No. 22-

IN THE

Supreme Court of the United States

NADINE GAZZOLA, individually, and as coowner, President, and as BATFE Federal Firearms Licensee Responsible Person for Zero Tolerance Manufacturing, Inc., SETH GAZZOLA, individually, and as coowner, 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 Resonsible 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 as 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, NICK AFFRONTI, individually, and as BATFE FFL Responsible Person for East Side Traders LLC, EMPIRE STATE ARMS COLLECTORS ASSOCIATION, INC.,

Plaintiffs-Appellants,

– 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, LETICIA JAMES, in her Official Capacity as the Attorney General of the State of New York,

Defendants-Appellees.

ON EMERGENCY APPLICATION FOR WRIT OF INJUNCTION TO THE HONORABLE SONIA SOTOMAYOR, CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY IN SUPPORT OF EMERGENCY APPLICATION TO REVERSE DENIAL BY SECOND CIRCUIT OF PETITIONER'S REQUEST FOR EMERGENCY PRELIMINARY INJUNCTIVE RELIEF AND FOR AN IMMEDIATE ADMINISTRATIVE STAY

PALOMA CAPANNA, ESQ.
Counsel of Record
106-B Professional Park Drive
Beaufort, North Carolina 28516
(315) 584-2929
pcapanna@yahoo.com
Counsel for Applicants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

U.S. Constitution

Statutes – Federal

Cases – Supreme Court of the United States

Statutes – State – New York

Other

I. KATHY HOCHUL DIDN'T WAIT, BUT NOW ASKS THIS COURT TO DO SO

A. RESPONDENTS ARE NECESSARY COMPONENTS OF AND PLAY A CLEAR ROLE IN THE INFRINGEMENT OF FUNDAMENTAL RIGHTS

For the first time in this case, the State raises that three of four of the bills from which the offending laws originate were signed on June 6, 2022, prior to this Court's decision in *NYSRPA v. Bruen.* 597 U.S. _____ (2022). They respond to a footnote in our Application (Appl. p. 4, n. 6) of an erroneous computation of the effective date of the statutes in one of those bills by the State and the District Court. Concurrently, also for the first time in this case, the State asks a court to slow down and follow what State attorneys call the "ordinary course" for this Court to decline interlocutory appeals in favor of allowing "issues to percolate in the lower courts" (Resp. p. 10). This request is politely made, even as the State routinely asks for injunctions in cases such as *New York v. Arm or Ally, LLC* where it recently claimed to have 47,000 shipping records from common carriers to support their allegations on page 6, but then buried on page 10, "Although New York cannot yet say definitively what was in each package…which will come out in discovery.", New York Supreme Court (Index No. 451972, Memorandum, July 13, 2022.

What the State didn't explain in its several references to the June 6, 2022 signing date for NY S.4970 (Rep. pp. 4, 5, 10) is the full story of *why* those bills were signed ahead of the June 23, 2022 *Bruen* decision release: the May 3, 2022 leak to Politico[1] of a draft of the *Dobbs* decision. That day was D-Day for Governor Hochul's vow to "go on offense" because she was

[1] Ward, Myah, "Alito's Roe draft, beyond abortion," Politico (May 3, 2022), available at https://www.politico.com/newsletters/politico-nightly/2022/05/03/alitos-roe-draft-beyond-abortion-00029725.

"absolutely horrified."[2] The Governor took to the podium ahead of the *Bruen* decision, for example, in Buffalo, on May 14, 2022, saying: "As an aside, we're also going to be preparing our state for what could be a Supreme Court decision that allows people to carry concealed weapons. We're ready. This is New York, we're here to protect our people."[3] Governor Kathy Hochul, a lawyer, did not even wait for either decision to be formally announced by the U.S. Supreme Court before launching her attack.

The swirl of the two issues – abortion and firearms – became the self-described "anger" of Hochul as she stood at a literal church pulpit, asking for forgiveness for "the anger in my heart."[4] The headlines became "New York lawmakers move to restrict concealed carry and add abortion rights to state constitution."[5] That message of *Roe*[6] to be overturned; *Bruen* to be a win for gun rights became common conversation, including headlines like "Jurisprudence: The Horror in New York Shows the Madness of the Supreme Court's Looming Gun Decision,"

---

[2] Goldsmith, Jill, "New York Gov. Kathy Hochul "Absolutely Horrified" as Supreme Court Poised to Reverse Roe v. Wade," The Deadline (May 3, 2022), available at https://deadline.com/2022/05/new-york-governor-kathy-hochul-supreme-abortion-roe-v-wade-1235015476/.

[3] "Video, Audio, Photo & Rush Transcript: Governor Hochul Addresses Shooting in Buffalo," official website of Governor Kathy Hochul (May 14, 2022), available at: https://www.governor.ny.gov/news/video-audio-photo-rush-transcript-governor-hochul-addresses-shooting-buffalo Broadcast of remark included, but was not limited to CNN, WREN 930-AM, WBFO (NPR) 88.7-FM, WKBW (ABC Buffalo affiliate) Channel 7, WHAM News (ABC Rochester affiliate) Channel 13, WIVB (CBS Buffalo affiliate) Channel 4; quoted also in Fingerlakes Daily News and Urban CNY.

[4] "Video, Audio, Photo & Rush Transcript: Governor Hochul Delivers Remarks at True Bethel Baptist Church," official website Governor Kathy Hochul (May 15, 2022) at https://www.governor.ny.gov/news/video-audio-photo-rush-transcript-governor-hochul-delivers-remarks-true-bethel-baptist-church. Widespread coverage of her "anger" included, but was not limited to CNN, The New York Times, Spectrum News 1 (Buffalo), WBEN 930-AM, News 10 (ABC affiliate, Albany); print coverage through Buffalo News, and Livingston County News.

[5] Quay, Grayson, "The Empire (State) Strikes Back: New York lawmakers move to restrict concealed carry and add abortion rights to state constitution," The Week (July 2, 2022), available at https://theweek.com/gun-control/1014853/new-york-lawmakers-move-to-restrict-concealed-carry-and-add-abortion-rights-to.

[6] *Roe v. Wade*, 410 U.S. 113 (1973).

including discussion of the *Dobbs*[7] draft and speculation about the scope of *Bruen.*[8] Governor Kathy Hochul didn't wait to infuse two polarizing issues with expressions of "anger."

The NYS Legislature completed regular session for the year on June 2, 2022.[9] The Governor could have chosen to wait until January 2023. To release her "anger" and give the *NYSRPA v. Bruen* decision time to "percolate" over a decent cup of coffee. To review bill drafts, have them numbered and published to legislators and constituents, to comport with New York's 3-day desk rule, and to engage in town hall meetings in district. To confer with NYS Attorney General and do what, for example, the California Attorney General did on June 24, 2022, which was to issue a "Legal Alert" to "All California District Attorneys, Police Chiefs, Sheriffs, County Counsels, and City Attorneys," announce the *NYSRPA v. Bruen* decision, and reaffirm professionalism through words like "Under the Supremacy Clause of the United States Constitution, state and local officials must comply with clearly established federal law."[10]

Respondent Hochul also didn't even wait to read the *Bruen* decision when it was officially issued two weeks later. Herself an attorney, Hochul did not even stop long enough on June 23, 2022 to read and reflect upon the Court's decision. Just "minutes" after the *Bruen* decision was released, there she was, at the podium, on live television, saying "*we're reading it now*," while launching a verbal tirade against this Court and misrepresenting the content of the decision. [Appl. pp. 5-6; Doc 1, pp. 38-54]

---

[7] *Dobbs v. Jackson Women's Health Organization,* 597 U.S. _____ (2022).

[8] Cornell, Saul, "Jurisprudence: The Horror in New York Shows the Madness of the Supreme Court's Looming Gun Decision," The Slate (May 19, 2022), available at https://slate.com/news-and-politics/2022/05/new-york-shooting-supreme-courts-gun-madness.html.

[9] "New York State Legislative Session Calendar: January – June 2022," available at https://nyassembly.gov/leg/docs/sessioncalendar_2022.pdf.

[10] California Department of Justice, Office of the Attorney General, "Legal Alert OAG-2022-02" (June 24, 2022), available at https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf.

Because that wasn't enough, Hochul didn't wait but the next day to issue an executive "Proclamation" on June 24, 2022, demanding the 213 member legislature return for extraordinary session for purpose of "considering legislation I will submit" in response to the decision of *NYRSPA v. Bruen.*[11] Then, while in session on June 30, 2022 (supposedly for purposes of S.51001, the "Concealed Carry Improvements Act"), Hochul abruptly Tweeted out at 2 AM: "We refuse to stand idly by while the Supreme Court attacks the rights of New Yorkers," with an image of a second "Proclamation"[12] for the legislature to "enshrine the right to abortion access in the State Constitution."[13] The second "Proclamation" also stated the extraordinary session was called "…for the purpose of: Considering legislation I will submit…" The separation of powers collapsed between the Governor and Legislators.

So, yes, Counsel is correct that three of the four bills complained of were technically signed ahead of the official release of the *NYSRPA v. Bruen* decision, but, context matters, as it is a not-unrelated fury by Respondent Gov. Hochul against this Court.

"This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Obergefell v. Hodges,* 576 U.S. _____(2015), citing *West Virginia Bd. of Ed. V. Barnette,* 319 U.S. 624, 638 (1943). As Mr. Chief Justice Roberts has recently described: "In an organized society, there can be nothing but ultimate confusion and chaos if court decrees are flaunted."[14] And a "fiasco" (Serafini, 13-4, ¶23) is what has resulted as a direct

[11] https://www.governor.ny.gov/sites/default/files/2022-06/Proclamation_Extraordinary_Session_June_2022.pdf

[12] https://www.governor.ny.gov/sites/default/files/2022-06/Proclamation_Extraordinary_Session_June_2022.pdf

[13] Tweet from official Twitter account Governor Kathy Hochul @GovKathyHochul, July 1, 2022 at 2:24 AM, available at https://twitter.com/govkathyhochul/status/1542755891023413248.

[14] "2022 Year-End Report on the Federal Judiciary," p. 2, available on line at the official website of the U.S. Supreme Court https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf.

result of the Governor's lead, especially at the county level, described in detail in Petitioners' Declarations and supporting Exhibits. [Docs. 1, pp. 34-37; 13-2 ¶¶21, 23-24, 27, 40-41, 47-56; 13-3 ¶¶19, 25-39; 13-4 ¶¶23-32; 13-5 ¶¶26-34; 13-7 ¶¶38-42; 13-8 ¶¶45, ¶¶69-74; 13-11, pp. 15-19; 17-3 through 17-11; 33, pp. 11, 17]

Petitioners come to the Court with clean hands. As all the fury was erupting at the proverbial Governor's mansion, it is undisputed that Petitioners were at work in their small business, in compliance with federal and state law, helping customers fulfill their needs for firearms, licensing training where applicable as NRA-certified instructors, with a free-flow of customers spanning generations, youth coming in for ammunition to practice in anticipation of 2021 youth hunting days, others getting fishing permits. It was summer and *NYSRPA v Bruen* had made them whole in their civil rights: no more could a state government infringe upon their civil rights – all civil rights, including the Second Amendment.

It is undisputed that none of the bills complained of were brought to the attention of the Applicants. They received no notification, either from the licensing arm of the NYSP or the County Clerks, nor legislative alerts, nor publication of notification in any industry newsletter. They had no chance to say, "Hey! Wait a minute! You can't do that!" No forum to air their concerns. No chance to meet with a legislator. None of the normal populace and business routes were available to them because Kathy Hochul couldn't and didn't wait.

Respondents, again, make clear their determination to enforce the new laws. There is a vague allegation by State's attorney on page 1 to "ongoing enforcement," but neither Petitioners, nor Counsel, are aware of any FFL, Responsible Person, business owner, or individual being charged to date under the new laws. State's attorneys repeat the enforcement threat on pages 13

and 20, as they did at the end of their memorandum to the Second Circuit. [Dkt. 22-3068, doc. 26, p. 25]

Oddly, where the Respondents "wait," in a manner of speaking, as in "waiting around," is not fulfilling their statutory obligations, not providing any explanation for their failures to any one of three courts, nor proffering any proposed documents requesting court permission for issuance now that their authority to do so has expired. [Doc 33-1] There is no substantive "implementation" to "halt" – a false claim by Counsel (p. 1 - twice, 5, 13, and 20).

- The State's attorneys on p. 5 list two documents and one website page they call "guidance." The two NYSP/DCJS items were introduced to the Record by Petitioners in District Court in support of their original Emergency Motion. [Dkt. 1:21-cv-1134, Docs. 15-2 and 15-3] The third item, a NYSP website page, was filed with a 4-page letter of protest to the Second Circuit, to which there was no response from the State or the circuit court. [Doc 19-1]
    - The NYSP/DCJS memo purporting to be a "detailed curriculum" for a 16-hour class [Doc 29, p. 2 n. 3 and 27], is now, admittedly, only a "minimum standards for concealed-carry training." (Resp. p. 5) At this point, State's counsel appears to acknowledge what says it is: "minimum standards." A course "curriculum" has not been published by Respondents since September 1, 2022, and that the new concealed carry licensing scheme is unavailable statewide for new or renewing permittees. The Respondents didn't pass a "ban" on concealed carry permits (too obvious). Instead, Hochul submitted and the legislature at her request passed laws seemingly bland *en face*, while agencies under her direction

haven't performed their lengthy list of detailed statutory responsibilities [Doc 33-1], and licensing systems and other individual rights already recognized by this nation's high court simply collapse. It's the new strategy to "evade federal constitutional commands," in this instance, relating to the Second Amendment. *Whole Woman's Health v. Jackson,* 594 U.S. _____ (2021) (Sotomayor, dissenting, p. 4). In *Whole Woman's Health,* the state displayed a tactic Your Honor described as a throw-back to the strategies as John C. Calhoun that a state could "veto" or "nullify" a federal law with which they "disagreed," a reference Esquire magazine described as Your Honor dropping "the A-bomb of all Supremacy Clause arguments."[15]

- The website page is listed by the State as December 6, 2022 (Resp. p. v), which confirms it was published the date after authority expired and the day Petitioners' Emergency Motion was filed to the Second Circuit.
- Respondents' Counsel appears unaware that in the past few days – after we filed the Emergency Motion to Your Honor – Respondent NYSP has added to that December 6, 2022 website page. As but one example of the on-going problem this creates, and in support of why this behavior must be halted, the website now says on one page that the semi-automatic license is separate and distinct from the concealed carry rifle license, but

[15] Pierce, Charles P., "Justice Sonia Sotomayor is Playing for Keeps on the Texas Abortion Law: You don't bring John C. Calhoun into it if you aren't," Esquire (December 10, 2021), on-line available at https://www.esquire.com/news-politics/politics/a38486325/texas-abortion-law-supreme-court-sonia-sotomayor/.

on the new page it says a concealed carry license suffice for purchase of a semi-automatic license.[16]

- Counsel again calls these items "guidance" (Resp. p. 5) – a characterization Petitioners have disputed since it first appeared in oral arguments in district court on December 1, 2022. A "guidance" document to someone in the firearms industry is a formal process with written publication by the ATF for the firearms industry. This is another example of the State plagiarizing terms-of-art language from the ATF without understanding what they are saying. The ATF issues "guidance" documents with recitation of governing federal law and regulations, direction to any forms, and instructions on variance parameters. For example, there's an ATF guidance on firearms marking, including ATF Form 3311.4 if a manufacturer is going to request a variance off the mark manufactured or imported, including a unique serial number/marking system. See, e.g., https://www.atf.gov/firearms/request-marking-variance-firearms. It is not a hastily published website page or memo that merely copies from a statute with no explanation or direction for application with supporting resources.

- "Those who wish to purchase arms remain free to do so, subject to reasonable "conditions and qualifications," says the State at p. 12, citing, again to the same page of *Heller*. No they don't. *No,* they don't. Respondents have crashed the concealed carry licensing system, concocted an SAR licensing scheme that can't be implemented, and have dealers writing down peoples' names, addresses,

[16] Website produced by the NYSP, available at https://gunsafety.ny.gov/resources-gun-dealers.

> occupations, and ages on blank pieces of paper because Respondents can't be bothered to issue even the simplest of all of the forms they were required to issue. Petitioners, as individuals, are not "free to do so," even as customers of their own shops.

Petitioners ask that Your Honor *not* wait. It is time to halt any enforcement of these laws, carrying criminal penalties, and create the space within which a critical industry can operate while we all properly analyze the constitutionality and legality of these laws. A cooling off period is appropriate while this case progresses, particularly because one was not taken by Respondents at the optimal time to do so.

Petitioners, as FFLs, are highly-regulated. The State does not dispute any details about Petitioners, their credentials, their compliance status prior to December 5, 2022, their business operations, or the federal laws and ATF direct oversight. Preliminary injunctive relief protects Petitioners and NYS FFLs from prosecution as the case progresses to a decision on the merits. If Petitioners fail to achieve this outcome, the new laws will go into effect and the federal records sought by the state will be up-to-date at Petitioners' business premises.

The record is well developed and largely uncontested, even at this early stage. Respondents do not dispute Petitioners' interpretations of the new laws, excepting one point, concealed carry training requirements for renewal of licenses outside of several identified counties (set out in Appl, pp. 31-32). Respondents also do not dispute Petitioners' delineation of the "legal cascade" of harms that will befall them due to their lack of compliance with the new laws. (Appl, p. 9; Dkt. 12, pp. 21-22). Nor do Respondents dispute Petitioners computations of estimated financial impact of the new laws, the technology infeasibility, the structural

impossibilities, and the simple time impossibilities (set out in Doc 1, 94-110; Docs. 13-2 through 13-9, *passim*).

B. THE STATE'S ATTORNEYS DON'T EVEN REFERENCE THE FOURTEENTH AMENDMENT

There was a reason the word "fundamental" was used, literally, more than 100 times in the *McDonald v. Chicago*[17] decision and was then carried forward into *NYSRPA v. Bruen*. It is because modern discrimination against this essential liberty has deeply taken hold. In their responsive memorandum, the States' Attorneys do not even bother to cite to the Fourteenth Amendment. (p. iii, absent *passim*). Respondents' one reference to *McDonald,* the U.S. Supreme Court decision that selectively incorporated the right of the Second Amendment through the Fourteenth Amendment to bind the states, is made in error. Respondents claim "To the contrary, Congress has expressly disclaimed any intent to preempt the field of firearm regulation," and they cite to *McDonald* at page 785. (p. 13). The page says no such thing. On that page, Justice Alito expressly rejected "pleas" against "established incorporation methodology" (at 783), and he goes on to say (at 785-786) "…if a Bill of Rights guarantee is fundamental from an American perspective, then, unless *stare decisis* counsels otherwise, that guarantee is fully binding on the States and thus *limits* (but by no means eliminates) their ability to devise solutions to social problems that suit local needs and values." There is no consideration of federal firearms compliance law in *Heller*[18]*, McDonald, or Bruen;* the issue was not before the Court. Neither was "to keep." Nor were the 2022 laws complained of, herein. The State misses the point entirely of Justice Alito's words: the Fourteenth Amendment binds the states to equal standards

[17] *McDonald v. Chicago,* 561 U.S. 742 (2010).

[18] *District of Columbia v. Heller,* 554 U.S. 570 (2008).

of respect for individual civil rights as restricts the federal government. It is our case, *Gazzola v. Hochul* that brings before this Court questions of "to keep" and the pre-emptive power of federal firearms compliance law to prohibit unconstitutional, if not illegal, behavior.

C. THE STATE ADMITS THE GOAL OF THE NEW LAWS IS TO CREATE A GUN OWNERS' REGISTRY

The final sentence of the State's response admits, for the first time in this case, the intention of the laws is to create "state databases" to "…track the sale of firearms and ammunition." (Resp. pp. 20-21) Petitioners already set out, at length, the prohibitions against the federal government from creating a firearms owners' registry and the Due Process-laden exceptions for obtaining specific firearms records from an FFL, including via federal judicial warrant. [Doc 1, pp. 27-33, 54-63; Doc 13-4 ¶¶72-75; Doc 13-8 ¶¶31-41; Doc 13-11, pp. 12-14; Appl, pp. 15-18]

There appears to be some new suggestion by the State that it is somehow entitled to full records because they are not expressly restrained in the same manner as the United States Attorney General. As a point of legislative history of the Brady Act,[19] Petitioners would touch upon the original federal-state arguments before implementation of NICS. At and about the time the bill was working its way through Congress, state law enforcement officers protested and even sued against being required to conduct background checks at the behest of the federal government. The arguments were centered around a now defunct interpretation of the Tenth Amendment. The original state position, if you will, was to have no involvement in what, at that time, was manual, paper reviews of persons living in their jurisdiction without compensation for

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

services performed.[20] It took this Court's decision in *Printz v. United States,* 521 U.S. 898 (1997) to settle the tension in favor of the NICS system becoming a federal mandate. Justice Scalia's decision spoke to the concurrent authority of federal and the states' governments. It's the mirror image of Petitioners' arguments insisting upon their individual rights under *McDonald* and *Bruen* that Respondents must respect, equally to the federal government, their Second Amendment rights because of the Fourteenth Amendment. There is no historical basis for the State now to argue that the federal firearms compliance records are being created for their use without restriction.

The State, for the first time in this case, argues it needs these databases "to combat gun crime." (Resp. pp. 20-21) The landmark case *New York Times Co. v. United States*, in a most interesting dissent by Justice Brennan, contains the more-artful-than-I words to universally respond to this manner of hyperbole by State's counsel:

> "But the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon surmise or conjecture that untoward consequences may result." 409 U.S. 713, 726 (1970).

This concept is equally applicable (now) to the Second Amendment: a fundamental right may not be withheld from exercise because of "surmise" or "conjecture" by way of scare tactics.

The Court need be reminded: the State submitted not one affidavit or evidentiary exhibit at any of three levels of court. Anything absent a citation to a law or case or to the Record developed by Petitioners is opinion, and should not be considered in these deliberations. Further, not once since 1968 has the ATF or the FBI asserted that the lack of a federal registry in any way

[20] A contemporary article on point would be Rooney, Patricia, "The Brady Act: Shot Down by the Tenth Amendment," Touro Law Review (Vol. 14, No. 2, Article 15, 1998).

inhibited their ability to fight crime on a national or international level while balancing Due Process rights of FFLs and individuals, alike.

Instead, go one step deeper into the background of NY S.4970-A and notice the "A" for amended version. This one bill (out of the package of ten bills passed last summer) was introduced some twenty years prior, but only as to its Section 1. Section 2, amended the day of the legislative vote, contained all of the provisions in NY Gen Bus §875, plus additional laws, many of which are complained of in this case. What was in Section 1? A singular ask by an Assemblywoman that NY-statewide law enforcement, including the NYSP, turn over crime guns to the federal ATF to conduct trace investigations. Petitioners did not and do not oppose that provision. Petitioners already referred Your Honor to the 2021 report that found incompetence in the contractor conducting NY law enforcement gun trace operations (Appl. p. 38).

The interstate crime gun argument is one advanced throughout the first year of Hochul serving as Governor, using terms like "iron pipeline," synonymous to "gun trafficking."[21]

> "People are bringing guns here from other states. And where are they coming from? Tell you right now, they're not being sold on our streets legally in a store. I mean, they're not. There are no gun stores here. They're coming in from other states."

Indeed, her administration started with formation of an "Interstate Task Force on Illegal Guns."[22] It continued through her "State-of-the-State" address delivered January 10, 2023,

[21] Example of coverage found on WCAX News, "Hochul takes aim at illegal gun pipeline," video and print available at https://www.wcax.com/2022/07/14/hochul-takes-aim-illegal-gun-pipeline/.

[22] Example of coverage found on WRGB Channel 6 News Albany, "The Interstate Task Force on Illegal Guns brings together law enforcement officials," video and print available at https://cbs6albany.com/news/local/the-interstate-task-force-on-illegal-guns-brings-together-law-enforcement-officials.

wherein she said "Launching a first-in-the-nation 9 state task force on illegal guns which took more than 10,000 illegal guns off our streets this past year."[23]

Respondent Gov. Hochul defined the topic of "gun crime" as an inter-state issue. In signing NY S.4970-A, Hochul acknowledged the demonstrated need for the ATF services to perform specialized services like trace investigations, which rely upon established ATF/FBI-FFL relationships exactly like those detailed by Petitioners based upon personal experience. Had Respondent Gov. Hochul stopped at NY S.4970, when it was only the original Section 1 Petitioners would not be here. Except that she didn't. She allowed her "anger" over the *Dobbs* decision leak plus the anticipated *Bruen* decision to become S.4970-A, S.9707-B, and S.9458 (signed June 6, 2022) [Docs 1-1, 1-2, and 1-3] and NY S.51001 (signed July 1, 2022) [Doc 1-4]. Respondent Gov. Hochul declared war on the very FFLs she needs to help the ATF and the FBI conduct gun crime trace investigations.

She refuses to contribute state records to NICS, even of NYS criminal convictions. And the State's attorneys at three different levels of court have failed to offer any explanation for that anti-safety posture.

II. IMPORTANT CONSTITUTIONAL QUESTIONS LEFT OPEN BY HELLER-MACDONALD-BRUEN ("TO KEEP" – STANDARD OF "CONSTITUTIONAL REGULATORY OVERBURDEN")

Petitioners' Rule 11 Petition (SCOTUS Dkt. 22-622) sets forth eight questions requested for review – a reflection of the novel concepts presented when forging the remaining path under

[23] Official website of Governor Kathy Hochul, "Remarks as Prepared: Governor Hochul Delivers 2023 State of the State" (January 10, 2023), available at https://www.governor.ny.gov/news/remarks-prepared-governor-hochul-delivers-2023-state-state.

the Second Amendment. The Petition fulfills any of the promises of further discussion made in the Emergency Application.

In *McDonald*, the Court references the right "to keep and bear arms" as both the question ("…we must decide whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty… citation omitted, emphasis in original), *supra* at 767, and the answer ("The right to keep and bear arms was considered no less fundamental by those who drafted and ratified the Bill of Rights."), *id.* at 768. But, this Court did not actually define "to keep" in that decision, nor in *Heller* or *Bruen*. While it is fair to say that the *Heller – McDonald – NYSRPA v. Bruen* trilogy incorporates the right to the individual, as federal and state citizen, these three linked decisions do not define (or protect) "to keep."

Petitioners propose this case is a golden opportunity to define "to keep" and to create a standard of "constitutional regulatory overburden" to test whether a law(s) targeting dealers in firearms is so onerous as to impair or impede the ability of the dealer to sell firearms to individuals. [Doc 1, pp. 20-30; 80-110] These two leading issues presented, for which Petitioners seek confirmation there is a likelihood of success through their Rule 11 Petition, are "important." Without the firearms dealer, there is no supply chain and no exercisable Second Amendment.

The boundaries of the Second Amendment are not limited to "an individual's right to "bear" arms in public," as Respondents suggest. Resp. 9. That Counsel limits the characterization to "bear" (*Id.*) rather makes the point for Petitioners that "to keep" has yet to be appreciated, defined, and put into a constitutional standard. Further, State's Counsel points out that the six other cases pending "are claimed to implicate the right to bear arms." (Resp. p. 9,

n. 6[24]) There is a reason that three of those six cases achieved district court level preliminary injunctions: "to bear" has the *NYSRPA v. Bruen* standard available to conduct the analysis with challenges to its proper application, whereas Petitioners are forging a new path.

Respondents dispute Petitioners' claims are "important." (Resp. pp. 2 and 9 – twice) Respondents randomly, in the middle of a paragraph, toss off "Firearms retailers remain open for business in New York State" (Resp. p. 12) in the manner of an "I Love NY" advertising jingle. Apparently, this is the replacement argument for "Wal-Mart and Runnings" is enough, after the same was disputed by Petitioners to the Second Circuit, to Your Honor in the Application, and to the Court in the Rule 11 Petition.

III. IMPACTS AN ENTIRE INDUSTRY (SCALE) THAT IS HIGHLY REGULATED AND WAS FUNCTIONING WELL IN CONCERT WITH THE FEDERAL GOVERNMENT FOR MORE THAN FIFTY YEARS

The new laws are "uniquely punitive," unsupported by any data-based public policy or cogent argument. Respondents attack dealers, without which all sales within New York become illegal. This is the havoc the unconstitutional scheme will produce, if it is left to "percolate." Petitioners made the effort from the Complaint to highlight the role of the Giffords Law Center and Every Town for Gun Safety. *Gazzola v Hochul* is the only case pending against the laws in the new bills from 2022 where one or both organization has already submitted an "amicus brief." The chief counsel and policy director of Giffords Law Center makes clear the plan is to enact everything they can, leaving it to the people to file a lawsuit, if they can, and to find a judge to stop unconstitutional laws, if they can. "If courts eventually strike down certain provisions, so

[24] *N.B.:* Respondents err to state "There are more than a dozen pending challenges…" Their list of six (6) cases is correct to the best of Petitioners' knowledge.

be it," said Adam Skaggs, chief counsel and policy director of Giffords Law Center to Prevent Gun Violence in a Wall Street Journal interview December 5, 2022.[25]

Petitioners set out the industry numbers. They set out estimates for costs per statutory mandate. They set out aggregate industry in New York projections. The computations might have been more "concrete" versus an estimation of infringement had the Respondents fulfilled their statutory obligations.

The scale of this lawsuit mirrors the scale of the potential negative impact. As one example, on the first day of big game license sales in 2020, the NYS DEC reported $922,444 in sales, growing over the first two weeks to more than $6.2 million.[26] Approximately one-half million New Yorkers enjoy hunting each year.[27] "New York's hunters and anglers contribute an estimated $4.9 billion to the economy in spending, which supports more than 56,000 jobs and $623 million in state and local taxes."[28]

Other scalable figures are reported by the National Shooting Sports Foundation, that the firearms sector in New York includes 4,212 jobs in firearm and ammunition manufacturing,

[25] Quoted in "Gun control lobby's new strategy: push the envelope on "sensitive places," by Cam Edwards for Bearing Arms (December 5, 2022), available at https://bearingarms.com/camedwards/2022/12/05/gun-control-lobbys-new-strategy-push-the-envelope-on-sensitive-places-n64937.

[26] NYS Department of Environmental Conservation website, "DEC Reports Record Sales for Big Game Hunting and Trapping Licenses, Nearly Triple 2019 Opening Day Sales" (September 9, 2020), available at https://www.dec.ny.gov/press/121334.html.

[27] NYS DEC website, "DEC Announces Hunting and Trapping Licenses are Now on Sale" (August 3, 2022), available at https://www.dec.ny.gov/press/125905.html.

[28] NYS DEC website, September 9, 2020, *supra.*

sales, and distribution, with an average wage paid of $85,432, and an estimated $155.8 million in federal business tax revenue.[29]

IV. PETITIONERS' ON-GOING INJURIES ARE NOT HYPOTHETICAL

State's attorneys are out of sync with the language of business and self-employed business owners, mischaracterizing Petitioners' on-going injuries as "hypothetical." (Resp. p. 3) Counsel otherwise deceptively lists one paragraph for each of two Petitioners as the extent of damages claimed. (Resp. p. 6)

Alternatively, State's attorneys posture that Petitioners' injuries are otherwise compensable, seeming to suggest that if Petitioners would name a number that the State would buy-out the Petitioners, like a gun buy-back program, so that the Sate could shutter the door with as little unpleasantness as possible. "And to the extent they complain about lost revenue, their harms are not irreparable." (Resp. p. 3)

The Complaint and the Declarations lay out in solid parameters the initial injuries suffered in the first 30-60 days of the CCIA going live on September 1, 2022. Injuries being sustained since the additional laws went live on December 5, 2022 post-date the commencement of the action and the initiation of the emergency motions that lead to this Application. The district court denied Petitioners' repeated request for a hearing. The circuit court gave so little thought to the case as to deny the request ahead of Petitioners' time allow to Reply, and, still, to date, never responded to the request they reconsider the submission of Petitioners' Reply Memorandum. There is a sufficient record to support preliminary injunctive relief, followed by

[29] National Shooting Sports Foundation, "Firearm and Ammunition Industry Economic Impact Report: 2022," p. 4, available at https://www.nssf.org/wp-content/uploads/2022/03/2022-Firearm-Ammunition-Industry-Economic-Impact.pdf.

discovery. The State offered no witness in opposition to any of the Petitioners' computations; simply a personal opinion of unsupported question of two sentences of Petitioners out of more than 200-pages of their Declarations and 126-pages of the Complaint.

V. THE STATE IS ARGUING – JUST NOT THIS CASE

The State's tactics in its (now) three memoranda, one in each court, is redundancy without direct engagement. They submitted no affidavits, nor evidentiary exhibits. This is Petitioners' third reply pointing out that without even a single affidavit from a party or a witness or even a single admissible exhibit, the arguments of the State, outside of quotations of precedent, amount to attorney opinions, and nothing more. (E.g., "Moreover, an injunction would be severely disruptive as well as detrimental to public safety." Resp. p. 3.)

While it is Petitioners' burden to achieve, it is Respondents' third time misrepresenting the case to a court.

- First, Respondents insist in each court of misrepresenting the laws complained of and of mischaracterizing the actual laws. Resp. pp. 3-4, 9, 11-12, 13. For example, Resp. p. 3, second bullet, summarizes that NY Gen Bus §875-b(2) "requir[es] dealers to have security alarm systems installed at their premises." That is far short of the statutory requirements, which include hiring a third-party contractor, which would have unlimited access to the video feed, for cameras at specified locations, with a video feed from each camera to record video to storage equipment to be maintained for a period of at least two years, where the third-party contractor (licensed by the State) is permitted to hire employees as young as 18 years and with a criminal record. This tactic of the NYS-AG attorneys is

intentional, but it belies the truth of what the new laws contain and the direct burdens already expected of the Petitioners under threat of criminal prosecution and other catastrophic losses.

- Petitioners do not argue against "regulation of the sale of firearms" (Resp. p. 1) or "regulating the commercial sale of firearms" (Resp. pp. 2, 9, 10, 11, 12, 13, 17, and 19). Petitioners *do* oppose the new laws which, as a group, and most individually, overburden operations of firearms dealers to a point of inability to stay in business due to technical infeasibility, financial unaffordability, premises impossibility, or other business operating metric.
    - Respondents' "regulation of sales of firearms" argument references *Heller* at 626-627, which is:

> "Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, *or laws imposing conditions and qualifications on the commercial sale of arms*." (emphasis added) The accompanying footnote #26 states: "We identify these presumptively lawful regulatory measures only as *examples*; our list does not purport to be exhaustive." (emphasis added)

    - This is *obiter dicta* as it pertains to a licensed dealer. None of the plaintiffs in *Heller, McDonald,* or *Bruen* were FFLs. The Court had no jurisdiction to rule on the issues this case presents, which is precisely why we brought this case.

- Petitioners do not argue whether training may be required. Petitioners argue an inability to obtain training and an inability to obtain mandated training materials, testing, and certificates in order to continue to offer training courses). (Appl. p. 24) For the first time in this memorandum, the State includes three historic laws now introduced below (Resp p. 19), while continuing to fail to acknowledge that the four historic laws they did submit in District Court [Dkt. 29-2, 29-3, and 29-4] support Petitioners' arguments under *NYSRPA v. Bruen* that there is no historic analogue for a semi-automatic rifle license or an ammunition background check.

VI. WHEN THIS COURT DOESN'T ACT IN THE FACE OF INJUSTICE, THERE IS REGRET

Your Honor has enough before you, even now, to grant, with confidence, the preliminary injunction and administrative stay that will stabilize lawful dealers in firearms, licensed in New York, against laws jammed by a Governor through a Legislature that now require constitutional and legal review. Petitioners laid a thorough pleading, affidavits, and exhibits in admissible form. With each stage of court, Petitioners have deepened their analysis and fine-tuned their arguments, leaving Respondents behind as they brought no party or witness, nor exhibit, and largely repeated their attorney memorandum content without either answering the Petitioners' allegations or responding to Counsel's rebuttals.

What the history of this Court suggests to Petitioners' Counsel is that when there is hesitation from the U.S. Supreme Court in a situation of 'indisputable clarity,' (Resp. cite p. 2) there is regret. This was poignantly set forth in the case of *Obergefell, supra*:

> "This is not the first time the Court has been asked to adopt a cautious approach to recognizing and protecting fundamental rights. In *Bowers,* a bare majority upheld a law criminalizing same-sex intimacy. (citation omitted). That approach might have been viewed as a cautious endorsement of the democratic process, which had only just begun to consider the rights of gays and lesbians. Yet, in effect, *Bowers* upheld state action that denied gays and lesbians a fundamental right and caused them pain and humiliation. … Although *Bowers* eventually repudiated in *Lawrence,* men and women were harmed in the interim, and the substantial effects of these injuries no doubt lingered long after *Bowers* was overruled. Dignitary wounds cannot always be healed with the stroke of a pen."

By contrast, imagine this country in the absence of appropriate decisions like *Gibbons v. Ogden,* 22 U.S. 1 (1824), which reversed a New York state law granting an exclusive right of navigating interstate waterways, the Court stating "The power to regulate commerce, so far as it extends, is exclusively vested in Congress, and no part of it can be exercised by a State." Or if *Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954) had not struck down *Plessy v. Ferguson,* 163 U.S. 537, 543 (1896) which held that a state law did not violate the Fourteenth Amendment's Equal protection Clause because a state statute that "implies merely a legal distinction" would have "no tendency to destroy the legal equality of the two races, or establish a state of involuntarily servitude."

CONCLUSION

After an intense two-plus months of litigation seeking preliminary injunctive relief, Petitioners can do not much more under deadlines and word counts to place this Record into the hands of Your Honor and respectfully request the granting of emergency relief. Petitioners are straightforward in their watershed claims, their dedication to federal firearms compliance law and the protection of individual records so created and maintained from state conversion into a registry, to their passion for the Second Amendment as individuals and as business owners

serving their communities. Respondents did not participate, nor bring forth witness(es), nor exhibits in evidentiary form. There is only one request now before Your Honor: the Emergency Motion. No cross-motion. And also upon your desk, awaiting, the Rule 11 Petition for *Writ of Certiorari*.

It is at the request of Petitioners and with my sincere appreciation of your consideration of this Emergency Application that we await your decision.

Respectfully submitted this 12th day of January 2023,

PALOMA A. CAPANNA, ESQ.
Counsel of Record
106-B Professional Park Drive
Beaufort, North Carolina 28516
(315) 584-2929 mobile
pcapanna@yahoo.com

Counsel for Applicants