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October 6, 2021

VIA ECF

Catherine O'Hagan Wolfe  
Clerk, U.S. Court of Appeals for the Second Circuit  
Thurgood Marshall United States Courthouse  
40 Foley Square  
New York, New York 10007

Re: *Palmer, et al. v. Amazon, et al.*, No. 20-3989  
Letter Pursuant To Fed. R. App. P. 28(j)

Dear Judges Jacobs, Chin, and Nardini:

Amazon respectfully submits this Court's recent unpublished decision, *Dark Storm Industries LLC v. Hochul*, No. 20-2725-CV, 2021 WL 4538640 (2d Cir. Oct. 5, 2021), in further support of Amazon's motion for partial dismissal for mootness. *See* Doc. 143.

In *Dark Storm*, a firearms manufacturer and two individuals challenged New York's COVID-19 executive orders that had prevented the manufacturer from selling firearms to civilians. 2021 WL 4538640, at \*1. The district court granted summary judgment for the state defendants, and the plaintiffs appealed. *Id.* The New York Attorney General, representing the state defendants, argued that the appeal was moot because, among other reasons, the Governor's COVID-19 state of emergency—which was the basis of the challenged executive orders—had expired. *See* N.Y. Att'y Gen., FRAP 28(j) Letter, *Dark Storm Industries LLC v. Hochul*, No. 20-2725-CV, Doc. 100 (2d Cir. Sept. 17, 2021). This Court agreed and dismissed the appeal as moot. Citing the Governor's announcement that "all state COVID-19 restrictions were lifted after 70% of New York residents 18 and older received at least one vaccine dose," the Court concluded that, "particularly in view of the mitigation measures that have become available to combat the spread of COVID-19, and

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Catherine O'Hagan Wolfe

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the providential infrequency of pandemics,' the risk that restrictions on firearm retailers will recur is only 'speculative.'" 2021 WL 4538640, at \*1 (quoting *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 446 (2d Cir. 2021)) (brackets omitted). Moreover, recent developments suggest that similar COVID-19 restrictions will not recur, "as a recent increase in COVID-19 cases has prompted neither a renewed disaster emergency declaration nor an order closing businesses." *Id.*

*Dark Storm* further confirms that Plaintiffs' New York Labor Law Section 200 and public-nuisance claims are moot. The New York Forward guidance on which Plaintiffs based their claims has been rescinded, and the State's emergency declaration is over. The possibility of a return to the conditions that existed when Plaintiffs filed this lawsuit is, at best, speculative, and cannot support the declaratory and injunctive relief Plaintiffs seek. *See Amazon's Partial Mot. to Dismiss*, Doc. 143, at 8–11 (July 13, 2021).

Respectfully submitted,

/s/ Jason C. Schwartz

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cc: Counsel of record (via ECF)

## CERTIFICATE OF COMPLIANCE

I certify that:

1. This letter complies with the type-volume limitation of Federal Rule of Appellate Procedure 28(j) because the body of the letter contains 350 words, as determined by the word-count function of Microsoft Word.
2. This letter complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: October 6, 2021

/s/ Jason C. Schwartz  
Jason C. Schwartz

20-2725-cv

*Dark Storm Industries, LLC v. Hochul*

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this Court's Local Rule 32.1.1. When citing a summary order in a document filed with this Court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 5<sup>th</sup> day of October, two thousand twenty-one.

PRESENT: JON O. NEWMAN,  
JOSÉ A. CABRANES,  
RICHARD C. WESLEY,  
*Circuit Judges.*

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DARK STORM INDUSTRIES LLC, BRIAN DOHERTY,  
AND KEVIN SCHMUCKER,

*Plaintiffs-Appellants,*

20-2725-cv

v.

KATHY C. HOCHUL, *in her official capacity as Governor of  
the State of New York*, EMPIRE STATE DEVELOPMENT  
CORP., AND ELIZABETH RUTH FINE,

*Defendants-Appellees.*

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**FOR PLAINTIFFS-APPELLANTS:**

JAMES M. MALONEY, Law Office of James  
M. Maloney, Port Washington, NY.

**FOR DEFENDANTS-APPELLEES:**

DUSTIN J. BROCKNER, Assistant Solicitor  
General, *for* Letitia James, Attorney  
General, State of New York, Albany, NY.

Appeal from an order of the United States District Court for the Northern District of New York (Lawrence E. Kahn, *Judge*).

**UPON DUE CONSIDERATION WHEREOF, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED** that the appeal is **DISMISSED** as moot, and the cause is **REMANDED** to the District Court with instructions to vacate judgment and to dismiss the claims of Plaintiffs-Appellants as moot.

Dark Storm Industries LLC (“Dark Storm”), Brian Doherty, and Kevin Schumucker (together, “Plaintiffs”) seek declaratory and injunctive relief from two March 2020 COVID-19 executive orders that barred Dark Storm from selling firearms to civilians. The District Court entered summary judgment for Defendants-Appellees (“Defendants”) on the merits of Plaintiffs’ Second Amendment claim.<sup>1</sup> The District Court rejected Defendants’ mootness argument, reasoning that even though Dark Storm had been permitted to reopen, Defendants did not meet their burden to show no reasonable expectation that the restriction would recur. We assume the parties’ familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

“A case becomes moot—and therefore no longer a ‘Case’ or ‘Controversy’ for purposes of Article III—when the issues presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.” *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (some internal quotation marks omitted). “The voluntary cessation of allegedly illegal activities will usually render a case moot if the defendant can demonstrate that (1) there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violation.” *Mbany Mgmt., Inc. v. County of Nassau*, 819 F.3d 581, 603 (2d Cir. 2016) (citation omitted). A defendant satisfies its burden where it shows that the possibility of recurrence is merely “speculative.” *Lillbask ex rel. Maunclair v. State of Conn. Dep’t of Educ.*, 397 F.3d 77, 88 (2d Cir. 2005).

We find that Defendants have met their burden. Plaintiffs challenge components of Executive Orders 202.6 and 202.8, which were based on the Governor’s prior declaration of a disaster emergency. N.Y. Exec. Order 202.6 (Mar. 18, 2020); N.Y. Exec. Order 202.8 (March 20, 2020). On June 24, 2021, the Governor rescinded this emergency declaration. N.Y. Exec. Order 210 (June 24, 2021). Also in June, the Governor announced that all state COVID-19 restrictions were lifted after 70% of New York residents 18 and older received at least one vaccine dose.<sup>2</sup> The

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<sup>1</sup> The District Court dismissed Plaintiffs’ remaining claims as abandoned. Plaintiffs do not challenge this ruling on appeal.

<sup>2</sup> Press Release, *Governor Cuomo Announces COVID-19 Restrictions Lifted as 70% of Adult New Yorkers Have Received First Dose of COVID-19 Vaccine* (June 15, 2021),

New York legislature has curtailed the Governor’s authority to issue new COVID-related directives. *See* 2021 N.Y. Sess. Laws ch. 71 § 4. Plaintiffs concede that this change was not “a strategic litigation ploy.” *E.I. Dupont de Nemours & Co. v. Invista B.V.*, 473 F.3d 44, 47 (2d Cir. 2006). They argue instead that the COVID-19 pandemic is a “*sui generis* worldwide situation” that has created “a state of extreme flux” and “almost certainly will require . . . varying responses by state executive branches.” Letter Br. 2. However, “[p]articularly in view of the mitigation measures that have become available to combat the spread of COVID-19, and the providential infrequency of pandemics,” the risk that restrictions on firearm retailers will recur is only “speculative.” *Conn. Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439, 446 (2d Cir. 2021). Thus, Plaintiffs do not “remain under a constant threat” of retail restrictions. *Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021) (citation omitted). Nor do “recent . . . developments suggest that they [may] recur,” *Fed. Defs. of N.Y., Inc. v. Fed. Bureau of Prisons*, 954 F.3d 118, 127 (2d Cir. 2020)—in fact, quite the opposite, as a recent increase in COVID-19 cases has prompted neither a renewed disaster emergency declaration nor an order closing businesses.

### CONCLUSION

We have reviewed all of the arguments raised by Plaintiffs-Appellants on appeal and find them to be without merit. For the foregoing reasons, we **DISMISS** the appeal as moot, and we **REMAND** the cause to the District Court with instructions to vacate judgment and to dismiss the claims of Plaintiffs-Appellants as moot.

FOR THE COURT:  
Catherine O’Hagan Wolfe, Clerk

  


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<https://www.governor.ny.gov/news/governor-cuomo-announces-covid-19-restrictions-lifted-70-adult-new-yorkers-have-received-first>.