No. 23-

IN THE

Supreme Court of the United States

NADINE GAZZOLA, INDIVIDUALLY, AND AS CO-OWNER, PRESIDENT, AND AS BATFE FEDERAL FIRE-ARMS LICENSEE RESPONSIBLE PERSON FOR ZERO TOLERANCE MANUFACTURING, INC., *et al.*,

Petitioners,

v.

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

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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

Counsel for Petitioners

327706

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED FOR REVIEW

As news broke that *Dobbs* would overturn *Roe* and *Bruen* would strike down the Sullivan Act, NYS Gov. Kathleen Hochul got "angry" and drove into law a first-in-class scheme targeting federally-licensed dealers in firearms with dozens of mandates under threat of criminal prosecution; along with an ammunition background check, rifle licensing, and concealed carry license standardized instruction and testing.

The Second Circuit followed Hochul through the back door. It denied Petitioners' individual standing but used derivative claims to adopt pre-*Bruen* scrutiny tests. It foreshadowed the *status quo ante* of 1,791 federally-licensed dealers in firearms in NY will be allowed to free-fall under the new mandates to somewhere short of "elimination." Absent was an evaluation of Petitioners' novel theory that "to keep" of "to keep and bear arms," tested by "constitutional regulatory overburden," can protect dealers on an equal constitutional basis as the individual.

The questions presented are:

Did the Second Circuit err in the *Winter* analysis of Petitioners' request for preliminary injunctive relief under Fed. R. Civ. P. 65, including (1.) when it adopted pre-*Bruen* scrutiny testing for Second Amendment claims effecting the core rights of individuals and of derivative claims on behalf of individuals; and/or (2.) when it failed to evaluate Petitioners' likelihood of success in their novel theory of "to keep" from "to keep and bear arms" as having independent constitutional value to protect federally-licensed dealers in firearms as measured by the standard of "constitutional regulatory overburden?"

PARTIES TO THE PROCEEDINGS

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

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

CORPORATE DISCLOSURE STATEMENT
(Sup. Ct. R. 29.6)

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

STATEMENT OF RELATED PROCEEDINGS

(Sup. Ct. R. 14.1(b)(iii))

This case arises from the following proceedings:

- *Gazzola v. Hochul*, No. 1:22-cv-1134, U.S. District Court for the Northern District of New York. Judgment entered Dec. 7, 2022.

- *Gazzola v. Hochul*, No. 22-3068, U.S. Court of Appeals for the Second Circuit. Judgment entered Dec. 8, 2023.

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Petitioners request of this Court a writ of certiorari to review the per curiam ruling of the Second Circuit denying their request for preliminary injunctive relief.

OPINIONS BELOW

The circuit court opinion appealed from is reported at *Gazzola v. Hochul,* 88 F.4th 186, 2023 U.S. App. LEXIS 32547, 2023 WL 8494188 (2d Cir. Dec. 8, 2023) and is reproduced at Appendix ("App.") 1a-31a. The district court's opinion is at 645 F.Supp.3d 37, 2022 U.S. Dist. LEXIS 220168, 2022 WL 17485810 (N.D.N.Y. 2022). It is reproduced at App. 32a-90a.

JURISDICTION

The Second Circuit issued its ruling on December 8, 2023. App. 1a. This Court has jurisdiction over the timely filed petition under 28 U.S.C. §2101(c).

CONSTITUTIONAL & STATUTORY PROVISIONS

Relevant constitutional and statutory provisions are reprinted at App. 91a-128a.

INTRODUCTION

At first glance, the Second Circuit appeared gracious in its denial of a preliminary injunction, below. A slower reading, however, revealed the Second Circuit's defiance of this Court's 2022 ruling of *NYSRPA v. Bruen,* through its adoption and praise of multiple pre-*Bruen* circuit court opinions that employed a hodge-podge of scrutinies. The

Second Circuit signaled a willingness to send federally-licensed dealers in firearms into a free-fall somewhere north of "elimination." If left unchecked by little more than "*cert. denied*," the Second Circuit's post-*Bruen* use of pre-*Bruen* standards will undermine fundamental civil rights under the Second Amendment as guaranteed to state citizens through the Fourteenth Amendment under *Heller*, *McDonald*, and *Bruen*. U.S. Const., amend II and XIV, §1, App. 91a-92a.

A proper Fed. R. Civ. P. 65 analysis under *Winter,* using a *Bruen* standard of review, from this Court will make a national course correction for derivative claims filed by licensed dealers and relevant businesses on behalf of individual customers, for core Second Amendment functions like ammunition sales, long gun licensing, and firearms training. A proper ruling will also awaken "to keep" of "to keep and bear arms" to thwart new infringement strategies that target licensed dealers to replace defunct outright bans against individuals.

STATEMENT OF THE CASE

A. The Political Dynamic in New York, Summer 2022

As news broke on May 3, 2022 that *Dobbs*[1] would overturn *Roe*[2] and *Bruen*[3] would strike down the Sullivan Act, an "angry" New York State Gov. Kathleen Hochul went on the attack against the U.S. Supreme Court

1. *Dobbs v. Jackson Women's Health Org.,* 597 U.S. 215, 142 S.Ct. 2228 (2022).

2. *Roe v. Wade,* 410 U.S. 113 (1973).

3. *NYSRPA v. Bruen,* 597 U.S. 1 (2022).

and the Rule of Law. 22A591, Appl. Reply (p. 1-2). Once *NYSRPA v. Bruen* was released on June 23, 2022, Hochul's machination intensified. C.A.App. 48-62.[4] Before even she finished reading *Bruen,* Hochul, herself an attorney, was out in front of the cameras, touting legal misrepresentations like "You can't yell fire in a crowded theater, but somehow there's no restrictions allowed on the second amendment." C.A.App.-50. She brandished fear in the populace with assertions like: "The Supreme Court's reckless and reprehensible decision to strike down New York's century-old concealed carry law puts lives at risk here in New York." C.A.App.-53. And, she portrayed herself as a state governor at war with this nation's high court through taunts like "And I thank the State Police for being so aggressive in their approach in making sure that we protect citizens, but then you have the Supreme Court of the United States of America that think that they have more power than a governor does when it comes to protecting the citizens of our state." *Id.*

Hochul summoned third party "experts" to bolster her attack. C.A.App.-49, 52, 55, 56. Without notice, mark-up, or committee hearing, the massive and complex text of NY Gen Bus §875 was shoved into a stale, skinny bill and passed within minutes on June 2, 2022. C.A.App. 146-150. Then, on June 29, 2022, nine additional bills emerged, among them S.B. 51001, the "Concealed Carry Improvements Act" ("CCIA"). Hochul twice signed "Proclamations" to convene an "extraordinary session" of the legislature to consider laws "I will submit," as she Tweeted "We refuse to stand idly by while the Supreme Court attacks the rights of New Yorkers." Two days later,

4. "C.A.App." for Circuit Court of Appeals Appendix, volume I unless so noted as "II."

Hochul emerged triumphant. C.A.App. 52-56; 22A591 Appl. Reply 1-4.

Hochul's manner of speaking harkened back to one Gov. Orval Faubus in the era of the 1950s Dixie Democrats, foreshadowing his infamous anti-integration showdown in Little Rock over *Brown v. Bd. of Educ.*[5] Hochul stood, equally defiant against the Fourteenth Amendment: "…I refuse, as I've said from day one, I refuse to surrender my right as Governor to protect New Yorkers from gun violence or any other form of harm. We're not going backwards." C.A.App.-56.

Those working for Hochul breathed her ire. On the eve of the September 1, 2022 effective date of the CCIA, during a joint press conference with Hochul, the acting state police superintendent threatened: "I don't have to spell it out more than this – we'll have zero tolerance. If you violate this law, you will be arrested. Simple as that." C.A.App.-57.

B. NY Gen Bus §875 (2022), first to target dealers in firearms

NY Gen Bus §875 is a first-in-form government attack against businesses with state licenses as "dealers in firearms," such as Petitioners. NY Gen Bus §875-a(1). (NY S.B. 4970-A at C.A.App. 144-150.)

By August 2023, the NYSP "Joint Terrorism Task Force" began on-site inspections, carrying a 31-point "Checklist" while questioning dealers like Petitioner Craig Serafini and others. 23A230, Appl. App. C, D.

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5. *Brown v. Bd. of Educ.,* 347 U.S. 483 (1954).

This is an over-simplified list of new compliance mandates under NY Gen Bus §875, and which are on the NYSP-JTTF "Checklist." All mandates apply equally to all Petitioners, and other FFLs with business premises in NY and a NY dealer's license:

[**1.**] individual shipping protocols (§875-b(1), App. 98a);

[**2.**] a "security plan," including secure storage for all firearms in a fireproof safe or vault or other secured and locked area on site at the close of each retail day (§875-b(1)(a), *id.*);

[**3.**] storage of ammunition separate of firearms and out of reach of customers (§875-b(1)(b), *id.*);

[**4.**] a security alarm system installed and maintained by a state-licensed security alarm operator to statutory "regulation" "established by the superintendent,"[6] *inter alia,* "capable of being monitored by a central station" (§875-b(2), App. 98a-99a);

[**5.**] installation of "a video recording device at each point of sale and each entrance and exit to the premises, which shall be recorded from both the indoor and outdoor vantage point;" (§875-b(2), sent. 5, App. 99a);

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6. Yet unpublished. C.A.App.II 521-526. Respondent agencies have failed to perform 32 of the 34 administrative responsibilities under the new laws – a 94% failure rate. NY S.4970-A bill §5 deadline for completion of these agency mandates was on or about Mar. 5, 2023. C.A.App.-150.

[**6.**] 2-years of video storage (§875-b(2), sent. 5, App. 99a);

[**7.**] exclusion of persons under eighteen years of age from firearms and ammunition sales area unless accompanied by a parent or guardian (§875-c, App. 100a);

[8.] NYS Police supplied employee training (§875-e, App. 101a-102a);

[**9.**] maintenance of records of employee training in accordance with "regulations"[7] (§875-e(3), App. 102a);

[**10.**] prohibition against employees under the age of twenty-one years (§875-e(3), App. 102a);

[**11.**] shadow books of the federally-required "Book of Acquisition & Disposition" of every firearm taken into inventory and its disposal "in such form and for such period as the superintendent shall require"[8] (§875-f, App. 103a-104a);

[**12.**] said shadow books to be reconciled monthly (§875-f(2), *id.*);

[**13.**] said shadow books to be monthly placed in a "secure container" or "at the close of each business day" electronically stored to "external server" or the "internet" (§875-f(1), *id.*);

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7. Yet unpublished. *Id.*

8. Yet unpublished. *Id.*

[**14.**] said shadow book data, including "identity of purchasers" and "serial numbers of firearms" with dates of transactions "shall be maintained and made available at any time to government law enforcement agencies and to the manufacturer of the weapon or its designee" (§875-f(3), *id.*);

[**15.**] submission of copies of said shadow books of acquisitions and dispositions to the NYS Police "every April and October" ((§875-f), *id.*);

[**16.**] submission of an annual certification of compliance in a "form and content" regulated by the superintendent[9] (§875-g(1)(b), App. 105a);

[**17.**] "superintendent shall promulgate regulations requiring periodic inspections of not less than one inspection of every dealer every three years"[10] (§875-g(2)(a), App. 105a); and,

[**18.**] "such additional rules and regulations[11] as the superintendent shall deem necessary to prevent firearms, rifles, and shotguns from being diverted from the legal stream of commerce." (§875-h, App. 106a).

These mandates were passed as a group. C.A.App. 144-50. None were in effect upon the filing of the motion. App. 44a. As of September 13, 2023, all mandates became effective against dealers, generally, and Petitioners, specifically. 23A230, Appl., p. 8-9.

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9. Yet unpublished. *Id.*

10. Yet unpublished. *Id.*

11. Yet unpublished. *Id.*

NY Gen Bus §875 vastly outstrips the regulatory corpus of federal firearms compliance law. Any "knowing violation" of §875 mandate is chargeable as a class A misdemeanor. NY Gen Bus §875-i, App. 107a. The corresponding term of imprisonment shall not exceed 364-days. NY Pen §70.15(1), App. 113a. A violation may also result in revocation or suspension of the dealer license. NY Pen §400.00(11), App. 108a. A failure of state compliance is "uniquely punitive." *Whole Woman's Health v. Jackson,* 595 U.S. _____, 142 S.Ct. 522, 546 (2021).

Criminal prosecution of any dealer, such as a Petitioner, becomes a catastrophic legal cascade. A loss of the state dealer license would result in the loss of all federal FFL licenses. 18 U.S.C. §923(e), *read with* §923(d)(1)(F). A criminal conviction would result in revocation of the state individual concealed carry permit. NY Pen §400.00(11), App. 108a. A conviction for a NY class E felony would result in the loss of Second Amendment firearm rights in all states and U.S. territories for becoming a "disqualified person." 18 U.S.C. §922(g)(1).

C. NY "CCIA" (2022), targets both individuals and dealers

Out of the CCIA, Petitioners challenge three infringements that impact them on both sides of their retail counters.[12] (NY S.B. 51001 at C.A.App. 151-171.)

First, Petitioners, as individuals and as dealers, fall under the ammunition background check mandate,

12. These provisions are distinct from those pending in *Antonyuk v. James,* No. 23-910.

prohibiting purchase or sale of ammunition without identity verification and transmission of customer and ammunition particulars to the NYSP plus an approval to proceed. NY Pen §400.02(2)[13] [sent. 6 with subparts "a" – "c"], App. 125-6a; *read with* dealer manual recordkeeping requirements[14] at §400.03(2), App. 127a.

Second from the CCIA, Petitioners, as individuals and as dealers, are bound by semi-automatic rifle license ("SAR license") requirements. Theoretically, an individual would obtain it through a process akin to obtaining a concealed carry permit. The license is to be presented to and verified by the dealer at the point-of-sale, in addition to federal and state firearms purchase background check requirements. NY Pen §400.00(1)(n); §400.00(2); §400.00(3)(a); §400.00(6); §400.00(7)[15]; §400.00(8); §400.00(9), App. 116a-122a. Criminal penalty for individual violations is a class A misdemeanor (first offense) and class E felony (subsequent offenses). NY Pen §265.65, App. 109a. The class A misdemeanor term of incarceration shall not exceed 364-days. NY Pen §70.15(1), App. 113a. The class E felony prison term is one to four years. NY Pen §70.00(1)-(4), App. 114a. For the dealer, penalties begin with a class E felony. NY Pen §265.66, App. 110a.

Third, from the CCIA, effecting Petitioners as individuals, instructors, and business owners, is the mandatory, standardized, classroom training and "written test for the curriculum." Successful course completion

13. Yet uncertified as operational

14. Yet unpublished. *Id.*

15. Yet, unpublished. *Id.*

must be certified in writing by the instructor.[16] NY Pen §400.001(1)(n) (App. 116a) and §400.00(19). Respondents NYS Police and Div. Criminal Justice Services ("DCJS") are required to approve the "curriculum" and the test. NY Pen §400.00(19); *reads with* NY Exec §235(1) ("standardization of firearms safety training required" under foregoing section, including "approval of course materials"), *and* NY Exec §837(23)(a) (identical language to §235(1)). This is also required the first time an individual renews said license. NY Pen §400.00(19) [sent. 1]. It is illegal in NY to own a handgun in the absence of a valid state license. NY Pen §265.00(3), §265.01(1).

As with NY Gen Bus §875, any violation of the CCIA, triggers a cascade of losses, including all licenses and rights under the Second and Fourteenth Amendments.

D. Petitioners are more than "ordinary" citizens

The plaintiffs of *Heller – McDonald – Bruen* were "ordinary, law-abiding adult citizens." *Bruen,* 597 U.S. at 31 and 15-16; *McDonald,* 561 U.S. at 750; *District of Columbia v. Heller*, 554 U.S. 570, 575 (2008). Petitioners are that – and more. They are multi-dimensional plaintiffs who reflect the Second Amendment like facets of a diamond. Petitioners' credentials are not disputed. C.A.App. 184-335. Summarily:

16. The additional element of live-fire training and testing is not challenged, herein.

1. Petitioners are dealers in firearms by profession.[17,18] Petitioners are Federal Firearms Licensees ("FFLs"[19]), licensed first and foremost by the U.S. Bureau of Alcohol, Tobacco, Firearms, and Explosives ("BATFE"). 18 U.S.C. §923; C.A.App.II 439-446 (ATF Form 7, new); C.A. 22-3068, Doc. 39, Ex. A (ATF Form 8, renewal (Nadine Gazzola)). Petitioners are BATFE "Responsible Persons"[20] for the businesses they own and operate. They are eight of the 1,782 FFL-01s and one of the nine FFL-02s with business premises in NY. C.A.App.II-402. Petitioners operate under federal firearms compliance laws, arising out of the 1968 Gun Control Act ("GCA")[21], the 1986 Firearm Owners Protection Act ("FOPA")[22], the 1994 Brady Act[23], and associated ATF regulations. New York requires a concurrent state license as a "dealer" (allowed,

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17. Herein, use of industry terms of "firearms" is from federal law at 27 CFR §478.11. Under NY Pen §265.00(3), the word "firearm," oddly, means, *inter alia,* "pistol or revolver." 23A230, Appl. 11-14.

18. *N.B.:* A federal license is not required to sell ammunition, nor is there a federal background check for it.

19. Herein, both the federally-licensed "dealer" (FFL Type 01) and the "pawnbroker" (FFL Type 02) are referenced as "FFLs." Distinctions at federal law are not relevant to the case.

20. The BATFE "Responsible Person" definition can be found at C.A.App. 444.

21. Gun Control Act, Pub. L. No. 90-618 (Oct. 22, 1968), 18 U.S.C. Ch. 44, §921, *et seq.*

22. Firearm Owners' Protection Act, Pub. L. 99-308 (Apr. 10, 1986), 18 U.S.C. §921, *et seq.*

23. Brady Handgun Violence Prevention Act, Pub. L. 103-159 (Nov. 30, 1993), 18 U.S.C. §§921-922, §925A.

but not required, by federal law, 18 U.S.C. §923(d)(1)(E)). Petitioners obtained and renew their dealer licenses every three years.

2. Petitioners are business owners who work for their businesses.

3. Petitioners have unrestricted NYS concealed carry licenses.

4. Petitioners Nadine and Seth Gazzola are paid firearms instructors. Petitioners, as business owners, benefit from new and renewing handgun licensee business connected to their own training courses and/or those of their affiliates.

5. Petitioners, as individuals, are customers of and continuously purchase firearms and ammunition at their own stores and in the broader state and inter-state marketplace. Petitioners, as individuals, own firearms and ammunition. Their businesses own distinct inventories.

As detailed in Petitioners' affidavits, as of December 5, 2022 (new dealer mandates began taking effect), Petitioners were compliant with all federal, state, and local laws governing their professional licenses. Petitioners remain in compliance with all federal laws and regulations governing their federal and state licenses not otherwise specifically indicated in each Petitioner's affidavit. Petitioners remain at on-going risk of arrest. Petitioners are anchored to fixed business premises, in plain view during regular business hours open to the public. 23A230, Appl. p. 31. Among their valued customers

are law enforcement officers, including of the NYS Police. C.A.App.-197 (Nadine Gazzola) and C.A.App.II-319 (Owens).

REASONS FOR GRANTING THE PETITION

I. LAW GOVERNING THE MOTION FOR PRELIMINARY INJUNCTION

Simply put, Petitioners motion for preliminary injunctive relief. Fed. R. C. P. 65. The motion is assessed using *Winter v. Nat'l Res. Def. Council*, 555 U.S. 7, 22 (2008) for claims made under the Fourteenth Amendment, involving the Second Amendment. U.S. Const. amend. II and XIV, §1 (91a-92a); *Bruen,* 597 U.S. at 37. Standing is a question inherent to the assessment. U.S. Const., art. III, ¶2, cl. 1. Second Amendment claims necessarily involve *Heller*, 554 U.S. 570 (2008), *McDonald v. Chicago,* 561 U.S. 742 (2010), and *NYSRPA v. Bruen,* 597 U.S. 1 (2022).

The State has not identified any historical law or antecedent to support the new laws. "Such a lack of historical precedent is generally a "telling indication" of a "severe constitutional problem" with the asserted power. *Trump v. Anderson,* 601 U.S. ___, p. 9 (2024) (*per curiam*), quoting *United States v. Texas,* 599 U.S. 670, 677 (2023) (quotation omitted).

II. THE SECOND CIRCUIT ADOPTED PRE-*BRUEN* SCRUTINY TESTING IN ERROR FOR POST-*BRUEN* ANALYSIS OF DERIVATIVE CLAIMS OF INDIVIDUAL RIGHTS AT THE CORE OF THE SECOND AMENDMENT

The Second Circuit committed its first major error below when it adopted pre-*Bruen* scrutiny testing to analyze Petitioners' request for preliminary injunctive relief against the new CCIA mandates for (1.) the ammunition background check, (2.) the SAR license, and (3.) the concealed carry statewide training curriculum and test. App. 10a-11a, 13a, 15a. The Second Circuit could have ingratiated itself by "faithfully" applying *Bruen* (142 S.Ct. at 2033, n.7). Instead, the Second Circuit perpetuated the "one step too many" rejected by *Bruen*. *Id.* at 2127. "In an organized society, there can be nothing but ultimate confusion and chaos if court decrees are flaunted."[24]

It is an easy and necessary course correction for this Court to reverse the Second Circuit in order to set a uniform standard of *Bruen* both to claims by an individual and by third parties on behalf of individual customers. This clarification would not disrupt lower courts definitions since *Heller* of core functions relating to the Second Amendment. It would also avoid time-consuming and costly judicial resources occasioned in *Rhode v. Bonta* (remand for a second trial consistent with *Bruen*) from happening to *Gazzola v. Hochul* because the proper standard of review is set out *en avance*.

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24. U.S. Supreme Court, Roberts, J., C.J., "2022 Year-End Report on the Federal Judiciary," p. 2.

II.(A.) THE SECOND CIRCUIT RULING BEGAN PROPERLY

The ruling below, started out, at least, by recognizing the importance of the federally-licensed dealer in firearms ("FFL"). "It follows 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.

To get there, the Second Circuit quoted *Heller* and *Bruen*. App. 12a-13a. ("A State cannot circumvent those holdings by banning outright the sale or transfer of common-use weapons and necessary ammunition."); and, *Andrews v. State*. App. 13a. ("The right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair.")

The ruling found Petitioners had derivative standing: "We have no trouble concluding that Appellants have standing to bring such a derivative claim." App. 10a. Repeating: "We therefore hold that Appellants have derivative standing to pursue Second Amendment claims on behalf of their customer base." App. 11a. And: "We conclude that there is a sufficient basis for that theory…" *Id.*

II.(B.) THE SECOND CIRCUIT ERRED WHEN IT ADOPTED PRE-*BRUEN* SCRUTINY TESTING

The Second Circuit erred when it adopted and praised – at length – scrutiny tests. App. 10a-16a. It is easily shown the cases cited used overturned scrutiny tests. See, *Ezell v. City of Chicago,* 651 F.3d 684, 701 (2011) ("*Ezell I*") ("For our purposes, however, we know that *Heller's* reference to "any standard of scrutiny" means any *heightened* standard of scrutiny; the Court specifically excluded rational-basis review." (emphasis in original)); and, *Teixeira v. County of Alameda,* 873 F.3d 670, 679, n.10 (9th Cir. 2017) ("*Teixeira II*") ("In *Heller,* the Supreme Court did not specify what level of scrutiny courts must apply…"); *Drummond v. Roinson Twp.,* 9 F.4th 217, 229 (3d Cir. 2021) ("*Roinson II*") ("First we decide whether to apply strict or intermediate scrutiny."); and, *Maryland Shall Issue v. Hogan,* 566 F. Supp. 3d 404, 425 (D. Md. 2021) ("Thus, the applicable level of scrutiny is determined by...").[25]

A Second Amendment derivative claim can and should be measured by *Bruen*. (When "…the plain text of the Second Amendment covers an individual's conduct, the Constitution presumptively protects that conduct." *Bruen*, 142 S.Ct. at 2126 and 2129-30. The government must then "…demonstrate the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*) A derivative claimant stands in the shoes of its customers

25. *N.B.:* The Second Circuit cited to the earlier ruling of *Maryland Shall Issue v. Hogan,* 971 F.3d 199 (4th Cir. 2020) ("*Maryland Shall Issue I*"). The 2021 case cited herein provides a deeper discussion of the standard applied.

over the rights infringed by the government. See, e.g., *Carey, Gov. of New York v. Pop. Svcs., Int'l,* 431 U.S. 678, 683-4 (1977).

II.(C.) PROPER *BRUEN* ANALYSIS OF THE AMMUNITION BACKGROUND CHECK

The ammunition background check went live September 13, 2023. 23A230, Appl. Ex. B. Recapping from Statement of the Case, *ante* at "C," the dealer must now collect customer personal information to transmit with ammunition data to the NYS Police, then manage police response, and interface that outcome with customers, and enforce any denial of purchase. The risk of prosecution effects Petitioners as individuals and as dealers with customers who want to purchase ammunition.

The Second Circuit denied in error Petitioners' standing as individuals; it misread Petitioners as exempt from an ammunition background check if purchasing ammunition from their own businesses. App. 29a. NY Pen §400.02(2) [sent. 6] is aimed at wholesale or other transactions between state-permitted sellers.[26] It facilitates commerce between dealers (NY Pen §400.03(1) [sent.2]) and "sellers of ammunition" and "organizational keepers of ammunition" (NY Pen §400.03(2)). App. 126a-127a.

Petitioners' individual and/or derivative claims against the ammunition background check requirement should

26. Petitioners' reading concurs with the published position of the NYS Police on point. NYS Police official website: https://gunsafety.ny.gov/ammunition-registration.

go through the same *Bruen* analysis as *Rhode II,* which permanently enjoined a comparable CA requirement. *Rhode v. Bonta,* Case 3:18-cv-802, ECF-105 at 3 (S.D. Cal. Jan. 30, 2024), stayed pending appeal (Case 24-542, dkt. 8.1 (Feb. 5, 2024)) ("*Rhode II*"). That district court defined ammunition as a core Second Amendment right: "…without bullets, the right to bear arms would be meaningless" *Id.* (citations omitted). The state list of "148 laws covering 535 years" was found by judicial analysis to contain "no historical twins and no dead ringers." *Id.* at 18-19. Specifically:

> "The Attorney General has not identified a single historical law that required a citizen to pass a background check in order to purchase ammunition. Citizens were free in every state to buy ammunition at any time and without qualification." *Id.,* at 19 (emphasis added).

Herein, the State filed only four historical laws (see III.B., herein), none being an historical analogue, either "well-established" or "representative" (*Bruen,* 142 S.Ct. at 2133) of a mandatory ammunition background check. In modern history in NY in 2015, NY Gov. Cuomo, with legislative support, signed off via "Memorandum of Understanding" ("MOU") an indefinite suspension of a first-of-its-kind, identical ammunition background check statute from the "SAFE Act." C.A.App.II 427-8. "Public safety" was not served by Hochul's 2022 TV camera announcement of "shredding" the MOU. C.A.App. 98-99, 257 (Mastrogiovanni).

The *Winter* factors are satisfied and a preliminary injunction should immediately issue against the ammunition background check.

II.(D.) PROPER *BRUEN* ANALYSIS OF THE SAR LICENSE REQUIREMENT

The SAR license requirement became effective September 1, 2022. Recapping from the Statement of the Case, *ante* at "C," Petitioners and Petitioners' customers, alike, are required to obtain the new SAR license prior to purchase; to present it at the time of purchase; to make amendments to it; and, to carry it on their person. App. 118a-22a.

To obtain an SAR license is akin to the process to obtain a concealed carry permit. See, e.g., *Heller v. Dist. of Columbia* ("*Heller III*"), 670 F.3rd 1244, 1256 (D.C. Cir. 2011) ("Certain portions of the law that are more akin to licensing the gun owner than to registering the gun…" and thus "impinge" upon the "core lawful purpose" protected by the Second Amendment, citing *Heller I,* 554 U.S. at 630.)

The SAR license requirements restrict the purchase (and sale) of an entire class of firearms.

The State failed to offer any historical law or analogue to meet its burden with respect to its new SAR license law. The State has never required an individual license for the purchase (or sale) of a long gun in common use.

Functionally, the NYS Police continue to abuse the new SAR license to, in effect, obstruct all purchases and sales of such rifles by continuously failing to design, approve, and publish the format of the new license, as they

are required to do under NY Pen §400.00(7). App. 120a.[27,28]

Petitioners also made a sufficient showing that applying for an SAR license would be a "futile gesture" where NYS Police have failed to issue the statewide license. The Second Circuit erred when it said the county clerk is a necessary defendant. App. 28a. The county clerk is not responsible for publishing the state license; they are the local administrators. The problem is traceable to the NYSP failing to perform a statutory responsibility. *Carney v. Adams,* 592 U.S. ___, 141 S.Ct. 493, 503 (2020) quoting *Teamsters v. United States,* 431 U.S. 324, 365-366 (1977).

Petitioners, as dealers, are correct to not sell SARs to customers without the NYS Police issuance of the SAR license format. C.A.App. 197-198. This situation – so bizarre that both lower courts were confused (App. 28a-29a and 83a) – is, by definition, counter to public safety.

The *Winter* test is satisfied and a preliminary injunction should immediately issue against the NYS SAR licensing scheme.

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27. Petitioners' reading coincides with NYS Police dealer FAQ memorandum (Dec. 6, 2022, p. 3): a concealed carry license is insufficient. NYS Police at https://troopers.ny.gov/system/files/documents/2022/12/dealer-faq.pdf.

28. Compare what is missing to the NYS DMV 1-page guide to authenticating a state-issued driver's license at: https://www.ejustice.ny.gov/LawEnforcement/docs/dmv/DriverLic_ID_Permit_Security.pdf.

II.(E.) PROPER *BRUEN* ANALYSIS OF THE CONCEALED CARRY TRAINING CURRICULUM AND TEST

The concealed carry amendments, including training, became effective September 1, 2022. Recapping from the Statement of the Case, *ante* at "C*,"* individuals desiring a concealed carry license must successfully complete a 16-hour in-classroom course with a corresponding test and obtain a certificate to attach to the application. NY Pen §400.00(1) and (19); App. 116a.

Petitioners are concealed carry licensees. Petitioners Nadine and Seth Gazzola are also paid instructors in firearms, who were forced to stop offering training because the NYS Police and DCJS failed to publish the 16-hour "standardized" training curriculum and related test. C.A.App. 193-197 (Nadine); C.A.App. 211-214 (Seth).

The NYSP has only uploaded a barebones memo, including less than two pages of "Minimum Standards for Classroom Training Curriculum." C.A.App. 347-349. It is little more than words copied from part of the statute. For example, for the required topic of "suicide prevention" at NY Pen §400.00(19)(a)(x), the NYSP added precisely this many words and no more: "including recognizing signs of suicide risk and resources to obtain assistance (e.g., 988 Suicide and Crisis Lifeline)." *Id.* at 348, #11. No "test" has published, at all.

Petitioners are right not to make up content when the statute objective is standardized, statewide course materials and testing from NYSP and DCJS. This follows the NYS Dep't. of Environmental Conservation process to obtain a "hunter education card" to apply for the hunting

permit, including that certification is offered in person or on-line (approximately 3-4 hours) with a course book and a standardized written test in either setting. See, on-line: https://www.hunter-ed.com/newyork/.

Firearms training, particularly as a prerequisite to an initial application, is an impact upon a core function. *Ezell v. City of Chicago*, 846 F.3d 888, 893 (7th Cir. 2017). ("*Ezell II*")

The Second Circuit denial of Petitioners' individual standing because of its reading of "renew" failed to reconcile the undefined statutory words "renew" and "recertify."[29] App. 30a. *See*, NY Pen §400.00(1) and (19), *read with* NY Exec §837(23)(a) and NY Pen §265.20(3-a). That the training is a prerequisite to the next renewal of Petitioners' licenses would confer individual standing.

The Second Circuit failed, altogether, to evaluate Petitioners' standing as firearms instructors and, derivatively, on behalf of students, or to consider the impact upon Petitioners' businesses. The Second Circuit also failed to weigh the dysfunction, statewide, of an effective block of the concealed carry licensing process.

Winter is satisfied and a preliminary injunction against the new training and testing requirements should immediately issue.

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29. This is one point of law disputed between Counsel, throughout.

III. THE SECOND CIRCUIT RULING SIGNALS: IT IS TIME TO ACTIVATE "TO KEEP" OF THE SECOND AMENDMENT

The second major error committed by the Second Circuit was their flights of fancy of alternatives to Petitioners' novel theory. 12a-17a. Petitioners' novel theory is that "to keep" has independent constitutional value that can be measured through "constitutional regulatory overburden." The Second Circuit said nothing directly about Petitioners' core argument against NY Gen Bus §875. The manner of Second Circuit silent treatment of "to keep" signals it is time to activate "to keep" of the Second Amendment.

III.(A.) THE NOVEL THEORY OF "TO KEEP" OF "TO KEEP AND BEAR ARMS" IS LIKELY TO SUCCEED ON THE MERITS

This is a case of first impression. Petitioners ask the Court to interpret the last undefined word of the Bill of Rights: the word "to keep" of "to keep and bear Arms" from the Second Amendment. U.S. Const. amend. II; C.A.App. 28-38. The Second Amendment is the only civil right that requires an individual to own, possess, or use an object to exercise a right. *Gazzola v. Hochul* empowers this Court to elevate the word "to keep" to the standing of "to bear." It appropriately places the firearms dealer on an equal constitutional footing as the individual. The two are inextricably intertwined as a matter of theory and practice. To achieve the apex of liberties within the Second Amendment and extend to state citizens these same liberties through the Fourteenth Amendment, the individual and the federally-licensed dealer in firearms

must accord equal standing and responsibility. U.S. Const. amend. II and XIV, §1 (91a-92a); C.A.App. 28-38.

III.(B.) *GAZZOLA* IS THE ORGANIC EVOLUTION OF *HELLER-MCDONALD-BRUEN*

This case is the organic evolution of *Heller-McDonald-Bruen*. The operative clause of the Second Amendment contains two verbs joined since the first draft of the text introduced by James Madison to the U.S. House of Representatives in 1789.[30]

The word "to bear" was defined in *Bruen,* as something of a lone sentry. This Court defined "to bear" as an individual's right to "wear, bear, or carry…upon the person or in the clothing or in a pocket…" *Bruen*, 142 S.Ct. at 2135, citing *Heller*, 554 U.S. at 584.

This Court found "to bear" to "naturally encompasses public carry" because "[t]o confine the right to "bear" arms to the home would nullify half of the Second Amendment's operative protections." *Bruen*, 142 S.Ct. at 2134-35. Yet, is it not true that the "halves" of the whole are "to bear" plus "to keep?"

Limiting "to keep and bear arms" to the in-and-out the front door of an individual's home leaves the back door wide open for precisely the scheme of infringement targeting federally-licensed dealers presented by this case.

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30. 1 Annals of Cong. 451 (1st Session, June 8, 1789) (Joseph Gales ed., 1834).

"To bear" already shares an historic security context with "to keep," finding "ordinarily when called for service men were expected to appear bearing arms supplied by themselves." *Heller*, 554 U.S. at 624 (citing to *U.S. v. Miller,* 307 U.S. 174, 179 (1939)) and 627. "To keep" is the *from whence* the individual militiamen – *as required by government to so do* – came into possession of a firearm or ammunition.

In the vast record below, Respondents submitted a total of four (4) laws. The laws read in opposition to their state burden under *Bruen*. These historical laws required:

> "That every person so enrolled, and notified, shall within twenty days thereafter, furnish and provide himself, at his own expense, with a good musket or firelock…" and "…not less than sixteen cartridges, suited to the bore of the musket or firelock…"

Gazzola v. Hochul, Case 1:22-cv-1134, ECF 29-2 (Laws of NY, Ch. 55, p. 238 (3rd Sess., Mar. 11, 1780) and ECF 29-4 (1782); ECF 29-3 (Act of May 8, 1792, 1 Stat. 271[31]); and, ECF 29-5 (Laws of NJ, Ch. 187 (2nd Sitting, Mar. 11, 1806).

The Second Amendment has no historical context or modern exercise without sellers of firearms and ammunition, like Petitioners. Few hands know the forging of the firearm from iron ore. Petitioner Mike Mastrogiovanni is a competition shooter who regularly reloads and trains how to reload ammunition. C.A.App.

31. *Heller,* 554 U.S. at 596, 672, and 716.

250-51. Bob Owens is a Veteran who was trained and can construct firearms from component parts. C.A.App. 314-315, 326. Seth Gazzola designs firearm parts that his CNC machine mills from billet blocks of metal under his federal FFL-07/SOT-2. C.A.App. 208-9. Even these highly skilled Petitioners do not make their own arms from metals and forge or mix their own black powder. The modern exercise of the Second Amendment is largely dependent upon the skill of the individual to use a credit card at a retail dealer in firearms.

Which is why, as *Heller-McDonald-Bruen* emerged as a bulwark against outright bans of core functions, those "joined at the hip" with Hochul[32] ran around to the wide-open back door and came in through the summer kitchen. C.A.App. 46-62.

Since the 1968 Gun Control Act, the FFL, including Petitioners, has served as the legally-sanctioned facilitator of sales of firearms to law-abiding citizens seeking to exercise their individual rights under the Second Amendment. No government office or agency is a routine conduit for an individual seeking to purchase a firearm or ammunition to exercise their Second Amendment rights.[33]

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32. C.A.App.-47 n54, quote by Hochul (Aug. 31, 2022) to named attorneys from "Every Town for Gun Safety" and "Giffords Law Center."

33. In one known exception, in 2020, Washington, D.C. residents suffered a gap in any FFL-01 or FFL-02 within the jurisdiction, putting D.C. Metro Police in the role of interstate transfers of firearms for district residents. Williams, E., WAMU Amer. U. Radio, Apr. 20, 2020.

A case like this may face "serious challenges but also present some opportunities." *Whole Woman's Health v. Jackson,* 142 S.Ct. at 539. Opportunities, including for a novel remedy as a direct result of the novelty of the scheme by a state to deprive individuals of their civil rights. *Id.* at 545, Roberts, C.J., dissenting.

III.(C.) THE SECOND CIRCUIT ANTITHESIS OF "CONSTITUTIONAL REGULATORY OVERBURDEN"

The Second Circuit said in a footnote 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, n.6. But, the judges wrote pages, just to stir things up. App. 10a-17a. Into the bouillabaisse, they measured a count-up from zero of how few dealers in firearms would constitute a bare minimum. À la gumbo, they poured out a count-down free-fall from the *status quo ante* of 1,791 federally-licensed dealers with business premises statewide to some unquantified low. App. 14a-16a; C.A.App.II-404.

The Fourteenth Amendment incorporation of "to keep and bear arms" "restricts experimentation and local variations" and "the enshrinement of constitutional rights necessarily takes certain policy choices off the table." *McDonald*, 561 U.S. at 790, citing *Heller*, 554 U.S. at 636. This Court already rejected a computational role for courts, "especially given their "lack [of] expertise" in the field." *Bruen*, 142 S.Ct. at 2130, citing *McDonald*, 561 U.S. at 790-791.

III.(C.)(1.) FIRST, THE SECOND CIRCUIT ERROR OF A STANDARD OF "SO RESTRICTIVE THAT IT THREATENS"

As evidenced by their language, the Second Circuit wanted to cook up something – *anything* – to skirt their assignment to evaluate Petitioners' novel theory of "to keep" measured by "constitutional regulatory overburden." The Second Circuit squirreled around with:

- "A State cannot circumvent those holdings *by banning outright* the sale or transfer of common-use weapons and necessary ammunition." 12a-13a.

- "cannot have the effect of *eliminating* the ability of law-abiding, responsible citizens to acquire firearms." 13a.

- "Still, Appellants have not shown that the New York law is *so restrictive that it threatens* a citizen's right to acquire firearms." 14a.

- "…there is no evidence that those regulations will impose *such burdensome requirements* on firearms dealers that they *restrict* protections conferred by the Second Amendment." 16a.

- "…there is no evidence that New Yorkers currently *lack, or will lack* under the challenged statutes, *relatively easy access* to sellers of firearms." 17a.

The cautionary tale from Petitioners' Brief was lost on the Second Circuit. C.A. Br. 43-44. The lesson they

misunderstood derives from *Dark Storm Ind. v. Cuomo,* 471, F.Supp.3d 482, 498 (N.D.N.Y. Jul. 8, 2020), where a pandemic-era district court concluded "Wal-Mart and Runnings" were "adequate" to fulfill state citizens Second Amendment needs.

That faulty premise should have been rejected on its face. Moreoever, analysis of faulty state data should have started with the BATFE database of current FFLs, updated monthly on its website. As of November 30, 2022, Wal-Mart had forty-four (44) BATFE FFL-01 licenses across New York.[34] A federal license is permissive to types of firearms lawful be sold; it does not mandate sales. Wal-Mart, nationwide, already stopped in-store sales of handguns based on "its marketing surveys" (1993)[35] and stopped selling modern sporting rifles, including the AR-15 platform, "…solely…on customer demand..." (2015)[36] This commonly-known industry history reduced to only one company (Runnings) with ten locations in New York with FFL-01 licenses for roughly 15.7 million New Yorkers over the age of 18 years, or, 1.6 million persons per store.[37, 38] Runnings store locations are west and north

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34. The BATFE license page requires user input to select date and state. The page cite is a constant. https://www.atf.gov/firearms/listing-federal-firearms-licensees.

35. Ayres, Drummond, "Wal-Mart to End Sales of Handguns in Stores," The New York Times (Dec. 23, 1993).

36. Layne, Nathan, "Wal-Mart to stop selling AR-15, other semi-automatic rifles," Reuters (Aug. 27, 2015).

37. BATFE license database, *supra.*

38. U.S. Census, on-line at https://www.census.gov/quickfacts/fact/table/NY/PST045223.

of Albany, meaning none in the five boroughs of NYC, on Long Island, or in the highly-populated counties of Nassau, Suffolk, Westchester Counties.[39,40] One does not "quantify" a fundamental right in this manner or this near to its elimination.

The *Dark Storm Ind.* decision must not foreshadow the fate of the Second and Fourteenth Amendments in New York. The decision does not reflect awareness, FFLs and ranges were classified as "essential services" on Mar. 28, 2020 by the U.S. Dep't of Homeland Security classified FFLs and ranges as "essential services."[41] *Steelworkers v. U.S.* echoes from our wartime past: "But a court is not qualified to devise schemes for the conduct of an industry so as to assure the securing of necessary defense materials." 361 U.S. 39, 50-51 (1959).

III.(C.)(2.) SECOND, THE SECOND CIRCUIT ERROR OF TOYING WITH "A CRITICAL MASS"

The Second Circuit went even further afield with their next idea. "It follows that Appellants, whose declarations (again) focused only on their anticipated costs, failed to present sufficient evidence that *any* New York firearms dealers – *let alone a critical mass* of the more than 1,700 such dealers – may close due to the challenged

39. Runnings website, store locator, on-line at https://www.runnings.com/storelocator.

40. Wikipedia, NY counties by pop. (2022), on-line at https://en.wikipedia.org/wiki/List_of_counties_in_New_York#List_of_counties.

41. U.S. Dep't Homeland Sec., "Advisory Memo. on Ident. of Essential Critical Infrastructure Workers During COVID-19 Response (Mar. 28, 2020).

regulations." App. 17a. First, Petitioners are eight of the "any" dealers that "may close due to the challenged regulations" and one (Robert Owens) did close out with the ATF November 2023. Second, "critical mass" is not a standard for *any* civil right in America, where one person, alone, can defeat government infringement.

Since this case started, more than 150 FFL-01 federally-licensed dealers across the state of New York either did not renew their license or prematurely terminated their 3-year license.[42] This is a loss statewide of 8.5% of federally-licensed dealers. Petitioner Owens is included in this figure.

And what if the Second Circuit idea of "constitutionally-acceptable collateral damage" should catch on? If 5% or 10% or 15% of persons of faith be shuttered from their houses of worship? If 20% or 30% of those inside the beltway be herded off sidewalks by law enforcement into no-Wi-Fi buildings when a President is scheduled to speak? Or if 40% - or maybe what if 51% - of cupcake shops are exempt from rainbow sprinkles? "That sort of argument should be no less unimaginable in the Second Amendment context." *Ezell I,* 651 F.3d at 697.

IV. "CONSTITUTIONAL REGULATORY OVERBURDEN" IS A CLEAR AND DURABLE STANDARD FOR CLAIMS UNDER "TO KEEP"

Petitioners propose the measure of infringement of "to keep" be "constitutional regulatory overburden." They seek approval in the form of a "likelihood" designation so that, *pendente lite,* they can advance their case to a

42. BATFE website, *supra,* selecting monthly reports for periods ending Nov. 30, 2022 through Jan. 31, 2024.

merits decision without being arrested, prosecuted, or otherwise caught up in a cascade of losses while defending civil rights.

FFL claims are not easily measured under *Bruen* because the legislative history of the federally-licensed dealer begins in 1968. A non-FFL individual can't carry the weight of a case like *Gazzola v. Hochul* because a customer doesn't have the requisite industry knowledge and experience. Further, an individual-centric outcome analysis would require demonstration of supply chain interruption, which, by the time it is noticeable to the customer would be unnecessarily downstream of the original infringement.

The FFL is that early warning system for "to keep." Like any other civil rights case, it will only take one FFL to bring the "to keep" case because it is a highly-regulated and specialized industry.[43] Using the FFL as the entrée to the claim would afford a simple, national standard. Another case may be as big as *Gazzola* and NY Gen Bus §875 or it could be a single, nefarious provision. The cases will involve objective calculations that initially (preliminary injunction) are small data sets with projections based upon metrics and those will (permanent injunction) bear out just as in any other §1983 or §1985(3) case.

43. By contrast, a case such as *Teixeira* on a zoning issue would lead with claims of real estate, business, or derivative for customers using the updated post-*Bruen* discussed above – because that type of issue is not directly related to the function and purpose of a federal license.

IV.(A.) FFLS ARE SUBJECT MATTER EXPERTS

The Second Circuit committed unnecessary error when it reduced Petitioners' credentials to a single sentence and dissed their work product as "say-so" and "some estimates" and "speculative." App. 16a, 31a. The court afforded no weight to Petitioners' credentials, operations experience, federal firearms compliance experience, detailed computations, and BATFE and FBI track records. Petitioners, as federally-licensed dealers, collectively, have more years of experience than this country has years. C.A.App. 184-335.

Petitioners' affidavits set out their education, military experience, industry training, multiple license applications and renewals including associated background checks, record-keeping responsibilities, formal firearms inventory reconciliation, store security, employee training, customer interface, ATF and FBI interface, local law enforcement interface, participation in crime-prevention responsibilities such as conducting background checks and denying sales of firearms to disqualified persons, participation in crime solving such as responding to trace requests within 24-hours, and study of the laws and regulations effecting their profession. C.A.App. 184-335; *read with* C.A.App. 102-122.

Petitioners' computations spelled out all things quantifiable, such as number of labor hours, labor rates, materials costs, material specifications, materials use limitations, and quality of output. *Id.* The declarations of Petitioners amount to an industry economic impact analysis.

The work product of Petitioners demonstrates a likelihood of success. "Actual success" is not the standard. *Amoco Prod. Co. v. Village of Gambell,* 480 U.S. 531, 546 n.12 (1987). Petitioners certainly have shown that the chance of success on the merits is "better than negligible." *Nken v. Holder,* 556 U.S. 418, 434 (2009).

Petitioners "…add to a sincere zeal for the happiness of their country [with] a temper favourable to a just estimate of the means of promoting it." The Federalist No. 37, p. 195 (J. Gideon ed. 1818, reprinted 2006) (J. Madison). When federally-licensed dealers in firearms are standing at that back door, in earnest defense of their rights and those of their community and customers, they can hear on the wind: "He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public Records, for the sole purpose of fatiguing them into compliance with his measures." U.S. Declaration of Independence, Para. 6 (1776).

IV.(B.) NEW LAWS ARE INCAPABLE OF COMPLIANCE AND THE PENALTIES ARE CRIMINAL

The Second Circuit erred by not taking seriously the acute threat standing across the check-out counter, face-to-face with Petitioners as dealers. That is the imminent threat level facing, particularly, Craig Serafini and witness Rich Sehlmeyer (23A230, App. App. C, D) and now also Petitioner Jim Ingerick. In the room stands the NYSP "Joint Terrorism Task Force" for inspections and questions with that 31-point "Checklist," covering the same mandates challenged in this case. *Id.*

The mandates "an essentially noncriminal and regulatory area of inquiry" into "an area permeated with criminal statutes." *Haynes v. U.S.* 390 U.S. 85, 99 (1968). It only takes one (1) out of the thirty-one items on the NYSP "Checklist" to trigger criminal charges and a catastrophic cascade of damages. The entire list complained of must be analyzed as "a single regulatory package for purposes of Second Amendment scrutiny." *Ezell II,* 846 F.3d at 894. That's how the NYSP-JTTF officers do it, as well.

The individual mathematical proofs are laid out in the record with the painstaking care of "The Man Who Knew Infinity."[44] C.A. App. 102-122, 184-335. It is tempting to look at any one mandate, discount it, and deny the claim. But, so long as even one mandate remains that is unconstitutional or incapable of compliance, Petitioners cannot rest. NY Gen Bus §875 is not a regulatory exercise that can be sussed out, one-at-a-time through fines as a cost of doing business, administrative hearings, or county court license appeal proceedings.

This first-of-its-kind scheme was initiated December 5, 2022. There is now another state pushing through a comparable bill, number SB 6266, targeting FFLs. On February 27, 2024, a comparable bill passed the Washington state legislature. This Petition is the final opportunity to close the back door fast against the impending storm.

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44. "The Man Who Knew Infinity." Directed by Matt Brown for Pressman Film. (2015).

IV.(C.) PETITIONER FFLS ARE MORE SAFETY-CONSCIOUS THAN THE GOVERNOR

To enjoin state mandates changes nothing about the pre-existing, well-settled federal firearms compliance mandates governing Petitioners and other FFLs.

FFLs in New York, including Petitioners, are particularly safety-minded as evidenced by data on FFLs, released by the ATF on February 14, 2024 which showed no (zero) NY-based FFL was in the "Demand 2" program[45] in 2022 or 2023. (This is the first time since 2003 this data has been released.) NY is one of only three states with a perfect record. [46]

Resp. Gov. Hochul actively interferes with the primary functions of federally-licensed dealers, including Petitioners, which is the NICS background check at the point-of-sale. Hochul adamantly refuses to report state-convicted felons and other disqualified persons into the federal FBI NICS system. A missing disqualifying record results in a false 'proceed' to purchase, which can have fatal consequences. C.A.App. 92-94 (FBI NICS reported records, by state); C.A.App. 388 (list of disqualifying factors); C.A.App. 258 (Mastrogiovanni); C.A.App. 278 (Martello).

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45. Program criteria includes 25 or more firearms trace requests for an FFL in a year.

46. Penzenstadler, N., "Gun shops that sell the most guns used in crime revealed in new list," USA Today, (Feb. 15, 2024); https://www.usatoday.com/story/news/investigations/2024/02/15/shops-selling-most-crime-guns-revealed-atf/72581120007/.

Not even the Resp. NYS Police has a positive relationship with FFLs who are state dealers. The division has full contact information for Petitioners. C.A.App. 325 (Owens). Petitioners receive no direct notification of new laws. C.A.App.-192 (Nadine Gazzola), C.A.App.-238 (Serafini), C.A.App.-325 (Owens). Petitioners were rebuffed with "I don't know," when they called the NYSP for compliance instruction. C.A.App.-255 (Mastrogiovanni). As Hanusik wrote: "I spent a couple weeks at the NYS Police in August [2022] and they told me I know more about what's going on than they do; they have no idea what's going on." C.A.App.-331 (Hanusik).

V. FEDERAL FIREARMS COMPLIANCE IS A FIELD WELL SETTLED

The Second Circuit ruling below, if allowed to stand, will encourage state governors, like Hochul, "to undermine the National Government." *Trump v. Anderson,* 601 U.S. ___ (2024) (Sotomayor, Kaga, and Jackson, JJ., concurring in jdg., p. 2). The Second Circuit overtly treated Petitioners like second-class citizens seeking "second-class rights." *McDonald,* 561 U.S. at 780.

The Second Circuit failed to appreciate Petitioners' federal pre-emption arguments. Until 2022, the State had no role in the field known as "federal firearms compliance law." To recap, the GCA was 1968, the ATF launched 1972, and four major acts of Congress plus year-over-year ATF regulations exclusively dominated the well-settled field. The industry has not been in court in these more than fifty years because of the solid, day-to-day working relationship between BATFE/FBI and the industry through the NICS Division background checks and the

agency beat personnel who are known by name, including with Petitioners. See, e.g., C.A.App. 191-192 (Nadine Gazzola); C.A.App. 238-239 (Serafini); C.A. App. 255-256, 259 (Mastrogiovanni); C.A. App. 297, 308 (Affronti). There has been a "settled understanding" (*Trump v. Anderson*, 23-719, Feb. 8, 2024 TR: 87-88 (Kavanaugh, J.)).

Multiple of the new state mandates are poorly-written efforts to steal, duplicate, or get around federal firearms compliance records rooted in federal law and regulation. Such records are created by FFLs on ATF-designed and supplied forms and are completed during FFL interface with customers and the ATF/FBI NICS federal background check system, and in accord with federal law, regulation, and guidance documents. 18 U.S.C. §923(g)(2); 18 U.S.C. §926; 28 CFR §25.6(a); 27 CFR §478.125(e); 27 CFR §478.124; and, 28 CFR §25.11(b).

The most valuable of these records is the ATF Form 4473 (C.A.App. 429-434) and the Book of Acquisitions & Dispositions ("A&D Book"). 27 CFR §478.125(e); 28 CFR §25.9.

The Petitioners will neither wholesale, nor periodically, transfer copies of their federal firearms compliance records to the NYS Police under NY Gen Bus §875-f. Nor will Petitioners create duplicitous (shadow) books to help Respondents avoid federal pre-emption court orders and/or federal penalty under NY Gen Bus §875-f. Petitioners are thus unable to sign annual compliance statements at NY Gen Bus §875(1)(b). Declarations, *passim*; see, e.g., C.A.App.-191 (Nadine Gazzola); C.A.App.-210 (Seth Gazzola); C.A.App. 233-234 (Serafini); C.A.App. 254-255 (Mastrogiovanni); C.A.App.-278 (Martello); C.A.App.II-303 (Affronti); C.A.App.II-316 (Owens).

Hochul *et cie.* demand what even the U.S. Attorney General cannot have. NY Gen Bus §875-f(3) awarded an unparalleled breadth of police power over dealers "at any time," including with third parties, to access all dealer records. App. 103a-104a. The provision is "wholly out of proportion to the public interests the [State] claims it serves." *Ezell I,* 851 F.3d at 710. By comparison, the U.S. AG or an ATF officer may only access the ATF Form 4473 and the A&D Book in two specific circumstances: (1.) pursuant to a warrant in a criminal investigation of a person other than the licensee; and, (2.) upon visual inspection during a routine inventory reconciliation compliance check, where if any pages be copied by BATFE, the pages must also be furnished to the FFL for their records. 18 U.S.C. §923(g)(1)(B) and 27 CFR §478.23. See, also, 18 U.S.C. §923(g)(1)(A) and 27 CFR §478.23; and, 18 U.S.C. §923(g)(1)(B)(iii).

The state creation of a firearm owners' registry, or the transfer of federal records that would enable state creation of such a registry, is antithetical to the compromises made in Congress over the decades it took to develop the entire unified field of federal firearms compliance law, including with FFL testimony and other input. The *esprit des corps* is embodied in FOPA (1986), Sec. 101:

> "No such rule or regulation prescribed after the date of the enactment of the Firearm Owners' Protection Act may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof…"

C.A.App. 64-65.

CONCLUSION

During oral arguments of *Trump v. Anderson* (No. 23-719), a simple truth reverberated: "I mean, the whole point of the Fourteenth Amendment was to restrict state power, right?" – Mr. Chief Justice Roberts. (*Id.*, TR:70.) Because of the 2022 laws, Petitioners are caught in an "interim disuniformity" (Justice Jackson, *id.*, TR:96), now exacerbated by the Second Circuit adoption of over-turned scrutiny tests and tacit endorsement of a state governor's power grab in opposition to public safety.

Petitioners are in the business of compliance. They cannot and will not conform to this new scheme designed to evade judicial review that targets them as federally-licensed dealers in firearms in order to trample the rights of individuals. "Then what do we do?" – Justice Alito (*Id.*, TR:99) This Court will find help from Petitioners and their multitude of credentials in the protection of fundamental rights guaranteed to all citizens under the Second Amendment and equally through the Fourteenth Amendment. Petitioners are the "to keep" of "to keep and bear arms" and seek the opportunity to join *Heller*, *McDonald*, *Bruen* through the novel theory of their case.

Petitioners ask this Court grant a writ of certiorari with all due speed.

Respectfully submitted this 7th day of March 2024.

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

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, DATED DECEMBER 8, 2023

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2022

March 20, 2023, Argued;
December 8, 2023, Decided

Docket No. 22-3068-cv

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

Appendix A

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, DOMINICK L. CHIUMENTO, 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.**

* The Clerk of Court is respectfully directed to amend the caption to conform to the above. Steven A. Nigrelli, formerly Superintendent of the New York State Police, was sued in his official

Appendix A

Before: JACOBS, LYNCH, and LEE, *Circuit Judges*.

PER CURIAM:

Plaintiff-Appellants are eight firearms and ammunition dealers, one firearms pawnbroker, and one business organization. They appeal from an order of the United States District Court for the Northern District of New York (Brenda K. Sannes, *C.J.*) denying their motion for preliminary injunctive relief. They argue that the district court erroneously rejected their claims that New York's commercial regulations on the sale of firearms and ammunition violate their customers' Second Amendment right to acquire firearms and ammunition, and that several provisions of New York law conflict with, and are thus preempted by, federal law. They also challenge the district court's conclusion that they lack standing to challenge New York's licensing scheme for semiautomatic rifles, background-check requirement for ammunition purchases, and firearms-training requirement for concealed-carry licenses. Finding no merit to their arguments, we **AFFIRM**.

BACKGROUND

Appellants are nine individual "responsible persons" who operate businesses throughout the State of New York that have federal firearms licenses ("FFLs"), and one business organization that does not have an FFL but

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capacity. By operation of Federal Rule of Appellate Procedure 43(c)(2), Dominic L. Chiumento was automatically substituted upon assuming the office of Acting Superintendent of the New York State Police on October 5, 2023, following Nigrelli's retirement.

whose members do.[1] An FFL is a license that is issued by the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to engage in the business of manufacturing, importing, or dealing in firearms or ammunition. *See* 18 U.S.C. § 923(a). The individual Appellants are eight licensed dealers in firearms and ammunition and one licensed firearms pawnbroker.

On November 1, 2022, Appellants filed suit in the Northern District of New York, naming several New York defendants in their official capacities: Governor Kathleen Hochul; Attorney General Leticia James; then Acting Superintendent of the New York State Police Steven A. Nigrelli;[2] and Commissioner of the Department of Criminal Justice Services of the New York State Police Rossana Rosado. A week later, Appellants moved for preliminary injunctive relief, and, as recounted by the

1. The firearms and ammunition dealers are John A. Hanusik, Jim Ingerick, Christopher Martello, Michael Mastrogiovanni, Robert Owens, Craig Serafini, Nick Affronti, Nadine Gazzola, and Seth Gazzola. They are associated, respectively, with AGA Sales, Ingerick's LLC d/b/a Avon Gun & Hunting Supply, Performance Paintball, Inc. d/b/a Ikkin Arms, Spur Shooters Supply, Thousand Islands Armory, Upstate Guns and Ammo, LLC, East Side Traders LLC, and Zero Tolerance Manufacturing, Inc. (both Gazzolas). The business organization is Empire State Arms Collectors Association, Inc.

2. Defendant-Appellant Chiumento assumed the office of Acting Superintendent of the New York State Police on October 5, 2023, while this appeal was pending. By operation of Federal Rule of Appellate Procedure 43(c)(2), Chiumento was automatically substituted as the Defendant-Appellant in place of the former Acting Superintendent of the New York State Police, Nigrelli.

district court, their claims in that initial motion were sprawling, purporting to challenge "thirty-one statutory firearms provisions." *Gazzola v. Hochul*, 645 F. Supp. 3d 37, 48 (N.D.N.Y. 2022). Their claims, however, have since narrowed, and can be summarized as follows.

First, Appellants claim that New York's commercial laws regulating the sale and transfer of firearms are too onerous and will thus "financially burden the Plaintiffs to a point that they will be forced out of business." J. App'x 88, ¶ 180. That, they say, in turn threatens their customers' right to acquire firearms in violation of the Second Amendment. The laws to which they object require them to secure firearms "in a locked fireproof safe or vault" outside of business hours, *see* N.Y. Gen. Bus. L. § 875-b(1)(a); install security alarm systems at each point of exit, entrance, and sale, *see id.* § 875-b(2); provide State Police-developed training to their employees, *see id.* § 875-e(1); perform monthly inventory checks, *see id.* § 875-f(2); provide State Police with full access to their premises during periodic onsite inspections, *see id.* § 875-g(2)(a); prohibit minors from entering their stores without a parent or guardian, *see id.* § 875-c; and hire employees who are at least twenty-one years old, *see id.* § 875-e(3).

Second, they claim that New York law is preempted by federal law in three ways: (1) by requiring all FFLs to devise a plan for securing firearms, even while those firearms are "in shipment," *see* N.Y. Gen. Bus. L. § 875-b(1); (2) by directing FFLs to maintain records of sale and inventory information and submit those records to the State Police on a semi-annual basis, *see* N.Y. Gen.

Bus. L. § 875-f; and (3) by setting up a background-check system that will result in a misuse of the National Instant Criminal Background Check System ("NICS"), principally by requiring background checks for ammunition sales, *see* N.Y. Exec. L. § 228; N.Y. Pen. L. § 400.02. Appellants purport that federal law (1) relieves an FFL of responsibility over the security of firearms that are in shipment if the FFL is merely receiving, as opposed to sending, firearms; (2) prohibits the Attorney General, and by extension the States, from requiring routine reporting of sale and inventory records; and (3) prohibits using the NICS to conduct background checks for ammunitions sales.

Third, Appellants claim that New York law violates their Fifth Amendment right to be free from self-incrimination by requiring them to annually certify their compliance with New York law. *See* N.Y. Gen. Bus. L. § 875-g(1)(b). They claim that such certification is impossible because if they were to comply with New York law they would necessarily violate federal law. We understand this claim to rest on their preemption theories.

Fourth, Appellants claim that New York law violates their own Second Amendment rights as individuals by requiring them to obtain a special license to possess semiautomatic rifles, undergo background checks to purchase ammunition, and undergo firearms training to renew their concealed-carry licenses.

The district court denied Appellants' motion for preliminary injunctive relief on jurisdictional, merits,

and procedural grounds. *Gazzola*, 645 F. Supp. 3d 37. In particular, the district court held that, while Appellants had standing as firearms dealers to challenge New York's commercial laws, they lacked standing as individuals to challenge New York's laws regulating semiautomatic rifles, ammunition sales, and concealed carry. *Id.* at 51-54. The court also held that Governor Hochul and Attorney General James were not proper defendants because they lacked a sufficient connection to enforcing the challenged provisions of New York law, and thus were entitled to sovereign immunity. *Id.* at 58-59. Turning to the merits, the court held that Appellants lacked Second Amendment rights as commercial dealers in firearms, *id.* at 65, and that they failed to offer a "basis" for their "novel" derivative right-to-acquire claim, *id.* at 70-71. The court rejected Appellants' preemption claims because federal law expressly did not occupy the field of firearms regulations, *id.* at 59-60, citing 18 U.S.C. § 927, and because federal and New York law were not in conflict, *id.* at 59-63. For that same reason, the court found no merit to Appellants' self-incrimination claim, which it understood, as we do, to be premised on their preemption theories. *Id.* at 69-70. Finally, the court found that Appellants would not suffer irreparable harm in the absence of an injunction because they failed to show that they would suffer a constitutional deprivation or anything more than lost profits. *Id.* at 54-57.

Appellants timely appealed.

Appendix A

DISCUSSION

We have appellate jurisdiction over a denial of a motion for preliminary injunctive relief pursuant to 28 U.S.C. § 1292(a)(1). "[W]e review a district court's decision on a motion for preliminary injunction for abuse of discretion." *Zervos v. Verizon N.Y., Inc.*, 252 F.3d 163, 167 (2d Cir. 2001). A district court abuses — or more precisely, exceeds — its discretion when its decision rests on an "error of law" or a "clearly erroneous factual finding," or "cannot be located within the range of permissible decisions." *Id.* at 169.[3]

"A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Id.* at 20.[4]

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3. As we have recounted several times, the word "abuse" is an imprecise way to describe instances where, as will inevitably happen, a district court commits an error of law, makes a clearly erroneous finding of fact, or renders a decision outside the range of reasonable ones. *See, e.g.*, *JTH Tax, LLC v. Agnant*, 62 F.4th 658, 666 n.1 (2d Cir. 2023) (collecting cases). None of those things involve "abuse" as that term is understood in its ordinary sense; the word "exceeds" is more accurate. *Id.*

4. Under our precedents, a plaintiff must satisfy a heightened standard when seeking a so-called "mandatory injunction" - that is,

Appellants argue that the district court erred in rejecting the merits of their derivative Second Amendment claim, federal-preemption claim, and self-incrimination claim; in holding that they lacked standing to assert Second Amendment claims as individuals; and in rejecting their plea of irreparable harm in the absence of an injunction.[5] Because we conclude that the district

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an injunction that "alter[s] the status quo." *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 34 (2d Cir. 1995). The district court held that the heightened standard applied but concluded that it was "immaterial" because Appellants failed under the "lesser," ordinary standard for preliminary injunctive relief. *Gazzola*, 645 F. Supp. 3d at 51. Because the district court did not exceed its discretion in denying Appellants' motion under the ordinary standard, we do not address whether the court correctly determined that the heightened standard should apply.

5. In the district court, Appellants also claimed that New York law was unconstitutionally vague in violation of the Fourteenth Amendment, and that New York law burdened their Second Amendment right to sell firearms. The district court rejected those claims, *Gazzola*, 645 F. Supp. 3d at 64-69, and Appellants do not press any error on appeal. We therefore do not consider those claims. For the first time on appeal, Appellants raise a discrimination claim, and for the first time in their reply brief, they substantively challenge, in more than a perfunctory manner, the district court's conclusion that Governor Hochul and Attorney General James are entitled to sovereign immunity. Those arguments are forfeited. *Presidential Gardens Assocs. v. U.S. ex rel. Sec'y of Hous. & Urb. Dev.*, 175 F.3d 132, 140-41 (2d Cir. 1999) (arguments made for the first time in reply are forfeited); *Katel Liab. Co. v. AT & T Corp.*, 607 F.3d 60, 68 (2d Cir. 2010) ("An argument raised for the first time on appeal is typically forfeited."); *In re Demetriades*, 58 F.4th 37, 54 (2d Cir. 2023) (perfunctory arguments are forfeited). While we may consider forfeited arguments in our discretion to avoid a risk of manifest injustice, "there is no such risk here." *Katel Liab. Co.*, 607 F.3d at 68.

court correctly assessed the merits and standing, we do not reach the issue of irreparable harm.

I. Derivative Second Amendment Claim

Appellants first claim that New York law is so onerous that it will put them and other firearms dealers out of business, and thereby threaten their customers' Second Amendment right to acquire firearms.

We have no trouble concluding that Appellants have standing to bring such a derivative claim. "[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function." *Teixeira v. County of Alameda*, 873 F.3d 670, 678 (9th Cir. 2017) (en banc), quoting *Craig v. Boren*, 429 U.S. 190, 195, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); *see also Carey v. Population Servs., Int'l*, 431 U.S. 678, 683-84, 97 S. Ct. 2010, 52 L. Ed. 2d 675 (1977) (holding that a provider of contraceptives could bring a derivative constitutional challenge on behalf of potential customers). Several circuits have extended that principle to purveyors of firearms and ammunition, and we follow suit. *See Teixeira*, 873 F.3d at 678 (holding that a "would-be operator of a gun store" had "derivative standing to assert the subsidiary right to acquire arms on behalf of his potential customers"); *Maryland Shall Issue, Inc. v. Hogan*, 971 F.3d 199, 215-16 (4th Cir. 2020), *as amended* (Aug. 31, 2020) (holding that a firearms dealer had derivative standing to challenge restrictions on potential customers' right to acquire firearms); *Ezell*

v. City of Chicago ("*Ezell I*"), 651 F.3d 684, 696 (7th Cir. 2011) (holding that a supplier of firing-range facilities had standing to challenge a Chicago ordinance that burdened its potential customers' firearms training). We therefore hold that Appellants have derivative standing to pursue Second Amendment claims on behalf of their customer base.

Without questioning Appellants' derivative standing, the district court held that there was "no basis for their novel theory" that New York law violated their customers' right to acquire firearms by imposing too many burdens on them as commercial dealers. *Gazzola*, 645 F. Supp. 3d at 71. We conclude that there is a sufficient basis for that theory, but we hold that Appellants are not entitled to preliminary injunctive relief. As the district court found in its irreparable harm analysis (a finding that likewise bears on the merits of Appellants' derivative claim), Appellants failed to show that they would suffer the type of burden that is required for their derivative claim to succeed. *See NXIVM Corp. v. Ross Inst.*, 364 F.3d 471, 476 (2d Cir. 2004) ("We review the denial of a preliminary injunction for an abuse of discretion. But we may affirm on any ground supported by the record." (internal citation omitted)).

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *District of Columbia v. Heller*, the Supreme Court held that the Second Amendment codifies a preexisting individual

right to keep and bear arms for self-defense in case of confrontation — a right that is not limited to service in an organized militia. 554 U.S. 570, 592, 595, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). In doing so, the Court observed several limitations on the right. Importantly, the Court made clear that "nothing in [its] opinion should be taken to cast doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." *Id.* at 626-27. The Court identified such "regulatory measures," and others, as "presumptively lawful." *Id.* at 627 n.26. Two years later, when the Court held that the Second Amendment is "fully applicable to the States," *McDonald v. City of Chicago*, 561 U.S. 742, 750, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010), the Court's principal opinion "repeat[ed]" *Heller*'s "assurance[]" concerning the presumptive constitutionality of "'laws imposing conditions and qualifications on the commercial sale of arms.'" *Id.* at 786 (plurality opinion), quoting *Heller*, 554 U.S. at 626-27. Nothing in the Court's more recent decision in *New York State Rifle & Pistol Association v. Bruen* casts doubt on that understanding of the Second Amendment's scope. *See* 142 S. Ct. 2111, 2162, 213 L. Ed. 2d 387 (2022) (Kavanaugh, *J.*, concurring).

Still, the presumption of legality can be overcome. The Second Amendment, as interpreted by the Supreme Court, forbids a State from banning the in-home possession of common-use weapons by law-abiding, responsible citizens, *Heller*, 554 U.S. at 635, and requiring them to show a special need to carry such weapons outside the home, *Bruen*, 142 S. Ct. at 2156. A State cannot circumvent those holdings by banning outright the sale or transfer

of common-use weapons and necessary ammunition. As the Tennessee Supreme Court observed in 1871, "[t]he right to keep arms, necessarily involves the right to purchase them, to keep them in a state of efficiency for use, and to purchase and provide ammunition suitable for such arms, and to keep them in repair." *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178 (1871). Our pre-*Bruen* law recognized as much, observing, albeit in dicta, that "restrictions that limit the ability of firearms owners to acquire and maintain proficiency in the use of their weapons" may violate the Second Amendment under certain circumstances. *New York State Rifle & Pistol Ass'n, Inc. v. City of New York*, 883 F.3d 45, 58 (2d Cir. 2018), *vacated and remanded on other grounds*, 140 S. Ct. 1525, 206 L. Ed. 2d 798 (2020). Other circuits have recognized that principle too. *Ezell I*, 651 F.3d at 704 ("The right to possess firearms for protection implies a corresponding right to acquire and maintain proficiency in their use . . . ."); *Drummond v. Robinson Twp.*, 9 F.4th 217, 227 (3d Cir. 2021) (similar); *Teixeira*, 873 F.3d at 677-78 (similar); *Jackson v. City & County of San Francisco*, 746 F.3d 953, 967-68 (9th Cir. 2014) (similar); *see also Heller*, 554 U.S. at 617-18 (explaining that the right "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" (internal quotation marks omitted)).

It follows 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.[6] For example, when the Supreme Court recognized a right to abortion, it correspondingly recognized that a State could not circumvent the Fourteenth Amendment's prohibition on abortion bans by imposing unnecessary special regulations on abortion providers as a class that had "the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion"; such would constitute "an undue burden on the right." *Whole Woman's Health v. Hellerstedt*, 579 U.S. 582, 136 S. Ct. 2292, 2309, 195 L. Ed. 2d 665 (2016), *as revised* (June 27, 2016) (internal quotation marks omitted), *abrogated by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 213 L. Ed. 2d 545 (2022). It is indeed a fundamental principle of constitutional law that "what cannot be done directly cannot be done indirectly. The Constitution deals with substance, not shadows." *Cummings v. Missouri*, 71 U.S. 277, 325, 18 L. Ed. 356 (1866); *accord Trump v. Mazars USA, LLP*, 140 S. Ct. 2019, 2035, 207 L. Ed. 2d 951 (2020) (explaining that "separation of powers concerns are no less palpable . . . simply because the subpoenas [for the President's information] were issued to third parties").

Still, Appellants have not shown that the New York law is so restrictive that it threatens a citizen's right to

6. We have 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 (assuming a plaintiff one day produces it). But whatever the standard is, a State cannot impose a regulation on commercial firearms dealers as a class that has the effect of prohibiting law-abiding, responsible citizens from possessing common-use weapons.

acquire firearms. To that end, we find the Ninth Circuit's *en banc* decision in *Teixeira* persuasive. At issue in *Teixeira* was an Alameda County zoning ordinance that prohibited gun stores within "five hundred feet" of "schools, day care centers, liquor stores or establishments serving liquor, other gun stores, and residentially zoned districts." 873 F.3d at 674. Prospective vendors challenged the law, claiming that it violated their potential customers' right to acquire firearms and ammunition because the ordinance made it impossible to open a new gun store in Alameda County. *Id.* at 676. The district court dismissed their complaint, and the Ninth Circuit affirmed. The Ninth Circuit recognized, as we do today, "that the Second Amendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense," and explained that "the core Second Amendment right to keep and bear arms for self-defense 'wouldn't mean much' without the ability to acquire arms." *Id.* at 677, quoting *Ezell I*, 651 F.3d at 704. But, "[w]hatever the scope" of the right to acquire firearms, the prospective vendors failed to state a claim. *Id.* at 678. Exhibits attached to their complaint "demonstrate[d] that Alameda County residents may freely purchase firearms within the County." *Id.* at 679. Those exhibits showed that "there were ten gun stores in Alameda County," including one located "approximately 600 feet away from the [challengers'] proposed site." *Id.* And "gun buyers have no right to have a gun store in a particular location, at least as long as their access is not meaningfully constrained." *Id.* at 680. Nor do they have a right to "travel" only short "distances" or receive "a certain type of retail experience." *Id.* at 679-80 & n.13.

There is even less evidence here than in *Teixeira* that New York citizens will be meaningfully constrained — or, for that matter, constrained at all — in acquiring firearms and ammunition. Appellants claim that New York law will put them and other FFLs out of business by requiring them to secure firearms "in a locked fireproof safe or vault" outside of business hours, *see* N.Y. Gen. Bus. L. § 875-b(1)(a); install security alarm systems at each point of exit, entrance, and sale, *see id.* § 875-b(2); provide State Police-developed training to their employees, *see id.* § 875-e(1); perform monthly inventory checks, *see id.* § 875-f(2); provide State Police with full access to their premises during periodic onsite inspections, *see id.* § 875-g(2)(a); prohibit minors from entering their stores without a parent or guardian, *see id.* § 875-c; and hire employees who are at least twenty-one years old, *see id.* § 875-e(3). But, besides Appellants' say-so, there is no evidence that those regulations will impose such burdensome requirements on firearms dealers that they restrict protections conferred by the Second Amendment.

Urging otherwise, Appellants estimate that the challenged laws could impose more than $1 billion dollars in compliance costs on all FFLs in the State. That figure, however, finds no support in record evidence. Appellants rely principally on their unverified, unsworn complaint. While a few of Appellants' sworn declarations contain some estimates of the financial impact of New York's commercial regulations, their declarations are speculative, focus only on their businesses, and offer no documentary evidence in support. The district court thus did not err, let alone clearly err, in holding that Appellants failed to "present

sufficient evidence to demonstrate" that "their businesses may close absent injunctive relief." *Gazzola*, 645 F. Supp. 3d at 56-57. It follows that Appellants, whose declarations (again) focused only on their anticipated costs, failed to present sufficient evidence that *any* New York firearms dealers — let alone a critical mass of the more than 1,700 such dealers — may close due to the challenged regulations. It bears repeating that "gun buyers have no right to have a gun store in a particular location," nor a right to "travel" no more than short "distances" to the most convenient gun store that provides what they deem a satisfactory "retail experience." *Teixeira*, 873 F.3d at 679-80 & n.13. On the record before us in this case, there is no evidence that New Yorkers currently lack, or will lack under the challenged statutes, relatively easy access to sellers of firearms.

Accordingly, the district court did not exceed its discretion in denying Appellants' motion for preliminary injunctive relief on their derivative Second Amendment claim.

II. Preemption

Appellants claim that several provisions of New York law are preempted by federal law and thus violate the Supremacy Clause. The district court thoroughly examined and rejected each of Appellants' theories of preemption, and we perceive no error.

"In general, three types of preemption exist: (1) express preemption, where Congress has expressly

preempted local law; (2) field preemption, 'where Congress has legislated so comprehensively that federal law occupies an entire field of regulation and leaves no room for state law'; and (3) conflict preemption, where local law conflicts with federal law such that it is impossible for a party to comply with both or the local law is an obstacle to the achievement of federal objectives." *New York SMSA Ltd. P'ship v. Town of Clarkstown*, 612 F.3d 97, 104 (2d Cir. 2010), quoting *Wachovia Bank, N.A. v. Burke*, 414 F.3d 305, 313 (2d Cir. 2005). "The latter two are forms of implied preemption." *Figueroa v. Foster*, 864 F.3d 222, 228 (2d Cir. 2017).

In arguing that federal law preempts state law, Appellants rely on 18 U.S.C. §§ 923 and 926 and regulations promulgated pursuant to § 926. But they ignore that Congress, in 18 U.S.C. § 927, expressly disclaimed field preemption:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

18 U.S.C. § 927. Thus, because "[t]he key to the preemption inquiry is the intent of Congress[,]" *New York SMSA Ltd. P'ship*, 612 F.3d at 104, Appellants must rely on conflict

preemption, demonstrating "a direct and positive conflict between" federal and state law such "that the two cannot be reconciled or consistently stand together," 18 U.S.C. § 927. They fail to satisfy that burden.

A. New York General Business Law § 875-b

Appellants challenge New York General Business Law § 875-b(1), which requires them to "implement a security plan" satisfying certain minimum specifications "for securing firearms, rifles and shotguns," including while those firearms are "in shipment." N.Y. Gen. Bus. L. § 875-b(1). Appellants assert that § 875-b(1) conflicts with federal law because, when an FFL ships a firearm to another FFL, § 875-b(1) makes *both* FFLs responsible for maintaining a security plan while those firearms are "in shipment," *id.*, whereas federal law makes only the *transferring FFL* responsible for firearms that are in shipment. In support of that theory, they cite 18 U.S.C. § 923(g)(6) and 27 C.F.R. § 478.39a. But neither supports that theory.

Both provisions require FFLs to report firearms that were lost or stolen from their "inventory" or "collection" to the Attorney General and appropriate local authorities within forty-eight hours, 18 U.S.C. § 923(g)(6); 27 C.F.R. § 478.39a(a)(1), and the federal regulation provides that, "[w]hen a firearm is stolen or lost in transit on a common or contract carrier (which for purposes of this paragraph includes the U.S. Postal Service), it is considered stolen or lost from the transferor/sender licensee's inventory *for reporting purposes*. Therefore, the transferor/sender of

the stolen or lost firearm shall *report* the theft or loss of the firearm within 48 hours after the transferor/sender discovers the theft or loss." 27 C.F.R. § 478.39a(a)(2) (emphases added). In other words, under federal law, it is the transferring FFL who must *report* a lost or stolen firearm. Nothing about New York law alters that duty, poses an obstacle to FFLs fulfilling that duty, or allocates responsibility in a way that conflicts with federal law. To the extent that New York law imposes *additional* duties on the transferee FFL, there is no conflict between federal and state law.

B. New York General Business Law § 875-f

Next, Appellants claim that New York General Business Law § 875-f is preempted by 18 U.S.C. §§ 923(g) and 926(a).

New York General Business Law § 875-f requires firearms dealers to "establish and maintain a book" or "electronic-based record of purchase, sale, inventory, and other records at the dealer's place of business in such form and for such period as the superintendent shall require." N.Y. Gen. Bus. L § 875-f. Among other information, those records must include, "at a minimum," (1) "the make, model, caliber or gauge, manufacturer's name, and serial number of all firearms, rifles and shotguns that are acquired or disposed of not later than one business day after their acquisition or disposition"; (2) an accounting, by means of a monthly "inventory check," of "all firearms, rifles and shotguns acquired but not yet disposed of"; (3) "firearm, rifle and shotgun disposition information,

including the serial numbers of firearms, rifles and shotguns sold, dates of sale, and identity of purchasers"; and (4) "records of criminal firearm, rifle and shotgun traces initiated by [ATF]." *Id.* § 875-f(1)-(4).

18 U.S.C. § 923(g)(1)(A) and its implementing regulation require FFLs to maintain similar records. *See* 18 U.S.C. § 923(g)(1)(A); 27 C.F.R. § 478.125(e). However, and central to Appellants' theory of preemption, while New York law requires firearms dealers to semi-annually report their records to the State Police, N.Y. Gen. Bus. L. § 875-f, federal law does not. Moreover, federal law expressly prohibits the Attorney General from enacting any "rule or regulation" requiring such reporting or otherwise establishing a "system of registration of firearms, firearms owners, or firearms transactions or dispositions." 18 U.S.C. § 926(a)(3). According to Appellants, if the Attorney General cannot require FFLs to semiannually report their disposition records or establish a firearm registry, neither can New York.

But that conclusion does not logically follow. Again, Congress expressly declined to "occupy the field," and instructed courts that state law is preempted only where "there is a direct and positive conflict between" federal and state law such "that the two cannot be reconciled or consistently stand together." 18 U.S.C. § 927. Nothing in federal law expressly prohibits States from requiring firearms dealers to routinely report their sale and inventory records to State Police. And, simply put, a limitation on the *Attorney General*'s regulatory authority is not in direct and positive conflict with the power of *New*

York to exercise broader regulatory authority. As the district court observed, it "is a hallmark of federalism" that a State may presumptively exercise regulatory authority in areas over which the federal government may not or does not. *Gazzola*, 645 F. Supp. 3d at 62, citing *Gonzales v. Raich*, 545 U.S. 1, 74, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Thomas, *J.*, dissenting) ("Our federalist system, properly understood, allows . . . States to decide . . . how to safeguard the health and welfare of their citizens.").

C. New York Executive Law § 228 & New York Penal Law § 400.02

Finally, Appellants challenge New York Executive Law § 228 and New York Penal Law § 400.02 on the ground that they will result in a misuse of the federal background check system — the NICS — and are therefore preempted.

Federal law prohibits certain classes of people, like felons, drug addicts, and the mentally ill, from purchasing or possessing firearms or ammunition. 18 U.S.C. § 922(g)(1), (3)-(4). Concomitantly, federal law prohibits "any person" from "sell[ing] or otherwise dispos[ing] of any firearm or ammunition" to individuals whom they know or have reasonable cause to believe fall within those classes of people. *Id.* § 922(d). As a special check, federal law requires FFLs to submit certain identifying information of a buyer or transferee to the NICS, which is maintained by the Federal Bureau of Investigation ("FBI"), which in turn checks a database known as the NICS Index for whether federal law prohibits the buyer or transferee from

possessing a firearm. 18 U.S.C. § 922(t)(1)(A)-(B); *see also* 28 C.F.R. § 25.1, *et seq.*

While the FBI ordinarily conducts that check, *see* 28 C.F.R. § 25.6(b)-(c), a State may alternatively designate a "law enforcement agency" as a point of contact ("POC") to "serv[e] as an intermediary between an FFL and the federal databases checked by the NICS," *id.* § 25.2; *see also id.* § 25.6(d)-(h). In that scenario, the "POC will receive NICS background check requests from FFLs, check state or local record systems, perform NICS inquiries, determine whether matching records provide information demonstrating that an individual is disqualified from possessing a firearm under Federal or state law, and respond to FFLs with the results of a NICS background check." *Id.* § 25.2. When conducting "a NICS background check, POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems." *Id.* § 25.6(e).

Importantly, a POC may not purposely use the NICS for "unauthorized purposes," *id.* § 25.11(b)(2), and "[a]ccess to the NICS Index for purposes unrelated to NICS background checks" is prohibited unless for:

> (1) Providing information to Federal, state, tribal, or local criminal justice agencies in connection with the issuance of a firearm-related or explosives-related permit or license, including permits or licenses to possess, acquire, or transfer a firearm, or to carry a concealed firearm, or to import, manufacture, deal in, or purchase explosives;

> (2) Responding to an inquiry from the Bureau of Alcohol, Tobacco, Firearms, and Explosives in connection with a civil or criminal law enforcement activity relating to the Gun Control Act (18 U.S.C. Chapter 44) or the National Firearms Act (26 U.S.C. Chapter 53); or,
>
> (3) Disposing of firearms in the possession of a Federal, state, tribal, or local criminal justice agency.

Id. § 25.6(j)(1)-(3).

Appellants claim that New York Executive Law § 228 and New York Penal Law § 400.02 will result in misuse of the NICS. But they do not explain how. New York Executive Law § 228 designates the State Police as a point of contact for NICS background checks, N.Y. Exec. L. § 228(1)(a), as federal regulations expressly contemplate, 28 C.F.R. §§ 25.2, 25.6(d)-(h). New York Executive Law § 228 also directs the State Police to create a "statewide firearms license and records database" containing records provided by various other state-level agencies, including "the division of criminal justice services, office of court administration, New York state department of health, New York state office of mental health, and other local entities." N.Y. Exec. L. § 228(3). The State Police are directed to use that database when conducting NICS background checks upon an FFL's request, *id.*, and its doing so, again, is expressly authorized by federal regulations, *see* 28 C.F.R. § 25.6(e) ("Upon receiving a request for a NICS

background check, POCs may also conduct a search of available files in state and local law enforcement and other relevant record systems . . . .").

Appellants seem to take issue with New York law directing FFLs to initiate background checks through the State Police for ammunition sales. In particular, Appellants speculate that, when conducting background checks for ammunition sales, the State Police will use the NICS Index, checks that are not expressly authorized by federal law and thus, they claim, unlawful. But even if such use would be unlawful, New York law authorizes no such thing. New York law requires firearms and ammunition dealers to initiate background checks for ammunition sales through a "*statewide* license and record database" maintained by the State Police — not through the NICS Index — before transferring ammunition to a non-dealer. N.Y. Pen. L. § 400.02(2)(a) (emphasis added); *see also id.* § 400.02(2) (directing the State Police to create and maintain a "statewide license and record database specific for ammunition sales"); N.Y. Exec. L. § 228(3) (directing the State Police to consult the "statewide firearms license and records database" for purposes of "firearm permit[]" certification and recertification, "assault weapon registration," and "ammunition sales"). And Appellants cite nothing that prohibits a State from conducting background checks for ammunition sales. Again, Congress expressly chose not to occupy the field of regulating firearms. *See* 18 U.S.C. § 927. So, the fact that federal law does not require background checks for ammunition sales does not mean that New York cannot require such checks. New York's residual authority to

do so is, as the district court aptly put it, "a hallmark of federalism." *Gazzola*, 645 F. Supp. 3d at 62.[7]

In sum, Appellants' preemption theories lack merit. The district court therefore did not exceed its discretion in denying their motion for preliminary injunctive relief on those claims.[8]

III. Individual Claims

Appellants, proceeding now as individuals, claim that New York law violates their Second Amendment rights by requiring them to obtain a license to possess semiautomatic rifles, N.Y. Pen. L. § 400.00(2); undergo background checks to purchase ammunition, N.Y. Pen. L. § 400.02(2); and undergo firearms training to renew their concealed-carry licenses, N.Y. Pen. L. § 400.00(1)(o)(iii).

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7. We understand Appellants to accuse New York of "authoriz[ing] [itself] to hack NICS and steal FFL paper dealer records," Appellants' Reply Br. 12, and of authorizing State Police to retain NICS-related information in violation of 28 C.F.R. § 25.9, which governs the destruction and retention of such information, *id.* at 10. Those imputations, however, are not backed by any legal or evidentiary support.

8. It follows that the district court appropriately rejected Appellants' self-incrimination claim. Appellants claim that New York law violates their right to be free from self-incrimination by compelling them to annually certify their compliance with New York law. *See* N.Y. Gen. Bus. L. § 875-g(1)(b). That claim rests on their predicate claim that New York law conflicts with federal law, such that compliance with New York law would implicitly be a violation of federal law. Because Appellants failed to show that predicate, their self-incrimination claim necessarily fails.

The district court held that Appellants lacked Article III standing to challenge each law, *Gazzola*, 645 F. Supp. 3d at 53-54, and we agree.

"To establish Article III standing, a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likelihood' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157-58, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (alterations adopted), quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992). An Article III-sufficient injury, however, must be "'concrete and particularized' and 'actual or imminent,' not 'conjectural' or 'hypothetical.'" *Id.* at 158, quoting *Lujan*, 504 U.S. at 560.

"Pre-enforcement challenges to criminal statutes are 'cognizable under Article III.'" *Picard v. Magliano*, 42 F.4th 89, 97 (2d Cir. 2022), quoting *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016). "As the Supreme Court has made clear, a plaintiff has suffered an injury-in-fact and has standing to bring a case when he is facing the 'threatened enforcement of a law' that is 'sufficiently imminent.'" *Id.*, quoting *Susan B. Anthony List*, 573 U.S. at 158-59. "Specifically, a plaintiff satisfies the injury-in-fact requirement where he alleges an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* (internal quotation marks omitted). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate

standing for each claim that they press and for each form of relief that they seek (for example, injunctive relief and damages)." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208, 210 L. Ed. 2d 568 (2021).

First, Appellants challenge New York Penal Law § 400.00(2), which requires an individual to have a license "to purchase or take possession of . . . a semiautomatic rifle when such transfer of ownership occurs." N.Y. Pen. L. § 400.00(2). Upon application, such a license "shall be issued" by the appropriate licensing authority if the applicant satisfies all relevant statutory criteria. *Id.* That licensing requirement does not apply retroactively; it applies only to future purchases or transfers of semiautomatic rifles. *Id.*

Christopher Martello is the only party who plausibly claims a desire to purchase a semiautomatic rifle, stating in his sworn declaration: "I desire to purchase additional semi-automatic rifles for personal self-defense and sporting purposes." J. App'x 271, ¶ 11. But his objection to the licensing requirement is not that he must obtain a license; instead, he complains that Livingston County, where he resides, is not providing license applications. As the district court pointed out, however, he fails to show how the *non-defendant* county's failure to provide license applications is fairly traceable to the challenged action of the *named defendants* - Governor Hochul, Attorney General James, Superintendent Chiumento, and Commissioner Rosado. *See Gazzola*, 645 F. Supp. 3d at 53, citing *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 134 n.6, 134 S. Ct. 1377, 188 L. Ed. 2d

392 (2014). "[N]o court may 'enjoin the world at large,' or purport to enjoin challenged 'laws themselves.'" *Whole Woman's Health v. Jackson*, 595 U.S. 30, 142 S. Ct. 522, 535, 211 L. Ed. 2d 316 (2021), first quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (Hand, *J.*), and then quoting *Whole Woman's Health v. Jackson*, 141 S. Ct. 2494, 2495, 210 L. Ed. 2d 1014 (2021) (on application for injunctive relief).[9]

Second, Appellants challenge New York Penal Law § 400.02(2), which requires sellers of ammunition to run background checks against a newly created statewide records and license database before selling such ammunition. N.Y. Pen. L. § 400.02(2)(a). In doing so, the seller must provide the database with the transferee's identity and "the amount, caliber, manufacturer's name and serial number, if any, of such ammunition." *Id.* § 400.02(2)(a).

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9. Moreover, even if Martello had sued Livingston County, we are skeptical that his bald claim — that he "desire[s] to purchase additional semi-automatic rifles," J. App'x 271, ¶ 11 - is sufficient to state an actual or imminent injury within the meaning of Article III. Ordinarily, "'some day' intentions — without any description of concrete plans, or indeed even any specification of when the some day will be — do not support a finding of the 'actual or imminent' injury that our cases require." *Lujan*, 504 U.S. at 564; *see also Colo. Outfitters Ass'n v. Hickenlooper*, 823 F.3d 537, 553 (10th Cir. 2016) ("The mere possibility that 'some day' a member of Outdoor Buddies might wish to obtain or retain a firearm before or after a hunt and that he or she might then experience difficulties obtaining the requisite background check is insufficient to establish an imminent injury for purposes of Article III standing.").

Craig Serafini is the only party who complains about that requirement in his individual capacity, claiming that he has not purchased ammunition since the law went into effect because, like others, he does not want to disclose his personal information to the government. But Serafini is a seller of ammunition, and the background-check requirement applies only to "any *other* person who is *not* a dealer in firearms . . . or a seller of ammunition." *Id.* § 400.02(2) (emphases added). Thus, because New York Penal Law § 400.02(2) does not require him to undergo a background check when he purchases ammunition, he does not have standing to challenge it.

Finally, Appellants challenge New York Penal Law § 400.00(1)(o)(iii), which requires an applicant for a concealed-carry license to provide a licensing officer with a certificate verifying his successful completion of firearms training that satisfies certain specifications. N.Y. Pen. L. § 400.00(1)(o)(iii); *see also id.* § 400.00(19) (outlining the training requirements). That training requirement applies also to an individual who "renew[s]" an existing license. *Id.* § 400.00(1). But an individual who already has a concealed-carry license, and who does not reside in New York City or Nassau, Suffolk, or Westchester Counties, need not renew the license. *Id.* § 400.00(10)(a). Instead, the license remains "in force and effect" so long as it is not "revoked or cancelled." *Id.* That individual need only "recertif[y]" the license by submitting the appropriate recertification form with all necessary information before the license expires. *Id.* § 400.00(10)(b).

The individual Appellants lack standing to challenge the training requirement because, simply put, it does not apply to them. The record indicates that eight of them have a concealed-carry license, and that none of those eight resides in New York City or Nassau, Suffolk, or Westchester Counties. Meanwhile, the record contains no information about Jim Ingerick's licensing situation. But he bears the burden to show he has standing. He therefore lacks standing to challenge the firearms training requirement because he has failed to show that it applies to him.

Accordingly, the district court correctly held that Appellants lacked standing to bring their individual Second Amendment claims.

CONCLUSION

We have considered Appellants' remaining arguments on appeal and find them to be without merit. Accordingly, we **AFFIRM** the district court's order denying their motion for preliminary injunctive relief.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK, FILED DECEMBER 7, 2022

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

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

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

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

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

Plaintiffs,

v.

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

Defendants.

Appendix B

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

MEMORANDUM-DECISION AND ORDER

I. INTRODUCTION

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

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

65 of the Federal Rules of Civil Procedure seeking an order enjoining enforcement of the challenged provisions. (Dkt. No. 13, at 2-5.) The motion is fully briefed, with an opposition from Defendants and a reply by Plaintiffs. (Dkt. Nos. 29, 33.) The Court held a hearing on December 1, 2022. After considering the parties' submissions and oral arguments, the Court orally denied Plaintiffs' motion for a temporary restraining order and preliminary injunction and indicated that a written decision would follow. (Dkt. No. 37.) This is that decision, including the Court's findings of fact and conclusions of law in accordance with Rule 52(a)(2).

II. FACTS[2]

A. Plaintiffs

Plaintiffs are nine individuals and one business organization.[3] At least eight[4] of the Plaintiffs are qualified under federal law as "Responsible Persons," (Dkt. No. 13-2, ¶ 11 n.1), associated with a federal firearms license ("FFL"). (*Id.* ¶ 11; Dkt. No. 13-3, ¶ 14; Dkt. No. 13-4, ¶ 6;

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

3. In the complaint, Plaintiffs initially suggest that the business organizations owned by Plaintiffs are also Plaintiffs themselves. (Dkt. No. 1, at 2.) However, the complaint lists only the individuals, plus Empire State Arms Collectors, Inc., under the "Parties" heading. (*Id.* ¶¶ 6-21.) Plaintiffs also describe this action as being filed "on behalf of 10 Plaintiffs." (Dkt. No. 33, at 5.) Accordingly, the group of Plaintiffs consists only of the nine named individuals and Empire State Arms Collectors, Inc.

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

Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 13; Dkt. No. 13-7, ¶ 6; Dkt. No. 13-8, ¶ 6; Dkt. No. 13-9, ¶ 6.) At least seven[5] of the nine business organizations owned by Plaintiffs possess federal firearms licenses that allow them to serve as dealers in firearms. (Dkt. No. 13-2, ¶ 12; Dkt. No. 13-3, ¶ 13-14; Dkt. No. 13-4, ¶ 6; Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 13; Dkt. No. 13-7, ¶ 6; Dkt. No. 13-8, ¶ 6; Dkt. No. 13-9, ¶ 6); *see also* 18 U.S.C. § 921(a)(11)(A). Two of these business organizations possess federal firearms licenses that allow them to serve as firearms manufacturers. (Dkt. No. 13-2, ¶ 12; Dkt. No. 13-3, ¶ 14; Dkt. No. 13-6, ¶ 13); *see also* 18 U.S.C. § 921(a)(10). One of the business organizations possesses a federal firearms license that allows it to serve as a firearms pawnbroker. (Dkt. No. 13-7, ¶ 6); *see also* 18 U.S.C. § 921(a)(12). At least six[6] of the nine business organizations also hold firearms licenses under New York law. (Dkt. No. 13-2, ¶ 15; Dkt. No. 13-4, ¶ 7; Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 15; Dkt. No. 13-7, ¶ 7; Dkt. No. 13-9, ¶ 7.) Plaintiff Empire State Arms Collectors, Inc., holds neither a federal nor a New York firearms license. (Dkt. No. 1, ¶ 14.)[7]

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

6. There is no indication that the business organization associated with Plaintiff Jim Ingerick, "Avon Gun & Hunting Supply," has a New York firearms license. And although Plaintiff Robert Owens submitted an affidavit in connection with Plaintiffs' motion for a temporary restraining order and preliminary injunction, there is no indication that the business associated with him, "Thousand Islands Armory," has a New York firearms license. (Dkt. No. 13-8.)

7. According to the complaint, Plaintiff Jim Ingerick "serves as the President" of Empire State Arms Collectors Association, Inc.,

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B. Challenged Laws

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

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an organization whose "primary function" is hosting a gun show, and Ingerick is "authorized to participate on its behalf for purposes of this litigation." (*Id.* ¶ 14.)

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

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

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New York Penal Law	**New York General Business Law**	**New York Executive Law**
N.Y. Penal § 265.20(3-a)	N.Y. Gen. Bus. § 875-b(1)	N.Y. Exec. § 144-a
N.Y. Penal § 270.22	N.Y. Gen. Bus. § 875-b(2)	N.Y. Exec. § 228
N.Y. Penal § 400.00(1)	N.Y. Gen. Bus. § 875-c	N.Y. Exec. § 837(23)(a)
N.Y. Penal § 400.00(2)	N.Y. Gen. Bus. § 875-e	
N.Y. Penal § 400.00(3)	N.Y. Gen. Bus. § 875-f	
N.Y. Penal § 400.00(6)	N.Y. Gen. Bus. § 875-g(1)(b)[9]	
N.Y. Penal § 400.00(7)	N.Y. Gen. Bus. § 875-g(2)	
N.Y. Penal § 400.00(8)	N.Y. Gen. Bus. § 875-h	
N.Y. Penal § 400.00(9)		
N.Y. Penal § 400.00(14)		
N.Y. Penal § 400.00(19)		
N.Y. Penal § 400.02(2)		
N.Y. Penal § 400.03(2)		

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

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

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

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

Appendix B

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

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

III. STANDARD OF REVIEW

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

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

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

is[] 'the last actual, peaceable uncontested status which preceded the pending controversy.'" *Id.* (quoting *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam)).

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

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

2020); *Hester*, 985 F.3d at 177. But Plaintiffs concede that some of the challenged provisions had already gone into effect. (Dkt. No. 33, at 4.) The injunctive relief Plaintiffs request with regard to these laws would not maintain "the last actual, peaceable uncontested status which preceded the pending controversy," *Hester*, 985 F.3d at 177 (quoting *N. Am. Soccer League*, 883 F.3d at 37), but would instead "alter the status quo by commanding some positive act," *Citigroup*, 598 F.3d at 35 n.4 (quoting *Tom Doherty Assocs.*, 60 F.3d at 34). Thus, for these provisions, the Plaintiffs "must meet a heightened legal standard by showing 'a clear or substantial likelihood of success on the merits.'" *N. Am. Soccer League*, 883 F.3d at 37 (quoting *N.Y. Civ. Liberties Union.*, 684 F.3d at 294).

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

IV. ANALYSIS

A. Standing

The parties did not fully raise the issue of standing.[14] However, the Court "bears an independent obligation to assure . . . that jurisdiction is proper before proceeding to the merits." *Plains Com. Bank v. Long Fam. Land & Cattle Co.*, 554 U.S. 316, 324, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94-95, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998)). Therefore, the Court will consider whether Plaintiffs have standing.

The jurisdiction of federal courts is limited to "Cases" and "Controversies." U.S. Const., art. III, § 2; *see also In re Clinton Nurseries, Inc.*, 53 F.4th 15, 22 (2d Cir. 2022). The doctrine of standing "gives meaning to these constitutional limits by "identify[ing] those disputes which are appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992)); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016). To establish standing, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) 'a likel[ihood]' that

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

the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List*, 573 U.S. at 157-58 (quoting *Lujan*, 504 U.S. at 560-61). An injury must be "concrete and particularized" and "actual or imminent," not "conjectural or hypothetical." *Id.* at 158 (quoting *Lujan*, 504 U.S. at 560). "'The party invoking federal jurisdiction bears the burden of establishing' standing," *id.* at 158 (quoting *Amnesty Int'l USA*, 568 U.S. at 411-12), and the party must establish standing for each claim, *Davis v. FEC*, 554 U.S. 724, 734, 128 S. Ct. 2759, 171 L. Ed. 2d 737 (2008). "At least one plaintiff must have standing to seek each form of relief requested in the complaint." *Town of Chester v. Laroe Ests., Inc.*, 581 U.S. 433, 137 S. Ct. 1645, 1651, 198 L. Ed. 2d 64 (2017).

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

To establish standing for a preliminary injunction, a party cannot rely on "mere allegations" but must "'set forth' by affidavit or other evidence 'specific facts'

which for purposes of [the] motion will be taken as true." *Cacchillo v. Insmed, Inc.*, 638 F.3d 401, 404 (2d Cir. 2011) (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 907 n.8, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990)).

1. Standing as Owners of FFL Businesses

The Court finds, for the purpose of ruling on the motion for a temporary restraining order and preliminary injunction, that at least one Plaintiff has satisfied the standing requirements for each claim. Several Plaintiffs have alleged existing economic injuries arising from the challenged New York laws that are already in effect that could plausibly be redressed by enjoining those laws. (Dkt. No. 13-2, ¶¶ 56-61; Dkt. No. 13-3, ¶ 42; Dkt. No. 13-4, ¶ 22; Dkt. No. 13-6, ¶¶ 53, 61, 69; Dkt. No. 13-7, ¶ 37; Dkt. No. 13-8, ¶¶ 52, 59; Dkt. No. 13-9, ¶¶ 13-14); *see also SM Kids, LLC v. Google LLC*, 963 F.3d 206, 211 (2d Cir. 2020). Each of Plaintiffs' claims involves at least one of these laws that is already in effect. (Dkt. No. 13, at 3-5.) Furthermore, several Plaintiffs allege an intention to violate the remaining laws that have not yet taken effect. (Dkt. No. 13-2, ¶¶ 64, 66, 68, 69, 70; Dkt. No. 13-3, ¶ 22; Dkt. No. 13-4, ¶¶ 29, 66, 83; Dkt. No. 13-5, ¶ 65; Dkt. No. 13-6, ¶¶ 40, 79, 87, 88, 92, 95; Dkt. No. 13-7, ¶ 71; Dkt. No. 13-8, ¶ 30.) Given that "courts are generally willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund," *Picard v. Magliano*, 42 F.4th 89, 98 (2d Cir. 2022) (internal quotation marks omitted), this is sufficient to establish an "intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed

by a statute, and [that] there exists a credible threat of prosecution thereunder." *See Susan B. Anthony List*, 573 U.S. at 159 (quoting *Farm Workers Nat'l Union*, 442 U.S. at 298). Thus, taking these allegations to be true at this stage, and considering the alleged existing injuries and the intentions to violate the New York statutes together, Plaintiffs have satisfied the standing requirements for seeking a temporary restraining order and preliminary injunction as owners of FFL businesses.

2. Individual Standing to Pursue a Second Amendment Claim

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

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

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

Plaintiff Craig Serafini makes a similar assertion with regard to ammunition, stating: "People don't want to give their name and personal information out every time they buy [ammunition]. . . . I don't blame them. I, myself, haven't purchased any ammunition since the new law went into effect. I'm leading in this section in my role as an FFL, but I also wish to remind the Court that my individual rights are being violated, as well." (Dkt. No. 13-4, ¶¶ 54-55). For the same reasons, these allegations are insufficient to demonstrate a concrete and particularized and actual and imminent injury.

Finally, with respect to the renewal of a concealed carry permit, Plaintiff Seth Gazzola states: "I have a concealed carry permit that I want to timely renew, which will require a valid training course." (Dkt. No. 13-3, ¶ 39.).[16] As with the claims of Plaintiffs Martello and Serafini, Plaintiffs fail to demonstrate how this single sentence, evincing a desire to timely renew a permit, amounts to

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

an actual, imminent, concrete, and particularized injury. *See Susan B. Anthony List*, 573 U.S. at 158. Accordingly, the Court limits its finding of standing to Plaintiffs as FFL businesses.

B. Injunctive Relief

1. Irreparable Harm

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

17. Defendants further argue that, even assuming Plaintiffs can establish irreparable harm, Plaintiffs' delay in seeking an injunction undermines any assertion of irreparable harm. (*Id.* at 10-11.) The challenged laws were passed between May 30, 2022, and July 1, 2022. (Dkt. No. 1, ¶ 1.) "Preliminary injunctions are generally granted under the theory that there is an urgent need for speedy action to protect the plaintiffs' rights. Delay in seeking enforcement of those rights, however, tends to indicate at least a reduced need for such drastic, speedy action." *Citibank N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985); *see also Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144-45 (2d Cir. 2005) ("We have found delays of as little as ten weeks sufficient to defeat the presumption

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

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of irreparable harm that is essential to the issuance of a preliminary injunction. By contrast, we have held that a short delay does not rebut the presumption where there is a good reason for it, as when a plaintiff is not certain of the infringing activity . . . ." (citations omitted)). Because Plaintiffs fail to demonstrate, for any of their claims, a likelihood of success on the merits, the Court need not consider whether the delay in seeking injunctive relief undermines Plaintiffs' contention that they will be irreparably harmed. *See Weight Watchers Int'l*, 423 F.3d at 145.

Generally, "[a] court will presume that a movant has established irreparable harm in the absence of injunctive relief if the movant's claim involves the alleged deprivation of a constitutional right." *J.S.G. ex rel. J.S.R*, 330 F. Supp. 3d at 738; *Mitchell v. Cuomo*, 748 F.2d 804, 806 (2d Cir. 1984) ("When an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary." (quoting 11 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure, § 2948 (1973))). Courts have, however, found that "the mere allegation of a constitutional infringement itself does not constitute irreparable harm." *Lore v. City of Syracuse*, No. 00-cv-1833, 2001 U.S. Dist. LEXIS 26942, at *17, 2001 WL 263051, at *6 (N.D.N.Y. Mar. 9, 2001). Indeed, the presumption of irreparable harm is triggered only where the alleged constitutional deprivation "is convincingly shown and that violation carries noncompensable damages." *Donohue v. Mangano*, 886 F. Supp. 2d 126, 150 (E.D.N.Y. 2012) (citing *Donohue v. Paterson*, 715 F. Supp. 2d 306, 315 (N.D.N.Y. 2010)). And "the Court cannot determine whether the constitutional deprivation is convincingly shown without assessing the likelihood of success on the merits." *Id.* at 150 (citing *Turley v. Giuliani*, 86 F. Supp. 2d 291, 295 (S.D.N.Y. 2000)).

As discussed below, Plaintiffs have failed to demonstrate a likelihood of success on the merits of any of their claims—that is, Plaintiffs have not convincingly shown a constitutional deprivation, *see Donohue*, 886 F. Supp. 2d at 150. Accordingly, the Court will not "presume that [Plaintiffs] ha[ve] established irreparable harm in the

absence of injunctive relief." *See J.S.G. ex rel. J.S.R.*, 330 F. Supp. 3d at 738.

Plaintiffs assert that the "loss of ability to sell entire lines of merchandise, such as handguns and semi-automatic rifles" constitutes irreparable injury. (Dkt. No. 13-11, at 7.) This injury arises, Plaintiffs suggest, both from specific laws, such as those requiring a training course for new licenses, (Dkt. No. 13-2, ¶ 59; Dkt. No. 13-5, ¶ 30; Dkt. No. 13-7, ¶ 38; Dkt. No. 13-8, ¶ 52), those requiring a license for purchasing semi-automatic rifles, (Dkt. No. 13-2, ¶¶ 57, 59; Dkt. No. 13-4, ¶ 63; Dkt. No. 13-5, ¶¶ 29-30; Dkt. No. 13-6, ¶¶ 57-58; Dkt. No. 13-7, ¶¶ 34, 37), and those requiring the collection of customer information for ammunition sales, (Dkt. No. 13-2, ¶ 61; Dkt. No. 13-4, ¶ 54; Dkt. No. 13-6, ¶ 69; Dkt. No. 13-7, ¶ 37; Dkt. No. 13-8, ¶ 52; Dkt. No. 13-9, ¶ 14), and from the "chilling" effect on firearms sales that the new laws have created, (Dkt. No. 13-2, ¶¶ 25-26).

Plaintiffs Nadine Gazzola and John Hanusik provide the only quantified data related to the alleged irreparable injury: Plaintiff Nadine Gazzola claims that "September sales in the categories of handguns and semi-automatic rifles were down Ninety Percent (90%) and October continued to be depressed," (*id.* ¶ 57), and "[a]mmunition sales have been irregular, at best. There was a drop-off. Then for approximately two weeks there were no sales," (*id.* ¶ 61); Plaintiff John Hanusik similarly alleges that "[s]ales in firearms at A.G.A. Sales are down 40%-50%." (Dkt. No. 13-9, ¶ 13.) Other Plaintiffs allege losses without quantifying them. Plaintiff Nicholas Affronti claims that

"sales are crashing for handguns and for semi-automatic rifles[] [and] [a]ncillary sales, like ammunition, are falling right alongside it." (Dkt. No. 13-7, ¶ 37.) Plaintiff Christopher Martello states: "*What ammunition sales?* Is the easiest way I can convey to the Court what is happening to business as a result of the new laws. . . . The retail side of business has gone crickets." (Dkt. No. 13-6, ¶ 69.)

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

A "company's loss of reputation, good will, and business opportunities" can constitute irreparable harm, *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 404 (2d Cir. 2004), "because these damages 'are difficult to establish

and measure.'" *Regeneron Pharms., Inc. v. United States HHS*, 510 F. Supp. 3d 29, 40 (S.D.N.Y. 2020) (quoting Register.com, 356 F.3d at 404). But in general, decreased sales alone are insufficient to constitute irreparable harm because such injuries can be adequately compensated with money damages. *See Tom Doherty Assocs.*, 60 F.3d at 38 ("[W]e have found no irreparable harm . . . [when] lost profits stemming from the inability to sell [certain products] could be compensated with money damages determined on the basis of past sales of [those products] and of current and expected future market conditions."); *see also Kane v. De Blasio*, 19 F.4th 152, 171-72 (2d Cir. 2021) ("Plaintiffs . . . face economic harms, principally a loss of income, . . . [that] do not justify an injunction . . . ."); *Register.com, Inc.*, 356 F.3d at 404 ("If an injury can be appropriately compensated by an award of monetary damages, then an adequate remedy at law exists, and no irreparable injury may be found to justify specific relief."). And while being forced out of business entirely can constitute irreparable harm, *see Entergy Nuclear Vt. Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (citing *Tom Doherty Assocs.*, 60 F.3d at 37), Plaintiffs do not present sufficient evidence to demonstrate such a danger by, for instance, describing how decreased sales in certain categories—namely, semi-automatic rifles, handguns, and ammunition—impact overall profitability and, consequently, the very viability of Plaintiffs' businesses. *See Rex Med. L.P. v. Angiotech Pharms. (US), Inc.*, 754 F. Supp. 2d 616, 622-23 (S.D.N.Y. 2010).[18] Nor do Plaintiffs'

18. Plaintiff Nadine Gazzola comes closest to succeeding in this regard: After stating that "September sales in the categories of handguns and semi-automatic rifles were down Ninety Percent

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

(90%) and October continued to be depressed," she alleges: "At least 50% of our firearms sales are handguns. Most of the remaining 50% are tactical rifles, including ARs and AKs. . . . We can't afford to keep the doors open with just sales of traditional hunting rifles during the fall hunting season." (Dkt. No. 13-2, ¶ 57.) But even these allegations fall short of providing a concrete showing that the viability of her business is threatened. As an initial matter, this Plaintiff does not quantify the sales decrease of "tactical rifles," as distinguished from semi-automatic rifles, (*id.*), making the effect of the decrease in semi-automatic rifle sales difficult to contextualize. More importantly, she does not quantify October sales beyond stating that they "continued to be depressed" despite having signed her affidavit on November 7, 2022, (*id.* at 22), when October sales data would have been available. As Plaintiffs acknowledge, some counties began issuing semiautomatic rifle licenses, or amendments or endorsements to existing licenses, in October 2022, (*id.* ¶ 51; Dkt. No. 13-3, ¶ 40; Dkt. No. 13-4, ¶ 63; Dkt. No. 13-5, ¶ 28; Dkt. No. 13-6, ¶¶ 55-56; Dkt. No. 13-8, ¶ 70), which suggests that semi-automatic rifle sales may well recover. Thus, even these comparatively specific allegations fall short of successfully demonstrating an irreparable injury. *See Tom Doherty Assocs.*, 60 F.3d at 38; *Rex Med. L.P.*, 754 F. Supp. 2d at 622-23.

3d 175, 199 (E.D.N.Y. 2015) ("Irreparable harm may not be premised 'only on a possibility.'" (quoting *Winter v. NRDC, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008))).[19]

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

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19. In their declarations, Plaintiffs allege additional harms, such as the inability to hire their children who are under twenty-one years old, (Dkt. No. 13-2, ¶ 70; Dkt. No. 13-4, ¶ 85), an inability to offer training classes, (Dkt. No. 13-2, ¶ 56), and the costs of implementing new security measures, (Dkt. No. 13-2, ¶¶ 62-63; Dkt. No. 13-5, ¶ 65; Dkt. No. 13-6, ¶¶ 76, 86; Dkt. No. 13-7, ¶¶ 57, 65.) But in their moving papers, Plaintiffs premise their irreparable harm argument primarily on the loss of ability to sell certain merchandise and the danger of being forced out of business. (Dkt. No. 13-11, at 7, 26; Dkt. No. 33, at 9, 11-12.) Furthermore, the costs of compliance with government regulations are typically insufficient to constitute irreparable harm. *See Freedom Holdings, Inc. v. Spitzer*, 408 F.3d 112, 114 (2d Cir. 2005); *see also New York v. U.S. Dep't of Educ.*, 477 F. Supp. 3d 279, 303-04 (S.D.N.Y. 2020) (citing *Freedom Holdings*, 408 F.3d at 115; *Am. Hosp. Ass'n v. Harris*, 625 F.2d 1328, 1331 (7th Cir. 1980); *A.O. Smith Corp. v. FTC*, 530 F.2d 515, 527-28 (3d Cir. 1976)). These allegations are insufficient to constitute irreparable harm.

20. Plaintiffs suggest in their reply brief that, if the Court were to hold an evidentiary hearing before ruling on the motion for a preliminary injunction, Plaintiffs would have "90[ ]days of available data" relevant to "allegations for damages." (Dkt. No. 33, at 15.) However, in light of Plaintiffs' failure to demonstrate a likelihood of success on the merits of their claims, *see infra* section IV.B.2, the Court, in its discretion, concludes that it may "dispose of the motion on the papers before it." *See Md. Cas. Co. v. Realty Advisory Bd. on Labor Rels.*, 107 F.3d 979, 984 (2d Cir. 1997) (quoting *Consol. Gold*

2. Likelihood of Success

"To establish a likelihood of success on the merits, a plaintiff must show that [it] is more likely than not to prevail on [its] claims, or, in other words, that the 'probability of prevailing is "better than fifty percent."'" *Doe v. Vassar Coll.*, No. 19-cv-0601, 2019 U.S. Dist. LEXIS 203418, at *20-21, 2019 WL 6222918, at *7 (S.D.N.Y. Nov. 21, 2019) (quoting *BigStar Ent., Inc. v. Next Big Star, Inc.*, 105 F. Supp. 2d 185, 191 (S.D.N.Y. 2000). The Court will examine each of Plaintiffs' claims to determine whether Plaintiffs have demonstrated a likelihood of success on the merits.

a. Defendants Hochul and James

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

Fields PLC v. Minorco, S.A., 871 F.2d 252, 256 (2d Cir. 1989)); *see also Charette v. Town of Oyster Bay*, 159 F.3d 749, 755 (2d Cir. 1998) ("An evidentiary hearing is not required when the relevant facts . . . are not in dispute . . . .") (internal citations omitted).

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

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The Eleventh Amendment generally prohibits lawsuits against a state without that state's consent. *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). This prohibition extends to individuals sued for damages in their capacities as state officials. *Davis v. New York*, 316 F.3d 93, 101 (2d Cir. 2002) (citing *Kentucky v. Graham*, 473 U.S. 159, 169, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)). However, under the Supreme Court's decision in *Ex parte Young*, "[a] plaintiff may avoid the Eleventh Amendment bar to suit and proceed against individual state officers, as opposed to the state, in their official capacities, provided that [the] complaint (a) 'alleges an ongoing violation of federal law' and (b) 'seeks relief properly characterized as prospective.'" *In re Deposit Ins. Agency*, 482 F.3d 612, 618 (2d Cir. 2007) (quoting *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)). For this exception to apply, "the state officer against whom a suit is brought 'must have some connection with the enforcement of the act' that is in continued violation of federal law." *In re Dairy Mart Convenience Stores, Inc.*, 411 F.3d 367, 372-73 (2d Cir. 2005) (quoting *Ex parte Young*, 209 U.S. 123, 154, 157, 28 S. Ct. 441, 52 L. Ed. 714 (1908)). A state official's general duty to execute the laws is not sufficient to make [the official] a proper party." *Roberson v. Cuomo*, 524 F. Supp. 3d 196, 223 (S.D.N.Y. 2021); *see also Warden v. Pataki*, 35 F. Supp. 2d 354, 359 (S.D.N.Y. 1999), *aff'd sub nom. Chan v. Pataki*, 201 F.3d 430 (2d Cir. 1999). Nor is a state attorney general a proper party absent a specific connection to the enforcement of the challenged laws. *See Chrysafis v. James*, 534 F. Supp. 3d 272, 290 (E.D.N.Y. 2021); *see also Mendez v. Heller*, 530 F.2d 457, 460 (2d

Cir. 1976). Plaintiffs assert that Defendants Hochul and James are "architects of the [challenged laws] . . . driving passage of the [laws], using public outlets to promote the cause . . . and a campaign of animus against those who support the Second Amendment and the U.S. Supreme Court." (Dkt. No. 33, at 19.) These vague connections, and other similarly tenuous connections Plaintiffs allege, are wholly insufficient to establish any connection between Defendants Hochul and James and the enforcement of the New York laws at issue. *See Roberson*, 524 F. Supp. 3d at 223; *Chrysafis*, 534 F. Supp. 3d at 290; *see also Antonyuk v. Hochul*, No. 22-cv-0986, 2022 U.S. Dist. LEXIS 201944, at *114-19, 2022 WL 16744700, at *39-40 (N.D.N.Y. Nov. 7, 2022) (dismissing Hochul as a defendant in an action challenging New York firearms provisions for violating the Second and Fifth Amendments because "Hochul would [not] be the individual who may provide [the plaintiffs] the (legal) relief they seek"). Accordingly, Plaintiffs have failed to show a likelihood of success as to their claims against Defendants Hochul and James.

b. Federal Pre-emption

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

The laws of the United States are the "supreme Law of the Land." U.S. Const. art. VI, cl. 2. Therefore, "state

laws that conflict with federal law are 'without effect.'" *Mut. Pharm. Co. v. Bartlett*, 570 U.S. 472, 479-80, 133 S. Ct. 2466, 186 L. Ed. 2d 607 (2013) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746, 101 S. Ct. 2114, 68 L. Ed. 2d 576 (1981)). In other words, "state laws that require a private party to violate federal law are preempted." *Id.* at 475 (quoting *Maryland*, 451 U.S. at 746). A state law is pre-empted when (1) Congress has defined "explicitly the extent to which its enactments pre-empt state law . . . through explicit statutory language"; (2) the state law at issue "regulates conduct in a field that Congress intended the Federal Government to occupy exclusively"; or (3) the state law at issue "actually conflicts with federal law . . . [so that] it is impossible for a private party to comply with both state and federal requirements." *See English v. Gen. Elec. Co.*, 496 U.S. 72, 78-79, 110 S. Ct. 2270, 110 L. Ed. 2d 65 (1990).

Plaintiffs suggest that their pre-emption claim relies on one federal statute, 18 U.S.C. § 926, and one federal regulation, 28 C.F.R. § 25.11(b),[22] (Dkt. No. 1, at 118), although they cobble together other federal statutes and regulations when 18 U.S.C. § 926 and 28 C.F.R. § 25.11(b) are clearly not in conflict with a challenged provision, (Dkt. No. 13-11, at 10-15). Plaintiffs claim that certain New York laws "expressly [] violate federal prohibitions under 18 U.S.C. §§ 926 and 927" and that "[o]thers fail under implied pre-emption through conflict impossibility and

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

obstacle." (Dkt. No. 1, ¶ 130.) But Congress has limited Plaintiffs to demonstrating pre-emption only where there is an actual conflict between state and federal law. *See* 18 U.S.C. § 927. Section 927 reads:

> No provision of this chapter shall be construed as indicating an intent on the part of the Congress to occupy the field in which such provision operates to the exclusion of the law of any State on the same subject matter, unless there is a direct and positive conflict between such provision and the law of the State so that the two cannot be reconciled or consistently stand together.

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

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

Bus. §§ 875-f, 875-g(1)(b). These laws are contained in N.Y. Gen. Bus. art. 39-BB.[23]

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

The New York laws regulating the security of firearms further require that a firearms dealer's "business premises . . . be secured by a security alarm system that

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

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

24. Plaintiffs' apparent belief that 18 U.S.C. § 922(h) prohibits a firearms dealer from hiring someone who has been convicted of a felony is incorrect. But even if that belief were correct, or if a separate

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

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federal law proscribed such conduct, there is no conflict between the state and federal provisions because there is no suggestion that the security alarm operator would ever receive, possess, or transport any firearm or ammunition. *See* N.Y. Gen. Bus. § 875-b(2).

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

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> The Attorney General [of the United States] may prescribe only such rules and regulations as are necessary to carry out the provisions of this chapter . . . . No such rule or regulation prescribed after the date of the enactment of the Firearms Owners' Protection Act [of 1986] may require that records required to be maintained under this chapter or any portion of the contents of such records, be recorded at or transferred to a facility owned, managed, or controlled by the United States or any State or any political subdivision thereof, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established.

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

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

Id. This does not conflict whatsoever with a New York official prescribing a regulation requiring that records kept under federal law be transmitted to, for instance, the New York State Police. *See id.*; 18 U.S.C. § 927. Nor does it conflict with a New York official creating a system of registration for firearms or firearms transactions and dispositions even if the information recorded is substantially similar to, or, as Plaintiffs put it, "plagiarizes," (Dkt. No. 13-11, at 12), federal firearms registration information. *See* 18 U.S.C. § 926(a), 927; N.Y. Gen. Bus. § 875-f; *see also* Haw. Rev. Stat. § 134-3 (creating a registration system for all firearms under the supervision of the Attorney General of Hawaii); Cal. Penal §§ 11106, 28100, 28155 (creating a database of information pertaining to the sale or transfer of certain firearms under the supervision of the Attorney General of California). That the Attorney General of the United States is prohibited from engaging in conduct that is specifically reserved to the states by federal law has no bearing on the ability of state officials to engage in that conduct. *See* 18 U.S.C. §§ 926(a), 927. This is a hallmark of federalism. *See, e.g., Gonzales v. Raich*, 545 U.S. 1, 74, 125 S. Ct. 2195, 162 L. Ed. 2d 1 (2005) (Thomas, J., dissenting) ("Our federalist system, properly understood, allows [states] to decide for themselves how to safeguard the health and welfare of their citizens."). Thus, Plaintiffs have failed to demonstrate any conflict between N.Y. Gen. Bus. § 875-f and 18 U.S.C. § 926.[26]

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

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

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

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

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

Plaintiffs also suggest that N.Y. Penal § 400.02(2), which creates a "statewide license and record database specific for ammunition sales," is pre-empted by 28 C.F.R. §§ 25.1, 25.6. (Dkt. No. 13-11, at 15.)[29] But the regulations

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

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

Plaintiffs rely on specifically state that "[a]ccess to the NICS Index for purposes unrelated to NICS background checks pursuant to 18 U.S.C. 922(t) shall be limited to uses for the purposes of . . . [p]roviding information to . . . state . . . criminal justice agencies in connection with the issuance of a firearm-related . . . permit or license." 28 C.F.R. § 25.6(j). Plaintiffs do not demonstrate that the purpose of N.Y. Penal § 400.02(2) is "unrelated to NICS background checks." *See* 28 C.F.R. § 25.6. Nor do they demonstrate that N.Y. Penal § 400.02(2) has a purpose other than "[p]roviding information to . . . state . . . criminal justice agencies in connection with the issuance of a firearm-related . . . permit or license." *See* 28 C.F.R. § 25.6. More importantly, N.Y. Penal § 400.02(2) does not require use of the NICS, but rather prescribes the creation of a "statewide . . . database." Thus, Plaintiffs have failed to demonstrate any conflict between N.Y. Penal § 400.02(2) and 28 CFR §§ 25.1, 25.6.

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

c. Constitutional Challenges

i. Second Amendment

Plaintiffs allege that certain provisions of the New York laws amount to "near total denial of the Plaintiffs' and all New York residents' Second Amendment rights." (Dkt. No. 13-11, at 21.) Defendants argue that the Second Amendment does not apply to corporations, that even if the Second Amendment did apply to corporations, the laws at issue do not implicate the Second Amendment, and that even if the laws at issue did implicate the Second Amendment, they are historically justified. (Dkt. No. 29, at 15-25.)

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

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

by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

Plaintiffs fail to demonstrate that the Second Amendment's plain text covers the conduct regulated by the statutory provisions at issue. Plaintiffs are "corporations, single-member LLCs, [] [s]ole [p]roprietorships, and . . . Federal Firearms Licensees with [the individual] Plaintiffs being 'Responsible Persons' for such businesses." (Dkt. No. 13-11, at 22.) Plaintiffs contend that, since a federal statutory firearms law defines "person" "[to] include any individual, corporation, company, association, firm, partnership, society, or joint stock company," 18 U.S.C. § 921(a)(1), and since the Supreme Court has recognized "that First Amendment protection extends to corporations," (Dkt. No. 13-11, at 23 (citing *Citizens United v. FEC*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14, 98 S. Ct. 1407, 55 L. Ed. 2d 707 (1978))), "Plaintiffs' businesses should receive the same level of protection," (*id.*). This argument is unavailing.

Justice Thomas explicitly stated the holding of *N.Y. State Rifle & Pistol Ass'n v. Bruen* twice: "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." 142 S. Ct. at 2126, 2129-30. Plaintiffs fail to present any support for their contention that the individual right secured by the Second Amendment applies to corporations or any other business organizations. It does not. *See District of Columbia v. Heller*, 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008) ("Nowhere

else in the Constitution does a 'right' attributed to 'the people' refer to anything other than an individual right. . . . [W]e find that [the Second Amendment] guarantee[s] the individual right to possess and carry weapons in case of confrontation."). Moreover, the Second Amendment's "operative clause"—"the right of the people to keep and bear Arms shall not be infringed"—makes no mention of buying, selling, storing, shipping, or otherwise engaging in the business of firearms. *See N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. at 2134. Indeed, none of the "trilogy" of cases cited by Plaintiffs—*N.Y. State Rifle & Pistol Ass'n v. Bruen, McDonald v. City of Chicago*, and *District of Columbia v. Heller*—"cast[s] doubt on . . . laws imposing conditions and qualifications on the commercial sale of arms." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *Heller*, 554 U.S. at 626-27. Plaintiffs have not cited any authority supporting a Second Amendment right for an individual or a business organization to engage in the commercial sale of firearms. Thus, Plaintiffs have not demonstrated a likelihood of success on the merits of their Second Amendment claim.

ii. Fourteenth Amendment

Plaintiffs allege that certain provisions of the New York laws violate the Fourteenth Amendment because they "are so vague as to be unintelligible and highly likely to result in random and irregular prosecutions." (Dkt. No. 13-11, at 17.) Defendants contend that this challenge "fails at the outset because 'it is obvious in this case that

there exist numerous conceivably valid applications of' the challenged statutes." (Dkt. No. 29, at 33 (quoting *Richmond Boro Gun Club, Inc. v. City of New York*, 97 F.3d 681, 684 (2d Cir. 1996)).)

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

As an initial matter, the Court must consider the nature of the vagueness challenge. "A statute may be challenged on vagueness grounds either as applied or on its face." *Thibodeau*, 486 F.3d at 67. Plaintiffs do not clearly indicate which type of challenge they are asserting, but they do not suggest that they have been faced with

any enforcement action. Therefore, "[b]ecause [P]laintiffs pursue this pre-enforcement [challenge] before they have been charged with any violation of law, it constitutes a facial, rather than as-applied[,] challenge." *Jacoby & Meyers, LLP v. Presiding Justs. of the First, Second, Third & Fourth Dep'ts, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 184 (2d Cir. 2017) (quoting *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265). To succeed on a facial challenge, Plaintiffs "must establish that no set of circumstances exists under which the [challenged laws] would be valid." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265 (quoting *United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987)). This high bar makes "a facial challenge . . . 'the most difficult challenge to mount successfully.'" *See id.* (quoting *Salerno*, 481 U.S. at 745).

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

Plaintiffs claim that several provisions of N.Y. Gen. Bus. art. 39-BB are unconstitutionally vague. Plaintiffs point to certain phrases in N.Y. Gen. Bus. § 875-b(2) to support their vagueness claim, asserting that the provision

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

is unconstitutionally vague because the "'security alarm system' standards provision" requires "the Defendant NYS Police to 'establish' 'standards for such security alarm systems' and [] requires the Defendant NYS Police to 'approve' the 'security alarm systems.'" (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. § 875-b(2)).)[32] Plaintiffs similarly claim N.Y. Gen. Bus. § 875-e is unconstitutionally vague because "the 'employee training' program and documentation . . . is to be 'developed by the superintendent' and is to be '[made] available to each dealer,' in accordance with minimum topics set out in N.Y. Gen. Bus. §§ 875-e(2)(a)-(e) [sic] plus '(f) such other topics the superintendent deems necessary and appropriate.'" (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. §§ 875-e, 875-f).)[33] Plaintiffs also claim that N.Y. Gen. Bus. § 875-f is unconstitutionally vague because the "provision may confer authority for the Defendant NYS Police to pr[e] scribe a[n] [acquisition and disposition book] 'in such form and for such period as the superintendent shall require,' which may differ from federal regulation" and requires the "creation of a new monthly inventory reconciliation report for the NYS Police." (Dkt. No. 1, ¶ 156 (quoting

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

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

N.Y. Gen. Bus. § 875-f).)[34] Plaintiffs further claim that N.Y. Gen. Bus. § 875-g is unconstitutionally vague because the "annual compliance certification['s] . . . 'form and content'" and "'regulations requiring periodic inspections' at 'the premises of every dealer to determine compliance by such dealer with the requirements of [article 39-BB] [are to] be promulgated by the Defendant NYS Police." (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. § 875-g).)[35] Finally with regard to N.Y. Gen. Bus. art. 39-BB, Plaintiffs claim that N.Y. Gen. Bus. § 875-h is unconstitutionally vague because it allows "[t]he superintendent [of the New York State Police] [to] promulgate such additional rules and regulations as the superintendent shall deem necessary to prevent firearms, rifles, and shotguns from being diverted from the legal stream of commerce." (Dkt. No. 1, ¶ 156 (quoting N.Y. Gen. Bus. § 875-h).)[36]

Plaintiffs provide no support for any of these claims and certainly fail to demonstrate, as they must, that the provisions "can never be validly applied," *Vt. Rt. to Life*

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

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

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

Comm., Inc. v. Sorrell, 758 F.3d 118, 128 (2d Cir. 2014), either as a result of providing inadequate notice or inviting arbitrary enforcement, *see Johnson*, 576 U.S. at 596; *see also Salerno*, 481 U.S. at 745. Indeed, each of these claims centers on the ability of New York agencies, namely the New York State Police, to promulgate rules, regulations, or guidance, and with such rules, regulations, or guidance, there is no suggestion that the provisions will fail to provide adequate notice or invite arbitrary enforcement. *See Johnson*, 576 U.S. at 596; *see also Salerno*, 481 U.S. at 745.[37] Plaintiffs fail to advance any argument that this is improper in the vagueness context, and they fail to establish a likelihood of success on meeting the high bar that makes "a facial [vagueness] challenge . . . 'the most difficult challenge to mount successfully.'" *See N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265 (quoting *Salerno*, 481 U.S. at 745).[38]

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

38. In the complaint, Plaintiffs raise a similar claim against N.Y. Penal § 270.22, which restricts the sale of body vests. (Dkt.

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

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

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

§§ 400.02, 400.03 are unconstitutionally vague, (Dkt. No. 1, ¶ 156; Dkt. No. 13-11, at 17),[40] but provide no basis for this argument. Plaintiffs have failed to show a likelihood of success on any of these arguments.

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

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

assessments and states that instructors must retain records of such assessments. (Dkt. No. 15-2.)

Plaintiffs' own acknowledgements similarly undermine their claim that the semiautomatic rifle licensing scheme is unconstitutionally vague: the New York State Police published a semi-automatic rifle license amendment application, (Dkt. No. 1, ¶ 160; Dkt. No. 13-11, at 21; Dkt. No. 15-4), and the Division of Criminal Justice Services issued a "FAQ" about semi-automatic rifle licensing. (Dkt. No. 15-3.) Plaintiffs suggest that because the New York State Police form is an "amendment," it "add[s] to the confusion[] [instead of] clarifying the new laws." (Dkt. No. 1, ¶ 160.) But the existence of the semi-automatic rifle license amendment application apparently did not suggest to Plaintiffs that a separate semi-automatic rifle license form exists. It does.[41] And Plaintiffs' apparent contention that the semi-automatic rifle licensing criteria cannot be described in the same section in which the concealed-carry licensing criteria are described, (Dkt. No. 1, ¶ 160), is entirely without merit.[42]

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

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

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

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

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43. At oral argument, Plaintiffs noted that, if the Court were to hold an evidentiary hearing before ruling on the motion for a preliminary injunction, Plaintiffs would call as witnesses a representative of the New York State Police and a county-level firearms licensing official. Plaintiffs have, however, "not shown that an evidentiary hearing would resolve any material factual issues" with respect to the likelihood of success on the merits. *Amaker v. Fischer*, 453 F. App'x 59, 64 (2d Cir. 2011). Accordingly, the Court,

iii. Fifth Amendment

Plaintiffs allege that N.Y. Gen. Bus. § 875-g(1)(b) compels them to certify compliance with New York laws that Plaintiffs contend will force them to violate federal law. (Dkt. No. 13-11, at 13-14.) This certification, Plaintiffs argue, will "amount to a waiver of the Plaintiffs' Fifth Amendment rights against self-incrimination" by compelling Plaintiffs "to provide the Defendant NYS Police with a formal certification of compliance (or lack thereof) that is 'likely to facilitate their arrest and eventual conviction.'" (*Id.* at 14-16 (quoting *Haynes v. United States*, 390 U.S. 85, 97, 88 S. Ct. 722, 19 L. Ed. 2d 923, 1968-1 C.B. 615 (1968))). Defendants argue that this claim is premised on a misreading of federal law and that Plaintiffs "run no risk of incriminating themselves by complying with the certification requirement under [New York law]." (Dkt. No. 29, at 20.)

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

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in its discretion, concludes that it may "dispose of the motion on the papers before it." *See Md. Cas. Co.*, 107 F.3d at 984 (quoting *Consol. Gold Fields*, 871 F.2d at 256); *see also Charette*, 159 F.3d at 755.

110 S. Ct. 900, 107 L. Ed. 2d 992 (1990) (quoting *Fisher v. United States*, 425 U.S. 391, 408, 96 S. Ct. 1569, 48 L. Ed. 2d 39 (1976)).

The provision at issue requires that "[e]very dealer . . . annually certify to the superintendent [of the New York State Police] that such dealer has complied with all of the requirements of [N.Y. Gen. Bus. art. 39-BB]." N.Y. Gen. Bus. § 875-g(1)(b). Plaintiffs contend that it is "impossible" to comply with N.Y. Gen. Bus. art. 39-BB "due to pre-existing, express[] federal prohibitions governing the business operations of the Plaintiffs." (Dkt. No. 13-11, at 13.) But the Court has examined all of Plaintiffs' proffered "federal prohibitions" and found none. That is, the premise of Plaintiffs' Fifth Amendment claim—that "[t]o comply with the [New York] laws results in a violation of federal laws," (*id.* at 14)—is baseless.

Furthermore, Plaintiffs' reliance on *Haynes v. United States* is misguided. In *Haynes*, the Supreme Court held that a law requiring those who obtained firearms without complying with federal statutory requirements—that is, those who obtained firearms illegally—to register such firearms with the federal government violated the Fifth Amendment right against self-incrimination because those persons were "inherently suspect of criminal activities." *See* 390 U.S. at 96-98 (quoting *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70, 79, 86 S. Ct. 194, 15 L. Ed. 2d 165 (1965)); *see also Marchetti v. United States*, 390 U.S. 39, 47, 88 S. Ct. 697, 19 L. Ed. 2d 889, 1968-1 C.B. 500 (1968) (applying the protections of the Fifth Amendment in the context of a federal tax

on illegal wagering because "those engaged in wagering are a group 'inherently suspect of criminal activities'" (quoting *Albertson*, 382 U.S. at 79)); *Grosso v. United States*, 390 U.S. 62, 64, 88 S. Ct. 709, 19 L. Ed. 2d 906, 1968-1 C.B. 496 (1968) (same); *Albertson*, 382 U.S. at 77-79 (applying the protections of the Fifth Amendment in the context of a federal law requiring registration as an affiliate of a Communist organization because such affiliation was illegal). But Plaintiffs are not in a "highly selective group inherently suspect of criminal activities." *See Haynes*, 390 U.S. at 98 (quoting *Albertson*, 382 U.S. at 79). Rather, Plaintiffs have merely "assume[d] control over items that are the legitimate object of the government's noncriminal regulatory powers." *Bouknight*, 493 U.S. at 558. Having failed to establish a likelihood of success on their claim that the certification requirement of N.Y. Gen. Bus. § 875-g(1)(b) compels them to make a testimonial communication that is incriminating, Plaintiffs have failed to demonstrate a likelihood of success on the merits of their Fifth Amendment claim.

d. "Constitutional Regulatory Overburden"

Plaintiffs finally raise a novel argument that they term "constitutional regulatory overburden." (Dkt. No. 13-11, at 23.)[44] This theory, Plaintiffs contend, is a "natural

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

extension of the *Heller - McDonald - NYSRPA I* trilogy" that extends the protections of the Second Amendment to businesses engaged in the sale of firearms by establishing that "the firearm is the only consumer product enshrined in the Bill of Rights." (*Id.* at 23-25.) Defendants argue that "there is no such claim" and that Plaintiffs fail to cite any supporting legal authority. (Dkt. No. 29, at 31.)

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

3. Public Interest and Balance of Equities

When the government is a party to an action, the Court's inquiry into the balance of equities merges into the evaluation of the public interest. *See We The Patriots USA*, 17 F.4th at 295 (citing *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d at 58-59); *see also Kane*, 19 F.4th at 163. The Court must "ensure that the 'public interest would not be disserved' by the issuance of a preliminary

injunction." *Salinger*, 607 F.3d at 80 (quoting *eBay, Inc. v. MercExchange*, 547 U.S. 388, 391, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006)). Even if Plaintiffs had shown that the public interest would not be disserved by the issuance of an injunction, Plaintiffs' failure to demonstrate either a likelihood of irreparable injury in the absence of an injunction or a likelihood of success on the merits is sufficient to deny injunctive relief. *See Salinger*, 607 F.3d at 75 n.5; *Faiveley*, 559 F.3d at 119. Accordingly, the Court need not consider the balance of equities and the public interest. *See Faiveley*, 559 F.3d at 119; *see also Conn. State Police Union v. Rovella*, 36 F.4th 54, 68 (2d Cir. 2022) ("Because the District Court did not err in concluding that the [plaintiff] could not succeed on the merits of its claim, we need not address the remaining prongs of the preliminary injunction test, including whether the [plaintiff] demonstrated irreparable harm or whether an injunction would be in the public interest."), *cert. denied*, No. 22-1162022 WL 4654636, 143 S. Ct. 215, 214 L. Ed. 2d 84, 2022 U.S. LEXIS 4041 (U.S. Oct. 3, 2022).

V. CONCLUSION

For these reasons, it is hereby

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

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

IT IS SO ORDERED.

Dated: December 7, 2022
Syracuse, New York

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

APPENDIX C — RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Second Amendment of the United States Constitution

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

Fifth Amendment of the United States Constitution

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

Fourteenth Amendment of the United States Constitution, Section 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state

deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix C

Bill S. 51001, pp. 15-17.

NY Exec §228. National instant criminal background checks.

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

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

2. (a) The division shall report the name, date of birth and physical description of any person prohibited from possessing a firearm pursuant to 18 U.S.C.

sec. 922(g) or (n) to the national instant criminal background check system index (*sic*), denied persons files.

[(b), omitted]

[(c), omitted]

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

4. The superintendent shall promulgate a plan to coordinate background checks for firearm and ammunition purchases pursuant to this section and to require any person, firm or corporation that

sells, delivers or otherwise transfers any firearm or ammunition to submit a request to the division in order to complete the background checks in compliance with federal and state law, including the National Instant Criminal Background Check System (NICS), in New York state. [sentence 2] Such plan shall include, but shall not be limited to, the following features:

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

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

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

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

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

[6. omitted]

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

(i) (*sic*) any (*sic*) person, firm or corporation that sells, delivers or otherwise transfers firearms shall obtain a completed ATF 4473 form from the potential buyer or transferee including name, date of birth,

gender, race, social security number, or other identification numbers of such potential buyer or transferee and shall have inspected proper identification including an identification containing a photograph of the potential buyer or transferee.

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

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

Appendix C

Bill S. 4970-A, pp. 3-4.

NY Gen Bus §§875-b(1) and (2). Security.

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

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

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

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

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

of this act. [sentence 4] The security alarm system shall be capable of being monitored by a central station, and shall provide, at a minimum, complete protection and monitoring for all accessible openings, and partial motion and sound detection at certain other areas of the premises. [sentence 5] The dealer location shall additionally be equipped with a video recording device at each point of sale and each entrance and exit to the premises, which shall be recorded from both the indoor and outdoor vantage point and shall maintain such recordings for a period of not less than two years.

Appendix C

Bill S. 4970-A, p. 4.

NY Gen Bus §875-c. Access to firearms, rifles, and shotguns.

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

Appendix C

Bill S. 4970-A, p. 4.

NY Gen Bus §875-e. Employee training.

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

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

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

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

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

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

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

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

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

Appendix C

Bill S. 4970-A, pp. 4-5.

NY Gen Bus §875-f. Maintenance of records.

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

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

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

3. firearm, rifle and shotgun disposition information, including the serial numbers of firearms, rifles

and shotguns sold, dates of sale, and identity of purchasers, shall be maintained and made available at any time to government law enforcement agencies and to the manufacturer of the weapon or its designee; and

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

Appendix C

Bill S. 4970-A, p. 5.

NY Gen Bus §875-g. Internal compliance, certification, and reporting.

1. Every dealer shall:

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

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

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

Appendix C

Bill S. 4970-A, p. 5.

NY Gen Bus §875-h. Rules and regulations.

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

Appendix C

Bill S. 4970-A, p. 5.

NY Gen Bus §875-i. Violations.

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

Appendix C

Read with **Bill S. 4970-A, p. 5.**

NY Pen §400.00(11). License: revocation and suspension.

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

Appendix C

Bill S. 9458, p. 7.

NY Pen §265.65. Criminal purchase of a semiautomatic rifle.

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

Appendix C

Bill S. 9458, p. 7.

NY Pen §265.66. Criminal sale of a semiautomatic rifle.

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

Appendix C

Bill S. 9407-B, pp. 1-2.

NY Pen §270.22. Unlawful sale of a body vest. [Also, NY Gen Bus §396-eee.]

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

Appendix C

Bill S. 9407-B, p. 2.

NY Exe §144-a. Eligible professions for the purchase, sale, and use of body vests.

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

Appendix C

Read with **NY Pen §§265.65, 265.66, and §270.22**:

NY Pen §70.15(1). Sentences of imprisonment for misdemeanors and violation – class A misdemeanor.

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

Appendix C

Read with **NY Pen §§265.65** and **265.66, and §270.22**:

NY Pen §70.00(1)-(4). Sentences of imprisonment for felony [class E felony, only].

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

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

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

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

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

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

Appendix C

Bill S. 51001, pp. 1-3.

NY Pen §400.00(1)(n). Eligibility.

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

Appendix C

Bill S. 9458, p. 1.

NY Pen §400.00(2). Types of licenses.

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

Appendix C

Bill S. 9458, p. 2.

NY Pen §400.00(3)(a). Applications.

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

Appendix C

Bill S. 9458, p. 3.

NY Pen §400.00(6). License: validity.

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

Appendix C

Bill S. 9458, p. 4.

NY Pen §400.00(7). License: form.

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

Appendix C

Bill S. 9458, pp. 4-5.

NY Pen §400.00(8). License: exhibition and display.

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

Appendix C

Bill S. 9458, p. 5.

NY Pen §400.00(9). License: amendment.

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

Appendix C

Bill S. 4970-A, p. 5.

NY Pen §400.00(12). Records required of gunsmiths and dealers in firearms.

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

Appendix C

Bill S. 9458, pp. 5-6.

NY Pen §400.00(14). Fees.

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

Appendix C

Bill S. 51001, pp. 11-12.

NY Pen §400.02(2). Statewide license and record database [ammunition background check, only].

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

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

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

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

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

Appendix C

Bill S. 51001, p. 12.

NY Pen §400.03(2). Sellers of ammunition [ammunition sale records, only]

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

Appendix C

Bill S. 51001, p. 12.

NY Pen §400.03(6). Sellers of ammunition [use of NICS system, only].

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