No. 22-

IN THE

Supreme Court of the United States

GAZZOLA, *et al.*,

Petitioners,

v.

HOCHUL, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI BEFORE JUDGMENT

PALOMA A. CAPANNA
Counsel of Record
106-B Professional Park Drive
Beaufort, North Carolina 28516
(585) 377-7260
pcapanna@yahoo.com

Attorney for the Petitioners

318023

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

1. Is there a likelihood of success on the merits under *Winter v. Natural Resources Defense Council* that the meaning and purpose of "to keep," as in "to keep and bear arms" in the Second Amendment, creates standing for the federally-licensed dealer in firearms comparable to that of the individual, given that the firearm is the only civil right dependent upon an object for actualization?

2. Is there a likelihood of success on the merits under *Winter* that "constitutional regulatory overburden" could be used as a standard of constitutionality of law(s) directed at federally-licensed dealers in firearms to guard against dis-incentivizing the industry from performing its necessary function for individuals seeking to exercise their fundamental Second Amendment rights?

3. Is there a likelihood of success on the merits under *Winter* that the Second Amendment, in conjunction with the Gun Control Act of 1968, the Firearm Owners' Protection Act of 1986, and the Brady Act (1993), along with federal firearms compliance law and regulation, protects the records of the federally-licensed dealer against government seizure of those records, including for purposes of creating a firearms owners' registry?

4. Is there a likelihood of success on the merits under *NYSRPA v. Bruen* that government actors must not so frustrate a licensing scheme as to substantially block issuance of licenses?

5. Is there a likelihood of success on the merits under *NYSRPA v. Bruen* that government is prohibited from requiring a license in order to purchase the class of firearms commonly used and known as the "semi-automatic rifle," where there is no historic analogue for the same?

6. Is there a likelihood of success on the merits under *NYSRPA v. Bruen* that government is prohibited from requiring an ammunition background check in order to purchase ammunition, where there is no historic analogue for the same?

7. Is there a likelihood of success on the merits under the Fifth Amendment that an individual cannot be compelled to sign a document requiring attestation of compliance while engaged in litigation to overturn the certification mandate?

8. Are Petitioners entitled to preliminary injunctive relief to stop enforcement of new laws, targeting state-licensed dealers in firearms, threatening catastrophic constitutional, criminal, and regulatory penalties, even where Respondents admit discriminatory animus and intentionally disrupt normal implementation of compliance and licensing systems?

PARTIES TO THE PROCEEDING

Petitioners are Nadine Gazzola, individually, and as co-owner, President, and as BATFE Federal Firearms Licensee Responsible Person for Zero Tolerance Manufacturing, Inc.; Seth Gazzola, individually, and as co-owner, Vice President, and as BATFE FFL Responsible Person for Zero Tolerance Manufacturing, Inc.; John A. Hanusik, individually, and as owner and as BATFE FFL Responsible Person for d/b/a "AGA Sales"; Jim Ingerick, individually, and as owner and as BATFE FFL Responsible Person for Ingerick's, LLC, d/b/a "Avon Gun & Hunting Supply"; Christopher Martello, individually, and as owner and as BATFE FFL Responsible Person for Performance Paintball, Inc., d/b/a "Ikkin Arms,"; Michael Mastrogiovanni, individually, and as owner and as BATFE FFL Responsible Person for "Spur Shooters Supply"; Robert Owens, individually, and as owner and as BATFE FFL Responsible Person for "Thousand Islands Armory"; Craig Serafini, individually, and as owner and as BATFE FFL Responsible Person for Upstate Guns and Ammo, LLC; and, Nick Affronti, individually, and as BATFE FFL Responsible Person for "East Side Traders LLC"; and, Empire State Arms Collectors, Inc.

Respondents are Kathleen Hochul, in her Official Capacity as Governor of the State of New York; Steven A. Nigrelli, in his Official Capacity as the Acting Superintendent of the New York State Police; Rossana Rosado, in her Official Capacity as the Commissioner of the Department of Criminal Justice Services of the New York State Police; and, Leticia James, in her Official Capacity as the Attorney General of the State of New York.

CORPORATE DISCLOSURE STATEMENT (RULE 29.6)

There is no parent or publicly held company owning 10% or more of any corporate party's stock, including Petitioners "Zero Tolerance Manufacturing, Inc.," "Ingerick's, LLC," "Performance Paintball, Inc.," "Upstate Guns and Ammo, LLC," "East Side Traders LLC," or "Empire State Arms Collectors, Inc." The following Petitioners are unincorporated sole proprietorships, including Petitioners John A. Hanusik d/b/a "AGA Sales," Michael Mastrogiovanni as "Spur Shooters Supply," and Robert Owens as "Thousand Islands Armory."

RELATED CASES

Gazzola, et al. v. Hochul, et al., No. 1:22-cv-1134, U.S. District Court for the Northern District of New York – Text Order denying requested relief Dec. 2, 2022, delayed decision dated Dec. 7, 2022; and,

Gazzola, et al. v. Hochul, et al., No. 22-3068, U.S. Court of Appeals for the Second Circuit – Order denying requested relief entered Dec. 21, 2022.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING iii

CORPORATE DISCLOSURE STATEMENT (RULE 29.6) iv

RELATED CASES v

TABLE OF CONTENTS. vi

TABLE OF CITED AUTHORITIES x

OPINIONS BELOW. 1

JURISDICTION 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION. 1

STATEMENT OF THE CASE .2

I. GRANT OF A RULE 11 WRIT OF CERTIORARI IS OF IMPERATIVE PUBLIC IMPORTANCE 2

A. FEDERAL FIREARMS LICENSEES IN NYS AND NATIONWIDE ARE IMPACTED 2

Table of Contents

Page

B. ALL NYS COUNTIES ARE ALSO IMPACTED 4

PROCEDURAL BACKGROUND 7

THE PETITIONERS AND THEIR MANY ROLES 8

THE RESPONDENTS 11

REASONS FOR GRANTING THE PETITION. 14

I. PETITIONERS' NOVEL THEORIES HAVE A LIKELIHOOD OF SUCCESS TO SUPPORT A GRANTING PRELIMINARY INJUNCTIVE RELIEF . . .14

A. DEFINING "TO KEEP" WILL GIVE THE FFL DEALER SECOND AMENDMENT PROTECTION EQUAL TO THE INDIVIDUAL 14

1. THE DEFINITION OF "TO KEEP" UNDER THE SECOND AMENDMENT 15

Page

2. "CONSTITUTIONAL REGULATORY OVERBURDEN" DEFINES THE BREAKPOINT AGAINST LAWS DESIGNED TO OR RESULTING IN FFL INABILITY TO MEET COMPLIANCE DEMANDS. 18

B. FEDERAL PRE-EMPTION PROHIBITS ANY FORM OF A GUN OWNERS' REGISTRY OR ABUSE OF FEDERAL FIREARMS COMPLIANCE TOOLS 20

C. *NYSRPA V BRUEN* EXTENDS AGAINST SCHEMES (A.) TO BLOCK CONCEALED CARRY PERMITS; (B.) TO REQUIRE SEMI-AUTOMATIC RIFLE LICENSES; AND, (C.) TO REQUIRE AMMUNITION BACKGROUND CHECKS. 26

II. *WINTER* ANALYSIS, USING THESE CLAIMS, RESULTS IN A GRANTING OF MUCH-NEEDED PRELIMINARY INJUNCTIVE RELIEF. 29

A. AT LEAST ONE PETITIONER HAS STANDING 29

Page

1. AS TO CASES AND CONTROVERSIES....................29

2. AS TO FACING "THREATENED ENFORCEMENT OF A LAW" 30

3. AS TO INJURIES, AND WHICH ARE ON-GOING..........31

B. RESPONDENTS ARE PROPERLY BEFORE THIS COURT, IF THE RULE OF LAW IS TO PREVAIL.....................32

C. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS AGAINST THE NEW LAWS...............................33

D. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING EMERGENCY RELIEF 33

CONCLUSION 37

TABLE OF CITED AUTHORITIES

Page

Cases – Supreme Court of the United States

Albertson v. Subversive Activities Control Board, 382 U.S. 70 (1965) 3, 11, 21

Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289 (1979) 31

Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) 23

District of Columbia v. Heller, 554 U.S. 570 (2008) 15, 16

Elrod v. Burns, 427 U.S. 347 (1976) 34

Ex parte Young, 209 U.S. 123 (1908) 32

Haynes v. U.S., 390 U.S. 85 (1967) 3, 21

McDonald v. Chicago, 561 U.S. 742 (2010) 16

MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118 (2007) 31

Page

Lujan v. Defenders of Wildlife,
504 U.S. 555 (1992). 30

NYSRPA v. Bruen,
597 U.S. _____ (2022) 11, 15, 16, 26, 29, 33

NYSRPA v. NYC,
590 U.S. _____ (2020, slip opinion) 13

Roman Cath. Diocese of Brooklyn v. Cuomo,
592 U.S. ___, 141 S. Ct. 63 (2020, *per curiam*) 34

Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.,
547 U.S. 47 (2006). 29

Steelworkers v. U.S.,
361 U.S. 39 (1959) .17, 18, 23, 26

Susan B. Anthony List,
573 U.S., 149 158159 (2014) 31

Tandon v. Newsom,
593 U.S. ___, 141 S. Ct. 1294 (2021, *per curiam*). . .34

Whole Woman's Health v. Jackson,
594 U.S. _____ (2021) .15, 26, 32

Winter v. Nat'l Resources Def. Council,
555 U.S. 7 (2008). 14, 29

Page

Cases – 2d Circuit Court of Appeals

Cayuga Nation v. Tanner,
824 F.3d 321 (2d Cir. 2016) 31

Centro de al Comunidad Hispania de Locust Valley v. Town of Oyster Bay,
868 F.2d 104 (2d Cir. 2017) 29

In re Deposit Ins. Agency,
482 F.3d 612 (2d Cir. 2007) 32

Picard v. Magliano,
42 F.4th 89 (2d Cir. 2022) 31

State Employees Bargaining Agent Coal. v. Rowland,
494 F.3d 71 (2d Cir. 2007) 32

Wisdom Import Sales Co. v. Labatt Brewing Co.,
339 F.3d 101, 113 (2d Cir. 2003) 32

Cases – Other

ACLU v. Reno,
929 F.Supp. 824 (E.D. Pa. 1996) 34

Dominion Bankshares Corp. v. Devon Holding Co.,
690 F.Supp. 338 (E.D.Pa. 1988) 32

Page

U.S. Constitution

U.S. Const. art. III, sec. 2, cl. 1 .29

U.S. Const. art. VI, cl. 2 20

U.S. Const. amend II 1, 3, 7

U.S. Const. amend V 1, 7

U.S. Const. amend XIV 1, 3, 7, 11

Statutes – Federal

Brady Handgun Violence Prevention Act, Pub. L. 103-159 (November 30, 1993), 107 Stat. 1536, 18 U.S.C. §§921-922, 925A 2

Firearms Owners' Protection Act, Pub. L. 99-308 (April 10, 1986), 100 Stat. 449, 18 U.S.C. §§921, *et seq.* 2, 22

Gun Control Act of 1968, Pub. L. No. 90-618 (October 22, 1968), 82 Stat. 1213-2, 18 U.S.C. Ch. 44 §§921, *et seq.* (referred to as "Gun Control Act"). 2

18 U.S.C. §923(d)(1)(E) 9

18 U.S.C. §922(g)(1) 3

Page

18 U.S.C. §923(d)(1)(E) 9

18 U.S.C. §923(g) 23

18 U.S.C. §923(g)(1)(A) 21, 24

18 U.S.C. §923(g)(1)(B) 21, 24

18 U.S.C. §923(g)(1)(B)(iii) 23

18 U.S.C. §923(g)(2). 20

18 U.S.C. §926 . . . . .20, 23

28 U.S.C. §2101(e) 1

42 U.S.C. §1983 7

42 U.S.C. §1985(3) 7

Regulations – Federal

27 CFR §478.122 26

27 CFR §478.123 26

27 CFR §478.124 20

27 CFR §478.125 26

Page

27 CFR §478.125(e) 20, 21

27 CFR §478.23 . . . . 23, 24

28 CFR §25.3 25

28 CFR §25.6 . . . . .20, 23

28 CFR §25.6(a) 20

28 CFR §25.9 . . . . .20, 26

28 CFR §25.11(b) 20, 23

Statutes – State – New York

NY Exe §144-a 13

NY Exe §228(3) 25

NY Exe §228(4) 25

NY Exe §228(8) 25

NY GCN §20 10

NY Exec §837(23)(a) 27

NY Gen Bus §837(23)(a) 5

Page

NY Gen Bus §875 4

NY Gen Bus §875-b. 26

NY Gen Bus §875-b(2) 19

NY Gen Bus §875-f 20

NY Gen Bus §875-f(3) 23

NY Gen Bus §875-g(1)(b) 21

NY Gen Bus §875-i 33

NY Pen §265.00(3). 5

NY Pen §265.01(1) 5

NY Pen §265.20(3-a) 5, 27

NY Pen §265.65 . . . . .6, 27

NY Pen §265.66 . . . . .6, 27

NY Pen §270.22 13

NY Pen §400.00 28

NY Pen §400.00(1). 28

Page

NY Pen §400.00(2). 6

NY Pen §400.00(5)(c). 28

NY Pen §400.00(5)(e)(ii) 28

NY Pen §400.00(5)(e)(iii). 28

NY Pen §400.00(5)(f). 28

NY Pen §400.00(7). 6, 27

NY Pen §400.00(10). 28

NY Pen §400.00(11). 3

NY Pen §400.00(16-a) 28

NY Pen §400.00(19). 27

NY Pen §400.02(2). 22

NY Pen §400.03(6). 27

Other

Sup. Ct. R. 11 1

Sup. Ct. R. 22 8

Sup. Ct. R. 23 8

OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is an unreported Order that is reproduced in the appendix hereto ("App.") at 59a-60a. The opinion of the District Court of the North District of New York is unreported and is reproduced at App. 1a and 2a–58a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. §2101(e). Under Sup. Ct. R. 11, it can, any time before judgment, deviate from normal appellate practice to review matters of "such imperative public importance" as to justify immediate determination in this Court. The District Court text order denying Petitioners' emergency motion for preliminary injunctive relief issued December 2, 2022. A delayed decision issued December 7, 2022.

STATUTORY PROVISIONS INVOLVED

Relevant constitutional and statutory provisions are reprinted in the appendix. App. 61a–99a.

INTRODUCTION

This case challenges multiple, inter-connected statutes arising out of new laws that impact some twenty aspects of Petitioners' individual rights under the Second, Fifth, and Fourteenth Amendments, as well as of their rights as federal and state licensees operating as dealers in the lawful stream of commerce in firearms in the U.S. The inventory of the offending statutes is laid out in the Complaint [Doc 1, sec. IV, ¶¶27-32 (pp. 1419)]

and the "Emergency Motion" to the District Court [Doc 13]. Petitioners seek a preliminary injunction enjoining Respondents from enforcing these laws.

STATEMENT OF THE CASE

I. GRANT OF A RULE 11 WRIT OF CERTIORARI IS OF IMPERATIVE PUBLIC IMPORTANCE

A. FEDERAL FIREARMS LICENSEES IN NYS AND NATIONWIDE ARE IMPACTED

The new laws directly impact Petitioners as eight of the 1,782 Federal Firearms Licensees Type-01 ("FFLs") and one of the nine Type-02 ("pawnbrokers") with business premises in New York.[1] [Doc 16-6, p. 2] Nationwide, there are 52,887 FFL-01s and 6,924 FFL-02s, including Puerto Rico and the U.S. Virgin Islands. [*Id.*] All operate under "federal firearms compliance law," arising largely out of the 1968 Gun Control Act ("GCA")[2], the 1986 Firearm Owners Protection Act[3] ("FOPA"), the 1994 Brady Handgun Violence Prevention Act,[4] and associated ATF regulations.

---

1. For simplicity of language, both the "dealer" and the "pawnbroker" are referred to herein as "dealers." The distinctions at federal law are not relevant to this case.

2. Gun Control Act of 1968, Pub. L. No. 90-618 (October 22, 1968), 82 Stat. 1213-2, 18 U.S.C. Ch. 44 §§921, *et seq.*

3. Firearms Owners' Protection Act, Pub. L. 99-308 (April 10, 1986), 100 Stat. 449, 18 U.S.C. §§921, *et seq.*

4. Brady Handgun Violence Prevention Act, Pub. L. 103-159 (November 30, 1993), 107 Stat. 1536, 18 U.S.C. §§921-922, 925A.

Petitioners, *inter alia*, engage in FFL-to-FFL interstate transactions. [e.g., Mastrogiovanni, Doc 13-5, ¶¶15, 48-54; Seth Gazzola, Doc 13-3, ¶¶53-58] Routine, inter-state commerce in firearms involves all FFL Types, including, e.g., manufacturers (FFL Type-07) that supply dealers.[5] From the GCA in 1968 until now, the ATF and the FBI have occupied the field, with the few statutory or regulatory exceptions open to states being theoretical and largely unexplored.

There is a catastrophic legal cascade for Petitioners for breaking the new laws, most of which came into effect while the case has been pending. *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 74 (1965). The new laws target "dealers" *only* – no other businesses in the state. Penalties include class A misdemeanor and/or class E felony criminal charges, *plus* revocation of the state-issued dealer license. NY Gen Bus §875-i; NY Pen §400.00(11). The loss of the state license results in the loss of the federal FFL license. 18 U.S.C. §923(e), *read with* §923(d)(1)(F); *see* Doc 24-4, ATF Form 7, question 20(b) for original application; Doc.App 19, ATF Form 8, questions 2 and 3 for renewals. A criminal conviction results in the loss of the NYS individual concealed carry permit and of Second Amendment rights. NY Pen §400.00(11); 18 U.S.C. §922(g)(1); U.S. Const. amends II and XIV. The new laws turn "an essentially noncriminal and regulatory area of inquiry" into "an area permeated with criminal statutes." *Haynes v. U.S.,* 390 U.S. 85, 99 (1967).

---

5. Several Petitioners have more than one type of federal license, e.g., Seth Gazzola of Zero Tolerance Manufacturing, Inc. has both an FFL Type-07 and an SOT Class 2 [Doc 13-2, ¶12; Doc 13-3, ¶1314]

Petitioners have fixed business premise addresses on file with NYS Police. Violations of the new laws are in plain sight while their stores are open to the public, including to their valued law enforcement customers, including NYSP officers. [Nadine Gazzola, Doc 133, ¶¶38, 58]

Petitioners cannot renew their federal and/or state licenses because they are no longer in compliance. The first such federal license renewal among Petitioners is Nadine & Seth Gazzola of "Zero Tolerance Manufacturing, Inc.," due February 2023, including responses to two questions of state compliance. [DocApp 39, pp. 24-27; Seth Gazzola, Doc 13-3, ¶23]

The new laws create massive financial impact to the industry, mostly found at NY Gen Bus §875, *et seq*. [Doc 1, pp. 94-108] The NYS dealers' industry impact could run $400 million to $1.6 billion. [Doc 1, ¶184] The estimated costs to individual Petitioners range from $200,000/year to approaching $1 million/year. [*Id.*, ¶183] Additional details are available in each of their Declarations. The bill jackets said "no financial impact." That was false.

The strangest impediment to analysis and attempted compliance is Respondent agencies failing (now 6-months post-enactment) to produce 32 out of 34 regulations and other publications delegated by the new laws to them. [Doc 33-1]

B. All NYS Counties are also Impacted

The new laws also directly impact county issuance of licenses for individuals and FFLs. "County," as used, includes county clerk's offices, county licensing

officers, and county Sheriffs' Departments. Although the State defines basic individual and business licensing requirements, counties implement them, with variations, under home rule. [E.g., Nadine Gazzola, Doc 13-2, ¶27; Serafini, Doc 13-4, ¶¶10, 23, 26] For example, the State previously did not require handgun training,[6] nor a semi-automatic rifle license, nor an ammunition background check. Now, it does.

There is a parallel legal cascade of damages facing Petitioners, as individuals, for personal license issues. It is illegal in NY to own a "firearm"[7] in the absence of a license. NY Pen §265.00(3), §265.01(1). It is now impossible to apply for or to renew a concealed carry license in the absence of the new training, testing, and completion certificate. NY Pen §400.00(1) and (19), *read with* NY Exec §837(23)(a) and NY Pen §265.20(3-a). However, Respondent NYSP has failed to issue the required materials. *Id.* [Doc 33-1, pp. 34; *Cf.* Doc 15-2, which Petitioners argue does not satisfy statutory requirements.]

Petitioners cannot renew their concealed carry licenses because they cannot complete the required classroom and live-fire training, take the test, and present the certificate of successful completion. The first such

6. Some Counties did require limited classroom training towards a concealed carry permit application. [Hanusik, Doc 13-9, ¶27]

7. The definitions of "firearm" at federal and state law differ. Herein, excepting this direct, statutory reference, the use of the word "handgun" refers to that which requires a concealed carry permit and "firearm" has its federal meaning to include all types of firearms (shotgun, rifle, handgun).

Petitioner wanting to renew his concealed carry permit is Michael Mastrogiovanni in January 2023.

Further, it is now illegal to purchase a semi-automatic rifle without a license. NY Pen §400.00(2). No free-standing SAR license is available because Respondent NYSP has failed to issue the format of the new SAR license. NY Pen §400.00(7). [Doc 33-1, p. 2] Petitioners are unable to apply for a proper, stand-alone SAR license, even though they desire "to purchase additional semi-automatic rifles for personal self-defense and sporting purposes." [Martello, Doc 13-6, ¶11]

There is further criminal exposure for Petitioners, as FFLs, if they sell a handgun or a semi-automatic firearm to an individual lacking a valid license(s). NY Pen §265.65, §265.66.

What once was a stable county-level system for individual and business licenses has been thrown into turmoil. More than twenty county legislatures passed resolutions since July 1, 2022, condemning, at least, the "Concealed Carry Improvements Act." [Docs 173, 175] Respondent Gov. Kathy Hochul, herself a former Erie County Clerk, knew exactly where to place the charge to blow up the statewide, county-level operating system. [Martello, Doc 136, ¶¶9699]

Some counties stopped issuing new concealed carry permits from September 1, 2022 through on or about October 25, 2022. [E.g., Nadine Gazzola, Doc 132, ¶51] Complicating matters, some counties resumed issuing concealed carry licenses without waiting for the new training and others decided to "approve instructors" to

teach courses those trainers created. [Serafini, Doc 134, ¶30; Doc 176, 178] Another variation is the "endorsement to a concealed carry license." [Martello, Doc 135, ¶¶55, 56] Still others are saying they are "business as usual" until they get further guidance from the state. [Owens, Doc 13-8, ¶71] And then there's the "legacy permit." [Serafini, Doc 13-4, ¶31] Examples are found at Docs 174, 177, 179, 1710, and 1711.

Petitioners' state dealers' licenses cannot renew because they are not in compliance with the new laws. The first Petitioner requiring such renewal is Christopher Martello in July 2023.

PROCEDURAL BACKGROUND

Petitioners filed a highly-detailed Complaint on November 1, 2022, setting out causes of action under 42 U.S.C. §1983 and §1985(3) through the Second, Fifth, and Fourteenth Amendments, also arguing federal pre-emption. [Doc 1] An "Emergency Motion" on the Record for TRO/PI followed on November 8, 2022 [Doc 13], including eight Petitioner affidavits [Doc 131 through 139] and more than thirty curated exhibits [Doc 15, 16, 17, 24, and all subparts]. A teleconference was held November 10, 2022. [ECF 11/10/2022] After an expedited, full briefing, oral arguments were held December 1, 2022. Less than 24-hours later, via text order, the district court denied the motion in its entirety (without the requested hearing). [App 1a]

On December 2, 2022, Petitioners filed their "Notice of Appeal" to the Second Circuit Court. [Doc.App 1] An emergency motion for preliminary injunctive relief

followed on December 6, 2022. [Doc.App 12] A circuit court three-judge panel denied the motion on December 21, 2022, writing only two (2) sentences, though claiming to have "weighed the applicable factors." [App 59a] The circuit court scheduled an expedited, full briefing. Petitioner's brief is due January 25, 2022; the State March 1, 2023. [ECF.App 37]

The State submitted one memorandum to each court. [Doc 29; Doc.App 26]. The State has submitted no (zero) affidavits or exhibits, excepting four historic laws that support Petitioners' case. [Docs 29-2 through 29-5]

On Friday, December 30, 2022, Petitioners filed an emergency motion under Sup. Ct. R. 22 and 23 to Justice Sotomayor, requesting immediate injunctive relief and an administrative stay.

THE PETITIONERS AND THEIR MANY ROLES

Petitioners' rights are infringed in multiple capacities by Respondents. Petitioners are dealers in firearms by profession.[8,9] Petitioners are Federal Firearms Licensees, licensed first by the ATF. [Doc. 24-4, 19] Petitioners are

---

8. *N.B.*: Federal law defines the FFL-01 license as covering both the retail and the gunsmith functions. NYS requires two separate licenses – the "dealer" license and the "gunsmith" license to achieve the same permissions. The federal definition of "dealer" differs from NYS in other aspects not relevant to this case.

9. *N.B.:* A federal license is not required to be a dealer of ammunition, nor is there a federal background check for the purchase of ammunition. The State does not require NYS-licensed dealers to obtain a "dealer of ammunition" license.

ATF "Responsible Persons"[10] for the businesses they own and operate. New York requires a concurrent state license as a "dealer," a requirement allowed by federal law. 18 U.S.C. §923(d)(1)(E). Plaintiffs receive their state licenses through their local County Clerk's Office. *See*, Nadine & Seth Gazzola [[11]Doc 13-2 & 13-3, ¶11-12, ¶15]; Craig Serafini [Doc 134, ¶6, 7]; Michael Mastrogiovanni [Doc 13-5, ¶9]; Christopher Martello [Doc 13-6, ¶1314, 15-16]; Nicholas Affronti [Doc 13-7, ¶5, 7]; Robert Owens [Doc 13-8, ¶16]; and, John A. Hanusik [Doc 13-9, ¶15, 17].

Petitioners are business owners in the form of sole proprietorships, single-member LLCs, and corporations. Petitioners work at their businesses. [Nadine Gazzola, Doc 132, ¶5; Serafini, Doc 134, ¶5; Mastrogiovanni, Doc 135, ¶5; Martello, Doc 13-6, ¶5; Owens, Doc 138, ¶5; Hanusik, Doc 139, ¶5.]

Petitioners, as individuals, have unrestricted NYS concealed carry permits. [Nadine Gazzola, Doc 132, ¶17; Seth Gazzola, Doc 13-3, ¶8; Serafini, Doc 13-4, ¶9; Mastrogiovanni, Doc 135, ¶7; Martello, Doc 13-6, ¶9; Affronti, Doc 13-7, ¶10; Owens, Doc 13-8, ¶10; Hanusik, Doc 13-9, ¶9.

---

10. "Responsible Person" is defined by BATFE on Form 7, "Definitions," as "In addition to a Sole Proprietor, a Responsible Person is, in the case of a Corporation, Partnership, or Association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the Corporation, Partnership, or Association, insofar as they pertain to firearms."

11. "Doc" is used to refer to district court documents of this case. "Doc.App" is used to refer to circuit court documents in this case. "Dkt" is used to refer to any other case docket entry or document, along with the court designation and case number.

Petitioners Nadine and Seth Gazzola are paid firearms instructors. [Doc 13-2, ¶¶47-48; Doc 13-3, ¶¶25-39] Some Petitioners benefit from sales to handgun permittees following courses by third-party instructors. [See, e.g., Serafini, Doc 13-4, ¶¶23-32.]

Petitioners, as individuals, are also consumers, and personally own firearms and ammunition. [Nadine Gazzola, Doc 13-2, ¶18; Seth Gazzola, Doc 13-3, ¶8; Serafini, Doc 13-4, ¶9; Mastrogiovanni, Doc 135, ¶7; Martello, Doc 13-6, ¶9-10; Affronti, Doc 13-7, ¶9; Owens, Doc 13-8, ¶9-10; Hanusik, Doc 13-9, ¶¶6, 9.]

Until December 5, 2022, Petitioners were in compliance with all federal and state laws governing their personal and professional licenses. On that day, most of the laws complained of came into effect[12] and Petitioners went out of compliance. As expressed by Petitioner Robert Owens:

> "The new laws are much worse than the "SAFE Act." For nine years, I have been able to work within the confines of the ATF mandates and the "SAFE Act." I could stay in the middle of that and do everything in accordance with the law. I am operating legally.
>
> "Now, I can't comply. It's literally impossible. It's also unconstitutional." Doc 138, ¶¶67-68.

---

12. Pursuant to NY GCN §20, laws that would otherwise become effective on a Saturday or Sunday become effective the following Monday. Any use of a "December 3" effective date for NY S.4970 by the lower courts or Counsel is in error.

With the advent of *NYSRPA v. Bruen,* Petitioners should be enjoying equal federal and state Second Amendment rights in every sense of the Fourteenth Amendment, which promises: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." U.S. Const amend XIV. Instead, the Petitioners feel as if they are "…a highly selective group inherently suspect of criminal activities." *Albertson, supra,* at 79.

THE RESPONDENTS

As laid-out in the Complaint (pp. 38-54), Respondent Gov. Hochul designed the new laws with help from CoRespondents while "joined at the hip" with lawyers she named from Every Town for Gun Safety and Giffords Law Center, as well as other outside "experts." [Doc 1, pp. 38-54, see ¶91] She repeatedly publicized her fury, particularly about this Court's June 23, 2022 ruling in *NYSRPA v. Bruen,* touting her superiority as a state governor and vowing revenge, including:

> "**And I thank the State Police for being so aggressive in their approach** in making sure that we protect citizens, *but then you have the Supreme Court of the United States of America that think that they have more power than a governor does when it comes to protecting the citizens of our state.*" (emphasis added) [Doc 1, ¶105]

Highlighting, another example, by June 29, 2022, Respondent Gov. Hochul attacked the six Justices in the majority vote:

> "The Supreme Court decision was a setback for us, but I would call it a temporary setback, because we are going to marshal the resources, **the intellect**, we've been talking to **leaders in this industry**, and **academics** and **people in think tanks to** find out what we can do legally, constitutionally, to make sure that we do not surrender my right as Governor, or our rights as New Yorkers to protect ourselves from gun violence." [*Id.,* at ¶108]

This, and numerous other quotes laid out in the Complaint say it all.

Respondent agencies' responsibilities should have been completed by the September 1st and December 5th effective dates. Petitioners' chart at Doc 33-1 is a 6-page, itemized list of the unfulfilled duties. Respondent agencies have failed to perform 32 of the 34 responsibilities under the new laws. That's a 94% *failure* rate. Petitioners urge the Court to review this chart. [Doc 331]

On December 5, 2022, the authority for Respondent agencies to perform these functions expired for the primary bill complained of:

> NY S.4970-A, §5: "Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed *on or before such effective date*." Doc 1-1, p. 7.

Most of the new laws are missing vital information that should have been published by Respondents. Taking but one example from the list:

> NY Exe §144-a says in sentence one "…*shall* promulgate *rules and regulations* to establish criteria for eligible professions requiring the use of a body vest…" (emphasis added)
>
> And, in sentence three, that such rules and regulations "…*shall* also include *a process* by which an individual or entity may request that the profession in which they engage be added to the list of eligible professions, *a process* by which they engage be added to the list of eligible professions, *a process* by which the department shall approve such professions, and *a process* by which individuals and entities may present proof of engagement in eligible professions when purchasing the body vest." (emphasis added)

Respondents met none of these requirements. The entire provision is meaningless. *Any* sale of a body vest is thus illegal. NY Pen §270.22. Petitioner Nick Affronti can no longer sell body vests because "…the new laws are too vague to interpret and because the [Respondents] have failed to fulfill their responsibilities under the law on point." [Doc 137, ¶24] This is but one example.

This Court may want to refresh on *NYSRPA v. NYC,* 590 U.S. _____, p. 21 (2020, Alito, J., dissenting), wherein NY City "fought petitioners tooth and nail in the District Court and the Court of Appeals, insisting that its old

ordinance served important public safety purposes" only to amend the law and admit it was "not needed for public safety" as soon as this Court granted certiorari.

Respondent NYS Police, in sharp comparison to the ATF, neither invests time or resources on NY-licensed dealers. Respondents have full contact information for Petitioners. [Owens, Doc 13-8, ¶69] Petitioners received no notification of the new laws. [Nadine Gazzola, Doc 13-2, ¶40; Serafini, Doc 13-4, ¶67; Owens, Doc 13-8, ¶69] Petitioners were rebuffed with "I don't know," when they called the NYSP for information. [Mastrogiovanni, Dkt. 13-5, ¶¶36, 38] As per Petitioner John A. Hanusik wrote: "I spent a couple weeks at the NYS Police in August and they told me I know more about what's going on than they do; they have no idea what's going on." [Doc 139, ¶17]

REASONS FOR GRANTING THE PETITION

I. PETITIONERS' NOVEL THEORIES HAVE A LIKELIHOOD OF SUCCESS TO SUPPORT A GRANTING PRELIMINARY INJUNCTIVE RELIEF

A. DEFINING "TO KEEP" WILL GIVE THE FFL DEALER SECOND AMENDMENT PROTECTION EQUAL TO THE INDIVIDUAL

To achieve preliminary injunctive relief, Petitioners must, *inter alia,* meet the "likelihood of success" factor of the *Winter* test. The traditional *Winter* test gives a false negative when lower courts don't recognize that watershed or novel claims can have a "likelihood" of success, like the ones herein. *Winter v. Nat'l Resources Def. Council,* 555 U.S. 7 (2008).

The Second Amendment is the modern civil rights movement. The field was born in 2008 out of *District of Columbia v. Heller,* 554 U.S. 570. It is in an early stage of interpretation.

This case, as a result, may face "serious challenges but also present some opportunities." *Whole Woman's Health v. Jackson,* 594 U.S. _____, p. 17 (2021) "Opportunities," including for a novel remedy as a direct result of the novelty of the scheme by a state to deprive individuals of their civil rights. *Id.* at 2496 (Roberts, C.J., dissenting).

1. THE DEFINITION OF "TO KEEP" UNDER THE SECOND AMENDMENT

The first novel theory of this case is laid out across ten pages of the Complaint. [Doc 1, pp. 20-30] This case is the organic progression of the trilogy of *Heller-McDonald-NYSRPA v. Bruen.* Petitioners are the "to keep" of "to keep and bear arms." U.S. Const. amend. II. The operative clause contains a joinder of two verbs; both should be equally used in constitutional analysis. The FFL in the lawful stream of commerce in firearms is inextricably inter-woven with fundamental individual rights.

Thus far, this Court has defined "to bear" as the right to "wear, bear, or carry…upon the person or in the clothing or in a pocket…" *NYSRPA v. Bruen, supra,* at 23, citing *Heller, supra,* at 592. Expressing also that "to bear" "naturally encompasses public carry" because "[t]o confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections." *NYSRPA v. Bruen, supra,* at 24. Similarly, this Court

found "in common use" as "lawful weapons that they [able-bodied men] *possessed* at home" to bring along to militia duty. *Heller, supra,* at 624 and 627 (emphasis added).

There appears an *obiter dicta* consensus among the Justices of this Court that "to keep" meant, historically, dating back to the British Crown, that the individual "right to "have arms" in private ownership, must, at least, be protected "should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation." *NYSRPA v. Bruen, supra* at 27, Breyer, J., dissenting.

Indeed, the historic New York laws required able-bodied men to report for militia training, bearing their own privately-owned arms and ammunition. [Doc 29-2, p. 2, New York (1780), Sec. I ("That every person so enrolled, and notified, shall within twenty days thereafter, furnish and provide himself, *at his own expense*, with a good musket or firelock…" and "…not less than sixteen cartridges, suited to the bore of the musket or firelock…" (emphasis added)); Doc 29-3, p. 1, New York (1792), Sec. 1; and, Doc 29-4, p. 2, New York (1782), Sec. I.]

In short, firearms and ammunition 'twere not furnished by the State; they were privately purchased and owned by individuals. The Second Amendment has no operational meaning without sellers of firearms, like Petitioners.

Throughout *Heller – McDonald – NYSRPA v. Bruen,* this Court did not have jurisdiction to rule upon the "to keep," the *from whence* the militiaman came into possession of a firearm, or, whether a firearms dealer stands on an equal constitutional footing as the individual while making a purchase. This case is that opportunity.

The firearm is the only object required to exercise a civil right in the Bill of Rights. This has yet to be formally recognized. In 2022, very few hands forge a firearm from iron ore. Some, like Petitioner Mike Mastrogiovanni, a competition shooter, do reload ammunition [Doc 13-5, ¶¶22-23], but even reloaders do not make their own arms from metals and forge. In 2022, the exercise of the Second Amendment depends upon the skill of the individual to use a credit card at a retail dealer in firearms.

Not one person in federal, state, or county government is the conduit for the individual seeking to purchase a firearm to exercise their Second Amendment rights. The FFL is the only lawful facilitator. The dealer in firearms is the indispensable extension of the individual for the procurement of the firearm, and dealers must be protected with as much rigor.

Informative are a small group of War Years cases that includes *Steelworkers v. U.S.*, 361 U.S. 39 (1959). The cases interpreted the statutory phrase "will imperil the national health or safety" relative to critical industries. The court explained:

> "But a court is not qualified to devise schemes for the conduct of an industry so as to assure the securing of necessary defense materials. It is not competent to sit in judgment on the existing distribution of factors in the conduct of an integrated industry to ascertain whether it can be segmented with a view to its reorganization for the supply exclusively, or even primarily, of government-needed materials. Nor is it able to readjust or adequately to reweigh the

> forces of economic competition within the industry or to appraise the relevance of such forces in carrying out a defense program for the Government." *Supra,* at 50-51.

The State earlier proposed "Walmart or Runnings" would suffice for New Yorkers' Second Amendment needs. [Doc 29, p. 16] Is the Court going to have us brief that the current ATF database[13] shows 47 Walmart locations plus 10 Runnings stores with FFL-01 licenses – statewide – and contemplate whether such would adequately meet the Second Amendment needs of all New Yorkers? The wisdom and applicability of *Steelworkers* suggest otherwise.

2. "CONSTITUTIONAL REGULATORY OVERBURDEN" DEFINES THE BREAKPOINT AGAINST LAWS DESIGNED TO OR RESULTING IN FFL INABILITY TO MEET COMPLIANCE DEMANDS

"Constitutional regulatory overburden" is a novel way to capture the Laffer Curve of a firearms dealer. The new laws, taken as a whole, define the point at which Petitioners asked, "Why would I continue to turn the key and flip on the lights?" The new laws are so onerous as to deincentivize the dealer, including Petitioners, to continue to perform commercial functions necessary to give life to and to protect individual rights under the Second Amendment.

13. https://www.atf.gov/firearms/listing-federal-firearms-licensees.

Petitioners urge the Court to review their presentation of each new law in this subgroup with cost estimates, technical problems, and structural restrictions in the Complaint [Doc 1, pp. 94-105], as well as for their individual situations in their Declarations where each Petitioner took a lead on one or more of the statutes.

For example, Petitioner Christopher Martello took lead on the technologically infeasible video recording devices and storage mandate under NY Gen Bus §875-b(2) in Doc 13-6, ¶¶8088. Among his credentials is the "Ikkin Industries" full line of "state-of-the-art police evidence body cameras." [*Id.*, ¶81] His affidavit walks through an analysis: number of 16 Terabyte drives required for the now facility-required camera positions, cost per drive, additional hardware requirements, and installation. [*Id.*, ¶86] This allowed other Petitioners to generate estimates. [Declarations, *passim*] And that allowed FFL-wide projections for the Complaint. [Doc 1, ¶¶253-261] No Petitioner is in compliance. Petition word limits do not allow a repeat of each statute, already set out in the Record.

Please note: Petitioners also argue an alternative theory that the new dealer laws must be struck under Void-for-Vagueness. It is literally impossible to comply with any and every new law awaiting Respondent agency action. The resultant text will result in arbitrary arrests.

B. FEDERAL PRE-EMPTION PROHIBITS ANY FORM OF A GUN OWNERS' REGISTRY OR ABUSE OF FEDERAL FIREARMS COMPLIANCE TOOLS

Petitioners seek validation also for their pre-emption claim, which represents the first time the federal-state balance in the field of firearms compliance law is being severely tested. [Doc 1, ¶¶54-63] The Supremacy Clause "invalidates state laws that interfere with, or are contrary to federal law." U.S. Const. art. VI, cl. 2.

Congress deemed the FFL as the guardian of the firearms transaction and inventory records[14] that they create. Petitioners' federal firearms compliance records are written by hand in carefully choreographed communication with the customer and the ATF in accord with federal law, regulation, and guidance documents too lengthy to set forth, herein. *See, e.g.,* 18 U.S.C. §926, 28 CFR §25.6(a), 28 CFR §25.11(b) The most valuable of these records are the ATF Form 4473 [Doc 241] and the Book of Acquisitions & Dispositions ("A&D Book"). "Even when the ATF runs a background check, it gets only so much information from me, the dealer, and that information has to be purged from their system in specified time periods, dependent upon the results of the records search." Owens, Doc 13-8, ¶35; 28 CFR §25.9.

Respondents now demand under NY Gen Bus §875-f that dealers semi-annually turn over copies of their

---

14. "Records" for purposes of federal firearms compliance are defined under statutes and regulations like 18 U.S.C. §923(g)(2), 27 CFR §478.125(e), and 27 CFR §478.124.

federal firearms compliance records, including the make, model, serial number, caliber of firearm, and who sold or collateralized the firearm, and who bought or collected back the firearm.

Even threatened with the legal cascade of penalties (above), Petitioners will not give their federal firearms compliance records to Respondent NYSP, nor will they create duplicitous (shadow) books[15] to help Respondents avoid federal pre-emption court orders and/or federal penalty. Petitioners will thus be unable to sign compliance statements at NY Gen Bus §875g(1)(b) and federal and state renewal applications. [Declarations, *passim;* see, e.g., Fifth Amendment claims by Nadine Gazzola, Doc 13-2, ¶38; Seth Gazzola, Doc 13-3, ¶22; Serafini, Doc 134, ¶50; Mastrogiovanni, Doc 135, ¶35; Martello, Doc 136, ¶40; Affronti, Doc 137, ¶53; and Owens, Doc 138, ¶31]

"To ask, in these circumstances, that petitioners await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege…" *Albertson, supra,* at 76. "The hazards of incrimination created by the registration requirement can thus only be termed "real and appreciable." *Haynes, supra,* at 97.

The federal acts can be described as a "covenant" between the federal government and those who defend

---

15. The new law directs creation of "record of purchase, sale, inventory," which is the federal A&D Book described at 27 CFR §478.125(e) and illustrated at corresponding "Table 4: Firearms Acquisition and Disposition Record."

and exercise Second Amendment rights. In the words of Petitioner Michael Mastrogiovanni:

> "I remember when the 1968 Gun Control Act was passed and when the 1996 Brady Law was passed. The Brady Act is what ushered in the NICS background check system. Congress gave the ATF five years to design, test, and launch the NICS background check system, including security protocols, speed requirements, and records development for the ATF and the Licensees, as well as the ATF record retention and destruction policies. Congress was clear, through any Member interviewed on TV and in the news: no government registry would be created through the records, of any kind, on any level; the dealers would retain the originals." [Doc 13-5, ¶39]

Section 101 of the Firearm Owners Protection Act reflected that sacred commitment:

> "*No such rule or regulation* prescribed after the date of the enactment of the Firearm Owners' Protection Act *may require that records required to be maintained under this chapter or any portion of the contents of such records*, be recorded at *or transferred to* a facility owned, managed, or controlled by the United States *or any State* or any political subdivision thereof, *nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established*." (emphasis added)

[Doc. 1, ¶¶65-66 and 133b, pp. 27-30]

When intention is clear, the court must "give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984). Industries that "[safeguard] the comprehensive interest of the community" and promote national policies "must be construed to give full effect to the protections they seek to afford." *Steelworkers, supra,* at 54 (Frankfurter and Harlan, concurring).

Respondents demand what even the U.S. Attorney General cannot have. The U.S. Attorney General or an ATF officer may only access the ATF Form 4473 and the A&D Book in two specific circumstances: (1.) pursuant to a warrant in a criminal investigation of a person other than the licensee; and, (2.) upon visual inspection during a routine inventory reconciliation compliance check, where if any pages be copied by BATFE, the pages must also be furnished to the FFL for their records. 18 U.S.C. §923(g)(1)(B) and 27 CFR §478.23. *See, also,* 18 U.S.C. §923(g)(1)(A) and 27 CFR §478.23; and 18 U.S.C. §923(g)(1)(B)(iii).

There are penalties for the misuse of the NICS background check system. Federal, state, and municipal governments can be fined $10,000 and lose NICS inquiry privileges. 18 U.S.C. §923(g), 18 U.S.C. §926, 28 CFR §25.6, and 28 CFR §25.11(b). This clearly prohibits the new law seeking use of NICS for a new ammunition background check. NY Pen §400.02(2).

The new law at NY Gen Bus §875-f(3) creates power to force access to dealer records "at any time" by "law

enforcement agencies and to the manufacturer of the weapon or its designee." This new law collides with Due Process afforded Petitioner FFLs under the restricted right of access by the U.S. Attorney General or the ATF officer under 18 U.S.C. §923(g)(1)(A)-(B) and 27 CFR §478.23 (entry and review of records conditioned upon a federal judicial warrant or a statutorily proscribed audit process).

It is unprecedented for a third-party, non-governmental entity to access Petitioners' federal firearms compliance records – not even an FFL-07 (assuming that is what is meant by Respondents' bald use of the words "manufacturer of the weapon"). The language is vague, but it suggests the State wants to turn manufacturers into agents of the State.

The FFL-ATF system has been working "beautifully" "for decades." [Mastrogiovanni, Doc 13-5, ¶¶40, 46] Petitioners unanimously support the federal compliance system, their relationships with their ATF Field Agents, specifically, and the ATF, generally, and their limited contact with the FBI for firearms trace. [See, e.g., Nadine Gazzola, Doc 13-2, ¶39, 39a, 39b; Serafini, Doc 13-4, ¶70-71; Mastrogiovanni, Doc 13-5, ¶¶39, 46; Affronti, Doc 13-7, ¶¶26, 82]

It is in the public interest for the 1,800 men and women like Petitioners to "…stay in business," as described by Petitioner Robert Owens:

> "What you get from that distribution of mom-and-pop shops is both solid supply for the citizens of North Country and, also, men and

> women on the ground who know the people in their communities and who are dedicated to preventing an illegal sale. You can characterize that as "working for" the ATF/FBI, or you can think of it as having the ATF/FBI on call to help us prevent crime in our communities. Either way, you do not want to drive the entire industry of firearms dealers out of business. It's contrary to public safety and it's an unconstitutional outcome." [Doc 138, ¶¶41 and 78]

The new laws permit Respondents to merge the federal compliance records into new NYSP "databases" under the thin disguise of becoming a "NICS Point-of-Contact" state. NY Exec §228(3), §228(4). The new Executive Law §228(3) empowers NYSP to create "Orwellian" mergers with records from other *state* agencies, including, but not limited to "office of court administration" and "department of public health." [Martello, Doc 136, ¶73] The power is unlimited for "such additional databases as needed." Concealed carry licenses for handgun, SAR licenses, and ammunition background checks will come under the discretion of the NYS Police with administrative appeal limited to the NYS Attorney General. NY Exec §228(8).

The new laws contain no records security protocols, access, retention parameters, or destruction definitions – all of which were set out for the ATF/FBI through the Brady Act, right down to the physical street location where the data is housed. 28 CFR §25.3. *See,* generally, Title 28 CFR; Affronti, Doc 13-7, ¶¶43-54. Federal law covers the first firearms background check record at a new FFL through disposition of records upon an FFL going out of business, all of which is done side-by-side

with the ATF due to the "technical difficult of start-ups and shutdowns." *Steelworkers, supra,* at 49 [See, e.g., 28 CFR §25.9; Mastrogiovanni, Doc 13-5, ¶47]

Respondents know so little about federal firearms law as to plop a random phrase in NY Gen Bus §875-b to allow dealers to make up individual shipping protocols. This will result in disruption of established, well-regulated, federal shipping mandates. Federal law must pre-empt to preserve a uniform system for FFL-to-FFL shipments, including loss/theft in shipment protocols. 27 CFR §§§478.122, 478.123, and 478.125. [*See* detailed discussion in Mastrogiovanni, Doc 135, ¶15, ¶¶48-54; Serafini, Doc 13-4, ¶¶76-81; and Seth Gazzola, Doc 13-3, ¶¶51-58.]

C. *NYSRPA V BRUEN* EXTENDS AGAINST SCHEMES (A.) TO BLOCK CONCEALED CARRY PERMITS; (B.) TO REQUIRE SEMI-AUTOMATIC RIFLE LICENSES; AND, (C.) TO REQUIRE AMMUNITION BACKGROUND CHECKS

The laws from NY S.51001, the "Concealed Carry Improvements Act," complained of should not even have been drafted in light of *NYSRPA v. Bruen*. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *NYSRPA v. Bruen, supra,* at 8. A government must then demonstrate that a firearms regulation "…is consistent with this nation's historical tradition of firearm regulation." *Id.,* at 2126, 2130-2131. Unfortunately, Respondent Gov. Hochul has "…employed an array of stratagems designed to shield its unconstitutional law from judicial review." *Whole Woman's Health, supra,* at p. 1 (Roberts, C.J., dissenting).

Respondents circuitously created widespread confusion to the point of effective stoppage of three individual Second Amendment rights:

A. Concealed carry permits: NYSP/DCJS failed to publish the standardized curriculum, test, and certification under NY Exe §837(23)(a) and NY Pen §265.20(3-a). No course has been available since September 1, 2022. No certificate of completion? No new permit or renewal. NY Pen §400.00(1) and (19).

B. Second, the State jammed purchases of semi-automatic rifles – an entire class of commonly-used firearms – by requiring a new (no historic analogue) SAR license and then failing to release the format for the new license required by NY Pen §400.00(7). No SAR license? No purchase by individual. No sale by dealer. NY Pen §265.65 and §265.66.

C. Third, the State is fumbling via NY Pen §400.03(6) towards its third effort at an ammunition background check (no historic analogue) through an illegal approach via NICS and otherwise mandating dealers write down customer information on a blank piece of paper because they didn't issue the "form."

On the matter of Petitioners' individual standing, the State below misrepresented "And [Petitioners] need not undergo training to maintain their [concealed carry] licenses." [Doc.App 26, at 23 and 33] Counsel referred to a NYSP/DCJS memo. [Doc 26; Doc.App 15-3, August 27,

2022] Memo "Q&A" 8-11 spout a fiction of "renew" versus "recertify" that is unsupported by law. NY Pen §400.00 does not define these words. "Renew" is used in its plain meaning some 39 times in the statute. "Recertify" is used three (3) times, twice in the context of §400.00(16-a) to "recertify" registration of an "assault weapon" and once in §400.00(10) for "recertification" of "all" carry/possess permits. "Recertification" is used another four (4) times, for privacy of permit records at §400.00(5)(c), (e)(ii)-(iii), (f). For "to renew" to apply only to NYC, Westchester, Nassau, and Suffolk Counties would eliminate eligibility for a permit to be "issued or renewed" to the whole rest of the State under NY Pen §400.00(1), *et seq.* Clearly: false.

There is no historic analogue for a semi-automatic rifle license or an ammunition background check. Militiamen were to appear with their private arms and ammunition when called up for duty. The State failed to provide historic analogue to defend these new laws.

Alternatively, Petitioners argue that if there is to be an SAR license, Respondents failed the launch and created, in effect, an effective ban. After Petitioners filed their Emergency Motion to the circuit court on December 6, 2022, NYSP added a "Resources for Gun Dealers" to their public website and circulated a 4-page "memo." [Doc. App 19-2 and 19-3] It contained the admission that the SAR license is required to be a stand-alone license; not an endorsement upon a concealed carry license. [Doc.App 19-1 includes this and other examples]

II. *WINTER* ANALYSIS, USING THESE CLAIMS, RESULTS IN A GRANTING OF MUCH-NEEDED PRELIMINARY INJUNCTIVE RELIEF

The *Winter* analysis is decidedly more functional when one agrees the novel theories, pre-emption, and application of *NYSRPA v. Bruen* have a likelihood of success. Here are the other *Winter* factors.

A. AT LEAST ONE PETITIONER HAS STANDING

1. AS TO CASES AND CONTROVERSIES.

To recap, Petitioners have multi-faceted standing as individuals, concealed carry permit holders, state licensees, federal licensees, "Responsible Persons" to BATFE, *and* business owner-operators. Their standing creates judicial economy to evaluate and rule upon three groups of inter-connected laws. Petitioners are perfectly positioned to present the issue of just "how" does the individual get "to keep" arms, to testify on federal firearms compliance law, discuss systemic problems with new laws at the county level, and more.

"[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." U.S. Const., art. III, sec. 2, cl. 1; *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006); *Centro de al Comunidad Hispania de Locust Valley v. Town of Oyster Bay,* 868 F.2d 104, 109 (2d Cir. 2017).

This case is as the earliest possible stage: complaint plus motion for preliminary injunctive relief. There is no

cross-motion by the State. Petitioners' burden of proof on standing is least when the case is at the pleading stage. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 561 (1992).

2. AS TO FACING "THREATENED ENFORCEMENT OF A LAW"

On August 31, 2022, Nadine Gazzola heard the threat: "When I listened to Governor Hochul or NYS Police Superintendent Bruen or (now) Acting Superintendent Nigrelli threaten that there will be "zero tolerance,"[16] you might imagine that it caught my ear." [Doc 13-2, ¶36] All Petitioners are conscious of being in circumstances vulnerable to arrest. [Declarations, *passim*]

In two other cases, Respondent Nigrelli's public threats of enforcement were sufficient to establish standing by way of threat of credible enforcement for purposes of preliminary injunctive relief. *Antonyuk v. Nigrelli ("Antonyuk II"[17]),* 1:22-cv-986, Dkt. 78, p. 31 (on appeal), writing "…Defendant Nigrelli has been shown to have threatened a "zero tolerance" enforcement of the CCIA." *See, also, Christian v. Nigrelli,* on November 22, 2022 (on appeal) and *Hardaway v. Nigrelli,* Case no. 1:22-cv-771, November 3, 2022, Doc. no. 52 (also on appeal).

16. YouTube Channel of Governor Kathy Hochul, "Governor Hochul Delivers a Press Conference on Gun Violence Prevention" (August 31, 2022), at https://www.youtube.com/watch?v=gC1L2rrztQs.

17. *Antonyuk v. Bruen ("Antonyuk I"),* Case no. 1:22-cv-734, dismissed August 31, 2022.

Petitioners satisfy the injury-in-fact requirement. They are facing the "threatened enforcement of a law" that is "sufficiently imminent." *Susan B. Anthony List,* 573 U.S. 149 158159 (2014). Petitioners allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 159, quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Petitioners need not be charged before bringing challenge to the constitutionality of a law "threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128-129 (2007).

Petitioners "…should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt, supra,* at 298. *Cayuga Nation v. Tanner* informs the point. The case "sets a low threshold and is quite forgiving to plaintiffs seeking such preenforcement review, as courts are generally 'willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.'" 824 F.3d 321, 331 (2d Cir. 2016). *See, also, Picard v. Magliano,* 42 F.4th 89, 98 (2d Cir. 2022).

3. AS TO INJURIES, AND WHICH ARE ON-GOING

Petitioners set out preliminary injuries in their Declarations of early November 2022 that are on-going. Petitioners also plausibly alleged that the new laws have already had multiple direct effects on their day-to-day operations, and they have identified key provisions of the new laws that "appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate [the new laws]."

That some damages are capable of computation does not capture all they are suffering. For John A. Hanusik, in business upwards of fifty years [Doc 13-9, ¶¶6, 30], he will suffer an injury that "[could] never accurately be ascertained or compensated by money damages." *Dominion Bankshares Corp. v. Devon Holding Co.,* 690 F.Supp. 338, 348 (E.D.Pa. 1988). For Nicholas Affronti, his small business, one of the last pawn shops in the entire state, "…is my dream." [Doc 13-7, ¶87] A monetary award will not adequately compensate these Plaintiffs. *Wisdom Import Sales Co. v. Labatt Brewing Co.,* 339 F.3d 101, 113 (2d Cir. 2003).

B. RESPONDENTS ARE PROPERLY BEFORE THIS COURT, IF THE RULE OF LAW IS TO PREVAIL

Petitioners devoted 15-pages of their Complaint to detail the animus unleashed by Respondent Gov. Hochul, her Co-Respondents, and third parties to make out *prima facie* claims under 42 U.S.C. §1983 and §1985(3). [Doc 1, pp. 38-54] Respondents' discrimination against Petitioners is an on-going constitutional violation. *State Employees Bargaining Agent Coal. v. Rowland,* 494 F.3d 71, 95 (2d Cir. 2007); *In re Deposit Ins. Agency,* 482 F.3d 612, 617 (2d Cir. 2007).

Respondents are otherwise properly before this Court under an exception to sovereign immunity set forth in *Ex parte Young,* 209 U.S. 123 (1908), recently affirmed, that "allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health, supra,* at p. 5, citing *Young,* at 159-160.

Hochul's scheme was masterminded with various persons external to state government, including attorneys she publicly named from Every Town for Gun Safety and Gifford Law Center, in order to deprive Petitioners of their rights. [Doc 1, ¶¶37, 91, 91 n.54, 319] Hochul's official Press Releases, appearance transcripts, and videos continue to be published through the state's governor's office website. Please take a moment to study the source for the many quotations defining "animus." [Doc 1, pp. 38-54]

Respondent Gov. Hochul's "leadership" on matters of the Second Amendment mimics Alabama Governor Orval Faubus in 1957 ("…I was not elected Governor of Arkansas to surrender all our rights as citizens to an all-powerful federal authority.") Faubus' speech was the foreshadow to the anti-integration showdown in Little Rock.

C. PETITIONERS ARE LIKELY TO SUCCEED ON THE MERITS AGAINST THE NEW LAWS

(This argument is laid out above, and requires no reiteration.)

D. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING EMERGENCY RELIEF

On June 23, 2022, when this Court released its decision in *NYSRPA v. Bruen,* the final selective incorporation of a federal civil right achieved state-level maturity. The federal and state rights of Petitioners under the Second and Fourteenth Amendments became one-and-the-same to defend themselves within and outside the home. Any loss of Second Amendment rights "for even minimal periods of

time" should now "unquestionably constitute irreparable injury," as does any loss of First Amendment freedoms. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). This status should also make protection of Second Amendment rights as *per se* "in the public interest." *Id.* The public interest will not be harmed by the grant of an injunction. *Tandon v. Newsom,* 593 U.S. ___, 141 S. Ct. 1294, 1298 (2021, *per curiam*); *Roman Cath. Diocese of Brooklyn v. Cuomo,* 592 U.S. ___, 141 S. Ct. 63, 68 (2020, *per curiam*). The public is harmed by government enforcing an unconstitutional law. *See, ACLU v. Reno,* 929 F.Supp. 824, 849 (E.D. Pa. 1996).

Public safety begins with the Petitioners. Real people. It begins when you walk into John A. Hanusik's tiny shop next to his home, where he greets you with his fifty years of firearms experience. [Doc 13-9, ¶10] You'll find that same easy confidence sitting down with Michael Mastrogiovanni, just north of Syracuse, where, between him [Doc 13-5, ¶18], Hanusik, and Owens [Doc 13-8, ¶8], no one is exactly sure who has the most industry experience. It extends into Nadine Gazzola dotting over every customer as much as the paperwork [Doc 13-3, ¶20, 21, 25, 29, 31, 32a, 39a, 41, 49, 54], while Seth quests for zero tolerances in gun parts he's milling on a CNC machine. [Docs 13-2 and 13-3, ¶39a and ¶11] It's Martello and Owens, Veterans, more than eight decades between them, freely sharing their specialized training and technical expertise with customers. [Doc 13-6, p. ¶63; Doc 13-8, ¶¶13-15, 75, 77] It's Nick Affronti helping out a neighbor. [Doc 13-7, ¶87] And Craig Serafini, whose best employee is his 20year-old son. [Doc 13-4, ¶85]

In contrast to the Petitioners' philosophy, stance, and demonstrated actions, the following limited examples relative to the new laws weigh heavily against Respondent.

First, Respondent Gov. Hochul's expressed policy is refusal to voluntarily contribute state records to the NICS Background Check System. (E.g., "We don't need the feds to do the work. We will do it here in the state of New York where we can have access to our state database as well as the federal database." [Doc 1, ¶196]) There are no (zero) NY records in NICS, except those for which the State was paid through two federal programs, one to help victims of domestic violence. [Doc 1, ¶¶189-196] The State does not even report convicted criminals - undisputed. [Doc 1, pp. 84-86; Doc 12, p. 11; Martello, Doc 13-6, ¶39; Doc. 16-4; Doc. 33, p. 15]

Let's be clear: a lack of NICS record can result in a false "proceed" from the ATF/FBI to the FFL with a customer at the counter. One example set forth below was the mass murder at the First Baptist Church of Sutherland Springs, Texas in 2017. The Air Force didn't enter the domestic violence conviction and the dishonorable discharge into NICS, creating a false "proceed" for a disqualified person. A court awarded $230 million in damages to survivors and families of the twenty-six people murdered. [Doc 33, p. 15]

Additional considerations:

- The State below dismissed the FFL as insignificant as against illegal sales of firearms, opining that FFLs stop "only" about 1.4% of persons using the ATF Form 4473 and NICS through an FFL for an attempted purchase. [Doc 24, p.17, n.8] From inception of NICS (November 30, 1998) to October 31, 2022, fully 2,149,464 attempted firearms purchases by disqualified persons were stopped at

the counter of FFL shops like Petitioner.[18] What we don't know is how high that number could be, if Respondent Gov Hochul would file records with the FBI, including NYS criminal convictions.

- Respondent Gov. Hochul repeatedly lies about the circumstances of mass shootings in public forums from her position of influence as a state governor and a lawyer. [Doc 1, ¶94, n.57-59]

- Annual ATF reporting for 2021 a total of twenty (20) reports by FFLs in NY of theft/loss of 176 firearms, including any firearm unable to be located in inventory within 24-hours of such identification event. Petitioner Seth Gazzola can attest to the reporting and firearm recovery process gone through in February 2020, which resulted in successful recovery of five firearms included in the 2020 statistics. [Doc 13-3, ¶¶16-18] The theft/loss report is a mandatory federal filing for an FFL. [Affronti, Doc 13-7, ¶¶27-29; Doc 24-2] There is an entire resource center on-line on this issue: https://www.atf.gov/resource-center/federal-firearms-licensee-theftloss-report-2021

- An interesting 2016 report by Bureau of Justice Statistics concluded based upon prison inmate interviews that the FFL dealer is not the primary source for gun crime. https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf

18. See monthly reports on the FBI official website, most recently, November 30, 2022 at 2,160,233 denials, at https://www.fbi.gov/file-repository/federal_denials.pdf/view.

- The New York State Intelligence Center (NYSIC), through its Crime Gun Center (est. 2003) found in a 2021 report that the third-party contractor hired to perform all of NY's law enforcement criminal firearms trace operations "has a top-secret clearance from the military" but needed "[a]dditional training in ATF database systems, policies and procedures." https://theiacp.org/sites/default/files/all/c/Crime_Gun_Info_Sharing.pdf

- The FBI 2021 national "active shooter" analysis report included that only one (1) wore body armor. https://fbi.gov/file-repository/active-shooter-incidents-in-the-us-2021-052422.pdf at p. 14.

What is in the public interest? Restoring Petitioners to an operational status through, at least, a preliminary injunction, so that they can try to keep their doors open and their lights on, while this case proceeds.

CONCLUSION

To sum up, Petitioner John A. Hanusik describes *why* two little words, "to keep," and the fate of the firearms industry under the new laws matter enough to make this a Rule 11 Petition.

> "Across the years since 1968, the federal government has developed laws and guidelines. The Defendants are now trying to mimic that system without any real way to support the activities they're trying to get into. Even just on a basic communications level, the Defendants don't send anything in written. You would assume the possibility of a formal letter to all

> FFLs stating the Dos and Don'ts, if they don't want you to do anything wrong. Instead, I call the NYS Police and they're not sure what they're supposed to do. The Defendants are trying to overreach their bounds and do federal work. The better approach would be for them to yield to the federal system, which more reflects the inter-state commerce of the firearms industry. The State could help by submitting its criminal records to NICS. The State could help by supporting FFLs who operate here by treating us as part of the barrier against illegal sales of firearms." Doc 13-9, ¶24.

It's a chaotic situation on the ground in New York as a direct result of laws generated in anger and passed literally in the dark of night while the Governor was at the bully pulpit. Petitioners respectfully ask the help of this Court through preliminary injunctive relief so that they can withstand this fight without fear that "…the next person who walks through the door won't be a Trooper from the Zone K substation with the handcuffs removed from his belt". [Nadine Gazzola, Doc 132, ¶38]

Respectfully submitted this 3rd day of January 2023

Paloma A. Capanna
Counsel of Record
106-B Professional Park Drive
Beaufort, North Carolina 28516
(585) 377-7260
pcapanna@yahoo.com

Attorney for the Petitioners

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED DECEMBER 22, 2022 . . . . 1a

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED DECEMBER 7, 2022 . . . . 2a

APPENDIX C — ORDER DENYING STAY OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 21, 2022 . . . . 59a

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS 61a

APPENDIX A — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED DECEMBER 22, 2022

U.S. DISTRICT COURT

Northern District of New York - Main Office (Syracuse)
[NextGen CM/ECF Release 1.7 (Revision 1.7.1.1)]

Case Name: Gazzola *et al.* v. Hochul *et al.*

Case Number: 1:22-cv-01134-BKS-DJS

Docket Text:

TEXT ORDER: After carefully considering all of the parties' submissions in connection with [13] Plaintiffs' motion for a temporary restraining order and/or a preliminary injunction, as well as the oral argument presented at the hearing yesterday, the Court DENIES Plaintiffs' [13] motion, and will not issue a temporary restraining order or a preliminary injunction. A written decision will follow shortly.

SO ORDERED by Chief Judge Brenda K. Sannes on 12/2/2022. (nmk)

APPENDIX B — MEMORANDUM-DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED DECEMBER 7, 2022

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

1:22-cv-1134 (BKS/DJS)

NADINE GAZZOLA, INDIVIDUALLY, AND AS CO-OWNER, PRESIDENT, AND BUREAU OF ALCOHOL, TOBACCO, FIREARMS, AND EXPLOSIVES FEDERAL FIREARMS LICENSEE ("BATFE FFL") RESPONSIBLE PERSON FOR ZERO TOLERANCE MANUFACTURING, INC., SETH GAZZOLA, INDIVIDUALLY, AND AS CO-OWNER, VICE PRESIDENT, AND BATFE FFL RESPONSIBLE PERSON FOR ZERO TOLERANCE MANUFACTURING, INC., JOHN A. HANUSIK, INDIVIDUALLY, AND AS OWNER AND BATFE FFL RESPONSIBLE PERSON FOR AGA SALES, JIM INGERICK, INDIVIDUALLY, AND AS OWNER AND BATFE FFL RESPONSIBLE PERSON FOR INGERICK'S, LLC, D/B/A AVON GUN & HUNTING SUPPLY, CHRISTOPHER MARTELLO, INDIVIDUALLY, AND AS OWNER AND BATFE FFL RESPONSIBLE PERSON FOR PERFORMANCE PAINTBALL, INC., D/B/A IKKIN ARMS, MICHAEL MASTROGIOVANNI, INDIVIDUALLY, AND AS OWNER AND BATFE FFL RESPONSIBLE PERSON FOR SPUR SHOOTERS SUPPLY, ROBERT OWENS, INDIVIDUALLY, AND AS OWNER AND

Appendix B

BATFE FFL RESPONSIBLE PERSON FOR THOUSAND ISLANDS ARMORY, CRAIG SERAFINI, INDIVIDUALLY, AND AS OWNER AND BATFE FFL RESPONSIBLE PERSON FOR UPSTATE GUNS AND AMMO, LLC, NICK AFFRONTI, INDIVIDUALLY, AND AS BATFE FFL RESPONSIBLE PERSON FOR EAST SIDE TRADERS LLC, AND, EMPIRE STATE ARMS COLLECTORS, INC.,

Plaintiffs,

v.

KATHLEEN HOCHUL, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW YORK, STEVEN A. NIGRELLI, IN HIS OFFICIAL CAPACITY AS THE ACTING SUPERINTENDENT OF THE NEW YORK STATE POLICE, ROSSANA ROSADO, IN HER OFFICIAL CAPACITY AS THE COMMISSIONER OF THE DEPARTMENT OF CRIMINAL JUSTICE SERVICES OF THE NEW YORK STATE POLICE, AND LETITIA JAMES, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF NEW YORK,

December 7, 2022, Decided
December 7, 2022, Filed

Hon. Brenda K. Sannes, Chief United States District Judge.

Appendix B

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

On November 1, 2022, Plaintiffs initiated an action under 42 U.S.C. §§ 1983, 1985 against Defendants Kathleen Hochul, in her official capacity as Governor of the State of New York, Steven Nigrelli, in his official capacity as the Acting Superintendent of the New York State Police, Rosanna Rosado, in her official capacity as the Commissioner of the New York Department of Criminal Justice Services,[1] and Letitia James, in her official capacity as the Attorney General of the State of New York, alleging that certain provisions of New York firearms law deprive them of civil rights secured by the Second, Fifth, and Fourteenth Amendments. (Dkt. No. 1, ¶¶ 1, 306-25.) Plaintiffs further allege that certain challenged provisions are pre-empted by federal statutory and regulatory law, (*id.* ¶¶ 326-35), certain challenged provisions run afoul of the Second, Fifth, or Fourteenth Amendments, (*id.* ¶¶ 308-09, 322, 336-43), and certain challenged provisions are unconstitutional under an apparently novel theory of «constitutional-regulatory overburden,» (*id.* ¶¶ 344-51). On November 8, 2022, Plaintiffs filed a motion for a temporary restraining order and a preliminary injunction under Rule 65 of the Federal Rules of Civil Procedure seeking an order enjoining enforcement of the challenged provisions. (Dkt. No. 13, at 2-5.) The motion

1. Defendants note that Plaintiffs have incorrectly characterized the Department of Criminal Justice Services as a division of the New York State Police when it is in fact a separate state agency. (Dkt. No. 29, at 7 n.1.)

is fully briefed, with an opposition from Defendants and a reply by Plaintiffs. (Dkt. Nos. 29, 33.) The Court held a hearing on December 1, 2022. After considering the parties' submissions and oral arguments, the Court orally denied Plaintiffs' motion for a temporary restraining order and preliminary injunction and indicated that a written decision would follow. (Dkt. No. 37.) This is that decision, including the Court's findings of fact and conclusions of law in accordance with Rule 52(a)(2).

II. FACTS[2]

A. Plaintiffs

Plaintiffs are nine individuals and one business organization.[3]

---

2. The facts are taken from the affidavits and attached exhibits submitted in connection with this motion. *See J.S.G. ex rel. J.S.R. v. Sessions*, 330 F. Supp. 3d 731, 738 (D. Conn. 2018) ("In deciding a motion for preliminary injunction, a court may consider the entire record including affidavits and other hearsay evidence."); *Fisher v. Goord*, 981 F. Supp. 140, 173 n.38 (W.D.N.Y. 1997) (noting that a "court has discretion on a preliminary injunction motion to consider affidavits as well as live testimony, given the necessity of a prompt decision"). The "findings are provisional in the sense that they are not binding on a motion for summary judgment or at trial and are subject to change as the litigation progresses." *trueEX, LLC v. MarkitSERV Ltd.*, 266 F. Supp. 3d 705, 720 n.108 (S.D.N.Y. 2017); *see also Fair Hous. in Huntington Comm. Inc. v. Town of Huntington*, 316 F.3d 357, 364 (2d Cir. 2003).

3. In the complaint, Plaintiffs initially suggest that the business organizations owned by Plaintiffs are also Plaintiffs themselves. (Dkt. No. 1, at 2.) However, the complaint lists only the individuals, plus Empire State Arms Collectors, Inc., under the "Parties"

At least eight[4] of the Plaintiffs are qualified under federal law as "Responsible Persons," (Dkt. No. 13-2, ¶ 11 n.1), associated with a federal firearms license ("FFL"). (*Id.* ¶ 11; Dkt. No. 13-3, ¶ 14; Dkt. No. 13-4, ¶ 6; Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 13; Dkt. No. 13-7, ¶ 6; Dkt. No. 13-8, ¶ 6; Dkt. No. 13-9, ¶ 6.) At least seven[5] of the nine business organizations owned by Plaintiffs possess federal firearms licenses that allow them to serve as dealers in firearms. (Dkt. No. 13-2, ¶ 12; Dkt. No. 13-3, ¶ 13-14; Dkt. No. 13-4, ¶ 6; Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 13; Dkt. No. 13-7, ¶ 6; Dkt. No. 13-8, ¶ 6; Dkt. No. 13-9, ¶ 6); *see also* 18 U.S.C. § 921(a)(11)(A). Two of these business organizations possess federal firearms licenses that allow them to serve as firearms manufacturers. (Dkt. No. 13-2, ¶ 12; Dkt. No. 13-3, ¶ 14; Dkt. No. 13-6, ¶ 13); *see also* 18 U.S.C. § 921(a)(10). One of the business organizations possesses a federal firearms license that allows it to serve as a firearms pawnbroker. (Dkt. No. 13-7, ¶ 6); *see also* 18 U.S.C. § 921(a)(12). At least six[6] of the

---

heading. (*Id.* ¶¶ 6-21.) Plaintiffs also describe this action as being filed "on behalf of 10 Plaintiffs." (Dkt. No. 33, at 5.) Accordingly, the group of Plaintiffs consists only of the nine named individuals and Empire State Arms Collectors, Inc.

4. Plaintiff Jim Ingerick is listed as a Responsible Person in the case caption but did not submit an affidavit in connection with Plaintiffs' motion for a temporary restraining order and preliminary injunction.

5. There is no indication that the business organization associated with Plaintiff Jim Ingerick, "Avon Gun & Hunting Supply," has a federal firearms license.

6. There is no indication that the business organization associated with Plaintiff Jim Ingerick, "Avon Gun & Hunting Supply," has a New York firearms license. And although Plaintiff Robert Owens submitted an affidavit in connection with Plaintiffs' motion

nine business organizations also hold firearms licenses under New York law. (Dkt. No. 13-2, ¶ 15; Dkt. No. 13-4, ¶ 7; Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 15; Dkt. No. 13-7, ¶ 7; Dkt. No. 13-9, ¶ 7.) Plaintiff Empire State Arms Collectors, Inc., holds neither a federal nor a New York firearms license. (Dkt. No. 1, ¶ 14.)[7]

B. Challenged Laws

Plaintiffs claim to be challenging thirty-one statutory firearms provisions. (Dkt. No. 1, ¶¶ 28, 32.) Their list of challenged provisions, however, appears to contain only twenty-four unique sections and subsections. (*Id.* ¶ 31.)[8] Each provision challenged in the complaint is set forth in the following table:

---

for a temporary restraining order and preliminary injunction, there is no indication that the business associated with him, "Thousand Islands Armory," has a New York firearms license. (Dkt. No. 13-8.)

7. According to the complaint, Plaintiff Jim Ingerick "serves as the President" of Empire State Arms Collectors Association, Inc., an organization whose "primary function" is hosting a gun show, and Ingerick is "authorized to participate on its behalf for purposes of this litigation." (*Id.* ¶ 14.)

8. Plaintiffs' memorandum of law in support of their motion for a temporary restraining order and preliminary injunction appears to add two other provisions: N.Y. Penal §§ 265.65, 265.66. (Dkt. No. 13, at 4.)

New York	New York	New York
Penal Law	**General Business Law**	**Executive Law**
N.Y. Penal § 265.20(3-a)	N.Y. Gen. Bus. § 875-b(1)	N.Y. Exec. § 144-a
N.Y. Penal § 270.22	N.Y. Gen. Bus. § 875-b(2)	N.Y. Exec. § 228
N.Y. Penal § 400.00(1)	N.Y. Gen. Bus. § 875-c	N.Y. Exec. § 837(23)(a)
N.Y. Penal § 400.00(2)	N.Y. Gen. Bus. § 875-e	
N.Y. Penal § 400.00(3)	N.Y. Gen. Bus. § 875-f	
N.Y. Penal § 400.00(6)	N.Y. Gen. Bus. § 875-g(1)(b)[9]	
N.Y. Penal § 400.00(7)	N.Y. Gen. Bus. § 875-g(2)	
N.Y. Penal § 400.00(8)	N.Y. Gen. Bus. § 875-h	

9. Plaintiffs incorrectly identify this provision as N.Y. Gen. Bus. § 875-g(b)(1) throughout both the complaint and the motion for a temporary restraining order and preliminary injunction, (Dkt. Nos. 1, 13-11), with the exception of one correct reference in the complaint, (Dkt. No. 1, ¶ 286). The Court notes that N.Y. Gen. Bus. § 875-g(b)(1) does not exist. It is clear from Plaintiffs' description of the provision, however, that they are referring to N.Y. Gen. Bus. § 875-g(1)(b). (Dkt. No. 13-11, at 13 ("N[.]Y[.] Gen[.] Bus[.] § 875-g(b)(1) would require the Plaintiffs to sign an annual certification of their compliance 'with all of the requirements of this article.'" (quoting N.Y. Gen. Bus. § 875-g(1)(b))).

N.Y. Penal § 400.00(9)
N.Y. Penal § 400.00(14)
N.Y. Penal § 400.00(19)
N.Y. Penal § 400.02(2)
N.Y. Penal § 400.03(2)

(*Id.*) In their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction, Plaintiffs separate these laws into three groups[10] and challenge each group under a different theory,[11] as set forth below:

---

10. N.Y. Gen. Bus. § 875-h is not included in any of Plaintiffs' groups.

11. These groups are not fully consonant with the allegations laid out in the complaint. In fact, each group differs from the lists of provisions challenged under each theory in the complaint. For instance, Plaintiffs include N.Y. Penal § 400.02(2) in Group A, (Dkt. No. 13, at 3), but Plaintiffs did not allege in their complaint that N.Y. Penal § 400.02(2) is pre-empted by federal law, (Dkt. No. 1). Group C has similarly been added to and subtracted from as compared to the portion of the complaint alleging Plaintiffs' theory of "constitutional regulatory overburden." (Dkt. No. 13, at 4-5; Dkt. No. 1, ¶ 181.) Plaintiffs also include N.Y. Penal §§ 265.65, 265.66 in Group B, (Dkt. No. 13, at 4), but these provisions are not mentioned at all in the complaint, (Dkt. No. 1). Nevertheless, the Court will "consider the entire record" and examine each law that Plaintiffs cite either in their complaint or in their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. *See J.S.G. ex rel. J.S.R.*, 330 F. Supp. 3d at 738.

Group A: "pre-empted by federal law" (Dkt. No. 13, at 3)	**Group B:** "unconstitutional under the Second, Fifth, and Fourteenth Amendments" (Dkt. No. 13, at 4)	**Group C:** "unconstitutional regulatory overburden in violation of the Second and Fourteenth Amendments" (Dkt. No. 13, at 4-5)
N.Y. Gen. Bus. § 875-b(1)	N.Y. Gen. Bus. § 875-g(1)(b)	N.Y. Gen. Bus. § 875-b(1)
N.Y. Gen. Bus. § 875-b(2)	N.Y. Penal §§ 400.00(1), (19)	N.Y. Gen. Bus. § 875-b(2)
N.Y. Gen. Bus. § 875-f	N.Y. Exec. § 837(23)(a)	N.Y. Gen. Bus. § 875-c
N.Y. Gen. Bus. § 875-f(1)-(4)	N.Y. Penal § 265.20(3-a)	N.Y. Gen. Bus. § 875-e
N.Y. Gen. Bus. § 875-f(2)	N.Y. Penal §§ 400.00(2)-(3), (6)-(9), (14)	N.Y. Gen. Bus. § 875-e(3)
N.Y. Gen. Bus. § 875-f(3)	N.Y. Penal § 265.65[12]	N.Y. Gen. Bus. § 875-f(2)
N.Y. Gen. Bus. § 875-g(1)(b)	N.Y. Penal § 265.66[12]	N.Y. Gen. Bus. § 875-g(2)
N.Y. Penal § 400.02(2)	N.Y. Penal § 400.02(2)	N.Y. Penal § 270.22
N.Y. Exec. § 228		N.Y. Exec. § 144-a
		N.Y. Penal § 400.03(2)

12. These provisions were not included in the list of challenged provisions in the complaint. (Dkt. No. 1, ¶ 31)

Plaintiffs have stated their opposition to compliance with the New York laws. (Dkt. No. 13-2, ¶¶ 64, 66, 68, 69, 70; Dkt. No. 13-3, ¶ 22; Dkt. No. 13-4, ¶¶ 29, 66, 83; Dkt. No. 13-5, ¶ 65; Dkt. No. 13-6, ¶¶ 40, 79, 87, 88, 92, 95; Dkt. No. 13-7, ¶ 71; Dkt. No. 13-8, ¶ 30.) Plaintiffs have also stated that the laws already in effect have had adverse economic consequences, (Dkt. No. 13-2, ¶¶ 56-61; Dkt. No. 13-3, ¶ 42; Dkt. No. 13-4, ¶ 22; Dkt. No. 13-6, ¶¶ 53, 61, 69; Dkt. No. 13-7, ¶ 37; Dkt. No. 13-8, ¶¶ 52, 59; Dkt. No. 13-9, ¶¶ 13-14), and that there will be economic consequences when the remaining laws take effect, (Dkt. No. 13-4, ¶ 22; Dkt. No. 13-5, ¶¶ 25, 68; Dkt. No. 13-8, ¶¶ 29, 58, 60). Additionally, the Court notes that the knowing violation of N.Y. Gen. Bus. art. 39-BB is a class A misdemeanor and that violations of N.Y. Penal §§ 265.65, 265.66, 270.22, 400.00, 400.03 carry consequences under New York Penal Law. *See* N.Y. Gen. Bus. § 875-i; N.Y. Penal §§ 265.65, 265.66, 270.22, 400.00(15), 400.03(8).

III. STANDARD OF REVIEW

Rule 65 of the Federal Rules of Civil Procedure governs temporary restraining orders and preliminary injunctions. In the Second Circuit, the standard for the issuance of a temporary restraining order is the same as the standard for the issuance of a preliminary injunction. *Fairfield Cnty. Med. Ass'n v. United Healthcare of New Eng.*, 985 F. Supp. 2d 262, 270 (D. Conn. 2013), *aff'd*, 557 F. App'x 53 (2d Cir. 2014) (summary order); *AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010). To obtain a temporary restraining order or preliminary injunction that "will affect government

action taken in the public interest pursuant to a statute or regulatory scheme," the moving party must demonstrate: (1) irreparable injury in the absence of an injunction; (2) a likelihood of success on the merits; and (3) that the public interest weighs in favor of and will not be disserved by the injunction. *See We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 279 (2d Cir. 2021), *cert. denied sub nom. Dr. A. v. Hochul*, 142 S. Ct. 2569, 213 L. Ed. 2d 1126 (2022); *see also Benihana, Inc. v. Benihana of Tokyo, LLC*, 784 F.3d 887, 895 (2d Cir. 2015); *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). Generally, "[t]he movant must also show that the balance of equities supports the issuance of an injunction." *See We The Patriots USA*, 17 F.4th at 280 (citing *Yang v. Kosinski*, 960 F.3d 119, 127 (2d Cir. 2020)). This factor merges into the inquiry into the public interest when the government is a party to the suit. *Id.* at 295 (citing *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42, 58-59 (2d Cir. 2020)).

Injunctive relief can be mandatory or prohibitory. *See Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010). When the injunctive relief sought is "'mandatory' [in that it would] 'alter[] the status quo by commanding some positive act,' as opposed to [being] 'prohibitory' [by] seeking only to maintain the status quo," *id.* (quoting *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995)), the movant "must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits.'" *N. Am. Soccer League*, 883 F.3d at 37 (quoting *N.Y. Civ. Liberties Union v. N.Y.C. Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2012)). The "status quo . . . is[] 'the last actual, peaceable uncontested status which

preceded the pending controversy.'" *Id.* (quoting *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam)).

Here, the injunctive relief Plaintiffs request with regard to the laws not yet in effect would maintain "the last actual, peaceable uncontested status which preceded the pending controversy," *Hester ex rel. A.H. v. French*, 985 F.3d 165, 177 (2d Cir. 2021) (quoting *N. Am. Soccer League*, 883 F.3d at 37), by "stay[ing] 'government action taken in the public interest pursuant to a statutory or regulatory scheme,'" *Field Day, LLC v. Cnty. of Suffolk*, 463 F.3d 167, 181 (2d Cir. 2006) (quoting *Mastrovincenzo v. City of New York*, 435 F.3d 78, 88 (2d Cir. 2006)). Though all of the laws at issue have been enacted, Plaintiffs allege, and Defendants do not dispute, that certain challenged provisions did not take effect until December 5, 2022.[13] (Dkt. No. 13-2, ¶ 62; Dkt. No. 13-4, ¶ 49; Dkt. No. 13-5, ¶ 25.) The requested injunctive relief would not have compelled Defendants to take any action before that date and would not have disrupted an established state program, so the heightened mandatory injunction standard does not apply to the challenges to these provisions. *See Libertarian Party of Conn. v. Lamont*, 977 F.3d 173, 177 (2d Cir. 2020); *Hester*, 985 F.3d at 177. But Plaintiffs concede that some of the challenged provisions had already gone into

---

13. The Court notes that these provisions appear to have taken effect on December 3, 2022, not December 5, 2022. *See* S.B. S4970A, 2020 Sen., 2021-22 Reg. Sess. (N.Y. 2022). In any event, the Court denied Plaintiffs' motion for a temporary restraining order and preliminary injunction on December 2, 2022. (Dkt. No. 37.) The Court further notes that some of the provisions Plaintiffs challenge had already taken effect (namely, N.Y. Penal §§ 270.22, 400.00(1)-(3), (6)-(9), (14), (19), 400.02(2), 400.03(2)).

effect. (Dkt. No. 33, at 4.) The injunctive relief Plaintiffs request with regard to these laws would not maintain "the last actual, peaceable uncontested status which preceded the pending controversy," *Hester*, 985 F.3d at 177 (quoting *N. Am. Soccer League*, 883 F.3d at 37), but would instead "alter the status quo by commanding some positive act," *Citigroup*, 598 F.3d at 35 n.4 (quoting *Tom Doherty Assocs.*, 60 F.3d at 34). Thus, for these provisions, the Plaintiffs "must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits.'" *N. Am. Soccer League*, 883 F.3d at 37 (quoting *N.Y. Civ. Liberties Union.*, 684 F.3d at 294).

However, this distinction is immaterial for the case at hand because, as discussed below, Plaintiffs fail to meet even the lesser "likelihood of success" standard for any of their claims. Accordingly, the Court limits its discussion to an examination of whether Plaintiffs have demonstrated (1) irreparable injury in the absence of an injunction; (2) a likelihood of success on the merits; and (3) whether the balance of the equities supports the issuance of an injunction. S*ee We The Patriots USA*, 17 F.4th at 279-80.

IV. ANALYSIS

A. Standing

The parties did not fully raise the issue of standing.[14] However, the Court "bears an independent obligation to

---

14. Neither party has fully briefed the issue of standing, and Defendants do not dispute Plaintiffs' standing except for limited arguments involving Defendants Hochul and James, (Dkt. No. 29, at 13-15).

assure . . . that jurisdiction is proper before proceeding to the merits." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). Therefore, the Court will consider whether Plaintiffs have standing.

The jurisdiction of federal courts is limited to "Cases" and "Controversies." U.S. Const., art. III, § 2; *see also In re Clinton Nurseries, Inc.*, 53 F.4th 15, 22 (2d Cir. 2022). The doctrine of standing "gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). To establish standing, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) 'a likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List*, 573 U.S. at 157-58 (quoting *Lujan*, 504 U.S. at 560-61). An injury must be "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Id.* at 158 (quoting *Lujan*, 504 U.S. at 560). "'The party invoking federal jurisdiction bears the burden of establishing' standing," *id.* at 158 (quoting *Amnesty Int'l USA*, 568 U.S. at 411-12), and the party must establish standing for each claim, *Davis v. FEC*, 554 U.S. 724, 734, 128 S. Ct.

2759, 171 L. Ed. 2d 737 (2008). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester v. Laroe Ests., Inc.*, 137 S. Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017).

Where a law not yet in effect is challenged, standing can be satisfied by alleging "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Susan B. Anthony List*, 573 U.S. at 159 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979)). In such a circumstance, a plaintiff need not show it is "subject to . . . an actual arrest, prosecution, or other enforcement action," nor does the plaintiff need "to confess that [it] will in fact violate the law." *Id.* at 158, 163 (citing *United Farm Workers Nat'l Union*, 442 U.S. at 301).

To establish standing for a preliminary injunction, a party cannot rely on "mere allegations" but must "'set forth' by affidavit or other evidence 'specific facts' which for purposes of [the] motion will be taken as true." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 907 n.8, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

1. Standing as Owners of FFL Businesses

The Court finds, for the purpose of ruling on the motion for a temporary restraining order and preliminary injunction, that at least one Plaintiff has satisfied the

standing requirements for each claim. Several Plaintiffs have alleged existing economic injuries arising from the challenged New York laws that are already in effect that could plausibly be redressed by enjoining those laws. (Dkt. No. 13-2, ¶¶ 56-61; Dkt. No. 13-3, ¶ 42; Dkt. No. 13-4, ¶ 22; Dkt. No. 13-6, ¶¶ 53, 61, 69; Dkt. No. 13-7, ¶ 37; Dkt. No. 13-8, ¶¶ 52, 59; Dkt. No. 13-9, ¶¶ 13-14); *see also SM Kids, LLC v. Google LLC*, 963 F.3d 206, 211 (2d Cir. 2020). Each of Plaintiffs' claims involves at least one of these laws that is already in effect. (Dkt. No. 13, at 3-5.) Furthermore, several Plaintiffs allege an intention to violate the remaining laws that have not yet taken effect. (Dkt. No. 13-2, ¶¶ 64, 66, 68, 69, 70; Dkt. No. 13-3, ¶ 22; Dkt. No. 13-4, ¶¶ 29, 66, 83; Dkt. No. 13-5, ¶ 65; Dkt. No. 13-6, ¶¶ 40, 79, 87, 88, 92, 95; Dkt. No. 13-7, ¶ 71; Dkt. No. 13-8, ¶ 30.) Given that "courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund," *Picard v. Magliano*, 42 F.4th 89, 98 (2d Cir. 2022) (internal quotation marks omitted), this is sufficient to establish an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and [that] there exists a credible threat of prosecution thereunder." *See Susan B. Anthony List*, 573 U.S. at 159 (quoting *Farm Workers Nat'l Union*, 442 U.S. at 298). Thus, taking these allegations to be true at this stage, and considering the alleged existing injuries and the intentions to violate the New York statutes together, Plaintiffs have satisfied the standing requirements for seeking a temporary restraining order and preliminary injunction as owners of FFL businesses.

2. Individual Standing to Pursue a Second Amendment Claim

While this action primarily concerns Plaintiffs as owners of FFL businesses, Plaintiffs did assert, in a cursory manner, that their individual rights under the Second Amendment were violated. (Dkt. No. 1; Dkt. No. 13-11, at 4).[15] Defendants argue that Plaintiffs "have no Second Amendment injuries as individuals." (Dkt. No. 29, at 23). In reply, Plaintiffs argue that they "have standing to assert infringement of their individual civil rights, such as the renewal of the permit, access to instructors to satisfy renewal requirements, the right to purchase a semiautomatic rifle[,] . . . and the right to purchase ammunition." (Dkt. No. 33, at 7.) Plaintiffs reiterated these claims at the December 1, 2022, hearing, arguing that their inability to purchase semi-automatic rifles or ammunition or renew existing concealed carry permits satisfies the standing requirements for an individual Second Amendment claim.

Although Plaintiffs did not adequately raise these arguments in their moving papers, the Court has considered the isolated allegations of injury to individual Second Amendment rights in the record and finds that no Plaintiff has provided sufficient allegations to establish individual standing to pursue a Second Amendment claim. Plaintiff Christopher Martello alleges that he "desire[s] to purchase additional semi-automatic rifles for personal

15. At the same time, Plaintiffs acknowledge that previously filed lawsuits involving individual plaintiffs "are distinguished." (Dkt. No. 13-11, at 4 n.1.)

self-defense and sporting purposes . . . [and that he is] unable to do so because Livingston County is not offering a semiautomatic license, which is required to be presented to an FFL to lawfully purchase such a rifle." (Dkt. No. 13-6, ¶ 11.) But there is no allegation that he took any steps to purchase a semiautomatic rifle. Thus, he has failed to establish a "concrete and particularized" and "actual and imminent" injury. *Susan B. Anthony List*, 573 U.S. at 158 (quoting *Lujan*, 504 U.S. at 560); *see also Antonyuk v. Bruen*, No. 22-cv-0734, 2022 U.S. Dist. LEXIS 157874, at *45, 2022 WL 3999791, at *15 (N.D.N.Y. Aug. 31, 2022) ("'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require." (quoting *Lujan*, 504 U.S. at 564)). Moreover, he has failed to establish how the non-defendant county's failure to issue semiautomatic rifle licenses is "fairly traceable to the challenged action." *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6, 134 S. Ct. 1377, 188 L. Ed. 2d 392 (2014); *see also Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 48 L. Ed. 2d 450 (1976) (holding that, to establish standing, the challenged action must have been taken by a defendant, not "some third party not before the court").

Plaintiff Craig Serafini makes a similar assertion with regard to ammunition, stating: "People don't want to give their name and personal information out every time they buy [ammunition]. . . . I don't blame them. I, myself, haven't purchased any ammunition since the new law went into effect. I'm leading in this section in my role

as an FFL, but I also wish to remind the Court that my individual rights are being violated, as well." (Dkt. No. 13-4, ¶¶ 54-55). For the same reasons, these allegations are insufficient to demonstrate a concrete and particularized and actual and imminent injury.

Finally, with respect to the renewal of a concealed carry permit, Plaintiff Seth Gazzola states: "I have a concealed carry permit that I want to timely renew, which will require a valid training course." (Dkt. No. 13-3, ¶ 39.).[16] As with the claims of Plaintiffs Martello and Serafini, Plaintiffs fail to demonstrate how this single sentence, evincing a desire to timely renew a permit, amounts to an actual, imminent, concrete, and particularized injury. *See Susan B. Anthony List*, 573 U.S. at 158. Accordingly, the Court limits its finding of standing to Plaintiffs as FFL businesses.

---

16. Plaintiffs' allegation regarding renewal appears to rely on the premise that concealed carry permits cannot be renewed without completing the training requirements of N.Y. Penal § 400.00 and that that law is unconstitutionally vague, rendering renewal impossible. This appears to misconstrue the law. Defendants argue that the relevant provisions do not require that concealed carry permits issued "[e]lsewhere than in the city of New York and the counties of Nassau, Suffolk and Westchester" be renewed. N.Y. Penal § 400.00(10). (Dkt. No. 29, at 25 n.10.) It appears that such permits must be recertified, N.Y. Penal § 400.00(10)(d), which requires a separate process that does not include the completion of the training course, N.Y. Penal § 400.00(1), (10), (19). Plaintiffs have not indicated how their interpretation of the statute is supported. Furthermore, the Court has concluded that Plaintiffs have not

B. Injunctive Relief

1. Irreparable Harm

Plaintiffs contend that the New York laws create a danger of imminent irreparable harm in the absence of injunctive relief because the laws violate constitutional rights and disrupt or force the closure of Plaintiffs' businesses, causing economic and emotional harm. (Dkt. No. 13-11, at 6-8, 26-27.) Defendants argue that Plaintiffs have failed to convincingly show any constitutional injury and failed to show that any injury is concrete and imminent. (Dkt. No. 29, at 10-12.) Defendants also argue that injunctive relief should be denied because the losses alleged by Plaintiffs are monetary and quantifiable. (*Id.* at 12.)[17]

17. Defendants further argue that, even assuming Plaintiffs can establish irreparable harm, Plaintiffs' delay in seeking an injunction undermines any assertion of irreparable harm. (*Id.* at 10-11.) The challenged laws were passed between May 30, 2022, and July 1, 2022. (Dkt. No. 1, ¶ 1.) "Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); *see also Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144-45 (2d Cir. 2005) ("We have found delays of as little as ten weeks sufficient to defeat the presumption of irreparable harm that is essential to the issuance of a preliminary injunction. By contrast, we have held that a short delay does not rebut the presumption where there is a good reason for it, as when a plaintiff is not certain of the infringing activity . . . ." (citations omitted)). Because Plaintiffs fail to demonstrate, for any of their claims, a likelihood of success on the merits, the Court need not

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction." *Faiveley Transp. Malmo AB v. Wabtec Corp.*, 559 F.3d 110, 118 (2d Cir. 2009) (quoting *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999)); *see also Doe* demonstrated a likelihood of success on their claim that the training requirements of N.Y. Penal 400.00 are unconstitutionally vague. *See infra* section IV.B.2.c.ii. *v. Rensselaer Polytechnic Inst.*, No. 18-cv-1374, 2019 U.S. Dist. LEXIS 5396, at *4, 2019 WL 181280, at *2 (N.D.N.Y. Jan. 11, 2019). "Irreparable harm is 'injury that is neither remote nor speculative, but actual and imminent and that cannot be remedied by an award of monetary damages.'" *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (quoting *Forest City Daly Hous., Inc. v. Town of N. Hempstead*, 175 F.3d 144, 153 (2d Cir. 1999)). "The relevant harm is the harm that (a) occurs to the parties' legal interests and (b) cannot be remedied after a final adjudication, whether by damages or a permanent injunction." *Salinger v. Colting*, 607 F.3d 68, 81 (2d Cir. 2010) (internal footnote omitted).

Generally, "[a] court will presume that a movant has established irreparable harm in the absence of injunctive relief if the movant's claim involves the alleged deprivation of a constitutional right." *J.S.G. ex rel. J.S.R*, 330 F. Supp. 3d at 738; *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing

---

consider whether the delay in seeking injunctive relief undermines Plaintiffs' contention that they will be irreparably harmed. *See Weight Watchers Int'l*, 423 F.3d at 145.

of irreparable injury is necessary." (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 2948 (1973))). Courts have, however, found that "the mere allegation of a constitutional infringement itself does not constitute irreparable harm." *Lore v. City of Syracuse*, No. 00-cv-1833, 2001 U.S. Dist. LEXIS 26942, at *17, 2001 WL 263051, at *6 (N.D.N.Y. Mar. 9, 2001). Indeed, the presumption of irreparable harm is triggered only where the alleged constitutional deprivation "is convincingly shown and that violation carries noncompensable damages." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012) (citing *Donohue v. Paterson*, 715 F. Supp. 2d 306, 315 (N.D.N.Y. 2010)). And "the Court cannot determine whether the constitutional deprivation is convincingly shown without assessing the likelihood of success on the merits." *Id.* at 150 (citing *Turley v. Giuliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000)).

As discussed below, Plaintiffs have failed to demonstrate a likelihood of success on the merits of any of their claims—that is, Plaintiffs have not convincingly shown a constitutional deprivation, *see Donohue*, 886 F. Supp. 2d at 150. Accordingly, the Court will not "presume that [Plaintiffs] ha[ve] established irreparable harm in the absence of injunctive relief." *See J.S.G. ex rel. J.S.R.*, 330 F. Supp. 3d at 738.

Plaintiffs assert that the "loss of ability to sell entire lines of merchandise, such as handguns and semi-automatic rifles" constitutes irreparable injury. (Dkt. No. 13-11, at 7.) This injury arises, Plaintiffs suggest, both

from specific laws, such as those requiring a training course for new licenses, (Dkt. No. 13-2, ¶ 59; Dkt. No. 13-5, ¶ 30; Dkt. No. 13-7, ¶ 38; Dkt. No. 13-8, ¶ 52), those requiring a license for purchasing semi-automatic rifles, (Dkt. No. 13-2, ¶¶ 57, 59; Dkt. No. 13-4, ¶ 63; Dkt. No. 13-5, ¶¶ 29-30; Dkt. No. 13-6, ¶¶ 57-58; Dkt. No. 13-7, ¶¶ 34, 37), and those requiring the collection of customer information for ammunition sales, (Dkt. No. 13-2, ¶ 61; Dkt. No. 13-4, ¶ 54; Dkt. No. 13-6, ¶ 69; Dkt. No. 13-7, ¶ 37; Dkt. No. 13-8, ¶ 52; Dkt. No. 13-9, ¶ 14), and from the "chilling" effect on firearms sales that the new laws have created, (Dkt. No. 13-2, ¶¶ 25-26).

Plaintiffs Nadine Gazzola and John Hanusik provide the only quantified data related to the alleged irreparable injury: Plaintiff Nadine Gazzola claims that "September sales in the categories of handguns and semi-automatic rifles were down Ninety Percent (90%) and October continued to be depressed," (*id.* ¶ 57), and "[a]mmunition sales have been irregular, at best. There was a drop-off. Then for approximately two weeks there were no sales," (*id.* ¶ 61); Plaintiff John Hanusik similarly alleges that "[s]ales in firearms at A.G.A. Sales are down 40%-50%." (Dkt. No. 13-9, ¶ 13.) Other Plaintiffs allege losses without quantifying them. Plaintiff Nicholas Affronti claims that "sales are crashing for handguns and for semi-automatic rifles[] [and] [a]ncillary sales, like ammunition, are falling right alongside it." (Dkt. No. 13-7, ¶ 37.) Plaintiff Christopher Martello states: "*What ammunition sales?* Is the easiest way I can convey to the Court what is happening to business as a result of the new laws. . . . The retail side of business has gone crickets." (Dkt. No. 13-6, ¶ 69.)

Plaintiffs also assert that absent judicial relief they "may be out-of-business as of end-of-day on December 4, 2022." (Dkt. No. 13-11, at 7.) Plaintiffs Craig Serafini, Michael Mastrogiovanni, and Robert Owens echo this sentiment in their affidavits without providing sufficient support. (Dkt. No. 13-4, ¶ 22 (alleging, without meaningful additional detail, that he is "probably not going to make it much longer than December 31" because he "won't be in compliance," and "won't be able to sustain the daily losses" he is incurring by staying open); Dkt. No. 13-5, ¶ 25 (alleging, without meaningful additional detail, that "[i]f we do not achieve an immediate Temporary Restraining Order, I am going to have to seriously consider closing my business as of December 5, 2022"); Dkt. No. 13-8, ¶ 29 (alleging, without meaningful additional detail, that "[i]f we do not achieve an immediate Temporary Restraining Order, I will have to close my business on or about December 5, 2022").)

A "company's loss of reputation, good will, and business opportunities" can constitute irreparable harm, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004), "because these damages 'are difficult to establish and measure.'" *Regeneron Pharms., Inc. v. United States HHS*, 510 F. Supp. 3d 29, 40 (S.D.N.Y. 2020) (quoting Register.com, 356 F.3d at 404). But in general, decreased sales alone are insufficient to constitute irreparable harm because such injuries can be adequately compensated with money damages. *See Tom Doherty Assocs.*, 60 F.3d at 38 ("[W]e have found no irreparable harm . . . [when] lost profits stemming from the inability to sell [certain products] could be compensated with money damages

determined on the basis of past sales of [those products] and of current and expected future market conditions."); *see also Kane v. De Blasio*, 19 F.4th 152, 171-72 (2d Cir. 2021) ("Plaintiffs . . . face economic harms, principally a loss of income, . . . [that] do not justify an injunction . . . ."); *Register.com, Inc.*, 356 F.3d at 404 ("If an injury can be appropriately compensated by an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief."). And while being forced out of business entirely can constitute irreparable harm, *see Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (citing *Tom Doherty Assocs.*, 60 F.3d at 37), Plaintiffs do not present sufficient evidence to demonstrate such a danger by, for instance, describing how decreased sales in certain categories—namely, semi-automatic rifles, handguns, and ammunition—impact overall profitability and, consequently, the very viability of Plaintiffs' businesses. *See Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 622-23 (S.D.N.Y. 2010).[18] Nor do Plaintiffs'

---

18. Plaintiff Nadine Gazzola comes closest to succeeding in this regard: After stating that "September sales in the categories of handguns and semi-automatic rifles were down Ninety Percent (90%) and October continued to be depressed," she alleges: "At least 50% of our firearms sales are handguns. Most of the remaining 50% are tactical rifles, including ARs and AKs. . . . We can't afford to keep the doors open with just sales of traditional hunting rifles during the fall hunting season." (Dkt. No. 13-2, ¶ 57.) But even these allegations fall short of providing a concrete showing that the viability of her business is threatened. As an initial matter, this Plaintiff does not quantify the sales decrease of "tactical rifles," as distinguished from semi-automatic rifles, (*id.*), making the effect of the decrease in semi-automatic rifle sales difficult to contextualize.

conclusory assertions that their businesses may close absent injunctive relief provide sufficient factual support to establish an actual and imminent irreparable injury. *See DeVivo Assocs., Inc. v. Nationwide Mut. Ins. Co.*, No. 19-cv-2593, 2020 U.S. Dist. LEXIS 94511, at *14, 2020 WL 2797244, at *5 (E.D.N.Y. May 29, 2020) ("[A] preliminary injunction 'should not issue upon a plaintiff's imaginative, worst case scenario of the consequences flowing from the defendant's alleged wrong but upon a concrete showing of imminent, irreparable injury.'" (quoting *USA Network v. Jones Intercable, Inc.*, 704 F. Supp. 488, 491 (S.D.N.Y. 1989))); *see also Rossito-Canty v. Cuomo*, 86 F. Supp. 3d 175, 199 (E.D.N.Y. 2015) ("Irreparable harm may not be premised 'only on a possibility.'" (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008))).[19]

More importantly, she does not quantify October sales beyond stating that they "continued to be depressed" despite having signed her affidavit on November 7, 2022, (*id.* at 22), when October sales data would have been available. As Plaintiffs acknowledge, some counties began issuing semiautomatic rifle licenses, or amendments or endorsements to existing licenses, in October 2022, (*id.* ¶ 51; Dkt. No. 13-3, ¶ 40; Dkt. No. 13-4, ¶ 63; Dkt. No. 13-5, ¶ 28; Dkt. No. 13-6, ¶¶ 55-56; Dkt. No. 13-8, ¶ 70), which suggests that semi-automatic rifle sales may well recover. Thus, even these comparatively specific allegations fall short of successfully demonstrating an irreparable injury. *See Tom Doherty Assocs.*, 60 F.3d at 38; *Rex Med. L.P.*, 754 F. Supp. 2d at 622-23.

19. In their declarations, Plaintiffs allege additional harms, such as the inability to hire their children who are under twenty-one years old, (Dkt. No. 13-2, ¶ 70; Dkt. No. 13-4, ¶ 85), an inability to offer training classes, (Dkt. No. 13-2, ¶ 56), and the costs of implementing new security measures, (Dkt. No. 13-2, ¶¶ 62-63; Dkt.

On this record, the Court finds that Plaintiffs have not established an actual and imminent injury that is irreparable in the absence of injunctive relief.[20]

2. Likelihood of Success

"To establish a likelihood of success on the merits, a plaintiff must show that [it] is more likely than not to prevail on [its] claims, or, in other words, that the

No. 13-5, ¶ 65; Dkt. No. 13-6, ¶¶ 76, 86; Dkt. No. 13-7, ¶¶ 57, 65.) But in their moving papers, Plaintiffs premise their irreparable harm argument primarily on the loss of ability to sell certain merchandise and the danger of being forced out of business. (Dkt. No. 13-11, at 7, 26; Dkt. No. 33, at 9, 11-12.) Furthermore, the costs of compliance with government regulations are typically insufficient to constitute irreparable harm. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005); *see also New York v. U.S. Dep't of Educ.*, 477 F. Supp. 3d 279, 303-04 (S.D.N.Y. 2020) (citing *Freedom Holdings*, 408 F.3d at 115; *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976)). These allegations are insufficient to constitute irreparable harm.

20. Plaintiffs suggest in their reply brief that, if the Court were to hold an evidentiary hearing before ruling on the motion for a preliminary injunction, Plaintiffs would have "90[ ]days of available data" relevant to "allegations for damages." (Dkt. No. 33, at 15.) However, in light of Plaintiffs' failure to demonstrate a likelihood of success on the merits of their claims, *see infra* section IV.B.2, the Court, in its discretion, concludes that it may "dispose of the motion on the papers before it." *See Md. Cas. Co. v. Realty Advisory Bd. on Labor Rels.*, 107 F.3d 979, 984 (2d Cir. 1997) (quoting *Consol. Gold Fields PLC v. Minorco, S.A.*, 871 F.2d 252, 256 (2d Cir. 1989)); *see also Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) ("An evidentiary hearing is not required when the relevant facts . . . are not in dispute . . . .") (internal citations omitted).

'probability of prevailing is "better than fifty percent."'" *Doe v. Vassar Coll.*, No. 19-cv-0601, 2019 U.S. Dist. LEXIS 203418, at *20-21, 2019 WL 6222918, at *7 (S.D.N.Y. Nov. 21, 2019) (quoting *BigStar Ent., Inc. v. Next Big Star, Inc.*, 105 F. Supp. 2d 185, 191 (S.D.N.Y. 2000). The Court will examine each of Plaintiffs' claims to determine whether Plaintiffs have demonstrated a likelihood of success on the merits.

a. Defendants Hochul and James

Defendants argue that Plaintiffs have failed to show any likelihood of success on their claims against Defendants Hochul and James because claims against these Defendants are barred by the Eleventh Amendment, no injury is fairly traceable to these Defendants, and legislative immunity bars suit against Defendant Hochul. (Dkt. No. 29, at 13-15.)[21] Plaintiffs assert that the *Ex parte Young* exception applies to these Defendants. (Dkt. No. 33, at 18-19.)

The Eleventh Amendment generally prohibits lawsuits against a state without that state's consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). This prohibition extends to individuals sued for damages in their capacities as state officials. *Davis v. New York*, 316 F.3d 93, 101 (2d Cir. 2002) (citing *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). However, under the Supreme

21. Defendants do not dispute the propriety of Defendants Nigrelli and Rosado. (*Id.*)

Court's decision in *Ex parte Young*, "[a] plaintiff may avoid the Eleventh Amendment bar to suit and proceed against individual state officers, as opposed to the state, in their official capacities, provided that [the] complaint (a) 'alleges an ongoing violation of federal law' and (b) 'seeks relief properly characterized as prospective.'" *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)). For this exception to apply, "the state officer against whom a suit is brought 'must have some connection with the enforcement of the act' that is in continued violation of federal law." *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372-73 (2d Cir. 2005) (quoting *Ex parte Young*, 209 U.S. 123, 154, 157, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). A state official's general duty to execute the laws is not sufficient to make [the official] a proper party." *Roberson v. Cuomo*, 524 F. Supp. 3d 196, 223 (S.D.N.Y. 2021); *see also Warden v. Pataki*, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). Nor is a state attorney general a proper party absent a specific connection to the enforcement of the challenged laws. *See Chrysafis v. James*, 534 F. Supp. 3d 272, 290 (E.D.N.Y. 2021); *see also Mendez v. Heller*, 530 F.2d 457, 460 (2d Cir. 1976). Plaintiffs assert that Defendants Hochul and James are "architects of the [challenged laws] . . . driving passage of the [laws], using public outlets to promote the cause . . . and a campaign of animus against those who support the Second Amendment and the U.S. Supreme Court." (Dkt. No. 33, at 19.) These vague connections, and other similarly tenuous connections Plaintiffs allege, are wholly insufficient to establish any connection between

Defendants Hochul and James and the enforcement of the New York laws at issue. *See Roberson*, 524 F. Supp. 3d at 223; *Chrysafis*, 534 F. Supp. 3d at 290; *see also Antonyuk v. Hochul*, No. 22-cv-0986, 2022 U.S. Dist. LEXIS 201944, at *114-19, 2022 WL 16744700, at *39-40 (N.D.N.Y. Nov. 7, 2022) (dismissing Hochul as a defendant in an action challenging New York firearms provisions for violating the Second and Fifth Amendments because "Hochul would [not] be the individual who may provide [the plaintiffs] the (legal) relief they seek"). Accordingly, Plaintiffs have failed to show a likelihood of success as to their claims against Defendants Hochul and James.

b. Federal Pre-emption

Plaintiffs allege that certain provisions of the New York laws "are illegal and/or expressly pre-empted under federal law." (Dkt. No. 13-11, at 24.) Defendants argue that Plaintiffs show no likelihood of succeeding on their pre-emption claim because there is no conflict between the New York provisions at issue and the federal statutes and regulations cited by Plaintiffs. (Dkt. No. 29, at 15.)

The laws of the United States are the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Therefore, "state laws that conflict with federal law are 'without effect.'" *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 479-80, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)). In other words, "state laws that require a private party to violate federal law are preempted." *Id.* at 475 (quoting *Maryland*, 451 U.S. at 746). A state law

is pre-empted when (1) Congress has defined "explicitly the extent to which its enactments pre-empt state law . . . through explicit statutory language"; (2) the state law at issue "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively"; or (3) the state law at issue "actually conflicts with federal law . . . [so that] it is impossible for a private party to comply with both state and federal requirements." *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).

Plaintiffs suggest that their pre-emption claim relies on one federal statute, 18 U.S.C. § 926, and one federal regulation, 28 C.F.R. § 25.11(b),[22] (Dkt. No. 1, at 118), although they cobble together other federal statutes and regulations when 18 U.S.C. § 926 and 28 C.F.R. § 25.11(b) are clearly not in conflict with a challenged provision, (Dkt. No. 13-11, at 10-15). Plaintiffs claim that certain New York laws "expressly [] violate federal prohibitions under 18 U.S.C. §§ 926 and 927" and that "[o]thers fail under implied pre-emption through conflict impossibility and obstacle." (Dkt. No. 1, ¶ 130.) But Congress has limited Plaintiffs to demonstrating pre-emption only where there is an actual conflict between state and federal law. *See* 18 U.S.C. § 927. Section 927 reads:

> No provision of this chapter shall be construed as indicating an intent on the part of the

22. The federal regulations Plaintiffs cite in support of their pre-emption claim are contained in 28 C.F.R. subpart A, which derives its authority from the Brady Handgun Violence Prevention Act, codified at 18 U.S.C. § 921 *et seq.*

> Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

"Given that Congress specifically preserved such authority for the States, it stands to reason that Congress did not intend to prevent the States from using appropriate tools to exercise that authority." *Chamber of Com. v. Whiting*, 563 U.S. 582, 600-01, 131 S. Ct. 1968, 179 L. Ed. 2d 1031 (2011). Thus, Plaintiffs must demonstrate that there exists a "direct and positive conflict between [federal law] and the law of the State so that the two cannot be reconciled or consistently stand together." *See* 18 U.S.C. § 927; *see also English*, 496 U.S. at 79; *Fla. Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43, 83 S. Ct. 1210, 10 L. Ed. 2d 248 (1963). They fail to do so.

The New York laws that Plaintiffs allege are pre-empted—"Group A"—deal generally with the security of firearms in the possession of firearms dealers, *see* N.Y. Gen. Bus. §§ 875-b(1), (2), and the maintenance and certification of firearms compliance records, *see* N.Y. Gen. Bus. §§ 875-f, 875-g(1)(b). These laws are contained in N.Y. Gen. Bus. art. 39-BB.[23]

---

23. Plaintiffs also challenge as pre-empted two other New York laws—N.Y. Exec. § 228 and N.Y. Penal § 400.02(2)—that are not contained in N.Y. Gen. Bus. art. 39-BB. (Dkt. No. 1, ¶ 131; Dkt. No. 13-11, at 15.) These provisions are discussed separately below.

The New York laws regulating the security of firearms in the possession of firearms dealers require that "[e]very dealer . . . implement a security plan for securing firearms, rifles and shotguns, including firearms, rifles and shotguns in shipment." N.Y. Gen. Bus. § 875-b(1). That plan must include storage of firearms outside of business hours "in a locked fireproof safe or vault on the dealer's business premises or in a secured and locked area on the dealer's business premises" and storing ammunition "separately from firearms . . . and out of reach of customers." *Id.* Plaintiffs contend that this would "allow the Plaintiffs to determine shipping liability, a matter of regulation comprehensively covered by federal law to facilitate interstate commerce between FFLs nationwide," (Dkt. No. 13-11, at 12-13 (citing 27 C.F.R. §§ 478.122, 478.123, 478.125)), and that this "expressly contradicts federal firearms compliance law." (Dkt. No. 1, ¶ 137.) The regulations Plaintiffs cite prescribe the records to be recorded and kept by firearms dealers, licensed importers, and licensed collectors. *See* 27 C.F.R. §§ 478.122, 478.125. They plainly do not regulate the conduct described in N.Y. Gen. Bus. § 875-b(1) and are therefore not in conflict.

The New York laws regulating the security of firearms further require that a firearms dealer's "business premises . . . be secured by a security alarm system that is installed and maintained by a security alarm operator" that monitors "all accessible openings, and partial motion and sound detection at certain other areas of the premises" and "a video recording device at each point of sale and each entrance and exit to the premises, which shall be recorded from both the indoor and outdoor vantage point and shall

maintain such recordings for a period of not less than two years." N.Y. Gen. Bus. § 875-b(2). Plaintiffs' chief preemption concern as regards this provision relies on the contention that it allows someone with a criminal record to be the operator of the security alarm system. (Dkt. No. 13-11, at 13.) That contention appears to be accurate, *see* N.Y. Gen. Bus. § 69-o, but it is also irrelevant. Plaintiffs assert that 18 U.S.C. § 922(h) prohibits firearms dealers from hiring anyone with a criminal record, (Dkt. No. 13-11, at 13), but it does not. Rather, § 922(h) prohibits any employee of a person who is disqualified from possessing firearms under 18 U.S.C. § 922(g), including someone "convicted in any court of[] a crime punishable by imprisonment for a term exceeding one year," from "receiv[ing], possess[ing], or transport[ing] any firearm or ammunition in or affecting interstate or foreign commerce . . . [or] receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or foreign commerce" 18 U.S.C. § 922(h). That is, the employee of a disqualified person cannot possess firearms in the course of employment with the disqualified person. *Id.*; *see also United States v. Lahey*, 967 F. Supp. 2d 731, 738-39 (S.D.N.Y. 2013). Thus, N.Y. Gen. Bus. § 875-b(2) and 18 U.S.C. § 922(h) are not in conflict.[24]

---

24. Plaintiffs' apparent belief that 18 U.S.C. § 922(h) prohibits a firearms dealer from hiring someone who has been convicted of a felony is incorrect. But even if that belief were correct, or if a separate federal law proscribed such conduct, there is no conflict between the state and federal provisions because there is no suggestion that the security alarm operator would ever receive, possess, or transport any firearm or ammunition. *See* N.Y. Gen. Bus. § 875-b(2).

The New York laws regulating the maintenance and certification of compliance records require that "[e]very dealer . . . establish and maintain a book[] or [electronic] record of purchase, sale, inventory, and other records at the dealer's place of business in such form and for such period as the superintendent shall require, and shall submit a copy of such records to the New York state police every April and October." N.Y. Gen. Bus. § 875-f. Plaintiffs contend that this law "would require the Plaintiffs to copy and transmit all entries from their federal A&D Book to the Defendant NYS Police," or "would require Plaintiffs to create records . . . which plagiarize[] federal firearms compliance laws." (Dkt. No. 13-11, at 10-12.) Either requirement, Plaintiffs claim, necessitates Plaintiffs violating 18 U.S.C. § 926. (Dkt. No. 13-11, at 10-12.) Neither claim is accurate. The New York law plainly does not require transmitting any or all entries from a dealer's federal acquisition and disposition book.[25] *See* N.Y. Gen. Bus. § 875-f. It requires the creation of records as prescribed by New York law. *See id.* But if section 875-f did require transmitting federal records, Plaintiffs are incorrect in asserting that such conduct is prohibited by federal law. The federal statute on which Plaintiffs rely states (in relevant part):

> The Attorney General [of the United States] may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . . No such rule or regulation

25. For relevant federal acquisition and disposition record-keeping requirements, *see* 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. § 478.125(e).

> prescribed after the date of the enactment of the Firearms Owners' Protection Act [of 1986] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

18 U.S.C. § 926(a). The "rule[s] or regulation[s]" controlled by this section are only those prescribed by the Attorney General of the United States. *See id.* Thus, this statute may be read as stating:

> The Attorney General [of the United States] may prescribe . . . [n]o . . . rule or regulation . . . [that] require[s] that records required to be maintained under this chapter . . . be recorded at or transferred to a facility owned, managed, or controlled by [New York], nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

Id. This does not conflict whatsoever with a New York official prescribing a regulation requiring that records kept under federal law be transmitted to, for instance, the New York State Police. *See id.*; 18 U.S.C. § 927. Nor does it conflict with a New York official creating a system of registration

for firearms or firearms transactions and dispositions even if the information recorded is substantially similar to, or, as Plaintiffs put it, "plagiarizes," (Dkt. No. 13-11, at 12), federal firearms registration information. *See* 18 U.S.C. § 926(a), 927; N.Y. Gen. Bus. § 875-f; *see also* Haw. Rev. Stat. § 134-3 (creating a registration system for all firearms under the supervision of the Attorney General of Hawaii); Cal. Penal §§ 11106, 28100, 28155 (creating a database of information pertaining to the sale or transfer of certain firearms under the supervision of the Attorney General of California). That the Attorney General of the United States is prohibited from engaging in conduct that is specifically reserved to the states by federal law has no bearing on the ability of state officials to engage in that conduct. *See* 18 U.S.C. §§ 926(a), 927. This is a hallmark of federalism. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 74, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Thomas, J., dissenting) ("Our federalist system, properly understood, allows [states] to decide for themselves how to safeguard the health and welfare of their citizens."). Thus, Plaintiffs have failed to demonstrate any conflict between N.Y. Gen. Bus. § 875-f and 18 U.S.C. § 926.[26]

Plaintiffs further contend that N.Y. Gen. Bus. § 875-g(1)(b), which requires "[e]very dealer [to] . . . annually certify to the superintendent [of the New York State

26. Plaintiffs' specific pre-emption contentions about certain subsections of N.Y. Gen. Bus. § 875-f—namely N.Y. Gen. Bus. § 875-f(2), which requires a monthly "inventory check" of firearms not yet disposed of, and N.Y. Gen. Bus. § 875-f(3), which allows access of the records to government agencies and firearms manufacturers, (Dkt. No. 13-11, at 11-12)—are without merit for the same reasons.

Police] that such dealer has complied with all of the requirements of this article," leaves Plaintiffs with "no legal pathway . . . [t]o comply with the [New York] laws [without] . . . violati[ng] . . . federal laws," (Dkt. No. 13-11, at 14). Plaintiffs do not suggest any specific federal law pre-empts N.Y. Gen. Bus. § 875-g(1)(b) except the Fifth Amendment. (Dkt. No. 13-11, at 13-14.) The Court addresses Plaintiffs' Fifth Amendment claim below outside the pre-emption context but finds that Plaintiffs have otherwise failed to demonstrate any positive and direct conflict between N.Y. Gen. Bus. § 875-g(1)(b) and federal law.

Finally, Plaintiffs tack on to their pre-emption claim two additional New York laws outside of N.Y. Gen. Bus. art. 39-BB. The first, N.Y. Exec. § 228,[27] makes New York "a state point of contact for implementation of 18 U.S.C. sec. 922(t), all federal regulations and applicable guidelines adopted pursuant thereto, and the national instant criminal background check system [("NICS")] for the purchase of firearms and ammunition." Plaintiffs do not address this claim in their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction, but state in their complaint, without federal statutory support, that this provision is "a scheme to grab firearms background check information and to retain the records, share the records among Executive Branch offices and agencies, and to use the records for purposes beyond the firearms purchase

27. This provision does not take effect until July 15, 2023. *See* S.B. S51001, 2020 Sen., 2021-22 Extraordinary Leg. Sess. (N.Y. 2022); N.Y. Exec. § 228.

background check defined at federal law." (Dkt. No. 1, ¶ 136.) Plaintiffs provide no basis for these allegations. What is more, N.Y. Exec. § 228, which transfers the duty to complete a background check from the firearms dealer to the State, is a state law precisely contemplated by, not in conflict with, federal law. *See* 18 U.S.C. § 922(t)(3); 28 C.F.R. § 25.9(d)(1); *see also Abramski v. United States*, 573 U.S. 169, 172 n.1, 134 S. Ct. 2259, 189 L. Ed. 2d 262 (2014) ("The principal exception [to the requirement that a firearms dealer contact NICS] is for any buyer who has a state permit that has been 'issued only after an authorized government official has verified' the buyer's eligibility to own a gun under both federal and state law." (quoting 18 U.S.C. § 922(t)(3))).[28] Thus, Plaintiffs have failed to demonstrate any conflict between N.Y. Exec. § 228 and federal law.

Plaintiffs also suggest that N.Y. Penal § 400.02(2), which creates a "statewide license and record database specific for ammunition sales," is pre-empted by 28 C.F.R. §§ 25.1, 25.6. (Dkt. No. 13-11, at 15.)[29] But the regulations Plaintiffs rely on specifically state that "[a]ccess to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of . . . [p]roviding information to

---

28. Indeed, as of November 2021, at least thirteen states serve as the point of contact for NICS for all firearms background checks. *See* Fed. Bureau of Investigation, National Instant Criminal Background Check System Participation Map, http://www.fbi.gov/about-us/cjis/nics/general-information/participation-map.

29. Plaintiffs did not allege in their complaint that N.Y. Penal § 400.02(2) is pre-empted by federal law. (Dkt. No. 1.)

. . . state . . . criminal justice agencies in connection with the issuance of a firearm-related . . . permit or license." 28 C.F.R. § 25.6(j). Plaintiffs do not demonstrate that the purpose of N.Y. Penal § 400.02(2) is "unrelated to NICS background checks." *See* 28 C.F.R. § 25.6. Nor do they demonstrate that N.Y. Penal § 400.02(2) has a purpose other than "[p]roviding information to . . . state . . . criminal justice agencies in connection with the issuance of a firearm-related . . . permit or license." *See* 28 C.F.R. § 25.6. More importantly, N.Y. Penal § 400.02(2) does not require use of the NICS, but rather prescribes the creation of a "statewide . . . database." Thus, Plaintiffs have failed to demonstrate any conflict between N.Y. Penal § 400.02(2) and 28 CFR §§ 25.1, 25.6.

Plaintiffs have wholly failed to demonstrate that any of the challenged laws "actually conflict[] with federal law . . . [so that] it is impossible for [Plaintiffs] to comply with both state and federal requirements." *See English*, 496 U.S. at 79. Accordingly, Plaintiffs have not demonstrated a likelihood of success on the merits of their federal preemption claim.

c. Constitutional Challenges

i. Second Amendment

Plaintiffs allege that certain provisions of the New York laws amount to "near total denial of the Plaintiffs' and all New York residents' Second Amendment rights." (Dkt. No. 13-11, at 21.) Defendants argue that the Second Amendment does not apply to corporations, that even if

the Second Amendment did apply to corporations, the laws at issue do not implicate the Second Amendment, and that even if the laws at issue did implicate the Second Amendment, they are historically justified. (Dkt. No. 29, at 15-25.)

The Second Amendment provides that, "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. The Supreme Court has held that the Second Amendment protects an individual's right to keep and bear arms for self-defense. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2125, 213 L. Ed. 2d 387 (2022).[30] To determine whether that right is implicated, a court must examine whether "the Second Amendment's plain text covers an individual's conduct." *See id.* at 2129-30. If it does, "the Constitution presumptively protects that conduct [and] [t]he government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

Plaintiffs fail to demonstrate that the Second Amendment's plain text covers the conduct regulated by the statutory provisions at issue. Plaintiffs are "corporations, single-member LLCs, [] [s]ole [p]roprietorships, and . . . Federal Firearms Licensees with [the individual] Plaintiffs being 'Responsible Persons' for such businesses." (Dkt. No. 13-11, at 22.) Plaintiffs

---

30. "Strictly speaking, [states] [are] bound to respect the right to keep and bear arms because of the Fourteenth Amendment, not the Second." *Id.* at 2137.

contend that, since a federal statutory firearms law defines "person" "[to] include any individual, corporation, company, association, firm, partnership, society, or joint stock company," 18 U.S.C. § 921(a)(1), and since the Supreme Court has recognized "that First Amendment protection extends to corporations," (Dkt. No. 13-11, at 23 (citing *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978))), "Plaintiffs' businesses should receive the same level of protection," (*id.*). This argument is unavailing.

Justice Thomas explicitly stated the holding of *N.Y. State Rifle & Pistol Ass'n v. Bruen* twice: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 142 S. Ct. at 2126, 2129-30. Plaintiffs fail to present any support for their contention that the individual right secured by the Second Amendment applies to corporations or any other business organizations. It does not. *See District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) ("Nowhere else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right. . . . [W]e find that [the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation."). Moreover, the Second Amendment's "operative clause"—"the right of the people to keep and bear Arms shall not be infringed"—makes no mention of buying, selling, storing, shipping, or otherwise engaging in the business of firearms. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. at 2134. Indeed, none of the

"trilogy" of cases cited by Plaintiffs—*N.Y. State Rifle & Pistol Ass'n v. Bruen, McDonald v. City of Chicago*, and *District of Columbia v. Heller*—"cast[s] doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *Heller*, 554 U.S. at 626-27. Plaintiffs have not cited any authority supporting a Second Amendment right for an individual or a business organization to engage in the commercial sale of firearms. Thus, Plaintiffs have not demonstrated a likelihood of success on the merits of their Second Amendment claim.

ii. Fourteenth Amendment

Plaintiffs allege that certain provisions of the New York laws violate the Fourteenth Amendment because they "are so vague as to be unintelligible and highly likely to result in random and irregular prosecutions." (Dkt. No. 13-11, at 17.) Defendants contend that this challenge "fails at the outset because 'it is obvious in this case that there exist numerous conceivably valid applications of' the challenged statutes." (Dkt. No. 29, at 33 (quoting *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996)).)

The Fourteenth Amendment prohibits any state from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. A state "violates this guarantee by taking away someone's life, liberty, or property under a criminal 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." *Johnson v. United States*, 576 U.S. 591, 595, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983)). Statutes that impose criminal penalties "are subject to a 'more stringent' vagueness standard than are civil or economic regulations." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 265 (2d Cir. 2015) (quoting *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498-99, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)). But such statutes need not contain "'meticulous specificity' . . . [since] 'language is necessarily marked by a degree of imprecision.'" *Id.* (quoting *Thibodeau v. Portuondo*, 486 F.3d 61, 66 (2d Cir. 2007) (Sotomayor, J.)).

As an initial matter, the Court must consider the nature of the vagueness challenge. "A statute may be challenged on vagueness grounds either as applied or on its face." *Thibodeau*, 486 F.3d at 67. Plaintiffs do not clearly indicate which type of challenge they are asserting, but they do not suggest that they have been faced with any enforcement action. Therefore, "[b]ecause [P]laintiffs pursue this pre-enforcement [challenge] before they have been charged with any violation of law, it constitutes a facial, rather than as-applied[,] challenge." *Jacoby & Meyers, LLP v. Presiding Justs. of the First, Second, Third & Fourth Dep'ts, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 184 (2d Cir. 2017) (quoting *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265). To succeed on a facial challenge, Plaintiffs "must establish that no set of circumstances exists under which the [challenged laws]

would be valid." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). This high bar makes "a facial challenge . . . 'the most difficult challenge to mount successfully.'" *See id.* (quoting *Salerno*, 481 U.S. at 745).

Plaintiffs challenge differing sets of laws as void for vagueness in their complaint and memorandum of law in support of their motion for a temporary restraining order and preliminary injunction.[31] The Court will examine each challenged provision.

Plaintiffs claim that several provisions of N.Y. Gen. Bus. art. 39-BB are unconstitutionally vague. Plaintiffs point to certain phrases in N.Y. Gen. Bus. § 875-b(2) to support their vagueness claim, asserting that the provision is unconstitutionally vague because the "'security alarm system' standards provision" requires "the Defendant NYS Police to 'establish' 'standards for such security alarm systems' and [] requires the Defendant NYS Police to 'approve' the 'security alarm systems.'" (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. § 875-b(2)).)[32] Plaintiffs

---

31. The Court notes that Plaintiffs appear to have inadvertently omitted the argument that their Group B claim is likely to succeed on the merits from their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. No. 13-11, at 25.)

32. Plaintiffs do not include N.Y. Gen. Bus. § 875-b(2) in Group B for their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. Nos. 13, 13-11.)

similarly claim N.Y. Gen. Bus. § 875-e is unconstitutionally vague because "the 'employee training' program and documentation . . . is to be 'developed by the superintendent' and is to be '[made] available to each dealer,' in accordance with minimum topics set out in N.Y. Gen. Bus. §§ 875-e(2)(a)-(e) [sic] plus '(f) such other topics the superintendent deems necessary and appropriate.'" (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. §§ 875-e, 875-f).)[33] Plaintiffs also claim that N.Y. Gen. Bus. § 875-f is unconstitutionally vague because the "provision may confer authority for the Defendant NYS Police to pr[e]scribe a[n] [acquisition and disposition book] 'in such form and for such period as the superintendent shall require,' which may differ from federal regulation" and requires the "creation of a new monthly inventory reconciliation report for the NYS Police." (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. § 875-f).)[34] Plaintiffs further claim that N.Y. Gen. Bus. § 875-g is unconstitutionally vague because the "annual compliance certification['s] . . . 'form and content'" and "'regulations requiring periodic inspections' at 'the premises of every dealer to determine compliance by such dealer with the requirements of [article 39-BB] [are to] be promulgated by the Defendant NYS Police." (Dkt. No. 1, ¶ 156 (quoting

---

33. Plaintiffs do not include N.Y. Gen. Bus. § 875-e in Group B for their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. Nos. 13, 13-11.)

34. Plaintiffs do not include N.Y. Gen. Bus. § 875-f in Group B for their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. Nos. 13, 13-11.)

N.Y. Gen. Bus. § 875-g).)[35] Finally with regard to N.Y. Gen. Bus. art. 39-BB, Plaintiffs claim that N.Y. Gen. Bus. § 875-h is unconstitutionally vague because it allows "[t]he superintendent [of the New York State Police] [to] promulgate such additional rules and regulations as the superintendent shall deem necessary to prevent firearms, rifles, and shotguns from being diverted from the legal stream of commerce." (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. § 875-h).)[36]

Plaintiffs provide no support for any of these claims and certainly fail to demonstrate, as they must, that the provisions "can never be validly applied," *Vt. Rt. to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 128 (2d Cir. 2014), either as a result of providing inadequate notice or inviting arbitrary enforcement, *see Johnson*, 576 U.S. at 596; *see also Salerno*, 481 U.S. at 745. Indeed, each of these claims centers on the ability of New York agencies, namely the New York State Police, to promulgate rules, regulations, or guidance, and with such rules, regulations, or guidance, there is no suggestion that the provisions will fail to provide adequate notice or invite arbitrary enforcement. *See Johnson*, 576 U.S. at 596; *see also Salerno*, 481 U.S.

---

35. Plaintiffs do not include N.Y. Gen. Bus. § 875-g(2) in Group B for their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. Nos. 13, 13-11.)

36. Plaintiffs do not include N.Y. Gen. Bus. § 875-h in Group B for their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. Nos. 13, 13-11.)

at 745.[37] Plaintiffs fail to advance any argument that this is improper in the vagueness context, and they fail to establish a likelihood of success on meeting the high bar that makes "a facial [vagueness] challenge . . . 'the most difficult challenge to mount successfully.'" *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265 (quoting *Salerno*, 481 U.S. at 745).[38]

Plaintiffs further challenge various provisions of N.Y. Penal §§ 400.00, 400.02, 400.03. Plaintiffs contend

---

37. For example, the superintendent of the New York State Police is required to provide firearms dealers with an employee training course that such dealers must provide to all employees. N.Y. Gen. Bus. § 875-e. There is no indication that such a course is currently available. However, Plaintiffs suggested at the December 1, 2022, hearing that, pursuant to N.Y. Gen. Bus. § 875-e, they will have to fire every employee the day the provision goes into effect. This is a misreading of the law. The statute provides that "all new employees [shall be provided the training] within thirty days of employment . . . [and] all existing employees [shall be provided the training] within ninety days of the effective date of this section." *Id.* So long as the employee training course is timely created, Plaintiffs have not demonstrated a likelihood of success on their vagueness claim.

38. In the complaint, Plaintiffs raise a similar claim against N.Y. Penal § 270.22, which restricts the sale of body vests. (Dkt. No. 1, ¶ 156.) They do not provide any support for this claim in their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction (and, in fact, exclude N.Y. Penal § 270.22 from Group B). (Dkt. Nos. 13, 13-11.) This claim is not likely to succeed for the same reasons that Plaintiffs' vagueness claims against provisions in N.Y. Gen. Bus. art. 39-BB are unlikely to succeed. Furthermore, no Plaintiff puts forth any allegations that he or she has attempted or otherwise intends to sell body armor. (Dkt. No. 13-4, ¶ 18; Dkt. No. 13-7, ¶ 24; Dkt. No. 13-9, ¶ 19.)

that the "classroom and live-fire training curriculum and certification scheme" created by N.Y. Penal § 400.00 is unconstitutionally vague, (Dkt. No. 1, ¶ 156; Dkt. No. 13-11, at 17), because "Defendants have failed to issue legally[] required curriculum, testing, and certification forms," (Dkt. No. 13-2, ¶ 48), or have otherwise failed to issue an adequate curriculum, (Dkt. No. 13-3, ¶ 26; Dkt. No. 13-4, ¶ 24; Dkt. No. 13-5, ¶¶ 32-33; Dkt. No. 13-7, ¶ 71; Dkt. No. 13-8, ¶ 50). Plaintiffs also suggest that the licensing scheme for purchase of a semi-automatic rifle created by N.Y. Penal §§ 400.00 is unconstitutionally vague, (Dkt. No. 1, ¶ 156; Dkt. No. 13-11, at 17),[39] because "[n]o semi-automatic license is known to have issued or to be available to request," (Dkt. No. 1, ¶ 160). Finally, Plaintiffs allege that ammunition sale record-keeping and background-check requirements created by N.Y. Penal §§ 400.02, 400.03 are unconstitutionally vague, (Dkt. No. 1, ¶ 156; Dkt. No. 13-11, at 17),[40] but provide no basis for this argument. Plaintiffs have failed to show a likelihood of success on any of these arguments.

Plaintiffs acknowledge that the Division of Criminal Justice Services published a document entitled "Minimum

39. The specific subsections of N.Y. Penal § 400.00 involving semi-automatic rifle licensing that Plaintiffs include in their complaint differ from those included in the memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. No. 1, ¶ 156; Dkt. No. 13-11, at 17.)

40. The specific sections involving ammunition record-keeping and background check requirements that Plaintiffs include in their complaint differ from those included in the memorandum of law in support of their motion for a temporary restraining order and preliminary injunction. (Dkt. No. 1, ¶ 156; Dkt. No. 13-11, at 17.)

Standards for New York State Concealed Carry Firearm Safety Training." (Dkt. No. 15-2; Dkt. No. 13-3, ¶ 26; Dkt. No. 13-4, ¶ 25; Dkt. No. 13-5, ¶ 32; Dkt. No. 13-8, ¶ 50.) Plaintiffs variously contend that this is not a "curriculum" or is not "course materials." (Dkt. No. 13-3, ¶ 26; Dkt. No. 13-4, ¶ 25; Dkt. No. 13-5, ¶ 32; Dkt. No. 13-8, ¶ 50.) While Plaintiffs are correct that the document is not "course materials," they are clearly incorrect that it is not a curriculum: the document includes a section titled "Minimum Standards for Classroom Training Curriculum" that includes twelve separate topics and how much time should be devoted to each; a section titled "Minimum Standards for Written Proficiency Test" that describes standards for the proficiency test to be developed by instructors and states that instructors must retain records of such tests; a section titled "Minimum Standards for Live-Fire Training Curriculum" that lists six separate live-fire topics for instruction; and a section titled "Minimum Standards for Live-Fire Proficiency Assessment" that includes five separate live-fire ability assessments and states that instructors must retain records of such assessments. (Dkt. No. 15-2.)

Plaintiffs' own acknowledgements similarly undermine their claim that the semiautomatic rifle licensing scheme is unconstitutionally vague: the New York State Police published a semi-automatic rifle license amendment application, (Dkt. No. 1, ¶ 160; Dkt. No. 13-11, at 21; Dkt. No. 15-4), and the Division of Criminal Justice Services issued a "FAQ" about semi-automatic rifle licensing. (Dkt. No. 15-3.) Plaintiffs suggest that because the New York State Police form is an "amendment," it "add[s] to the

confusion[] [instead of] clarifying the new laws." (Dkt. No. 1, ¶ 160.) But the existence of the semi-automatic rifle license amendment application apparently did not suggest to Plaintiffs that a separate semi-automatic rifle license form exists. It does.[41] And Plaintiffs' apparent contention that the semi-automatic rifle licensing criteria cannot be described in the same section in which the concealed-carry licensing criteria are described, (Dkt. No. 1, ¶ 160), is entirely without merit.[42]

Having failed to put forth any argument about the ammunition sale record-keeping and background check requirements, Plaintiffs have failed to demonstrate a likelihood of success on the merits of their claim that the classroom and live-fire training curriculum and certification scheme created by N.Y. Penal §§ 400.00, the licensing scheme for purchase of a semi-automatic rifle created by N.Y. Penal §§ 400.00, or the ammunition sale record-keeping and background-check requirements created by N.Y. Penal §§ 400.02, 400.03 are unconstitutionally vague.

---

41. *See* N.Y. State Police, State of New York Semi-Automatic Rifle License Application, Form PPB-3 (rev. 08/22), https://troopers.ny.gov/system/files/documents/2022/10/ppb-3-08-22.pdf.

42. In their memorandum of law in support of their motion for a temporary restraining order and preliminary injunction, Plaintiffs add N.Y. Penal §§ 265.65, 265.66 to their claim that the semi-automatic rifle licensing scheme is unconstitutionally vague. (Dkt. No. 13, at 4; Dkt. No. 13-11, at 17, 21-22.) These sections provide the criminal penalties for failing to adhere to the semi-automatic rifle licensing requirements, either as the purchaser, N.Y. Penal § 265.65, or as the seller, N.Y. Penal § 265.66.

In sum, Plaintiffs have not shown a likelihood of success on the merits of their Fourteenth Amendment vagueness claim—that is, that any one of the challenged provisions is "so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement," *see Johnson*, 576 U.S. at 595 (citing *Kolender*, 461 U.S. at 357-58), especially under the stringent standard for facial challenges imposed by *Salerno*, which requires that Plaintiffs show that "no set of circumstances exists under which the [challenged laws] would be valid," *see N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265 (quoting *Salerno*, 481 U.S. at 745).[43]

iii. Fifth Amendment

Plaintiffs allege that N.Y. Gen. Bus. § 875-g(1)(b) compels them to certify compliance with New York laws that Plaintiffs contend will force them to violate federal law. (Dkt. No. 13-11, at 13-14.) This certification, Plaintiffs argue, will "amount to a waiver of the Plaintiffs' Fifth Amendment rights against self-incrimination" by

---

43. At oral argument, Plaintiffs noted that, if the Court were to hold an evidentiary hearing before ruling on the motion for a preliminary injunction, Plaintiffs would call as witnesses a representative of the New York State Police and a county-level firearms licensing official. Plaintiffs have, however, "not shown that an evidentiary hearing would resolve any material factual issues" with respect to the likelihood of success on the merits. *Amaker v. Fischer*, 453 F. App'x 59, 64 (2d Cir. 2011). Accordingly, the Court, in its discretion, concludes that it may "dispose of the motion on the papers before it." *See Md. Cas. Co.*, 107 F.3d at 984 (quoting *Consol. Gold Fields*, 871 F.2d at 256); *see also Charette*, 159 F.3d at 755.

compelling Plaintiffs "to provide the Defendant NYS Police with a formal certification of compliance (or lack thereof) that is 'likely to facilitate their arrest and eventual conviction.'" (*Id.* at 14-16 (quoting *Haynes v. United States*, 390 U.S. 85, 97, 88 S. Ct. 722, 19 L. Ed. 2d 923, 1968-1 C.B. 615 (1968))). Defendants argue that this claim is premised on a misreading of federal law and that Plaintiffs "run no risk of incriminating themselves by complying with the certification requirement under [New York law]." (Dkt. No. 29, at 20.)

The Fifth Amendment provides that "[n]o person . . . shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. X, cl. 3. "[T]he Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgment by the States." *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964). This protection "applies only when the accused is compelled to make a testimonial communication that is incriminating." *Balt. City Dep't of Soc. Servs. v. Bouknight*, 493 U.S. 549, 554, 110 S. Ct. 900, 107 L. Ed. 2d 992 (1990) (quoting *Fisher v. United States*, 425 U.S. 391, 408, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)).

The provision at issue requires that "[e]very dealer . . . annually certify to the superintendent [of the New York State Police] that such dealer has complied with all of the requirements of [N.Y. Gen. Bus. art. 39-BB]." N.Y. Gen. Bus. § 875-g(1)(b). Plaintiffs contend that it is "impossible" to comply with N.Y. Gen. Bus. art. 39-BB "due to pre-existing, express[] federal prohibitions governing the

business operations of the Plaintiffs." (Dkt. No. 13-11, at 13.) But the Court has examined all of Plaintiffs' proffered "federal prohibitions" and found none. That is, the premise of Plaintiffs' Fifth Amendment claim—that "[t]o comply with the [New York] laws results in a violation of federal laws," (*id.* at 14)—is baseless.

Furthermore, Plaintiffs' reliance on *Haynes v. United States* is misguided. In *Haynes*, the Supreme Court held that a law requiring those who obtained firearms without complying with federal statutory requirements—that is, those who obtained firearms illegally—to register such firearms with the federal government violated the Fifth Amendment right against self-incrimination because those persons were "inherently suspect of criminal activities." *See* 390 U.S. at 96-98 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965)); *see also Marchetti v. United States*, 390 U.S. 39, 47, 88 S. Ct. 697, 19 L. Ed. 2d 889, 1968-1 C.B. 500 (1968) (applying the protections of the Fifth Amendment in the context of a federal tax on illegal wagering because "those engaged in wagering are a group 'inherently suspect of criminal activities'" (quoting *Albertson*, 382 U.S. at 79)); *Grosso v. United States*, 390 U.S. 62, 64, 88 S. Ct. 709, 19 L. Ed. 2d 906, 1968-1 C.B. 496 (1968) (same); *Albertson*, 382 U.S. at 77-79 (applying the protections of the Fifth Amendment in the context of a federal law requiring registration as an affiliate of a Communist organization because such affiliation was illegal). But Plaintiffs are not in a "highly selective group inherently suspect of criminal activities." *See Haynes*, 390 U.S. at 98 (quoting *Albertson*, 382 U.S. at

79). Rather, Plaintiffs have merely "assume[d] control over items that are the legitimate object of the government's noncriminal regulatory powers." *Bouknight*, 493 U.S. at 558. Having failed to establish a likelihood of success on their claim that the certification requirement of N.Y. Gen. Bus. § 875-g(1)(b) compels them to make a testimonial communication that is incriminating, Plaintiffs have failed to demonstrate a likelihood of success on the merits of their Fifth Amendment claim.

d. "Constitutional Regulatory Overburden"

Plaintiffs finally raise a novel argument that they term "constitutional regulatory overburden." (Dkt. No. 13-11, at 23.)[44] This theory, Plaintiffs contend, is a "natural extension of the *Heller – McDonald – NYSRPA I* trilogy" that extends the protections of the Second Amendment to businesses engaged in the sale of firearms by establishing that "the firearm is the only consumer product enshrined in the Bill of Rights." (*Id.* at 23-25.) Defendants argue that "there is no such claim" and that Plaintiffs fail to cite any supporting legal authority. (Dkt. No. 29, at 31.)

It is unclear to the Court how Plaintiffs' theory of "constitutional regulatory overburden" differs from

---

44. Plaintiffs suggest this claim applies to "Group C," (*id.* at 4-5), although they challenge a different set of laws under this theory in their complaint, (Dkt. No. 1, ¶ 181). The Court need not determine precisely which laws Plaintiffs challenge under this theory because they have failed to show a likelihood of success on this claim regardless of which challenged law it is applied to.

their Second Amendment claim, which the Court found insufficient. Indeed, in support of their "constitutional regulatory overburden" theory, Plaintiffs cite the very cases that explicitly refuse to "cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *McDonald*, 561 U.S. at 786; *Heller*, 554 U.S. at 626-27; (Dkt. No. 13, at 22). Since Plaintiffs have provided no basis for their novel theory, they have failed to demonstrate a likelihood of success on the merits of their "constitutional regulatory overburden" claim.

3. Public Interest and Balance of Equities

When the government is a party to an action, the Court's inquiry into the balance of equities merges into the evaluation of the public interest. *See We The Patriots USA*, 17 F.4th at 295 (citing *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 58-59); *see also Kane*, 19 F.4th at 163. The Court must "ensure that the 'public interest would not be disserved' by the issuance of a preliminary injunction." *Salinger*, 607 F.3d at 80 (quoting *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)). Even if Plaintiffs had shown that the public interest would not be disserved by the issuance of an injunction, Plaintiffs' failure to demonstrate either a likelihood of irreparable injury in the absence of an injunction or a likelihood of success on the merits is sufficient to deny injunctive relief. *See Salinger*, 607 F.3d at 75 n.5; *Faiveley*, 559 F.3d at 119. Accordingly, the Court need not consider the balance of equities and the public

interest. *See Faiveley*, 559 F.3d at 119; *see also Conn. State Police Union v. Rovella*, 36 F.4th 54, 68 (2d Cir. 2022) ("Because the District Court did not err in concluding that the [plaintiff] could not succeed on the merits of its claim, we need not address the remaining prongs of the preliminary injunction test, including whether the [plaintiff] demonstrated irreparable harm or whether an injunction would be in the public interest."), *cert. denied*, No. 22-1162022 WL 4654636, 214 L. Ed. 2d 84, 2022 U.S. LEXIS 4041 (U.S. Oct. 3, 2022).

V. CONCLUSION

For these reasons, it is hereby

ORDERED that Plaintiffs' motion for a temporary restraining order, (Dkt. No. 13), is **DENIED**; and it is further

ORDERED that Plaintiffs' motion for a preliminary injunction, (*id.*), is **DENIED**.

IT IS SO ORDERED.

Dated: December 7, 2022
Syracuse, New York

/s/ Brenda K. Sannes
Brenda K. Sannes
Chief U.S. District Judge

APPENDIX C — ORDER DENYING STAY OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED DECEMBER 21, 2022

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

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 21st day of December, two thousand twenty-two.

Present:

Robert D. Sack,
Richard C. Wesley,
Joseph F. Bianco,
Circuit Judges.

22-3068

NADINE GAZZOLA, *ET AL.*,

Plaintiffs-Appellants,

v.

KATHLEEN HOCHUL, IN HER OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEW YORK, *ET AL.*,

Defendants-Appellees.

Appellants move for a stay pending appeal of the district court's orders dated December 2 and December 7 denying their motion for a temporary restraining order and preliminary injunction (N.D.N.Y. 22-cv-1134, docs. 37 & 42). Appellants challenge various provisions of New York's General Business Law Article 39-BB, Executive Law, and Penal Law as they pertain to firearms regulations. Preliminarily, the motion is DENIED because Appellants did not "move first in the district court" for a stay or injunction pending appeal, nor have they explained why moving first in the district court would have been impracticable. Fed. R. App. P. 8(a)(1)(C), (a)(2)(A)(i). And in any event, even if Appellants had first moved in the district court, having weighed the applicable factors, *see In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); *Agudath Israel of Am. v. Cuomo*, 979 F.3d 177, 180 (2d Cir. 2020), we would conclude that an injunction pending appeal would not be warranted. Accordingly, upon due consideration, it is hereby ORDERED that the motion for a stay pending appeal (2d Cir. 22-3068, doc. 12) is DENIED. The Clerk of Court shall set an expedited briefing schedule for the appeal.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe
Catherine O'Hagan Wolfe, Clerk of Court

APPENDIX D — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Second Amendment of the United States Constitution

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Bill S. 51001, pp. 15-17.
NY Exec §228. National instant criminal background checks.

1. (a) The division is hereby authorized and directed to serve as a state point of contact for implementation of 18 U.S.C. sec. 922(t), all federal regulations and applicable guidelines adopted pursuant thereto, and the national instant criminal background check system for the purchase of firearms and ammunition.

(b) Upon receiving a request from a licensed dealer pursuant to section eight hundred ninety-six or eight hundred ninety-eight of the general business law, the division shall initiate a background check by (i) contacting the National Instant Criminal Background Check System (NICS) or its successor to initiate a national instant criminal background check, and (ii) consulting the statewide firearms license and records database established pursuant to subdivision three of this section, in order to determine if the purchaser is a person described in sections 400.00 and 400.03 of the penal law, or is prohibited by state or federal law from possessing, receiving, owning, or purchasing a firearm or ammunition.

2. (a) The division shall report the name, date of birth and physical description of any person prohibited from possessing a firearm pursuant to 18 U.S.C. sec. 922(g) or (n) to the national instant criminal background check system index (*sic*), denied persons files.

[(b), omitted]

[(c), omitted]

3. The division shall create and maintain a statewide firearms license and records database which shall contain records held by the division and any records that it is authorized to request from the division of criminal justice services, office of court administration, New York state department of health, New York state office of mental health, and other local entities. [sentence 2] Such database shall be used for the certification and recertification of firearm permits under section 400.02 of the penal law, assault weapon registration under subdivision sixteen-a of section 400.00 of the penal law, and ammunition sales under section 400.03 of the penal law. [sentence 3] Such database shall also be used to initiate a national instant criminal background check pursuant to subdivision one of this section upon request from a licensed dealer. [sentence 4] The division may create and maintain additional databases as needed to complete background checks pursuant to the requirements of this section.

4. The superintendent shall promulgate a plan to coordinate background checks for firearm and ammunition purchases pursuant to this section and to require any person, firm or corporation that sells, delivers or otherwise transfers any firearm or ammunition to submit a request to the division in order to complete the background checks in compliance with federal and state law, including the National Instant Criminal Background Check System (NICS), in New York state. [sentence 2] Such plan shall include, but shall not be limited to, the following features:

(a) The creation of a centralized bureau within the division to receive and process all background check requests, which shall include a contact center unit and an appeals unit. [sentence 2] Staff may include but is not limited to: bureau chief, supervisors, managers, different levels of administrative analysts, appeals specialists and administrative personnel. [sentence 3] The division shall employ and train such personnel to administer the provisions of this section.

(b) Procedures for carrying out the duties under this section, including hours of operation.

(c) An automated phone system and web-based application system, including a toll-free telephone number and/or web-based application option for any licensed dealer requesting a background check in order to sell, deliver or otherwise transfer a firearm which shall be operational every day that the bureau is open for business for the purpose of responding to requests in accordance with this section.

5. (a) Each licensed dealer that submits a request for a national instant criminal background check pursuant to this section shall pay a fee imposed by the bureau for performing such background check. [sentence 2] Such fee shall be allocated to the background check fund established pursuant to section ninety-nine-pp of the state finance law. [sentence 3] The amount of the fee shall not exceed the total amount of direct and indirect costs incurred by the bureau in performing such background check.

(b) The bureau shall transmit all moneys collected pursuant to this paragraph to the state comptroller, who shall credit the same to the background check fund.

[6, omitted]

7. Within sixty days of the effective date of this section, the superintendent shall notify each licensed dealer holding a permit to sell firearms of the requirement to submit a request to the division to initiate a background check pursuant to this section as well as the following means to be used to apply for background checks:

(i) (*sic*) any (*sic*) person, firm or corporation that sells, delivers or otherwise transfers firearms shall obtain a completed ATF 4473 form from the potential buyer or transferee including name, date of birth, gender, race, social security number, or other identification numbers of such potential buyer or transferee and shall have inspected proper identification including an identification containing a photograph of the potential buyer or transferee.

(ii) it (*sic*) shall be unlawful for any person, in connection with the sale, acquisition or attempted acquisition of a firearm from any transferor, to willfully make any false, fictitious oral or written statement or to furnish or exhibit any false, fictitious, or misrepresented identification that is intended or likely to deceive such transferor with respect to any fact material to the lawfulness of the sale or other disposition of such firearm under federal or state law. Any person who

violates the provisions of this subparagraph shall be guilty of a class A misdemeanor.

8. Any potential buyer or transferee shall have thirty days to appeal the denial of a background check, using a form established by the superintendent. [sentence 2] Upon receipt of an appeal, the division shall provide such applicant a reason for a denial within thirty days. [sentence 3] Upon receipt of the reason for denial, the appellant may appeal to the attorney general.

Bill S. 4970-A, pp. 3-4.
NY Gen Bus §875-b(1)-(2). Security.

1. Every dealer shall implement a security plan for securing firearms, rifles and shotguns, including firearms, rifles and shotguns in shipment. The plan shall satisfy at least the following requirements:

(a) all firearms, rifles and shotguns shall be secured, other than during business hours, in a locked fireproof safe or vault on the dealer's business premises or in a secured and locked area on the dealer's business premises; and

(b) ammunition shall be stored separately from firearms, rifles and shotguns and out of reach of customers.

2. The dealer's business premises shall be secured by a security alarm system that is installed and maintained by a security alarm operator properly licensed pursuant to article six-D of this chapter.[1] [sentence 2] Standards for such security alarm systems shall be established by the superintendent in regulation. [sentence 3] Such security alarm systems may be developed by a federal or state agency, a not-for-profit organization, or another entity specializing in security alarm standards approved by the superintendent for the purposes of this act. [sentence 4] The security alarm system shall be capable of being monitored by a central station, and shall provide, at

1. "Security alarm operator" defined at NY Gen Bus, art. 6-D at §69-o(2).

a minimum, complete protection and monitoring for all accessible openings, and partial motion and sound detection at certain other areas of the premises. [sentence 5] The dealer location shall additionally be equipped with a video recording device at each point of sale and each entrance and exit to the premises, which shall be recorded from both the indoor and outdoor vantage point and shall maintain such recordings for a period of not less than two years.

Appendix D

Bill S. 4970-A, p. 4
NY Gen Bus §875-c. Access to firearms, rifles, and shotguns.

Every retail dealer shall exclude all persons under eighteen years of age from those portions of its premises where firearms, rifles, shotguns, or ammunition are stocked or sold, unless such persons is accompanied by a parent or guardian.

Bill S. 4970-A, p. 4.
NY Gen Bus §875-e. Employee training.

1. Every dealer shall provide the training developed by the superintendent pursuant to subdivision two of this section to all new employees within thirty days of employment, to all existing employees within ninety days of the effective date of this section, and to all employees annually thereafter.

2. The superintendent shall develop and make available to each dealer, a training course in the conduct of firearm, rifle, and shotgun transfers including at a minimum the following:

(a) Federal and state laws governing firearm, rifle, and shotgun transfers.

(b) How to recognize, identify, respond, and report straw purchases, illegal purchases, and fraudulent activity.

(c) How to recognize, identify, respond, and report an individual who intends to use a firearm, rifle, or shotgun for unlawful purposes, including self-harm.

(d) How to prevent, respond, and report theft or burglary of firearms, rifles, shotguns, and ammunition.

(e) How to educate customers on rules of gun safety, including but not limited to the safe handling and storage of firearms, rifles, shotguns and ammunition.

(f) Such other topics the superintendent deems necessary and appropriate.

3. No employee or agent of any retail dealer shall participate in the sale or disposition of firearms, rifles, or shotguns unless such person is at least twenty-one years of age and has first received the training required by this section. [sentence 2] The superintendent shall promulgate regulations setting forth minimum requirements for the maintenance of records of such training.

Bill S. 4970-A, pp. 4-5
NY Gen Bus §875-f. Maintenance of records.

Every dealer shall establish and maintain a book, or if the dealer should choose, an electronic based record of purchase, sale, inventory, and other records at the dealer's place of business in such form and for such period as the superintendent shall require, and shall submit a copy of such records to the New York state police every April and October. [sentence 2] Such records shall at a minimum include the following:

1. the make, model, caliber or gauge, manufacturer's name, and serial number of all firearms, rifles and shotguns that are acquired or disposed of not later than one business day after their acquisition or disposition. [sentence 2] Monthly backups of these records kept in a book shall be maintained in a secure container designed to prevent loss by fire, theft, or flood. [sentence 3] If the dealer chooses to maintain an electronic-based record system, those records shall be backed up on an external server or over the internet at the close of each business day;

2. all firearms, rifles and shotguns acquired but not yet disposed of shall be accounted for through an inventory check prepared once each month and maintained in a secure location;

3. firearm, rifle and shotgun disposition information, including the serial numbers of firearms, rifles and shotguns sold, dates of sale, and identity of purchasers,

shall be maintained and made available at any time to government law enforcement agencies and to the manufacturer of the weapon or its designee; and

4. every dealer shall maintain records of criminal firearm, rifle and shotgun traces initiated by the federal bureau of alcohol, tobacco, firearms and explosives ("ATF"). [sentence 2] All ATF Form 4473 transaction records shall be retained on the dealer's business premises in a secure container designed to prevent loss by fire, theft, or flood.

Bill S. 4970-A, p. 5
NY Gen Bus §875-g. Internal compliance, certification, and reporting.

1. Every dealer shall:

(a) implement and maintain sufficient internal compliance procedures to ensure compliance with the requirements of this article; and

(b) annually certify to the superintendent that such dealer has complied with all of the requirements of this article. [sentence 2] The superintendent shall by regulation determine the form and content of such annual certification.

2. (a) The superintendent shall promulgate regulations requiring periodic inspections of not less than one inspection of every dealer every three years, during regular and usual business hours, by the division of state police of the premises of every dealer to determine compliance by such dealer with the requirements of this article. [sentence 2] Every dealer shall provide the division of state police with full access to such dealer's premises for such inspections. [(b), *et seq.,* omitted]

Bill S. 4970-A, p. 5
NY Gen Bus §875-h. Rules and regulations.

The superintendent may promulgate such additional rules and regulations as the superintendent shall deem necessary to prevent firearms, rifles, and shotguns from being diverted from the legal stream of commerce.

Bill S. 4970-A, p. 5
NY Gen Bus §875-i. Violations.

Any person, firm, or corporation who knowingly violates any provision of this article shall be guilty of a class A misdemeanor punishable as provided for in the penal law.

Read with **Bill S. 4970-A, p. 5.**
NY Pen §400.00(11). License: revocation and suspension.

11. License: revocation and suspension. (a) [sentence 4] A license to engage in the business of dealer may be revoked or suspended for any violation of the provisions of article thirty-nine-BB of the general business law. [sentence 5] The official revoking a license shall give written notice thereof without unnecessary delay to the executive department, division of state police, Albany, and shall also notify immediately the duly constituted police authorities of the locality.

Bill S. 9458, p. 7.
NY Pen §265.65. Criminal purchase of a semiautomatic rifle.

A person is guilty of criminal purchase of a semiautomatic rifle when he or she purchases or takes possession of a semiautomatic rifle and does not possess a license to purchase or take possession of a semiautomatic rifle as provided in subdivision two of section 400.00 of this chapter. [sentence 2] Criminal purchase of a semiautomatic rifle is a class A misdemeanor for the first offense and a class E felony for subsequent offenses.

Appendix D

Bill S. 9458, p. 7.
NY Pen §265.66. Criminal sale of a semiautomatic rifle.

A person is guilty of criminal sale of a semiautomatic rifle when, knowing or having reason to know it is a semiautomatic rifle, he or she sells, exchanges, gives or disposes of a semiautomatic rifle to another person and such other person does not possess a license to purchase or take possession of a semiautomatic rifle as provided in subdivision two of section 400.00 of this chapter. [sentence 2] Criminal sale of a semiautomatic rifle is a class E felony.

Appendix D

Bill S. 9407-B, pp. 1-2.
NY Pen §270.22. Unlawful sale of a body vest. [Also, NY Gen Bus §396-eee.]

A person is guilty of the unlawful sale of a body vest when they sell, exchange, give or dispose of a body vest, as such term is defined in subdivision two of section 270.20 of this article, to an individual whom they know or reasonably should have known is not engaged or employed in an eligible profession, as such term is defined in section 270.21 of this article. [sentence 2] Unlawful sale of a body vest is a class A misdemeanor for the first offense and a class E felony for any subsequent offense.

Bill S. 9407-B, p. 2.
NY Exe §144-a. Eligible professions for the purchase, sale, and use of body vests.

The secretary of state in consultation with the division of criminal justice services, the division of homeland security and emergency services, the department of corrections and community supervision, the division of the state police, and the office of general services shall promulgate rules and regulations to establish criteria for eligible professions requiring the use of a body vest, as such term is defined in subdivision two of section 270.20 of the penal law. [sentence 2] Such professions shall include those in which the duties may expose the individual to serious physical injury that may be prevented or mitigated by the wearing of a body vest. [sentence 3] Such rules and regulations shall also include a process by which an individual or entity may request that the profession in which they engage be added to the list of eligible professions, a process by which the department shall approve such professions, and a process by which individuals and entities may present proof of engagement in eligible professions when purchasing the body vest.

Appendix D

Read with **NY Pen §§265.65, 265.66, and §270.22: NY Pen §70.15(1). Sentences of imprisonment for misdemeanors and violation – class A misdemeanor.**

1. Class A misdemeanor. A sentence of imprisonment for a class A misdemeanor shall be a definite sentence. When such a sentence is imposed the term shall be fixed by the court, and shall not exceed three hundred sixty-four days.

Read with **NY Pen §§265.65** and **265.66, and §270.22**: **NY Pen §70.00(1)-(4). Sentences of imprisonment for felony [class E felony, only]**

1. Indeterminate sentence. Except as provided in subdivisions four and five of this section or section 70.80 of this article, a sentence of imprisonment for a felony, other than a felony defined in article two hundred twenty or two hundred twenty-one of this chapter, shall be an indeterminate sentence. When such a sentence is imposed, the court shall impose a maximum term in accordance with the provisions of subdivision two of this section and the minimum period of imprisonment shall be as provided in subdivision three of this section.

2. Maximum term of sentence. The maximum term of an indeterminate sentence shall be at least three years and the term shall be fixed as follows:

(e) For a class E felony, the term shall be fixed by the court, and shall not exceed four years.

3. Minimum period of imprisonment. The minimum period of imprisonment under an indeterminate sentence shall be at least one year and shall be fixed as follows:

(b) For any other felony, the minimum period shall be fixed by the court and specified in the sentence and shall be not less than one year nor more than one-third of the maximum term imposed.

4. Alternative definite sentence for class D and E felonies. When a person, other than a second or persistent felony offender, is sentenced for a class D or class E felony, and the court, having regard to the nature and circumstances of the crime and to the history and character of the defendant, is of the opinion that a sentence of imprisonment is necessary but that it would be unduly harsh to impose an indeterminate or determinate sentence, the court may impose a definite sentence of imprisonment and fix a term of one year or less.

Appendix D

Bill S. 51001, pp. 1-3.
NY Pen §400.00(1)(n). Eligibility.

1. Eligibility. No license shall be issued or renewed pursuant to this section except by the licensing officer, and then only after investigation and finding that all statements in a proper application for a license are true. No license shall be issued or renewed except for an applicant [subparagraphs (a) – (m) omitted]; (n) for a license issued under paragraph (f) of subdivision two of this section, that the applicant has not been convicted within five years of the date of the application of any of the following: [(i) and (ii) omitted] (iii) certification of completion of the training required in subdivision nineteen of this section; [subdivision (iv), omitted].

Bill S. 51001, p. 20.
Read **NY Pen §400.00(1)(n)** *with, inter alia*
NY Pen §400.00(19).

19. Prior to the issuance or renewal of a license under paragraph (f) of subdivision two of this section, issued or renewed on or after the effective date of this subdivision, an applicant shall complete an in-person live firearms safety course conducted by a duly authorized instructor with curriculum approved by the division of criminal justice services and the superintendent of state police, and meeting the following requirements:

(a) a minimum of sixteen hours of in-person live curriculum approved by the division of criminal justice services and the superintendent of state police, conducted by a duly authorized instructor approved by the division of criminal justice services, and shall include but not be limited to the following topics: [(i) through (xi) omitted]; and

(b) a minimum of two hours of a live-fire range training course.

The applicant shall be required to demonstrate proficiency by scoring a minimum of eighty percent correct answers on a written test for the curriculum under paragraph (a) of this subdivision and the proficiency level determined by the rules and regulations promulgated by the division of criminal justice services and the superintendent of state police for the live-fire range training under paragraph (b) of this subdivision.

Upon demonstration of such proficiency, a certificate of completion shall be issued to such applicant in the applicant's name and endorsed and affirmed under the penalties of perjury by such duly authorized instructor.

An applicant required to complete the training required herein prior to renewal of a license issued prior to the effective date of this subdivision shall only be required to complete such training for the first renewal of such license after such effective date.

Bill S. 9458, p. 1.
NY Pen §400.00(2). Types of licenses.

2. Types of licenses. A license for gunsmith or dealer in firearms shall be issued to engage in such business. [sentence 2] A license for a semiautomatic rifle, other than an assault weapon or disguised gun, shall be issued to purchase or take possession of such a firearm when such transfer of ownership occurs on or after the effective date of the chapter of the laws of two thousand twenty-two that amended this subdivision. [remainder of provision, omitted]

Bill S. 9458, p. 2.
NY Pen §400.00(3)(a). Applications.

3. (a) Applications shall be made and renewed, in the case of a license to carry or possess a pistol or revolver or to purchase or take possession of a semiautomatic rifle, to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his or her principal place of business as merchant or storekeeper; and, in the case of a license as gunsmith or dealer in firearms, to the licensing officer where such place of business is located. [remainder of provision, omitted]

Bill S. 9458, p. 3.
NY Pen §400.00(6). License: validity.

Any license issued pursuant to this section shall be valid notwithstanding the provisions of any local law or ordinance. [sentence 2] No license shall be transferable to any other person or premises. [sentence 3] A license to carry or possess a pistol or revolver, or to purchase or take possession of a semiautomatic rifle, not otherwise limited as to place or time of possession, shall be effective throughout the state, except that the same shall not be valid within the city of New York unless a special permit granting validity is issued by the police commissioner of that city. [remainder of provision, omitted]

Appendix D

Bill S. 9458, p. 4.
NY Pen §400.00(7). License: form.

Any license issued pursuant to this section shall, except in the city of New York, be approved as to form by the superintendent of state police. [sentence 2] A license to carry or possess a pistol or revolver or to purchase or take possession of a semiautomatic rifle shall have attached the licensee's photograph, and a coupon which shall be removed and retained by any person disposing of a firearm to the licensee. [sentence 3] A license to carry or possess a pistol or revolver shall specify the weapon covered by calibre (*sic*), make, model, manufacturer's name and serial number, or if none, by any other distinguishing number or identification mark, and shall indicate whether issued to carry on the person or possess on the premises, and if on the premises shall also specify the place where the licensee shall possess the same. [remainder of provision, omitted]

Bill S. 9458, pp. 4-5.
NY Pen §400.00(8). License: exhibition and display.

8. License: exhibition and display. Every licensee while carrying a pistol or revolver shall have on his or her person a license to carry the same. [sentence 2] Every person licensed to possess a pistol or revolver on particular premises shall have the license for the same on such premises. [sentence 3] Every person licensed to purchase or take possession of a semiautomatic rifle shall have the license for the same on his or her person while purchasing or taking possession of such weapon. [remainder of provision, omitted]

Bill S. 9458, p. 5.
NY Pen §400.00(9). License: amendment.

9. License: amendment. Elsewhere than in the city of New York, a person licensed to carry or possess a pistol or revolver or to purchase or take possession of a semiautomatic rifle may apply at any time to his or her licensing officer for amendment of his or her license to include one or more such weapons or to cancel weapons held under license. [remainder of provision, omitted]

Bill S. 4970-A, p. 5.
NY Pen §400.00(12). Records required of gunsmiths and dealers in firearms.

12. Records required of gunsmiths and dealers in firearms. In addition to the requirements set forth in article thirty-nine-BB of the general business law, any person licensed as gunsmith or dealer in firearms shall keep a record book approved as to form, except in the city of New York, by the superintendent of state police. [remainder of provision, omitted]

Bill S. 9458, pp. 5-6.
NY Pen §400.00(14). Fees.

14. Fees. In the city of New York and the county of Nassau, the annual license fee shall be twenty-five dollars for gunsmiths and fifty dollars for dealers in firearms. [sentence 2] In such city, the city council and in the county of Nassau the Board of Supervisors shall fix the fee to be charged for a license to carry or possess a pistol or revolver or to purchase or take possession of a semiautomatic rifle and provide for the disposition of such fees. [sentence 3] Elsewhere in the state, the licensing officer shall collect and pay into the county treasury the following fees: for each license to carry or possess a pistol or revolver or to purchase or take possession of a semiautomatic rifle, not less than three dollars nor more than ten dollars as may be determined by the legislative body of the county; for each amendment thereto, three dollars, and five dollars in the county of Suffolk; and for each license issued to a gunsmith or dealer in firearms, ten dollars. [remainder of provision, omitted]

Bill S. 51001, pp. 11-12.
NY Pen §400.02(2). Statewide license and record database [ammunition background check, only].

2. There shall be a statewide license and record database specific for ammunition sales which shall be created and maintained by the division of state police the cost of which shall not be borne by any municipality no later than thirty days upon designating the division of state police as the point of contact to perform both firearm and ammunition background checks under federal and state law. [sentence 2] Records assembled or collected for purposes of inclusion in such database shall not be subject to disclosure pursuant to article six of the public officers law. [sentence 3] All records containing granted license applications from all licensing authorities shall be monthly checked by the division of criminal justice services in conjunction with the division of state police against criminal conviction, criminal indictments, mental health, extreme risk protection orders, orders of protection, and all other records as are necessary to determine their continued accuracy as well as whether an individual is no longer a valid license holder. [sentence 4] The division of criminal justice services shall also check pending applications made pursuant to this article against such records to determine whether a license may be granted. [sentence 5] All state and local agencies shall cooperate with the division of criminal justice services, as otherwise authorized by law, in making their records available for such checks. [sentence 6] No later than thirty days after the superintendent of the state police certifies

that the statewide license and record database established pursuant to this section and the statewide license and record database established for ammunition sales are operational for the purposes of this section, a dealer in firearms licensed pursuant to section 400.00 of this article, a seller of ammunition as defined in subdivision twenty-four of section 265.00 of this chapter shall not transfer any ammunition to any other person who is not a dealer in firearms as defined in subdivision nine of such section 265.00 or a seller of ammunition as defined in subdivision twenty-four of section 265.00 of this chapter, unless:

(a) before the completion of the transfer, the licensee or seller contacts the statewide license and record database and provides the database with information sufficient to identify such dealer or seller transferee based on information on the transferee's identification document as defined in paragraph (c) of this subdivision, as well as the amount, calibre (*sic*), manufacturer's name and serial number, if any, of such ammunition;

(b) the licensee or seller is provided with a unique identification number; and

(c) the transferor has verified the identity of the transferee by examining a valid state identification document of the transferee issued by the department of motor vehicles or if the transferee is not a resident of the state of New York, a valid identification document issued by the transferee's state or country of residence containing a photograph of the transferee.

Bill S. 51001, p. 12.
NY Pen §400.03(2). Sellers of ammunition
[ammunition sale records, only]

2. Any seller of ammunition or dealer in firearms shall keep either an electronic record, or dataset, or an organized collection of structured information, or data, typically stored electronically in a computer system approved as to form by the superintendent of state police. [sentence 2] In the record shall be entered at the time of every transaction involving ammunition the date, name, age, occupation and residence of any person from whom ammunition is received or to whom ammunition is delivered, and the amount, calibre (*sic*), manufacturer's name and serial number, or if none, any other distinguishing number of identification mark on such ammunition.

Bill S. 51001, p. 12.
NY Pen §400.03(6). Sellers of ammunition [use of NICS system, only]

6. If the superintendent of state police certifies that background checks of ammunition purchasers may be conducted through the national instant criminal background check system or through the division of state police once the division has been designated point of contact, use of that system by a dealer or seller shall be sufficient to satisfy subdivisions four and five of this section and such checks shall be conducted through such system, provided that a record of such transaction shall be forwarded to the state police in a form determined by the superintendent.