No. 22A557

In The
Supreme Court of the United States

IVAN ANTONYUK, et al.,

Applicants,

v.

STEVEN NIGRELLI, in His Official Capacity as Acting Superintendent of New York State Police, JUDGE MATTHEW J. DORAN in His Official Capacity as the Licensing Official of Onondaga County, New York, and JOSEPH CECILE in His Official Capacity as the Chief of Police of Syracuse, New York,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

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PRELIMINARY STATEMENT

In July 2022, the New York State Legislature enacted the Concealed Carry Improvement Act (CCIA) to make necessary changes to the State's firearms licensing and possession laws following this Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). Shortly after this legislation took effect, applicants—five individuals with carry permits and a sixth individual who has never applied for a firearms license—sued to challenge nearly every provision of the CCIA as unconstitutional. After giving respondents[1] approximately three weeks to oppose a motion seeking a preliminary injunction as to dozens of distinct provisions, the U.S. District Court for the Northern District of New York (Suddaby, J.) entered a preliminary injunction against defendants' enforcement of vast swaths of the CCIA on a statewide basis. After full briefing and consideration, a three-judge panel of the U.S. Court of Appeals for the Second Circuit (Sack, Wesley, Bianco, JJ.) granted respondents' motion for a stay of the preliminary injunction pending appeal and ordered expedited consideration of the matter, with respondents' opening briefs due on January 9, 2023.

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[1] Respondents are Steven A. Nigrelli in his official capacity as Acting Superintendent of the New York State Police, Judge Matthew J. Doran in his official capacity as licensing official for Onondaga County (which includes the City of Syracuse), and Joseph Cecile in his official capacity as Chief of Police of the City of Syracuse.

Applicants now ask this Court to take the extraordinary step of vacating a stay entered by a court of appeals. This Court should deny the request for multiple independent reasons.

First, applicants cannot show that this Court is likely to grant review of the court of appeals' forthcoming decision reviewing a preliminary injunction. Likely review in this Court is ordinarily the predicate for action by this Court in connection with a stay pending appeal. However, this Court rarely grants review of cases in an interlocutory posture absent unusual circumstances that are not present here. In addition, this case involves the application of *Bruen*, which was issued only six months ago and which revised the relevant constitutional framework for Second Amendment challenges. This Court ordinarily awaits percolation of legal issues in the lower courts before granting review and would benefit from such percolation here.

Second, applicants have not shown that the court of appeals erred—much less "clearly and demonstrably erred"—in issuing a stay. *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 571 U.S. 1061, 1061 (2013) (quotation marks omitted) (Scalia, J., concurring in denial of application to vacate stay). Respondents showed a strong likelihood of success on the merits given the numerous flaws in the district court's opinion regarding standing, the district court's erroneous requirement of a showing of historical evidence to support every challenged restriction regardless of whether the restriction implicated the text of the Second Amendment, and the district court's use of an improperly rigid analogical methodology. Respondents also showed below that a stay was in the public interest and necessary to avoid

irreparable injury from the injunction. For example, the injunction would have precluded the enforcement of a "good moral character" requirement for firearms licenses, thereby requiring the State to issue licenses to people with a demonstrated propensity to misuse firearms. In addition, the likelihood of public and law enforcement confusion resulting from the preliminary injunction was substantial.

By contrast, applicants will not suffer irreparable injury from the stay pending the court of appeals' expedited resolution of the appeal. The injuries cited by applicants are either hypothetical or sufficiently narrow that they cannot overcome respondents' strong showing on the merits and equities. At a minimum, any vacatur of the stay should be limited to applicants, since the statewide relief ordered by the district court is grossly disproportionate to the individual harms alleged.

STATEMENT

A. Factual Background

1. This Court's decision in *New York State Rifle & Pistol Association v. Bruen*

Like dozens of States, New York requires a license to carry a concealed handgun in public. *See, e.g.*, Penal Law § 265.03(b) (criminalizing possession of loaded handgun), § 265.20(a)(3) (exempting license holders). New York law has long set forth basic eligibility criteria for a license, including being at least twenty-one years old, not having a felony record, and otherwise having "good moral character." *Id.* § 400.00(1)(a)-(c). Until recently, New York also required demonstrating "proper

cause" to obtain a concealed-carry license. *Id.* § 400.00(2)(f) (effective through June 23, 2022).

In *Bruen*, this Court concluded that insofar as "proper cause" demanded showing "a special need for self-defense," this requirement implicated the Second Amendment right of law-abiding, responsible citizens to carry arms in public for self-defense and was invalid because it was unsupported by historical tradition. 142 S. Ct. at 2122, 2130-31. In so holding, *Bruen* rejected the framework previously used by nearly all federal courts of appeals to evaluate Second Amendment challenges in favor of a restated standard: if "the Second Amendment's plain text covers an individual's conduct," then the government seeking to regulate that conduct "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126; *see also id.* at 2129.

Bruen was explicit about the areas of law left undisturbed by the decision. The Court made clear that "nothing in [its] analysis" was meant "to suggest the unconstitutionality" of "shall-issue" licensing regimes. *Id.* at 2138 n.9. These laws "often require applicants to undergo a background check or pass a firearms safety course" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)); *see also id.* at 2161-62 (Kavanaugh, J., concurring). The Court also "assume[d] it settled" that certain areas are "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.* at 2133. The opinion endorsed such prohibitions in schools, legislative assemblies, polling

places, and courthouses, while recognizing that this list was nonexhaustive and that "modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* In other words, *Bruen* decided "nothing about who may lawfully possess a firearm or the requirements that must be met to buy a gun," nor did it disavow previously recognized "restrictions that may be imposed on the possession or carrying of guns." *Id.* at 2157 (Alito, J., concurring).

Bruen was also clear that application of the restated Second Amendment standard would require substantial development in the lower courts, in accordance with traditional patterns of constitutional litigation. For example, the court declined to "undertake an exhaustive historical analysis of the full scope of the Second Amendment." *Id.* at 2134 (quotation and alteration marks omitted). Indeed, *Bruen* left open many questions about how to evaluate historical sources from different time periods. *See id.* at 2136-38; *see also id.* at 2162-63 (Barrett, J., concurring). And while *Bruen* instructed that the historical inquiry required in Second Amendment cases "will often involve reasoning by analogy," it similarly declined to "provide an exhaustive survey of the features that render regulations relevantly similar." *Id.* at 2132. At the same time, *Bruen* cautioned that its standard was not intended to be a "regulatory straightjacket" and that governments were not required to identify "historical twin[s]" or "dead ringer[s]" to support modern regulations. *Id.* at 2133 (emphasis omitted); *see also id.* at 2162 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations." (quoting *Heller*, 554 U.S. at 636)). As the Court recognized, in some cases historical analogies will be "relatively

simple to draw," while "other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id.* at 2132.

2. New York's Concealed Carry Improvement Act

The day after *Bruen* was decided, New York Governor Kathy Hochul announced that she would convene an extraordinary legislative session to bring New York's law into compliance with the decision. *See* N.Y. Governor, Proclamation (June 24, 2022). On July 1, 2022, the Legislature passed the CCIA, which removed the proper cause requirement that *Bruen* declared unconstitutional and made several other changes to New York's firearms licensing and possession laws. *See* Ch. 371, 2022 N.Y. Laws (N.Y. Legis. Retrieval Serv.) (eff. Sept. 1, 2022) (codified at, inter alia, Penal Law §§ 265.01-d, 265.01-e, 400.00). The statutory amendments relevant to this application are discussed below.

First, the CCIA made more precise the longstanding requirement of "good moral character" for a handgun license; this is the provision under which the State had long denied licenses to people with criminal records and other indicia of a propensity for violence. The CCIA defined the term "good moral character" to mean "having the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others." Penal Law § 400.00(1)(b). In addition, the CCIA required that every applicant "shall meet in person with the licensing officer for an interview," *id.* § 400.00(1)(o), complete sixteen hours of training and two hours of live-fire instruction, *id.* §§ 400.00(1)(o)(iii), 400.00(19), and submit statutorily specified

information to the licensing officer, including contact information for any spouse, domestic partner, and adult coinhabitants, and whether minor children live in the applicant's house, *see id.* § 400.00(1)(o)(i); at least "four character references who can attest to the applicant's good moral character" by representing that the applicant is not "likely to engage in conduct that would result in harm to themselves or others," *id.* § 400.00(1)(o)(ii); "a list of former and current social media accounts" over the past three years, meant "to confirm the information" otherwise provided about the applicant's "character and conduct," *id.* § 400.00(1)(o)(iv); and "such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application," *id.* § 400.00(1)(o)(v).

Second, the CCIA codified several "sensitive locations" in which carrying "a firearm, rifle or shotgun" would not be allowed, including government buildings such as courthouses; polling places; schools, colleges, and universities; nursery schools, preschools, and playgrounds; places of worship; public transit; public parks and zoos; shelters for the homeless and domestic-violence victims; sites of programs for the disabled; health-care and drug-treatment facilities; entertainment venues such as theaters and conference centers; venues serving alcohol; "gathering[s] of individuals to collectively express their constitutional rights to protest or assemble"; and Times Square, if "identified with signage." *Id.* § 265.01-e(1)-(2).

Third, the CCIA made it unlawful to possess "a firearm, rifle, or shotgun" in a "restricted location." *Id.* § 265.01-d(1). Under this provision, a person may not carry such a weapon "on or in private property" when the "person knows or reasonably

should know that the owner or lessee of such property" has not "given express consent" to carrying such weapons on the premises by posted signage or other means. *Id.*

The "sensitive" and "restricted" location provisions exempt law enforcement officers, military personnel, armed security guards, and persons lawfully hunting. *Id.* §§ 265.01-d(2), 265.01-e(3).

B. Procedural Background

1. The district court's jurisdictional dismissal and advisory opinion in *Antonyuk I*

Ten days after the CCIA's enactment, applicant Ivan Antonyuk and two gun-advocacy organizations filed suit under 42 U.S.C. § 1983 in the U.S. District Court for the Northern District of New York against the then-Superintendent of the New York State Police, challenging the above-referenced CCIA provisions under the First, Second, and Fourteenth Amendments. *See* Compl., *Antonyuk v. Bruen* (*Antonyuk I*), No. 22-cv-734 (N.D.N.Y. July 11, 2022), ECF 1. Plaintiffs sought a preliminary injunction to block these provisions from taking effect as scheduled on September 1, 2022. The superintendent opposed the request and sought dismissal of the case for lack of Article III standing.

Four days before plaintiffs' reply was due, the district court (Suddaby, J.) sua sponte invited plaintiffs to file "supplemental declarations" on whether they had suffered specified types of injuries from the CCIA or otherwise had "any intent" to "engage in conduct proscribed by the CCIA (e.g., carrying a concealed handgun into a gas station or store that is not specifically posted with a sign allowing him to carry

there)." Text Order (Aug. 18, 2022), ECF No. 34. The next day, the district court clarified that the "declarations may also detail the fair traceability of Plaintiffs' alleged injuries to Defendant." Amended Text Order (Aug. 19, 2022), ECF No. 39.

Notwithstanding these directions, plaintiffs did not make the requisite showings. On August 31, the district court dismissed the case for lack of Article III standing. *See Antonyuk I*, 2022 WL 3999791, at *1 (N.D.N.Y. Aug. 31, 2022). In particular, the court held that the organizations had not shown injury-in-fact to themselves, *id.* at *18-23, and that Antonyuk had not indicated his intent to violate the CCIA's provisions, *id.* at *16-18. The court correctly observed that this result "requir[ed] an immediate dismissal without prejudice." *Id.* at *23-25. But despite the absence of a live controversy, the court proceeded to render an advisory opinion describing what "would constitute the Court's holding" on the merits if the plaintiffs were "found to, in fact, possess standing."[2] *Id.* at *25; *see id.* at *26-37. Specifically, the court stated that the CCIA was "an unconstitutional statute," and indicated that it would have enjoined the enforcement of nearly every challenged provision of the law—including most of the licensing requirements, each of the codified sensitive locations (including schools and government buildings), and the restricted-location provision in its entirety. *Id.* at *26.

[2] Assuming "[h]ypothetical jurisdiction" so as "to pronounce upon the meaning or the constitutionality of a state or federal law" generates "an advisory opinion." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 101 (1998). Doing so is therefore "ultra vires." *Id.* at 102.

2. The district court's entry of a temporary restraining order and preliminary injunction in *Antonyuk II*

On September 20, Antonyuk filed a new § 1983 lawsuit attacking mostly the same CCIA provisions, dropping the organizational plaintiffs, adding five other individual plaintiffs (who are also applicants in this Court), and naming new state and municipal defendants (three of whom are respondents in this Court). *See* Compl., *Antonyuk v. Hochul* (*Antonyuk II*), No. 22-cv-986 (N.D.N.Y. Sept. 20, 2022), ECF 1.

Shortly thereafter, applicants moved for a temporary restraining order (TRO), preliminary injunction, and permanent injunction. Mem. in Supp. of Pls.' Mot. for TRO, Prelim. Inj., & Permanent Inj. ("PI Mem.") at 1 (Sept. 22, 2022), ECF 6-1. Additionally, applicants marked the complaint as related to *Antonyuk I*, *see* Civil Cover Sheet (Sept. 20, 2022), ECF 1-11, and Judge Suddaby accepted the case as related, *see* Text Order (Sept. 26, 2022), ECF 12.

In their motion, the five applicants with carry licenses represented that they have standing because they intend to bring weapons into various sensitive or restricted locations "in the near future." PI Mem. at 3; *see id.* at 2-5. A sixth applicant who lacked a concealed-carry license argued that he had standing to challenge the licensing provisions even though he had never applied for a license because his hypothetical application would be rejected due to his intention to withhold much of the required information. *See id.* at 7-9.

On October 6, the district court granted a TRO as to multiple CCIA provisions. *See Antonyuk II*, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022). The court held that all of

the applicants had standing, that all defendants were proper, and that each of the challenged provisions was a proper subject for adjudication. *Id.* at *7-9.

On the merits, the district court rewrote the CCIA's definition of "good moral character" such that a firearms-license applicant is presumed to satisfy this criterion absent a contrary determination supported by a preponderance of the evidence, which may rest only on an applicant's past conduct and which may not rest on a desire to use a weapon for lawful self-defense (though the law did not purport to disqualify applicants for this reason). *Id.* at *9-11. In addition, the court restrained enforcement of the application requirements of an in-person interview, identification of other adult coinhabitants, disclosure of whether minor children live at home, and listing of social media accounts, all for a perceived lack of historical analogs. *Id.* at *12. The court then analyzed whether history supported every "sensitive location" designated in New York's law—without regard to whether applicants had challenged, or even had standing to challenge, any particular provision—and held "that most of the CCIA's list of 'sensitive locations' violate the Constitution" because respondents had "not met their burden" of presenting relevant precursors. *Id.* at *13-21. The court also restrained enforcement of the prohibition on carrying firearms onto private property without the proprietor's express consent, except as to fenced-in farmland or hunting grounds. *Id.* at *21. The court expressly extended the TRO beyond the fourteen days permitted in Federal Rule of Civil Procedure 65(b). *Id.* at *23.

The state respondents (Acting Superintendent Nigrelli and Judge Doran) and respondent Cecile (the Chief of Police of Syracuse) filed notices of appeal from the

open-ended TRO and moved for a stay pending appeal and an emergency interim stay. *See Antonyuk v. Hochul*, No. 22-2379 (2d Cir.) (appeal docketed Oct. 7, 2022), No. 22-2403 (2d Cir.) (appeal docketed Oct. 11, 2022). The U.S. Court of Appeals for the Second Circuit granted a single-judge interim stay on October 12, and calendared the motion for argument on November 15. *See* No. 22-2379, Dkt. 39, 67, 68 (2d Cir.).

On November 7, the district court entered a preliminary injunction against enforcement of many (but not all) of the provisions subject to the TRO and of several provisions that were not enjoined in the TRO. *See* App.003a-187a. The parties thereafter stipulated to withdraw the appeal of the TRO as moot. No. 22-2379, Dkt. 74 (2d Cir. Nov. 9, 2022).

First, the district court determined that the sole applicant without a carry license had standing to challenge the CCIA's licensing requirements, even though he had never applied for such a license. App.020a-024a. The court also reversed its prior ruling enjoining only certain applications of the good moral character requirement. App.094a-105a. Although the court acknowledged that the requirement would be constitutional if it allowed a licensing official to determine, based on prior conduct, that an applicant was "likely to use the weapon in a manner that would injure themselves or others (other than in self-defense)," the court nevertheless enjoined enforcement of the provision in its entirety. App.105a. As in the TRO, the court separately enjoined enforcement of the requirement to identify household members, disclose whether children live in the home, and list social media accounts. App.108a-114a. The court departed from the TRO by enjoining the requirement to provide "such

other information . . . that is reasonably necessary and related to the review of the licensing application," based on speculation that a licensing official might use this provision to demand inspection of an applicant's cell phone or the production of a urine sample.[3] App.116a.

Second, the district court for the first time acknowledged that applicants lacked standing to challenge most of the "sensitive location" provisions. App.026a-083a. The court therefore limited the injunction to the following places: locations providing behavioral health or chemical dependence care or services, places of worship or religious observation, public parks and zoos, airports (to the extent the license holder is complying with federal regulations), buses, establishments serving alcohol, theaters, conference centers, banquet halls, and any gathering of individuals to collectively express their constitutional rights to protest or assemble. App.185a-187a; *see* App.027a-047a, 059a-076a, 077a-082a.

Finally, the district court enjoined in full the prohibition on carrying firearms onto private property without express consent, eliminating the TRO's carveout for fenced-in farmland or hunting grounds.[4] App.168a-182a.

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[3] The district court declined to enjoin the in-person interview requirement (which had been subject to the TRO), or the character reference and training requirements. App.105a-108a, 119a-125a.

[4] In the preliminary injunction decision, the district court dismissed Governor Hochul from the action. *See* App.087a-089a. On November 17, the district court granted the remaining state respondents' motion to dismiss the claims as to which it had found applicants to lack standing. *See Antonyuk II*, 2022 WL 17039232 (N.D.N.Y. Nov. 17, 2022).

3. The court of appeals' stay of the preliminary injunction pending appeal

The state respondents filed a notice of appeal from the preliminary injunction and again moved for a stay pending appeal and an emergency interim stay.[5] *See Antonyuk v. Hochul*, No. 22-2908 (appeal docketed Nov. 9, 2022). Respondents sought a stay of the preliminary injunction in its entirety, except as to (i) places of worship or religious observation, to the extent such locations designate individuals who are otherwise authorized to carry firearms to keep the peace; (ii) airports, as the injunction was limited to license holders acting in compliance with applicable federal regulations; and (iii) private buses, which were the subject of the complaint and the district court's discussion of standing. See Mem. in Supp. of Mot. for Stay Pending Appeal ("Stay Mem.") at 13 n.5 (Nov. 12, 2022), No. 22-2908, Dkt. 18.

Respondents argued that a stay was necessary on multiple grounds. First, respondents argued that equitable factors supported a stay. For example, the injunction against enforcement of the "good moral character" requirement for firearms licenses would require the issuance of licenses to people with a demonstrated propensity to misuse firearms. Likewise, the injunction against enforcement of restrictions on firearm possession in sensitive locations like bars, restaurants, theaters, and political protests risked potential irreparable injuries from intentional or inadvertent shootings. And the injunction against enforcement of the restricted-locations provision

[5] Respondent Cecile subsequently filed a notice of appeal as well. *See Antonyuk v. Hochul*, No. 22-2972 (appeal docketed Nov. 21, 2022).

would allow persons to carry firearms onto any private property (including into a person's home) without obtaining express consent or even notifying the property owner of the presence of a deadly weapon on their property. In addition, the likelihood of public and law enforcement confusion resulting from the preliminary injunction was substantial. By contrast, applicants faced no likelihood of irreparable harm from the stay, given that the CCIA has been in effect for months and the availability of expedited appellate resolution. *Id.* at 14-17; Reply Mem. in Supp. of Mot. for Stay Pending Appeal ("Stay Reply Mem.") at 3-7 (Nov. 28, 2022), No. 22-2908, Dkt. 51.

Second, respondents argued that they were likely to prevail on the merits of the appeal for numerous reasons. As an initial matter, the district court's standing analysis was deeply flawed. Among other things, the court erroneously concluded that a person who had never applied for a carry license nevertheless has standing to challenge applicable licensing laws, and that a person who provides counseling to drug-addicted persons in church has standing to challenge the prohibition on guns in drug-treatment clinics. Stay Mem. at 20, 24; Stay Reply Mem. at 10. Similarly, the district court misapplied the first part of *Bruen*'s analysis—whether the Second Amendment's text applies to an individual's conduct—by assuming that the text applied with respect to every restriction challenged by applicants. Stay Mem. at 20-23, 25; Stay Reply Mem. at 9-10. And the court erroneously disregarded the historical analogues identified by respondents based on invented metrics of relevancy and representativeness, speculative hypotheticals, and an improper demand that respondents identify examples of historical regulations that are both numerous and identical

to the challenged provisions of the CCIA. Stay Mem. at 23, 25-27; Stay Reply Mem. at 11.

Third, respondents argued that the preliminary injunction was improperly granted because respondents were not given a meaningful opportunity to mount a defense before being subject to an injunction. Specifically, the district court entered the injunction after giving respondents less than three weeks to oppose both a TRO and a preliminary injunction with respect to dozens of distinct provisions. Stay Mem. at 17-19.

Finally, respondents argued that the district court erred in granting statewide preliminary injunctive relief that far exceeded any need to redress applicants' highly individualized assertions of harm. Stay Mem. at 27-28; Stay Reply Mem. at 11-12.

On November 15, a three-judge panel (Sack, Wesley, Bianco, JJ.) granted respondents' request for an interim stay. *See* No. 22-2908, Dkt. 31. On December 7, following full briefing, the same panel granted respondents' motion for a stay pending appeal (as narrowed in the motion) and ordered expedited consideration of the matter. App.002a. Respondents' opening briefs are due on January 9, 2023. *See* No. 22-2908, Dkt. 79.

ARGUMENT

Applicants seek to vacate the stay of the preliminary injunction entered by the court of appeals following full briefing and consideration. The application should be denied.

"A stay granted by a court of appeals is entitled to great deference from this Court . . . ." *Garcia-Mir v. Smith*, 469 U.S. 1311, 1313 (1985) (Rehnquist, J., in chambers). "[W]hen a court of appeals has not yet ruled on the merits of a controversy, the vacation of an interim order invades the normal responsibility of that court to provide for orderly disposition of cases on its docket." *Moore v. Brown*, 448 U.S. 1335, 1341 n.9 (1980) (Powell, J., in chambers). "Respect for the assessment of the Court of Appeals is especially warranted when that court is proceeding to adjudication on the merits with due expedition." *Doe v. Gonzales*, 546 U.S. 1301, 1308 (2005) (Ginsburg, J., in chambers).

Accordingly, vacatur of a stay entered by a court of appeals (and the attendant disruption of the orderly appellate process) is appropriate only when (1) the case "could and very likely would be reviewed [by this Court] upon final disposition in the court of appeals"; (2) "the court of appeals is demonstrably wrong in its application of accepted standards in deciding to issue the stay"; and (3) applicants' rights "may be seriously and irreparably injured by the stay." *Western Airlines, Inc. v. International Bhd. of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers). None of those requirements is satisfied here.

I. THIS COURT IS NOT LIKELY TO GRANT REVIEW OF THE FORTHCOMING DECISION FROM THE COURT OF APPEALS.

Applicants cannot make the "exceptional" showing that this Court is likely to grant a writ of certiorari to review the court of appeals' forthcoming determination regarding the district court's preliminary injunction. *See Certain Named and Unnamed Non-citizen Children v. Texas*, 448 U.S. 1327, 1331 (1980) (Powell, J., in chambers). Indeed, although applicants acknowledge this requirement for vacatur of a stay (Appl. at 4), they offer no explanation as to how it has been satisfied in this case.

Applicants could not carry the burden to make this showing in any event for several reasons: review is premature given this case's interlocutory posture, and although this case concerns important issues, further percolation of the relevant issues in the lower courts is needed to inform this Court's review.

First, this Court is unlikely to grant review because this case's interlocutory posture renders the resolution of any Second Amendment question premature. This Court's ordinary practice is to deny interlocutory review even when a case presents a significant statutory or constitutional question.[6] This Court has departed from that practice in very rare circumstances, such as, for example, granting review when an

[6] *See, e.g., Abbott v. Veasey*, 137 S. Ct. 612 (2017) (Roberts, C.J., respecting denial of certiorari); *Mount Soledad Memorial Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J.); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J.); *Moreland v. Federal Bureau of Prisons*, 547 U.S. 1106 (2006) (Stevens, J.); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) (per curiam).

important question would be "effectively unreviewable" after final judgment, *e.g.*, *Will v. Hallock*, 546 U.S. 345, 349-50 (2006) (quotation marks omitted), or when an immunity from suit, rather than a mere defense to liability, is implicated, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). But nothing in this case will become effectively unreviewable if this Court were to take its ordinary course by waiting until after final judgment—and the development of a complete record—to review any remaining issues. Such a course is especially prudent in this case, where many claims have already been dismissed for lack of standing (see *supra* at 13 n.4) and the court of appeals may well rule in respondents' favor solely on threshold standing grounds as to many of the remaining issues.

Second, this Court is unlikely to grant review because lower courts have had no meaningful opportunity to engage with the standard set forth in *Bruen*. Since *Bruen*, there have been two substantive Second Amendment decisions from federal appellate courts, neither of which directly address the myriad issues presented in this case. *See Range v. Attorney General*, 53 F.4th 262 (3d Cir. 2022) (per curiam) (holding that federal felon-in-possession law is constitutional because it does not implicate the text of the Second Amendment); *Frein v. Pennsylvania State Police*, 47 F.4th 247 (3d Cir. 2022) (holding that state police must return guns seized from criminal suspect's parents after the trial and appeal had concluded). "[W]hen frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting);

see also Maslenjak v. United States, 137 S.Ct. 1918, 1931 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) ("[T]he crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.") The need for percolation is particularly strong where "other courts" may need to fully consider the "substantive and procedural ramifications of the problem," which in turn allows this Court "to deal with the issue more wisely at a later date." *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., respecting denial of certiorari).

Applicants' only argument to the contrary is that this case implicates Second Amendment interests. *See* Appl. at 1. But the existence of a Second Amendment claim is far from a guarantee that an issue is suitable for this Court's review, let alone ripe for it. As noted above (at 18 & n.6), this Court routinely denies premature requests for review of even important constitutional disputes either to allow further development below in the litigation at issue, or to allow further percolation in courts around the country. Following such an approach here would be especially appropriate given that this Court announced a revised constitutional framework for Second Amendment challenges just six months ago and numerous pending cases are currently percolating in the courts of appeals and district courts.[7]

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[7] There are numerous challenges to various provisions of the CCIA alone. *See, e.g.*, *Hardaway v. Nigrelli*, No. 22-2933 (2d Cir.); *Christian v. Nigrelli*, No. 22-2987 (2d Cir.); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 22 cv-907 (N.D.N.Y.); *Goldstein*
(*continues on the next page*)

II. APPLICANTS HAVE NOT SHOWN THAT THE COURT OF APPEALS CLEARLY AND DEMONSTRABLY ERRED IN GRANTING A STAY.

Applicants have similarly failed to demonstrate that the court of appeals was "demonstrably wrong in its application of accepted standards in deciding to issue the stay," *Coleman v. Paccar, Inc.*, 424 U.S. 1301, 1304 (1976) (Rehnquist, J., in chambers). *See also Western Airlines*, 480 U.S. at 1305 (O'Connor, J., in chambers). Instead, applicants ask this Court for a de novo consideration of the underlying stay motion (*see* Appl. at 15-16), an action that is far outside the scope of this Court's general practice.[8]

In any event, each of the traditional stay factors—(1) whether respondents are likely to succeed on the merits of the appeal, (2) whether respondents will be irreparably injured absent a stay, (3) whether applicants will be substantially injured by a stay, and (4) whether the public interest supports a stay—favored respondents

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v. Hochul, No. 22-cv-8300 (S.D.N.Y.); *Spencer v. Nigrelli*, No. 22-cv-6486 (W.D.N.Y.). There are many additional pending cases involving Second Amendment challenges to other federal and state laws. *See, e.g.*, *Lara v. Commissioner, Pa. State Police*, No. 21-1832 (3d Cir.); *United States v. Price*, No. 22-4609 (4th Cir.); *Bianchi v. Frosh*, No. 21-1255 (4th Cir.); *Miller v. Smith*, No. 22-1482 (7th Cir.); *National Rifle Ass'n v. Commissioner, Fla. Dep't of Law Enforcement*, No. 21-12314 (11th Cir.) *Miller v. Bonta*, No. 19-cv-1537 (S.D. Cal.); *Duncan v. Bonta*, No. 17-cv-1017 (S.D. Cal.); *Koons v. Reynolds*, No. 22-cv-7464 (D.N.J.); *Hanson v. District of Columbia*, No. 22-cv-2256 (D.D.C); *Gates v. Polis*, No. 22-cv-1866 (D. Colo.); *Brumback v. Ferguson*, No. 22-cv-3093 (E.D. Wash.).

[8] Applicants repeatedly fault the court of appeals for the brevity of its stay order (Appl. at 1-4, 14-15) but appellate rulings on stay motions (including from this Court) are typically short and often lack a detailed explanation given the temporary and nondefinitive nature of these orders.

below.[9] *See Nken v. Holder*, 556 U.S. 418, 434 (2009). "A stay pending appeal 'simply suspends judicial alteration of the status quo.'" *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2013) (quoting *Nken*, 556 U.S. at 429). In this case, the status quo is that the CCIA has taken effect after the failed preemptive attack in *Antonyuk I* (see *supra* at 8-9) and has been in effect for three months because of stays issued by the court of appeals. The stay factors continue to weigh in favor of maintaining this status quo pending appeal of the district court's judgment, which has been expedited.[10]

A. Respondents Are Likely to Succeed on the Merits of Their Appeal.

Respondents are likely to prevail on appeal because the district court's decision is riddled with errors on threshold issues of standing, misapplies *Bruen* by requiring a showing of historical evidence to support every challenged restriction regardless of whether the restriction implicates the text of the Second Amendment, and applies a rigid analogical methodology that impermissibly turns *Bruen* into a "regulatory

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[9] Applicants erroneously contend (Appl. at 13-14) that the court of appeals mistakenly applied a standard "less demanding" than that set forth in *Nken*. As respondents explained below (Stay Reply Mem. at 8-9), *Nken* did not discuss, much less repudiate, a stay analysis that allows for calibrating the required merits showing to the strength of the equities. In any event, respondents made a strong showing of their likelihood of success on appeal under any applicable standard.

[10] For the same reason, it was also appropriate for the court of appeals to grant stays pending appeal in *Hardaway v. Nigrelli*, No. 22-2933 (2d Cir.) (appeal docketed Nov. 15, 2022) (challenging the restriction on firearms in places of worship), and *Christian v. Nigrelli*, No. 22-2987 (2d Cir.) (appeal docketed Nov. 23, 2022) (challenging the restricted-locations provision). Applicants' suggestion to the contrary (Appl. at 3) is without merit.

straightjacket." 142 S. Ct. at 2133. The various statutory provisions enjoined by the district court and then reinstated by the stay are discussed in turn below.

Licensing requirements. The district court facially enjoined enforcement of New York's longstanding "good moral character" requirement to obtain a firearms license, as well as several disclosures required by the statute to assist in assessing "good moral character"—namely, identification of spouses, domestic partners, and other adult inhabitants, disclosure of whether minors are present in the home, identification of social media accounts, and the requirement to provide other relevant information upon a licensing officer's request. The stay lifted that injunction. Applicants mistakenly state (at 6, 18) that the "good moral character" requirement is a replacement for the "proper cause" requirement invalidated in *Bruen*. To the contrary, the "good moral character" requirement has been an independent feature of New York's licensing law since 1913, and addresses something quite separate from "proper cause." Analogous requirements are part of several "shall-issue" regimes favorably referenced in *Bruen*. *See, e.g.*, Ga. Code Ann. § 16-11-129(d)(4); Ind. Code § 35-47-2-3(g); Conn. Gen. Stat. § 29-28(b); R.I. Gen. Laws § 11-47-11; *see also Bruen*, 142 S. Ct. at 2123 n.1.

As a threshold matter, no applicant has Article III standing to challenge the CCIA's licensing requirements. Here, five of the applicants already have carry permits and have thus been found to satisfy the statutory requirement of good moral character. The sixth applicant has never applied for a permit. A person who has "failed to apply for a gun license in New York . . . lacks standing to challenge the licensing

laws." *United States v. Decastro*, 682 F.3d 160, 164 (2d Cir. 2012); *see also Libertarian Party of Erie County v. Cuomo*, 970 F.3d 106, 122 (2d Cir. 2020), *abrogated in part on other grounds by Bruen*, 142 S. Ct. 2111. Applicants contend that such an application would be futile because of alleged processing delays (Appl. at 20), but in that case, any injury would be due to the possible delay and not to the underlying requirements. Insofar as the district court concluded that an application would be futile because of the applicant's refusal to provide required disclosures (App.021a-024a), a plaintiff cannot manufacture standing by refusing to "submit to the challenged policy." *Libertarian Party*, 970 F.3d at 121.

Moreover, the "good moral character" requirement does not infringe the text of the Second Amendment, as it is "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens,'" *Bruen*, 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635); *see also Range*, 53 F.4th at 284. Good moral character connotes the absence of "base or depraved" actions that reflect moral turpitude. *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957). The clarifying definition added by the CCIA makes express that the requirement is intended to prevent possession of firearms by persons who lack "the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others." Penal Law § 400.00(1)(b). The district court acknowledged that the requirement could be constitutionally applied in many circumstances (App.105a) but nevertheless enjoined enforcement of the provision in its entirety while precluding licensing officials from collecting

information aimed at informing the "good moral character" inquiry. That ruling was inappropriate in a facial challenge. *Cf. Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring) ("[S]hall-issue licensing regimes are constitutionally permissible, subject of course to an as-applied challenge if a shall-issue licensing regime does not operate in that manner in practice.")

Because the "good moral character" requirement does not implicate the text of the Second Amendment in the first instance, respondents were not required to proffer historical evidence to support the challenged licensing provisions. Indeed, this Court in *Bruen* endorsed shall-issue licensing regimes without undertaking any historical analysis. *See id.* at 2138 n.9; *see also id.* at 2161-62 (Kavanaugh, J., concurring). But even if such a showing were required, the historical record confirms that a "legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety," *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting), whether the person "belongs to a dangerous category or bears individual markers of risk," *id.* at 451.[11] Respondents identified many relevant historical laws in their papers below. *See* PI Mem. in Opp. at 23-24 (Oct. 13, 2022), Dist. Ct. ECF 48 (citing historical authority for making individualized determinations of suitability). Respondents similarly identified relevant historical analogues for each of the enjoined disclosures, whose use is limited

[11] The majority's decision in *Kanter* was abrogated on other grounds by *Bruen*, 142 S. Ct. 2111.

to the evaluation of whether an applicant is law-abiding and responsible for purposes of firearms licensing. *Id.* at 33-34, 37-40.

Sensitive locations. Applicants contend that the CCIA's enumerated sensitive locations amount to a prohibition on concealed carry in "virtually the entire landmass of New York." Appl. at 6-7, 18. Plaintiffs offer no factual support for this hyperbole. Moreover, applicants' general disagreement with the policy choices reflected in the law, "however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements," *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013) (quotation marks omitted). Here, the district court already determined that applicants lack standing to challenge most of the sensitive-location provisions enumerated in the CCIA. App.026a-083a. Applicants do not acknowledge or grapple with this ruling, and instead repeatedly reference all twenty statutory subdivisions as if all of those issues were ripe for resolution in this or some other court.

Moreover, the district court's standing analysis with respect to the sensitive locations that were enjoined by the district court and then reinstated by the court of appeals' stay is seriously flawed.[12] For example, the district court erroneously found

[12] As noted above (at 12-13), the injunction is limited to (i) locations providing behavioral health or chemical dependence care or services, (ii) places of worship or religious observation, (iii) public parks and zoos, (iv) airports (to the extent the license holder is complying with federal regulations) and buses, (v) establishments serving alcohol, (vi) theaters, conference centers, banquet halls, and (vii) any gathering of individuals to collectively express their constitutional rights to protest or assemble. App.184a-185a. At respondents' request, the stay does not apply to places of worship or religious observation when those places designate persons to carry firearms to protect the peace, the narrowed injunction as to airports, and the injunction to the extent it applies to private buses. App.002a.

that an applicant has standing to challenge the sensitive-place regulation governing behavioral health or chemical dependence care or services, Penal Law § 265.01-e(2)(b), because he allegedly provides counseling to drug-addicted individuals in his church. App.028a-029a, 185a. But the applicant attested that his counseling is intended to encourage those whom he counsels "to seek help and voluntarily enter treatment"—not to provide the treatment that may be covered by the statute. App.290a.

Next, the district court erroneously relieved applicants of their burden to show that the Second Amendment's "text, as informed by history," plausibly encompassed any of the challenged sensitive locations. *Bruen*, 142 S. Ct. at 2127; *see Heller*, 554 U.S. at 626 & n.26 (stating that sensitive places fall outside the "scope of the Second Amendment" and that certain of such prohibitions are "presumptively lawful"). Instead, the court assumed without meaningful analysis that the Second Amendment's text reaches every sensitive place covered by the CCIA that is open to the public. App.126a, 131a, 137a. But several of the exemplar sensitive places identified by this Court in *Bruen* are quintessentially open to the public. *See* 142 S. Ct. at 2133 (identifying courthouses and legislative assemblies). Moreover, the district court compounded its error by relying on state statutory definitions of "public place" and "public facility" (App.126a, 131a, 137a) even though these definitions say nothing about the original meaning of bearing arms under the Second Amendment.

Finally, the district court erred in finding the State's historical sources not "relevantly similar" to New York's current prohibitions, *see Bruen*, 142 S. Ct. at 2132.

Bruen identified "at least two metrics" for addressing similarity of historical analogues: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2133. As respondents explained below, the "how and why" of the CCIA's sensitive-place regulations closely track the "how and why" of longstanding prohibitions on the possession of firearms in places like fairs, markets, election sites, places of worship, courts, schools, places of public assembly, and so forth. These historical restrictions served several purposes, including: (1) to protect the exercise of other rights such as voting, religious congregation, and public assembly, and governmental processes such as courtroom adjudication; (2) to protect places where vulnerable or impaired people who either cannot defend themselves, or cannot be trusted to have firearms around them safely, are ordinarily found; and (3) to avoid violence or chaos in unusually crowded places. Each of the CCIA's sensitive-place regulations at issue in this appeal serves at least one of these purposes, and a number of them serve more than one. Applicants cannot show that the court of appeals would have been demonstrably wrong in deeming these arguments potentially meritorious—particularly when this Court has yet to "expound upon the historical justifications" for the indisputably valid prohibitions on carrying firearms in schools and government buildings, among other sensitive places, *Heller*, 554 U.S. at 635.

Although the district court referenced *Bruen*'s "how and why" metrics (App.090a), its analysis of the challenged sensitive-location restrictions applied no principles of analogical reasoning. Instead, the court repeatedly demanded identical

historical predecessors, invented a metric of representativeness based on historical census data that respondents never had an opportunity to address or rebut, and categorically discounted swaths of respondents' historical evidence based on irrelevant criteria and speculative hypotheticals. App.125a-168a. In so doing, the court ignored *Bruen*'s clear direction to take a "nuanced approach" to "cases implicating unprecedented societal concerns or dramatic technological changes," 142 S.Ct. at 2132, to apply the Constitution "to circumstances beyond those the Founders specifically anticipated," *id.*, and to utilize careful analogical reasoning based on "well-established and representative historical analogue[s]" rather than demanding "historical twin[s]," *id.* at 2133 (emphasis omitted).

Restricted locations. The district court also erroneously enjoined—and the stay reinstated—the enforcement of CCIA's restricted-locations provision, which bars the possession of firearms on others' private property absent express consent from the owner or proprietor. *See* Penal Law § 265.01-d(1). Applicants lack standing to challenge this provision on Second Amendment grounds because they do not dispute that property owners may always exclude guns from their property or that a person wishing to enter private property bearing a firearm can seek and obtain express consent. Accordingly, an injunction against respondents cannot vindicate applicants' asserted desire to carry guns onto others' property. Any inability to do so would flow not from respondents' enforcement of the CCIA, but rather from decisions by property owners or lessees about whether to allow guns on the premises and when and how to convey that determination. Applicants hazard a guess that "the majority of otherwise

pro-gun homeowners, along with most proprietors of businesses . . . will not bother to post such signage" (Appl. at 8), but this speculation, even if true, demonstrates that any injury is due to actions by third parties and not respondents. "[U]nder traditional equitable principles, no court may lawfully enjoin the world at large, or purport to enjoin challenged laws themselves." *Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (quotation marks and citation omitted).

In addition, the district court mistakenly presumed that the restricted-locations provision implicates the Second Amendment's text. App.168a-169a. This Court has never found that carrying firearms onto others' private property equates with "carrying handguns publicly," *Bruen*, 142 S. Ct. at 2134, or keeping arms in one's own home, *see Heller*, 554 U.S. at 628. A private property owner has an undisputed right to decide "whether to allow firearms on its premises and, if so, under what circumstances." *GeorgiaCarry.Org., Inc. v. Georgia*, 687 F.3d 1244, 1266 (11th Cir. 2012) (conducting extensive historical inquiry of Second Amendment's textual scope), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. New York's statute merely protects that right by selecting a default rule that enables proprietors to make an informed determination about whether to allow guns on the premises; namely, by requiring someone carrying a concealed firearm to seek express consent, which may, in certain circumstances, require disclosing that the person is carrying a weapon.[13]

[13] In New York, it has long been a crime to remain in a building with an operable firearm after a direction to leave. *See* Penal Law § 140.17(2).

Moreover, even if the Second Amendment's text reached the restricted-locations provision (which it does not), respondents provided ample evidence showing that the law is supported by an unambiguous historical tradition of laws forbidding carrying guns onto others' property without their permission. The district court acknowledged that respondents identified numerous statutes spanning two centuries from the colonial through the Reconstruction eras but misinterpreted many of these provisions as "anti-poaching laws" and thereby dismissed them as irrelevant to the restricted-locations provision. App.169a-174a. According to the district court, these statutes were irrelevant because applicants have not alleged injury due to "not being able to hunt turkey and deer" on private property. App.171a.

The district court's reasoning is flawed in many respects. As an initial matter, many of the statutes cited by respondents are, by their plain terms, not limited to poaching but extend broadly to carrying any firearm. The court's analysis also eschews the careful analogical reasoning required by *Bruen*. *See* 142 S.Ct. at 2132-33. Even if the cited historical laws had been motivated in whole or in part by concerns about poaching, the court failed to explain why respondents could not rely on these provisions to support a similar restriction motivated by different and modern concerns. In arbitrarily dismissing respondents' historical evidence, the court in effect eliminated the possibility of supporting a modern law through historical analogues—the exact result against which *Bruen* cautioned.

Finally, the district court erred in concluding that the restricted-location provision violated the First Amendment by "compelling" property owners to

communicate that guns are welcome on their property. App.177a-181a. This ruling misunderstands compelled-speech claims, which require that the government force individuals to "speak a particular message," *National Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371 (2018). The CCIA does not compel speech; rather, it prohibits guests from entering private property with a firearm without obtaining consent. A property owner may give consent to carry, deny permission to carry, or choose not to speak at all; none of these options represents a state-sponsored message.

In sum, there is a strong likelihood that respondents will succeed on the merits of their challenge to the provisions of the injunction that were suspended by the stay.

B. The Remaining Stay Factors Weigh in Favor of a Stay Pending Appeal.

A stay pending appeal was necessary to prevent irreparable injury to respondents and was in the public interest for several reasons. First, a stay was necessary to prevent regulatory chaos and public confusion, which had already been exacerbated by the district court's issuance of three different decisions in the span of ten weeks, each of which reached a different result as to which provisions of the CCIA may be enforced and for which reasons. *See Citibank, N.A. v. Nyland (CF8) Ltd.*, 839 F.2d 93, 97 (2d Cir. 1988) (public confusion can constitute irreparable harm). In addition, the need for state and local law enforcement to explain the effect of these decisions to officials and members of the public and to implement compliance with a piecemeal injunction that may ultimately be vacated on appeal was a substantial burden warranting a stay.

Second, a stay was necessary to avoid substantial public harms. For example, the injunction would require the issuance of firearms licenses to persons who fail to demonstrate good moral character and would allow applicants for permits to withhold multiple categories of information relevant to assessing their fitness to carry a firearm. As a result, concealed-carry licenses may be granted to people lacking "the essential character, temperament and judgement necessary to be entrusted with a weapon," Penal Law § 400.00(1)(b).

In addition, the injunction bars respondents from enforcing prohibitions on carrying firearms in numerous sensitive locations such as bars, restaurants, theaters, and political protests, increasing the risk of intentional or inadvertent shooting deaths or injuries. And the injunction would allow people to enter private property (including people's homes) with concealed firearms without obtaining consent or even providing notice, notwithstanding the potential presence of children or other vulnerable persons on that property. "That [a State] may not employ a duly enacted statute to help prevent [serious] injuries constitutes irreparable harm." *Maryland v. King*, 567 U.S. 1301, 1303 (2012) (Roberts, C.J., granting stay).

Third, a stay was necessary where, as here, the district court enjoined the enforcement of a duly enacted state law without giving respondents a meaningful opportunity to mount a defense. Indeed, the court gave appellants less than three weeks in total to oppose both a TRO and a preliminary injunction, *see* Text Order (Sept. 23, 2022), ECF 8, as well as to address the reasoning in the court's own shifting decisions. But, under *Bruen*'s standard for Second Amendment challenges, defending

firearm regulations requires assembling materially analogous laws and policies from a wide range of sources, and obtaining expert testimony from legal historians and other scholars—a task that could not realistically be completed on the district court's timetable.

III. APPLICANTS WILL NOT SUFFER IRREPARABLE INJURY FROM THE STAY.

By contrast, a stay would not cause (and has not caused) substantial injury to applicants (as enumerated in the stay factors), much less the irreparable injury needed to justify this Court's vacatur of a stay entered by a court of appeals.

The harms identified by applicants in their papers are hypothetical. For example, applicants assert that a pastor might not be able to possess a firearm in his home if that home is located on church property. Appl. at 7, 21-22. But applicants fail to explain how the CCIA could fairly be read (or ultimately applied) to reach that result; and, in any event, the terms of the stay allow the place of worship to designate the applicant to carry firearms on church property to keep the peace. App.002a. Applicants also assert that a person whose home is "surrounded by the rural Catskill Park" cannot possess a firearm at home because of the designation of parks as sensitive places. Appl. at 7. However, Catskills State Park is a forest preserve rather than a park and is therefore not a sensitive location, although it may contain some interior sensitive locations like libraries or government administrative facilities. *See* N.Y. Div. of Crim. Just. Servs., *Frequently Asked Questions Regarding Recent Changes to New York State Firearm Laws* (Aug. 27, 2022).

Likewise, the applicant who has yet to file a license erroneously asserts that the CCIA prevents him from filing that application. Appl. at 22. The CCIA does no such thing; the applicant's purported injury is due to his own decision to refuse to comply with the law, which does not bestow standing, much less cognizable injury in a stay application. And while applicants now assert that they cannot "freely carry their firearms in public to defend themselves and their families" (Appl. at 22), what the complaint and declarations in support of the preliminary injunction motion reflect is that several applicants wish to carry guns into specific sensitive or restricted locations, such as a zoo in Syracuse or a community center in Albany (App.045a-046a, 071a). To the extent applicants are unable to do so during the pendency of this appeal, such injuries are not sufficiently substantial to warrant enjoining the application of the law on a statewide basis.

Applicants are also wrong to argue that the alleged denial of their constitutional rights is, standing alone, sufficient to establish substantial injury for purposes of a stay. *See* Appl. at 23, 26-27. This argument conflates likelihood of success on the merits with the equitable stay factors. Under applicants' logic, the government would never be entitled to a stay pending appeal where a district court has entered a preliminary injunction based on an asserted constitutional violation, no matter how weak the decision may be on the merits. That result is untenable.

Finally, the risk of any harm to applicants is mitigated by the court of appeals' decision to hear the case on an expedited basis, with appellants' opening briefs due on January 9, 2023—less than a week from the date of this filing. App.002a;

Antonyuk, No. 22-2908, Dkt. 79. The court of appeals has similarly ordered expedited briefing in *Hardaway v. Nigrelli* and *Christian v. Nigrelli*, two other cases involving overlapping challenges to the CCIA.[14] Where, as here, the court of appeals stands ready to adjudicate these important challenges in a timely fashion, this Court's premature intervention is neither appropriate nor necessary.

If this Court disagrees and determines to vacate the stay, it should do so only with respect to applicants, which would suffice to prevent any alleged injuries that applicants may have standing to assert. *See Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080, 2087-88 (2017) (per curiam).

[14] *See Hardaway*, No. 22-2933, Dkt. 57 (briefing to be completed by March 13, 2023); *Christian*, No. 22-2987, Dkt. 44 (briefing to be completed by March 22, 2023).

CONCLUSION

The emergency application to vacate the stay issued by the court of appeals should be denied.

Dated: New York, New York
January 3, 2023

Respectfully submitted,

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