No. 22A591

In The
Supreme Court of the United States

NADINE GAZZOLA, et al.,

Applicants,

v.

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

Respondents.

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

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PRELIMINARY STATEMENT

Applicants, who are retail sellers of firearms, challenge a series of recently enacted public safety measures regulating the sale of firearms in New York State. Most of these measures were enacted on June 6, 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 legislation enacted in July 2022, in response to *Bruen*. All of the challenged laws took effect in either September or December 2022. Applicants claim, albeit with scant support, that the statutory provisions in question will put their firearm retail stores out of business. They seek to halt the implementation and enforcement of these measures by the New York State Police and Division of Criminal Justice Services, claiming that some of the laws violate the Second Amendment and others are preempted by federal law.[1] The U.S. District Court for the Northern District of New York (Sannes, J.) denied applicants' motion for a preliminary injunction. Applicants appealed and moved for an injunction pending appeal. A three-judge panel of the U.S. Court of Appeals for the Second Circuit (Sack, Wesley, Bianco, JJ.) denied the motion, and ordered an expedited briefing schedule on the appeal.

Applicants now ask this Court for an interlocutory injunction, pending the filing and disposition of a petition for certiorari, under the All Writs Act, 28 U.S.C. § 1651(a). They seek to halt the ongoing enforcement and implementation of duly

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[1] Applicants also asserted below that several of the newly enacted laws are unconstitutionally vague, but do not rely on that claim to support their present application.

enacted laws in a case where the courts below have not yet adjudicated the merits of applicants' claims and in which those courts have declined requests for similar injunctive relief. Injunctions of this nature are proper only where the legal rights at issue are "indisputably clear" in favor of the applicant. *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1303 (1993) (Rehnquist, C.J., in chambers). Applicants have not satisfied this high standard. This Court should deny the request for multiple independent reasons.

First, applicants cannot show that this Court is likely to grant review of the court of appeals' forthcoming decision reviewing the district court's denial of a preliminary injunction. Applicants have not presented any important and recurring issue for the Court to review; this case does not, for example, present any significant Second Amendment issue left open by *Bruen*. Nor have applicants pointed to any split in authority on the issues they raise.

Second, applicants have not made a strong showing of likelihood of success on the merits. Laws regulating the commercial sale of firearms, like those challenged here, do not generally implicate the Second Amendment. With regard to their particular claims, applicants have not shown that New York's recently enacted commercial safety measures impair their Second Amendment rights as firearm dealers by making compliance "overly burdensome." Applicants have also failed to show that the recordkeeping requirements for firearm dealers are preempted by federal law. And applicants lack standing to challenge three laws that allegedly violate their individual Second Amendment rights—a training requirement for concealed-carry licenses,

a licensing requirement for the purchase of semiautomatic rifles, and a background check requirement for ammunition sales—because they allege no concrete injury. In any event, these laws pass muster under the Second Amendment.

Third, applicants have failed to show that they will suffer irreparable harm absent injunctive relief from this Court. Their asserted harms are hypothetical and, with respect to the concealed-carry training requirement, based on a misreading of the statute. And to the extent they complain about lost revenue, their harms are not irreparable. Moreover, an injunction would be severely disruptive as well as detrimental to public safety. The public interest thus weighs in favor of the State's continued rollout of the challenged laws.

STATEMENT

A. Factual Background

Applicants include nine individuals who sell firearms at retail stores in upstate New York. ECF 1, at 4-6. They each allege that they hold both a federal firearm license and a state license to operate as a firearms dealer. ECF 1, at 7-10. They challenge a series of requirements recently imposed by the New York Legislature on retail sellers of firearms:

- General Business Law § 875-b(1), requiring firearm dealers to secure firearms in a safe or a locked area other than during business hours;
- General Business Law § 875-b(2), requiring dealers to have security alarm systems installed at their premises;
- General Business Law § 875-c, prohibiting individuals under 18 years old from entering firearm retail stores unless accompanied by a parent or guardian;

- General Business Law § 875-e(1), requiring dealers to provide training developed by State Police to employees;
- General Business Law § 875-e(3), prohibiting firearm retailers from hiring employees under 21 years old;
- General Business Law § 875-f(1), requiring dealers to maintain records of firearm purchases, sales, and inventories and to provide copies of such records to State Police semiannually;
- General Business Law § 875-f(2), requiring dealers to perform monthly inventory checks;
- General Business Law § 875-f(3), requiring dealers to provide records of firearm sales to government law enforcement agencies and manufacturers at their request; and
- General Business Law § 875-g(2), directing State Police to conduct periodic onsite inspections of every dealer and obligating dealers to provide State Police full access to their premises for such inspections

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 Serv.) (eff. Dec. 3, 2022) (codified at, inter alia, Gen. Bus. Law art. 39-BB).

Applicants also challenge laws pertaining to the purchase of firearms and ammunition:

- Penal Law § 400.00(2), requiring a license to purchase or take possession of a semiautomatic rifle;
- Penal Law § 400.00(19), setting forth training requirements for obtaining a concealed-carry license;
- Penal Law § 400.02(2), requiring background checks for ammunition sales and directing State Police to establish a database for such sales; and
- Penal Law § 400.03(2), requiring dealers to maintain records of ammunition sales.

The licensing requirement for semiautomatic rifles 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 Serv.) (eff. Sept. 4, 2022) (codified at, inter alia, Penal Law § 400.00(2)). The concealed-carry training requirement and ammunition sale background check requirement were part of the Concealed Carry Improvement Act (CCIA), which New York enacted on July 1, 2022, in response to *Bruen*.[2] *See* Ch. 371, 2022 Sess. Laws of N.Y. (N.Y. Legis. Retrieval Serv.) (eff. Sept. 1, 2022) (codified at, inter alia, Penal Law § 400.00). State Police and the State Division of Criminal Justice Services have issued guidance to individuals on complying with these new laws[3] and on minimum standards for concealed-carry training,[4] and guidance for gun dealers on how to comply with the dealer requirements.[5]

B. Procedural Background

Applicants commenced this action in the United States 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,

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[2] This Court recently denied an application to vacate the Second Circuit's stay of a preliminary injunction barring enforcement of different provisions of the CCIA in *Antonyuk v. Nigrelli*, No. 22A557 (Jan. 11, 2023).

[3] N.Y. Div. of Crim. Just. Servs., *Frequently Asked Questions Regarding Recent Changes to New York State Firearms Laws* (Aug. 27, 2022).

[4] N.Y. Div. of Crim. Just. Servs., *Minimum Standards for New York State Concealed Carry Firearm Safety Training* (Aug. 23, 2022).

[5] N.Y. State Police, *Frequently Asked Questions for Firearm Dealers Regarding Recent Changes to New York Firearm Laws* (Dec. 6, 2022).

Commissioner of the Division of Criminal Justice Services Rossana Rosado, and Attorney General Letitia James. Among other claims, they asserted that the laws listed above violate their individual Second Amendment rights, are preempted by federal law, and are unconstitutionally burdensome. *See* ECF 1.

Applicants moved for a temporary restraining order and a preliminary injunction to enjoin enforcement of the challenged laws. ECF 13. All but one of the individual applicants submitted declarations describing, among other things, the burdens of complying with these laws. For example, applicants noted the lost revenue they attributed to the new laws (*see, e.g.*, ECF 13-2, at 14), and their belief that compliance with the recordkeeping requirements would cause them to violate federal firearm laws (*see, e.g.*, ECF 13-3, at 5). Respondents opposed the motion, arguing that applicants failed to show irreparable harm, lack standing to assert their individual Second Amendment claims, and failed to show a likelihood of success on the merits of any of their claims in any event. ECF 29. Respondents also submitted historical evidence of firearm training requirements to show that the concealed-carry training requirement was consistent with the Nation's historic regulation of firearms. *See* ECF 29-1.

The district court (Sannes, J.) denied applicants' preliminary injunction motion in a text order, stating that a written decision was forthcoming, on December 2, 2022. App. A. Applicants immediately appealed that order. The district court later issued its written decision, which thoroughly addresses and disposes of each of applicants' claims. The court first held that while applicants generally have standing to assert their claims in their capacity as firearm dealers, they lack standing to assert their

Second Amendment claims as individuals because they do not sufficiently allege any Second Amendment injury. App. B at 11-14. For example, the court noted that each of the individual applicants already possesses a concealed-carry license and therefore is not subject to the concealed-carry training requirement. App. B at 13. Nor did any of the applicants show that they are unable to purchase a semiautomatic rifle because of New York's licensing requirement. App. B at 12. The court next held that even if they had standing, applicants' alleged economic harms do not suffice to show the irreparable injury that is required for injunctive relief. App. B at 14-19. On the merits, the court held that applicants fail to state a claim against the Governor and Attorney General; that the challenged state laws are not preempted by federal law; and that each of the constitutional claims is meritless. App. B at 20-40.

Before the district court had issued its written decision, and without seeking an injunction pending appeal in the district court as required by Federal Rule of Appellate Procedure 8(a), applicants moved in the court of appeals for an injunction pending appeal. On December 21, a three-judge panel (Sack, Wesley, Bianco, JJ.) denied the motion both because applicants had not complied with Federal Rule of Appellate Procedure 8(a) and because an injunction pending appeal was not warranted. App. C. The court of appeals set an expedited briefing schedule for the appeal, making applicants' brief due on January 25, 2023, and respondents' brief due 35 days thereafter.

ARGUMENT

The application for a writ of injunction should be denied. In order to show that an injunction pending appeal is warranted, applicants must make a "strong showing" that they are likely to prevail on the merits, that they will suffer irreparable harm absent an injunction, and that an injunction would not harm the public interest. *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495 (2021); *see also Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 66 (2020) (per curiam). And because the lower courts denied injunctive relief here, applicants' request for an injunction from this Court "'demands a significantly higher justification' than a request for a stay." *Respect Maine PAC v. McKee*, 562 U.S. 996, 996 (2010) (citation omitted). A writ of injunction is warranted "only in the most critical and exigent circumstances," and only in aid of the Court's jurisdiction. *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1312 (1986) (Scalia, J., in chambers) (citing, inter alia, 28 U.S.C. § 1651(a)). Thus, applicants must demonstrate that the "legal rights at issue" are "indisputably clear" in their favor. *Lux v. Rodrigues*, 561 U.S. 1306, 1307 (2010) (Roberts, C.J., in chambers) (quotation marks omitted). Applicants have not met this high bar.

I. THIS COURT IS NOT LIKELY TO GRANT REVIEW OF EITHER THE DISTRICT COURT'S DECISION OR THE FORTHCOMING DECISION FROM THE COURT OF APPEALS ON APPLICANTS' MOTION FOR A PRELIMINARY INJUNCTION.

Preliminarily, applicants cannot make the "exceptional" showing that this Court is likely to grant certiorari before judgment, to review either the district court's denial of a preliminary injunction or the court of appeals' forthcoming decision on the appeal from that denial. *See Certain Named and Unnamed Non-citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers). The Court is unlikely to grant review because there is no important and recurring issue for the Court to decide, no split in authority for the Court to resolve, and no need for the Court to become involved at this early stage of litigation.

First, there is no reasonable probability that the Court will grant certiorari in this case because applicants have not presented any important and recurring issue for the Court to review. Unlike other pending challenges to firearm laws enacted in the wake of this Court's decision in *Bruen*, most of the claims in this case do not concern an individual's right to "bear" arms in public.[6] Rather, applicants challenge a series of New York laws concerning the commercial sale of firearms, which, they argue, impair their right to "keep" arms. *See, e.g.*, App. 11. Most of these laws were enacted before *Bruen* was even decided. *See* Ch. 207, 2022 Sess. Laws of N.Y. (N.Y.

[6] There are more than a dozen pending challenges to various provisions of New York's CCIA that are claimed to implicate the right to bear arms. *See, e.g.*, *Antonyuk v. Nigrelli*, No. 22-2908 (2d Cir.); *Hardaway v. Nigrelli*, No. 22-2933 (2d Cir.); *Christian v. Nigrelli*, No. 22-2987 (2d Cir.); *Spencer v. Nigrelli*, No. 22-3237 (2d Cir.); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 22-cv-907 (N.D.N.Y.); *Goldstein v. Hochul*, No. 22-cv-8300 (S.D.N.Y.).

Legis. Retrieval Serv.) (approved June 6, 2022). And nothing in *Bruen* "should be taken to cast doubt on" laws regulating the commercial sale of firearms. 142 S. Ct. at 2162 (Kavanaugh, J. concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008)). Thus, this case does not involve any significant Second Amendment issue left open by *Bruen* that would warrant this Court's review.

Second, applicants do not point to any relevant split in authority. Applicants assert that their claims—including their regulatory overburden claim—are "novel" (Appl. 5). If true, this Court should allow these issues to percolate in the lower courts. In any event, applicants have not identified any holding of the district court—which disposed of each of applicants' claims—that is inconsistent with prior authority.

Third, this case's interlocutory posture renders the resolution of any issues premature. This Court's ordinary practice is to deny interlocutory review even, unlike here, where a case presents a significant statutory or constitutional question.[7] 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, 349-50 (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

[7] *See, e.g., Abbott v. Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., respecting denial of certiorari); *Mount Soledad Memorial Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J.); *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).

in this case will become effectively unreviewable if this Court were to take its ordinary course by deferring any review until after final judgment. And the expedited briefing schedule in the court of appeals will further the lower courts' prompt review of this case.

II. APPLICANTS' CLAIMS ARE MERITLESS.

This Court should deny a writ of injunction for the additional reason that applicants have not demonstrated their "indisputably clear" right to relief. *Lux*, 561 U.S. at 1307. They articulate three claims in their application: (1) recently enacted laws regulating the commercial sale of firearms violate their Second Amendment rights as firearm dealers because these laws are overly burdensome to comply with; (2) certain recordkeeping requirements for firearm dealers are preempted by federal law; and (3) the concealed-carry training requirement, semiautomatic rifle licensing requirement, and background check requirement for ammunition sales violate applicants' individual right to keep and bear arms. These claims are meritless.

A. Applicants Fail to Show That the Requirements Imposed on Firearm Dealers Violate the Second Amendment.

Applicants first claim that a series of recently enacted laws regulating the retail sale of firearms in New York State violate their Second Amendment rights as firearms dealers. Appl. 11-14, 26-29. These laws require firearm dealers to secure firearms outside business hours, 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); provide State Police with

full access to their premises during periodic onsite inspections, *id.* § 875-g(2); and maintain records of ammunition sales, Penal Law § 400.03(2). Additionally, the laws prohibit individuals under 18 years old from entering firearm retail stores unless accompanied by a parent or guardian, Gen. Bus. Law § 875-c, and prohibit retailers from hiring employees under 21 years old, *id.* § 875-e(3).

Applicants complain about the burdens of complying with these laws, asserting what they characterize as the "novel theory" that regulatory burdens on firearm retailers violate the Second Amendment. Appl. 5. They have not shown a likelihood of success on this claim. The Second Amendment does not bar "laws imposing conditions and qualifications on the commercial sale of arms." *Heller*, 554 U.S. at 626-27. *Bruen* did not disturb that principle when it invalidated New York's requirement that a person show "proper cause" in order to obtain a license for the concealed carrying of a handgun in public. As Justice Kavanaugh stated in his concurrence, nothing in the opinion "should be taken to cast doubt on" laws regulating the commercial sale of firearms. *Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J. concurring) (quoting *Heller*, 554 U.S. at 626).

Nor have applicants made out a derivative claim that these laws violate the Second Amendment rights of their customers by preventing them from purchasing firearms. *See Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc). Firearm retailers remain open for business in New York State. Those who wish to purchase arms remain free to do so, subject to reasonable "conditions and qualifications." *Heller*, 554 U.S. at 627. And while applicants suggest that the laws will

cause retailers to close their businesses (Appl. 14), the record does not bear that out. As the district court found, applicants failed to explain how the laws will affect their businesses' profitability, let alone their viability; even the most detailed of applicants' declarations, that of Nadine Gazzola, "fall[s] short of providing a concrete showing that the viability of her business is threatened." (App. B at 18.) And applicants made no attempt whatsoever to demonstrate any impact of these laws on the public's ability to procure firearms in their geographic region or in New York more generally. The district court thus correctly declined to enjoin the implementation and enforcement of the laws regulating the commercial sale of firearms.

B. Applicants Fail to Show That Recordkeeping Requirements Imposed on Firearm Dealers Are Preempted by Federal Law.

Applicants next claim that certain recordkeeping requirements are preempted by federal law. Appl. 14-18. These provisions require firearm dealers to maintain records of firearm purchases, sales, and inventories, Gen. Bus. Law § 875-f(1); reconcile inventories monthly, *id.* § 875-f(2); and provide records of firearm sales to government law enforcement agencies and manufacturers at their request, *id.* § 875-f(3).

Applicants have not shown a likelihood of success on this claim. Initially, applicants point to no federal law explicitly preempting state recordkeeping requirements for firearm dealers. Nor do the federal statutes on which applicants 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; *see also McDonald v. City of Chicago*, 561 U.S. 742, 785 (2010).

And applicants have failed to show any conflict between New York and federal law: it is not impossible to comply with both laws, and the state law does not pose an "obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Wyeth v. Levine*, 555 U.S. 555, 563-64 (2009) (quotation marks omitted). State laws requiring applicants to keep records and reconcile inventories, *see* Gen. Bus. Law § 875-f(1), (2), do not make it impossible for them to satisfy similar obligations imposed by federal law, *see* 18 U.S.C. § 923(g); 27 C.F.R. § 478.125(e). Nor do applicants' state law obligations impair any federal objectives. To the contrary, the federal legislation adding 18 U.S.C. § 923(g) was animated by the "declared policy of the Congress to assist States and local governments in strengthening and improving law enforcement at every level by national assistance." Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. 90-351, 82 Stat. 197, 198. New York's recordkeeping laws are fully consistent with that federal policy. Likewise, the provision governing access to dealers' records, *see* Gen. Bus. Law § 875-f(3), complements and does not conflict with the federal statute and regulation governing the federal government's access to similar information, *see* 18 U.S.C. § 923(g)(1)(A)-(B); 27 C.F.R. § 478.23. The district court thus correctly held that New York's recordkeeping requirements for firearm dealers are not preempted.

C. Applicants Fail to Show That the Training, Licensing, and Background Check Requirements Violate Their Individual Second Amendment Rights.

Finally, applicants challenge three laws as violating their Second Amendment rights as individuals to keep and bear arms: the concealed-carry training requirement, Penal Law § 400.00(1), (19); the semiautomatic rifle licensing requirement, *id.* § 400.00(2)-(3), (6)-(9), (14); and the background check requirement for ammunition sales, *id.* § 400.02(2). Appl. 18-21, 24-25. Applicants are not likely to succeed on these claims.

1. The district court correctly held that applicants lack standing to challenge each of these three laws. App. B at 12-14. First, applicants have not shown that they are subject to the concealed-carry training requirement. All the individual applicants who submitted declarations in support of the preliminary injunction motion already possess concealed-carry licenses. ECF 13-2, at 3; ECF 13-3, at 2; ECF 13-4, at 2; ECF 13-5, at 2; ECF 13-6, at 2; ECF 13-7, at 2; ECF 13-8, at 2; ECF 13-9, at 2. And the law does not require them to undergo training in order to maintain their licenses. The training requirement applies only to an individual applying for a license, and to an individual residing in one of the downstate counties where licenses expire and must be renewed every three years. *See* Penal Law § 400.00(1), (10), (19). Concealed-carry licenses issued to applicants and other upstate residents, by contrast, "shall be in force and effect until revoked" and need only be recertified every three years. *Id.* § 400.00(10)(a), (d). Unlike renewal, recertification involves simply filling out an

online form.[8] Because applicants are not subject to the concealed-carry training requirement, they cannot show any "actual or imminent" injury arising from that requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (quotation marks omitted).

Second, applicants 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 applicant—Martello—has stated that he desires to purchase a semiautomatic rifle. ECF 13-6, at 3. But he did not describe any "concrete plans" to purchase a semiautomatic rifle or indicate when he intends to do so. *Lujan*, 504 U.S. at 564. 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 Livingston County, which allegedly "is not offering a semi-automatic license." ECF 13-6, at 3. This is consistent with the temporary delays in county-level implementation that applicants' counsel described during the hearing on the preliminary injunction motion. ECF 43, at 15-16. As the district court found, any hypothetical injury arising from the "non-defendant county's failure to issue semi-automatic rifle licenses" (App. B at 13) would be traceable to "the independent action of some third party not before the court." *Lujan*, 504 U.S. at 560 (quotation marks omitted). An injunction in these circumstances would fall afoul of the principle that "no court may lawfully enjoin the

[8] *See* N.Y. State Police, *Pistol Permit Recertification* (n.d.).

world at large, or purport to enjoin challenged laws themselves." *Whole Woman's Health*, 142 S. Ct. at 535 (quotation marks and citation omitted).

Third, applicants have not shown any personal injury arising from the ammunition background check requirement. Starting in September 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); Exec. Law § 228(7). Additionally, 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). This recordkeeping requirement is currently in effect. But applicants have not alleged any difficulty in obtaining ammunition. Nor have they shown they will face any such difficulty once the background check requirement comes into effect. Applicants therefore lack standing to challenge these laws.

2. Even if applicants had standing, they have not shown a sufficient likelihood of success on the merits to warrant a writ of injunction. It is far from "indisputably clear," *Lux*, 561 U.S. at 1307, that the training, licensing, and background check requirements challenged here violate the Second Amendment. Preliminarily, two of the provisions—the licensing and background check requirements—merely impose "conditions and qualifications on the commercial sale of arms" which the Second Amendment does not forbid. *See Heller*, 554 U.S. at 626-27. And all three provisions are "consistent with this Nation's historical tradition of firearm regulation," and therefore easily pass muster under the Second Amendment. *Bruen*, 142 S. Ct. at 2126.

First, training requirements are explicitly contemplated by the Second Amendment's prefatory clause, which states that "[a] *well regulated* Militia [is] necessary to the security of a free State." U.S. Const. amend. II (emphasis added). This implies "the imposition of proper discipline and training." *Heller*, 554 U.S. at 597. The Supreme Court in *Heller* further acknowledged that

> to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use; in other words, it implies the right to meet for voluntary discipline in arms, observing in doing so the laws of public order.

Heller, 554 U.S. at 617-18 (quoting Thomas Cooley, *General Principles of Constitutional Law* 271 (1880)). And from the very beginning of American history, training in the use of arms was required as part of a citizen's mandatory duty to serve in the local militia. *See, e.g.*, Ch. 55 (1780), 1 *Laws of the State of New York* 237 (Weed, Parsons & Co. printer, 1886) (ECF 29-2); Militia Act, Ch. 33, 1 Stat. 271, 273 (1792) (ECF 29-3); Ch. 27 (1782), 1 *Laws of the State of New York*, *supra*, at 440 (ECF 29-4); Ch. 187, 1806 N.J. Laws 536, 565 (ECF 29-5). New York's training requirement for concealed-carry licenses is consistent with this historical tradition.

Second, licensing requirements are also consistent with the Nation's historic regulation of firearms. While this Court in *Bruen* struck down New York's then-existing "proper cause" requirement for a concealed-carry license, it also emphasized that "nothing in [its] 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." 142 S. Ct. at 2138 n.9 (quotation and alteration marks omitted). Several such States require a license to purchase semiautomatic

rifles. *See* Conn. Gen. Stat. § 29-37p et seq.; 430 Ill. Comp. Stat. 65/2(a)(1); Wash. Rev. Code § 9.41.090(2). Applicants have failed to explain why a licensing requirement to purchase a semiautomatic rifle would offend the Second Amendment when a licensing requirement to carry a handgun in public does not. Indeed, the licensing requirement challenged here concerns only "the commercial sale of arms," which this Court has held does not even implicate the Second Amendment. *See Heller*, 554 U.S. at 627.

Third, applicants' challenge to the ammunition background check requirement fails for the same reasons. *Bruen* approved of background checks for concealed-carry licenses. 142 S. Ct. at 2138 n.9. Applicants fail to explain why ammunition should be treated differently. Applicants therefore have not shown a likelihood of success on the merits of any of their three individual Second Amendment claims, let alone the indisputably clear right to relief required for a writ of injunction from this Court.

III. APPLICANTS WILL NOT SUFFER IRREPARABLE HARM ABSENT AN INJUNCTION, NOR WILL AN INJUNCTION SERVE THE PUBLIC INTEREST.

Finally, applicants have failed to "demonstrate that irreparable injury is likely in the absence of an injunction." *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The harms applicants identify are either hypothetical or not irreparable.

Applicants first assert they will suffer irreparable harm because they will be unable to satisfy the training requirement before their concealed-carry licenses expire. Appl. 24. This asserted harm relies on a mistaken understanding of the law. As explained above, applicants need not renew their concealed-carry licenses and therefore are not subject to the training requirement. *See* Penal Law § 400.00(10)(a), (d).

Applicants next assert they cannot obtain semiautomatic rifle licenses. Appl. 25. But they point to no concrete plans to purchase semiautomatic rifles. And they fail to explain how the licensing requirement they challenge would prevent them from doing so. Applicants likewise fail to explain how the ammunition background check requirement harms them.

Applicants' claims of economic harm are also insufficient. They complain about difficulties they confront as retailers in complying with the recordkeeping and security requirements imposed on firearm retailers, and they speculate about potential lost sales. Appl. 25-29. But "ordinary compliance costs are typically insufficient to constitute irreparable harm." *Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 115 (2d Cir. 2005). Likewise, lost sales are measurable monetary damages that do not amount to irreparable harm. *See Teva Pharms. USA, Inc. v. Sandoz, Inc.*, 572 U.S. 1301 (2014) (Roberts, C.J., in chambers). Applicants' asserted harms therefore do not warrant injunctive relief from this Court.

Moreover, an injunction would not serve the public interest. It would halt the implementation and enforcement of the recordkeeping, security, and training requirements. It would cause confusion for county-level administrators and dealers who have been preparing to comply with these laws since they were passed in June and July 2022. And it would put the public at risk. For example, an injunction would delay implementation of gun store security requirements that protect against the theft of firearms and license requirements for semiautomatic rifles that help prevent the harmful use of these lethal weapons. Likewise, law enforcement efforts to combat gun

crime would suffer without state databases to track the sale of firearms and ammunition. The Court should decline to issue a writ of injunction and allow the State's rollout of the challenged laws to continue.

CONCLUSION

The emergency application for a writ of injunction should be denied.

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Respectfully submitted,

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