

No. 22-622

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IN THE  
**Supreme Court of the United States**

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NADINE GAZZOLA, *et al.*,

*Petitioners,*

*v.*

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

*Respondents.*

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

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**REPLY BRIEF FOR PETITIONERS**

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**I. IT IS TIME TO GRANT CERT OF THIS RULE 11 PETITION**

**A. LOOMING DEADLINE TO PROTECT FFL RECORDS FROM NYSP**

April 30, 2023 is the first semi-annual deadline for NY-based FFLs to submit their federal records containing gun owner personal information to Resp. NYS Police under NY Gen Bus §875-f. [Br 20-21] Petitioners will neither transmit nor allow blanket access of federal A&D Records or ATF Form 4473s to Respondents or third parties. NY Gen Bus §875-f, §875-g(2). [Br 21] *See*, Sec. II this Reply (records content detail and federal prohibitions).

Since December 5, 2022, Petitioners were unable to or did not meet multiple deadlines, principally, new laws NY Gen Bus §875-b, §875-b(1), §875-b(2), §875-c, §875-e, §875-e(3), and §875-f(1)-(4).

Non-compliance triggers a catastrophic legal cascade, including loss of Second Amendment rights. [Br 3, 5, 21]

**B. THE SECOND CIRCUIT GAVE NO REASON TO WAIT FOR A RULING**

Oral arguments at the Second Circuit on March 20, 2023 left no reason to wait for a ruling. The panel conveyed no familiarity with the *Gazzola* submissions. Attitudes surfaced, e.g., “Nobody is entitled to have a gun store on every corner...”

Present were Resp. NYS-AG James and NYS Solicitor Underwood. Attorney Beezly Kiernan argued. Nothing

said in Manhattan was noted in opposition to this Rule 11 Petition, even by these attorneys who signed off on the Opposition Brief.

Contrary to the State's claim [Opp.Br 11], Rule 11 is a normal tool, used at least eight times last year.<sup>1</sup> This case is an appropriate use of the Rule.

### **C. NADINE GAZZOLA HAS NOW PLED THE FIFTH AND FFLS ARE CLOSING**

Updating Br 4, 21: Petitioner Nadine Gazzola of Zero Tolerance Manufacturing, filed her ATF Form 8 (FFL renewal). Nadine pled the Fifth Amendment to questions #2 and #3 on state compliance. Nadine affirmed federal compliance and with such state laws not otherwise subject of this case. We alerted the ATF of this case and her party status. [App.Br 13-15; App.Br Ex A] The ATF did renew her FFL on March 9, 2023.<sup>2</sup> [App.R 21-22]

All FFL licenses and NY licenses renew every 3 years. 27 CFR §478.49; NY Pen §400.00(10).

An FFL cannot temporarily close while pursuing a merits decision (e.g., FFLs must respond in 24-hours to an ATF trace request during a crime investigation. 18 U.S.C. §923(g)(7)). Permanent close involves ATF

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1. *AZ v. Mayorkas* (No. 22A544, 21-1609); *Dep't of Educ v. Brown* (No. 22-535); *Biden v. NE* (No. 22-506); *U.S. v. TX* (No. 22-58); *Ardoin v Robinson* (No. 21-1596); *Allen v. Caster* (No. 22-10272); *Students for Fair Admissions v. UNC* (No. 21-707).

2. March 1 through March 9 were covered by an ATF "Letter of Authorization."

on-site for “...all acquisition and disposition logbooks, firearms transactions records – such as ATF Form 4473 that contains purchaser information – and other required records.”<sup>3</sup> 18 U.S.C. §923(g)(4).

Counsel decries FFL data is not “mass closures.” [Opp.Br 6<sup>4</sup>]. Petitioners are model civil rights plaintiffs, holding steady while pursuing injunctive relief at every level.<sup>5</sup> Other NY-based FFLs were/are not able to hold out.<sup>6</sup> There were 1,782 FFL Type-01s in November 2022; down to 1,745 by February 2023. [App.R 3] Several FFLs announced closure because of the new laws, including

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3. U.S. GAO, “Report to Congressional Requesters: Firearms Data – ATF Did Not Always Comply with the Appropriations Act Restriction and Should Better Adhere to Its Policies,” GAO-16-552 (June 2016), p. 14.

4. Counsel’s data claims are wrong. [Opp.Br 6] One example: NICS checks include, e.g., permit background checks. Per ATF methodology: “They do not represent the number of firearms sold.” This [https://www.fbi.gov/file-repository/nics\\_firearm\\_checks\\_-\\_month\\_year\\_by\\_state\\_type.pdf/view](https://www.fbi.gov/file-repository/nics_firearm_checks_-_month_year_by_state_type.pdf/view) provides handgun and long gun checks from Form 4473s at FFLs. Even so, “long gun” does not reflect rifle vs shotgun, nor sub-divide rifle into, *inter alia*, semi-automatic rifle (SAR). That detail is not collected by the ATF. It is FFL-based data *only*. ATF data shows a high of 23,170 long gun checks at NY FFLs in August 2022 (month prior to new SAR license effective date). Low: February 2023 of 10,952 long guns. Counsel’s arguments are irrelevant to Petitioners’ Declaration analysis on sales figures and customer behavior.

5. Methodology note: Declarations state time period Sep’t. + partial Oct.; only critical updates like FFL renewal inserted over these five months of motions/appeals on TRO/PI.

6. ATF website, available at <https://www.atf.gov/file/176601/download>.

Armageddon Arsenal Supply, Amity Firearms, and Operation Steel Rain.

Take note: Resp. Nigrelli testified February 8, 2023 no NYSP arrests yet under the new laws. He told lawmakers he will do so. “As the law is written, we are obligated to enforce them.”<sup>7</sup> See, also Br 11-12, 30-31. NYSP license data is not published.

#### D. “TO KEEP” IS RIPE FOR DECISION

The *Heller* court cited *Andrews v. State* with approval.<sup>8</sup> A scholarly “Memorandum” written for President Bush includes two pages on the independent value of “to keep” and traces its origins to 1541.<sup>9</sup> Apart from this, little, either philosophically, or by way of precedent, discusses “to keep.” Nor is there negative treatment. “To bear” simply occupies pole position.

“To keep” is not about “commercial sales.” [Opp.Br 1, 4, 5, 8]

“To keep” is the existence of the dealer.

The individual civilian has a choice whether to bear arms.

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7. NYS Senate public hearing video, available at <https://www.nysenate.gov/calendar/public-hearings/february-07-2023/joint-legislative-public-hearing-2023-executive-budget>.

8. *D.C. v. Heller*, 554 U.S. 570, 608, 614, and 629, citing *Andrews v. State*, 50 Tenn. 165 (1871).

9. Bradbury, Steven G., Nielson, Howard C., Marshall, C. Kevin, U.S. DOJ, Office of Legal Counsel, “Whether the Second Amendment Secures an Individual Right” (Vol. 28, 2004), pp. 140-141.



Once an affirmative decision is made, the dealer must exist or the right is hollow. Even if it is “fundamental” or “first class,” the Second Amendment is meaningless if there are no dealers or too few dealers or dealers that are geographically skewed or lacking inventory of entire classes of firearms or ammunition. Hence, “constitutional-regulatory overburden” and the value of precedents like *Steelworkers*.

“To keep” is the partner of “to bear.” The individual and the dealer are inextricably intertwined. They are one in the name of liberty.

## **II. FFLS ARE OBLIGATED TO SAFEGUARD FEDERAL COMPLIANCE RECORDS AT THEIR BUSINESS PREMISES**

“...Article VI unambiguously provides that federal law “shall be the supreme Law of the Land,” binding in every State.” *Printz v. U.S.*, 521 U.S. 898, 943 (1997), Stevens, J., dissenting. “Thus, not only the Constitution, but every law enacted by Congress as well, establishes policy for the State just as firmly as do laws enacted by state legislation.” *Id.*, 944.

## A. CONGRESS REPEATEDLY PROHIBITED CREATION OF A GUN OWNERS' REGISTRY

Supplementing Br 20-26. Since 1968,<sup>10,11,12</sup> Congress repeatedly reaffirmed their covenant to gun owners. Most recently, June 2022:

“(k) RULE OF CONSTRUCTION. – Nothing in this section, or an amendment of this section, shall be construed to allow the establishment of a Federal system of registration of firearms, firearms owners, or firearms transactions and dispositions.”<sup>13</sup>

Simply put, the 1968 GCA, as amended, “...established a system requiring federal firearms licensees (FFL) to record and maintain records of firearms transactions and make these records available to ATF for inspection under certain circumstances.”<sup>14</sup> “To achieve this balance, Congress requires FFLs to provide certain firearms transaction information to ATF, while also restricting ATF’s maintenance and use of such information.”<sup>15</sup>

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10. Gun Control Act of 1968, Pub. L. 90-618, 18 U.S.C. §§921, *et seq.*

11. Firearms Owners’ Protection Act, Pub. L. 99-308 (1986), 18 U.S.C. §§921, *et seq.*

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

13. Bipartisan Safer Communities Act, Pub. L. 117-159 (June 25, 2022), *inter alia*, 18 U.S.C. §§921, *et seq.*

14. GAO-16-552, *supra*, p. 2.

15. *Id.*

Preceding passage of the 1968 GCA, bills were introduced with language for national firearms registration, however, "...none of the registration bills came close to passage."<sup>16</sup>

### **B. HOCHUL'S "NEW" STATE LAWS ARE FEDERAL DISCARDS**

Provisions of Hochul's "new" laws were picked out of the garbage can of old federal laws and quashed regulation drafts, rejected by Congress as unconstitutional. Here are but three examples:

1. §875-f and §875-f(2) resurrect 18 U.S.C. §923(g) (ver. 1968), which originally read: "shall submit to the Secretary such reports and information with respect to such records and the contents thereof as he shall by regulation prescribe."<sup>17</sup>
  - It was replaced by 18 U.S.C. §923(g)(1) (A), "shall not be required to submit to the Attorney General reports and information with respect to such records and the contents thereof, except as expressly required by this section." (emphasis added)
2. §875-f(3) is also copied from 18 U.S.C. §923(g) (ver. 1968) which originally read: "The Secretary may enter during business hours the premises

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16. Vizzard, William J., "The Gun Control Act of 1968," St. Louis Univ. Pub. L. Rvw., Vol. 18, No. 1, pp. 85-86.

17. U.S. Senate, Committee on the Judiciary, "Federal Firearms Owners Protection Act (to accompany S.914)," Report 98-583 (August 8, 1984), p. 15.

(including places of storage...for the purpose of inspecting and examining....”<sup>18</sup> And included “shall make such records available for inspection at all reasonable times.”<sup>19</sup>

- It was replaced with entry and examination exceptions, such as a judicial warrant. [Br 23-24]
3. §875-f(2) plagiarizes a 1978 ATF-proposed rule that failed (it was not implemented) for dealers to “prepare and submit to the Director a quarterly report showing disposition of firearms during the reporting period.”<sup>20</sup>
- Congress immediately held hearings, imposed funding restrictions, and, in 2011, passed a “prohibition against consolidating or centralizing firearms compliance records of dealers to the ATF.”<sup>21</sup>

Via the FOPA adoption legislative process, Congress determined multiple provisions of the 1968 GCA were unconstitutional FFL dealer mandates (“...further numerous constitutional rights guaranteed to firearms owners by correcting substantial deficiencies in the Federal firearms laws, which, in part, [gave] rise to certain

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18. *Id.*

19. *Id.*

20. 43 Fed. Reg. 11800-11802 (March 21, 1978).

21. GAO-16-552, *supra*, p. 10-11.

questionable enforcement policies.”<sup>22</sup>). “Constitutional rights guaranteed to firearms owners” were thus defined by Congress – decades ahead of this Court – to include the Second, Fourth, Fifth, Ninth, and Tenth Amendments.<sup>23</sup>

A judicial stay will halt new laws offensive to the laws of Congress.

**C. IT IS ILLEGAL FOR FFLS TO GIVE  
FEDERAL COMPLIANCE RECORDS TO  
ANY THIRD PARTY**

Further to Br 20-26. FFL recordkeeping is dictated by 18 U.S.C. §923(g)(1)(A): a dealer “...shall maintain such records...at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe.” Regulations at 27 CFR §478.121(a) state: “The records pertaining to firearms transactions prescribed by this part shall be retained on the licensed premises in the manner prescribed by this subpart and for the length of time prescribed by §478.129.” This is true for FFLs of every type, conducting business across the U.S., its territories, and globally via import/export. Failure under 18 U.S.C. §922(m) “...to properly maintain, any record...” is punishable under 18 U.S.C. §924(a). All FFLs are obliged to zealously safeguard their federal firearms compliance records on site and against third parties.

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22. U.S. Senate, Report 98-583, *supra*, p. 1.

23. *Id.*, ftnt. 1.

**D. NICS DATABASES AND RECORDS ARE A CREATION OF FEDERAL LAW AND ARE ACCESSED ONLY ON A TRANSACTIONAL OR WARRANT BASIS**

Additionally to Br 25-26. As of 2018, federal agencies are required to submit disqualified person records and certify reporting compliance.<sup>24</sup> States have a choice whether to contribute records. 28 CFR §25.4.

Further to Br 34-35. Resp. Gov. Hochul refuses to voluntarily contribute state records to NICS, even though briefed in writing that 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.”<sup>25</sup> Hochul’s quest for political dominance undermines public safety.

Strict laws govern FBI/ATF: (a.) physical housing of data servers; (b.) processing inquiries; (c.) retention and destruction of inquiry data of nondisqualified persons in 24-hours; and, (d.) exceptions for use of customer data in criminal trace pursuant to a warrant served upon FFLs for voice or copy relay of a specific customer or firearm (by serial number) from the original FFL record. 28 CFR §25.1 through §25.11.

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24. Fix NICS Act, Pub. L. No. 115-141 (March 2018).

25. NYS Governor website, “Governor’s Program Bill 2022 Memorandum (Extraordinary Session #1), p. 4, available at [https://www.governor.ny.gov/sites/default/files/2022-07/EXTRAORDINARY\\_SESSION1-CONCEALED\\_CARRY\\_IMPROVEMENT\\_ACT-MEMO.pdf](https://www.governor.ny.gov/sites/default/files/2022-07/EXTRAORDINARY_SESSION1-CONCEALED_CARRY_IMPROVEMENT_ACT-MEMO.pdf).

The FFL dealer also operates under exacting federal data retention and destruction laws. 27 CFR §478.129. An FFL is prohibited to query NICS “for any other purpose” than a potential transfer of a firearm to a customer. 28 CFR §25.6. NICS POC is also limited to firearm transfer queries. 28 CFR §25.6(d)(2). It would be illegal to use NICS for an ammunition background check as set out in NY Pen §400.02(2), *read with* NY Pen §400.03(6) (If NYSP Superintendent certifies use of NICS, “...use of that system by a dealer...shall be sufficient to satisfy... this section...”). No federal law allows state personnel to direct FFLs to use NICS for illegal purposes.

Hochul’s efforts to become a NICS POC state, violate, *inter alia*, 28 CFR §25.9, data retention and destruction. The new NY Exec §228 does not satisfy federal requirements.

POC states do not have *carte blanche* access to federal databases. POC states check state and local records as a compliment of the federal check. 28 CFR §25.2; §25.6(d). POC states are bound by federal records access and destruction requirements. 28 CFR §25.9(d). Prohibited activity is punishable. 28 CFR §25.11.

What, then, is the role of a state in the federal NICS system? Exactly what Hochul won’t do: voluntary submission of state records of disqualification. 18 U.S.C. §922(g)(1).

A stay against abuse of the NICS system or the NICS POC permissions furthers the objectives of Congress and mandates binding the US-AG, ATF, FBI, and FFLs.

### **III. RESPONDENTS CANNOT BE TRUSTED**

#### **A. RESPONDENTS WANT TO BUILD A GUN OWNERS' REGISTRY USING FEDERAL RECORDS**

Respondents plan to build a gun owners' registry. State Counsel admitted it. The new laws will create it, unless stayed. [App.Opp Br 18; SCOTUS Dkt 22A591, Resp. 20-21]

Hochul exploited "anger" and "abortion" and "guns" to pass laws she erroneously thinks will facilitate her smash-and-grab of federal NICS and FFL records in order to create the first gun owners' registry in the history of this country. Hochul's impermissible and discriminatory goal supports Petitioners' §1983 and §1985(3) claims and supports this requested stay. [Br 32-33; SCOTUS 22A591 E/R Mo 5-7; SCOTUS E/R Reply 1-4] Any state shadow bookkeeping is merely an end-run around the Fourteenth Amendment and is equally offensive to the Rule of Law.

#### **B. RESPONDENTS REFUSE TO MEET THEIR OWN OBLIGATIONS**

Respondent agencies refused to perform their own statutory obligations. [Br 12; Doc 33-1] Authority to do so expired December 5, 2022. [S.4970-A, §5; Br 12] State's Counsel waived all opportunities to explain.



### C. RESPONDENTS MISREPRESENT FEDERAL LAW

Updating Br 12. On January 27, 2023,<sup>26</sup> Resp. NYSP randomly uploaded a PDF titled “New York Gun Dealer Training.”<sup>27</sup> [See, NY Gen Bus §875-e(1), employee training.] It is replete with errors of federal firearms compliance law and is worse than no “training” at all.

- For example, slide #6 reads: “You are NOT required to obtain an ATF Form 4473 for the following: Transfer of a firearm, rifle or shotgun to another FFL.” This omits the federal requirement of the selling FFL to obtain a copy of the receiving dealer’s FFL and ascertain that the license is valid. 27 CFR §478.94.
- Another example, slide #7 references a non-existent statute (“unless the transferee qualifies for one of the exceptions listed in 18 U.S.C. 900(t)(3).”

### IV. NYSRPA V. BRUEN REQUIRES A STAY OF LAWS INFRINGING INDIVIDUAL RIGHTS

Supplementing Br 26-28. “If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution itself becomes a solemn mockery.” *United States v. Peters*, 5 Cranch 115, 136 (1809). It is “[the] role of the Supreme

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26. After statutory expiration of agency authority.

27. NYS Police website, available at <https://troopers.ny.gov/system/files/documents/2023/01/2022-nys-dealer-training.pdf>.

Court in our constitutional system that is at stake.” *Whole Woman’s Health, supra* (Roberts, C.J., concurring, p. 4).

**A. NO HISTORIC ANTECEDENTS FOR SAR LICENSE, AMMUNITION BACKGROUND CHECK, OR YOUTH PROHIBITION**

The Opposition Brief added no claim of antecedents to support new laws for an SAR license, an ammunition background check, or a ban on youth entry to FFLs. These infringements should be stayed, including NY Pen §400.00(2), (3), (6)(9), and (14) and §400.02(2); *read with* NY Pen §265.65 and §265.66; NY Gen Bus §875-c.

A stay conforms to Congressional intent and law:

- “...Congress can – and should – deal differently with long-guns than it does with handguns.”<sup>28</sup>
- FOPA in 1986 repealed the 1968 GCA licensing of dealers for ammunition sales, finding such a license had “no measurable crime-fighting value” and that the “paperwork burden is enormous.”<sup>29</sup>

**B. NON-EXISTENT STANDARDIZED CURRICULUM AND TEST FOR CONCEALED CARRY**

Respondents refuse to issue the standardized curriculum and testing for statewide concealed carry

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28. U.S. Senate, Report 98-583, *supra*, p. 32.

29. Congressional Record (July 9, 1985), p. 18183.

training. Neither the curriculum, nor the test exists. State's Counsel failed at every turn to explain or provide. The training requirement should be stayed, as found at NY Pen §400.00(1) and §400.00(19), *read with* NY Exec §235, §837(23)(a) and NY Pen §265.20(3a).

State Counsel's persistent misrepresentation of law changes nothing about the black letter of it. [Opp.Br 10] There is no legal distinction between "renew" and "recertify." [Br 28] No longer is the NYS concealed carry permit "for life." [Opp.Br 10] Every permit holder must now renew every three years. NY Pen §400.00(10). Every Petitioner must train once, but cannot because there is no state curriculum or test. Nor can they offer training as part of their livelihood.

Here is the walk-through: NY Pen §400.00(19) – Prior to the...renewal of license under [400.00(2)(f)]...", which itself reads "A license for a pistol or revolver to...(f) have and carry concealed." Last sentence NY Pen §400.00(19): "...shall only be required to complete such training for the first renewal of such license..."

Respectfully submitted this 3<sup>rd</sup> day of April 2023

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