No. 23-995

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 IN OPPOSITION

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QUESTION PRESENTED

Petitioners challenge a series of gun safety measures enacted by the State of New York, including (1) laws regulating the sale of firearms by firearm dealers, (2) a licensing requirement for the purchase of semiautomatic rifles, (3) a background check requirement for the purchase of ammunition, and (4) a training requirement for individuals applying for a concealed-carry license. The district court denied petitioners' motion for a preliminary injunction and the U.S. Court of Appeals for the Second Circuit affirmed.

The question presented on this petition for certiorari is whether these gun safety measures comport with the Second Amendment.

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INTRODUCTION

Petitioners are firearm dealers licensed by the State of New York. They challenge gun safety measures recently enacted by the New York State Legislature. Petitioners principally claim that these measures will push firearm dealers out of business, thereby violating their customers' Second Amendment rights. Petitioners also claim that a licensing requirement for the purchase of semiautomatic rifles, a background check requirement for the purchase of ammunition, and a training requirement for individuals applying for a concealed-carry license violate the Second Amendment. The district court denied petitioners' motion for a preliminary injunction and the Second Circuit affirmed. This Court previously denied a petition for certiorari before judgment. *See Gazzola v. Hochul*, 143 S. Ct. 1796 (2023) (Mem). The Court should deny this petition as well.

Petitioners present no issue warranting this Court's review. They point to no split in authority on the issues they raise. To the contrary, the Second Circuit's decision declining to enjoin commercial laws regulating the sale of firearms is consistent with this Court's statement in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that "conditions and qualifications on the commercial sale of arms" are "presumptively lawful." *Id.* at 627 & n.26. Moreover, this case is a poor vehicle to review the licensing, background check, and training requirements because, as the Second Circuit correctly held, petitioners lack standing to challenge those provisions. Finally, this case's interlocutory posture renders the resolution of any issues premature. The Court should deny 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. (App. 36a-37a.) They each allege that they hold both a federal firearm license (FFL) and a state license to operate as a firearms dealer. (App. 3a-4a.) They challenge several safety and recordkeeping requirements imposed on retail sellers of firearms. For example, petitioners challenge requirements that dealers have security alarm systems installed at their premises, N.Y. General Business Law § 875-b, and that they maintain records of firearm purchases, sales, and inventories, and provide copies of such records to the State Police semiannually, General Business Law § 875-f. These laws were enacted on June 6, 2022, before this Court's decision in *New York State Rifle and Pistol Association v. Bruen*, 597 U.S. 1 (2022). *See* Ch. 207, 2022 N.Y. Laws (N.Y. Legis. Retrieval Sys.) (eff. Dec. 3, 2022) (codified at, inter alia, Gen. Bus. Law art. 39-BB).

Asserting their Second Amendment rights as individual possessors of firearms, petitioners also challenge multiple licensing, training, and background check laws. These include the requirement of N.Y. Penal Law § 400.00(2) that a person 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, but only the requirement to apply for a license in the first place. This provision was enacted on June 6, 2022, again before this Court's decision in *Bruen*. Ch. 212, 2022 N.Y. Laws (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 Concealed Carry Improvement Act (CCIA), which New York enacted on July 1, 2022, following *Bruen*. *See* Ch. 371, 2022 N.Y. Laws (N.Y. Legis. Retrieval Sys.) (eff. Sept. 1, 2022) (codified at, inter alia, Penal Law § 400.00). Specifically, petitioners challenge training requirements for obtaining a concealed-carry license, Penal Law § 400.00(19), and mandatory background checks for ammunition sales, along with the direction to State Police to establish a database for such sales, Penal Law § 400.02(2). Petitioners also challenge CCIA provisions codified in N.Y. Executive Law § 228 designating the State Police as a state point of contact for the National Instant Criminal Background Check System 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 Kathy Hochul, State Police Acting Superintendent Steven Nigrelli,[1] Commissioner of the Division of Criminal Justice Services Rossana Rosado, and Attorney General Letitia James. Petitioners assert that compliance with the laws listed above (among others) is so burdensome that it will cause firearm dealers to go out of business, thereby violating the Second Amendment right of their customers to obtain firearms. Petitioners also assert that federal law preempts some of those laws, including the recordkeeping, reporting, and background

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[1] Nigrelli has since been replaced by Superintendent Steven James.

check requirements imposed on firearm dealers. Finally, petitioners assert that the semiautomatic licensing requirement, the ammunition background check requirement, and the concealed-carry training requirement violate their individual Second Amendment rights. (App. 5a-6a.)

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. Petitioners alleged that the laws posed an imminent threat to their ability to stay in business, but offered little concrete information to substantiate this claim. (App. 55a-59a.)

The district court (Sannes, C.J.) denied petitioners' motion. (App. B.) Petitioners appealed, and unsuccessfully sought injunctive relief pending appeal. This Court denied their application for a writ of injunction on January 18, 2023. *Gazzola v. Hochul*, 143 S. Ct. 743 (2023) (Mem). This Court also denied a petition for certiorari before judgment on April 24, 2023. *Gazzola v. Hochul*, 143 S. Ct. 1796 (2023). And on October 10, 2023, this Court denied an emergency application for a stay. *Gazzola v. Hochul*, 144 S. Ct. 274 (2023) (Mem).

After expedited briefing, the Second Circuit heard argument in this case (and in four other cases challenging additional provisions of the CCIA) on March 20, 2023. The Second Circuit decided this case on December 8, 2023.[2] (App. A.)

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[2] The Second Circuit issued a separate opinion deciding the four other cases on the same day. *See Antonyuk v. Chiumento*, 89

(*continues on next page*)

The Second Circuit first held that petitioners were unlikely to succeed on their derivative claim that New York's commercial laws regulating the sale of firearms will push firearm dealers out of business, thereby infringing their customers' Second Amendment rights. The court held that petitioners have derivative standing to assert that claim on behalf of their customers. (App. 10a-11a.) The court also acknowledged that while "conditions and qualifications on the commercial sale of arms" are "presumptively lawful," *District of Columbia v. Heller*, 554 U.S. 570, 627 & n.26 (2008), that "presumption of legality can be overcome" (App. 12a). The court explained that "commercial regulations on firearms dealers, whose services are necessary to a citizen's effective exercise of Second Amendment rights, cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms." (App. 13a-14a.) The court cautioned that it had "no present occasion to set out specific guidance as to how a trial court must assess evidence that a commercial regulation is stifling the individual right of access to firearms." (App. 14a.) Whatever the bar, however, petitioners failed to meet it. As the court explained, petitioners failed to demonstrate that "New York citizens will be meaningfully constrained—or, for that matter, constrained at all—in acquiring firearms and ammunition" due to the challenged laws. (App. 16a.)

The court next held that the laws challenged by petitioners were not preempted by federal law. As the court noted, Congress has expressly disclaimed the intent to occupy the entire field of firearm regulation,

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F.4th 271 (2d Cir. 2023). A petition for certiorari seeking review in one of those cases is currently pending before the Court. *See Antonyuk v. James*, No. 23-910.

see 18 U.S.C. § 927. (App. 18a.) And petitioners failed to show any conflict between federal law and the record-keeping, reporting, and background check requirements imposed on firearm dealers under state law. (App. 19a-26a.)

Finally, the court held that petitioners lack standing to bring their individual Second Amendment claims. Regarding the licensing requirement for the purchase of a semiautomatic rifle, the Second Circuit observed that only one petitioner—Martello—stated that he intended to purchase such a weapon. (App. 28a.) But Martello complained only that his county of residence was "not providing license applications," and failed "to show how the *non-defendant* county's failure to provide license applications is fairly traceable to the challenged action of the *named defendants*." (App. 28a.) Regarding the ammunition background check requirement, the court explained that it did not apply to a purchaser of ammunition who is himself "a dealer in firearms," Penal Law § 400.02(2). (App. 30a.) Because the only petitioner who had expressed any concern about the background check requirement—Serafini—was a firearms dealer, he was not subject to this provision, and thus lacked standing to challenge it. (App. 30a.) Likewise, the court explained that the concealed-carry training requirement did not apply to petitioners, whose concealed-carry licenses are not required to be renewed. (App. 30a.) *See* Penal Law § 400.00(1)(o)(iii), (10)(a), (19).

Petitioners now seek certiorari on their Second Amendment claims.

REASONS FOR DENYING THE PETITION

Certiorari is not warranted because the Second Circuit's decision denying a preliminary injunction follows settled law, and petitioners point to no split in authority implicated by the decision below. Moreover, this case is a poor vehicle to review petitioners' individual Second Amendment claims because they lack standing to bring them. Finally, review at this point is premature because of this case's interlocutory posture.

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

The Court should deny certiorari because the decision below is consistent with settled law and implicates no split in authority. As the Second Circuit held, petitioners failed to show that New York's commercial laws regulating the sale of firearms impair the Second Amendment rights of petitioners' customers to acquire firearms. The Second Circuit also correctly held that petitioners failed to show any conflict between state and federal law.

1. The Second Amendment protects "the right of the people to keep and bear Arms." U.S. Const. amend. II. When a government regulation implicates that right, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 17 (2022). As this Court has made clear, however, "laws imposing conditions and qualifications on the commercial sale of arms" are "presumptively lawful." *Heller*, 554 U.S. at 627 & n.26; *see also McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010); *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring).

Petitioners chiefly challenge a series of laws regulating the commercial sale of firearms in New York State. For example, petitioners challenge laws requiring firearm dealers to secure firearms in their possession outside business hours, N.Y. Gen. Bus. Law § 875-b(1); install security alarm systems, *id.* § 875-b(2); provide State Police-developed training to employees, *id.* § 875-e; perform monthly inventory checks, *id.* § 875-f(2); and provide State Police with full access to their premises during periodic onsite inspections, *id.* § 875-g(2). Petitioners also challenge laws prohibiting individuals under 18 years old from entering firearm retail stores unless accompanied by a parent or guardian, *id.* § 875-c, and prohibiting retailers from hiring employees under 21 years old, *id.* § 875-e(3).

These laws impose "conditions and qualifications on the commercial sale of arms," *Heller*, 554 U.S. at 627. As such laws, they are "presumptively lawful regulatory measures," *id.* at 627 n.26. To rebut this presumption, petitioners propose what they describe as a "novel theory": New York's laws are so burdensome that they will force firearm dealers across the State to close, thus implicating the public's ability to purchase guns. (Pet. 23; *see also* App. 10a.) The Second Circuit recognized the viability in principle of such a claim and held that petitioners have derivative standing to assert their claim on behalf of their customers. (App. 10a-11a.) Indeed, the decision below acknowledges that "commercial regulations on firearms dealers, whose services are necessary to a citizen's effective exercise of Second Amendment rights, cannot have the effect of eliminating the ability of law-abiding, responsible citizens to acquire firearms." (App. 13a-14a.) This principle is consistent with authority from other circuits. *See Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011)

(recognizing that "[t]he right to possess firearms for protection implies a corresponding right to acquire" firearms); *Teixeira v. County of Alameda*, 873 F.3d 670, 677-78 (9th Cir. 2017) (en banc) (same), *cert. denied*, 584 U.S. 977 (2018); *Drummond v. Robinson Township*, 9 F.4th 217, 227-28 (3d Cir. 2021) (same).

The Second Circuit correctly held that although laws regulating the sale of firearms may be so burdensome on dealers as to violate the Second Amendment, petitioners failed to show that New York's laws have that effect. (App. 14a-17a.) The preliminary injunction record contains no evidence of *any* gun store closures due to the challenged laws. Nor did petitioners support their billion-dollar estimate of compliance costs with competent evidence. And most important, as the Second Circuit observed, petitioners failed to demonstrate that "New York citizens will be meaningfully constrained—or, for that matter, constrained at all—in acquiring firearms and ammunition" due to the challenged commercial laws. (App. 16a.) 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. On average, New York firearm dealers have initiated over 30,000 federal background checks each month since December 2022, when these laws came into effect, including 30,206 in April 2024.[3]

Thus, petitioners have failed to show that New York's laws "impose such burdensome requirements on

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[3] Fed. Bureau of Investigation, *NICS Firearm Checks: Month/Year by State* (thru Apr. 30, 2024), https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state.pdf/view.

firearms dealers that they restrict protections conferred by the Second Amendment." (App. 16a.) Given petitioners' failure to demonstrate the impact of these laws on "the right of the people to keep and bear Arms," U.S. Const. amend. II, the Second Circuit correctly held that petitioners had failed to show a likelihood of success on their derivative Second Amendment claim and properly affirmed the district court's denial of a preliminary injunction. This Court should not grant certiorari to review that decision.

2. Petitioners do not appear to seek certiorari on their claim that federal law preempts New York's record-keeping, reporting, and background check requirements imposed on firearm dealers. Certiorari would not be warranted to review the Second Circuit's rulings on petitioners' preemption claims in any event. As the court explained, Congress has expressly disclaimed the intent to occupy the field of firearm regulation, *see* 18 U.S.C. § 927. (App. 18a.) And petitioners failed to show any conflict between federal and state law. (App. 19a-26a.) The Second Circuit correctly applied this Court's precedent in rejecting petitioners' preemption claims on the merits, and petitioners offer no reason for this Court to review those rulings.

II. THIS CASE IS A POOR VEHICLE TO REVIEW PETITIONERS' INDIVIDUAL SECOND AMENDMENT CLAIMS BECAUSE THEY LACK STANDING TO BRING THESE CLAIMS.

This case is a poor vehicle to review petitioners' Second Amendment claims as individual possessors of firearms because, as the Second Circuit correctly held, petitioners lack standing to bring these claims. Specifically, petitioners lack standing to challenge the semiautomatic rifle licensing requirement, N.Y. Penal Law § 400.00(2); the background check requirement for ammunition sales, *id.* § 400.02(2); and the concealed-carry training requirement, *id.* § 400.00(1), (19). Unlike the commercial laws discussed above, these three requirements were challenged by petitioners in their individual capacity. (*See* App. 49a.) Yet petitioners failed to demonstrate any injury arising from these requirements.

First, 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. (App. 28a.) 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 semiautomatic license." (App. 50a.) There is no evidence in the preliminary injunction record to support that allegation. But even if there were, as the Second Circuit observed, petitioners failed "to

show how the *non-defendant* county's failure to provide license applications is fairly traceable to the challenged action of the *named defendants*." (App. 28a.) *See also Whole Woman's Health v. Jackson*, 595 U.S. 30, 44 (2021) ("no court may lawfully enjoin the world at large or purport to enjoin challenged laws themselves" (citation and quotation marks omitted)).

Second, petitioners have not shown any injury-in-fact arising from the ammunition background check requirement. Penal Law § 400.02(2) requires sellers of ammunition to conduct background checks for ammunition sales to any "person who is not a dealer in firearms . . . or a seller of ammunition." Petitioners have not shown that they are likely to face any personal difficulty obtaining ammunition. Indeed, as the Second Circuit noted, the only petitioner who expressed any concern about the background check requirement—Serafini—is not subject to it because he is "a dealer in firearms." (App. 30a.) In the absence of any "concrete and particularized" allegation of harm, petitioners lack standing to challenge the background check requirement. *See Lujan*, 504 U.S. at 560.

Third, petitioners are not injured by the training requirement. As the Second Circuit explained, that requirement applies only to an individual applying for a license, and to an individual residing in New York City and certain downstate counties—Westchester, Nassau, and Suffolk—where licenses expire and must be renewed every three years. (App. 30a.) *See* Penal Law § 400.00(1)(o)(iii), (10)(a), (19). Petitioners already have concealed-carry licenses and do not reside in the city or those 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.

Having affirmed the district court's holding that petitioners lack standing to challenge the licensing, background check, and training requirements, the Second Circuit properly declined to decide whether these requirements comport with the Second Amendment. This Court should not do so in the first instance.

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) (quotation marks 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. Proceedings in the district court are continuing apace. Respondents filed an answer to petitioners' complaint on March 21, 2024, and discovery has just

commenced. This Court should not grant certiorari while this case is still proceeding in the lower courts.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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