No. 22A557

IN THE
Supreme Court of the United States

IVAN ANTONYUK, COREY JOHNSON, ALFRED TERRILLE, JOSEPH MANN, LESLIE LEMAN, AND LAWRENCE SLOANE
Applicants,

v.

STEVEN P. NIGRELLI, IN HIS OFFICIAL CAPACITY AS ACTING-SUPERINTENDENT OF THE NEW YORK STATE POLICE, ET AL.
Respondents.

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT ON APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPLICANTS' REPLY BRIEF IN SUPPORT OF EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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I. Respondents Misrepresent the CCIA's Purpose and Scope.

Respondents' Brief in Opposition begins by attempting the impossible, seeking to walk back that the express purpose of the Concealed Carry Improvement Act ("CCIA") was to defy, repudiate, circumvent, and undermine this Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). In this futile effort at damage control, Respondents assert that the CCIA was enacted merely "to make necessary changes to the State's firearms licensing and possession laws" after *Bruen*. Brief for Respondents in Opposition ("Opp.") at 1. But no changes were made necessary by *Bruen*'s repudiation of the requirement that a person demonstrate "proper cause" — a special need more than a general desire for self-defense — to obtain a license to carry a firearm. *See* Opp. at 6 (describing the CCIA as having "made several other changes" unrelated to "proper cause").

Similarly, Respondents represent to this Court that Governor Hochul's purpose for calling for a special legislative session to enact CCIA was "to bring New York's law into compliance with the [*Bruen*] decision" (Opp. at 6). Yet it is evident that "compliance" was the last thing on the Governor's mind when, only hours after this Court's opinion was released, she promised New Yorkers that she would not "back down" or "cede" to this Court's authority, vowing instead to "fight back" against *Bruen* — a decision she called "reckless," "insanity," and "reprehensible." Emergency Application ("Application") at 1. In other words, the CCIA's entirely novel gun control enactments are not "necessary changes" after *Bruen*, nor was the CCIA enacted to "compl[y] with" *Bruen*.

II. The "Interlocutory Posture" of this Case Is Not Relevant to the Court's Decision.

Respondents claim that this Court should deny the relief sought on the theory that certiorari review is unlikely because the Court "rarely grants review of cases in an interlocutory posture." Opp. at 2; *see also* at 18-19. But that is a *non sequitur*. The question whether to vacate the stay below does not revolve around the current status of the case – indeed, it is Respondents who have appealed this case from the district court, leading to its "interlocutory posture." Instead, the Court considers whether it eventually "would consider the underlying issue sufficiently meritorious for the grant of certiorari…." *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U.S. 1301, 1305 (1974) (Powell, J., in chambers); *see also Certain Named & Unnamed Non-Citizen Children & Their Parents v. Tex.*, 448 U.S. 1327, 1330 (1980) (Powell, J., in chambers) ("there must be a significant possibility that a majority of the Court eventually will agree with the District Court's decision."); *Western Airlines, Inc. v. International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (vacatur of stay appropriate "where it appears [the] case could and very likely would be reviewed here upon final disposition in the court of appeals….").

In this case, due to the sweeping and "patently unconstitutional" nature of the CCIA (App.184a), and the district court's careful application of the *Bruen* framework to the statute, it is hardly "unreasonable to believe that five Members of the Court may agree with the decision of the District Court." *Certain Named and Unnamed Non-Citizen Children* at 1332. Under Respondents' theory, focusing on the current "interlocutory posture" of the case, it would never be appropriate for this Court to

weigh in with respect to stays of preliminary injunctions. *But see Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080 (2017); *N.Y. State Bd. of Elections v. Lopez Torres*, 549 U.S. 1204 (2007); *NetChoice, LLC v. Paxton*, 142 S. Ct. 1715 (2022).

What is more, New York's blatant repudiation of *Bruen* and this Court's authority to safeguard constitutional rights presents a compelling case for review at any stage.[1] *See Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997) (per curiam) ("our cases make clear that there is no absolute bar to review of nonfinal judgments"); *see also* Stephen M. Shapiro, *et al.*, Supreme Court Practice § 4.18 (10th ed. 2013) ("[Where] there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status.").

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[1] Respondents' cited cases do not support their argument. For example, *Abbott v. Veasey*, 580 U.S. 1104 (2017), involved a case that had been "remanded for further consideration of the facts" with respect to whether a statute had been enacted with a "discriminatory purpose … issues [that] will be better suited for certiorari review … after entry of final judgment." *Id.* at 1105 (Roberts, C.J., respecting the denial of certiorari). Similarly, *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) involved a "remand[] … to the District Court to fashion an appropriate remedy," where "it remains unclear precisely what action the Federal Government will be required to take…." *Id.* at 945 (Alito, J., respecting the denial of certiorari). *See also Wrotten v. New York*, 560 U.S. 959, 960 (2010) (Sotomayor, J., respecting the denial of certiorari) ("remanded … for further review, including of factual questions relevant to the issue of necessity"); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A. R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("remanded to the District Court to consider whether there had in fact been a contempt…."). No such outstanding factual determinations remain in this case, which presents squarely legal questions with respect to the facial constitutionality of a state statute. Finally, in *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (declining to grant a petition by prisoners where "10 Courts of Appeals ha[d] either agreed with, or deferred to, the Government's interpretation."). Here, not one circuit has upheld a "patently unconstitutional" statute like the CCIA – much less since *Bruen*.

As this Court recently reaffirmed, "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen* at 2156 (quoting *McDonald v. City of Chi.*, 561 U.S. 742, 780 (2010)). Respondents' plea for this Court to stand down is not persuasive here, where a state has reflexively enacted a law with the *express purpose* of defying and challenging a recent decision of this Court.

III. The Recency of *Bruen* Does Not Weigh Against Vacatur.

Arguing that this Court is unlikely "to grant review," Respondents further claim that there is some "need for percolation" in the lower courts before this Court should weigh in. Opp. at 2, 20. In support, Respondents claim that *Bruen* somehow altered course from this Court's earlier Second Amendment jurisprudence, providing a "revised constitutional framework" and "restated Second Amendment standard" – one that allegedly will "require substantial development in the lower courts, in accordance with traditional patterns of constitutional litigation." Opp. at 5, 20. On the contrary, *Bruen* merely reaffirmed what the Court had already decided more than a decade ago in *District of Columbia v. Heller*, 554 U.S. 570 (2008) and *McDonald*, repudiating the two-step "judge-empowering 'interest-balancing inquiry'" that the lower courts had widely adopted. *Heller* at 634; *Bruen* at 2129. Assessment of New York's blatant disregard for this Court's authority, and the CCIA's open conflict with the Second Amendment's text and *Bruen*'s framework, does not require "percolation" prior to this Court vacating the Second Circuit's stay and allowing the district court's injunction to take effect.

Moreover, it is worth noting that "percolation" of Second Amendment jurisprudence both *prior to Heller* (with most courts concluding the Second Amendment did not protect an individual right) and *after Heller* (with most courts applying prohibited judicial interest-balancing) did not advance jurisprudence in this area, but instead created mountains of unprincipled and atextual precedents that this Court was required to cast aside.

Nor are Applicants asking the Court to decide the merits of their challenge to the CCIA, but merely to vacate a reflexive, unexplained, and improvidently granted stay of a well-reasoned district court injunction. Should the Court grant the relief Applicants seek, this in no way would short-circuit or otherwise preclude the inevitable "percolation" in the lower courts, including resolution of this case by the Second Circuit.

Finally, Respondents are simply incorrect that this Court invariably waits some period of years before revisiting "'frontier legal problems'" of constitutional law. *See* Opp. at 19. For example, soon after returning to (for the first time in decades) the private property roots of the Fourth Amendment in *United States v. Jones*, 565 U.S. 400 (2012) (warrantless GPS tracking of a vehicle parked in public), the Court followed up by applying that property principle the very next year in *Florida v. Jardines*, 569 U.S. 1 (2013) (warrantless use of a drug-sniffing dog on a homeowner's porch). *See also* recent back-to-back cases involving Fifth Amendment Miranda rights, including *Maryland v. Shatzer*, 559 U.S. 98 (2010), *J. D. B. v. North Carolina*, 564 U.S. 261 (2011), and *Howes v. Fields*, 565 U.S. 499 (2012).

IV. The Second Circuit's Stay Did Not Preserve the "Status Quo."

Respondents claim that they wish to preserve the status quo, which they allege to be "that the CCIA has taken effect ... and has been in effect for three months because of stays issued by the court of appeals." Opp. at 22. On the contrary, the "'status quo' in preliminary-injunction parlance is really a 'status quo ante,'" which "shuts out defendants seeking shelter under a current 'status quo' precipitated by their wrongdoing." *N. Am. Soccer League, LLC v. United States Soccer Fed'n, Inc.*, 883 F.3d 32, 37 n.5 (2d Cir. 2018) (citation omitted). Here, the status quo is the day before the CCIA took effect, which has been the state of the law in New York for most, if not all, of its history. In any event, the "status quo" is not as simple as Respondents make it appear, as there have been no fewer than three different injunctions against the CCIA by district courts in New York, meaning that various components of the CCIA have been in effect *and not in effect* numerous times in recent months.

The statute was expeditiously challenged below. The fact that the district court's temporary restraining order and preliminary injunction did not occur until after the CCIA went into effect does not confer some sort of immunity from the law being enjoined, particularly as the district court deemed the CCIA a "patently unconstitutional" statute. The status quo here is the last point prior to the action giving rise to the dispute, which would be the state of New York law *before* the CCIA took effect. *See O Centro Espirita Beneficente Uniao do Vegetal v. Ashcroft*, 389 F.3d 973, 981 (10th Cir. 2004), *aff'd and remanded sub nom. Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) (the status quo is the "'last

peaceable uncontested status existing between the parties before the dispute developed,'" quoting 11A Wright & Miller § 2948, at 136 n.14).

V. Respondents Fail to Undermine Applicants' Likelihood of Success.

A. At Respondents' Urging, the Second Circuit Applied the Wrong Standard.

Respondents claim that this Court should decline relief here because "applicants have not shown that the court of appeals erred – much less 'clearly and demonstrably erred' – in issuing a stay." Opp. at 2 (citation omitted); *see also* at 21. Of course, the Second Circuit's single conclusory sentence provides precious little to critique: "[h]aving weighed the applicable factors, *see In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007), we conclude that a stay pending appeal is warranted."[2] App.002a. Requiring applicants to mount a robust legal challenge to an opinion that *does not exist* would merely incentivize lower courts to provide no analysis and justification whatsoever for their decisions in situations like this. On the contrary, it is the lower court's lack of any analysis supporting its stay that represents error. *See Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006); Application at 14.

What is more, Applicants *did* identify clear legal error in the Second Circuit's conclusory stay, explaining how the court applied the wrong legal standard to reach

[2] Respondents demur that "appellate rulings on stay motions (including from this Court) are typically short and often lack a detailed explanation…." Opp. at 21 n.8. *But see, e.g., SEC v. Citigroup Glob. Mkts., Inc.*, 673 F.3d 158 (2d Cir. 2012) (granting a stay of district court proceedings in a lengthy opinion); *Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41 (2d Cir. 2020) (denying a stay of the district court's order in a lengthy opinion); *New York v. DHS*, 974 F.3d 210 (2d Cir. 2020) (granting a stay of the district court's preliminary injunction in a lengthy opinion).

its finding that a stay was warranted. Application at 12-14. In a short footnote, Respondents disagree, opining that "*Nken [v. Holder*, 556 U.S. 418 (2009)] did not discuss, much less repudiate, a stay analysis that allows for calibrating the required merits showing to the strength of the equities." Opp. at 22 n.9. But that is *precisely* what *Nken* did, explaining that "'*[m]ore than a mere 'possibility' of relief is required*.'" *Id*. at 434 (emphasis added). That statement directly conflicts with the standard employed below by the Second Circuit, which permits a showing of merely "*some possibility of success*" on the merits when compensated for by a strong showing on the equities. *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) (emphasis added), relied on by *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007).

Hoping to salvage the issue, Respondents claim that, "[i]n any event, respondents made a strong showing of their likelihood of success on appeal under any applicable standard." Opp. 22 at n.9. But Respondents forget that the Second Circuit was not alone in its improper application of *Thapa*'s flawed, pre-*Nken* standard. Rather, Respondents themselves presented that standard to the Second Circuit – over Applicants' objections – as the correct framework to be used. *See* 2d Cir. No. 22-2908, Document 38 at 6 n.3; Document 18 (Mot.) at 13-14. Respondents cannot now claim that they have met an entirely different and more robust legal standard than that which they presented to the Second Circuit and which the lower court adopted and applied. Ironically, by asking this Court to find in the first instance that they have met their burden under a more robust post-*Nken* standard that the Second Circuit did not consider, Respondents ask this Court for precisely what their brief had just

disclaimed – "a de novo consideration of the underlying stay motion … an action that is far outside the scope of this Court's general practice." *Cf.* Opp. at 20 with Opp. at 21.

B. Respondents Fail to Identify Error in the District Court's Analysis.

Respondents offer a cornucopia of theories why the district court got its legal analysis wrong. None is persuasive – certainly not persuasive enough for this Court to oppositely conclude that *Respondents* are the ones likely to succeed on the merits.

1. The CCIA Obviously "Implicates" the Second Amendment.

First, Respondents repeatedly argue, with respect to many of Applicants' challenges, that the CCIA "does not implicate the text of the Second Amendment in the first instance," and thus "respondents were not required to proffer historical evidence to support the challenged licensing provisions." Opp. at 25; *see also* at 2, 4, 19, 22, 27,[3] and 30;[4] *See Bruen* at 2126 ("when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct.

[3] *See* Opp. at 27 ("[T]he court assumed without meaningful analysis that the Second Amendment's text reaches every sensitive place."). Respondents appear to advocate for flipping *Bruen* on its head, such that Applicants must prove the *presence of* a historical tradition of carrying firearms in each type of location the CCIA prohibits, before the government can be required to show a historical tradition supporting such restrictions. It is hardly surprising that Respondents desire to be freed from their burden under *Bruen*, but that is not the framework this Court has established.

[4] *See* Opp. at 30 ("the district court mistakenly presumed that the restricted-locations provision implicates the Second Amendment's text," yet "[t]his Court has never found that carrying firearms onto others' private property equates with 'carrying handguns publicly'"). On the contrary, neither the Second Amendment ("keep and bear arms"), nor *Heller* ("handgun possession in the home), nor *Bruen* ("bear arms in public for self-defense") makes such distinctions about the broad rights protected by the Second Amendment.

To justify its regulation, the government … must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.").

Respondents' claim – that the CCIA's conditions of licensure to keep and bear arms, along with its prohibitions on locations where firearms can be carried in public, *do not even "implicate"* the right to "bear arms" – simply cannot be taken seriously. Below, Applicants fully explained how they, their firearms, and their activities are unambiguously within the scope of the Second Amendment, as *Heller* and *Bruen* unequivocally demonstrate: (i) that "the People" includes the law-abiding, adult plaintiffs here; (ii) that "arms" unequivocally includes Applicants' handguns; and (iii) that "bear[ing] arms" unequivocally includes concealed carrying handguns in public for self-defense. App.246a-247a; App.298a-299a; Motion for TRO at 33 n.36. Likewise, the district court concluded that "the Second Amendment's plain text covers the conduct in question" in a variety of instances. App.092a, 125a, 131a, 137a, 146a, 153a, 153a, 157a, 161a. Indeed, this Court has held conclusively that ordinary citizens have a right to carry "handguns publicly for self-defense." *Bruen* at 2134.

It is hard to see how "proper cause" (a prerequisite to licensure) was found to involve conduct squarely within the scope of the Second Amendment in *Bruen*, yet "good moral character" (a prerequisite to licensure) is not within the scope of Second Amendment protections now. Indeed, one *cannot even possess* a firearm in New York without first obtaining a license and registering the firearm – meaning that "good moral character" is required not only to "bear" but merely to "keep" a firearm in one's own home. *See* N.Y. Penal Law § 265.01-b and N.Y. Penal Law § 400.00. Without

question, then, impediments (constitutional or otherwise) to the exercise of these enumerated rights "implicate" the Second Amendment, and demand *Bruen*'s historical analysis.[5]

2. Licensing Requirements.

As a preliminary matter, Respondents object to the district court's finding that Applicants had standing to challenge the CCIA's licensing provisions, claiming that Plaintiff Sloane "has never applied for a permit." Opp. at 23; *see also* at 10, 15, 35. But importantly, Respondents fail to acknowledge that Plaintiff Sloane tried to do so but has been forced to *wait more than a year* for an appointment *even to submit* his application to county licensing officials, characterizing this "lengthy wait time[]" as merely an "alleged processing delay[]." *Bruen* at 2138 n.9; Opp. at 24. Yet Respondents' co-defendant *openly admitted* to this "alleged" delay in his answer. ECF #35 at ¶10 ("Defendants admit … that Conway does not have an appointment available until October 2023."). Respondents also fail to acknowledge that *they admitted* that Defendant Doran (the licensing official below) would act "in accordance with the" CCIA, meaning that he would deny Plaintiff Sloane's incomplete application omitting the challenged information (such as a list of social media accounts). App.023a. Under Second Circuit precedent, these facts more than imbued

[5] As the district court correctly concluded, the CCIA merely "replaced the 'proper cause' standard with (1) a definition of [] 'good moral character'…." App.007a; *cf.* Opp. at 23 ("Applicants mistakenly state … that the 'good moral character' requirement is a replacement for the 'proper cause' requirement invalidated in *Bruen*.").

Plaintiffs with standing to challenge the CCIA's licensing provisions. *See United States v. Decastro*, 682 F.3d 160 (2d Cir. 2012).

With respect to the merits of the CCIA's licensing provisions, Respondents claim that the district court was wrong to demand they "proffer historical evidence to support the challenged provisions." Opp. at 25. First, relying on *Bruen*, Respondents claim that the CCIA's focus on "good moral character" is constitutional on its face, on the theory that this merely "'ensure[s] only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens'…." Opp. at 24 (quoting *Bruen* at 2138 n.9). Of course, the devil is in the details, and the CCIA's demand that a person subjectively be deemed to have "good moral character" is hardly the sort of objective, unbiased standard akin to "fingerprinting, a background check, a mental health records check, and training." *Bruen* at 2162 (Kavanaugh, J., concurring). Unsurprisingly, Respondents omit discussion of the full extent of the CCIA's "good moral character" inquisition, including its demand that an applicant offer up to the government a list of her *social media accounts* and the contact information for co-habitants and *her children*,[6] and that she sit for an open-ended inquest with law enforcement. *See* Application at 6. Second, Respondents claim that no "historical analysis" is necessary to defend the CCIA's licensing provisions because "*Bruen*

[6] *See United States v. Jones*, 565 U.S. 400, 415 (2012) (Sotomayor, J., concurring) (noting that such private information can provide a "precise, comprehensive record of a person's public [life] that reflects a wealth of detail about her familial, political, professional, religious, and sexual associations [including] 'trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar and on and on.'"). *See also* ECF# 6-1 at 21-22.

endorsed shall-issue licensing regimes" – claiming the CCIA to be such a regime. Opp. 25 (emphasis added). When this outlandish argument – that *Bruen* somehow "endorsed" dozens of states' statutory schemes that were not part of the case or before the Court – was made to the district court, the court called Respondents "just disingenuous." PI Tr. 60:10-15. Third, Respondents rely on then-Judge Barrett's dissent in *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) for the proposition that a "legislature may disarm those who have demonstrated a proclivity for violence whose possession of guns would otherwise threaten the public safety.'" Opp. at 25. Remarkably, Respondents omit Judge Barrett's previous points – first, "that power extends only to people who are dangerous," and second, "[n]or have the parties introduced any evidence the founding-era legislatures imposed virtue-based restrictions on the right," such as the CCIA's "good moral character" demand imposes. *Kanter* at 451. Read in context, Judge Barrett's statements are fatal to Respondents' position here.

3. Sensitive Locations.

With respect to the district court's limited order enjoining various of the CCIA's prohibitions on firearms in certain "sensitive locations," Respondents accuse Applicants of unsupported "hyperbole" for summarizing how the CCIA declares "virtually the entire landmass of New York" off limits to firearms. Opp. at 26. Yet the CCIA's prohibition on firearms in "restricted locations" applies to *all* "private property" (Opp. 7), while its "sensitive location" prohibitions sweep up virtually every conceivable category of public property. It is no wonder that, when challenged to list

the remaining places where New Yorkers *could still carry* firearms, Governor Hochul replied "probably some streets." *See* Application at 8. It thus is hardly an exaggeration that the CCIA effectively declares almost the entire State of New York a "sensitive place" – far in excess of this Court's admonition not to "effectively declare the island of Manhattan a 'sensitive place'…." *Bruen* at 2134.

Next, Respondents claim that the district court's "standing analysis" was "seriously flawed." Opp. at 26. As an example, Respondents allege that the district court improperly enjoined the CCIA's "prohibition on guns in drug-treatment *clinics*" based on Plaintiff Mann's allegations that he "provides counseling for drug-addicted persons *in church*…." Opp. at 15 (emphasis added). But Respondents mischaracterize the CCIA and misrepresent Applicants' allegations. The CCIA, for example, does not apply only to "drug-treatment *clinics*," but broadly to "*any location* providing ... chemical dependence care or services." App.206a (emphasis added). Nor did Pastor Mann allege that he only provides drug counseling services "in church," but also that he "travel[s]" and provides counseling in many locations. App.290a, App.347a-48a. In other words, once the facts and the law are portrayed accurately, the district court's conclusion that Applicants have standing seems eminently reasonable.

Finally, Respondents contend that the district court was not sufficiently receptive to the "historical sources" they proffered to support the CCIA. Opp. at 27-29. As an example, Respondents claim that the district court "invented a metric of representativeness based on historical census data…." Opp. at 29. But Respondents apparently failed to read *Bruen*, as the district court's analysis using census data was

drawn directly from this Court's methodology. *See Bruen* at 2154 (applying census data to conclude that "western restrictions" that applied to "about two-thirds of 1% of the population" of the country … were irrelevant" to establishing a historical tradition); *see also* at 2168, 2173 (Breyer, J., dissenting). Respondents also grossly misinterpret *Bruen* to have created wide categories of permissible "sensitive places" including (i) anywhere people exercise other constitutional rights, (ii) places containing so-called "vulnerable or impaired people," and (iii) in order "to avoid violence or chaos in unusually crowded places." Opp. at 28. Ironically, Respondents lost that very argument in *Bruen*, when the Court rejected the notion that guns could be banned in "'places where people typically congregate'…." *Bruen* at 2133. Moreover, *Bruen*'s focus on "sensitive places" involved locations "where a bad-intentioned armed person could disrupt key functions of democracy," or "where uniform lack of firearms is generally a condition of entry, and where government officials are present and vulnerable to attack." *Hardaway v. Nigrelli*, 2022 U.S. Dist. LEXIS 200813, *34, __ F.Supp.3d __ (U.S.D.C. W.D.N.Y Nov. 3, 2022). The CCIA, in contrast, bans firearms in a whole host of entirely ordinary and nonsensitive locations (such as public parks, doctors' offices, and churches) based on nothing more than ordinary members of society typically being present.

4. Restricted Locations.

Defending the CCIA's default ban on firearms in *all private property* across the state, Respondents claim that owners of private property have always had the right to exclude firearms (the default exclusionary policy that the CCIA now imposes on

them), and thus any harm to Applicants "would flow not from … the CCIA, but rather from decisions by property owners … about whether to allow guns … and when and how to convey that determination." Opp. at 29. On the contrary, the CCIA has made the uniform "decision" to ban firearms *unless and until* a property owner consents (through posting "clear and conspicuous signage" or otherwise providing "express consent") prior to a visit by a gun owner. *See* Application at 8. In other words, the CCIA has decided not only the "whether" but also the "how" and the "when" that Respondents erroneously claim remains the choice of property owners.[7]

VI. Respondents' Arguments on the Equitable Factors Are Unpersuasive.

With respect to the public interest, Respondents assert that "a stay was necessary to prevent regulatory chaos and public confusion...." Opp. at 32; *see also* Opp. at 3, 15. Respondents only citation was to *Citibank, N.A. v. Nyland* (CFS) Ltd. 849 F.2d 94, 97 (2d Cir. 1988) for the proposition that "public confusion can constitute irreparable harm." Opp. at 32. But *Nyland* involved a real estate parcel being managed by two parties, causing the Court to conclude that "having two entities speaking for one property is confusing to those in the rental market" — a type of

[7] One would not imagine that New York would be permitted to engage in such state-sponsored discrimination in another context. Certainly, New York could not ban unvaccinated persons from visiting all private property within the state, and allowing property owners to opt out by expressly posting "clear and conspicuous signage" that the unvaccinated are welcome – with the state claiming immunity to legal challenge on the theory that any harm arises only from a property owner's "decision" not to post a sign regarding vaccination status. Indeed, the district court enjoined the CCIA's restricted locations provision not only on Second Amendment grounds but also on First Amendment compelled speech grounds. *See* App.175a-182a.

confusion wholly unrelated to the issue here. Respondents also complain about the extra work to notify the public if the CCIA were enjoined (of course, much of the CCIA *was* enjoined until the Second Circuit stayed the district court's injunction). Opp. at 32. But it is New York that bears responsibility for having "to explain" a statute that it has enacted, and which the district court called "patently unconstitutional."

Next, Respondents hand-wring that the Preliminary Injunction will "requir[e] the State to issue licenses to people with a demonstrated propensity to misuse firearms." Opp. at 3; *see also* Opp. at 14, 33. On the contrary, offenses committed by individuals with a "demonstrated propensity to misuse firearms" no doubt would be recorded in state and federal databases which New York licensing officials could check in an unbiased manner. *See* App.105a (explaining that this would be an "objective … standard … easily applied."). What Respondents *actually* desire is the "open-ended discretion" to disqualify law-abiding citizens from obtaining licenses to carry firearms, empowered to adjudge the "good moral character" of ordinary Americans who wish merely to exercise their enumerated rights.

Next, Respondents claim that the district court's injunction, preventing New York from banning law-abiding persons with carry licenses from carrying in ordinary "locations such as bars, restaurants, [and] theaters" somehow will "increase[e] the risk of intentional or inadvertent shooting deaths or injuries." Opp. at 33. But to count this as a "harm" to the state would require the Court to conclude that the mere exercise of Second Amendment rights by licensed, law-abiding persons in public is a public "harm." On the contrary, "[t]he Second Amendment is the very product of an

interest balancing by the people" (*Heller* at 635), and their conclusion was that the bearing of arms by "the people" is *beneficial* to "the security of a free state." *See McDonald* at 783 ("[t]he right to keep and bear arms … is not the only constitutional right that has controversial public safety implications."). Simply put, more law-abiding people peaceably carrying firearms is not a detriment to public safety, and certainly not sufficient to support the Second Circuit's stay. Indeed, if this were a valid concern, New York long ago would have made carrying by licensed persons illegal in the locations the CCIA now declares off limits, rather than waiting to enact this ban to punish gun owners for having prevailed in *Bruen*.

Next, Respondents bemoan that they had only "three weeks" to oppose the preliminary injunction in the district court, claiming this time frame to be an inadequate "opportunity to mount a defense." Opp. at 33. Yet it is entirely unclear what relevance the district court's briefing schedule has to the three "equitable factors" but, even so, that harm is in the past, not occurring now or likely to occur in the future. Moreover, *Antonyuk I* was filed on July 11, 2022, (*see* Opp. at 8) 10 days after the CCIA's enactment, giving Respondents more than 15 weeks to craft their defenses prior to the district court's October 25, 2022 hearing on Applicants' preliminary injunction. Additionally, New York has been litigating challenges to its firearms laws for many years (having, in fact, presented in *Bruen* many of the same unhelpful historical sources offered below), and so one would think the Governor's, Attorney General's, and Solicitor General's offices would have been fully prepared to

defend CCIA *before* it was proposed to the State Assembly for enactment.[8] The district court's briefing schedule provides no basis for this Court to decline relief.

Next, claiming that Applicants are not being harmed by the Second Circuit's stay, Respondents claim that the Second Circuit "stands ready to adjudicate these important challenges in timely fashion, falsely alleging that the Second Circuit has "ordered expedited consideration of the matter...." Opp. at 1; *see also* Opp. at 15, Opp. at 35 ("court of appeals' decision to hear the case on an expedited basis"). Respondents' claim is flatly untrue. Rather, the Second Circuit granted expedited consideration only to Respondents' *stay motion* – not Respondents' *appeal*.[9] *See* 2nd Cir. 22-2908 Document 45 (cover sheet); App.002a. In fact, Respondents actually have sought to *delay the time for briefing*, having filed an extended scheduling request with the Second Circuit. *Cf.* 2nd Cir. 22-2908 Document 49 at 1 with Second Circuit Local Rule 31.2(a)(1)(A).

Finally, claiming Applicants will suffer no harm from the Second Circuit's continued and indefinite stay, Respondents take issue with various of Applicants'

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[8] The Attorney General's office has seven lawyers listed on its Opposition, and "[o]ver 1,800 employees, including over 700 attorneys...." *See* https://ag.ny.gov/our-office. If the Attorney General's office really needed additional time to develop legal and historical arguments in order to put up a defense, then the district court's decision to put the law on hold while it do so is the right step to take.

[9] *Cf. Christian, et al. v. Nigrelli*, 2nd Cir. 22-2987 Document 43 Order on expedited briefing: "IT IS HEREBY ORDERED that Appellant's opening brief is due January 23, 2023; Appellees' opposition brief is due March 6, 2023; any reply brief must be filed by March 22, 2023"; *Hardaway, et al, v. Nigrelli*, 2nd Cir. 22-2933 Document 57 Order on expedited briefing: "IT IS HEREBY ORDERED that Appellant's opening brief and the appendix are due January 17, 2023; Appellees' response brief is due February 27, 2023; and any reply brief must be filed by March 13, 2023." No such "expedited" briefing schedule exists in this case.

specific allegations below (Opp. at 34-35), but then appear to concede that Applicants will be harmed by being unable to carry their firearms in numerous public locations. Opp. at a35. However, Respondents allege that these infringements of Applicants' Second Amendment rights are "not sufficiently substantial to warrant enjoining application of the law on a statewide basis." *Id.* In fact, Respondents dispute even the fundamental notion that the violation of constitutional rights constitutes irreparable harm for purposes of injunctive relief. *Id*. Of course, this Court's opinions say otherwise. *See Elrod v. Burns*, 427 U.S. 347, 373 (1976).

CONCLUSION

Respondents claim that vacatur of the Second Circuit's unreasoned stay would mean "disruption of the orderly appellate process." Opp. at 17. On the contrary, as this Court has explained, it is the stay itself which represents "an 'intrusion into the ordinary processes of administration and judicial review'…." *Nken* at 427. The fact that the Second Circuit did not see fit to provide even the briefest explanation for its "intrusion" not only causes significant irreparable harm to Applicants, but also has deprived "[t]he parties and the public [of their] entitle[ment] to both careful review and a meaningful decision…." *Id.*

Whereas the district court took a deliberate and systematic approach, carefully weighing each of the CCIA's provisions under the *Bruen* framework, the Second Circuit applied the wrong legal standard and issued a knee-jerk conclusory opinion entirely devoid of reasoning or legal analysis. But even so, no appellate judge has suggested that the district court committed any legal error – yet the circuit court

thwarted the critical protections offered by the district court's preliminary injunction, which temporarily paused enforcement of a "patently unconstitutional" statute and would protect the Second Amendment rights of New Yorkers pending a decision on the merits.

Tellingly, in spite of Respondents' opposition, five of the nine defendants below *did not object* to the substance of the relief Applicants sought, and six of the nine *did not appeal* entry of the district court's preliminary injunction. Moreover, even Respondents did not ask the Second Circuit to stay the district court's entire injunction (Stay Mot. Document 18 at 13 n.5), possibly recognizing that certain portions of the CCIA are entirely indefensible.

It was error for the Second Circuit to stay the district court's injunction. This Court should vacate that stay pending the orderly resolution of Respondents' appeal, thereby once again making clear to New York that the Second Amendment is neither a "constitutional orphan" nor a "second-class right."

Respectfully submitted,

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