UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

ZUFFA, LLC d/b/a ULTIMATE FIGHTING CHAMPIONSHIP,

Plaintiff,

-against-

ERIC T. SCHNEIDERMAN, in his official capacity as ATTORNEY GENERAL OF THE STATE OF NEW YORK, VINCENT G. BRADLEY, in his official capacity as COMMISSIONER AND CHAIRMAN OF THE NEW YORK STATE LIQUOR AUTHORITY, AND KEVIN KIM, in his official capacity as COMMISSIONER OF THE NEW YORK STATE LIQUOR AUTHORITY,

Defendants.

No. 15-cv-7624

PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Mixed martial arts ("MMA") is a sport that combines elements of multiple martial arts, both ancient and modern. Over the past fifteen years, the sport has grown enormously in popularity, while shedding the brutality that sometimes characterized its early days. It now boasts a following and a safety record that is the envy of sports such as boxing and other forms of martial arts. MMA is practiced in gyms in all fifty states, and live professional MMA events are legal in all but one. The outlier—the only state in the Union that refuses to allow live professional MMA events to proceed—is New York. New York purports to do so pursuant to a 1997 statute that bans "combative sport" matches and exhibition. But that law has been plagued by erratic interpretation and enforcement from the very start. Indeed, even now, the state is unable to provide any coherent explanation of what the law prohibits and permits, other than that it cannot be read to permit the live professional MMA events that Plaintiff wants to hold.

Much of the law's problems stem from its failure to explain with any reasonable degree of clarity what exactly a "combative sport" is. Rather than define the term expressly, the statute attempts to reverse engineer a definition by exempting from its prohibitions certain sports, including "martial arts." But the statute does not define the term "martial arts" either, other than to state that it "shall include any professional match or exhibition sanctioned by" a list of twelve organizations. This inherently vague language has led to all manner of confusion, with the state at times taking the position that a listed organization could sanction only those events found in its name (*e.g.*, the U.S. Judo Association may sanction only judo), at other times taking the position that an organization could sanction only "single discipline" martial arts (whatever that may mean), at still other times taking the position that an organization could sanction anything under the sun, and most recently taking the position that, whatever else an organization may or may not

sanction, it may not sanction MMA events. The state's ever-shifting interpretations succeed only in confirming that the law has been hopelessly vague all along.

The state's actions also confirm that this unconstitutionally vague law is causing Plaintiff concrete, imminent, and irreparable injury. Plaintiff is in the business of promoting live professional MMA events and is ready, willing, and able to begin promoting those events in New York. Indeed, Plaintiff has made arrangements to hold just such an event, sanctioned by one of the statutorily exempt organizations, at Madison Square Garden ("MSG") on April 23, 2016. Whatever uncertainty may have existed on the matter in the past, it is now crystal clear that the state interprets the law to prohibit Plaintiff from doing so. Accordingly, without immediate relief from this Court, Plaintiff stands to suffer considerable monetary and reputational injury in connection with the MSG event, not to mention the many other events that the state is actively prohibiting Plaintiff from hosting in one of the world's most important entertainment markets. And because the Eleventh Amendment bars Plaintiff from recovering monetary damages against the state or its officials, those injuries are not only concrete and imminent, but also irreparable. Plaintiff thus asks this Court to intervene now and preliminarily enjoin enforcement of the challenged laws as applied to its live professional sanctioned MMA events during the pendency of this litigation, before Plaintiff suffers even more irreparable monetary and reputational injury on account of New York's unconstitutionally vague "combative sport" ban.

STATEMENT OF FACTS

A. Early MMA and the Combative Sports Law

MMA is a sport featuring contests between highly trained athletes skilled in a mix of martial and combat arts—including karate, jiu-jitsu, boxing, kickboxing, grappling, judo, Muay Thai, and freestyle and Greco-Roman wrestling—who are not limited to the use of techniques

from any one style. Compl. ¶2. Its provenance is ancient, tracing back to the sport of pankration in the Olympic Games of the ancient Hellenes. *See id.* ¶35.

Modern MMA traces its origins to the Brazilian martial arts of jiu-jitsu and vale tudo. Compl. ¶37. In the United States, leading practitioners of vale tudo promoted contests in which fighters from different martial arts disciplines competed in open-weight and essentially rule-free tournaments to determine which discipline was most effective. *Id.* In 1993, a pay-per-view televised tournament of this nature was held under the name "Ultimate Fighting Championship" ("UFC"). *Id.* ¶¶38-39. The victories of smaller contestants displaying finely honed technique demonstrated that brute-force combat skills were not necessarily ideal in these cross-disciplinary tournaments. *See id.* ¶40. Accordingly, martial artists began to focus on training in multiple styles. *Id.* ¶41.

Early MMA tournaments were marketed "as blood sport or fights to the death" lacking rules or regulation. *Id.* ¶42. As MMA increased in popularity, however, its no-holds-barred approach drew the ire of politicians and regulators, including the New York legislature. In 1997, the legislature enacted a ban on "competitive sport." N.Y. Unconsol. Law §8905-a(1) ("Combative Sports Law" or "CSL").[1] The law's proponents sought to proscribe "ultimate" and "extreme" fighting events, which they described as matches characterized by a lack of rounds or weight divisions, the absence of gloves, passive refereeing, and rules permitting punches and kicks to the throat and groin, eye gouging, and head butting. Compl. ¶48. In short, they sought to ban the sort of "blood sport" events that MMA had marketed itself as in the 1990s.

[1] The legislature initially passed a statute subjecting MMA to regulation by the New York State Athletic Commission ("NYSAC"), *see* 1996 N.Y. Sess. Laws ch. 708 (McKinney), but the CSL repealed the 1996 law on February 25, 1997, less than three weeks after the 1996 legislation took effect.

To that end, the CSL provides that "[n]o combative sport shall be conducted, held, or given within the state of New York." CSL §8905-a(2). The statute defines "combative sport" as "any professional match or exhibition other than boxing, sparring, wrestling or martial arts wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents." *Id.* §8905-a(1). The statute does not define what constitutes permissible "martial arts"; instead it provides only that "'martial arts' shall include any professional match or exhibition sanctioned by" a list of twelve organizations that does not include UFC ("Exempt Organizations"). *Id.* The law also authorizes the New York State Athletic Commission ("NYSAC") to "promulgate regulations which would establish a process to allow for the inclusion or removal of martial arts organizations from the above list." *Id.*

The CSL provides criminal and civil penalties for any person "who knowingly advances or profits from a combative sport activity." *Id*. §8905-a(3)(a). The statute defines "advances a combative sport activity" as "engag[ing] in conduct which materially aids any combative sport," "acting other than as a spectator." *Id.* §8905-a(3)(b). It includes a broad swath of activities within the scope of "conduct which materially aids any combative sport," including "conduct directed toward the creation, establishment or performance of a combative sport" or "toward the actual conduct of the performance thereof." *Id.* The statute defines "profits from a combative sport activity" as "accept[ing] or receiv[ing] money or other property with intent to participate in the proceeds of a combative sport activity, or pursuant to an agreement or understanding with any person whereby he or she participates or is to participate in the proceeds of a combative sport activity." *Id.* §8905-a(3)(c).

Four years after the CSL became law, the legislature enacted a follow-on law making it illegal for any "retail [alcohol] licensee for on-premises consumption" to

> suffer, permit, or promote an event on its premises wherein the contestants deliver, or are not forbidden by the applicable rules thereof from delivering kicks, punches or blows of any kind to the body of an opponent or opponents, whether or not the event consists of a professional match or exhibition, and whether or not the event or any such act, or both, is done for compensation.

N.Y. Alco. Bev. Law §106(6-c)(a) (the "Liquor Law"). Like the CSL, the Liquor Law exempts "boxing, wrestling, or martial arts," as well as anything else "excepted from the definition of the term 'combative sport' contained in" the CSL. *Id.* §106(6-c)(b). Accordingly, the scope of the Liquor Law is dependent on the scope of the CSL's definition of "combative sport."

B. The CSL's Erratic and Standardless Enforcement

MMA today is not at all what it was when the state enacted the CSL. *See Jones v. Schneiderman*, 974 F. Supp. 2d 322, 341 (S.D.N.Y. 2013) (Wood, J.) ("*Jones II*") ("MMA has changed substantially since the Ban was enacted."). In response to many of the same safety concerns advanced by proponents of the CSL, in 2000, New Jersey regulators drafted the Unified Rules of Mixed Martial Arts ("Unified Rules"). Compl. ¶57. Under those rules, athletes are divided into weight classes and matchmakers ensure that matches are between similarly skilled athletes. Declaration of J. Levitt in Support of Pl.'s Mot. for Preliminary Injunction ("Levitt PI Decl.") Ex. 1 (1996 Hearing), at 14:23-25; *id*. Ex. 2 (Sponsor's Memo), at 1; *id.* Ex. 3 (Spindola Dep. Tr.), at 87:20-88:4; *id*. Ex. 4 (Unified Rules), at Rule 2.[2] The Unified Rules prohibit the sort of "head butting, eye gouging, biting, hair pulling, fish hooking, stomping a grounded opponent, and strikes to the groin or throat" that concerned the legislature in 1997. Compl. ¶¶63,

[2] All exhibits included with the Levitt PI Declaration except for Exhibit 20 were previously filed in *Jones v. Schniederman*, No. 11-8215 (KMB) (S.D.N.Y. 2011).

68; Levitt PI Decl. Ex. 5 (56.1) ¶222(b)–(d) (and exhibits cited therein). They also prohibit kicks and knees to the head of a grounded opponent and give opponents the opportunity to "tap out," or quit, with honor. *Id*. Ex. 4 (Unified Rules), at Rules 12-13, 15, 17.

The UFC promoted its first performance under the Unified Rules in 2000. Compl. ¶57. And after Plaintiff purchased the UFC brand in 2001, it "began aggressively restructuring its professional mixed martial arts contests into highly organized, well controlled, and safely regulated sporting events." *Id.* ¶58. As current and former state officials conceded in the *Jones v. Schneiderman* litigation, as a result of Plaintiff's efforts, MMA today is not the "no holds barred" combat sport that the legislature sought to ban in 1997. *Id.* ¶71; Levitt PI Decl. Ex. 6 (Alleyne Dep. Tr.), at 81:22-83:24, 119:22-120:17, 121:2-4; *id*. Ex. 3 (Spindola Dep. Tr.), at 87:14-88:4, 111:10-17; *id*. Ex. 7 (Maher Dep. Tr.), at 84:4-7; *id*. Ex. 8 (Leary Dep. Tr.), at 164:20-165:25; *id*. Ex. 9 (Genia Dep. Tr.), at 20:7-9, 133:16-23.

Notwithstanding the reality that MMA today is not the same sport that prompted enactment of the CSL, the state has (with one brief deviation during earlier litigation) continued to take the position that the CSL prohibits Plaintiff's MMA events. The state has never been able to offer any coherent explanation, however, as to why that is so. Instead, the CSL has been marked by the kind of consistently inconsistent interpretation and enforcement history that an inherently vague law is doomed to produce.

1. The NYSAC's ever-changing enforcement practices

The problems began with the NYSAC's erratic efforts to enforce the CSL. Although the law does not actually give the NYSAC authority to do anything other than promulgate rules for altering the list of Exempt Organizations (something that it has never done), the NYSAC has long assumed responsibility for interpreting the CSL and shutting down events that it considers illegal. Levitt PI Decl. Ex. 5 (56.1) ¶¶291-95 (and exhibits cited therein); *see also id*. Ex. 10

(Spindola MSJ Decl.) ¶3. Thus, for years, NYSAC assumed and repeatedly exercised regulatory power, including the power to issue cease-and-desist orders when it deemed an event prohibited by the CSL. *Id*. Ex. 5 (56.1) ¶¶298–303 (and exhibits cited therein).

For the first five years of the CSL's existence, the NYSAC did not enforce it against anyone other than UFC. Accordingly, from 1997 to 2002, while Plaintiff was not permitted to promote its events, other martial arts events—including those *not* sanctioned by an Exempt Organization—were held regularly in New York and even attended by NYSAC commissioners. Compl. ¶150; Levitt PI Decl. Ex. 9 (Genia Dep. Tr.), at 91:23-93:14. In 2002, however, the NYSAC began taking a much more aggressive approach, issuing cease-and-desist letters to combat sport promoters with some frequency. Levitt PI Decl. Ex. 5 (56.1) ¶¶296-98 (and exhibits cited therein); *see also id*. Ex. 11 (Ltr. from H. Spindola to Webster Hall, Mar. 24, 2004); *id*. Ex. 12 (Ltr. from M. Lathan to Main Street Armory, Feb. 4, 2009). The NYSAC's approach to these letters varied wildly. Although the commission purported to permit Exempt Organizations to sanction only those "martial arts" contained in their name (*e.g.*, the U.S. Judo Association may sanction only judo), *id*. Ex. 5 (56.1) ¶¶122, 129–30 (and exhibits cited therein), in practice it routinely allowed those organizations to sanction martial arts not found in their names, such as kickboxing, Muay Thai, and jiu-jitsu—but never MMA. *See id.* ¶¶123–24, 126, 134–35 (and exhibits cited therein). The NYSAC also regularly issued cease-and-desist letters as to amateur events even though the CSL refers only to "professional matches and exhibitions." *See id.* ¶¶275–80, 305–12 (and exhibits cited therein); *see also id*. Ex. 13 (Email from H. Spindola to P. Rosner, May 17, 2007).

In 2008, the NYSAC changed positions again, announcing that henceforth only "single discipline" martial arts would be permitted. *Id*. Ex. 5 (56.1) ¶¶136–38 (and exhibits cited

therein). Although this term is foreign to the world of martial arts, apparently it was intended to mean that an Exempt Organization could sanction martial arts other than those found in their names, but only if those martial arts did not draw on more than one discipline. Compl. ¶85; Levitt PI Decl. Ex. 5 (56.1) ¶¶148-51 (and exhibits cited therein); *see also id*. Ex. 14 (Email from J. Leary to B. Matula, Mar. 25, 2010); *id*. Ex. 7 (Maher Dep. Tr.), at 145:14–153:13; 164:7–165:19; *id.* Ex. 6 (Alleyne Dep. Tr.), at 83:25–102:7; 132:15–135:9. But the NYSAC promptly ignored that new standard in practice, routinely permitting Exempt Organizations to sanction events promoted by UFC's competitors Glory and K1 (but still not UFC), even though those organizations openly market their events as involving a mix of several different martial arts. *See* Compl. ¶¶128-38; Levitt PI Decl. Ex. 5 (56.1) ¶¶153-67 (and exhibits cited therein). The NYSAC also allowed Exempt Organizations to sanction jiu-jitsu, Muay Thai, and kickboxing events, even though those too involve multiple martial arts. *See* Compl. ¶¶91-94; Levitt PI Decl. Ex. 5 (56.1) ¶¶168-78 (and exhibits cited therein).

When the NYSAC was asked to explain these inconsistencies, it became readily apparent that it has no coherent view of what constitutes a "single discipline" martial art, other than that MMA does not count. Compl. ¶¶87-89, 95-96; Levitt PI Decl. Ex. 5 (56.1) ¶¶182-210 (and exhibits cited therein). For example, one state official testified that the distinction between single discipline and mixed martial arts is not "black and white," and that, whereas mixing martial arts that are "closer cousins" may be permissible under the CSL, "the more mixed the martial arts match becomes, the more it comes close to violating the statute." Levitt PI Decl. Ex. 7 (Maher Dep. Tr.), at 145:21-22, 165:9-10, 17-19. Unsurprisingly, those potentially subject to criminal penalties under the CSL still have no idea what the NYSAC means by "single discipline" martial arts. *See id.* Ex. 15 (Lilly Dep. Tr.), at 79:15-17, 80:19-22.

2. The AG's flip-flopping interpretations

The erratic interpretation and enforcement of the CSL only got worse when, after years of trying to convince the legislature to repeal the law, *see id.* Ex. 16 (Epstein Dep. Tr.), at 65:17-66:9, 68:4-70:7, Plaintiff and others filed a lawsuit seeking a declaration that the CSL and Liquor Law are, among other things, unconstitutionally vague. In the course of trying to defend against that suit, the AG (much like the NYSAC before him) repeatedly changed his view on what the laws prohibit and permit.

For instance, during the *Jones* litigation, Plaintiff discovered that a promoter had planned a Muay Thai event at Madison Square Garden. Compl. ¶105; Levitt PI Decl. Ex. 17 (Pls.' Opp. to 1st MTD), at 26 n.14. When Plaintiff questioned why the state's "single discipline" interpretation permitted such an event given that Muay Thai is a mixed martial art, the AG responded by opining—in direct contrast to the NYSAC's position—that martial arts do *not* have to be "single disciple" to be permissible, but rather only have to be sanctioned by an Exempt Organization:

> Why plaintiffs believe Muay Thai is "not exempted from the Ban" is unclear, since exempted "martial arts" are *defined* as "any professional match or exhibition sanctioned by any" of the listed organizations. The proposed Muay Thai event appears to confirm that the 1997 Legislation provides a procedure by which a sport claiming to be a "martial art" or to have similar characteristics can enter the New York market under the sponsorship of a listed organization. The UFC has apparently decided not to even explore this path, preferring an all-out attack on the statute, but the procedure's availability shows the legislature's reasonable intent in 1997 to allow for future flexibility.

Levitt PI Decl. Ex. 18 (AG 1st MTD Reply Br.), at 6. In a subsequent filing, the AG once again emphasized that a "plain reading of the statute … leaves open the possibility that MMA fights could at least under some circumstances be made legal if sanctioned by a listed organization." *Id.* Ex. 19 (AG 2nd MTD Br.), at 30.

Taking the AG at his word, Plaintiff immediately began planning an event to be sanctioned by an Exempt Organization and, that same day, wrote the AG asking him to confirm that the event would not violate the CSL. Compl. ¶¶108-10; Levitt PI Decl. Ex. 20 (Ltr from J. Levitt to AG, Oct. 26, 2012). The AG refused to do so, but shortly thereafter made his position on the matter unequivocally clear to the District Court, informing the court during a hearing:

> I don't see much wiggle room here … Martial arts are excluded from the definition of combative sport. Martial arts expressly include matches or exhibitions sanctioned by one of the listed organizations. Accordingly, *on its face*, the ban of combative sport does not appear … to apply to a match or exhibition sanctioned by listed organizations. So I don't think on these issues we have to go any further than the text.

Levitt PI Decl. Ex. 21 (MTD Hearing Tr.), at 46:1-8 (emphasis added). The AG also confirmed that the NYSAC shared his view, stating that he "couldn't find a single lawyer in that agency that disagreed with [him] on the reading of it. I think that their position reflects that … exempt organizations could sanction a sport that would otherwise be a combative sport." *Id.* at 70:16-22.

In light of this landscape-altering pronouncement, the District Court ordered the parties to a settlement conference with a magistrate judge in an effort to resolve their dispute by allowing Plaintiff to hold professional MMA events sanctioned by an Exempt Organization. On the eve of the settlement conference, however, the AG abruptly changed his mind, announcing that he would not stipulate to any understanding of the CSL that would permit Plaintiff to promote an MMA event. *Id*. Ex. 22 (Ltr. from AG to Judge Wood, Mar. 8, 2013), at 1. In a supplemental filing, the AG attempted to explain this about-face by contending that the CSL "cannot be read to permit professional Ultimate Fighting/MMA events in New York, even if sanctioned by a listed exempt organization," because "[t]he intent of the New York Legislature in enacting §8905-a was clearly not to permit the principle target of the legislation—professional Ultimate Fighting/MMA—to take place in New York." *Id*. Ex. 23 (AG's Supp. Br.), at 5, 7. The AG did

not explain how the statutory phrase "any professional match or exhibition sanctioned by" an Exempt Organization, which he had previously insisted meant *any* event, might be read to mean "any" such event "except MMA."' Instead, he just insisted that his professed understanding of the legislature's intent must trump the statute's text.

"In light of [the AG']s varying interpretations of the statutory language," the District Court concluded that the *Jones* plaintiffs "adequately alleged that the statute is unconstitutionally vague with respect to professional MMA sanctioned by exempt organizations." *Jones II*, 974 F. Supp. 2d at 341-42. But the court never reached the merits of the plaintiffs' vagueness claims because it subsequently concluded that the plaintiffs lacked standing to pursue them, on account of the court's view that the state had not clearly taken the position *before* the litigation commenced that the CSL prohibits MMA events sanctioned by an Exempt Organization. Given that the state *had* clearly taken that position by the *end* of the litigation, however, the court invited the plaintiffs—and particularly Plaintiff Zuffa—to consider pursuing their vagueness claims in a new lawsuit. *Jones v. Schneiderman* ("*Jones III*"), No. 11-cv-8215, 2015 WL 1454529, at *11 (S.D.N.Y. Mar. 31, 2015).

Plaintiff initiated the present lawsuit to pursue its due process rights once again. To eliminate any potential concerns about the imminence of its injury, Plaintiff has contracted to host a live professional MMA event sanctioned by an Exempt Organization (specifically, the World Kickboxing Organization) at MSG on April 23, 2016. Declaration of I.L. Epstein, 9/25/15 ("Epstein PI Decl.") ¶59 & Ex. A; Declaration of D. Wanagiel, 9/28/15 ("Wanagiel PI Decl.") ¶9 & Ex. 1. To make that happen, Plaintiff has had to commit $25,000 as a non-refundable deposit and stands to lose millions of dollars in ticket sales and media revenue if this Court does not grant a preliminary injunction. Epstein PI Decl. ¶¶59-60, 62; Wanagiel PI Decl. ¶9.

STANDARD OF REVIEW

To obtain a preliminary injunction, movant must demonstrate (1) "a likelihood of success on the merits," (2) that it will suffer "irreparable harm" without a preliminary injunction, and (3) "that a preliminary injunction is in the public interest." *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 19-20 (2008). To demonstrate a likelihood of success, "movant … need not show that success is an absolute certainty. He need only make a showing that the probability of his prevailing is better than fifty percent." *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985).

ARGUMENT

I. Plaintiff Is Likely To Prevail On Its Claim That The CSL And Liquor Law Are Unconstitutionally Vague As Applied To Sanctioned Professional MMA Events.

"Living under a rule of law entails various suppositions, one of which is that all persons are entitled to be informed as to what the State commands or forbids." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (quotation marks and parentheses omitted). Accordingly, "'a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.'" *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) (quoting *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926)). And in the context of a criminal statute, it is all the more essential that the legislature "establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quotation marks omitted). As the Supreme Court has explained:

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them.

> A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application.

Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1982). Any law "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," therefore violates the Due Process Clause. *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *see also Hill v. Colorado*, 530 U.S. 703, 732 (2000).

The CSL fails on both counts. Not only does it "fail[] to give ordinary people fair notice of the conduct it punishes," but it has produced a long record of discriminatory and "arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. Indeed, even when forced to defend the law against a vagueness challenge in litigation, the state remained utterly unable to explain what the CSL prohibits or why, other than that—notwithstanding its plain text or the concerns that actually motivated the legislature—it must be read to prohibit any event involving UFC. That certainly makes Plaintiff's injury all the more concrete and imminent, but it does nothing to cure the vagueness problems that plague the CSL.

A. The Text of the Statute Is Inherently Vague.

The constitutional infirmity with the CSL begins with the provision at its core, namely, its definition of "combative sport." At a bare minimum, one would expect—and due process requires—a statute to define with particularity the term used to describe the very conduct it purports to forbid. *See Perez v. Hoblock*, 368 F.3d 166, 175 (2d Cir. 2004) (due process requires the "specific conduct at issue" to "fall[] with sufficient clarity within the ambit of the regulation"). But instead of describing with particularity what a combative sport *is*, the CSL attempts to reverse engineer a definition by describing what a combative sport is *not*, defining the term as "any professional match or exhibition *other than boxing, sparring, wrestling or*

martial arts wherein the contestants deliver ... kicks, punches or blows of any kind to the body of an opponent." CSL §8905-a(1) (emphasis added).

This clunky reverse-engineering might not itself be problematic if the statute defined what is *not* a "combative sport" with sufficient particularity. But the statute utterly fails on that score as well. While "boxing" and "wrestling" are sports with long regulatory histories and agreed-upon definitions, "martial arts" encompasses a wide range of styles, including, one would natural think (and is commonly thought), MMA itself. *See* Levitt PI Decl. Ex. 24 (Miller Dep. Tr.), at 11:14-16; *id*. Ex. 25 (Crenshaw Dep. Tr.), at 27:2-24; *id*. Ex. 15 (Lilly Dep. Tr.), at 80:19-81:6; *cf.* Cal. Bus. & Prof. Code § 18627 (defining "marital arts" to include MMA). Rather than actually define the conduct qualifying as "martial arts," however, the legislature instead said only that the term "shall include any professional match or exhibition sanctioned by" a list of twelve organizations. CSL §8905-a(1). This formulation suffers from two difficulties. First, the statute provides no guidance as to how expansively the word "any" in the phrase "any professional match or exhibition" should be read. Does "any" mean any event of the kind found in the name of the organization at issue (*e.g.*, for the U.S. Judo Association, a judo event), or does it "any" mean what it ordinarily means, such that the U.S. Judo Association could sponsor a kickboxing, Muay Thai, or MMA event as well? And if "any" means something in between, the statute provides no guidance as to what that might be.

Second, although the statute says that martial arts "shall include" events sanctioned by an Exempt Organization, it is silent as to what else might be included within "martial arts" exempt from the CSL. The District Court in *Jones* interpreted the law to mean that "martial arts" includes "*only* events sanctioned by exempt organizations." *Jones II*, 974 F. Supp. 2d at 347. After that decision, however, a representative of the AG's office testified during discovery that

"shall include" may not be exhaustive. Compl. ¶147; Levitt PI Decl. Ex. 7 (Maher Dep. Tr.), at 36:17-37:6, 67:17-25. But if that is so, the statute once again provides no guidance on what else might be permitted, as the list of Exempt Organizations lacks the sort of coherent, unifying theme that would allow a person of ordinary intelligence to discern which martial arts are in and which are out. *Cf. Johnson*, 135 S. Ct. at 2561.

B. The CSL's Vagueness Has Produced a Long Pattern of Inconsistent, Arbitrary, and Discriminatory Interpretation and Enforcement.

Predictably, the vagueness inherent in the CSL's text has resulted in a long pattern of "arbitrary and discriminatory enforcement." *Hill*, 530 U.S. at 732. For the first five years of the CSL's existence, NYSAC apparently construed it to permit every kind of martial arts event except UFC; indeed, NYSAC officials even attended martial arts events that were not sanctioned by an Exempt Organization. *See* Levitt PI Decl. Ex. 9 (Genia Dep. Tr.), at 91:23-93:14. Then, without warning, NYSAC reversed course and claimed the power to shut down any martial arts event—including an amateur one—unless it was *both* sanctioned by an Exempt Organization *and* found in that organization's name. *Id*. Ex. 3 (Spindola Dep. Tr.), at 86:15-21, 113:9-12, 115:18-25; *id*. Ex. 7 (Maher Dep. Tr.), at 54:23-55:2; *id*. Ex. 5 (56.1) ¶¶305-12 (and exhibits cited therein). In practice, however, the NYSAC routinely allowed Exempt Organizations to sanction martial arts not found in their names, such as kickboxing, Muay Thai, and jiu-jitsu—but never MMA. *See id*. Ex. 5 (56.1) ¶¶121, 123, 135, 291-303 (and exhibits cited therein).

The NYSAC tried to explain this discriminatory enforcement practice by claiming the statute permits Exempt Organizations to sanction only "single discipline" martial arts events. *See id.* ¶¶136-38 (and exhibits cited therein); Compl. ¶84. But not only is that term found nowhere in the text of the statute; it is not even known to the martial arts world. *See* Levitt PI Decl. Ex. 15 (Lilly Dep. Tr.), at 79:15-17, 80:19-22; Compl. ¶91; *Rock of Ages Corp. v. Sec'y of*

Labor, 170 F.3d 148, 156 (2d Cir. 1999) ("a reasonably prudent person, *familiar with the conditions the regulations are meant to address and the objectives the regulations are meant to achieve*, [must] ha[ve] fair warning of what the regulations require" (emphasis added)). Indeed, when asked during discovery in the *Jones* case to explain what they understood "single-discipline martial art" to mean, the state's own witnesses offered a litany of differing and inconsistent explanations. *See* Levitt PI Decl. Ex. 5 (56.1) ¶¶182-210 (and exhibits cited therein) (summarizing discovery and other MMA references); *see also id*. Ex. 6 (Alleyne Dep. Tr.), at 83:25–102:7; 132:15–135:9; *id*. Ex. 8 (Leary Dep. Tr.), at 118:15–120:16; 139:5–151:5; *id*. Ex. 7 (Maher Dep. Tr.), at 145:14–153:13; 164:7–165:19.

Unsurprisingly, then, this new rule produced no more consistency in enforcement of the CSL (except against UFC), as the NYSAC permitted exempt organizations to sanction all sorts of martial arts events that openly market themselves as mixing martial arts styles in the same event—including events promoted by Plaintiff's competitors Glory and K-1—so long as they did not involve MMA. *See* Compl. ¶¶129-44; Levitt PI Decl. Ex. 5 (56.1) ¶¶153-81 (and exhibits cited therein); *id*. Ex. 26 (*Glory Expands Its Scope of Promoter Relationships in New York State*, Mar. 12, 2013, https://www.gloryworldseries.com/en/news/view/307) (describing Glory as "a mix of several combat disciplines including Karate, Muay Thai, Tae Kwon Do and traditional Boxing"); *id*. Ex. 27 ("About K-1," http://www.k-1.tv/about-k-1) (describing K-1 as "a combat sport that combines the most effective stand-up fighting strategies from bare knuckle Karate, Kung Fu, Muay Thai, Taekwon-do, Savate, San Shou/San Da, Western Kickboxing, and traditional boxing.").

Rather than put an end to this arbitrary and discriminatory enforcement, the *Jones* litigation only exacerbated it. The AG first attempted to avoid defending the CSL against the

plaintiffs' constitutional attacks by insisting that the law *does* permit professional MMA events, so long as they are sanctioned by an Exempt Organization. But when the plaintiffs took the state at its word and attempted to negotiate a resolution to the litigation under which they could promote and participate in sanctioned MMA events, the state pulled the rug out from under them at the last moment, returning to the view that the statute does not permit professional MMA events under any circumstances. The state did not even try to ground that position in any coherent interpretation of the statute's text—which it had previously maintained plainly allowed MMA—but instead simply insisted that, whatever else the law might prohibit or permit, it cannot be read to permit "professional Ultimate Fighting/MMA" events because, in the state's view, that was "the principle target of the legislation." Levitt PI Decl. Ex. 23 (AG's Supp. Br.), at 5.

These "persistent efforts," but ultimately abject failures, to "establish a standard … to be used as a basis to render the section possible of execution," *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 91 (1921), are themselves further "evidence of vagueness." *Johnson*, 135 S. Ct. at 2558; *see also Jones II*, 974 F. Supp. 2d at 340 ("Courts routinely consider ... evidence [regarding statute's real-world interpretation and enforcement] in adjudicating vagueness claims." (citing cases)). After all, "if administrators cannot determine the meaning of a prohibition, those subject to it can hardly be expected … to do so." *Hayes v. N.Y. Att'y. Grievance Comm. of the Eighth Judicial Dist.*, 672 F.3d 158, 169 (2d Cir. 2012) (quotation marks and brackets omitted). And the due process problem is particularly acute here in light of the state's rejection of the only two interpretations of the CSL that are even remotely coherent. The CSL could perhaps be understood as susceptible of two readings—"any" either actually means "any," or it means any event of the kind found in an Exempt Organization's name. But the state has now rejected both, in favor of a view that "any" means anything except those things that the

state deems—without any coherent explanation—too close to the core of what it thinks the legislature wanted to prohibit. That is the very model of an interpretation so "standardless that it invites arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556.

The standardless nature of this law is underscored by the fact that the AG's effort to divine meaning from "the fundamental purpose of the" CSL, Levitt PI Decl. Ex. 23 (AG's Supp. Br.), at 1-2, does not even produce a standard that would prohibit Plaintiff's events. The legislature's concern was with the kinds of "ultimate," "extreme," or "no-holds-barred" fighting events that were taking place at the time. But "MMA has changed substantially since the [CSL] was enacted, making the legislative history, which relates to earlier versions of MMA, of little relevance." *Jones II,* 974 F. Supp. 2d at 341. As everyone confronted with the question—including former and current enforcement officials, and former public critics—has conceded, professional MMA today is simply nothing like the kinds of events that the legislature enacted the CSL to prohibit. *See, e.g.*, Levitt PI Decl. Ex. 3 (Spindola Dep. Tr.), at 111:10-17; *id.* Ex. 28 (Richard Sandomir, *Overseer of Boxing, Supporter of M.M.A.*, N.Y. Times, 3/6/10) (discussing chair of NYSAC's views); *id*. Ex. 6 (Alleyne Dep. Tr.), at 81:22-83:15; *id*. Ex. 29 (Gareth A. Davies, *UFC night proves a hit*, The Telegraph, 11/20/07) (discussing Sen. John McCain); *id*. Ex. 30 (*Mixed Martial Arts: Sports or Spectacle?*, NPR.org, 8/24/07) (same); *id*. Ex. 31 (MMA Timeline, USA Today, 5/30/08, http://usatoday30.usatoday.com/sports/2008-05-29-mma-timeline_N.htm) (same); *id.* Ex. 32 (Kenneth Lovett, *Change of heart for 'barbaric' sport: Ex-Gov. Pataki pedal to metal for steel-cage-ultimate fighting*, N.Y. Daily News, 1/12/10) (former Gov. George Pataki).

The state is thus left with a law that has proven impossible to interpret or enforce in any consistent and coherent matter. That is so not only because of the statute's inherently vague text,

but also because of the state's repeated insistence on rejecting any interpretation that would allow Plaintiff's events to proceed. Indeed, the history of the CSL's enforcement is essentially one of the state searching in vain for an interpretation that would permit everything but events bearing the UFC label. Of course, that reading of the law is flatly impermissible, not least because bills of attainder are unconstitutional. *See* U.S. Const. art. I, §9, cl. 3; *Analytical Diagnostic Labs, Inc. v. Kusel*, 626 F.3d 135, 140 (2d Cir. 2010) (the Constitution forbids government from singling out one person for treatment different from others similarly situated). The state cannot circumvent that prohibition by drafting a law in terms so vague that it can be enforced solely against the target of the state's particular animus—even when doing so no longer even makes sense in light of the concerns that animated the law's enactment.

In short, the CSL is "so vague that it fails to give ordinary people fair notice of the conduct it punishes," and "so standardless that it invites"—indeed, has produced—"arbitrary enforcement." *Johnson*, 135 S. Ct. at 2556. Accordingly, Plaintiff is likely to succeed on its claim that the law is unconstitutional as applied to live professional sanctioned MMA events.[3]

II. Without Injunctive Relief, Plaintiff Will Suffer Irreparable Harm.

Plaintiff will suffer irreparable injury without a preliminary injunction preventing the state from enforcing the CSL and Liquor Law to prohibit Plaintiff from holding live professional sanctioned MMA events in New York. "[A]n irreparable injury is 'an injury that is not remote or speculative but actual and imminent, and for which a monetary award cannot be adequate compensation.'" *Dexter 345 Inc. v. Cuomo*, 663 F.3d 59, 63 (2d Cir. 2011) (quoting *Tom*

[3] Because the Liquor Law simply borrows definitions of the conduct it prohibits from the CSL, it is unconstitutionally vague for the same reasons. Indeed the NYSLA confirmed during discovery in the *Jones* litigation that, in enforcing the Liquor Law, it just follows the NYSAC's lead as to what qualifies as a "combative sport" or "martial arts." Levitt PI Decl. Ex. 5 (56.1) ¶¶325-26 (and exhibits cited therein).

Doherty Assocs. v. Saban Entm't, Inc., 60 F.3d 27, 37 (2d Cir. 1995)). Plaintiff's injuries in this case readily satisfy that standard.

Plaintiff is ready, willing, and able to begin holding live professional sanctioned MMA events in New York. Indeed, Plaintiff has taken "every step it can—short of violating the criminal law of New York—to be prepared to promote a professional MMA event in New York in the event it becomes permissible." Levitt PI Decl. Ex. 33 (Ratner MSJ Decl.) ¶8; Epstein PI Decl. ¶¶59-67. Plaintiff became a licensed WKA promoter for professional MMA in 2014. Levitt PI Decl. Ex. 33 (Ratner MSJ Decl.) ¶10; *id*. Ex. 34 (Crenshaw MSJ Decl.) ¶16; Declaration of Brian Crenshaw, 9/11/15 ("Crenshaw PI Decl.") ¶14. It renewed its WKA promoter license on August 14, 2015. Crenshaw PI Decl. ¶14 & Exs. A, B. And the UFC has signed a license agreement to hold a live WKA-sanctioned UFC-promoted MMA event at MSG in April 2016. Epstein PI Decl. ¶59 & Ex. A; Wanagiel PI Decl. ¶9 & Ex. 1. This event is expected to generate millions of dollars in ticket sales and pay per view and Internet revenues. Epstein PI Decl. ¶62. Hosting its first ever event at MSG, the home to some of the world's most momentous concerts, speeches, and athletic events, also would be an enormous asset for the UFC from a marketing and reputational perspective.

The risk that the state will shut down this event is neither remote nor speculative. The AG has declared in this Court that the CSL forbids Plaintiff from promoting a live professional MMA exhibition in New York even if sanctioned by an Exempt Organization. Levitt PI Decl. Ex. 23 (AG's Supp. Br.), at 5. The AG has also confirmed that the NYSAC, which has a long history of aggressively enforcing whichever version of the CSL it prefers at the time, *see id.* Ex. 5 (56.1) ¶¶281-312 (and exhibits cited therein), shares the AG's view, *id*. Ex. 23 (AG's Supp. Br.), at 1. In light of the AG and NYSAC's interpretation, Plaintiff has every reason to believe

that the state would take action to stop its April 2016 MSG event, or bring criminal charges after the fact, unless this Court enjoins the state from doing so. *See* Epstein PI Decl. ¶67. The injuries Plaintiff stands to suffer absent preliminary injunctive relief allowing it to promote events sanctioned by an Exempt Organization are therefore both actual and imminent.

And the monetary injuries Plaintiff stands to suffer if this Court does not enjoin the state from shutting down the April 2016 event are hardly the only actual and concrete injuries that Plaintiff has suffered and continues to suffer on account of the challenged laws. Plaintiff loses millions of dollars in profits *every* time it is unable to hold an event in New York. Compl. ¶¶22, 25-27; Levitt PI Decl. Ex. 16 (Epstein Dep. Tr.), at 76:7-77:2; *id*. Ex. 35 (HR&A Economic Impact Report), at 12. Plaintiff also has suffered and continues to suffer significant reputational damage, in the eyes of both fans and potential corporate sponsors, on account of its inability to participate in a market as significant as New York. That injury is compounded by the New York's continued insistence on singling out Plaintiff's events *alone* for criminal prohibition. Levitt PI Decl. Ex. 16 (Epstein Dep. Tr.), at 77:3-25; Epstein PI Decl. ¶¶56-58. Not only does that impose particular stigma on the UFC, but by allowing Plaintiff's competitors to promote their professional exhibitions featuring a mix of martial arts in New York—including at MSG—the state allows them to draw market share from Plaintiff's fan base. *See supra* pp. 8, 16. Every day that the state is permitted to continue enforcing its law in this arbitrary and discriminatory manner, Plaintiff suffers ever greater reputational and financial injuries.

To make matters worse, these actual and imminent reputational and financial injuries cannot be remedied because the Eleventh Amendment forbids suits in federal court to recover money damages against a state. *Edelman v. Jordan*, 415 U.S. 651, 662-63 (1974). This immunity "extends beyond the states themselves to 'state agents and state instrumentalities' that

are, effectively, arms of a state." *Woods v. Rondout Valley Cent. Sch. Dist. Bd. of Educ.*, 466 F.3d 232, 236 (2d Cir. 2006) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). The Eleventh Amendment thus bars suits for money damages against state officers who, like Defendants, are acting in their official capacity no differently than it bars such suits against the state itself. *Ying Jing Gan v. City of New York*, 996 F.2d 522, 529 (2d Cir. 1993); *see also Ward v. Thomas*, 207 F.3d 114, 119 (2d Cir. 2000).[4]

The Second Circuit long ago held that a pecuniary injury is irreparable if, as here, the Eleventh Amendment bars recovery of money damages in federal court. *United States v. New York*, 708 F.2d 92, 93 (2d Cir. 1983) (per curiam); *see also Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (finding irreparable injury prong of permanent injunction test satisfied in part by fact that recovery for pecuniary injury was barred by Eleventh Amendment); *John E. Andrus Mem'l, Inc. v. Daines*, 600 F. Supp. 2d 563, 572 n.6 (S.D.N.Y. 2009) (holding that irreparable injury may be presumed where Eleventh Amendment would bar recovery for monetary injury). Countless other courts have done the same.[5] Because Plaintiff

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[4] Moreover, a state officer in his or her official capacity is not a "person" subject to liability for money damages under section 1983. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 71 & n.10 (1989).

[5] *See, e.g.*, *Pankos Diner Corp. v. Nassau Cty. Legislature*, 321 F. Supp. 2d 520, 524 (E.D.N.Y. 2003) (holding that pecuniary injury was irreparable where Eleventh Amendment barred money damages action); *Am. Fin. Servs. Ass'n. v. Burke*, 169 F. Supp. 2d 62, 70 (D. Conn. 2001) ("Where pecuniary losses cannot later be recovered because the defendant enjoys Eleventh Amendment immunity …, such losses are irreparable for purposes of preliminary injunctive relief."); *Blum v. Schlegel,* 830 F. Supp. 712, 725 (W.D.N.Y. 1993) ("[T]he Second Circuit has determined that in cases where the defendant is protected by the Eleventh Amendment which thus renders the plaintiff unable to recover monetary damages, the injury will be irreparable."), *aff'd*, 18 F.3d 1005 (2d Cir.1994); *N.Y. State Trawlers Ass'n v. Jorling*, 764 F. Supp. 24, 26 (E.D.N.Y. 1991) (holding that pecuniary injury is irreparable if Eleventh Amendment bars recovery of damages); *see also Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013) (noting broad agreement that Eleventh Amendment bar to recovery of money damages makes pecuniary injury irreparable); *Kan. Health Care Ass'n, Inc. v. Kan.*

cannot recover money damages for the financial and reputational injuries inflicted by Defendants' enforcement of the CSL and Liquor Law, Plaintiff's actual and imminent injury is also irreparable, making preliminary injunctive relief essential.

III. A Preliminary Injunction Is In The Public Interest.

Finally, preliminarily enjoining enforcement of the challenged laws against Plaintiff's sanctioned events "is in the public interest." *Actavis PLC*, 787 F.3d at 650. Of course, "[t]he public has no interest in enforcing an unconstitutional ordinance," *KH Outdoor, LLC v. City of Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006), which is reason enough to grant preliminary relief here. *See also, e.g.*, *Planned Parenthood Ass'n of Cincinnati, Inc. v. City of Cincinnati*, 822 F.2d 1390, 1400 (6th Cir. 1987) ("[T]he public is certainly interested in the prevention of enforcement of ordinances which may be unconstitutional."). But preliminarily enjoining application of the CLS and Liquor Law to Plaintiff's sanctioned professional MMA also would serve other important public interests.

First, doing so would prevent the irreparable injury that members of the public who wish to attend Plaintiff's events suffer every time New York's laws prohibit those events from taking place. Every year, live professional MMA events are attended by millions of fans across the nation, and millions more worldwide. Yet every year fans of this exceptionally popular sport are denied the opportunity to attend such events in New York, including in Madison Square Garden, one of the most famous venues in the world. Prospective fighters, too—including fighters who

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Dep't of Soc. & Rehab. Servs., 31 F.3d 1536, 1543 (10th Cir. 1994) ("Because the Eleventh Amendment bars a legal remedy in damages, and the court concluded no adequate state administrative remedy existed, the court held that plaintiffs' injury was irreparable. We agree."); *Temple Univ. v. White*, 941 F.2d 201, 215 (3d Cir. 1991) ("As to the inadequacy of legal remedies, the Eleventh Amendment bar to an award of retroactive damages against the Commonwealth, clearly establishes that any legal remedy is unavailable and that the only relief available is equitable in nature.").

live in or come from New York and would love nothing more than display their craft before a home crowd—are prevented from participating in such events. Whatever the First Amendment rights of those fighters may be, spectators suffer at least some First Amendment injury (and an inherently irreparable one, at that) when they are denied the opportunity to attend the live entertainment of their choice. *See Spargo v. N. Y. State Comm'n on Judicial Conduct*, 351 F.3d 65, 83 (2d Cir. 2003) ("it is well-established that the First Amendment protects not only the right to engage in protected speech, but also the right to receive such speech").[6] Moreover, allowing Plaintiff's events to proceed would serve the additional public interest of being a boon to New York's economy. *See* Levitt PI Decl. Ex. 35 (HR&A Economic Impact Report) (outlining professional MMA's economic benefits, including increased tax revenues, jobs, and consumer spending).

Finally, preliminarily enjoining application of the CSL and Liquor Law to Plaintiff's WKA-sponsored events during the pendency of this litigation also is appropriate because prohibiting those events no longer furthers the interests underlying the challenged laws. As explained, the CSL was enacted to address concerns about "ultimate," "extreme," or "no-holds-barred" fighting of the 1990s, *Jones v. Schneiderman,* 888 F. Supp. 2d 421, 422-23 (S.D.N.Y. 2012) ("*Jones I*"), not the carefully regulated MMA that Plaintiff promotes. And to the extent the Liquor Law is anything more than just derivative of those same interests, it was animated by concerns about permitting "patrons" of "a bar or tavern" from engaging in a "full-contact fight" Levitt PI Decl. Ex. 36 (Liquor Law Bill Jacket), at 2, something that Plaintiff is decidedly not

[6] Although this Court dismissed the First Amendment claims in the *Jones* case, in doing so, the Court did not address the First Amendment interests of fans as distinct from those of participants in live MMA events. Plaintiff also continues to believe that the CSL violates the First Amendment rights of would-be participants in and promoters of live professional MMA events, and has appealed this Court's contrary decision to the Second Circuit.

asking this Court to permit. Instead, Plaintiff is asking this Court only to stop the state from prohibiting what every other state in the nation already allows—carefully regulated live professional MMA events—with the sanctioning of an organization that the state itself has approved. That relief is manifestly in the public interest.

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that this Court **GRANT** Plaintiff's motion for a preliminary injunction.

Respectfully submitted,

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