No. 22-

IN THE

Supreme Court of the United States

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 EMERGENCY APPLICATION FOR WRIT OF INJUNCTION TO THE HONORABLE SONIA SOTOMAYOR, CIRCUIT JUSTICE FOR THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

EMERGENCY APPLICATION TO REVERSE DENIAL BY SECOND CIRCUIT OF PETITIONER'S REQUEST FOR EMERGENCY PRELIMINARY INJUNCTIVE RELIEF AND FOR AN IMMEDIATE ADMINISTRATIVE STAY

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PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

The Applicants are:

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

Seth Gazzola, individually, and as co-owner, Vice President, and as BATFE FFL Responsible Person for Zero Tolerance Manufacturing, Inc.;

John A. Hanusik, individually, and as owner and as BATFE FFL Responsible Person for d/b/a "AGA Sales";

Jim Ingerick, individually, and as owner and as BATFE FFL Responsible Person for Ingerick's, LLC, d/b/a "Avon Gun & Hunting Supply";

Christopher Martello, individually, and as owner and as BATFE FFL Responsible Person for Performance Paintball, Inc., d/b/a "Ikkin Arms,";

Michael Mastrogiovanni, individually, and as owner and as BATFE FFL Responsible Person for "Spur Shooters Supply";

Robert Owens, individually, and as owner and as BATFE FFL Responsible Person for "Thousand Islands Armory";

Craig Serafini, individually, and as owner and as BATFE FFL Responsible Person for Upstate Guns and Ammo, LLC; and,

Nick Affronti, individually, and as BATFE FFL Responsible Person for "East Side Traders LLC"; and,

Empire State Arms Collectors, Inc.;

The Respondents are:

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 Rosada, 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

The related proceedings below are:

1. *Gazzola, et al. v. Hochul, et al.,* Case No. 22-3068 (2d Cir.) – Order denying requested relief December 21, 2022; and,

2. *Gazzola, et al. v. Hochul, et al.,* Case No. 1:22-cv-1134 (N.D.N.Y.) – Text Order denying requested relief December 2, 2022, delayed decision dated December 7, 2022.

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT

STATEMENT

Pursuant to Rules 22 and 23 of this Court and the All Writs Act, 28 U.S.C. §1651, Applicants Nadine Gazzola, Seth Gazzola, John A. Hanusik, Christopher Martello, Michael Mastrogiovanni, Robert Owens, Craig Serafini, Nick Affronti[1], as individuals, as owners and BATFE FFL "Responsible Persons" for their federally-licensed businesses, respectfully apply for an emergency order reversing the denial of their request for preliminary injunctive relief issued on December 21, 2022 by the United States Court of Appeals for the Second Circuit. [App C.] They also seek an immediate administrative stay pending the Court's consideration of this Application and their in-bound Rule 11 Petition for Writ of Certiorari.[2] The court of appeals' order repeated a denial of the same requested relief issued December 2, 2022 by the United States District Court for the Northern District Court of New York. [App B.]

JURISDICTION

This Court has jurisdiction under the All Writs Act, 28 U.S.C. §1651 and pursuant to Sup. Ct. Rules 22 and 23.

[1] Mr. Ingerick and Empire State Arms Collectors were unable to submit a Declaration with the District Court Motion, but support this application and remain parties to this case.

[2] Because of holiday limitations, the Petition will be filed on Tuesday, January 3, 2023.

SUP. CT. RULE 29(b)

One question of this case intended to be presented in the in-bound Rule 11 Petition involves questions of federal pre-emption in a manner that 28 U.S.C. §2403(a) may apply. The United States is not a party, nor is any federal department, office, agency, officer, or employee. This is the first document in this case to reach this Court. Accordingly, the U.S. Solicitor General is also being served.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Attached at Appendix D are the constitutional provisions relied upon and the statutes at issue.

BACKGROUND AND PROCEEDINGS BELOW

Petitioners sue in several capacities, like facets of a cut diamond. Petitioners are individuals, who are also dealers in firearms by profession.[3,4] They are federal and state licensees and ATF "Responsible Persons" for the businesses they own and operate. *See*, Nadine & Seth Gazzola [[5]Doc 13-2 & 13-3, ¶11-12, ¶15]; Craig Serafini [Doc 13-4, ¶6, 7]; Michael Mastrogiovanni [Doc 13-5, ¶9]; Christopher Martello [Doc 13-6, ¶13-14, 15-16]; Nicholas

[3] *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.

[4] *N.B.:* A federal license is not required to be a dealer of ammunition, nor is there a federal background check for purchase of ammunition. The State does not require NYS-licensed dealers to obtain a "dealer of ammunition" license.

[5] "Doc" is used to refer to the District Court documents of this case. "Doc.App" is used to refer to the Second Circuit Court of Appeals documents in this case. "Dkt" is used to refer to any other case docket entry or document, along with the court designation and case number.

Affronti [Doc 13-7, ¶5, 7]; Robert Owens [Doc 13-8, ¶16]; and, John A. Hanusik [Doc 13-9, ¶15, 17].

Petitioners Nadine and Seth Gazzola are also firearms instructors. [Nadine, Doc 13-2, ¶¶47-48; Seth, Doc 13-3, ¶¶25-39] Appellants, as business owners, benefitted from new and renewing handgun permittee business connected to their own training courses or those courses of their affiliates. [See, e.g., Serafini, Doc 13-4, ¶¶23-32]

All Petitioners are also individual NYS concealed carry permit holders. Nadine Gazzola [Doc 13-2, ¶17]; Seth Gazzola [Doc 13-3, ¶8]; Serafini [Doc 13-4, ¶9]; Mastrogiovanni [Doc 13-5, ¶7]; Martello [Doc 13-6, ¶9]; Affronti [Doc 13-7, ¶10]; Owens [Doc 13-8, ¶10]; Hanusik [Doc 13-9, ¶9]

And they are also consumers and owners of firearms and ammunition. Nadine Gazzola [Doc 13-2, ¶18]; Seth Gazzola [Doc 13-3, ¶8]; Serafini [Doc 13-4, ¶9]; Mastrogiovanni [Doc 13-5, ¶7]; Martello [Doc 13-6, ¶9-10]; Affronti [Doc 13-7, ¶9]; Owens [Doc 13-8, ¶9-10]; Hanusik [Doc 13-9, ¶¶6, 9]

Petitioners, through these and other of their credentials, can each be qualified as subject matter experts. Each Declaration properly notes that, although the undersigned added citations in footnotes, the Petitioners words, including of the laws and regulations, are their own. Petitioners ask that Your Honor take a moment to read their Declarations to see for yourself how much information has been put together as quickly as possible to support this Emergency Motion from the point of filing on November 8, 2022. See, Docs 13-2 through 13-9.

Until December 5, 2022, Petitioners were in compliance with all federal and state laws and regulations governing their personal and professional licenses and business ownership.

On that day, most of the laws complained of went into effect[6] and Petitioners went out of compliance. Petitioners are unable to comply with most of the new laws; they refuse to comply with several, specific laws under federal pre-emption and their Fifth Amendment right against self-incrimination. The new laws treat state-licensed dealers in firearms as if they are "…a highly selective group inherently suspect of criminal activities." *Albertson v. Subversive Activities Control Board,* 382 U.S. 70, 79 (1965)*; see, also, Haynes v. U.S.,* 390 U.S. 85, 97 (1967). Petitioners urgently seek a preliminary injunction to keep their doors open, while fighting to restore their civil rights through this lawsuit.

The new laws involve and thus have direct impact also upon 1,782 Federal Firearms Licensees Type-01 ("dealers") and nine Type-02 ("pawnbrokers") in New York.[7] [Doc 16-6, p. 2] For inter-state commerce reference purposes, there are 52,887 FFL-01s and 6,924 FFL-02s, nationwide, including Puerto Rico and the U.S. Virgin Islands. [*Id.*] Petitioners engage in the same on an FFL-to-FFL basis, including Mastrogiovanni [Doc 13-5, ¶¶15, 48-54] and Seth Gazzola [Doc 13-3, ¶¶53-58] Routine, inter-state commerce between FFLs of all Types, including, e.g., manufacturers of FFL Type-07, is common.[8] It's the basis for federal firearms compliance law originating, being most strategically placed, and requiring uniformity at the federal level.

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[6] 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.

[7] 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.

[8] Several Petitioners have more than one type of federal license, including that Seth Gazzola of Zero Tolerance Manufacturing, Inc. has both an FFL Type-07 and an SOT Class 2. The new laws target "dealers," specifically, so the discussion is limited. A brief discussion of this, and other Types, plus impacts will be included in the Rule 11 Petition.

Petitioners commenced this case November 1, 2022 in the Northern District Court of New York through the filing of a lengthy and detailed Complaint, setting out causes of action under 42 U.S.C. §1983 and §1985(3) through the Second, Fifth, and Fourteenth Amendments, arguing also federal pre-emption. [Doc 1] Over-arching their case is the novel concept that Petitioners represent the "to keep" portion of the "to keep and bear arms" of the Second Amendment, and that, as dealers in firearms, their engagement in the lawful stream of commerce in firearms is inextricably inter-woven with the fundamental individual rights, including their own. [Doc 1, pp. 20-30] Petitioners assert most of the new laws should be struck due to "constitutional regulatory overburden," a novel theory that government mandates that target only dealers in firearms are unconstitutional when designed to be and are implemented in a manner incapable of compliance or when otherwise pre-empted by federal firearms law or the Second Amendment, in order to strip them of their operating licenses and place them under criminal charges. [Doc 1, pp. 80-110]

The new laws were signed June 6, 2022 and July 1, 2022 by Respondent NYS Gov. Kathy Hochul, in coordination with big-money, outside influence, about which she bragged as being "joined at the hip." [Doc 1, pp. 38-54; see ¶91 for quote] From late May through early September 2022, Hochul incessantly took to the bully pulpit, repeatedly attacking the U.S. Supreme Court and its Justices, pronouncing her legal superiority as a state governor over the authority of this federal Court, and vowing revenge for this Court's decisions of June 23, 2022 in *NYSRPA v. Bruen*.

On the day of June 23, 2022, Hochul stood at a podium, bearing the emblem of the State of New York to broadcast her official 'reaction-to' press conference in a room full of reporters, holding a stack of papers in a spring clip as a visual prop she claimed to be a print-out of the

NYSRPA v. Bruen Decision, but from which she noticeably struggled to read aloud, gushing, instead:

> "Today, the Supreme Court struck down a New York law that limits who can carry concealed weapons. Does everyone understand what a concealed weapon means? That you have no forewarning that someone can hide a weapon on them and go into our subways, go into our grocery stores like stores up in Buffalo, New York, where I'm from, go into a school in Parkland or Uvalde.[9]
>
> "This could place *millions* of New Yorkers in harm's way. And this is at a time when we're still mourning the loss of lives as I just mentioned. This decision isn't just reckless, it's reprehensible. It's not what New Yorkers want. We should have the right of determination of what we want to do in terms of our gun laws in our state.
>
> "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 insanity of the gun culture that has now possessed everyone all the way up to even to the Supreme Court.*" (emphasis added) [Doc 1, ¶94]

Hochul, herself an attorney, admitted to the Bar in New York [Doc 1, ¶97], completely misrepresented the ruling in that same speech, including:

> "…[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) [Doc 1, ¶96]

Hochul concluded the speech by saying "Stay tuned. Stay tuned. We're just getting started here." [Doc 1, ¶101]

[9] Please see the footnotes in the Complaint, corresponding to this statement for a correction of this incorrect assertion; none of these three gunmen had concealed carry permits or used a handgun in the commission of their crimes. [Doc 1, ¶94, ftnts]

On June 29, 2022, the day prior to the start of the extraordinary legislative session, Hochul began her chant for a police state authority, ahead of 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 of America that think that they have more power than a governor does when it comes to protecting the citizens of our state*." (emphasis added) [Doc 1, ¶105]

Hochul ordered by "Proclamation" the legislature return for extraordinary session, and pushed them, literally into the dark of night, to pass NY S.51001, so that she could, in the light of the next day, perform for the media. [Doc 1, ¶¶102-104, 110-113]

Hochul's assertion of power, including over this Court, crescendoed with:

> "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." (emphasis added) [Doc 1, ¶112]

On Respondents' victory trip around the State, Hochul yielded her microphone to then "First" (now "Acting") Superintendent Nigrelli for him to publicly threaten: "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." [Doc 1, ¶115]

Six other cases[10] were filed ahead of this one, filed starting July 11, 2022 on behalf of seventy other plaintiffs across the state, to protect fundamental individual rights under *NYSRPA*

[10] *Antonyuk I v. Hochul,* case 22-cv-734 (Suddaby, J., dismissed August 31, 2022, Dkt. 48) and followed by *Antonyuk II v. Nigrelli,* N.D.N.Y., case 22-cv-986, the Hon. Glenn Suddaby, presiding;

v. Bruen, 597 U.S. _____ (2022) against laws in one bill, NYS S.51001.[11] One such case motion is now also pending before Your Honor. *Antonyuk II v. Nigrelli,* S.Ct. Doc. 22A557.

This case, *Gazzola v. Hochul,* is distinguished as the one case to challenge laws against NYS-licensed dealers in firearms and ammunition[12] now effective out of NY S.9407-B, 9458, and 4970-A. [Docs 1-1, 1-2, 1-3] It also pulls from NY S.51001 [Doc 1-4] for concealed carry permit training, new semi-automatic rifle licenses, and new ammunition background checks.

After November 1 commencement, Petitioners rapidly filed on November 7, 2022 for an emergency TRO and preliminary injunction (a two-step process in the Second Circuit), as well as for appointment of a Master under FRAP 65(a). [Doc 13] The motion was supported by eight detailed affidavits of Petitioners [Docs 13-2 to 13-9] plus thirty-three exhibits in admissible form [Docs 15, 16, 17, 24 and all subparts]. The State opposed via Memorandum, only, without affidavits or exhibits. [Doc 29] Petitioners filed a Reply Memorandum [Doc 33]. The district court rushed to deny Petitioners' motion on Friday, December 2, 2022, less than 24-hours after it cut short scheduled oral arguments on December 1, 2022. [App A] In the same text order, it dumped the preliminary injunction request without a hearing. [*Id.*]

Petitioners expeditiously filed to the circuit court their Notice of Appeal within the hour, on the afternoon of Friday, December 2, 2022. [Doc.App 1] On Tuesday, December 6, 2022, Petitioners filed an "Emergency Motion." [Doc.App 12] The circuit court said nothing by way

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(2.) *Bleuer v. Nigrelli,* N.D.N.Y., case 22-cv-01037; (3.) *Christian v. Nigrelli,* W.D.N.Y., case 22-cv-695; (4.) *NYSRPA II v. Nigrelli,* N.D.N.Y., case 22-cv-907; (5.) *Goldstein v. Hochul,* S.D.N.Y., case 22-cv-8300; and, (6.) *Hardaway v. Nigrelli,* W.D.N.Y., 22-cv-771.

[11] At least one court already declared NYS S.51001 an "unconstitutional statute," containing "…a wish list of exercise-inhibiting restrictions glued together by a severability clause." *Antonyuk v. Bruen,* No. 1:22-cv-734 (N.D.N.Y. Aug. 31, 2022), p. 72.

[12] For ease of language, "firearms" throughout should be read to include also "ammunition."

of scheduling the motion, or otherwise. On December 21, 2022, a three-judge circuit court panel in two sentences denied Petitioners' motion, claiming to have "weighed the applicable factors," but publishing no such thing through its Order. [Cir Doc 29] The circuit court Order issued in such haste as to usurp Petitioner's Reply period under FRAP R.27(a)(4), although it had allowed – in utter silence – a standard ten-day response period for the State [App C].

In the meantime, Petitioners notified the district court of the filing of the "Emergency Motion" to the circuit court and waived any written decision. [Doc 41] The district court published a delayed opinion, anyway, on December 7, 2022. [App B]

Let us be clear: we have been fighting in courts for nearly two straight months to try to find a judge to grant Petitioners' request for emergency injunctive relief because as of December 5, 2022 they are out of compliance with new laws impacting FFL dealers *only* – no other business in the state – and each so-called regulatory violation is chargeable as a criminal class A misdemeanor, in addition to the revocation of their state-issued dealer license. NY Gen Bus §875-I [App D, p. xi]; NY Pen §400.00(11) [*Id.*]. The loss of the state license results in the loss of the federal license. 18 U.S.C. §923(e), *read with* §923(d)(1)(F); Doc 24-4, ATF Form 7, question 20(b) for original application; Doc.App 19, ATF Form 8, questions 2 and 3 for renewals, thereafter. A criminal conviction results in the loss of the concealed carry permit and of Second Amendment rights. 18 U.S.C. §922(g)(1); NY Pen §400.00(11) (App D, p. xi). And, Petitioners are sitting ducks for having licenses anchored to fixed business premises addresses and violations that are in plain view any hour of any day that they are open to the public, including their valued law enforcement customers, not the least of whom are NYSP officers. [Doc 13-3, ¶¶38, 58]

Petitioners are risking everything to try to stay in business in support of civil rights under the Second, Fifth, and Fourteenth Amendments, and to keep the doors open and the lights on while they pursue this case, but we can't seem to find a judge in district or circuit court who will back them up. Petitioners are thus before you now.

REASONS FOR GRANTING THE APPLICATION

An applicant earns preliminary injunctive relief pending the filing and disposition of a petition for a writ of certiorari upon the showing of: (1.) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari*;* (2.) a fair prospect that a majority of the Court will vote to reverse the judgment below; and, (3.) a likelihood that irreparable harm will result from the denial of a stay. *Hollingsworth v. Perry,* 558 U.S. 183, 190 (2010, *per curiam*); *Lucas v. Townsend,* 486 U.S. 1301, 1304 (1988); *Rostker v. Goldberg,* 448 U.S. 1306, 1308 (1981). It is not a matter of right; the granting of the request depends upon the circumstances of a particular case. *Nken v. Holder,* 556 U.S. 418 (2009).

The Justices have authority to issue injunctions under the All Writs Act, 28 U.S.C. §1651(a), when "[a]pplicants are likely to succeed on the merits of their…claim," when they would be "irreparably harmed," and when it would not harm the public interest. *Tandon v. Newsom,* 593 U.S. ___, 141 S. Ct. 1294, 1297 (2021, *per curiam*), citing *Roman Cath. Diocese of Brooklyn v. Cuomo,* 592 U.S. ___, 141 S. Ct. 63, 68 (2020, *per curiam*).

A case, like this, involving watershed constitutional interpretation may face "serious challenges but also present some opportunities" (*Whole Woman's Health v. Jackson,* 594 U.S. _____, p. 17 (2021)), including for a novel remedy as a direct result of the novelty of the scheme by a state to deprive individuals of their civil rights (*Id.* at 2496 (Roberts, C.J., dissenting, joined

inter alia by Sotomayor)). When a grant or denial of a motion for preliminary injunctive relief "might have a 'serious, perhaps irreparable consequence, and…can be 'effectually challenged' only by immediate appeal," this Court can and does exercise appellate jurisdiction. *Carson v. American Brands, Inc.,* 450 U.S. 79, 84 (1981). 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 county." *Rossito-Canty v. Cuomo,* 86 F.Supp.3d 175, 195 (E.D.N.Y. 2015).

I. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL CONSIDER THE ISSUE SUFFICIENTLY MERITORIOUS TO GRANT CERTIORARI

I.A. The Six Justices Who Decided *NYSRPA v. Bruen* Currently Sit on the Court

This Court, from 2008 to 2022, published three decisions that define the fundamental rights of the individual under the Second Amendment and, then, through the Fourteenth Amendment. Most recently, *NYSRPA v. Bruen* was decided by a 6-3 majority. All six Justices of the *NYSRPA v. Bruen* majority are current Justices of the Court: Roberts, C.J.; Thomas; Alito; Gorsuch; and Kavanaugh; Justice Barrett, concurring. Previously, Justices Roberts, Thomas, and Alito also voted in the majority in *McDonald v. Chicago,* 561 U.S. 742 (2010); as well, in *District of Columbia v. Heller,* 554 U.S. 570 (2008). More than four Justices demonstrate a Second Amendment perspective consistent with the interpretation advanced in this case.

I.B. This Case is of First Impression to Interpret the Words "To Keep" in the Second Amendment and to Establish a Standard of "Constitutional Regulatory Overburden"

This case is the organic progression of the trilogy of *Heller-McDonald-NYSRPA v. Bruen*. Petitioners are the "to keep" of "to keep and bear arms." U.S. Const. amend. II. The

operative clause contains a joinder of two verbs; both should be equally used in constitutional analysis. [Doc 1, pp. 20-30]

Thus far, this 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. That it "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. That "to bear" is "perhaps "most acute" in the home," but "…the need [is not] insignificant elsewhere." *Id.*

As well, this Court has discussed "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).

In spite of the disagreement of the Justices in this field, there appears an *obiter dicta* consensus 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, it may be the only point about which the State and the undersigned agree: that the three historic New York laws cited by the State required able-bodied men to report for militia training, bearing their own privately-owned arms and ammunition. [Doc 29-2, p. 2, 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)); Doc 29-3, p. 1, New York (1792), Sec. 1; and, Doc 29-4, p. 2, New York (1782), Sec. I.

In short, firearms and ammunition 'twere not furnished by the State; they were privately owned by individuals.

Throughout *Heller-McDonald-NYSRPA v. Bruen,* this Court did not have jurisdiction to rule upon the nature of the "to keep," the *from whence* the militiaman came into possession of a firearm, and whether the third party seller stands on an equal constitutional footing as the individual as he stands in the shoes of a customer. Here, now, 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. The firearm is more than simply a thing of personal possession bought at a store, like a handbag or dangle earrings. Things lawfully acquired from stores are, generally, purchased. In 2022, very few hands forge a firearm from iron ore. Some, like Petitioner Mike Mastrogiovanni, a competition shooter, do reload ammunition, but even they do not make their own from metals and forge. [Doc 13-5, ¶¶22-23] In 2022, the exercise of the Second Amendment depends upon the skill of the individual in use of a credit card at a retail dealer in firearms.

The dealer in firearms is the indispensable extension of the individual for the procurement of the firearm, and must be protected with as much rigor.

Petitioners and other FFLs must not be squeezed out of business across the state, nor plowed asunder in favor of (as the State suggests) "Wal-Mart" [Doc 29, p. 22], lest the embedded right of the individual "to keep" a purchased firearm be turned into a raincheck.

Securing this logical judicial holding would allow emanation of a much-needed standard to protect FFLs from government actions targeting dealers in firearms. Call it "constitutional regulatory overburden." Inspired by the economic principle of "The Laffer Curve,"

"constitutional regulatory overburden" defines the point at which compliance by a dealer in firearms becomes 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.

This is why Petitioners file this Application and prepare to immediately file a Petition for Writ of Certiorari, under this Court's Rule 11, to secure a ruling that this approach is sanctioned. Petitioners are getting the wrong results in the lower courts. *NYSRPA v. Bruen* isn't enough to protect the individual-to-FFL relationship. The traditional *Winter* analysis gives a false negative when a lower court can't recognize the Petitioners' claims as viable claims. The district court only saw it as claims without likelihood of success, not realizing this isn't a cookie-cutter case. It involves novel and serious issues. The circuit court didn't even bother to explain. [App C] The Second Circuit's failure to grant an injunction pending appeal was, in a word, "erroneous." *Tandon, sura,* p. 1.

Petitioners' claims are not completely without precedent. In addition to this discussion of recent Second Amendment cases, Petitioners argue a small group of overlooked War Years cases lend support. The best analogue being *Steelworkers v. U.S.,* 361 U.S. 39 (1959), a discussion set out in greater detail in the Rule 11 Petition, and argued below.

I.C. This Case is Also Watershed to Establish the Protection of Federal Firearms Compliance Records Against a State Attempting to Build a Firearm Owners Registry

Petitioners need validation and support also for their second watershed claim of the case. [Doc 1, ¶¶54-63] Respondents demand Petitioners and all FFLS with NYS dealer's licenses to surrender their federal firearms compliance records. NY Gen Bus §875-f. [App. C, p. viii] Petitioners face incarceration and license revocation, if they do not. NY Gen Bus §875-i; NY Pen

§400.00(11). [App D, p. xi] Even so, Petitioners took the position they will not turn over their federal firearms compliance records, nor will they create duplicitous (shadow) books to help Respondents avoid pre-emption.

Until now, no federal, state, or municipal government in this country has attempted to grab the federal firearms compliance records of an FFL,[13] established in 1968 and expanded to current form in 1989. The most valuable of these records are the ATF Form 4473 and the Book of Acquisitions & Dispositions, or, "the A&D Book," as commonly referred to in industry. Only the FFL dealer/pawnbroker has access to all of the information captured in the ATF Form 4473 and which gets transferred into the A&D Book, most notably, perhaps, being the serial number of the firearm.

The federal government is prohibited from a wholesale taking of such records. There are penalties for the misuse of these records and of the NICS background check system. Federal, state, and municipal governments can be fined and prohibited from any unauthorized use of NICS. 18 U.S.C. §923(g), 18 U.S.C. §926, and 28 CFR §25.11(b).

When Congress enacted the 1986 Firearm Owners Protection Act, it reassured gun owners and the industry that if the federal Gun Control Act of 1968 was to continue, it could never be abused by a government to compile a registry against its citizens. [Doc 1, pp. 27-30; Pub.L. 90-618, Sec 101 at Doc. 1, ¶65-66. The "Firearm Owners Protection Act," Sec. 101, reaffirmed that commitment:

> "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

[13] "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.

> 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." (emphasis added)

[Doc. 1, ¶133b]

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).

The new law at NY Gen Bus §875-f(3) would allow forced access to inventory records "at any time" by "law enforcement agencies and to the manufacturer of the weapon or its designee." This imperils all of Petitioners' federal firearms compliance records and must be restrained and/or enjoined as pre-empted. This new law suspends any right of Due Process afforded the Petitioner FFL 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, where entry and review of records is conditioned either under a federal judicial warrant or a statutorily proscribed audit process.

There is absolutely no (zero) existing right of access at law to Petitioners' federal firearms compliance records for any third parties, even and including another Federal Firearms Licensee

(assuming that is what is meant by Respondents' bald use of the words "manufacturer of the weapon"). It is vague, but it suggests the State wants to turn manufacturers into agents of the State.

The new record requirements under NY Gen Bus §875-f(2) [App D, p. viii] would require Petitioners to create a "new" set of reports using an inventory reconciliation process, which steals the concept from ATF audits of FFLs when the open entries of the A&D Book are manually compared to the physical firearms inventory at the FFL. 18 U.S.C. §923(g)(1)(C)(i), §923(g)(1)(B)(ii) and (C).

Additional new recordkeeping requirements under NY Gen Bus §875-f(1) [App D, p. viii] plagiarize federal firearms compliance laws by forcing dealers to create a near duplicate set of records to submit to Respondent NYSP. The new law directs creation of "record of purchase, sale, inventory," which is the federal A&D Book described at 27 CFR §478.125(e) and illustrated at corresponding "Table 4: Firearms Acquisition and Disposition Record."

The state has identified no prior circumstance in which a government has attempted to seize – whole cloth – federal firearms compliance records as they do now through NY Gen Bus §875-f. [App D, p. viii] Because the "architect" of the new laws "designed this scheme to evade *Young* as historically applied, it [would be] especially perverse for the Court to shield it from scrutiny based on its novelty." *Whole Woman's Health, supra,* p. 8 (Sotomayor, concurring in part/dissenting in part), citing *Ex parte Young,* 209 U.S. 123 (1908).

Respondents plan to merge these federal records into NYSP "databases" (undefined) under the guise of converting into a "NICS Point-of-Contact" state. NY Exec §228(3), §228(4). [App D, pp. 2-3] This is false cover. The new Executive Law §228(3) provides a first glance look into the "databases" as merging records from state agencies including the "office of court administration" (undefined records) and "department of public health" (undefined records) and

others. The law sets no limit at subparagraph 3, sentence 4 of creating and maintaining "such additional databases as needed" to complete background checks. Concealed carry licenses for handgun, SAR licenses, and ammunition background checks, alongside other licensees and all under the discretion of the NYS Police with administrative appeal limited to the NYS Attorney General. NY Exec §228(8). [App D, p. iii]

Petitioners have, rightfully, filed this case to not only defend against the taking of these records, but, also, to request the first-ever interpretation of these specific federal statutes via-à-vis the new state laws, plus the codified spirit of these Acts of Congress and the value of promises made of the limited and specific purposes of the federal firearms compliance records, specifically, and the background check system, generally.

I.D. This Case Will Expand the Right of the Individual to Purchase a Class of Firearms Known as the "Semi-Automatic Rifle," to Purchase that Rifle without a License, and to Purchase Ammunition Without a Background Check.

In theory, no one in New York should need Your Honor for the three individual rights claims made in this case. *NYSRPA v. Bruen* is the standard for the reasonable woman, as well as the proverbial "reasonable man." But, it's Hochul and it's New York, and, so, it's not reasonable. She's going to force Your Honor, the undersigned, and lead plaintiff Nadine Gazzola to meticulously define for her the limits that constitute abuse. 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 with, *inter alia,* Sotomayor).

What the State has achieved is an effective ban, or, stoppage, by three routes.

- First, Respondents threw ball bearings under the feet of county employees who issue and renew concealed carry permits through the NYSP/DCJS failure to publish a mandated curriculum, test, and certification under NY Exe §837(23)(a) and NY Pen §265.20(3-a), so that no course could be taught in accordance with the new mandate since September 1, 2022. No course certificate? No permit or renewal.

- Second, the State jammed up sales and purchases of semi-automatic rifles – an entire class of firearms – by requiring a new (no historic analogue) SAR license and then failing to release the format for the new license required by NY Pen §400.00(7). [App D, p. xviii] No SAR license? No purchase or sale.

- Third, the State is inhibiting ammunition sales by requiring a new background check (no historic analogue) through a non-existent system and otherwise mandating dealers write down on a blank piece of paper because they didn't issue the "form," while the State is trying to use NICS for the illegal purpose of an ammunition background check under NY Pen §400.03(6). [App D, p. xxiii]

The new laws assigned thirty-four (34) tasks (just for the new laws complained of herein; not the full content of the four Bills). On November 25, 2022, Petitioners filed a 6-page, line-by-line statutory list of failures of Respondent agencies to fulfill mandates and discussed it in oral arguments at district court on December 1, 2022 and raised it again through motion to the circuit court, but neither State's Counsel nor the lower courts have seemed particularly bothered by this undisputed fact: Respondent agencies have failed to perform 32 of the 34 administrative responsibilities under the new laws. That's a 94% <u>failure</u> rate. Petitioners urge Your Honor to review this chart. [Doc 33-1]

Petitioners weren't the only ones in non-compliance as of December 5, 2022: the authority for Respondent agencies to perform these functions expired for the primary Bill complained of, S.4970-A. [Doc 1-3, §5]

> NY S.4970-A, §5: "Effective immediately, the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such effective date." [Doc 1-1, p. 7]

It is literally impossible to comply with every new law complained of that is dependent upon Respondent agency action. Most of the new laws, whether gutted by operation of law, or, through Respondents' persistent failures, are "vague" by definition. What remains when you cross out everything that's not been published and you consider the haste in drafting? A mess of a mis-managed launch of multiple new schemes that needs a recall akin to the failed launch of "New Coke," before someone is arbitrarily arrested.

The "response," if one can call it that, was published by Respondent NYS Police, after Petitioners filed their Emergency Motion to the circuit court on December 6, 2022. The NYSP added a "Resources for Gun Dealers" to their public website and published a 4-page "memo." [Doc.App 19-2 and 19-3] The positives were the admissions of critical allegations of Petitioners made since commencement, such as the SAR license being required to be a stand-alone license; not an endorsement upon a concealed carry license. The negative was it further muddied the waters by rearranging a single effective date of December 5, 2022 into multiple, random postponed dates and into random unscheduled future dates. For example, it admitted employee

training materials were not timely published ("is currently developing") and set a new date of "will be available by 2022 calendar year."[14] [Doc.App 19-1 includes this and other examples]

There is no historic analogue for a semi-automatic rifle license. Not in the history of this state, which is precisely what the State's only three historic law exhibits establish. The long gun has never required a license in New York. Moreover, there has never been an ammunition background check in New York, which, again, is reflected in the three historic laws submitted by the State. Militia men were to appear with their private arms and ammunition when called up for duty. Both should easily fail as being unconstitutional under *NYSRPA v. Bruen.*

Respondents cannot inhibit either new or renewal concealed carry licenses by requiring training where there has never been any required by this State, and then blowing up the county home rule system through a failure of Respondent agencies to publish the curriculum, the test, and the certificate.

Sadly, even though the new laws are completely malfunctioning on all levels – state, state, county, dealer, individual – the State is ever-eager to enforce the new laws. Even State's Counsel couldn't resist threatening "enforcement" as the concluding paragraph of his responsive memorandum to the circuit court. Counsel, personally, and without supporting affidavit, growled and forewarned: "It [an injunction] would halt State Police's implementation and enforcement of the recordkeeping, security, and training requirements." [Doc.App 26, at p. 33] Respondent agencies responsibilities were due ahead of September 1st and December 5th, and they met neither of those deadlines, but apparently aim to stay true to their threat of enforcement with "zero tolerance."

[14] *N.B.:* it's December 28, 2022 for final drafting of this third Emergency Motion and nothing (zero) has since been published for this or any other statutory requirement.

For all the fanfare Hochul and the Co-Respondents put out in person all over the media last summer and continue to display all over their official government websites, the Respondents have gone to crickets. *NYSRPA v. NYC,* 590 U.S. _____ (2020, slip opinion). They abandoned actual implementation of the laws and have failed to participate in this lawsuit for even one affidavit.

I.E. Petitioners Seek to Restore the Rule of Law in New York

Although Your Honor dissented in *NYSRPA v. Bruen* and *McDonald,* this case includes issues involving the federal-state balance of the Fourteenth Amendment and the Rule of Law. In 2009, in your remarks at UC Berkeley Law you said, "I firmly believe in the rule of law as the foundation of our basic rights."[15] And so it has been since at least the time of *Marbury v. Madison,* 1 Cranch 137, 177 (1803), occasionally for better or worse, but surviving. We are, again, in tumultuous times in a battle launched by Hochul.

There are precious few cases decided each year by this Court, and it will be natural for you to question *why* – why should another Second Amendment case occupy one of these slots? Because it is a member of the civil rights family. It has been adopted, selectively incorporated, and is now an undeniable part of "the Bill of Rights." The Second Amendment is the new civil right kid on the block. The Second Amendment is the modern civil rights movement. An attack on any one civil right and through such unacceptable methods must be called out, if all are to endure – no matter one's own "political preferences" or "whether society finds the idea itself

[15] "Court Shorts: Rule of Law" for the U.S. Courts at https://www.uscourts.gov/news/2019/08/08/judges-explain-rule-law-why-it-matters.

offensive of disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 and 417 (1989). That's how this Court defines "family," with few exceptions in its history.

The Justices of this Court need to find their way through to a strong majority, if not unanimous decision against the new laws, not just to defend the Second and Fourteenth Amendments, but to defend the Court from unanswered attack (taking New York "backwards" through a "temporary setback" because "possessed" by the "insanity of the gun culture" [Doc 1, pp. 40-52]); to defend the institution from intentionally misleading allegations designed to instill fear and loathing (placing "no restrictions" on the Second Amendment, resulting in "millions of New Yorker's in harm's way" [*Id.*]); and to defend the Rule of Law where the United States Supreme Court is the final arbiter on the interpretation of our United States Constitution and its Bill of Rights (Hochul will "not surrender" her superior rights as governor [*Id.*]). "The nature of the federal right infringed does not matter; it is the role of the Supreme Court in our constitutional system that is at stake." *Whole Woman's Health, supra,* at p. 4 (Roberts, C.J., dissenting).

II. Failure to Grant Emergency Relief Will Irreparably Harm Petitioners

Petitioners' Declarations, which personalized the already-detailed allegations of the Complaint, set the stage for a preliminary injunction hearing, which the lower court did not allow. It sets up matters for discovery. It's place holders for trial testimony. For either the State or the lower court to criticize a lack of harm and characterize the Petitioner's suffering as "self-inflicted" [Doc.App. 26, p. 32] or insufficient, on a motion for preliminary injunctive relief, given the nature and the scope of the problems presented, has no credibility of analysis of what is at stake.

Petitioners are willing to lose everything in defense of the Constitution and their federal firearms compliance records. Nadine is candid in asking whether it will be worth it and whether it will actually change anything, especially because she is the mother of two young girls, and does not want anything to damage that relationship, including that she does not want to go to jail or to lose parental rights. Petitioners Serafini, Mastrogiovanni, and Hanusik talk about their wives, children, grandchildren because they are facing, for the first time in their lives, the very real probability that to defend the Constitution will mean to be arrested. Petitioners are law-abiding, compliance-minded individuals arguing for public safety with voices truer than the Governor. The undersigned would only wish Petitioners could submit supplementary affidavits to share what it has been like to go through these two months, the cross-over of December 5, and hanging on to hope with this final motion submission for injunctive relief.

II.A. Individual Harm

The individual rights claims of Petitioners are laid out, already, herein, including: loss of concealed carry permits when unable to renew; loss of ability to obtain an SAR license and/or purchase an SAR; being subject to ammunition background check.

Particularly, Appellants challenge the process of renewal of their license, which requires completion of the new mandatory 16-hour training class plus 2-hour live fire training. NY Pen §§400.00(1)(n) and 400.00(19) [App D, p. xvi] Appellants are unable to teach the new course because Appellees failed to publish "standardized" training "curriculum" and written test. NY Pen §400.00(19), NY Exec §235, NY Exec §837(23)(a), NY Exec §235(1), NY Pen §265.20(3-a). The State has no history of requiring any training; it was a County requirement, if at all. Appellants are unable to take the required course ahead of their renewal deadlines, which violates *NYSRPA v. Bruen.*

The new semi-automatic license is the second individual violation of Appellants' fundamental Second Amendment rights. NY Pen §400.00(2), (3), (6), (7)-(9), (14). [App D, p. xvii, *et seq.*] The Appellee NYSP failed to release the format of the new SAR license, which means the counties cannot issue it. NY Pen §400.00(7). [App D, p. xviii] The Appellants cannot obtain a stand-alone SAR license. They had no obligation to apply for any county-issued endorsement on their concealed carry permits, which they knew was legally incorrect. An individual does not attain standing by claiming a need for something that is illegal. An individual gains standing and demonstrates a cause of action when standing tall for what they know to be right.

The Appellants can neither (as individuals) buy, nor (as FFLs) sell a semi-automatic rifle without fear of prosecution. NY Pen §265.65, §265.66. [App D, p. xii] There is no historic antecedent in NY for a semi-automatic rifle license, and the Appellee imposition of one violates Appellants' Second Amendment rights under *NYSRPA v. Bruen.* Similarly, the new ammunition background check violates Appellants' fundamental Second Amendment rights. NY Pen §400.02(2). [App D, p. xxi] There is no historic antecedent in NY for the ammunition background check, and the Appellee imposition of one violates Appellants' Second Amendment rights under *NYSRPA v. Bruen.*

II.B. Federal Firearms Compliance Records and Fifth Amendment Harm

Being forced to surrender federal firearms compliance records to the State would be devastating. If whole records start transferring to NYSP, in the electronics age, it will be irretrievable. You either protect the information in the silo at the business premises of the individual dealer and their premises, or you let lose the information to create a gun registry. The new laws come nowhere close to matching the federal counterparts, starting with the very first

federal section stating physically where the records will be stored. The new laws are a gigantic vacuum cleaner, out to suck up records from dealers, records from the Office of Court Administration, medical records, and on. It's not "1984;" it's "Minority Report."

II.C. Constitutional Regulatory Overburden and Void-for-Vagueness

Then, as concerns the ability of the FFL to operate as a business, it's Void-for-Vagueness and "Constitutional Regulatory Overburden." The Void-for-Vagueness claim is illustrated through analysis of Group C laws, as well as in Group A if those are not knocked out through federal pre-emption and Fifth Amendment claims.

Group C laws will overburden Appellants with costly and unconstitutional state compliance mandates from a "security plan" involving daily storage of complete firearms inventory into safes (NY Gen Bus §875-b(1)) [App D, p. v], a "security alarm system" contracted through a third party vendor and compiling a multi-camera placement system with 2-year storage requirements (NY Gen Bus §875-b(2)) [*Id.*], employee training (NY Gen Bus §875-e) [App D, p. vii], monthly firearms inventory reconciliation reports (NY Gen Bus §875-f(2)) [App D, p. viii], "full access" to dealer premises (NY Gen Bus §875-g(2)) [App D, p. ix], and ammunition sale records (undefined) (NY Pen §400.03(2)) [App D, p. xxiii].

The cost estimates by individual Appellants are significant, and cannot be met. Appellants used their "best guesses" on the vague Class C laws to work through cost estimates. These were unchallenged by the State.

A walk through of example provisions at issue illustrates the problems. Each one represents a potential criminal charge with loss of all licenses, and Second Amendment rights, as already explained.

If Nadine Gazzola unlocks their shop, Zero Tolerance Manufacturing, Inc., on a Saturday, and walks through that door with their daughters, the younger of whom, in particular, is a shop kid who enjoys interacting with customers, Nadine can't leave without them, even to go to the bank or the post office and leave them in the care of their trusted employee. NY Gen Bus §875-c. The parent must be present at all times. The most common event in the small business world – parents taking their children to work – is now illegal if the parent steps out.

If Serafini goes in to work with his eldest of three, a son who has worked at Upstate Guns & Ammo since he graduated three years ago from high school, he's committing a crime under NY Gen Bus §875-e(3) in having an employee under 21 years of age. Serafini's son is over 18 years of age, but is only 20 years of age. And, if his children's teenage friends come in for a late-in-the-season hunting license, that's also a crime.

No Petitioner is willing to exclude a person under 18 years of age from their store, nor restrict employees to those over 21 years. They would end up with less rights than Larry Flint and have to employ a bouncer, trained to examine documents purporting to demonstrate legal relationships, like "parent" or "legal guardian."

For Mastrogiovanni, Hanusik, and Owens, their shops are part of their homes. Federal law defines "business premises" to exclude parts of the private dwelling not open to the public. 27 CFR §478.11. Now, their homes are subject to "full access" inspections (NY Gen Bus §875-g(2), sentence 2), no less than once every three years (NY Gen Bus §875-g(2)(a)), and otherwise upon demand to see records (NY Gen Bus §875-f(3)), without limitation or exclusion. Not a defense, whether the wife and grandchildren are baking cookies in the kitchen.

Martello installed a new video surveillance system just ahead of the new law at NY Gen Bus §875-b(2). The only way he can figure to comply with new video storage requirements

(sentence 2) is to severely diminish the recording quality to where you can't distinguish facial features. The Gazzolas finished installing a new security system; that idea doesn't solve technology shortages of their system. Nor does it for Serafini. Mastrogiovanni, Hanusik, and Owens don't have video systems, at all, and can't afford to do so. No one but Martello is arguably in compliance, but his work-around can't possibly be in accord with the point of having video in the first place.

Not one of the Petitioners is willing to have a third party vendor monitoring their video feeds at a "central station," particularly when the state-licensed "security alarm operator" can be someone with a criminal record. NY Gen Bus §875-b(2), first sentence; read with NY Gen Bus §69-o(2). Their stores are their safes and security is one reason the Declarations, published on the PACER system, were written as they were.

Affronti, Nadine Gazzola, and Serafini are still trying to figure out how to train their employees under NY Gen Bus when there's no training materials from the NYSP/DCJS.

Nick used to sell body armor. Not since the new laws went into effect. There's a carve out from NY Pen §270.22, when read with NY Exe §144-a, but Respondents never did release the list of accepted professions who are permitted to continue to purchase it. Nor did they release a new application process through which a customer could apply to be added to the exempted professions list.

The Petitioners are all scratching their heads over the "security plan" at NY Gen Bus §875-b(1) because none of them have the floor space to install sufficient safes to house their firearms inventory, nor would the floors support the weight of such safes, nor are their enough hours in the day to one-by-one place the firearms in the safes at the end of the day and back out to the retail space at the top of the next day, even if you were willing to risk damage to the

condition of the firearms and any mounted accessories. This is New York and there is no other business in the state required to store their inventory in safes each night, before turning out the lights.

It is not possible to operate a highly-regulated by federal law business in this atmosphere of Respondents' dysfunction and laws that are unconstitutional or illegal.

II.D. Lost Revenue, Reputation, Businesses

The impact ripples to Petitioners as business owners because they are suffering lost business from being unable to teach the new class and from being unable to sell handguns and related accessories to concealed carry permittees. Petitioners as business owners sell semi-automatic rifles, but they have been unable to do so since September 1, 2022 – statewide – because the new SAR license is not available. SARs are trapped in inventory. Ammunition sales are down. Sales across the board are down. Again, this is a motion for preliminary injunction; not summary judgment or to reverse a decision after trial. The arguments are set up in the pleadings and affidavits. There is no answer or affidavit from the state. Petitioners requested in writing in the motion and repeatedly at the teleconference and the oral arguments to be granted a hearing; it was denied. The circuit court didn't comment on any aspect of the motion.

III. There is a Fair Prospect the Court Will Reverse the Second Circuit Order Denying Petitioners Their Requested Preliminary Injunctive Relief.

Petitioner's emergency motion for a stay pending appeal "relied on the traditional stay factors and a likelihood of success on the merits (citation omitted), yet the [Second] Circuit

failed to analyze the motion under that framework." *Rose v. Raffensperger* (No. 22A136, order Aug. 19 2022). [App C]

The analysis of a request for interim injunctive relief is set forth in *Winter v. Nat'l Resources Def. Council,* 555 U.S. 7, 22 (2008), as follows: (1.) that plaintiff is likely to succeed on the merits; (2.) that plaintiff is likely to suffer irreparable injury in the absence of the preliminary relief; (3.) that the balance of equities tips in plaintiff's favor; and, (4.) that an injunction is in the public interest. The *Winter* analysis naturally implicates the Cases and Controversies Clause, which includes an analysis of standing. Only one Petitioner need be found to have standing to satisfy Article III's case-or-controversy requirement. *Centro de al Comunidad Hispania de Locust Valley v. Town of Oyster Bay,* 868 F.2d 104, 109 (2d Cir. 2017).

If you don't grasp the "to keep" and constitutional regulatory overburden arguments, it makes it difficult to see how this case works. If you don't see the urgency in protecting federal firearms compliance records at the FFL level, it makes it difficult to see how this case works. The lower courts are not taking the time to appreciate and consider the claims made. They are dismissing the requested relief out-of-hand.

III.A. Petitioners Have Standing

This is covered throughout this submission. Petitioners are unique: individuals, concealed carry permit holders, state licensees, federal licensees, "Responsible Persons" to BATFE, and business owner-operators. Their standing is extraordinary. They are subject matter experts. Petitioners are perfectly positioned to present the issue of just "how" does the individual get "to keep" arms. The answer is for the individual to buy it through the lawful stream of

commerce. Right now, Petitioners cannot even buy firearms from themselves, which, in mathematical terms, is like saying zero doesn't equal zero.

Petitioner's have said from the beginning they will be unable to sign the new annual certification of compliance, mandatory under NY Gen Bus §875-g(1)(b). [App D, p. ix] This amounts to a violation of their Fifth Amendment rights against self-incrimination. The Plaintiffs would sooner surrender their state dealer licenses than risk violating the responsibilities of their federal licenses. [Declarations, *passim;* see, e.g., Fifth Amendment claims by Nadine Gazzola, ¶38; Seth Gazzola - ¶22; Serafini – 50; Mastrogiovanni - ¶35; Martello - ¶40; Affronti - ¶53; and Owens - ¶30]

Part of Respondent NYSP's spontaneous Internet publication on December 7, 2022 shifted the new compliance certification deadline out one year to January 23, 2024. [Doc.App 19-1, p. 6] It is of no consequence. Petitioners with federal license renewals through December 31, 2023 will lose their FFLs in the interim. This will be true for state license renewals, as well. The first such federal renewal hits Nadine & Seth Gazzola of Zero Tolerance Manufacturing, Inc. [Doc.App ___]

The State below misrepresented new laws in an effort to damage Petitioners' individual standing. E.g., "And [Petitioners] need not undergo training to maintain their [concealed carry] licenses." [Doc.App 26, at 23 and 33] Counsel referred to a NYSP/DCJS memo. [Doc 26; Doc.App 15-3, August 27, 2022] Memo "Q&A" 8-11 spout a fiction of "renew" versus "recertify" that is unsupported by law. NY Pen §400.00 does not define 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. Petitioners are required to complete the concealed carry training in order to renew their permits, which they intend to do. Petitioners also want to continue to teach the training course in place of courses they were already teaching.

Petitioners satisfy the injury-in-fact requirement. They are facing the "threatened enforcement of a law" that is "sufficiently imminent." *Susan B. Anthony List,* 573 U.S., 149 158-159 (2014). Whether as individuals seeking to exercise their recognized constitutional rights under the Second, Fifth, or Fourteenth Amendments or as FFLs seeking to protect federal firearms compliance records or as federally and state-licensed dealers seeking to remain in compliance under the novel theory of the extension of the individual right to the FFL dealer, Petitioners 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). A plaintiff need not be sued before bringing a suit challenging the constitutional of a law "threatened to be enforced." *MedImmune, Inc. v. Genentech, Inc.,* 549 U.S. 118, 128-129 (2007); *see also Babbitt, supra,* at 298.

Petitioners also plausibly alleged that the new laws have already had multiple direct effects on their day-to-day operations, and they have identified key provisions of the new laws that "appear to impose a duty on the licensing-official defendants to bring disciplinary actions against them if they violate [the new laws]." *Whole Woman's Health, supra,* at 14, finding "this

is enough" at a motion to dismiss stage to suggest petitioners "will be the target of an enforcement action and thus allow this suit to proceed."

III.B. Respondents are Properly Before This Court

Petitioners devoted 15-pages of their Complaint to detail the animus unleashed by Hochul, her Co-Respondents, and third parties to make out their 42 U.S.C. §1983 and §1985(3) claims. [Doc 1, pp. 38-54] Their discrimination against Petitioners 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).

Respondents 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, supra,* at p. 5, citing *Young,* at 159-160.

Hochul masterminded with various persons external to state government, including attorneys she publicly named from Every Town for Gun Safety and Gifford Law Center to deprive Petitioners of their rights. [Doc 1, ¶¶37, 91, 91 n.54, 319] Hochul's official Press Releases, appearance transcripts, and videos continue to be published through the state's governor's office website. Please take a moment to study the source for the many quotations defining "animus." [Doc 1, pp. 38-54] These are not "just" media quotes – one-liners here today, tossed in the recycle bin tomorrow. These are proudly and continuously displayed on Hochul's official state website.

James and her staff attorneys cite on their official state website and in both state responses to this emergency motion to these external "non-profits" as authoritative as a matter of law. [Doc. 29, p. 11, n.4 and p. 30, n.14] Nigrelli threated "zero tolerance" and the State's Counsel from the AG's Office to the circuit court ended his memorandum with a call for "enforcement." [Doc.App 26, p. 33] Hochul and her Administration made multiple public appearances with press corps around the state after the July 1st bill signing. In every respect, Hochul's "leadership" is a leader akin to Alabama Governor Orval Faubus in 1957 ("…I was not elected Governor of Arkansas to surrender all our rights as citizens to an all-powerful federal authority.") Faubus' speech was the foreshadow to anti-integration showdown in Little Rock.

Ours is a motion for emergency injunctive relief, describing both new laws and bad actors reviving strategies thought to have been put down at some time before enactment of 42 U.S.C. §1983 and §1985(3) – but this is why Congress gave private citizens added protection against unconstitutional infringements by the state of their federal rights.

III.C Petitioners are Likely to Succeed on the Merits Against the New Laws

The Record lays out the strategy for defeat of each law and is discussed herein. Again, the over-arching the entire case is a new theory of law that the dealer in firearms stands on par with the individual . Petitioners' chart at Doc 35 summarizes the case into one page, grouping the laws into A, B, and C, organized by legal theory.

It's the same Petitioner on lead argument in one of their several roles, dependent upon the claim being made. It's each law having more than one argument against it. While this might feel confusion, do it one law at a time. What Your Honor should feel is this scheme is wrong *on so many levels* and for so many more people than "just" the Petitioners.

IV. THE BALANCE OF EQUITIES AND PUBLIC INTEREST WEIGH IN FAVOR OF GRANTING EMERGENCY RELIEF

The public interest will not be harmed by the grant of an injunction. *Tandon, supra,* at 1298; *Roman Cath. Diocese of Brooklyn v. Cuomo, sura,* at 68. The public is harmed by government enforcing an unconstitutional law. *See, ACLU v. Reno,* 929 F.Supp. 824, 849 (E.D. Pa. 1996). Any loss of freedoms "for even minimal periods of time" "unquestionably constitute irreparable injury." *Roman Catholic Diocese, supra; Tandon, supra,* at p. 3; *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

Public safety begins with the Petitioners. Real people. It begins when you walk into Hanusik's tiny shop at his home and are greeted by his fifty years of firearms experience. [Doc 13-9, ¶10] You'll find that same easy confidence sitting down with Mastrogiovanni, just north of Syracuse, where, between him [Doc 13-5, ¶18], Hanusik, and Owens [Doc 13-8, ¶8], no one is exactly sure who is the most experienced by age, among them. It extends into Nadine Gazzola personally dotting over every customer [Doc 13-3, ¶20, 21, 25, 29, 31, 32a, 39a, 41, 49, 54], while Seth quests for zero tolerances for gun parts on a CNC machine. [Docs 13-2 and 13-3, ¶39a and ¶11] It's Christopher Martello and Bob Owens, Veterans, more than eight decades between them of specialized training, freely sharing their technical expertise with customers. [Doc 13-6, p. ¶63; Doc 13-8, ¶¶13-15, 75, 77] It's Nick Affronti helping out a neighbor. [Doc 13-7, ¶87] And Craig Serafini, whose best employee is his 20-year-old son. [Doc 13-4, ¶85] The Appellants are the front line, day-in and day-out in support of the Second Amendment and against illegal sales to disqualified persons. They are the public interest.

Petitioners are the ones making the public safety arguments:

- Defending proper handling of federal firearms compliance records;

- Arguing against illegal use of the NICS Background Check System;
- Federal firearms compliance, in all respects, as an operating FFL and with established ATF/FBI relationships and routine interaction;
- Fighting to restore a functional concealed carry permit system and working with county-level partners at the Sheriff's Department, the Clerk's Offices, and Licensing Officers;
- Fighting against excess licensing, while protecting all their pre-existing federal, state, and individual licenses; etc.

In comparison, the NYS AG's Office brought forth no one, not even an affidavit from their boss or their own clients. Counsel wrote hollow words to opine an injunction would "cause chaos for dealers who have been preparing to comply with these laws." [ECF 26:33] The Attorney had 1,782 FFL-01s and 9 FFL-02s statewide to choose from, minus the Appellants. [Dkt. 16-6] Counsel filed no affidavit from a single FFL. The opinion of an attorney cannot defeat the sworn affidavits, supporting exhibits, and detailed pleading of Petitioners.

Justice Thomas is correct that the courts should not usurp legislative function to debate policy interests. However, both a *Winter* motion or a Sup. Ct. Rule 23 motion require comment on the "public interest." In contrast to the Petitioners' philosophy, stance, and actions, the following relative to the Respondents should weigh heavily against a ruling in their favor:

- Hochul's expressed policy is against the voluntary contribution of records by a state to the NICS Background Check System. ("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." [Doc 1, ¶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. [Doc 1, ¶191]

The State answered none of Petitioner's public policy allegations of this, including the point-blank argument the State does not even report convicted criminals. [Doc 1, pp. 84-86; Mastrogiovanni, Doc 13-5, ¶44; Martello, Doc 13-6, ¶39; Doc. 16-4; Doc. 33, p. 15; Doc.App 12, pp. 10]

  - There are real life consequences for failure to contribute records and for data entry errors, a point discussed in Petitioners' District Court Memorandum, with reference to the mass murder at the First Baptist Church of Sutherland Springs, Texas in 2017. The Air Force failed, *inter alia,* to enter the domestic violence conviction and the dishonorable discharge into NICS, creating a false "proceed" on a federally-disqualified person. [Doc 33, p. 18] The report represents hard, objective data.

- Already mentioned above, Hochul repeatedly lies about the circumstances of mass shootings to serve her own purposes [Doc 1, ¶94, n.57-59], where hysteria, not based upon available facts, skews results like passage of misguided laws.

- In New York in 2021, there was a total of twenty (20) reports by FFLs of theft/loss of 176 firearms, including any firearm unable to be located in inventory within 24-hours of such identification event. These statistics are published annually by the ATF, and a more detailed discussion can be had from the reporting. There is an entire resource center on-line on this issue: https://www.atf.gov/resource-center/federal-firearms-licensee-theftloss-report-2021 The theft/loss report is a mandatory federal filing for an FFL. [24-2]

    - An interesting 2016 report by Bureau of Justice Statistics concluded based upon prison inmate interviews that the FFL dealer is not the primary source for gun crime. https://bjs.ojp.gov/content/pub/pdf/suficspi16.pdf

- The New York State Intelligence Center (NYSIC), established in 2003, uses its Crime Gun Center for tracing for all law enforcement in the state. A 2021 report found that the contractor "has a top-secret clearance from the military" but needed "[a]dditional training in ATF database systems, policies and procedures." https://theiacp.org/sites/default/files/all/c/Crime_Gun_Info_Sharing.pdf

- The FBI 2021 national "active shooter" analysis report included that only one (1) wore body armor. https://fbi.gov/file-repository/active-shooter-incidents-in-the-us-2021-052422.pdf at p. 14.

Public policy analysis can easily start with objective government reports on the very questions the new laws present. As this case develops, Petitioners welcome the opportunity to provide deposition and courtroom testimony, to bring in government witnesses from the legislature and from law enforcement, and to enhance a public policy discussion that, last summer, was simply destructive.

Respondents are, themselves, shooting fish in a barrel to have targeted Petitioners as federal firearms licensees and as concealed carry permit holders, semi-automatic rifle customers, and purchasers of ammunition. It's an act of futility against the wrong segment of the population and of the business community. Petitioners are undeniably law-abiding and compliance-minded. Their day job is to help law enforcement, particularly the ATF, prevent firearms from falling into

the hands of legally-disqualified persons. The new laws are a failure of public policy, as well as of public safety, to say nothing of how far short of the Bill of Rights their aim fails.

Petitioners were in compliance until the new laws went into effect. Respondents haven't been in compliance at any point in this entire period. Hochul is out-of-bounds to the Rule of Law. Nigrelli and Rosado haven't done their homework. Nigrelli and James are ready to enforce laws that have little to no meaning without the agency tasking. And Hochul and James are so wrapped up in their own state power, surrounded by a Greek chorus, that they haven't even taken down their offending public displays from their official state government websites since this case was started.

None of this is in the public interest except restoring Petitioners to a place of compliance through, at least, a preliminary injunction, so that they can try to keep their doors open and their lights on, while this case proceeds.

Respectfully submitted,

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APPENDIX A

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

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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:

APPENDIX B

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:
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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
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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*

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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'ts, App. Div. of the Sup. Ct. of N.Y.*, 852 F.3d 178, 184 (2d Cir. 2017) (quoting *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265). To succeed on a facial challenge, Plaintiffs "must establish that no set of circumstances exists under which the [challenged laws] would be valid." *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d at 265 (quoting *United States v. Salerno*, 481 U.S. 739, 745 (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[]

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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

APPENDIX C

N.D.N.Y.
22-cv-1134
Sannes, C.J.

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 21st day of December, two thousand twenty-two.

Present:

Robert D. Sack,
Richard C. Wesley,
Joseph F. Bianco,
Circuit Judges.

Nadine Gazzola, et al.,

Plaintiffs-Appellants,

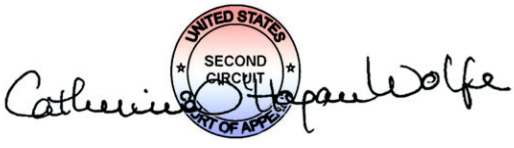
v. 22-3068

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

Defendants-Appellees.

Appellants move for a stay pending appeal of the district court's orders dated December 2 and December 7 denying their motion for a temporary restraining order and preliminary injunction (N.D.N.Y. 22-cv-1134, docs. 37 & 42). Appellants challenge various provisions of New York's General Business Law Article 39-BB, Executive Law, and Penal Law as they pertain to firearms regulations. Preliminarily, the motion is DENIED because Appellants did not "move first in the district court" for a stay or injunction pending appeal, nor have they explained why moving first in the district court would have been impracticable. Fed. R. App. P. 8(a)(1)(C), (a)(2)(A)(i). And in any event, even if Appellants had first moved in the district court, having weighed the applicable factors, *see In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007); *Agudath Israel of Am. v. Cuomo,* 979 F.3d 177, 180 (2d Cir. 2020), we would conclude that an injunction pending appeal would not be warranted. Accordingly, upon due consideration, it is hereby ORDERED that the motion for a stay pending appeal (2d Cir. 22-3068, doc. 12) is DENIED. The Clerk of Court shall set an expedited briefing schedule for the appeal.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk of Court



APPENDIX D

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.

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 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.

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

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.

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.

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]

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]

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]

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]

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.