

No. 23-995

IN THE
Supreme Court of the United States

NADINE GAZZOLA, *et al.*,

Petitioners,

v.

KATHLEEN HOCHUL, GOVERNOR
OF NEW YORK, *et al.*,

Respondents.

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

REPLY TO BRIEF IN OPPOSITION

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**I. PETITIONERS' COMPELLING
QUESTION SATISFIES SUP. CT. R. 10(a)
AND 10(c) FOR A GRANT OF CERTIORARI**

The Petitioners ask this Court grant certiorari to engage in a deeper discussion on the errors committed by the Second Circuit when it denied preliminary injunctive relief in favor of Petitioners against Respondent criminal enforcement of challenged laws because the Second Circuit applied the wrong legal standards. The State opposes, using words like “settled law” and “does not implicate split.” Opp.7. The law of derivative claims on behalf of individuals for core functions of the Second Amendment is mired in split circuit court decisions, now including the Second Circuit ruling in *Gazzola*. Pet.16-17. Further, the Second Circuit declined to answer Petitioners’ important federal constitutional law question of first impression. Pet.27-31. The Petition offers “compelling reasons” to grant certiorari in *Gazzola*. Sup. Ct. R. 10(a), (c).

I. (A.) The circuit court split compels uniform standards be set by this court.

“Does not implicate split” was tried by the State in 2020 in opposition to the request for certiorari in *NYSRPA v. Bruen*. No. 20-843, Opp.8. Such remarks should have no more weight in *Gazzola* than in *Bruen*. The Second Circuit in *Gazzola* relied on split circuit court decisions for its derivative claims analysis. App. 10a-16a. In doing so, the Second Circuit adopted and promulgated scrutiny testing using pre-*Bruen* cases. Pet.14-17.

The *Bruen* Petition for Writ of Certiorari from 2020 is informative. It demonstrated a circuit split that

deprived law-abiding citizens of their individual rights under the Second Amendment. *NYSRPA v. Bruen*, No. 20-843, Pet.3, 9, 10, 15, and 28. They focused on “concern that some federal and state courts may not be properly applying *Heller* and *McDonald*.” See, *id.* at Pet.28 (citation omitted). *Bruen* attorney Paul Clement put it simply: “... they’ve made a muddle of it...” *Bruen*, TR oral arguments, p. 26.¹

Here, now, in *Gazzola*, is the Second Circuit not properly applying *Bruen*. Pet 16-22. In *Gazzola*, the Second Circuit used pre-*Bruen* circuit court decisions without identifying either the split, or, the probable conflict with *Bruen*. Pet.10a-11a, 13a. Instead, the Second Circuit reinvigorated the scrutiny test. Pet.16. This problem now extends a dozen years post-*Heller* from 2011 (*Ezell I*) through post-*Bruen* in 2023 (*Gazzola*).

This perpetuated split among the Second, Third, Fourth, Seventh, and Ninth Circuits now blankets twenty-two (22) U.S. states plus the U.S. Virgin Islands, Guam, and the Northern Mariana Islands.² This is a wider impact than the list in the *Bruen* Petition. *Bruen*, No. 20-843, Pet.10-11.

The Court should grant certiorari in *Gazzola*, as it did in *Bruen*.

1. *NYSRPA v. Bruen*, No. 20-843, Oral Argument – Nov. 3, 2021, on <https://www.oyez.org/cases/2021/20-843>.

2. Note is made of reliance upon the U.S. Courts website circuit map at https://www.uscourts.gov/sites/default/files/u.s._federal_courts_circuit_map_1.pdf.

I. (B.) The important federal question compels standard setting by this court.

The novel federal question present in *Gazzola* is not “well settled.” Opp.7. The State launched first-in-class laws with criminal penalty enforcement against state-licensed dealers in firearms (who are federally-licensed, first and foremost), using a scheme designed to evade judicial review³, at the behest of a state governor of unapologetic animus against all things federal, including this nation’s high court. Pet.4-8, 23-31, 34-35. The Second Circuit took Petitioners’ novel theory about “to keep” from “to keep and bear arms” as measured by “unconstitutional regulatory overburden,” and it didn’t say no. Pet.27. It indirectly responded by experimenting with burden, sliding scales of scrutiny, and derivatives. Pet.28-31. Petitioners’ watershed federal question is worthy of a proper answer. Sup. Ct. R. 10(c).

This court recently granted certiorari in *Garland v. VanDerStok* (No. 23-852). The Gun Control Act of 1968⁴ is as central to *VanDerStok* (U.S. Br.2-3) as it is to *Gazzola* (Pet.37-39).⁵ The U.S. Attorney General’s Petition in *VanDerStok* supports Petitioners’ interpretation of the structure and function of federal firearms compliance law and the authority and role of the ATF. U.S. Br.2-3 (citations omitted). Pet.37-39. It also reads like a risk

3. Phrase derived from *Whole Woman’s Health v. Jackson*, 595 U.S. _____, 142 S. Ct. 522 (2021).

4. Gun Control Act, Pub.L. 90-618 (1968), find at 18 U.S.C. Ch. 44 §921 *et seq.*

5. *N.B.*: the *VanDerStok* question presented differs and will not moot any claims in *Gazzola*.

management proposition against unfettered disruption of the field of federal firearms compliance law by external (state or local) government actors. *Id.*

The U.S. Attorney General’s Petition highlights core aspects of the Gun Control Act (1968):

“Congress imposed requirements on persons engaged in the business of ... dealing in “firearms.” 18 U.S.C. 922, 923. Such persons must obtain a federal firearms license, keep records of the acquisition and transfer of firearms,⁶ and conduct a background check before transferring a firearm to a non-licensee⁷. 18 U.S.C. 922(t), 923(a) and (g)(1)(A).” *Id.* at 2-6.

Also, “to assist law enforcement authorities in investigating serious crimes⁸.” *Id.* at 6.

FFLs serve these operational roles.⁹

The USAG characterizes these federally-mandated FFL functions as “conditions and qualifications on the commercial sale of arms,” citing to *Dist. of Columbia v. Heller*, 554 U.S. 570, 627 (2008). *VanDerStok*, *id.*, at 8.

6. The “Book of Acquisition & Disposition,” or, “A&D Book,” as referenced throughout Petitioners’ record.

7. Including the ATF Form 4473, as referenced throughout Petitioners’ record.

8. For example, with serial trace, as referenced throughout Petitioners’ record.

9. For a fuller discussion of these functions in relation to *Gazzola*, review, *inter alia*, 22A591, pp. 15-18.

The State took that *obiter dicta* from *Heller* at 627 and erroneously conflated the FFL and the individual. The USAG and the Petitioners read this *obiter dicta* from *Heller*, not as meaning ‘onto the FFL,’ but as meaning ‘as carried out through the FFL to the individual.’ This comports with FFL standing in derivative claims *on behalf of* non-disqualified customers; at the same time, this does not equate to an FFL serving *as a proxy* for any and all individuals wishing to purchase a firearm. The federally-mandated tasks referenced by USAG Garland are consistent with the FFL as performing a quasi-government agency function while protecting against individual infringement. Pet.37-39.

The Opposition Brief references having answered the Complaint. Opp.13. That Answer disclaimed knowledge sufficient to form a belief of the *entire* field of federal firearms compliance law. ECF-79. Here are three short examples of their extensive denial of knowledge:

- ¶65, excerpt: “That same year, 1968, Congress passed the “Gun Control Act” (“GCA”), creating the “federal firearms licensee,” which would be responsible for the background check against the sale of a firearm to a “disqualified person.””¹⁰;
- ¶67 excerpt: “Also relevant to this case, the 1993 Brady Handgun Violence Prevention Act (“the Brady Act”) created the modern NICS background check system.”¹¹; and,

10. Gun Control Act, *id.* Footnote in the original.

11. Brady Handgun Violence Prevention Act, Pub.L. 103-59 (1993), find at 18 U.S.C. §§921-922. Footnote in the original.

- ¶56a excerpt: “Inter-state commerce is governed by the federal requirement that an out-of-state FFL must ship a firearm purchased by a non-resident to an FFL in the residential state of the customer in accordance with the laws of the customer’s residence.”

This lack of knowledge is the type of risk relevant to *Winter* in preliminary injunctive relief analysis. Here is just one, specific example (Pet.36), used throughout the motion on appeal, of how the Respondents generate risk through lack of knowledge of the role of the FFL in the field of federal firearms law and operations:

- ¶190, Respondents admit the bill jacket for NY S.51001 (the “CCIA”) states “...the FBI “lacks access to crucial state-owned and local-owned records and databases that provide a fuller, more accurate assessment of an applicant’s background.”
- ¶191, excerpt: The State admits the FBI “maintains the NICS database.”
- ¶191, balance of: Petitioners invoke Fed. R. Evid. 803(8) to overcome the State response that it denies or lacks information of whether the FBI Criminal Justice Information Services/Division NICS Section annually publishes the number of state records contributed (in aggregate) by type of disqualification, which reports NY as submitting only one (1) felony record.¹²

12. See Compl., C.A.App.92, ¶191 for full state statistics plus FBI website address of report.

- ¶196: The State admits Respondent Gov. Hochul, at the signing ceremony for the CCIA on July 1, 2022, said: “So what’s clear is, there’s also an opportunity for states that are serious about protecting their citizens like New York, where we can say, we should be able to take this over. We don’t need the feds to do the work. We will do it here in the state of New York where we can have access to our state database *as well as* the federal database.” (emphasis added)
- ¶¶192 and 195: The State denies that its refusal to contribute state criminal and other records of disqualification to the FBI-NICS means the background checks at the point-of-sale will *not* be returned as “DENY” if initiated at an out-of-state FFL.

Respondents either refuse to admit within litigation, or, honestly do not know, that the refusal to report state disqualified persons puts the rest of the country and all U.S. territories at risk of a false “PROCEED” because that record is missing from FBI-NICS when an out-of-state FFL runs a background check. Including a background check on a NYS-convicted felon. See, C.A.App.92-97. Respondents’ position is deleterious to national public safety.

Respondents Gov. Hochul and the NYS Police took over the entire background check system in New York effective September 13, 2023, over the exhaustive effort of Petitioners through Emergency Application. No. 23A230.

Petitioners stayed the course and respectfully request this Court grant certiorari to move forward with

determination of “an important question of federal law that has not been, but should be, settled by this court.” Sup. Ct. R. 10(c). This Court should grant certiorari to *Gazzola* as it did in *VanDerStok*.

II. GAZZOLA IS RIPE FOR REVIEW, IN ACCORDANCE WITH LAW AND PRECEDENT

The State posits without authority that this Court’s “ordinary practice is to deny interlocutory review.” Opp.13. This is cut-and-paste from the State’s Opposition Brief in *Antonyuk* (No. 23-910, Opp.1, 11, 12). Petitioners in *Antonyuk* dissected and dispelled the comment and the same is incorporated by reference, herein. *Antonyuk*, No. 23-910, R.1-3. That *Winter* originates from this Court, speaks for itself. Pet.13; *Winter v. Nat’l Res. Def. Council*, 555 U.S. 7 (2008). That federal statutory jurisdiction allows the appeal, also speaks for itself. Pet.1; 28 U.S.C. §2101(c). When a case like *Gazzola* is ripe for review, law, precedent, and custom support the grant of certiorari.

Worth noting, recent grants of certiorari pertinent to the Second Amendment also originate in motions. See: *U.S. v. Rahimi* (Case 22-915, 78a, Mot. Dismiss, Fed. R. CR. P. 12(b)(3)(B)); and, *Garland v. VanDerStok* (Case 23-852, 12a-13a, Mot. Summ. Jgmt., Fed. R. Civ. P. 56(a)).

Notably, the landmark decisions of *Heller*, *McDonald*, and *Bruen* were appeals of motions filed promptly after commencement, using pleadings of 10-13 pages, limited (if any) party declarations, and no party testimony. See, *Heller*: Case No. 03-cv-213 (D.D.C.), ECF-1 (Compl., Feb. 10, 2003), ECF-4 (Mot. Summ. Jgmt., Fed. R. Civ. P. 56,

Mar. 14, 2003, Decls.); *McDonald*: Case No. 01:08-cv-3645 (N.D.Ill.), ECF-1 (Compl., Jun. 26, 2008), ECF-32/34 (Mot. Summ. Jgmt., Fed. R. Civ. P. 56, Jul. 31, 2008, Decls.); and, *Bruen*: Case No. 1:18-cv-134 (N.D.N.Y.), ECF-31 (Amd. Compl., May 16, 2018), ECF-19 (Mot. Dismiss, Fed. R. Civ. P. 12(b)(6), Mar. 26, 2018, no attach.).

The *Gazzola* record is robust in support of the motion for preliminary injunction under Fed. R. Civ. P. 65(a). Pet.33-34. The State filed no affidavits or exhibits, save four historic laws that support Petitioners' claims. Pet.25.

The record supporting the Petition is a trove ready to be chiseled into a merits brief and engaged at oral arguments, so that this Court can rule with confidence.

III. THE CASE IN DISTRICT COURT IS ONE STEP FORWARD; THEN, FULL STOP.

The State unabashedly admitted the many allegations of anti-federal animus of Respondent Gov. Hochul in its recent Answer. ECF-79; Sec. III.(B.) below.¹³ However, one cluster of admissions about one Respondent does not equate to this case “proceeding” or “continuing apace.” Opp.13-14. The State “filed” an Answer because the district court ordered it to do so. ECF-75.¹⁴ The State is now writing its second motion to dismiss¹⁵, which abruptly halted any

13. ECF-79 (Mar. 21, 2024); after the Petition was filed on Mar. 7, 2024, herein.

14. ECF-75 (Feb. 29, 2024).

15. The State previously on February 28, 2023, right before the March 2, 2023 appearance before the Second Circuit, filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). ECF-51. The State *sua sponte* withdrew it on December 13, 2023. ECF-64/66.

hope of discovery and kiboshed all projected dates of the “Case Management Plan” (ECF-83¹⁶). ECF-84.¹⁷ The State misrepresented the status of this case, below.

A remark about the State’s Answer is thus warranted. The Answer denied most allegations either outright, or, through “lack sufficient knowledge and information to form a belief and therefore deny,” or, “neither admit nor deny,” or, “refer the Court to the statutes cited for the best evidence of its content.” ECF-79.

The State rejected common denominator allegations like ECF-79, ¶34, “Among the Civil Rights belonging to the Plaintiffs is the Second Amendment to the U.S. Constitution, which 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.

The State went so far as to deny knowledge of whether the Petitioners have NYS licenses to operate as dealers in firearms; and, whether Petitioners have NYS concealed carry permits. ECF-79, ¶¶19, 21.¹⁸ And, see, Pet.10-13. These are state-required licenses, which require a state police background check. NY Pen. §400.00(1). The concealed carry permit renewal is performed through a

16. ECF-83 (Apr. 5, 2024).

17. ECF-84 (Apr. 19, 2024).

18. *N.B.*: The first sentence of the State’s Opposition Brief states “Petitioners are dealers licensed by the State of New York.” Opp.1 (emphasis added).

NYS Police website.¹⁹ The Complaint commenced the case November 1, 2022. The Respondent NYS Police should have that information available at a touch of a button.

The State's attorneys want to portray this case in the manner of "Dance in the Country" by Pierre-Auguste Renoir, which rather invites the collegial quip, "American Gothic by Grant Wood."

IV. NYS GOV. HOCHUL'S ANTI-FEDERAL ANIMUS WAS ADMITTED BY THE STATE

The Answer (ECF-79) did admit a body of allegations against NYS Gov. Hochul, relative to her anti-federal animus and collusion with outside influencers, which was set out across fifteen pages of the Complaint. C.A.App.46-62. Simply put, NYS Gov. Hochul viewed *Bruen* as this U.S. Supreme Court taking away state power over the state citizen and lashed out against what she thought was no more than a proxy for the individual – whether literally, or, symbolically – namely, the FFL.

Here are four very limited excerpts of public statements by Gov. Hochul, as admitted:

- ¶194: "...the insanity of the gun culture that has now possessed everyone all the way up to even to the Supreme Court."
- ¶196: "Shocking, absolutely shocking that they have taken away our right to have reasonable restrictions."

19. NYS Police website page at <https://firearms.troopers.ny.gov/pprecert/welcome.faces>.

- ¶104: “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.” and,
- ¶105: “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.”

But, as to whether the Respondent Governor, as a NY-licensed attorney, is bound under the NY Code of Professional Responsibility, including Canon 9, EC 9-6, “...to uphold the integrity and honor of the profession; to encourage respect for the law and for the courts and the judges thereof...”, the Answer states

“Admit that Governor Hochul is an attorney. Neither admit nor deny the remaining allegations of Paragraph 97 as they state legal conclusions to which no response is required. To the extent a response is deemed required, deny the remaining allegations and respectfully refer the Court to the authorities cited for the best evidence of its content.” ECF-79, ¶97.

Petitioners’ claims in these regards (C.A.App. 48-62), and repeated throughout this motion process, are thus advanced under 42 U.S.C. §1985(3) and §1983, and the Second and Fourteenth Amendments. No longer can or do Respondents disguise their intention to defeat the

Fourteenth Amendment civil rights guarantee of “equal protection of the laws” to individuals in their capacity as state citizens, using the Second Amendment and the Petitioners as their vehicle to get there.

CONCLUSION

Our history is one of individual ownership, possession, and use of firearms, captured and symbolized through the Second Amendment to the U.S. Constitution. Going backwards and forwards of 1791, deep into this Court’s work in *Heller*, *McDonald*, and *Bruen*, is bedrock, neither reliant upon, nor dominated by, government possession and distribution of firearms to citizens. That is our history and tradition.

Petitioners’ place as FFLs in that history begins in 1968 with the advent of the federal license, serialization, and recordkeeping. It incorporated electronic technology since the 1993 Brady Act propelled the 1998 launch of FBI-NICS centralized database. The function of the FFL for more than fifty years has balanced individual civil rights and universal concern for public safety because of compliance-minded, private business owners who are ATF “Responsible Persons.”

Without Petitioners, in the here-and-now, the history and tradition written by this Court becomes just a dusty book on a shelf. Without Petitioners, this Court loses its sentry at the back door, signaling the scheme designed by Respondents to evade judicial review that would cause the dust to settle on those pages.

At this time, Petitioners request certiorari be granted.

Respectfully submitted this 22nd day of May 2024.

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