No. 24-795

IN THE
Supreme Court of the United States

IVAN ANTONYUK, *et al.*,
Petitioners,
v.

STEVEN G. JAMES, in his official capacity as 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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The same state whose "proper-cause" standard *Bruen* repudiated once again urges this Court to postpone review of its "*Bruen* response bill." While Respondents admit their prior standard was "exceptional," to accept that their latest enactment is "wholly unexceptional" would allow foxes to guard the henhouse. Indeed, Respondents neither walk back Governor Hochul's denigration of this Court nor deny her legislative scheme to contravene *Bruen*.

Respondents' arguments against review are unavailing. As two Justices of this Court already observed, this case "presents novel and serious questions under both the First and the Second Amendments." *Antonyuk v. Nigrelli*, 143 S.Ct. 481 (2023). No benefit will come from further delaying review of New York's rebellion against *Bruen*. Even now, on remand "for further consideration in light of *Rahimi*," the Second Circuit dismissed this Court's decision as having "little direct bearing." This petition therefore presents an important opportunity to course-correct and to resolve the circuit splits that have emerged after *Bruen* and deepened in *Rahimi*'s wake.

I. RESPONDENTS MISSTATE THE PRACTICE GOVERNING CERTIORARI REVIEW.

Respondents urge this Court to deny interlocutory review, claiming that is "ordinary practice" except for "rare circumstances." Brief in Opposition ("Opp.") at 13-14. Respondents offer two "depart[ures] from that … ordinary course," Opp.14, but those cases

discussed *circuit court* review and the collateral order doctrine, not when *this Court* grants certiorari.

Respondents also reference five cases where this Court denied review of non-final judgments. Opp.13-14 n.7. Each is distinguishable. Here, the Second Circuit remanded "for proceedings consistent with this amended opinion." App.3. In contrast, three of Respondents' cases involved remand for complex factual findings. *See* Opp.13-14 n.7 (*Abbott*; *Wrotten*; *Bangor*). One involved remand to craft a remedy. Opp.13 n.7 (*Mount Soledad*). And Respondents' final case simply reiterates that interlocutory review is unusual. Opp.14 n.7 (*Hamilton-Brown*).

But as this Court has observed, "there is no absolute bar to review of nonfinal judgments," which "is appropriate" when the "decision is clearly erroneous" and "produced immediate consequences" for litigants. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997).

Moreover, the procedural history of *this case* belies Respondents' reliance on "ordinary practice." Among this Court's numerous post-*Rahimi* remands, this case was the *only* interlocutory petition granted. *See* Opp.11 n.5 (collecting cases).

Although certiorari review of non-final orders is not routine, it is not extraordinary,[1] and is warranted

[1] *See, e.g.*, *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021); *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 142 S.Ct. 895 (2022); *Coinbase, Inc. v. Bielski*, 599

here given the Second Circuit's defiance of *NYSRPA v. Bruen*, 597 U.S. 1 (2022). Multiple Justices have expressed concern about delaying review in similar situations. *See, e.g.*, *Peruta v. California*, 582 U.S. 943, 947-48 (2017) (Justices Thomas and Gorsuch); *Rogers v. Grewal*, 140 S.Ct. 1865, 1866 (2020) (Justices Thomas and Kavanaugh); *NYSRPA v. City of New York*, 590 U.S. 336, 340 (2020) (Justices Kavanaugh, Alito, Gorsuch, and Thomas).

II. THE SECOND CIRCUIT'S REJECTION OF *BRUEN* DEMANDS SWIFT CORRECTION.

A. This Case Presents an Excellent Vehicle to Resolve the Methodological Question.

The Second Circuit upheld the CCIA based almost exclusively on Reconstruction-era (and later) sources. *See* Petition for Writ of Certiorari ("Pet.") at 19. And the few Founding-era statutes the court did identify were previously rejected in *Bruen*. Pet.21. Meanwhile, the court ignored the contrary Founding-era tradition. *See* Pet.22. In other words, the Second Circuit purported to determine the Second Amendment's original meaning with virtually no reference to the time period when it was ratified.

Attempting to rehabilitate this deficiency, Respondents claim that Virginia and North Carolina "'fairs and markets'" statutes governed a sufficiently "large proportion of the national population" to

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U.S. 736 (2023); *Warner Chappell Music, Inc. v. Nealy*, 601 U.S. 366 (2024).

establish a historical tradition for banning guns in myriad crowded places. Opp.15. But Respondents omit that those statutes did not altogether prohibit carriage, but rather offensive conduct — "bearing arms in 'terror' of the county." App.151 n.82; *see also Bruen* at 51. To avoid *Bruen*'s rejection of these very same laws (*id.* at 47, 122), Respondents theorize that *Bruen*'s rejection was "only 'within the context'" of "'a carriage ban in public *generally*,'" not the "specific location restrictions" here. Opp.16-17. *But see Bruen* at 49-50. But Respondents never mention the Statute of Northampton, on which these laws were based, perhaps because this Court broadly (not in any specific "context") said it "has little bearing on the Second Amendment...." *Id.* at 41.

Nor is Respondents' newfound reliance on *Rahimi*'s surety and going-armed laws availing. Claiming New York's morality test is "consistent" with these laws because it "disarm[s] dangerous individuals" (Opp.15), Respondents crush the distinction between their default *prohibition* on carry (*i.e.*, disarming *everyone*) and Founding-era practice which *presumed* carry and disarmed only upon credible accusation and judicial determination of cause. *See United States v. Rahimi*, 602 U.S. 680, 696-97 (2024).

Finally, Respondents offer a smattering of reasons why the Second Circuit was right to uphold the CCIA *even without* Founding-era analogues. Opp.16-17. First, Respondents justify banning guns on public lands via Reconstruction-era laws, because "public parks" purportedly "emerged" at that time. Opp.16.

But even if that were true (it is not[2]), the court below should have analogized parks to the next-closest thing *at the Founding*, not have entirely jettisoned the time period. *See Bruen* at 30. Second, Respondents assert that *Bruen*'s rejection of "'three colonial regulations'" as insufficient does not apply to "Founding era … regulations." Opp.17. On the contrary, *Bruen* repeatedly discounted historical laws that were few in number. *Id.* at 65-69. In contrast, the court below relied on just *two* inapposite state laws to concoct a *national* tradition at the Founding.

B. The Second Circuit's Methodology Is Diametrically Opposed to *Bruen*.

Respondents assert that courts routinely find "post-1791 history" relevant and this Court's precedents "do[] not preclude the relevance of history from the incorporation era...." Opp.19. But Petitioners never claimed such history is *irrelevant*, only that, "[t]o the extent that earlier or later sources are utilized, it is only to confirm a tradition that existed at the Founding." Pet.10-11 ("1791 is the proper focal point," as *Heller* "primarily examin[ed] Founding-era sources," and then considered later evidence "only to confirm"); *see also* Pet.11-13 (same for *McDonald*, *Bruen*, and *Rahimi*); Pet.14 ("preceding or subsequent history serv[es] a merely confirmatory role"); Pet.15 n.7 (later sources "must confirm (not create or contradict)"). Respondents'

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[2] *See* "Boston Common," Nat'l Park Serv. (Jan. 16, 2025) ("[Boston] Common was a place for recreation as early as the 1660s.").

citation to cases *employing that very approach* (Opp.19) proves nothing.

Respondents next overstate *Rahimi*'s "reli[ance] on nineteenth-century history," as if this Court broke from its prior course. Opp.18. Not so. Rather than rely on *Reconstruction-era* evidence, *Rahimi* identified regulations in the decades immediately following the Founding (1807, 1836) to confirm a tradition already "[w]ell entrenched in the common law." *Id.* at 695. Once again, the "value of postratification history" (Opp.18) was merely confirmatory.

Next, Respondents dispute that the Second Amendment's meaning is "pegged … 'to … 1791.'" Opp.19. Although conceding that this Court said just that (*Bruen* at 37), Respondents theorize that *Bruen*'s "further context cast[s] doubt on this assumption" and, in fact, that public understanding was "reevaluated … in 1868." Opp.20. Not so – Second Amendment protections are not more robust in the District of Columbia than in New York. Rather, there is "no daylight between the federal and state conduct" for what an incorporated Bill of Rights provision "prohibits or requires." *Timbs v. Indiana*, 586 U.S. 146, 150 (2019).[3]

Respondents next disagree that the Second Circuit

[3] Inconsistently, Respondents dismiss *Bruen*'s "general[] assum[ption]" regarding 1791 as non-controlling (and in fact wrong), while simultaneously opining that *Bruen*'s "assum[ptions]" as to "sensitive places" amount to "endorse[ment]." Opp.20; Opp.5.

"marginalize[d] *Bruen*." Opp.20. But Respondents do the same, characterizing *Bruen* as addressing the "exceptional … proper-cause requirement," unlike the CCIA's purportedly "wholly unexceptional" requirement to prove one's "good moral character" as a precondition to "bear[ing] arms," and conversion of virtually the entire State into a gun-free zone. *Id.*

Respondents also omit *why* the Second Circuit deemed *Bruen* "exceptional" — so that it could declare *Bruen*'s analytical framework inapplicable. *See* Pet.19-24. But again, Respondents do the same, asserting that even an "absence of prior laws is relevant but not dispositive." Opp.20 (appealing to "common-sense"). *But see Bruen* at 26 ("lack of a distinctly similar historical regulation … is relevant evidence that the challenged regulation is" unconstitutional); *cf.* App.41 (admitting "a lack of [historical] precedent was … dispositive in *Bruen*"). Indeed, *Bruen* even rejected laws with "little evidence" they were "ever enforced" (*Bruen* at 58), making it highly unlikely that a *complete absence* of analogues is "not dispositive."

C. Respondents Deny, Then Acknowledge, a Circuit Split.

Although first flatly denying that the circuits are deeply divided on the appropriate temporal focal point for Second Amendment review, Respondents eventually concede "vari[ance]." Opp.21-23.

Initially, Respondents attempt to recast the circuit split in terms of *relevance*, claiming that "all courts of

appeals … have found incorporation-era history relevant...." Opp.21. But the issue is not whether Reconstruction-era history is *irrelevant* — indeed, *Bruen* says it is secondary and confirmatory. *See* Pet.14. At issue is whether Reconstruction-era history can stand in for an absence of Founding-era history. Respondents never address the circuits' divergent holdings on *that* issue. *See* Pet.25-27.[4] Thus, Respondents' attempt to manufacture a consensus among the circuits fails. *See* Opp.21-22.

Shifting gears, Respondents object that some of Petitioners' cases involved "challenges to *federal* — rather than state — laws," which naturally focused on 1791 because the Fourteenth Amendment was not implicated. Opp.22. But Respondents ignore the broadly applicable principles those courts articulated. In *United States v. Connelly*, 117 F.4th 269, 280-81 (5th Cir. 2024), the court explained that "non-Founding era historical laws are of, at best, limited utility" and "miss[] the mark by a wide margin." Likewise, *Brown v. BATFE*, 704 F. Supp. 3d 687, 704 (N.D. W. Va. 2023), explained that "reliance on mostly 19th century gun safety regulations … is misplaced...." Finally, *United States v. Ayala*, 711 F. Supp. 3d 1333, 1342 n.4 (M.D. Fla. 2024), only confirms the split among the lower courts, examining

[4] The same is true for Respondents' collection of district-court opinions. *See* Opp.22 n.11. In fact, Respondents' citation to *Springer v. Grisham*, 704 F. Supp. 3d 1206, 1217-18 (D.N.M. 2023), undermines their argument, as that court referenced "*no* … relevant laws around the time of" ratification as one of "several issues that render [analogues] irrelevant or unpersuasive in light of *Bruen*."

"the pertinent time period for a Second Amendment" challenge, as "compared to a Fourteenth Amendment challenge." *But see Timbs* at 150 ("no daylight"). At bottom, "mostly 19th century gun safety regulations" (*Brown* at 704) is all the court offered below.

Next, Respondents admit that the Third Circuit "rejected reliance on incorporation-era history," but claim this was only because there was "a conflict between incorporation-era history and Founding-era history." Opp.23 (citing *Lara v. Comm'r Pa. State Police*, 125 F.4th 428 (3d Cir. 2025)). But the Third Circuit endorsed no such qualifier, stating broadly that "the constitutional right to keep and bear arms should be understood according to its public meaning in 1791." *Lara* at 441; *see also Reese v. BATFE*, 2025 U.S. App. LEXIS 2142, at *36 (5th Cir. Jan. 30, 2025). These holdings are irreconcilable with the opinion below.

Finally conceding that "courts have varied somewhat" methodologically, Respondents suggest that "the issue is actively percolating," and lower courts "should be given an opportunity to crystallize … their own law...." Opp.23. But the Third Circuit *has* "crystallize[d]," recently denying rehearing in *Lara*. *See* 2025 U.S. App. LEXIS 4553 (3d Cir. Feb. 26, 2025). Respondents are thus left with an appeal to "'diverse opinions.'" Opp.23. But if, as Respondents claim, the lower courts are "consistent" on this issue, why would "diverse opinions" need further "percolation" in order to "crystallize"? Respondents illuminate the very circuit split they deny.

III. NEW YORK'S SUITABILITY REQUIREMENT DEFIES *BRUEN* AND CREATES A CIRCUIT SPLIT.

A. *Bruen* Already Rejected Respondents' Facial-Challenge Argument.

Respondents attack what they characterize as the "facial" nature of Petitioners' challenge to the CCIA's "good moral character" requirement. Opp.24-26. Respondents theorize that, because *some* dangerous individuals may be denied, the law has at least *some* constitutional applications. But Respondents confuse process with result. As the Second Circuit recognized, "injury flows from the application itself...." App.61. Indeed, it is the requirement of morality preclearance to exercise an enumerated right which is ahistorical and unconstitutional. Plus, *Heller* and *Bruen* sustained facial challenges even though those laws (complete bans) obviously prevented at least *some* dangerous individuals from owning or carrying handguns. Certainly, no court would facially uphold a law conditioning all speech upon receiving preclearance of its propriety — theorizing that this would stop some from falsely yelling fire in a theater. The same must be true for public carry. *See Bruen* at 70 ("not 'a second-class right'").

Respondents' reliance on *Rahimi* also fails. Rather than challenging the underlying DVRO process, *Rahimi* challenged the result — his temporary disarmament upon a judicial finding of dangerousness. *Id.* at 702. Indeed, this Court expressly noted that due process concerns were *not*

before it. *Id.* at 701 n.2.

Finally, Respondents claim there is no "record to assess how" good moral character "operates in practice," objecting to Petitioners' examples of how the standard[5] has been abused (Pet.33-34), on the grounds that those cases "predated the CCIA's … good-moral-character definition," which Respondents claim "narrowed and made more precise the longstanding requirement...." Opp.25, 28 n.13, 7. Not so. The CCIA merely adopted language used in prior decisions. *See Kamenshchik v. Ryder*, 186 N.Y.S.3d 797, 803 (Sup. Ct. 2023) ("likely to engage in conduct that would result in harm to themselves or others"); *Sibley v. Watches*, 501 F. Supp. 3d 210, 219 (W.D.N.Y. 2020) ("the essential temperament of character" to be "entrusted with a dangerous [weapon]"); *Pelose v. Cnty. Ct. of Westchester Cnty.*, 384 N.Y.S.2d 499 (App. Div. 1976). The CCIA codified what has been the law in New York for decades.

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[5] Previously, Respondents claimed that the CCIA's definition of good moral character "eliminates any discretion." No. 23-910, Brief in Opposition at 24 n.12. Now, they claim that it allows only "'bounded discretion,'" and certainly "no more discretion than in the other shall-issue regimes." Opp.13, 28. But New York courts disagree on both counts. First, New York is not a "shall-issue" state. *Harper v. Neary*, 206 N.Y.S.3d 390, 393 (App. Div. 2024) (CCIA "does not establish a clear legal right to a pistol license"); *cf. Bruen* at 13 n.1 (New York not listed among "'shall-issue' jurisdictions"). Second, a New York "pistol licensing officer has broad discretion." *Husejnovic v. DeProspo*, 225 A.D.3d 597, 598 (App. Div. 2024).

B. "Good Moral Character" Is Indefensible Under *Bruen*.

Respondents next theorize that "good moral character" is "nearly identical" to other states' regimes which this Court purportedly "favor[ed]" in *Bruen*. Opp.27 (asserting that other states employ similar standards).[6] But *Bruen* neither scrutinized nor validated other states' licensing schemes, instead contrasting how some "appear[ed]" to operate without discretion. *Bruen* at 38 n.9.

Nor can Respondents rely on *Rahimi*, which sanctioned only "temporary disarmament...." *Id.* at 699. In contrast, "good moral character" imposes a permanent, *default* state of disarmament. Until one proves good moral character, the CCIA imposes "indiscriminate dispossession, plain and simple." *Beckwith v. Frey*, 2025 U.S. Dist. LEXIS 25871, at *7 (D. Me. Feb. 13, 2025).

Next, Respondents contend that discretion is permissible because denied applicants are entitled to the "writ[ten] … reasons for the denial" and "appellate review...." Opp.26. But as this Court explained, an "inherent denial" of a constitutional right "is not saved by … immediate appeal" or "the right to review … in the courts...." *Phillips v. Commissioner*, 283 U.S. 589, 594 (1931).

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[6] Since their prior Opposition, Respondents no longer claim *Bruen* "approved" of other regimes — only that it "favorably referenced" them. No. 23-910 Brief in Opposition at 26; Opp.27.

Respondents next try to hammer the CCIA's square peg into *Rahimi*'s round hole, claiming that "good moral character … requires a dangerousness showing," and therefore that *Rahimi*'s penultimate paragraph "has no application here." *See* Opp.29 & n.14; Opp.26 (CCIA "denies firearm licenses only to individuals who are demonstrably dangerous"). But Respondents repeatedly omit the first half of good moral character's *conjunctive* requirement — "having the essential character, temperament and judgement necessary to be entrusted with a weapon" (App.438) — that being "the ideal state of a person's beliefs and values...." *Sibley*, 501 F. Supp. 3d at 219. It is hard to imagine a broader grant of prohibited "open-ended discretion." *See Bruen* at 79 (Kavanaugh, J., concurring); *see also Kantarakias v. Hyun Chin Kim*, 226 A.D.3d 1020, 1021 (App. Div. 2024) ("broad discretion"); *Srour v. New York City*, 699 F. Supp. 3d 258, 278 (S.D.N.Y. 2023), *vacated as moot*, 117 F.4th 72, 86 (2d Cir. 2024), *pet. for cert. docketed*, No. 24-844 (U.S. Feb. 7, 2025) ("exceedingly broad and discretionary"; "unfettered discretion"). Indeed, numerous applicants have been denied under Respondents' morality test for reasons having *nothing to do* with dangerousness. *See* Pet.33-34.

Unsurprisingly, Respondents now abandon their prior claim that "good moral character" ensures that applicants are "responsible citizens...." *Cf.* No. 23-910 Brief in Opposition at 27; Opp.29. But if *Rahimi*'s repudiation of responsibility as a litmus test for Second Amendment rights is all it took for Respondents to change their tune, then their characterization of "good moral character" as

"bounded discretion" is little more than *ipse dixit*.

C. New York's Character Requirement Creates a Circuit Split.

Respondents attack their own strawman, triumphing that there is no circuit split on "a licensing requirement like the CCIA's good-moral-character...." Opp.31. But the split Petitioners identified is whether individuals may be disarmed over *something more than* dangerousness — *i.e.*, "character judgments." Pet.36. Accordingly, Respondents' reiteration that "dangerous people c[an] be disarmed" (Opp.32) only deflects from the issue. Indeed, "[g]ood moral character" contemplates far more than dangerousness, reaching "'suitability,' 'responsibility,' [and] perfect 'law-abiding' status...." Pet.34. And on *this* question, the circuits need guidance.

Respectfully submitted,

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