

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF NEW YORK

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NATIONAL SHOOTING SPORTS FOUNDATION, INC.,  
*et al.*,

*Plaintiffs,*

1:21-CV-1348

v.

(MAD/CFH)

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

*Defendant.*

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**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF  
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT  
PURSUANT TO FED. R. CIV. P. 12(b)(6)**

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March 18, 2022

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Defendant Letitia James, in her official capacity as Attorney General of the State of New York, respectfully submits this reply memorandum of law in further support of her motion to dismiss the Complaint (“Compl.” ECF. No. 1).

**PRELIMINARY STATEMENT**

Plaintiffs mount a facial constitutional challenge to N.Y. General Business Law §§ 898–a to 898–e (“§ 898”), but their opposition papers do not come close to demonstrating that § 898 is unconstitutional in all of its possible applications. That alone warrants dismissal of Plaintiffs’ facial challenge. In addition, contrary to Plaintiffs’ assertion that the Attorney General’s opening brief was not “illuminating” enough, *see* Opp. at 1, the brief put a bright spotlight on the facts and the law of this case, and it established three key points.

First, although Plaintiffs accuse the Attorney General of just “penciling in” words to § 898 to make it comply with the predicate exception contained within the Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 5921, (“PLCAA”), she did no such thing. Rather, her opening brief carefully analyzed and compared the words of § 898 and PLCAA – because the words of statutes matter – and then demonstrated exactly how the New York statute fits comfortably into the predicate exception of the PLCAA under the plain text of the statute and governing Second Circuit precedent. In sum, the New York Legislature passed a firearms-related statute, and because it did so, it hit the bullseye of the PLCAA predicate exception – which is all about allowing States to have room to pass firearms-related statutes to address gun violence.

Second, Plaintiffs cannot show that § 898 – which is closely focused on conduct that results in harms *inside* of New York State – favors intrastate activity in any way, or regulates purely extraterritorial conduct *in every application*, as is necessary for facial relief. Thus, their Dormant Commerce Clause claims fail.

Finally, § 898 is not unconstitutionally vague. In the civil context, to meet the standard for a violation of the Due Process Clause for vagueness, a statute must be so vague and indefinite as to be no rule at all. But a statute is not unconstitutionally vague if persons of reasonable intelligence can derive a core meaning from the statute.

## ARGUMENT

### POINT I

#### **PLAINTIFFS' SUPREMACY CLAUSE CLAIMS MUST BE DISMISSED**

It is crucial to recall that Plaintiffs bring a *facial challenge* to the provisions of § 898. This is determinative of the outcome here because, as was noted in the Attorney General's opening brief, a facial challenge to the provisions of a statute can succeed only if Plaintiffs "show that 'no set of circumstances exists under which the [statute] would be valid, *i.e.*, that the law is unconstitutional in all of its applications,' or at least that it lacks a 'plainly legitimate sweep.'" *United States v. Decastro*, 682 F.3d 160, 168 (2d Cir. 2012) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 (2008)); *see also N.Y. State Rifle & Pistol Ass'n. v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

Apparently, because Plaintiffs could not meet this crucial *Salerno* test, they simply absolved themselves of the requirement to do so. They did this by citing nonbinding out-of-Circuit cases – *e.g.*, *League of Women Voters of Ind., Inc. v. Sullivan*, 5 F.4th 714, 729 (7th Cir. 2021) – and by arguing that "the *Salerno* test does not apply in preemption challenges." Opp. at 7. But Plaintiffs are wrong since: (1) the *dicta*<sup>1</sup> in the Seventh Circuit case they cite is not controlling

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<sup>1</sup> That Plaintiffs rely upon *dicta* in the Seventh Circuit case is shown by the fact that the Seventh Circuit themselves stated that "we need not wade into the debate about the compatibility (or not) of *Arizona* and *Salerno*." *Sullivan*, 5 F.4th 714, 729 (7th Cir. 2021). Of course, the *Arizona* case reference here was *Arizona v. United States*, 567 U.S. 387 (2012), a preemption case, relied upon by Plaintiffs here, a case in which the majority opinion never mentioned *Salerno*.

here, (2) that *dicta* is in direct conflict with at least four other Circuits that have expressly applied the *Salerno* test to preemption cases – often times while simultaneously citing to *Anderson v. Edwards*, 514 U.S. 143, 155 (1995) (applying the same type of *Salerno* standard in a preemption case), and *Cal. Coastal Comm’n v. Granite Rock Co.*, 480 U.S. 572, 593 (1987) (same)<sup>2</sup> – and (3) the Seventh Circuit’s *dicta* is in direct conflict with recent district court cases within this Circuit. In fact, a 2019 preemption case from the District Court for the Southern District of New York expressly held that “*Salerno* remains the basis for evaluating facial constitutional challenges in the Second Circuit.” *Sykes v. N.Y. State Office of Children & Family Servs.*, 2019 U.S. Dist. LEXIS 165554, at \*40 n.14 (S.D.N.Y. Sep. 25, 2019). So *Salerno* and the “no set of circumstances” test indeed apply to Plaintiffs’ preemption claims, despite Plaintiffs’ meritless claim to the contrary.

Moreover, concomitant with *Salerno*, it is black-letter law that Attorney General James and the New York State courts must be given the opportunity to narrow § 898, if needed, during the course of enforcement activity, or in judicial proceedings.<sup>3</sup> *See Erznoznik v. Jacksonville*, 422

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<sup>2</sup> The out-of circuit authority cited by the Plaintiffs – the *dicta* in the Seventh Circuit’s *Sullivan* opinion and the Third Circuit’s opinion in *Lozano v. City of Hazelton*, 724 F.3d 297 (3d Cir. 2013) – are at odds with the mainstream of federal jurisprudence, both within the Second Circuit and nationwide. For instance, the First, Fifth, Ninth, and Tenth Circuits have expressly applied the *Salerno* test to preemption cases, including after *Arizona* was decided. *See, e.g., NCTA-Internet & TV Ass’n v. Frey*, 451 F. Supp. 3d 123, 134 (D. Me. 2020) (“The First Circuit has applied the *Salerno* standard to a facial preemption challenge.”) (collecting cases); *Villas at Parkside Partners v. City of Farmers Branch, Tex.*, 726 F.3d 524, 564-65 (5th Cir. 2013) (applying *Salerno* to a preemption case); *Sprint Telephony PCS, Ltd. P’ship v. Cty. of San Diego*, 543 F.3d 571, 579 n.3 (9th Cir. 2008) (“In cases involving federal preemption of a local statute, ... the [*Salerno*] rule applies with full force.”); *Puente Arizona v. Arpaio*, 821 F.3d 1098, 1104 (9th Cir. 2016) (“we have chosen to continue applying *Salerno*”); *United States v. Supreme Court of N.M.*, 839 F.3d 888, 917 (10th Cir. 2016) (in a preemption case, the court held: “We thus are prepared to assume *arguendo* that *Salerno*’s no-set-of-circumstances language does apply here.”); *see also Sykes*, 2019 U.S. Dist. LEXIS 165554, at \*40 n.14 (“*Salerno* remains the basis for evaluating facial constitutional challenges in the Second Circuit.”).

<sup>3</sup> Plaintiffs assert that the *Salerno* test cannot be applied here to § 898 on a “case-by-case basis,” but rather, it must be applied on a “law-by-law basis.” *Opp.* at 8 (emphasis in original). Plaintiffs are wrong on this point as well. In fact, in *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 347-48 (2d Cir. 1998), after citing the “heavy burden” of demonstrating the “no set of circumstances” test of *Salerno*, the Second Circuit held that the challenged NYPD policy must be assessed on a *case-by-case basis*. *Id.* at 348 (“In sum, we believe that this facial challenge is not the appropriate vehicle to resolve plaintiffs’ Fifth Amendment challenge and leave the resolution of plaintiffs’ claims to case-by-case *Huntley* hearings.”). This Court

U.S. 205, 216 (1975) (“a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts”). It’s because of this black-letter law that “[a] plaintiff making a facial claim faces an uphill battle because it is difficult to demonstrate that the mere enactment of a piece of legislation violated the plaintiff’s constitutional rights.” *Cranley v. Nat’l Life Ins. Co. of Vt.*, 318 F.3d 105, 110 (2d Cir. 2003) (quoting *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 736 n.10 (1997)) (internal quotation marks omitted); *see also Diaz v. Pataki*, 368 F. Supp. 2d 265, 274 (S.D.N.Y. 2005) (same).

There are any number of sets of circumstances in which PLCAA’s predicate exception would apply, demonstrating the statute’s “plainly legitimate sweep.” *Decastro*, 682 F.3d at 168. At a minimum, an action under § 898 plainly would not offend PLCAA if it concerned the example violations specified by the statute’s drafters – false bookkeeping, false statements, or knowing use of straw purchasers. *See* 15 U.S.C. § 7903(5)(A)(iii). But one could posit any number of other scenarios where the state remedy would be available – for instance, if a police officer is gunned down by a convicted felon recently released from confinement in a mental hospital, who was sold an illegal handgun by a gun industry member that intentionally does not perform background checks, might a New York state court be able to hear a § 898 case brought against that particular gun industry member on behalf of the officer’s widow? If § 898 can plausibly be applied to such a ripped-from-the-headlines hypothetical case – and it should, because these facts would clearly fall within PLCAA’s predicate exception – then it is not unconstitutional. Even Plaintiffs would likely concede this point, since they correctly acknowledge that the Attorney General has already “come up with examples of narrow cases” that might be brought under § 898. *Opp.* at 8. This concession by Plaintiffs is decisive here because it correctly shows that § 898 can in fact rightly

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should likewise leave the resolution of Plaintiffs’ PLCAA claims to the case-by-case assessment of individual proceedings brought under § 898.

be applied in at least certain circumstances. While the “hypothetical scenario[s]” cited above “may not be common, [they are] sufficient to establish that [Plaintiffs’] facial challenge fails.” *Chem. Waste Mgmt. v. United States EPA*, 56 F.3d 1434, 1437 (D.C. Cir. 1995).

Unable to demonstrate that there is “no set of circumstances” where § 898 would fall into the predicate exception, the Plaintiffs instead ask the Court to interpret PLCAA in a way that pretends the exception does not exist. *See* Opp. at 2-3 (arguing that the issue “turns on congressional intent” to “prohibit causes of action against manufacturers and sellers of firearm products”). But as always, “the best evidence of Congress’s intent is the statutory text.” *NFIB v. Sebelius*, 519 U.S. 519, 544 (2012). The words used by Congress to create the predicate exception are simply much more expansive than Plaintiffs let on here, and this more expansive reading is consistent with the legislative history of PLCAA. In fact, as Connecticut’s Supreme Court noted:

[There are] dozens of statements by PLCAA’s drafter and cosponsors that imply or directly state that the predicate exception applies far more broadly, such that firearms companies may be held liable for violation of *any* applicable law .... Indeed, in the vast majority of instances in which the predicate exception was discussed during the legislative debates, proponents spoke in broad, general terms, indicating that the bill would not immunize firearms companies that had engaged in *any* illegal activity.

*Soto v. Bushmaster Firearms Int’l, LLC*, 202 A.3d 262, 322 (2019) (emphasis in original). *See also* 151 Cong. Rec. 18,919 (2005), Remarks of PLCAA Cosponsor, Senator Jon L. Kyl (“We don’t try to exempt any gun manufacturer for conduct that is in violation of law. ... The bottom line here is that if there really is a problem, that is to say, the conduct is so bad that it is a violation of law, no lawsuit is precluded under our bill in any way.”). Thus, it is the plain language of the statute, along with the legislative history, that controls here – not what Plaintiffs wish that Congress had said, thought, or believed about the PLCAA predicate exception.

In sum, because § 898 is a statute “that clearly can be said to regulate the firearms industry,”

*City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d 384, 402 (2d Cir 2008), this new legislation falls within the predicate exception of PLCAA, at least under certain factual scenarios, as Plaintiffs already readily admit. Opp. at 8. Thus, there is no merit to Plaintiffs’ facial Supremacy Clause or preemption challenges – express or implied. *See Allergan, Inc. v. Athena Cosmetics, Inc.*, 738 F.3d 1350, 1355 (Fed. Cir. 2013) (“there is no implied preemption where simultaneous compliance with state and federal law is possible, and the state law is not an obstacle to the realization of federal goals”).<sup>4</sup>

## POINT II

### PLAINTIFFS’ DORMANT COMMERCE CLAUSE CLAIMS ALSO FAIL

First, Plaintiffs’ Dormant Commerce Clause claims fare no better here because Plaintiffs appear to correctly concede – in opposition to what they alleged in their own Complaint – that § 898 is not facially discriminatory in favor of firearms that are created wholly within New York State – because no such firearms exist. Opp. at 12. In fact, as Attorney General James noted in her opening brief, § 898 applies to all New York gun industry members since at least “one screw, one spring, one small piece of metal, hard plastic, or even one piece of wood on the handle” on or in a firearm – *i.e.*, the “component parts” of a firearm – would have been in interstate commerce at some point in time. *See City of N.Y. v. Beretta U.S.A. Corp.*, 524 F.3d at 394 (recognizing that “the firearms industry is interstate – indeed, international – in nature”). Because of how § 898 was

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<sup>4</sup> In particular, there is no implied preemption here since compliance with state and federal law is possible, and the state law is not an obstacle to the realization of federal goals. PLCAA’s drafters expressed a clear intent to harmonize its provisions with applicable state laws, and codified that intent in the predicate exception. *See, e.g.*, 151 Cong. Rec. 18,922, Remarks of PLCAA Cosponsor, Senator Orrin G. Hatch (PLCAA would not preempt conduct that “would already be a violation of [f]ederal, [s]tate or local law, and therefore would not receive the protection of this law anyway”). This intent is important here because “[t]he case for federal pre-emption is particularly weak where Congress has indicated its awareness of the operation of state law in a field of federal interest, and has nonetheless decided to stand by both concepts and to tolerate whatever tension there [is] between them.” *Wyeth v. Levine*, 555 U.S. 555, 575 (2009).

drafted, then, this means that as far as firearms go, § 898 applies to all New York gun industry members. Again, Plaintiffs seem to concede this obvious point, *see* Opp. at 12, but they simultaneously assert that the same logic does not apply to ammunition (while asserting that such a putative intrastate market would be “small”). Opp at 12 and fn. 6. Yet this is a completely nonsensical argument to make because ammunition is made of metal, lead, tin, brass, and gunpowder. Because these “component parts” of ammunition – even ammunition that is hypothetically made solely within New York State – were once within interstate commerce, there is no facial discrimination claim as related to ammunition caused by § 898. *See, e.g., United States v. Mosby*, 60 F.3d 454 (8th Cir. 1995) (convicted felon was properly found guilty of possessing ammunition cartridges in violation of federal law despite the fact that the ammunition cartridges were manufactured and possessed by the defendant entirely within the State of Minnesota, since the components used to manufacture the cartridges were made from out-of-state components that had traveled through interstate commerce); *see also* 18 U.S.C. § 922(q)(1)(D) (noting that “even before the sale of a firearm, the gun, its component parts, ammunition, and the raw materials from which they are made have considerably moved in interstate commerce”).<sup>5</sup> So there is simply no intrastate ammunition market within New York State for § 898 to benefit. Thus, Plaintiffs’ ammunition argument fails, as does their firearms facial discrimination claim.<sup>6</sup>

Second, in an effort to argue that the practical effect of § 898 is to control commerce outside of New York State’s borders, Plaintiffs deliberately misquote the Attorney General’s opening

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<sup>5</sup> Taken together, these two citations make it clear that such an intrastate ammunition market is not possible, thus, it is simply impossible for New York State to have “incentivized” such a market, as Plaintiffs claim, by the enactment of § 898. Opp. at 13.

<sup>6</sup> The same high standard for a facial challenge applies to the Plaintiffs’ claim under the Dormant Commerce Clause. *See Rosenblatt v. City of Santa Monica*, 940 F.3d 439, 444 (9th Cir. 2019) (“To succeed on her facial challenge under the Dormant Commerce Clause, [plaintiff] must establish that no set of circumstances exists under which [the challenged statute] would be valid.”); *see also United States v. Le*, 902 F.3d 104, 117 n.12 (2d Cir. 2018) (applying facial challenge standard to Commerce Clause argument).

brief, asserting that she conceded more than she really did. Specifically, at page 13 of Plaintiffs’ brief, they assert that the brief “concedes that ‘a statute may be unconstitutional when it regulates commerce that takes place fully outside its borders.’”<sup>7</sup> Opp. at 13 (citing *Healy v. Beer Inst., Inc.*, 491 U.S. 324 (1989)). But that simple (and uncontroversial) quotation came in the context of a fuller discussion explaining that “[t]he mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids.” Opening Brief at 13-14 (quoting *Osborn v. Ozlin*, 310 U.S. 53, 62 (1940)). Indeed, “almost every state and local law – indeed, almost every private transaction – affects interstate commerce.” *National Paint & Coatings Ass’n v. Chicago*, 45 F.3d 1124, 1130-31 (7th Cir. 1995). Accordingly, the Second Circuit has emphasized that “the Commerce Clause’s ban on extraterritorial regulation 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). This is the law that Plaintiffs simply fail to acknowledge.

The Court can and should find that § 898 has “*permissible* extraterritorial effects,” since, as the Supreme Court has held elsewhere, “there is a residuum of power in the state to make laws governing matters of local concern which nevertheless in some measure affect interstate commerce or even, to some extent, regulate it.” *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670

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<sup>7</sup> The Plaintiffs’ major citation in their extraterritoriality attack is to *American Booksellers Foundation v. Dean*, 342 F.3d 96 (2d Cir. 2003), which struck down a Vermont law regarding online sexual material. But that case dealt with the internet communication, which “does not recognize geographic boundaries.” *Id.* at 103. Due to the nature of the internet, “[a] person outside Vermont who posts information on a website ... cannot prevent people in Vermont from accessing the material,” *id.*, meaning that as a practical matter every site on the internet was subject to the Vermont law. In contrast to a law regulating webpages, which are the same everywhere, § 898 is only concerned with dangers to health or safety specifically “in New York State,” and only applies if a gun industry member “knowingly or recklessly create[s], maintain[s], or contribute[s] to” such a condition. N.Y. Gen. Bus. Law § 898-b(1). Unlike the plaintiffs in *American Booksellers*, who could not use the internet without needing to comply with Vermont law, Plaintiffs here can avoid the law entirely by not knowingly or recklessly creating dangerous conditions in New York.

(1981) (quoting *Pacific Co. v. Arizona*, 325 U.S. 761, 767 (1945)). “For example, regulations that touch upon safety are those that the Court has been most reluctant to invalidate.” *Kassel*, 450 U.S. at 670. Such strong safety interests are on display here.

Citing the New York State Legislature’s finding that 74% of the firearms used in crimes in New York are purchased outside of New York, Plaintiffs assert that “[b]urdening interstate commerce is what [§ 898] was *designed* to do.” Opp. at 14 (emphasis in original). But, as *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018) demonstrates, the mere consideration of out-of-state or nationwide activity does not violate the extraterritoriality doctrine. *Id.* at 255-57. Indeed, the statute at issue in *VIZIO* not only required consideration of out-of-state commerce but also imposed in-state charges based on that conduct. Nonetheless, the Second Circuit still found *VIZIO*’s extraterritoriality arguments unavailing. *Id.* This Court should do likewise here with regard to Plaintiffs’ extraterritoriality arguments.

Finally, for the purpose of scrutinizing the Dormant Commerce Clause claim under the *Pike* analysis, the Supreme Court has held, “[a]bsent discrimination,” the statute at issue “will be upheld unless the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Notably, “[s]tate laws frequently survive this *Pike* scrutiny,” as the Supreme Court noted in *Dep’t of Revenue v. Davis*, 553 U.S. 328, 339 (2008); indeed, the *Pike* test is simply “not a high bar.” *Jacoby & Meyers, LLP v. Presiding Justices*, 118 F. Supp. 3d 554, 577 (S.D.N.Y. 2015). And in determining whether § 898 has cleared this bar, it is important to underscore that “[l]egislation pertaining to public health and safety consistently has been recognized as an important local interest.” *Gary D. Peake Excavating v. Town Bd.*, 93 F.3d 68, 76 (2d Cir. 1996). And, as was noted in Defendant’s opening brief, the Supreme Court has often affirmed that the Commerce Clause in no way

“displaces States’ authority to shelter [their] people from menaces to their health or safety.” *Am. Trucking Ass’ns v. Mich. PSC*, 545 U.S. 429, 434 (2005) (internal quotation marks omitted). Because “New York has substantial, indeed compelling, governmental interests in public safety and crime prevention”, *Kachalsky v. Westchester*, 701 F.3d 81, 97 (2d Cir. 2012), § 898 is precisely the type of legislation permitted by the Constitution.

### **POINT III**

#### **SECTION 898 IS NOT UNCONSTITUTIONALLY VAUGE**

As a last point, § 898 is not unconstitutionally vague. As this Court noted, in a civil case the vagueness standard is met “only if [the law] is so vague and indefinite as really to be no rule or standard at all.” *33 Seminary, LLC v. City of Binghamton*, No. 3:11-CV-1300 (MAD/DEP), 2013 U.S. Dist. LEXIS 78627, at \*20 (N.D.N.Y. June 5, 2013) (omits internal citations and quotations). Here, as discussed more fully on pages 20-21 of the Attorney General’s opening brief, the meaning of § 898 is readily ascertainable, key terms are defined, *see* N.Y. Gen. Bus. Law § 898-a, and the statute builds off of New York’s longstanding public nuisance law, which has been on the books for over half a century. Although Plaintiffs pose a series of rhetorical questions that they demand that the Attorney General answer about the application of § 898, *see* Opp. at 20, Plaintiffs get “the rule backwards.” *Copeland v. Vance*, 893 F.3d 101, 113 n.3 (2d Cir. 2018). To the contrary, it is Plaintiffs who must show, under *Salerno*, that the statute is “*invalid* in all its applications.” *Id.* (emphasis in original). Because they have not and cannot do so, that ends Plaintiffs’ vagueness challenge.

### **CONCLUSION**

For the foregoing reasons, the Complaint should be dismissed in its entirety.

Dated: Albany, New York  
March 18, 2022

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