Exhibit A

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

NATIONAL SHOOTING SPORTS FOUNDATION, INC., et al., *Plaintiffs*, v. LETITIA JAMES, in her official capacity as New York Attorney General, *Defendant.*	Civil Action No. 1:21-CV-01348-MAD-CFH

[PROPOSED] BRIEF OF GUN VIOLENCE PREVENTION GROUPS AS AMICI CURIAE IN SUPPORT OF DEFENDANT'S (I) OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION AND (II) MOTION TO DISMISS

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CORPORATE DISCLOSURE STATEMENTS

Brady is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Everytown for Gun Safety (formally, Everytown for Gun Safety Action Fund) is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

The Rohan Levy Foundation is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

Giffords Law Center to Prevent Gun Violence is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

New Yorkers Against Gun Violence (formally, New Yorkers Against Gun Violence, Inc.) is a nonprofit organization. It has no parent corporations. It has no stock, and therefore no publicly held company owns 10% or more of its stock.

INTERESTS OF AMICI CURIAE

Amici are gun violence prevention groups and advocates that operate in New York and around the country. Amici New Yorkers Against Gun Violence and the Rohan Levy Foundation are advocacy and community-based organizations in New York that develop anti-violence initiatives, pursue policy solutions to gun violence, and provide support to survivors. Amici Maxine E. Lewis, founder of the Carlton Locksley Bennett Foundation, and Nadine Sylvester, founder of the Rohan Levy Foundation, are survivors of gun violence, who have become anti-violence leaders in their communities. Jointly, these New York-based amici witness firsthand the devastating effects of gun violence and have an intimate understanding of the connection between such violence and the flow of the gun industry's products into their communities.

Amici Everytown for Gun Safety, Brady, and the Giffords Law Center to Prevent Gun Violence are national gun violence prevention organizations that have extensive experience litigating cases under the Protection of Lawful Commerce in Arms Act ("PLCAA"). They also conduct research on the causes of gun violence, as well as the role of the gun industry in contributing to such violence. All amici jointly submit this brief in support of Defendant Letitia James' (i) motion to dismiss and (ii) opposition to Plaintiffs' motion for a preliminary injunction, in order to provide factual and historical context concerning the gun industry's direct role in contributing to gun violence in New York, as well as analyses of several legal issues that are informed by their work. For a further description of the amici, see the Appendix attached hereto.

INTRODUCTION

Gun violence is surging across the United States, and New York is no exception. In response to this crisis, New York State "exercised [its] police powers to protect the health and safety of [its] citizens" by enacting a law that requires members of the gun industry to take steps to prevent the diversion of their products into the illegal market in New York. *Medtronic, Inc. v.*

Lohr, 518 U.S. 470, 475 (1996). This law, New York General Business Law §§ 898-a–e ("§ 898"), responds to the concerns of law enforcement and communities most affected by gun violence, who witness firsthand the carnage caused by illegally acquired weapons.

Plaintiffs are federally licensed gun companies and the industry trade organization that represents them. They enjoy extraordinary protections from tort liability under PLCAA, which they now seek to turbocharge. Although PLCAA specifically allows for liability when state laws are violated, they argue that PLCAA preempts state legislatures from exercising their centuries-old power to declare public nuisances; that the dormant Commerce Clause prevents New York from imposing liability for harms directed at, and having effects in, the State; and that § 898, which utilizes the language regularly used in public nuisance and consumer protection statutes, is unduly vague. None of these arguments holds water.

Below, amici address three topics, each informed by their work: the scope of PLCAA's preemption language, the inapplicability of the dormant Commerce Clause in cases such as this, and Plaintiffs' balance of the equities arguments, in which they remarkably claim that New York State will suffer no irreparable harm if the statute is enjoined.

First, Plaintiffs' preemption arguments would require this Court to ignore the plain text of PLCAA's operative provision. PLCAA does not, and has never been found to, preempt the ability of New York or any other state to enact statutes directly regulating the firearms industry. Quite the opposite: PLCAA expressly contemplates that state legislatures may enact statutes "applicable to the sale or marketing" of firearms or ammunition – and that entities that violate such statutes may not claim PLCAA's protection. *See Estate of Kim v. Coxe*, 295 P.3d 380, 389 (Alaska 2013) ("Although expressly preempting conflicting state tort law, the PLCAA allows Alaska's legislature

to create liability for harms proximately caused by knowing violations of statutes regulating firearm sales and marketing.").

Second, Plaintiffs' dormant Commerce Clause arguments lack a factual basis and are unsupported by caselaw. Section 898 does not discriminate against interstate commerce because Plaintiffs have not alleged – much less shown – that there are companies making or selling purely intrastate New York guns that would benefit under the statute. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978) (holding that a claim of disparate treatment under the dormant Commerce Clause is "meritless" when there is no intrastate commerce to be advantaged). And even if there were such guns, companies selling them would face greater liability exposure than Plaintiffs under existing New York tort law, because PLCAA only protects entities engaged in interstate commerce. Plaintiffs have also failed to demonstrate that any burden placed on them outweighs the benefits to New York, or how the extraterritoriality doctrine – which has been characterized as the "most dormant" of all dormant Commerce Clause doctrines – applies to this public safety statute. *See Vizio, Inc. v. Klee*, 886 F.3d 249, 255 (2d Cir. 2018).

Finally, Plaintiffs anchor their preliminary injunction request in a specious balancing of the equities. Plaintiffs both inflate the burdens placed on the gun industry by § 898 and entirely omit mention of the catastrophic gun violence that § 898 is designed to abate.

Through this lawsuit, Plaintiffs seek to expand their already unprecedented protection from common law claims, while imposing an unwarranted restriction on New York's legislative power to protect its citizens from avoidable harm. This is part and parcel of the industry's broader effort to disclaim any accountability for the grievous harm inflicted with its products. Even as they reap record profits supplying instruments of gun violence, Plaintiffs protest that they have no part to play in mitigating such violence. This abdication of responsibility harms New Yorkers every day.

BACKGROUND

I. New York State and the New York Public Face a Gun Violence Epidemic

New York State is burdened by a gun violence epidemic. In an average year, 870 New Yorkers die from gun violence and an additional 2,607 New Yorkers suffer nonfatal gun injuries.[1] And an analysis of data from the Centers for Disease Control and the Healthcare Cost and Utilization Project shows that "[g]un violence costs New York $5.9 billion each year, of which $321.0 million is paid by taxpayers."[2] Of course, the economic cost of gun violence pales in comparison to the physical and emotional costs borne by victims and their communities.

The problem is only getting worse. Recent data on 20 New York cities show a 54 percent increase in the number of individuals killed by guns in 2021 as compared to the preceding five-year average.[3] Gun violence in cities such as Buffalo and Rochester has increased dramatically, and Rochester's spike is particularly alarming – the number of individuals killed with guns in 2021 increased 120 percent over the preceding five-year average.[4] Both cities are struggling under the strain, with young and Black residents bearing the brunt of the harm.[5] Similarly, in New York City, gun homicides increased from 172 in 2019 to 307 in 2020.[6] What this means is that New York

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[1] Everytown Research & Policy, *Everystat: New York*, https://perma.cc/MBJ8-Q7B4.
[2] *Id.*
[3] New York State Division of Criminal Justice Services, *Gun Involved Violence Elimination (GIVE) Initiative: Shooting Incidents, Shooting Victims, and Individuals Killed by Gun Violence* (Jan. 13, 2022), https://perma.cc/AF5W-4GZG.
[4] *Id*.
[5] *See, e.g.*, Olivia Proia, *The impact of gun violence on children and teens in Buffalo*, WKBW (Oct. 1, 2021), https://www.wkbw.com/news/i-team/the-impact-of-gun-violence-on-children-and-teens-in-buffalo; Aaron Besecker, *Surge in gun violence disproportionately hits Buffalo's Black residents*, The Buffalo News (Oct. 2, 2020), https://buffalonews.com/news/local/crime-and-courts/surge-in-gun-violence-disproportionately-hits-buffalos-black-residents/article_09749c24-025a-11eb-88aa-77c1c696d52d.html; Matt Driffill et al., *'It has to stop': Rochester reaches record for homicides as community grasps for solutions*, RochesterFirst.com (Nov. 12, 2021), https://perma.cc/6PUQ-VHYU.
[6] Everytown Research & Policy, *City Dashboard: Murder and Gun Homicide* (Dec. 16, 2021), https://everytownresearch.org/report/city-data/.

State is forced to devote more resources to combatting gun violence, and local violence intervention groups are called out in the middle of the night to more shootings, to comfort more families victimized by gun violence, to hold more prayer vigils, and to attend more funerals.

This recent surge in gun violence coincides with a concurrent surge in gun sales.[7] Recent data indicates that, during the same period that gun sales and overall gun violence rose across the country, law enforcement recovery of guns with indicators of having been trafficked also increased by record numbers.[8] Put simply, while the gun industry celebrated a year of record sales, their products were being diverted into the criminal market, contributing to a record number of deaths and leaving the burden of this violence to be borne by New York State and its public.[9]

II. Gun Industry Practices Contribute to This Gun Violence

This recent surge in gun violence is particularly egregious because the industry has been on notice for decades that its "head-in-the-sand" supply chain practices contribute to such violence. *See NAACP v. AcuSport, Inc.,* 271 F. Supp. 2d 435, 449-52 (E.D.N.Y. 2003) ("The power of the gun industry to reduce deaths from their products is estimated to run into the thousands in any decade."). However, many members of the industry have refused to accept their role in preventing diversion of their products and resulting violence. *See e.g.,* American Outdoor Brands Corporation, *Shareholder Requested Report on Product Safety Measures and Monitoring of Industry Trends* at 15 (Feb. 8, 2019) (report by Smith & Wesson's former parent company asserting that "the

[7] Champe Barton, *New Data Suggests a Connection Between Pandemic Gun Sales and Increased Violence*, The Trace (Dec. 8, 2021), https://perma.cc/TGR8-X8KJ.
[8] *Id.*; *see also* ATF, *Firearms Trace Data: New York – 2020*, https://perma.cc/8BEX-VUJH; ATF, *New York: 2019* at 8, https://perma.cc/66E6-WG29. When guns are recovered less than three years after purchase, that temporal proximity is considered an important indictor of trafficking. *City of New York v. A-1 Jewelry & Pawn, Inc.*, 247 F.R.D. 296, 313 (E.D.N.Y.2007).
[9] *See, e.g.*, NSSF, *Firearm & Ammunition Sales*, https://perma.cc/6LB3-87WT.

manufacturer of a firearm is not responsible in any way for its illegal misuse").[10]

Despite the industry's resistance to adopting safer business practices, it is well-established that the diversion of its products into the illegal market facilitates gun violence in New York. At the retail level, research shows that some unscrupulous or careless dealers engage in practices that facilitate diversion, such as (a) selling products off-the-books; and (b) failing to implement training and policies to prevent straw sales (i.e., illegal sales to buyers acting on behalf of other individuals).[11] Additionally, courts have found that upstream manufacturers and distributors could institute practices and safeguards to reduce diversion, including (a) monitoring their own sales practices and those of retailers they supply for risky patterns, such as close-in-time repeat sales to the same buyer or sales of multiple guns to one buyer; (b) refusing to do business with dealers who frequently sell guns used in crimes; (c) requiring that downstream retailers conduct anti-straw sale trainings; and (d) requiring downstream retailers to maintain an electronic inventory of firearms and ammunition products. *See, e.g., NAACP,* 271 F. Supp. 2d at 449-52.[12] There is also reason to

[10] Available at https://perma.cc/H2ZR-R8FY; *see also* Sturm, Ruger & Company, Inc., *Shareholder Report* at 2 (Feb. 8. 2019) (report by Plaintiff Sturm, Ruger stating: "The criminal misuse of firearms is a complex societal issue, resistant to solution through more laws or new technologies. We respectfully disagree with those who seek to blame firearms themselves – and by extension firearms manufacturers – for the violent actions of criminals."); Avi Selk, *A gunmaker once tried to reform itself. The NRA nearly destroyed it*, The Washington Post (Feb. 27, 2018), https://perma.cc/66SV-VF6V (discussing 2000 settlement agreement between Smith & Wesson and government entities that imposed reforms but was never enforced).

[11] *See* Office of the New York Attorney General, *Target on Trafficking: New York Crime Gun Analysis* at 2, 7-8 (2016), https://perma.cc/MR6D-JFUM; Gregor Aisch & Josh Keller, *How Gun Traffickers Get Around State Gun Laws*, The New York Times (Nov. 13, 2015), https://www.nytimes.com/interactive/2015/11/12/us/gun-traffickers-smuggling-state-gun-laws.html; Anthony A. Braga et al., *Interpreting the Empirical Evidence on Illegal Gun Market Dynamics*, 89 J. of Urban Health 779, 780, 782, 784 (2012), https://perma.cc/FUQ5-P5B2 ; *see also* Daniel W. Webster et al., *Effects of a Gun Dealer's Change in Sales Practices on the Supply of Guns to Criminals*, 83 J. Urban Health 778 (2006), https://perma.cc/VD7F-XCM5

[12] *See also Smith & Wesson Settlement Agreement* at Part II, available at

believe that reckless marketing by major manufacturers contributes to gun violence, including mass shootings. *See e.g., Soto v. Bushmaster Firearms Int'l LLC*, 202 A.3d 262, 272-73, 277-78 (Conn. 2019) (reversing dismissal of claims of survivors of Sandy Hook shooting who alleged that defendants knowingly marketed the rifle used by the shooter as a weapon for carrying out violent, militaristic missions and that such marketing influenced the shooter's choice of weapon).

At the same time, gun companies are exempted from much legal oversight.[13] Firearms are carved out from the federal Consumer Products Safety Commission's jurisdiction and PLCAA protects gun companies from most tort claims. Perhaps as a result, Smith & Wesson stated in a recent shareholder report that it has "not seen any meaningful increase in the Company's operating, capital, or regulatory costs as a result of firearms-related violence."[14]

III. Recognizing This Problem, the New York Legislature Utilized Its Well-Established Legislative Power to Declare Public Nuisances

The New York Legislature stepped into the regulatory gap to provide better oversight of industry practices that contribute to gun violence in New York. *See* 2021 N.Y. SB 7196 § 1, 2021 N.Y. Laws ch. 237. Section 898 outlines two categories of "prohibited activities" and provides that a public nuisance exists when a gun industry member violates either prohibition and such violation results in harm in New York. §§ 898-b, 898-c. The two categories are 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

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https://perma.cc/9K6V-UWKQ; Chelsea Parsons et al., *The Gun Industry in America: The Overlooked Player in the National Crisis*, Center for Am. Progress at 2 (Aug. 2020), https://perma.cc/U4V8-DZLL.

[13] *See* Everytown Research & Policy, *Lack of Gun Industry Accountability*, https://perma.cc/2GWW-VE92; Parsons et al., *supra* note 12, at 14-20, 32-36; 15 U.S.C. § 2052(a)(5)(E) (exempting firearms and ammunition from oversight by the federal Consumer Products Safety Commission).

[14] American Outdoor Brands Corporation, *Shareholder Requested Report on Product Safety Measures and Monitoring of Industry Trends* at 15, https://perma.cc/H2ZR-R8FY.

> 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.

Id. § 898-b.

The first category closely tracks the language of New York's longstanding criminal public nuisance provision, which imposes criminal liability on any person who, "[b]y conduct either unlawful in itself or unreasonable under all the circumstances, [] knowingly or recklessly creates or maintains a condition which endangers the safety or health of a considerable number of persons." New York Penal Law § 240.45; *see Copart Indus., Inc. v. Consolidated Edison Co.*, 41 N.Y.2d 564, 568 (N.Y. 1977) (referencing § 240.45 in defining common law public nuisance); *New York v. Schriber*, 34 A.D.2d 852, 853 (N.Y. App. Div. 3d Dep't 1970) (affirming conviction under § 240.45); *City of New York v Land & Bldg. Known as 4203 Hylan Blvd*., No. 151891/2017, 2018 N.Y. Misc. LEXIS 615 (Sup. Ct. Richmond Co. Jan. 2, 2018) (enjoining defendants from violating § 240.45 by selling untaxed cigarettes). With regard to the second category, § 898 further provides examples of "reasonable controls and procedures," relating to screening, security, inventory control, and preventing deceptive acts and practices. *Id*. § 898-a. The statute provides causes of action to the New York State Attorney General, the corporation counsels of New York municipalities, and private plaintiffs harmed by conduct that violates the statute. *Id*. §§ 898-d–e.

Section 898 is part of New York's long history of legislative declarations of public nuisances to redress public harm. *See City of New York v. Smokes-Spirits.com, Inc.*, 12 N.Y.3d 616, 627 (N.Y. 2009) (stating that "the Legislature's authority to enact laws deeming certain activities public nuisances" is "clear"); *see also* Restatement (Second) of Torts § 821B cmt. C (Am. L. Inst. 1975) ("[A]ll of the states have numerous special statutes declaring certain conduct

or conditions to be public nuisances because they interfere with the rights of the general public"). In addition to the generally applicable nuisance law codified at Penal Law § 240.45, declarations of public nuisances likewise appear in connection with the possession, manufacture, transport, and disposition of certain weapons (N.Y. Penal Law § 400.05); unsafe and unsanitary buildings (N.Y. Mult. Dwell. L. § 309(1)(a) (declaring, *inter alia*, that "[w]hatever is dangerous to human life or detrimental to health" is an unlawful nuisance)); discharge of industrial wastes (N.Y. Pub. Health L. § 1300-b); growth of noxious plants (N.Y. Pub. Health L. § 1320); and in many other contexts.

ARGUMENT

Amici address two discrete questions regarding Plaintiffs' likelihood of success in this litigation, namely, whether PLCAA preempts § 898 and whether § 898 violates the dormant Commerce Clause. Amici then address the balance of the equities.

I. PLCAA Does Not Preempt Section 898

A. Statutory Background

Enacted in 2005, PLCAA requires dismissal of any "qualified civil liability action." 15 U.S.C. § 7902. This prohibition protects gun industry members from many tort claims arising from gun violence. *See id*. § 7903(5)(A) (defining a "qualified civil liability action."); s*ee also Williams v. Beemiller*, 100 A.D.3d 143, 147 (N.Y. App. Div. 4th Dep't 2012) (describing PLCAA), *amended* 103 A.D.3d 1191 (N.Y. App. Div. 4th Dep't 2013). It does so, in many cases, even where the conduct of a company that supplied the firearm also contributed to the harm. *See, e.g.*, *Estate of Kim*, 295 P.3d at 386 (stating that PLCAA bars general negligence actions, "including negligence with concurrent causation").[15] However, PLCAA does not protect gun companies from

[15] *See also Ileto v. Glock*, 565 F.3d 1126 (9th Cir. 2009) (dismissing negligence and public nuisance claims arising from defendants' allegedly knowing facilitation of firearms diversion); *Estate of Kim*, 295 P.3d at 393-95 (holding that, where a shooter steals a gun, PLCAA preempts consideration of whether gun dealer's negligence enabled the theft and subsequent violence);

every civil claim. Congress carved out six exceptions to the definition of "qualified civil liability action." 15 U.S.C. § 7903(5)(A). The so-called "predicate exception," at issue here, provides that PLCAA does not bar "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[.]" *Id*. § 7903(5)(A)(iii). To satisfy the exception "a plaintiff not only must present a cognizable claim, [but] he or she also must allege a knowing violation of a 'predicate statute[.]'" *Williams*, 100 A.D.3d at 148.

In *City of New York v. Beretta*, the Second Circuit considered New York City's allegations that manufacturers and distributors facilitated diversion of their firearms into the criminal market. 524 F.3d 384, 389 (2d Cir. 2008). Prior to PLCAA's passage, the district court had found the city's allegations sufficient to state a *common law* public nuisance claim. *See City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004). The court focused on the specificity with which the city alleged that the defendants failed to take certain steps to reduce diversion, including (a) monitoring corrupt dealers; (b) limiting multiple sales to the same buyer; and (c) limiting sales to dealers in states with lax guns laws. *Id*. at 284. Following PLCAA's enactment, the city asserted that its common law claim survived PLCAA via the predicate exception because the underlying conduct also amounted to a violation of New York's generally applicable criminal public nuisance statute. However, the Second Circuit disagreed, concluding that the criminal statute did not qualify as a predicate statute. *Beretta*, 524 F.3d at 390. In reaching this conclusion, the Second Circuit determined that a predicate statute under PLCAA must fall into one of these categories:

(1) Statutes "that expressly regulate firearms;"

(2) Statutes "that courts have applied to the sale and marketing of firearms;" or

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Adames v. Sheahan, 233 Ill. 2d 276, 306-18 (Ill. 2009) (finding that PLCAA barred product liability claims arising from accidental shooting by thirteen-year-old child).

(3) Statutes "that do not expressly regulate firearms but that clearly can be said to implicate the purchase and sale of firearms."

Beretta, 524 F.3d at 404. The Second Circuit ultimately concluded that New York Penal Law § 240.45, which does not expressly regulate firearms and had not been previously applied to the sale and marketing of firearms, did not fit within any of these categories. *Id*.

Since the *Beretta* decision, courts around the country have identified a wide range of other predicate statutes. *See e.g., Williams*, 100 A.D.3d at 148-51 (plaintiffs sufficiently alleged defendants' knowing violation of several predicate statutes, including the federal Gun Control Act); *Soto*, 202 A.3d at 274 n.9, 300-25 (adopting the reasoning of *Beretta* and holding that the Connecticut Unfair Trade Practices Act – which provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" – constitutes a predicate statute for purposes of PLCAA); *Goldstein v. Earnest*, Case No. 37-2020-00016638, *slip op.* at *3-5 (Cal. Super. Ct. San Diego Co. Jul. 2, 2021) (finding that California's Unfair Competition Law (Cal. Bus. & Prof. Code § 17200) – which prohibits any "unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising" – constitutes a PLCAA predicate statute).[16]

B. PLCAA Expressly Provides For Its Coexistence With Section 898

When a federal statute includes an express preemption clause, courts considering the scope of preemption "focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' preemptive intent." *Chamber of Commerce v. Whiting*, 563 U.S. 582, 594 (2011). Nothing in PLCAA's text preempts states' ability to statutorily regulate the marketing and sale of guns. *See Estate of Kim*, 295 P.3d at 389. And the Supreme Court has cautioned that "because the States are independent sovereigns in our federal system, we have long presumed that

[16] Slip opinion available at https://perma.cc/4Z9Z-PMKU.

Congress does not cavalierly pre-empt state-law causes of action," and therefore Congress must use "clear and manifest" language to preempt state lawmaking. *Lohr*, 518 U.S. at 485; *see also Wurtz v. Rawlings Co., LLC*, 761 F.3d 232 (2d Cir. 2014) (quoting *Lohr* and finding that the federal ERISA statute did not preempt plaintiffs' New York State statutory anti-subrogation claims).

Rather than preempting state statutes, PLCAA's operative preemption provision expressly permits civil liability claims arising from a manufacturer or seller's sale of a qualified product where the company "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[.]" 15 U.S.C. § 7903(5)(A)(iii) (emphasis added). The only limitation on a predicate statute is that it must be "applicable to the sale or marketing" of firearms – which § 898 indisputably is. Plaintiffs would have this Court rewrite to PLCAA, either by limiting the predicate exception to state laws that existed at the time of PLCAA's passage or by carving out gun-related public nuisance statutes from the exception. This is impermissible, as PLCAA says neither such thing.

Plaintiffs nevertheless contend that PLCAA preempts § 898 because (1) PLCAA's preamble speaks to Congress' intent to bar civil liability actions against the gun industry; (2) the Second Circuit's *Beretta* decision necessitates a finding of preemption here; and (3) New York courts "have repeatedly held" that the "general tort law … does not permit lawsuits against manufacturers of firearms and ammunition products based on a 'dangerous condition' created by the nuisance." PI Mot. at 11-13. Plaintiffs are incorrect on all three counts.

First, to the extent that Plaintiffs contend that PLCAA's preamble contradicts the text of its operative preemption provision, it is well-established that a preamble cannot override a statute's clear operative language. *See e.g., Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 173 (2016) ("[P]refatory clauses or preambles cannot change the scope of [a statute's] operative

clause[.]" (citation omitted)). In any case, the preamble confirms that PLCAA's sponsors were concerned with what they perceived to be meritless *common law* claims because they considered firearm regulation to be the purview of state and federal legislatures. *See e.g.*, 15 U.S.C. § 7901(a)(7) (finding that the actions against gun industry members "do not represent a bona fide expansion of the common law" and noting that such actions had never been contemplated "by the legislatures of the several States."); *id*. § 7901(a)(8) (finding that existing lawsuits "attempt to use the judicial branch to circumvent the Legislative branch of government").

Comments made by PLCAA's sponsors also make clear that PLCAA was not intended to cut off the ability of state legislatures to pass gun laws:

- Sen. Coburn: "These lawsuits are part of an anti-gun activist effort to make an end run around the legislative system … . When you can't pass it in the legislature, you get an activist judge to get done what you wanted to do in the first place[.]" 151 Cong. Rec. S 9059 (daily ed. July 27, 2015) (statement of Sen. Coburn).

- Sen. Hatch: "These abusive gun liability actions usurp the authority of the Congress and of State legislators." *Id.* (statement of Sen. Hatch).

- Sen. Craig: "Advocates of gun control are trying to usurp State power by circumventing the legislative process through judgments and judicial decrees. Allowing activist judges to legislate from the bench will destroy state sovereignty. This bill will protect it." *Id.* (statement of Sen. Craig).

Far from being preempted by PLCAA, § 898 embodies exactly the sort of regulatory power that PLCAA's sponsors thought should be left to state legislatures.

Second, Plaintiffs invert the *Beretta* ruling: rather than requiring a finding that PLCAA preempts § 898, the Second Circuit decision mandates a ruling in favor of New York. *Beretta* does not, as Plaintiffs suggest (PI Mot. at 11-12), stand for the proposition that § 898 will cause the predicate exception to swallow PLCAA's preemption rule. With regard to the public nuisance claim before it, the Second Circuit held only that a claim specifically predicated on violation of New York's general criminal nuisance statute (Penal Law § 240.45) could not satisfy the predicate

exception. *Beretta*, 524 F.3d at 404. Nor did the Second Circuit hold, as Plaintiffs suggest, that the illustrative examples included in PLCAA's predicate exception narrowly restrict the scope of the exception. *See* PI Mot. at 12. Rather, the court explained that the examples help illuminate the predicate exception's scope, but do not represent its outer bounds. *Beretta*, 524 F.3d at 401-02.[17] Here, § 898 – which *does* expressly regulate firearms – plainly falls within the scope of the predicate exception. Moreover, § 898 does not disturb the limitations built into the exception itself: plaintiffs asserting claims pursuant to § 898 against a PLCAA-protected defendant must establish both the elements of the statutory claim and that the underlying conduct amounted to a knowing violation of § 898 that proximately caused their injuries. *See* 15 U.S.C. § 7903(5)(A)(iii).

Finally, Plaintiffs' reliance on *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222 (N.Y. 2001) and *People ex rel. Spitzer v. Sturm, Ruger & Co., Inc.*, 309 A.D. 2d 91 (N.Y. App. Div. 1st Dep't 2003) is misplaced. *See* PI Mot. at 12. Both decisions predate PLCAA's passage and concern common law claims; they have no bearing on the scope of PLCAA's preemption or on the statutory claim created by § 898. *See Hamilton,* 96 N.Y.2d at 233-34 (explaining the "judicial resistance" to the expansion of common law duties); *Spitzer,* 309 A.D.2d at 94. Nor does either decision foreclose all tort liability against gun companies for harm arising from a third party's misuse of their products. In *Hamilton*, the New York Court of Appeals held that the facts before it did not support a negligence finding because the defendants' conduct was too remote from the harm. 96 N.Y.2d at 232-34. But the court posited other facts under which imposing a duty *would* be

[17] The Connecticut Supreme Court, for its part, considered the relative temporal proximity between the 2002 D.C. sniper shootings and PLCAA's 2005 enactment, and concluded: "The most reasonable interpretation of this legislative history, then, is that the record keeping and unlawful buyer illustrations were included in the final version of PLCAA not in an effort to define, clarify, or narrow the universe of laws that qualify as predicate statutes but, rather, simply to stave off the politically potent attack that PLCAA would have barred lawsuits like the one that had arisen from the widely reported Beltway sniper attacks." *Soto*, 202 A.3d at 316.

warranted – namely, where a manufacturer "knows or has reason to know those distributors are engaging in substantial sales of guns into the gun-trafficking market on a consistent basis." *Id.* at 237. This is precisely the type of claim that § 898 was passed to allow. Similarly, in *Spitzer*, the First Department ordered dismissal of a public nuisance claim against manufacturers and wholesalers because their alleged conduct was too attenuated from the harm. 309 A.D. 2d at 95.

Since *Hamilton* and *Spitzer* were decided, numerous New York courts have permitted nuisance and negligence claims against gun industry members to go forward where the plaintiff alleged both a predicate statute violation and a connection between the defendant's actions and the plaintiff's harms. *See Williams*, 103 A.D.3d at 1191-92 (permitting negligence and public nuisance claims against manufacturer, distributor and dealer to go forward because, "unlike in *Hamilton*, plaintiffs have sufficiently alleged that defendants were a direct link in the causal chain that resulted in plaintiffs' injuries"); *Chiapperini v. Gander Mountain Co., Inc.*, 48 Misc. 3d 865, 878-79, 879 n.12 (N.Y. Sup. Ct. Monroe Co. Dec. 23, 2014) (distinguishing *Hamilton* and *Spitzer*); *see also King v. Klocek*, 187 A.D.3d 1614 (N.Y. App. Div. 4th Dep't 2020) (permitting negligence claim to go forward against ammunition seller where the plaintiff alleged that the particular defendant had sold the ammunition at issue).

In short, Plaintiffs' preemption arguments cannot overcome PLCAA's clear textual consistency with § 898 and cannot justify an injunction here.

II. Section 898 Does Not Violate the Dormant Commerce Clause

Plaintiffs fail to establish that § 898 (1) "clearly discriminates against interstate commerce in favor of intrastate commerce"; (2) "imposes a burden on interstate commerce incommensurate with the local benefits secured" pursuant to the balancing test of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970); 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), *cert. denied*, 142 S. Ct. 755 (2022). Plaintiffs thus fail to establish that § 898 violates the dormant Commerce Clause. Instead, they offer a myopic reading of § 898, without explaining what effect the statute has had on their business practices in the seven months since its enactment.

A. Section 898 Does Not Advantage Intrastate Commerce

Section 898 does not discriminate against interstate commerce because there is no intrastate commerce to advantage, and because any hypothetical intrastate commerce would not be protected by PLCAA, thus putting it in a *disadvantaged* position with respect to guns covered by § 898.

As a threshold matter, it is impossible to discriminate between intrastate and interstate commerce if there is no intrastate commerce. *See Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 125 (1978); *District of Columbia v. Beretta, U.S.A., Corp*., 872 A.2d 633, 656 (D.C. 2005). Here, there is no dispute that § 898 applies both to in-state and out-of-state actors. *See* § 898-a(4) (defining a covered "[g]un industry member" without any reference to location). Thus, the only "facial discrimination" argument that Plaintiffs make is that § 898 incorporates PLCAA's definition of a covered "qualified product," which itself includes an interstate nexus. *See* § 898-a(6); 15 U.S.C. § 7903(4), (5)(A) (limiting the reach of PLCAA to firearms, ammunition, and component parts that have "been shipped or transported in interstate or foreign commerce"). But, as Plaintiffs acknowledge, a purely made-and-sold-in-New York gun is one that does not have a *single* out-of-state component. *See* Compl. ¶ 63. And Plaintiffs do not identify *any* businesses that operate in such a manner in New York and that would thereby be advantaged by Plaintiffs' reading of the law. Moreover, amici – experts in the field who are intimately familiar with the causes and sources of New York's gun violence – are aware of no such wholly intrastate, legal New York firearms. This comports with the unquestionably "interstate character" of the gun industry. *Beretta*,

524 F.3d at 394.

Even assuming, arguendo, there exists a New York business that makes or sells purely intrastate firearms, such guns would not be "qualified products" under PLCAA (because they would lack the required interstate nexus), and would accordingly not enjoy PLCAA's protection. *See* 15 U.S.C. § 7903(4), (5)(A). The misuse of such a gun, therefore, would subject its seller or producer to common law claims without the heightened knowledge standard of PLCAA's predicate exception. *See supra* p. 15 (listing New York cases that recognize viability of negligence and public nuisance claims, where plaintiffs identified causal links between the defendants' actions and the plaintiffs' harms). Thus, § 898, at most, simply lessens the disparity PLCAA created between out-of-state and (hypothetical) purely in-state guns.

Courts have "long refused to construe words 'in a vacuum,'" *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion) (citation omitted), or to give effect to "hypertechnical reading[s] … examined in isolation." *Davis v. Mich. Dep't of the Treasury*, 489 U.S. 803, 809 (1989). Thus, § 898 must be viewed in concert with the "preexisting obligations" that already applied to any New York gun industry member, *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129, 1143 (10th Cir. 2016), *i.e.*, the potential for ordinary tort liability for New York guns, which are not protected by PLCAA. As the Supreme Court has said, a state has "the right to invoke other statutes to support the validity of the Act assailed" when "answer[ing] the contention as to discrimination against interstate commerce." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 479-80 (1932) ("There is no demand in the Constitution that the State shall put its requirements in any one statute. It may distribute them as it sees fit, if the result, taken in its totality, is within the State's constitutional power."). Accordingly, even if there are New York businesses that engage in purely intrastate firearms commerce, when properly read together with all of New York and federal law, § 898 does

not enact "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Or. Waste Sys., Inc. v. Dep't of Env't Quality*, 511 U.S. 93, 99 (1994); *see also Fulton Corp. v. Faulkner,* 516 U.S. 325, 331 (1996) ("[A] facially discriminatory tax may still survive Commerce Clause scrutiny if it is … 'designed simply to make interstate commerce bear a burden already borne by intrastate commerce'" (citation omitted)).

B. Plaintiffs Fail to Show That Any Incidental Burdens on Interstate Commerce Outweigh the Local Benefits of Section 898

Plaintiffs also fail to establish that, under the *Pike* balancing test, "the statute 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) (citation omitted); *see also Pike*, 397 U.S. at 142. Although § 898 has been in effect for months, no Plaintiff avers any change in business practice that amounts to a burden on interstate commerce, let alone a burden that outweighs the clear benefits of this statute to New Yorkers. Plaintiffs simply lament that § 898 exposes them to litigation risk, and they cannot imagine a single step they could take "to insulate themselves from liability absent a complete cessation of lawful operations." PI Mot. at 18. This is not a dormant Commerce Clause concern. *See*, *e.g., Vizio, Inc. v. Klee*, 886 F.3d 249, 256 n.2 (2d Cir. 2018) (rejecting plaintiffs' argument that law that allegedly imposed "'overlapping, inconsistent, and confusing obligations,'" which could "lead to 'additional cost[s],'" was a violation of the dormant Commerce Clause). Put simply, "the Commerce Clause is indifferent to whether any single commercial actor becomes more or less profitable as a result of proper state regulatory activity." *See Nat'l Elec. Mfrs. Ass'n v. Sorrell*, 272 F.3d 104, 111 (2d Cir. 2001).

Every business faces litigation risk from a variety of statutes with flexible standards that protect consumers and the health and safety of the public. *See, e.g.*, *City of Boston v. Smith & Wesson Corp.*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *55-58 (July 13, 2000)

(rejecting gun industry defendants' dormant Commerce Clause arguments and explaining that "[n]o one doubts that a State may protect its citizens by prohibiting deceptive trade practices …. But the States need not, and in fact do not, provide such protection in a uniform manner …. The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States." (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-70 (1996))). Thus, Plaintiffs have failed to show *any* burden that offends the dormant Commerce Clause, let alone a clearly excessive one.

C. Section 898 Does Not Directly or Inevitably Regulate Commerce Occurring Entirely Outside of New York

Next, Plaintiffs argue that holding the industry accountable for contributing to gun violence is an impermissible extraterritorial control of commerce. They have made this argument before, and it has been rejected by each court that has considered it. *See e.g.*, *District of Columbia*, 872 A.2d at 656-58 (holding that a statute that held makers and sellers of assault weapons strictly liable for resulting damage in the District of Columbia did not violate the extraterritoriality doctrine of the dormant Commerce Clause); *City of Boston*, No. 1999-02590, 2000 Mass. Super. LEXIS 352, at *56-58 (rejecting dormant Commerce Clause defense in nuisance lawsuit and noting that the Supreme Court has spoken approvingly about consumer protection statutes whose "result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States" (citation omitted)); *City of Cincinnati v. Beretta U.S.A. Corp.*, 768 N.E.2d 1136, 1150 (Ohio 2002).

Plaintiffs' present reliance on the extraterritoriality doctrine to challenge § 898 is equally unavailing. A state law violates the extraterritoriality principle of the dormant Commerce Clause only when it "directly controls commerce occurring wholly outside" the state's borders. *New York Pet Welfare Assn. v. City of New York*, 850 F.3d 79 (2d Cir. 2017) (internal citations omitted). The Second Circuit has cautioned that this doctrine should be narrowly applied, because the "extraterritoriality principle [is] 'the most dormant doctrine in dormant commerce clause

jurisprudence.'" *Vizio*, 886 F.3d at 255 (citation omitted). After all, "it is inevitable that a state's law, whether statutory or common law, will have extraterritorial effects." *Instructional Sys. v. Comput. Curriculum Corp.*, 35 F.3d 813, 825 (3d Cir. 1994).

The Supreme Court has struck down only three laws under the extraterritoriality doctrine, none of which resemble § 898. *See Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 519 (1935) (striking down New York law that regulated prices for milk purchased in other states); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 338 (1989) (striking down Connecticut price-affirmation law that governed price of beer sold in Massachusetts); *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 575-76, 582-83 (1986) (invalidating New York law that effectively required New York regulatory approval for prices charged by out-of-state distillers). While the broad language in *Baldwin*, *Brown-Forman*, and *Healy* can be read "as standing for a (far) grander proposition," the Supreme Court has indicated that "the *Baldwin* 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)); *accord Nat'l Pork Producers Council v. Ross*, 6 F.4th 1021, 1027-29 (9th Cir. 2021) (same), *petition for cert. filed*, No. 21-468 (Sep. 27, 2021). Plaintiffs' reliance on *Healy*, *see* PI Mot. at 15, is thus misplaced.

Section 898, which does not regulate prices and was not motivated by economic protectionism, is thus poorly suited for a dormant Commerce Clause challenge under the extraterritoriality doctrine. It more closely resembles the myriad public safety and consumer protection statutes that have been upheld against dormant Commerce Clause challenges. For example, in *District of Columbia v. Beretta*, the District of Columbia Court of Appeals held that a D.C. statute that imposed strict liability on makers and sellers of assault weapons and machine

guns did not violate the extraterritoriality doctrine. 872 A.2d at 656-58. As the court explained:

> [The Strict Liability Act] does not regulate [commerce] in any direct sense, but instead imposes liability in tort for harm caused by an abnormally dangerous subset of firearms; and it limits that right of action to injuries incurred in the District of Columbia. It may have *effects* outside of the District if manufacturers alter their business practices to avoid that liability, but "legislation … may affect commerce and persons engaged in it without constituting a regulation of it, within the meaning of the Constitution."

Id. at 656 (citation omitted); s*ee also Grand River*, 988 F.3d at 119 (rejecting extraterritoriality argument where plaintiffs challenged a Connecticut law that imposed a sales reporting requirement on certain cigarette manufacturers, the purpose of which was to prevent manufacturers from "diverting cigarettes into an illicit market that harms Connecticut residents"); *New York Pet Welfare Assn.*, 850 F.3d at 85-86, 91-92 (upholding New York City law that prohibited city pet shops from doing business with certain types of federally licensed breeders because the law "attache[d] no significance to breeders' conduct with respect to animals sold outside the City.").

Plaintiffs primarily rely on *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), which does not support their challenge. *See* PI Mot. at 16. There, the court focused on the Internet's unique nature; because it "does not recognize geographic boundaries, it is difficult, if not impossible, for a state to regulate internet activities without 'projecting its legislation into other States.'" *Am. Booksellers*, 342 F.3d at 103 (citation omitted).[18] The court rooted its analysis in its prediction "that the internet will soon be seen as falling within the class of subjects that are

[18] In *Grand River*, the Second Circuit found *American Booksellers* "inapposite" and refused to apply it outside of its narrow context. *See* 988 F.3d at 124-25 (challenged regulation did not violate the dormant Commerce Clause because it "does not seek to, and in practical effect does not, project onto the rest of the nation a scheme to prohibit cigarette sales or regulate the commercial terms of them"); *see also Vizio, Inc. v. Klee*, No. 3:15-cv-00929, 2016 U.S. Dist. LEXIS 44761, at *39-40 (D. Conn. Mar. 31, 2016) (finding the regulation of the "tangible products" at issue did "not require out-of-state parties to transact out-of-state business according to the regulating state's terms because the manufacturers could simply avoid engaging in the prohibited conduct when transacting out-of-state business") (citation omitted).

protected from State regulation because they 'imperatively demand[] a single uniform rule.'" *Id.* at 104 (citation omitted). The gun industry is not akin to the boundary-less flow of Internet content. While the industry is inherently interstate, it is subject to myriad state laws. *See* 18 U.S.C. § 927 (absent irreconcilable conflict, "no provision of [the Gun Control Act] shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter").

Section 898 does not "project[] onto purely intrastate" conduct wholly *outside* of New York. *Am. Booksellers*, 342 F.3d at 103. Instead, the statute (a) prohibits knowingly or recklessly creating a condition *in New York State* that endangers the health or safety of the public and (b) requires companies doing business in New York to establish reasonable controls to prevent their products from "being possessed, used, marketed or sold unlawfully in New York state." §§ 898-b(1), (2). For example, gun industry members may be held liable under § 898 for sending firearms to a known corrupt gun dealer in New York that engages in off-the-book sales. To avoid this liability, manufacturers and distributors could have stricter requirements for sending guns to their New York dealers. This tailored adjustment would have *no* impact on their sales or other transactions with non-New York dealers. *See Online Merchs. Guild v. Cameron,* 995 F.3d 540, 555 (6th Cir. 2021) (upholding Kentucky's price-gouging law where extraterritorial effect was not the "direct or inevitable" result of the law) (citing *Walsh*, 538 U.S. at 669). Plaintiffs have simply not shown – in this *facial* constitutional challenge – how § 898 directly or inevitably controls "commerce occurring wholly outside that State's borders."

Instead, in their attempt to bring § 898 within the narrow prohibitions of the extraterritoriality doctrine, Plaintiffs misconstrue this carefully circumscribed statute and exaggerate its reach. Both of the statute's provisions focus on conduct that has an impact in New

York or that involves activities directed into New York. §§ 898-b(1), (2). Plaintiffs also ignore the realities of how § 898 will operate in the courts. Many of Plaintiffs' arguments seem to assume that personal jurisdiction limitations or conflicts of laws principles do not exist, and that anyone can be haled into any court irrespective of their connection to the state. This erroneous analysis is particularly misplaced here, where, as recently as 2019, the New York Court of Appeals held that a dealer that has no connection to the state, other than selling guns to a customer who took them to New York, is not subject to the jurisdiction of New York courts. *Williams v. Beemiller*, 130 N.E.3d 833, 836 (N.Y. 2019). Plaintiffs' challenge to § 898 thus rests on hypotheticals that are implausible and incongruent with fundamental procedural requirements.

Plaintiffs' final swing at the dormant Commerce Clause is another miss: they argue that § 898 would result in inconsistencies between New York legislation and that of other states. When determining whether "inconsistent legislation" exists, the extraterritoriality cases target conflicts where, for example, a New York regulation "'raise[s] the possibility' that a regulated entity's compliance with New York's law would put it *out of compliance* with another state's laws." *Online Merchs.*, 995 F.3d at 557-58 (emphasis added) (citation omitted). "It is not enough to point to a risk of conflicting regulatory regimes in multiple states; there must be an actual conflict between the challenged regulation and those in place in other states." *Nat'l Elec. Mfrs. Ass'n*, 272 F.3d at 112. Plaintiffs identify no such conflict. And amici are aware of no state law that would either (i) require Plaintiffs to knowingly contribute to a condition in New York that endangers the public; or (b) prohibit gun companies from adopting reasonable controls and procedures to prevent diversion in and affecting New York. Indeed, "[e]ntities doing business in multiple states must comply with those states' valid consumer protection laws – this is nothing new, and nothing that the extraterritoriality doctrine frowns upon." *Online Merchs.*, 995 F.3d at 558.

III. The Balance of the Equities Weighs Against Enjoining Section 898

Plaintiffs assert that § 898 burdens them with irreparable commercial harm while imposing no burden on the State or the public. PI Mot. at 24-25. In fact, the opposite is true.

Plaintiffs need not cease all business operations to mitigate their liability exposure. Plaintiffs need only take steps to make their products reasonably safe and to monitor and control the distribution of their products such that they are not unreasonably allowing diversion of their products or otherwise knowingly or recklessly contributing to the endangerment of the public. Notably, Plaintiffs make no representation about whether they have instituted anti-diversion or new safety practices, either prior to or following enactment of § 898. *See*, PI Mot., Exs. A-B, D-O. Moreover, this Court should view the arguments about potential litigation burdens with skepticism. Many members of the gun industry, including several Plaintiffs here, are currently defending a long-running public nuisance action that has advanced into discovery. *See City of Gary v. Smith & Wesson Corp.*, 126 N.E.3d 813 (Ind. Ct. App. 2019). Likewise, Smith & Wesson is facing both a lawsuit for negligence, public nuisance, and unfair marketing under California's unfair trade practices law. *Goldstein*, Case No. 37-2020-00016638, slip op. at *6-7 (Cal. Super. Ct. San Diego Co. Jul. 2, 2021), as well as an ongoing investigation by New Jersey's acting attorney general into potential consumer protection violations related to its marketing practices.[19] And yet, the industry is thriving. Smith & Wesson's 2021 annual report boasts that the company's "[n]et revenue surpassed $1 [billion] for [the] first time in [its] 169-year history" and Plaintiff NSSF and its executive Larry Keane have publicly touted the recent soaring sales figures in the

[19] Slip opinion available at https://perma.cc/4Z9Z-PMKU; Office of the New Jersey Attorney General, *Smith & Wesson Must Now Fully Comply with Investigative Subpoena*, press release (Aug. 9, 2021), https://perma.cc/RLM4-BEEA.

industry overall, including the gun sales spike in New York.[20] Plaintiffs have offered no evidence that § 898 – or that litigation in general – will force any company to "cease operations."

Section 898 simply does not create the free-for-all that Plaintiffs imagine. Members of the gun industry are still protected by PLCAA: insofar as a plaintiff seeks to invoke PLCAA's predicate exception, they must establish that the defendant "knowingly" violated § 898, and that such violation "was a proximate cause of the harm for which relief is sought." 15 U.S.C. § 7903(5)(A)(iii). On the other hand, as detailed *supra* pp. 4-5, New York State and the New York public face a dire and escalating gun violence crisis. Enjoining § 898 at this stage will handicap the State's well-tailored efforts to combat that crisis. As the Ninth Circuit stated succinctly:

> The social value of manufacturing and distributing guns without taking basic steps to prevent these guns from reaching illegal purchasers and possessors cannot outweigh the public interest in keeping guns out of the hands of illegal purchasers and possessors who in turn use them in crimes like the one that prompted plaintiffs' action here.

Ileto v. Glock, Inc., 349 F.3d 1191, 1205 (9th Cir. 2003). Here, the balance of the equities and the public interest weigh strongly against a preliminary injunction.

CONCLUSION

Amici respectfully submit that the Court should deny Plaintiffs' motion for a preliminary injunction and grant Defendant's motion to dismiss.

[20] Smith & Wesson, *2021 Annual Report* at 1, https://perma.cc/J3V9-M646; NSSF, *Firearm & Ammunition Sales* (infographic outlining 2020 statistics, including the 87 percent of retailers that experienced an increase in firearms sales during the first half of the year), https://perma.cc/6LB3-87WT; Larry Keane, Feb. 1, 2022 Tweet (declaring January 2022 to be the 30th month in a row that Americans purchased more than one million guns), https://perma.cc/P7A7-4FNE; Larry Keane, Dec. 23, 2021 Tweet (sharing news article and stating: "NICS Check System Indicates Spike in NY Gun Sales"), https://perma.cc/9QCM-QUFX; *see also Lawrence Keane*, LinkedIn, https://www.linkedin.com/in/lawrence-g-keane.

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Respectfully submitted,

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APPENDIX

Description of Amici

A leader in gun violence prevention for over 40 years, **Brady** is one of the nation's oldest and largest nonpartisan, non-profit organizations dedicated to gun violence prevention. Brady provides education, research, and direct legal advocacy to reduce gun deaths and injuries, including filing amicus briefs and representing victims and communities in impact litigation.

Everytown for Gun Safety is the nation's largest gun violence prevention organization with over eight million supporters and more than 375,000 donors including moms, mayors, survivors, students, and everyday Americans who are fighting for common-sense gun safety measures that can help save lives.

For over 25 years, the legal experts at **Giffords Law Center to Prevent Gun Violence** have been fighting for a safer America. Led by former Congresswoman Gabrielle Giffords, Giffords Law Center researches, drafts, and defends the laws, policies, and programs proven to save lives from gun violence.

Maxine E. Lewis is the founder and president of the Carlton Locksley Bennett Foundation, a Brooklyn, New York-based organization that serves communities impacted by gun violence and supports youths and families in achieving their dreams by assisting with educational scholarships, mentorship opportunities, tutoring, leadership training, bereavement therapy, and spiritual and therapeutic interventions. Ms. Lewis is a gun violence survivor: her son, Carlton Locksley Bennett, a smart and funny young man who dreamed of becoming a soccer player and engineer, was shot and killed at the age of 16.

Nadine Sylvester, the founder and chief executive officer of the Rohan Levy Foundation, lost her only son, Rohan Levy, at the age of 15 to gun violence. Rohan was a high school sophomore, a solid B+ student, who was looking forward to attending college to be an architect. Rohan was gunned down steps from his home, allegedly by a teenage shooter.

New Yorkers Against Gun Violence is a statewide non-profit organization that advocates for strong, sensible gun violence prevention laws and programs at the state, local, and federal levels.

The mission of the **Rohan Levy Foundation**, a nonprofit 501(c)(3) organization, is to combat gun violence in Brooklyn communities of color and low socioeconomic status by providing: gun awareness and educational resources to community youth; and support and resources to families impacted by youth gun violence.