

SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

897

CA 23-01059

PRESENT: LINDLEY, J.P., CURRAN, MONTOUR, OGDEN, AND NOWAK, JJ.

IN THE MATTER OF INVESTIGATOR JOHN KESEL,
ONTARIO COUNTY SHERIFF'S DEPARTMENT,
PETITIONER,

V

MEMORANDUM AND ORDER

JEFFREY HOLTZ, RESPONDENT-RESPONDENT.

LETITIA JAMES, ATTORNEY GENERAL OF THE STATE
OF NEW YORK, INTERVENOR-APPELLANT.

LETITIA JAMES, ATTORNEY GENERAL, ALBANY (SARAH COCO OF COUNSEL), FOR
INTERVENOR-APPELLANT.

SELENDY GAY ELSBERG PLLC, NEW YORK CITY (ANDREW R. DUNLAP OF COUNSEL),
ON BEHALF OF DISTRICT OF COLUMBIA AND STATES OF ARIZONA, CALIFORNIA,
COLORADO, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MAINE, MARYLAND,
MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW JERSEY, NEW MEXICO,
OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN
AS AMICI CURIAE IN SUPPORT OF INTERVENOR-APPELLANT.

ALVIN L. BRAGG, JR., DISTRICT ATTORNEY, NEW YORK CITY (JOHN T. HUGHES
OF COUNSEL), ON BEHALF OF ALVIN BRAGG, JR., DISTRICT ATTORNEY, NEW
YORK COUNTY; MELINDA KATZ, DISTRICT ATTORNEY, QUEENS COUNTY; MICHAEL
E. MCMAHON, DISTRICT ATTORNEY, RICHMOND COUNTY; AND MIRIAM E. ROCAH,
DISTRICT ATTORNEY, WESTCHESTER COUNTY AS AMICI CURIAE IN SUPPORT OF
INTERVENOR-APPELLANT.

ARNOLD & PORTER KAYE SCHOLER LLP, WASHINGTON, DC (ARTHUR LUK OF
COUNSEL), FOR GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AND BRADY
CENTER TO PREVENT GUN VIOLENCE, AMICI CURIAE.

Appeal from an order of the Supreme Court, Ontario County
(Frederick G. Reed, A.J.), entered May 5, 2023. The order dismissed
the application for a temporary extreme risk protection order and
final extreme risk protection order.

It is hereby ORDERED that the order so appealed from is
unanimously reversed on the law without costs, the application is
reinstated, and the matter is remitted to Supreme Court, Ontario
County, for further proceedings in accordance with the following
memorandum: Petitioner filed an application seeking a temporary
extreme risk protection order (TERPO) and final extreme risk
protection order (ERPO) against respondent pursuant to CPLR article

63-A. Supreme Court issued the TERPO, and respondent was directed to surrender his weapons. Prior to a final ERPO hearing, respondent moved to vacate the TERPO and asserted that CPLR article 63-A is unconstitutional. It is undisputed that respondent did not notify the Attorney General of his challenge to the constitutionality of the statute (see CPLR 1012 [b] [1]). The court determined that article 63-A is unconstitutional, vacated the TERPO, and dismissed petitioner's application without conducting an evidentiary hearing on its merits. Intervenor Letitia James, Attorney General of the State of New York, subsequently intervened and now appeals from that order, contending that the court erred in determining that article 63-A is unconstitutional. Inasmuch as respondent failed to notify the Attorney General that he would be challenging the constitutionality of the statute, the court was prohibited from considering respondent's constitutional challenge (see CPLR 1012 [b] [3]) and, moreover, that challenge is not properly before us (see *People v Reinard*, 134 AD3d 1407, 1409 [4th Dept 2015], *lv denied* 27 NY3d 1074 [2016], *cert denied* 580 US 969 [2016]; *People v Crespi*, 51 AD3d 1036, 1036 [2d Dept 2008]; *People v Whitehead*, 46 AD3d 715, 716 [2d Dept 2007], *lv denied* 10 NY3d 772 [2008]). We therefore reverse the order, reinstate the application, and remit the matter to Supreme Court for further proceedings thereon after additional briefing on respondent's constitutional challenge.