22-3068

United States Court of Appeals

for the

Second Circuit

Nadine Gazzola, individually, and as coowner, President, and as BATFE Federal Firearms Licensee Responsible Person for Zero Tolerance Manufacturing, Inc., Seth Gazzola, individually, and as coowner, 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 Resonsible 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 as 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, 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, 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, Leticia James, in her Official Capacity as the Attorney General of the State of New York,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK (SYRACUSE)

BRIEF FOR PLAINTIFFS-APPELLANTS AND SPECIAL APPENDIX

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CORPORATE DISCLOSURE STATEMENT
(FRAP 26.1)

No nongovernmental corporation that is an Appellant to this proceeding has a parent corporation or is publicly held.

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JURISDICTIONAL STATEMENT

Appellants filed this case on November 1, 2022 under 42 U.S.C. §1983, §1985(3), and §1988. [A9-134] Appellants assert claims under the Second, Fifth, and Fourteenth Amendments to the U.S. Constitution. [A122-132] The district court has subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1343. Appellants seek redress of grievances for deprivation under color of state law of their civil and other rights, privileges, and immunities, and for resultant declaratory and injunctive relief and damages. [A11-12]

This appeal arises out of an interlocutory order that denied Appellants' request for preliminary injunctive relief. 28 U.S.C. §1292(a)(1). On November 8, 2022, Appellants submitted a "Motion for Temporary Relief" to the Hon. Brenda K. Sannes, N.D.N.Y. [A172, *et seq.*] It was denied by text order on December 2, 2022. [CM/ECF 2] Appellants continue to seek an emergency stay against enforcement by Appellees of the new laws complained of herein, including, but not limited to, firearms dealer mandates under NY Gen Bus §875, concealed carry permit renewal training, semi-automatic license requirements, and ammunition background check requirements. Appellants also seek appointment of a Master with specific duties. The proposed order is found at A-336 to A-340.

This appeal as of right was timely filed. Fed. R. App. P. 4. Appellants' "Notice of Appeal" was filed from Text Order (Sannes, J., December 2, 2022). [CM/ECF 1, 2].[1] Appellants' "Emergency Motion" was filed December 6, 2022. [CM/ECF 12]. It was denied on December 21, 2022. [CM/ECF 29] Appellants are not aware of this case having been reported.

This court ordered an expedited brief be submitted by January 30, 2023. [CM/ECF 60] Oral arguments will be held March 20, 2023, in tandem with three related cases. [CM/ECF 46]

Pending before the U.S. Supreme Court is a Petition for Writ of Certiorari Before Judgment. Sup. Ct. R. 11. [SCOTUS dkt. 22-622] It is an appropriate application because this case "…is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court." The State's response is due February 8, 2023.

Appellants motioned the U.S. Supreme Court for an administrative stay while the Petition for Cert is pending. The request was denied. [SCOTUS dkt. 22A591] Appellants motioned this court for a stay while the U.S. Supreme Court

[1] Although waived in writing [1:22-cv-1134, Doc 41], Judge Sannes released a written decision a week after her text order [Doc 42] and after the emergency motion was filed to this court [CM/ECF 12].

Petition is pending. [CM/ECF 56] This request was denied. [CM/ECF 60] Appellants are thus simultaneously in both courts.

STATEMENT OF THE CASE

Appellants are individuals engaged as "dealers" in the lawful stream of commerce in firearms, as licensed by the ATF and the State. Their eight small businesses are owner-operated. One Appellant is licensed as a pawn shop. They have been in business from nine to fifty years, and have repeatedly renewed their professional licenses, including background checks, without event. Similarly, they have concealed carry permits, which they have previously renewed, including additional background checks, also without event. There is no dispute that as of September 1, 2022 and December 5, 2022 when the new laws complained of went into effect that Appellants were in compliance with laws and regulations governing their licensed and other Second Amendment activities.

Appellants got caught in the cross-fire of Hochul's counterattack against the U.S. Supreme Court and the Rule of Law following the leak of the *Dobbs* decision[2] and the release of *NYSRPA v. Bruen*.[3] Governor Hochul, in her self-described "anger," surrounded by her "team," signed bills, then recalled the legislators by

[2] *Dobbs v. Jackson Women's Health Organization*, 597 U.S. _____ (2022).

[3] *NYSRPA v. Bruen*, 597 U.S. _____ (2022).

"Proclamation" into "extraordinary session" to pass one more bill, the "Concealed Carry Improvements Act" ("CCIA").

Without feedback from either SCOTUS or this court over motion denials, this Brief is presented on the hypothesis that Fed. R. Civ. P. 65(b)(1) and *Winter v. Natural Res Def Council,* 555 U.S. 7 (2008) produce a false negative when a case (a.) relies upon a novel theory of law; and, (b.) goes after infringement of rights caused by a novel scheme designed to evade judicial review.

There is a silver lining: the Appellants bring forth the opportunity for the court to interpret the remaining word of the Bill of Rights as yet untouched. The word "to keep" of "to keep and bear Arms" from the Second Amendment. Appellants are distinguished as individuals, concealed carry permit holders, firearms instructors, licensed dealers, and business owners. Unlike the individual plaintiffs in *District of Columbia v. Heller*,[4] *McDonald v. Chicago*,[5] and *NYSRPA v. Bruen*,[6] Appellants in *Gazzola v. Hochul* have standing to bring the case that will not only define "to keep," but will also generate protection for licensed dealers of firearms. The firearm being the only object in the Bill of Rights. The Second Amendment being the only right requiring an object to self-actualize.

[4] *District of Columbia v. Heller*, 554 U.S. 570 (2008).

[5] *McDonald v. Chicago,* 561 U.S. 742 (2010).

[6] *Supra.*

As a pressing matter, Appellants continue to request a stay of enforcement of the new laws by Appellees while this case progresses to a decision on the merits. Any loss of Second Amendment rights "for even minimal periods of time" should "unquestionably constitute irreparable injury," as does any loss of First Amendment freedoms. *Elrod v. Burns,* 427 U.S. 347, 373 (1976). Protection of Second Amendment rights should be as *per se* "in the public interest" as the First Amendment. The public interest will not be harmed by the grant of an injunction. *Tandon v. Newsom,* 593 U.S. ___, 141 S. Ct. 1294, 1298 (2021, *per curiam*); *Roman Cath. Diocese of Brooklyn v. Cuomo,* 592 U.S. ___, 141 S. Ct. 63, 68 (2020, *per curiam*). The public is harmed by government enforcing an unconstitutional law. See, *ACLU v. Reno,* 929 F.Supp. 824, 849 (E.D. Pa. 1996).

Gazzola v. Hochul is complex and simple. Eight Appellants participate in this motion. Four Appellees. Just over thirty laws and sections of laws are challenged. Hochul has declared war on gun stores. Appellees are out-of-control with their random, unannounced publications via Internet during this litigation. Appellants' Form C Addendum is five pages, single-spaced. But, what shines through is "to keep." Appellants are the "to keep" of "to keep and bear Arms. Ultimately, the case is that simple and the likelihood of success on the merits is that clear.

ISSUES PRESENTED FOR REVIEW

Whether the District Court erred to deny Appellants a stay of enforcement of the laws complained of and whether a Master should be appointed with defined responsibilities?

ARGUMENT

I. APPELLANTS HAVE STANDING IN MULTIPLE CAPACITIES

Nadine Gazzola caught the words "zero tolerance" as a press conference aired with the Governor and a NYS Trooper. [A-190 ¶36] She and her husband, Seth, are co-owners of Zero Tolerance Manufacturing Inc. in Ghent, about a half hour south of Albany. [A-12; A-185 ¶5] It was August 31, 2022, the eve of the effective date for the "Concealed Carry Improvements Act" ("CCIA") A few weeks since Governor Hochul had signed NY S.4970-A – the day Nadine dubbed as "Pearl Harbor" for firearms dealers. [A-190 ¶34]

Appellants didn't know each other then. Christopher Martello of "Ikkin Arms" in Rochester [A-13; A-270 ¶5], a Veteran [*Id.*, ¶6] Bob Owens, also a Vet and former private contractor, up the St. Lawrence Seaway, d/b/a "Thousand Islands Armory." [A¶13; A-312 ¶5; A-313 ¶13-15] Craig Serafini, his son working for him at "Upstate Guns and Ammo," just twenty minutes NW of the

Capitol, when traffic allows. [A-13; A-242 ¶85; A-223 ¶5] John A. Hanusik, a dealer some fifty years, d/b/a as "AGA Sales" in the town of Catskill, on the Hudson. [A-12; A-329 ¶5] Michael Mastrogiovanni is up the I-81 in Liverpool (past Syracuse), owner of "Spur Shooters Supply." [A-13; A-247 ¶5] Nick Affronti, one of only nine federally-licensed pawn brokers left in the state [A-14; A-294 ¶12], living his "dream" [A-309 ¶87] through "East Side Traders" in rural Wayne County on Lake Ontario [A-294 ¶5].

Each of them had, separately, figured out that a catastrophic legal cascade was about to bury them. They'd be forced out of business or arrested – or both – by December 5, 2022 when the new business laws went live. Because they held NY-issued "dealer" licenses, they were now part of a group targeted by Governor Hochul.

A. APPELLANTS' CREDENTIALS MAKE THEM IDEAL TO STAND IN FOR THE LAST WORD OF THE BILL OF RIGHTS THAT IS RIPE FOR INTERPRETATION: "TO KEEP"

Appellants are individuals who present with credentials as federal firearms licensees, state licensees, business owners, and concealed carry permit holders. [A15-17; Declarations, *passim,* A184-335] "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." U.S. Const., art. III, sec. 2, cl. 1; *Rumsfeld v. Forum for Acad. & Instit. Rights, Inc.*, 547

U.S. 47, 52 n.2 (2006); *Centro de al Comunidad Hispania de Locust Valley v. Town of Oyster Bay*, 868 F.2d 104, 109 (2d Cir. 2017).

This case is at the earliest possible stage: complaint plus the motion for preliminary injunctive relief. Motion plus eight affidavits from the Appellants. None from Appellees. Appellants' burden of proof on standing is least when the case is at the pleading stage. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

Appellants are dealers in firearms by profession.[7,8] Specifically, Appellants are "Federal Firearms Licensees" ("FFLs"), licensed first by the ATF. Appellants are ATF "Responsible Persons"[9] for the businesses they own and operate. New York requires its own "dealer" license; an option allowed, but not required, by federal law. NY Pen §400.00(1); 18 U.S.C. §923(d)(1)(E). Appellants' state licenses are administered through their local county clerks' offices. [Nadine

[7] *N.B.*: Federal law defines the FFL-01 license as covering both the retail and the gunsmith functions. NYS requires two separate licenses – the "dealer" license and the "gunsmith" license to achieve the same permissions. The federal definition of "dealer" differs from NYS in other aspects not relevant to this case.

[8] *N.B.:* A federal license is not required to be a dealer of ammunition, nor is there a federal background check for the purchase of ammunition. The State does not require NYS-licensed dealers to obtain a "dealer of ammunition" license. NY Pen §400.03(7).

[9] "Responsible Person" is defined by BATFE on Form 7, "Definitions," as "In addition to a Sole Proprietor, a Responsible Person is, in the case of a Corporation, Partnership, or Association, any individual possessing, directly or indirectly, the power to direct or cause the direction of the management, policies, and practices of the Corporation, Partnership, or Association, insofar as they pertain to firearms." [A-444]

Gazzola A-185 ¶11-12; Seth Gazzola A-186 ¶15; Serafini A-223 ¶6-7; Mastrogiovanni A-247 ¶9; Martello A271-272 ¶13-16; Affronti A-294 ¶¶5, 7; Owens A-312 ¶16; and, Hanusik A-329 ¶6-7.] The federal license must be renewed every three years. 27 CFR §478.45. The state license, likewise. NY Pen §400.00(10). Each renewal requires a fresh background check, as was done when the first application was submitted (some nine to fifty years prior). 27 CFR §478.47; ATF Form 7; ATF Form 8.

The new laws directly impact Appellants as eight of the 1,782 Federal Firearms Licensees Type-01 ("FFL-01s") and one of the nine Type-02 ("pawnbrokers") with "business premises"[10] in New York.[11] [A-404] Nationwide, there are 52,887 FFL-01s and 6,924 FFL-02s, including Puerto Rico and the U.S. Virgin Islands. [*Id.*] All operate under "federal firearms compliance law," arising largely out of the following: (1.) the 1968 Gun Control Act ("GCA")[12]; (2.) the 1986 Firearm Owners Protection Act[13] ("FOPA"); (3.) the 1994 Brady Handgun

[10] Federal regulation defines the "business premises" as "The property on which the manufacturing or importing of firearms or ammunition or the dealing in firearms is or will be conducted. A private dwelling, no part of which is open to the public, shall not be recognized as coming within the meaning of the term." 27 CFR §478.11.

[11] For simplicity of language, both the "dealer" and the "pawnbroker" are referred to herein as "dealers." The distinctions at federal law are not relevant to this case.

[12] Gun Control Act of 1968, Pub. L. No. 90-618 (October 22, 1968), 82 Stat. 1213-2, 18 U.S.C. Ch. 44 §§921, *et seq*.

[13] Firearms Owners' Protection Act, Pub. L. 99-308 (April 10, 1986), 100 Stat. 449, 18 U.S.C. §§921, *et seq*.

Violence Prevention Act[14]; and, (4.) associated ATF regulations primarily at 27 CFR §478.1, *et seq.* and 28 CFR §25.1, *et seq*. Complaints made herein are indicative of the problems the new laws create industry-wide.

Appellants are business owners in the form of sole proprietorships, single-member LLCs, and corporations. Appellants are owner-operators at their small businesses. [Nadine Gazzola A-185 ¶5; Serafini A-223 ¶5; Mastrogiovanni A-247 ¶5; Martello A-270 ¶5; Owens A-312 ¶5; Hanusik A-329 ¶5.]

Appellants Nadine and Seth Gazzola are paid firearms instructors. [Nadine Gazzola A-195 ¶47-48; Seth Gazzola A-211 ¶25-39] Appellants, as business owners, benefitted from new and renewing handgun permittee business connected to their own training courses or courses of known third parties. [See, e.g., Serafini A-226 ¶23-32]

Appellants, as individuals, have unrestricted NYS concealed carry permits. [Nadine Gazzola A-186 ¶17; Seth Gazzola A-207 ¶8; Serafini A-223 ¶9; Mastrogiovanni A-247 ¶7; Martello A-270 ¶9; Affronti A-294 ¶10; Owens A-312 ¶10; Hanusik A-329 ¶9.] These permits must now be renewed every three years. NY Pen §400.00(10). This, too, requires repeated background checks.

[14] Brady Handgun Violence Prevention Act, Pub. L. 103-159 (November 30, 1993), 107 Stat. 1536, 18 U.S.C. §§921-922, 925A.

Appellants, as individuals, are also owners, users, and customers of firearms and ammunition. [Nadine Gazzola A-186 ¶18; Seth Gazzola A-207 ¶8; Serafini A-223 ¶9; Mastrogiovanni A-247 ¶7; Martello A-270/A-271 ¶9-10; Affronti A-294 ¶9; Owens A-312 ¶9-10; Hanusik A-329 ¶6 and 9.] Firearms purchases require background checks.

B. NEW COMPLIANCE LAWS TOOK EFFECT AGAINST DEALERS AND THREATEN TO PUT THEM OUT-OF-BUSINESS

Until December 5, 2022, Appellants were in compliance with all federal and state laws and regulations governing their licenses. On that day, most of the state laws complained of went into effect[15] and Appellants found themselves out of compliance. As described by Appellant Robert Owens:

> "The new laws are much worse than the "SAFE Act." For nine years, I have been able to work within the confines of the ATF mandates and the "SAFE Act." I could stay in the middle of that and do everything in accordance with the law. I am operating legally.
>
> "Now, I can't comply. It's literally impossible. It's also unconstitutional." [A-325 ¶67-68]

There is a catastrophic legal cascade for Appellants as a direct result of the new laws. These laws target NY-licensed "dealers" *only* – no other business in the

[15] Pursuant to NY GCN §20, laws that would otherwise become effective on a Saturday or Sunday become effective the following Monday. Any reference in the record to a "December 3" effective date for NY S.4970 by State's Counsel or the District Court Judge is in error.

state. [A146-150] Penalties include class A misdemeanor and/or class E felony criminal charges, *plus* revocation of the state-issued dealer license. NY Gen Bus §875-i; NY Pen §400.00(11). The loss of the state license results in the loss of the federal FFL license. 18 U.S.C. §923(e), *read with* §923(d)(1)(F). [See ATF Form 7, question 20(b) for original application at A-440; and, ATF Form 8, questions #2 and #3 for renewals at CM/ECF 19; then at "Exhibit A" to this Brief.] Additionally, a criminal conviction for non-compliance would result in the loss of the personal NYS individual concealed carry permit and of Second Amendment rights in all fifty states and U.S. territories. NY Pen §400.00(11); 18 U.S.C. §922(g)(1); U.S. Const. amends II and XIV. An immediate stay is needed to forestall this unjust legal cascade until the case reaches a decision on the merits.

Appellants are unable to comply with most of the new laws; they refuse to comply with several, specific laws under federal pre-emption and invoke their Fifth Amendment right against self-incrimination in so doing. [Nadine Gazzola A-191 ¶38, CM/ECF 19, and Exhibit A, hereto; Seth Gazzola A-210 ¶22; Serafini A-233 ¶50; Mastrogiovanni A-254 ¶35; Martello A-278 ¶40; Affronti A-303 ¶53; and Owens A-316 ¶30.]

C. THE FIRST FEDERAL LICENSE RENEWAL WAS FILED BY MAIL THIS JANUARY 30, 2023 BY NADINE GAZZOLA OF ZERO TOLERANCE MANUFACTURING

On January 30, 2023, the day this Brief will file, the first of the Appellants is required to file for renewal of their FFL and invokes Fifth Amendment rights to two questions in an effort to stave off federal license suspension and/or revocation. U.S. Const. amend V. Attached to this Brief at "Exhibit A" is Nadine Gazzola's renewal application for Zero Tolerance Manufacturing Inc. on ATF Form 8 with her attachment invoking her Fifth Amendment rights.

ATF Form 8 includes two trapdoor questions about state compliance, as follows:

> Question 2. "Within thirty days after this application has been approved, will the firearms or ammunition activity comply with the requirements of State and local law applicable to the conduct of the firearms or ammunition business or collection of curios and relics?"
>
> Question 3. "Will the requirements of State and local law that are applicable to the firearms or ammunition activity or collection of curios or relics, be met prior to the start of the business or collection activity?"

[Exhibit A, hereto; CM/ECF 39, pp. 24-27; Seth Gazzola A-210 ¶23-24] The renewal application must also be mailed to the local County Sheriff's Department. [*Id.*]

The Appellants' request for a stay – nearly ninety (90) days after making the first such request – can no longer be scuttled. It has fallen upon this court to grant the stay. "To ask, in these circumstances, that Appellants await such a prosecution for an adjudication of their self-incrimination claims is, in effect, to contend that they should be denied the protection of the Fifth Amendment privilege…" *Albertson v. Subversive Activities Control Board*, 382 U.S. 70, 76 (1965). "The hazards of incrimination created by the registration requirement can thus only be termed "real and appreciable."" *Haynes v. U.S.*, 390 U.S. 85, 97 (1967).

The immediacy of Nadine Gazzola's ATF renewal application progresses one argument that has evolved in these months. Appellants initially argued the new annual certification of compliance, found at NY Gen Bus §875-g(1)(b)[16], would trigger the first licensing renewal problems. [A-25 ¶31(k); A-69 ¶145; DCt doc 13-11, p. 13] Just as Appellants submitted their motion to this court [CM/ECF 12], the NYSP spontaneously posted to the Internet the annual certification would not commence until January 2024. [CM/ECF 19] Appellants sounded the alarm that this did not solve the problem because several of their federal and state dealer licenses would come up for renewal in the interim. [*Id.*]

[16] Apologies are extended that the record contains several errors of this provision, incorrectly as NY Gen Bus §875-g(b)(1).

And: here we are. The ATF is now within its authority to suspend (or revoke) Nadine Gazzola's federal firearms license for failure to affirm compliance with state laws and regulations governing business operations. 27 CFR §478.73.

D. APPELLANTS REMAIN IN NEED OF IMMEDIATE, PRELIMINARY INJUNCTIVE RELIEF

With the advent of *NYSRPA v. Bruen*, Appellants should have been able to enjoy their equal federal and state Second Amendment rights with all the promise of the Fourteenth Amendment: "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." U.S. Const amend XIV. Instead, the new laws treat Appellants as state-licensed dealers in firearms as if they are "…a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive, supra* at 79*; Haynes v. U.S., supra* at 97.

Ultimately, firearms dealers in NY will need a fourth decision. The trilogy of *Heller – McDonald – NYSRPA v. Bruen* do not go far enough to protect the ability of the individual to purchase a firearm and ammunition through a licensed dealer. The precedent cases were brought by individuals, as individuals only. Anything else in those decisions is *obiter dicta.* It is the interpretation of "to keep" that is needed to insulate the individual-to-FFL relationship from infringement.

Gazzola v. Hochul is that case; it has jurisdiction, standing, claims, and damages to support the last word of the Bill of Rights that will ever be a case of first impression. Nadine, Seth, Bob, John A., Michael, Bob, Christopher, and Nick are the "to keep" of "to keep and bear Arms." From 1791 to now. Appellants need the stay to help them go the distance to cross that historic finish line.

TRO rulings are exempted from the Fed. R. Civ. P. 52(a) requirement of express findings. TROs are "characteristically issued in haste, in emergency circumstances, to forestall irreparable harm." *Romer, supra* at 16. Fed. R. Civ. P. 65(b) authorizes a TRO may be resolved without taking any evidence and that a preliminary injunction demands "…only such thoroughness as a burdened federal judiciary can reasonably be expected to attain within twenty days." *SEC v. Frank,* 388 F.2d 486, 490 (2d Cir. 1968). The TRO/PI are *pendente lite* tools, used even with a "sketchy" record, especially when the right is "…a central pillar of democracy in this country." *Rossito-Canty v. Cuomo,* 86 F.Supp.3d 175, 195 (E.D.N.Y. 2015). Findings '…are "not a jurisdictional requirement of appeal,' but only 'aid appellate courts in reviewing the decision below.'" *Rossiter v. Vogel,* 148 F.2d 292, 293 (2d Cir. 1945).

Appellants continue to ask this court award preliminary injunctive relief as quickly as possible so that, if in the affirmative, it can catch up to the ATF renewal

application. It will not bind the federal agency, but may assist the balance of the ATF renewal evaluation to weigh in Nadine's favor.

II. APPELLEES ARE TRYING TO TAKE DOWN THE U.S. SUPREME COURT USING DEALERS AS PAWNS

Drafting the Complaint overflowed of fifteen pages to capture an essential overview of the animus unleashed by Gov. Hochul, her Co-Appellees, and team of third parties. The *prima facie* claims under 42 U.S.C. §1983 and §1985(3) are made out. [A-46 through A-71] Appellees' discrimination against Appellants is an on-going constitutional violation. *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 95 (2d Cir. 2007); *In re Deposit Ins. Agency*, 482 F.3d 612, 617 (2d Cir. 2007).

Appellees are otherwise properly before this Court under a narrow exception to sovereign immunity set forth in *Ex parte Young*, 209 U.S. 123 (1908), recently affirmed, that "allows certain private parties to seek judicial orders in federal court preventing state executive officials from enforcing state laws that are contrary to federal law." *Whole Woman's Health v. Jackson,* 594 U.S. _____ (2021) at p. 5, citing *Young*, at 159-160.

A. THE FIRST WAVE OF LAWS BROUGHT ON BY GOV. HOCHUL AGAINST NY-LICENSED "DEALERS" IN FIREARMS

The firestorm ignited with the May 3, 2022 leak to Politico[17] of a draft of the U.S. Supreme Court *Dobbs* decision. That was the day NYS Governor Kathy Hochul vowed to "go on offense" because she was "absolutely horrified."[18]

The resultant winds of Hochul's self-described "anger" carried her on May 15 to a literal church pulpit, seeking forgiveness for "the anger in my heart."[19] The headlines over the next six weeks would mirror Hochul's emotional drama: "Jurisprudence: The Horror in New York Shows the Madness of the Supreme Court's Looming Gun Decision."[20] and "New York lawmakers move to restrict concealed carry and add abortion rights to state constitution."[21]

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[17] Ward, Myah, "Alito's Roe draft, beyond abortion," Politico (May 3, 2022), available at https://www.politico.com/newsletters/politico-nightly/2022/05/03/alitos-roe-draft-beyond-abortion-00029725.

[18] Goldsmith, Jill, "New York Gov. Kathy Hochul "Absolutely Horrified" as Supreme Court Poised to Reverse Roe v. Wade," The Deadline (May 3, 2022), available at https://deadline.com/2022/05/new-york-governor-kathy-hochul-supreme-abortion-roe-v-wade-1235015476/.

[19] Official website of NYS Governor Kathy Hochul, "Video, Audio, Photo & Rush Transcript: Governor Hochul Delivers Remarks at True Bethel Baptist Church," (May 15, 2022) at https://www.governor.ny.gov/news/video-audio-photo-rush-transcript-governor-hochul-delivers-remarks-true-bethel-baptist-church. Widespread coverage of her "anger" included, but was not limited to CNN, The New York Times, Spectrum News 1 (Buffalo), WBEN 930-AM, News 10 (ABC affiliate, Albany); print coverage through Buffalo News, and Livingston County News.

[20] Cornell, Saul, "Jurisprudence: The Horror in New York Shows the Madness of the Supreme Court's Looming Gun Decision," The Slate (May 19, 2022), available at https://slate.com/news-and-politics/2022/05/new-york-shooting-supreme-courts-gun-madness.html.

[21] Quay, Grayson, "The Empire (State) Strikes Back: New York lawmakers move to restrict concealed carry and add abortion rights to state constitution," The Week (July 2, 2022), available at https://theweek.com/gun-control/1014853/new-york-lawmakers-move-to-restrict-concealed-carry-and-add-abortion-rights-to.

A brief recitation is offered here of these events. See, also, SCOTUS Motion Reply, pp. 1-4 and Complaint A-46 through A-62. These pages provide an overview of the motivated discrimination exhibited by Hochul, her Co-Appellees, and associated third parties, and substantiate Appellants' claims under 42 U.S.C. §1983 and §1985(3).

"This is why "fundamental rights may not be submitted to a vote; they depend on the outcome of no elections." *Obergefell v. Hodges,* 576 U.S. _____(2015), citing *West Virginia Bd. of Ed. V. Barnette,* 319 U.S. 624, 638 (1943). As Mr. Chief Justice Roberts has recently described: "In an organized society, there can be nothing but ultimate confusion and chaos if court decrees are flaunted."[22]

B. THE SECOND WAVE OF LAWS BROUGHT ON BY GOV. HOCHUL AGAINST INDIVIDUAL FIREARMS OWNERS

The NYS Legislature completed its regular session for the year on June 2, 2022.[23]

[22] "2022 Year-End Report on the Federal Judiciary," p. 2, available on line at the official website of the U.S. Supreme Court https://www.supremecourt.gov/publicinfo/year-end/2022year-endreport.pdf.

[23] "New York State Legislative Session Calendar: January – June 2022," available at https://nyassembly.gov/leg/docs/sessioncalendar_2022.pdf.

Hochul could have used the off-season to cool down. Time that would have been better spent reviewing drafts of bills, numbering and publishing them to legislators and constituents, comporting with New York's 3-day desk rule, and engaging in town hall meetings at home. In other words, to demonstrate respect for the Rule of Law, as did the California Attorney General, who, on June 24, 2022, issued a written "Legal Alert" to "All California District Attorneys, Police Chiefs, Sheriffs, County Counsels, and City Attorneys," to announce the *NYSRPA v. Bruen* decision and remind that "Under the Supremacy Clause of the United States Constitution, state and local officials must comply with clearly established federal law."[24] U.S. Const., art. VI, para 2.

Instead, upon release of the *Bruen* decision, Hochul generated firestorm winds. On that second fateful day of June 23, 2022, Hochul stood at a podium bearing the state emblem to live broadcast her official 'reaction-to' press conference in a room filled with reporters, while clutching and waving a stack of papers in a spring clip she claimed to be a print-out of the *NYSRPA v. Bruen* Decision. Hochul struggled with the pages, gushing:

> "If the federal government will not have sweeping laws to protect us, then our states and our governors have a moral responsibility to do what we can and have laws that protect our citizens because of what is going on – *the*

[24] California Department of Justice, Office of the Attorney General, "Legal Alert OAG-2022-02" (June 24, 2022), available at https://oag.ca.gov/system/files/media/legal-alert-oag-2022-02.pdf.

> *insanity of the gun culture that has now possessed everyone all the way up to even to the Supreme Court.*" [A-48 ¶94, emphasis added]

Hochul, an attorney admitted to the Bar in New York, knowingly misrepresented the SCOTUS ruling in order to inflame others:

> "…[the *NYSRPA v. Bruen* Decision] is only minutes old…" "*Shocking, absolutely shocking that they have taken away our right to have reasonable restrictions*. We can have restrictions on speech. You can't yell fire in a crowded theater, *but somehow there's no restrictions allowed on the second amendment*." (emphasis added) [A-50 ¶95]

Hochul concluded by foreshadowing: "Stay tuned. Stay tuned. We're just getting started here." [A-51 ¶101]

The very next day, June 24, 2022, Hochul issued a "Proclamation" that yanked back the 213-member legislature to Albany for extraordinary session for the purpose of "considering legislation I will submit" in response to the decision of *NYRSPA v. Bruen.*[25] [A-52 ¶104]

On June 29, 2022, the day prior to the start of the extraordinary legislative session, Hochul unveiled her hopes to override the Rule of Law:

> "And I thank the State Police for being so aggressive in their approach and making sure that we protect citizens, *but then you have the Supreme Court of the United States*

[25] NYS Governor Kathy Hochul website, "Proclamation" (June 24, 2022) available at https://www.governor.ny.gov/sites/default/files/2022-06/Proclamation_Extraordinary_Session_June_2022.pdf

> *of America that think that they have more power than a governor does when it comes to protecting the citizens of our state*." [A-53 ¶105, emphasis added]

The Governor attacked the U.S. Supreme Court Justices of the majority vote:

> "The Supreme Court decision was a setback for us, but I would call it a temporary setback, because we are going to marshal the resources, **the intellect**, we've been talking to **leaders in this industry**, and **academics** and **people in think tanks to** find out what we can do legally, constitutionally, to make sure that we do not surrender my right as Governor, or our rights as New Yorkers to protect ourselves from gun violence." [A-54 ¶108, (emphasis added)]

Hochul's assertion of power, including over the nation's high court, intensified to:

> "The Supreme Court's decisions were certainly *setbacks*. But we view them as *only temporary setbacks*, because 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. They may think they can change our lives with the stroke of a pen, but we have pens too, I give out a lot of pens. And that draws from the office of the Governor of the State of New York. And I intend to fully exercise those rights, working with our partners in the legislature to protect our freedoms and to keep New Yorkers safe." [A-55 ¶112, emphasis added]

Hochul behaved as if the Fourteenth Amendment had never been ratified.

The extraordinary session began on June 30, 2022 at noon with a gavel in and a stand at ease because S.51001, the "Concealed Carry Improvements Act"

was not yet released, even for the legislators.[26] Session began closer to 5 pm, and went on into the dark of night. Hochul abruptly Tweeted at 2 AM on July 1, 2022: "We refuse to stand idly by while the Supreme Court attacks the rights of New Yorkers," with an image of her second "Proclamation," this one "to enshrine the right to abortion access in the State Constitution."[27] It, too, called extraordinary session "…for the purpose of: Considering legislation I will submit…" [A-51 ¶102-104; A-55 ¶110-113]

Hochul collapsed the separation of powers between the governor and legislators. NY S.51001 passed. Hochul signed it on July 1, 2022.

Hochul masterminded the multi-bill assault upon federal civil rights and SCOTUS with her "team" [A-51 ¶103; A-55 ¶111] of "leaders in industry," "academics," "people in think tanks," "outside consultants," "constitutional and policy experts," "experts." All were external to state government, including the lawyers with whom she was "joined at the hip"[28] – lawyers she named and said

[26] NYS Senator (former) Daphne Jordan, website blog entry "Extraordinary Session in Extraordinary Times," available at https://www.nysenate.gov/newsroom/articles/2022/daphne-jordan/extraordinary-session-extraordinary-times.

[27] NYS Governor Kathy Hochul Twitter official account @GovKathyHochul, July 1, 2022 at 2:24 AM, available at https://twitter.com/govkathyhochul/status/1542755891023413248.

[28] At a press conference on August 31, 2022 in Syracuse, NY, Hochul describes herself as "joined at the hip with Everytown" in preparation and drafting of the new laws, including credit to Samuel Levy, Senior Counsel to "Everytown for Gun Safety" and Dave Pucino, Deputy Chief Counsel at the "Gifford Law Center." Video of the press conference is available on ABC News (Syracuse) https://www.localsyr.com/news/state-news/watch-live-governor-hochul-makes-a-public-safetyannouncement-in-nyc/ beginning at 2:00.

worked for Everytown for Gun Safety and Gifford Law Center. [A-47 ¶ 91, 91 n.54; A-54 ¶108; A-55 ¶111; A-56 ¶113] Only two days prior, Everytown for Gun Safety Action Fund, an IRC §501(c)(4), had endorsed Hochul for Governor and James for Attorney General.[29]

C. THE DISCRIMINATORY ATMOSPHERE IN ALBANY UNDER HOCHUL'S LEADERSHIP

Fast forward to August 31, 2022, the day before the CCIA went into effect, and "First" (now "Acting") Superintendent Nigrelli stood alongside and converted Hochul's sustained anger into his own threat: "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." [A-57 ¶115]

Hochul's animus saturates her official government website Press Releases, appearance transcripts, and videos. [A-46 through A-62] Hochul's remarks are not isolated comments or media out-takes or one-liners. This assemblage is proudly and continuously displayed to the public from her official state government website and social media platforms. Her discrimination is an on-going

[29] Everytown for Gun Safety website, Press Release (June 22, 2022), available at https://www.everytown.org/press/everytown-for-gun-safety-action-fund-endorses-kathy-hochul-for-governor-antonio-delgado-for-lieutenant-governor-letitia-james-for-attorney-general/.

constitutional violation. *State Employees Bargaining Agent Coal., supra*, at 95; *In re Deposit Ins. Agency, supra,* at 617.

Co-Appellee NYS Attorney General Letitia James, too, uses her official government website to promote Everytown for Gun Safety, hyperlinking to it with language like "Here's what you need to know about NYSRPA v. Bruen." [A-367] Staff attorneys also cite to these external "non-profits" during this case. [DCt. 29, p. 11, n.4 and p. 30, n.14]

In every respect, Hochul's "leadership" draws from the history of the Dixie Democrats in the South. Hochul's words breathe new life into the 1957 speech of Alabama Governor Orval Faubus ahead of the Little Rock showdown ("…I was not elected Governor of Arkansas to surrender all our rights as citizens to an all-powerful federal authority.") [A-58 ¶119] The atmosphere in Albany under Appellee's leadership is such that State's Counsel failed even once to cite to the Fourteenth Amendment in their recent, responsive submission to the U.S. Supreme Court in this case. [SCOTUS 22A591, Resp. *passim*]

D. APPELLANTS HAVE VALID CIVIL RIGHTS CLAIMS AGAINST APPELLEES THAT WARRANT PRELIMINARY INJUNCTIVE RELIEF

Hochul's active and on-going discrimination must be curbed through immediate injunctive relief. *Ex parte Young*, 209 U.S. 123 (1908) provides

exception to sovereign immunity and allows private parties to sue state officials in their official capacity to enforce federal laws and regulations and achieve injunctive relief.

On July 14, 2022, Hochul hinted at her end game:

> "Also, $15 million for crime analysis centers. Why does this matter? Because people are bringing guns here from other states. I mean, where are they coming from? I'll tell you right now, they're not being sold on our streets. Legally in a store, I mean. **There's no gun stores here**. They're coming in from other states." [A-60 ¶124, emphasis added]

Hochul is the face of a burgeoning strategy of excessive, targeted laws to force firearms dealers out-of-business, which will, in turn, constrict the lawful supply of firearms and ammunition to New York residents.

On December 5, 2022, the day the bulk of the laws complained of went into effect, Adam Skaggs, the current chief counsel and policy director of Giffords Law Center/former senior counsel at Everytown for Gun Safety did an interview with The Wall Street Journal, laying out the strategy to enact everything possible, leave it to people to file lawsuits (if they can), and try to find a judge to stop unconstitutional laws (if they can). Skaggs told the reporter: "If courts eventually strike down certain provisions, so be it."[30]

[30] Quoted in "Gun control lobby's new strategy: push the envelope on "sensitive places," by Cam Edwards for Bearing Arms (December 5, 2022), available at

All of which is why Congress gave private citizens protection against unconstitutional infringements of federal civil rights by state officials. 42 U.S.C. §1983, §1985(3), §1988. We have the litigation tools to fight this injustice in ways earlier civil rights activists did not.

It may be Appellants' burden to establish the basis for the stay, but in three months in three courts, Appellees have created no dispute of fact against Appellants' civil rights claims.

III. A NOVEL THEORY OF LAW WITH A LIKELIHOOD OF SUCCESS: "TO KEEP"

When a litigant and an attorney advance a new theory of law, it is not presumptively wrong. And a new theory that is the organic extension of an established legal theory should definitely not result in a denial of relief out of hand. In 2003, when *Heller* began in the D.C. District Court, it had no precedent of direct lineage. In comparison, *Gazzola v. Hochul* has a running head start.

"The [appellants'] theories for relief challenges but also present some opportunities." *Whole Woman's Health*, *supra* (Roberts, C.J., dissenting, p. 17).

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https://bearingarms.com/camedwards/2022/12/05/gun-control-lobbys-new-strategy-push-the-envelope-on-sensitive-places-n64937.

"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*

A. "TO KEEP" OF THE SECOND AMENDMENT IS THE LAST WORD TO BE DEFINED FROM THE BILL OF RIGHTS

The first novel theory of this case is laid out across ten pages of the Complaint. [A-28 to A-38] This case is the organic progression of the trilogy of *Heller-McDonald-NYSRPA v. Bruen*. Appellants are the "to keep" of "to keep and bear arms." U.S. Const., amend. II. The operative clause contains a joinder of two verbs; not just one. It's not just "to bear." Both verbs should be equally available to define and defend fundamental individual rights in constitutional analysis. The FFL in the lawful stream of commerce in firearms is inextricably inter-woven with the individual. Indeed, in the case of Appellants, the individual is the same thing as the dealer.

Thus far, the U.S. Supreme Court has defined "to bear" as the right to "wear, bear, or carry…upon the person or in the clothing or in a pocket…" *NYSRPA v. Bruen, supra,* at 23, citing *Heller, supra,* at 592. The nation's high court also wrote that "to bear" "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." *NYSRPA v. Bruen, supra,* at 24.

Also important to this case, the U.S. Supreme Court previously found "in common use" as "lawful weapons that they [able-bodied men] possessed at home" to bring along to militia duty. *Heller, supra,* at 624 and 627 (emphasis added).

There is an *obiter dicta* consensus even among U.S. Supreme Court Justices that "to keep" meant, historically, dating back to the British Crown, that the individual "right to "have arms" in private ownership, must, at least, be protected "should the sovereign usurp the laws, liberties, estates, and Protestant religion of the nation." *NYSRPA v. Bruen, supra* at 27, Breyer, J., dissenting.

Indeed, the historic New York laws cited by the State required able-bodied men to report for militia training, bearing their personal, privately-owned arms and ammunition. [A-456, New York (1780), Sec. I ("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…" (emphasis added)); A-467, New York (1792), Sec. 1; and, A-472, New York (1782), Sec. I.

Historically, firearms and ammunition were not furnished by the State; they were privately purchased and owned by individuals, who then used them on behalf of a government. The Second Amendment has no historic or modern operational

meaning without sellers of firearms, like Appellants. Dealers are the "to keep" of "to keep and bear Arms."

Throughout *Heller – McDonald – NYSRPA v. Bruen*, the U.S. Supreme Court did not have jurisdiction to rule upon the "to keep," the *from whence* the militiaman came into possession of a firearm or ammunition, or, whether a firearms dealer stands on an equal constitutional footing as the individual. This case is that opportunity.

The firearm is the only object required to exercise a civil right in the Bill of Rights. This has yet to be formally recognized. In modern America, very few hands forge a firearm from iron ore. Some, like Appellant Mike Mastrogiovanni, a competition shooter, do reload ammunition [A-250 to A-251 ¶22-23] Others, like Appellant Bob Owens can bench build a firearm from component parts. [A-326 ¶75] Even reloaders and bench builders do not make their own arms from metals and forge. In 2023, the exercise of the Second Amendment depends upon the skill of the individual to use a credit card at a retail dealer in firearms.

No government office or agency is a conduit for an individual seeking to purchase a firearm to exercise their Second Amendment rights. The FFL is the only legally-sanctioned facilitator since 1968. The dealer in firearms is the

indispensable extension of the individual for the procurement of the firearm, and dealers must be protected with as much rigor.

Informative of why it's so important to protect this industry is a small group of War Years cases that includes *Steelworkers v. U.S.*, 361 U.S. 39 (1959). These cases interpreted a statutory phrase "will imperil the national health or safety" relative to critical industries. The court explained:

> "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. It is not competent to sit in judgment on the existing distribution of factors in the conduct of an integrated industry to ascertain whether it can be segmented with a view to its reorganization for the supply exclusively, or even primarily, of government-needed materials. Nor is it able to readjust or adequately to reweigh the forces of economic competition within the industry or to appraise the relevance of such forces in carrying out a defense program for the Government." *Supra*, at 50-51.

Consider, juxtaposed against the *Steelworkers* backdrop, that the State earlier suggested "Walmart and Runnings" would be "adequate" to meet New Yorkers' Second Amendment needs. [DCt. doc 29, pp. 16, 22.] The ATF database[31] shows 47 Walmart locations plus 10 Runnings stores with FFL-01 licenses – 57 stores total. Should we contemplate supply chains and delivery dates to quantify "adequate?" Any such discussion should include that Walmart,

[31] https://www.atf.gov/firearms/listing-federal-firearms-licensees.

nationwide, not only in New York, stopped selling handguns in 2019, along with the AR-15 platform rifle.[32] The wisdom *Steelworkers* suggests otherwise and draws us back to the test designed in *NYSRPA v. Bruen.*

B. "CONSTITUTIONAL REGULATORY OVERBURDEN" DEFINES THE BREAKPOINT AGAINST LAWS DESIGNED TO OR RESULTING IN FFL INABILITY TO MEET COMPLIANCE DEMANDS

The firearms industry is, even according to Forbes, "already one of the most heavily-regulated businesses in the United States."[33]

Applying "to keep" once established and defined will then require a standard for assessment of laws unconstitutional under it. Appellants propose a standard to be called "constitutional regulatory overburden" as a novel way to capture the Laffer Curve of a firearms dealer. "Constitutional regulatory overburden" defines the point at which new laws make compliance by a dealer in firearms either literally impossible, or, so impractical as a matter of finance, technology, or implementation, as to render the dealer literally or effectively out-of-business.

[32] Walmart, website, at https://corporate.walmart.com/askwalmart/what-is-walmart-doing-to-guarantee-responsible-firearm-sales.

[33] Bromund, Ted, "Why is the ATF Making Secret Rules for the Firearms Industry?" Forbes (March 24, 2019), available at https://www.forbes.com/sites/tedbromund/2019/03/24/why-is-the-atf-making-secret-rules-for-the-firearms-industry/?sh=2fd9876c526d.

The new laws, taken as a whole, define the point at which Appellants asked, "Why would I continue to turn the key and flip on the lights?" The new laws are so onerous as to de-incentivize a dealer, including Appellants, to continue to perform commercial functions necessary to give life to and to protect individual rights under the Second Amendment.

Appellants did a yeoman's job of setting out in the complaint the range of costs, technical requirements, and physical impossibilities of the new mandates, and they backed up that work with individual affidavits with further details. A logical response to the illogical situation in which they find themselves. The court is urged to walk through the analysis, focusing most readily in the Complaint at A-102 through A-122. Individual applications are found *passim* in each party affidavit. Appellants remain available at any time for testimony about this and any other aspect of their claims.

IV. FEDERAL PRE-EMPTION DEMANDS A STAY TO AVERT DISRUPTION OF ESTABLISHED SYSTEMS AND TO PREVENT A PROHIBITED GUN OWNERS' REGISTRY BUILD

Each Appellant was clear from the get-go about what they were "not" going to do as they read and marked up copies of NY S.4970-A. Top of the list? Not surrender federal firearms compliance records to the NYS Police. Not the ATF Forms 4473. Not the A&D books. Nor would they create a double set of books.

Or misuse the NICS firearms transfer background check system to run illegal ammunition background checks. They would not help the NYS Police create the first gun owners' registry. Whether by mandate to send in copies of records or by forced access to records on site, including with "manufacturers," Nadine, Seth, Craig, Nick, Mike, John A., Christopher – each had independently made decisions to invoke their Fifth Amendment rights and sue to have the offending laws reversed.

Appellants satisfy the injury-in-fact requirement. They are facing a "threatened enforcement of a law" that is "sufficiently imminent." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158-159 (2014). Appellants allege "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.* at 159, quoting *Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289, 298 (1979). Appellants need not be charged before bringing challenge to the constitutionality of a law "threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128-129 (2007).

Appellants "…should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." *Babbitt, supra,* at 298. *Cayuga Nation v. Tanner* informs the point. The case "sets a low threshold and is quite

forgiving to plaintiffs seeking such pre-enforcement review, as courts are generally 'willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.'" 824 F.3d 321, 331 (2d Cir. 2016). *See, also, Picard v. Magliano,* 42 F.4th 89, 98 (2d Cir. 2022).

A. THE NEW LAWS CREATE NEW TENSION IN A WELL-ESTABLISHED FEDERAL ATF TO FFL SYSTEM

Appellants present a pre-emption claim, which represents the first test of the federal-state balance in the field of firearms compliance law. [A-321 to A-324 ¶54-63] The Supremacy Clause "invalidates state laws that interfere with, or are contrary to federal law." U.S. Const. art. VI, cl. 2. From the GCA in 1968 until now, the ATF, with support from the FBI and the DOJ, has occupied the field. The few statutory or regulatory exceptions open to states have been largely theoretical and unexplored.

The new laws have direct impact upon the earlier-mentioned 1,782 Federal Firearms Licensees Type-01 ("dealers") and nine Type-02 ("pawnbrokers") in New York[34] [A-402] and, through inter-state commerce the 52,887 FFL-01s and 6,924 FFL-02s, nationwide, including Puerto Rico and the U.S. Virgin Islands. [*Id.*] Appellants engage in interstate commerce in firearms on an FFL-to-FFL

[34] For simplicity of language, both the "dealer" and the "pawnbroker" are collectively referred to as "dealers." The distinguishing features at federal law are not relevant to this case.

basis, including Mastrogiovanni [A-248 ¶15; A-259 to A-260 ¶48-54] and Seth Gazzola [A-217 ¶51 to A-219 ¶58]. Inter-state commerce is routine between FFLs of all Types, including, e.g., manufacturers (FFL Type-07) that supply dealers (FFL Type-01).[35] It's the basis for federal firearms compliance law originating, being most strategically placed, and requiring uniformity at the federal level.

Take "shipping" as one example from the new laws that seems innocuous, but has potentially catastrophic repercussions to ATF/FBI criminal investigations. Hochul and her team plopped the word "shipping" into a random phrase of "security plan" in NY Gen Bus §875-b to invite dealers to make up individual shipping protocols. If not pre-empted, this new state law will disrupt established, well-regulated, federal shipping mandates. The uniform system for FFL-to-FFL shipments must be preserved, including loss/theft in shipment protocols that are executed by the ATF/FBI and the FFL within a statutorily-mandated 24-hour window. 18 U.S.C. §§923(g)(6)-(7); 27 CFR §478.39a; ATF Forms 3310.6 and 3310.11 theft/loss in transit at A-435 and A-436 to 438. [*See* detailed discussion in Seth Gazzola, A-217 to A-219 ¶¶51-58; Serafini, A-240 to A-241 ¶¶76-81; and Mastrogiovanni, A-248 ¶15 and A-269 to A-270 ¶¶48-54.]

[35] Several Appellants have more than one type of federal license, e.g., Seth Gazzola of Zero Tolerance Manufacturing, Inc. has both an FFL Type-07 and an SOT Class 2 [A-186 ¶12; A-208 ¶13-14]

In another simple example, the new law at NY Pen §400.02(2) reveals the State's desire to run ammunition background checks through the federal NICS. This is illegal at federal law, including for "state and local agencies." As stated at 28 CFR §25.6(a):

> "FFLs may initiate a NICS background check only in connection with a proposed firearm transfer as required by the Brady Act. FFLs are strictly prohibited from initiating a NICS background check for any other purpose."

Federal, state, and municipal governments can be fined and prohibited from any unauthorized use of NICS. 28 CFR §25.6 ("shall be subject to" a fine not to exceed $10,000 and the possible cancellation of NICS inquiry privileges) and 28 CFR §25.11(b).

B. THE NYSP POLICE INTENDS TO AMASS FEDERAL FIREARMS COMPLIANCE RECORDS INTO DATABASES TO BECOME THE FIRST GUN OWNERS' REGISTRY

More sinister, under the new laws, Appellees demand all dealers, including Appellants, to periodically send their federal firearms compliance records to the NYS Police. NY Gen Bus §875-f. Penalties – as with any and all violations of the new General Business Law §875 – include incarceration and license revocation. NY Gen Bus §875-i; NY Pen §400.00(11).

The State admitted the record grab to create "state databases" will be to "…track the sale of firearms and ammunition." [SCOTUS Dkt 22A591, Resp. pp. 20-21] This is a "registry." The State is trying to commit "…an unfettered data grab of an individual's most personal information, from Social Security Number to eye color to firearms serial number." [Affronti A-302 ¶48]

Through three acts of Congress from 1968 to 1989, the federally-licensed dealer was born and was refined as the gold standard of the firearms purchase by an individual through transaction and inventory records[36] created by and managed by the FFL at his or her business premises. Pursuant to 18 U.S.C. §923(g)(1)(A):

> "Each licensed importer, licensed manufacturer, and licensed dealer shall maintain such records of importation, production, shipment, receipt, sale, or other disposition of firearms at his place of business for such period, and in such form, as the Attorney General may by regulations prescribe."

Appellants' federal firearms compliance records during an attempted firearms purchase are carefully choreographed communications with the customer and, separately, with the ATF in accord with federal law, regulation, and guidance documents too lengthy to set forth, herein. *See, e.g.*, 18 U.S.C. §926, 28 CFR §25.6(a), 28 CFR §25.11(b).

[36] "Records" for purposes of federal firearms compliance are defined under statutes and regulations like 18 U.S.C. §923(g)(2), 27 CFR §478.125(e), and 27 CFR §478.124.

The most valuable of these transaction records are the ATF Form 4473 [A-429 through A-434] and the Book of Acquisitions & Dispositions ("A&D Book"). "Even when the ATF runs a background check, it gets only so much information from me, the dealer, and that information has to be purged from their system in specified time periods, dependent upon the results of the records search." [Owens, A-317 ¶35; citing to 28 CFR §25.9] Nor can even the U.S. Attorney General require either all documents or even reports about such records be transmitted by the FFL to the U.S. Attorney General. 18 U.S.C. §923(g)(1)(A), second sentence.

Congress reassured gun owners and the industry that if they would trust the federal license concept to continue, the records would never be abused by any government, including any state government, to compile a registry against its citizens. [A-35 to A-38] The "Firearm Owners Protection Act of 1986," Sec. 101, reaffirmed:

> "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, nor that any system of registration of firearms, firearms owners, or firearms transactions or dispositions be established." [A-37 ¶¶65-66; A-65 ¶133b; A-35 through A-38 (emphasis added)]

This covenant is codified in 18 U.S.C. §926(a) in the unnumbered paragraph literally dropped under the third subdivision.

In the living history narrative of Appellant Michael Mastrogiovanni:

> "I remember when the 1968 Gun Control Act was passed and when the 1996 Brady Law was passed. The Brady Act is what ushered in the NICS background check system. Congress gave the ATF five years to design, test, and launch the NICS background check system, including security protocols, speed requirements, and records development for the ATF and the Licensees, as well as the ATF record retention and destruction policies. Congress was clear, through any Member interviewed on TV and in the news: no government registry would be created through the records, of any kind, on any level; the dealers would retain the originals." [A-255 ¶39]

The FFL-ATF system has been working "beautifully" "for decades." [Mastrogiovanni A-256 ¶40 and A-259 ¶46] Appellants unanimously support the federal compliance system, their relationships with their ATF Field Agents, specifically, and the ATF, generally, and their limited contact with the FBI for firearms trace. [See, e.g., Nadine Gazzola A-191 ¶¶39, 39a, and 39b; Serafini A-238 ¶¶70-71; Mastrogiovanni A-255 ¶39 and A-259 ¶46; Affronti A-297 ¶26 and A-308 ¶82.]

It is in the public interest for the 1,800 men and women like Appellants to "…stay in business," as described by Appellant Robert Owens:

> "What you get from that distribution of mom-and-pop shops is both solid supply for the citizens of North Country and, also, men and women on the ground who know the people in their communities and who are dedicated to preventing an illegal sale. You can characterize that as "working for" the ATF/FBI, or you can think of it as having the ATF/FBI on call to help us prevent crime in our communities. Either way, you do not want to drive the entire industry of firearms dealers out of business. It's contrary to public safety and it's an unconstitutional outcome." [A-318 ¶41]

Even threatened with the cascade of penalties previously set out, Appellants will not turn over their federal firearms compliance records to Appellee NYSP, nor will they create duplicitous (shadow) books to help Appellees avoid federal pre-emption court orders and/or federal penalty. [Declarations, *passim;* see, e.g., Fifth Amendment claims by Nadine Gazzola A-191 ¶38; Seth Gazzola A-210 ¶22; Serafini A-233 ¶50; Mastrogiovanni A-254 ¶35; Martello A-278 ¶40; Affronti A-303 ¶53; and Owens A-316 ¶31.]

Appellees demand what even the U.S. Attorney General cannot have. The U.S. Attorney General or an ATF officer may only access the ATF Form 4473 and the A&D Book in two routine, yet 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 for one additional circumstance of reasonable cause to believe a violation of law has been committed by the FFL. The final instance is assistance with a trace of a stolen firearm, as made to the FFL by the U.S. Attorney General or an ATF Officer under 18 U.S.C. §923(g)(1)(B)(iii).

C. NYSP WILL OTHERWISE FORCE PRODUCTION OF "NEW" COMPLIANCE RECORDS

Additional new recordkeeping requirements under NY Gen Bus §875-f(1) plagiarize federal firearms compliance laws by forcing dealers to create a near duplicate set of records to submit to Appellee NYSP. The new law mandates the new record include "the make, model, caliber or gauge, manufacturer's name, and serial number," which is the "Description of firearm" section of the "Table 4 illustration," which derives from 27 CFR §478.125(e), which says the entry shall include "…the name of the manufacturer and importer (if any), the model, serial number, type, and the caliber or gauge of the firearm." While the federal A&D Book is maintained by the Appellants and highly regulated against government seizure, this new law would require Appellants to send "such records" to the Appellee NYSP on a semi-annual basis beginning April 2023.

Additional, new record requirements under NY Gen Bus §875-f(2) would require Appellants to create a "new" set of reports using an inventory

reconciliation process. This is another stolen ATF concept. The "inventory reconciliation" is a process to manually compare the physical firearm in inventory at the FFL to the open entries of the A&D Book. 18 U.S.C. §923(g)(1)(C)(i). The audit is done during the ATF Field Officer on-site inspection, as granted and defined by 18 U.S.C. §923(g)(1)(B)(ii) and (C). This, too, is designed to capture sensitive firearms data for purposes of an illegal firearms owners' registry by Appellees.

As if all of that is not enough, the new law at NY Gen Bus §875-f(3) creates power to push in and force access to dealer records "at any time" by "law enforcement agencies and to the manufacturer of the weapon or its designee." There is no third-party access to FFL firearms records at federal law. This new law collides with Due Process afforded FFL-01s under the restricted right of access by the U.S. Attorney General or the ATF officer under 18 U.S.C. §923(g)(1)(A)-(B) and 27 CFR §478.23 (entry and review of records conditioned upon a federal judicial warrant or a statutorily proscribed audit process).

It is unprecedented for a third-party, non-governmental entity to randomly access Appellants' federal firearms compliance records – not even an FFL-07 (assuming that is what is meant by Appellees' undefined use of the words

"manufacturer of the weapon"). The language is vague, but it suggests the State wants to turn industry manufacturers into agents of the state.

D. NYSP DATABASE BUILD WOULDN'T STOP AT FFL RECORDS, BUT WOULD MERGE WITH OTHER STATE AGENCY DATABASES

The new laws direct merger of federal dealer records into NYSP "databases" (undefined) along with "such additional databases as needed," under the guise of converting into a "NICS Point-of-Contact" state. NY Exec §228(3), §228(4). If left unchecked, there will be "…no restrains on their data amalgamation as it relates to existing and new gun owners in a very Orwellian sort of way." [Serafini A-239]. FFL compliance records will merge with records from other state agencies, including, but not limited to the "office of court administration" and "department of public health." NY Exec §228(3).

> "The statutory language is clear: "databases." Plural and vague. No limits on what is swept up into it. No siloing of data used by it. No limits on the purposes it is to be used for going forward." [Affronti A-302, citing to NY Exec §228]

Handgun licenses, SAR licenses, firearm purchase background checks, and ammunition background checks will operate at the discretion of the NYS Police with administrative appeal limited to the NYS Attorney General.

NY Exec §228(8).

"The new laws contain no records security protocols, access, retention parameters, or destruction limitations." [Mastrogiovanni A-259, citing, e.g., to 28 CFR §25.9] All of which were set out for the ATF/FBI through the Brady Act, right down to the physical street location where the data is housed. 28 CFR §25.3. [*See*, generally, Title 28 CFR; Affronti A-300 to A-303 ¶¶43-54.] Federal law covers the first firearms background check record at a new FFL through disposition of records upon an FFL going out of business, all of which is done side-by-side with the ATF due to the "technical difficult of start-ups and shutdowns." [See, e.g., 28 CFR §25.9; Mastrogiovanni A-259 ¶47.]

The State has "…no demonstrated competency for setting up a firearms and ammunition background checks system." [Owens A-317] The conversion to a NICS-POS system will artificially jam the NYS Police in between dealers and the ATF. Further? Appellees gave themselves a blank check to build an infrastructure necessary to take over every gun and ammunition purchase in New York. The cost for the build is passed through to the dealer on a per background check charge. NY Exec §228(5).

By contrast to their uniformly negative experience as FFLs with the NYS Police, Appellants uniformly praise the ATF-based federal compliance system. That system, they describe, "functions smoothly and quickly" and is "free to use."

The ATF "800" number is "answered promptly and by employees who provide answers to my questions." [Owens A-316 ¶33] "NICS is a well-oiled machine that is offered free to the public and FFLs to use as a crime prevention tool." [Affronti A-302 ¶51]

"The better approach would be for [the State] to yield to the federal system, which more reflects the inter-state commerce of the firearms industry." [Hanusik A-331 ¶24] One positive step from the 2022 bills, all state and local crime guns will transfer to the ATF for trace purposes. NY Exec §§7-9. This addresses findings of a 2021 report by the NYS Intelligence Center through its Crime Gun Center, which found the third-party contractor hired to perform all New York law enforcement criminal firearms trace operations "has a top-secret clearance from the military" but needed "[a]dditional training in ATF database systems, policies and procedures."[37]

In contrast to the Appellees' philosophy, stance, and demonstrated actions, Appellants have been part of the federal crime gun trace system since they opened their doors. Hochul is trying to eliminate a crime gun trace partner valued by the ATF and the FBI, namely, the FFL.

[37] International Association of Chiefs of Police, "Crime Gun Information Sharing: The ATF i-Trafficking Project: Integration of Firearms Trace/Ballistic Data into Fusion Center Intelligence Sharing (2021) available at https://theiacp.org/sites/default/files/all/c/Crime_Gun_Info_Sharing.pdf

Similarly, Gov. Hochul's official policy risks public safety through her refusal to voluntarily contribute state records to the NICS Background Check System. (E.g., "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." [A-94 ¶196]) There are no (zero) NY records in NICS, except those for which the State was paid through two federal programs, one to help victims of domestic violence. [A-92 through A-94, ¶¶189-196] The State does not even report convicted criminals. [*Id.*; Martello A-276 ¶39; A-389]

Let's be clear: a lack of NICS record can result in a false "proceed" from the ATF/FBI to the FFL with a customer at the counter. One example set forth was the mass murder at the First Baptist Church of Sutherland Springs, Texas in 2017. The Air Force didn't enter the domestic violence conviction and the dishonorable discharge into NICS, creating a false "proceed" for a disqualified person. A court awarded $230 million in damages to survivors and families of the twenty-six people murdered. [DCt. Doc 33, p. 15]

The State, for the first time in response to Appellants' Application to the U.S. Supreme Court, claimed it needed the databases "to combat gun crime." [SCOTUS Dkt. 22A591, Resp. pp. 20-21.] The U.S. Attorney General, the DOJ, the FBI, and the ATF have not complained in more than fifty years that they

needed the FFL compliance records compiled into a gun owners' registry to "combat gun crime." Federal agencies have partnered with private FFLs to get the job done through a uniform, nationwide system that Appellants, *inter alia,* filed this case to defend. And they have done so while balancing Due Process rights of individuals and FFLs, alike.

E. DEFENDING AGAINST SEIZURE OF THEIR FEDERAL FIREARMS RECORDS WILL HARM APPELLANTS AND MAY RESULT IN ARREST AND/OR LOSS OF LICENSES

Because they are standing up for these federal pre-emption claims, Appellants will be unable to sign the new annual statement of compliance housed in NY Gen Bus §875-g(1)(b) and, as Nadine Gazzola already fears, will struggle to renew their federal and state licenses. Violation of the new annual compliance certification by any "person, firm, or corporation" is a class A misdemeanor, punishable by up to a year in jail and a monetary fine. NY Gen Bus §875-g(1)(b); NY Pen §70.15. Conviction also "shall operate as a revocation of the license." NY Pen §400.00(11-12). And, all personal firearms may be removed, if not surrendered. *Id.*

The annual compliance certification form (not yet published by Appellee NYSP) could ask no more than "Are you in compliance with NY Gen Bus §875-f

and the other provisions of §875?" This amounts to a violation of the Appellants' Fifth Amendment rights, and is unconstitutional. *Albertson*, *supra*, at 75-77.

Counsel calls these injuries "self-inflicted," [Dkt. 26, p. 32] which is an insult to our American experience of seeking judicial redress of civil rights violations in accord with our U.S. Constitution and Bill of Rights.

V. SECOND AMENDMENT INFRINGEMENTS BY APPELLEES THROUGH NOVEL METHODS DESIGNED TO EVADE JUDICIAL REVIEW

It quickly got confusing after the CCIA went into effect on September 1st. Customers started coming in, confused, asking questions. County-level officials, too. There was no training curriculum for the mandatory training for concealed carry permits. No one knew what to do about an unprecedented semi-automatic rifle license. "*And hadn't we already been through at least two failed rounds of ammunition background checks, including CoBIS and the "Memorandum of Understanding?*" It was inevitable that each county – previously operating under home rule – would start creative work-arounds to try to satisfy individual rights, especially since *Bruen* had only just been decided. Unfortunately, as Appellees push towards state-level uniformity the county-level creativity has made matters worse.

NY S.51001, the "Concealed Carry Improvements Act," should not even have been drafted in light of *NYSRPA v. Bruen*. "[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *NYSRPA v. Bruen, supra,* at 8. A government must then demonstrate that a firearms regulation "…is consistent with this nation's historical tradition of firearm regulation." *Id.,* at 2126, 2130-2131. Unfortunately, Appellee Gov. Hochul has "…employed an array of stratagems designed to shield its unconstitutional law from judicial review." *Whole Woman's Health, supra,* at p. 1 (Roberts, C.J., dissenting).

A. THE NEW STRATEGY OF APPELLEES BLOCKS SALES OF SEMI-AUTOMATIC RIFLES AND HINDERS SALES OF AMMUNITION

There are two essential strategies at play by Appellees to defeat Appellants' individual Second Amendment rights. First, the new laws impose an unprecedented (a.) semi-automatic rifle license requirement; and, the new laws impose an unprecedented (b.) ammunition background check. It is now illegal to purchase a semi-automatic rifle without a new license. NY Pen §400.00(2), (3), (6), (7)-(9), (14).

This argument is straightforward. The laws are presumptively unconstitutional. In response to these arguments, the State responded with four

historic laws – that support Appellants' claims that the license is unprecedented and the ammunition background check is unprecedented. This amounts to an infringement of Appellants' fundamental Second Amendment rights under *NYSRPA v. Bruen.* These new laws are unconstitutional and should be immediately stayed.

The State previously tried to muddy Appellants' standing to raise the SAR license requirement. Appellants have standing as individuals who own and use semi-automatic rifles. Appellants were not obligated to go to a third-party FFL-01 and attempt to purchase an SAR without a new license or to attempt to purchase an SAR with a county-endorsed concealed carry permit. Appellants are the gun store and the individual. This is their field of expertise and these statutes are not vague. It is illegal to purchase an SAR without a license. NY Pen §265.65. It is illegal to sell an SAR without a license. NY Pen §265.66. Appellants, as individuals, cannot even buy an SAR from themselves, as FFLs, without the SAR license.

Assuming, *arguendo,* this court approves of an SAR license, Appellants then argue: No free-standing SAR license is available because Appellee NYSP has failed to issue the format for the new SAR license. NY Pen §400.00(7). [A-522] Any right to purchase a semi-automatic firearm which is "in common use" at this time does not exist in New York.

After Appellants filed their Emergency Motion to this Circuit Court on December 6, 2022, NYSP spontaneously added a "Resources for Gun Dealers" to their public website and circulated a 4-page "memo." [CM/ECF 19-2 and 19-3] The memo admits that the SAR license is required to be a stand-alone license; not an endorsement upon a concealed carry license. [CM/ECF 19-1]

A "fiasco" [Serafini A-226 ¶23] is what has resulted as a direct result of the Governor's lead, especially at the county level, as described in detail in the Complaint, the Appellants' affidavits and exhibits. [A-42 through A-45; Nadine Gazzola A-187 ¶21, A-188 ¶23-24 and 27, A-192 to A-193 ¶¶40-41, A-195 to A-196 ¶¶47-56; Seth Gazzola A-209 ¶19, A-211 through A-214 ¶¶25-39; Serafini A-226 to A-229 ¶¶23-32; Mastrogiovanni A-251 to A-254 ¶¶26-34; Affronti A-299 to A-300 ¶¶38-42; Owens A-319 ¶45, A-325 ¶¶69-74; Dkt. 13-11, pp. 15-19; A-407 through A-426; CM/ECF 33, pp. 11, 17.]

Between the unconstitutional infringements and the mechanical frustrations, more than twenty county legislatures passed resolutions since July 1, 2022, condemning, *inter alia*, the "Concealed Carry Improvements Act." [See, e.g., A-407-410 (Columbia); A-414-415 (Jefferson)] It is unconstitutional for Appellees to create an effective ban on the purchase (or sale) of "an entire class of

arms, which will fail constitutional muster" under *Heller, supra*, at 628-629. These laws should be immediately stayed.

The State is fumbling via NY Pen §400.03(6) towards an ammunition background check through an illegal use of NICS, detailed in the prior section. The new law at NY Pen §400.02(2) also fails *NYSRPA v. Bruen.* As earlier set forth, the historic laws provided by the State supports Appellants' argument. Militiamen were to report both with their firearm and their ammunition or powder. This new law is unconstitutional and should be immediately stayed.

B. APPELLANTS ARE UNABLE TO RENEW THEIR CONCEALED CARRY PERMITS BECAUSE OF A LACK OF AVAILABILITY OF TRAINING AND TESTING

Second, as individuals, Appellants' Second Amendment rights are infringed because they are required to take a new training course that is not available anywhere in the state. Renewal of Appellants' concealed carry permits requires completion of a new, mandatory 16-hour training class with written test plus 2-hour live fire training with demonstration test, in order to obtain the certificate needed to demonstrate successful course completion. NY Pen §§400.00(1)(a), 400.00(19), *read with* NY Exec §837(23)(a) and NY Pen §265.20(3-a).

The State has no history of requiring any handgun training; it was a county requirement, if at all. [Hanusik A-333 ¶27] Appellants are unable to take the

required course ahead of their renewal deadlines, which violates *NYSRPA v. Bruen*. [E.g., Nadine Gazzola A-188 ¶27; Serafini A-221 ¶10; A-226 ¶23; A-227 ¶26.]

In the absence of available training, some counties stopped issuing new concealed carry permits altogether from September 1, 2022 through on or about October 25, 2022. [E.g., Nadine Gazzola A-196 ¶51] Complicating matters, some counties then took to issuing concealed carry licenses without waiting for the new training and others decided to "approve instructors" to teach courses those trainers created. [Serafini A-228 ¶30; A-416 (Jefferson); A-419 (Onondaga)] Another variation is the "endorsement to a concealed carry license." [Martello A-261, ¶¶55, 56] Still others are saying they are "business as usual" until they get further guidance from the state. [Owens A-325 ¶71] And then there's the "legacy permit." [Serafini A-228 ¶31] Examples are found at A-410-413 (Columbia); A-417-418 (Onondaga); A-420-424 (Schenectady); A-426 (Wayne).

The Appellees NYSP and DCJS have failed to issue the standardized curriculum for the training, the written test, and the certificate format. [A-523-524] To date, NYSP/DCJS have published on the Internet a four-page memo that describes "minimum standards for classroom training curriculum," but does not actually provide the curriculum. For example, it takes words out the new law and

pastes them into this memo. "Conflict management." That's it. Those two words from the statute and into the memo.

This means no new permit can issue – a fact that licensing officers are starting to realize. In just the past week, several more customers walked into Nadine & Seth Gazzola's shop, Zero Tolerance Manufacturing, to ask what could be done about their license rejection letters that arrived with a Columbia County made-up training certificate for an instructor to fill in. [See "Exhibit B," hereto.] There is no curriculum. There is no written test. There is no instructor anywhere to send customers. There is nowhere for Appellants to get their own training, as individuals.

On the matter of Appellants' individual standing, the State below misrepresented "And [Appellants] need not undergo training to maintain their [concealed carry] licenses." [CM/ECF 26, at pp. 23 and 33] Counsel's comment relies on a NYSP/DCJS memo. [*Id.*; A-351-359 (dated August 27, 2022)] The memo "Q&A" #8 through #11 present a version of the words "renew" and "recertify" that is unsupported by law. NY Pen §400.00 does not define either of these words. "Renew" is used in its plain meaning some 39 times in the statute. "Recertify" is used three (3) times, twice in the context of §400.00(16-a) to "recertify" registration of an "assault weapon" and once in §400.00(10) for

"recertification" of "all" carry/possess permits. "Recertification" is used another four (4) times, for privacy of permit records at §400.00(5)(c), (e)(ii)-(iii), (f). For "to renew" to apply only to NYC, Westchester, Nassau, and Suffolk Counties would eliminate eligibility for a permit to be "issued or renewed" to the whole rest of the State under NY Pen §400.00(1), *et seq*. Clearly: false.

The State also tries to mislead the courts by attributing arguments being made in other cases, e.g., *Antonyuk II v. Nigrelli* [Dkt. 22-2908] as if the same arguments were being made by Appellants in this case. For example, Counsel wrote pages on sixteen hours being an appropriate duration for handgun training. [CM/ECF 26:14-17] Appellants' consistent and detailed argument on new handgun permit training under NY Pen §400.00(1), (19); Exec §235; and Exec §837(23) opposes the persistent failure of Appellees since September 1, 2022 to publish the standardized curriculum, written testing, and certificate, so the class can be taken and can be taught. [See new Exhibit B, hereto; Nadine Gazzola A-192 ¶40 and A-194-195 ¶¶44-56; Seth Gazzola A-211-214 ¶¶25-39; Serafini A-227-229 ¶¶24-32; Mastrogiovanni 251-252 ¶¶26-28 and A-253-254 ¶¶32-34; Martello A-280 ¶48 and A-284-285 ¶¶63-68; Affronti A-299-300 ¶¶38-42; and, Owens A-319-321 ¶¶45-52.]

Appellee Gov. Kathy Hochul, herself a former Erie County Clerk, knew exactly where to place the charge to blow up the county-level operating system. [Martello A-290-291 ¶¶96-99] What once was a stable county-level system for individual handgun licenses is now in disarray. Because Appellees "designed this scheme to evade *Young* as historically applied, it is especially perverse for the court to shield it from scrutiny based on its novelty." *Whole Woman's Health, supra* (Sotomayor, J., dissenting).

The Appellees didn't pass a "ban" on concealed carry permits (too obvious). Instead, Hochul submitted bills that may have seemed bland *en face,* while agencies under her direction haven't performed their lengthy list of detailed statutory responsibilities. [A-521 through A-526] It's the new strategy to "evade federal constitutional commands," in this instance, relating to the Second Amendment. *Whole Woman's Health, supra* (Sotomayor, dissenting, p. 4).

VI. IT IS IMPOSSIBLE TO FULFILL COMPLIANCE MANDATES OF NEW LAWS

Respondent NYS Police, in sharp comparison to the ATF, neither invests time or resources on NYS-licensed dealers. Respondents have full contact information for Petitioners. [Owens, Doc 13-8, ¶69] Petitioners received no notification of the new laws. [Nadine Gazzola, Doc 13-2, ¶40; Serafini, Doc 13-4, ¶67; Owens, Doc 13-8, ¶69] Petitioners were rebuffed with "I don't know," when

they called the NYSP for information. [Mastrogiovanni, Dkt. 13-5, ¶¶36, 38] As per Petitioner John A. Hanusik wrote: "I spent a couple weeks at the NYS Police in August and they told me I know more about what's going on than they do; they have no idea what's going on." [Doc 13-9, ¶17]

After ninety straight days of work on this case through District to Circuit to U.S. Supreme Court to now concurrent litigation in both this Circuit Court *and* the U.S. Supreme Court what to do to understand what Appellants are up against is this:

- Grab the 1-page case schemata at A-527 (the entire case fits onto one page);
- Cast your eyes over the bill of origin for the most offending of the provisions now housed at NY Gen Bus §875, namely, S.4970-A (A-146 through A-150) to confirm its newness;
- Introduce yourself to each Appellant by at least glancing at their individual Declarations (A-184 through A-335) and select even just one to actually read without multi-tasking;
- Pick one statutory provision from this list that was submitted as part of the Form C "Addendum" back in December:
    - (a.) "security plan" under NY Gen Bus §875-b(1);

- (b.) standards (undefined) for security alarm systems under NY Gen Bus §875-b(2);
- (c.) prohibition against entry by persons under 18 years of age without parent or legal guardian under NY Gen Bus §875-c;
- (d.) employee "training course" (unpublished) under NY Gen Bus §875-e;
- (e.) minimum requirements for maintenance of records of employee training (unpublished) under NY Gen Bus §875-e;
- (f.) prohibition against employees under 21 years of age under NY Gen Bus §875-e(3);
- (g.) forms of records for purchase, sale, inventory, "and other" of firearms (unpublished) under NY Gen Bus §875-f, including monthly reports under NY Gen Bus §875-f(2);
- (h.) form of the annual certification of compliance (unpublished) under NY Gen Bus §875-g(1)(b);
- (i.) full access inspections with regulations (unpublished) for periodic inspections under NY Gen Bus §875-g(2)(a);
- (j.) "such additional rules" as the NYSP Superintendent "shall deem necessary to prevent firearms, rifles, and shotguns from being diverted from the legal stream of commerce" under NYS Gen Bus §875-h;
- (k.) form for license to purchase or take possession of a semi-automatic license (unpublished) under NY Pen §400.00(7);
- (l.) rules and regulations "to establish criteria" "for eligible professions" requiring use of a body vest (unpublished) under NY Pen §270.22, read with NY Exec §144-a;
- (m.) rules and regulations to establish "a process" for an individual/entity to request being added to the list of "eligible professions" permitted to purchase a body vest (unpublished) under NY Exec §144-a;

- (n.) an "approve[d] curriculum" for concealed carry permit training (unpublished) under NY Pen §400.00(19);
- (o.) a "certificate" to qualify "duly authorized instructor[s]" (unpublished) under NY Pen §265.00(19);
- (p.) policies and procedures for "standardization" of firearms safety training, including approved course materials (unpublished) under NY Exec §837(23)(a), read with NY Exec §235(1); and,
- (q.) format for records of transactions involving ammunition (unpublished) under NY Pen §400.03; *and more, on implementation dates that run from September 1, 2022 and December 5, 2022 through July 2023*.

➢ Now turn to "Section X" of the Complaint (A-88 through A-121) to review the corresponding paragraphs for the one statutory provision selected for computations, technical specifications, structural considerations, time demands, and other factors used to analyze the feasibility of each new compliance mandates;

➢ Finally, take that one statutory provision selected and match it up to the corresponding entry(ies) on the six-page chart of what Appellees have failed to do at A-521 through A-526.

The methodology was fairly straight-forward. For just one example, Appellant Christopher Martello took lead on the technologically infeasible video recording devices and storage mandate under NY Gen Bus §875-b(2) in Doc 13-6, ¶¶80-88. Among his credentials is the "Ikkin Industries" full line of "state-of-the-

art police evidence body cameras." [*Id.*, ¶81] His affidavit walks through an analysis: number of 16 Terabyte drives required for the now facility-required camera positions, cost per drive, additional hardware requirements, and installation. [*Id.*, ¶86] This allowed other Petitioners to generate estimates. [Declarations, *passim*] And that allowed FFL-wide projections for the Complaint. [Doc 1, ¶¶253-261] No Petitioner is in compliance. Petition word limits do not allow a repeat of each statute, already set out in the Record.

Now realize that Appellants have been working and reworking the new mandates – *all of the new mandates* – since last June, trying to find solutions so that they can stay in business and serve their communities and families and be part of the Second Amendment. Appellants are compliance-minded. Would be more than willing to testify, and were prepared to do so even as Judge Sannes simply text ordered a complete denial. Appellants are caught between the word "deny" from the courts and the complete randomness of the non-compliance and occasional, spontaneous Internet publication of Appellee NYS Police.

Another example from these past 90 days. NY Gen Bus §875-e, Employee training. New employees must be trained within 30-days of employment, or, by January 2, 2023. Existing employees must be trained within 90-days, or, March 3,

2023. No "training course" was published ahead of the effective date of December 5, 2022.

So, after the motion to this court was filed on December 6, Appellee NYSP threw up on the Internet "The [NYSP] is currently developing the training materials and anticipates that these materials will be available by the 2022 calendar year." (emphasis added) Appellees admitted the "training course" wasn't ready when the law became effective. [ECF 19-1:6]

Now, the regulatory penalty, under NY Gen Bus §875-e(3), is that no "untrained" employee is permitted to work. Plus, the criminal penalty for failure to train an employee is a class A misdemeanor charge. NY Gen Bus §875-i. Yet, in response to criticism, Counsel painted his client's behavior as "guidance" and minimized there was no concern for "immediate compliance." [ECF 26:13, 29, and 33]

Out of the blue on last Friday, a PowerPoint training deck popped up with no notification by NYSP to Appellants and no notice to this Counsel from State's Counsel. Appellee NYSP simply decided it was the day to upload the PowerPoint deck to a partial-line hyperlink buried on its website.[38] Appellants got lucky. A

[38] Official website of the NYS Police, PowerPoint deck dated January 27, 2023 at https://troopers.ny.gov/firearms. Scroll down to "New York State Gun Dealer Training" hyperlink.

state legislator's staffer contacted one of them on Saturday morning with the information.

The ability to exercise individual Second Amendment rights comes down to these Appellants. If there are no dealers left standing in New York because of the new laws, the Second Amendment will cease to operate inside this State's boundaries. And Appellees will have dragged down the Rule of Law with it.

A stay would be helpful. A Master would be helpful. Justice can do better than "deny."

Dated: January 30, 2023

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 13,771 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using MS Word in 14 pt Times New Roman.

Dated: January 30, 2023

APPENDIX A

6-14-[redacted]

U.S. Department of Justice
Bureau of Alcohol, Tobacco, Firearms and Explosives

OMB No. 1140-0019

Federal Firearms License (FFL) RENEWAL Application

March 1, 2023

FFL no.: 6-14-0[redacted]

FFL Type: 01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES

Renewal application DUE PRIOR TO: March 1, 2023

RENEWAL FEE DUE: $90.00

CHECK OR MONEY ORDER AMOUNT ENCLOSED (made payable to ATF) $ ____ Check Amount

AMOUNT AUTHORIZED TO BE CHARGED TO THE CREDIT/DEBIT CARD: $ ____ Charge Amount

MAIL APPLICATION & PAYMENT TO:
Federal Firearms Licensing Center
P.O. Box 6200-20
Portland, OR 97228-6200

☑ I am requesting that a Letter of Authorization (LOA) be sent to me so I may continue the business/operations authorized by my license until my renewal application is processed and approved.

Method of Payment (Check one) :

☐ Check (Enclosed) ☐ Cashier's Check or Money Order (Enclosed)

☒ Visa ☐ MasterCard ☐ American Express ☐ Discover ☐ Diner's Club

[redacted]
Credit/Debit Card Number

[redacted] Nadine Garrido
M M Y Y Expiration Date — Name as it appears on the credit/debit card

370 Route 217 Hudson NY 12534
Credit/Debit Card Billing Address

[redacted] 01 29 2023
Signature of Cardholder — Date

Your credit/debit card will be charged the above stated amount upon receipt of your application and a charge from ATF Licensing Fee will be reflected on your credit/debit card statement. In the event a license/permit is NOT issued, the above amount will be credited to the credit/debit card noted above.

6-14-0[redacted]

NOT RENEWING?

1. **Return this application and your firearms records within 30 days of discontinuance of your business to:**

ATF Out-of-Bnsiness Records Center
244 Needy Road
Martinsburg, WV 25405
1(800)788-7133, x1590

(Collector's of Curios or Relics are NOT required to send their firearms records to ATF.)

2. **Check the box below and sign & date on the line provided.**

☐ **I am NOT renewing my license and will submit my records to ATF. I understand I may NOT engage in the business or operations authorized by my license on or after the expiration date of the license.**

Signature — Date

A. CURRENT FFL Information

ZERO TOLERANCE MANUFACTURING INC
Business Name (NAME of Corporation, Partnership, OR Sole Proprietor)

ZERO TOLERANCE MANUFACTURING INC
Trade or Business Name *

PREMISES Address (physical location of business or collection) 1131 RT 9H GHENT, NY 12075-

MAILING Address (where renewed license will be mailed to this address) 1131 RT 9H GHENT, NY 12075-

Telephone Number (business)
Telephone Number (fax)

24-hour Emergency Telephone Number

E-mail Address

* Listing your trade or business name with ATF in no way registers such a name, you MUST comply with Federal, State, and local laws regarding trade or business name registration.

☐ Check here for a change to your current FFL Information AND complete the appropriate box below with the updated information

NEW Licensee Name - Federal firearms licenses (FFLs) are NOT transferable. If there has been a CHANGE in ownership of the firearms business or collection activity, you may NOT use this form to obtain a renewed license. You MUST file a NEW application.

NEW Trade or Business Name

NEW Premises Address**

NEW Mailing Address

NEW Telephone Number (business)
NEW Telephone Number (fax)

NEW 24-hour Emergency Telephone Number

NEW E-mail Address

** You may NOT operate your business or conduct your collection activity at the NEW premises address until you have received a NEW License reflecting your new address.

B. HOURS OF OPERATION.

Please indicate AM for morning hours and PM for afternoon/evening hours when stating your business hours.

NOTE: You do NOT have to list hours of operation if you are a Gunsmith. If this applies to you, please check the appropriate box below.

☐ Gunsmithing activities ONLY

TIME	Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
Open			10AM	10AM	10AM	10AM	10AM
Close			5PM	5PM	5PM	5PM	5PM
	☒ Closed ALL day NO business hours	☒ Closed ALL day NO business hours	☐ Closed ALL day NO business hours	☐ Closed ALL day NO business hours	☐ Closed ALL day NO business hours	☐ Closed ALL day NO business hours	☐ Closed ALL day NO business hours

WARNING: You may NOT continue the operations authorized by your Federal firearms license (FFL) on or after the expiration date of your license UNLESS you have filed this renewal application PRIOR TO March 1, 2023 **There are criminal penalties for continuing your firearms business or collectors' activities without renewing your license.**

6 14-0[redacted] March 1 2023

FFL No.: 6-14-0[redacted] FFL Name: **ZERO TOLERANCE MANUFACTURING INC**

FFL Type: 01-DEALER IN FIREARMS OTHER THAN DESTRUCTIVE DEVICES Premises Address: 1131 RT 9H GHENT, NY 12075-

Expiration Date: **March 1, 2023**

C. Answer questions 1 - 6, and 8 by checking "yes" or "no" in the boxes to the right of the questions. or N/A, if applicable.

	Check YES	Check NO
1. Is the firearms or ammunition activity to be conducted under the Federal firearms license (FFL) at the "premises address" shown above and on the front of this renewal application permitted by State and local law?	☒	☐
2. Within thirty days after this application has been approved, will the firearms or ammunition activity comply with the requirements of State and local law applicable to the conduct of the firearms or ammunition business or collection of curios or relics? Please see attached pages	☐	☐
3. Will the requirements of State and local law that are applicable to the firearms or ammunition activity or collection of curios or relics, be met prior to the start of the business or collection activity? Please see attached pages NOS.	☐	☐
4. Has a completed COPY of this renewal application form (front & back) been sent or delivered to the Chief Law Enforcement Officer (CLEO) of the locality in which the premises is located?	☒	☐
5. As required by 18 U.S.C. 923(d)(1)(G), will secure gun storage or safety devices be made available at any place in which firearms are sold under the FFL to persons who are NOT licensees. Check "N/A" if you are a Collector of Curios and Relics or a Manufacturer of Ammunition. N/A ☐	☒	☐
6. Are there any new responsible persons to be added and/or any responsible persons to be removed from the license? If yes, please attach a separate sheet of paper to provide their identifying information as listed in #3 on the application Instruction Sheet that accompanied this application.	☐	☒

7 a. How many firearms have you bought or acquired with your firearms license over the past 3 years? If none, enter '0'.

5040 * If you hold multiple FFLs, please only indicate the number of firearms relating to this FFL you are renewing.

b. How many firearms have you sold or disposed of with your firearms license over the past 3 years? If none, enter '0'.

4658 * If you hold multiple FFLs, please only indicate the number of firearms relating to this FFL you are renewing.

(Write "N/A" if you are solely a gunsmith or a manufacturer of ammunition.)

MAILING ADDRESS

ZERO TOLERANCE MANUFACTURING IN
ZERO TOLERANCE MANUFACTURING IN
1131 RT 9H
GHENT, NY 12075-

8. Have you conducted or do you intend to conduct internet sales of firearms? If yes, list websites from which you conduct your internet business: Gunbroker, Guns International	☒	☐

D. The following questions apply to YOU and to any other responsible person who has the power to direct the management and policies of your firearms activities. Answer questions 9 - 19 by checking "yes" or "no" in the boxes to the right of the questions.

	Check YES	Check NO
9. Are you charged by information or under indictment in any court for a felony or any other crime for which the judge could imprison you for more than one year? An "information" is a formal accusation of a crime made by a prosecuting attorney.	☐	☒
10. Have you ever been convicted in any court of a felony or any other crime for which the judge could have imprisoned you for more than one year, even if you received a shorter sentence, including probation?	☐	☒
11. Are you presently appealing a conviction of a crime punishable by imprisonment for a term exceeding one year? *(If "yes," attach an explanatory statement showing date of conviction, court in which convicted, and court in which appeal is pending.)*	☐	☒
12. Are you a **fugitive** from justice?	☐	☒
13. Are you an unlawful user of or addicted to marijuana or any depressant, stimulant, narcotic drug, or any other controlled substance?	☐	☒
14. Have you ever been adjudicated mentally defective, *(which includes a determination by a court, board, commission, or other lawful authority that you are a danger to yourself or to others or are incompetent to manage your own affairs)* OR have you ever been committed to any mental institution?	☐	☒
15. Have you been discharged from the Armed Forces under **dishonorable** conditions?	☐	☒
16. Are you an alien **illegally or unlawfully** in the United States?	☐	☒
17. Have you ever renounced your United States citizenship?	☐	☒
18. Are you subject to a court order restraining you from harassing, stalking, or threatening your child or an intimate partner or child of such partner?	☐	☒
19. Have you been convicted in any court of a misdemeanor crime of domestic violence? This includes any misdemeanor conviction involving the use or attempted use of physical force committed by a current or former spouse, parent, or guardian of the victim or by a person with a similar relationship with the victim.	☐	☒

Under penalties imposed by 18 U.S.C. 924, I certify that the statements contained in this renewal application, and any attached statements, are true and correct to the best of my knowledge and belief.

Authorized Signature: [signature] Title: President/owner Date: 1/29/2023

PRINTED NAME of signature above: Nadine Gazzola Telephone no.: 518-938-1335

FOR ATF USE ONLY - Application Status: ___Approved ___Abandoned ___Withdrawn ___Denied

Signature of Licensing Official: _____ Date: _____

Reason for Denial:

ATF Form 8 (5310.11) Part II
Revised (Nov 2017)

Paloma A. Capanna
Attorney & Policy Analyst

106-B Professional Park Drive
Beaufort, North Carolina 28516
(585) 377-7260
(315) 584-2929 mobile

P. O. Box 95
Keene Valley, New York 12943

**Admitted to practice in NY, N.D.N.Y., W.D.N.Y., 2d & 4th Cir., U.S. Supreme Court*

January 30, 2023

Bureau of Alcohol, Tobacco, Firearms & Explosives
Federal Firearms Licensing Center
P.O. Box 6200-20
Portland, Oregon 97228-6200

Re: Renewal application of **Zero Tolerance Manufacturing Inc.**
BATFE License No.: **6-14-0**[redacted]

To Whom It May Concern:

This letter is written to accompany the 2023 BATFE "Federal Firearms License (FFL) RENEWAL Application" of Zero Tolerance Manufacturing Inc. (1131 Route 9H, Ghent, Columbia County, New York 12075). The renewal application submission deadline is so stated upon the pre-printed forms as March 1, 2023. The license number is above-stated.

Nadine Gazzola is a Responsible Persons for this license. She is also a co-owner of Zero Tolerance Manufacturing.

I also represent Ms. Gazzola in the context of federal civil rights litigation, commenced November 1, 2022, in the Northern District Court of New York, under Docket 1:22-cv-01134. The name of the case is *Gazzola v. Hochul*. This case is also on appeal to the Second Circuit Court under Docket No. 22-3068. And, it is currently pending on a Petition for Writ of Certiorari Before Judgment under Rule 11 at the U.S. Supreme Court under Case No. 22-622. Ms. Gazzola is one of the ten plaintiffs I represent in this case, of which eight are BATFE-licensed FFLs with NYS premises. What is currently flying about the appellate process are emergency motions to stay the application and enforcement of the new laws of which we complain.

Please accept this renewal application as submitted.

Upon the direction of counsel, Ms. Gazzola is not answering questions #2 and #3 of the renewal form and is, instead, submitting an attached response. Upon the advice of counsel, that attached response includes Ms. Gazzola pleading the Fifth Amendment to the U.S. Constitution

in response to the renewal application questions #2 and #3, specifically as pertains to the NYS statutes that became effective December 1, 2022 and which are the subject of the pending litigation.

> Question 2. "Within thirty days after this application has been approved, will the firearms or ammunition activity comply with the requirements of State and local law applicable to the conduct of the firearms or ammunition business or collection of curios and relics?"
>
> Question 3. "Will the requirements of State and local law that are applicable to the firearms or ammunition activity or collection of curios or relics, be met prior to the start of the business or collection activity?"

Ms. Gazzola pleads the Fifth Amendment because the new laws complained of carry criminal penalties of misdemeanor class E and felony class A for violation. No charges are pending against her.

Zero Tolerance Manufacturing is, and this attachment confirms, in compliance with all other NYS laws and regulations pertaining to the operation of this FFL to the best of Ms. Gazzola's knowledge. She is aware of no violation of federal firearms compliance law and regulations, and the lawsuit makes no challenge to any such federal mandate. She is also not aware of any violation of local requirements applicable to Zero Tolerance Manufacturing.

In accordance with the renewal directions, a copy of this renewal application with attachment will be sent to the Chief Law Enforcement Officer of the locality of Columbia County, where the Zero Tolerance Manufacturing premises is located. By copy of these materials to him, I request he, too, direct any questions on this to my attention and thank him for his professional courtesies in this regard.

I am available to speak with the processing agent for this renewal. It is a unique situation. The new mandates in NYS are a nightmare of conflict with federal law, unconstitutionality, vagueness, and impossibility of execution. Our primary objections are to defeat numerous portions of NY General Business Law §875, which became effective December 5, 2022.

Given that we have near 1,800 FFL Type-01s with NYS business premises, if you have already issued or are in the process of developing a guidance for renewals and new applications in New York, please do direct it to my attention? I remain actively abreast of ATF publications, but have not seen anything on point. Ms. Gazzola understands from her Field Agent that BATFE is aware that there are issues with the new statutes. I am available to speak with BATFE about the pending litigation, if that is of any assistance in support of this renewal application.

Thank you for your consideration of this renewal application. **It is our shared objective to renew and remain in business and in a continued good working relationship with BATFE**. We request renewal of the application in the normal course.

Respectfully,

Paloma A. Capanna

Paloma A. Capanna

c. w/encls.: Columbia County Sheriff Donald J. Krapf

ATTACHMENT

Renewal application of **Zero Tolerance Manufacturing Inc.**
BATFE License No.: 6-14-0[redacted]
BATFE Type-01, dealer in firearms other than destructive devices
Renewal cycle: March 1, 2023

STATEMENT of NADINE GAZZOLA

1. I am Nadine Gazzola, and I am one of the two Responsible Persons for the BATFE license Type-01 of Zero Tolerance Manufacturing Inc.

2. I make this statement as an attachment to the March 1, 2023 renewal application for Zero Tolerance Manufacturing, specifically, and only, as to ATF Form 8, Part II (ver Nov 2017), questions #2 and #3, as follows:

> **Question 2.** "Within thirty days after this application has been approved, will the firearms or ammunition activity comply with the requirements of State and local law applicable to the conduct of the firearms or ammunition business or collection of curios and relics?"
>
> **Question 3.** "Will the requirements of State and local law that are applicable to the firearms or ammunition activity or collection of curios or relics, be met prior to the start of the business or collection activity?"

3. Upon the advice of counsel, I plead the Fifth Amendment to these two questions with the following specificity:

   a. To the best of my knowledge, we were in compliance with all federal, state, and local laws and regulations governing the conduct of our business as of December 4, 2022.

   b. To the best of my knowledge, we remain and intend to remain in compliance with all federal firearms compliance laws and regulations governing the conduct of our business.

   c. Upon information and belief, new laws went into effect in New York State, effective December 5, 2022, including, but not limited to NYS General Business Law §875. It is to these new laws that I plead the Fifth Amendment for purposes of ATF Form 8, questions #2 and #3.

ATTACHMENT

Renewal application of **Zero Tolerance Manufacturing Inc.**
BATFE License No.: 6-14-0[redacted]
BATFE Type-01, dealer in firearms other than destructive devices
Renewal cycle: March 1, 2023

d. To the best of my knowledge, other than the new laws that went into effect, including, NY Gen Bus Law §875, we are in compliance with state laws and regulations governing the conduct of our business.

e. To the best of my knowledge, other than any county-level administrative functions related to the new laws complained of, we are in compliance with any local laws and regulations governing the conduct of our business.

4. I am one of the plaintiffs in the federal civil rights case *Gazzola v. Hochul*, currently pending, as is Seth Gazzola. The case was commenced November 1, 2022 in the Northern District Court under Docket No. 1:22-cv-01134. It has appeals also currently pending before the Second Circuit Court under Docket No. 22-3068 and to the U.S. Supreme Court under Case No. 22-622. Upon information and belief, currently pending are emergency motions to stay the application and enforcement of new laws, including NY Gen Bus §875.

5. I am represented in the case of *Gazzola v. Hochul* by attorney Paloma A. Capanna, and I ask that you direct any questions about our response to questions #2 and #3 to Ms. Capanna. Her contact information is 106-B Professional Park Drive, Beaufort, North Carolina 28516, (315) 584-2929. She has also an office in Keene Valley, NY.

6. Please accept our renewal application. It is our intention to remain in good standing with our federal and state licenses, and to continue to own and operate our business, Zero Tolerance Manufacturing.

Dated: January 29, 2023

Nadine Gazzola

APPENDIX B

STATE OF NEW YORK
COUNTY OF COLUMBIA
COUNTY, FAMILY AND SURROGATE'S COURTS
CHAMBERS

JONATHAN D. NICHOLS
Judge

JOHN H. CLARK III
Court Attorney

January 11, 2023

Re: Pistol License Application dated September 14, 2022

Dear Mr. [redacted]

I am in receipt of you above referenced pistol license application, forwarded to me as the Licensing Officer for review. Please be advised that for all pistol license applications submitted on and after September 1, 2022, pursuant to recent amendments, New York State Penal Law §400.00(19) requires applicants to obtain a sworn certification from a Duly Authorized Instructor that the applicant has successfully completed 16 hours of specified classroom training, and 2 hours of live fire training as part of any carry concealed pistol permit application.

Since your application contains a certification of training applicable prior to this requirement, your application is not complete. I am returning your application to Hon. Donald Krapf, Columbia County Sheriff, pending the Sheriff's receipt of an original sworn certification from a Duly Authorized Instructor of your successful completion of the statutory training requirements. Enclosed is a copy of the required Certification of Completion of Training, which must be filled out and sworn to by the Duly Authorized Instructor after you successfully complete the required training, and then submitted by you to the Sheriff to complete your application for a carry concealed pistol permit. After your application is complete, it will be forwarded by the Sheriff to me for review.

Sincerely,

Jonathan D. Nichols

Columbia County Courthouse, 401 Union Street, Hudson, NY 12534

(518)267-3141

DONALD J. KRAPF, Sheriff

JACQUELINE SALVATORE, Undersheriff

COLUMBIA COUNTY SHERIFF'S OFFICE

COLUMBIA COUNTY PUBLIC SAFETY FACILITY

518 828-3344 - Law Enforcement Dispatch
518 828-3324 - Corrections/Jail Reception
518 828-0601 - Admin/Civil Enforcement

85 Industrial Tract
Hudson, New York 12534-1500
www.columbiacountysheriff.us
Emergency Call - 911

518 828-2032 - Corrections/Jail Fax
518 828-9088 - Law Enforcement Fax
518 822-8477 - Crime Tip Hotline

CERTIFICATION OF COMPLETION OF TRAINING

(Only required when applying for a Carry Concealed Permit)

Applicant's Full Name: _____

Applicant's Address: _____

Applicant's Date of Birth: _____/_____/_____

Certification of In-Person Training

I, _____, hereby certify, under penalty of perjury, that the following information is true and accurate:

1. I am a Duly Authorized Instructor, as that term is defined in New York State Penal Law §265.00(19), approved by the New York State Division of Criminal Justice Services and New York State Police to instruct the concealed carry firearms safety training.

2. The above-listed applicant has completed the following in-person live firearms safety course(s) conducted by me (choose all that apply):

_____ (a). A minimum of (16) hours of in-person live curriculum that meets or exceeds the requirements set forth in New York State Penal Law § 400.00(19) and the "Minimum Standards For New York State Concealed Carry Firearm Safety Training" issued on August 23, 2022, as amended or updated from time to time.

_____ (b) A minimum of two (2) hours of a live-fire range training course that meets or exceeds the requirements set forth in New York State Penal Law§ 400.00(19) and the "Minimum Standards For New York State Concealed Carry Firearm Safety Training" issued on August 23, 2022, as amended or updated from time to time.

Over →

DONALD J. KRAPF, Sheriff

JACQUELINE SALVATORE, Undersheriff

COLUMBIA COUNTY SHERIFF'S OFFICE

COLUMBIA COUNTY PUBLIC SAFETY FACILITY

518 828-3344 - Law Enforcement Dispatch
518 828-3324 - Corrections/Jail Reception
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www.columbiacountysheriff.us
Emergency Call - 911

518 828-2032 - Corrections/Jail Fax
518 828-9088 - Law Enforcement Fax
518 822-8477 - Crime Tip Hotline

3. (If Section 2 (a) is checked) I have administered a written proficiency test to the above-listed applicant that evaluates his/her/their understanding of the requirements set forth in New York State Penal Law§ 400.00(19) and the "Minimum Standards For New York State Concealed Carry Firearm Safety Training" issued on August 23, 2022, as amended or updated from time to time. The above-listed applicant achieved a minimum correct answer score of 80% on his/her/their written proficiency test.

4. I understand that this certification will be provided to and relied upon by the Columbia County Court to demonstrate the above-listed applicant's compliance with New York State Penal Law§ 400.00(19).

_____ _____

Duly Authorized Instructor's Signature Date

Print name of Instructor: _____

State of _____.

County of _____,

On the _____ day of _____ in the year _____, before me, the undersigned notary public, personally appeared _____, personally known to me or proved to me on the basis of satisfactory evidence the be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/their signature on the instrument, the individual(s), or the person on behalf of which the individual(s) acted, executed the instrument.

_____

Notary Public

SPECIAL APPENDIX

TABLE OF CONTENTS

SA-1

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.**;

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.;

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;

Civ. No.: 1:22-cv-1134 (BKS/DJS)

NOTICE OF APPEPAL

SA-2

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,

Defendants

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Nadine Gazzola, Seth Gazzola, Zero Tolerance Manufacturing, Inc.; John A. Hanusik, "AGA Sales"; Jim Ingerick, Ingerick's, LLC, d/b/a "Avon Gun & Hunting Supply"; Christopher Martello, Performance Paintball, Inc., d/b/a "Ikkin Arms"; Michael Mastrogiovanni, "Spur Shooters Supply"; Robert Owens, "Thousand Islands Armory"; Craig Serafini, Upstate Guns and Ammo, LLC; Nick Affronti; and, Empire State Arms Collectors, Inc. ("Plaintiffs") hereby appeal to the United States Court of Appeals for the Second Circuit from the "Text Order" entered in this matter on December 2, 2022 (ECF No. 37).

Respectfully submitted this 8th day of November 2022,

Attorney for the Plaintiffs

Paloma A. Capanna

Paloma A. Capanna, Attorney

N.D.N.Y. Bar Roll No.: 703996
106-B Professional Park Drive
Beaufort, North Carolina 28516
(315) 584-2929 mobile
(585) 377-7260
pcapanna@yahoo.com

SA-3

Activity in Case 1:22-cv-01134-BKS-DJS Gazzola et al v. Hochul et al Order on Motion for Preliminary Injunction

From: ecf.notification@nynd.uscourts.gov

To: nynd_ecfqc@nynd.uscourts.gov

Date: Friday, December 2, 2022 at 01:12 PM EST

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.
*****NOTE TO PUBLIC ACCESS USERS*** Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.**

U.S. District Court

Northern District of New York - Main Office (Syracuse) [NextGen CM/ECF Release 1.7 (Revision 1.7.1.1)]

Notice of Electronic Filing

The following transaction was entered on 12/2/2022 at 1:11 PM EST and filed on 12/2/2022

Case Name: Gazzola et al v. Hochul et al
Case Number: 1:22-cv-01134-BKS-DJS
Filer:
Document Number: 37(No document attached)

Docket Text:
TEXT ORDER: After carefully considering all of the parties' submissions in connection with [13] Plaintiffs' motion for a temporary restraining order and/or a preliminary injunction, as well as the oral argument presented at the hearing yesterday, the Court DENIES Plaintiffs' [13] motion, and will not issue a temporary restraining order or a preliminary injunction. A written decision will follow shortly. SO ORDERED by Chief Judge Brenda K. Sannes on 12/2/2022. (nmk)

1:22-cv-01134-BKS-DJS Notice has been electronically mailed to:

Aimee Cowan aimee.cowan@ag.ny.gov, gail.drexler@ag.ny.gov

Paloma A. Capanna pcapanna@yahoo.com

Timothy P. Mulvey timothy.mulvey@ag.ny.gov

1:22-cv-01134-BKS-DJS Notice has been delivered by other means to:

SA-4

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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, 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.

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

Appearances:

For Plaintiffs:
Paloma A. Capanna
Law Office of Paloma A. Capanna, P.C.
106-B Professional Park Drive
Beaufort, North Carolina 28516

For Defendants:
Letitia James
Attorney General of the State of New York
Aimee Cowan
Timothy P. Mulvey
Assistant Attorneys General
300 South State Street, Suite 300
Syracuse, New York 13202

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,

[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.)

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 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; Dkt. No. 13-5, ¶ 6; Dkt. No. 13-6, ¶ 13; Dkt. No. 13-7, ¶ 6; Dkt. No. 13-8, ¶ 6; Dkt. No. 13-

[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.

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]

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:

[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., 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.)

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:

[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))).)

[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.

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).

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

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 (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. 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

[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)).

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 (2008) (citing *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (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

[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).

appropriately resolved through the judicial process." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)); *see also Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (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 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 (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.*, 137 S. Ct. 1645, 1651 (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 (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 (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 semi-automatic 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.

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 semi-automatic 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 semi-automatic 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*

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

also Antonyuk v. Bruen, No. 22-cv-0734, 2022 WL 3999791, at *15, 2022 U.S. Dist. LEXIS 157874, at *45 (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 semi-automatic 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 (2014); *see also Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (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,

[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

Plaintiffs fail to demonstrate how this single sentence, evincing a desire to timely renew a permit, amounts to 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]

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.

[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 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.

v. Rensselaer Polytechnic Inst., No. 18-cv-1374, 2019 WL 181280, at *2, 2019 U.S. Dist. LEXIS 5396, at *4 (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).

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 WL 263051, at *6, 2001 U.S. Dist. LEXIS 26942, at *17 (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. U.S. Dep't of Health & Hum. Servs.*, 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' 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 WL 2797244, at *5, 2020 U.S. Dist. LEXIS 94511, at *14 (E.D.N.Y. May 29, 2020) ("[A]

[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 (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 semi-automatic 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.

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. 3d 175, 199 (E.D.N.Y. 2015) ("Irreparable harm may not be premised 'only on a possibility.'" (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (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]

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 WL 6222918, at *7, 2019 U.S. Dist. LEXIS 203418, at *20–21 (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

[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 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).

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.)

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 (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 (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 (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 (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

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

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 WL 16744700, at *39–40, 2022 U.S. Dist. LEXIS 201944, at *114–19 (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 (2013) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981)). In other words, "state laws that require a private party to violate federal law are pre-empted." *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 (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 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

[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.*

> 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 (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 (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 inter-state commerce between

[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.

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 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]

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):

> 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

[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 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).

> 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 (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]

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 information and to retain the records, share the records among Executive Branch offices and agencies, and to use the records

[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.

[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.

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 (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 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

[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.)

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 (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

[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.

government must then justify its regulation 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 (2010); *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 778 n.14 (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 (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 (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 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (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 *Vill. of Hoffman*

Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 498–99 (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't's, 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 (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.

[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.)

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 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 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

[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.)

[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.)

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 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]

[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.)

[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.

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]

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 §§ 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.

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

[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.)

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

Plaintiffs' own acknowledgements similarly undermine their claim that the semi-automatic 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]

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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[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.

[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, in its discretion, concludes that it may "dispose of the motion

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 (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. X, cl. 3. "[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 (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 (1990) (quoting *Fisher v. United States*, 425 U.S. 391, 408 (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[]

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.

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 (1965)); *see also Marchetti v. United States*, 390 U.S. 39, 47 (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 (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 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

[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.

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 (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. 22-116, 2022 WL 4654636, 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

Brenda K. Sannes
Chief U.S. District Judge

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.

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.

SA-51

Bill S. 4970-A, pp. 3-4.
NY Gen Bus §875-b(1)-(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 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

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

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.

SA-53

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.

SA-54

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.

SA-56

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.

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]

SA-58

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.

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.

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.

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.

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.

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.

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.

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.

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.

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].

Bill S. 51001, p. 20.
Read **NY Pen §400.00(1)(n)** *with, inter alia* **NY Pen §400.00(19).**

19. Prior to the issuance or renewal of a license under paragraph (f) of subdivision two of this section, issued or renewed on or after the effective date of this subdivision, an applicant shall complete an in-person live firearms safety course conducted by a duly authorized instructor with curriculum approved by the division of criminal justice services and the superintendent of state police, and meeting the following requirements:

(a) a minimum of sixteen hours of in-person live curriculum approved by the division of criminal justice services and the superintendent of state police, conducted by a duly authorized instructor approved by the division of criminal justice services, and shall include but not be limited to the following topics: [(i) through (xi) omitted]; and

(b) a minimum of two hours of a live-fire range training course.

The applicant shall be required to demonstrate proficiency by scoring a minimum of eighty percent correct answers on a written test for the curriculum under paragraph (a) of this subdivision and the proficiency level determined by the rules and regulations promulgated by the division of criminal justice services and the superintendent of state police for the live-fire range training under paragraph (b) of this subdivision.

Upon demonstration of such proficiency, a certificate of completion shall be issued to such applicant in the applicant's name and endorsed and affirmed under the penalties of perjury by such duly authorized instructor.

An applicant required to complete the training required herein prior to renewal of a license issued prior to the effective date of this subdivision shall only be required to complete such training for the first renewal of such license after such effective date.

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]

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]

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]

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]

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]

SA-69

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]

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]

SA-70

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]

SA-71

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.

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.

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.