No. 22-622

IN THE

Supreme Court of the United States

NADINE GAZZOLA, et al.,
Petitioners,

v.

KATHLEEN HOCHUL,
Governor of New York, et al.,
Respondents.

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

BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

The State of New York has enacted a series of public safety measures regulating the sale of firearms, including (1) safety and recordkeeping requirements imposed on firearm dealers, (2) a training requirement for individuals applying for a concealed-carry license, (3) a licensing requirement for the purchase of semiautomatic rifles, and (4) a background check requirement for the purchase of ammunition. The district court denied petitioners' motion for a preliminary injunction against enforcement of these provisions. Petitioners' appeal from the denial of the preliminary injunction is pending before the U.S. Court of Appeals for the Second Circuit, where it was argued on March 20, 2023.

The questions presented on this petition for certiorari before judgment are:

1. Whether petitioners have standing to challenge these measures under the Second Amendment, and if so, whether any of these measures violate the Second Amendment; and

2. Whether certain state safety and recordkeeping requirements and background check procedures conflict with federal law.

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INTRODUCTION

Petitioners, who are retail sellers of firearms, challenge a series of public safety measures regulating the sale of firearms in New York State. Most of these measures were enacted in June 2022, before this Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), while some were part of the Concealed Carry Improvement Act (CCIA) that New York enacted in July 2022 following *Bruen*. Petitioners seek to halt the implementation and enforcement of these measures by the New York State Police and the State Division of Criminal Justice Services, principally claiming that some of the laws violate the Second Amendment and others are preempted by federal law. The district court denied petitioners' motion for a preliminary injunction, and an appeal from that decision is now pending before the Second Circuit. The Second Circuit heard argument in this case on March 20, 2023.

Petitioners have failed to show any reason why this Court should take the extraordinary step of bypassing Court of Appeals review and granting certiorari before judgment. Indeed, petitioners have not presented any pressing issue for the Court to review even in the ordinary course. Nor have applicants pointed to any split in authority on the issues they raise. To the contrary, this Court in *District of Columbia v. Heller*, 554 U.S. 570 (2008), expressly stated that "nothing in [its] opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. Moreover, this case's interlocutory posture renders the resolution of any issues premature. The Court should not grant certiorari while this case proceeds in the lower courts.

STATEMENT

1. Petitioners include nine individuals who sell firearms at retail stores in upstate New York. Pet. App. 5a-6a. They each allege that they hold both a federal firearm license (FFL) and a state license to operate as a firearm dealer. Pet. App. 6a. They challenge several safety and recordkeeping requirements imposed on retail sellers of firearms. For example, petitioners challenge General Business Law § 875-b, which requires dealers to have security alarm systems installed at their premises. Petitioners also challenge General Business Law § 875-f, which requires dealers to maintain records of firearm purchases, sales, and inventories and to provide copies of such records to the State Police semi-annually. These laws were enacted on June 6, 2022, before this Court's decision in *Bruen*. *See* Ch. 207, 2022 Sess. Laws of N.Y. (N.Y. Legis. Retrieval Sys.) (eff. Dec. 3, 2022) (codified at, inter alia, Gen. Bus. Law art. 39-BB).

Petitioners also challenge Penal Law § 400.00(2), which requires a person to obtain a license before purchasing or taking possession of a semiautomatic rifle. The law provides that such a license "shall be issued" by the county-level licensing authority so long as certain statutory prerequisites are met. Penal Law § 400.00(2)-(3). Petitioners do not challenge any of those prerequisites. This provision was enacted on June 6, 2022, again before this Court's decision in *Bruen*. Ch. 212, 2022 Sess. Laws of N.Y. (N.Y. Legis. Retrieval Sys.) (eff. Sept. 4, 2022) (codified at, inter alia, Penal Law § 400.00(2)).

Lastly, petitioners challenge several provisions of the CCIA, which New York enacted on July 1, 2022, following *Bruen*. *See* Ch. 371, 2022 Sess. Laws of N.Y.

(N.Y. Legis. Retrieval Sys.) (eff. Sept. 1, 2022) (codified at, inter alia, Penal Law § 400.00). Specifically, petitioners challenge Penal Law § 400.00(19), which sets forth training requirements for obtaining a concealed-carry license. Petitioners also challenge Penal Law § 400.02(2), which requires background checks for ammunition sales and directs the State Police to establish a database for such sales. And petitioners challenge CCIA provisions codified in Executive Law § 228, designating the State Police as a state point of contact for the National Instant Criminal Background Check System (NICS) and directing the State Police to establish a statewide firearm license and records database.

2. Petitioners commenced this action in the U.S. District Court for the Northern District of New York on November 1, 2022. They named as defendants Governor Kathleen Hochul, State Police Acting Superintendent Steven Nigrelli, Commissioner of the Division of Criminal Justice Services Rossana Rosado, and Attorney General Letitia James. Petitioners assert that the laws listed above (among others) violate their Second Amendment rights, are preempted by federal law, and are unconstitutionally burdensome. Pet. App. 4a.[1]

Petitioners moved for a preliminary injunction to enjoin implementation and enforcement of these public safety measures. All but one of the individual petitioners submitted declarations describing, among other things, the purported burdens of complying with these laws. For example, petitioners attributed lost revenues to the new laws and asserted that compliance with the recordkeeping requirements would cause them to

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[1] Petitioners also asserted below that several of the challenged laws are unconstitutionally vague, but do not rely on that claim to support their petition for certiorari.

violate federal firearm laws. Petitioners also alleged that the laws jeopardize their ability to stay in business, but offered little concrete information to show that they would go out of business because of the laws. Pet. App. 23a-27a.

The district court (Sannes, C.J.) denied petitioners' motion. The court thoroughly addressed and disposed of each of petitioners' claims. The court held that petitioners had not sufficiently alleged that the training, licensing, or background check requirements infringed their individual Second Amendment rights, and therefore they lacked standing to challenge those laws. Pet. App. 18a-20a. The court next held that petitioners' alleged economic harms do not suffice to show irreparable harm warranting interim injunctive relief. Pet. App. 21a-28a. On the merits, the court held that the challenged state laws do not conflict with, and therefore are not preempted by, federal law. Pet. App. 31a-41a. The court also rejected petitioners' Second Amendment claims because petitioners had failed to establish "a Second Amendment right for an individual or a business organization to engage in the commercial sale of firearms." Pet. App. 44a. Likewise, the court rejected petitioners' claim that the statute imposed on them an unconstitutional "regulatory overburden," noting that petitioners "provided no basis for their novel theory." Pet. App. 57a.

Petitioners unsuccessfully sought injunctive relief pending appeal. The Second Circuit denied their motion for an injunction pending appeal on December 21, 2022. Pet. App. 59a-60a. This Court denied their application for a writ of injunction on January 18, 2023. *See* Order in Pending Case, *Gazzola v. Hochul*, No. 22A591.

After expedited briefing, the Second Circuit heard argument in this case (and in four other cases challeng-

ing additional provisions of the CCIA) on March 20, 2023.

REASONS FOR DENYING THE PETITION

This Court grants certiorari before judgment "only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." R. 11; *see also* 28 U.S.C. § 2101(e). Petitioners have not met this "demanding standard." *Mount Soledad Mem'l Ass'n v. Trunk*, 573 U.S. 954 (2014) (Alito, J., respecting denial of certiorari). Certiorari is not warranted in any event because the district court's order denying a preliminary injunction follows settled law. Petitioners point to no split in authority nor any significant constitutional or statutory question implicated in this case. And even if they could, resolution of such issues would still be premature because of this case's interlocutory posture.

I. THIS CASE DOES NOT PRESENT ANY ISSUE OF IMPERATIVE PUBLIC IMPORTANCE REQUIRING IMMEDIATE DETERMINATION IN THIS COURT.

Petitioners have failed to present any issue sufficiently important to warrant certiorari before judgment.

1. Petitioners principally challenge safety and recordkeeping requirements imposed on firearm dealers. These laws merely impose "conditions and qualifications on the commercial sale of arms." *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). As such, they are "presumptively lawful regulatory measures." *Id.* at 627 n.26; *see also New York State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2162 (2022) (Kavanaugh, J., concurring). Insofar as petitioners assert the "novel"

claim that these laws violate petitioners' purported Second Amendment right to sell arms, Pet. 15-18, or that these laws are preempted by federal law, Pet. 20-26, those claims should be addressed by the Second Circuit in the first instance.

And while petitioners claim that these safety and recordkeeping requirements are so burdensome as to force firearm retailers across the State to close, thus implicating the public's ability to purchase guns, Pet. 18-19, there is no evidence in the record of a mass closure of gun stores. Indeed, as petitioners note, there are still over 1,700 firearm retailers in the State. Pet. 2.[2] Moreover, as the district court noted, petitioners failed to explain how the laws will affect even their own businesses' viability. Pet. App. 24a-26a. Nor is there any evidence in the record showing that the challenged safety and recordkeeping requirements have prevented any individuals from purchasing guns in the State. To the contrary, public records of federal firearm background checks show that New Yorkers continue to purchase firearms in significant numbers. These background checks are initiated by firearm dealers at the point of sale and thus approximate the number of firearm sales. New York firearm dealers have initiated over 30,000 federal background checks each month since September 2022, when these laws came into effect, including 31,505 in February 2023.[3] Given petitioners' failure to demonstrate the impact of these laws on the

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[2] In March 2023, the Bureau of Alcohol, Tobacco, Firearms and Explosives reported 1,744 firearm dealers in New York. U.S. Dep't of Justice, Report of Active Firearms Licenses—License Type by State Statistics (Mar. 10, 2023). (For sources available on the internet, URLs appear in the Table of Authorities.)

[3] Fed. Bureau of Investigation, NICS Firearm Checks: Month/Year by State, November 1998 to February 2023 (n.d.).

"the right of the people to keep and bear Arms," U.S. Const. amend. II, the Court should not deviate from normal appellate practice and grant certiorari before judgment here.

2. Petitioners likewise fail to show that the Court should grant certiorari before judgment to address petitioners' individual Second Amendment claims. Pet. 26-28. These claims challenge the concealed-carry training requirement, Penal Law § 400.00(1), (19); the semiautomatic rifle licensing requirement, *id.* § 400.00(2); and the background check requirement for ammunition sales, *id.* § 400.02(2).

Bruen leaves no doubt that such laws are generally permissible under the Second Amendment. *Bruen* stated expressly that "nothing in [the Court's] analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes, under which 'a general desire for self-defense is sufficient to obtain a [permit].'" *Bruen*, 142 S. Ct. at 2138 n.9 (citation omitted). And *Bruen* cites background checks and firearms safety courses as components of lawful shall-issue regimes. *Id.*; *see also id.* at 2162 (Kavanaugh, J., concurring) (noting that "shall-issue licensing regimes are constitutionally permissible," and "may require a license applicant to undergo" both "a background check" and "training in firearms handling"). Such laws may be subject to an as-applied challenge if in operation they prevent law-abiding, responsible citizens from keeping and bearing arms, *see id.* at 2138, n.9, but this case presents no such challenge. And even if it did, petitioners offer no reason for the Court to deviate from normal appellate practice and grant certiorari before judgment.

II. THE DECISION BELOW ACCORDS WITH SETTLED LAW AND DOES NOT IMPLICATE ANY SPLIT IN AUTHORITY.

The Court should deny certiorari for the additional reason that the decision below is consistent with settled law and implicates no split in authority. As the district court held, petitioners are unlikely to prevail on their claims either because the claims are meritless or because petitioners lack standing or both.

1. The district court correctly held that the challenged safety and recordkeeping requirements do not implicate petitioners' Second Amendment rights. Pet. App. 41a-44a. As this Court explained in *Bruen*, an individual can assert a Second Amendment claim only "when the Second Amendment's plain text covers [the] individual's conduct," i.e., an individual's keeping or bearing of arms. 142 S. Ct. at 2126. The plain text of the Second Amendment does not cover the right to *sell* arms. For this reason, the Ninth Circuit has rejected an "independent, freestanding right to sell firearms under the Second Amendment." *Teixeira v. County of Alameda*, 873 F.3d 670, 682, 687 (9th Cir. 2017) (en banc). And, as noted above, this Court has expressly declined to cast doubt on laws regulating "the commercial sale of arms." *Heller*, 554 U.S. at 627; *see also Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring). Petitioners cite no contrary authority.

2. The district court also correctly rejected petitioners' federal preemption claim. Pet. App. 31a-41a. Preliminarily, petitioners point to no federal law explicitly preempting state recordkeeping requirements for firearm dealers. Nor do the federal statutes on which petitioners rely occupy the field of firearm sales. To the contrary, Congress has expressly disclaimed any intent

to preempt the field of firearm regulation. *See* 18 U.S.C. § 927.

And petitioners have failed to show any conflict between New York and federal law. Petitioners' reliance on the federal Firearm Owners' Protection Act is unavailing. The provision on which petitioners rely merely prohibits the U.S. Attorney General from promulgating rules requiring FFL holders to turn over federal records to federal, state, or local authorities. 18 U.S.C. § 926(a). This provision does not prevent New York State from requiring state-licensed firearm dealers to provide records of firearm sales to the State Police, *see* Gen. Bus. Law § 875-f, as petitioners contend, Pet. 23. Nor does "the restricted right of access by the U.S. Attorney General or the ATF" under federal law, Pet. 24, conflict with the State Police's authority to inspect dealer records under state law. *See* 18 U.S.C. § 923(g)(1); 27 C.F.R. § 478.23. And federal law explicitly contemplates state authorities, like the State Police, acting as partners in conducting firearm background checks. *See* 28 C.F.R. § 25.6(d); Penal Law § 400.02(2). Moreover, contrary to petitioners' assertion, Pet. 23, state law does not authorize the State Police to use NICS for ammunition purchases, and there is no basis for petitioners' assertion that they will do so. To the contrary, the State Police are authorized to use state databases to conduct background checks for ammunition purchases, Penal Law § 400.02(2), and there is no reason to believe they will do otherwise.

3. Finally, the district court correctly held that petitioners lack standing to challenge the training, licensing, and background check requirements. Pet. App. 18a-20a. Petitioners fail to show otherwise.

First, petitioners are not injured by the training requirement. That requirement applies only to an individual applying for a license, and to an individual residing in one of the downstate counties—New York City, Westchester, Nassau, and Suffolk Counties—where licenses expire and must be renewed every three years. *See* Penal Law § 400.00(1), (10), (19). Petitioners already have concealed-carry licenses and do not reside in any of the downstate counties; thus, their licenses "shall be in force and effect until revoked." *Id.* § 400.00(10)(a). Because petitioners are not subject to the training requirement, they cannot show any injury-in-fact arising therefrom.

Second, petitioners have not shown that they will suffer any injury-in-fact traceable to the semiautomatic rifle licensing requirement. The requirement applies to the purchase or transfer of a semiautomatic rifle. Penal Law § 400.00(2). Only one petitioner—Martello—has stated that he desires to purchase a semiautomatic rifle. Pet. App. 18a. But he did not describe any "concrete plans" to purchase a semiautomatic rifle or indicate when he intends to do so. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 564 (1992). Nor has he shown that any obstacle he may face would be traceable to respondents. Instead, he attributed his hypothetical inability to obtain a semiautomatic rifle to his county of residence, which allegedly "is not offering a semi-automatic license." Pet. App. 19a. There is no evidence in the preliminary injunction record to support that allegation. But even if there were, it would mean that Martello's hypothetical injury would be traceable to "the independent action of some third party not before the court"—not to the state respondents sued in this case. *Lujan*, 504 U.S. at 560 (citation omitted).

Third, petitioners have not shown any injury-in-fact arising from the ammunition background check requirement. Currently, sellers of ammunition must maintain records of ammunition sales including "the date, name, age, occupation and residence of any person from whom ammunition is received or to whom ammunition is delivered." Penal Law § 400.03(2). Once the State's firearm license and records database becomes operational later in 2023, New York law will require background checks for ammunition sales, similar to the background checks already conducted for firearm sales. *See* Penal Law § 400.02(2); Executive Law § 228. But petitioners have not shown that they are likely to face any personal difficulty obtaining ammunition. In the absence of any "concrete and particularized" allegation of harm, petitioners lack standing to challenge the background check requirement. *Lujan*, 504 U.S. at 560.

III. THIS CASE'S INTERLOCUTORY POSTURE RENDERS THE RESOLUTION OF ANY ISSUES PREMATURE.

The interlocutory posture of petitioners' claims weighs further against granting certiorari. This Court's ordinary practice is to deny interlocutory review even, unlike here, where a case presents a significant statutory or constitutional question. *See, e.g.*, *Abbott v. Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., respecting denial of certiorari); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J.); *Moreland v. Federal Bureau of Prisons*, 547 U.S. 1106 (2006) (Stevens, J.); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (per curiam). This Court has departed from that practice in very rare circumstances, such as, for example, granting review when an important question would be "effectively unreviewable" after final judgment, *e.g.*, *Will v. Hallock*,

546 U.S. 345, 349 (2006) (citation omitted), or when an immunity from suit, rather than a mere defense to liability, is implicated, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009).

But nothing in this case will become effectively unreviewable if this Court were to take its ordinary course by deferring any review until after final judgment. Notably, proceedings in both the district court and Second Circuit are continuing apace. Respondents' motion to dismiss the complaint is pending in the district court, and the Second Circuit heard argument in this case on March 20, 2023. This Court should not grant certiorari while this case is still proceeding in the lower courts.

CONCLUSION

The petition for a writ of certiorari before judgment should be denied.

Respectfully submitted,

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March 2023

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