdings, Inc.</i> <i>v. U.S. Fid. &amp; Guar. Co.</i> , 367 F.3d 1252 (11th Cir. 2004).....	6
<i>Teixeira v. Cnty. of Alameda</i> , 873 F.3d 670 (9th Cir. 2017).....	5
<i>Wash. State Dep’t of Soc. &amp; Health Servs.</i> <i>v. Guardianship Est. of Keffeler</i> , 537 U.S. 371 (2003).....	24
<b>Constitutional Provision</b>	
U.S. Const. amend. II .....	5
<b>Statutes</b>	
15 U.S.C. §7901 .....	27
15 U.S.C. §7901(a)(2).....	7
15 U.S.C. §7901(a)(3).....	5
15 U.S.C. §7901(a)(4).....	5, 29
15 U.S.C. §7901(a)(5).....	7, 13, 29
15 U.S.C. §7901(a)(6).....	2, 7, 21, 28, 29
15 U.S.C. §7901(a)(6)-(7) .....	10, 17, 27
15 U.S.C. §7901(a)(7).....	6, 7, 21, 28, 30
15 U.S.C. §7901(b)(1).....	7, 27, 30
15 U.S.C. §7902(a) .....	7, 23
15 U.S.C. §7903(3) .....	8
15 U.S.C. §7903(4) .....	12
15 U.S.C. §7903(5)(A) .....	2, 3, 8, 9, 11, 15, 17, 23, 24, 25
15 U.S.C. §7903(5)(B) .....	8
815 Ill. Comp. Stat. 505/2DDDD.....	31
Cal. Civ. Code §3273.51.....	30

Colo. Rev. Stat. §6-27-104 .....	30
Colo. Rev. Stat. §6-27-105 .....	30
10 Del. Code §3930 .....	30
Haw. Rev. Stat. §134-102 .....	30
Haw. Rev. Stat. §134-103 .....	30
Md. Code Ann., Cts. & Jud. Proc. §3-2502 .....	31
Md. Code Ann., Cts. & Jud. Proc. §3-2503 .....	31
N.J. Stat. Ann. §2C:58-35.....	31
N.Y. Gen. Bus. Law §898-a(2) .....	12
N.Y. Gen. Bus. Law §898-a(6) .....	12
N.Y. Gen. Bus. Law §898-b .....	25
N.Y. Gen. Bus. Law §898-b(1) .....	12, 23
N.Y. Gen. Bus. Law §898-b(2) .....	12
N.Y. Gen. Bus. Law §898-c(1) .....	12, 13
N.Y. Gen. Bus. Law §898-c(2) .....	13
N.Y. Gen. Bus. Law §898-d .....	13, 23
N.Y. Gen. Bus. Law §898-e .....	13, 23, 26
N.Y. Penal Law §240.45 .....	12
Wash. Rev. Code §7.48.330 .....	31
2002 Cal. Legis. Serv. ch. 906, §1 (A.B. 496) .....	19
2025 Conn. Pub. Act. No. 25-43 .....	31
<b>Other Authorities</b>	
Compl., <i>Mayor of Balt. v. Glock, Inc.</i> , No. C 24-CV-25-001450 (Md. Cir. Ct. Feb. 12, 2025) .....	31
Compl., <i>Platkin v. RR Outdoors, LLC</i> , No. CUM-C-37-24 (N.J. Sup. Ct. Nov. 13, 2024) .....	31

Consent Order & Final Judgment, <i>Platkin v. Point Blank Guns &amp; Ammo LLC</i> , No. MRS-C-123-24 (N.J. Sup. Ct. Mar. 13, 2025).....	33
First Amended Compl., <i>City of Buffalo v. Smith &amp; Wesson Brands, Inc.</i> , No. 6:23-cv-06061 (W.D.N.Y. Jan. 22, 2026) .....	32
First Amended Compl., <i>City of Rochester v. Smith &amp; Wesson Brands, Inc.</i> , No. 6:23-cv-06061 (W.D.N.Y. Jan. 22, 2026) .....	32
Gov. Andrew M. Cuomo, <i>Governor Cuomo Signs First-in-the-Nation Gun Violence Disaster Emergency to Build a Safer New York</i> , YouTube (July 6, 2021), <a href="https://bit.ly/3UyZoSx">https://bit.ly/3UyZoSx</a> .....	2, 11, 22, 30
H.B. 21, 2026 Gen. Assemb., Reg. Sess. (Va. 2026), <a href="https://perma.cc/QU5H-HWB4">https://perma.cc/QU5H-HWB4</a> .....	31
H.B. 2672, 194 Gen. Ct., Reg. Sess. (Mass. 2025) .....	31
Order Denying Defs.’ Mot. to Dismiss, <i>Platkin v. Glock, Inc.</i> , No. ESX-C-00286-24 (N.J. Super. Ct. Oct. 14, 2025) .....	32
Order Denying Mot. to Dismiss, <i>Roberts v. Smith &amp; Wesson Brands, Inc.</i> , No. 22 LA 00000487 (Ill. Cir. Ct. Apr. 1, 2025).....	32
Recent Legislation, <i>Protection of Lawful Commerce in Arms Act</i> , 119 Harv. L. Rev. 1939 (2006).....	6

## PETITION FOR WRIT OF CERTIORARI

The decision below green-lights efforts by states to nullify a federal statute that Congress enacted for the express purpose of stopping states from abusing tort law to try to cripple a lawful industry—and it creates a circuit split in the process. This Court’s review is sorely needed to ensure that states hostile to Second Amendment rights cannot frustrate their exercise by trying to bankrupt the licensed (and heavily regulated) industry members that make the exercise of those constitutional rights possible.

In 2005, Congress passed the Protection of Lawful Commerce in Arms Act (“PLCAA”) to stamp out state and local government efforts to use novel applications of nuisance and negligence torts to make law-abiding members of the firearms industry liable for injuries caused by criminals who misuse their lawful products. To be clear, the problem with those nuisance and negligence suits was not that they were based on nominally generally applicable laws that did not specifically single out firearms manufacturers. To the contrary, the problem was that they were being used to unfairly target an industry that is central to the lawful exercise of constitutional rights. Nonetheless, in 2021, New York enacted a law to—in the Governor’s own words—“reinstate the public nuisance liability for gun manufacturers” that Congress prohibited in the PLCAA, in an avowed effort to “right the wrong” that New York believes Congress committed when it enacted that federal law. Gov. Andrew M. Cuomo, *Governor Cuomo Signs First-in-the-Nation Gun Violence Disaster Emergency to Build a Safer New York* at 35:00-38:15, YouTube (July 6, 2021),

<https://bit.ly/3UyZoSx>. True to the Governor’s word, New York General Business Law §§898-a-e (“§898”) does exactly what the PLCAA prohibits, creating a new civil action under which “gun industry members” may be forced to redress criminals’ misdeeds, on the theory that they “unreasonably” made, sold, or marketed a firearm that is later misused in New York.

That undisguised state effort to “reinstate” what federal law expressly forbids is a blatant assault on the Supremacy Clause. Yet the Second Circuit allowed it to stand, on the theory that one of the PLCAA’s exceptions is so capacious as to defeat the statute’s core mission. According to the Second Circuit, the PLCAA’s “predicate exception,” 15 U.S.C. §7903(5)(A)(iii), empowers states to resurrect the very lawsuits that the PLCAA says on its face it was enacted to inter, through the simple expedient of codifying into a statute that specifically targets the firearms industry the same novel theories that Congress derided as an “abuse of the legal system,” *id.* §7901(a)(6). Congress did not enact such a self-defeating law or incentivize states to codify generally applicable torts as distinct statutory disabilities for the firearms industry. Indeed, “if [§898] fell within” the predicate exception, then that exception “would swallow most of the rule.” *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280, 299 (2025). This Court has already expressed “doubt Congress intended to draft such a capacious way out of PLCAA”—and “in fact it did not.” *Id.*

The predicate exception permits civil suits alleging that a member of the firearms industry “knowingly violated a State or Federal statute

applicable to the sale or marketing of [a firearm], and the violation was a proximate cause of the harm for which relief is sought.” 15 U.S.C. §7903(5)(A)(iii). That exception cannot sensibly be read to exempt any and all statutes that apply to firearms or the firearms industry, as such a capacious reading “would make it trivially easy for States to undermine the Act—indeed, to wholly defeat it.” *Kindred Nursing Ctrs. Ltd. P’ship v. Clark*, 581 U.S. 246, 255 (2017). In reality, text, context, purpose, and common sense all make clear that the predicate exception exempts only actions predicated on laws that impose concrete obligations or prohibitions that industry members can actually knowingly violate (or knowingly comply with), not laws that merely codify general common-law duties—and do away with proximate cause, for good measure.

Other courts have agreed—and emphatically rejected the notion that the predicate exception authorizes such easy nullification of federal law. The Ninth Circuit has held that the PLCAA preempts “negligence and nuisance” claims and other “general tort theories of liability that traditionally have been embodied in the common law” even when they have been “codified” in a statute that applies “to the sale or marketing of firearms.” *Ileto v. Glock (Ileto II)*, 565 F.3d 1126, 1135-36 (9th Cir. 2009) (quoting *Ileto v. Glock, Inc. (Ileto I)*, 349 F.3d 1191, 1202 (9th Cir. 2003)). The D.C. Court of Appeals likewise has held that the PLCAA preempts strict-liability tort claims even when brought under a statute that “appli[es] to the sale or marketing of a class of firearms.” *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169 (D.C. 2008). Both of those courts recognized that reading the predicate exception to permit such suits

would turn the Protection of Lawful Commerce in Arms Act into an act that protects neither lawful arms nor lawful commerce in them. But the Second Circuit has now concluded otherwise, holding that any law that “applie[s] to the sale and marketing of firearms” qualifies as a predicate statute, even if it concededly revives *the very same* tort claims that Congress explicitly decried as “abusive” and set out to inter. App.20.

That division of authority is clear, and it necessitates this Court’s resolution. Just as Congress does not hide elephants in mouseholes, it does not place trap doors in statutes that empower states to circumvent federal laws enacted to curb state abuses. Yet under the decision below, state and local governments are free to invite ever more litigation reinstating the same strained theories that Congress prohibited, through the simple expedient of codifying those theories in statutes targeting commerce in arms. This is already happening: In recent months, municipalities and private parties alike have flooded the zone with suits hawking the exact same theories that led Congress to pass the PLCAA in the first place. And it is not just New York; ten states have already passed similar anti-PLCAA laws, and more are on the way. This Court should step in now, before these pernicious and verboten laws proliferate further.

#### **OPINIONS BELOW**

The Second Circuit’s opinion, 144 F.4th 98, is reproduced at App.1-44. The district court’s opinion, 604 F.Supp.3d 48, is reproduced at App.47-79.

## JURISDICTION

The Second Circuit issued its opinion on July 10, 2025, and denied a timely petition for en banc rehearing on December 2, 2025. App.45-46. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, is reproduced at App.80. New York’s General Business Law §§898-a to -e (“§898”) is reproduced at App.80-82.

## STATEMENT OF THE CASE

### A. Legal and Factual Background

1. The Constitution “confer[s] an individual right to keep and bear arms.” *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 20 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008)); *see* U.S. Const. amend. II. And “the core Second Amendment right to keep and bear arms for self-defense ‘wouldn’t mean much’ without the ability to acquire arms.” *Teixeira v. Cnty. of Alameda*, 873 F.3d 670, 677 (9th Cir. 2017) (en banc) (quoting *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)). Nevertheless, in the late 1990s, state and local governments began trying to use novel applications of state tort law to hold licensed “manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended” accountable “for the harm caused by the misuse of firearms by third parties, including criminals.” 15 U.S.C. §7901(a)(3); *see id.* §7901(a)(4).

These lawsuits invoked a variety of theories, including: strict liability for abnormally dangerous activities or defective design, *Penelas v. Arms Tech., Inc.*, 778 So.2d 1042, 1043-44 (Fla. Dist. Ct. App. 2001); negligent marketing, *City of St. Louis v. Cernicek*, 145 S.W.3d 37, 38, 40 (Mo. Ct. App. 2004) (per curiam); negligent distribution, *District of Columbia v. Beretta, U.S.A., Corp.*, 847 A.2d 1127, 1131 (D.C. 2004); deceptive trade practices, *Taurus Holdings, Inc. v. U.S. Fid. & Guar. Co.*, 367 F.3d 1252, 1252-53 (11th Cir. 2004) (per curiam); and public nuisance, *Sills v. Smith & Wesson Corp.*, 2000 WL 33113806, at \*7 (Del. Super. Ct. Dec. 1, 2000).

Some of these suits succeeded in stretching the common law far beyond its traditional limits. Others were unsuccessful. But the final tally told only part of the story. Had these sprawling suits been permitted to persist and proliferate, the legal fees alone would have bankrupted the industry. That was the goal: State and “municipal leaders pressed on regardless of their chance of success, spending taxpayers’ money in a war of attrition against the firearms industry.” Recent Legislation, *Protection of Lawful Commerce in Arms Act*, 119 Harv. L. Rev. 1939, 1940 (2006).

2. It did not take long for Congress to see these suits for what they were: a coordinated effort to try to destroy the firearms industry by saddling its members with crushing liability for the independent acts of criminals. As the PLCAA’s enumerated findings detail, the actions brought by these cities and states pressed “theories without foundation in hundreds of years of the common law and jurisprudence of the United States.” 15 U.S.C. §7901(a)(7). Indeed,

Congress found “[t]he possibility of imposing liability on an entire industry for harm that is solely caused by others” an anathema to our legal traditions and “an abuse of the legal system” that “erodes public confidence in our Nation’s laws.” *Id.* §7901(a)(6). Cities and states pressed these novel efforts, moreover, at substantial cost to individual rights, including the Second Amendment right to keep and bear arms, *id.* §7901(a)(2), (6), and the right of industry members to pursue their trade consistent with the Constitution’s privileges and immunities guarantee, *see id.* §7901(a)(7). In short, Congress found it profoundly unfair to try to hold law-abiding businesses engaged in the lawful sale of legal (and constitutionally protected) products accountable “for the harm caused by those who criminally or unlawfully misuse ... products that function as designed and intended.” *Id.* §7901(a)(5).

Having so found, Congress declared the PLCAA’s first enumerated “purpose[]” to be to “prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations,” based on harm “caused by the criminal or unlawful misuse of firearm products” by third parties. *Id.* §7901(b)(1). To make good on that promise, Congress prohibited all such suits (dubbed “qualified civil liability actions”) from being “brought in any Federal or State court.” *Id.* §7902(a). Specifically, the PLCAA prohibits “civil action[s] ... brought by any person,” “including any governmental entity,” “against a manufacturer or seller of [firearms and related products] for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other

relief, resulting from the criminal or unlawful misuse of a qualified product by ... a third party.” *Id.* §7903(3), (5)(A). That is not just a defense against liability. The PLCAA confers a substantive “immunity” from “qualified civil liability actions” altogether. *Smith & Wesson*, 605 U.S. at 299.

Only six enumerated types of claims are not prohibited. *See* 15 U.S.C. §7903(5)(A). The PLCAA exempts actions against someone who has been convicted of transferring a firearm knowing or having reasonable cause to believe that it will be used in a crime. *Id.* §7903(5)(A)(i). It exempts actions against licensed sellers of firearms for negligence per se and negligent entrustment, *id.* §7903(5)(A)(ii), the latter of which is defined as supplying a firearm to someone “the seller knows, or reasonably should know, ... is likely to, and does, use the product in a manner involving unreasonable risk of physical injury to the person or others,” *id.* §7903(5)(B). It exempts actions for breach of contract or warranty and design or manufacturing defects. *Id.* §7903(5)(A)(iv)-(v). And it exempts actions in which a licensed manufacturer or seller is alleged to have “knowingly violated a State or Federal statute applicable to the sale or marketing of [a firearm or related] product,” if “the violation was a proximate cause of the harm for which relief is sought.” *Id.* §7903(5)(A)(iii).

That particular provision has become known as the “predicate exception” because, “to take effect, it requires that the manufacturer or seller have committed an underlying (or predicate) statutory violation.” *Beretta*, 940 A.2d at 168. Congress provided examples of the kind of statutes it had in

mind: (I) statutes prohibiting industry members from making false entries in or omitting information from firearm-sale records; and (II) statutes prohibiting industry members from facilitating straw purchases. 15 U.S.C. §7903(5)(A)(iii). Congress also made clear that not just any statutory violation will suffice. The predicate exception covers only actions predicated on a “knowing” violation of such a statute that was “a proximate cause” of the plaintiff’s alleged injury. *Id.*

3. In the years following the PLCAA’s enactment, public and private litigants raised a host of constitutional challenges to the statute. All of them failed. *See, e.g., Iieto II*, 565 F.3d at 1139-40; *Beretta*, 940 A.2d at 172-82; *Adames v. Sheahan*, 909 N.E.2d 742, 765 (Ill. 2009); *Delana v. CED Sales, Inc.*, 486 S.W.3d 316, 323-24 (Mo. 2016) (en banc).<sup>1</sup> Their efforts to skirt the PLCAA’s prohibition on “qualified civil liability actions” proved equally fruitless. *See, e.g., Delana*, 486 S.W.3d at 320-21 (rejecting argument that “criminal or unlawful misuse of a [firearm]” must be sole cause of injury to fall within §7903(5)(A)).

A third front in the early campaign against the PLCAA focused on the predicate exception. After the law was enacted, various litigants tried to leverage the predicate exception to salvage or revive the same nuisance- and negligence-based tort actions Congress passed the PLCAA to stamp out, on the theory that the predicate exception exempts state-law tort claims so long as a state codifies its tort law in a statute. Those efforts—or at least the initial round of them—

---

<sup>1</sup> A recent retread failed too. *See Gustafson v. Springfield, Inc.*, 333 A.3d 651, 673-83 (Pa. 2025), *cert. denied*, --- S.Ct. ----, 2025 WL 3620464 (Dec. 15, 2025).

failed too. *See, e.g., Iletto II*, 565 F.3d at 1135-36; *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008). As courts recognized, the problem Congress had with pre-PLCAA tort suits was not that they were common-law suits; in fact, some of those suits had invoked statutes that codified the common-law principles on which they relied. *See, e.g., Iletto II*, 565 F.3d at 1130, 1143 n.11; *City of New York v. Beretta U.S.A. Corp.*, 315 F.Supp.2d 256, 262 (E.D.N.Y. 2004); *People ex rel. Spitzer v. Sturm, Ruger & Co.*, 761 N.Y.S.2d 192, 202 (N.Y. App. Div. 2003). The problem was that those sprawling suits sought not only to target an industry that is both unpopular in some quarters and vital to the exercise of constitutional rights, but to “expand civil liability” far beyond its traditional moorings. 15 U.S.C. §7901(a)(6)-(7). Courts thus concluded that the PLCAA prohibits such actions entirely, regardless of whether they are brought pursuant to general tort law or a specific statute codifying it. *See Iletto II*, 565 F.3d at 1135-36; *Beretta*, 524 F.3d at 403-04.

4. The PLCAA accomplished for a while Congress’ goal of deterring intrepid state and local governments from seeking to make manufacturers and sellers of legal firearms pay for criminal misuses of firearms. But critics of the PLCAA are not easily deterred. In 2021, New York reentered the fray, enacting General Business Law §§898-a to -e—which, as Judge Jacobs observed below, “is nothing short of an attempt to end-run PLCAA,” App.40.

New York made no secret of that. As the Governor put it on signing day, the point of §898 is to “reinstate the public nuisance liability for gun manufacturers”

that Congress enacted the PLCAA to foreclose, and thereby “right the wrong” that New York believes Congress committed by enacting it. Cuomo, *supra*, at 35:00-38:15. The legislature was no less transparent. Section 898 reproduces, largely verbatim, the text of Penal Law §240.45, the state’s general nuisance law. That is notable, because the Second Circuit held in 2008 that §240.45 does *not* qualify as a predicate statute for purposes of the PLCAA’s exception, reasoning that it does not “regulate the firearms industry” in any meaningful sense, let alone in a manner “similar to” the illustrative examples Congress supplied. *Beretta*, 524 F.3d at 402; *see* 15 U.S.C. §7903(5)(A)(iii)(I) & (II). Nevertheless, New York decided to try again with §898.

Indeed, the only differences between §240.45 and §898 are (a) whereas §240.45 applies to acts and “person[s]” generally, §898 applies *only* to “the sale, manufacturing, importing[,] or marketing” of firearms or related products by “gun industry members,” and (b) whereas §240.45 prohibits only creating or maintaining a condition that “endangers the safety or health of [the public],” §898 prohibits “contribut[ing]” to such a condition too:

**No gun industry member**, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain **or contribute to** a condition in New York state that endangers the safety or health of the public **through the sale,**

**manufacturing, importing or  
marketing of a qualified product.<sup>2</sup>**

N.Y. Gen. Bus. Law §898-b(1) (bolded type showing alterations from N.Y. Penal Law §240.45). Any failure to comply with §898-b(1) “that results in harm to the public” is deemed “a public nuisance.” *Id.* §898-c(1).

Section 898 imposes negligence liability on industry members too. Section 898 requires “gun industry members ... [to] establish and utilize reasonable controls and procedures to prevent [their] qualified products from being possessed, used, marketed or sold unlawfully in New York state.” *Id.* §898-b(2). But, as with §898-b(1), §898-b(2) does not tie “reasonable controls and procedures” to any of the many federal, state, or local laws with which firearms manufacturers and sellers must already comply. It instead offers only the exceedingly generic guidance that “[r]easonable controls and procedures” are “policies that include, but are not limited to[,] ... instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others.” *Id.* §898-a(2).

---

<sup>2</sup> Section 898 initially incorporated the PLCAA’s definition of “[q]ualified product,” N.Y. Gen. Bus. Law §898-a(6), which is limited to firearms products “shipped or transported in interstate or foreign commerce,” 15 U.S.C. §7903(4). The statute thus by its terms applied only to *interstate*, not *intrastate*, commerce. The legislature subsequently amended the statute to fix that glaring Commerce Clause problem. App.26-27.

Failure to abide by the nebulous commands of §898-b(1) or §898-b(2) is “declared to be a public nuisance” if it “results in harm to the public.” *Id.* §898-c(1). And §898 not only lacks any requirement that a violation of its amorphous obligations be “knowing,” but makes clear that intent is not relevant to liability: “The existence of a public nuisance shall not depend on whether the gun industry member acted for the purpose of causing harm.” *Id.* §898-c(2).

Section 898 authorizes the state attorney general and any city corporation counsel to sue “to enjoin” violations of §898 “and to obtain restitution and damages” on behalf of their respective constituencies. *Id.* §898-d. It also creates a private right of action. *Id.* §898-e. Both by design and in effect, then, §898 authorizes exactly what the PLCAA prohibits: civil actions seeking to hold firearms industry members liable “for the harm caused by those who criminally or unlawfully misuse firearm products ... that function as designed and intended.” 15 U.S.C. §7901(a)(5).

## **B. Procedural Background**

Petitioners are the National Shooting Sports Foundation and 14 of its members. They filed suit shortly after §898 took effect, seeking a preliminary injunction on the ground that §898 is preempted, void for vagueness, and unconstitutional under the Commerce Clause. App.8. The state moved to dismiss, and the district court granted the state’s motion and denied petitioners’ motion. App.8.

The Second Circuit affirmed. At the outset, despite acknowledging that petitioners “argue[d] *both* that Section 898 is entirely unconstitutional[] ... *and* that it should be invalidated ‘to the extent it is

preempted by the PLCAA,” App.10 (emphases added), the court insisted that petitioners “have not brought an as-applied challenge” on any of their claims, App.12. The court thus assigned petitioners the burden of “establish[ing] that [§898] cannot be constitutionally applied against anyone in any situation.” App.13. It then held that they failed to make that showing.

The court acknowledged that Congress enacted the PLCAA to prevent state and local governments from imposing “attenuated theories of civil liability [on] the gun industry.” App.17. And it recognized that §898 authorizes state and local governments to impose “precisely the type of civil liability action proscribed by PLCAA.” App.14. Nevertheless, the court held that §898 is a predicate statute for purposes of 15 U.S.C §7903(5)(A)(iii)’s predicate exception, and thus is not preempted by the PLCAA, because it “expressly” applies to commerce in arms. App.17-18.

The court reached that conclusion not by interpreting the PLCAA per se, but by reconstructing its 2008 decision in *Beretta*. *Beretta* held that New York’s general nuisance law (on which §898 was built) could *not* serve as a “predicate statute” because it “is a statute of general applicability that does not encompass the conduct of firearms manufacturers of which the City complains” (namely, manufacturing and selling firearms). 524 F.3d at 399-400. *Beretta* made clear that “the predicate exception was meant to apply only to statutes that actually regulate the firearms industry,” not ones that just impose broad duties of care like “negligence.” *Id.* at 403-04. And it cautioned that a contrary conclusion would give the

exception a “too-broad reading,” allowing it to “swallow the statute.” *Id.* at 403.

Yet rather than heed that admonition here, the Second Circuit read *Beretta* as confined only to statutes that do not “expressly regulate firearms,” have not been “applied to the sale and marketing of firearms,” or cannot “clearly ... be said to implicate the sale and purchase of firearms.” App.20. Thus, in the Second Circuit’s view, states actually *can* circumvent the PLCAA by codifying general tort-law principles—so long as they do so in a statute that clearly applies to the firearms industry. App.19-20. And because the court could imagine cases “under Section 898 that would fulfill the ‘knowing’ and ‘proximate cause’ requirements of the predicate exception,” it deemed it of no moment that §898 does not require either of those things. App.23 n.7; *see* 15 U.S.C. §7903(5)(A)(iii). The court accordingly rejected petitioners’ preemption argument in its entirety.<sup>3</sup>

While Judge Jacobs concurred, he expressed considerable doubt about that result. As he acknowledged, §898 is “nothing short of an attempt to end-run PLCAA.” App.40, 44. In practice, moreover, it is an end-run around *Beretta*, as §898 merely “add[ed] the words ‘gun industry member’ to the not-a-predicate statute” from *Beretta* in a “perfunctory” gesture to try to get around that decision. App.39-40. And he warned that §898 risks “enforcement so abusive and arbitrary that [the industry] can be destroyed by litigation expense, damages, and

---

<sup>3</sup> The court also affirmed dismissal of petitioners’ vagueness and Commerce Clause claims. App.31-34.

impediments to insurance and the raising of capital”— i.e., the very concerns that led Congress to enact the PLCAA. App.40-41. Nevertheless, he concluded that *Beretta* tied his hands. App.41.

Petitioners sought rehearing, which the Second Circuit denied. App.45-46.

### **REASONS FOR GRANTING THE PETITION**

The decision below blows a gaping hole in a statute that Congress enacted for the express purpose of protecting the firearms industry from exactly the kinds of lawsuits New York seeks to usher back in. Indeed, New York candidly admitted that it sought to accomplish exactly that through §898—and, thanks to the Second Circuit, it did. This Court should grant certiorari to resolve the circuit split the decision below creates and to repair the damage the Second Circuit has done to a statute that is critical to the continued exercise of Second Amendment rights. Indeed, if the predicate exception actually creates the gaping hole the Second Circuit perceived, then this Court should grant review and say as much—and give Congress an opportunity to repair the statute. The one outcome that makes no sense is to leave an Act of Congress a dead letter in the Second Circuit while it remains (at least for now) a viable statute elsewhere.

As this Court reiterated just this past Term, the PLCAA’s predicate exception, like most statutory exceptions, cannot sensibly be read so capaciously as to swallow the statute whole. In keeping with that eminently reasonable proposition, the Ninth Circuit has squarely rejected the argument that states can evade the PLCAA through the simple expedient of codifying the same common-law principles that

undergirded the litigation Congress enacted the law to stamp out. The D.C. Court of Appeals likewise has rejected the notion that the predicate exception can be woodenly read to cover literally any statute that applies to the firearms industry. Yet that is precisely what the Second Circuit held here, concluding that an avowed effort to circumvent the PLCAA can succeed so long as it has the imprimatur of a state legislature.

That conclusion not only defies common sense, but ignores virtually everything in the statute save the words “applicable to the sale or marketing of” firearms. 15 U.S.C. §7903(5)(A)(iii). It ignores the illustrative examples Congress provided in the predicate exception to show what kinds of statutes it had in mind—which look nothing like §898 (which, in turn, looks nothing like any statute enacted for any purpose other than trying to target a lawful industry by frustrating the PLCAA). It ignores the fact that the predicate exception requires a “knowing” violation of a statute, which makes sense as to things like falsifying sale records or knowingly selling to straw purchasers, but makes no sense as to a bare command to act “reasonably.” It ignores the first enumerated purpose of the statute, which is to stamp out lawsuits just like the ones §898 authorizes. And it ignores Congress’ express findings that the kinds of theories on which liability under §898 depends are an “abuse of the legal system” “without foundation in hundreds of years of the common law and jurisprudence of the United States.” *Id.* §7901(a)(6)-(7). Simply put, nothing in the PLCAA compels the nonsensical conclusion that the predicate exception empowers states to sneak in through the back door the very claims that Congress tossed out the front.

Yet, left standing, the decision below will permit New York and other states to do just that. Indeed, while New York may have been the first state to brazenly defy the PLCAA, it is certainly not the last: Several other states (including others in the Second Circuit) have already enacted copycat laws, which state attorneys general and municipalities are already using to relegate industry members to exactly the kind of state-court trench warfare that Congress already found poses a grave threat to an industry that is essential to the exercise of Second Amendment rights. The Court should put a stop to this now, and ensure that the second war of attrition against the firearms industry does not meet with more success than the first.

### **I. The Decision Below Creates A Circuit Split.**

The decision below creates a division of authority on a question that should be susceptible of only one answer: Does the PLCAA's predicate exception really empower states to circumvent the Act's core command simply by codifying the very same abusive nuisance and negligence theories that the PLCAA explicitly says it was enacted to prohibit?

In *Ileto II*, the Ninth Circuit squarely rejected the argument that the predicate exception supplies such a facile get-out-of-PLCAA-immunity-free card. The *Ileto* litigation was filed before the PLCAA was enacted. Invoking both California common law and California's "general" negligence, nuisance, and public nuisance statutes, the plaintiffs alleged that various "manufacturers, marketers, importers, distributors, and sellers" (among other things) "produce[d], market[ed], distribute[d], and s[old] more firearms

than the legitimate market demands,” which “foreseeably and proximately” contributed to crime committed with firearms. 565 F.3d at 1130, 1132-33.

At the time, none of the California laws the plaintiffs invoked expressly referred to firearms.<sup>4</sup> But the Ninth Circuit held (in a pre-PLCAA decision) that the plaintiffs’ “negligence and public nuisance allegations state[d] cognizable claims under” them. *Id.* at 1132; *see Iletto I*, 349 F.3d at 1209, 1215. In other words—specifically, the words of the Second Circuit here—the Ninth Circuit held in *Iletto I* held that those statutes “applied to the sale and marketing of firearms.” App.17-18, 20. Yet when the plaintiffs tried to argue that their statutory claims survived the PLCAA under its predicate exception, the Ninth Circuit disagreed, concluding that the laws under which they sued are *not* predicate statutes—and that a contrary holding would flout “the text and purpose of the PLCAA.” *Iletto II*, 565 F.3d at 1135-36.

Starting with the PLCAA’s express “findings and ... statement of purpose,” the Ninth Circuit explained that “Congress clearly intended to preempt common-law claims” even when they arise under statutes “codified” in a state’s “[c]ivil [c]ode.” *Id.* And merely adding the legislature’s imprimatur to “general tort theories of liability,” the court explained, does not prevent “the same judicial evolution as ordinary common-law claims,” which was “precisely

---

<sup>4</sup> California later amended its negligence statute to provide that “[t]he design, distribution, or marketing of firearms and ammunition is not exempt from the duty to use ordinary care and skill that is required by this section.” 2002 Cal. Legis. Serv. ch. 906, §1 (A.B. 496).

the target of the PLCAA.” *Id.* at 1136. Indeed, as the court recognized, the whole point of the PLCAA is to ensure that these heavily regulated businesses, whose activities are necessary to the exercise of a fundamental right, are not subjected to after-the-fact tort liability for conduct that violated none of the many concrete obligations and prohibitions with which they must comply. *Id.* In light of that undeniable legislative purpose, the Ninth Circuit held that the predicate exception encompasses “only the[] types of statutes” that actually “regulate manufacturing, importing, selling, marketing, and using firearms or that regulate the firearms industry” in some meaningful sense, not statutes laying out “general tort theories that happened to have been codified.” *Id.*

The decision below squarely departs from that sensible understanding. According to the Second Circuit, the “PLCAA’s text and history ... *do not* clearly establish that the statute’s aim was to prevent state legislatures from creating avenues to hold gun manufacturers liable for downstream harms caused by” the misuse of “their products” by criminals. App.17 (emphasis added). And in the Second Circuit’s view, the predicate exception is *not* “limited to causes of action brought under statutes similar to the enumerated examples” in the PLCAA. App.19-20. Rather, under the decision below, *any* statute “falls within th[e] bounds” of the predicate exception, so long as it applies “to the sale and marketing of firearms.” App.18, 20. By the Second Circuit’s telling, then, New York can—and did—vitate PLCAA immunity simply by grafting a “perfunctory” “reference to the firearms industry” onto its “general-purpose nuisance statute[].” App.40 (Jacobs, J., concurring).

To be sure, the California statutes in *Ileto* were generally applicable, whereas §898 singles out firearms industry members. But that had nothing to do with the Ninth Circuit’s reasoning, which rested on the fact that general tort statutes are simply not what the predicate exception has in mind, not any uncertainty about whether the state laws at issue applied to the firearms industry (which *Ileto I* had already held they did). *Ileto II*, 565 F.3d at 1135-36. Nor would a rule that turned on whether a law singles out the firearms industry make any sense, as the notion that the PLCAA is *more* receptive to statutes that subject *only* the firearms industry to suits that Congress declared “an abuse of the legal system,” 15 U.S.C. §7901(a)(6), is difficult to take seriously. Congress was not concerned with ensuring that state public-nuisance and negligence laws incant magic words making them applicable to firearms industry members. The problem with the nuisance and negligence theories being misused in an effort to bankrupt the firearms industry was not that they were generally applicable. To the contrary, Congress understood that the firearms industry was being unfairly singled out for abusive litigation based on novel tort theories. And the undeniable point of the PLCAA is to protect firearms industry members from civil actions “based on theories without foundation in hundreds of years of the common law.” *Id.* §7901(a)(7).

The Second Circuit’s rule-swallowing view of the predicate exception also conflicts with the D.C. Court of Appeals’ decision in *District of Columbia v. Beretta*. The question there was whether D.C. Code §7-2551.01 *et seq.* (2001) qualifies as a predicate statute. “[B]y its express terms,” that law “appli[es] to the sale or

marketing of a class of firearms.” 940 A.2d at 169. So, under the framework the Second Circuit adopted here, it would be a predicate statute. *See* App.19-20. But the D.C. court held otherwise. As it explained, the law “imposes no duty on firearms manufacturers or sellers to operate in any particular manner”; it just “imposes a duty to pay compensation” anytime a criminal injures someone using one of the industry member’s products. 940 A.2d at 170. The law thus looked nothing like “the class of statutory violations” Congress provided as exemplars in §7903(5)(A)(iii)(I) and (II). *Id.* at 171. And allowing it to serve as a predicate statute, the court held, would flout “the purposes underlying the PLCAA,” about which “Congress was explicit.” *Id.* Once again, then, the decision below creates a division of authority on how broadly the predicate exception sweeps.

## **II. The Decision Below Defies Text, Context, And Common Sense, And It Green-Lights State Efforts To Nullify Federal Law.**

The decision below not only creates a circuit split, but also makes nonsense of the PLCAA. As this Court recognized in *Smith & Wesson*, Congress made quite explicit that the “PLCAA’s core purpose” is to foreclose “lawsuits attempting to make gun manufacturers pay for the downstream harms resulting from misuse of their products.” 605 U.S. at 298. Yet the core purpose of §898 is to “reinstate” lawsuits seeking to make gun manufacturers (and other industry members) do exactly that. Cuomo, *supra*, at 35:00-38:15. The Second Circuit’s conclusion that §898 succeeds in accomplishing that federalism-defying objective flouts text, precedent, and the cardinal rule that a federal

statute cannot be read to “make it trivially easy for States to undermine [it]—indeed, to wholly defeat it.” *Kindred Nursing*, 581 U.S. at 255.

1. Under the PLCAA, any “civil liability action” against a licensed seller or manufacturer of firearms and related product seeking “damages ... or other relief, resulting from the criminal or unlawful misuse of [such a product] by ... a third party,” “may not be brought in any Federal or State court.” 15 U.S.C. §§7902(a), 7903(5)(A). There is no dispute that §898 authorizes “civil actions” that fit that bill. Under §898, if a plaintiff proves that a “gun industry member[’s] ... sale, manufacturing, importing or marketing of a [firearm or related product]” “contribute[d]” to “a condition in New York state that endangers the safety or health of the public,” then the industry member can be made to pay “restitution” and “damages”—even if the industry member’s conduct was not “unlawful in itself.” N.Y. Gen. Bus. Law §§898-b(1), 898-d, 898-e.

“Of course, the law Congress wrote includes the predicate exception, which allows some suits falling within PLCAA’s general ban to proceed.” *Smith & Wesson*, 605 U.S. at 299. In particular, that exception exempts actions alleging that an industry member “knowingly violated a State or Federal statute applicable to the sale or marketing of [a firearm or related] product,” if “the violation was a proximate cause of the harm for which relief is sought.” 15 U.S.C. §7903(5)(A)(iii). But the predicate exception cannot sensibly be read to exempt any and all statutes that apply to the firearms industry in any way, shape, or form, as such a capacious reading would allow the exception to “swallow most of the rule.” *Smith &*

*Wesson*, 605 U.S. at 299. The predicate exception is instead far better read to exempt only actions predicated on laws that impose concrete obligations or prohibitions on industry members—not laws that merely codify general common-law duties of care.

At the outset, the notion that the predicate exception covers any law capable of being applied to the firearms industry is belied by the fact that Congress supplied illustrative examples of what kinds of laws it had in mind. There would have been no need to do so if the exception was meant to reach literally any law that applies to the firearms industry, as that is hardly a concept that requires illumination. The whole point of providing examples is to inform the meaning of general phrases like “applicable to”—which is why interpretive canons teach that general language must be “construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words” that “follow.” *Wash. State Dep’t of Soc. & Health Servs. v. Guardianship Est. of Keffeler*, 537 U.S. 371, 384 (2003). And the examples Congress supplied in the predicate exception look nothing like §898.

The first is a knowing violation of a recordkeeping requirement, i.e., knowingly omitting from or entering false information into the records that industry members are legally required to keep, or aiding, abetting, or conspiring with someone to make a false statement material to the lawfulness of a sale. 15 U.S.C. §7903(5)(A)(iii)(I). The second is a violation of the statutory prohibition on knowingly facilitating a straw purchase, i.e., aiding, abetting, or conspiring to sell a firearm to someone the seller knows or has

reasonable cause to believe is buying it for someone who is prohibited from possessing it. *Id.* §7903(5)(A)(iii)(II). Both of those examples involve laws that tell industry members in no uncertain terms what they must do or not do to comply with them. That, in turn, ensures that an industry member can actually “*knowingly* violate[]” them, which is the culpable level of *mens rea* the predicate exception demands. *See id.* §7903(5)(A)(iii) (emphasis added).

Section §898, by contrast, just commands that firearms industry members conduct their operations “reasonabl[y],” without identifying what controls and procedures are “reasonable,” what conduct is “unreasonable under all the circumstances,” or what “circumstances” are relevant to that determination. *See* N.Y. Gen. Bus. Law §898-b. The statute thus leaves industry members guessing as to what otherwise-lawful conduct may retroactively be deemed “unreasonable,” based on circumstances that may not even have been evident at the time, thereby exposing them to crippling liability without regard to whether they had any reason to “know” contemporaneously that their conduct might “violate” anything.

Making matters worse, §898 does not even require proof that an industry member’s conduct proximately caused the harms for which redress is sought. *But see* 15 U.S.C. §7903(5)(A)(iii). To the contrary, the whole point of the law is to permit imposition of liability based on the criminal misuse (or even mere illegal possession) of firearms by remote third parties, even if the defendant did no business with the criminal, has no relation to the criminal, and had no control over the criminal. Section 898 thus allows “[a]ny person ...

that has been damaged *as a result of a* gun industry member’s acts or omissions in violation of [§898] ... to bring an action for recovery of damages.” N.Y. Gen. Bus. Law §898-e (emphasis added). The phrase “as a result of” is a classic descriptor of “a but-for causal relationship,” not proximate cause. *Burrage v. United States*, 571 U.S. 204, 213-14 (2014). While that loose nexus is entirely consistent with New York’s aim of exposing industry members to liability for any harm that would not have occurred but for a firearm, it looks nothing like the kind of culpable conduct the predicate exception’s examples contemplate—e.g., knowingly falsifying information in a sale record, or knowingly selling a firearm to a straw purchaser.

The Second Circuit did not claim otherwise. It instead brushed those illustrative examples aside, holding “that the predicate exception’s scope is *not* limited to causes of action brought under statutes similar to the enumerated examples” because “such examples are to be viewed as ‘illustrative, not exhaustive.’” App.19-20, 21 (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012)). That is a non sequitur. Of course the examples are illustrative, not exhaustive; petitioners have never argued that nothing save those two examples could qualify as a predicate statute. The point is that the specific examples Congress provided must inform the meaning of the more general phrase “statute applicable to the sale or marketing of [a firearm or related] product.” See *Fischer v. United States*, 603 U.S. 480, 487 (2024) (explaining that “the canon of *noscitur a sociis*” helps courts “avoid[] ascribing to one word a meaning so broad that it is inconsistent with ‘the company it keeps’” (quoting *Gustafson v. Alloyd*

*Co.*, 513 U.S. 561, 575 (1995))). Indeed, if that is not what they are there for, then there would have been no point in including them. They are illustrative, not superfluous.

2. While it makes little sense in any context to ignore the illustrative examples Congress supplies, that approach makes even less sense when it comes to the PLCAA. One need not comb through obscure legislative history, or search for inferences lurking in statutory text, to divine “Congress’ purposes and objectives” here. *Hillman v. Maretta*, 569 U.S. 483, 491 (2013). Congress said in the text what “Findings” led it to enact the PLCAA and what “Purposes” the law is supposed to accomplish. See 15 U.S.C. §7901. And those findings confirm that the kind of liability §898 seeks to impose is *precisely* what Congress enacted the PLCAA to foreclose.

As Congress explained in no uncertain terms, the first and foremost “purpose[]” of the PLCAA is “[t]o prohibit causes of action against [firearms industry members] for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.” 15 U.S.C. §7901(b)(1). Lest there be any doubt what it meant, Congress explained in its “Findings” that it was focused on lawsuits that had been “commenced or contemplated by the Federal Government, States, municipalities, and private interest groups” at the time, which it declared “an abuse of the legal system” that “erodes public confidence in our Nation’s laws.” *Id.* §7901(a)(6)-(7). And Congress found the “theories” underlying those lawsuits, not the precise cause(s) of action they

invoked, to be “without foundation in hundreds of years of the common law and jurisprudence of the United States” and not “a bona fide expansion of the common law.” *Id.* §7901(a)(7).

The notion that Congress simultaneously green-lighted suits advancing exactly the same unfounded theories, so long as they are initiated under a statute that codifies the same general common-law principles that it found do not support them, defies common sense. That is particularly so given that reading the predicate exception so capaciously would have saved some of the very lawsuits that Congress found to be “an abuse of the legal system,” *id.* §7901(a)(6), as several pursued their novel theories via both common-law and statutory claims. *See, e.g., Beretta*, 315 F.Supp.2d at 262; *Sturm, Ruger & Co.*, 761 N.Y.S.2d at 202. Simply put, any reading of the predicate exception that would allow states to sneak in through the back door the very claims that Congress tossed out the front would put the PLCAA at war with itself. That makes it especially critical to carefully examine any text supplying a more sensible reading of the statute. By providing illustrative examples of the kinds of statutes it had in mind in the predicate exception, Congress supplied just that.

The findings themselves likewise underscore that Congress was focused on the distinction between conduct that violates a clear extant legal obligation or prohibition and conduct that is retroactively deemed to have fallen short of some nebulous duty “without foundation in hundreds of years of the common law.” 15 U.S.C. §7901(a)(7). Congress explained that those engaged in “the lawful design, manufacture,

marketing, distribution, importation, or sale to the public of firearms ... are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products ... that function as designed and intended.” *Id.* §7901(a)(5). And as the Second Circuit itself once recognized, Congress made clear what it meant by “lawful”: “activities having been done in compliance with statutes like those described in” the immediately preceding finding—i.e., “the Gun Control Act of 1968, the National Firearms Act, and the Arms Control Act.” *Beretta*, 524 F.3d at 402-03; *see* 15 U.S.C. §7901(a)(4).

Like the examples in the predicate statute, those federal statutes do not impose amorphous commands to manufacture, market, and sell firearms “reasonably,” let alone sanction after-the-fact liability for indirectly “contributing” to harms caused by criminals. They are comprehensive regulatory regimes that impose concrete obligations and prohibitions with which industry members can confidently ensure compliance (or, conversely, can consciously choose to violate) in real time. A statute that merely codifies common-law principles that have never been understood to permit “imposing liability on an entire industry for harm that is solely caused by others,” 15 U.S.C. §7901(a)(6), plainly does not fit that bill.

\* \* \*

At bottom, reading the predicate exception to encompass statutes like §898 would gut the PLCAA. As Congress said quite explicitly, the point of the PLCAA is to *protect* industry members from liability “based on theories without foundation in hundreds of

years of the common law.” 15 U.S.C. §7901(a)(7). Yet under the decision below, the Protection of Lawful Commerce in Arms Act protects neither lawful arms nor lawful commerce in them. It instead empowers states to “end-run PLCAA,” App.40, by subjecting industry members to novel theories of liability that expose them to crippling liability “for the harm solely caused by the criminal or unlawful misuse of firearm[s],” 15 U.S.C. §7901(b)(1), so long as they codify them in a statute. Nothing in the statute comes anywhere close to compelling the nonsensical conclusion that Congress “draft[ed] such a capacious way out of PLCAA.” *Smith & Wesson*, 605 U.S. at 299.

### **III. The Question Presented Is Exceptionally Important, And Time Is Of The Essence.**

When §898 was enacted, the Governor brazenly admitted what is clear on its face: New York wants to “reinstate the public nuisance liability for gun manufacturers” that the PLCAA forbids states from imposing, to “right the wrong” New York believes Congress committed. Cuomo, *supra*, at 35:00-38:15. But under the Supremacy Clause, states do not get to right perceived congressional wrongs. State efforts to “reinstate” what federal law prohibits are preempted.

Unfortunately, New York is not alone in trying to undo the PLCAA. Over the past five years, nine states have enacted laws authorizing civil suits against firearms industry members based on harms caused by criminal misuse of firearms—in other words, authorizing the very same suits Congress passed the PLCAA to foreclose. *See, e.g.*, Cal. Civ. Code §3273.51; Colo. Rev. Stat. §§6-27-104, -105; 10 Del. Code §3930; Haw. Rev. Stat. §§134-102, -103; 815 Ill. Comp. Stat.

505/2DDDD; N.J. Stat. Ann. §2C:58-35; Md. Code Ann., Cts. & Jud. Proc. §§3-2502, -2503; Wash. Rev. Code §7.48.330; 2025 Conn. Pub. Act. No. 25-43. Notably, that group includes most of the states whose outlier “may issue” carry permit regimes this Court invalidated in *Bruen*. See 597 U.S. at 13-15 & n.2. And more states are poised to pass copycat laws soon. See, e.g., H.B. 21, 2026 Gen. Assemb., Reg. Sess. (Va. 2026), <https://perma.cc/QU5H-HWB4>; H.B. 2672, 194 Gen. Ct., Reg. Sess. (Mass. 2025).

Several of these laws have already been invoked to try to subject industry members to crippling damages. See, e.g., *Roberts v. Smith & Wesson Brands, Inc.*, 98 F.4th 810, 812 (7th Cir. 2024) (affirming order remanding to state court “[m]ultiple consolidated suits” brought under Illinois’ law “by some of the victims” of a 2022 shooting against the manufacturer of the (legal) rifle the shooter used); Compl., ¶¶9, 59, 95-99, *Mayor of Balt. v. Glock, Inc.*, No. C 24-CV-25-001450 (Md. Cir. Ct. Feb. 12, 2025) (suit under Maryland’s law seeking to make Glock redress “violent crimes” committed by third parties who illegally modify and misuse (legal) Glock handguns); *Platkin v. RR Outdoors, LLC*, No. CUM-C-37-24 (N.J. Sup. Ct. Nov. 13, 2024) (suit under New Jersey’s law alleging that licensed dealer failed to implement “reasonable controls” when it did not secure a background check on a purchaser of rifle ammunition, even though no law requires retailers to do so).

Thus far, motions to dismiss on PLCAA grounds have failed. See, e.g., Order Denying Mot. to Dismiss, *Roberts v. Smith & Wesson Brands, Inc.*, No. 22 LA

00000487 (Ill. Cir. Ct. Apr. 1, 2025); Order Denying Defs.’ Mot. to Dismiss, *Platkin v. Glock, Inc.*, No. ESX-C-00286-24 (N.J. Super. Ct. Oct. 14, 2025). Firearms industry members thus face déjà vu all over again: the prospect of yearslong litigation, in state courts across the country, seeking bankruptcy-inducing damages and, in some cases, seeking to prohibit manufacturers from continuing to sell some of the most commonly owned handguns.

This is already happening in New York, which was the first state to enact an anti-PLCAA law. In the wake of the Second Circuit’s decision, Buffalo and Rochester filed new pleadings alleging that three of the petitioners here violated §898—not by doing anything that violated (let alone knowingly violated) any of the myriad federal, state, or local laws with which they must comply. See First Amended Compl., *City of Rochester v. Smith & Wesson Brands, Inc.*, No. 6:23-cv-06061 (W.D.N.Y. Jan. 22, 2026), Dkt.157 (“Rochester 1AC”); First Amended Compl., *City of Buffalo v. Smith & Wesson Brands, Inc.*, No. 6:23-cv-06061 (W.D.N.Y. Jan. 22, 2026), Dkt.158 (“Buffalo 1AC”). Instead, the cities allege that each manufacturer could do more to make it harder for criminals to get ahold of their products—and that their failure to so violates §898’s command “to establish and utilize reasonable controls and procedures to prevent [their] firearms from being possessed, used, marketed, or sold unlawfully in New York.” Rochester 1AC ¶¶186-90; Buffalo 1AC ¶¶191-95. Those allegations are indistinguishable from allegations municipalities leveled pre-PLCAA. See, e.g., *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 638 (D.C. 2005); *City of Gary ex rel. King v.*

*Smith & Wesson Corp.*, 801 N.E.2d 1222, 1227-29 (Ind. 2003). Indeed, they are exactly the types of claims that Congress “meant the PLCAA to preempt.” *Ileto II*, 565 F.3d at 1137 (discussing legislative history).

Those tandem §898 suits are just the tip of the iceberg. Because states, municipalities, and others can pursue these state-law claims in state courts, many of the industry members who have been subjected to them have been unable to secure a federal forum in which to assert the immunity PLCAA grants them. And many industry members may not be able to do so until the sprawling litigation against them runs its full course—if they can afford to litigate that long. Some industry members have the wherewithal to defend themselves, but many (perhaps most) do not. New Jersey has already leveraged that reality, securing a consent judgment under its copycat law against a mom-and-pop retailer based on no violation of federal or state law other than the copycat law’s gestalt “unreasonableness” provision. Consent Order & Final Judgment, *Platkin v. Point Blank Guns & Ammo LLC*, No. MRS-C-123-24 (N.J. Sup. Ct. Mar. 13, 2025). Left unchecked, these efforts threaten to do precisely what PLCAA is supposed to guard against: use novel tort-style theories to bankrupt lawful participants in lawful industry that is essential to the exercise of a fundamental constitutional right.

There is no reason to allow such open defiance of federal law. Federal immunities and constitutional rights are worthwhile only if this Court ensures that lower courts enforce them. And Congress plainly intended to confer broad immunity through the PLCAA. Indeed, Congress’ intention is so plain that it

would be incumbent on this Court to intervene even if it had doubts that the text suffices to accomplish the “Purposes” set forth in the PLCAA. After all, if there really were no escaping the conclusion that Congress inadvertently crafted an exception that manages to swallow the rule, then this Court would owe it to Congress to make that crystal clear, so Congress can promptly fix it. Allowing the Second Circuit alone to treat the PLCAA as a dead letter has nothing to recommend it.

The time to step in is now, and this is an excellent vehicle to do so. The Second Circuit decided a pure question of statutory interpretation—whether statutes that merely codify general tort theories qualify as predicate statutes for purposes of 15 U.S.C. §7903(5)(A)(iii) if they apply to commerce in arms—and answered it in a way that squarely conflicts with decisions of other appeals courts and the plainly expressed intent of Congress. And while the Second Circuit got wrapped around the axle on whether petitioners brought facial or as-applied claims, petitioners unquestionably brought both, and that matters only to what relief would be appropriate if this Court were to reverse the dismissal and remand anyway. The Court thus should grant certiorari and put a stop to these inversions of our constitutional order before they wreak any more havoc on the firearms industry than they already have.

**CONCLUSION**

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

PAUL D. CLEMENT

ERIN E. MURPHY

*Counsel of Record*

MATTHEW D. ROWEN

NICHOLAS A. AQUART

CLEMENT & MURPHY, PLLC

706 Duke Street

Alexandria, VA 22314

(202) 742-8900

erin.murphy@clementmurphy.com

*Counsel for Petitioners*

February 20, 2026

# APPENDIX

## TABLE OF APPENDICES

### Appendix A

Opinion, United States Court of Appeals  
for the Second Circuit, *Nat'l Shooting  
Sports Found., Inc. v. James*, No. 22-1374  
(July 10, 2025) ..... App-1

### Appendix B

Order, United States Court of Appeals for  
the Second Circuit, *Nat'l Shooting Sports  
Found., Inc. v. James*, No. 22-1374 (Dec.  
2, 2025)..... App-45

### Appendix C

Memorandum Decision & Order, United  
States District Court for the Northern  
District of New York, *Nat'l Shooting  
Sports Found., Inc. v. James*, No. 21-cv-  
1348 (May 25, 2022) ..... App-47

### Appendix D

Relevant Constitutional and Statutory  
Provisions..... App-80

- U.S. Const. art. VI, cl. 2 ..... App-80
- N.Y. Gen. Bus. Law §898-a ..... App-80
- N.Y. Gen. Bus. Law §898-b ..... App-81
- N.Y. Gen. Bus. Law §898-c ..... App-82
- N.Y. Gen. Bus. Law §898-d ..... App-82
- N.Y. Gen. Bus. Law §898-e ..... App-82

App-1

*Appendix A*

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

No. 22-1374

---

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,  
BERETTA U.S.A. CORP., DAVIDSON'S, INC., GLOCK INC.,  
CENTRAL TEXAS GUN WORKS, HORNADY  
MANUFACTURING COMPANY, LIPSEY'S LLC, OSAGE  
COUNTY GUNS LLC, RSR GROUP, INC., SHEDHORN  
SPORTS, INC., SIG SAUER, INC., SMITH & WESSON INC.,  
SPORTS SOUTH LLC, SPRAGUE'S SPORTS INC., STRUM,  
RUGER & COMPANY, INC.,

*Plaintiffs-Appellants,*

v.

LETITIA JAMES, in her official capacity as New York  
Attorney General,

*Defendant-Appellee.*

---

Argued: Nov. 3, 2023  
Decided: July 10, 2025

---

Before: Jacobs, Lohier, Lee, *Circuit Judges.*

---

OPINION

---

Eunice C. Lee, *Circuit Judge*:

National Shooting Sports Foundation (“NSSF”), a trade association of manufacturers and wholesalers of firearms, and fourteen of its members (collectively, “Appellants”), appeal from an order and judgment entered in the United States District Court for the Northern District of New York (D’Agostino, *J.*) dismissing their complaint challenging New York’s gun-related public nuisance dismissing their complaint challenging New York’s gun-related public nuisance statute, N.Y. General Business Law § 898-a-e, which imposes liability for gun industry members who knowingly or recklessly endanger the safety or health of the public through their sale or marketing of firearms. The complaint alleges that Section 898 is unconstitutional because it is preempted by the federal Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. §§ 7901-7903, violates the dormant Commerce Clause, and is so vague as to violate the Due Process Clause of the Fourteenth Amendment. The district court granted judgment in favor of New York’s Attorney General, Letitia James, in her official capacity (the “State”), because it determined that Section 898 is neither preempted by PLCCA nor constitutionally infirm. On appeal, we find that Appellants have not met their burden in this facial, preenforcement challenge to demonstrate that Section 898 is unenforceable in all its applications. We further conclude that, on its face, Section 898: (1) falls within PLCAA’s predicate exception clause and thus is not preempted, (2) does not violate the principles of interstate commerce, and (3) is not void for vagueness.

Therefore, we **AFFIRM** the judgment of the district court.

## **BACKGROUND**

### **I. Statutory and Legal Landscape**

We begin with a brief overview of the relevant statutes and legal precedents governing civil liability for gun manufacturers and distributors in New York.

PLCAA is a federal statute enacted in 2005 “to prohibit causes of action” against gun industry members<sup>1</sup> “for the harm solely caused by the criminal or unlawful misuse of firearm products or ammunition products by others when the product functioned as designed and intended.” 15 U.S.C. § 7901(b)(1). More specifically, it bars any “qualified civil liability action,” defined as:

a civil action . . . brought by any person against a manufacturer or seller of a qualified product, or a trade association, for damages, punitive damages, injunctive or declaratory relief, abatement, restitution, fines, or penalties, or other relief, resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.

*Id.* §§ 7902(a), 7903(5)(A). In other words, PLCAA generally establishes that gun manufacturers and

---

<sup>1</sup> While PLCAA does not use the term “gun industry member,” Section 898 does. For purposes of this opinion, “gun industry member” refers to entities “engaged in the sale, manufacturing, distribution, importing or marketing of firearms, ammunition, ammunition magazines, and firearms accessories,” N.Y. Gen. Bus. Law § 898-a(4), to which both PLCAA and Section 898 apply. *See also* 15 U.S.C. § 7901(b)(1).

distributors cannot be held civilly liable for harm caused by their products when that harm stems from the criminal or unlawful actions of others.

However, as relevant here, PLCAA provides that qualified civil liability actions do not include actions in which a gun industry member “knowingly violated a State or Federal statute applicable to the sale or marketing of” firearms, and where “the violation was a proximate cause of the harm” alleged. *Id.* § 7903(5)(A)(iii). This provision is referred to as PLCAA’s “predicate exception” because it applies only where the manufacturer or seller has committed “an underlying (or predicate) statutory violation.” *Dist. of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 168 (D.C. 2008); *see also City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384, 390 (2d Cir. 2008) (adopting the appellation).

The parties here disagree as to the purposes of PLCAA and its predicate exception. Appellants, relying on the statement of purposes provided in the statute itself, argue that the statute was intended to end attenuated theories of liability for gun manufacturers and distributors. *See* Appellants’ Br. at 6-7 (citing 15 U.S.C. § 7901(b)(1)). The State, pointing to the congressional findings recited in the statute, suggests that the legislation was intended to prevent “a maverick judicial officer or petit jury” from using courts to circumvent legislation by imposing expansive common-law liability on gun manufacturers and distributors through theories that have not been approved by Congress or state legislatures. *See* Appellee’s Br. at 6 (citing 15 U.S.C. § 7901(a)(7)-(8)); *see also* 15 U.S.C. § 7901(b)(6) (identifying as a

purpose of PLCAA “[t]o preserve and protect the Separation of Powers doctrine and important principles of federalism, State sovereignty and comity between sister States”). Thus, while Appellants view PLCAA’s purpose as primarily substantive—to insulate gun manufacturers and distributors from excess liability—the State views it as structural and procedural—to preserve the balance of power between legislatures and the judiciary and to ensure that gun industry members are not exposed to liability without proper notice via a legislative enactment. As demonstrated above, there is some support for both views among PLCAA’s enumerated findings and purposes. *See* 15 U.S.C. § 7901(a)-(b).

We previously addressed the purpose and scope of PLCAA’s predicate exception in the context of a nuisance action brought by New York City (“the City”) against firearms manufacturers and sellers. *See Beretta*, 524 F.3d at 398-404. In 2000, before PLCAA was enacted, the City sued manufacturers and wholesale sellers of firearms under New York Penal Law § 240.45 (criminal nuisance in the second degree), alleging that these firearms suppliers caused, contributed to, and maintained a public nuisance by knowingly supplying the illegal firearms market. *Id.* at 389. On the day that PLCAA was enacted in 2005, the defendants in *Beretta* moved to dismiss the case as barred by the statute. *Id.* In response, the City claimed that the suit fell within PLCAA’s predicate exception since New York Penal Law § 240.45 qualified as a predicate statute “applicable to the sale or marketing of [firearms],” *id.* at 389-90 (quoting 15 U.S.C. § 7903(5)(A)(iii)), and the defendants’ knowing violation of the statute was the proximate cause of the

harm alleged. The district court found that the suit fell within PLCAA's predicate exception, and we reversed. *Id.* at 390, 404.

Because both parties in *Beretta* agreed that New York's general nuisance statute was a statute of general applicability which had never been applied to firearms suppliers for conduct akin to that complained of by the City, we found that it was not a statute "applicable to the sale or marketing of [firearms]." 15 U.S.C. § 7903(5)(A)(iii). We further explained that the predicate exception was intended "to apply only to statutes that actually regulate the firearms industry," namely those that: (a) "expressly regulate firearms," (b) have been applied by courts "to the sale and marketing of firearms," or (c) "do not expressly regulate firearms but . . . clearly can be said to implicate the purchase and sale of firearms." *Beretta*, 524 F.3d at 404. In other words, civil liability actions brought against firearms manufacturers under statutes of general applicability which do not fall within any of the three enumerated categories are preempted by the claim-restricting provisions of PLCAA. *See* 15 U.S.C. §§ 7902(a), 7903(3), 7903(5)(A).

In July 2021, New York enacted General Business Law Section 898—a gun-specific public nuisance statute—that imposes liability for gun industry members who knowingly or recklessly endanger the safety or health of the public through their sale or marketing of firearms. Section 898-b states:

- (1) No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to

App-7

a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.

(2) All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.

N.Y. Gen. Bus. Law § 898-b(1)-(2).

Section 898-b was designed to fall within PLCAA's predicate exception by serving as "a predicate statute that is applicable to the sale or marketing of firearms." Sponsor Mem., 2021 S.B. 7196, 244th Leg., 2021 Reg. Sess. (N.Y. 2021) (internal quotation marks omitted). Through Section 898, the State sought to create a pathway to hold gun industry members civilly liable for their own illegal or unreasonable conduct where that conduct contributed to a public health crisis of gun violence.

In practical effect, Section 898: (1) requires gun industry members to establish and utilize reasonable controls and procedures to prevent unlawful misuse of relevant firearm products within New York, and (2) permits civil actions against industry members if they knowingly or recklessly endanger New York's population through the sale or manufacture of firearms and firearms accessories. N.Y. Gen. Bus. Law §§ 898-b, 898-e.

## II. Procedural History

In December 2021, Appellants brought a preenforcement challenge to Section 898 against the State. Each appellant is a gun industry member that ships or transports firearms and ammunition directly into New York.

Appellants sought a preliminary injunction as well as declaratory and injunctive relief barring enforcement of the statute. They asserted that Section 898 is preempted by PLCAA because it is an “undisguised state effort to reinstate what federal law expressly forbids.” Appellants’ Br. at 2 (internal quotation marks omitted). Specifically, Appellants contended that Section 898 is no different from the City’s prior attempt, rejected in *Beretta*, to hold gun industry members liable under a generally applicable nuisance law. Moreover, Appellants contended that Section 898 is unconstitutional because it regulates solely interstate commerce, in violation of the dormant Commerce Clause, and is unconstitutionally vague, in violation of the Due Process Clause. The State moved to dismiss.

In May 2022, the district court granted the State’s motion to dismiss and denied Appellants’ motion for preliminary injunction, determining that Section 898 is not preempted by PLCAA, does not violate the dormant Commerce Clause, and is not void for vagueness. *See Nat’l Shooting Sports Found., Inc. v. James*, 604 F. Supp. 3d 48 (N.D.N.Y. 2022).

The district court explained that there was no express preemption because Section 898 directly regulates firearms and therefore falls within the predicate exception, unlike the general nuisance law

at issue in *Beretta. Id.* at 57-60. The district court additionally concluded that there was no implied conflict preemption because Section 898 does not conflict with the overall purpose and objective of PLCAA, which, it found, is to ensure that generally applicable laws are not used to create novel and attenuated theories of liability for the gun industry without notice. *Id.* at 60-61.

As for the dormant Commerce Clause challenge, the district court concluded that there was no discrimination against out-of-state commerce because Section 898 treats interstate and intrastate commerce the same and because plaintiffs did not allege the existence of any wholly in-state commerce that could hypothetically receive an unfair advantage. *Id.* at 62-63. The district court also determined that there was no undue burden on interstate commerce under the *Pike* balancing test, which requires an element of favoritism towards intrastate commerce. *Id.* at 63-64 (citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970)). Finally, the district court found no impermissible regulation of wholly out-of-state commercial activity or violation of extraterritoriality principles because it concluded that Section 898 does not materially differ from most other state statutes, which in some way have repercussions beyond state lines. *Id.* at 64-65.

Lastly, the district court found that Section 898 is not void for vagueness because it gives sufficient notice to a reasonable person of what is prohibited. *Id.* at 65-69. The district court noted that even if a vagueness issue existed, it was not clear that Section 898 would be unconstitutional in *all* its applications,

and a facial challenge therefore could not succeed. *Id.* at 69.

This appeal followed.

## DISCUSSION

### I. Standard of Review

We review *de novo* a district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, "accepting all factual allegations in the complaint as true, and drawing all reasonable inferences in the plaintiff's favor." *Shomo v. City of New York*, 579 F.3d 176, 183 (2d Cir. 2009) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152 (2d Cir. 2002)).

### II. II. Classifying Plaintiffs' Challenge

As a preliminary matter, the parties disagree as to whether Appellants have brought a facial or as-applied challenge to Section 898. In the complaint, Appellants sought "declaratory and injunctive relief to have [Section 898] declared unconstitutional and to prevent the State . . . from enforcing it." App'x 15, ¶ 8. Indeed, Appellants' pleadings repeatedly characterized their challenge as "facial." *See id.* at 31 ¶ 84, 33 ¶ 98, 34 ¶ 106. On appeal, however, Appellants argue both that Section 898 is entirely unconstitutional, *see* Appellants' Br. at 20 ("§ 898 is a compendium of constitutional problems that should not be permitted to stand"), and that it should be invalidated "to the extent it is preempted by the PLCAA; directly regulates out-of-state commerce; discriminates against and unduly burdens interstate commerce; and is void for vagueness," Appellants' Reply Br. at 4. Appellants suggest that their claims "have characteristics of both facial and as-applied

challenges” because they challenge “discrete and well-defined” potential applications of Section 898 that are “likely to occur.” *Id.* at 4-5 (internal quotation marks omitted and alterations adopted). Indeed, at oral argument, Appellants at times conceded that they had brought a facial challenge, while also characterizing it as a “hybrid” as-applied facial claim. *See Oral Arg. Tr.* 6, 21, 22.

“The line between facial and as-applied challenges can sometimes prove amorphous[.]” *Bucklew v. Precythe*, 587 U.S. 119, 139 (2019) (internal quotation marks omitted). Generally, however, a challenge to a statute before its enforcement will presumptively constitute a facial challenge. *See N.Y. State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (“Because plaintiffs pursue this ‘pre-enforcement’ appeal before they have been charged with any violation of law, it constitutes a ‘facial,’ rather than ‘as-applied,’ challenge.”).

Prospective as-applied challenges are considered “comparatively infrequently” and “seek[] to prove that a statute cannot constitutionally be applied to a specific course of conduct that the challenger intends to follow.” *Copeland v. Vance*, 893 F.3d 101, 112 (2d Cir. 2018). Such challenges generally must focus on specific conduct that the plaintiff “would pursue but for fear of future enforcement.” *Id.* at 112-13 (concluding that a challenge to New York’s gravity knife law more closely resembled a facial challenge than an as-applied challenge because the plaintiffs sought a declaration that the statute could not be constitutionally applied to anyone carrying a certain category of knife, rather than a tailored declaration

that the statute could not be applied to specific knives that plaintiffs wished to carry). Challengers bringing preenforcement as-applied challenges cannot rely on hypothetical situations. *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 189 (2d Cir. 2010) (holding that in the context of an as-applied challenge, “a court should not analyze whether a reasonable person would understand that certain hypothetical conduct or situations violate the statute”). Here, because Appellants have not identified a specific course of action they would follow but for fear of Section 898’s enforcement, they have not brought an as-applied challenge.<sup>2</sup> Accordingly, Appellants’ challenge is properly characterized as facial, notwithstanding their new appellate suggestions to the contrary.

“[C]lassifying a lawsuit as facial or as-applied affects the extent to which the invalidity of the challenged law must be demonstrated and the corresponding ‘breadth of the remedy,’ but it does not speak at all to the substantive rule of law necessary to establish a constitutional violation.” *Bucklew*, 587 U.S. at 138 (quoting *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 331 (2010)). Facial challenges are disfavored. *See Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008) (recognizing that courts should “[e]xercis[e] judicial

---

<sup>2</sup> In their complaint, Appellants alleged only the following: (1) “Defendant James has not disavowed future enforcement [of] the Act. To the contrary, Defendant James has stated that she ‘look[s] forward to enforcing the Public Nuisance law’”; and (2) “Given Defendant James’s stated intention to enforce the Act, each of the fourteen Firearm Industry Members named as Plaintiffs presently and reasonably fears imminent prosecution under the Act.” App’x 20 ¶¶ 31, 33.

restraint in a facial challenge”). Such challenges “run contrary to the fundamental principle of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010) (quoting *Wash. State Grange*, 552 U.S. at 450).

Since Appellants have brought a facial constitutional challenge seeking a declaration that Section 898 is unenforceable in all its applications, they must establish that the law cannot be constitutionally applied against anyone in any situation. “A facial challenge is ‘the most difficult challenge to mount successfully’ because, as a general matter, ‘the challenger must establish that no set of circumstances exists under which the Act would be valid.’” *Copeland*, 893 F.3d at 110 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); accord *United States v. Rahimi*, 602 U.S. 680, 693 (2024) (confirming the difficulty of sustaining a facial challenge).

### **III. The Preemption Challenge**

Appellants argue that Section 898 is preempted by PLCAA, and thus violates the Supremacy Clause, because it aims to frustrate PLCAA’s purpose or might otherwise permit civil actions barred by PLCAA.

The Supremacy Clause of the United States Constitution provides that federal law “shall be the supreme Law of the Land.” U.S. Const. art. VI, cl. 2. “Consistent with that command, . . . state laws that conflict with federal law are without effect.” *Altria*

*Grp., Inc. v. Good*, 555 U.S. 70, 76 (2008) (internal quotation marks omitted). “[T]he purpose of Congress is the ultimate touchstone in every pre-emption case.” *Id.* (internal quotation marks omitted) (quoting *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)).

There are three types of preemption:

(1) express preemption, where Congress has expressly preempted local law; (2) field preemption, “where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law”; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

*N.Y. SMSA Ltd. P’ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005)). Here, Appellants allege that there is express preemption and implied conflict preemption.

Specifically, Appellants argue that Section 898 is expressly preempted by PLCAA because it allows precisely the type of civil liability action proscribed by PLCAA and does not fall within the scope of PLCAA’s predicate exception. Alternatively, Appellants argue that even if Section 898 does fall within the scope of the predicate exception, it is impliedly preempted because it may authorize lawsuits that do not comply with the “knowing violation” and “proximate cause” requirements of that exception, and thus

irreconcilably conflicts with PLCAA. We address each argument in turn.

**A. Express Preemption**

In Appellants’ view, Section 898 is expressly preempted by PLCAA because its aim is to subvert Congress’s core mission in enacting the statute: ending liability for gun manufacturers “under vague standards with no historical pedigree.” Appellants’ Br. at 29. As noted above, a stated purpose of PLCAA is to significantly limit the liability of gun manufacturers and sellers by eliminating suits stemming from the unlawful misuse of firearms by third parties. *See* 15 U.S.C. § 7901(b)(1). Appellants contend that state statutes enshrining such theories of liability are “blatant end-run[s] around federal law” that cannot stand. Appellants’ Br. at 19 (“The point of the PLCAA was most certainly not to prompt states to codify the nuisance theories the PLCAA aimed to eradicate.”).<sup>3</sup>

The State emphasizes that preemption “fundamentally is a question of congressional intent,”

---

<sup>3</sup> Appellants make much of the fact that various State officials have expressly stated that, in their view, the purpose of Section 898 is to override PLCAA. *See, e.g.*, App’x 14-15 ¶ 6 (citing comments by Defendant James describing PLCAA as an example of “federal overreach” and characterizing Section 898 as an “important step to right [the] wrong” done by enacting PLCAA); Appellants’ Br. at 23 (citing comments by then-Governor Andrew Cuomo stating that Section 898 would reinstate civil liability for gun manufacturers and distributors, thus “right[ing] the wrong done” by PLCAA). But whatever the views of various State officials regarding the purpose of Section 898, the question before this Court is whether the statute as written and enforced is preempted by PLCAA. The State’s intent, ultimately, is irrelevant.

Appellee's Br. at 20 (quoting *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884 (2000)), and asserts that PLCAA was not intended to offer the gun industry blanket immunity for the misuse of firearms. Rather, in its view, Congress intended to "vest the primary authority to regulate the gun industry in federal and state legislatures acting in their representative capacities, rather than federal or state judiciaries acting in their common law capacities." *Id.* at 2; *see also id.* at 31 (observing that PLCAA was enacted in part to preclude the creation of new forms of civil liability by the judiciary, without the approval of Congress or state legislatures, through unauthorized "expansion of the common law" (quoting 18 U.S.C. § 7901(a)(7)). The State maintains that it is perfectly proper for a state legislature, as opposed to "a maverick judicial officer or petit jury," to "expand civil liability" for gun manufacturers, in accordance with important principles of federalism and state sovereignty. Appellee's Br. at 6 (quoting 15 U.S.C. § 7901(a)(6), (7)).

Neither the parties nor this Court can divine Congress's purpose in passing PLCAA beyond those aims expressly stated. *See Va. Uranium, Inc. v. Warren*, 587 U.S. 761, 778-79 (2019) (explaining that "[e]fforts to ascribe unenacted purposes and objectives" to a statute "invites speculation" and "risk[s] displacing the legislative compromises actually reflected in the statutory text," and emphasizing that "[t]he only thing a court can be sure of is what can be found in the law itself"). Here, PLCAA's text identifies as a legislative aim ending the use of "theories without foundation [that] do not represent a bona fide expansion of the common law" to

“impos[e] liability on an entire industry for harm that is solely caused by others,” as well as “attempt[s] to use the judicial branch to circumvent the Legislative branch of government.” 15 U.S.C. § 7901(a)(6)-(8). And, as we have noted before, the statute’s legislative history reinforces our understanding of this aim by indicating that Congress intended PLCAA to end the use of generally applicable laws to create new and attenuated theories of civil liability for the gun industry, but not to protect those manufacturers who violate state or federal laws. *See Beretta*, 524 F.3d at 402-04 (explaining that “Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the *lawful* design, manufacture, marketing, distribution, importation, or sale of firearms,” in compliance with existing federal, state, and local laws (emphasis added) (internal quotation marks omitted)). Taken together, PLCAA’s text and history therefore do not clearly establish that the statute’s aim was to prevent state legislatures from creating avenues to hold gun manufacturers liable for downstream harms caused by their products.

In fact, as noted by the State, the existence of the predicate exception evidences Congress’s intent to preserve at least some causes of action flowing from knowing violations of state and federal laws applicable to the sale or marketing of firearms. *See Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556, 1562 (2025) (noting that “the predicate violation opens a path to making a gun manufacturer civilly liable for the way a third party has used the weapon it made,” where that manufacturer has knowingly committed a predicate offense). In *Beretta*, we concluded that PLCAA’s predicate exception

encompassed statutes that expressly regulated firearms, statutes that courts have applied to the sale and marketing of firearms, and statutes that do not expressly regulate firearms but that clearly can be said to implicate the sale and purchase of firearms. 524 F.3d at 404.<sup>4</sup> Because Section 898 expressly regulates firearms, it falls within those bounds.

Appellants, however, suggest that in order to qualify as a predicate statute, a given law must expressly regulate firearms with the same specificity as the two examples of qualifying statutes provided in PLCAA's text. Those examples include statutes authorizing: (1) suits against manufacturers who knowingly falsify or fail to keep records related to the sale of firearms, and (2) suits against manufacturers who aid, abet, or conspire to sell firearms to individuals prohibited from receiving them under 18 U.S.C. § 922(g) or (n).<sup>5</sup> Appellants argue that neither

---

<sup>4</sup> A year after *Beretta*, the Ninth Circuit also considered the scope of the predicate exception. See *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). Citing *Beretta*, the court held that predicate statutes generally must pertain specifically to sales and manufacturing activities and often will target the firearm industry specifically, although they need not pertain exclusively to the firearms industry. *Id.* at 1134-35.

<sup>5</sup> The specific examples given are: (1) “any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product”; and (2) “any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product,

of these provisions is similar in kind to Section 898's general requirement that firearm manufacturers and sellers maintain reasonable operations. *See* N.Y. Gen. Bus. Law § 898-b(2) (requiring gun industry members to “establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state”). They further suggest that the predicate exception should apply only to statutes that impose concrete obligations or prohibitions on gun industry members' conduct, rather than general duties of care. Any alternative interpretation, they argue, would “effectively gut the PLCAA” by allowing the exception to swallow the rule. Appellants' Br. at 24, 28.

But in *Beretta*, we repeatedly refuted this reasoning and rejected the idea that the predicate exception's enumerated examples are exhaustive. In determining how to construe the phrase “statute applicable to the sale or marketing of [firearms],” this Court noted that “the examples of state and federal statutory violations in the predicate exception itself refer to state and federal laws that specifically and expressly govern firearms” but then rejected the argument that “the predicate exception is [therefore] necessarily limited to statutes that *expressly* regulate the firearms industry.” *Beretta*, 524 F.3d at 400; *see also id.* at 401, 404. Thus, we have already determined that the predicate exception's scope is *not* limited to

---

knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18.” *See* 15 U.S.C. § 7903(5)(A)(iii)(I)-(II).

causes of action brought under statutes similar to the enumerated examples in 15 U.S.C. § 7903(5)(A)(iii)(I)-(II). Rather, we have found that limiting the predicate exception to statutes (1) that expressly regulate firearms, (2) that courts have applied to the sale and marketing of firearms, and (3) that clearly can be said to implicate the sale and purchase of firearms, is sufficient to avoid “allow[ing] the predicate exception to swallow the statute.” *Id.* at 403.

And, even if *Beretta* had not already adopted a construction of the statute that implicitly rejects Appellants’ position, PLCAA’s text does not support Appellants’ argument. *See Buono v. Tyco Fire Prods., LP*, 78 F.4th 490, 495 (2d Cir. 2023) (explaining that, in the context of express preemption, “the plain wording of the [statute] . . . necessarily contains the best evidence of Congress’ preemptive intent”); *see also United States v. Kozeny*, 541 F.3d 166, 171 (2d Cir. 2008) (explaining that statutory construction “must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose” (quoting *United States v. Albertini*, 472 U.S. 675, 680 (1985))).

PLCAA excepts from the definition of a qualified civil liability action any “action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, *including*” the enumerated exceptions. 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). The term “includes” is typically interpreted as

“a term of enlargement, and not of limitation.” *Burgess v. United States*, 553 U.S. 124, 131 n.3 (2008) (internal quotation marks omitted). Where “including” is used to introduce a list of examples, such examples are to be viewed as “illustrative, not exhaustive.” *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 162 (2012); *see also Pfizer, Inc. v. U.S. Dep’t of Health & Human Servs.*, 42 F.4th 67, 76 (2d Cir. 2022) (concluding that, because the listed examples were preceded by the term “including,” they were “merely non-exhaustive examples” that did not limit the scope of the statutory provision).

Therefore, because Section 898 falls within the bounds of PLCAA’s predicate exception as written, it is not expressly preempted.

### **B. Implied Conflict Preemption**

Appellants also contend that, even if Section 898 falls within the predicate exception, it is nevertheless impliedly preempted because it imposes liability without the exception’s explicit “knowing violation” or “proximate cause” requirements, thereby potentially permitting PLCAA-barred civil liability actions.<sup>6</sup> *Compare* 15 U.S.C. § 7903(5)(A)(iii) (allowing suits in which “a manufacturer or seller of a qualified product knowingly violated a State or Federal statute

---

<sup>6</sup> The State argues that this argument has been forfeited because Appellants did not raise it below, while Appellants contend that the argument “is subsumed within the broader preemption claim” they raised before the district court, Reply Brief at 12 n.3. Because the argument is arguably part of the general preemption claim consistently raised by Appellants throughout the course of this litigation, we address its merits here.

applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought”) *with* N.Y. Gen. Bus. Law § 898-b(1)-(2) ((1) prohibiting gun industry members from knowingly or recklessly creating, maintaining, or contributing to a public nuisance through the sale or marketing of firearms, and (2) requiring gun industry members to establish and utilize reasonable controls and procedures to prevent unlawful possession, use, marketing, or sale of their products).

We understand this to be a conflict preemption argument. Conflict preemption arises in two scenarios: (1) “where it is impossible for a private party to comply with both state and federal requirements”; or (2) “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (internal quotation marks omitted). Conflict preemption is a “form[] of implied preemption.” *Figueroa v. Foster*, 864 F.3d 222, 228 (2d Cir. 2017).

We find that the alleged incongruence between Section 898 and PLCAA’s predicate exception—specifically, the lack of an express knowing or proximate cause requirement in Section 898—is insufficient to sustain Appellants’ claim of conflict preemption in this facial challenge. “[W]hen plaintiffs bring a facial preemption challenge to a state law, they must demonstrate that there is no possible set of conditions under which the challenged state regime could be constitutional.” *Rest. L. Ctr. v. City of New York*, 90 F.4th 101, 117-18 (2d Cir. 2024) (alterations adopted and internal quotation marks omitted)

(declining to find facial preemption based on a speculative application of the challenged law and noting that “nothing would prohibit a successor from raising the preemption issue in a future as-applied challenge”). In other words, a facial challenge to a state statute involves a claim that the law “is invalid in toto—and therefore incapable of any valid application.” *Steffel v. Thompson*, 415 U.S. 452, 474 (1974) (internal quotation marks omitted). Such a challenge fails where, as here, a statute has “a plainly legitimate sweep.” *Wash. State Grange*, 552 U.S. at 449 (internal quotation marks omitted).<sup>7</sup>

The Supreme Court has cautioned against speculating about hypothetical or imaginary cases in which a law might be invalid, especially when state courts “have had no occasion to construe the law” or “to accord the law a limiting construction to avoid constitutional questions.” *Wash. State Grange*, 552 U.S. at 450. So, while Appellants are correct that Section 898 does not expressly incorporate the predicate exception’s *mens rea* and causation requirements, the pertinent consideration, for present purposes, is that it does not contravene them.

---

<sup>7</sup> It is plainly possible to bring an action under Section 898 that would fulfill the “knowing” and “proximate cause” requirements of the predicate exception. For example, both Section 898 and the predicate exception would allow a civil suit brought by a victim of a shooting against a gun manufacturer, if that shooting were proximately caused by a gun manufacturer’s knowing failure to conduct background checks on potential customers and its unlawful sale of a firearm to the perpetrator of the shooting, who could not lawfully procure a firearm. See 15 U.S.C. § 7903(5)(A)(iii)(II); N.Y. Gen. Bus. Law § 898-b(2).

Without the benefit of particular instances of enforcement, we decline to make any pronouncement about future cases in which litigants might invoke Section 898 without proving knowledge or proximate cause. At this stage, we find only that Section 898 is not impliedly preempted by PLCAA simply because it lacks express knowledge and proximate cause requirements.

#### **IV. The Dormant Commerce Clause Challenge**

Next, Appellants claim that Section 898 violates the dormant Commerce Clause because it impermissibly regulates interstate commerce in a variety of ways.

The Commerce Clause grants Congress the power “[t]o regulate Commerce . . . among the several States.” U.S. Const., art. I, § 8, cl. 3. The dormant Commerce Clause is “a doctrine inferred from the Commerce Clause” and serves as “a ‘restriction on permissible state regulation,’” *Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 429 (2d Cir. 2013) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979)), which has been understood to “limit[] the power of local governments to enact laws affecting interstate commerce,” *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007). “The negative or dormant implication of the Commerce Clause prohibits state . . . regulation . . . that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997) (internal quotation marks and citations omitted). It also “precludes the application of a state statute to commerce that takes

place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)).

Importantly, the dormant Commerce Clause's scope is not "absolute." *Maine v. Taylor*, 477 U.S. 131, 138 (1986). Rather, states retain "broad power" to legislate and regulate, even in ways that may "bear adversely upon interstate commerce." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 531-32 (1949). "And courts are not to wield the dormant Commerce Clause as 'a roving license . . . to decide what activities are appropriate for state and local government to undertake.'" *Rest. L. Ctr.*, 90 F.4th at 118 (quoting *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 380 (2023) (Gorsuch, *J.*, plurality opinion)).

A state statute violates the dormant Commerce Clause if it: (1) "clearly discriminates against interstate commerce in favor of intrastate commerce"; (2) "imposes a burden on interstate commerce incommensurate with the local benefits secured"; or (3) "has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." *Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 123 (2d Cir. 2021) (internal quotation marks omitted); *see also Healy*, 491 U.S. at 336; *Pike*, 397 U.S. at 142.

In a facial challenge, a plaintiff must show that there is no set of circumstances under which the challenged statute would be valid under the dormant Commerce Clause. *See United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012). Appellants allege that Section 898 violates the dormant Commerce Clause in

each of the three ways outlined above. We address each argument in turn.

**A. Facial Discrimination**

If a state law “clearly discriminates against interstate commerce in favor of intrastate commerce,” it “is virtually invalid per se and will survive only if it is ‘demonstrably justified by a valid factor unrelated to economic protectionism.’” *Town of Southold*, 477 F.3d at 47 (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)).

Appellants argue that Section 898 facially discriminates against interstate commerce because it applies only to products that pass through interstate commerce, and therefore impermissibly privileges intrastate commerce. They initially noted that Section 898 defined “qualified product” using PLCAA’s definition: “a firearm, . . . ammunition . . . , or a component part [thereof] that has been shipped or transported in interstate or foreign commerce.” 15 U.S.C. § 7903(4); *see also* A.B. 7555-A, 2024 Sess. Law News of N.Y. Ch. 123 (N.Y. 2024) (noting that prior to June 28, 2024, the term “[q]ualified product” had “the same meaning as defined in 15 U.S.C. section 7903(4)”).

This issue need not detain us for long. The State submitted a letter after oral argument informing us that the New York State Legislature had amended the definition of “qualified product” to omit any cross-reference to the definition of “qualified product” in PLCAA. *See* Appellee’s 28(j) Letter ¶¶ 1-2, July 8, 2024, ECF No. 220. The technical amendment therefore removed any reference to interstate commerce and eliminates the basis of Appellants’

facial dormant Commerce Clause challenge. Appellants have not responded to the State's letter claiming otherwise. Accordingly, the facial discrimination issue is moot.

### **B. Undue Burden**

Even laws that do not explicitly discriminate against interstate commerce may incidentally, and impermissibly, burden interstate commerce. *See Nat'l Pork Producers Council*, 598 U.S. at 377 (explaining that “a law’s practical effects may also disclose the presence of a discriminatory purpose”). To determine whether a given statute imposes such a burden, we apply “the more permissive [*Pike*] balancing test.” *Town of Southold*, 477 F.3d at 47. “[U]nder the *Pike* balancing test, appellants must show that a statute enacted for a legitimate public purpose, although apparently evenhanded, actually imposes [1] ‘burdens on interstate commerce that exceed the burdens on intrastate commerce,’ . . . and that [2] those excess burdens on interstate commerce are ‘clearly excessive in relation to the putative local benefits.’” *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 217 (2d Cir. 2004) (first quoting *Automated Salvage Transp., Inc. v. Wheelabrator Env't Sys., Inc.*, 155 F.3d 59, 75 (2d Cir. 1998), and then quoting *Pike*, 397 U.S. at 142).

Appellants contend that “the burdens § 898 imposes fall disproportionately . . . on interstate (and mostly out-of-state) commerce” because, as described above, the statute initially applied only to “qualified products,” which had been shipped or transported in interstate or foreign commerce. Appellants’ Br. at 49-50. In their view, the “real-world impact” of the statute is to “incentivize[] wholly in-state commerce and

disincentivize[] out-of-state commerce, which is classic discrimination regardless of how much wholly intrastate commerce presently exists.” Appellants’ Reply Br. at 18-19. Appellants further contend that any putative benefits to New York do not outweigh the costs of qualified civil liability actions prohibited by PLCAA. Finally, they argue that because a *Pike* inquiry is necessarily fact-intensive, the district court’s dismissal of this claim at the motion-to-dismiss stage was premature.

The State argues that Appellants’ undue burden claim was rightly dismissed because they “identified no in-state business that [was] favored” by Section 898 and have not demonstrated that any burden imposed on interstate commerce is clearly excessive in relation to the putative local benefits. Appellee’s Br. at 44. We agree.

As a preliminary matter, Appellants’ argument regarding the definition of “qualified product” has been rendered moot by the above-noted amendment to Section 898. Moreover, Appellants’ argument that the law’s regulation of interstate commerce, in the absence of a wholly intrastate market, is sufficient to show discrimination against interstate commerce, *see* Appellants’ Br. at 41-42, is barred by precedent. It is well established that “[t]he fact that the burden of a state regulation falls on some interstate companies does not, by itself, establish a claim of discrimination against interstate commerce.” *Rest. L. Ctr.*, 90 F.4th at 120 (quoting *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (1978)); *see also N.Y. Pet Welfare Ass’n, Inc. v. City of New York*, 850 F.3d 79, 91 (2d Cir. 2017) (“The Supreme Court has considered and rejected the

argument that a statute is discriminatory because it will apply most often to out-of-state entities in a market that has more out-of-state than in-state participants.” (internal quotation marks omitted) (citing *CTS Corp. v. Dynamics Corp. Of Am.*, 481 U.S. 69, 88 (1987))). As we have previously explained, the dormant Commerce Clause “doctrine is animated by ‘concern about economic protectionism’ or those measures ‘designed to benefit instate economic interests by burdening out-of-state competitors’—not laws that primarily regulate firms operating across state lines.” *Rest. L. Ctr.*, 90 F.4th at 120 (quoting *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 337-38 (2008)). Here, the mere fact that Section 898 may, in practice, apply only to gun industry members engaged in interstate commerce because there exist no wholly intrastate gun industry members is not sufficient to establish discrimination.

Because Section 898 does not discriminate against interstate commerce, it will be upheld under the *Pike* balancing test unless the burdens it imposes on interstate commerce are “clearly excessive in relation to the putative local benefits.” *Freedom Holdings, Inc.*, 357 F.3d at 217 (quoting *Pike*, 397 U.S. at 142). Here, Appellants suggest that Section 898 would cause a number of generalized harms, such as eroding public confidence in our nation’s laws, threatening diminution of a basic constitutional right and civil liberty, inviting the disassembly and destabilization of industries and economic sectors lawfully competing in the economy, and burdening interstate and foreign commerce. Appellants’ Br. at 49-50 (citing 15 U.S.C. § 7901(a)(6)). They further argue that these harms are clearly excessive when

weighed against the public health and safety aims underlying Section 898. *See* Reply Br. at 19. These arguments fall well short of what is required to demonstrate an undue burden under *Pike*. Courts are generally “ill qualified to develop Commerce Clause doctrine dependent on . . . predictive judgments” and should not “project[] the effect of applying the Commerce Clause” where the economic benefits and burdens of a regulation are not clear. *Gen. Motors Corp.*, 519 U.S. at 309. Here, in the absence of any evidence or specific findings regarding the economic benefits and burdens of Section 898, we find no undue burden under *Pike*.

### **C. Extraterritoriality**

Finding no express discrimination against, and no undue burden on, interstate commerce, we now consider whether Section 898 regulates “commerce that takes place wholly outside of the State’s borders,” *Healy*, 491 U.S. at 336—in other words, if it operates extraterritorially. Pivotal to Appellants’ extraterritoriality argument is the fact that exposure to Section 898 liability does not require that an entity does business in New York. Accordingly, Appellants contend that Section 898 impermissibly allows for the imposition of state-law liability on out-of-state actors for actions taken entirely out of state. This, they argue, is “the definition of unconstitutional extraterritorial state regulation,” which, if allowed, will give states “carte blanche to impose their regulatory preferences on other states.” Appellants’ Br. at 44, 50.

However, each of Section 898(b)’s subsections has a New York state nexus requirement,

notwithstanding the absence of a requirement that the subject gun industry member does business in New York. The first subsection requires that the business “maintain or contribute to a condition *in New York state*,” and the second subsection applies to “[a]ll gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product *in New York state*.” N.Y. Gen. Bus. Law § 898(b)(1)-(2) (emphases added). Section 898 is therefore plainly focused on regulating conduct that occurs in or has a connection to New York.

Appellants posit a number of hypothetical scenarios in which Section 898 could be used to regulate conduct occurring entirely in another state, or to impose liability on manufacturers and sellers that conduct no commerce in New York. But “[w]hen assessing a plaintiff’s extraterritoriality theory, we focus squarely on whether the state law has ‘the practical effect of *requiring* [wholly] out-of-state commerce to be conducted at the regulating state’s direction.’” *VIZIO, Inc. v. Klee*, 886 F.3d 249, 255 (2d Cir. 2018) (quoting *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 193 (2d Cir. 2007)); *see also Healy*, 491 U.S. at 336 (“The critical inquiry is whether the practical effect of the regulation is to control conduct beyond the boundaries of the State.” (citing *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986))).

Because a facial constitutional challenge seeks to strike down a statute in its entirety, Appellants must show that Section 898 regulates wholly extraterritorial conduct *in every application of the statute* in order to succeed on their extraterritoriality

claim. *See Wash. State Grange*, 552 U.S. at 449-50 (“In determining whether a law is facially invalid, [courts] must be careful not to go beyond the statute’s facial requirements and speculate about ‘hypothetical’ or ‘imaginary’ cases.”). Appellants have not made—and cannot make—such a showing. Each Appellant, as the State notes, ships or transports firearms and ammunition directly into New York. Application of Section 898 to their own conduct would therefore not raise extraterritoriality concerns, and they have not alleged any facts that would support any other inference of extraterritoriality. If Section 898, in practice, has an impermissible extraterritorial effect, gun industry members may raise such claims as part of an as-applied challenge. *Cf. Arizona v. United States*, 567 U.S. 387, 415 (2012) (explaining that when a party brings suit to challenge a law before it has gone into effect, “[t]here is a basic uncertainty about what the law means and how it will be enforced,” and “without the benefit of a definitive interpretation from the state courts, it would be inappropriate to assume [the law] will be construed” unconstitutionally).

For the foregoing reasons, we conclude that Section 898 does not violate the dormant Commerce Clause.

## **V. The Vagueness Challenge**

Last, Appellants argue that Section 898 is void for vagueness because it provides insufficient notice as to what conduct is forbidden or required, effectively requiring gun industry members to leave the industry in order to avoid liability.

The Fourteenth Amendment guarantees that no state shall “deprive any person of life, liberty, or

property, without due process of law,” U.S. Const. amend. XIV, § 1, and entitles a person to “be informed as to what [a law] commands or forbids.” *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). We “generally disfavor[]” facial vagueness challenges, *Dickerson*, 604 F.3d at 741, because “the challenger must establish that *no set of circumstances* exists under which the Act would be valid,” *N.Y. State Rifle & Pistol Ass’n.*, 804 F.3d at 265. “The claim in a facial challenge is that a statute is so fatally indefinite that it cannot constitutionally be applied to anyone.” *Copeland*, 893 F.3d at 110.

Section 898 requires gun industry members to establish and utilize reasonable controls to prevent unlawful possession, use, marketing, or sale of their products in New York. It further subjects them to liability for any unreasonable or unlawful conduct related to the sale or marketing of firearms that creates, maintains, or contributes to a condition that endangers public health or safety. N.Y. Gen. Bus. Law § 898-b(1)-(2). Appellants argue that Section 898’s “reasonableness” standard is unconstitutionally vague because it does not clearly delineate what specific reasonable controls a gun industry seller or manufacturer must deploy in order to avoid liability. They emphasize that New York courts have recognized that gun manufacturers “do *not* owe a duty to control the conduct of third persons so as to prevent them from harming others,” *People v. Sturm, Ruger & Co., Inc.*, 761 N.Y.S.2d 192, 196 (N.Y. App. Div. 2003) (emphasis added) (internal quotation marks omitted), and that Section 898 is therefore not rooted in a codified or knowable body of law. Appellants also

contend that Section 898 is broader and less clear than preexisting public nuisance law because it imposes liability for “*contribut[ing]* to a condition in New York state that endangers the safety or health of the public,” Appellants’ Br. at 53 (quoting N.Y. Gen. Bus. Law § 898-b(1)), and that such “freewheeling liability” “violate[s] basic notions of fairness,” *id.* at 53-54.

The State argues that Section 898 resembles many other New York public nuisance laws and therefore accords with common understanding and practices. It notes that the statute specifically proscribes certain categories of conduct and further provides illustrative examples of “reasonable controls and procedures.” Appellee’s Br. at 53. Finally, the State notes that “reasonable” is a term used in “countless statutes and standards,” *id.* at 54, and that there exist judicial precedents regarding the meaning of the terms “reasonable” and “contribute” in the context of public nuisance statutes, *id.* at 54-55.

We conclude that Appellants have not met their burden of demonstrating that Section 898 is so “fatally indefinite” that it cannot be constitutionally applied under any circumstances. *See Copeland*, 893 F.3d at 110. We agree with the State that reasonableness is a well-established legal standard that is employed in a wide range of statutes consistent with the requirements of the Due Process Clause. Moreover, Section 898 provides examples of the types of “reasonable controls and procedures” that gun industry members are instructed to employ:

“Reasonable controls and procedures” shall mean policies that include, but are not limited to: (a) instituting screening, security,

inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; [and] (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter . . . .

N.Y. Gen. Bus. Law § 898-a(2). Though Appellants characterize these examples as “singularly unhelpful guidance,” Appellants’ Br. at 13, we will not “strain[] to inject doubt as to the meaning of words where no doubt would be felt by the normal reader,” *United States v. Powell*, 423 U.S. 87, 93 (1975). Where the language of a given statute is “sufficiently clear,” “the speculative danger of arbitrary enforcement does not render the ordinance void for vagueness.” *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 503 (1982).

Accordingly, Section 898 is not facially void for vagueness.

### CONCLUSION

For the foregoing reasons, we **AFFIRM** the district court’s judgment.

Dennis Jacobs, *Circuit Judge*, concurring:

With the Protection of Lawful Commerce in Arms Act (“PLCAA”), Pub. L. No. 109-92, 119 Stat. 2095 (2005) (codified at 15 U.S.C. §§ 7901-03), Congress shut the door on litigation that would destroy the nation’s firearms industry. New York has now contrived a broad public nuisance statute that applies solely to “gun industry members” and is enforceable by a mob of public and private actors. The intent of Congress when it closes a door is not for States to thus jimmy a window. However, I am constrained to agree with my colleagues that, depending on the pleading, this statute *could* be applied consistent with PLCAA and the Constitution; and under Circuit precedent, that suffices to defeat Appellants’ facial challenge. I write separately to emphasize the vulnerability of New York’s statute to as-applied preemption challenges and the narrow aperture of the law’s legitimate reach.

As the Court recounts, “a stated purpose of PLCAA is to significantly limit the liability of gun manufacturers and sellers by eliminating suits stemming from the unlawful misuse of firearms by third parties.” *Ante* at 19-20; *see also Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 145 S. Ct. 1556, 1569 (2025) (“Congress enacted the statute to halt a flurry of lawsuits attempting to make gun manufacturers pay for the downstream harms resulting from misuse of their products.”); § 7901(b)(1). This purpose aligns with Congress’s finding that “[b]usinesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing,

distribution, importation, or sale to the public of firearms or ammunition products . . . are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.” § 7901(a)(5). Congress expressly found that the “possibility of imposing liability on an entire industry for harm that is solely caused by others is an abuse of the legal system.” § 7901(a)(6). Congress worried that the possibility that a “maverick judicial officer or petit jury” might sustain liability actions “based on theories without foundation in hundreds of years of the common law . . . in a manner never contemplated by the framers of the Constitution, by Congress, or by the legislatures of the several States,” and warned that such an abuse “would constitute a deprivation of the rights” guaranteed by the Fourteenth Amendment. § 7901(a)(7).

PLCAA achieves its liability-limiting purpose by barring any “qualified civil liability action” from proceeding in federal or state court. § 7902(a). “Qualified civil liability action” is broadly defined to encompass any “civil action or proceeding or an administrative proceeding” against industry members or their trade groups for harm “resulting from the criminal or unlawful misuse” of firearms or ammunition by third parties. § 7903(5)(A).

Several exceptions qualify this definition, including one “usually called the predicate exception” that is relevant here. *See Smith & Wesson*, 145 S. Ct. at 1562. As the Supreme Court recently explained, the predicate exception “applies to suits in which the defendant manufacturer or seller ‘knowingly violated

a State or Federal statute applicable to the sale or marketing' of firearms, and that 'violation was a proximate cause of the harm for which relief is sought.'" *Id.* (quoting § 7903(5)(A)(iii)). Congress provided two example predicate violations:

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe, that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of title 18[.]

§ 7903(5)(A)(iii). "If a plaintiff can show that [the predicate exception] is satisfied . . . then a suit can proceed, *even though* it arises from a third party's later misuse of a gun." *Smith & Wesson*, 145 S. Ct. at 1562 (emphasis added). Importantly, the predicate exception is just that: an *exception*. The rule remains that suits against firearms manufacturers and sellers over third-party misuse of firearms are otherwise barred.

In *City of New York v. Beretta U.S.A. Corp.*, we considered which laws are deemed by Congress to be “applicable to the sale or marketing” of firearms for purposes of the predicate exception. See 524 F.3d 384 (2d Cir. 2008). We observed that “the examples of state and federal statutory violations in the predicate exception itself refer to state and federal laws that specifically and expressly govern firearms.” *Id.* at 400. Reasoning by analogy to these examples, we held that the predicate exception “encompass[es] statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms[, or (c)] that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms.” *Id.* at 404. At issue in *Beretta* was New York’s criminal nuisance law, N.Y. Penal Law § 240.45. We concluded that this law of general applicability was insufficiently specific to firearms. *Beretta*, 524 F.3d at 404.

New York State later enacted the modified nuisance law at issue in this case, which adds the words “gun industry member” to the not-a-predicate statute at issue in *Beretta*. This new law, Section 898, provides that “[n]o gun industry member . . . shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product” and that any gun industry member that operates in New York “shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.” N.Y. Gen. Bus. Law § 898-b. Violation of these prohibitions

is declared a public nuisance, enforceable by various public officials as well as private parties. *See id.* § 898-c-e.

This law is nothing short of an attempt to end-run PLCAA. I know that because then-Governor Cuomo used his signing statement to tell the public that Section 898 would “right the wrong” done by PLCAA. *See* Governor Andrew M. Cuomo, *Governor Cuomo Signs First-in-the-Nation Gun Violence Disaster Emergency to Build a Safer New York* at 35:11-36:50.<sup>1</sup>

I cannot very well deny that what New York has done, perfunctory as it is, and deadly in its aim at the firearms industry, comports with *Beretta*. *See ante* at 23-25. Were I deciding *Beretta* afresh, I would have concluded that the predicate exception is strictly defined by the examples that Congress provided, and that the exception permits only those measures that are particular to firearms as a product and an industry--not general-purpose nuisance statutes onto which reference to the firearms industry is grafted. *Cf. Beretta*, 524 F.3d at 402 (“the general term—’applicable to’—is to be construed to embrace only objects similar to those enumerated by” § 7903(5)(A)(iii)(I)-(II) (internal quotation omitted)). A predicate statute, in my view, must bear upon firearms more specifically than by mere reference, must give notice of its requirements sufficient to allow compliance with confidence, and must require proximate cause. *See* § 7903(5)(A)(iii) (requiring knowledge and proximate cause). Otherwise, the

---

<sup>1</sup> YouTube (July 6, 2021), <https://www.youtube.com/watch?v=tKj0FZueFM>.

firearms industry is in jeopardy of enforcement so abusive and arbitrary that it can be destroyed by litigation expense, damages, and impediments to insurance and the raising of capital.

New York’s repurposed nuisance law is infirm for many of the same reasons as New York’s original nuisance law, on which it was modeled. PLCAA apprises the members of the firearms industry about specific obligations (record-keeping requirements) and proscriptions (straw purchases, specified false statements). Unlike PLCAA, Section 898 imposes liability for diffuse and generalized conduct: “creat[ing], maintain[ing] or contribut[ing] to a condition in New York state that endangers the safety or health of the public.” § 898-b(1). Such a “condition” could be “created, maintained, or contributed to” in myriad ways. Yet, since Section 898 undoubtedly “expressly regulate[s] firearms,” it satisfies *Beretta*. A violation of Section 898 *might*—on the right set of facts—qualify as a predicate violation.

I therefore agree with my colleagues that Appellants’ facial PLCAA challenge fails.<sup>2</sup> But even so, PLCAA invites *as-applied* challenges to Section 898. PLCAA’s operative language bars specific “qualified civil liability actions,” a term defined by reference to specific facts characterizing specific cases. Though Congress articulated a purpose concerning “*causes of*

---

<sup>2</sup> I also agree that Appellants’ facial dormant Commerce Clause and vagueness challenges fail, for the reasons provided by the Court. Because Section 898 is likely to have a limited reach in practice, its benefits and interstate burdens are as-yet unclear. *See ante* at 37. Moreover, at least some applications of Section 898 would accord with due process. *See ante* at 42-43.

*action,*” Congress drafted PLCAA to bar only individual “qualified civil liability *actions.*” Compare § 7901(b)(1), *with* § 7902(a). We must assume this difference in terms is material. See *Yale New Haven Hospital v. Becerra*, 56 F.4th 9, 21 (2d Cir. 2022) (quoting *Sw. Airlines Co. v. Saxon*, 596 U.S. 450, 458 (2022)). Therefore, unless a cause of action cannot be pleaded consistently with PLCAA, preemption is best considered as applied to individual cases.

Indicative is the Supreme Court’s *Smith & Wesson* opinion, which held that the Government of Mexico had failed to “plausibly plead[]” conduct consistent with the predicate exception. 145 S. Ct. at 1562; *see also id.* at 1570 (Thomas, J., concurring) (the Court’s opinion “concludes only that Mexico has not adequately pleaded its theory of the case—that, *as a factual matter*, the defendant gun manufacturers committed criminal aiding and abetting” (emphasis added)). Thus, the Supreme Court made clear that, despite PLCAA’s announced purpose to the contrary, “the predicate violation opens a path to making a gun manufacturer civilly liable for the way a third party has used the weapon it made.” *Smith & Wesson*, 145 S. Ct. at 1562. But as the Supreme Court did in *Smith & Wesson*, we must consider whether the predicate exception bars a particular lawsuit with reference to particular facts, not in the abstract on a facial challenge.

It is possible to plead a Section 898 action that threads the eyelet of the predicate exception. The Court concludes that Section 898’s lack of express knowledge and causation requirements “does not contravene” the predicate exception’s requirement of

them. *Ante* at 29. Though I cannot see how a Section 898 action could proceed *without* pleading these federally mandated elements, this is a question that can be easily saved for (inevitable) as-applied preemption challenges to Section 898, and easily answered then.<sup>3</sup> The Court rightly declines Appellants’ invitation to declare that Section 898 is preempted “to the extent” that its application will exceed the predicate exception’s scope.<sup>4</sup> And “to the extent” that Appellants wish us to declare federal law’s supremacy over state law, the Constitution already offers this rule of decision without any underlining by us. *See* U.S. Const. art. VI, cl. 2.

PLCAA constrains application and interpretation of Section 898. For example, Section 898 authorizes actions based on a showing of (criminal) recklessness, whereas only knowing violations of federal or state law fall within the predicate exception. *Compare* § 898-b(1) (prohibiting certain acts done “knowingly or recklessly”), *with* § 7903(5)(A)(iii) (requiring

---

<sup>3</sup> Because federal law appears to supply essential (albeit implied) elements of a Section 898 cause of action, Section 898 cases filed in state court may also be removable. *See NASDAQ OMX Grp. v. UBS Secs., LLC*, 770 F.3d 1010, 1019-20 (2d Cir. 2014). Removal to federal court should allay concern over a “maverick judicial officer or petit jury” reading Section 898 inconsistently with federal law.

<sup>4</sup> Appellants appear to have raised whether Section 898 is preempted *to some extent* for the first time on appeal; below, they argued it was preempted entirely. Failure of preservation is further reason to defer answering the question of *to what extent* Section 898 is preempted. *See United States v. Mendonca*, 88 F.4th 144, 165 (2d Cir. 2023); *see also ante* at 30 (reserving question).

violations occur “knowingly” to fit into predicate exception); *see also* N.Y. Penal Law § 15.05 (knowledge is more rigorous than recklessness under New York law). An as-applied challenge may decide whether recklessness under New York criminal law is tantamount to knowledge under federal law; if not, suits based on reckless conduct will be dismissible. Section 898 also lacks an express proximate cause requirement. But PLCAA is sufficiently emphatic that we can rely on trial courts to dismiss Section 898 actions expeditiously where federally sufficient knowledge or proximate cause are missing—lest application of Section 898 prove an obstacle to Congress’s intention. *Cf.* § 7902(b) (requiring that any “qualified civil liability action that is pending on October 26, 2005 shall be *immediately* dismissed” (emphasis added)).

Speedy dismissal of attenuated Section 898 claims accords with PLCAA’s goal of preventing litigation from eating up the firearms industry whole. There is every indication that New York intends Section 898 to contravene federal law; but there is *some* legitimate reach to the law, which suffices for us to affirm the dismissal of this facial challenge. Just how limited that reach is must await future cases.

App-45

*Appendix B*

**UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT**

---

No. 22-1374

---

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,  
BERETTA U.S.A. CORP., DAVIDSON'S, INC., GLOCK INC.,  
CENTRAL TEXAS GUN WORKS, HORNADY  
MANUFACTURING COMPANY, LIPSEY'S LLC, OSAGE  
COUNTY GUNS LLC, RSR GROUP, INC., SHEDHORN  
SPORTS, INC., SIG SAUER, INC., SMITH & WESSON INC.,  
SPORTS SOUTH LLC, SPRAGUE'S SPORTS INC., STRUM,  
RUGER & COMPANY, INC.,

*Plaintiffs-Appellants,*

v.

LETITIA JAMES, in her official capacity as New York  
Attorney General,

*Defendant-Appellee.*

---

Filed: December 2, 2025

---

**ORDER**

---

Appellants filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

App-46

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

Catherine O'Hagan Wolfe,  
Clerk

  
Catherine O'Hagan Wolfe

The seal of the United States Second Circuit Court of Appeals is circular. It features a blue outer ring with the text "UNITED STATES" at the top and "COURT OF APPEALS" at the bottom. Inside the ring, the words "SECOND CIRCUIT" are written in a smaller font, flanked by two small stars.

App-47

*Appendix C*

**UNITED STATES DISTRICT COURT FOR THE  
NORTHERN DISTRICT OF NEW YORK**

---

No. 21-cv-1348

---

NATIONAL SHOOTING SPORTS FOUNDATION, INC.,  
BERETTA U.S.A. CORP., DAVIDSON'S, INC., GLOCK INC.,  
CENTRAL TEXAS GUN WORKS, HORNADY  
MANUFACTURING COMPANY, LIPSEY'S LLC, OSAGE  
COUNTY GUNS LLC, RSR GROUP, INC., SHEDHORN  
SPORTS, INC., SIG SAUER, INC., SMITH & WESSON INC.,  
SPORTS SOUTH LLC, SPRAGUE'S SPORTS INC., STRUM,  
RUGER & COMPANY, INC.,

*Plaintiffs,*

v.

LETITIA JAMES, in her official capacity as New York  
Attorney General,

*Defendant.*

---

Filed: May 25, 2022

---

**MEMORANDUM DECISION & ORDER**

---

**I. INTRODUCTION**

Plaintiffs, fourteen gun industry members and a trade association, initiated this action on December 16, 2021, against Defendant Attorney General Letitia James. *See* Dkt. No. 1. Plaintiffs' complaint generally alleges that N.Y. Gen. Bus. Law §§ 898-a-e is

unconstitutional. *See id.* Along with the complaint, Plaintiffs also filed a motion for a preliminary injunction on December 16, 2021. *See* Dkt. No. 2. On February 18, 2022, Defendant filed a motion to dismiss all of Plaintiffs’ claims. *See* Dkt. No. 35. For the following reasons, Defendant’s motion to dismiss is granted and Plaintiffs’ motion for a preliminary injunction is denied.

## II. BACKGROUND

On July 6, 2021, New York enacted a law to hold gun industry members<sup>1</sup> civilly liable for “public nuisance[s].” N.Y. Gen. Bus. Law §§ 898-a-e (“§ 898”). Specifically, the law states as follows:

1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.
2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being

---

<sup>1</sup> “[A] person, firm, corporation, company, partnership, society, joint stock company or any other entity or association engaged in the sale, manufacturing, distribution, importing or marketing of firearms, ammunition, ammunition magazines, and firearms accessories.” N.Y. Gen. Bus. Law § 898-a(4).

possessed, used, marketed or sold unlawfully in New York state.

*Id.* § 898-b. Violation of either provision resulting in “harm to the public,” regardless of “whether the gun industry member acted for the purpose of causing harm to the public,” is deemed by the statute a public nuisance. *Id.* § 898-c(1), (2). Section 898 is enforced by the New York Attorney General, “a city corporation counsel on behalf of the locality,” or “[a]ny person, firm, corporation or association that has been damaged as a result of a gun industry member’s acts or omissions in violation of this article.” *Id.* §§ 898-d, e.

On December 16, 2021, Plaintiffs filed a complaint and a motion for a preliminary injunction. *See* Dkt. Nos. 1, 2. Plaintiffs seek a declaratory judgment that § 898 is unconstitutional and an injunction enjoining Defendant from enforcing the act. *Id.* Plaintiffs argue that § 898 is unconstitutional for three reasons: (1) it is preempted by the federal Protection of Lawful Commerce in Arms Act (“PLCAA”), 15 U.S.C. § 5921; (2) it violates the dormant Commerce Clause; and (3) it is void for vagueness. *See* Dkt. No. 2-1 at 17.

### **III. DISCUSSION**

#### **A. Failure to State a Claim**

##### **1. Standard of Review**

A motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the legal sufficiency of the party’s claim for relief. *See Patane v. Clark*, 508 F.3d 106, 111-12 (2d Cir. 2007) (citation omitted). In considering the legal sufficiency, a court must accept as true all well-

pleaded facts in the pleading and draw all reasonable inferences in the pleader's favor. *See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd.*, 493 F.3d 87, 98 (2d Cir. 2007) (citation omitted). This presumption of truth, however, does not extend to legal conclusions. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although a court's review of a motion to dismiss is generally limited to the facts presented in the pleading, the court may consider documents that are "integral" to that pleading, even if they are neither physically attached to, nor incorporated by reference into, the pleading. *See Mangiafico v. Blumenthal*, 471 F.3d 391, 398 (2d Cir. 2006) (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

To survive a motion to dismiss, a party need only plead "a short and plain statement of the claim," *see* Fed. R. Civ. P. 8(a)(2), with sufficient factual "heft to 'sho[w] that the pleader is entitled to relief[.]" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007) (quotation omitted). Under this standard, the pleading's "[f]actual allegations must be enough to raise a right of relief above the speculative level," *see id.* at 555 (citation omitted), and present claims that are "plausible on [their] face," *id.* at 570. "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678 (citation omitted). "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting [*Twombly*, 550 U.S.] at 557). Ultimately, "when the allegations in a complaint, however true, could not

raise a claim of entitlement to relief,” *Twombly*, 550 U.S. at 558 or where a plaintiff has “not nudged [its] claims across the line from conceivable to plausible, the[ ] complaint must be dismissed[.]” *id.* at 570.

## **2. Preemption**

The Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, “invalidates state laws that interfere with, or are contrary to federal law.” *Air Transport Ass’n of Am., Inc. v. Cuomo*, 520 F.3d 218, 220 (2d Cir. 2008) (quotation omitted). Defendant moves to dismiss Plaintiffs’ claim that § 898 is preempted by the PLCAA. There are three different types of preemption:

(1) express preemption, where Congress has expressly preempted local law; (2) field preemption, where congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives.

*N.Y. SMSA Ltd. P’ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010) (citations and quotations omitted). Plaintiffs argue that § 898 is expressly preempted and conflicts with federal objectives. *See* Dkt. No. 1 at ¶¶ 74-91.

### ***a. Express Preemption***

The PLCAA expressly preempts “qualified civil liability action[s],” 15 U.S.C. § 7902(a), which are defined as a “civil action or proceeding or an

administrative proceeding brought by any person against a manufacturer or seller of a qualified product, or a trade association ... resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” 15 U.S.C. § 7903(5). Plaintiffs contend that § 898 creates qualified civil liability actions and is therefore expressly preempted by the PLCAA. The PLCAA, however, excludes from the definition of qualified civil liability action, known as the “predicate exception,” the following:

an action in which a manufacturer or seller of a qualified product knowingly violated a State or Federal statute applicable to the sale or marketing of the product, and the violation was a proximate cause of the harm for which relief is sought, including—

(I) any case in which the manufacturer or seller knowingly made any false entry in, or failed to make appropriate entry in, any record required to be kept under Federal or State law with respect to the qualified product, or aided, abetted, or conspired with any person in making any false or fictitious oral or written statement with respect to any fact material to the lawfulness of the sale or other disposition of a qualified product; or

(II) any case in which the manufacturer or seller aided, abetted, or conspired with any other person to sell or otherwise dispose of a qualified product, knowing, or having reasonable cause to believe,

that the actual buyer of the qualified product was prohibited from possessing or receiving a firearm or ammunition under subsection (g) or (n) of section 922 of Title 18;

15 U.S.C. § 7903(5)(A)(iii). Because § 898 establishes liability against gun industry members resulting from the criminal or unlawful misuse of a firearm, it is expressly preempted by the PLCAA unless it falls within the predicate exception.

Following the passage of the PLCAA, the Second Circuit discussed the predicate exception at length in *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008). The court discussed whether New York’s general public nuisance statute, N.Y. Penal Law § 240.45, was “applicable to” the sale or marketing of firearms within the meaning of the predicate exception. The Second Circuit held the term “applicable to” in the predicate exception “to mean statutes that clearly can be said to regulate the firearms industry[.]” *Beretta*, 524 F.3d at 402. In reaching its conclusion, the court noted that “the term ‘applicable’ must be examined in context.” *Id.* at 401. Then, because both parties relied on “a reasonable meaning of the term ‘applicable,’” the court looked at “canons of statutory interpretation to help resolve the ambiguity.” *Id.* (internal quotations omitted). Ultimately, the court held that New York’s general public nuisance statute was not “applicable to the sale or marketing of [firearms]” within the meaning of the predicate exception and was, therefore, preempted by the PLCAA. *Beretta*, 524 F.3d at 399-404.

The court reached its conclusion by relying on the *noscitur a sociis*<sup>2</sup> and *ejusdem generis*<sup>3</sup> canons of statutory construction. The court interpreted the general language of “applicable to” in section 7903(5)(A)(iii) by noting that the examples which follow “including” are “specific language referring to statutes imposing record-keeping requirements on the firearms industry . . . and prohibiting firearms suppliers from conspiring with or aiding and abetting others in selling firearms directly to prohibited purchasers.” *Id.* (citing 15 U.S.C. § 7903(5)(A)(iii)(I)-(II)).

The Second Circuit also looked to the purpose and legislative history of the PLCAA. *Id.* at 402-404. Congress stated the purpose of the statute was

[t]o prohibit causes of action against manufacturers, distributors, dealers, and importers of firearms or ammunition products, and their trade associations, for the harm solely caused by the criminal or unlawful misuse of firearms products or

---

<sup>2</sup> “As we noted in *United States v. Dauray*, 215 F.3d 257 (2d Cir. 2000), ‘the meaning of doubtful terms or phrases may be determined by reference to their relationship with other associated words or phrases (*noscitur a sociis*).’” *Beretta*, 524 F.3d at 401.

<sup>3</sup> “Where general words follow specific words in a statutory enumeration, the general words are usually construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words.” *Yates v. United States*, 574 U.S. 528, 545 (2015) (internal quotations and alternations omitted).

ammunition products by others when the product functioned as designed and intended.

15 U.S.C. § 7901(b)(1). Moreover, Congress found businesses in the United States that are engaged in interstate and foreign commerce through the lawful design, manufacture, marketing, distribution, importation, or sale to the public of firearms or ammunition products that have been shipped or transported in interstate or foreign commerce are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products or ammunition products that function as designed and intended.

15 U.S.C. § 7901(a)(5). Therefore, the court stated, “[w]e think Congress clearly intended to protect from vicarious liability members of the firearms industry who engage in the lawful design, manufacture, marketing, distribution, importation, or sale of firearms.” *Beretta*, 524 F.3d at 402 (internal quotations omitted).

Accordingly, the court held that applying the predicate exception to New York’s general public nuisance law “leads to a far too-broad reading of the predicate exception.” *Id.* at 403. “Such a result would allow the predicate exception to swallow the statute, which was intended to shield the firearms industry from vicarious liability for harm caused by firearms that were lawfully distributed into primary markets.” *Id.* at 403. The *Beretta* court therefore limited the predicate exception to “statutes that actually regulate the firearms industry.” *Id.* at 404.

The general public nuisance statute from *Beretta* and § 898 here are generally similar in content, except § 898 substitutes the term “gun industry member” for “person.” Defendant contends that because § 898 expressly regulates firearms, it comports with *Beretta*’s definition of “applicable to.” Plaintiffs, however, argue that the reasoning behind *Beretta* supports a finding that that § 898 is excluded from the predicate exception.

The *Beretta* court was engaged in a narrow question of statutory interpretation. To determine whether New York’s general public nuisance law fell within the predicate exception, the *Beretta* court was required to resolve the ambiguity of the term “applicable to.” *Beretta*, 524 F.3d at 400-01. Only to resolve that ambiguity did the court engage in difficult questions of statutory construction. Here, Plaintiffs employ the same tools as the *Beretta* court, but it is unclear for what job. Similar to *Beretta*, the question before this Court is whether § 898 is “applicable to the sale or manufacture of [firearms].” But Plaintiffs offer no suggestion for how to interpret or define “applicable to” such that § 898 is excluded. Rather, Plaintiffs argue in the abstract that § 898 is not the type of law that Congress intended to authorize with the predicate exception, untethered from the text of the predicate exception itself.

Congress authorized lawsuits against gun industry members for “knowingly violat[ing] a State or Federal statute applicable to the sale or marketing of the product.” The Supreme Court has “stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute

what it says there. When the words of a statute are unambiguous, then, this first canon is also the last: judicial inquiry is complete.” *Connecticut Nat’l Bank v. Germain*, 503 U.S. 249, 254-55 (1992). Here, Plaintiffs identify no ambiguity in the predicate exception that leads to the exclusion of § 898. In fact, many of the Plaintiffs here were the same parties in *Beretta* that argued that “applicable to” means expressly regulates.

No reasonable interpretation of “applicable to” can exclude a statute which imposes liability exclusively on gun manufactures for the manner in which guns are manufactured, marketed, and sold. In *Beretta*, the Second Circuit provided clear instruction on whether a statute is “applicable to” the firearm industry within the meaning of the predicate exception, whether it “encompass statutes (a) that expressly regulate firearms, or (b) that courts have applied to the sale and marketing of firearms.” *Beretta*, 524 F.3d at 404. Therefore, the only question before this Court is whether § 898 expressly regulates firearms. Because § 898 establishes liability exclusively on gun industry members for certain actions—such as the failure to institute “screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others,” § 898-a(1)—the Court holds

that § 898 expressly regulates firearms.<sup>4</sup> Therefore, Plaintiffs' express preemption claim is dismissed.

***b. Conflict Preemption***

Conflict preemption can arise in two situations: when “it is ‘impossible for a private party to comply with both state and federal requirements’ . . . or where state law ‘stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’” *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995) (quotation omitted). Here, Plaintiffs allege only obstacle preemption. *See* Dkt. No. 1 at ¶¶ 85-91. Obstacle preemption “precludes state law that poses an ‘actual conflict’ with the overriding federal purpose and objective.” *In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 725 F.3d 65, 101 (2d Cir. 2013) (quoting *Mary Jo C. v. N.Y. State & Local Ret. Sys.*, 707 F.3d 144, 162 (2d Cir. 2013)). “What constitutes a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” *Id.* “The burden of establishing obstacle preemption . . . is heavy: the mere fact of tension between federal and state law is generally not enough to establish an obstacle supporting

---

<sup>4</sup> The Court notes that Plaintiffs agree that § 898 expressly regulates firearms; their entire dormant Commerce Clause claim is necessarily predicated on it. *See* Dkt. No. 1 at ¶ 104 (“Specifically, the Act seeks to regulate the conduct of the 97.1% of FFLs operating outside New York by declaring conduct fully lawful where it occurred unlawful in New York”); Dkt. No. 2-1 at 20 (“New York’s attempt to regulate the nationwide firearm industry would still violate the Constitution because it discriminates against, attempts to control, and imposes severe burdens on interstate commerce”).

preemption, particularly when the state law involves the exercise of traditional police power.” *Id.* at 101-02 (internal quotation marks and brackets omitted). “Indeed, federal law does not preempt state law under obstacle preemption analysis unless the repugnance or conflict is so direct and positive that the two acts cannot be reconciled or consistently stand together.” *Id.* at 102 (internal quotation marks omitted).

Here, the PLCAA broadly preempts civil actions “brought by any person against a manufacturer or seller of a [firearm] . . . resulting from the criminal or unlawful misuse of a qualified product by the person or a third party.” 15 U.S.C. § 7903(5). It then excludes from preemption “an action in which a manufacturer or seller of a [firearm] knowingly violated a State or Federal statute applicable to the sale or marketing of the product.” 15 U.S.C. § 7903(5)(A)(iii). As discussed above, the text of the statute does not expressly preempt § 898. The lack of express preemption, however, “does not bar the ordinary working of conflict pre-emption principles.” *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869 (2000).

Nonetheless, “Congress’ enactment of a provision defining the pre-emptive reach of a statute implies that matters beyond that reach are not pre-empted.” *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 517 (1992). “Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority.” *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 600-01 (2011). Here, the preemptive scope of the PLCAA and its predicate exception give a “reliable indicium of

congressional intent with respect to state authority.” *Cipollone*, 505 U.S. at 517. Congress clearly intended to allow state statutes which regulate the firearms industry. See 15 U.S.C. § 7903(5)(A)(iii) (exempting from preemption “an action in which a manufacturer or seller of a [firearm] knowingly violated a *State or Federal statute* applicable to the sale or marketing of the product”) (emphasis added). “Implied preemption analysis does not justify a ‘freewheeling judicial inquiry into whether a state statute is in tension with federal objectives’; such an endeavor ‘would undercut the principle that it is Congress rather than the courts that preempts state law.’” *Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 607 (2011) (quoting *Gade v. National Solid Wastes Management Assn.*, 505 U.S. 88, 111 (1992) (Kennedy, J., concurring in part and concurring in judgment)).

Still, a review of the statute as a whole and the legislative history show that a state statute establishing liability for improper sale or marketing of firearms is not an obstacle to any congressional objective of the PLCAA. For example, the preamble states that actions against gun industry members “do not represent a bona fide expansion of the common law.” 15 U.S.C. § 7901(a)(7). The PLCAA also targets the expansion of generally applicable laws, such as New York’s general public nuisance statute discussed in *Beretta*, as an “attempt to use the judicial branch to circumvent the Legislative branch of government.” *Id.* § 7901(a)(8). But there is no statutory indication in the PLCAA for Plaintiffs’ claim that Congress intended to preempt state statutes which expressly regulate firearms—much less establish the “high threshold [that] must be met if a state law is to be preempted for

conflicting with the purposes of a federal Act.” *Whiting*, 563 U.S. at 607 (quoting *Gade*, 505 U.S. at 110). Defendant’s motion to dismiss the conflict preemption claim is therefore granted.

### **3. Dormant Commerce Clause**

The Commerce Clause provides the federal government, through Congress, with the power “[t]o regulate Commerce . . . among the several States.” U.S. Const., art. I, § 8, cl. 3. This express grant of power to Congress contains “a further, negative command, known as the dormant Commerce Clause ‘which limits the power of local governments to enact laws affecting interstate commerce.’” *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 47 (2d Cir. 2007) (citing *Hughes v. Oklahoma*, 441 U.S. 322, 326 (1979) (internal quotations and citations omitted)). “The negative or dormant implication of the Commerce Clause prohibits state taxation or regulation that discriminates against or unduly burdens interstate commerce and thereby impedes free private trade in the national marketplace.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 287 (1997). Additionally, the dormant Commerce Clause “precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders, whether or not the commerce has effects within the State.” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982)).

Accordingly, a state statute violates the dormant Commerce Clause if it: (1) “clearly discriminates against interstate commerce in favor of intrastate commerce”; (2) “imposes a burden on interstate

commerce incommensurate with the local benefits secured”; or (3) “has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question.” *Grand River Enters. Six Nations v. Boughton*, 988 F.3d 114, 123 (2d Cir. 2021) (citation omitted). Plaintiffs allege that § 898 is unconstitutional in all three ways.

“In analyzing a challenged local law under the dormant Commerce Clause, we first determine whether it clearly discriminates against interstate commerce in favor of intrastate commerce, or whether it regulates evenhandedly with only incidental effects on interstate commerce.” *Town of Southold*, 477 F.3d at 47. If the state law “clearly discriminates” it is “virtually invalid per se and will survive only if it is ‘demonstrably justified by a valid factor unrelated to economic protectionism.’” *Id.* (quoting *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)). A law that does not “clearly discriminate” but still “imposes a burden on interstate commerce” is “subject to the more permissive balancing test under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), and will be struck down if the burden imposed on interstate commerce clearly exceeds the putative local gains.” *Id.* Lastly, the Court will analyze whether § 898 violates *Healy*’s extraterritoriality principles. *See Healy*, 491 U.S. 324.

***a. Whether § 898 Clearly Discriminates Against Out-of-State Commerce***

Plaintiffs argue that § 898 is facially discriminatory. The term discrimination in this context “simply means differential treatment of in-

state and out-of-state economic interests that benefits the former and burdens the latter.” *Oregon Waste Sys., Inc. v. Dep’t of Env’t Quality of State of Or.*, 511 U.S. 93, 99 (1994). Here, § 898 regulates “qualified products.” N.Y. Gen. Bus. Law § 898-b. “Qualified product[s],” in turn, are defined “as the same meaning as defined in 15 U.S.C. section 7903(4),” which is “a firearm . . . or ammunition . . . or a component part of a firearm or ammunition, that has been shipped or transported in interstate or foreign commerce.” *Id.* § 898-a(6) (quoting 15 U.S.C. § 7903(4)). Plaintiffs therefore argue that because § 898 only applies to interstate commerce and is not applicable to wholly intrastate gun industry members, based on the definition of “qualified products,” it is facially discriminatory.

Discrimination, however, “assumes a comparison of substantially similar entities.” *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). This is because, as the Supreme Court has explained, “[t]he central rationale for the rule against discrimination is to prohibit state or municipal laws whose object is local economic protectionism, laws that would excite those jealousies and retaliatory measures the Constitution was designed to prevent.” *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). “The fundamental objective of the dormant Commerce Clause is to ‘preserv[e] a national market for competition undisturbed by preferential advantages conferred by a State upon its residents or resident competitors.’” *Brown & Williamson Tobacco Corp. v. Pataki*, 320 F.3d 200, 208 (2d Cir. 2003) (quoting *Gen. Motors Corp.*, 519 U.S. at 299). Therefore, in order to state a dormant Commerce Clause claim on the basis

of discrimination, Plaintiffs are required to “identify an[ ] in-state commercial interest that is favored, directly or indirectly, by the challenged statutes at the expense of out-of-state competitors.” *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 95 (2d Cir. 2009) (quoting *Grand River Enters. Six Nations, Ltd. v. Pryor*, 425 F.3d 158, 169 (2d Cir. 2005)). “[I]n the absence of actual or prospective competition between the supposedly favored and disfavored entities in a single market there can be no local preference.” *Gen. Motors Corp.*, 519 U.S. at 300.

Here, there can be no discrimination against out-of-state commerce, and in favor of instate commerce, because Plaintiffs have not alleged that any in-state commerce exists. Plaintiffs allege that of the 131,952 federal firearms licensees in the country, 3,827 of them operate in the state of New York. Dkt. No. 1 at ¶ 58. Plaintiffs, however, do not allege that § 898 does not apply to these 3,827 federal firearms licensees. As Defendant points out, there is likely no gun industry member who is exempt from § 898 because it participates in wholly in-state commerce. The definition of qualified product under § 898 includes “any component part of a firearm . . . that has been shipped or transported in interstate or foreign commerce.” 15 U.S.C. § 7903(4). Even if a New York State gun industry member manufactured a firearm in New York and sold it exclusively in New York, it would still be subject to § 898 if any component part of that firearm originated out-of-state. *Id.* “[T]he firearms industry is interstate—indeed, international—in nature.” *Beretta*, 524 F.3d at 394. Plaintiffs have not alleged, nor could they, that a New

York State gun industry member that is exempt from § 898 exists.

Because there is no in-state competitor, the state of New York cannot discriminate against out-of-state commerce and in favor of in-state commerce. *See Town of Southold*, 477 F.3d at 49 (finding no discrimination where the law “does not give any advantage to local businesses at the expense of out-of-state competitors”); *Angus Partners LLC v. Walder*, 52 F. Supp. 3d 546, 562 (S.D.N.Y. 2014) (“Plaintiffs fail to satisfy their burden of identifying an in-state interest that is benefitted or an out-of-state competitor that is harmed”). Defendant’s motion to dismiss Plaintiffs’ claim that § 898 violates that dormant Commerce Clause as facially discriminatory is therefore granted.

***b. Whether § 898 Places an Undue Burden on Interstate Commerce***

Because § 898 does not clearly discriminate against interstate commerce, the Court “next assess[es] its validity under the *Pike* balancing test.” *Town of Southold*, 477 F.3d at 50. Under *Pike*, a challenged regulation will be upheld unless it “places a burden on interstate commerce that is clearly excessive in relation to the putative local benefits.” *USA Recycling, Inc. v. Town of Babylon*, 66 F.3d 1272, 1282 (2d Cir. 1995). As the Supreme Court has noted, “[s]tate laws frequently survive this *Pike* scrutiny.” *Dep’t of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008) (collecting cases).

“The *Pike* test is often directed at differentiating ‘protectionist measures’ from those that ‘can fairly be viewed as . . . directed to legitimate local concerns, with effects upon interstate commerce that are only

incidental.” *VIZIO, Inc. v. Klee*, 886 F.3d 249, 259 (2d Cir. 2018) (quoting *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). With this principle in mind, the Second Circuit previously denied a *Pike* claim where the plaintiff was unable to “identify any in-state commercial interest that is favored, directly or indirectly.” *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205, 218 (2d Cir. 2004). “To be prohibited, a statute still must favor an in-state commercial interest over a corresponding out-of-state commercial interest, an element absent in the present matter.” *Id.* at 219. As the Court stated in the preceding section, § 898 does not favor any in-state commercial interests. There are no in-state commercial interests that benefit from § 898. Accordingly, Plaintiffs’ *Pike* claim is denied.

***c. Whether § 898 Impermissibly  
Regulates Out-of-State Commerce***

A local statute can also violate the dormant Commerce Clause if it “directly controls commerce occurring wholly outside the boundaries of a State.” *Healy*, 491 U.S. at 336. The Second Circuit has stated that, “when assessing a plaintiff’s extraterritoriality theory, we focus squarely on whether the state law has ‘the practical effect of requiring out-of-state commerce to be conducted at the regulating state’s direction.’” *VIZIO*, 886 F.3d at 255 (quoting *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 193 (2d Cir. 2007)). “In that analysis, courts shall not only consider the effect of the challenged law, but also ‘what effect would arise if not one, but many or every State adopted similar legislation.’” *Id.* (quoting *Healy*, 491 U.S. at 336). Courts, however, “have consistently recognized that

‘[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.’” *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 67 (2d Cir. 2010) (quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)).

Plaintiffs allege that § 898 impermissibly regulates out-of-state commerce by “declaring conduct fully lawful where it occurred unlawful in New York.” Dkt. No. 1 at ¶ 104. Plaintiffs argue that if this type of statute were permissible, then gun industry members would have to comply with the strictest state restrictions “regardless of federal law or the law of the individual state of operation, or face liability.” *Id.* at ¶ 106. The compliance with regulations regarding the safe manufacturing, marketing, or selling of a product, however, is wholly outside the concerns of the extraterritoriality-dormant Commerce Clause doctrine.

As the Second Circuit stated, statutes that the Supreme Court has struck down as impermissibly extraterritorial “went a step further, controlling in-state and out-of-state pricing of goods going into the state. These statutes did so by making specific reference to the terms of such pricing—terms which burdened out-of-state actors more than in-state actors—and attaching in-state consequences where the pricing terms violated the statutes.” *Freedom Holdings, Inc.*, 357 F.3d at 221 (2d Cir. 2004) (citing *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 575-76 (1986); *Healy*, 491 U.S. at 326). Rather, this line of cases

“concerns only ‘price control or price affirmation statutes’ that involve ‘tying the price of ... in-state products to out-of-state prices.” *Energy & Env’t Legal Inst. v. Epel*, 793 F.3d 1169, 1174 (10th Cir. 2015) (Gorsuch, J.) (quoting *Pharm. Rsch. & Mfrs. of Am. v. Walsh*, 538 U.S. 644, 669 (2003)).

For example, the Second Circuit rejected a claim where the state statute “merely influence[d] national pricing decisions, rather than directly control[led] out-of-state commerce.” *VIZIO*, 886 F.3d at 255. In *VIZIO*, the court held that no dormant Commerce Clause claim existed where the state law “does not ‘mak[e] specific reference to the terms of . . . pricing’ and does not ‘attach[ ] in-state consequences where the pricing terms violate[ ] the statute[ ].” *VIZIO*, 886 F.3d at 255 (quoting *Freedom Holdings*, 357 F.3d at 221) (alterations in original). And in *Grand River Enterprises Six Nations, Ltd. v. Boughton*, the court stated that where the effect of a local statute was “indirect as well as incidental to the purpose of the statute” then it is “not analogous to that of the economic regulation held to violate the dormant Commerce Clause in *Healy*.” 988 F.3d 114, 124 (2d Cir. 2021).

Here, § 898 is a regulation targeted at the manufacturing, marketing, and sale of firearms in New York State. “[R]egulations that touch upon safety . . . are those that the Court has been most reluctant to invalidate.” *Kassel v. Consol. Freightways Corp. of Delaware*, 450 U.S. 662, 670 (1981) (internal quotations omitted); *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 194 (2d Cir. 2007) (“Were we to accept [plaintiff]’s theory, almost every state consumer

protection law would be considered ‘protectionist’ in a sense prohibited by the Constitution. The meaning of the dormant Commerce Clause is far narrower”). Section 898 in no way differs from the extraterritorial effect of the myriad of safety state laws and regulations with which every industry must comply. *See Instructional Sys. v. Comput. Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994) (“[I]t is inevitable that a state’s law, whether statutory or common law, will have extraterritorial effects”); *Freedom Holdings*, 357 F.3d at 220-21 (“The extraterritorial effect described by appellants amounts to no more than the upstream pricing impact of a state regulation”). Accordingly, § 898 does not violate the extraterritoriality principles of the dormant Commerce Clause.

#### 4. Void for Vagueness

The Fourteenth Amendment’s guarantee that no state shall “deprive any person of life, liberty, or property, without due process of law,” U.S. Const. amend. XIV, § 1, entitles a person to “be informed as to what [a law] commands or forbids.” *Thibodeau v. Portuondo*, 486 F.3d 61, 65 (2d Cir. 2007) (quoting *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939)). The void for vagueness doctrine requires first that “laws be crafted with sufficient clarity to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited” and second that “laws contain ‘minimal guidelines to govern law enforcement.’” *Id.* at 65-66 (quoting *Betancourt v. Bloomberg*, 448 F.3d 547, 552 (2d Cir. 2006)) (other quotation omitted); *see also Kolender v. Lawson*, 461 U.S. 352, 358 (1983); *Farid v. Ellen*, 593 F.3d 233, 240 (2d Cir. 2010). A statute or rule is inadequate under

the second criterion when it “fails to provide sufficiently explicit standards for those who apply it,” and “impermissibly delegates basic policy matters . . . for resolution on an ad hoc and subjective basis.” *Farid*, 593 F.3d at 243 (citations omitted).

Facial void for vagueness challenges, like Plaintiffs bring here, “are generally disfavored.” *Dickerson v. Napolitano*, 604 F.3d 732, 741 (2d Cir. 2010); *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (holding that a pre-enforcement challenge constitutes a “facial,’ rather than ‘as-applied,’ challenge”). As the *Dickerson* court stated, facial challenges “run contrary to the fundamental principles of judicial restraint that courts should neither anticipate a question of constitutional law in advance of the necessity of deciding it nor formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.” *Dickerson*, 604 F.3d at 741. Moreover, facial challenges “often rest on speculation.” *Id.* (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008)). Accordingly, limiting facial challenges “serves institutional interests by ensuring that the issues before the court are concrete and sharply presented.” *Id.* (quoting *Thibodeau*, 486 F.3d at 71).

“[T]he degree of vagueness tolerated in a statute varies with its type: economic regulations are subject to a relaxed vagueness test, laws with criminal penalties to a stricter one, and laws that might infringe constitutional rights to the strictest of all.” *VIP of Berlin, LLC v. Town of Berlin*, 593 F.3d 179, 186 (2d Cir. 2010). Plaintiffs argue that a facial

challenge to § 898 is subject to a stringent standard because it “threatens to inhibit First and Second Amendment rights.” Dkt. No. 43 at 26.

“When a statute is capable of reaching expression sheltered by the First Amendment, the doctrine demands a greater degree of specificity than in other contexts.” *Farrell v. Burke*, 449 F.3d 470, 485 (2d Cir. 2006). But to the extent § 898 implicates First Amendment rights at all, the Supreme Court has noted, “economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of action.” *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 498 (1982). Here, similarly to the village ordinance at issue in *Hoffman Estates*, § 898 “simply regulates business behavior[.]” *Id.* at 499. Such regulations of commercial speech are not subject to a heightened vagueness test. *See id.* at 496-500; *ACA Connects - Am.’s Commc’ns Ass’n v. Frey*, 471 F. Supp. 3d 318, 330 (D. Me. 2020).

Plaintiffs also claim § 898 inhibits their Second Amendment rights. The Second Circuit has noted two possible standards that may apply in evaluating facial challenges outside of the First Amendment context, but has declined to resolve the ambiguity. *See Dickerson*, 604 F.3d at 743-44; *New York State Rifle & Pistol Ass’n, Inc.*, 804 F.3d at 265-66 (“We have previously declined to specify a preference for either test, and we need not do so here, because the challenged provisions are sufficiently clear to survive a facial challenge under either approach”); *United*

*States v. Rybicki*, 354 F.3d 124, 131 (2d Cir. 2003). The first possible standard is that “such challenges are permitted only when ‘no set of circumstances exists under which the [law] would be valid.’” *Id.* at 743 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). The *Salerno* standard “effectively eliminates facial challenges outside of the First Amendment context that could not also be brought as an as-applied challenge, since any law that is unconstitutional in every set of circumstances is also necessarily unconstitutional when applied to any plaintiff.” *Id.* at 743-44; *see also Rybicki*, 354 F.3d at 129-30 (discussing decisions that have “held that when ... the interpretation of a statute does not implicate First Amendment rights, it is assessed for vagueness only ‘as applied’”); *United States v. Nadi*, 996 F.2d 548, 550 (2d Cir. 1993) (“[V]agueness challenges that do not involve the First Amendment must be examined in light of the specific facts of the case at hand and not with regard to the statute’s facial validity”).

In *City of Chicago v. Morales*, 527 U.S. 41 (1999), however, a plurality of the Supreme Court expressed skepticism about the “no set of circumstances” standard enunciated in *Salerno* and upheld a facial vagueness challenge to an anti-loitering statute. *Morales*, 527 U.S. at 55 n.22. *Morales* upheld a facial vagueness challenge to an anti-loitering statute, which defined “loiter” as “to remain in any one place with no apparent purpose.” *Id.* at 47 n.2. The Court first found that the freedom to loiter is a liberty interest protected by the substantive Due Process Clause. *Id.* at 53-54. Next, the Court differentiated the anti-loitering ordinance from the *Salerno* line of cases, stating “[t]his is not an ordinance that ‘simply

regulates business behavior and contains a scienter requirement.” *Id.* at 55 (quoting *Hoffman Estates*, 455 U.S. at 499). Rather, the Court noted that the anti-loitering ordinance was a “criminal law that contains no *mens rea* requirement and infringes on constitutionally protected rights.” *Id.* (internal quotations omitted). The Court concluded that “[w]hen vagueness permeates the text of such a law, it is subject to facial attack.” *Id.*

Here, the Court finds that *Morales* is not applicable to § 898. Whereas *Morales* was concerned with a criminal statute with no *mens rea* requirement, § 898 imposes civil liability and requires the gun industry member to act “knowingly or recklessly.” N.Y. Gen. Bus. Law § 898-b(1).<sup>5</sup> Central to the holding in *Morales* was that the anti-loitering statute did not “simply regulate[] business behavior[,]” unlike § 898. *Morales*, 527 U.S. at 55. Additionally, the antiloitering statute had broad and indiscriminate impact on the constitutionally protected right to loiter, but § 898 has only attenuated effects on Second Amendment rights. The statute limits the unreasonable “sale, manufacturing, importing or marketing” of firearms but does not directly “regulate the right of the people to keep and bear Arms.” N.Y. Gen. Bus. Law § 898-b(1); U.S. Const. amend. II. In *Hoffman Estates*, for example, the Supreme Court noted that the “interest in displaying and marketing merchandise in the manner that the retailer desires” had only an “attenuated” impact on the freedom of speech. *Vill. of*

---

<sup>5</sup> The Court notes that § 898-b(2) does not have a scienter requirement. Nonetheless, the Court finds § 898-b(2) would satisfy any more stringent void for vagueness review.

*Hoffman Ests.*, 455 U.S. 489, 496. Similarly, the ability for gun industry members to sell, manufacture, import, and market firearms in the manner they desire, only has an attenuated impact on Second Amendment rights, if any. *See also Kuck v. Danaher*, 822 F. Supp. 2d 109, 133 (D. Conn. 2011) (Applying *Salerno*, in part because, “[w]hile the statute at issue implicates a constitutional right, the Court does not believe the consequence complained of, namely revocation of a permit to carry a weapon outside of the home, is as severe as the deprivation of liberty occasioned by an arrest and incarceration”); *Sibley v. Watches*, 460 F. Supp. 3d 302, 316-17 (W.D.N.Y. 2020). Accordingly, because *Morales* is not applicable to Plaintiffs’ claim, the Court must now determine whether there is “no set of circumstances under which” § 898 would be valid. *Salerno*, 481 U.S. at 745.

Section 898-b(1) states, “[n]o gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.” The Court finds that this gives “the person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Thibodeau*, 486 F.3d at 65. “Statutes need not . . . achieve meticulous specificity, which would come at the cost of flexibility and reasonable breadth. The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices.” *United States v. Holloway*, No. 20-578, 2022 WL 453370, \*3 (2d Cir.

Feb. 15, 2022) (quoting *Arriaga v. Mukasey*, 521 F.3d 219, 224 (2d Cir. 2008)).

Here, there are clear “common understanding and practices” of what type of conduct § 898-b(1) prohibits. The statute closely tracks the language of New York’s current general public nuisance law, N.Y. Penal Law § 240.45, which has been good law since 1965. Not only has N.Y. Penal Law § 240.45 never been held to be void-for-vagueness itself, but its over fifty years of existence elucidates and narrows the application of § 898-b(1). Given decades of applications of nearly identical language, it certainly cannot be said that there are “no set of circumstances under which” § 898 would be valid. *Salerno*, 481 U.S. at 745.

Even if the stricter *Morales* standard were to apply, the Court also does not believe the law is “permeated” with vagueness. *Morales*, 527 U.S. at 55. Reading the provision as a whole, a gun industry member is required to “knowingly or recklessly create, maintain or contribute to a condition,” through the “sale, manufacturing, importing or marketing,” that is “unlawful in itself or unreasonable under all the circumstances” that “endangers the safety or health of the public.” N.Y. Gen. Bus. Law § 898-b(1). Plaintiffs argue that the terms “unreasonable under all the circumstances” and “contribute to a condition” imbed the statute with vagueness. *See* Dkt. No. 2-1 at 29. The Court disagrees. Courts regularly provide meaning to the term unreasonable. *United States v. Hsu*, 40 F. Supp. 2d 623, 628 (E.D. Pa. 1999) (“[A] statute is not void for vagueness merely because it uses the word ‘reasonable’ or ‘unreasonable’” (citing U.S. Const. amend. IV)). And whether an action contributed to a

result is neither a vague nor esoteric inquiry. *See, e.g., Prunier v. City of Watertown*, 936 F.2d 677, 679 (2d Cir. 1991) (“Under New York law, Prunier must prove that the City’s negligence was a substantial contributing factor in producing McDermott’s injuries”).

Section 898-b(2) also satisfies the vagueness inquiry. That section requires that gun industry members “establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.” *Id.* The statute defines “reasonable control and procedures” to mean:

policies that include, but are not limited to: (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others; and (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter.

*Id.* § 898-a(2). Within this definition, “deceptive acts and practices” and “false advertising” are further defined in the New York Deceptive Trade Practice laws. *See id.* §§ 898-a(1), (3); N.Y. Gen. Bus. Law § 349 *et seq.* This list of required conduct is far from “so vague and indefinite as really to be no rule at all.” *Boutilier v. INS*, 387 U.S. 118, 123 (1967). For

example, in *Kuck*, the court denied a facial vagueness challenge to a Connecticut handgun permitting law. *See Kuck*, 822 F. Supp. 2d at 119-20. The Connecticut statute listed ten statutory exclusions to eligibility and additionally included the requirement that “the applicant is a ‘suitable person’ to receive such a permit.” *Id.* at 120. The court held that “suitable person” was not unconstitutionally vague because the “fundamental principle of statutory construction ‘ejusdem generis’ circumscribes the discretion of DPS and the Board and gives citizens adequate notice of who is and who is not eligible to receive a gun permit.” *Id.* at 132-33. Therefore, the court denied the facial challenge because “[t]here are innumerable factual circumstances in which invocation of the suitability standard to revoke a person’s pistol permit on the basis that he poses a danger to the public, even though he does not fall within one of the express statutory grounds for revocation, would be constitutionally valid.” *Id.* at 132.

Similarly, § 898-b(2) constitutionally applies to a wide range conduct, so it cannot be said that “no set of circumstances exists under which the [law] would be valid.” *Salerno*, 481 U.S. at 745. It expressly applies to certain business practices, “intelligibly forbids a definite course of conduct,” *United States v. Powell*, 423 U.S. 87, 93 (1975), and is therefore ill-suited for a facial challenge. And even if the *Morales* standard were to apply to § 898-b(2), the Court finds that this section is not “permeated” with vagueness. *Morales*, 527 U.S. at 55. The use of “include, but not limited to” in the statute does not imbed it with vagueness, as Plaintiffs suggest. *See, e.g., Slattery v. Cuomo*, 531 F. Supp. 3d 547, 571 (N.D.N.Y. 2021); *United States v.*

*Grande*, 353 F. Supp. 2d 623, 635 (E.D. Va. 2005) (“The Court rejects Defendant’s argument that the ‘as demonstrated by, but not limited to’ language renders the factor unconstitutionally vague”). Accordingly, Defendant’s motion to dismiss Plaintiffs’ void-for-vagueness claim is granted.

### **B. Preliminary Injunction**

For the reasons discussed above, Defendant’s motion to dismiss the complaint in its entirety is granted. Plaintiffs’ motion for a preliminary injunction is, therefore, denied as moot. *See, e.g., Am. Freedom Def. Initiative v. Metro. Transp. Auth.*, 815 F.3d 105, 111 (2d Cir. 2016) (affirming dissolution of a preliminary injunction where the claim underlying the injunction became moot); *McMillian v. Konecny*, No. 9:15 Civ. 0241, 2018 WL 813515, \*2 (N.D.N.Y. Feb. 9, 2018) (“[W]here no complaint remains pending, no motion for a temporary restraining order or preliminary injunction remains available”).

### **IV. CONCLUSION**

After careful review of the record, the parties’ submissions, and the applicable law, and for the above-stated reasons, the Court hereby

**ORDERS** Defendant’s motion to dismiss (Dkt. No. 35) is **GRANTED**; and the Court further

**ORDERS** that Plaintiffs’ motion for a preliminary injunction (Dkt. No. 2) is **DENIED**; and the Court further

**ORDERS** that the Clerk of the Court shall enter judgment in Defendant’s favor and close this case; and the Court further

App-79

**ORDERS** that the Clerk of the Court shall serve a copy of this Memorandum-Decision and Order on the parties in accordance with the Local Rules.

**IT IS SO ORDERED.**

Dated: May 25, 2022  
Albany, New York

[handwritten: signature]

Mae A. D'Agostino  
U.S. District Judge

*Appendix D*

**RELEVANT CONSTITUTIONAL AND  
STATUTORY PROVISIONS**

**U.S. Const. art. VI, cl. 2**

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**N.Y. Gen. Bus. Law §898-a**

For purposes of this article, the following terms shall have the following meanings:

1. “Deceptive acts or practices” shall have the same meaning as defined in article twenty-two-A of this chapter.
2. “Reasonable controls and procedures” shall mean policies that include, but are not limited to:
  - (a) instituting screening, security, inventory and other business practices to prevent thefts of qualified products as well as sales of qualified products to straw purchasers, traffickers, persons prohibited from possessing firearms under state or federal law, or persons at risk of injuring themselves or others;
  - (b) preventing deceptive acts and practices and false advertising and otherwise ensuring compliance with all provisions of article twenty-two-A of this chapter; and
  - (c) taking reasonable steps to prevent the installation and use of a pistol converter, as defined in section 265.00 of the penal law, on qualified products.

App-81

3. “False advertising” shall have the same meaning as defined in article twenty-two-A of this chapter.

4. “Gun industry member” shall mean a person, firm, corporation, company, partnership, society, joint stock company or any other entity or association engaged in the sale, manufacturing, distribution, importing or marketing of firearms, ammunition, ammunition magazines, and firearms accessories.

5. The terms “knowingly” and “recklessly” shall have the same meaning as defined in section 15.05 of the penal law.

6. “Qualified product” shall mean a firearm, as defined in subparagraph (A) or (B) of 18 U.S.C. section 921(a)(3), including any antique firearm, as defined in 18 U.S.C. section 921(a)(16), or ammunition, as defined in 18 U.S.C. section 921(a)(17)(A), or a component part of a firearm or ammunition.

**N.Y. Gen. Bus. Law §898-b.**

1. No gun industry member, by conduct either unlawful in itself or unreasonable under all the circumstances shall knowingly or recklessly create, maintain or contribute to a condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product.

2. All gun industry members who manufacture, market, import or offer for wholesale or retail sale any qualified product in New York state shall establish and utilize reasonable controls and procedures to prevent its qualified products from being possessed, used, marketed or sold unlawfully in New York state.

**N.Y. Gen. Bus. Law §898-c**

1. A violation of subdivision one or two of section eight hundred ninety-eight-b of this article that results in harm to the public shall hereby be declared to be a public nuisance.
2. The existence of a public nuisance shall not depend on whether the gun industry member acted for the purpose of causing harm to the public.

**N.Y. Gen. Bus. Law §898-d**

Whenever there shall be a violation of this article, the attorney general, in the name of the people of the state of New York, or a city corporation counsel on behalf of the locality, may bring an action in the supreme court or federal district court to enjoin and restrain such violations and to obtain restitution and damages.

**N.Y. Gen. Bus. Law §898-e**

Any person, firm, corporation or association that has been damaged as a result of a gun industry member's acts or omissions in violation of this article shall be entitled to bring an action for recovery of damages or to enforce this article in the supreme court or federal district court.