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

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| NATIONAL SHOOTING SPORTS FOUNDATION, Inc. et al.,<br><br>Plaintiffs,<br><br>v.<br><br>LETITIA JAMES, in her official capacity as New York Attorney General,<br><br>Defendant. | Case No.: 1:21–cv–1348 (MAD/CFH)<br><br>**Oral Argument Requested** |

**PLAINTIFFS' COMBINED REPLY MEMORANDUM OF LAW**
**IN FURTHER SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**
**AND IN OPPOSITION TO DEFENDANT'S CROSS-MOTION TO DISMISS**

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## PRELIMINARY STATEMENT

Ms. James's opposition brief is an exercise in avoidance. For example, congressional purpose is at the heart of any preemption challenge, yet Ms. James simply ignores the PLCAA's enumerated purposes. We explained that New York's new law is impliedly preempted; Ms. James did not respond at all. We identified a Second Circuit case demonstrating that New York's projection of its policy choices on the rest of the country violates the Constitution. Ms. James pretends it doesn't exist. We posed certain basic questions about the new law and what it proscribes. Ms. James doesn't answer. The list goes on.

What Ms. James *does* say isn't any more illuminating. Her entire express-preemption defense is grounded in the theory that—by erasing the word "person" and penciling in "gun industry member"—New York's legislature somehow resuscitated the exact statute the Second Circuit found preempted over a decade ago. Her Dormant Commerce Clause defense is premised in part on three cases that concern alcohol distribution. But the Twenty-first Amendment cedes to the States virtually complete control in that field. New York has no similar free rein here. Defendant even argues that Plaintiffs seek a mandatory injunction. But that's simply not true. Plaintiffs ask the Court only to enjoin Ms. James from enforcing the law against them until final judgment.

Perhaps most concerning is that Ms. James has expressed her zeal to enforce the new law—a law that might even subject offenders to punitive damages—yet even she cannot explain what the law requires or what specific conduct would subject industry members to liability.

Plaintiffs are likely to succeed on all of their claims. Because New York's new law violates Plaintiffs' constitutional rights, Ms. James's threatened enforcement subjects them to irreparable harm. And the balance of equities and the public interest favor Plaintiffs; no one can be said to

benefit from the enforcement of an unconstitutional law. The Court should therefore enter a preliminary injunction and deny Defendant's motion to dismiss.

## ARGUMENT

### I. Plaintiffs Not Only State A Claim; They Are Likely To Succeed On The Merits.

We argued in our opening brief that Plaintiffs are likely to succeed on the merits because New York's new statute violates (a) the Supremacy Clause, (b) the Dormant Commerce Clause, and (c) the Due Process Clause. Ms. James's responses do not alter that conclusion.[1]

#### A. The Statute Violates The Supremacy Clause.

As we explained, every preemption case turns on congressional intent. Mem. at 10 (citing *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996)). And in enacting the PLCAA, Congress didn't hide the ball about its intent. The statute says expressly that one of its purposes is "to prohibit causes of action against" manufacturers and sellers of firearm and ammunition products "for the harm solely caused by the criminal or unlawful misuse of [those] products by others." 15 U.S.C. § 7901(b)(1). The Second Circuit reaffirmed this goal, explaining in *City of New York v. Beretta*

[1] Defendant argues that Plaintiffs seek "a mandatory injunction" in order to "alter[] the status quo," and thus must show a "clear or substantial likelihood of success on the merits." Opp. at 22. A case cited by Defendant proves otherwise. "Prohibitory injunctions maintain the status quo pending resolution of the case; mandatory injunctions alter it." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n*, 883 F.3d 32, 36 (2d Cir. 2018) (referenced in Opp. at 22). The "status quo," in turn, is "the last actual, peaceable uncontested status which preceded the pending controversy," *id.* at 37—that is, the state of play before New York enacted its new law. So "[t]he 'status quo' in preliminary-injunction parlance is really a 'status quo ante.'" *Id.* at 37 n.5. "This special 'ante' formulation of the status quo in the realm of equities shuts out defendants"—like Defendant here—"seeking shelter under a current 'status quo' precipitated by their wrongdoing." *Id.* Plaintiffs seek to maintain the status quo through a textbook prohibitory injunction.

*U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), that the PLCAA "was intended to shield the firearms industry from vicarious liability for harm caused by [lawfully distributed] firearms." *Id.* at 403.[2]

Ms. James's opposition makes no effort to reconcile New York's new law with Congress's explicit goal.[3] And *outside* of this litigation, Ms. James both: (i) acknowledges that the PLCAA "give[s] gun manufacturers and distributors blanket immunity for gun violence perpetrated" by others; and (ii) describes New York's new law as "combat[ing]" the PLCAA. Office of the A.G., "Attorney General James Vows to Defend New York's Gun Control Laws" (Dec. 16, 2021), *at* https://perma.cc/EG95-TMDY ("AG Press Release"). So this should be an easy case: when federal and state law go head to head, state law must yield. That's because "the Laws of the United States" are "the supreme Law of the Land." U.S. Const. art. VI, cl. 2.

Because New York's new law is so at odds with the PLCAA, Defendant resorts to gimmickry. In three short pages, Ms. James argues that the very public-nuisance law the Second Circuit found preempted in *City of New York* now magically survives because, with the stroke of

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[2] Unless expressly included, all citations and internal quotation and alteration marks have been omitted.

[3] Defendant's *amici*, on the other hand, expressly ask the Court to *ignore* Congress's purposes. *Amici* Br. at 12–13 (citing *Kingdomware Technologies, Inc. v. United States*, 579 U.S. 162 (2016)). But federal courts "cannot interpret federal statutes to negate their own stated purposes," *King v. Burwell*, 576 U.S. 473, 493 (2015)—especially in the preemption context. *See Medtronic, Inc.*, 518 U.S. at 485. And *amici*'s citation to *Kingdomware* is off point. The PLCAA's enumerated purposes do not contradict the predicate exception; they inform what the predicate exception *means*.

Taking a hard right turn, *amici* then argue that New York's new law "embodies exactly the sort of regulatory power that PLCAA's sponsors thought should be left to state legislatures." *Amici* Br. at 13. But that argument doesn't pass the straight-face test given Congress's enumerated purposes and the reaffirmation of those purposes in *City of New York*. Indeed, the Ninth Circuit rejected their exact argument in *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009): "The purpose of the PLCAA leads us to conclude that Congress intended to preempt general tort law claims such as Plaintiffs', even though California has codified those claims in its civil code. Our examination of the legislative history of the Act further confirms that conclusion." *Id.* at 1138.

a pen, New York made it apply to "gun industry member[s]" instead of "person[s]." Opp. at 7–10. But New York is not the first State that has tried to avoid express preemption through clever drafting. The Supreme Court has rejected other States' attempts to end-run express preemption through similarly transparent legislative subterfuge. And even if such statutory trickery could somehow defeat express preemption (it cannot), New York's new law is so obviously impliedly preempted that Defendant and her *amici* simply declined to engage.

**1. The PLCAA Expressly Preempts New York's New Statute.**

**i. States cannot avoid preemption through obvious ploys.**

Ms. James admits, as she must, that New York's new law "closely mirrors" (Opp. at 4, 21) the general public-nuisance statute that the Second Circuit held to be preempted by the PLCAA in *City of New York*. And she does not dispute that with respect to firearms manufacturers and sellers, the new law does exactly the same thing as the old law. Mem. at 11. In Defendant's view, however, the mere substitution of the term "gun industry member" for "person" in that statute suddenly renders the new law one "'that expressly regulate[s] firearms,'" and, like a phoenix from the ashes, now survives the PLCAA. Opp. at 9 (quoting *City of New York*, 524 F.3d at 404). Taken to its logical conclusion, Defendant's position is that *any* law will qualify under the predicate exception, and avoid preemption under the PLCAA, simply by focusing the law on "firearms manufacturers and sellers." Opp. at 9. She is wrong for four reasons.

*First*, Defendant ignores the fact that "the purpose of Congress is the ultimate touchstone in *every* pre-emption case." *Medtronic, Inc.*, 518 U.S. at 485 (emphasis added). In addition to "the language of the pre-emption statute and the statutory framework surrounding it," federal courts also consider "the structure and purpose of the statute as a whole" and how "Congress intended the statute . . . to affect business, consumers, and the law." *Id.* at 486. Defendant points to nothing in the PLCAA's text, its structure, or its legislative history that would even hint that

Congress intended the PLCAA to be evaded by any general tort theory that a State legislature decided to codify and apply to the firearms industry. By snubbing congressional purpose, Ms. James all but admits that New York's new law is preempted.

*Second*, New York's new law does not "regulate firearms" any more than New York's general, PLCAA-preempted public-nuisance law did (which is, to say, not at all). "[S]tatutes that clearly can be said to regulate the firearms industry" are those that regulate the industry in a manner "similar to those enumerated" in the PLCAA's two specific examples: "statutes regulating record-keeping and those prohibiting participation in direct illegal sales." *City of New York*, 524 F.3d at 402. Both of those examples are of statutes that impose prescriptive *regulations*—requirements that must be followed by participants in a heavily regulated industry. Nothing in the PLCAA suggests that Congress intended to save from preemption general tort theories—like public nuisance—just because a State's legislature decrees that they apply to the firearms industry. To the contrary, the PLCAA demonstrates that Congress knew full well how to exempt general tort-law theories from preemption when it wanted to, as it did with negligent entrustment and certain defect theories. *See* 15 U.S.C. § 7903(5)(A)(ii) & (v).

In an effort to avoid this outcome, Ms. James (at 7–8) and her *amici* (at 14) both argue that the predicate exception's two examples do not, as *amici* put it, "narrowly restrict the scope of the exception." *Amici* Br. at 14. But as we explained (Mem. at 6 & 12), the Second Circuit held otherwise. Citing the *noscitur a sociis* and *ejusdem generis* canons, the court wrote that the predicate exception's "applicable to" language "is to be construed to embrace only objects similar to those enumerated by" the predicate exception's two specific examples. *City of New York*, 524 F.3d at 402. So the predicate exception *does*, in fact, "narrowly restrict the scope of the exception"

to those statutes that impose prescriptive regulations—and does not embrace general tort theories like public nuisance.

*Third*, as we noted (Mem. at 12), Defendant's sprawling interpretation of the predicate exception would—as the Second Circuit explained in rejecting another "far too-broad reading" of it—violate "the interpretive principle that statutory exceptions are to be construed narrowly in order to preserve the primary operation of the general rule." *City of New York*, 524 F.3d at 403. The Supreme Court has "long rejected interpretations of sweeping saving clauses that prove absolutely inconsistent with the provisions of the act in which they are found." *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1355 (2020). "In other words, [an] act cannot be held to destroy itself." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011). But that's exactly what Ms. James's interpretation would do. Under her theory, any State law—even the very public-nuisance law the Second Circuit found preempted—can avoid preemption simply by rejiggering it to make it "firearm-specific." But "[s]uch a result would allow the predicate exception to swallow the statute," thus contravening the PLCAA's express purpose. *City of New York*, 524 F.3d at 403; *cf. Ileto v. Glock, Inc.*, 565 F.3d 1126, 1155 (9th Cir. 2009) (Berzon, J., concurring in part and dissenting in part) ("[T]he predicate exception cannot possibly encompass every statute that might be 'capable of being applied' to the sale or manufacture of firearms; if it did, the exception would swallow the rule, and no civil lawsuits would ever be subject to dismissal under the PLCAA.").

*Finally*, the Supreme Court has rejected the notion that States can evade express preemption through legislative sleight of hand. "Pre-emption is not a matter of semantics." *Wos v. E.M.A. ex rel. Johnson*, 568 U.S. 627, 636 (2013). "In a pre-emption case . . . a proper analysis requires consideration of what the state law in fact *does*, not how the litigant might choose to describe it." *Id.* at 637 (emphasis added).

The Supreme Court's decision in *National Meat Association v. Harris*, 565 U.S. 452 (2012), proves this point. In that case, the Court considered the question whether the Federal Meat Inspection Act (the "FMIA") "expressly preempts a California law dictating what slaughterhouses must do with pigs that cannot walk, known in the trade as nonambulatory pigs." *Id.* at 455. In relevant part, California's law banned slaughterhouses from "selling meat or products of nonambulatory animals for human consumption." *Id.* at 463. Though the FMIA's preemption clause preempts state laws that impose additional or different requirements on slaughterhouse *operations*, *see id.* at 459–60, it does not specifically contemplate slaughterhouse *sales*, *see id.* at 463. The unanimous Supreme Court nevertheless held that California's sales ban was expressly preempted by the FMIA: "[I]f the sales ban were to avoid the FMIA's preemption clause, then any State could impose any regulation on slaughterhouses just by framing it as a ban on the sale of meat produced in whatever way the State disapproved." *Id.* at 464. Because "the sales ban regulates how slaughterhouses must deal with non-ambulatory pigs on their premises," "the FMIA . . . preempts it." *Id.* Any other result "would make a mockery of the FMIA's preemption provision." *Id.* So, too, here: Defendant's position—that New York can enact any law imposing on the firearms industry "vicarious liability for harm caused by [lawfully distributed] firearms," *City of New York*, 524 F.3d at 403, simply by focusing the law specifically at the firearms industry—"make[s] a mockery of" the PLCAA. *Cf. Nat'l Meat Ass'n*, 565 U.S. at 464.

**ii. Defendant's ancillary arguments both fail.**

Defendant levels two other arguments; both lack merit. *First*, she argues that Plaintiffs have not brought a proper facial challenge under the no-set-of-circumstances test first set forth in *United States v. Salerno*, 481 U.S. 739 (1987). Opp. at 7. But the *Salerno* test does not apply in preemption challenges. *See League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 729 (7th Cir. 2021) (citing *Arizona v. United States*, 567 U.S. 387 (2012)); *Lozano v. City of Hazelton*,

724 F.3d 297, 313 n.22 (3d Cir. 2013). And even if it did, Defendant concedes that a facial challenge "can succeed" where the challenged statute "lacks a plainly legitimate sweep." Opp. at 7. "[A] law enacted for [the] purpose" of interfering in a preempted space "facially lack[s] any plainly legitimate sweep." *See Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 415 (2d Cir. 2013) (state statute found to be preempted on a facial challenge). As Ms. James has boasted in response to this lawsuit, New York's new law is an express effort to "combat[]" the PLCAA. *See* AG Press Release, at https://perma.cc/EG95-TMDY. It lacks any legitimate sweep—let alone a "plainly legitimate" one.

In any case, there is no set of circumstances in which New York's new law would survive preemption. Though Defendant can come up with examples of narrow cases that might be brought under New York's sweeping new law, *see* Opp. at 9, the predicate exception does not apply on a case-by-case basis; rather, it applies on a *law-by-law* basis: it exempts from preemption "action[s] 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." 15 U.S.C. § 7903(5)(A) & (A)(iii) (emphasis added). New York City made a similar argument in *City of New York*, contending that its public-nuisance lawsuit concerned conduct that, as alleged, would violate federal gun laws, thus making it subject to the predicate exception. Appellee's Br. § I.C.4, *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008) (No. 05–6942), *at* 2006 WL 4452959. But the Second Circuit declined to interpret the predicate exception on a case-by-case basis. Rather, it expressly held that the predicate exception "does not encompass" New York's general public-nuisance law *as a whole*. *City of New York*, 524 F.3d at 404. So the question is not whether the allegations in any particular action fit within the predicate exception; it is whether the *cause of action* fits within

the predicate exception. Because New York's new law, like its old law, is not covered by the exception, there is no set of circumstances under which it is not preempted as a whole.

*Second*, Defendant points the Court (at 9–10) to the Connecticut Supreme Court's sharply divided 4-3 decision in *Soto v. Bushmaster Firearms International, LLC*, 202 A.3d 262 (2019), but she never explains how that case has any relevance here. In fact, *Soto*'s majority and dissent *both* demonstrate that New York's new law is preempted.

*Soto* concerned the question whether a "specific, narrowly framed" *wrongful marketing* claim brought under Connecticut's *general consumer-protection law* could survive PLCAA preemption. *See id.* at 300–01, 312. In answering this question, the *Soto* majority distinguished Connecticut's consumer-protection law from "general tort theories masquerading as statutes," noting that claims brought under such statutes "were precisely the sort that Congress intended to preempt." *Id.* at 306 n.47. The majority further distinguished the Connecticut law from "novel legal theories" developed "with the goal of putting firearms sellers out of business." *Id.* at 320.

In contrast to the Connecticut law, New York's "firearm-specific" public-nuisance law is both a "general tort theor[y] masquerading as a statute" ("precisely the sort that Congress intended to preempt") as well as a "novel legal theor[y]." As we explained (Mem. at 12, 18, 19), and Ms. James does not dispute, New York's common law has already repelled an attempt to extend public-nuisance doctrine to the gun industry, and so New York's new law is novel in that it deviates from the common law. *See People ex rel. Spitzer v. Sturm, Ruger & Co.*, 309 A.D.2d 91, 93–106 (1st Dep't 2003); *see also Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232–34 (2001).[4] *Soto*'s

[4] *Amici* argue that because *Hamilton* and *Spitzer* concerned common-law nuisance, and were not brought under New York's general public-nuisance statute, they supposedly "have no bearing on the scope of PLCAA's preemption or on the statutory claim created by" New York's new law. Doc. 38–1 at 14. But *amici* cannot divorce New York's common law of nuisance from its general public-nuisance statute because "New York PL 240.45 [the general public-nuisance statute] is essentially a criminal codification of the common law doctrine of public nuisance." *City of New*

majority opinion only further proves that New York's new law is "precisely the sort that Congress intended to preempt." *Soto*, 202 A.3d at 306 n.47.[5]

Nor is Defendant helped by anything in *Soto*'s persuasive three-Justice dissent. The dissent "strongly disagree[d] with the majority's conclusion that" Connecticut's "broadly drafted state unfair trade practices statute . . . comes within [the predicate] exception." *Soto*, 202 A.3d at 347 (Robinson, J., dissenting in part). Rather, the dissent explained that "whether this court agrees with Congress or not, in adopting the [PLCAA], Congress adopted findings and statements of purpose . . . which made very clear its intent to absolve . . . gun manufacturers and distributors . . . from liability for criminal use of firearms by third parties except in the most limited and narrow circumstances and, particularly, to shield them from novel or vague standards of liability. This court is obligated, therefore, to construe the predicate exception to the [PLCAA] narrowly in light of that clear expression of congressional intent." *Id.* at 346 (Robinson, J., dissenting in part).

**2. The PLCAA Impliedly Preempts The Statute.**

Even if New York's new law could somehow survive express preemption, we also explained that it is *impliedly* preempted by the PLCAA. Mem. at 12–13. Ms. James does not address this argument at all. That's not surprising. New York's express goal in enacting its new law was to resurrect the very law the Second Circuit held to be preempted by the PLCAA in *City*

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*York v. Beretta U.S.A. Corp.*, 401 F. Supp. 2d 244, 271 (E.D.N.Y. 2005), *aff'd in part and rev'd in part on other grounds*, 524 F.3d 384 (2d Cir. 2008).

[5] To be clear, *Soto* was wrongly decided (and conflicts with Second Circuit precedent). As just one example of its error, the *Soto* majority interpreted the PLCAA in a fashion that the Second Circuit expressly rejected. *Compare Soto*, 202 A.3d at 302–03 (interpreting the term "applicable to" in the PLCAA as "capable of being applied") *with City of New York*, 524 F.3d at 403 ("resort to the dictionary definition of 'applicable'—i.e., capable of being applied—leads to a far too-broad reading of the predicate exception"). But, as explained above, even the *Soto* majority would agree that New York's new law is beyond the pale.

*of New York*. And if that were not clear enough, Ms. James drove the point home in her post-lawsuit press release, railing against the PLCAA as an "unprecedented action to usurp states' rights" and stating that New York's new law "combats that federal overreach." AG Press Release, at https://perma.cc/EG95-TMDY. Given all this, it is difficult to think of another law that so transparently "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Arizona*, 567 U.S. at 406. Standing as an obstacle to Congress's purposes and objectives is the law's *entire point*.

At most, Defendant's opposition could perhaps be read to suggest that the implied-preemption doctrine does not apply where the statute at issue contains an express-preemption clause. *See* Opp. at 8. But, as we explained in our opening brief (Mem. at 13), the Supreme Court rejected that argument over two decades ago in *Geier v. American Honda Motor Co.*, 529 U.S. 861 (2000). Defendant does not address (let alone distinguish) *Geier*. Nor can she. *Geier* made clear that the existence of an express preemption provision "does not foreclose (through negative implication) any possibility of implied conflict pre-emption." 529 U.S. at 869. And *Geier* ultimately concluded that, despite the presence of an express-preemption clause, the implied-preemption doctrine still worked to preempt a lawsuit. *Id.* at 867 ("First, does the Act's express pre-emption provision pre-empt this lawsuit? We think not. Second, do ordinary pre-emption principles nonetheless apply? We hold that they do."). Simply put, "the existence of an express preemption provision does *not* bar the ordinary working of conflict preemption principles or impose a special burden that would make it more difficult to establish the preemption of laws falling outside the clause." *Arizona*, 567 U.S. at 406 (emphasis in original).

**B. The Statute Violates The Dormant Commerce Clause.**

Defendant's opposition only further proves that New York's new law violates the Dormant Commerce Clause in three separate ways: (i) it facially discriminates against interstate commerce;

(ii) it controls commerce outside its borders; and (iii) its burdens on interstate commerce outweigh whatever local benefits it might create.

**1. The Statute Is Facially Discriminatory.**

Ms. James does not dispute: (i) laws that favor intrastate commerce over interstate commerce are generally invalid per se; and (ii) on its face, New York's new law favors intrastate commerce over interstate commerce. *See generally* Mem. at 14–15. Instead, she simply argues that all firearms contain components that have traveled within interstate commerce, so there is no purely intrastate firearms market. Opp. at 11–13. She is wrong for two reasons.

*First*, Defendant's (and her *amici*'s) attempt to frame New York's new law as encompassing only *firearm* sales falls flat. Even assuming every single firearm travels in interstate commerce, New York's new law is far more expansive. It purports to impose liability on those that sell or manufacture "qualified product[s]." N.Y. Gen. Bus. Law § 898–b. And "qualified product[s]" include—in addition to firearms—"ammunition" and even "*component part[s]* of a firearm or ammunition." 15 U.S.C. § 7903(4) (emphasis added); *see* N.Y. Gen. Bus. Law § 898–a(6) (incorporating the PLCAA's definition of "qualified product"). In Defendant's view, a "component part" of a firearm can be "one screw, one spring, one small piece of metal, hard plastic, or even one piece of wood on the handle." Opp. at 13. Neither Defendant nor her *amici* argue that there is no intrastate market in ammunition or component parts.[6] And Defendant cannot avoid the Dormant Commerce Clause based on an unduly narrow interpretation of New York's new law, lacking any basis in its actual text. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 103–04 (2d

[6] To be sure, such an intrastate market is likely small. But courts do not "consider the size or number of the in-state businesses favored or the out-of-state businesses disfavored" in the Dormant Commerce Clause analysis. *New Energy Co. v. Limbach*, 486 U.S. 269, 276 (1988).

Cir. 2003) (rejecting Vermont's "narrow interpretation of [its] statute" and concluding that the statute, as actually written, violates the Dormant Commerce Clause).

*Second*, even assuming there is no purely intrastate market in firearms, ammunition, or component parts, the new law's facial discrimination against interstate commerce incentivizes the creation of such an intrastate market.[7] And that incentive alone renders the law unconstitutional. Defendant's contrary view—that the constitutionality of its new law depends on whether an intrastate market actually exists—makes little policy sense, and means that the constitutionality of its law will ping-pong based on what's going on in New York on a given day. Defendant cites no case to support that strange proposition.[8]

**2. The "Practical Effect" Of The Statute Is To Control Commerce Outside New York's Borders.**

Defendant concedes that "a statute may be unconstitutional when it regulates commerce that takes place fully outside its borders." Opp. at 13 (citing *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989)). And Defendant does not dispute that each of *Healy*'s three factors are satisfied. *Compare* Mem. at 15–17 *with* Opp. at 13–15.[9] Instead, in an effort to avoid *Healy* altogether,

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[7] That New York may not have intended to discriminate against interstate commerce is beside the point. "[T]he purpose of, or justification for, a law has no bearing on whether it is facially discriminatory." *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 100 (1994).

[8] In an effort to fill the void, Defendant's *amici* cite *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) and *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633 (D.C. 2005). Neither case helps them. Unlike New York's new law, the statute in *Exxon* was not facially discriminatory. *See* 437 U.S. at 119–20 & n.1. And the court in *District of Columbia* noted that it was impossible to have an intrastate machine-gun market in the District because "[t]he manufacture and distribution of machine guns is prohibited in the District." 872 A.2d at 656 & n.15. *Amici* also argue that a purely intrastate market would not be shielded by the PLCAA. *Amici* Br. at 17. In *amici*'s view, of course, New York's new law is *not* preempted by the PLCAA. And the relevant question here is whether the *new law* facially discriminates against interstate commerce. The PLCAA has no bearing on whether the new law is facially discriminatory.

[9] Defendant's *amici* dedicate about one-fifth of their brief to raising arguments that Defendant has decided not to raise. *See Amici* Br. at 19–23. But "[i]n our adversarial system of

Defendant argues that New York's new law "only incidentally burdens interstate commerce" and is justified by New York's "safety interests." Opp. at 11, 15.

But the new law's burden on interstate commerce is hardly "incidental[]." Burdening interstate commerce is what the law was *designed* to do. The legislature made clear that the goal of the statute is to project its own policy choices on the rest of the country, pointing in its findings to a statistic that "74% of firearms used in crimes in New York are purchased outside of New York." NY LEGIS 237 (2021), 2021 Sess. Law News of N.Y. Ch. 237 (S. 7196), *available at* Doc. 35–3. And, as we explained (Mem. at 16–17), it is just like the Vermont law enjoined by the Second Circuit in *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), which case Defendant tellingly ignores.[10]

To be sure, we do not dispute that the Dormant Commerce Clause "must be applied carefully so as not to invalidate many state laws that have permissible extraterritorial effects." *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 68 n.19 (2d Cir. 2010) (quoted in Opp. at 13–14).

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adjudication, we follow the principle of party presentation." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). "[O]ur system is designed around the premise that parties represented by competent counsel know what is best for them, and are responsible for advancing the facts and argument entitling them to relief." *Id.* at 1579. And so the course of this case must therefore "bear[] a fair resemblance to the case shaped by the parties"—not by *amici*. *Id.* at 1582. To the extent the Court desires a full response to the arguments that Defendant has waived, Plaintiffs would be happy to submit a supplemental brief.

[10] Defendant's *amici* try to distinguish *American Booksellers* as applying some internet-only rule. *Amici* Br. at 21. But "the Internet is analogous to a highway or railroad," and "the novelty of the technology should not obscure the fact that regulation of the Internet"—like regulation of other aspects of interstate commerce—"impels traditional Commerce Clause considerations." *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 161, 173 (S.D.N.Y. 1997). In fact, both Defendant and *amici* argue that the gun industry is wholly interstate in nature—when it suits them. Opp. at 12–13; *Amici* Br. at 16–18. *Amici*'s citation (at 21 & n.18) to *Grand River Enterprises Six Nations, Ltd. v. Boughton*, 988 F.3d 114 (2d Cir. 2021), only further proves Plaintiffs' point. In contrast to New York's new law, the Connecticut law at issue in that case did "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." *Id.* at 125.

But the key word there is "permissible." New York's new law is anything but permissible. That's because "the Commerce Clause precludes a state from enacting legislation that has the practical effect of exporting that state's domestic policies." *Am. Libraries Ass'n v. Pataki*, 969 F. Supp. 160, 174 (S.D.N.Y. 1997). Here, the express end-goal of New York's new law is to "compel manufacturers" and sellers "to act in accordance with [New York] law outside of [New York]." *Ass'n for Accessible Medicines v. Frosh*, 887 F.3d 664, 672 (4th Cir. 2018). "This" New York "cannot do." *Id.*; *see also id.* at 674 (holding that a Maryland statute that prohibited price-gouging in the sale of prescription drugs "is unconstitutional under the dormant commerce clause because it directly regulates transactions that take place outside Maryland") (emphasis omitted).[11]

Citing *Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1982), Defendant argues that the law's extraterritorial effects don't matter because of New York's "strong safety interests." Opp. at 14–15. But Defendant's "incantation of a purpose to promote the public health or safety does not insulate a state law from [a] Commerce Clause attack." *Kassel*, 450 U.S. at 670. More fundamentally, safety-interest considerations only come into play when weighing a law's burdens on interstate commerce against its local benefits in the *Pike* balancing test. *See id.* at 670–71. But those interests are not considered where, as here, a law's practical effect is to control interstate commerce. Thus, in *American Booksellers*, the Second Circuit held that because Vermont had "projected its legislation into other States, and directly regulated commerce therein," the court had "no need to apply the *Pike* balancing test to the statute's extraterritoriality"—and thus did not consider the challenged law's benefits of protecting Vermont minors from receiving pornographic

[11] Defendant's *amici* suggest that the Dormant Commerce Clause doesn't apply here because New York's new law "does not regulate prices and was not motivated by economic protectionism." *Amici* Br. at 20. But the pornography-distribution law in *American Booksellers* did not regulate prices and was not motivated by economic protectionism. It was enjoined all the same.

materials over the internet. 342 F.3d at 102–04; *see also Am. Libraries Ass'n*, 969 F. Supp. at 173–181 (considering local benefits only in the context of the *Pike* balancing test).[12]

At bottom, Defendant does not seriously dispute that New York's new law has the practical effect of projecting New York's policy choices on the rest of the country and controlling commerce outside of the State. The law accordingly violates the Dormant Commerce Clause.[13]

**3. The Statute Fails The *Pike* Balancing Test.**

Even assuming New York's new law does not discriminate against interstate commerce on its face or in effect (and it does, in both ways), it still fails the *Pike* balancing test.

As a threshold matter, the *Pike* balancing test has been criticized by some, most notably Justice Scalia, on the ground that "the balancing of various values [should be] left to Congress—which is precisely what the Commerce Clause . . . envisions." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 348–49 (2007) (Scalia, J., concurring in part). "[C]ourts are less well suited than Congress to perform this kind of balancing." *Dep't of Rev. v. Davis*, 553 U.S. 328, 360 (2008) (Scalia, J., concurring in part). Yet the *Pike* test remains because Congress does not weigh in on most issues affecting interstate commerce. This case presents the relatively rare scenario where Congress *has* weighed in on the *Pike* balancing question. Congress expressly found that "[t]he possibility of imposing liability on an entire

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[12] Defendant's *amici* argue that New York's new law does not "result in inconsistencies between New York legislation and that of other states." *Amici* Br. at 23. But part of the problem, as explained in our opening brief and further below, is that no one understands what New York's new law means. And examples of potential inconsistencies between New York's new law and those of other States are not difficult to foresee. *See, e.g.*, Mem. at 23 (noting potential conflict between New York's new law and Missouri's criminal law).

[13] Both Ms. James and her *amici* contend that she may have personal-jurisdiction difficulties suing out-of-state gun industry members in New York State. Opp. at 14 n.1; *Amici* Br. at 22–23. But personal jurisdiction concerns only where suit is brought, not whether a defendant may be held liable under a State's substantive law.

industry for harm that is solely caused by others . . . constitutes an unreasonable burden on interstate . . . commerce." 15 U.S.C. § 7901(a)(6). In determining what constitutes a burden on interstate commerce—a matter firmly in Congress's domain per the Commerce Clause, *see* U.S. Const. art. I, § 8, cl. 3—Congress's value judgments must be respected. So it is no wonder that Defendant and her *amici* ignore the fact that, as we pointed out in our opening brief (Mem. at 18), Congress has already set the scale here.

Even if the Court could disregard Congress's balancing, Ms. James has not demonstrated—certainly not as a matter of law as is her burden—that New York's safety interests outweigh the excessive burdens its new law imposes on interstate commerce. Defendant directs the Court (Opp. at 3) to the 2004 decision in *City of New York v. Beretta U.S.A. Corp.*, 315 F. Supp. 2d 256 (E.D.N.Y. 2004), in which the district court summarily concluded that "*any* burden placed on interstate commerce is outweighed by the substantial public interest in the regulation of the sale of firearms to protect the health and safety of New York City and its people." *Id.* at 286 (emphasis added). That broad statement wasn't correct then, and it's certainly not correct now, in light of the PLCAA (enacted in 2005) and subsequent Circuit law. *See Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 52 (2d Cir. 2007) (vacating summary judgment and remanding because "the District Court did not . . . engage in any meaningful examination of the claimed local benefits conferred by the Ferry Law").

By the same token, we do not dispute that New York has a legitimate interest in the health and safety of its people. But "[t]he State cannot avoid" a determination of the law's *actual* benefits "simply by invoking [a] legitimate state interest underlying the Act." *Am. Libraries Ass'n*, 969 F. Supp. at 178. And New York's asserted benefits are "for the most part, speculative." *Edgar v. MITE Corporation*, 457 U.S. 624, 645 (1982) (holding that an Illinois statute fails the *Pike* test);

*see Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 447–48 (1978) ("The State of Wisconsin has failed to make even a colorable showing that its regulations contribute to highway safety."). As in *American Libraries*, "[t]he local benefits likely to result from the New York Act are not overwhelming." 969 F. Supp. at 178.

As a threshold matter, as we explained in the opening brief (at 21–24) and further below, no one understands what New York's new law actually means. And Ms. James's opposition sheds no light on the matter. The end result of all of this is that the law will—apart from hanging the Sword of Damocles over Plaintiffs' heads—effect no actual change and thus produce *no* local benefits. Ms. James also downplays her ability to enforce the law, arguing that New York's new law "plainly does not" "allow[] out-of-state gun industry members to be arbitrarily and indiscriminately dragged into court in New York State." Opp. at 14 n.1; *accord Amici* Br. at 22–23. But if the Court takes Defendant at her word, "practical difficulties" in enforcing a law also cut against the notion that the law provides any significant local benefit. *Am. Libraries Ass'n*, 969 F. Supp. at 178. Finally, New York's new law "is, of course, not the only law in New York's statute books designed to protect" its citizens against gun violence. *Id.* at 179. So whether the new law will have any incremental benefit is far from clear.

In an effort to defend the new law, Ms. James analogizes this case to a trio of cases concerning alcohol distribution. Opp. at 16–18 (citing *Granholm v. Heald*, 544 U.S. 460 (2005), *Arnold Wines, Inc. v. Boyle*, 571 F.3d 185 (2d Cir. 2009), and *Baude v. Heath*, 538 F.3d 608, 612 (7th Cir. 2008)). Her reliance on these cases is telling. As the Second Circuit explained in *Arnold Wines*, "the Supreme Court has made clear that the Twenty-first Amendment alters [the] dormant Commerce Clause analysis of state laws governing the importation of alcoholic beverages." 571 F.3d at 188 (citing *Granholm*, 544 U.S. at 488–89). That is because "[t]he Twenty-first

Amendment grants the States *virtually complete control* over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Granholm*, 544 U.S. at 488 (emphasis added). But New York does not have "virtually complete control" over *non*-alcohol-related commerce, so Ms. James's alcohol-distribution cases are not relevant here.

At bottom, neither Defendant nor her *amici* explain how a law that no one understands and that they contend (for the purposes of avoiding this lawsuit) may not be enforceable in large part will actually generate any local health or safety benefits incremental to those afforded by existing firearm laws. Plaintiffs are thus likely to succeed on their Dormant Commerce Clause claims.

### C. The Statute Violates The Due Process Clause.

Plaintiffs are likely to succeed on their Due Process Clause claim. Ms. James all but admits that the new law is subject to the strictest vagueness test. And her opposition proves definitively that the law fails that test.

#### 1. The Law Is Subject To A Strict Test For Vagueness.

In our opening brief, we explained that New York's new law is subject to the most stringent vagueness test for two independent reasons: (i) it threatens to inhibit First and Second Amendment rights; and (ii) it threatens to impose punitive damages, which are "quasi-criminal" penalties. Mem. at 20–21. Ms. James simply ignores the first point, thus effectively conceding that the strict test applies. Nor does she seriously dispute the second point. Instead of addressing the Supreme Court and Second Circuit cases we cited, Defendant oddly directs the Court to an Eleventh Circuit case that concerned a Georgia statute governing motor-vehicle-insurance applications—and that had nothing to do with punitive damages. Opp. at 20 (citing *Cotton States Mut. Ins. Co. v. Anderson*, 749 F.2d 663, 669 n.9 (11th Cir. 1984)). The heightened vagueness test applies here.

**2. The Law Fails The Strict Vagueness Test.**

As we explained, New York's new law comes nowhere close to satisfying the strict vagueness test. Mem. at 21. To illustrate the law's nebulousness, we posed a handful of basic hypothetical questions in the opening brief. Under the statute, what constitutes a "contribution" to a "condition" in New York "that endangers the safety or health" of the public? Mem. at 22. If a Texas dealer sells a firearm that is legal in Texas but illegal in New York—and fully complies with federal and Texas law when doing so—can he be held liable under this statute if the firearm is later stolen and used in a crime in New York? *Id.* at 23. If a Missouri dealer sells a firearm to a Missouri customer who was associated with a law-enforcement-traced weapon and that firearm is used in a New York crime, has the dealer acted "unreasonably under all the circumstances," even though Missouri law *requires* the dealer to complete the sale despite the previous trace? *Id.*

These questions should have answers. Rather than answering them, Ms. James generically argues that New York's new law "provide[s] clear guidance to members of the gun industry about their obligations and responsibilities under this new law." Opp. at 20. But where? And if the law provides such "clear guidance," why not answer Plaintiffs' questions? The answer, of course, is that she can't. New York's new law is so vague as to be unintelligible, and it provides no guardrails to guide its enforcement. That's not how laws are supposed to work in this country. "[N]o one should be surprised that the Constitution looks unkindly on any law so vague that reasonable people cannot understand its terms and judges do not know where to begin in applying it. A government of laws and not of men can never tolerate that arbitrary power." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1233–34 (2018) (Gorsuch, J., concurring in part and in the judgment).

Because she cannot begin to explain what New York's new law actually means (because no one knows)[14] or what standards guide its enforcement (because none exist), Ms. James—as predicted (*see* Mem. at 23–24)—leans on the fact that New York's new law was adapted from the State's general public-nuisance statute, Opp. at 20–21, as if its decades of interpretive law could somehow guide Defendant's enforcement here. That argument fails for three reasons.

*First*, as we explained (Mem. at 23–24), New York's new law cannot be informed by the interpretive common law underlying the general public-nuisance statute because the new law was designed to *undermine* that common law. Under New York's common law, "gun manufacturers" generally "do not owe a 'duty to control the conduct of third persons so as to prevent them from harming others.'" *Spitzer*, 309 A.D.2d at 95 (quoting *Hamilton*, 96 N.Y.2d at 233). Applying that common law, the First Department expressly *rejected* Defendant's effort (through her predecessor) "to widen the range of common-law public nuisance claims in order to reach the legal handgun industry." *Spitzer*, 309 A.D.2d at 96, 99. If anything, the fact that New York's new law is repugnant to the "half a century" of common law interpreting "New York's current general public nuisance law" (Opp. at 21), renders the new statute even *more* ambiguous than it would be just on its face. To this, Ms. James did not bother to respond.

*Second*, Defendant does not dispute that: (i) unlike the general public-nuisance law, New York's new law also prohibits "contributing" to a dangerous "condition"; (ii) the word "contribute" is extraordinarily broad; and (iii) the word "condition" is similarly "broad enough to include any state or situation," *Am. Sugar-Ref. Co. v. United States*, 99 F. 716, 719 (2d Cir. 1900). *See generally* Mem. at 22. Ms. James's only response is that even though "the new legislation does not define" these vague, expansive terms, the law is good enough. *See* Opp. at 19. It's not.

[14] Defendant's *amici* also didn't even try.

*See F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012) (laws must "give fair notice of conduct that is forbidden or required").

*Finally*, unlike New York's general public-nuisance statute, New York's new law also penalizes gun industry members that do not utilize "reasonable controls and procedures" to prevent their products from being used unlawfully in New York. N.Y. Gen. Bus. Law § 898-b(2). What does that mean? Defendant argues that the new law defines this term. Opp. at 20. But she does not quarrel with the fact that "the statute's definition of that term is so broad as to be meaningless." Mem. at 22 n.15. A vague and ambiguous statute is not cured of its due-process deficiencies simply by purporting to "define" its vague and ambiguous terms in vague and ambiguous ways. If anything, such "definitions" only further muddy the waters.

## II. Plaintiffs Will Be Irreparably Harmed Absent Preliminary Injunctive Relief.

"In the Second Circuit, it is well settled that an alleged constitutional violation constitutes irreparable harm." *Barrett v. Maciol*, No. 9:20–cv–537, 2022 WL 130878, at *5 (N.D.N.Y. Jan. 14, 2022) (D'Agostino, J.), *appeal docketed*, No. 22–200 (2d Cir. Jan. 31, 2022). As Defendant puts it in her brief, "[w]hen a plaintiff seeks injunctive relief based on an alleged constitutional deprivation, the two prongs of the preliminary injunction threshold merge into one . . . and in order to show irreparable injury, plaintiff must show a likelihood of success on the merits." Opp. at 23. Plaintiffs agree. Because Plaintiffs have shown a likelihood of success on their constitutional claims, they satisfy the irreparable-harm prong. *See also N.Y. State Telecomm. Ass'n, Inc. v. James*, 544 F. Supp. 3d 269, 278–79 (E.D.N.Y. 2021) (irreparable harm demonstrated where compliance with a law would impose significant costs on plaintiffs' members, and noncompliance would expose them to serious liability "includ[ing] possible initiation of dissolution proceedings").

Ms. James argues that Plaintiffs nonetheless fail the irreparable-harm test because they did not file this lawsuit with sufficient alacrity. Opp. at 23–24. But "a delay in filing is not a proper

basis for denial of a preliminary injunction." *Gordon v. Holder*, 632 F.3d 722, 724 (D.C. Cir. 2011). "Although federal courts have at times bolstered their denials of preliminary injunctions by referring to the late hour of a filing, those cases in no way stand for the proposition that a late filing, on its own, is a permissible basis for denying a preliminary injunction." *Id.* (citing cases); *see, e.g.*, *Kuklachev v. Gelfman*, 361 F. App'x 161, 163 (2d Cir. 2009) (affirming preliminary injunction despite 18-month delay). And, in all events, any delay is more than outweighed by the new law's constitutional violations. "[I]n balancing the presumed irreparable harm stemming from an alleged constitutional violation on one hand and a delay in seeking injunctive relief on the other hand, the alleged constitutional deprivation is the more compelling consideration." *Marquez v. Annucci*, No. 20–cv–1974, 2020 WL 3871362, at *5 (S.D.N.Y. July 9, 2020); *accord Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 41–42 (S.D.N.Y. 2020); *Yafai v. Cuccinelli*, No. 20–cv–2932, 2020 WL 2836975, at *4 (S.D.N.Y. June 1, 2020).

Plaintiffs are also irreparably harmed because New York's new law threatens the viability of their businesses. Indeed, the Second Circuit—as noted in a case cited by Defendant (Opp. at 22)—has "found irreparable harm where a party is threatened with the loss of a business." *Tom Doherty Assocs., Inc. v. Saban Entm't, Inc.*, 60 F.3d 27, 37 (2d Cir. 1995). Defendant argues that the danger to Plaintiffs' businesses imposed by her threatened enforcement of the new law does not constitute irreparable harm because Plaintiffs might be able to obtain financial compensation from New York. Opp. at 24. But that argument falters because New York is generally immune to suit in federal court. "Though monetary damages would usually supply an adequate remedy at law . . . the harm takes on special import where, as here, the Eleventh Amendment precludes redressability." *N.Y. State Telecomm. Ass'n*, 544 F. Supp. 3d at 276 (finding irreparable harm and preliminarily enjoining Defendant from enforcing another preempted state statute). And to the

extent Plaintiffs could theoretically recover damages from New York in State court, "in deciding whether a federal plaintiff has an available remedy at law that would make injunctive relief unavailable, federal courts may consider only the available *federal* legal remedies." *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam) (emphasis in original).

## III. The Balance Of Equities And Public Interest Favor Plaintiffs.

Defendant does not argue that the general public has any valid interest in her enforcement of an unconstitutional statute. Instead, Defendant cites (without properly identifying it as such) the single-Justice opinion in *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers), for the proposition that enjoining New York's new law will irreparably harm New York.

Though "[i]ndividual justices, in orders issued from chambers, have expressed the view that a state suffers irreparable injury when one of its laws is enjoined," "[n]o opinion for the Court adopts this view." *Latta v. Otter*, 771 F.3d 496, 500 n.1 (9th Cir. 2014). At any rate, *King* cuts against Defendant. "Federal courts . . . have the power to enjoin state actions, in part, because those actions sometimes offend *federal* law provisions, which, like state statutes, are themselves enactments of its people or their representatives." *Indep. Living Ctr. of S. Cal., Inc. v. Maxwell-Jolly*, 572 F.3d 644, 658 (9th Cir. 2009) (emphasis in original), *vacated and remanded on other grounds sub nom. Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 565 U.S. 606 (2012). As New York's new statute was enacted in violation of the Constitution and in an express effort to end-run the PLCAA—a "statute[] enacted by representatives of [the] people," *King*, 567 U.S. 1303—allowing Defendant to enforce the new statute would irreparably harm the general public. For these reasons, the balance of equities and the public interest favor Plaintiffs.[15]

[15] Defendant and *amici* also argue that, as Defendant puts it, New York "has a substantial interest in preventing and limiting gun violence." Opp. at 24; *accord Amici* Br. at 25. But as explained above (§ I.B.3), the actual benefits of New York's new law are mostly illusory.

## CONCLUSION

The Court should deny Defendant's motion to dismiss and grant a preliminary injunction.

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Respectfully submitted,

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