21-1658

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

JOHN DOES 1-10,

Plaintiff-Appellant,

—against—

SUFFOLK COUNTY, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK (CENTRAL ISLIP)

APPELLEE'S BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

1. Whether District Court erred in dismissing the complaint *sua sponte*.

2. Whether it was incorrect for District Court to dismiss the case as one it could not properly adjudicate.

3. Whether District Court abused its discretion in denying Appellants preliminary injunctive relief.

4. Whether it was an abuse of discretion for District Court to deny Appellants' request to proceed anonymously.

STATEMENT OF CASE

Plaintiffs-Appellants John Does 1-10 ("Does") commenced this action on June 16, 2021 with the filling of their Complaint ("complaint") in the United States District Court for the Eastern District of New York (A. 4- 20). The Does did not disclose their names in the complaint, identifying themselves only as purchasers of a firearm sold by Delta Level Defense, Inc. and known as a CT4-2A Other ("CT4-2A") who had received a form letter from the Suffolk County Police Department ("Police Department"), an agency of Defendant-Appellee Suffolk County, New York ("County"). The letter informed them that as a result of a criminal investigation, the Police Department had learned that their weapon was not in compliance with the New York State Penal Law. The letter requested that the Does present their firearm for inspection and disposition to the Suffolk County Police

Department. Further, the letter advised that they would not be charged with any crime related to the purchase of the firearm if they complied, but if they failed to comply, they "may be subject to arrest and criminal charges for [their] purchase and continued possession of said firearm." (A. 76).

The complaint did not allege that any of the Does had presented their weapons to the Police Department as requested, had their CT4-2As seized by County, or had been arrested or charged.

The theory underlying the complaint was that the Police Department's letters conveyed an unconstitutional policy because, the Does asserted, the CT4-2A is not an assault weapon banned under New York State Penal Law § 265.00 *et seq*. They sought to hold the County liable under 42 U.S.C § 1983 for alleged violations of their Fourth Amendment right to be free of unreasonable arrest, search and seizure of their persons, homes and property; the Fifth Amendment's "Takings Clause"; and their Fourteenth Amendment right to due process. The relief sought included a declaration that the CT4-2A is not a prohibited assault weapon under New York Penal Law § 265.00 *et seq*.; a preliminary and permanent injunction against what the Does claimed was an unlawful County policy; and compensatory damages and attorney's fees pursuant to 42 U.S.C. § 1988.

On June 17, 2021, the following day, the Does filed an Order To Show Cause requesting a temporary restraining order and preliminary injunction prohibiting the

County from (i) from seizing, arresting, charging, and/or prosecuting them or others for possession, use, and/or purchase of the CT4-2A pending a final disposition of the action (A. 101-102). In support of the Order to Show Cause, they filed affidavits, presumably authored by each of the Does, from which the affiants' names were redacted (A. 26-65). An affidavit executed by Ryan Gisolfi, the President of Delta Level Defense, Inc., was also filed in support of the Order to Show Cause (A. 67-68). In his affidavit, Gisolfi stated his opinion that the CT4-2A is not a prohibited assault weapon under the New York Penal Law. [1]

Upon the filing of the Order to Show Cause, the case was assigned to District Judge the Hon. Gary R. Brown and a summons was issued. The County was served with the summons and complaint on June 24, 2021.

On June 26, 2021, District Court issued a Memorandum of Decision and Order ("MDO") denying the Does' request for temporary and preliminary relief and dismissing the action. The Court reasoned that they had failed to demonstrate a likelihood of success on the merits because the enjoinder of state investigations and prosecutions under the New York Penal Law they sought was "well outside [the] Court's authority" and would "tread[] on separation of powers concerns" by

[1] Gisolfi does not appear to be qualified to give legal opinions. According to his LinkedIn profile, he is not an attorney. His highest level of education is a Bachelor's degree in economics from West Virginia University. In addition to being a gunsmith, he also claims to be a personal trainer, gemologist and nutritionist. *https://www.linkedin.com/in/ryan-gisolfi-6103b745*.

interfering with the free exercise of prosecutors' discretionary powers over their prosecutions (A. 110-111).

"Worse yet" the lower Court continued on to note, granting the relief sought would necessitate its interpreting "state criminal laws without the benefit of, and in anticipation of, potential interpretations by state courts in contemplated criminal proceedings." To do so would "usurp the functions of state judges and juries by declaring….that the Delta Level Defense CT4-2A Other Firearm is not a [banned assault weapon] as defined by Penal Law § 265.00." "It is difficult to imagine an act that could further offend the principles of comity" Judge Brown observed (A. 111-12).

District Court found it significant that none of the Does claimed to have been arrested or charged. Since the arrests and prosecutions they supposedly feared were thus completely "theoretical," the District Judge expressed that it would "run[ ] afoul of the advisory opinions prohibitions" of the Constitution to adjudicate the case. Because even if the police were to attempt some sort of action, "no one can predict whether state judges would authorize arrest, seizure and search warrants and whether state grand juries would indict," District Court saw the Does as "merely speculate[ing]" that they would be subject to prosecution (A. 112).

Additionally, the Court below found that the complaint to be "procedurally defective" under Fed. R. Civ. P. 10 (a) due to the Does' failure to name themselves

in its title and provide more than a "threadbare" justification for that omission (A. 109).

After issuing the MDO, District Court entered an Order denying the Does' application for a temporary restraining order and preliminary injunction, and dismissing the case for the reasons set forth in the MDO. However, the Order granted them leave to replead within 30 days (DE. 9)

On July 1, 2021, Amy Bellantoni, Esq., counsel for the Does in District Court and on this appeal, filed a complaint in the United State District Court for the Eastern District of New York in an action captioned *Ron Wilson v. Suffolk County, et al.,* 21-cv-3716 (JS) (SIL*)*. The *Wilson* action was noted to be a related case on the District Court docket sheet of the instant action (DE. 10). The *Wilson* case was similarly centered on the claim that the County incorrectly considers the CT4-2A to be an illegal assault weapon under New York Penal Law § 265 *et seq*. The relief demanded in this litigation was also sought in the *Wilson* case.

Five days after bringing the related case, the Does filed their Notice of Appeal from the MDO on July 6, 2021 (DE. 11).

Upon taking the appeal, they moved in this Court for a preliminary injunction and stay of the MDO pending determination of this plenary appeal, along with permission to proceed anonymously. The motion was denied on July 23, 2021

without prejudice to renewal due to their failure to comply with Fed. R. App. P. 8 (a) (1) and to explain why it was impracticable for them to do so.

The Does next returned to District Court, filing a cursory one page letter motion asking for a "stay of the June 23, 2021 Order" (DE 12). The motion was denied on the grounds that the Does could not establish that a stay was needed to prevent irreparable injury; that District Court could not assess the effect of a stay on any parties or on the public interest; and Judge Brown's "considered view" that they were are unlikely to prevail on the merits (DE dated 7/8/21).

On July 28, 2021, the Does returned to this Court to renew their application for a preliminary injunction and permission to proceed anonymously. Evidently, the arrests and prosecutions they had forecast remained theoretical as of that date, as they still did not contend that anyone had been arrested or charged when they renewed their motion. On September 16, 2021, the renewed motion for an injunction was denied, but the request to proceed anonymously was granted without prejudice to the merits panel later concluding that the Does should not be permitted to proceed anonymously.

The Does also moved to place this appeal on the Expedited Appeal Calendar. The motion was denied on September 20, 2021.

The Does did not avail themselves of the leave granted by District Court to amend their complaint.

SUMMARY OF ARGUMENT

The *sua sponte* dismissal of the complaint by District Court was not in error. *Sua sponte* dismissals of counsel-drafted complaints are not impermissible. The case was not dismissed for failure to state claim under Rule 12 (b)(6). Since the court below granted the Does leave to amend, they had a potential opportunity to proceed to seek relief in District Court, but they waived that opportunity.

District Court did not err in concluding that the case was not one it could hear. It correctly reasoned that granting the relief sought would exceed the authority of the federal courts, intrude on the separation of powers, and violate the constitutional proscription against advisory opinions. The New York state courts have not held that the CT4-2A may be lawfully possessed in New York, and the Does do not allege that they have been arrested or prosecuted. The lower court did not rule that subject matter jurisdiction was lacking.

It was not an abuse of discretion for District Court to decline to grant the Does a preliminary injunction. The Does had failed to demonstrate that they were likely to succeed on the merits because the federal courts lack authority to afford them the relief they demand. They did not establish that they would be irreparably harmed without a preliminary injunction since they did not identify a probable violation of their constitutional rights. They also failed to show that a temporary injunction permitting them to possess a CT4-2A was in the public interest, given that possession

of the firearm has not been found lawful under the New York Penal Law ban on assault weapons.

District Court did not abuse its discretion in declining to permit the Does to litigate anonymously. The Does have not demonstrated that disclosure of their names will likely lead to retaliation by the County or that there is a diminished public interest in knowing their identities. The subject of this case is not highly sensitive or personal. That they sue the government does not, by itself, entitle them to proceed without identifying themselves.

STANDARD OF REVIEW

A District Court's denial of a preliminary injunction is reviewed for an abuse of discretion, which is present only if the decision rests on an error of law or a clearly erroneous finding of fact, or cannot be located within the range of permissible decisions. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 180 (2d Cir. 2020) citing *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018).

Dismissal of a complaint for lack of subject matter jurisdiction pursuant to Rule 12(b) (1) is given *de novo review*. *APWU v. Potter*, 343 F.3d 619, 623–24 (2d Cir. 2003).

Generally, District Court decisions to abstain from adjudicating a case are reviewed under an abuse of discretion standard. *Dittmer v. Cty. of Suffolk*, 146 F.3d

113, 116 (2d Cir. 1998). However, the applicable abuse of discretion standard of review is "more rigorous than that which is generally employed" such that there is "little practical distinction" from de novo review. *Dorce v. City of New York*, 2 F.4d 82, 94. (2d Cir. 2021) quoting *In re Picard, Tr. for Liquidation of Bernard L. Madoff Inv. Sec. LLC*, 917 F.3d 85, 101–02 (2d Cir. 2019), *cert. denied sub nom. HSBC Holdings PLC v. Picard*, 140 S. Ct. 2824, 207 L. Ed. 2d 157 (2020) (internal quotation marks omitted).

Relatedly, where "a district court dismisses the action based on comity, its decision is reviewed decision for abuse of discretion." *Dorce*, at 94 quoting *Joseph v. Hyman*, 659 F.3d 215, 218 n.1 (2d Cir. 2011).

De novo review is given a dismissal pursuant to Rule 12 (b) (6) for failure to state a claim upon which relief can be granted. *Melendez v. City of New York*, 16 F.4th 992, 1010 (2d Cir. 2021).

Review of a district court's decision to grant or deny an application to litigate under a pseudonym is for abuse of discretion. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) citing *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001) (reviewing a motion to proceed anonymously for abuse of discretion).

ARGUMENT

POINT I

THE *SUA SPONTE* DISMISSAL OF THE CASE WAS NOT ERRONEOUS

Citing to cases involving dismissals for failure to state a claim pursuant to Rule 12 (b) (6), the Does posit that the disposition below was erroneous because District Courts lack authority to dismiss under the rule without affording a plaintiff an opportunity to be heard.

At the risk of overstating the obvious, District Court did not dismiss this case for failure to state a claim. If that were the basis for its decision, it could easily have said so. The adequacy of the causes of action is not mentioned in the MDO. It is plain from the MDO's substantial analysis and careful wording that the lower court did not address the adequacy of the claims as it determined that it lacked the power to act on the Does' behalf, and would exceed its authority if it attempted to do so. This critical distinction precludes applying any rule from *Perez v. Ortiz*, 849 F.2d 793 (2d Cir. 1988), *Square D. v. Niagara Frontier Tariff Bureau, Inc*, 760 F. 2d 1347 (2d Cir. 1985) or the non-binding authorities cited by the Does to the dismissal.

Furthermore, a dismissal because a case is beyond the domain of the federal courts and a dismissal for failure to state a claim are not fungible. See *Dylan 140 LLC v. Figueroa as Tr. of Bldg. Serv. 32BJ Health Fund*, 982 F.3d 851, 855 (2d Cir. 2020) quoting *Bell v. Hood*, 327 U.S. 678, 682, 66 S. Ct. 773, 776, 90 L. Ed. 939

(1946) ("…it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction."). The question of whether a federal court is the proper forum to bring a certain type of dispute is a distinct from the issue of whether a complaint states a cognizable claim, and district courts should only reach the latter issue after deciding the former in the affirmative. *Bell*, 327 U.S. at 682. ("Whether the complaint states a cause of action on which relief could be granted …. must be decided after and not before the court has assumed jurisdiction over the controversy."). [2]

Nor is there a general prohibition against *sua sponte* dismissals as the Does suggest. District Courts certainly have the power to dismiss an action *sua sponte. Walters v. Indus. & Com. Bank of China, Ltd*., 651 F.3d 280 (2d Cir. 2011) quoting *Snider v. Melindez*, 199 F.3d 108, 112 (2d Cir. 1999) ("[b]oth the Supreme Court and the Second Circuit have long held that courts may dismiss actions on their own motion in a broad range of circumstances where they are not explicitly authorized to do so by statute or rule."). That power extends to dismissals for failure to state a claim. *Leonhard v. United States*, 633 F.2d 599, 609 n.11 (2d Cir. 1980). District

[2] Since a district court may not consider the sufficiency of a complaint after determining that the dispute may not be heard in the federal courts, the Does' characterization of the dismissal as pursuant to Rule 12 (b) (6) is to some degree inconsistent with their argument that District Court incorrectly dismissed the matter for lack of subject matter jurisdiction.

Courts even have "inherent authority to dismiss meritless claims *sua sponte,*" where the pleadings are not closed and the subject of the action is not within the purview of the federal courts. *Webster v. Penzetta*, 458 F. App'x 23 (2d Cir. 2012), *as amended* (Jan. 24, 2012) (District Court properly dismissed action pursuant to Rooker-Feldman doctrine although not all defendants had answered). See e.g., *Deem v. DiMella-Deem*, 941 F.3d 618 (2d Cir. 2019), *cert. denied*, 140 S. Ct. 2763, 206 L. Ed. 2d 937 (2020) (affirming *sua sponte* dismissal prior to defendants answering where issues were ones of state law and defendant judge protected by judicial immunity); *Hamilton v. Hamilton-Grinols*, 363 F. App'x 767 (2d Cir. 2010) (affirming pre-answer *sua sponte* dismissal where complaint grounded in state law domestic relations matters).

That the Does are represented by counsel rather than proceeding pro se is an immaterial distinction with respect to the propriety of the *sua sponte* dismissal. Granted, since they have an attorney, it was not incumbent upon Judge Brown to preliminarily parse their complaint for sufficiency upon its filing. However, that they are represented by counsel does not, as they proffer, afford them to greater leeway in pleading than a self-represented party. Trained and experienced counsel who drafts a complaint and selects the forum in which to bring an action should, at minimum, be no less responsible for the quality of their legal work than a layperson.

Finally, it cannot be overlooked that the Does were granted leave to amend but chose not to avail themselves of that opportunity. The choice not to pursue their case in District Court where they could continue to seek immediate and ultimate equitable relief was a valuable forfeited opportunity. cf. *Schlesinger Inv. P'ship v. Fluor Corp.*, 671 F.2d 739, 743 (2d Cir. 1982) (District Court should have granted leave to replead to provide plaintiff opportunity to develop claims when it *sua sponte* dismissed action).

In sum, the *sua sponte* dismissal of the Does' counsel drafted complaint is not reversible error.

POINT II

DISTRICT COURT CORRECTLY REFRAINED FROM REACHING THE ISSUE OF SUBJECT MATTER JURISDICTION

The Does assert that District Court erroneously ruled that subject matter jurisdiction was absent. Simply put, the court below did not pass upon whether it had subject matter jurisdiction, just as it did not assess whether the complaint stated a cognizable claim. While it pinpointed three obstacles to federal court intervention in the Does' dispute with the County, its conclusion that District Court was not the correct forum in which to raise the controversy is not equivalent to a determination that subject matter jurisdiction is lacking. *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639, 129 S. Ct. 1862, 1866, 173 L. Ed. 2d 843 (2009) ("This Court's

precedent makes clear that whether a court has subject-matter jurisdiction over a claim is distinct from whether a court chooses to exercise that jurisdiction.") (citing cases).

The hurdles to adjudication expressly identified by Judge Brown were that granting the relief sought would a) exceed the authority of the federal courts under *Ex parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908) and *Rizzo v. Goode*, 423 U.S. 362, 96 S. Ct. 598, 46 L. Ed. 2d 561 (1976); b) "tread[] on separation of powers concerns" since the judiciary cannot interfere with prosecutors' control over their prosecutions; and c) transgress the Constitution's prohibition on advisory opinions as the alleged anticipated arrests and prosecutions were "squarely in the realm of the theoretical" (A. 112).

On this appeal, the Does do not take issue with District Court's adherence to the constitutional proscription against advisory opinions. Instead, they argue that its supposed ruling that it lacked subject matter jurisdiction over their claims was erroneous because they seek to enjoin a municipal policy rather than investigations and prosecutions under a state statute, and that separation of powers concerns would not be triggered by the adjudication of this case.

Aside from the fact that District Court did not address the question of subject matter jurisdiction, there was no error in District Court's view that jurisprudence required it to refrain from hearing this litigation.

A. Separation of Powers Concerns Were Not Given Undue Deference.

District Court exercised its judgment to abstain from becoming involved in this case so as to not "tread[s] on separation of powers concerns," in that the judiciary generally cannot issue injunctions to "interfere with the free exercise of the discretionary powers of [prosecutors] in their control over criminal prosecutions." *In re Seizure of All Funds in Accts. in Names Registry Pub. Inc.*, 68 F.3d 577, 582 (2d Cir. 1995) (reversing injunction preventing government inquiry into suspected violations) (quoting *United States v. Burzynski Cancer Rsch. Inst.*, 819 F.2d 1301 (5th Cir. 1987))" (A. 111). The Does suggest that they merit an exception to the rule against interference in state prosecutions since they allege that their constitutional rights are being violated. Contrary to this argument, there is no exclusion for the claims they raise.

While *Gajon Bar & Grill, Inc. v. Kelly*, 508 F.2d 1317 (2d Cir. 1974) ("*Gajon*") [3] acknowledges some exception for § 1983 actions, the limited exception it outlines does not fit the facts alleged herein. *Gajon* merely approves the exercise of equitable power where there is a pending state criminal proceeding that entails a "grave threat of irreparable injury to the exercise of constitutional rights." *Gajon* at

[3] The County is constrained to correct the Does' misstatement (at pages 8-9 of their brief) that the local law challenged in *Gajon* was a Suffolk County statute. The law at issue in *Gajon* was a Town of Smithtown ordinance. *Gajon* at 1318.

1319–20. The threat required must be one of a "collateral defect" associated with the prosecution's case other than the lawfulness of the criminal statute, such as the unwarranted seizure of evidence. See *Younger v. Harris*, 401 U.S. 37, 47, 91 S. Ct. 746, 752, 27 L. Ed. 2d 669 (1971) (searches pursuant to warrants later vacated, continued threats of prosecution despite suppression of evidence, and prosecutor's holding of public hearings using seized documents are collateral defects). "Certain types of injury, in particular, the cost, anxiety and inconvenience of having to defend against a single criminal prosecution, could not by themselves be considered 'irreparable'….Instead the threat to the plaintiff's federally protected rights must be one that cannot be eliminated by his defense against a single criminal prosecution." *Younger*, 401 U.S. at 46 quoting *Ex parte Young*, 209 U.S. 123, 145–147, 28 S. Ct. 441, 447–449, 52 L. Ed. 714 (1908). That a municipal law may be "unconstitutional on its face" without an unrelated harm, "does not justify federal intervention" under *Younger*. *Id*. at 1321.

Significantly, the Does do not allege that there is a prosecution against any of them, much less one tainted by a collateral defect. Contrary to the overly expansive interpretation they urge, *Gajon* appears to reject the exercise of federal equitable jurisdiction under *Younger* for a merely potential prosecution. *Gajon* at 1322 (extending equitable relief to an unindicted corporation while denying it to person being prosecuted is not consistent with *Younger*).

Neither *Bell*, 327 U.S. 678 nor *Spencer v. Casavilla*, 903 F.2d 171 (2d Cir. 1990) support the Does' thesis that raising constitutional claims entitles them to relief in equity. Those cases address the extent of the federal courts' subject matter jurisdiction. They do not bear on the issue of when a federal court should refrain from exercising its otherwise available equitable powers.

Likewise, *Ex parte Young* and *Younger* do not recommend the federal courts to enjoin a state prosecution where a criminal defendant claims that the prosecution transgresses his constitutional rights. *Younger* articulates that an injunction may not issue save for where the criminal defendant can show irreparable damage outside the ordinary difficulties of being prosecuted that cannot be remedied within the context of the criminal case. *Younger*, 401 U.S. at 46 citing *Ex parte Young*, 209 U.S. at 145–147. Contrary to the Does' interpretation, *Younger* cautions that "federal injunctions against state criminal statutes….are not to be granted as a matter of course, even if such statutes are unconstitutional." *Younger*, 401 U.S. at 46 quoting *Beal v. Missouri Pac. R. R. Corp*., 312 U.S. 45, 49, 61 S. Ct. 418, 420, 85 L. Ed. 577 (1941).[4]

[4] *Jefferson v. Rose*, 869 F. Supp. 2d 312 (E.D.N.Y. 2012), which the Does suggest permits federal court intervention where the challenged action is "flagrantly unconstitutional," cannot be extrapolated to fit their situation. The action challenged in *Jefferson* was the enforcement of a statute that had been struck down as unconstitutional twenty years prior. In contrast, no federal or state court has held that the CT4-2A may be lawfully possessed under New York Penal Law § 265.00 *et seq*.

Furthermore, whether a federal court should abstain from adjudicating a matter is a threshold issue. *Bronx Defs. v. Off. of Ct. Admin.*, 475 F. Supp. 3d 278, 283 (S.D.N.Y. 2020) quoting *Tenet v. Doe*, 544 U.S. 1, 6 n.4, 125 S. Ct. 1230, 161 L. Ed. 2d 82 (2005). It was incumbent upon District Court to examine at the outset whether this case belonged in the federal courts.

B. District Court Correctly Reasoned That This Case Requires An Unwarranted First Impression Interpretation of State Law.

The Does' contention that they challenge an illegal County policy rather than New York State law is bottomed on their categorical insistence that the CT4-2A is not a prohibited assault weapon under the New York Penal Law§ 265.00 *et seq*. Even at this appellate juncture, the critical fact remains that no New York state court has ever passed upon whether the CT4-2A is a banned assault weapon.

As District Court wisely acknowledged, "…this case seeks a determination…interpreting state criminal laws without the benefit of, and in anticipation of, potential interpretations by state courts in contemplated criminal proceedings. Plaintiffs would have this Court usurp the functions of state judges and juries by declaring, in their words, "that the Delta Level Defense CT4-2A Other Firearm is not a 'firearm', 'pistol', 'rifle', 'shotgun', or 'assault weapon' as defined by Penal Law § 265.00." …It is difficult to imagine an act that could further offend the principles of comity."

This absence of relevant case law is pivotal to the Does' claims for if possession of the weapon is criminal under N.Y. state law, then it is New York's assault weapons prohibition, and not a County policy choice, that is the Does' correct target. Inarguably, the County cannot be held liable under § 1983 for simply enforcing state law. *Juzumas v. Nassau Cty.*, 417 F. Supp. 3d 178, 186–187 (E.D.N.Y. 2019).

Besides, even if the CT4-2A may be legally possessed under the N.Y. Penal Law, the County could still not be held liable for claimed constitutional infringements should the Suffolk County District Attorney's Office chose to prosecute the Does. This is because in deciding whether to prosecute and for what charge, a prosecutor in New York acts on behalf of the state, not the County in which their office is located. See *Lewis v. Hoovler*, 2021 WL 1299491, at *4 (S.D.N.Y. Apr. 5, 2021) citing *Baez v. Hennessy*, 853 F.2d 73, 77 (2d Cir. 1988) (holding that when prosecuting, a prosecutor acts on behalf of state, not county). See also, *Sibley v. Watches*, 460 F. Supp. 3d 302, 322 (W.D.N.Y. 2020) quoting *Bellamy v. City of New York*, 914 F.3d 727, 757 (2d Cir. 2019) ("[when] prosecuting a criminal matter, a district attorney in New York State….represents the State and not the County.").

Regardless of whether the Does challenge County policy or state law, this action cannot be adjudicated without resolving the question of whether the CT4-2A is an assault weapon under New York law as a matter of first impression. For this

reason, District Court it did not err in dismissing the case, the Does' contention that they challenge County policy and not state law, notwithstanding.

POINT III

INJUNCTIVE RELIEF WAS APPROPRIATELY DENIED

Undoubtedly, a preliminary injunction is an extraordinary remedy never awarded as of right. *Benisek v. Lamone*, 138 S. Ct. 1942, 1943, 201 L. Ed. 2d 398 (2018). To obtain a preliminary injunction, the movant must show that they are likely to succeed on the merits, likely to suffer irreparable harm absent preliminary relief, that the balance of equities tips in their favor, and that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc*., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). A denial of a preliminary injunction is reviewed for an abuse of discretion, which is present only if the decision rests on an error of law or a clearly erroneous finding of fact, or cannot be located within the range of permissible decisions. *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 180 (2d Cir. 2020) citing *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 36 (2d Cir. 2018).

By any measure, District Court did not abuse its discretion by declining to grant the Does the preliminary injunction they demanded.

A. The Likelihood of Merits Success Was Not Demonstrated.

The Does contend that the denial of a preliminary injunction was erroneously due to an incorrect factual finding that they had failed to demonstrate a likelihood of irreparable harm. Even a cursory review of the MDO reflects that the denial of a preliminary injunction was not based on this or any other factual finding. The mention of the Does' failure to show irreparable harm contained in the MDO was in reference to the deficiency under Rule 65 of their motion for a temporary restraining order ("…"to the extent this is framed as an application for a TRO, it entirely fails to comply with Fed. R. Civ. P. 65, which provides: The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if: (A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition... No irreparable harm could come to plaintiffs prior to a hearing…") (A. 110).

The lower court's decision not to grant a preliminary injunction was expressly grounded in its view that, as a matter of law, the Does "cannot demonstrate a likelihood of success on the merits" because the injunctive relief sought was "well outside" its authority, in that it would exceed limits placed on the federal courts by *Ex parte Young*, 209 U.S. 123 and *Rizzo v. Goode*, 423 U.S. 362; tread on the proper separation of powers by enjoining state prosecutors; and transgress the prohibition

of advisory opinions due to "theoretical" nature of the "imagined" arrests and prosecutions (A. 110). Plainly, District Court concluded that the Does were unlikely to succeed on the merits because their claims were beyond the authority of the federal courts, not because it discounted their factual allegations.

B. The Does Did Not Demonstrate That They Are Likely to be Irreparably Harmed Absent a Preliminary Injunction.

That the claims made in this case are beyond the realm of federal jurisprudence is not the only obstacle to the Does establishing an entitlement to a preliminary injunction. They also remain unable to show a palpable threat of irreparable harm at this stage on both the facts and law.

Legally, their constitutional rights are being not violated unless the CT4-2A may legally be possessed under New York Penal Law § 265:00 *et seq*. At the risk of repetition, no Court of the State of New York has passed upon the question of whether the CT4-2A is or is not a prohibited assault weapon under N.Y. Penal Law § 265.00 *et seq*. As District Court wisely observed, the Does "would have this Court usurp the functions of state judges and juries, by declaring" the CT4-2A is not an assault weapon under New York State Law (A. 112). Their contention that the CT4-2A is not a banned assault weapon under New York law is premised on nothing more than their categorical insistence that it is not.

Indeed, their blanket assertion that the CT4-2A is not a pistol and therefore not an assault weapons is so inconsistent with New York Law as to border on the

frivolous. As the Does concede, N.Y. Penal Law § 265.00, which includes definitions of "rifle" and "shotgun," contains no definition of "pistol." In fact, "[n]o particular form or shape is necessary to constitute a pistol" under New York law. *People v. Anderson*, 236 A.D. 586, 589, 260 N.Y.S. 329 (App. Div. 1932). Nor is there any statutory support for excluding the CT4-2A from the category of pistols on the basis that it was not designed or intended to be fired with one hand. On the contrary, § 265.00 (22) (c) (ii) explicitly defines a semi-automatic pistol with a second or protruding handgrip that can be held by the non-trigger hand as an assault weapon. The Does' other hypothesis- that the CT4-2A cannot be an assault weapon because it is not designed for concealment and only concealable guns must be licensed- turns logic on its head. The definition of assault weapons at § 265.00 (22) includes specified shotguns and rifles, two types of weapons that are not readily concealable. Moreover, by definition, assault weapons are *per se* illegal and therefore cannot be licensed to civilians regardless of their size.

Truly, the CT4-2A is an assault weapon under the New York Penal Law because it is semi-automatic, accepts a detachable magazine, has a second handgrip and has a manufactured weight of over 50 ounces when unloaded, a characteristic of an assault weapon pursuant to § 265.00 (22) (c) (vii) [5]

[5] According to Delta Level Defense's website, the manufactured weight of the CT4-2A is 4.5 to 6.5 pounds. *http://www.deltaleveldefense.com/ct4-2a-other-firearm*.

The Does' argument that the CT4-2A is alternatively not a rifle because it has a forearm brace and is therefore not intended to be fired from the shoulder as contemplated by § 265.00 (11) is also flawed. It is the objective features of a firearm configured with a stabilizing brace that determine whether or not it is a rifle, not the mere presence of a stabilizing or arm brace alone. *https://www.federalregister.gov/documents/2021/06/10/2021-12176/factoring-criteria-for-firearms-with-attached-stabilizing-braces, Supplementary Information, I. Background* (The "ATF's longstanding and publicly known position is that a firearm does not evade classification under the [National Firearms Act] because the firearm is configured with a device marketed as a 'stabilizing brace' or 'arm brace.' … Accordingly, ATF must evaluate on a case-by-case basis whether a particular firearm configured with a 'stabilizing brace' bears the objective features of a firearm designed and intended to be fired from the shoulder and is thus subject to the NFA. The use of a purported 'stabilizing brace' cannot be a tool to circumvent the NFA (or the [Gun Control Act]) and the prohibition on the unregistered possession of 'short-barreled rifles.'") [6]

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6 The Bureau of Alcohol, Tobacco and Firearms has proposed an amendment to 21 C.F.R 478.11 and 479.11 to modify the definition of "rifle" to clarify that it can include weapons with an attached "stabilizing brace" that has objective design features and characteristics that indicate that the firearm is designed to be fired from the shoulder. *https://www.federalregister.gov/documents/2021/06/10/2021-12176/factoring-criteria-for-firearms-with-attached-stabilizing-braces, Supplementary Information, III. Proposed Rule*.

The fact is that the Does' concerns about arrest and prosecution are obviously nothing more that fear and conjecture, if not outright exaggeration. Despite their stated insistence that have not and will not present their weapons as requested by the letters, none of them claim to have been arrested or had their property seized.[7] The letters from the Police Department state unequivocally that the recipients "will not be charged with any crime(s) related to the purchasing of this firearm, should you comply with this request and present the firearm to the Suffolk County Police Department, pursuant to this letter." It is only if the recipient "fail[s] to present the weapon" that they may be subject to arrest and criminal charges for the "purchase and continued possession of said firearm." Further, the letters do not state that the weapons will be permanently retained by the County without compensation. Nothing prevents the return of the guns to the owners if their possession is determined to be lawful.

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[7] The Does suggest that an alleged interaction between Ron Wilson, plaintiff in the parallel action *Wilson* action and the Suffolk County Police Department, bears out their claim of imminent harm. Tellingly, they do not state that Wilson was arrested and he was not. The County denies that the Does' description of the interaction is accurate. In any event, the reference to Wilson is not part of the record on appeal and should therefore not be considered by this Court. See *Gomes v. ANGOP*, 541 F. App'x 141, 1 (2d Cir. 2013) quoting *Loria v. Gorman*, 306 F.3d 1271, 1280 (2d Cir. 2002) n. 2 (2d Cir.2002) (internal citation omitted) ("Ordinarily, material not included in the record on appeal will not be considered.")

Susan B. Anthony List v. Driehaus, 573 U.S. 149, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014), *Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974) and similar cases cited by the Does have no bearing as to probability of harm a movant for a preliminary injunction must show. Although those cases indicate that a party need not actually be arrested or prosecuted to have Article III standing to sue, they do not speak to the likelihood of harm that a party seeking a preliminary injunction must establish.

District courts do not abuse their discretion in denying a preliminary injunction when the proponent's presentation of irreparable harm consists only of their conjecture that the defendant might take a harmful step at some point in the future. *Schwartz v. Cerner Corp*., 804 F. App'x 85, 87 (2d Cir. 2020) citing *Faiveley Transp. Malmo AB v. Wabtec Corp*., 559 F.3d 110, 120 (2d Cir. 2009). In light of the passage of months without an arrest or confiscation of a CT4-2A, it is clear that the Does' apprehensions amount to nothing more. Plainly, they fell markedly short of establishing a probability of irreparable harm absent a preliminary injunction. *Schwartz*, 804 F. App'x 85, quoting *New York ex rel. Schneiderman v. Actavis PLC*, 787 F.3d 638, 660 (2d Cir. 2015) (internal quotation marks omitted) ("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.")

Labelling their claim as one for a constitutional violation does not eliminate the Does' burden to show that they are likely to be harmed. See, *Lore v. City of Syracuse*, 2001 WL 263051, at *6 (N.D.N.Y. Mar. 9, 2001) citing *Pinckney v. Bd. of Educ. of Westbury Union Free Sch. Dist.*, 920 F. Supp. 393, 400 (E.D.N.Y. 1996) (noting that some courts have held that the mere allegation of a constitutional infringement itself does not constitute irreparable harm). Courts have considered the nature of the constitutional injury alleged before making such a conclusion. *Id.* citing cases. Moreover, their claims are not necessarily constitutional in nature. If the CT4-2A is an assault weapon under New York state law, they can raise no constitutional claim that it is the County that is violating their constitutional rights. Such a claim can be made if and only if possession of the weapon is permissible under N.Y. Penal Law § 265.00 *et seq*. and no court of the State of New York has ever held that to be the case.

Despite the Does opinion that the CT4-2A is not an assault weapon under the New York Penal Law, the inescapable fact remains that, as recognized by District Court, the Courts of New York State have never so held ("Worse yet, this case seeks a determination from this Court interpreting state criminal laws without the benefit of, and in anticipation of, potential interpretations by state courts in contemplated criminal proceedings. Plaintiffs would have this Court usurp the functions of state judges and juries by declaring, in their words, that the Delta Level Defense CT4-2A

Other Firearm is not a firearm, pistol, rifle, shotgun, or assault weapon as defined by Penal Law § 265.00 …It is difficult to imagine an act that could further offend the principles of comity.") (internal quotation marks omitted) (A. 111-112).

That the firearm is purportedly not an assault weapon under the statutes of other jurisdictions is not dipositive as to the meaning of § 265.00 (22) and is obviously not a substitute for a New York court ruling that the weapon is not a pistol or rifle under the New York Penal Law.

C. The Does Did Not Show That Their Constitutional Rights Are Implicated.

Insofar as the CT4-2A is an illegal assault weapon under state law, it is contraband *per se* and there is no constitutional interest in its possession. *Illinois v. Caballes*, 543 U.S. 405, 408, 125 S. Ct. 834, 837, 160 L. Ed. 2d 842 (2005) ("interest in possessing contraband cannot be deemed 'legitimate' "). Unquestionably, the government may act under the police power doctrine to protect the general health, safety and welfare of its citizens without having to compensate its citizens.

Even if the lawfulness of the firearm was open to question, the Does fell far short of establishing the likelihood of their constitutional rights being violated by the hypothesized policy. They presented no evidentiary support for their assertion that they would be permanently deprived of their firearms without recompense. Nothing in the letters received by them states that the weapons will be permanently retained

by the County without compensation. Nothing prevents the return of the guns to the owners if their possession is determined to be lawful.

The Does do not meet the criteria for invoking the Takings Clause as a basis for relief as no property belonging to them has or will be taken for a public use. The Takings Clause "does not entitle all aggrieved owners to recompense, only those whose property has been 'taken for a public use.' '' *Akins v. United States*, 82 Fed. Cl. 619, 622 (2008) quoting *Amerisource Corp. v United States*, 525 F.3d 1149, 1152 (Fed. Cir. 2004). Thus, to prevail on a takings claim, a plaintiff must satisfy both the public use and protected property interest requirements under the Fifth Amendment. *Mod. Sportsman, LLC v. United States*, 145 Fed. Cl. 575, 581 (2019), aff'd, No. 2020-1107, 2021 WL 4486419 (Fed. Cir. Oct. 1, 2021) citing *Amerisource*, 525 F.3d at 1152. However, "[p]roperty seized and retained pursuant to the police power is not taken for a 'public use.' " *Akins*, 82 Fed. Cl. at 622 quoting *Amerisource Corp. v United States*, 525 F.3d at 1152. Accord, *Modern Sportsman, LLC*, 145 Fed. Cl. 575, 581-582 (2019).

"The police power doctrine may apply where the government acts to protect the general health, safety and welfare of its citizens." *Akins*, 82 Fed. Cl. at 622 quoting *Amerisource,* 525 F.3d at 1149. See *Mugler v. Kansas*, 123 U.S. 623, 668–69, 8 S. Ct. 273, 301, 31 L. Ed. 205 (1887) ("The exercise of the police power by the destruction of property which is in itself a public nuisance…. is very different

from taking property for public use, or from depriving a person of his property without due process of law"). Applying the police power doctrine, no Fifth Amendment taking was deemed to have occurred where, by way of example, property is seized as evidence in an investigation or law enforcement action, *Amerisource, supra*, and where the Bureau of Alcohol, Tobacco and Firearms adopts a rule clarifying that "bump stock type devices" ae "machineguns" and requiring their timely surrender or destruction. *Modern Sportsman, LLC*, 145 Fed. Cl. 575

To the extent that the Does fail to show that the policy mandates permanent dispossession without compensation, the Fourteenth Amendment does not necessarily compel a pre-deprivation hearing. *Razzano v. Cty. of Nassau*, 765 F. Supp. 2d 176, 186 (E.D.N.Y. 2011) (pre-deprivation process may not be required for "exigent circumstances" created by need to seize guns).

In any event, whether the County's letters implicate constitutional rights cannot be determined unless and until it is decided whether the CT4-2A is or is not a prohibited firearm under New York Penal Law § 265.00 *et seq*.

D. It Was Not Shown That a Temporary Injunction Was in The Public Interest.

The Does' thesis that a temporary injunction is in the public interest cannot be accepted without also accepting their contention that the CT4-2a is a legal weapon under New York state law. Again, there is no New York state authority to support this foundational assumption, and it is the County's positon that it is wrong.

Beyond that, it just cannot reasonably be said that the public interest weighs in favor of those who wish to possess these semi-automatic pistols and against the government's interest in regulating the possession of lethal weapons. This risk to the public is not minimized by the fact that the Does' claim to have passed NCIS federal background checks. Since Suffolk County does not issue pistol licenses under New York Penal Law §400.00 for CT4-2As, the Does were not required to undergo the more rigorous investigation conducted when a pistol license application is submitted in order to obtain their weapon.

POINT IV

THE DOES' REQUEST TO HIDE THEIR IDENTITIES IS WITHOUT MERIT

Review of a district court's decision to grant or deny an application to litigate under a pseudonym is for abuse of discretion. *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) citing *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 684 (11th Cir. 2001).

District Court did not need to engage in the balancing test of *Sealed Plaintiff*, 537 F.3d 185 because the Does did not move below to proceed anonymously and the complaint was dismissed ("plaintiffs proceeded anonymously without leave of court") (A. 109).

Of the ten applicable factors of the balancing test spelled out in *Sealed Plaintiff*, 537 F.3d 185, the Does actually invoke only two as relevant to their

application: 1) that disclosure of their names will cause the County to retaliate by arresting them and confiscating their property; and 2) there is a diminished public interest in knowing their identities.

Correctly however, these two factors do not weigh in favor of the Does' pleas for secrecy. The public interest in knowing the litigants' identities is not weak. If the possession of CT4-2As is lawful under New York State law, then there is no harm in the Does' identities being known. On the other hand, if the weapons are illegal assault weapons, the public is entitled to know who possesses such firearms.[8] The supposed risk of retaliatory physical or mental harm is utter speculation in the absence of any supporting evidence.

Although the Does do not rely on the eight other factors, some of those factors cut against allowing them to continue to litigate anonymously. The matters at issue are neither highly sensitive or personal. *Id*. at 190. While the defendant is a government entity, that factor alone is not dispositive as to regard it so "would lead inappropriately, to granting anonymity to any plaintiff suing the government to challenge a law or regulation." *Plaintiffs # 1-21 v. Cty. of Suffolk*, 138 F. Supp. 3d 264, 277–78 (E.D.N.Y. 2015) quoting *Doe v. Merten*, 219 F.R.D. 387, 394 (E.D.

[8] Affording anonymity to the Does' would also be contrary to the spirit of N.Y. Penal Law § 400.00 (5), which makes the name of a pistol license holder a public record, unless an exception has been granted under the statute.

Va. 2004). They do not claim that the public, as opposed to County law enforcement personnel, pose any threat to them whatsoever.

Pursuant to Rule 10 of the Federal Rules of Civil Procedure, the title of a complaint must name all the parties. "This requirement, though seemingly pedestrian, serves the vital purpose of facilitating public scrutiny of judicial proceedings and therefore cannot be set aside lightly. Certainly, '[i]dentifying the parties to the proceeding is an important dimension of publicness. The people have a right to know who is using their courts.' " *Sealed Plaintiff*, 537 F.3d 185 quoting *Doe v. Blue Cross & Blue Shield United of Wisconsin*, 112 F.3d 869, 872 (7th Cir. 1997) (Posner, J.).

Accordingly, the Does fail to show the District Court abused its discretion in not permitting them to proceed anonymously.

POINT V

AS PROPERLY RECOGNIZED BY JUDGE BROWN, THIS CASE IS NOT ONE FOR THE FEDERAL COURTS

The Does conclude their presentation to this Court by asserting that their complaint states a claim upon which relief may be granted. Again, the correct inquiry on this appeal is not whether they have pled alleged violations of their constitutional rights in sufficient detail. Rather, the appropriate inquiry is whether

or not the federal courts should determine this case. District Court befittingly ruled that the federal judiciary should refrain from adjudicating this action.

CONCLUSION

Plaintiffs-Appellants' appeal from the Memorandum of Decision and Order of the United States District Court of the Eastern District of New York, the Hon. Gary R. Brown, presiding, dated June 26, 2021 should be denied and said Memorandum of Decision and Order affirmed. So much of the Order Dismissing Case dated June 26, 2021 as dismissed the action should also be affirmed.

Dated: Hauppauge, New York
December 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of Local Rule 32.1(a)(4)(A) because this brief contains 8,269 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 with 14-point Times New Roman font.

Dated: December 11, 2021

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