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September 15, 2023

Mr. Robert Meek
Clerk of the Court
Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: Nadine Gazzola, et al. v. Gov. Kathleen Hochul, et al.
Case No. 23A230

To Clerk Mr. Robert Meek:

On September 11, 2023, I filed an Emergency Application. On September 12, 2023, I submitted a supplemental letter briefing on key aspects of the newly-published “User Guide” to the dealer interface. While awaiting a ruling, the NYS Police take-over of background checks began on September 13, 2023. After two days of system failures and attempted operation reports by federally-licensed dealers in firearms (FFLs), I bring forward this second supplemental briefing. Will you please transmit this supplemental submission to the Hon. Justice Clarence Thomas, and, if it has advanced to the full court, to all Justices?

The following key points support the likelihood of success of our claims and thus support the request for emergency stay.

First, the NYS Police are actively violating federal law by abusing the FBI-NICS system to run ammunition background checks. NYSP employees are manually entering individual ammunition background check data from their new system, by hand, into the federal FBI-NICS system in violation of 28 CFR §25.11. Attached is the Declaration of Elijah Falkner, who is a Columbia County Sheriff’s Department Corrections Officer, concerning his attempted purchase of ammunition on September 14, 2023 and his subsequent telephone conversations with employees at the NYS Police about the “delay” notification. The officer at NYSP who provided the information to Mr. Falkner is one of the employees engaging in this illegal use of FBI-NICS.

28 CFR §25.11(b)(2) prohibits a state, expressly, from misuse of the FBI-NICS system for any purpose outside the federally-mandated firearms background check. The new (2022) statutes complained of includes express language of the state’s intention to attempt to use the FBI-NICS system for this illegal purpose. NY EXE §228(3). Our record is replete with

arguments against this intended abuse of the FBI-NICS system by the state. (*See, e.g.,* most recently, Reply Brief at 8, 26, 39-41; Brief at 15, 29-30, 34, 44-45, 50-53, 60.)

It is common knowledge in our industry such an input would be illegal if committed by the FFL. 28 CFR §25.6(a). Now, the NYSP is creating a situation where the federally-licensed dealer logs in to the new state NYSP system and refers to the “User Guide” without knowledge or notification that the NYSP is going to man-handle the data by manual entry into the FBI-NICS system. No federally-licensed dealer in New York, nor any individual customer, has given their consent for the data misuse, nor been made aware it is happening.

Second, the NYS Police paperless system undermines public safety, including federal prosecutions of illegal purchases of firearms. The NYSP failed to promulgate any paper form to be completed by the individual customer and attested to under penalties of perjury. NY EXE §228(4). NYSP is promoting a “paperless” system. By contrast, federal law requires the individual customer in a Brady state to complete the customer portions of the ATF Form 4473 and sign it under penalties of perjury. 18 U.S.C. §922(t) makes it illegal for an FFL to complete a transaction without completion of the form and a “proceed” or a 3-day delay without status change. The customer attestation provides the basis, e.g., for the U.S. Department of Justice to prosecute persons who commit “straw purchases” on behalf of a third party they know to be a disqualified person. This ATF Form 4473 with purchaser attestation allowed federal prosecutors to gain a conviction with maximum 10-year federal prison sentence against Dawn Nguyen, for her straw purchase of firearms o/b/o (deceased) mass murderer William Spangler, who shot and killed two responding firemen in Webster, New York on Christmas Eve 2012. The singular focus of the defendants to build a firearm owners’ registry is literally undermining the federal commitment, shared by plaintiffs and FFLs across New York, against a firearm being purchased to a disqualified person.

The plaintiffs and FFLs are required to continue the use of the ATF Form 4473 for federally-regulated firearms purchases. 28 CFR §25.6(i). (A.) The new NYSP computer system requires data entry beyond the federal form, such as mandatory Social Security Number (see NYSP “User Guide,” p. 9), mandatory e-mail address (p. 10), mandatory occupation (p. 7). And, (B.) the ATF Form 4473 is not permitted to be used for ammunition background checks or for antique firearm¹, both of which the state now requires. The State Police would still have to issue a paper form with attestation for at least purposes A and B.

Third, the NYS Police “appeals” process violates individual civil rights. The NYS Police released mid-day yesterday a 1-page flyer and an on-line computer screen for a customer appeal of a denied transaction. The on-line screen does not allow attorney representation (the ATF administrative appeals process on line and on paper does so). The appeal does not function with the burden of proof upon the NYS Police to provide a record match to the denied customer. Instead, in order for an individual to file an on-line appeal he or she must answer additional, irrelevant and/or potentially self-incriminating responses from the customer (the ATF administrative appeals process on-line and on paper does not ask for additional information beyond identity verification). A .pdf of the NYSP appeals screen is attached.

¹ Defined at federal law at 18 U.S.C. §921(a)(16).

Also, the new statute plus the new release on-line, creates a 2-phase administrative appeal with terminal ruling. NY EXE §228(8). It is first to the NYS Police and, if adverse, to the NYS Attorney General. The presentation of the statute and of the now-public materials makes it appear the state will treat the NYS-AG as the terminal decision. There is no notification to the customer that they may have other and different rights, including to avail themselves of a state or federal court proceeding, under either NY Civil Practice Law & Rules Art. 78 in country court (as is used for concealed carry permit appeals) and/or in federal district court via 18 U.S.C. §925A.

In these two exhausting days, I feel more like a war correspondent than an attorney. There is simply too much data in support of our claims to streamline for the Court. I have selected these three additional data points in support of our claims of the likelihood of our success upon the merits in this continuing application for emergency relief in the form of a stay.

In the interests of time, I transmit this. On behalf of myself, plaintiffs, and our named witnesses, please do not hesitate to ask any question about our submission. Thank you for your consideration of our application.

Respectfully submitted,
Paloma A. Capanna
Paloma A. Capanna

c.: Beezly Kiernan, Esq., NYS Office of the Attorney General (courtesy copy also via e-mail)

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK**

Nadine Gazzola, individually, and as co-owner,
President, and as BATFE Federal Firearms Licensee
Responsible Person for **Zero Tolerance
Manufacturing, Inc.**; *et al.*

Plaintiffs

v.

Kathleen Hochul, in her Official Capacity as Governor of
the State of New York; *et al.*

Defendants

DECLARATION OF ELIJAH FALKNER

1. I am Elijah Falkner and I make this Declaration under penalties of perjury. These statements are true to the best of my knowledge, and are based upon my personal knowledge and experience unless otherwise specified.
2. I submit this affidavit in support of the plaintiffs' Emergency Application, now before the Hon. Clarence Thomas, Justice of the United States Supreme Court.
3. On September 14, 2023, I received two "delay" responses on attempts to purchase two different calibers of ammunition at two different federally-licensed dealers in firearms in my area. Today, September 15, 2023, I checked with Nadine Gazzola at Zero Tolerance Manufacturing as to the status of the second of my two pending requests for ammunition purchase and she told me the purchase remained "delayed."

4. Following the first “delay” on September 14, 2023, at approximately 1:00 p.m., I called the NYSP and spoke to a female officer. Following the second “delay,” at approximately 2:45 p.m., I called the same NYSP number and spoke with a male officer. I identified myself both times as a law enforcement officer, employed by the Columbia County Sheriffs Department as a Corrections Officer. I stated the purpose of my call was to inquire into the “delay” responses received for my attempted ammunition purchases.
5. Both the female and the male officer told me the delays were caused by having to input “by hand” (meaning, “manually”) the information input and transmitted by dealers into the new NYS Police ammunition background check on-line system.
6. Additionally, the male officer told me there was a problem with “NICS.” I asked the male operator if the issue was with the federal system, asking “I just wanted to make sure it wasn’t an issue with the E-Justice system and it was in fact the Fed NICS and you don’t have anything to port it with,” or other, similar words to that effect. The male officer replied “Yep.”
7. I used the term “port it with” in the commonly-understood technical meaning of systems inter-operation and automatic fill of information from one system to another.
8. The NYS Police are actively running ammunition background checks using the federal FBI-NICS system and are doing so by manual data entry.
9. In the scope of my work responsibilities for the Sheriff’s Department, I am trained in and do regularly use the “e-Justice” system of the New York State Police. For the past four years, I have used the NYSP e-Justice system to run criminal background checks on inmates. Two primary forms of checks can be run, a “full run,” including fingerprints, or,

a “hard run,” driven by a Social Security Number. These criminal background checks come back within seconds to approximately five minutes.

10. The NYSP e-Justice is the data house for state records of, e.g., criminal convictions.
11. It is my understanding that e-Justice can be and is being used to complete the state records component of any new firearms or ammunition background check.
12. What I believe the NYSP male officer specifically referred to is that NYSP employees are using the federal FBI-NICS system to run federal background checks on individuals attempting to purchase ammunition.
13. It has always been my understanding that the federal NICS background check system is to be used only for non-antique firearms purchases and/or specific types of inter-personal transfers of non-antique firearms through a federally-licensed dealer.
14. I am unaware of any federal requirement for an ammunition purchase background check.
15. I am unaware of any component of the ATF Form 4473 that applies to the purchase of ammunition.
16. Personally, I have never been “delayed” or “denied” for any federal background check using an ATF Form 4473 at the point of purchase. I have numerous times gone through this background check system and have always been a “proceed.”
17. In addition to my employment through the Sheriff’s Department, I continue to have special clearances with the U.S. Army. I served in the Army as a Combat Engineer with an Alternate Duty as a Weapons Armorer and assisted with US Army Weapons Qualifications and Trainings from 2014 to 2018 and was honorably discharged. I am President of a Fire Company, and I am on the “County Cause and Origin Team” I am also sit on the Board of

Directors of an EMS Squad. I am also a Post Adjutant and assist Veterans with benefits through an American Legion Post.

18. I have undergone many background checks throughout my military service and my civilian employment, in addition to numerous FBI-NICS background checks.
19. The Columbia County Sheriff's Department allows us to qualify with personal duty weapons per department policy. I can elect to purchase my own firearm to use as a duty firearm. This also allows me to practice off-duty at the range and using ammunition I buy and pay for.
20. Any delay in the purchase of either ammunition or a firearm I select to use in the line of duty directly impedes my ability to do my job in the field of public safety.
21. Also, Corrections Officers (Peace Officers) were exempted from the 2022 restrictions against concealed carry under the "Concealed Carry Improvements Act." Any delay in the purchase of either ammunition or a firearm I select to concealed carry during off-duty hours impairs my ability to perform my civic duty to assist in the public safety of my community, at large.
22. I am available to provide testimony or further written submission, if the court requests it.

Whereas, I respectfully request this emergency motion be granted in favor of the plaintiffs.

Dated: September 15, 2023

Elijah Falkner

Elijah Falkner

(signed electronically with concurrent voice authorization directly to counsel)

NYS NICS

New York State Police

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Appeals Form

Required Field [*]

STN *

Date of Background Check Submission *

Applicant's Last Name *

Applicant's First Name *

Applicant's Middle Name

Email *

Confirm Email *

Reason for Appeal Request *

Have you ever been arrested in New York and/or another state? *

Yes No

Where? *

Did this arrest(s) result in a conviction? *

Yes No

Were you ever arrested while in the military? *

Yes No

Where? *

Did this arrest(s) result in a conviction? *

Yes No

Were you ever adjudicated incompetent or involuntarily committed? *

Yes No

Are you the subject of a current order of protection? *

Yes No

Submit

- **New York State Police**

1220 Washington Avenue
Building 22
Albany, NY 12226

- **Support**

Website: NYSNICS.ny.gov
Email us: NYSNICS@troopers.ny.gov
Phone Number: 1-877-NYS-NICS

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