22-1374

In the United States Court of Appeals for the Second Circuit

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

Plaintiffs-Appellants,

v.

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

Defendant-Appellee.

On Appeal from the United States District Court for the Northern District of New York, No. 21-cv-1348

BRIEF OF CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amicus curiae* states that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

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INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC has a strong interest in ensuring that the Constitution is interpreted in a manner consistent with its text and history and accordingly has an interest in this case.

INTRODUCTION

With the collapse of the American economy in the wake of the Revolutionary War, the states quickly became embroiled in a new kind of warfare, each seeking "to legislate according to its estimate of its own interests, the importance of its own products, and the local advantages or disadvantages of its position in a political or commercial view." 1 Joseph Story, *Commentaries on the Constitution of the United States* 240 (1833). The Framers feared that this sort of state economic protectionism would be the downfall of the political union, and the Commerce Clause was their response.

[1] *Amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution to the brief's preparation or submission. Counsel for all parties have consented to the filing of this brief.

Yet "[t]he desire of the Forefathers to federalize regulation of foreign and interstate commerce stands in sharp contrast to their jealous preservation of power over their internal affairs." *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 533-34 (1949). Thus, the Framers did not adopt the Commerce Clause to exempt businesses from local regulation or to usurp the core "power of the State to shelter its people from menaces to their health or safety and from fraud, even when those dangers emanate from interstate commerce." *Id.* at 533.

Faithful to this original understanding, both the Supreme Court's and this Court's decisions addressing state laws that affect interstate commerce have long focused on averting protectionist legislation that discriminates against products and citizens of other states—a task that gives the judiciary an important but narrow role. Appellants' effort to expand that role and obtain immunity from a run-of-the-mill nuisance law designed to protect the health and safety of New York residents is at odds with history and precedent. It should be rejected.

In July 2021, based on its findings that the illegal use of firearms "contribute[s] to the public health crisis of gun violence in this state," 2021 N.Y. Sess. Laws, ch. 237, § 1, New York enacted Section 898, codifying a cause of action in nuisance to hold certain "gun industry members" liable for "knowingly or recklessly creat[ing], maintain[ing], or contribut[ing] to a condition in New York state that endangers the safety or health of the public through the sale,

manufacturing, importing or marketing" of firearms or ammunition, N.Y. Gen. Bus. Law § 898-b(1). The law also requires gun businesses to "establish and utilize reasonable controls and procedures" to prevent their products "from being possessed, used, marketed or sold unlawfully in New York state." *Id.* § 898-b(2). In simple terms, Section 898 requires gun businesses to take steps to ensure that their products do not end up in the wrong hands and thereby threaten the well-being of New Yorkers. *Id.* § 898-b(1), (2). If they fail to do so, they are subject to civil prosecution or private suit. *Id.* §§ 898-c, 898-d.

Section 898 treats gun industry members even-handedly based on their conduct, not their location. It does not put New York in competition with any other state because it does not discriminate against other states' commerce or favor local economic interests. Rather than incentivize the creation of a wholly New York–based gun market, as Appellants assert, the law equalizes the playing field and makes all gun industry members subject to the same potential liability for creating a public nuisance in New York. In fact, the law may ultimately drive guns *out* of New York, potentially at a loss to the state's economy, based on the New York legislature's considered judgment that the law's health and safety benefits are worth that cost. Nothing in the text or history of the Commerce Clause gives this Court the authority to second-guess that policy choice at the behest of industry players who simply want to avoid enhanced operational costs.

As noted above, the Commerce Clause was a response to "state tariff[s]," which the Framers viewed as a "quintessential evil." *Comptroller of Treas. of Md. v. Wynne*, 575 U.S. 542, 545 (2015). Under the Articles of Confederation, each state set its own commercial policies, and "selfish motives frequently dictated what was done." Max Farrand, *The Framing of the Constitution of the United States* 7 (1913). "The competitions of commerce" risked inducing the states "to make war upon each other." *Federalist No. 7*, at 62, 60 (Clinton Rossiter ed., 1961) (Hamilton). But where such danger was absent, there is no evidence that any of the Framers—including those who regarded the federal government's new commercial powers as exclusive—understood the Commerce Clause to empower courts to strike down state laws simply because they imposed costs on out-of-state businesses.

In keeping with the original understanding of the Clause, the Supreme Court's dormant Commerce Clause precedents consistently have focused on curbing economic protectionism. The Court's early decisions exclusively struck down laws that targeted out-of-state goods or vessels because of their foreign origins, or gave preference to local industry. Meanwhile, laws affecting commerce even-handedly were upheld. Invoking the Clause's history, the Court repeatedly emphasized the pivotal role of protectionism in distinguishing valid from invalid laws, prohibiting "any discrimination in enacting commercial or revenue regulations." *Ward v. Maryland*, 79 U.S. 418, 431 (1870).

Although dormant Commerce Clause jurisprudence underwent a split in the late nineteenth century, with one branch attempting to scrutinize non-protectionist state laws for the first time, the Court subsequently restored its exclusive focus on protectionism—and that has been the law for nearly a century now. Even in cases purporting to rely on the balancing test from *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), or on analysis of a law's extraterritorial effects, the presence or absence of economic protectionism has played the decisive role in determining which laws are valid. Indeed, the only cases in which the Supreme Court has overturned non-protectionist limits on commerce involve a uniquely problematic type of restriction that is, in many ways, analogous to economic protectionism: barriers to the interstate movement of vehicles transporting goods.

This Court has largely followed suit, with one unique exception: striking down a statute criminalizing online dissemination of material harmful to minors based on the premise that this behavior is not susceptible to limitation to a single state. *See Am. Booksellers Found. v. Dean*, 342 F.3d 96, 104-05 (2d Cir. 2003). But since *American Booksellers*, this Court has repeatedly declined invitations to extend that case's narrow holding.

Section 898, of course, does not involve regulation of internet behavior. It is not remotely protectionist, and it does not impede the transportation of goods through the states. Because the law creates no economic rivalries, it poses no risk

of causing the "jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 (1994). In short, Section 898 is not the sort of law that treads upon congressional authority over interstate commerce. This Court should affirm.

ARGUMENT

I. The Commerce Clause Was the Framers' Response to State Economic Protectionism, Which Threatens the Political Union.

A. After the Revolutionary War, Americans confronted a deep economic depression and severe trade imbalance. "At the same time, Britain restricted American merchants' ability to trade with Britain and with its colonies." Barry Friedman & Daniel T. Deacon, *A Course Unbroken: The Constitutional Legitimacy of the Dormant Commerce Clause*, 97 Va. L. Rev. 1877, 1887 (2011). "France and Spain soon followed suit," Michael J. Klarman, *The Framers' Coup: The Making of the United States Constitution* 21 (2016), and "American trade suffered severe losses," Curtis P. Nettels, *The Emergence of a National Economy, 1775-1815*, at 55 (1962). Because Congress lacked the power to regulate commerce, the states were "unable to adopt a uniform response." Friedman & Deacon, *supra*, at 1887. Instead, "[s]tates tried to respond on their own," levying taxes and fees on foreign goods and vessels. Klarman, *supra*, at 22. But these efforts "lacked any coordination," Brannon P. Denning, *Confederation-Era Discrimination Against Interstate Commerce and the Legitimacy of the Dormant Commerce Clause Doctrine*, 94 Ky.

L.J. 37, 46 (2005), and were easily evaded by an "end run through a neighboring state," Calvin H. Johnson, *The Panda's Thumb: The Modest and Mercantilist Original Meaning of the Commerce Clause*, 13 Wm. & Mary Bill Rts. J. 1, 23 (2004).

Worse, the states' individual policies were "pursued with surreptitious views against each other." Letter from Edmund Carrington to Edmund Randolph (Apr. 2, 1787), *in* 4 *Calendar of Virginia State Papers* 264 (William P. Palmer ed., 1884). When states with superior ports tried to raise tax rates on foreign imports, their neighbors "responded by establishing free ports," Klarman, *supra*, at 23, "undercutting the tax rates to channel commerce in [their own] direction," Johnson, *supra*, at 14.

As tensions rose, states began engaging in "overt discrimination," enacting "imposts and tariffs specifically targeting goods coming from a particular state." Denning, *supra*, at 48. Thus, "Connecticut taxed foreign goods from Massachusetts," and New York "put special duties on foreign goods imported" from its neighbors. Nettels, *supra*, at 72. Rhode Island merchants "believed they were virtually barred from trade with Massachusetts and New York because of prohibitively high state duties." Cathy D. Matson & Peter S. Onuf, *A Union of Interests: Political and Economic Thought in Revolutionary America* 73 (1990). In short, "interstate rivalries" and "the hostile competition for relative advantage" had

"made Americans foreigners to one another." *Id.* at 76, 50-51. As Fisher Ames put it, the states' commercial disputes were "fermenting into civil war." *The Republican No. VI*, Conn. Courant (Mar. 19, 1787).

The most notorious example was an imbroglio between New York and its neighbors that exemplified the dangers of tit-for-tat retaliation. To combat British trade restrictions, New York placed heavy imposts on British goods arriving at its ports. Connecticut and New Jersey "were outraged," Johnson, *supra*, at 12, and reacted by establishing duty-free ports, undercutting New York by diverting trade toward themselves. In response, New York taxed foreign goods imported from its neighbors and imposed port fees and tonnage charges on their vessels. New Jersey then began taxing the New York–owned lighthouse at Sandy Hook, and Connecticut resolved to halt trade with New York and ban its ships for a year. *See* Friedman & Deacon, *supra*, at 1889. Nathaniel Gorham said it was only "the restraining hand of Congress (weak as it is) that prevents New Jersey and Connecticut from entering the lists very seriously with New York and bloodshed would very quickly be the consequence." Letter to James Warren (Mar. 6, 1786), *quoted in* Klarman, *supra*, at 24.

It was this "warfare & retaliation among the States," Letter from James Madison to Thomas Jefferson (Aug. 12, 1786), https://founders.archives.gov/documents/Madison/01-09-02-0026, that the Framers

denounced as the "interfering and unneighborly regulations of some States, contrary to the true spirit of the Union," *Federalist No. 22*, *supra*, at 144 (Hamilton); *see id.* at 145 (making clear that Hamilton was referring to the "duties" levied by states "upon the merchandises passing through their territories"). State protectionism, because of the "retaliating" measures it provoked, was inherently "destructive of the general harmony." James Madison, *Vices of the Political System of the United States* ¶ 4 (Apr. 1787), https://founders.archives.gov/documents/Madison/01-09-02-0187.

B. By the mid-1780s, many statesmen "believed interstate discrimination to be an extremely serious problem meriting a profound response." Friedman & Deacon, *supra*, at 1890. Accordingly, Virginia organized an interstate conference to discuss the union's commercial defects. Farrand, *supra*, at 8. This conference "culminated in a call for the Philadelphia Convention that framed the Constitution." *Tenn. Wine & Spirits Retailers Ass'n v. Thomas*, 139 S. Ct. 2449, 2460 (2019).

In Philadelphia, the Commerce Clause was adopted "unanimously, and without debate." Denning, *supra*, at 82; *see* 2 *The Records of the Federal Convention of 1787*, at 308 (Max Farrand ed., 1911). There was "nearly universal agreement that the federal government should be given the power of regulating commerce." Albert S. Abel, *The Commerce Clause in the Constitutional Convention and in Contemporary Comment*, 25 Minn. L. Rev. 432, 443-44 (1941).

Discussion of interstate commerce at the Constitutional Convention focused on the need to eliminate "discriminatory state laws," which "posed a continuing threat to the Union." Friedman & Deacon, *supra*, at 1908. Madison touted the "removal of the existing & injurious retaliations among the States." 2 *Farrand's Records* 451-52. Gouverneur Morris warned that without federal power over commerce, "the exporting States will [continue to] tax the produce of their uncommercial neighbors." 2 *id.* 360. Roger Sherman described "the power to regulate trade between the states" as guarding against the "oppression of the uncommercial States." 2 *id.* 308. Without exception, therefore, the federal power to "regulate Commerce . . . among the several States," U.S. Const. art. I, § 8, cl. 3, was described as a means of eliminating state laws that were protectionist and "partial," Abel, *supra*, at 471.

II. The Supreme Court's Dormant Commerce Clause Precedents Consistently Have Focused on Combatting Protectionism, and This Court Has Followed Suit.

A. An early question confronting the Supreme Court was whether the Commerce Clause vests exclusive authority in Congress and, if so, what role the courts should play in restraining state attempts to exercise that power. Although these topics were not discussed at length when the Constitution was adopted, some Framers suggested that the Clause would "exclude" state regulation of commerce by its own force, without congressional legislation, *see* 2 *Farrand's Records* 625

(James Madison), while others said federal and state authority would be "concurrent," *id.* (Roger Sherman). In an influential passage, which the Supreme Court later would endorse, Hamilton maintained that federal power was exclusive by implication only where "a similar authority in the States would be absolutely and totally *contradictory* and *repugnant*." *Federalist No. 32*, *supra*, at 198-99. Hamilton emphasized the narrowness of this category: state laws did not offend the Constitution whenever "the exercise of a concurrent jurisdiction might be productive of occasional interferences in the *policy* of any branch of administration," but only where federal power "must necessarily" be exclusive. *Id.*

Although the Supreme Court's earliest cases did not resolve the exclusivity question, *e.g.*, *Gibbons v. Ogden*, 22 U.S. 1, 210-11 (1824), what they *did* establish is that states may exercise their police powers in ways that significantly affect interstate commerce. Chief Justice Marshall cited "[i]nspection laws, quarantine laws, [and] health laws of every description" as examples of "that immense mass of legislation, which embraces every thing within the territory of a State, not surrendered to the general government." *Id.* at 203. Indeed, the very decision that gave name to the dormant Commerce Clause, *Willson v. Black-Bird Creek Marsh Co.*, 27 U.S. 245 (1829), held that measures calculated to enhance the value of local property or "the health of the inhabitants" are "undoubtedly within those which are reserved to the states." *Id.* at 251. As the Court later elaborated, the Commerce

Clause "was not a surrender" of the states' police power, which covers efforts to secure "domestic order, morals, health, and safety," including through "the adoption of precautionary measures against social evils." *Hannibal & St. J.R. Co. v. Husen*, 95 U.S. 465, 470-71 (1877) (quotation marks omitted).

Ultimately, the Supreme Court also recognized that Congress's power to regulate interstate commerce left ample room for the states to regulate it as well. Invoking Hamilton's *Federalist No. 32*, the Court denied that the commerce power "is absolutely and totally repugnant to the existence of similar power in the states." *Cooley v. Bd. of Wardens of Port of Phila.*, 53 U.S. 299, 318 (1851). Instead, only subjects that are inherently "national, or admit only of one uniform system," were off-limits. *Id.* at 319.

The principle of averting state protectionism was implicit in early Supreme Court decisions, and over time became increasingly explicit. Every law struck down targeted out-of-state goods or traffic by virtue of their foreign origin, or gave preference to local industry. *E.g.*, *Gibbons*, 22 U.S. at 221; *Smith v. Turner*, 48 U.S. 283, 392 (1849); *Brown v. Maryland*, 25 U.S. 419, 448 (1827); *Steamship Co. v. Portwardens*, 73 U.S. 31, 33 (1867). Meanwhile, laws affecting commerce even-handedly were upheld. *E.g.*, *Black-Bird*, 27 U.S. at 252; *Thurlow v. Massachusetts*, 46 U.S. 504, 595 (1847); *Cooley*, 53 U.S. at 320; *Gilman v. City of Philadelphia*, 70 U.S. 713, 732 (1865).

Increasingly, the Court highlighted the pivotal role of protectionism in distinguishing valid from invalid laws. While taxes that applied only to out-of-state goods violated the Commerce Clause, taxes making "no attempt to discriminate injuriously against the products of other States" were valid. *Woodruff v. Parham*, 75 U.S. 123, 139-40 (1868). To uphold laws "discriminating adversely" against other states would cause "a total abolition of all commercial intercourse between the States." *Hinson v. Lott*, 75 U.S. 148, 152 (1868). Such laws therefore triggered a need for national uniformity, *id.*, and states could not "make any discrimination in enacting commercial or revenue regulations," *Ward*, 79 U.S. at 431.

B. In the late nineteenth century, the Court's "previously unitary" dormant Commerce Clause doctrine "split into separate branches," Norman R. Williams, *The Commerce Clause and the Myth of Dual Federalism*, 54 UCLA L. Rev. 1847, 1864 (2007), addressing "two distinct principles," *Tenn. Wine*, 139 S. Ct. at 2464 (quotation marks omitted).

The more enduring branch continued targeting protectionist laws, focusing on "enactments discriminating against the products and citizens of other states," *Minnesota v. Barber*, 136 U.S. 313, 325 (1890). These cases recognized that the aim of the Commerce Clause was "to protect the products of other States and countries from discrimination by reason of their foreign origin." *Guy v. City of Baltimore*, 100 U.S. 434, 443 (1879). The rule was straightforward and modest in

scope: measures "operating to the disadvantage of the products of other states," *Brimmer v. Rebman*, 138 U.S. 78, 82 (1891) (quoting *Walling v. Michigan*, 116 U.S. 446, 455 (1886)), or attempting "to discriminate unfavorably" against them, were "forbidden," *Cook v. Pennsylvania*, 97 U.S. 566, 573 (1878).

The Court continued to stress, however, that the "police power of the state" could be used in a non-protectionist fashion to safeguard "health, peace, and morals." *Bowman v. Chicago & Nw. Ry. Co.*, 125 U.S. 465, 494 (1888). "In the exercise of its police powers," a state could prohibit the sale "of any articles" that were "prejudicial to the health . . . of its people." *Guy*, 100 U.S. at 443.

C. The other branch of the doctrine that developed in this period involved a fruitless quest to identify a justifiable basis for striking down non-protectionist laws. This "more problematic" branch, Williams, *supra*, at 1869, produced only a confused and inconsistent body of decisions.

It began with the *Cooley* test, which sought to distinguish between national and local subjects. That test, however, proved unsatisfactory, as "everything depended on how the relevant 'subject' was defined," and the Court was prone "to define it inconsistently and without explanation." David P. Currie, *The Constitution in the Supreme Court, 1789-1888*, at 339 (1985).

The Court gradually replaced *Cooley* with an attempt to distinguish between laws that burdened interstate commerce "directly" or only "indirectly," but this "arid

distinction" also provided "very little coherent, trustworthy guidance," *Wynne*, 575 U.S. at 552 (quotation marks omitted), as it "offered so little of a criterion for determining on which side a case would fall," Noel T. Dowling, *Interstate Commerce and State Power*, 27 Va. L. Rev. 1, 6 (1940); *see Shafer v. Farmers' Grain Co.*, 268 U.S. 189, 199 (1925) (recognizing that the Court's decisions "have not been in full accord").

Acknowledging the criticisms of its non-protectionism line of dormant Commerce Clause cases, in the New Deal era, the Supreme Court once again changed the standards it would (ostensibly) use to evaluate state laws. The Court declared that henceforth it would perform its role as "the final arbiter of the competing demands of state and national interests" through an "appraisal and accommodation" of those competing demands. *S. Pac. Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 769 (1945). The Court would judge the "relative weights" of the state and national interests and decide which should yield. *Id.* at 770.

But in reality, the Court never assumed that role. Instead, by the time of *Pike*, the Court had clarified that state enactments are presumptively valid, 397 U.S. at 142, and under that deferential standard nearly all measures have survived, *see Dep't of Revenue of Ky. v. Davis*, 553 U.S. 328, 339 (2008). Thus, the "modern law" of the dormant Commerce Clause continues to be "driven by concern about economic

protectionism." *Id.* at 337 (quotation marks omitted). That has been true even in those cases that are sometimes described as exemplifying a "balancing" approach.

In *Pike* itself, where a state required certain fruit to be packaged at in-state facilities, the law's goal was "to protect and enhance the reputation of growers within the State," and its method of achieving that goal contravened a longstanding prohibition on "requiring business operations to be performed in the home State that could more efficiently be performed elsewhere." 397 U.S. at 143, 145. In *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951), the law "erect[ed] an economic barrier protecting a major local industry against competition," thus "plainly discriminat[ing] against interstate commerce." *Id.* at 349. In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333 (1977), the law "shield[ed] the local apple industry from the competition of Washington apple growers and dealers," offering "the very sort of protection against competing out-of-state products that the Commerce Clause was designed to prohibit." *Id.* at 351-52.

To the extent that "balancing" occurred in these cases, it was not to weigh the value of nondiscriminatory laws against national interests. Rather, in deference to state prerogatives, it held out the possibility of upholding even *discriminatory* state laws if "the State ha[d] no other means to advance a legitimate local purpose," *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 338-39 (2007), or if the local interests promoted were sufficiently robust, *e.g.*,

Pike, 397 U.S. at 146 (despite its discriminatory nature, the law "could perhaps be tolerated if a more compelling state interest were involved").

D. The decisive role of protectionism in modern precedent is especially obvious in the cases on which Appellants rely involving laws with extraterritorial effects. "[I]n each of these cases," the Supreme Court "simply found that the law at issue created a discriminatory trade barrier." John E. Nowak & Ronald D. Rotunda, *Constitutional Law* 345 (8th ed. 2010).

The price regulation in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935), "promote[d] the economic welfare of [New York] farmers" by "guard[ing] them against competition with the cheaper prices of Vermont." *Id.* at 522; *see City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978) (*Baldwin* was about "simple economic protectionism"). Appellants make much of the fact that the law at issue in *Baldwin* was "all about product safety," Br. 46, but the Court in *Baldwin* ultimately concluded that the real purpose and effect of the law was to secure the economic welfare of local producers at the expense of those from other states, *i.e.*, to "neutralize advantages belonging to the place of origin," 294 U.S. at 527.

Similarly, the price regulation in *Brown-Forman Distillers Corp. v. New York State Liquor Authority*, 476 U.S. 573 (1986), was a form of "[e]conomic protectionism" that benefitted "local consumers" by "insist[ing] that producers or consumers in other States surrender [their] competitive advantages." *Id.* at 580. And

the price regulation in *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989), was "essentially indistinguishable," and, "on its face," imposed "patent discrimination" against interstate brewers. *Id.* at 339-41.

The only set of cases in which the Supreme Court has overturned non-protectionist restrictions on commerce involves a special topic: interstate transit. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 30 (1959) ("the interstate movement of trucks"); *S. Pac. Co.*, 325 U.S. at 779 ("the interstate movement of trains"). These cases address situations in which a state "prescribe[s] standards for interstate carriers" that may "conflict with the standards of another State, making it necessary, say, for an interstate carrier to shift its cargo to differently designed vehicles" when crossing state lines, *Bibb*, 359 U.S. at 526. Like protectionism, restrictions on the ability "to move commodities through the State," *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 667 (1981), may pose a unique threat to economic union, for if every state could "place a great burden of delay and inconvenience on [vehicles] crossing its territory," *Bibb*, 359 U.S. at 529-30, their cumulative impact could make multi-state trips untenable, *S. Pac. Co.*, 325 U.S. at 774.

E. Following the Supreme Court's lead, in case after case, this Court has emphasized that "the central rationale for the dormant Commerce Clause is to prohibit state or municipal laws whose object is local economic protectionism."

Janes v. Triborough Bridge & Tunnel Auth., 774 F.3d 1052, 1055 (2d Cir. 2014) (quotation marks omitted); *see, e.g.*, *Selevan v. N.Y. Thruway Auth.*, 711 F.3d 253, 254 n.1 (2d Cir. 2013) ("[T]he dormant Commerce Clause . . . is driven by concern about economic protectionism." (quotation marks omitted)). This focus on protectionism persists even in cases in which parties have advanced arguments premised on *Pike* balancing or concerns about extraterritorial effects.

Take, for example, two cases that are representative of this Court's approach: *Freedom Holdings, Inc. v. Spitzer*, 357 F.3d 205 (2d Cir. 2004), and *VIZIO, Inc. v. Klee*, 886 F.3d 249 (2d Cir. 2018). In *Freedom Holdings*, this Court rejected a *Pike* claim because the plaintiff could not "identify any in-state commercial interest that [was] favored, directly or indirectly . . . at the expense of out-of-state competitors." 357 F.3d at 218. Similarly, in *VIZIO*, this Court used the *Pike* framework to reject a challenge to Connecticut's electronic device recycling program, explaining that the framework is "directed at differentiating 'protectionist measures' from those that 'can fairly be viewed as . . . directed to legitimate local concerns, with effects upon interstate commerce that are only incidental.'" 886 F.3d at 259 (quoting *Philadelphia*, 437 U.S. at 624). Thus, because the plaintiff company could not "at least demonstrate that the 'burden on interstate commerce . . . [was] qualitatively or quantitatively different from that imposed on intrastate commerce,'" *id.* at 259

(quoting *Town of Southold v. Town of East Hampton*, 477 F.3d 38, 50 (2d Cir. 2007)), "VIZIO [could] not state a claim under *Pike*," *id.* at 260.

Both *Freedom Holdings* and *VIZIO* also involved claims that the laws at issue had impermissible extraterritorial effects. But as this Court explained in *VIZIO*, "[w]hen assessing a plaintiff's extraterritoriality theory, we focus squarely on whether the state law has 'the practical effect of *requiring* out-of-state commerce to be conducted at the regulating state's direction.'" *Id.* at 255 (emphasis in original) (quoting *SPGGC, LLC v. Blumenthal*, 505 F.3d 183, 193 (2d Cir. 2007)). Where neither statute "inescapably require[d] out-of-state conformance with its dictates," *id.* (quotation marks omitted), nor directly "control[led] the terms of out-of-state transactions," *Freedom Holdings*, 357 F.3d at 221, this Court found no impermissible extraterritorial effects. Thus, only the adoption of protectionist statutes that would lead to "the 'competing and interlocking local economic regulation' of a kind found objectionable by the Supreme Court in *Healy*" are impermissible under this Court's extraterritoriality precedents. *Grand River Enters. Six Nations, Ltd. v. Boughton*, 988 F.3d 114, 124 (2d Cir. 2021) (quoting *Healy*, 491 U.S. at 337).

Appellants harp on one unique exception to this principle. In *American Booksellers*, this Court held that a Vermont statute barring internet dissemination of sexually explicit materials harmful to minors had an impermissible extraterritorial

effect because, due to the "the internet's boundary-less nature," "the rest of the nation [was] forced to comply with [Vermont's] regulation or risk prosecution." 342 F.3d at 103.

It is true that the statute in *American Booksellers* was not a form of protectionist economic regulation. But the case arose in a *sui generis* context involving the internet and is now largely viewed as a relic of its time, as both geolocation technologies on the web and courts' understanding of the internet's functioning have advanced. *See, e.g.*, Jack Goldsmith & Eugene Volokh, *State Regulation of Online Behavior: The Dormant Commerce Clause and Geolocation*, 101 Tex. L. Rev. (forthcoming 2023) (manuscript at 2) (available at https://ssrn.com/abstract=4142647) ("[M]ore recently, and increasingly, courts have upheld state laws regulating various internet transactions."). Indeed, this Court has repeatedly declined to extend the rule from *American Booksellers* and has limited it to its facts. *See, e.g.*, *SPGGC*, 505 F.3d at 195 (upholding consumer protection law as applied to online sales of gift cards, and declining to extend "dicta" from *American Booksellers*); *Grand River*, 988 F.3d at 124 (rejecting expansion of *American Booksellers* to context not involving the internet).

* * *

In sum, both the Supreme Court and this Court have focused on combatting economic protectionism when analyzing statutes under the so-called dormant

Commerce Clause, creating a consistent line of cases resting on the history and purpose of the Clause.

III. Neither the Constitution Nor Binding Precedents Provide a Basis for Invalidating Section 898.

A historically grounded approach to the Commerce Clause, as well as a faithful application of binding precedents, requires affirming the district court's dismissal of Appellants' facial dormant Commerce Clause challenge. Section 898 has neither the purpose nor effect of economic protectionism. It does not "prohibit the flow of interstate goods." *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 126 (2007). It does not regulate behavior on the internet that is not susceptible to limitation to a single state. *See Am. Booksellers*, 42 F.3d at 103. And for nearly a century, those are virtually the only types of state laws that the Supreme Court and this Court (in the latter case) have struck down.

Under this longstanding approach, therefore, there is no basis for invalidating Section 898. The law causes none of the problems that prompted the adoption of the Commerce Clause and creates none of the risks that have long guided courts. It does not "neutralize the economic consequences of free trade among the states." *Baldwin*, 294 U.S. at 526. It neither "convey[s] advantages" on local interests, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 577 (1997), nor "deprives out-of-state businesses of access to a local market," *C&A Carbone*, 511 U.S. at 389. Indeed, its clear purpose and effect is to ensure gun industry members

take steps to mitigate the misuse of firearms in New York—wholly unrelated to economic protectionism.

Appellants assert that the fact that Section 898 applies only to gun industry members dealing in "qualified products," N.Y. Gen. Bus. Law § 898-a(6), defined by reference to the federal Protection of Lawful Commerce in Arms Act (PLCAA) as firearms, ammunition, and component parts thereof "that ha[ve] been shipped or transported in interstate or foreign commerce," 15 U.S.C. § 7903(4), results in a *per se* dormant Commerce Clause violation. In their view, because the law "impose[s] burdens on regulated entities *unless their commerce takes place wholly in-state*," it favors an in-state gun market at the expense of an interstate one. Br. 42.

The district court righty disposed of this claim on the ground that Appellants did not plausibly allege that a wholly intrastate gun market even *exists* in New York. A55-56; *see VIZIO*, 886 F.3d at 260 (rejecting dormant Commerce Clause challenge due to failure to "allege[] the actual—or potential—existence of any in-state manufacturer that is less negatively affected by" the law). In the absence of such factual allegations, there can be no "competition between the supposedly favored and disfavored entities" and "no local preference." *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997). Given that the chief purpose of the rule against discrimination is to root out local economic protectionism, the failure to allege the actual existence of a favored local entity is fatal to a facial challenge under the dormant Commerce

Clause. *See Tracy*, 519 U.S. at 311 ("[W]e have never deemed a hypothetical possibility of favoritism to constitute discrimination that transgresses constitutional commands." (quotation marks omitted)); *Wash. State Grange v. Wash. State Repub. Party*, 552 U.S. 442, 449-50 (2008) ("In determining whether a law is facially invalid, we must be careful not to go beyond the statute's facial requirements and speculate about hypothetical or imaginary cases." (quotation marks omitted)).

Appellants retort that the absence of any purely intrastate market to favor is a "non sequitur" because by exempting from regulation those entities whose commerce takes place completely in-state, "the state necessarily incentivizes the creation of an intrastate market." Br. 42. That assertion misunderstands the operation of Section 898.

As all parties agree, Section 898 was enacted in response to the PLCAA, which bars the filing of certain civil actions against gun industry members for harms "resulting from the criminal or unlawful misuse of a qualified product," 15 U.S.C. § 7903(5)(A), subject to several exceptions, *id.* § 7903(5)(A)(i)-(vi). Because the PLCAA itself, enacted pursuant to Congress's Commerce Clause power, *only* bars lawsuits with respect to "qualified products"—again, that is, firearms, ammunition, and component parts thereof "that ha[ve] been shipped or transported in *interstate or foreign commerce*," *id.* § 7903(4) (emphasis added)—any of Appellants' hypothetical gun businesses that might choose to operate solely within the bounds

of New York would remain subject to civil actions of the sort authorized by Section 898 even in the *absence* of Section 898. In other words, Section 898, which fits into one of the delineated exceptions to the PLCAA, *see* Appellee Br. 21-30, simply equalizes the litigation playing field. It creates no "incentiv[e]," Appellant Br. 42, to establish an intrastate gun business to avoid liability under Section 898 because *the exact same lawsuits* as those authorized by Section 898 may be brought against a wholly New York–based gun business regardless of whether Section 898 exists, given that the PLCAA does not bar them.

To the extent that any gun industry members decide that they would rather keep their products out of New York altogether than comply with Section 898, that is not a constitutional problem; it is simply their choice. The Commerce Clause does not promise free access to every market in the nation; rather, it prevents each state from placing "burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear." *Am. Trucking Assoc., Inc. v. Mich. Pub. Serv. Comm.*, 545 U.S. 429, 433 (2005) (quotation marks omitted).

Equally implausible is the idea that other states will enact copycat laws with a goal of luring gun industry members into their states to conduct purely intrastate business because, again, those gun industry members would not be exempt from nuisance actions of the sort authorized by Section 898. For instance, a gun manufacturer engaged exclusively in commerce in New Jersey is not subject to the

PLCAA and therefore may be sued for creating a public nuisance in that state, even in the absence of a statute like Section 898 fitting into one of the PLCAA's exceptions. In other words, because Section 898 is not protectionist in nature, it poses no risk of a regulatory race premised on the "jealousies and retaliatory measures the Constitution was designed to prevent." *C&A Carbone*, 511 U.S. at 390.

Thus, properly understood, Section 898 is not a protectionist measure seeking to create or privilege New York gun industry members to enhance revenue for the state or otherwise privilege local commerce. Section 898 is a public health measure seeking to minimize the misuse of a potentially harmful product within the state's borders. Accordingly, the law constitutes a "regulation[] in the interest of local health and safety" that this Court and the Supreme Court have consistently "support[ed]," even where such laws are notably "burdensome." *H.P. Hood*, 336 U.S. at 535.

Unable to make out an argument that Section 898 is the sort of protectionist measure subject to invalidation under this Court's discrimination analysis, Appellants also assert that the law impermissibly regulates extraterritorial commerce and places an undue burden on interstate commerce under the *Pike* test. But these claims ultimately fail for the same reason: where there is no protectionism in purpose

or effect, Section 898 simply does not fit into the category of regulations that this Court and the Supreme Court have invalidated, whatever the mode of analysis.

As for extraterritoriality, Appellants assert that the breadth of the language in the statute may sweep in commercial activities that do not take place in New York. Even if true, the extraterritoriality doctrine does not remotely bar state laws that regulate products for health or safety reasons merely because the products are manufactured out of state. *See, e.g.*, *Tracy*, 519 U.S. at 306 ("[T]he Commerce Clause . . . was never intended to cut the States off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." (quotation marks omitted)); *Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169, 1175 (10th Cir. 2015) (Gorsuch, J.) (rejecting argument that any "state health and safety regulation" that "controls conduct out of state is *per se* unconstitutional"). Countless state laws have "permissible extraterritorial effects," *Freedom Holdings, Inc. v. Cuomo*, 624 F.3d 38, 68 n.19 (2d Cir. 2010), and "no one thinks that all (or even most) of these laws violate the dormant Commerce Clause," Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause*, 110 Yale L.J. 785, 795 (2001). For instance, in *Baldwin*, Appellants' lead case, the problem with the statute was not that it resulted in the regulation of milk produced outside of New York; it was that it required compliance with pricing restrictions within New York through "what is

equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin." 294 U.S. at 527. In other words, this protectionist law seeking to privilege New York milk producers was "hostile in conception as well as burdensome in result." *Id.*

Appellants also fixate on the district court's apparently overbroad assertion that "this Court has limited the extraterritoriality doctrine to state laws regulating the price of goods sold out of state." Br. 48.[2] That argument is a red herring. As discussed above, the only non-protectionist law that this Court has invalidated as having impermissible extraterritorial effects is a law regulating behavior on the internet that was not susceptible to limitation to a single state. *See Am. Booksellers*, 42 F.3d at 103. Indeed, the only other case Appellants cite for this principle also involved a statute criminalizing internet dissemination of material harmful to minors. *See ACLU v. Johnson*, 194 F.3d 1149 (10th Cir. 1999). Of course, Section 898 is not that type of law.

Finally, Appellants' single-paragraph argument that Section 898 cannot survive *Pike* balancing fails for similar reasons. As this Court has explained, the focus of the *Pike* analysis "is a state's shifting the costs of regulation to other states,"

[2] *But see Epel*, 793 F.3d at 1174 (Gorsuch, J.) (stating that "the *Baldwin* line of cases concerns only price control or price affirmation statutes" (quotation marks omitted)); *Assoc. des Eleveurs de Canards et d'Oies du Quebec v. Harris,* 729 F.3d 937, 951 (9th Cir. 2013) (same).

Nat'l Elec. Mfrs. Ass'n v. Sorrell, 272 F.3d 104, 109 (2d Cir. 2001), with the "purpose or effect [of] gain[ing] for those within the state an advantage at the expense of those without," *id.* (quoting *S.C. State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177, 184-85 n.2 (1938)). Given that Section 898 has neither the purpose nor effect of giving the New York gun market an upper hand at the expense of other states, "a reviewing court need not proceed further." *Id.*

To the extent that Appellants ask this Court to consider congressional findings in the PLCAA as evidence that the alleged burdens of Section 898 outweigh its benefits, they seek to plunge dormant Commerce Clause doctrine back into the unworkable conceptual morass of the late nineteenth and early twentieth centuries, culminating in the Court declaring itself "the final arbiter of the competing demands of state and national interests." *S. Pac. Co.*, 325 U.S. at 769. But, as discussed earlier, the Supreme Court itself never undertook that task, *see supra* Section II.C, and for good reason: to accept that invitation would turn the dormant Commerce Clause into the "judicial economic veto" that its critics have long charged, *Wynne*, 575 U.S. at 572 (Scalia, J., dissenting); *see United Haulers*, 550 U.S. at 349 (Thomas, J., concurring in the judgment).

Under current precedent, the Commerce Clause does not authorize this Court to decide whether Congress's objectives in enacting the PLCAA are weightier than those of the state legislature that enacted Section 898. *See Brown & Williamson*

Tobacco Corp. v. Pataki, 320 F.3d 200, 209 (2d Cir. 2003) (the modern *Pike* test "does not invite courts to second-guess legislatures by estimating the probable costs and benefits of the statute, nor is it within the competency of courts to do so"). Such inquiries are "ill-suited to the judicial function and should be undertaken rarely if at all." *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in the judgment). This case is no exception.

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the district court.

Respectfully submitted,

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Dated: January 13, 2023

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

I further certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because it has been prepared in a proportionally spaced typeface using 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing document using the Court's CM/ECF system, causing a notice of filing to be served upon all counsel of record.

Dated: January 13, 2023

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