NO. 23-910

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

BRIEF OF AMICUS CURIAE NEW YORK STATE SHERIFFS' ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF THE AMICUS CURIAE

The NEW YORK STATE SHERIFFS' ASSOCIATION, INC., (NYSSA) is a non-profit association (26 U.S.C. § 501(c)(6)).[1] Formed in 1934, NYSSA is a statewide organization representing the interests of each County Sheriff in the State of New York.

NYSSA works to promote the public interest goals and policies of law enforcement throughout the State of New York. It participates in the judicial process where the interests of law enforcement and the communities Sheriffs serve are affected. As frontline law enforcement officers who enforce criminal laws, it is important for Sheriffs to know what constitutes illegal possession of a firearm, and what does not. Additionally, Sheriffs in many counties conduct the background investigations that undergird the determinations of licensing officers when deciding whether or not to grant a pistol permit.

This case touches on both those aspects of Sheriffs' duties. The ultimate ruling of the District Court in this case, which will be heavily influenced by the Second Circuit's stay order, will set the boundaries of who will be able to exercise their Second Amendment rights in New York, and where that right can be exercised.

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[1] This brief was not authored in whole or in part by counsel for any party. No person or entity other than amicus curiae made a monetary contribution to this brief's preparation or submission. Pursuant to Supreme Court Rule 37.2(a), counsel of record for all parties have received timely notice of the intent to file this brief.

SUMMARY OF ARGUMENT

The Supreme Court in *New York State Rifle and Pistol Association v. Bruen* made clear that discretionary licensing regimes that allow government officials to consider subjective criteria as a basis for denying the issuance of a license to possess or carry a firearm violates the Second Amendment. Additionally, the Court has, in both *Bruen* and *District of Columbia v. Heller*, emphasized that the scope of the Second Amendment is determined in accordance with the scope it was understood to have when the people adopted it: 1791.

The Second Circuit's stay ruling in the above captioned proceeding is at odds with both of these established precedents. New York State's Concealed Carry Improvement Act, passed hastily in the wake of *Bruen*, requires that pistol license applicants possess the requisite "good moral character" for licensure; an amorphous standard that seems little different from the "proper cause" standard that was found to be unconstitutional in *Bruen*. The Second Circuit has allowed this standard to remain in effect as the merits of the challenge to the overall statute are resolved, upending the initial stay of the District Court.

The Second Circuit has also determined that New York's designation of various "sensitive locations"—enumerated places where firearm possession is strictly prohibited, regardless of licensure—may also remain in effect, again in contravention of the District Court's initial stay. In reaching this conclusion, the Second Circuit relied on a smattering of historical analogues from the time of the ratification of the Fourteenth

Amendment, far removed from the enshrinement of the Constitutional right at issue.

ARGUMENT

I. Governmental Discretion to Determine "Good Moral Character" to Deny a Constitutional Right is Unconstitutional.

The Second Circuit below rescinded the majority of the District Court's stay of various provisions of the Concealed Carry Improvement Act (CCIA) in *Antonyuk*, essentially sanctioning the requirement that pistol permit applicants demonstrate their "good moral character" to licensing officials despite this Court's rejection of discretionary "suitability" determinations in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022). Astonishingly, another lower court in New York was recently able to accurately and intelligently apply this Court's guidance from *Bruen* in *Srour v. New York City*, 2023 U.S. Dist. LEXIS 190340 (S.D.N.Y. October 24, 2023), in determining whether a "good moral character" requirement for firearm licensure in New York City passes constitutional muster. This Court should grant certiorari in this interlocutory appeal to ensure that the Second Circuit does the same.

In *Srour*, in 2018, Joseph Srour applied to the New York City Police Department ("NYPD") License Division for a permit to possess rifles and shotguns in his home, and the following year he applied for a license to possess handguns in his home. Both applications were denied in 2019, with the License Division's

Appeals Unit citing Sections 3-03 and 5-10 of Title 38 of the Rules of the City of New York ("RCNY"), and specifically pointing to Srour's prior arrests, bad driving history, and supposedly false statements on the applications as the reasons for denial. *Srour* at 1.

The Notice of Denial proceeded to articulate particular findings in support of its ultimate determination that Srour lacked good moral character and that good cause existed to deny him either a firearm or rifle permit or a handgun license. *Id.*

Srour brought an action against New York City and Edward A. Caban in his official capacity as the Commissioner of the NYPD and, therefore, the City's firearms licensing official, challenging those denials. *Srour* at 1. The proceedings were delayed at several points in order to allow for this Court to render its decision in *Bruen*, as well as provide an opportunity for both the State and City to change its laws and regulations in the wake of that decision such that the petitioner's claim might be mooted. In any event, Srour continued to contend that the pre-amendment versions of Sections 3-03 and 5-10, as well as other related provisions of the New York City Administrative Code, ran afoul of the Second Amendment. *Srour* at 1-2. Srour argued that the provisions were facially invalid under the Second Amendment.

This case should be instructive for the Court, as the challenged City regulations are substantially similar to the language at issue found in New York State Penal Law § 400.00(1):

> As discussed, the Challenged Firearms Licensing Provisions each contains the same or very similar "good moral character" and

> "good cause" language. New York City Administrative Code Section 10-303(a) states that no person shall be denied a permit to possess a rifle or shotgun unless the "applicant . . . (2) is not of good moral character; or . . . (9) unless good cause exists for the denial of the permit." N.Y.C. Admin. Code § 10-303(a).

Srour at 11.

Under this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 213 L.Ed.2d 387 (2022), the District Court in *Srour* considered, first, whether the conduct at issue was covered by the text of the Second Amendment, and if so, second, whether the challenged New York City regulations were "consistent with the Nation's historical tradition of firearm regulation." *Srour*, 2023 U.S. Dist. LEXIS 190340 *citing Bruen*, 142 S. Ct. at 2130. The District Court found that the conduct at issue—the possession of firearms for lawful purposes—plainly fell within the text of the Second Amendment. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 2. The court stated that the Second Amendment safeguards "the right of the people to keep and bear Arms." *Srour. citing* U.S. Const. amend. II. Thus, a presumption of constitutional protection was triggered. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 2. Further, the District Court found that Defendants had failed to show that the broad discretion afforded to licensing officials under subsections (a)(2) and (a)(9) of New York City Administrative Code Section 10-303, which imposed the permit requirement for rifles and shotguns, and the pre-amendment versions of Sections 3-03 and 5-10 of Title 38 of the RCNY, was consistent with the history and tradition of firearm regulation in this country.

Srour at 2-3. Each of these provisions (which the court refers to collectively as the Challenged Firearms Licensing Provisions, *Srour* at 30) allowed for the denial of a firearm permit upon a City official's determination of the applicant's lack of "good moral character" or upon the official's finding of "other good cause"—broad and unrestrained discretionary standards which Defendants had not shown to have any historical underpinning in our country. *Srour* at 3. And because that unconstitutional exercise of discretion occurred every time a licensing official applies or has applied these provisions, they each were facially unconstitutional according to the District Court. *Id*.

In sum, having considered Defendants' proffered historical materials, and applying the standard set in *Bruen*, the *Srour* court determined that the magnitude of discretion afforded to New York City licensing officials under subsections (a)(2) and (a)(9) of Section 10-303 of the New York City Administrative Code and the pre-December 16, 2022 versions of Sections 3-03 and 5-10 of Title 38 of the RCNY, empowering them to evaluate an applicant's "good moral character" and "good cause" in deciding whether to permit that applicant to exercise his or her Second Amendment rights, was not constitutionally permissible under the Second and Four teenth Amendments. *Id*. at 55-56.

The District Court explained that this case was not about the ability of a state or municipality to impose appropriate and constitutionally valid regulations governing the issuance of firearm licenses and permits. *Id*. at 64. The constitutional infirmities identified herein lie not in the City's decision to impose requirements for the possession of handguns, rifles, and

shotguns. Rather, the provisions fail to pass constitutional muster because of the magnitude of discretion afforded to City officials in denying an individual their constitutional right to keep and bear firearms, and because of Defendants' failure to show that such unabridged discretion has any grounding in our Nation's historical tradition of firearm regulation. *Id.*

The District Court explained that to start, *Bruen* itself, while addressing a different New York State statute, posed considerable obstacles for Defendants to overcome in defending the Challenged Firearms Licensing Provisions. *Id.* at 35. The petitioners in *Bruen* challenged New York State's licensing regime, which at the time required an applicant seeking to possess a gun at home to "convince a 'licensing officer'—usually a judge or law enforcement officer—that, among other things, he is of good moral character, has no history of crime or mental illness, and that 'no good cause exists for the denial of the license.'" *Id.* at 35-36, *citing Bruen*, 142 S. Ct. at 2122-23 (quoting N.Y. Penal Law §§ 400.00(1)(a)-(n) (2022)). An applicant seeking to carry a firearm also had to "prove that 'proper cause exists' to issue [a license]." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 36, *citing Bruen*, 142 S. Ct. at 2123 (quoting N.Y. Penal Law § 400.00(2)(f)).

The court contrasted a "may issue" regime like New York's, "under which authorities have discretion to deny concealed-carry licenses even when the applicant satisfies the statutory criteria," with "shall issue" regimes, "where authorities must issue concealed-carry licenses whenever applicants satisfy certain threshold requirements, without granting licensing officials discretion to deny licenses based on a perceived lack of need or suitability." *Srour*, 2023 U.S. Dist. LEXIS

190340 at 36, *citing Bruen*, 142 S. Ct. at 2123-24. In stating that "nothing in [the court's] analysis should be interpreted to suggest the unconstitutionality of the 43 States' 'shall-issue' licensing regimes," the court described such regimes as being "designed to ensure only that those bearing arms in the jurisdiction are in fact, law-abiding, responsible citizens," and stated that they did so using "only narrow objective and definite standards guiding licensing officials, rather than requiring the appraisal of facts, the exercise of judgment, and the formation of an opinion—features that typify proper-cause standards like New York's." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 36-37, *citing Bruen*, 142 S. Ct. at 2138 n.9 (internal quotation marks omitted). After conducting a lengthy and thorough review of "the Anglo-American history of public carry," the court held that the respondents failed to meet "their burden to identify an American tradition justifying the State's proper-cause requirement." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 37, *citing Bruen*, 142 S. Ct. at 2156.

The *Srour* court noted that the Challenged Firearms Licensing Provisions landed very close to the problematic "may issue" laws criticized in *Bruen*. *Cf. id.* at 2162 (Kavanaugh, J., concurring) ("Going forward . . . the 6 States including New York potentially affected by today's decision may continue to require licenses for carrying handguns for self-defense so long as those States employ objective licensing requirements like those used by the 43 shall-issue States."). *Srour*, 2023 U.S. Dist. LEXIS 190340 at 37. The Challenged Firearms Provisions empower a City licensing official to decide not to issue a permit or license for a firearm based on that official's discretionary assessment of the

applicant's "good moral character" and the determination of a vaguely defined presence of "good cause." *Id.* Much like the "proper-cause" inquiry invalidated in *Bruen*, permitting denial of a firearms license based on a government official's "good moral character" or "good cause" assessment has the effect of "prevent[ing] law-abiding citizens with ordinary self defense needs from exercising their right to keep and bear arms." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 38, *citing* *Bruen*, 142 S. Ct. at 2156.

Under the former versions of both Sections 3-03 and 5-10, a licensing official would make a judgment call about the character, temperament, and judgment of each applicant without an objective process. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 38. There are some objective components that come into play in this process: whether or not an applicant has been arrested, indicted, or convicted of a crime, for example, is a discernible fact. *Id. citing* RCNY Tit. 38, §§ 3-03(a), 5-10(a) (2019) (last amended Dec. 16, 2022). But the former versions of Sections 3-03 and 5-10 did not specify how a licensing official was to consider those facts, or even that any of those facts was dispositive; Sections 3-03 and 5-10 only generally required their consideration by the official in arriving at the ultimate conclusion of whether to deny a permit or license based on the applicant's lack of "good moral character" or "other good cause." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 38, *citing* RCNY Tit. 38, §§ 3-03, 5-10.

Relatedly, and probably more problematically, by allowing the official to make a determination of the person's moral character, and to vaguely consider "other good cause," Sections 3-03 and 5-10 further bestowed vast discretion on licensing officials, according to the

Srour court. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 38-39, *citing* RCNY Tit. 38, §§ 3-03, 5-10. The court noted, indeed, subsection (n) of each provision allowed a licensing official to deny a permit based on "[o]ther information [that] demonstrates . . . other good cause for the denial of the permit." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 38, citing RCNY Tit. 39, §§ 3-03(n), 5-10(n). The permissive language of these provisions—allowing that a permit "may be denied"—does not undermine the fact that the challenged regime requires "the appraisal of facts, the exercise of judgment, and the formation of an opinion" prior to the issuance of a license. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 39, citing *Bruen*, 142 S. Ct. at 2138 n.9 (emphasis added) (internal quotation marks omitted). Subsections (a)(2) and (a)(9) of New York City Administrative Code Section 10-303 suffer from the very same constitutional flaws under *Bruen* according to the *Srour* court. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 39. These provisions allow a City official to deny a shotgun or rifle permit after finding that an applicant "is not of good moral character" or that "good cause exists for the denial of the permit." *Id.*, *citing* N.Y.C. Admin. Code § 10-303(a)(2), (a)(9).

The *Srour* court noted that Section 10-303 itself defines neither of these terms in further detail, with the factors enumerated in Section 3-03 of Title 38 of the RCNY implementing Section 10-303. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 39. Without doubt, the very notions of "good moral character" and "good cause" are inherently exceedingly broad and discretionary according to the court. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 39. The court reasoned that someone may be deemed to have good moral character by one person, yet a very

morally flawed character by another. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 39-40. Such unfettered discretion is hard, if not impossible, to reconcile with *Bruen,* according to the court. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 39-40.

Under *Bruen*'s historical inquiry analysis, the *Srour* court initially considered whether the "challenged regulation addresses a general societal problem that has persisted since the 18th century" and, if so, whether there was "a distinctly similar historical regulation addressing that problem." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 40-41, *citing Bruen*, 142 S. Ct. at 2131. The *Srour* court noted that Defendants were not particularly clear regarding what, if anything, they consider to be the "general societal problem" addressed by both the Challenged Firearms Licensing Provisions in this case and our country's historical tradition of firearm regulation. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 41. The court stated that they do, however, indicate that both the challenged provisions and their suggested historical analogues are geared towards "ensuring public safety." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 41, *citing* Opposition at 16. The court concluded that for essentially the same reasons discussed below in conducting an analogical analysis, the historical information presented by Defendants failed to reveal a "distinctly similar historical regulation" to the at-issue provisions. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 41, *citing Bruen*, 142 S. Ct. at 2131. The *Srour* court therefore turned to "reasoning by analogy," *id.* at 2132, and considered the degree of relevant similarity between the challenged provisions and the historical tradition presented by Defendants. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 41.

The *Srour* court reasoned that here too, the fatal problem with subsections (a)(2) and (a)(9) of New York City Administrative Code Section 10-303 and the former versions of Sections 3-03 and 5-10 of Title 38 of the RCNY continued to lie in the broad discretion afforded to City officials in determining whether someone may exercise their Second Amendment right. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 41. The court believed that Defendants had not identified any historical analogue for investing officials with the broad discretion to restrict someone's Second Amendment right based on determining the person to "lack[] good moral character" or for a vague and undefined notion of "good cause." *Id*. at 41-42. And while the court found allowing such a discretionary determination to run afoul of the Second Amendment, Defendants had not even identified a historical analogue for the various non-determinative considerations that were required to go into the official's "good moral character" and "other good cause" assessments under Sections 3-03 and 5-10. *Id*. at 42. The *Srour* court continued that, moreover, and as mentioned, subsection (n) of each of those Sections affords tremendous—and seemingly boundless—discretion to the licensing official in making that lack of "good moral character" or "good cause" determination by allowing the official to consider "[o]ther information [that] demonstrates an unwillingness to abide by the law, a lack of candor toward lawful authorities, a lack of concern for the safety of oneself and/or other persons and/or for public safety, and/or other good cause for the denial of the permit." *Id*. *citing*, RCNY Tit. §§ 3-03(n), 5-10(n) (2019) (last amended Dec. 16, 2022) (emphasis added).

The *Srour* court also believed that Defendants had no more success in arguing that "Founding-era regulations restricted firearms sales to people that the Founders deemed dangerous or potentially dangerous." *Srour*, 2023 U.S. Dist. LEXIS 190340 at 42, *citing*, Opposition at 13. The court stated that a law preventing a person who is "dangerous or potentially dangerous" from possessing a firearm is hardly analogous to denying someone their Second Amendment's rights based on a City official's discretionary determination that that person "lacks good moral character" or that "good cause" exists. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 42-43, *citing*, N.Y.C. Admin. Code 10-303; RCNY Tit. 38 §§ 3-03, 5-10 (2019) (last amended Dec. 16, 2022). The court believed that the latter is far broader and sweeps in significantly more conduct. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 43. More importantly, the Court found no evidence in the historical materials that Defendants identified of a tradition of regulations of the sort challenged here. *Id.*

The *Srour* court concluded that Defendants had provided no historical analogue for denying a person's exercise of their Second Amendment right upon on a municipality official's subjective assessment of that person's character, or based on a vague determination of the existence of good cause—particularly when that determination is made after weighing in an undefined manner both objective and subjective factors. *Id.* at 44. Defendants' argument that the government previously could disarm those that were "perceived dangerous" when certain identified criteria were met, and so now can prohibit firearm possession when an administrative

official deems a person not to have "good moral character" or otherwise finds "good cause," was unavailing to the court. *Id.*

In sum, having considered Defendants' proffered historical materials, and applying the standard set in *Bruen*, the *Srour* court determined that the magnitude of discretion afforded to New York City licensing officials under subsections (a)(2) and (a)(9) of Section 10-303 of the New York City Administrative Code and the pre-December 16, 2022 versions of Sections 3-03 and 5-10 of Title 38 of the RCNY, empowering them to evaluate an applicant's "good moral character" and "good cause" in deciding whether to permit that applicant to exercise his or her Second Amendment rights, is not constitutionally permissible under the Second and Fourteenth Amendments. *Srour*, 2023 U.S. Dist. LEXIS 190340 at 55-56.

Following the above decision, Defendants petitioned for a stay of the injunction issued in the above opinion against enforcing the statutes until the case was appealed. *Srour v. New York City*, 2023 U.S. Dist. LEXIS 192497 (S.D.N.Y. October 26, 2023). The District Court then denied the stay after concluding that Defendants were unlikely to succeed on appeal.

The Court concluded that a stay pending appeal was not warranted in this case under the standards discussed above. Starting with likelihood of success on the merits, the Court explained in detail in the Opinion why subsections (a)(2) and (a)(9) run afoul of the Second Amendment. *See, e.g.*, Opinion at 39-40. The District Court concluded that Defendants' arguments to the contrary were unpersuasive. *Srour* at 3. Defendants claim that the court failed to take into account the current version of Section 3-03 of Title 38 of the

Rules of the City of New York, which—per Defendants —now "defines 'good moral character' and the factors which are to be used in making that determination, and does not include any consideration of 'other good cause' not contained in the provision." Motion at 3. However, the court noted it did not take the current version of Section 3-03 into account in the Opinion because Srour lacked standing to challenge that provision, Opinion at 21, "[a]nd federal courts do not issue advisory opinions." *Id. citing TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203, 210 L.Ed.2d 568 (2021).

Moreover, subsections (a)(2) and (a)(9) of New York City Administrative Code Section 10-303 have not been amended, and the constitutionally problematic language identified by this Court remained on the books. *Srour*, 2023 U.S. Dist. LEXIS 192497 at 4. The amendments to Section 3-03 that Defendants point to did not also amend Section 10-303. Further, Defendants' argument that the current version of Section 3-03 provided objective criteria that somehow constrain a licensing officer's discretion under Section 10-303(a)(2) —particularly given the deletion of the "other good cause" language—is unpersuasive for another reason, according to the court. 2023 U.S. Dist. LEXIS 192497 at 4.

As the court explained in the Opinion, the inclusion of objective components does not cure the constitutional defects in allowing a licensing officer to deny individuals their Second Amendment rights based on "good moral character" in the first place. Opinion at 28. *Srour*, 2023 U.S. Dist. LEXIS 192497 at 4. As the court noted, "the very notion[] of 'good moral character' . . . [is] inherently exceedingly broad and discretionary." Opinion at 29 (emphasis added). *Srour*, 2023

U.S. Dist. LEXIS 192497 at 4. "Someone may be deemed to have good moral character by one person, yet a very morally flawed character by another." Opinion at 29. *Srour*, 2023 U.S. Dist. LEXIS 192497 at 4. And Defendants were likewise unable to demonstrate a tradition of similar regulations, as *Bruen* requires. Opinion at 32; *see New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126, 213 L.Ed.2d 387 (2022) ("To justify its regulation, the government may not simply posit that the regulation promotes an important interest. *Srour*, 2023 U.S. Dist. LEXIS 192497 at 4-5. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."). *Id*.

Turning to the remaining factors, the public interest also squarely weighed against a stay pending appeal, according to the court. *Srour*, 2023 U.S. Dist. LEXIS 192497 at 5. As the court explained in its Opinion, "'the public interest is best served by ensuring the constitutional rights of persons within the United States are upheld,' a proposition that certainly rings true for rights as 'fundamental' as those protected by the Second Amendment." Opinion at 45 (first quoting *Coronel v. Decker*, 449 F.Supp.3d 274, 287 (S.D.N.Y. 2020) (internal quotation marks omitted), then quoting *Bruen*, 142 S. Ct. at 2151). *Srour*, 2023 U.S. Dist. LEXIS 192497 at 5. Defendants correctly point to the need to protect "public safety and well-being." Motion at 2. However, the court stated, "noble ends cannot justify the deployment of constitutionally impermissible means." *Srour*, 2023 U.S. Dist. LEXIS 192497 at 5, *citing, Wessmann v. Gittens*, 160 F.3d 790, 809 (1st Cir. 1998).

II. The Appropriate Time Period to Determine Original Public Understanding of the Second Amendment is 1791, When the Bill of Rights Was Adopted.

This Court's decision in *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022) unambiguously restated the temporal context in which courts must evaluate cases involving constitutional rights: "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Bruen*, 142 S.Ct. 2136 (quoting *District of Columbia v. Heller*, 554 U.S. 570, 634-635 (2008).

It would follow then that, in determining whether a statute or regulation infringes upon a right enshrined in the Constitution, a court would look to when that right was first codified in our founding document so that its legal analysis could be guided by the historical conditions—an analogous laws, regulations or ordinances relating to the right in question—at that time. Relevant to the case at issue here, the Second Amendment was adopted by the people in 1791 along with the rest of the Bill of Rights.

However, the Second Circuit Court of Appeals declined to confine itself to this time frame when making its ruling on the propriety of the District Court's stay of the challenged provisions of New York's Concealed Carry Improvement Act: "We therefore agree with the decisions of our sister circuits—emphasizing 'the understanding that prevailed when the States adopted the Fourteenth Amendment'—is, along with the understanding of that right held by the founders in 1791, a relevant consideration." *Antonyuk v. Chiumento*, 89 F.4th 27, 305, internal citations omitted.

This Court has long held that the Constitution has a fixed meaning, tethered to the inception of its respective provisions. In his concurrence in *McIntyre v. Ohio Election* Comm'n, 514 U.S. 334, 359 (1995), Justice Thomas recounted the following:

> When interpreting the Free Speech and Press Clauses, we must be guided by their original meaning, for "[the] Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now." *South Carolina v. United States*, 199 U.S. 437, 488 (1905). We have long recognized that the meaning of the Constitution "must necessarily depend on the words of the Constitution [and] the meaning and intention of the convention which framed and proposed it for adoption and ratification to the conventions . . . in the several states."

Rhode Island v. Massachusetts, 37 U.S. 657, 721 (1839).

And, in looking again specifically at its Second Amendment jurisprudence, the Supreme Court stated in *District of Columbia v. Heller* that:

> [W]e are guided by the principle that "[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that would not have been known to ordinary citizens in the founding generation.

Heller, 554 U.S. 570, 576-577 (2008).

Simply put, Certiorari is warranted in this case in order to clarify to the federal judiciary writ large that 1791 is the temporal touchstone for any Second Amendment analysis.

III. The Second Circuit Cannot Decide Second Amendment Issues Correctly.

The Second Circuit has a history of "getting it wrong" when it comes to Second Amendment issues. First, in *Kachalsky v. County of Westchester*, 701 F.3d 81 (2nd Cir. 2012), the Second Circuit sustained New York's "proper cause" standard for issuing a conceal carry license, holding that the requirement was "substantially related to the achievement of an important governmental interest." *Id*. at 96.

The Second Circuit again failed to properly uphold the Second Amendment in *New York State Rifle & Pistol Ass'n v. City of New York*, 883 F.3d 45 (2nd Cir. 2018). There, in the District Court, petitioners challenged a New York City rule regarding the transport of firearms. Petitioners claimed that the rule violated the Second Amendment. Petitioners sought declaratory and injunctive relief against enforcement of the rule insofar as the rule prevented their transport of firearms to a second home or shooting range outside of the city. The District Court and the Court of Appeals rejected petitioners' claim. *See* 883 F. 3d 45 (CA2 2018). The judgment of the Court of Appeals was vacated, and the case remanded for such proceedings as are appropriate in *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525 (2020).

This Court, in 2022, overturned the Second Circuit again in *Bruen* after the Second Circuit again upheld the "proper cause" standard. *Bruen* not only overturned

the Second Circuit in that Second Amendment case but also overturned the Second Circuit opinion in *Kachalsky v. County of Westchester*.

The Second Circuit has now been incorrect in 3 out of 3 Second Amendment cases so far. Based on the Second Circuit's track record on gun rights, this Court should not be persuaded by its latest pronouncement on Second Amendment rights. And based on the Second Circuit's failure to properly follow this Court's clear instructions in *Bruen* only two years ago on analyzing Second Amendment issues, the Second Circuit's stay decision in *Antonyuk* should be vacated.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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March 22, 2024