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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

John A. Eidsmoe*
**Counsel of Record*
Roy S. Moore
Talmadge Butts
Katrinnah Darden
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

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Counsel for *Amicus Curiae*

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae Foundation for Moral Law is an Alabama-based nonprofit corporation dedicated to the strict interpretation of the Constitution intended by its Framers, to the defense of religious liberty as protected by the First Amendment, and to the defense of the right to keep and bear arms as protected by the Second Amendment. *Amicus* believes the New York law at issue in this case directly violates both Amendments.

SUMMARY OF THE ARGUMENT

The Second Amendment is clear on its face:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

U.S. Const. amend II.

This Court made clear in *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the right to keep and bear arms applies to individual citizens; in *McDonald v. City of Chicago*, 561 U.S. 742 (2010), that the right to keep and bear arms is incorporated and applies to the States; and most recently in *New*

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[1] Pursuant to Rule 37.2, all parties received notice at least ten days prior to the deadline of *Amicus Curiae*'s intent to file this brief. Pursuant to Rule 37.6, *Amicus Curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *Amicus Curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

York Rifle & Pistol Association, Inc., v. Bruen, 597 U.S. 1 (2022), that the right to keep and bear arms is a highly protected right that includes the right to bear arms in public.

The ink was barely dry on the *Bruen* decision when New York's anti-gun leaders shouted their defiance. Governor Kathy Hochul used Twitter to call this Court's decision "reckless" and "outrageous," and within a week of the decision, the New York Legislature passed the so-called Concealed Carry Improvement Act (the "CCIA") that is every bit as unconstitutional as the law this Court struck down in *Bruen*.

Because New York failed to heed this Court's determination, *Amicus* believes this Court should grant this Petition for Certiorari and uphold the right of New York citizens to keep and bear arms.

Rather than reiterating the excellent arguments made by Petitioners, *Amicus* will focus on the violation of the Establishment and Free Exercise Clauses of the First Amendment imposed by the prohibition of firearms in churches, the unconstitutional vagueness of the CCIA law, and the unconstitutionality of requiring completion of a course and passage of a test for exercising a fundamental constitutional right.

ARGUMENT

I. The New York Concealed Carry Improvement Act violates the Establishment and Free Exercise Clauses of the First Amendment.

The scene above, depicted by George Henry Boughton in his 1867 painting *Pilgrims Going to Church*, is perhaps the best-known and best-loved of all art depicting the Pilgrims of Plymouth, Massachusetts, in the 1620s.[2] It is based in part upon the letter by Isaack de Rasieres, Secretary to the Director-General of the New Netherlands colony in Manhattan, written circa 1628, describing his visit to the Plymouth colony:

> Upon the hill they have a large square house, with a flat roof, made of thick sawn plank, stayed with oak beams, upon the top

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[2] George Henry Boughton, *Pilgrims Going to Church*, 1867, oil on canvas, 29 in × 52 in, New York Historical Society, https://www.nyhistory.org/blogs/pilgrims-going-to-church-thanksgiving-and-the-pilgrim-in-public-memory.

> of which they have six cannon, which shoot iron balls of four and five pounds, and command the surrounding country. The lower part they use for their church, where they preach on Sundays and the usual holidays. They assemble by beat of drum, each with his musket or firelock, in front of the captain's door; they have their cloaks on, and place themselves in order, three abreast, and are lead by a sergeant without beat of drum. Behind comes the governor, in a long robe; beside him, on the right hand, comes the preacher with his cloak on, and on the left hand the captain with his side-arms, and cloak on, and with a small cane in his hand; and so they march in good order, and each sets his arms down near him. Thus they are constantly on their guard night and day.[3]

The practice of carrying firearms to church thus goes back to the days of the Pilgrims, who thought it necessary to keep and bear arms to ensure their safety and that of their loved ones before, during, and after church services.

But now, the State of New York has enacted the CCIA, which prohibits the possession of firearms within a church or, in some instances, within a parsonage.[4] This violates both the Establishment

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[3] Letter from Isaack de Rasieres to Herr Samuel Blommaert (circa 1628), *in* John Brown, *The Pilgrim Fathers of New England and Their Puritan Successors* 252–53 (1895).

[4] *See* N.Y. Penal Law §§ 265.01–03. Petitioner Mann submitted an affidavit that he is a pastor and that he keeps a firearm in his parsonage, which is part of the same structure that

and the Free Exercise Clauses of the First Amendment.

It violates the Establishment Clause by dictating to churches what their policy toward firearms must be. This is an internal policy of the church, and the Establishment Clause reserves to the churches the responsibility and right to make that decision.

This Court has instructed that Establishment Clause claims must be reviewed on the basis of the Founders' original understanding. *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2022). However, because of the decades of jurisprudence that has strayed from the Founders' intent, this is not an easy task for the lower courts, and the court below got it egregiously wrong.

The Founders viewed Church and State as separate institutions with separate jurisdictions. When Jefferson spoke of a "wall of separation between church and State," he meant a jurisdictional separation.[5] The Founders inherited this jurisdictional understanding of Church and State from a lineage as long as the institutions of Church and State themselves—from ancient times, through the medieval period, and through and beyond the Reformation.

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includes his church, and that he frequently holds Bible studies, meetings of elders, and other church gatherings in the parsonage.

[5] *Reynolds v. United States*, 98 U.S. 145, 164 (1879) (quoting Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802)).

The Framers did not view Church and State simply as man-made institutions. They did not accept Rousseau's enlightenment notion that the State is above the Church and all other institutions.[6] Instead, the Founders were well versed in ancient, medieval, and reformation theology, and, like the people of their time and those of preceding generations, they understood Church and State as divinely established institutions, each with distinctive authority and distinctive limitations.

This institutional separation goes back to the ancient Hebrews, as can be seen in the Old Testament, in which Israel's kings were of the Tribe of Judah while Israel's priests were of the Tribe of Levi; these were separate offices and separate jurisdictions, but both were subject to the will of God and the Law of God. On several occasions, God disciplined kings severely for usurping the functions of the priesthood. For example, when King Saul offered sacrifices instead of waiting for Samuel the priest, God cut off his descendants from the kingship forever. And when King Uzziah tried to usurp the functions of the priesthood by burning incense on the altar in the Temple, God smote him with leprosy, and he remained a leper all the days of his life. *II Chronicles* 2:19–23 (King James).

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[6] In *The Relative Influence of European Writers on Late Eighteenth Century American Political Thought*, 78 AM. POL. SCI. REV. 189 (1984), Donald S. Lutz studied citations of European thinkers by American writers 1760-1805 and demonstrated that American writers most frequently cited the Bible (34%), Montesquieu (8.3%), Blackstone (7.9%), and Locke (2.9%), and cited Roussseau much less frequently (0.9%).

This institutional separation continued in the New Testament. When the Pharisees asked Jesus about paying taxes to the Roman government, He pointed to Caesar's image on a coin and answered, "Render therefore unto Caesar the things which are Caesar's; and unto God the things that are God's." *Matthew* 22:21 (King James). Lord Acton said of Christ's statement,

> It was left for Christianity . . . to animate old truths, to make real the metaphysical barrier which philosophy had erected in the way of absolutism. . . . [Christ's statement] gave to the State a legitimacy it had never before enjoyed, and set bounds to it that it had never yet been acknowledged. And he not only delivered the precept, but he also forged the instruments to execute it. To limit the power of the State ceased to be the hope of patient, ineffectual philosophers and became the perpetual charge of a universal Church.[7]

From the beginning, Church scholars understood that Church and State were distinct kingdoms. Augustine of Hippo (AD 356–430), who many consider the greatest influence on the Church between Paul and Martin Luther, wrote of the City of God and the City of Man in his *Civitas Dei*.[8] The

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[7] Gertrude Himmelfarb, *Lord Acton: A Study in Conscience and Politics* (1952) (citing Lord Acton, *The History of Freedom in Antiquity* (1877)).

[8] John Piper, *The Swan Is Not Silent: Sovereign Joy in the Life*

understanding that Church and State were separate and distinct kingdoms was universal; the only question was the nature of the precise relationship between them. Pope Gelasius I (died AD 496), Bernard of Clairvaux (circa AD 1150), and Pope Boniface (circa AD 1302) all wrote of the two swords of the two kingdoms of Church and State.[9]

In ancient and medieval thought, then, Church and State were separate kingdoms, and neither

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and Thought of St. Augustine, Bethlehem Conference for Pastors (Feb. 3, 1998). The *Encyclopedia Britannica* describes *The City of God* as "one of the most influential works of the Middle Ages" and says it

> would be read in various ways, at some points virtually as a founding document for a political order of kings and popes that Augustine could hardly have imagined. Indeed, his famous theory that people need government because they are sinful served as a model for church-state relations in medieval times. He also influenced the work of St. Thomas Aquinas and John Calvin and many other theologians throughout the centuries.

James O'Donnell, ENCYC. BRITANNICA, *The City of God*, https://www.britannica.com/topic/The-City-of-God.

[9] Letter from Pope Gelasius I to Emperor Anastasius (496); Bernard of Clairvaux, *Book Four on Consideration* (1150), *in From Irenaeus to Grotius: A Sourcebook in Christian Political Thought* 179, 276 (Oliver O'Donovan and Joan Lockwood O'Donovan eds., 1999). Using very similar language, in AD 1302, Pope Boniface spoke of "two swords,—a spiritual, namely, and a temporal." Pope Boniface VIII, *Unuum Sanctum* (1304), *in Select Historical Documents of the Middle Ages* 436 (Ernest F. Henderson ed., 1965). He wrote, "[f]or when the apostle said 'Behold, here are two swords'—when, namely, the apostles were speaking in the church—the Lord did not reply that this was too much, but enough." *Id.*

controlled the other. The Church often influenced temporal rulers by admonition, reprimand, discipline, excommunication, and interdiction. [10] Kings sometimes insisted they had the power to approve appointments to ecclesiastical offices within their realms, although church officials often disputed this. But in the West, as a rule, kings and princes did not become popes and bishops, and popes and bishops did not become kings and princes. Of course, a noted exception to this rule occurred in AD 1534 when King Henry VIII of England separated the Church of England from the Roman Catholic Church and proclaimed himself as the head of the Church. The Framers' belief in the separation of Church and State was in part a reaction against this union of Church and State in England.

The Protestant Reformation took force in Northern Europe in the 1500s, a century before the settlement of the English colonies in North America. The Reformers' understanding of the Two Kingdoms of Church and State is therefore key to understanding the views of the Founders. Being largely children of the Reformation, [11] they

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[10] A decree of interdiction, exercised in varying degrees, could have the effect of prohibiting the Mass or the Sacraments within a certain realm because of the perceived wickedness of that realm or its ruler.

[11] As Dr. M.E. Bradford established in *A Worthy Company: Brief Lives of the Framers of the United States Constitution* iv–v (1982), the fifty-five delegates to the Constitutional Convention included 28 Episcopalians, 8 Presbyterians, 2 Lutherans, 2 Dutch Reformed, 2 Methodists, 2 Roman Catholics, one uncertain, and 3 who might be Deists. Yale History Professor Sydney E. Ahlstrom concluded: "If one were to compute such a percentage on the basis of all the German,

understood that God had established two kingdoms, Church and State, each with distinctive authority. As Luther said, these

> two kingdoms must be sharply distinguished, and both be permitted to remain; the one to produce piety, the other to bring about external peace and prevent evil deeds; neither is sufficient in the world without the other.[12]

And as John Calvin stated in his *Institutes of the Christian Religion*,

> let us observe that in man government is twofold: the one spiritual, by which the conscience is trained to piety and divine worship; the other civil, by which the individual is instructed in those duties which, as men and citizens, we are bold to perform. . . . For there exists in man a kind of two worlds, over which different kings and different laws can preside.[13]

Long before Jefferson would speak of the "wall of separation between church and state," Rhode Island founder Roger Williams wrote of a "gap in the hedge

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Swiss, French, Dutch, and Scottish people whose forebears bore the 'stamp of Geneva' in some broader sense, 85 or 90 percent would not be an extravagant estimate." I Sydney E. Ahlstrom, *A Religious History of the American People* 169 (1975).

[12] Martin Luther, *Secular Authority: To What Extent It Should Be Obeyed* (1523), *in* III *Works of Martin Luther* 237 (1982).

[13] III John Calvin, *Institutes of the Christian Religion* ch. 19 (1536).

or wall of separation between the garden of the church and the wilderness of the world."[14] This "Two Kingdoms" approach to Church and State relations was not limited to Protestantism post-Reformation. The *Catechism of the Catholic Church* recognizes distinct jurisdictions between Church and State as well.[15]

This understanding of Church and State as two separate kingdoms, both established by God but with separate spheres of authority, shaped the Founders on a foundational level. As Yale History Professor Sydney E. Ahlstrom has noted,

> No factor in the "Revolution of 1607–1760" was more significant to the ideals and thought of colonial Americans than the Reformed and Puritan character of their Protestantism; and no institution played a more prominent role in the molding of colonial culture than the church. [16]

The Founders were thus well acquainted with the history of the preceding generations and carried this understanding of jurisdictional separation between Church and State with them both as they wrote and ratified the First Amendment. This understanding is best reflected in the Founders' own

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[14] Lynn R. Buzzard & Samuel Ericsson, *The Battle for Religious Liberty* 51 (1982) (quoting Roger Williams, *The Bloody Tenent of Persecution* (1644)).
[15] *Catechism of the Catholic Church* §§ 2245–46 (2d ed. 2000).
[16] Ahlstrom, *supra* note 11, at 423.

actions concerning religious liberty leading up to ratification and after.

Throughout his *Memorial and Remonstrance Against Religious Assessments* (1785), James Madison emphasized the distinct jurisdictional separation between Church and State, writing that "in matters of Religion, no man's right is abridged by the institution of Civil Society and that Religion is wholly exempt from its cognizance." He further revealed his jurisdictional view of church/state relations by saying Christianity is "the Religion which we believe to be of divine origin" and enjoys the "patronage of its Author" and therefore does not need the aid of the State. And, as discussed *supra*, Madison's definition of religion within his *Memorial and Remonstrance* was the primary definition the Founders were familiar with when Madison introduced the First Amendment on the floor of Congress in June 1789.

Thomas Jefferson's "wall of separation" must also be viewed in this context: as a jurisdictional separation between the two kingdoms, Church and State. Jefferson's statement was a reassurance to the Danbury Baptists concerned with government overreach over the Church:

> Believing with you that religion is a matter which lies solely between man [and] his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, [and] not opinions, I contemplate with sovereign reverence that act of the

> whole American people which declared that their legislature should "make no law respecting an establishment of religion, or prohibiting the free exercise thereof," thus building a wall of separation between Church [and] State.[17]

Jefferson's understanding that the "wall of separation" was meant to protect the Church from State intrusion is apparent from his later writing:

> I consider the government of the [United States] as interdicted by the Constitution from intermeddling in religious institutions, their doctrines, discipline, or exercises. . . . Certainly no power to prescribe any religious exercise, or to assume authority in religious discipline, has been delegated to the general government.[18]

He described the jurisdictional separation of Church and State as he described them in the Virginia Bill for Religious Freedom in 1777. This Court quoted that bill in 1878:

> "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on

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[17] Letter from Thomas Jefferson to the Danbury Baptist Association (Jan. 1, 1802).

[18] Letter from Thomas Jefferson to Samuel Miller (Jan. 23, 1808), https://press-pubs.uchicago.edu/founders/documents/amendI_religions60.html.

> supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order."[19]

This Court followed Jefferson's words by stating: "In these two sentences is found the true distinction between what properly belongs to the church and what to the State."[20]

Rather than an amorphous and subjective "test," the Founders' true instruction for the Religion Clauses of the First Amendment based on their understanding and definition of religion is this: Congress shall make no law respecting an establishment of the duties which we owe to our Creator, and the manner of discharging those duties, or prohibiting the free exercise of the duties which we owe to our Creator, and the manner of discharging those duties *unless those duties break out into overt acts against peace and good order*.

After *Reynolds*, this Court continued to apply the Founders' understanding of jurisdictional separation of Church and State under the Religion Clauses. In 1892, the Court overturned the

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[19] *Reynolds v. United States*, 98 U.S. 145, 163 (1879) (quoting Thomas Jefferson, *A Bill for Establishing Religious Freedom* (June 18, 1779)); *see* II *The Papers of Thomas Jefferson* 545–553 (Julian P. Boyd ed. 1950).

[20] *Reynolds*, 98 U.S. at 163.

application of national immigration law to an alien pastor from England who had been contracted to work with a church in New York. *Holy Trinity Church v. United States*, 143 U.S. 457 (1892). After finding that the statute's language could not be construed to include more than manual laborers, the Court found that "beyond all these matters, no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people." *Id.* at 465. This Court found that the colonial records, state constitutions, and the Declaration of Independence show "a constant recognition of religious obligations." *Id.* at 465–71. Comparing these recognitions of God to the Establishment and Free Exercise Clauses of the First Amendment to the Constitution, this Court went on to say:

> There is no dissonance in these declarations. There is a universal language pervading them all, having one meaning. They affirm and reaffirm that this is a religious nation. These are not individual sayings, declarations of private persons. They are organic utterances. They speak the voice of the entire people. While, because of a general recognition of this truth, the question has seldom been presented to the courts, yet we find that in *Updegraph v. Commonwealth*, 11 S. & R. 394, 400 [(Pa. 1824)], it was decided that "Christianity, general Christianity, is, and always has been, a part of the common law of Pennsylvania; . . . not Christianity with an established church and tithes and spiritual

> courts, but Christianity with liberty of conscience to all men."

Id. at 470. This Court then applied the Founders' understanding of jurisdictional separation to hold that a valid immigration law could not be applied to the Church where "the general language thus employed is broad enough to reach cases and acts which the whole history and life of the country affirm could not have been intentionally legislated against." *Id.* at 472. The state could not dictate to the church whom the church could or could not call as a pastor.

The first Supreme Court Establishment Clause decision (as noted by Justice Rutledge in his dissent), *Everson v. Board of Education*, 330 U.S. 1 (1947), is also consistent with the Founders' understanding of a jurisdictional separation of Church and State. Justice Hugo Black, alluding to Jefferson, concluded the Court's majority opinion with the famous statement: "The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach." *Id.* at 18; *See id.* at 16 (citing *Reynolds*, 98 U.S. at 164).

The Court had explained the "wall" earlier in its opinion:

> The "establishment of religion" clause of the First Amendment means *at least this*: neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one

> religion over another. *Neither can force nor influence a person to go to or to remain away from church against his will* or force him to profess a belief or disbelief in any religion. *No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance.*

Id. at 15–16 (emphasis added). *Everson* did not address any subjective tests, nor did the Court discuss specific types of state regulation of churches. Rather, the Court stated as an absolute that "[n]either a state nor the Federal Government" can "force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion." *Id.*

The *Everson* Court made the straightforward conclusion that simple church assembly is not an "overt act against peace and good order" and recognized that it is a matter of Church jurisdiction that the State cannot breach. *Id.* However, this truth has been clouded by confusing and tangled precedent which has blurred the complementary nature of the Establishment and Free Exercise Clauses.

As recently as 2012, this Court has recognized the jurisdictional separation of Church and State enshrined in the Religion Clauses. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the Court held that there is a "ministerial exception" that precludes the application of employment discrimination laws to the Church. 565

U.S. 171, 187–88 (2012). The Court held that the Religion Clauses require that "the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical,' [*Kedroff v. St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 119 (1952)]—is the church's alone." *Id.* The *Hosanna-Tabor* Court's "ministerial exception" is simply what the Founders would have considered a necessary and obvious result of the jurisdictional separation of Church and State. *Hosanna-Tabor* illustrates how this jurisdictional separation is inherent in both the Establishment and Free Exercise Clauses:

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.

Id. at 188–89; *accord Our Lady of Guadalupe School v. Morrissey-Berru*, 140 S. Ct. 2049 (2020).

The Court distinguished its decision in *Hosanna-Tabor* from *Employment Division v. Smith*, 494 U.S. 872 (1990), by stating that, while the discrimination law was a valid and neutral law of general applicability, "a church's selection of its ministers is unlike an individual's ingestion of peyote. *Smith* involved government regulation of only outward physical acts. The present case, in contrast, concerns government's interference with an internal church

decision that affects the faith and mission of the church itself." *Id.* at 190.

Decisions as to how to protect worshippers during a worship service inside a church are left by the Establishment Clause to churches. If a church chooses to prohibit its attendees from bringing firearms into the church building, it may prohibit them. If a church chooses to allow its attendees to bring firearms into the church, it may allow them. This decision may involve Biblical, theological, moral, and practical considerations, but the church and the church alone has the authority to make that decision. The church may decide, based on *Luke* 11:21, that "When a strong man armed keepeth his palace, his goods are in peace," and therefore that the Biblically and theologically correct position is to allow or require firearms in church to ensure the safety of worshippers. (King James). Or the church may decide, based on practical considerations, that its worshippers are more likely to be safe if armed worshippers are present. [21] The Establishment

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[21] The District Court in this case observed the following:

> Unless the Court is mistaken, there have been at least three instances of handguns being effectively used in self-defense in churches in the United States since the turn of the 21st century: (1) at the Colorado Springs New Life Church on December 9, 2007; (2) at the Antioch (Tennessee) Burnette Chapel Church of Christ on September 24, 2017; and (3) at the West Freeway Church of Christ in Texas on December 29, 2019. *See* Kirk Johnson, "Colorado: Gunman Killed Himself," *The New York Times* (Dec. 12, 2007); Natalie O'Neill, "Usher hailed for preventing massacre: Deadly church gunfire," *The New York Post* (Sept. 25, 2017); "Man

Clause protects the church's right to make this determination.

Likewise, a worshipper may decide he has a religious duty to protect himself and his fellow worshippers by carrying a firearm to church during the worship service based upon the same or other considerations. The Free Exercise Clause protects the worshipper's right to make this determination.[22]

II. Portions of the Concealed Carry Improvement Act are vague and, given the hostility of many New York officials toward firearms, subject to arbitrary and discriminatory interpretation and enforcement.

In many places in New York, firearms are prohibited. In the areas where firearms are permitted, applicants for permits must meet certain ambiguous requirements. Among these requirements are that the applicant for a permit prove his or her good moral character,[23] disclose his

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who shot church gunman gets highest Texas civilian honor," *Athens Daily Review* (Jan. 16, 2020).

App.369 n.103.

[22] The rare situation in which a church determines that it should prohibit people from carrying arms while a worshipper believes he should carry arms, is not relevant to this case. *Amicus* believes the right of the church to exclude those who do not conform to its rules takes precedence, while a dissenting worshipper has the right to choose a different church.

[23] N.Y. Penal Law § 400.00(1)(o)(y) (defining good moral character 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.").

or her social media accounts over the last three years for government scrutiny,[24] list any cohabitants, including children,[25] provide four references,[26] and meet with a licensing official for an in-person interview.[27]

These requirements are vague and subject to arbitrary and discriminatory enforcement. For example, the burden is on the applicant to prove good moral character, and as Leo Bernabei observes in the *Fordham Law Review,* New York has considered this requirement in other contexts to require the disclosure of

> [any] arrest (even without a conviction), a poor driving history, termination from employment, a history of lost or stolen firearms, failure to pay debts, and [even] catchalls [like] "a lack of candor towards lawful authorities" and "a lack of concern for the safety of oneself and/or other persons."[28]

Under this amorphous standard,

> [t]he New York City Police Department has denied applications based on an applicant's post-nasal drip making him appear nervous in an interview; the fact that an applicant's son had an altercation with the police,

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[24] N.Y. Penal Law § 400.00(1)(o)(iv).
[25] N.Y. Penal Law § 400.00(1)((o)(i).
[26] N.Y. Penal Law § 400.00(1)(o)(ii).
[27] N.Y. Penal Law § 400.00(1)(o).
[28] Leo Bernabei, *Taking Aim at New York's Concealed Carry Improvement Act*, 92 FORDHAM L. REV. 103, 116 (2023) (citations omitted).

> despite the applicant himself carrying an unblemished record; an applicant neglecting to inform licensing officials of a license revocation in another jurisdiction; an applicant failing to disclose a sealed nineteen-year-old arrest in which the applicant was found not guilty; and an applicant submitting misleading letters to licensing officials regarding the applicant's employment. In Westchester County, just north of New York City, licensing authorities once denied an application because the applicant's psoriasis prevented his fingerprints from being recorded. From that case and its progeny was born the glib phrase that still permeates both state and federal court cases surrounding the denial of a New York handgun license: "Possession of a handgun license is a privilege, not a right."[29]

In *Winters v. New York*, 333 U.S. 507 (1948), this Court stated that "there must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." New York's CCIA lacks ascertainable standards of guilt. As the Supreme Court said in *United States v. Beckles,* 137 U.S. 886, 892 (2017), the void-for-vagueness doctrine applies with special rigor to criminal statutes and statutes prescribing penalties for criminal violations.

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[29] *Id.*

Another reason the Due Process Clause of the Fourteenth Amendment forbids vague statutes is that they lead to arbitrary and discriminatory enforcement. *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). An interviewing officer, consciously or subconsciously, may decide that an applicant is or is not deserving of a permit based upon his or her personal beliefs, tastes, and prejudices. An officer may decide, based on careful reasoning or simply a gut reaction, that an applicant is or is not of good moral character and can or cannot be entrusted with a firearms permit, because the officer does or does not agree with the applicant's religion, political party, or ideology, or because he does or does not empathize the with the applicant's race, sex, gender preference, gender identification, personality, style of speaking, manner of dress, or any of an infinite number of factors.

The danger of arbitrary and discriminatory enforcement is even greater considering that the interviewer may have a basic prejudice against guns and people who want to carry them or may report to supervisors and political figures who have such prejudices, as may be the case in New York.

III. The right to keep and bear arms is a fundamental right that cannot be conditioned on completing a firearms safety course and passing an exam.

The CCIA also requires that applicants for a permit to carry a weapon complete a sixteen-hour state-certified training course [30] and score a

[30] N.Y. Penal Law § 400.00(19)(a).

minimum of 80 percent on a written exam.[31] Bernabei notes that "[e]arly indications suggest that this course can cost upward of $500. The law gives a licensing official six months to approve or deny an application but allows a delay for good cause."[32]

The State of New York appears to have unfettered discretion to refuse to certify any but the most restrictive and anti-gun training courses, to make the course so expensive that few could afford it, and make the exam so difficult that almost no one could pass it.

The right to keep and bear arms is a highly protected right, as this Court established in *Heller*, *McDonald*, and *Bruen*. *Amicus* questions whether the Second Amendment allows New York to require a permit to exercise such a basic human right, or to condition the right on taking a course or passing an exam.

Suppose New York were to require a public speaking course as a condition for exercising the right of free speech, or a theology exam as a condition for exercising the right to free exercise of religion, or a journalism course as a condition for exercising the right to freedom of the press. Such requirements would be struck down in a heartbeat.

The right to keep and bear arms is inextricably related to the most basic of all human rights—the right to life—and the concomitant right to defend

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[31] N.Y. Penal Law § 400.00 (19)(b).

[32] Bernabei, *supra* note 28, at 115 (citations omitted).

one's life. This right would be meaningless if one were denied the right to carry arms in one's defense.

The Framers developed their understanding of unalienable human rights largely through the writings of Thomas Hobbes and John Locke. For both Hobbes and Locke, all rights stem from the fundamental human motivation to preserve one's own life. Hobbes asserted this as the first right of nature: "the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life." Thomas Hobbes, *Leviathan* XIV (1651). Similarly, Locke posited that everyone "is bound to preserve himself, and not to quit his station wilfully." John Locke, *The Second Treatise on Civil Government* § 6 (1689). Consequently, "Men, being once born, have a right to their Preservation." *Id.* at § 25.

If humanity's most basic purpose is to live, natural reason dictates that they must have the freedom to do what is necessary to preserve their lives. The basic right to life necessarily implies a right to defend oneself against enemies or otherwise hostile forces. Locke epitomized this sentiment by arguing that one has the right to kill even a petty thief in self-defense, since it is impossible to know his full intentions at the time. Denying a person the right to keep and bear arms is tantamount to denying him the right to self-defense, which is essential to the right to life itself.

The exercise of a right that is this fundamental cannot be conditioned on taking a sixteen-hour course or scoring 80% on an exam.

CONCLUSION

Never since *Brown v. Board of Education*, 347 U.S. 483 (1954), have lower courts and state officials so defiantly resisted a Supreme Court ruling that is so squarely based on the plain wording of the Constitution, as New York and the lower courts have done here.

This Court should accept the present Petition and rule once again in clear and unmistakable terms that the Second Amendment guarantee of the "right of the people to keep and bear arms" means exactly what it says.

Respectfully submitted,

John A. Eidsmoe*
**Counsel of Record*
Roy S. Moore
Talmadge Butts
Katrinnah Darden
FOUNDATION FOR MORAL LAW
One Dexter Avenue
Montgomery, AL 36104
(334) 262-1245
eidsmoeja@juno.com

Counsel for *Amicus Curiae*

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