UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ZACHARY GIAMBALVO, JOHN MOUGIOS, SHANE MASHKOW, KEVIN MCLOUGHLIN, MICHAEL MCGREGOR, FRANK MELLONI, and RENAISSANCE FIREARMS INSTRUCTION, INC. and all similarly situated individuals,

22-cv-4778(GRB) (ST)

Plaintiffs,

-against-

SUFFOLK COUNTY, New York, Police Commissioner RODNEY HARRISON, in his Official Capacity, MICHAEL KOMOROWSKI, Individually, ERIC BOWEN, Individually, WILLIAM SCRIMA, Individually, WILLIAM WALSH, Individually, THOMAS CARPENTER, Individually, JOHN DOES 1-5, Individually, JANE DOES 105, Individually, Acting Superintendent of the New York State Police STEVEN NIGRELLI, in his Official Capacity,

Defendants.

SUFFOLK COUNTY DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S APPLICATION FOR A PRELIMINARY INJUNCTION

DATED: Hauppauge, New York
January 20, 2023

Respectfully submitted,

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PRELIMINARY STATEMENT

Defendants County of Suffolk (sued as "Suffolk County, New York"), Suffolk County Police Commissioner Rodney Harrison (in his official capacity), Michael Komorowski, Eric Bowen, William Scrima, William Walsh and Thomas Carpenter, defendants in this civil rights action pursuant to 42 U.S.C. § 1983 (collectively, "County defendants") submit this memorandum of law in opposition to plaintiffs' motion for a preliminary injunction.

Plaintiffs allege that County defendants maintain certain policies and practices that slow down the pistol licensing process, thereby transgressing their rights under the Second Amendment as applied to the states by the due process clause of the Fourteenth Amendment. They also contend that certain portions of the Concealed Carry Improvement Act ("CCIA"), an omnibus legislative amendment to the laws of New York State enacted in the wake of the Supreme Court's opinion in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 213 L. Ed. 2d 387, 142 S. Ct. 2111 (2022) ("*Bruen*"), are unconstitutional.[1]

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[1] To the extent that defendant County of Suffolk is implementing state law by enforcing the CCIA, it cannot be considered a violator of plaintiffs' constitutional rights. *Vives v. City of New York,* 524 F.3d 346, n.4 (2d Cir. 2008) (holding that a municipality is not liable under §1983 for a decision to honor its obligation to enforce state law). See *Juzumas v. Nassau County, New York,* 33 F.4th 681 (2d Cir. 2022) (Under *Vives*, municipality not liable under § 1983 for decision to enforce N.Y. Penal Law § 400.00.) Relatedly, an individual employee is entitled to qualified immunity for enforcing a state statute that has not been struck down as unconstitutional. *Amore v. Novarro*, 624 F.3d 522 (2d Cir. 2010) (officer who makes an arrest under erroneous belief that loitering statute still in effect entitled to qualified immunity). See also *Sorokti v. City of Rochester*, 2022 WL 2356757, at *6 (W.D.N.Y. June 30, 2022) (officer entitled to qualified immunity for making arrest pursuant to existing emergency order still "on the books"). Accordingly, County defendants refrain from addressing the constitutionality of the CCIA herein, although the statutory scheme is certainly constitutional.

Plaintiffs now seek to enjoin County defendants' asserted policies and practices, including their implementation of the CCIA by the Suffolk County Police Department ("SCPD"). They seek a mandatory preliminary injunction directing several changes in the SCPD's pistol licensing procedures that they claim will speed up the licensing process to require decisions on license applications in 3 months. They also seek to enjoin what they assert is County defendants' policy of subjecting unlicensed individuals who participate in live-fire training with duly certified instructors, and their instructors, to criminal penalties.

Additionally, plaintiffs seek to enjoin the enforcement of various provisions of the CCIA as unconstitutional.

Plaintiffs Giambalvo, Mougios, Mashkow, McLaughlin and McGregor ("applicant plaintiffs") attest that they intend to possess and carry handguns. They assert that there are no prohibitors against any of them purchasing, possessing, receiving or owning firearms.[2] They maintain that County defendants are violating their Second Amendment rights by taking as long as two years to act on license applications. Plaintiff McGregor, who has a sportsman's license and has already filed to amend his license to "full carry" (¶20, Declaration of McGregor) also complains of delays. Plaintiffs Mashkow and McGregor further complain that the SCPD's Pistol Licensing Bureau ("PLB") hours are insufficient since it is only open Monday through Friday from 9:00 A.M. to 4:00 P.M [3]; (although plaintiff McGregor admits that he has already filed to amend his license, rendering his dissatisfaction moot.).

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[2] County defendants do not concede that all plaintiffs are suitable candidates to obtain pistol licenses and carry handguns.

[3] This claim is not true. As stated in the accompanying Declaration of Michael Komorowski, the PLB is open and conducting interviews from 8 A.M. to 11 A.M., Monday through Friday, and the counter for amendments is open weekdays from 9 A.M. to 4:30 P.M.

None of the applicant plaintiffs alleges that they have been arrested or even personally threatened with arrest if they participate in the live-fire training contemplated by N.Y. Penal Law §400.00(19). Plaintiff Melloni, President of Renaissance Firearm Instruction, Inc, states that he was told by the PLB that the SCPD will arrest unlicensed persons who take the company's training course.

Plaintiffs present a stunning lack of support for their claim that County defendants are violating their constitutional rights, let alone that preliminary equitable relief is warranted.

Factually, although they allege that County defendants take up to two years to determine license applications, none of their applications has been pending for anywhere near two years. In fact, at the time he signed his declaration, plaintiff Giambalvo's application had been pending for approximately 4 months. Plaintiff McLaughlin's declaration, which is unsigned, is also dated approximately 4 months after his application. Plaintiff McGregor's request to amend his license had been pending for approximately 10 months at the time he executed his declaration.[4] Plaintiffs Giambalvo, Mougios and Mashkow all submitted their applications for licenses prior to *Bruen's* nullification of New York state's restrictions on concealed carry permits. Plaintiff McGregor filed his request to amend to "full carry" pre-*Bruen*. None of the plaintiffs' applications has been denied. None of the applicant plaintiffs

[4] As plaintiffs sue only for claimed violations of their constitutional rights, and make no claim that County defendants are failing to determine license applications within the six-month period of spoken of in N.Y. Penal Law § 400.00 (4-a), the question of whether they are complying with that statutory provision is not before the Court. In any event, plaintiffs are seeking to preliminarily mandate the determination of applications within 3 months, half of the N.Y. statutory period.

assert that they were arrested for engaging in live-fire training, or even that County defendants informed them that live-fire training participants would be arrested.

Legally, as County defendants now explain, plaintiffs utterly fail to make the requisite showing for preliminarily injunctive relief. Essentially, their argument that County defendants' purported practices violate their constitutional rights is premised on nothing more than plaintiffs' categorical say-so.

POINT I

PLAINTIFFS FAIL TO DEMONSTRATE A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

A. Standard For Mandatory Injunction Against Government Action.

A preliminary injunction is an extraordinary remedy never awarded as of right. *Benisek v. Lamone*, 201 L. Ed. 2d 398, 138 S. Ct. 1942, 1943 (2018). Injunctive relief "may only be awarded upon a clear showing that the plaintiff is entitled to such relief." *Woodstock Ventures, LC v. Woodstock Roots LLC*, 837 F. App'x 837, 838 (2d Cir. 2021) quoting *Salinger v. Colting*, 607 F.3d 68, 79 (2d Cir. 2010) (quoting *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Such relief should not be granted "unless the movant, by a clear showing, carries the burden of persuasion." *Id.*, quoting *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, 138 L. Ed. 2d 162 (1997).

Generally, meeting that burden of persuasion entails that the plaintiff demonstrate "(1) irreparable harm; (2) either a likelihood of success on the merits, or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *N. Am. Soccer League, LLC v. United*

States Soccer Fed'n, Inc., 883 F.3d 32, 36–37 (2d Cir. 2018) citing *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015).

Not all of these factors are entitled to equal weight. 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). **"**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." *Schwartz v. Cerner Corp.*, 804 F. App'x 85, 87 (2d Cir. 2020) quoting *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (internal quotation marks omitted).

In the ordinary case, a "likelihood of success" requires only "better than fifty percent" chance of success. *Eng v. Smith*, 849 F.2d 80, 81–2 (2d Cir. 1988) quoting *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985). Significantly however, the injunction sought here against county defendants is mandatory, rather than prohibitory, as it "would command [ ] a positive act that would alter rather than preserve the status quo." See e.g., *A.H. by & through Hester v. French,* 985 F.3d 165, 176–177 (2d Cir. 2021) (injunction requiring agency to allow student and school to participate in educational program pending determination of constitutionality of funding requirement is mandatory, not prohibitory); *Doe v. Livanta LLC*, 489 F. Supp. 3d 11, 16 (E.D.N.Y. 2020) (injunction that prevents plaintiff's discharge from health care facility is mandatory because it would disrupt status quo); *Raia v. Pompeo*, 455 F. Supp. 3d 7, 15 (E.D.N.Y. 2020) (injunction directing passport to be issued is mandatory). See also, *Gazzola v. Hochul*, 2022 WL 17485810, at *3 (N.D.N.Y. Dec. 7, 2022) ((N.D.N.Y. Dec. 7, 2022) (injunction is mandatory if prohibits enforcement of laws already in effect; prohibitory if it enjoins laws not yet in effect). Thus, plaintiffs must meet a higher standard.

U.S. Fid. & Guar. Co. v. J. United Elec. Contracting Corp., 62 F. Supp. 2d 915, 921 (E.D.N.Y. 1999) citing *Phillip v. Fairfield Univ*., 118 F.3d 131, 133 (2d Cir. 1997). They must show either "clear" entitlement to relief or that "extreme or very serious damage" will result from a denial. *JLM Couture, Inc. v. Gutman*, 24 F.4th 785, 799 n.16 (2d Cir. 2022) quoting *Tom Doherty Assocs., Inc. v. Saban Ent., Inc*., 60 F.3d 27, 34 (2d Cir. 1995) (cleaned up).

Further, plaintiffs seek "to stay government action taken in the public interest pursuant to a statutory or regulatory scheme." Accordingly, the "court should not apply the less rigorous ["serious questions"] standard and should not grant the injunction unless [they] establish [ ], along with irreparable injury, a likelihood that [they] will succeed on the merits of [their] claim." *Citigroup Glob. Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 34 n.4 (2d Cir. 2010) quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) quoting *Plaza Health Lab'ys, Inc. v. Perales*, 878 F.2d 577, 580 (2d Cir. 1989)).

Distilling the applicable principles, because plaintiffs challenge government action, they should not be granted relief unless they demonstrate (1) actual and imminent harm that cannot be remedied by money damages; (2) a clear entitlement to relief or that extreme or very serious damage will result from a denial, and (3) that a preliminary injunction is in the public interest. This they have not done.

B. Plaintiffs' Conduct is Not Presumptively Protected.

Plaintiffs rely exclusively on *Bruen* to buttress their contention that their proposed conduct, the possession and carrying of handguns, is presumptively legal, More particularly, they theorize that "the Constitution presumptively protects [their] that conduct" because the "Second Amendment's plain text" covers it.

The obvious and fundamental flaw in this hypothesis is its assumption that plaintiffs' intended conduct fits within *Bruen's* concept of "plain text." The only guidance *Bruen* gives as to the meaning of "plain text" is its abstract statement that it encompasses "carrying handguns publicly for self-defense." *Bruen* at 2134. *Bruen* affords no guidance as to what specific aspects of carrying handguns for self-defense fall under the "plain text" umbrella.

This paucity of guidance cannot fairly be interpreted as holding that all conduct with any degree of relationship to the "carrying of handguns for self-defense" is constitutionally protected. To the contrary, the Supreme Court has expressly enunciated that "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Bruen*, 142 S. Ct. at 2128). See *United States v. Tilotta*, 2022 WL 3924282, at *6 (S.D. Cal. Aug. 30, 2022) citing *D.C. v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 2817, 171 L. Ed. 2d 637 (2008) (noting that "*Heller, McDonald*, and *Bruen* all state that the Second Amendment right is not absolute and is thus subject to reasonable limitations.") See also, *Doe v. Bonta*, 2023 WL 187574, *5 (S.D.Ca. Jan. 12, 2023) (Since "*Bruen* didn't undo all preexisting gun regulations" licensing requirement, fingerprinting, background checks, and mandatory gun safety training courses may all be permissible).

Post-*Bruen*, several courts have already clarified that the Supreme Court has not immunized all conduct relating to carrying a handgun for self-defense from government action. See e.g., *Gazzola v. Hochul*, 2022 WL 27485810 (N.D.N.Y. Dec. 7, 2022) (noting that the Second Amendment does not protect "buying, selling, storing, shipping or otherwise engaging in the business of firearms" in denying injunctive relief); *Reese v. Bureau of Alcohol Tobacco Firearms & Explosives*, 2022 WL 17859138, at *10 (W.D. La. Dec. 21, 2022) ("Second Amendment does not protect the ability of 18 to 20-year-olds to purchase handguns from

federal firearms licensees"); *Oregon Firearms Fed'n, Inc. v. Brown*, 2022 WL 17454829, at *9–10 (D. Or. Dec. 6, 2022) (magazines capable of holding more than ten rounds not covered by plain text of Second Amendment). In this regard, the *Bruen* Court did not substantively depart from settled law. See e.g., *GeorgiaCarry.org, Inc. v. U.S. Army Corps of Engineers*, 212 F. Supp. 3d 1348 (N.D. Ga. 2016) (permitting restriction of gun use on Army property); *Cruz-Kerkado v. Puerto Rico* (D.P.R. Apr. 5, 2018) ("The affiliation requirements and $250 carry permit application fee are not unconstitutional simply because they regulate the possession and carrying of firearms").

Indeed, plaintiffs essentially acknowledge that *Bruen* does not support the notion that all behavior touching upon that the right to bear arms to any degree is presumptively protected. They acknowledge that "[t]he 6 States including New York potentially affected by [*Bruen*] may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States." *Bruen* at 2162," n.10, (p.11, Plaintiffs' Memorandum of Law).

Because *Bruen* does not create a boundless right to possess, carry and use a handgun simply because the Second Amendment pertains generally to such conduct, it is the plaintiffs' obligation to establish that the conduct they seek to engage in is covered by its plain text. *Baird v. Bonta*, 2022 WL 17542432, at *6 (E.D. Cal. Dec. 8, 2022).

Nor is the "plain text" of the amendment equally applicable to everyone. *Bruen* expressly confines "the people" upon whom the right to bear arms is conferred as "law abiding, responsible citizens." *Bruen*, 142 S.Ct. at 2138 n.9 quoting *Heller*, 554 U.S. at 635. See *Range v. Att'y Gen. United States,* 53 F.4th 262, 284 (3d Cir. 2022), *reh'g en banc granted, opinion vacated sub nom. Range v. Att'y Gen. United States of Am*., 2023 WL 118469 (3d Cir.

Jan. 6, 2023) citing *Bruen*, 142 S. Ct. at 2122; and *Heller*, 554 U.S. at 635, 128 S.Ct. 2783 ("We believe the Supreme Court's repeated characterization of Second Amendment rights as belonging to 'law-abiding' citizens supports our conclusion that individuals convicted of felony-equivalent crimes, like [plaintiff], fall outside 'the people' entitled to keep and bear arms.") This limitation is pivotal because applicant plaintiffs offer no evidence to buttress their claim that there are no prohibitors to them being licensed, and at least two of them, Giambalvo and Mougios, have a history of arrests and summonses (see Declaration of Arlene S. Zwilling). [5]

Even *Bruen* did not create a universal right to quickly obtain a license to carry a concealed handgun, and applicant plaintiffs have not establish that each of them is a person who is entitled to a concealed carry pistol license. There is no legal foundation for their proposition that their planned conduct falls within the "plain text" of the Second Amendment. The Court should decline applicant plaintiffs' invitation to find that they have a presumptive right to pistol licenses.

C. The Burden is Not Shifted.

Plaintiffs' contention that defendants are burdened to prove that their asserted policies comport with the Second Amendment suffers from the same flaw as their argument that their proposed actions are presumptively protected. It relies on the untenable assumption that plaintiffs' conduct falls within the Constitution's "plain text." It is only where the amendment's plain text covers an individual's conduct that the government must then

[5] While no decision has been made on their applications, plaintiff Giambalvo attests in his Declaration that if he "were to be arrested, even if the charge is dismissed, [he] will be ineligible to obtain a handgun or semiautomatic rifle license from the SCPD…" If arrests even on charges which are later dismissed is an prohibitor, then he and plaintiff Mougios may not be eligible for licenses.

justify its action. *Bruen*, at 2129-30 quoting *Konigsberg v. State Bar of Cal*., 366 U.S. 36, 50, n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961) ("When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation.") To the extent plaintiffs' proposed conduct is not closely enough connected to the "plain text" of the Second Amendment to be covered by it, plaintiffs retain the burden of proof. It is not shifted to defendants.

D. The Alleged SCPD Practices Do Not Violate Plaintiffs' Constitutional Rights.

1) PLB hours

As shown by the accompanying Declaration of Lieutenant Michael Komorowski, commanding officer of the PLB, plaintiffs' claims about the limited hours of the unit are incorrect. The PLB is open from 8 A.M. to 11 P.M Monday to Friday and interview are conducted throughout those hours. The counter for license amendments is open from 9 A.M. to 4:30 P.M. Monday through Friday (but no plaintiff complains of insufficient hours to file an amendment). There is no need for a mandatory injunctive relief compelling additional hours.

2) Processing time

Invoking *Bruen's* language that "constitutional challenges to ….lengthy wait times in processing license applications" cannot be ruled out, *Bruen* at 2138, n. 9, plaintiffs posit that their civil rights are being transgressed by the PLB's claimed delays in processing license applications. The High Court's quoted language, which appears in a footnote rather than the

body of the opinion, is mere commentary. In any event, *Bruen* fixed no constitutional time limit on processing time and plaintiffs point to no authority clarifying how long is too long. [6]

Furthermore, plaintiffs do not merely argue that the "lengthy delays" spoken of in *Bruen* are impermissible. Their C.f. citation to *Doninger v. Niehoff*, 527 F.3d 41, 47 (2d Cir. 2008) and related cases reflects that their contention is actually that any delay in processing license applications is an abridgment of their Second Amendment rights. The plain defect in this position is that, as evident from plaintiffs' exclusive reliance on cases that construe the First Amendment, there appears to be no controlling authority that applies the prohibition of any delay to Second Amendment rights. Truly, it strongly appears that the Supreme Court deliberately refrained from holding that any delay violates the Second Amendment. *Bruen* at 2138, n. 9. ("...we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications….deny ordinary citizens their right to public carry.)

Critically, the question of whether the PLB is complying with N.Y. Penal Law § 400.00 (4-a)'s provision that the licensing officer shall act upon applications within six months is not before this Court. All of plaintiffs' claims in this litigation are made for alleged constitutional violations pursuant to § 1983. They make no claim that County defendants' actions abridge state law. For the same reason, the issue of whether the PLB is failing to comply with New York State law by supposedly providing the PPB-3 only after an applicant

[6] The preliminary injunction plaintiffs seek would require licenses to be issued within 30 days of presentment of the PPB-3. This is a far shorter than the six month time frame currently prescribed by N.Y. Penal Law § 400.00 (4-a).

is interviewed, not releasing its ORI number, and not permitting applicants to supply their own photographs, fingerprints and other materials, is also not before the Court.

As for plaintiff McGregor's grievance that he cannot simply carry a concealed weapon after *Bruen*, County defendants are the wrong target for that gripe. Concealed carry by an individual who has a more restrictive license is not permitted by N.Y. Penal Law § 400.00. County defendants are responsible for carrying out state law and do not abridge constitutional rights by doing so. See *footnote 1, supra.*

3) Live-fire training

Although no plaintiff claims to have been arrested or personally threatened with arrest, they argue that arresting unlicensed participants in live-fire training would contravene the Second Amendment. Inexplicably, they base this contention not on any constitutional precept, but on the theory that such arrests would be contrary to the exemption from N.Y. Penal Law § 265.03 found at subsection (3-a).

First, at the risk of repetition, whether such arrests (if ever made) would align with state law is not at issue in this case. Plaintiffs bring claims under § 1983 only, alleging violations of their civil rights, not violations of state law.

Next, §265.20 (3-a) plainly does not grant an unqualified exemption to all who propose to engage in live-fire training without a pistol license. N.Y. Penal Law § 265 (7-b) limits the exemption to "person[s] who ha[ve] applied for a license to possess a pistol or revolver and pre-license possession of same pursuant to N.Y. Penal Law § 400.00 of this chapter...." N.Y. Penal Law § 400.00 (3) (b) makes explicit that application for both a license and an exemption, along with *some* investigation, are a prerequisite for the 7-b exemption. In relevant part, the statute states that each applicant:

> shall make the exemption request of the licensing officer with whom his application for a license is filed, at the time of filing such application…... Such licensing officer shall, no later than ten business days after such filing, request the duly constituted police authorities of the locality where such application is made to investigate and ascertain any previous criminal record of the applicant pursuant to subdivision four of this section. Upon completion of this investigation, the police authority shall report the results to the licensing officer without unnecessary delay. The licensing officer shall no later than ten business days after the receipt of such investigation, determine….. and either approve or disapprove the applicant for exemption purposes based upon such determinations. If the applicant is approved for the exemption, the licensing officer shall notify the appropriate duly constituted police authorities and the applicant. Such exemption shall terminate if the application for the license is denied, or at any earlier time based upon any information obtained by the licensing officer or the appropriate police authorities which would cause the license to be denied.

The combination of § § 265 (7-b) and § 400.00 (3)(b) readily indicate that one must apply for a license and exemption, and be subject to some level of investigation, prior to engaging in live-fire training. None of the applicant plaintiffs states that they have applied for the exemption or been interviewed. Thus, they have not qualified for the exemption.

POINT II

PLAINTIFFS ARE NOT IRREPARABLY HARMED BY COUNTY DEFENDANTS' ACTIONS

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. See *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015). Granted, "a strong showing of a constitutional deprivation that results in non-compensable damages ordinarily warrants a finding of irreparable harm." *A.H. by & through Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021).

However, plaintiffs completely fail to demonstrate irreparable harm. They do not assert that money damages would inadequately compensate them. They do not make the

essential "strong showing of a constitutional deprivation" because their blanket proposition that their proposed conduct comes within the "plain text" of *Bruen* is unsound and unsupported, and the alleged actions of the PLB which they challenge do not offend the Second Amendment. Inarguably, the Court should refrain from imposing injunctive relief given that plaintiffs have not shown that they will suffer irreparable harm in its absence. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008).

POINT III

PLAINTIFFS HAVE NOT ESTABLISHED THAT AN INJUNCTION IS IN THE PUBLIC INTEREST

Plaintiffs do not attempt to explain how the requested injunction would benefit the public. Instead, taking a shortcut in reasoning, they turn to Ninth Circuit case law indicating that the likelihood of a constitutional violation, in itself, establishes both that an injunction is in the public interest and that the equities balance in their favor. Importantly, the Second Circuit does not appear to have adopted the Ninth Circuit's view. C.f., *Agudath Israel of Am. v. Cuomo*, 983 F.3d 620, 636–637 (2d Cir. 2020) (separately examining elements of public interest and likelihood of constitutional violation); *A.H. by & through Hester v. French*, 985 F.3d 165 (2d Cir. 2021) (same).

Of course, insofar as plaintiffs fail to show that their constitutional rights are being transgressed, the question of the public interest is academic.

Moreover, whether the public interest will actually be furthered by imposing the injunction plaintiffs request is certainly open to debate. Clearly, there are two sides to the question of what will benefit the public interest. The government has a duty to protect the rights of all its citizens. That includes the right of citizens who wish to be kept safe from the

unsound licensing of firearms to inadequately trained and irresponsible persons that may well ensue if defendants' ability to ensure that license applicants are qualified, trained and responsible is unnecessarily curtailed.[7]

POINT IV
BALANCING THE EQUITIES IS NOT IMPROPER

Plaintiffs do not argue, much less show, that the equities balance in their favor. Instead, they suggest that balancing should play no role in the determination of their motion since they claim a violation of the Second Amendment. Even a cursory review of the language they cite for this proposition indicates that it is inapposite. While perhaps *Bruen* and its antecedents suggest that the courts should not employ a balancing test in considering whether state action offends the Second Amendment, they say nothing about how courts should adjudicate a request for injunctive relief.

The requirement that the movant demonstrate that the equities balance in their favor stands, and plaintiff have ignored it.

POINT V

PLAINTIFFS LACK STANDING TO CONTEST THE CLAIMED LIVE-FIRE TRAINING POLICY

None of the applicant plaintiffs alleges that they have been arrested or even threatened with arrest by County defendants. Yet, they seek to enjoin what they contend is County defendants' policy of pursing arrests that are contrary to state law in not honoring

[7] This duty extends to County defendants' responsibility to enforce the licensing scheme established by the CCIA.

the exemption of criminal liability supposedly given by N.Y. Penal Law §265.20 (3-a). It is obvious that all plaintiffs lack standing to contest this purported policy.

Unquestionably, a plaintiff must show an "injury-in-fact" to establish Article III standing," *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158, 134 S. Ct. 2334, 2341, 189 L. Ed. 2d 246 (2014) quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–561, 112 S. Ct. 2130, 119 L. Ed. 2d 351 (1992) (internal quotation marks omitted), a criterion "which helps to ensure" that they have a "personal stake in the outcome of the controversy." *Susan B. Anthony List*, 573 U.S. 149, quoting *Warth v. Seldin*, 422 U.S. 490, 498, 95 S. Ct. 2197, 45 L. Ed. 2d 343 (1975).

While an actual arrest is not a must for a plaintiff to demonstrate injury-in-fact, there must be a credible threat of government enforcement action. *Susan B. Anthony List*, 574 U.S. at 159. A credible threat of enforcement entails a fear of prosecution that is not imaginary or wholly speculative. *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016). A "credible threat sufficient to satisfy the imminence requirement of injury in fact…..will not be found where 'plaintiffs do not claim that they have been threatened with prosecution, that a prosecution is likely or even that a prosecution is remotely possible.'" *Id*. quoting *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015). Since no plaintiff claims to have been arrested or personally threatened with arrest, there is no "credible threat" constituting injury in fact.

POINT VI

PLAINTIFFS MELLONI AND REI, INC. ARE NOT PROPER PARTIES TO THIS ACTION

Unlike the other plaintiffs, plaintiff Melloni is not seeking a pistol license. He does not assert that his right to bear arms has been affected by County defendants' actions. Instead,

on behalf of plaintiff Renaissance Firearms Instruction, Inc., a corporation of which is president, he seems to raise the derivative claim that the company cannot do its business without its prospective students being arrested. Melloni and his company have no place in this litigation. Melloni has no § 1983 claim since he does not allege that his constitutional rights were violated. As for his company, businesses have no Second Amendment rights. *Gazzola v. Hochul*, 2022 WL 17485810, at *14 (N.D.N.Y. Dec. 7, 1022) writ of injection denied 2023 WL 221511 (Mem) Janaury 18, 2023) citing *District of Columbia*, 554 U.S. at 592 ("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.").

POINT VII

ALTERNATIVELY, THE COURT SHOULD STAY THIS CASE PENDING THE *ANTONYUK* APPEAL

Again, one aspect of County defendants' position is that they are carrying out their obligation to enforce the CCIA. The Western District's decision in *Antonyuk v. Hochul*, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022), currently on appeal to the Court of Appeals for the Second Circuit, presents the question of whether some of the same provisions challenged here comport with the Second Amendment. The Second Circuit has stayed District Court's decision pending appeal, including a stay of the temporary injunction issued. The Court of Appeals also granted a motion to expedite the appeal. *Antonyuk v. Hochul*, 2022 WL 18228317 (2d Cir. Dec. 7, 2022). The Supreme Court has denied a request to lift the stay.

Should the Court be disinclined to deny plaintiffs' motion for preliminary injunctive relief outright, County defendants ask alternatively that proceedings in this case be stayed to abide the appellate court's determination of *Antonyuk*.

CONCLUSION

Plaintiffs' motion for a preliminary injunction should be denied. Alternatively, the Court should stay proceedings in this case pending the Second Circuit's decision in *Antonyuk v. Hochul*.

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Respectfully submitted,

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