No. 23-_____

IN THE

Supreme Court of the United States

IVAN ANTONYUK, *et al.*,

Petitioners,

v.

STEVEN G. JAMES, in his official capacity as Acting Superintendent of the New York State Police, *et al.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

STEPHEN D. STAMBOULIEH
STAMBOULIEH LAW, PLLC
P.O. Box 428
Olive Branch, MS 38654
(601) 852-3440
stephen@sdslaw.us

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
rob@wjopc.com
Attorneys for Petitioners
**Counsel of Record*

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QUESTIONS PRESENTED FOR REVIEW

Moments after this Court issued *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), striking down New York's discretionary firearms licensing regime, New York politicians decried that decision as "reprehensible," vowing to resist the "insanity" of "gun culture" that "possessed … the Supreme Court." Rather than following this Court's decision, New York sought to nullify it through a "Concealed Carry *Improvement* Act" that makes it more difficult to exercise the right to bear arms in public than before *Bruen* was decided.

Relying almost entirely on a few outlier laws from the late 19th century, rather than common practice at the time the Second Amendment was ratified, the Second Circuit affirmed most of New York's "*Bruen* response bill," sanctioning the requirement that carry license applicants demonstrate their "good moral character" to licensing officials despite *Bruen*'s rejection of discretionary "suitability" determinations. The Second Circuit also endorsed New York's firearm bans in all manner of nonsensitive public places, rendering carry licenses of almost no value. The questions presented are:

1. Whether the proper historical time period for ascertaining the Second Amendment's original meaning is 1791, rather than 1868; and
2. Whether "the people" must convince government officials of their "good moral character" before exercising their Second Amendment right to bear arms in public.

PARTIES TO THE PROCEEDINGS

Petitioners are Ivan Antonyuk, Corey Johnson, Alfred Terrille, Joseph Mann, Leslie Leman, and Lawrence Sloane.

Respondents are Steven G. James in his official capacity as Acting Superintendent of the New York State Police,[1] 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.

Kathleen Hochul, in her official capacity as the Governor of the State of New York, William Fitzpatrick, in his official capacity as the Onondaga County District Attorney, Eugene Conway, in his official capacity as the Sheriff of Onondaga County, P. David Soares, in his official capacity as the District Attorney of Albany County, Gregory Oakes, in his official capacity as the District Attorney of Oswego County, Don Hilton, in his official capacity as the Sheriff of Oswego County, Joseph Stanzione, in his official capacity as the District Attorney of Greene County were defendants in the district court but were not parties before the Court of Appeals.

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[1] Steven G. James was appointed Acting Superintendent on January 31, 2024. His predecessor, Dominick L. Chiumento, was automatically substituted for his predecessor, Steven A. Nigrelli, in the Circuit Court.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Antonyuk v. Chiumento*, Nos. 22-2908 (lead), 22-2972 (consolidated) (2d Cir.) (opinion affirming in part and denying in part the district court's preliminary injunction, issued December 8, 2023); and
- *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH) (N.D.N.Y.) (order granting preliminary injunction, filed November 7, 2022).

The district court continued its stay of this matter pending Petitioners' filing this Petition for Writ of Certiorari:

- *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH) (N.D.N.Y.) (Text Order 111, filed January 17, 2024).

There are no other proceedings in state or federal trail or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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"The Second Amendment's plain text … presumptively guarantees … a right to 'bear' arms in public for self-defense." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 33 (2022). But just days after that statement was made, New York defiantly enacted its "*Bruen* response bill," purporting to comport with this Court's decision, but instead seeking to nullify it. Intent on maintaining its *de facto* prohibition on public carry, New York decided that, if it must issue licenses to ordinary citizens after *Bruen*, it first would do whatever it could to discourage applicants by imposing novel and onerous licensing requirements, and then render any remaining licenses a practical nullity by prohibiting carry virtually everywhere in the State by declaring a multitude of brand new "sensitive locations."

Although the district court issued a "thorough opinion" that carefully applied the framework established in *Bruen*, found Petitioners "likely to succeed on a number of their claims," and enjoined large portions of the New York law, the Second Circuit ("the panel") quickly stayed that order without providing "any explanation for its ruling."[2] The Second Circuit has now issued an opinion largely vacating the district court's injunction, affirming only as to two of the least defensible provisions of the New York law.

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[2] *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023) (Alito, J., joined by Thomas, J., statement respecting the denial of the application to vacate stay).

To justify New York's widespread carry ban across much of the State, the panel below concocted a historical tradition composed almost entirely (and at times exclusively) of mid-to-late 19th-century statutes that reveal nothing about what the Second Amendment meant to those who ratified it. And to justify New York's requirement that a person prove so-called "good moral character" to licensing officials before being "entrusted" to exercise an enumerated right, the panel sanctioned the very sort of "open-ended discretion" to determine "suitability" that *Bruen* explicitly prohibited.

If New York's challenged law was its "*Bruen* response bill," then the panel's decision represents the Second Circuit's "*Bruen* response opinion." Brazenly, the panel repeatedly justified wholesale rejection of *Bruen*'s methodology, claiming that *Bruen* was an "exceptional" case, and that in "less exceptional" cases — like this one, apparently — courts are free to contrive their own approach. Audaciously, the panel repeatedly chastised the district court for having hewed too closely to *Bruen*. And in one instance, the panel faulted the district court for having "failed to properly appreciate" a historical analogue that appears never to have existed.

The panel's repudiation of *Bruen* was no accident. In support of its rejection of this Court's holdings, the panel referenced a law review article written as a playbook for "lower courts" to "mitigate" *Bruen* by "engag[ing] in the time-honored practice of 'narrowing Supreme Court precedent from below.'"

This Court's intervention is necessary for several reasons. First, to correct the panel's flagrant methodological errors which conflict with this Court's precedents. Second, to repudiate the panel's unabashed refusal to abide by the *Bruen* framework. And third, to provide lower courts that *actually* desire to follow this Court's directive with critical guidance on how to analyze Second Amendment cases.

The lower courts need a definite pronouncement that the proper time period for ascertaining the scope of the Second Amendment is at the Founding — not the last two decades of the 19th century, as the panel apparently believed. And this case would allow this Court the opportunity to clarify that government may not selectively disarm law-abiding members of "the people" whenever licensing officials feel they are of poor character, potentially dangerous, or otherwise unworthy of enjoying the natural right to self-defense with which they were endowed by their Creator. These necessary course corrections not only would rectify the errors in the panel's decision, but also would provide critical guidance to the lower courts who are struggling with (and split on) the questions presented here.

OPINIONS BELOW

The opinion of the Court of Appeals (App.1-215) is available at 89 F.4th 271. The district court's opinion (App.216-428) issuing a preliminary injunction is available at 639 F. Supp. 3d 232.

JURISDICTION

The Court of Appeals issued its opinion on December 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and the relevant portions of the New York Penal Law are reproduced at App.429-40.

STATEMENT OF THE CASE

A. The *Bruen* Decision

When this Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), its recognition of a pre-existing, individual Second Amendment right to keep and bear arms was met with swift and widespread resistance in the lower courts. Nearly uniformly, the lower courts refused to believe that *Heller*'s rejection of "a freestanding 'interest-balancing' approach" would deny to them the "power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. Many years of constitutional infidelity followed, during which courts invented atextual tests applying their own conceptions about which laws ran afoul of the Second Amendment.

Expressing concern over this Court's hesitancy to review those decisions, Justices Thomas and Scalia

observed that "[t]he Court's refusal to review a decision that flouts … our Second Amendment precedents stands in marked contrast to the Court's willingness to summarily reverse courts that disregard our other constitutional decisions." *Friedman v. City of Highland Park*, 577 U.S. 1039, 1043 (2015) (Thomas, J., dissenting from the denial of certiorari). Absent substantive vindication of the Second Amendment in the years that followed, Justice Thomas reiterated this concern, observing that "the lower courts seem to have gotten the message" that "[t]he right to keep and bear arms is apparently this Court's constitutional orphan." *Silvester v. Becerra*, 583 U.S. 1139, 1149 (2018) (Thomas, J., dissenting from the denial of certiorari).

With *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), this Court corrected this "message" and decisively ended the Second Amendment's relegation to constitutional steerage. Declaring the Second Amendment a "second-class right" no longer, *Bruen* reaffirmed the traditional American right to carry arms in public, rejecting a New York law that treated the right as a mere privilege conditioned upon an applicant's demonstrating "proper cause" to licensing authorities. *Id.* at 70. This Court repudiated the Courts of Appeals' atextual, ahistorical, "judge-empowering 'interest-balancing,'" and explicitly reaffirmed *Heller*'s standard of review "centered on constitutional text and history." *Id.* at 22. Reiterating *Heller*'s first principles, *Bruen* instructed the lower courts to ascertain the scope of the right to keep and bear arms as originally understood by the people who adopted it. *Id.* This standard rightly places the

burden on the government to prove affirmatively that its interposition between "the people" and their right to "keep and bear arms" comports with early American practice. *Id.* at 24.

B. New York's "*Bruen* Response Bill"

Even before *Bruen*'s ink was dry, New York Governor Kathleen Hochul decried the decision, calling it "disturbing," "shocking," "reckless," and "reprehensible."[3] Alarmed at the prospect of an armed populace empowered to defend against New York's criminal element, the Governor made her plan clear: "This decision [is] not what New Yorkers want. And we should have the right of determination … [we] have *a moral responsibility* to do what we can … because of … the insanity, of the gun culture that has now possessed … the Supreme Court."[4]

Governor Hochul's "Concealed Carry Improvement Act" ("CCIA") passed almost immediately. This "swift and bold action" to combat this Court's "senseless[]" decision was New York's answer to "the resulting increase in licenses and in the number of individuals who will likely purchase and carry weapons" in *Bruen*'s wake.[5] Accordingly, the CCIA maintains

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[3] A. Hagstrom, "NY Gov. Hochul Defiant After Supreme Court Gun Decision: 'We're Just Getting Started,'" *Fox News* (June 23, 2022).

[4] *Id.* (emphasis added).

[5] "Press Release: Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed

business as usual in the Empire State where, one way or another, the ordinary citizen is not to be permitted to carry a firearm in public for self-defense. Although *Bruen* abrogated "may-issue" licensing, the CCIA — by design and intent — makes the licensing process so onerous, and the list of newly "sensitive" places so expansive, that in New York it is as if *Bruen* was never decided.

The CCIA effectuates its *Bruen* nullification scheme first by overhauling New York's licensing regime. In place of the discretionary "proper cause" standard that *Bruen* invalidated, the CCIA requires an applicant to demonstrate "good moral character," defined as "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." App.436. To implement this ahistorical morality test, the CCIA demands character references, information about cohabitants and adult children, a personal "interview" with a licensing official, more than two full days of firearms training, a list of social media accounts, and "such other information" as might be demanded. App.438-39.

For those who persevere through this process, the CCIA then restricts *where* in public a licensee may carry a firearm, declaring not just "the island of Manhattan" but virtually the *entire landmass* of New York a "sensitive place," making public carry so risky

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Carry Weapons in Response to Reckless Supreme Court Decision," *N.Y. State* (July 1, 2022).

that even the hyper-law-abiding CCIA licensee would not dare to carry. In fact, when asked where New Yorkers could carry under the CCIA, Governor Hochul responded "[p]robably some streets."[6] These so-called "sensitive locations" comprise 20 categories, and more subcategories, including the most ordinary locations normal people visit as they go about their daily lives. *See* App.432-34. Finally, filling the gaps in this disarmament scheme, the CCIA effectively commandeers *all private properties* in New York, declaring them "restricted locations" where firearms by default are prohibited unless the owner posts "clear and conspicuous signage" or "giv[es] express consent." App.431.

C. Procedural History

Petitioners filed suit in the Northern District of New York on September 20, 2022, challenging various of the CCIA's provisions under the First, Second, Fifth, and Fourteenth Amendments. Following briefing and oral argument on a motion for preliminary injunction, the district court issued a lengthy opinion partially granting preliminary relief on November 7, 2022, enjoining enforcement of many of the CCIA's licensing requirements and sensitive locations. App.216-428.

Respondents appealed the district court's preliminary injunction to the Second Circuit, seeking an emergency interim stay of the injunction and a stay

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[6] M. Kramer & D. Brennan, "Fresh off primary win, Gov. Kathy Hochul dives right into guns – who can get them and where they can take them," *CBS New York* (June 29, 2022).

pending appeal. The Second Circuit reflexively granted New York a "temporary stay" before Petitioners could respond, and later a stay pending appeal without analysis.

On December 21, 2022, Petitioners sought emergency relief from this Court to vacate the Second Circuit's unexplained stay. Although this Court declined to intervene at that preliminary stage, *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023), Justices Alito and Thomas issued a statement explaining that "[t]he New York law at issue in this application presents novel and serious questions under both the First and the Second Amendments," and noting that the district court's "thorough opinion" found "that the applicants were likely to succeed … as to twelve provisions of the challenged law." *Id.* (Alito, J., joined by Thomas, J., statement respecting the denial of the application to vacate stay).

After briefing, and oral argument on March 20, 2023, the panel issued its opinion in a consolidated appeal on December 8, 2023. App.1-215. Distinguishing *Bruen* as an "exceptional" case (App.35, 112), the Second Circuit vacated much of the district court's injunction, finding virtually all of the CCIA to be facially constitutional under the Second Amendment.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION WHOSE ANSWER WILL AFFECT HUNDREDS OF SECOND AMENDMENT CASES.

A. *Bruen* Left Unresolved the Appropriate Temporal Focal Point for Second Amendment Analysis.

Although *Bruen* "acknowledge[d] ... an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding" when the Fourteenth Amendment was ratified in 1868, or when the Second Amendment was ratified in 1791, the Court ultimately left the question unresolved, determining that it "need not address this issue today because ... the public understanding of the right to keep and bear arms in both 1791 and 1868 was ... the same with respect to public carry." *Bruen* at 37-38. But while unnecessary to answer in *Bruen*, this question is central to this and many other Second Amendment cases. Indeed, Justice Barrett's concurrence seemed to anticipate that the Court soon would be called on to resolve this important question, and suggested that "1791 is the benchmark" because "Reconstruction-era history" alone would be "simply too late" and "too little." *Id.* at 82 (Barrett, J., concurring). Cautioning lower courts, Justice Barrett warned that the Court's "decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century…." *Id.*

Although it has been nearly two years since *Bruen* was decided, the lower courts have failed to coalesce around a definitive answer to the question of 1791 versus 1868. There is a multi-way circuit split on the question, and the district courts are in disarray. *See* Section III, *infra*. If anything, the lower courts' approaches have only continued to diverge and multiply, since this issue arises in most Second Amendment challenges.

This case presents an excellent vehicle for this Court to resolve the debate between 1791 and 1868. Below, the panel relied — almost without exception — on historical laws enacted well after the Second Amendment's ratification, with the earliest being nearly half a century after the Founding. Strikingly, of the three earlier analogues the panel did reference, every one was considered and rejected in *Bruen*. And the only time the panel *did* examine a series of Founding-era statutes, it affirmed that part of the district court's injunction.

In other words, the Second Circuit's singular focus on mid-to-late 19th-century history was outcome-determinative in this case. And, "apart from [this] handful of late-19th-century jurisdictions" (*Bruen* at 38), the panel would have been forced to admit that no historical tradition exists and affirm the district court's injunction. Thus, in addition to correcting the errors in the opinion below, resolution of this important structural question would provide critical guidance to innumerable lower courts analyzing similar challenges.

B. This Court's Second Amendment Decisions Confirm 1791 as the Proper Focal Point.

Although *Bruen* found it unnecessary to definitively answer the 1791 vs. 1868 "scholarly debate," that does not mean the lower courts were left without guidance. Far from it. Not only *Bruen*, but also *Heller* and *McDonald*, provided significant confirmation that the Second Amendment should be construed as originally understood in 1791. To the extent that earlier or later sources are utilized, it is only to confirm the understanding that existed at the Founding. Indeed, *Bruen* stated that this was the Court's "general[] assum[ption]." *Id.* at 37.

In *Heller*, although not addressing a state law, the Court explained that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them...." *Heller* at 634-35. Noting that, "[i]n the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment," the Court explained that "those discussions took place 75 years after the ratification of the Second Amendment, [and thus] do not provide as much insight into its original meaning as earlier sources." *Id.* at 614. Thus, after primarily examining sources from the Founding era (*id.* at 582-603), the Court secondarily considered sources "through the end of the 19th century" (*id.* at 605), which served only to confirm what the Court already had established (*id.* at

605-25).[7] Thus in *Heller*, as in *Bruen*, the tradition of both time periods was "the same...." *Bruen* at 38.

McDonald v. City of Chicago, 561 U.S. 742 (2010), provides further confirmation. There, the Court reiterated its rejection of "'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights,'" refusing "to apply different standards 'depending on whether the claim was asserted in a state or federal court.'" *Id.* at 765. And, as had *Heller* before it, *McDonald* examined "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment," but only because it "confirms that the right to keep and bear arms was considered fundamental." *Id.* at 776; *see also* at 780.[8]

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[7] *See also Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) ("post-ratification adoption or acceptance of laws that are *inconsistent* with the original meaning of the constitutional text obviously cannot overcome or alter that text.").

[8] The panel badly misread *McDonald* as supporting its singular focus on 1868, explaining that "the *McDonald* plurality looked to evidence of the pre-Civil War and Reconstruction Eras to hold that right to keep and bear arms was a fundamental right...." App.40-41 (citing *McDonald* at 770-78). But the panel ignored the preceding pages of *McDonald*, which looked at 19th-century sources *only after* reaffirming *Heller*'s historical analysis, examining the English tradition, noting that this tradition continued to the colonies and explaining that "[t]his understanding persisted in the years immediately following the ratification of the Bill of Rights." *Id.* at 767-69. *McDonald* thus falls squarely in line with *Heller* and *Bruen*, in which

Unsurprisingly, *Bruen* did not upset the apple cart, instead providing significant further confirmation that 1791 is the focal point to determine the Second Amendment's meaning. First, the Court described the "Second Amendment" as being "'intended to endure for ages to come,'" noting that "its meaning is fixed according to the understandings of those who ratified it...." *Id.* at 28. Second, the Court reaffirmed that constitutional rights have the same meaning "against the States ... as against the Federal Government." *Id.* at 37. Third, the Court noted that "we have generally assumed that the scope of the protection applicable to the Federal Government **and States** is pegged to ... **1791**." *Id.* (emphasis added). Fourth, the Court again made clear that 19th-century history provides — at best — murky insight and "'do[es] not provide as much insight into [] original meaning as earlier sources.'" *Id.* at 36.[9] And fifth, the Court explained that, to the extent 19th-century evidence is to be consulted at all, it can only be to provide "'mere confirmation of what

"19th-century evidence was 'treated as mere confirmation of what the Court thought had already been established.'" *Bruen* at 37. Yet according to the panel, "[i]t would be incongruous to deem the right to keep and bear arms fully applicable to the States by Reconstruction standards but then define its scope and limitations exclusively by 1791 standards." App.41. But *McDonald* did precisely that, stating "that incorporated Bill of Rights protections 'are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment.'" *Id.* at 765.

[9] *See also Sprint Commc'ns Co. v. APCC Servs.*, 554 U.S. 269, 312 (2008) (Roberts, J., dissenting) ("belated innovations of the mid- to late-19th-century … come too late…. A belated and equivocal tradition cannot fill in….").

the Court thought had already been established.'" *Id.* at 37.

Heller, *McDonald*, and *Bruen* thus provide unwavering confirmation that the Second Amendment is to be understood based on the original "public understanding of the right" when it was adopted in 1791.

C. This Court's Other Precedents Confirm 1791 Is the Proper Focal Point.

In addition to *Heller*, *McDonald*, and *Bruen*, other decisions indicate that 1791 is the appropriate focus for determining the original meaning of the Bill of Rights. Indeed, *Bruen* referenced several such decisions (*Bruen* at 37, collecting cases), which make several analytical precepts clear.

First, this Court has been consistent that incorporated constitutional provisions mean the same thing "against the States … as against the Federal Government." *Bruen* at 37; *see also South Carolina v. United States*, 199 U.S. 437, 448 (1905) ("The Constitution['s] … meaning does not alter. That which it meant when adopted it means now."). Consequently, this Court has observed "no daylight between the federal and state conduct" that an incorporated Bill of Rights provision "prohibits or requires." *Timbs v. Indiana*, 139 S. Ct. 682, 687 (2019).

Second, this Court consistently has used 1791 as the focal point for constitutional analysis, second only to "the text," with preceding or subsequent history

serving a merely confirmatory role. *See, e.g., Lynch v. Donnelly*, 465 U.S. 668, 674 (1984) (noting the "special significance" of the "interpretation of the Establishment Clause by Congress in 1789"); *Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("We look to the statutes and common law of the founding era to determine the norms that the Fourth Amendment was meant to preserve."); *Gamble v. United States*, 139 S. Ct. 1960, 1965, 1966 (2019) ("start[ing] with the text of the Fifth Amendment," and then looking to how it "'was commonly understood in 1791,'" before turning to "antebellum cases" which "reflect the same reading"); *Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020) (noting that "[i]nfluential, postadoption treatises confirm" the "backdrop" of the Sixth Amendment's drafting and ratification); *Timbs* at 688 (looking at "colonial-era provisions" and the "constitutions of eight States" to determine the original meaning of the Eighth Amendment, before finding further confirmation in "[a]n even broader consensus … in 1868").

Third, never has this Court looked to 1868 incorporation, or beyond, as the primary historical period for determining the meaning of an enumerated right originally adopted in 1791.[10] Rather, subsequent history can only "'confirm[] … what the Court thought had already been established.'" *Bruen* at 37. *See also*

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[10] The one exception, *Apodaca v. Oregon*, 406 U.S. 404 (1972), "was the result of an unusual division among the Justices, not an endorsement of the two-track approach to incorporation." *McDonald* at 766 n.14. Ultimately, this Court overruled that "badly fractured set of opinions." *Ramos* at 1397.

Espinoza v. Mont. Dep't of Revenue, 140 S. Ct. 2246, 2258-59 (2020) ("a tradition [that] arose in the second half of the 19th century … cannot by itself establish an early American tradition.").[11]

There is no question that this uniform 1791-centric approach should apply to Second Amendment cases, as the Second Amendment is not "subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald* at 780. The above principles apply to the Second Amendment with equal force, regardless of the entirely academic "ongoing scholarly debate" as to 1791 or 1868. *Bruen* at 37. Indeed, such academic debate has long been laid to rest. *See id.* at 82 (Barrett, J., concurring). Yet the panel found otherwise, charting its own path, and claiming "1868 and 1791 are *both* focal points" of analysis. App.39 (emphasis added). This Court should grant certiorari to correct that obviously erroneous holding and to make clear that 1791 is *the* singular focal point for Second Amendment analysis.

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[11] Nor may courts rely on pre-American sources to manufacture a tradition that was not adopted at the Founding. *Bruen* at 39 ("this Court has long cautioned that the English common law 'is not to be taken in all respects to be that of America.'"); *Powell v. Alabama*, 287 U.S. 45, 64 (1932) ("in at least twelve of the thirteen colonies the rule of the English common law … had been definitely rejected"). Thus, as with Reconstruction-era sources, to the extent that pre-Founding sources are to be used at all, they must confirm (not create or contradict) a tradition that existed at the Founding.

II. THE DECISION BELOW DEFIES THIS COURT'S PRECEDENTS.

A. The Second Circuit Boldly Stated Its Intent to Evade *Bruen*'s Framework.

Repeatedly, the panel advanced the remarkable theory that it was not bound to apply the Court's methodology in *Bruen*. Labeling *Bruen* a case of "exceptional nature," the panel surmised that courts are not required to follow *Bruen*'s lead "in cases challenging less exceptional regulations." App.35. The panel repeated this claim no fewer than four times, each time justifying circumvention of a portion of *Bruen*'s framework on the theory that *Bruen* came out the way it did only because it was "exceptional." *See* App.28, 35 ("a lack of [historical] precedent was … dispositive in *Bruen*. But that was due to [its] exceptional nature…."); App.37 (*Bruen* rejected analogues affecting "'minuscule [and] territorial populations'" only because of "the exceptional context…. In less exceptional contexts," the lack of historical analogues "does not command the [same] inference…."); App.112 ("True, *Bruen* did utilize the number of states ... and their relative populations as indicia of the orthodoxy and representativeness ... but New York's requirement was exceptional….").

But although *Bruen* was a landmark decision, there was nothing "exceptional" about the framework of historical analysis the Court articulated. Rather, even Justice Breyer in dissent agreed that the Court was establishing rules to be used in future cases. *Id.* at 111. As the Court explained, *Bruen*'s methodology is

the "[o]nly" way to analyze Second Amendment challenges. *Id.* at 17.[12]

Not so, according to the panel. Justifying its refusal to strike down the apparently "less exceptional" provisions of New York law in this case, the panel disagreed with *Bruen* that "[t]he government must ... justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 24. Rather, the panel claimed, "the absence of a distinctly similar historical regulation … can only prove so much." App.33.

In support of this *Bruen*-defying conclusion, the panel cited (App.34 n.10) to a recent law review article that calls *Bruen* "unsatisfying," claims that *Bruen* "places outsized importance … on historical silence," and suggests "possible judicial … responses to the decision" in order to "read[] *Bruen* narrowly" and "engage in the time-honored practice of 'narrowing Supreme Court precedent from below.'" Jacob D. Charles, *The Dead Hand of a Silent Past:* Bruen*, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 67-149 (2023). Maligning this nation's historical tradition as "the dead hands of the past," the article

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[12] During oral argument, one panel member critiqued *Bruen*: "they're not giving us a whole lot to work with here ... there's all this picking and choosing of historical evidence...." The panel's decision echoes that sentiment, claiming that "*Heller* did not offer much guidance to lower courts analyzing future Second Amendment claims." App.22; *accord Bruen* at 111 (Breyer, J., dissenting). This Court should grant the panel's request, and provide the desired "guidance" by clarifying that 1791 is the focal point of Second Amendment analysis.

recommends that, "though the Supreme Court may desire to sit as a superlegislature over nationwide gun policy, lower courts … need not easily cede the people's ultimate authority." *Id.* at 71, 155.

Even the panel's reference to this law review article is disturbing, as it boldly recommends "pathways for … lower courts to implement [*Bruen*]" with "significant refinement" and to decide cases "without voiding all reasonable attempts to regulate guns," advocating for judicial opinions designed to make this Court "rethink whether the test *Bruen* mandated should be continued." *Id.* at 80, 146, 154. But the panel did not stop there. After referencing this detailed plan to defy this Court, the panel implemented the playbook in its opinion.[13] *Cf.* Charles at 148, *with* App.35; Charles at 148-49, *with* App.33; Charles at 149, *with* App.22.

B. Freed from *Bruen*, the Second Circuit Manufactured Its Own Framework.

Having rid itself of *Bruen*, the panel engaged in precisely the sort of "freewheeling reliance on

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[13] Similar tactics by lower courts have drawn swift correction. In *Hutto v. Davis*, 454 U.S. 370, 374-75 (1982) (*per curiam*), this Court noted that "the Court of Appeals could be viewed as having ignored … the hierarchy of the federal court system.... [U]nless we wish anarchy to prevail within the federal judicial system, a precedent of this Court must be followed by the lower federal courts no matter how misguided the judges of those courts may think it to be." *See also Jaffree v. Wallace*, 706 F.2d 1526, 1532 (11th Cir. 1983) ("the Supreme Court is the ultimate authority on the interpretation of our Constitution and laws; its interpretations may not be disregarded.").

historical practice from the mid-to-late 19th century" that this Court implicitly — and Justice Barrett explicitly — indicated is not permitted. *Bruen* at 83 (Barrett, J., concurring).

First, the panel upheld many of the CCIA's novel restrictions despite admitting to having located *no Founding-era analogue at all.*[14] *See, e.g.*, App.70 n.31 (conceding that "[l]icensing schemes" requiring good moral character "were a post-Civil War phenomenon"); App.111 (referencing the "absence of 18th- [or even] 19th-century regulations prohibiting firearms in medical establishments"); App.145 (recognizing "statutes banning firearms in analogous places [to parks] such as 'commons' or 'greens' were ... absent from the historical record"). These concessions are in open war with *Bruen*'s teaching that "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 26.

Second, the panel fabricated its own "historical record" piecemeal, based entirely on a smattering of late-in-time analogues, mostly from the 1860s and later. *See, e.g.*, App.67-70 (upholding "good moral character" by relying entirely on "firearm licensing schemes from the years immediately following ratification of the Fourteenth Amendment");

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[14] Tellingly, the only time the panel *did* examine a series of Founding-era statutes, it *struck down* New York's "prohibition on carriage on private property open to the public," affirming the district court's injunction as to the same. App.207-12.

App.143-44, 146-51, 154-57 (finding a tradition banning firearms in "parks and zoos" in various state, territorial, and city laws enacted between 1861 and 1897); App.106-19 (upholding firearm ban in healthcare settings based on three state laws enacted nearly half a century after the Founding); App.167 (upholding firearm ban in bars and restaurants based entirely on laws from 1867 through 1890); App.187-88 (approving firearm ban in "theaters" using five laws dating from 1869 through 1890).

Seeking to justify its polestar reliance on post-Reconstruction laws, the panel demurred that "evidence from Reconstruction regarding the scope of the right to bear arms incorporated by the Fourteenth Amendment is *at least as relevant* as evidence from the Founding Era," and this "period of relevance extends past 1868 itself." App.68 n.27 (emphasis added). *See also* App.71 n.32 (claiming that even "[t]wentieth-century evidence is … not weightless"). On the contrary, this Court has made clear that "19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established.'" *Bruen* at 37.

Third, the panel claimed to have discovered three Founding-era sources to uphold various portions of the CCIA: (1) the 1328 Statute of Northampton; (2) a 1786 Virginia statute; and (3) a 1792 North Carolina statute. App.147-48. The panel relied on these three laws repeatedly throughout its opinion.[15] App.149-51,

[15] Likely, the historical record contains not three, but rather only two of these examples, as the 1792 North Carolina statute

153, 157, 187, 189-90. But, as this Court has already explained, the Statute of Northampton "has little bearing on the Second Amendment adopted in 1791." *Bruen* at 41. And laws like the 1786 Virginia statute "merely codified the existing common-law offense of bearing arms to terrorize the people," and thus "provide no justification for laws restricting the public carry of weapons." *Bruen* at 47; *see also* at 122 (Breyer, J., dissenting) (identifying the "1792 … North Carolina … law" and noting "[t]he Court discounts these laws primarily because they were modeled on the Statute of Northampton…."). In other words, *Bruen* considered and rejected the only three pre-Reconstruction-era laws on which the panel relied.[16]

Fourth, the panel frequently chided the district court for its faithful adherence to *Bruen*'s methodology, insisting that it was error to assume that *Bruen* meant what it said. *See, e.g.*, App.75 (criticizing that "[t]he

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appears never to have existed. Indeed, "[t]he … source was a 1792 book by a lawyer … compiling the English statutes in force in North Carolina." S.P. Halbrook, *Faux Histoire of the Right to Bear Arms: Young v. Hawaii (9th Cir. 2021)* at 21 (July 13, 2021). And as subsequent North Carolina statute compilers noted, that author "was utterly unworthy … omitting many important statutes, always in force, and inserting many others, which never were, and never could have been in force...." Preface of the Commissioners of 1838, Revised Code of North Carolina at xiii (1855); *see also State v. Huntly*, 25 N.C. 418, 420 (1843) (that statute "certainly has not been [in effect] since the first of January, 1838....").

[16] *Bruen* expressed "doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation." *Id.* at 46.

district court ... seemed to draw strong and specific inferences from historical silence....”); App.145, 160 (disparaging as “analogical error” the district court’s observation that “statutes banning firearms in analogous places [to parks] such as ‘commons’ or ‘greens’ were ... absent from the historical record”); App.167-68, 175 (rejecting the district court’s distinction between 19th-century laws which, at most, prohibited firearm possession *by intoxicated persons* and New York’s law banning firearm possession by anyone *in the presence of alcohol*, finding them “analogous enough”).[17] The panel even faulted the district court for having “failed to appreciate” the seemingly non-existent 1792 North Carolina statute, claiming this “tainted the rest of the district court’s analysis.” App.190, 157-58. *See* n.15, *supra.*

Fifth, the panel minimized — or simply ignored — Petitioners’ showings of relevant *Founding-era* traditions *contrary* to New York’s prohibitions. *See, e.g.*, App.159 (“unconvinced by [Petitioners’] argument that the former use of Boston Common and similar spaces as gathering grounds for the militia undermines a tradition of regulating firearms in urban public parks.”); App.166-76 (ignoring Petitioners’ evidence[18] that firearms and alcohol were *ubiquitously*

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[17] *But see United States v. Daniels*, 77 F.4th 337, 345, 347 (5th Cir. 2023) (“Founding-era statutes concerning guns and alcohol were few, [and] [a]t most, the postbellum statutes support the banning the *carry* of firearms *while under the influence*.”).

[18] *See* Plaintiffs-Appellees’ Answering Brief in Response to Defendant-Appellant Cecile (Feb. 1, 2023) at 29.

mixed during colonial times); App. 176-91 (ignoring Petitioners' contrary Founding-era historical tradition[19] demonstrating that firearms were regularly carried in assemblies and taverns akin to "theaters"). Yet *Bruen* made clear that "we do not consider ... 'instructive' ... 'legislative improvisations[]' which conflict with the Nation's earlier approach" or "when it contradicts earlier evidence." *Bruen* at 66-67.

Thus, despite marshaling *not even one* non-repudiated Founding-era law to support the statute below, the panel upheld infringement after infringement based on a smattering of Reconstruction-era statutes it claimed demonstrated the sort of enduring historical tradition *Bruen* requires. The earliest of these sources arose nearly half a century after the Second Amendment's ratification, with the vast majority occurring well after ratification of the Fourteenth Amendment — stretching even into the 1890s. Each time the district court determined there to be no Founding-era tradition and enjoined the statute on that basis, the panel scolded and reversed. And when Petitioners pointed to *contrary* Founding-era traditions, the panel ignored them.

Declaring this Court's emphasis on original meaning "implausible," the Second Circuit instead offered the *Bruen*-rejecting acumen that public understanding of constitutional rights can *evolve* "over the preceding era" — and beyond. App.39-40. But

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[19] *See* Answering Brief at 26-27.

Heller rejected this sort of revisionist living constitutionalism when it announced that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them...." *Id.* at 634-35. *Bruen* was similarly unequivocal: the meaning of constitutional rights is "pegged to the public understanding … when the Bill of Rights was adopted in 1791." *Id.* at 37. In contrast, the panel's decision was pegged to nothing, allowing a few post-Reconstruction statutes to pry the Second Amendment's meaning from the cold "dead hands"[20] of the Founders.

III. THE SECOND CIRCUIT'S OPINION CREATES A THREE-WAY CIRCUIT SPLIT, AND THE DISTRICT COURTS ARE IN DISARRAY.

Since *Bruen* was decided, courts have been significantly divided as to whether 1791 or 1868 is the proper reference point in Second Amendment cases. The panel's decision conflicts directly with two other circuit courts that have addressed the issue. And while there was one circuit decision employing similar reasoning as the panel, it was vacated by a grant of *en banc* review. In addition to this circuit split, the federal district courts and state courts have failed to coalesce on a consistent standard, instead taking multiple inconsistent approaches most of which cannot be reconciled with *Bruen*.

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[20] *See* Charles, *supra*.

The panel below concluded that, "[b]ecause the CCIA is a state law, the prevailing understanding of the right to bear arms in 1868 and 1791 *are both focal points* in our analysis." App.39 (emphasis added). The panel even indicated the nod might go to 1868, asserting that "evidence from Reconstruction ... *is at least as relevant* as evidence from the Founding Era." App.68 n.27 (emphasis added). Yet by necessity, the panel relied nearly exclusively on post-Reconstruction-era historical sources, since no Founding-era sources exist to justify the CCIA.

In stark contrast to the panel's conclusion, the Third Circuit recently recognized that, "[a]lthough *Bruen* did not definitively decide this issue, it gave a strong hint...." *Lara v. Comm'r Pa. State Police*, 91 F.4th 122, 127 (3d Cir. 2024). That court determined, with respect to a state statute, that "the Second Amendment should be understood according to its public meaning in 1791." *Id.* at 129. And quite unlike the panel below, whose earliest non-repudiated sources arose nearly 50 years after 1791, the Third Circuit rejected the government's "catalogue of statutes from the mid-to-late nineteenth century, as each was enacted at least 50 years after the ratification of the Second Amendment." *Id.* Finally, while the Second Circuit omitted any consideration of the Founding-era tradition provided by Plaintiffs (*see id.* at 142 n.19), the Third Circuit "juxtapose[d]" a historical tradition requiring young adults to be armed "[a]gainst th[e] conspicuously sparse record of state regulations on 18-to-20-year-olds at the time of the Second Amendment's ratification." *Id.* at 142-143.

In line with the Third Circuit in *Lara* is the Fifth Circuit's decision in *United States v. Daniels*, 77 F.4th 337 (5th Cir. 2023). Although examining "a federal statute [which] implicates the Second Amendment, not the Fourteenth," *Daniels* nevertheless concluded that "the meaning of the Second Amendment ... was fixed when it first applied to the federal government in 1791." *Id.* at 348 (opining that "late-century practice" at most "sheds some dim light on Founding era understandings").

Taking a different approach entirely, the Seventh and Ninth Circuits seem ambivalent as to which time period is preferable. *Teter v. Lopez*, 76 F.4th 938, 950-51 (9th Cir. 2023) (government "may meet its burden by citing analogous regulations that were enacted close in time to … 1791 or … 1868."); *see also Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023) (the "relevant time to consult is 1791, or maybe 1868.").

The only circuit court to have adopted the Second Circuit's laser focus on 1868 was the now-vacated opinion of the Eleventh Circuit in *NRA v. Bondi*, 61 F.4th 1317 (11th Cir. 2023). Beginning and ending its analysis with "the Reconstruction Era" (*id.* at 1319, 1332), that court found "Reconstruction Era historical sources ... *more probative* of the Second Amendment's scope than those from the Founding Era." *Id.* at 1321-22 (emphasis added). As *Bondi* reasoned, "because the Fourteenth Amendment is what *caused* the Second Amendment to apply to the States," and because "originalism's claim to democratic legitimacy" is based on "respect[ing] the choice that those who

bound themselves to be governed by the constitutional provision in question ... the Reconstruction Era ... is what matters." *Id.* at 1322. But *Bondi* was quickly vacated by a grant of *en banc* review. *See NRA v. Bondi*, 72 F.4th 1346 (11th Cir. 2023).[21]

In addition to this entrenched circuit split, both district and state courts have struggled in choosing between 1791 and 1868, generating even more division. Some district courts favor 1791. *See Worth v. Harrington*, 2023 U.S. Dist. LEXIS 56638, at *29 (D. Minn. 2023) (acknowledging the Supreme Court "favors 1791 as the date…"); *Springer v. Grisham*, 2023 U.S. Dist. LEXIS 217447, at *21 (D.N.M. 2023) (*Bruen* "considered late 19th century laws only to the extent they were consistent with earlier laws."); *Duncan v. Bonta*, 2023 U.S. Dist. LEXIS 169577, at *48-49 (S.D. Cal. 2023) ("*Bruen* teaches the most significant historical evidence comes from 1791."); *Brown v. BATFE*, 2023 U.S. Dist. LEXIS 214615, at *31 (N.D. W. Va. 2023) ("reliance on mostly 19th century gun safety regulations … is misplaced under *Heller* and *Bruen*.").

Other district courts have chosen 1868. *See Md. Shall Issue, Inc. v. Montgomery County*, 2023 U.S. Dist. LEXIS 117902, at *27 (D. Md. 2023) (1868 "equally if not more probative of the scope of the Second Amendment[] ... applied to the states by the Fourteenth Amendment."); *We the Patriots, Inc. v.*

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[21] The Eleventh Circuit subsequently stayed resolution of *Bondi* pending this Court's decision in *United States v. Rahimi*, No. 22-915.

Grisham, 2023 U.S. Dist. LEXIS 183043, at *22 (D.N.M. 2023) (same); *Goldstein v. Hochul*, 2023 U.S. Dist. LEXIS 111124, at *30, *31 (S.D.N.Y. 2023) (using mostly late 19th-century laws to uphold "house of worship" as a sensitive place).

Two courts seemed to have no preference. *See Frey v. Nigrelli*, 661 F. Supp. 3d 176, 198 (S.D.N.Y. 2023) ("no issue in considering the abundance of examples provided by the Defendants ... from 1750 to the late 19th century."); *Matter of Gonyo v. D.S.*, 2024 N.Y. Misc. LEXIS 366, at *4 (Sup. Ct. Dutchess Cnty. 2024).

One district court took the "it depends" approach. *See United States v. Ayala*, 2024 U.S. Dist. LEXIS 7326, at *9, *14 n.4 (M.D. Fla. 2024) (applying 1791 to "*federal* statute," but claiming a Fourteenth Amendment challenge could be different).

Finally, at least two state courts seem to have been dissatisfied with *Bruen*, and have chosen *neither* date. *See Wade v. Univ. of Mich.*, 2023 Mich. App. LEXIS 5143, at *24 (Mich. Ct. App. 2023) ("it is not clear that either 1791 or 1868 are [sic] the correct time periods...."); *State v. Wilson*, 2024 Haw. LEXIS 10, at *32, *50 (2024) (rejecting *Bruen*, claiming this Court "distorts and cherry-picks historical evidence," and instead applying the "Aloha Spirit" and the "Law of the Splintered Paddle").

Whether viewed as clear guidance or "strong hint[s]," it should be evident from this Court's Second Amendment precedents that 1791 is the focal point for Second Amendment analysis. Nevertheless, there

continues to be an abundance of confusion in the lower courts on this issue. Since the choice of reference point will be outcome-determinative in many, if not most, Second Amendment cases, and will affect hundreds of past, present, and future rulings, the nationwide importance of this issue cannot be overstated. This Court's intervention is necessary to provide clear and definitive guidance as to the appropriate time period to serve as the guidepost for analyzing Second Amendment challenges under *Bruen*'s framework.

IV. REQUIRING NEW YORKERS TO "PERSUADE" THE GOVERNMENT THEY CAN BE "ENTRUSTED" WITH ENUMERATED RIGHTS CONFLICTS WITH *BRUEN* AND CREATES A CIRCUIT SPLIT.

A. The Second Circuit's Decision Upholding New York's "Good Moral Character" Requirement Conflicts with *Bruen*.

In *Bruen*, this Court rejected New York's requirement that, to be authorized to bear arms in public, citizens first must demonstrate "proper cause" — defined as "a special need for self-protection." *Id.* at 12. Here, the panel sanctioned New York's stand-in requirement that citizens convince licensing officials of their "good moral character" prior to licensure. As the district court explained, New York simply "replaced" proper cause with good moral character, "while retaining (and even expanding) the open-ended discretion afforded to its licensing officers." *Antonyuk v. Hochul*, 635 F. Supp. 3d 111, 133 (N.D.N.Y. 2022) (partially granting temporary restraining order).

Rejecting the "proper cause" requirement in *Bruen*, this Court explained the problem with such a standard: it grants licensing officials "discretion to deny concealed carry licenses even when the applicant satisfies" ostensibly "objective criteria," without any historical evidence that such practices would have been permitted in the Founding era. *Bruen* at 14, 11; *see also* at 70-71, 79 (Kavanaugh, J., concurring) (rejecting the grant of "unchanneled" and "open-ended discretion to licensing officials"). Importantly, this Court contrasted 43 so-called "shall issue" states, "where authorities *must issue* concealed-carry licenses ... based on ... 'narrow, objective, and definite standards,'" with six so-called "may issue" regimes where "authorities have *discretion* to deny concealed-carry licenses...." *Id.* at 13, 38 n.9, 14 (emphasis added). As the Court explained, under "may issue" regimes, applicants may be denied if they fail to "demonstrate[] cause *or suitability* for the relevant license," based on a licensing official's "'appraisal of facts, the exercise of judgment, and the formation of an opinion.'" *Id.* at 14-15 (emphasis added), 38 n.9. While *Bruen* specifically addressed New York's "discretion" to determine "proper cause," its broader analysis of "discretion" — and its specific reference to a "perceived lack of need *or suitability*" (*id.* at 13, emphasis added) — points to other impermissible forms of discretion.

New York's "good moral character" standard is just such a prohibited "suitability" determination and, as the district court noted, is merely a surrogate for the "proper cause" standard that was struck down in *Bruen*. App.217. As this Court explained, a New York

"license applicant ... *must convince* a 'licensing officer' ... that ... he is of good moral character...." *Bruen* at 12 (emphasis added); *see also* at 11 (emphasis added) (license issued "only if that person *proved* 'good moral character'"). The district court understood the same. *See* App.321 (emphasis added) ("unless he or she *can persuade* a licensing officer that he or she is of 'good moral character'"). Indeed, under the CCIA, New York officials decide whether a person "ha[s] the essential character, temperament and judgement necessary to be *entrusted* with a weapon...." App.436 (emphasis added).

It is quite difficult to understand *Bruen*'s criticism of "suitability" not to include "good moral character." And it is even more difficult to believe that this Court would approve the discretionary power to deny carry licenses to "all Americans" unless they first "convince a 'licensing officer'" of their general morality. Indeed, some courts already have found that "good moral character" means "suitability." *See Srour v. New York City*, 2023 U.S. Dist. LEXIS 190340, at *39-40 (S.D.N.Y. 2023) ("the very notion[] of 'good moral character' [is] inherently exceedingly broad and discretionary.... Such unfettered discretion is hard, if not impossible, to reconcile with *Bruen*."); *see also People v. Mosqueda*, 97 Cal. App. 5th 399, 411 (2023).

But reaching the conclusion *Srour* found "impossible" seemed easy for the panel. Although seeming to admit that "suitability" and "good moral character" are the same thing, the panel pointed to the licensing regimes of Connecticut, Delaware, and Rhode Island, which *facially* contain suitability requirements,

but which this Court nevertheless believed operate as "shall-issue" *in practice*, conferring no discretion on licensing officials. App.83; *Bruen* at 13 n.1. Indeed, this Court also noted that Delaware law allows open carry without a permit. *Id.* None of this commentary demonstrates the resounding affirmation of a "good moral character" test that the panel claimed *Bruen* contains.

Nevertheless, the message the panel took from *Bruen* is that not all licensing discretion is bad, amorphously distinguishing between "discretion in the strong sense" versus "a certain bounded area of discretion" or a "modicum of discretion," and asserting that "*Bruen* does not forbid discretion" but rather only "impermissibly discretionary" licensing regimes. App.67, 55-56. But *Bruen* drew no such nebulous distinctions, instead contrasting "discretion" with "narrow, objective, and definite standards" (*Bruen* at 38 n.9) — which New York's shapeless concept of "good moral character" certainly is not. The panel's attempt to find broad support for "good moral character" in *Bruen*'s passing discussion of "shall issue" regimes is tenuous at best.

B. A Circuit Split Exists as to Whether Governments May Disarm People Based on *Premonitions* of Dangerousness.

Dissenting in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), then-Judge Barrett explained that any "power to prohibit dangerous people from possessing guns ... extends only to people who are *dangerous*." *Id.* at 451 (Barrett, J., dissenting) (finding no "evidence that

founding-era legislatures imposed virtue-based restrictions on the right"); *see also id.* at 462 (rejecting the notion that "the legislature can disarm [persons] because of their poor character, without regard to whether they are dangerous"). *Bruen* was consistent on this point, noting that "shall issue" regimes "ensure" applicants "*are, in fact*, 'law-abiding, responsible citizens.'" *Bruen* at 38 n.9 (emphasis added).

The panel took a starkly divergent view, claiming that "good moral character" represents "*a proxy* for dangerousness," whereby licensing officials predict whether applicants are "*deemed likely* to pose [] a danger" based on "*reasoned determination.*" App.55, 63, 59 (emphases added). The panel readily admitted that "'good moral character'" is a "spongy concept susceptible to abuse,"[22] which licensing officials may

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[22] Good moral character has proved to be a "spongy concept" indeed. One district court described it as "the ideal state of a person's beliefs and values that provides the most benefit to a healthy and worthy society…. [It] is more than having an unblemished criminal record," including "behav[ing] in an ethical manner and provid[ing] … reassurance that he can be trusted to make good decisions … where there are no written rules." *Sibley v. Watches*, 501 F. Supp. 3d 210, 219 (W.D.N.Y. 2020). Under this standard, one applicant was denied a permit for having "numerous traffic infractions" which purportedly showed "someone with a lesser respect for the law." *Matter of Kamenshchik v. Ryder*, 186 N.Y.S.3d 797, 806 (Nassau Cnty. 2023). Another applicant was denied for providing "character references ... who were unaware of [an] arrest" as a minor two decades prior. *Matter of Dimino v. McGinty*, 177 N.Y.S.3d 788, 790 (App. Div. 2022). If the right to keep and bear arms can be denied to anyone whose character is not in "the ideal state," it

use "as a smokescreen to deny licenses" on such bases as "lifestyle or political preferences." App.64-65. Nonetheless, the panel concluded that this hugely discretionary standard comports with *Bruen* because "the core" and "[t]he gravamen of the 'character' inquiry is" dangerousness. App.63.

On the contrary, constitutional rights are not "spongy concept[s]." *Bruen* explicitly rejected the notion that licensing officials can exercise "discretion" — open-ended, "spongy," or otherwise — in determining whether Americans are worthy of Second Amendment rights.

The panel's opinion also conflicts with the decisions of the Third and Fifth Circuits. Flatly rejecting the notion that the Second Amendment only protects "law-abiding and responsible citizens" (App.60), the Third Circuit recently noted "th[at] phrase … is as expansive as it is vague.... We are confident that the Supreme Court's references ... do not mean that every American who gets a traffic ticket is no longer among 'the people'…." *Range v. AG United States*, 69 F.4th 96, 102 (3d Cir. 2023); *see also* at 102-03 (rejecting "devolv[ing] authority to legislators to decide whom to exclude from 'the people'" by exercising "'unreviewable power to manipulate the Second Amendment by choosing a label'").

Likewise, the Fifth Circuit recently opined that "the legislature cannot have unchecked power to designate

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seems unlikely that the Second Amendment truly applies to "all Americans." *See Bruen* at 70.

a group of persons as 'dangerous' and thereby disarm them," which would "render the Second Amendment a dead letter." *United States v. Daniels*, 77 F.4th 337, 353 (5th Cir. 2023).[23] This decision is entirely incompatible with the panel's conclusion that a historical tradition exists which permits any designated "local official" (not even an elected "legislature") to make an "individualized assessment" (far different than a "group ... designat[ion]") whether individual applicants can be "entrusted" with Second Amendment rights. App.67, 74, 63.

This case presents an excellent vehicle to resolve the sharp circuit split on this important issue. No other constitutional provision is subject to a government precog's[24] guess as to whether a member of "the people" can be "entrusted" to exercise enumerated rights responsibly. And the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald* at 780. This Court should grant the petition and set the record straight.

One final issue deserves mention. Currently pending before this Court is *United States v. Rahimi*,

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[23] *See also NRA v. BATFE*, 714 F.3d 334, 335, 345, 335 (5th Cir. 2013) (Jones, J., dissenting) (the notion "that a whole class of adult citizens ... can have its constitutional rights truncated," "so long as the legislature finds the suspect 'discrete' class to be 'dangerous' or 'irresponsible,'" "[is] far-reaching.").

[24] *See* MINORITY REPORT (2002) (utilizing individuals with psychic abilities to predict future events, and then punishing purported offenders before they can engage in criminality).

No. 22-915. During oral argument, several Justices expressed concerns at how the amorphous concepts of "dangerousness," "responsibility," "virtuous[ness]," and "law-abiding" status might be applied in the context of 18 U.S.C. § 922(g)(8)'s ban on firearm possession by those under domestic violence restraining orders. *See United States v. Rahimi*, Oral Argument (Nov. 7, 2023). Those questions have some overlap with the second question presented here, namely, whether a carry license can be denied based on a government official's discretionary determination that an applicant lacks "good moral character." Petitioners believe this Court's review *of this case* is warranted on both questions presented, but a decision on whether to grant review of the "good moral character" issue could be held pending a merits decision in *Rahimi*.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN D. STAMBOULIEH
STAMBOULIEH LAW, PLLC
P.O. Box 428
Olive Branch, MS 38654
(601) 852-3440
stephen@sdslaw.us

ROBERT J. OLSON*
WILLIAM J. OLSON
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
rob@wjopc.com
Attorneys for Petitioners
**Counsel of Record*

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