No. 20-1151

IN THE
Supreme Court of the United States

LIBERTARIAN PARTY OF ERIE COUNTY, et al.,
Petitioners,

v.

ANDREW M. CUOMO, Individually and as Governor of the State of New York, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly rejected petitioners' Second Amendment challenge to New York State's authority to maintain a firearms licensing scheme, to charge fees to cover the costs of issuing licenses, and to deny a license to a person whose criminal history shows a current unwillingness or inability to adhere to public safety laws.

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INTRODUCTION

Petitioners bring a Second Amendment challenge to New York State's regime for licensing the possession of firearms. New York's licensing regime has existed in the same essential form since 1913 and descends from a centuries-long Anglo-American historical practice of ensuring that only persons who are law-abiding and responsible have access to arms. Petitioners argue that the Second Amendment forbids a State to maintain a licensing scheme at all, and challenge various details of New York's scheme, including the background-check requirement, the State's imposition of licensing fees to cover the costs of issuing licenses, and certain of the State's licensing criteria.

The petition does not warrant this Court's review. Petitioners' case is a poor vehicle for evaluating the questions the petition seeks to present, the analysis of the court of appeals does not implicate any circuit split, and the decision below was correct.

Although the petition purports to have been brought on behalf of nine individuals and one organization (Pet. iii), petitioners have conceded that the organization identified in the caption does not possess standing; that petitioners Richard Cooper, Michael Rebmann, and Edward Garrett have not even applied for licenses; that petitioner Ginny Rober is dead; that petitioners Philip Mayor and William Cuthbert have moved to other States; and that petitioners Michael Kuzma and David Mongielo hold unrestricted licenses that enable them to possess firearms at home and carry firearms in public. Pet. 15; *see* Pet. App. 98, 102–103.

Thus, only petitioner John Murtari actually possesses Article III standing to pursue a challenge to New York's firearms licensing criteria. But his claim is not a suitable vehicle for challenging New York's "proper cause" requirement for a license to carry firearms in public because he applied only for a premises license, not a public carry license. Likewise, his claim is not a suitable vehicle for challenging New York's requirement that an applicant exhibit "good moral character," because he was not denied a license on that basis. Instead, he was denied a license for "good cause" based on his lengthy criminal history, which encompasses sentences for trespassing in violation of court orders, including trespassing in a federal courthouse. See *infra* at 16–17.

The petitioners who have brought damages requests cannot use those to avoid the mootness of their challenges to New York's requirement to show "proper cause" for a carry license. As they acknowledge, the respondents from whom they seek damages are state court judges who, as the court of appeals recognized, are absolutely immune from damages claims. Pet. 15; *see* Pet. App. 109. In disputing the court of appeals's conclusion, petitioners do not raise any issues meriting resolution by this Court. The court of appeals relied on well-settled legal principles in explaining why the judicial respondents were performing an at least quasi-judicial function when evaluating the merits of specific licensing applications, and therefore were entitled to immunity from petitioners' damages claims. Pet. App. 91, 107–109.

Beyond these serious vehicle problems, petitioners cannot identify any circuit split on the authority of a State to maintain a firearms licensing scheme or to

impose licensing fees to defray the costs of issuing firearm licenses. Seven circuits have held that firearms licensing and registration schemes do not run afoul of the Second Amendment; two circuits have explicitly held that that the administrative fees incidental to such schemes comport with the Second Amendment; and no court of appeals has held to the contrary on either issue.

Nor can petitioners identify any circuit split that is implicated by Murtari's specific licensing challenge. The court of appeals concluded that a State may consider an applicant's criminal history when deciding whether to grant a firearms license—and that a State is not required to issue a license to a person whose criminal history shows a current unwillingness or inability to adhere to public safety laws. Pet. App. 117. No circuit court has held otherwise. Because Murtari's licensing application was rejected based on his repeated and relatively recent failures to heed public safety laws, his claims do not raise any question regarding the scope of a law-abiding person's right to carry a firearm.[1]

A further reason why the petition should be denied is that the court of appeals's analysis was correct. New York's longstanding licensing regime is consistent with the historical scope of the Second Amendment. Moreover, petitioners' own experiences with the scheme show that it directly advances the State's

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[1] Thus, there is no need to hold this petition for the Court's decision in *New York State Rifle and Pistol Association v. Corlett*, No. 20-843, in which the Court granted certiorari to decide whether New York violated the Second Amendment by denying concealed-carry licenses for self-defense to petitioners, whose complaint alleged that they are law-abiding and responsible.

compelling interests in public safety and crime prevention without impinging on the rights of law-abiding and responsible persons to defend themselves. For example, Murtari is the only petitioner who applied for a firearms license but did not receive one; the other petitioners either did not apply for licenses or were not denied a license. And the denial decision, which he received in 2015, advised him that he could reapply once he was able to demonstrate that he was willing to abide by public safety laws. The Second Amendment permits that measured and tailored approach.

STATEMENT

1. In *District of Columbia v. Heller*, this Court recognized that the Second Amendment protects the rights of "law-abiding" and "responsible" persons to keep and bear arms. 554 U.S. 570, 625, 635 (2008). In line with that recognition, the Court emphasized that the Second Amendment right "is not unlimited," and that nothing in *Heller* should be taken to cast doubt on certain "longstanding" and "presumptively lawful regulatory measures," including "prohibitions on the possession of firearms by felons and the mentally ill." *Id.* at 626–27 & n.26. The Court added that its list of longstanding laws was not "exhaustive." *Id.* at 626.

This passage from *Heller* underscores the bedrock status of New York's firearms licensing scheme, which was a forerunner of the restrictions referenced with approval in *Heller*. New York's laws have existed in the same essential form since 1913 and are therefore even older than the restrictions on firearm possession by felons and the mentally ill that *Heller* approved as "longstanding" and "presumptively lawful." Those

restrictions were enacted at the state level in the 1920s and 1930s, and took their current forms at the federal level in the 1960s. See *infra* at 25.

After a 1911 New York Coroner's Office Report described a marked increase in homicides and suicides committed with concealable firearms, the New York legislature sought to craft a licensing scheme that would stem the rise in deaths associated with such weapons. *See People ex rel. Darling v. Warden of City Prison*, 154 A.D. 413, 423 (1st Dep't 1913); *Revolver Killings Fast Increasing*, N.Y. Times, Jan. 30, 1911, at 4 (citing New York Coroner's Office Report). The result was the enactment in 1911 of the Sullivan Law, which required a license to possess "any pistol, revolver or other firearm of a size which may be concealed upon the person." Ch. 195, § 1, 1911 N.Y. Laws 442, 443 (codifying former N.Y. Penal Law § 1897 ¶ 3).

In 1913, the New York legislature amended the Sullivan Law to establish statewide standards for issuing licenses to possess and carry concealable firearms. Ch. 608, § 1, 1913 N.Y. Laws 1627, 1627–30. As amended, the statute allowed any magistrate in the State to issue a license for home possession if the magistrate was "satisfied of the good moral character of the applicant," and "no other good cause exist[ed]" to deny the license. *Id.* at 1629. The statute also authorized a magistrate to issue a license for concealed carrying in public upon proof "of good moral character, and that proper cause exists for the issuance [of the license]." *Id.* Other States adopted similar laws.[2] Those laws and New York's were

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[2] *See, e.g.*, Ch. 256, § 2, 1913 Or. Laws 497, 497 (permit to acquire firearm issued only if affidavit showed "good moral

forerunners of two influential model acts: the model Revolver Act of 1923 promulgated by the United States Revolver Association, and the Uniform Firearms Act of 1930 promulgated by the National Conference of Commissioners on Uniform State Laws. The 1923 model Revolver Act included provisions restricting access to firearms by felons, and it mandated waiting periods between the purchase and transfer of firearms so as to enable law enforcement to perform background checks.[3] The 1930 Uniform Firearms Act built on the template of the 1923 model Revolver Act, including provisions for longer waiting periods and for restrictions on firearm access by persons convicted of violent crimes and those of "unsound mind."[4] In the 1920s and 1930s, at least fourteen States, the District of Columbia, and the territory of Hawai'i adopted these model acts or various provisions of them, including the restrictions on firearm access by felons and mentally ill persons.[5]

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character"); Ch. 2, § 3, 1918 Mont. Laws 6, 7 (permit to acquire firearm issued only upon determination that applicant was of "good moral character"); Ch. 197, § 3, 1919 N.C. Sess. Laws 397, 398 (same); Act of Apr. 7, 1921, § 2, 1921 Mo. Laws 691, 692 (same); *see also* Ch. 430, § 2, 1923 Ark. Acts 379, 380 ("good character"); Ch. 206, 1927 Haw. Sess. Laws 209 ("good moral character"); Ch. 321, § 9, 1927 N.J. Laws 742, 746 ("good character" and "good repute in the community"); Ch. 267, § 4, 1931 Tex. Gen. Laws 447, 447–48 ("good character").

[3] *See* Nat'l Conf. of Comm'rs on Uniform State Laws, *Handbook and Proceedings of the 34th Annual Meeting* 717–18, 731 (1924) (reprinting the 1923 Revolver Act and its appendix).

[4] *See* Uniform Firearms Act § 8 (Nat'l Conf. of Comm'rs on Unif. State L. 1930).

[5] *See, e.g.,* Ch. 339, § 2, 1923 Cal. Stat. 695, 696 (restricting firearm access by felons); Ch. 252 §§ 3, 7, 1923 Conn. Pub. Acts

Over the course of the twentieth century, New York maintained its licensing regime in essentially the same form. Statutory amendments and recodifications through the years reiterated the importance of New York's licensing requirements to public safety, but never evinced a "general animus towards guns." *Kachalsky v. County of Westchester*, 701 F.3d 81, 97 n.22 (2d Cir. 2012). As a 1965 legislative report observed: "Statutes governing firearms and weapons are not desirable as ends in themselves. Such legislation is valuable only as a means to the worthwhile end of preventing crimes of violence before they occur." State of N.Y., *Report of the N.Y. State Joint Legislative Comm. on Firearms & Ammunition* 12 (1965).

2. New York law requires a license to possess or carry a "firearm." *See* N.Y. Penal Law § 400.00. The statutory term "firearm" is defined to include

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3707–3709 (requiring application for purchase); Ch. 118, §§ 3, 8, 1923 N.H. Laws 138, 138–139 (felons); Ch. 266, §§ 5, 10, 1923 N.D. Laws 379, 380–81 (felons); Ch. 207, §§ 4, 9, 1925 Ind. Acts 495, 495, 497 (felons); Ch. 260, §§ 2, 10, 1925 Or. Laws 468, 468, 473 (felons); Ch. 3, § 1, sec. 7(b), 1925 W. Va. Acts 24, 26 (Extraordinary Sess.) (requiring dealer to report purchaser's characteristics to police); Ch. 206, § 23, 1927 Haw. Laws 209, 215–216 (conditioning permit to purchase on applicant's background); Ch. 372, § 2, 1927 Mich. Pub. Acts 887, 887–88 (felons and those "adjudged insane"); Ch. 321, §§ 4, 7, 1927 N.J. Laws 742, 743, 45 (those convicted of violent crimes and "not of sound mind"); Ch. 1052, § 3, 1927 R.I. Sess. Laws 256, 257 (those convicted of violent crimes); Act No. 158, §§ 4, 9, 1931 Pa. Laws 497, 498-99 (those convicted of violent crimes and of "unsound mind"); Ch. 465, §§ 3, 7, 47 Stat. 650, 651, 652 (D.C. 1932) (same); Ch. 63, § 6, 1935 Ind. Acts 159, 161 (same); Ch. 208, §§ 4, 9, 1935 S.D. Sess. Laws 355, 355–56 (same); Ch. 172, §§ 4, 8, 1935 Wash. Sess. Laws 599, 601 (same); Act No. 82, § 9, 1936 Ala. Laws 51, 53 (Feb. Gen. Laws Extra Sess.) (same).

handguns (e.g., pistols and revolvers) but excludes most rifles and shotguns, which are not subject to New York's licensing requirements. *Id.* § 265.00(3). New York residents may obtain either a "premises" license, which allows them to possess a firearm in their home or place of business, *id.* § 400.00(2)(a)–(b), or a "carry" license, which allows them to carry a concealed firearm in public, *id.* § 400.00(2)(c)–(f). An applicant must apply for licenses in the county where the applicant resides or does business. *Id.* § 400.00(3)(a).

To obtain a premises license, an applicant must show that he or she is at least twenty-one years old, of "good moral character," has no history of serious crime or mental illness, and that "no good cause exists for the denial of the license." *Id.* § 400.00(1). To obtain an unrestricted carry license, an applicant must make the requisite showing for a premises license and establish "proper cause" for issuing an unrestricted carry license. *Id.* § 400.00(2)(f). If the applicant does not obtain an unrestricted carry license, the applicant may receive a carry license that is restricted to specific purposes such as hunting and target shooting. *See Kachalsky*, 701 F.3d at 86 & n.5.

Applicants for licenses must undergo a background check of their mental health history and criminal history. *See* N.Y. Penal Law § 400.00(1), (12). Local police departments, which conduct the background checks, may charge fees for processing applications and performing background checks. *Id.* § 400.00(14).

Upon completion of the background check, the local police department reports the results to a local licensing officer, who adjudicates the application. *See id.* § 400.00(4). In almost all New York counties—

including those in which petitioners reside and would make any application for a firearms license—the local licensing officer is the "judge or justice of a court of record having his office in the county of issuance." *Id.* § 265.00(10). A challenge to a licensing adjudication rendered by a state court judge or justice must be brought in the Appellate Division of New York Supreme Court. *See, e.g.*, *Matter of Hassig v. Nicandri*, 2 A.D.3d 1118, 1119 (3d Dep't 2003).[6]

3a. Petitioners' complaint (CA2 J.A. 56–81) alleges that New York's firearms licensing regime violates their Second Amendment rights. Petitioners challenge the State's authority to maintain a firearms licensing scheme, the scheme's background-check requirement, the State's imposition of licensing fees to cover the costs of issuing licenses, and certain of the State's criteria for premises licenses and public carry licenses. The complaint alleges that petitioner Murtari applied for but was denied a premises license; that petitioner Cuthbert applied for an unrestricted license but was granted a carry license restricted to target shooting and hunting; that petitioner Mayor secured an unrestricted license but faced a "constant threat" that it could be revoked; and that petitioner Mongielo's unrestricted license was suspended after an arrest and then fully reinstated—putting Mongielo under a "constant threat" of revocation. CA2 J.A. 67–69 (complaint). The complaint contained no

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[6] In New York City and Nassau County, the local licensing officer is the police commissioner; in Suffolk County, the local licensing officer is the police commissioner or the sheriff, depending on the applicant's town. N.Y. Penal Law § 265.00(10). A licensing decision made by a police official may be reviewed in court under N.Y. C.P.L.R. article 78. *See, e.g., Matter of Delgado v. Kelly*, 127 A.D.3d 644 (1st Dep't 2015).

allegations that petitioners Cooper, Garrett, Kuzma, Rebmann, and Rober had applied for or been denied a license, and no allegations whatsoever about any injuries purportedly suffered by the Libertarian Party of Erie County.

As relief, petitioners requested an injunction striking down New York's licensing laws and money damages from Governor Andrew M. Cuomo, then-Attorney General Eric T. Schneiderman, then-Superintendent of State Police Joseph A. D'Amico,[7] and three state court judges who issued license-related rulings pertaining to petitioners Murtari, Cuthbert, and Mongielo. CA2 J.A. 58–59, 67–71 (complaint).

b. The district court dismissed the action. The court held that all of the petitioners except Murtari and Cuthbert lacked standing, noting that some had not even applied for a license, while others already held an unrestricted license. Pet. App. 46–54. The court further held that the Governor, the Attorney General, and the Superintendent were improper defendants because they had no involvement in administering firearms licensing laws, and therefore the claims against them could not satisfy the traceability component of standing; and that Judge Murphy was an improper defendant because he had reinstated Mongielo's unrestricted license, leaving Mongielo with no redressable claim against him. Pet. App. 49–54.

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[7] The Attorney General is currently Letitia James; the Superintendent's duties are currently performed by Acting Superintendent Kevin P. Bruen.

In addition, the court held that Eleventh Amendment sovereign immunity barred all of petitioners' official-capacity damages claims, and absolute judicial immunity barred their individual-capacity damages claims, which were brought only against the judicial respondents. Pet. App. 54–59. The court then held that, although Murtari had standing to bring a claim for injunctive relief against Judge Kehoe for denying Murtari a premises license, and Cuthbert had standing to bring such a claim against Justice Boller for denying Cuthbert an unrestricted carry license, their respective Second Amendment challenges were meritless. Pet. App. 63–73.

c. The court of appeals affirmed the dismissal of the complaint. The court held that the petitioners who had secured licenses and the petitioners who had not applied for licenses had not suffered an injury-in-fact and therefore lacked Article III standing to sue. Pet. App. 102–103. The court also agreed with the district court's conclusion that Governor Cuomo, Attorney General James, and Superintendent D'Amico were not proper defendants; that the judicial defendants were immune from petitioners' damages claims; and that Mongielo had not stated any redressable claims. Pet. App. 103–110.

The court of appeals noted that petitioner Cuthbert had moved away from New York while the appeal was pending, thus mooting petitioners' challenge to New York's carry licensing laws. Pet. App. 98. The court further noted that even if Cuthbert's claim were not moot, it would have been foreclosed by the court's *Kachalsky* decision. Pet. App. 113.

Finally, the court of appeals observed that the complaint had failed to allege that any law-abiding,

responsible citizen had been denied a premises license. Pet. App. 115. As the court noted, the only petitioner who was denied a premises license was Murtari, who had failed to demonstrate a "law-abiding temperament" and had "frequently violat[ed] court orders for "more than a decade"—as petitioners' complaint acknowledged. Pet. App. 117. Reasoning that New York's premises licensing laws did not impose substantial burdens on the Second Amendment rights of law-abiding and responsible citizens, the court subjected the laws to intermediate scrutiny. Pet. App. 114–116. The court concluded that the laws satisfied that standard in light of the "close relationship between the licensing regime and the State's interests in public safety and crime prevention—as well as solicitude for the Second Amendment rights of citizens who are responsible and law abiding." Pet. App. 117.

REASONS FOR DENYING THE PETITION

I. This Case Is a Poor Vehicle for Considering the Questions the Petition Seeks to Raise.

Petitioners seek to raise sweeping constitutional challenges to New York's firearms licensing regime, but as the court of appeals correctly recognized, almost all of petitioners' claims fail at the threshold. Most of the petitioners lack Article III standing to challenge the State's licensing criteria because they have not applied for a license, possess unrestricted licenses, or have moved away from New York.[8] One petitioner (Murtari) possesses a live challenge to the denial of his

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[8] Petitioners abandoned their claims on behalf of the Libertarian Party of Erie County. *See* Pet. App. 81.

application for a premises license, but the facts of his case make it a poor vehicle for broader constitutional review; as the complaint acknowledges, the basis for the denial was Murtari's chronic and comparatively recent history of breaking the law—including by violating court orders. Nor can damages claims save petitioners' constitutional challenges. The respondents here are either state officials who have no role in firearm licensing, or state judges who possess absolute judicial immunity against petitioners' damages claims.

1. Several of the petitioners (Cooper, Garrett, and Rebmann) never applied for a firearms license and do not allege that applying would have been futile. As the court of appeals properly held, they lack an injury-in-fact. Pet. App. 102 (citing, inter alia, *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 167 (1972)).[9]

Other petitioners (Mongielo and Kuzma) already possess unrestricted licenses. The court of appeals correctly noted that their allegations that they are under a "constant threat" that their licenses might be revoked is a mere speculative fear of future injury (Pet. App. 102–103), of the type that this Court has

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[9] *See also Morin v. Leahy*, 862 F.3d 123, 128 (1st Cir. 2017) (plaintiff lacked "standing to challenge the constitutionality of the statutory scheme that governs the issuance" of Massachusetts Firearm Identification Card required to possess handgun in homes, because "without having applied for, or having been denied, a [card], [plaintiff] can show no injury to sustain his claim"); *Parker v. District of Columbia*, 478 F.3d 370, 373–75 (D.C. Cir. 2007) (only plaintiff who had applied for D.C. registration certificate to possess handgun in home had standing), *aff'd sub nom. District of Columbia v. Heller*, 554 U.S. 570 (2008).

found inadequate to support standing, *see Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). Although Mongielo alleges that his license was temporarily suspended after he was arrested and prosecuted on charges of obstructing governmental administration and resisting arrest, he admits that his license was fully restored after the charges were resolved in his favor. He advances no allegations to support his fear that his license might be revoked at some uncertain time in the future for no ascertainable reason. CA2 J.A. 67–68 (complaint). As the court of appeals observed, Mongielo's fear of revocation is "speculative" and "insufficiently concrete" to confer standing. Pet. App. 102.

Cuthbert, the only petitioner who applied for and did not receive an unrestricted license, has moved away from New York. Pet. App. 103. As the court of appeals rightly observed, that move rendered him ineligible for a New York firearm license, *see* Penal law § 400.00(3)(a), for reasons other than Penal Law § 400.00(2)'s "proper cause" requirement—thereby mooting his claim for an injunction against that requirement. Pet. App. 103, 110; *see Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 72 (1997). Petitioner Mayor possessed an unrestricted license when this litigation commenced (Pet. App. 102) and he has since moved away from New York (Pet. 15). And petitioner Rober, who had not applied for a license, died while the appeal was pending. Pet. App. 98. Thus, their claims were not justiciable from the case's start, and their claims remain non-justiciable now: striking down New York's firearms licensing regime, as they request, will not benefit them. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983).

2. An additional defect in the complaint, as the court of appeals recognized, is that the complaint names multiple improper defendants. Because the Governor, the Attorney General, and the Superintendent of the State Police have no role in administering New York's firearms licensing laws here, petitioners' injuries are not fairly traceable to those officials. Pet. App. 103; *see also* Pet. App. 53–54. *See generally* N.Y. Penal Law §§ 265.00, 400.00 (providing no role for listed defendants in administering licensing laws relating to petitioners).

The court of appeals also correctly held that Eleventh Amendment sovereign immunity bars petitioners' official-capacity damages claims against all the defendants, and absolute judicial immunity bars petitioners' individual-capacity damages claims against the state court judges who issued rulings concerning certain petitioners' firearms licenses. Pet. App. 106–110. *See also Kentucky v. Graham*, 473 U.S. 159, 167 (1985). Each state court judge considered a request for a "declaration on rights as they stand" and issued a decision on the "merits" that set forth the reasons for the decision based on "present or past facts" and "existing law." *See District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 478–80 (1983) (quotation marks omitted); *see also* Penal Law § 400.00(4-a) (requiring that license denials include "reasons specifically and concisely stated in writing"). The license-adjudication process also included safeguards to ensure fair decision-making and to correct errors, including participation by the individual seeking the license and an opportunity for judicial review. *See Cleavinger v. Saxner*, 474 U.S. 193, 201–02 (1985). For example, the denied applicants could have sought further review in New

York's intermediate appellate court. *See, e.g.*, *Matter of Parker v. Randall*, 120 A.D.3d 946, 947 (4th Dep't 2014). And given the public-safety dimension of the judicial respondents' decision-making, there is a significant "need to assure" that the judges can "perform [their] functions without harassment or intimidation." *See Cleavinger*, 474 U.S. at 201–02.[10]

3. The only remaining claim here—and the sole claim on which the lower courts reached the merits—is Murtari's challenge to the order denying him a premises license. A. 110. But that claim presents a poor vehicle for broader constitutional review because it is evident from the pleadings that during the time leading up to Judge Kehoe's decision, Murtari had not been a "law-abiding" or "responsible" citizen, *see Heller*, 554 U.S. at 625, 635. Justice Kehoe's 2015 decision, which is quoted in petitioners' complaint, recounted that Murtari had been arrested approximately fifty times from 1998 through 2010; had committed trespass in violation of a federal court order on four occasions; and had served multiple post-conviction jail sentences. Judge Kehoe concluded that

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[10] For these same reasons, the judicial respondents would be entitled to immunity from damages claims even if they were acting as licensing officials performing a quasi-judicial role. *See Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 436 (1993) (recognizing that absolute immunity may "extend[] to officials other than judges"); *Keystone Redevelopment Partners, LLC v. Decker*, 631 F.3d 89, 101 (3d Cir. 2011) (state gaming control board members adjudicating issuance of gaming licenses) (citing *Cleavinger*, 474 U.S. at 201–02); *Diva's Inc. v. City of Bangor*, 411 F.3d 30, 40 (1st Cir. 2005) (city council members adjudicating issuance of special amusement permits for semi-nude dancing establishments); *Watts v. Burkhart*, 978 F.2d 269, 277 (6th Cir. 1992) (state medical licensing board members adjudicating revocation of physician licenses).

Murtari's "prior conduct" constituted "good cause" to deny his application. CA2 J.A. 69–70 (denial quoted in complaint); *see also* CA2 J.A. 93–94 (denial as exhibit to motion to dismiss).

Several of Murtari's arrests and trespassing offenses concern actions that he undertook at the James F. Hanley Federal Building in Syracuse, New York, such as refusing direct orders from law-enforcement personnel to cease his disruptive activities there. *See, e.g.*, *United States v. Murtari*, No. 5:03 Crim. 81, 2007 WL 1174860, at *1 (N.D.N.Y. Apr. 19, 2007); *United States v. Murtari*, No. 5:07 Crim. 387, 2007 WL 3046746, at *1 (N.D.N.Y. Oct. 16, 2007). Even after court orders restricting his access to the area, he continued his disruptive activities. *United States v. Murtari,* No.5:07 Crim. 428, 2008 WL 687434, at *6 (N.D.N.Y. Mar. 11, 2008). As one federal judge observed, by "unilaterally deciding that he would violate any order" that was "not to his liking," Murtari exhibited a fundamental failure to grasp that "[o]ur country's justice system operates pursuant to the rule of law." *Id.*; *see also United States v. Murtari*, 120 F. App'x 378, 380 (2d Cir. 2004) (noting Murtari's "avowed unwillingness to abide by" the "lawful restrictions on his use of the Federal Building").

Because Justice Kehoe found that affirmative "good cause exists for the denial of the license," N.Y. Penal Law § 400.00(1)(n), Justice Kehoe did not reach any question of whether Murtari has "good moral character," *id.* § 400.00(1)(b). *See* CA2 J.A. 93–94 (order denying application). This case thus presents no vehicle for this Court to evaluate the "good moral character" requirement of New York's firearm licensing scheme. Pet. 7, 11.

This case is likewise a weak vehicle to evaluate whether New York's other premises licensing requirements comply with the Second Amendment. Murtari is the only petitioner who applied for and was denied a premises license, and thus the only petitioner with standing to challenge New York's criteria for issuing a premises license. But Murtari's conduct has been far from "law-abiding" and "responsible," *see Heller*, 554 U.S. at 625, 635, and he points to no circuit split on the question whether a State must grant a firearms license to a person whose ongoing criminal history of arrests, prosecutions, jail sentences, and violations of court orders—and whose averments to federal judges—show that he cannot and will not heed public safety laws.

II. Petitioners Fail to Identify Any Split in Authority on the Questions They Present in Their Petition.

1. Petitioners ask this Court to grant certiorari to decide whether a State may license firearms ownership at all, or charge a fee to defray the cost of processing such licenses. Pet. 4, 9, 26. There is no circuit split on these questions. No court of appeals has suggested that licensing or registration schemes for firearms ownership are inherently suspect, or that the fees incidental to such schemes violate the Second Amendment.

Seven courts of appeals—the First, Second, Third, Fourth, Seventh, Ninth, and D.C. Circuits—have held that the Second Amendment allows some licensing or

registration schemes for firearms.[11] Consistent with *Heller's* observation that the Constitution leaves States and localities with a "variety of tools" to combat gun violence, "including some measures regulating handguns," 554 U.S. at 636, those courts have concluded that licenses and similar measures are among the "traditional" and constitutionally available options, *see Wrenn*, 864 F.3d at 667; *cf. Heller II*, 670 F.3d at 361 (Kavanaugh, J., dissenting) (noting that licensing laws can "advance gun safety by ensuring that owners understand how to handle guns safely").

Two courts of appeals, relying on precedents of this Court, have expressly concluded that the Second Amendment permits States and localities to charge administrative fees to defray the costs of maintaining licensing or registration schemes. The D.C. Circuit has

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[11] The Second Circuit and the D.C. Circuit have upheld licensing and registration schemes for *possessing* firearms. *See* Pet. App. 115–117; *Heller v. District of Columbia* ("*Heller III*"), 801 F.3d 264, 273–74 (D.C. Cir. 2015) and *Heller v. District of Columbia* ("*Heller II*"), 670 F.3d 1244, 1254–55 (D.C. Cir. 2011) (upholding D.C.'s basic registration requirements for long guns and handguns respectively).

And five circuits have upheld licensing schemes for *carrying* firearms in public. *See Kachalsky*, 701 F.3d at 100–01; *Gould v. Morgan*, 907 F.3d 659, 662 (1st Cir. 2018); *Drake v. Filko*, 724 F.3d 426, 431 (3d Cir. 2013); *Woollard v. Gallagher*, 712 F.3d 865, 868 (4th Cir. 2013); *Young v. Hawai'i*, 992 F.3d 765, 773 (9th Cir. 2021) (en banc). Although other courts have struck down particular carry-licensing schemes as too restrictive, those courts have noted that they, too, view licensing as a permissible regulatory tool. *See Moore v. Madigan*, 702 F.3d 933, 941–42 (7th Cir. 2012) (inviting Illinois legislature to "craft a new gun law that will impose reasonable limitations"); *Wrenn v. District of Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017) (recognizing that "licensing requirements" are "traditional limits").

explained that "administrative . . . provisions incidental to the underlying regime"—which include reasonable fees associated with registration—"are lawful insofar as the underlying regime is lawful." *Heller II*, 670 F.3d at 1249 n.*; *accord Heller III*, 801 F.3d at 274 (quoting *Heller II*) (citing *Cox v. New Hampshire*, 312 U.S. 569, 577 (1941)). The Second Circuit similarly has explained that imposing fees "to defray" the "administrative costs" of maintaining a firearms licensing scheme does not itself violate the Second Amendment. *Kwong v. Bloomberg*, 723 F.3d 160, 165–66 (2d Cir. 2013) (citing *Cox*, 312 U.S. at 577).[12] Courts of appeals have applied a similar analysis outside of the Second Amendment context too, recognizing that governments may license other types of constitutionally protected activity and charge administrative fees that are designed to defray the costs of the licensing scheme.[13]

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[12] *See also Lane v. Holder*, 703 F.3d 668, 673 (4th Cir. 2012) (holding that the "additional costs and logistical hurdles" associated with the federal requirement that interstate firearm transfers take place via federal firearm licensees are "distinct from an absolute deprivation" of the Second Amendment right); *Ezell v. Chicago*, 651 F.3d 684, 695, 698 (7th Cir. 2011) ("expense and inconvenience" of traveling "was not the relevant constitutional harm" associated with the challenged restriction on firing-ranges).

[13] *See, e.g.*, *International Women's Day March Planning Comm. v. City of San Antonio*, 619 F.3d 346, 370–71 (5th Cir. 2010) (rejecting First Amendment challenge to fee defraying costs of permitting regime for street processions); *Jake's, Ltd., Inc. v. City of Coates*, 284 F.3d 884, 890–91 (8th Cir. 2002) (same, for fee defraying costs of licensing regime for adult businesses); *American Target Adver., Inc. v. Giani*, 199 F.3d 1241, 1248–49 (10th Cir. 2000) (same, for fee defraying costs of registration regime for charitable fundraisers); *Coalition for the Abolition of*

2. Nor does the decision below precipitate any circuit split on the scope of the Second Amendment right. All eleven courts of appeals that have interpreted the Second Amendment in *Heller*'s aftermath, including the Second Circuit in this case and others, recognize that the Second Amendment protects the right of "law-abiding" and "responsible" persons to possess firearms. *See Heller,* 554 U.S. at 625, 635. These courts have also uniformly held that the Second Amendment permits the government to restrict a person's access to firearms, if that person has demonstrated a lack of capacity or will to heed public safety laws.[14] In the decision below, the Second

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Marijuana Prohibition v. City of Atlanta, 219 F.3d 1301, 1324 (11th Cir. 2000) (same, for fee defraying costs of permitting regime for outdoor festivals); *Northeast Ohio Coal. for the Homeless v. City of Cleveland*, 105 F.3d 1107, 1109–10 (6th Cir. 1997) (same, for fee defraying costs of licensing regime for street peddlers).

[14] *See* Pet. App. 115–117; *United States v. Rene E.*, 583 F.3d 8 (1st Cir. 2009) (juveniles); *Folajtar v. Attorney General*, 980 F.3d 897 (3d Cir. 2020) (person convicted of tax fraud), *cert. denied*, 2021 WL 1520793 (Apr. 19, 2021); *United States v. Chester*, 514 F. App'x 393 (4th Cir. 2013) (domestic-violence misdemeanants); *National Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms, & Explosives*, 700 F.3d 185 (5th Cir. 2012) (18-to-20-year-olds); *Tyler v. Hillsdale County Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc) (involuntarily committed person); *United States v. Yancey*, 621 F.3d 681 (7th Cir. 2010) (per curiam) (habitual drug users); *United States v. Bena*, 664 F.3d 1180 (8th Cir. 2011) (persons subject to court order of protection); *United States v. Torres*, 911 F.3d 1253 (9th Cir. 2019) (undocumented immigrants); *United States v. Reese*, 627 F.3d 792 (10th Cir. 2010) (persons subject to domestic restraining order); *United States v. Focia*, 869 F.3d 1269 (11th Cir. 2017) (unlicensed firearms dealer); *Schrader v. Holder*, 704 F.3d 980 (D.C. Cir. 2013) (common-law misdemeanants).

Circuit rejected a challenge to New York premises licensing laws by Murtari (Pet. App. 115–117), who openly "avowed" an "unwillingness" to be law-abiding and responsible, *see Murtari*, 120 F. App'x 379. That decision is fully in line with the unanimous circuit position.[15]

Equally unavailing is petitioners' suggestion that the decision below deepens a divide among the courts of appeals on the scope of a law-abiding and responsible person's right to carry firearms in public. *See* Pet. 25–26. Murtari is the only petitioner with live claims, he applied only for a premises license, and his application was denied because he was demonstrably neither law-abiding nor responsible. His claims, therefore, cannot implicate any questions regarding the scope of that particular right.

III. The Decision Below Is Correct.

An additional reason why this Court should deny the petition is that the court below correctly decided the only question presented on the merits: petitioner Murtari's Second Amendment challenge to New York's premises licensing scheme. The court of appeals correctly concluded that New York's premises licensing laws are supported by a centuries-old tradition of regulating access to firearms by persons who are not law-abiding or responsible. That court also correctly concluded that New York's premises

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[15] Petitioners suggest (*see* Pet. 26) that the decision below conflicts with the Ninth Circuit's approach in *Duncan v. Becerra*, 970 F.3d 1133 (9th Cir. 2020) (rejecting ban on large-capacity magazines). But the Ninth Circuit has vacated that opinion and will rehear the case en banc. *See* 988 F.3d 1209 (9th Cir. 2021).

licensing laws directly advance the State's compelling interests in protecting the public from gun violence.[16]

A. History and tradition show that New York's premises licensing laws are consistent with the Second Amendment.

In *Heller*, this Court stressed that the Second Amendment right is "not unlimited" and does not allow a person to keep "any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller*, 554 U.S. at 626; *accord McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010). Rather, the Court explained, the Second Amendment "codified a *preexisting* right," *Heller*, 554 U.S. at 592, and thus incorporated the "limitations upon the individual right," *id.* at 595 that were "inherited from our English ancestors," *id.* at 599. The Court also made clear that its decision should not "be taken to cast doubt on longstanding prohibitions," such as the prohibitions "on the possession of firearms by felons and the mentally ill." *Id.* at 626, 627 & n.26; *accord McDonald*, 561 U.S. at 786. In line with that analysis, the Court emphasized that the Second Amendment protects the right of "law-abiding" and "responsible" persons to possess firearms. *Heller*, 554 U.S. at 625, 635. The Court added that its list of longstanding laws was not "exhaustive" and that such measures are "presumptively lawful." *Id.* at 626, 627 & n.26.

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[16] The court below did not address the merits of petitioner Cuthbert's Second Amendment challenge to New York's carry-licensing scheme. As noted (*supra* at 14), because Cuthbert moved away from New York, he had no longer had a justiciable interest in the controversy. Pet. App. 110.

New York's premises licensing laws are similar to the items on *Heller*'s list of longstanding and presumptively lawful regulatory measures. The legislation that created New York's licensing scheme—the Sullivan Law—was enacted in 1911, and in 1913, it was amended to condition the issuance of a license to possess a handgun on an individual's ability to demonstrate that the individual was law-abiding and responsible. Other States followed New York's example.[17] The Sullivan Law and the similar laws in other States were forerunners of two influential model acts, the Revolver Act of 1923 and the Uniform Firearms Act of 1930. The Revolver Act included provisions restricting access to firearms by felons,[18] and the Uniform Firearms Act included provisions restricting access to firearms by those convicted of violent crimes and those of "unsound mind."[19]

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[17] *Compare* Ch. 608, § 1, 1913 N.Y. Laws 1627, 1629 (conditioning license for possession on applicant's "good moral character"), *with, e.g.*, Ch. 256, § 2, 1913 Or. Laws 497, 497 (permit to acquire firearm issued only if affidavit showed "good moral character"); Ch. 2, § 3, 1918 Mont. Laws 6, 7 (permit to acquire firearm issued only upon determination that applicant was of "good moral character"); Ch. 197, § 3, 1919 N.C. Sess. Laws 397, 398 (same); Act of Apr. 7, 1921, § 2, 1921 Mo. Laws 691, 692 (same); *see also* Ch. 430, § 2, 1923 Ark. Acts 379, 380 ("good character"); Ch. 206, § 23, 1927 Haw. Sess. Laws 209, 215–16 ("good moral character"); Ch. 321, § 9, 1927 N.J. Laws 742, 746 ("good character" and "good repute in the community"); Ch. 267, § 4, 1931 Tex. Gen. Laws 447, 447–48 ("good character").

[18] *See* Nat'l Conf. of Comm'rs on Uniform State Laws, *Handbook and Proceedings of the 34th Annual Meeting* 717–18, 731 (1924) (reprinting the 1923 Revolver Act and its appendix).

[19] *See* Uniform Firearms Act § 8 (Nat'l Conf. of Comm'rs on Unif. State L. 1930).

States began adopting restrictions on firearm possession by felons and the mentally ill in the 1920s and 1930s.[20] Federal restrictions on possession by felons and the mentally ill were enacted even later. The federal restriction on felons, 18 U.S.C. § 922(g)(1), was not enacted until 1938, and was not expanded to cover non-violent felonies until 1961. In 1968, Congress enacted the first restrictions on possession by felons and by the mentally ill.[21] New York's laws, which predated and influenced these later laws, are even more "longstanding," and are entitled to at least as strong a presumption of lawfulness.

History and tradition also support the constitutionality of New York's premises licensing laws in a more fundamental sense. New York's regime descends from a centuries-old Anglo-American tradition that aims to limit access to arms by those who would not use them lawfully and responsibly. Although the terminology used to describe law-

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[20] *See, e.g.*, Ch. 339, § 2, 1923 Cal. Stat. 695, 696 (felons); Ch. 118, §§ 3, 8, 1923 N.H. Laws 138, 138–139 (felons); Ch. 266, §§ 5, 10, 1923 N.D. Laws 379, 380–81 (felons); Ch. 207, §§ 4, 9, 1925 Ind. Acts 495, 495, 497 (felons); Ch. 260, §§ 2, 10, 1925 Or. Laws 468, 468, 473 (felons); Ch. 372, § 2, 1927 Mich. Pub. Acts 887, 887–88 (felons and those "adjudged insane"); Ch. 321, §§ 4, 7, 1927 N.J. Laws 742, 743, 745 (those convicted of violent crimes and "not of sound mind"); Ch. 1052, § 3, 1927 R.I. Sess. Laws 256, 257 (those convicted of violent crimes); Act No. 158, §§ 4, 9, 1931 Pa. Laws 497, 498-99 (those convicted of violent crimes and of "unsound mind"); Ch. 63, § 6, 1935 Ind. Acts 159, 161 (same); Ch. 208, §§ 4, 9, 1935 S.D. Sess. Laws 355, 355–56 (same); Ch. 172, §§ 4, 8, 1935 Wash. Sess. Laws 599, 601 (same); Act No. 82, § 9, 1936 Ala. Laws 51, 53 (Feb. Gen. Laws Extra Sess.) (same).

[21] *See* Federal Firearms Act, ch. 850, 52 Stat. 1250, 1251 (1938); Pub. L. No. 87-342, 75 Stat. 757 (1961); Omnibus Crime Control Act of 1968, Pub. L. No. 90-351, § 1202, 82 Stat. 197, 236.

abiding and responsible persons has differed through the centuries, the principle has remained steadfast: for public welfare's sake, legislatures may impose "restraints" on firearm possession by persons outside that category to prevent "what would be pernicious either to ourselves or our fellow citizens." 1 William Blackstone, *Commentaries* *139–40; *see also* 1 W. & M., ch. 2, § 7, in 3 Eng. Stat. at Large 440, 441 (1689) (permitting persons to access arms as "suitable to their Conditions and as allowed by Law"). See *supra* at 5 & n.2 (describing "good moral character" laws).

Petitioners thus miss the mark in contending, in their petition and supplemental brief, that New York's laws conflict with a tyranny-deterring function of the Second Amendment. Pet. 30; Supp. Br. 1–3. From the English Bill of Rights through *Heller*, it has been understood that firearm possession can both serve that function *and* be subject to reasonable public safety laws. *See* 554 U.S. at 593–95. New York's laws fit comfortably within this historical tradition.

B. New York's premises licensing laws advance the State's compelling interests in public safety and crime prevention.

The court of appeals also correctly concluded that New York's premises licensing scheme was sufficiently related to New York's compelling interest in public safety and crime prevention to pass constitutional muster. Pet. App. 114–117; *see also* Pet. App. 68–72.[22] Petitioners' experiences with the

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[22] As *Heller* recognized, and as several courts of appeals have subsequently observed, heightened scrutiny is not

scheme support that conclusion. They allege that only Murtari applied for and was denied a premises license; and they acknowledge that Murtari has violated numerous court orders, been arrested over fifty times, and been jailed several times. Pet. App. 116–117; CA2 J.A. 69–70 (complaint). See *supra* at 16–17. Moreover, court decisions concerning Murtari's prior federal offenses establish Murtari's inclination to defy public safety laws that are not "to his liking." *See Murtari,* 2008 WL 687434, at *6; *see also Murtari*, 120 F. App'x at 379; *Murtari*, 2007 WL 1174860, at *1; *Murtari*, 2007 WL 3046746, at *1.

The court of appeals also properly found that New York's premises licensing laws are appropriately tailored. For the typical applicant, a New York premises license is not "difficult to come by," as the New York Court of Appeals has explained. *People v. Hughes*, 22 N.Y.3d 44, 50 (2013). Petitioners' complaint does not allege facts showing that New York's premises licensing laws impose substantial burdens on the self-defense rights of law-abiding and responsible persons. A law-abiding, responsible applicant must provide basic information (e.g., name, date of birth, address, Social Security number, citizenship status), submit character references, pay an administrative fee designed to defray the costs of operating the licensing scheme, and undergo a background check. Penal Law § 400.00(3)(a), (4), (14). Petitioners offer no support for the proposition that these requirements amount to a substantial burden on

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equivalent to an "interest-balancing inquiry." *See, e.g.*, *National Rifle Ass'n*, 700 F.3d at 197; *Heller II*, 670 F.3d at 1257, 1265; *United States v. Marzzarella*, 614 F.3d 85, 96 (3d Cir. 2010). Petitioners' suggestion to the contrary is incorrect. *See* Pet. 21–24

an applicant's Second Amendment right. *See* Pet. 33–34. Indeed, petitioners' successful interactions with New York's licensing regime undermine the notion that the regime is unduly burdensome. Several petitioners applied for and obtained licenses. One petitioner (Kuzma) did not have a license when the complaint was filed, but by the time the appeal was heard, he had applied for and secured an unrestricted license. See *supra* at 13.

Even the burden on Murtari is limited. An applicant like Murtari who is initially denied a license may seek further review of that decision in New York's intermediate appellate court. *See, e.g.*, *Matter of Parker*, 120 A.D.3d at 947 (reversing and remanding licensing officer's denial). Such applicants also may reapply in the future. In the 2015 decision denying Murtari a license, Judge Kehoe observed that the denial was not permanent, but rather Murtari could reapply once he was in a position to show that he was willing and able to cease violating the law. CA2 J.A. 93–94 (order denying application). Nothing prevents Murtari from accepting that invitation and renewing his application even now.

* * *

In sum, the court below appropriately recognized that New York's longstanding premises licensing laws are constitutional. The licensing regime has existed in the same form for over a century and comports with a historical tradition of ensuring that those who have access to arms are law-abiding and responsible. At the same time, the regime does not unduly burden the typical applicant, and it manifestly serves the State's compelling interests in protecting the public.

CONCLUSION

The petition for a writ of certiorari should be denied.

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