21-1658-cv

United States Court of Appeals
for the
Second Circuit

JOHN DOES 1-10,

Plaintiffs-Appellants,

v

SUFFOLK COUNTY, NEW YORK,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFFS-APPELLANTS

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JURISDICTIONAL STATEMENT

Subject matter jurisdiction was proper in the district court pursuant to 28 U.S.C. § 1331, as the causes of action arose from violations of the U.S. Constitution. The Memorandum of Decision and Order appealed from, which denied Appellants' application for a temporary restraining order and *sua sponte* disposed of all claims and dismissed the complaint, was entered by the Clerk of the Court on June 26, 2021. Appellant timely filed a Notice of Appeal on July 6, 2021. Jurisdiction in this court is proper pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED FOR REVIEW

1) Whether the district court's *sua sponte* dismissal of the complaint constitutes reversible error.

2) Whether the district court's denial of the application for a temporary restraining order was erroneous.

3) Whether the district court erred by failing to conduct the balancing test under *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 188–89 (2d Cir. 2008).

STATEMENT OF THE CASE

On June 16, 2021, Appellants filed a complaint for declaratory and injunctive relief in the Eastern District of New York to permanently enjoin a Suffolk County policy that violates the Fourth, Fifth, and Fourteenth Amendments to the Constitution.[1] [See, District Court Docket Sheet at A1[2]].

The Suffolk County Police Department, in the absence of any legislative action or statutory support, is enforcing a policy that criminalizes the mere purchase and possession of the "CT4-2A Other Firearm". [See, Suffolk County Police Department form letter at A76]

Under no provision of the New York Penal Law or federal law is the mere purchase or possession of a CT4-2A Other Firearm illegal. *Id.*

By way of a form letter dated May 20, 2021, the Suffolk County Police Department ("SCPD") notified Appellants, and other similarly situated individuals who purchased a CT4-2A Other Firearm from a federally licensed firearms store in Suffolk County between November 2018 and November 2020, that the firearm

[1] As explained further below, the complaint did not seek to enjoin, strike, or interfere with any investigation, prosecution, or enforcement of the New York State Penal Law. The policy being challenged below is a Suffolk County-created policy. Suffolk County's policy is not an enforcement of state law; it is inconsistent with state and federal law. The complaint also did not require an *interpretation* of state law; it required the *application* of state law to the facts contained therein.

[2] References to the Appendix are cited herein as "A__" with the corresponding page number.

they purchased was "**NOT** in compliance with the New York State Penal Law". [A76] [emphasis supplied].

The SCPD form letter (the "Letter") requests that the 'firearm' be brought to the police station for "inspection **and disposition**" and threatens,

> "if you fail to present the weapon to the Suffolk County Police Department within the fifteen days allotted, you may be subject to arrest and criminal charges for your purchase and continued possession of said firearm."

[A76] [emphasis added].

Appellants have not complied with the Suffolk County Police Department's confiscation order, nor do they intend to. [See, sworn Declarations of Appellants at A25-A65]. More than fifteen days had passed between the May 20, 2021 date on the Letter and the filing of the complaint on June 16, 2021. [A1]. Under the SCPD Policy, when the complaint was filed, Appellants were subject to arrest and prosecution, the unlawful seizure of their property, the confiscation of private property without just compensation, and the violation of their right to due process. [A4].

On June 17, 2021, Appellants filed an application for a Temporary Restraining Order ("TRO") and the matter was assigned to the Hon. Gary R. Brown. [A1; see, Declaration of Amy L. Bellantoni and annexed exhibits in support of Appellants' application for temporary restraining order at A21-A102]. The TRO contained sworn declarations from Appellants, the sworn Declaration of

the manufacturer of the CT4-2A Other Firearm, including the specifications of the CT4-2A Other Firearm and photographs, copies of the SCPD Letter dated May 20, 2021, the listing of prohibited firearms under the National Firearms Act, and the definition of 'pistol' under the Gun Control Act. [A21-A102].

On June 21, 2021, after learning that a second batch of the SCPD Letter was mailed out to additional similarly situated purchasers, the undersigned filed a letter via ECF informing the district court,

> "I write to inform the Court that the Suffolk County Police Department has sent out a letter dated June 16, 2021 – the same date that the within Complaint was filed - to a second, separate group of individuals who are similarly situated to Plaintiffs.
>
> Attached is a copy of the June 16, 2021 letter, virtually identical to the May 20, 2021 letter, which also demands compliance with the Suffolk County's demand to comply with the confiscation of their private property, which was legally purchased and is legally owned, under the threat of arrest, incarceration, and prosecution."

[A103].

On June 24, 2021, not having heard from the district court on the TRO application and fearing negative arrest and/or confiscation of Appellants' property action by the SCPD, the Summons and Complaint was served on Suffolk County in anticipation of filing and serving a Notice of Motion and Motion for a Preliminary Injunction thereon. [A1; see, proof of service on Suffolk County at A105-A106].

The proof of service of the Summons and Complaint on Suffolk County was filed electronically via ECF with the district court on Friday, June 25, 2021. [A1; A105-A106].

The next day (Saturday, June 26), after the district court received the above notice by ECF that Suffolk County had been served with the Summons and Complaint, before Appellants could file/serve a motion for a preliminary injunction, before Suffolk County even appeared in the action, the district court issued a Memorandum of Decision and Order [the "Decision"] that (i) *sua sponte* dismissed the action; and (ii) denied the TRO. [A1; see Memorandum of Decision and Order at A108].

Appellants were provided with no advance notice of the grounds upon which the complaint would be dismissed and no opportunity to be heard, and Suffolk County was shielded from having to answer the allegations in the complaint and defend its policy in the face of sworn and conclusive evidence of its unconstitutionality. [A1; A108].

The district court retained jurisdiction for 30 days to allow for Appellants to replead; no amended complaint was filed. [A1]. On July 6, 2021, Appellants filed a Notice of Appeal of each and every part of the Decision and Order. [A1; see, Notice of Appeal at A114].

On July 8, 2021, Appellants filed a motion in this Court for (i) a preliminary injunction pending appeal; and (ii) a stay of the proceedings below. [A14; A20]. This Court denied the motion in its entirety, including that part of the motion seeking injunctive relief pending this appeal, because Appellants had not first sought a stay in the district court.[3] [A36].

On July 23, 2021, Appellants filed a letter motion with the district court seeking a stay of the proceedings, which amounted to no more than a request to stay the remaining 3 of the 30 days in which to file an amended complaint, as the Decision indicated, "the action is DISMISSED." [District Court Dkt. Sheet at Entry No. 12; A113].

In rather caustic fashion, on July 28, 2021 the district court denied the request for a stay. [A2].[4]

On July 28, 2021, Appellants filed with this Court a second motion for a preliminary injunction, which did not include a motion for a stay of the district court proceedings; Suffolk County's opposition was filed on August 3, 3021; Appellants' reply was filed on August 6, 2021. [2d Cir. Dkt. Entry Nos. 38-39; 41;

[3] Appellants also filed a motion for leave to file an oversized brief, which was granted. [2d Cir. Dkt. Entry Nos. 13; 36].

[4] The district court's denial of the motion to stay indicates that its Decision was rendered "without prejudice to repleading and denying an improperly-filed preliminary injunction application", but repleading would not cure the court's *sua sponte* dismissal of the complaint on what the court described to be a lack of subject matter jurisdiction and failure to state a claim.

45]. Appellants' motion for a preliminary injunction pending appeal has not yet been decided.

On August 30, 2021, Appellants filed a motion in this Court to place the appeal on the Expedited Appeals Calendar, which was opposed by Suffolk County on September 1, 2021. [2d Cir. Dkt. Entry Nos. 56-57; 61]. Appellants filed a reply on September 2, 2021. [2d Cir. Dkt. Entry No. 66]. No decision has yet been rendered.

As the Decision appealed from both denied the TRO and dismissed the action in its entirety, the substance of the complaint and the application for a Temporary Restraining Order is set forth below.

Between 2018 and November 2020, over 500 individuals[5], including Appellants, purchased one or more "CT4-2A Other Firearms" from Jerry's Firearms located in Suffolk County, New York. [A25-A65]. Jerry's Firearms is a federally licensed firearms dealer ("FFL"). [A7 at ¶ 15].

Prior to their purchases of a CT4-2A Other Firearm, each Appellant was subject to, and passed, a federal background check through the National Instant Criminal Background Check System ("NICS"). [A7]. No Appellant is prohibited from purchasing or possessing firearms under state or federal law. [A7; A25-A65].

[5] 2d Cir Docket Entry No. 39 at Ex. 3.

The CT4-2A Other Firearm is manufactured by Delta Level Defense in Stratford, Connecticut. [A7; A67]. Prior to its manufacture and release to the firearms market, Delta Level Defense conducted extensive research regarding the legality of the specifications of the CT4-2A Other Firearm under federal and state law. [2d Cir Docket Entry No. 39 at Ex. 3].

As its name indicates, the CT4-2A Other Firearm is classified as an "Other Firearm". [A67]. It is neither a pistol, rifle, nor shotgun as those terms are defined under federal law and the New York State Penal Law. [A10-A15; A67-A68]; Penal Law § 265.00, *et seq.*

The CT4-2A Other Firearm is legally sold to retailers for sale, and thereafter legally sold, purchased and possessed in 49 of the 50 states, including throughout New York State, Connecticut, and New Jersey. [A67]. The mere possession of the CT4-2A Other Firearm in New York State does not require a license nor does it violate any provision of the New York State Penal Law. Penal Law § 265.00, *et seq.*

Suffolk County is enforcing a county-created policy that criminalizes the purchase and mere possession of lawfully owned CT4-2A Other Firearms (the "Policy"). [A76]. Under the County's Policy, the mere possession of the CT4-2A Other Firearms is a crime – notwithstanding that the CT4-2A Other Firearm is not an illegal firearm under the New York State Penal Law or federal law. [A76].

The Suffolk County Police Department ("SCPD") has targeted every individual who legally purchased the CT4-2A Other Firearm from Jerry's Firearms between November 2018 and November 2020 - - over 500 individuals, including Appellants -- to accomplish the forced confiscation of lawfully owned private property under threat of arrest and prosecution. [A8-A9; A76; A104; 2d Cir. Dkt. Entry No. 39 at Exhibit 3].

In 7 separate bulk mailings thus far since May 20, 2021[6], SCPD has mailed a form letter [the "Letter"] to hundreds of individuals, including Appellants, who lawfully purchased and possess the CT4-2A Other Firearm. [2d Cir. Dkt. Entry No. 57]. The Letters are all identical in form and substance, except for the date. [*Id.*].

The Letter informs the purchaser, including Appellants, that the firearm they purchased from Jerry's Firearms "between November 2018 and November 2020" is illegal and violates the New York Penal Law, which it does not. [A76]. The Letter fails to identify which section of the Penal Law the CT4-2A Other Firearm purportedly violates. [*Id.*]. The Letters are all unsigned, are not addressed to any particular purchaser, and none of the letters are sent by certified mail. [*Id.*].

[6] The respective dates of the 7 bulk mailings are May 20, 2021; June 16; June 30; July 14; July 28; August 11; and August 25, 2021.

The Letter further informs the purchasers,

> "…Be further advised, however, that if you fail to present the weapon to the Suffolk County Police Department within the fifteen days allotted, you may be subject to arrest and criminal charges for your purchase and continued possession of said firearm."[7]

[*Id.*]

Suffolk County's Policy does not enforce the New York State Penal Law or federal law. Suffolk County is the only jurisdiction in New York State that has criminalized the purchase, sale, and/or possession of the CT4-2A Other Firearm. [2d Cir. Dkt. Entry No. 39 at Exhibit 3, ¶ 7].

Under the Policy, SCPD intends to permanently confiscate and "dispose" of the CT4-2A Other Firearms sold by Jerry's Firearms, without any legal justification and in the absence of any compensation to the purchasers. [A76].

Suffolk County's Policy has caused, and will continue to cause, the unlawful confiscation of hundreds of lawfully purchased and owned CT4-2A Other Firearms, subjects Appellants to the unreasonable and unlawful loss of their private property, threatens the loss of private property without just compensation, violates

[7] The plain words of SCPD's Letter belie the district court's conclusion that "the arrests and prosecutions imagined by plaintiffs fall squarely in the realm of the theoretical" and that plaintiffs "merely speculate that they will be subject to prosecution." [A111-A112]. The district court's error is further underscored by Suffolk County's representation to this Court in opposing Appellants' motion for an injunction pending appeal, "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. (Exhibit 1). Thus, it is entirely within the Does' control whether they choose to trigger their own arrests." [See, 2d Cir. Dkt. Entry No. 41, Suffolk County's opposition to Appellants' application for injunction pending appeal at p. 13] (internal quotation marks omitted).

Appellants' rights to due process, and subjects Appellants to false arrest and malicious prosecution, which constitutes 'irreparable harm'.

The John Doe Appellants

Each Appellant is a resident of, and/or has a residence in, Suffolk County, New York. [A7; A25-A65]. No Appellant is prohibited and/or disqualified from purchasing, receiving, possessing, and/or owning firearms under federal or state law. [A7; A25-A65].

One or more of the plaintiffs is a military veteran; multiple plaintiffs hold professional licenses that would be compromised and revoked if the plaintiffs were to be arrested and charged with a crime particularly a weapons-related offense. [A25-A65].

Each plaintiff fears and faces imminent and irreparable harm in the nature of, *inter alia*, false arrest, prosecution, permanent loss of property without just compensation, the loss of the use and enjoyment of their property, unreasonable search and seizure of their person and property. [A7-A9; A25-A65].

Each Appellant was identified as a "JOHN DOE" because they are in fear of imminent and unlawful arrest, criminal prosecution, incarceration, and, *inter alia*, the confiscation of their lawfully acquired and owned CT4-2A Other Firearms if the SCPD and/or SCDA's Office learn of their identities without the protection of a

Court Order enjoining the implementation and enforcement of the policy as laid out in the Letter during the pendency of this action and the within appeal. [*Id.*].

Each plaintiff has a justified and realistic fear of, *inter alia*, being falsely arrested and/or charged by members and/or agents of the SCPD with a criminal offense and prosecuted by the SCDA's Office for their past purchase and continued possession of the CT4-2A as evidenced by the criminalization of the CT4-2A by Suffolk County, the intent to confiscate every CT4-2A sold by Jerry's Firearms, and the threat of arrest and prosecution if purchasers do not obey within the "fifteen days allotted", as set forth in the plain language of the SCPD Letter. [A25-A65; A76].

The plaintiffs each purchased a CT4-2A Other Firearm from Jerry's Firearms after being subject to a federal background check through the FBI's National Instant Criminal Background Check System ("NICS") and found to have no prohibitors to the purchase, receipt, possession, or use of firearms under federal or New York State law. [A7; A25-A65].

Each Plaintiff has owned and possessed their respective CT4-2A in a lawful manner, without incident since its purchase. [A7; A25-A65].

Appellants received the SCPD Letter during the first batch of mailings, dated May 20, 2021, did not contact the SCPD, did not surrender their CT4-2A

Other Firearms to SCPD, and do not intend to allow its confiscation. [A8-A9; A25-A65].

Because of Appellants' non-compliance with the SCPD policy, by the plain language of the SCPD Letter, Appellants face a real and imminent threat of being falsely arrested, prosecuted, having their lawfully owned property confiscated by SCPD, and the permanent deprivation of their property without just compensation. [A25-A65; A76].

Appellants are also deprived of any use and enjoyment of their property for fear of arrest and prosecution. For example, Appellants would like to but can no longer take their CT4-2A Other Firearm to a target shooting range in Suffolk County for fear of arrest and prosecution. [A25-A65].

SCPD may have a list of purchasers, but simply having the list does not provide SCPD with personal knowledge of whether, and which, purchasers still possess the CT4-2A Other Firearm.

Appellants filed the complaint anonymously as "John Does 1-10" fearing that, if they used their actual names they would be immediately arrested, charged, and their property would be confiscated by SCPD. Revealing Appellants' identity, SCPD would now know (i) that these particular purchasers, who purchased the CT4-2A Other Firearm between 1-2 years ago, still possess the CT4-2A Other

Firearm in Suffolk County; and have not complied with the SCPD confiscation policy. [A7-A9; A25-A65].

While the SCPD and the SCDA's Office have a list of the names and addresses of the 500+ individuals who purchased CT4-2A Other Firearms from Jerry's Firearms, neither the SCPD nor the SCDA's Office know Appellants' identities nor do they know whether Appellants still possess and/or own their CT4-2A Other Firearms.

SUMMARY OF THE ARGUMENTS

In a Decision denying Appellants' application for a temporary restraining order ("TRO"), the district court *sua sponte* dismissed the complaint in its entirety without providing Appellants advance notice of the grounds for such dismissal or an opportunity to be heard.

Though it is unclear what standard the district court followed for dismissing the action, it appears that the dismissal of the complaint was for reasons sounding in (i) lack of subject matter jurisdiction; and (ii) failure to state a claim upon which relief can be granted.

At the outset, the district court's *sua sponte* dismissal of the complaint, which was neither filed by a *pro se* litigant nor *in forma pauperis*, was reversible error. Appellants had no notice of the arguments raised by the district court and no opportunity to respond to them. Indeed, even amending the complaint would not

address all the positions taken by the district court for dismissing the action, which would likely reach the same conclusions.

The district court's *sua sponte* dismissal for failure to state a claim upon which relief could be granted failed to take all of the allegations in the complaint as true.[8]

The district court's *sua sponte* dismissal for lack of subject matter jurisdiction by holding that "the injunctive relief sought here is well outside this Court's authority" is erroneous. [A110]. Appellants were not seeking to "enjoin [ ] state authorities from investigation and prosecutions of the state penal law." [A110] [emphasis added]. Appellants sought to enjoin Suffolk County's policy, as set forth in the Letter, which criminalizes the possession of a gun that the New York State Legislature has not deemed illegal to possess.

The injunctive relief sought in the complaint did not, as the district court held, "interfere with the free exercise of the discretionary powers of [prosecutors] in their control over criminal prosecutions." [A111]. Police departments and/or prosecutors have no legislative powers to create criminal laws. Similarly, police departments and/or prosecutors have no 'discretion' to arrest and/or prosecute individuals for an act that does not violate the state's criminal laws, nor do they

[8] It would also appear that, because the court's Decision considered both the complaint and the TRO submissions, it *sua sponte* determined and dismissed the entire case on its merits without allowing Suffolk County to defend itself and barring Appellants from being heard.

have 'discretion' to seize property that is neither contraband, nor used or about to be used in the commission of a crime. The mere possession of the CT4-2A Other Firearm, without more, is not a crime.

The district court also dismissed the complaint for lack of subject matter jurisdiction by finding that the relief sought in the complaint [and TRO] required the court to "interpret[] state criminal laws without the benefit of, and in anticipation of, potential interpretations by state courts in contemplated criminal proceedings." [A111]. This finding was erroneous.

The relief sought in the TRO and the complaint did not require an *interpretation* of the Penal Law[9]; it required the *application* of the Penal Law to the facts before the district court. The terms 'firearm', 'pistol', 'rifle', 'shotgun', and 'assault weapon' are clearly defined in the Penal Law and/or under federal law. The district court was not required to 'usurp the functions of state judges and juries'; it merely needed to apply existing definitions to the explicit design

[9] Even if this action required an interpretation of state statutes, it is well within the jurisdiction of the federal courts to interpret state statutes and make determinations of their constitutionality. See, *Zwickler v. Koota*, 389 U.S. 241, 251, 88 S. Ct. 391, 397, 19 L. Ed. 2d 444 (1967) ("In *Turner v. City of Memphis*, 369 U.S. 350, 82 S.Ct. 805, 7 L.Ed.2d 762, (per curiam), we vacated an abstention order which had been granted on the sole ground that a declaratory judgment action ought to have been brought in the state court before the federal court was called upon to consider the constitutionality of a statute alleged to be violative of the Fourteenth Amendment. In *McNeese v. Board of Education*, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622, we again emphasized that abstention cannot be ordered simply to give state courts the first opportunity to vindicate the federal claim.").

specifications of the CT4-2A Other Firearm. [A111-A112]. The *application* of federal and state law definitions to the design specifications of the CT4-2A Other Firearm leads to a conclusion of whether Suffolk County's policy constitutes a violation of the Fourth, Fifth, and Fourteenth Amendments to the Constitution.

In dismissing the complaint for what appears to be based on a failure to state a claim upon which relief can be granted, the district court failed to take the allegations in the complaint as true. The district court disregarded the plain language of the SCPD Letter, which threatens arrest and prosecution for noncompliance with its confiscation policy, and somehow reached an opposite conclusion. By reaching a conclusion directly opposite of the exhibits submitted, that "the arrests and prosecutions imagined by plaintiffs fall squarely in the realm of the theoretical" and "the plaintiffs merely speculate that they will be subject to prosecution"[10], the court reached an erroneous conclusion, became an advocate for Suffolk County, and barred Appellants from being heard.

The complaint contained a verbatim replication of the SCPD letter, and the exhibits to the TRO contained an exact copy of the Letter, which indicates, "if you fail to present the weapon to the Suffolk County Police Department within the fifteen days allotted, you may be subject to arrest and criminal charges for your purchase and continued possession of said firearm." [A8-A9; A76]. The district

[10] A112 [emphasis added].

court ignored the plain language in the SCPD Letter – a documented threat of arrest and criminal charges for non-compliance with the confiscation order, the confiscation of lawfully owned property, and deprivation of private property without just compensation – and substituted evidence with speculation.

The denial of Appellants' application for a TRO was in error because Appellants satisfied each required element. Even if they had not, however, the denial of the TRO should not have led to the *sua sponte* dismissal of the action before the merits of the SCPD policy could be heard and adjudicated.

The Decision also characterized Appellants' filing of the complaint as "John Does" as a 'procedural defect' that 'could be overlooked'. [A109-A110]. Under the balancing test set forth in *Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 188–89 (2d Cir. 2008), which was not conducted by the district court, the factors weigh heavily in Appellants' favor.

Based on the arguments set forth below, the Decision and Order appealed from should be reversed in its entirety.

STANDARD OF REVIEW

The *sua sponte* dismissal of a complaint that is neither *pro se* or *in forma pauperis* so far deviates from the role of a judge that it constitutes reversible error. See, *Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988); accord *Lewis v. State of N. Y.*, 547 F.2d 4, 5–6 (2d Cir. 1976).

With respect to the standard of reviewing the legal grounds for the court's *sua sponte* dismissal of the complaint, its Decision does not identify what, if any, standard the district court used in making its decision nor is there any mention of the federal rule upon which the dismissal was based.[11]

Generally, the standard for determinations regarding subject matter jurisdiction are 'clear error' for factual findings, and *de novo* for the legal conclusion as to whether subject matter jurisdiction exists. *Lyndonville Sav. Bank & Tr. Co. v. Lussier*, 211 F.3d 697, 701 (2d Cir. 2000); *Filetech, S.A. v. France Telecom*, S.A., 157 F.3d 922, 930 (2d Cir.1998).

The standard of review of the grant of a motion under Rule 12(b)(6), which is a ruling of law, is *de novo*. A dismissal under Rule 12(b)(6) will be affirmed only if it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief. *Citibank, N.A. v. K-H Corp.*, 968 F.2d 1489, 1494 (2d Cir. 1992).

This court reviews a district court's denial of an application for injunctive relief with an abuse of discretion standard. *Bery v. City of New York*, 97 F.3d 689, 693–94 (2d Cir. 1996) citing, *Reuters Ltd. v. United Press Int'l, Inc.*, 903 F.2d 904,

[11] Were the title "Memorandum of Decision and Order" removed from the document, it reads more in the nature of an adversarial brief than a balanced and neutral judicial opinion, particularly considering its tone.

907 (2d Cir.1990). "An abuse of discretion exists when the district court has made an error of law or of fact." *Id.* (citations omitted).

I. THE *SUA SPONTE* DISMISSAL OF THE ACTION IS REVERSIBLE ERROR, WARRANTING REINSTATEMENT OF THE COMPLAINT

Sua sponte dismissals, especially those entered without notice, deviate from the traditions of the adversarial system by making the judge 'a proponent rather than an independent entity'. *Perez v. Ortiz*, 849 F.2d 793, 797 (2d Cir. 1988); accord *Lewis v. State of N. Y.*, 547 F.2d 4, 5–6 (2d Cir. 1976) ("[i]t is prudent for judges to avoid an inquisitorial role"; [i]f defendants had moved to dismiss for failure to state a claim, the plaintiff would have received notice of the challenge, had an opportunity to respond by setting forth arguments supporting the validity of his claim). "[S]uch dismissals may tend to produce the very effect they seek to avoid—a waste of judicial resources—by leading to appeals and remands." *Id.*

While *sua sponte* dismissals may be appropriate in some circumstances, particularly in cases involving frivolous *in forma pauperis complaints*, [see 28 U.S.C. § 1915(d); 2A Moore's Federal Practice § 12.07 [2.—5] (1987)], or frivolous habeas petitions, [see Rule 4 of the Rules Governing Section 2254 Cases in the United States District Courts (1987)], the general rule is that a "district court has no authority to dismiss a complaint for failure to state a claim upon which relief can be granted without giving the plaintiff an opportunity to be heard." *Perez*, 849 F.2d at 797 citing, *Square D Co. v. Niagara Frontier Tariff Bureau,*

Inc., 760 F.2d 1347, 1365 (2d Cir.1985) ("Failure to afford an opportunity to address the court's sua sponte motion to dismiss is, by itself, grounds for reversal") (quoting Lewis v. New York, 547 F.2d 4, 5–6 & n. 4 (2d Cir.1976)), aff'd, 476 U.S. 409, 106 S.Ct. 1922, 90 L.Ed.2d 413 (1986); see *Eades v. Thompson*, 823 F.2d 1055, 1061 (7th Cir.1987) ("*sua sponte* dismissals are not favored, particularly where no party has raised the issue, and there is no notice or hearing"); *Doe v. St. Joseph's Hospital of Ft. Wayne*, 788 F.2d 411, 415 (7th Cir.1986) ("*Sua sponte* dismissals without prior notice or an opportunity to be heard on the issues underlying the dismissal 'generally may be considered hazardous.'") (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 565 F.2d 1194, 1198 (7th Cir.1977), cert. denied, 435 U.S. 905, 98 S.Ct. 1450, 55 L.Ed.2d 495 (1978)); *Jefferson Fourteenth Assoc. v. Wometco de Puerto Rico*, 695 F.2d 524, 525, 527 (11th Cir.1983) (*sua sponte* dismissal of third-party claims "on the merits" deprived third-party plaintiff of due process); *Schlesinger Investment*, 671 F.2d at 742–43 (plaintiff entitled to notice that court was considering dismissal, and to discovery and leave to replead).

This case neither involves *pro se* plaintiffs nor was it brought *in forma pauperis*.

By dismissing the complaint *sua sponte*, the district court 'deviate[d] from the traditions of the adversarial system by making [itself] a proponent rather than

an independent entity'. This is particularly so considering that its dismissal order was filed on a Saturday, the day after it received notification that Suffolk County had been served with the summons and complaint, which shielded Suffolk County from having to answer the allegations in the complaint and/or defending a motion for a preliminary injunction.

Appellants had no opportunity to respond to the district court's theories because there was no 'motion' to respond to. And, although the district court dismissed the complaint with leave to file an amended complaint within 30 days, even amending the complaint would not address the arguments made in the Decision and Order.

Based on the above, the *sua sponte* dismissal of the complaint constitutes reversible error, warranting reinstatement of the complaint in the district court.

II. THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION

The district court committed clear error in its factual determinations that it lacked subject matter jurisdiction over the complaint.

A. The Relief Sought is Within the District Court's Authority

The district court erred in holding that the injunctive relief sought is outside of its authority and erred in finding that "Plaintiffs seek orders from this Court enjoining state authorities from investigation and prosecutions of the state penal law." [A110-111].

Appellants did not seek to enjoin investigations and prosecutions under state law; they sought to enjoin a rogue SCPD-created policy.[12] Throughout the complaint, TRO motion, and supporting exhibits, Appellants consistently make the argument that the CT4-2A is legal under the Penal Law and sought to enjoin Suffolk County's policy.

The enforcement of the Penal Law would have no negative effect on Appellants or the 500+ other purchasers of the CT4-2A Other Firearm because the gun is not illegal.

B. The Relief Sought Does not 'Tread on Separation of Powers Concerns'

The district court erroneously determined that the relief sought by Appellants would 'interfere with the free exercise of the discretionary powers of [prosecutors] in their control over criminal prosecutions.' [A111].

While 28 U.S.C. 2283 prevents a federal court from granting an injunction to stay proceedings in a state court, Congress 'expressly authorized' federal injunctive relief where a claim is brought in federal court under 42 U.S.C. § 1983 to safeguard federal rights against deprivation under color of state law. *Gajon Bar & Grill, Inc. v. Kelly*, 508 F.2d 1317, 1319 (2d Cir. 1974). In *Gajon,* Suffolk

[12] Notwithstanding that Appellants sought to enjoin Suffolk County's policy, which is not an enforcement of the Penal Law, it should be noted that "district court[s] may enter a declaratory judgment on the constitutional validity of a state statute at the behest of a party who, although affected by the operation of the statute, has not been indicted for violating it." *Gajon Bar & Grill, Inc. v. Kelly*, 508 F.2d 1317, 1320 (2d Cir. 1974) citing, *Steffel v. Thompson*, 415 U.S. 452 (1974); *Roe v. Wade*, 410 U.S. 113 (1973).

County Legislature passed an ordinance criminalizing topless dancing. The plaintiffs were charged with violating the statute and filed a complaint for declaratory and injunctive relief in the Eastern District court sought to enjoin their prosecution until the constitutionality of the ordinance could be determined. This power be exercised sparingly, which is to say only where it is absolutely necessary to stave off the threat of irreparable great and immediate injury to the exercise of constitutional rights. *Id.* (quotations omitted); citing, *inter alia, Ex Parte Young*, 209 U.S. 123 (1908).

Federal question jurisdiction exists whenever the complaint states a cause of action under federal law that is neither "clearly ... immaterial and made solely for the purpose of obtaining jurisdiction" nor "wholly insubstantial and frivolous." *Bell v. Hood*, 327 U.S. 678, 682–83 (1946); accord *Spencer v. Casavilla*, 903 F.2d 171, 173 (2d Cir.1990).

Federal injunctive relief is warranted where "the injury to the free exercise of constitutional rights is greater than that associated with the defense of a single prosecution brought in good faith under a statute of doubtful constitutional validity." *Gajon Bar & Grill, Inc. v. Kelly*, 508 F.2d 1317, 1320 (2d Cir. 1974) citing, *Younger v. Harris*, 401 U.S. 37, 48 (1971). Such is the case when there are defects in the prosecution, other than the alleged unconstitutionality of the statute, which are sufficiently clear to warrant the inference of bad faith prosecution. The

injury is then 'irreparable' because the state court could not reach the merits of federal claim. See, *Younger v. Harris*, 401 U.S. 37, 43 (1971) (a judicial exception exists to stay state court proceedings where a person about to be prosecuted in a state court can show that, if the proceeding in the state court is not enjoined, he will suffer irreparable damages.") citing, *Ex parte Young*, 209 U.S. 123 (1908).

Indeed, *Ex parte Young* and subsequent cases have established the doctrine that, when absolutely necessary for protection of constitutional rights, courts of the United States have power to enjoin state officers from instituting criminal actions. But this may not be done, except under extraordinary circumstances, where the danger of irreparable loss is both great and immediate. *Younger*, 401 U.S. at 45.

Here, there is no state criminal proceeding pending against Appellants and no statute being enforced.[13] The complaint did not seek to enjoin an existing prosecution or governmental action taken pursuant to a statutory scheme, but to prevent civil rights violations before irreparable harm occurred. [14] Appellants' fears that SCPD will enforce its policy consistent with the Letter, sufficiently establish

[13] Even if Appellants or any other purchaser were arrested and charged with the mere possession of the CT4-2A Other Firearm, an injunction of the prosecution would be warranted. Such an arrest and prosecution would not, and could not, have been brought in good faith because possession of the CT4-2A Other Firearm does not violate the Penal Law.

[14] Abstention is not required "when great and immediate irreparable harm may result, a state court is engaging in flagrantly unconstitutional acts, or statutes are being enforced in bad faith." *Jefferson v. Rose*, 869 F. Supp. 2d 312, 314 (E.D.N.Y. 2012) (Seybert, J.) citing, *Hansel v. Town Ct. of Springfield*, 56 F.3d 391, 393 (2d Cir.1995) (citing *Younger v. Harris*, 401 U.S. 37, 56, 91 S.Ct. 746, 27 L.Ed.2d 669 (1971)).

an 'imminent threat' of constitutional harm warranting an injunction of SCPD's policy. Federal intervention is not only 'absolutely necessary' to protect constitutional rights but could not be interpreted as reflecting negatively upon the state court's ability to enforce constitutional principles. *Gajon,* 508 F.2d at 1321–22.

As such, the federal court has jurisdiction to consider Appellants' claims for declaratory and injunctive relief.

III. DENIAL OF INJUNCTIVE RELIEF WAS IN ERROR

The denial of Appellants' motion for a TRO was in error, such that this Court should vacate the denial of application for a temporary restraining order and direct the district court to issue the injunction. See, *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 489 (2d Cir. 2013); *Hsu v. Roslyn Union Free Sch. Dist. No. 3*, 85 F.3d 839, 873 (2d Cir. 1996) ("Although reversal of an order denying an application for a preliminary injunction is customarily accompanied by a directive that the district court conduct a new hearing on remand, an appellate court, on a finding of merit in plaintiff's case, can in the alternative direct the district court to issue the injunction." (quoting Patton v. Dole, 806 F.2d 24, 31 (2d Cir. 1986)).

A. The District Court Made Erroneous Findings of Fact

In considering Appellants' *ex parte* application for a Temporary Restraining Order, the district court made factual determinations that contradict the evidentiary submissions, then denied the application and dismissed the complaint holding there was 'no likelihood of success on the merits.'

The court found, "No irreparable harm could come to plaintiffs prior to a hearing, and counsel has not certified any effort to notify Suffolk County of the action or the application."

On the known facts, neither the undersigned, Appellants, nor the district court knew what actions SCPD had planned, or still have planned, for the purchasers of the CT4-2A Other Firearm, including Appellants. SCPD was, and is still, engaging in the wide-ranging confiscation of a legally owned firearm. No one except SCPD and the individuals working in concert with them know when or whether purchasers did not surrender their lawfully owned property, like Appellants, will receive a knock on their door. The SCPD Letter is being mailed to purchasers in other states and other counties. Ron Wilson, the plaintiff in *Wilson v. Suffolk County, et al.*, 21 Civ. 3716 (E.D.N.Y., JS-SIL) was 'visited' by SCPD at his Nassau County home in May 2021 so they could 'inspect' his CT4-2A to see whether it was 'compliant'. When SCPD arrived they immediately went to the CT4-2A Other Firearms, removed the attached scopes, lights, and such add-on

fixtures and confiscated them – under false pretenses, without consent, and without a warrant.

Appellants do not know how many people were sent the May 20, 2021 Letter. What if only 15 people, including the 10 Appellants were sent the Letter and the other 5 individuals surrendered their guns within the 15-day period. SCPD would certainly know Appellants' identity under those facts and Appellants would, therefore, be subject to imminent arrest anytime they stepped outside of their home – no warrant necessary.

For the district court to say "no irreparable harm could come to plaintiffs prior to a hearing" the court reaches a conclusion that only SCPD and those working with them could know.

"[N]either this Court nor the Supreme Court has required much to establish this final step in challenges to ordinary criminal or civil punitive statutes. Rather, we have presumed that the government will enforce the law." *Hedges v. Obama*, 724 F.3d 170, 200 (2d Cir. 2013). Likewise, the district court should have assumed that SCPD would enforce its policy when Appellants did not comply within the 15 days allotted.

Moreover, the district court's determination that Appellants failed to justify why Suffolk County was not notified prior to filing the TRO is incorrect. The Appellants' Declarations submitted in support of the TRO demonstrated that they

are in fear of imminent and irreparable harm in the nature of arrest, incarceration, prosecution, fines and penalties, loss of personal property, forfeiture of their Second Amendment rights, permanent harm to their professional and personal reputations, and in some cases the loss of their professional business licenses. [Dkt. Sheet at Entry No. 2-8 at p. 9 of 23]. Taken in conjunction with all the exhibits and sworn declarations filed in support of the TRO, the memorandum of law provided:

> "Notification to Defendant will cause imminent harm to Plaintiffs in the nature of arrest, incarceration, prosecution, fines and penalties, loss of personal property, forfeiture of their Second Amendment rights, permanent harm to their professional and personal reputations, and in some cases the loss of their professional business licenses to Plaintiff, and all those similarly situated, albeit unlawfully, but nevertheless permanently harmful."

[Dkt. Sheet Entry at No. 2-8, p. 9 of 23].

Appellants justified their decision to seek an *ex parte* TRO; even assuming that the TRO was denied for that reason, the district court could have dismissed the TRO while issuing an order directing service of the application on Suffolk County by a date certain and issuing a scheduling order.

B. Appellants Demonstrated Irreparable Harm

"A plaintiff seeking a temporary restraining order must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Natera, Inc. v. Bio-Reference Labs., Inc.*,

No. 16 Civ. 9514, 2016 WL 7192106, at *2 (S.D.N.Y. Dec. 10, 2016) (internal quotation marks, citation, and alteration omitted).

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) (internal quotation marks and citation omitted). Where a plaintiff has asserted a constitutional violation, a presumption of irreparable harm attaches. *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996). "Several courts in this circuit have concluded that the deprivation of an alien's liberty is, in and of itself, irreparable harm." *Hernandez Aguilar v. Decker*, 482 F. Supp. 3d 139, 149 (S.D.N.Y. 2020) citation omitted.

The district court erroneously held that Appellants failed to demonstrate irreparable harm. Appellants have maintained that they will not comply with SCPD's confiscation policy. Appellants have been subject to imminent and irreparable harm from (i) the County's false characterization of the CT4-2A as an illegal firearm; (ii) the County's summary confiscation of the CT4-2A under threat of arrest and prosecution; (iii) the summary confiscation of private property without just compensation; (iv) arrest, incarceration, and criminal prosecution for non-compliance; and (v) permanent dispossession of private property.

As set forth in the SCPD Letter [A76] and the County's opposition to Appellants' motion for an injunction pending appeal [FN 7, *supra*], Appellants

face an imminent threat of arrest and criminal charges, which constitute irreparable harm. See, *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158–59 (2014) (When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law); *Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"); *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979) (a plaintiff satisfies the injury-in-fact requirement where he alleges "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."); *Hedges v. Obama*, 724 F.3d 170, 196 (2d Cir. 2013); *c.f.,* 11A Charles A. Wright, Arthur R. Miller and Mary Kane, Federal Practice and Procedure, § 2948.1 at 161 (2d ed. 1995) ("[w]hen an alleged deprivation of a constitutional right is involved, most courts hold that no further showing of irreparable injury is necessary").

By the very nature of their allegations, Appellants have met the first prong of the test.

C. Appellants Demonstrated A Likelihood of Success on the Merits

A likelihood of success requires a demonstration of a better than fifty percent probability of success. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d

Cir. 1985), disapproved on other grounds, *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, n.2, 107 S.Ct. 2400, 96 L.Ed.2d 282 (1987).

Appellants demonstrated a substantially higher than 50% likelihood of success on their claims under the Fourth, Fifth, and Fourteenth Amendments.

i. Fourth Amendment Violations

Suffolk County's Policy violates the Fourth Amendment because the CT4-2A Other Firearm is not an illegal firearm under the Penal Law. As such, any arrest, incarceration, prosecution, and/or seizure for the "mere possession" of a CT4-2A Other Firearm is an "unreasonable" and unlawful seizure of such person and property.

The CT4-2A is classified as an "other firearm"; it is not a rifle, shotgun, or pistol as defined under New York or federal law. [A67 at ¶¶ 9-10]. The CT4-2A is a semiautomatic gun with an overall length that exceeds 26 inches. [A67 at ¶ 8].

Every CT4-2A is manufactured and sold with 4 mandatory features: (i) forearm brace; (ii) barrel length over 12 inches; (iii) an overall length greater than 26 inches; and (iv) vertical foregrip. [A67 at ¶ 11].

The presence of all 4 features excludes the CT4-2A from being classified as a pistol, rifle, or shotgun. [A67 at ¶ 12]; Penal Law § 265.00(3), (11), (12), (22).

The CT4-2A is not "designed or redesigned, made or remade, and intended to be fired from the shoulder"; it does not have a shoulder stock or buttstock. [A67-

A68 and annexed photographs]. Thus, it is not a "rifle" under 26 U.S.C. § 5845 or Penal Law § 265.00 (11)[15] or a "shotgun" under 26 U.S.C. § 5845(d) or Penal Law § 265.00(12)[16].

One of the 4 essential characteristics of the CT4-2A is the forearm brace, further demonstrating that it is not intended to be fired from the shoulder. [A67-A68].

The CT4-2A is not a pistol. The term pistol is not defined in the Penal Law; however, the normal, customary, and common definition of the term pistol is a "handgun", "a firearm designed to be held and fired with one hand." Under 18 U.S.C. 921(a)(29), a "handgun" is a "firearm with a short stack and is designed to be held and fired by the use of a single hand." 27 C.F.R. 478.11 defines "pistol" as:

> "A weapon originally designed, made, and intended to fire a projectile (bullet) from one or more barrels when held in one hand, and having (a) a chamber(s) as an integral part(s) of, or permanently aligned with, the bore(s); and (b) a short stock designed to be gripped by one hand and at an angle to and extending below the line of the bore(s)."

The CT4-2A is not a pistol. The CT4-2A is not made, designed, or intended to be held and fired with one hand as evidenced by the fact that the CT4-2A is specifically designed with a front vertical foregrip intended to be used by a second

[15] Penal Law § 265.00 (11) defines a "rifle" as: "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder…"
[16] Penal Law § 265.00(12) defines a "shotgun" as: "a weapon designed or redesigned, made or remade, and intended to be fired from the shoulder…" Moreover, unlike a shotgun, the CT42A has a rifled barrel; shotguns have a smooth bore. [A13-A14].

hand. [A68]. Additionally, the overall weight of the CT4-2A, combined with the vertical foregrip creates a front-heavy imbalance and demonstrating the intention that it be used with a second hand, foreclosing any intention that it be fired with one hand. [A68].

Pistols are also made and designed for concealment.[17] The CT4-2A is not made, intended, or capable of being concealed on the person because it has an overall length exceeding 26 inches. [A67-A68 and attached photographs].

Based on the above, the CT4-2A cannot be considered an "assault weapon" as defined by Penal Law § 265.00 (22) because there are only three types of "assault weapons" defined in the Penal Law: (i) semiautomatic rifles with certain characteristics; (ii) semiautomatic shotguns with certain characteristics; and (iii) semiautomatic pistols with certain characteristics.

Because the specifications of the CT4-2A Other Firearm do not fit within the definition of "rifle", "shotgun" or "pistol", it cannot be a "semiautomatic rifle with certain characteristics", a "semiautomatic shotgun with certain characteristics" or a "semiautomatic pistol with certain characteristics" as required to be considered an "assault weapon" under the New York State Penal Law.

[17] Further demonstrating that the term 'pistol' refers only to those firearms that are small concealable is New York State's requirement that concealable firearms – pistols and revolvers – be licensed [see, Penal Law § 400.00, *et seq.*] but does not require the licensing of rifles, shotguns and "other firearms", such as the CT4-2A.

As the CT4-2A Other Firearm is not a "firearm" as that term is defined [not a rifle, shotgun, or pistol], any arrest for the "mere purchase and/or possession of the CT4-2A Other Firearm and/or the seizure of the CT4-2A Other Firearm from Appellants and/or similarly situated individuals violates the Fourth Amendment against unreasonable searches and seizures. Appellants demonstrated a high likelihood of success on the merits of their Fourth Amendment claim such that injunctive relief was warranted.

ii. Fifth Amendment Violation

The Takings Clause of the Fifth Amendment provides, "…nor shall private property be taken for public use, without just compensation." U.S. Const., Amdt. 5.

The Takings Clause applies to two types of governmental action: "physical takings" and "regulatory takings." Horne v. Dep't of Agric., 135 S. Ct. 2419, 2427 (2015). A physical taking occurs when "the government physically takes possession of an interest in property for some public purpose"—that is, when it "dispossess[es] the owner" of private property to promote the general good. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 322, 325 n.19 (2002).

When the government physically takes property, it "has a categorical duty to compensate the former owner." Id. at 322. That duty applies equally to takings of real and "personal property." Horne, 135 S. Ct. at 2427.

By contrast, a regulatory taking is "a restriction on the use" of private property. *Id.* A regulation that deprives an owner of "all economically beneficial use of her property" categorically requires government compensation. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1019 (1992)). A regulation of property use also requires compensation if it "goes too far"—an inquiry that requires analysis of several factors, including "the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 537-38, 540.

By its plain terms, the SCPD Letter is the embodiment of a government mandate that purchasers of the CT4-2A physically dispossess themselves of their private property — a physical taking that requires government compensation. See *Tahoe-Sierra*, 535 U.S. at 324 n.19 (holding that a physical taking "dispossess[es] the owner" of property); *Nixon v. United States*, 978 F.2d 1269, 1287 (D.C. Cir. 1992) (statute that "physically dispossessed" property owner "resulted in" per se taking). Physical dispossession of the kind mandated by the Policy is the paradigm of a physical taking – it seeks to "absolutely dispossesses the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 n.12 (1982).

As the Supreme Court noted in *Horne*, there is a fundamental difference between a regulation that restricts only the use of private property, and one that requires "physical surrender . . . and transfer of title." *Horne*, 135 S. Ct. at 2429.

The Policy requires permanent dispossession of the lawfully owned CT4-2A Other Firearm. This "per se taking" requires government compensation, but no means of compensating Appellants or any other lawful purchasers was provided or intended.

"Whatever . . . reasonable expectations" people may have "with regard to regulations," they "do not expect their property, real or personal, to be actually occupied or taken away." *Id.* at 2427.

Accordingly, Appellants' likelihood of success on the merits of their claim under the Takings Clause of the Fifth Amendment is substantially high. C.f., *Duncan v. Becerra*, 742 F. App'x 218, 222 (9th Cir. 2018) (affirming district court's granting of preliminary injunction against the State of California where newly passed state statute required "surrender, removal, or sale" of high capacity magazines lawfully possessed by the plaintiffs; state statute "fundamentally deprive[s] Plaintiffs not just of the use of their property, but of possession, one of the most essential sticks in the bundle of property rights…California cannot not use the police power to avoid compensation.").

iii. The SCPD Policy Violates the Due Process Clause

Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning

of the Due Process Clause of the Fourteenth Amendment. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

A regulation that deprives an owner of private property without a permissible justification violates the Due Process Clause regardless of whether it also violates the Takings Clause. *Lingle*, 544 U.S. at 541-42.

The Supreme Court consistently has held that some form of hearing is required before an individual is finally deprived of a property interest. *Ibid.* citing, *Wolff v. McDonnell*, 418 U.S. 539, 557-558 (1974); *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, 596-597 (1931); *Dent v. West Virginia*, 129 U.S. 114, 124-125 (1889).

The "right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society." *Ibid.* citing, *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring). The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Ibid.* citing, *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

The SCPD Letter demands summary compliance with the surrender of private property without compensation under the threat of arrest and criminal prosecution and provides no opportunity to be heard in violation of the Due

Process Clause of the Fourteenth Amendment. The plaintiffs' have a high likelihood of success on the merits of their Due Process claim.

By making the application for an injunction, Appellants sought a hearing on the merits of the SCPD Policy where Appellants and their witnesses would be subject to the penalties of perjury and Suffolk County would be required to bear witness under oath justifying its threats of arrest and its confiscation of personal property.

At the very least, the district court should have held a hearing or denied the TRO with leave to allow Appellants to file, and the County to oppose, a motion for a preliminary injunction. The *sua sponte* dismissal of this complaint thwarts justice by shielding Suffolk County from having to justify the confiscation of legally owned property from hundreds of individuals[18] under threat of arrest and prosecution.

D. The Requested Relief is in the Public Interest

Appellants demonstrated that the requested relief serves the public's interest because neither the government nor the public have an interest in the unlawful and unconstitutional overreach of police powers. C.f., *Airbnb, Inc. v. City of New York*, 373 F. Supp. 3d 467, 500 (S.D.N.Y. 2019), appeal withdrawn, No. 19-288, 2019

[18] The confiscation of CT4-2A Other Firearms under threat of arrest has already become a reality for Ron Wilson – the plaintiff in *Wilson v. Suffolk County, et al.*, 21 Civ. 03716 (JS)(SIL) - as well as numerous other lawful purchasers.

WL 3492425 (2d Cir. May 9, 2019) citing, *Ligon v. City of New York*, 925 F. Supp. 2d 478, 541 (S.D.N.Y. 2013) (finding that the public has a strong interest "in liberty and dignity under the Fourth Amendment").

While any member of the public could suddenly find themselves subject to a rogue local and/or county policy, "[e]ven if the constitutional violations described by plaintiffs were confined to the members of a discrete community, the public has a clear interest in protecting the constitutional rights of all its members." *Ligon*, 925 F. Supp. 2d at 541.

Appellants and approximately 500 members of the general public lawfully purchased a CT4-2A Other Firearm from a duly licensed FFL after a passing a federal background check through NICS. [A25-A65]. These purchasers, Appellants included, are "the public" for whom the requested injunctive relief will be protecting from a rogue unconstitutional policy.

There was no detriment to granting the requested relief, and the district court did not identify any.

Suffolk County would have suffered no harm from granting the requested relief because Appellants and similarly situated purchasers remain subject to the actual provisions of the Penal Law, which prohibit the unlawful use of any firearm. Appellants have demonstrated, by passing a NICS background check, that they pose no danger to the public. As such, their continued use and enjoyment of their

private property pending a determination as to the constitutionality of Suffolk County's Policy poses no threat.

IV. THE DISTRICT COURT'S FAILURE TO CONDUCT A BALANCING TEST IS REVERSIBLE ERROR

The district court erroneously found that 'no facts are offered' in support of the proposition that disclosure of Appellants' identities would cause them to suffer immediate arrest and/or the loss of their private property in the absence of due process. [A109].

As set forth above, neither the court nor Appellants know how many people were sent the May 20, 2021 Letter, how SCPD is tracking those who have been sent the Letter, those who have responded, and which purchasers have complied with the Letter. The allegations in the complaint are to be taken as true, not disregarded in favor of speculation as to what actions the SCPD will or will not take. Appellants have sworn under oath that they fear arrest and prosecution, which even if ultimately dismissed, will cause them irreparable harm. [A25-A65].

Federal Rule of Civil Procedure requires that Courts have "carved out a limited number of exceptions to the general requirement of disclosure [of the names of parties], which permit plaintiffs to proceed anonymously." *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 685 (11th Cir.2001).

This Circuit has established a balancing test that weighs the plaintiff's need for anonymity against countervailing interests in full disclosure. *Sealed Plaintiff v.*

Sealed Defendant, 537 F.3d 185, 188–89 (2d Cir. 2008). The district court failed to "balance the plaintiff's need for anonymity against countervailing interests in full disclosure."

Specifically, courts should consider whether:

(1) "the litigation involves matters that are highly sensitive and [of a] personal nature"; (2) "identification poses a risk of retaliatory physical or mental harm to the ... party [seeking to proceed anonymously] or even more critically, to innocent non-parties"; (3) "identification presents other harms and the likely severity of those harms ... including whether the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity"; (4) "the plaintiff is particularly vulnerable to the possible harms of disclosure ... particularly in light of his age"; (5) "the suit is challenging the actions of the government or that of private parties"; (6) "the defendant is prejudiced by allowing the plaintiff to press his claims anonymously, whether the nature of that prejudice (if any) differs at any particular stage of the litigation, and whether any prejudice can be mitigated by the district court"; (7) "the plaintiff's identify has thus far been kept confidential"; (8) "the public's interest in the litigation is furthered by requiring the plaintiff to disclose his identity"; (9) "because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigants' identities"; and (10) "there are any alternative mechanisms for protecting

the confidentiality of the plaintiff." *Rives v. SUNY Downstate Coll. of Med.*, No. 20CV621RPKSMG, 2020 WL 4481641, at *2 (E.D.N.Y. Aug. 4, 2020), reconsideration denied, No. 20CV621RPKSMG, 2020 WL 7356616 (E.D.N.Y. Dec. 14, 2020) citing, *Sealed Plaintiff*, 537 F.3d at 189.

The majority of the factors weigh in favor of Appellants. Disclosing Appellants' identities in the absence of an injunction poses a risk of retaliation by the SCPD, particularly if any of the Appellants have a Suffolk County pistol license, which is subject to the 'broad discretion' of the SCPD; disclosure will likely cause Appellants' immediate arrest and confiscation of their property. Moreover, because of the purely legal nature of the issues there is an atypically weak public interest in knowing the identities.

The district court also erred in placing the need for 'public scrutiny' over the imminent harm – arrest, prosecution, incarceration, and the loss of property - that will come to Appellants if SCPD knows that they are presently in possession of the CT4-2A Other Firearm.

V. THE COMPLAINT STATES A CLAIM UPON WHICH RELIEF SHOULD BE GRANTED

The foregoing, along with a plain reading of the complaint and documents submitted in support of Appellants' application for a TRO sufficiently demonstrate valid claims for violations of Appellants' fundamental rights under the Fourth,

Fifth, and Fourteenth Amendments to the Constitution, warranting reinstatement of the complaint.

CONCLUSION

The Memorandum of Decision and Order should be reversed in its entirety, the complaint reinstated, and the district court directed to issue a temporary restraining order enjoining Suffolk County, its officers, agents, servants, employees, and all persons acting in concert with the defendants who receive actual notice of the injunction, from (i) enforcing any provision of the SCPD Letter (ii) seizing, arresting, charging, and/or prosecuting Appellants and any similarly situated purchasers for the mere possession and/or purchase of the CT4-2A Other Firearm; and (iii) from confiscating, seizing, and/or interfering in any manner with the mere ownership and possession of the CT4-2A Other Firearm by Appellants and all similarly situated purchasers, and remand the matter to the district court for proceedings consistent herewith.

Dated: September 13, 2021

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CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), as it contains 10,281 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: September 13, 2021

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