No. 25-1026

In the Supreme Court of the United States

NATIONAL SHOOTING SPORTS FOUNDATION, INC., ET AL.,

Petitioners,

v.

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

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF MONTANA AND 23 OTHER STATES IN SUPPORT OF PETITIONERS

AUSTIN KNUDSEN
Attorney General

CHRISTIAN B. CORRIGAN
Solicitor General
**Counsel of Record*

JOSEPH S. ST. JOHN
Spec. Asst. Solicitor Gen.

MONTANA DEPT. OF JUSTICE
215 N. Sanders Street
Helena, MT 59601
christian.corrigan@mt.gov
(406) 444-2026

Counsel for Amici Curiae

QUESTIONS PRESENTED

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*[1]

For decades, Congress has taken a measured and carefully-calibrated approach to firearms regulation. It sought to balance the public's Second Amendment rights with the need to keep guns away from criminals. Anti-gun activists wanted more. So they turned to the judiciary. Their admitted goal: to circumvent the political branches by turning the courts into regulators via creative legal theories and tenuous chains of causation. Even better, they knew they didn't have to actually win. The threat of a bankrupting judgment was sufficient and – if it wasn't – enough rolls of the dice would land them in front of a judge sharing their creative view of the law.

Congress recognized the public's right to keep and bear arms was all-but-meaningless if firearms manufacturers were put out of business, and further recognized the importance of the firearms industry to the military and law enforcement. So Congress enacted the Protection of Lawful Commerce in Arms Act of 2005, Pub. L. 109-92, 119 Stat. 2095 ("PLCAA").

You might think that would be the end of it. But no. The states have now entered the arena. As the first of several states, New York enacted a law that attempts to circumvent the PLCAA by trying to cram the same creative legal theories into one of the Act's narrow exceptions.

New York General Business Law §§ 898-a to -e purports to empower States and individuals alike to

---

[1] Under Supreme Court Rule 37.2(a), *amici* timely notified counsel of record of their intent to file this brief.

bring public nuisance lawsuits against gun industry members for contributing to a "condition in New York state that endangers the safety or health of the public through the sale, manufacturing, importing or marketing of a qualified product." N.Y. Gen. Bus. Law § 898-b(1). It further requires these members to "establish and utilize reasonable controls and procedures" to prevent the misuse of firearms in New York.

When signing General Business Law §§ 898-a to -e into law, Governor Cuomo admitted the statute was intended to "reinstate the public nuisance liability for gun manufacturers" so as to correct what New York views as the federal mistake of the PLCAA.

Petitioners challenged the law, arguing, in part, that the law is preempted by the PLCAA and violates the Dormant Commerce Clause. The Second Circuit erred by permitting a state to nakedly circumvent PLCAA by simply engrafting firearms-targeted words onto the same type of nuisance theories PLCAA barred. *Nat'l Shooting Sports Found., Inc. v. James*, 144 F.4th 98 (2d Cir. 2025). Its decision is in conflict with decisions by the Ninth Circuit and D.C. Court of Appeals holding that California and D.C. statutes were not predicate statutes and recognizing that a contrary holding would flout the PLCAA. *See Ileto v. Glock*, 565 F.3d 1126, 1135-36 (9th Cir. 2009); *District of Columbia v. Beretta U.S.A. Corp.*, 940 A.2d 163, 169 (D.C. 2008).

The *amici* States file this brief to urge the Court to grant review to stop the Second Circuit's wayward approach from proliferating to other Circuits as more states enact laws similar to the one at issue here. In doing so, *amici* seek to protect their citizens' Second

Amendment rights, as well as the industrial base that equips *amici* States' police and military forces.

SUMMARY OF ARGUMENT

I. Over a period of decades, Congress has carefully balanced the public's Second Amendment rights with the need to keep firearms out of criminals' hands. In the late 1990s, activists who were unhappy with the balance Congress struck turned to the judiciary, concededly attempting to use litigation to circumvent their lack of success in the legislature. The burden of meritless litigation became so large that the firearms industry was threatened. Congress responded by enacting the PLCAA specifically to prevent such circumvention of its carefully-calibrated scheme.

II. This case is but the latest attempt to cram materially identical litigation into one of the PLCAA's narrow exceptions. New York seeks to do so by the artifice of a vague nuisance statute that specifically targets the firearms industry. But just last year this Court rejected such gameplaying in *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025). And as recognized by Judge Jacobs in his concurrence, the Second Circuit endorsing that artifice effectively neuters the PLCAA, contrary to the statute's plain purpose and splitting with the Ninth Circuit and District of Columbia Court of Appeals.

III. The New York statute has the purpose and effect of regulating extraterritorially. Indeed, it subjects firearms sold *anywhere* to New York's jurisdiction, thereby increasing prices everywhere in the country other than New York. The statute thereby transgresses the Dormant Commerce Clause, and New York cannot satisfy strict scrutiny.

REASONS FOR GRANTING THE PETITION

I. The PLCAA is part of a carefully-calibrated regulatory scheme by which Congress has categorically precluded public nuisance liability for the firearms industry.

1. For decades, Congress has carefully balanced the people's Second Amendment rights with the need to keep firearms away from criminals. That careful balancing started with Congress's first foray into firearms regulation in response to the gangland violence of the 1930s. Even in responding to that pressing problem, Congress used a calibrated touch: it concluded heavy taxation of transfers of machineguns, short-barreled shotguns, short-barreled rifles, and silencers—together with the manufacturers, importers, and dealers of those weapons—was enough to achieve its aim. National Firearms Act of 1934, Pub. L. 73-474, 48 Stat. 1236. Congress concluded regulation of pistols, revolvers, and sporting arms was unnecessary. H.R. Rep. 73-1780 at 1. Four years later, Congress adjusted its calibrated view, requiring manufacturers and dealers of any firearms to obtain a license, but imposing little regulation other than record-keeping. Federal Firearms Act of 1938, Pub. L. 75-785, 52 Stat. 1250.

Congress pervasively regulated the firearms industry with the Gun Control Act of 1968, Pub. L. 90-168, 82 Stat. 1213, "the most comprehensive gun control law ever signed in this Nation's history." President Lyndon B. Johnson, Remarks Upon Signing the Gun Control Act of 1968, 2 Pub. Papers 1059, 1059 (Oct. 22, 1968). Still, Congress's touch was measured. It expressly sought to prevent "crime and violence" without "plac[ing] any undue or unnecessary Federal

restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms appropriate to the purpose of hunting, trapshooting, target shooting, personal protection, or any other lawful activity." Anyone "engaged in the business" of manufacturing or dealing in firearms fell within the statute's ambit. 82 Stat. at 1232. But Congress made clear the Act was "not intended to discourage or eliminate the private ownership or use of firearms by law-abiding citizens for lawful purposes." *Id.* at 1213-14.

By the 1980s, Congress concluded the Executive was overreaching in its zeal to regulate transfers of firearms. *See* Senate Subcommittee on the Constitution, *The Right to Keep and Bear Arms* 20-21 (Comm. Print Feb. 1982). Congress responded with the Firearm Owners Protection Act, Pub. L. 99-308, 100 Stat. 449 (1986). As part of that Act, Congress found that "the rights of citizens … to keep and bear arms under the Second Amendment" required "correct[ion] of existing firearms statutes and enforcement policies," and that additional legislation was needed to reaffirm the limited purpose of the Gun Control Act, 100 Stat. at 449 (codified at 18 U.S.C. 921 Note).

Congress continued to adjust its calibrated scheme to provide greater or lesser regulation as it believed necessary. In 1993, for example, Congress required background checks for those purchasing firearms. Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536. But that, too, was tailored: the statute included a waiting period provision that was in effect only until the National Instant Criminal Background Check System could be implemented. *Id.*

at 1536-37. Similarly, Congress enacted a ban on so-called assault weapons, Public Safety and Recreational Firearms Use Protection Act, Pub. L. 103-322 Title XI, 108 Stat. 1796, 1996 (1994), but allowed the ban to sunset when there was no evidence of a statistically significant impact on violent crime, *see, e.g.*, Robert A. Hahn et al, First Reports Evaluating the Effectiveness of Strategies for Preventing Violence: Firearms Laws, 52 RR-14 MMWR 11 (Oct. 3, 2003) ("insufficient evidence"); Lois K. Lee et al, Firearm Laws and Firearm Homicides – A Systematic Review, 177 JAMA Int. Med. 106, 117 (Jan. 2017) ("4 studies … do not provide evidence that the ban was associated with a significant decrease in firearm homicides").

2. Although anti-gun activists had some success with the Brady Bill and the Assault Weapons Ban, they were unhappy with Congress's measured approach. So the activists—often in concert with big city politicians—started filing suits against firearm manufacturers. They made no secret that their strategy was to bankrupt firearms manufacturers through a large volume of litigation asserting novel legal claims.

The first suit was by New Orleans, in 1998. It sought to hold gun manufacturers responsible for police and healthcare expenditures the city alleged were attributable to gun violence. Paul Dugan & Saundra Torry, *New Orleans Initiates Suit Against Gunmakers*, WASHINGTON POST, Oct. 30, 1998. Among other things, New Orleans argued the firearms industry had not invested in technology to make weapons safer. *Id.* "Guns must now become the next tobacco," said Dennis Henigan, a lawyer in the case

who worked for the Washington-based Center to Prevent Handgun Violence. *Id.*

Chicago quickly followed with a suit against 38 retailers, distributors and manufacturers, seeking $433 million in damages. Raad Cawthon, *Chicago Sues Gun-makers*, PHILADELPHIA INQUIRER, Nov. 13, 1998. Mayor Richard Daly explained it was "not a product-liability suit," adding that the "problem is the guns work all too well." *Id.* Chicago instead alleged otherwise lawful sales of firearms created a public nuisance, including by supplying too many firearms to retailers *outside* of Chicago. *Id.* Daly opined that firearms "should not be on the streets, not only in Chicago, but in America." *Id.* The strategy, as Daly put it, was "to hit [the firearms industry] where it hurts, in the wallet." *Id.*

Dozens more cities and politicians piled on. For example, the small city of Bridgeport, Connecticut filed suit in early 1999. Fred Musante, *After Tobacco, Handgun Lawsuits*, NEW YORK TIMES, Jan. 31, 1999, at 1. That suit went so far as to target trade associations for promoting the idea that handgun ownership is an effective means of personal protection. *Id.* Bridgeport's mayor proudly proclaimed he was "creating law with litigation" because other views prevailed in the legislature and "kept [his preferred] laws from being passed." *Id.*

The New Orleans, Chicago, and Bridgeport suits were ultimately rejected by the courts, albeit after years of litigation. *Morial v. Smith & Wesson Corp.*, 785 So. 2d 1 (La. 2001); *City of Chicago v. Beretta U.S.A. Corp.*, 821 N.E.2d. 1099 (Ill. 2004); *Ganim v. Smith & Wesson Corp.*, 780 A.2d 98 (Conn. 2001). But the tidal wave of lawsuits had the desired effect.

Manufacturers were being dropped by their insurers, some closed, and many were drowning in legal bills. Sharon Walsh, *Gun Industry Views Pact as Threat to Its Unity*, WASHINGTON POST, Mar. 17, 2000. A Washington lawyer involved in the city suits stated the obvious: "The legal fees alone are enough to bankrupt the industry." *Id.* HUD Secretary Andrew Cuomo famously told the firearms industry that those who did not fall into line would suffer "death by a thousand cuts." PLCAA: Hr'g Before the Subcomm. on Comm. & Admin. Law of the Comm. on the Judiciary, Ser. No. 109-21 (Mar. 15, 2005) at 30 (statement of Lawrence Keane).

The defense costs were staggering. In early 2005, Congress heard testimony that the firearms industry had spent over $200 million defending against those lawsuits, many of which were carefully drafted to take them "outside liability insurance coverage in order to apply maximum pressure." Ser. No. 109-21 at 30. That was in addition, of course, to the ever-present risk that "[o]ne abusive lawsuit … could destroy a national industry and [effectively] deny citizens nationwide the right to keep and bear arms guaranteed by the Constitution." 151 Cong. Rec. H8993 (Oct. 20, 2005).

3. Congress responded with the Protection of Lawful Commerce in Arms Act, Pub. L. 109-92, 119 Stat. 2095 (2005). The PLCAA's sponsor explained that "[b]ecause the anti-gun community didn't get it their way, they … determined that they could use the legal system, the court system, to bypass and suggest that the third party, or the manufacturer, even though he or she was a law-abiding company and produced under the auspices of the Federal laws in responsible ways in that those products were sold through

federally licensed firearms dealers, that wasn't good enough." 151 Cong. Rec. S9218 (July 28, 2005). "As a result, these legal, law-abiding manufacturers and citizens have increasingly had to pay higher and higher legal costs to defend themselves in lawsuit after lawsuit … largely by municipalities who, obviously frustrated by gun violence in their communities, chose this route." *Id.* "Instead of insisting that their communities and prosecutors and law enforcement go after the criminal element, they … looked for an easy way out." *Id.*

In findings enacted as part of the PLCAA, Congress made specific reference to "[l]awsuits [that] have been commenced against manufacturers, distributors, dealers, and importers of firearms that operate as designed and intended, which seek … relief for the harm caused by the misuse of firearms by third parties, including criminals." 119 Stat. at 2095 (codified at 15 U.S.C. 7901). Congress made clear that it sought to eliminate those lawsuits. It found that the firearms industry is "heavily regulated," firearms businesses "are not, and should not, be liable for the harm caused by those who criminally or unlawfully misuse firearm products … that function as designed and intended," the liability theories underlying those lawsuits were not "a bona fide expansion of the common law," and acceptance of them "by a maverick judicial officer" "would constitute a deprivation of the rights, privileges, and immunities guaranteed to a citizen of the United States under the Fourteenth Amendment." *Id.* at 2095-96. Lest there be any doubt, Congress found that "us[ing] the judicial branch to circumvent the Legislative branch of government to regulate interstate and foreign commerce" raised

grave "separation of powers," "federalism," and "State sovereignty" concerns. *Id.*

Congress accordingly prohibited lawsuits "against a manufacturer or seller of a [firearm], or a trade association, for damages … or other relief, resulting from the criminal or unlawful misuse of a [firearm] by the person or a third party." 119 Stat. at 2096-97 (codified at 15 U.S.C. §§ 7902, 7903). Opponents made clear the breadth of the PLCAA's prohibition:

> Essentially, this bill prohibits any civil liability lawsuit from being filed against the gun industry for damages resulting from the criminal or unlawful misuse of a gun by a third party, with a number of narrow exceptions.
>
> * * * * *
>
> Countless experts have now said that this bill would stop virtually all of the suits against gun dealers and manufacturers filed to date which are based on distribution practice, many of which are vital to changing industry practice ….

109 Cong. Rec. S9070 (July 27, 2005).

4. In *Smith & Wesson Brands, Inc. v. Estados Unidos Mexicanos*, 605 U.S. 280 (2025), this Court recognized the predicate exception must necessarily be construed as limited to prevent that provision from swallowing the rule of the PLCAA. Mexico had filed suit against seven American gun manufacturers, alleging that they aided and abetted unlawful gun sales that provided firearms to Mexican drug cartels, under the theory that the PLCAA's predicate exception provision applied. The Court held that the complaint did not plausibly allege the defendant

manufacturers had aided and abetted gun dealers' unlawful sales of firearms to Mexican traffickers. Merely claiming that the manufacturers had general knowledge that some unidentified dealers routinely violated the law did not meet the aiding-and-abetting pleading standard and thus did not put them within the PLCAA's predicate exception.

The unanimous Court emphasized the PLCAA provides a robust "immunity" that must be vigorously enforced at the motion-to-dismiss stage. 605 U.S. at 299. After all, the "core purpose" of the statute was to "halt a flurry of lawsuits attempting to make gun manufacturers pay for the downstream harms resulting from misuse of their products." *Id.* at 298. Thus, while the statute contains some narrow "exception[s]," courts must be careful not to construe them in "such a capacious way" that they would "swallow most of the rule." *Id.* at 299.

II. The Court Should Grant The Petition To Stop State Laws From Swallowing The Rule of the PLCAA.

You'd think the broad prohibition of the PLCAA—particularly after this Court's interpretation in *Smith & Wesson Brands*— would have ended the politically-motivated suits against the firearms industry. Lower courts did dismiss many of the lawsuits pending in 2005. *See, e.g.*, *Ileto v. Glock, Inc.*, 565 F.3d 1126 (9th Cir. 2009). But state officials hostile to their citizens' Second Amendment rights and anti-gun activists have turned their sights to the state legislative process. New York, along with several other states, enacted laws that attempt to squeeze the same theories

Congress targeted with the PLCAA into the Act's narrow exceptions.

1. The New York law at issue in this case does exactly that. A key provision provides that:

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

N.Y. Gen. Bus. L. §898-b. It then goes on to declare that violations are a public nuisance, authorizes public officials to seek injunctive relief, and creates a private right of action for damages. *Id.* §§898-c, d, e.

The Sponsor Memorandum that accompanied the bill in the legislature made clear it was designed to fall within PLCAA's predicate exception by serving as "a predicate statute that is applicable to the sale or marketing of firearms." Sponsor Mem., 2021 S.B. 7196, 244th Leg., 2021 Reg. Sess. (N.Y. 2021), Indeed, Governor Cuomo announced the statute was intended to "reinstate the public nuisance liability for gun manufacturers" so as to correct what New York views

as the federal mistake of the PLCAA. New York Attorney General Letitia James did, too, saying that New York sought "to right [the] wrong" of PLCAA:

> In 2005, Congress took unprecedented action to usurp states' rights and give gun manufacturers and distributors blanket immunity for gun violence perpetrated as a direct result of their marketing and distribution of firearms. Plain and simple, this was federal overreach to protect the gun industry in every way possible. But, today, New York state took an important step to right that wrong and protect its citizens from gun violence. As the state's attorney and chief law enforcement officer, I look forward to enforcing the Public Nuisance law ….

2. Just as intended, lawsuits against firearms manufacturers started a few months later. *See The City of Buffalo v. Smith & Wesson Brands, Inc., et al*, No. 815602/2022 (N.Y. Sup. Ct.), removed as No. 1:23-cv-66 (W.D.N.Y.), and *The City of Rochester v. Smith & Wesson Brands, Inc., et al*, E2022010581 (N.Y. Sup. Ct.), removed as No. 6:23-cv-6061 (W.D.N.Y.). Those cases—with Everytown, the Brady Center, and an obscure law firm in Puerto Rico representing the plaintiff cities—alleged violations of GBL §898 by gun manufacturers. Not-so-curiously, the original complaints did not seek injunctive relief, only damages. The point isn't to eliminate the nuisance; it's to eliminate the industry.

Similar statutes—and similar lawsuits—are now popping up in other states. *See, e.g.*, *Mayor and City Council of Baltimore*, No. C-24-CV-25-001450 (Md. Cir. Ct.) (seeking to hold Glock liable for selling pistols

that are too easy to unlawfully modify). Almost invariably, the same anti-gun activists act as counsel.

3. A firearms trade association—the National Shooting Sports Foundation—responded with this suit. It sought to head-off the enormous burden of such litigation by seeking to have Section 898 declared preempted. But purportedly applying *City of New York v. Beretta U.S.A. Corp.*, 524 F.3d 384 (2d Cir. 2008), the Second Circuit concluded that "PLCAA's predicate exception encompassed statutes that expressly regulated firearms, statutes that courts have applied to the sale and marketing of firearms, and statutes that do not expressly regulate firearms but that clearly can be said to implicate the sale and purchase of firearms." 144 F.4th at 111.

The Second Circuit thus rendered PLCAA functionless so long as a state legislature incorporates a common law nuisance provision into a statute and adds magic words like "firearm manufacturer." That was a split with the Ninth Circuit and the District of Columbia Court of Appeals, which have rejected such statutory gamesmanship. *See Ileto*, 565 F.3d at 1135-36; *Beretta U.S.A. Corp.*, at 169. It also contravened this Court's rule that "[i]n construing provisions … in which a general statement of policy is qualified by an exception," courts should "read the exception narrowly in order to preserve the primary operation of the provision." *Comm'r v. Clark*, 489 U.S. 726, 739 (1989). Worse, just last year in *Smith & Wesson*, 605 U.S. at 299, this Court made clear that rule applies to PLCAA's predicate exception.

Circuit Judge Jacobs, concurring, correctly rejected the panel's outcome, but he concluded the panel was bound by *Beretta*. "Were I deciding *Beretta* afresh, I

would have concluded that the predicate exception is strictly defined by the examples that Congress provided, and that the exception permits only those measures that are particular to firearms as a product and an industry--not general-purpose nuisance statutes onto which reference to the firearms industry is grafted." 144 F.4th at 121. Under PLCAA as properly construed, "[a] predicate statute … must bear upon firearms more specifically than by mere reference, must give notice of its requirements sufficient to allow compliance with confidence, and must require proximate cause." *Id.* The Court should use this case to clarify that requirement.

III. The Statute Violates the Dormant Commerce Clause

The Second Circuit's ruling is especially troubling because it allows New York to reach beyond its own boundaries and regulate the "controls and procedures" of the firearm industry nationwide, including in the Amici States.

Start with some history. Before they ratified the Constitution, the thirteen colonies freely imposed tariffs and trade restrictions on the goods and services of the other States. "The want of uniformity in the regulations of commerce was a source of perpetual strife and dissatisfaction, of inequality, and rivalries, and retaliations among the states." Joseph Story, 2 *Commentaries on the Constitution* § 1078 (1833). Such trade restrictions sometimes advanced a comparable commercial interest of the belligerent State, but not always. In fact, the history prior to ratification shows that the varied nature of the States' commercial interests created significant turmoil and led the

Framers to empower Congress to regulate interstate and foreign trade through the Commerce Clause.

During the constitutional convention, Pennsylvania delegate George Clymer advocated for the power that became the Commerce Clause by observing that "[t]he diversity of commercial interests, of necessity creates difficulties, which ought not be increased by unnecessary restrictions." 2 *The Records of the Federal Convention of 1787*, at 449 (Max Farrand ed., 1937). The difficulties largely took the form of excessive taxes or import duties on goods that originated from outside a State's borders. Unchecked, this system created "bur[d]ens which might be imposed by some of the states, on others, whose exports, and imports must necessarily pass through them." St. George Tucker, *Blackstone's Commentaries: With Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia* 248–54 (1803).

To address this problem, the Framers lodged the power to regulate interstate commerce with the new federal government. *See* U.S. Const. art. I, § 8, cl. 3. "A very material object of this power was the relief of the States which import and export through other States, from the improper contributions levied on them by the latter." The Federalist No. 42, at 264 (James Madison) (Charles Kessler ed., 1961).

Besides an affirmative grant of power to the federal government, the Commerce Clause "was intended as a negative and preventive provision against injustice among the States themselves …." 3 *The Records of the Federal Convention of 1787*, at 478 (M. Farrand ed. 1911) (reprinting letter from James Madison to J.C.

Cabell, Feb. 13, 1829). This aspect of the Commerce Clause is referred to as the Dormant Commerce Clause, and it restricts states' enforcement of laws that discriminate against or unreasonably burden commerce with other states.

A statute violates the Dormant Commerce Clause if it (1) "clearly discriminates against interstate commerce in favor of intrastate commerce"; (2) "imposes a burden on interstate commerce incommensurate with the local benefits secured"; or (3) "has the practical effect of extraterritorial control of commerce occurring entirely outside the boundaries of the state in question." *Selevan v. New York Thruway Auth.*, 584 F.3d 82, 90 (2d Cir. 2009). The New York law does all three.

The Second Circuit disagreed. The court determined that the statute does not run afoul of the Dormant Commerce Clause because the law treats interstate and intrastate commerce the 144 F.4th at 114. And because there are no "wholly intrastate gun industry members," and no clear evidence regarding the economic benefits and burdens, the statute survived the *Pike* balancing test. *Id.* at 115–16. Of particular concern to the States, the court also determined that, at least in the present facial-challenge posture, the statute does not directly, or as a practical matter, controls commerce outside of New York. *Id.* at 116–17.

The Second Circuit's decision blinds itself to the statute's extraterritorial regulation of commerce. The Commerce Clause "reflect[s]" the Constitution's special concern both with the maintenance of a national economic union unfettered by state-imposed limitations on interstate commerce and with the

autonomy of the individual States within their respective spheres." *Healy v. Beer Inst.*, 491 U.S. 324, 335–36 (1989). The statute violates the text and mandate of this Clause.

A. Section 898 controls commerce outside of New York.

New York's law controls commerce outside of New York. *See Healy*, 491 U.S. at 336. The law imposes a requirement that gun industry members everywhere establish and utilize reasonable controls and procedures to prevent misuse of firearms in New York. Failure to do so subjects gun industry members to liability. The law, though, only applies to makers and sellers outside of New York. This regulation, therefore, applies "wholly outside of the State's borders," applying to every product that is from out of State and that has moved in State. *Id.* at 336. In addition, the practical effect forces out-of-state makers and sellers to comply with New York's law. *Id.*; *see also Am. Booksellers Found. v. Dean*, 342 F.3d 96 (2d Cir. 2003) (Dormant Commerce Clause "protects against inconsistent legislation arising from the project of one state regulatory regime into the jurisdiction of another State"). Finally, if other States adopt similar laws, the effect would be to force gun manufacturers and sellers to comply with the laws of the State with the strictest liability requirement. This is precisely the patchwork regulatory system that the Dormant Commerce Clause protects against. *Healy*, 491 U.S. at 336. Because New York's law has the practical effect of burdening interstate sales of firearms and component parts, it violates the Dormant Commerce Clause.

The New York law also has the practical effect of discriminating against firearms industry members. First and foremost, the law raises the cost of doing business everywhere except New York. Every maker or seller of firearms must not only be knowledgeable about compliance requirements in its home State, but it also must ensure that it meets New York's standard for establishing and utilizing "reasonable controls and procedures." Failure to meet this standard results in liability. And it is this threat—the threat of increased liability—that raises the cost of doing business for the 97% of the federal firearms licensees in 49 other States.

The law additionally discriminates against out-of-state firearms industry members by effectively forcing these members to cease doing business entirely. Because the law only applies to products in interstate commerce, not intrastate commerce, only out-of-state merchants are subject to this increased liability. And these out-of-state merchants are in a position least able to control the actions of third parties misusing or illegally using firearms in New York. Thus, even if the out-of-state manufacturers and sellers adopt reasonable controls and procedures, they cannot guarantee compliance with the law as individuals could still illegally use or possess these firearms in New York. The only way to avoid liability, then, is for these manufacturers and sellers to halt all operations altogether. And that's of course the point. The New York law expressly and impliedly disadvantages out-of-state gun industry members.

B. New York can't satisfy strict scrutiny.

Because Section 898 has the practical effect of controlling commerce and discriminates against gun industry members located in the 49 other States, the burden is on New York to justify the law "both in terms of the local benefits flowing from the statute and the unavailability of nondiscriminatory alternatives." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 353 (1977); *see also Wyoming v. Oklahoma*, 502 U.S. 437, 456-57 (1992); *Maine v. Taylor*, 477 U.S. 131 (1986). Even if New York is not engaging in explicit economic protectionism, its law still runs afoul of the Commerce Clause's negative implications if it fails to survive this scrutiny. Put another way, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981).

In *Maine v. Taylor*, for example, the Supreme Court considered Maine's ban on the importation of live bait fish into its State. The Supreme Court considered both the local purpose of the law and whether other nondiscriminatory means were available to serve this purpose. 477 U.S. at 140. Because the Supreme Court determined that no less restrictive means were available, the Court upheld the ban. By comparison, the Supreme Court applied a similar framework in *Wyoming v. Oklahoma*, but it enjoined an Oklahoma law requiring ten percent of electric utilities' coal purchases to be from Oklahoma coal sources. 502 U.S. at 457. The Supreme Court determined that because the law discriminated both on its face and in practical effect, Oklahoma had to justify its laws under the standard set forth in *Hunt* and applied in *Taylor*. The

Court determined that Oklahoma failed to provide a sufficient local purpose such that the law was necessary. *Id.* The Court, therefore, enjoined Oklahoma's law. *Id.*

Under the framework set forth in *Hunt*, the New York statute fails to survive constitutional muster. New York passed the law for the purpose of "protect[ing] its citizens from gun violence." Attorney General James' Statement on New Law That Allows NYS to Hold Gun Manufacturers Responsible for Gun Violence (July 6, 2021), *available at* https://ag.ny.gov/press-release/2021/attorney-general-james-statementnew-law-allows-nys-hold-gun-manufacturers. But this general concern for public health and safety does not save New York's far-reaching law. *See Kassel*, 450 U.S. at 670. New York must put forth affirmative evidence about the local benefits this law addresses—benefits beyond just sweeping policy preferences—as well as an explanation for why nothing short of regulating firearm commerce in all 49 other States will achieve this goal. The Court should make clear that laws like Section 898 cannot meet this burden.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted.

AUSTIN KNUDSEN
Attorney General
CHRISTIAN B. CORRIGAN
Solicitor General
Counsel of Record

JOSEPH S. ST. JOHN
Spec. Asst. Solicitor Gen.

MONTANA DEPARTMENT OF JUSTICE
215 North Sanders Street
Helena, MT 59601
(406) 444-2026
Christian.Corrigan@mt.gov

Counsel for Amici Curiae

AUTHORIZED LAW OFFICERS OF THE AMICI

STEVE MARSHALL
Attorney General of Alabama

STEPHEN J. COX
Attorney General of Alaska

TIM GRIFFIN
Attorney General of Arkansas

JAMES UTHMEIER
Attorney General of Florida

CHRISTOPHER M. CARR
Attorney General of Georgia

THEODORE E. ROKITA
Attorney General of Indiana

BRENNA BIRD
Attorney General of Iowa

KRIS W. KOBACH
Attorney General of Kansas

RUSSELL COLEMAN
Attorney General of Kentucky

LIZ MURRILL
Attorney General of Louisiana

LYNN FITCH
Attorney General of Mississippi

CATHERINE L. HANAWAY
Attorney General of Missouri

MICHAEL T. HILGERS
Attorney General of Nebraska

DREW H. WRIGLEY
Attorney General of North Dakota

GENTNER F. DRUMMOND
Attorney General of Oklahoma

ALAN WILSON
Attorney General of South Carolina

MARTY J. JACKLEY
Attorney General of South Dakota

JONATHAN SKRMETTI
Attorney General of Tennessee

KEN PAXTON
Attorney General of Texas

DEREK BROWN
Attorney General of Utah

JOHN B. MCCUSKEY
Attorney General of West Virginia

KEITH G. KAUTZ
Attorney General of Wyoming

JOHN M. FORMELLA
Attorney General of New Hampshire