No. _____

IN THE
Supreme Court of the United States

JOSEPH SROUR

Applicant,

v.

NEW YORK CITY, NEW YORK and EDWARD A. CABAN,

Respondents.

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT ON APPLICATION TO VACATE STAY OF A PERMANENT INJUNCTION ISSUED BY THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

EMERGENCY APPLICATION TO VACATE THE SECOND CIRCUIT'S STAY PENDING APPEAL

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Dated: March 20, 2024

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IDENTITY OF PARTIES AND RELATED PROCEEDINGS

The parties to the proceedings below are:

Applicant is Joseph Srour, the plaintiff in the district court and appellee in the Second Circuit.

Respondents are New York City, New York and Edward A. Caban, the defendants in the district court and appellants in the Second Circuit.

The related proceedings are:

Srour v. New York City, New York, 2023 WL 7005172 (S.D.N.Y. Oct. 24, 2023) (order granting preliminary injunction).

Srour v. New York City, New York, 2023 WL 7091903 (S.D.N.Y. Oct. 26, 2023) (order denying Respondents' motion for stay pending appeal).

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TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Pursuant to Rules 22 and 23 of the Rules of this Court, applicant respectfully applies for an order vacating the stay issued by the Second Circuit on February 21, 2024, a copy of which is appended to this application.

After a merits-based determination, a district court of the Southern District of New York permanently enjoined a discretionary provision of the Rifle/Shotgun licensing scheme for New York City that requires non-prohibited individuals to prove to a government official that they possess 'good moral character' before they may lawfully possess rifles and shotguns for self-defense.

Methodically applying the text, history, and tradition analysis for Second Amendment challenges reiterated by this Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1 (2022), the district court properly found that "the magnitude of discretion afforded to New York City licensing officials…empowering them to evaluate an applicant's 'good moral character'" to decide who may -- and may not -- exercise the rights codified in the Second Amendment, "is not constitutionally permissible under the Second and Fourteenth Amendments." App.041.

Respondents failed to identify an historical analogue for their regulation, which is inconsistent with the plain text of the Amendment and this Nation's historical traditions. To be sure, forcing the citizenry to obtain the government's permission before they may lawfully possess long guns is simply un-American.

Consistent with the *Bruen* test, the district court was required to permanently enjoin New York City Administrative Code 10-303(a)(2). When Respondents moved the district court for a stay of its order pending appeal, the district court appropriately denied their motion. App.050.

Respondents proceeded to move the Second Circuit for a stay pending appeal. Rather than allow the district court order to properly take effect, the Second Circuit continued its longstanding history of disregarding this Court's Second Amendment jurisprudence, and stayed the permanent injunction of a patently unconstitutional firearm regulation. App.001.

The Second Circuit's stay order offered no more than a citation to an interlocutory appeal concerning New York State's handgun licensing regulations, *Antonyuk v. Chiumento,* and a claim of "due consideration." App.001. Had the Second Circuit complied with the factors laid out by this Court in *Nken v. Holder*, 556 U.S. 418, 427 (2009), Respondents' motion for a stay pending appeal would have been denied.

The Second Circuit's stay was impulsive and legally infirm. Respondents have no chance of success on appeal, never mind the 'strong showing' this Court requires under the *Nken* factors. Respondents produced no historical analogue to justify their regulation - because none exist. The people are not required to 'prove' their worthiness *before* exercising the Right. As this Court noted in *District of Columbia v. Heller*, the possession of weapons for self-protection is a *pre-existing* right. 554 U.S.

570, 592 (2008) ("The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it "shall not be infringed").

The Second Circuit's reliance on *Antonyuk* was hasty. *Antonyuk* reached conclusions about New York State's moral character factor for handgun possession that are constitutionally unsound, arising out of a flagrant disregard of substantial portions of *Bruen*'s historical analysis. By extension, *Antonyuk* ignores the sound legal precedents set by this Court in *Heller* and *McDonald*.

Antonyuk also sidesteps this Court's constitutional precedent when interpreting the Bill of Rights provisions, which look to post-ratification history solely to *confirm* what the Court already knew the Founders intended -- not to *define* the Amendments. *Bruen*, 597 U.S. at 37 (19th-century evidence was "treated as mere confirmation of what the Court thought had already been established").

Antonyuk's discussion of 'moral character' requirements was also confined to New York State's handgun licensing scheme. No part of the Second Circuit's 'moral character' discussion involved long guns.

Even if there were a hint of constitutionality to the State's moral character requirement for handguns, New York City's Rifle/Shotgun regulation affords grossly broader discretion to licensing officials than the State handgun statute, as the district court observed.

Moral character aside, there is no National history of requiring a license to possess long guns. Even the New York State Legislature recognized in 1963 that not one of the fifty-one jurisdictions in this Nation required a license to possess rifles and

shotguns [relevant provision of Governor's Bill Jacket to Senate Bill 136 reproduced at App.092-096].

Most respectfully, this Court should vacate the Second Circuit's order granting a stay pending appeal.

OPINIONS BELOW

The district court's order is available at *Srour v. New York City, New York*, 2023 WL 7005172 (S.D.N.Y. Oct. 24, 2023) and reproduced at App.002. The district court's denial of the City's motion for a stay pending appeal can be found at *Srour v. New York City, New York*, 2023 WL 7091903 (S.D.N.Y. Oct. 26, 2023) and reproduced at App.050.

The Second Circuit's stay order is unreported and reproduced at App.001.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651. A "Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding the issue of the stay." *Western Airlines, Inc. v International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (citation omitted). *See also Chabad of S. Ohio v. City of Cincinnati*, 537 U.S. 1501 (2002) (vacating Sixth Circuit's stay of district court's injunction). *See also* Supreme

Court Rule 23.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App.056.

STATEMENT

Respondents New York City, New York and New York City Police Commissioner Edward A. Caban impose a discretionary licensing scheme over the lawful possession of rifles and shotguns which, among other burdens, requires applicants prove their 'good moral character' *before* they can exercise the right to possess long guns.

Applicant has no disqualifiers under federal or state law to firearms possession, yet was denied the right to possess rifles and shotguns because New York City Admin. Code 10-303(a)(2) imbues limitless discretion in the police commissioner to render 'moral character' judgments to decide who is sufficiently worthy to exercise the Right. If Applicant lived outside of New York City, there would be no barrier to his lawful possession of rifles and shotguns. If he were a resident of a county outside of the five boroughs, he could readily purchase and possess a rifle or shotgun from an FFL[1] after submitting to a federal background check through the NICS[2] system, which he would pass.

New York City requires its residents to apply to the NYPD police commissioner ("License Division") for a discretionary Rifle/Shotgun license ("R/S license"). Under

[1] Federal Firearms Licensee.
[2] National Instant Criminal Background Check System.

Respondents' licensing scheme for rifles and shotguns[3] all applicants must prove they possess 'good moral character' – or be denied. A denial creates the absolute ban of a presumptively protected constitutional right. *Heller,* 554 U.S. at 582 ("the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding").

In 2019, Applicant's application for a R/S license was denied under section 10-303(a)(2) [good moral character] and 10-303(a)(9) [any good cause].[4,5] Applicant commenced an action in the federal district court for the Southern District of New York. Relevant here, Applicant sought a judicial declaration that the moral character requirement of New York City Administrative Code 10-303(a)(2) violates the Second Amendment and prayed for the permanent injunction thereof.

Applicant's facial challenge was a success, as Respondents failed to meet their burden of justifying their regulations under the test announced by this Court in *Bruen*; the district court appropriately struck NYC Admin. Code 10-303(a)(2). Predictably, the Second Circuit stayed the enforcement of the district court's order.

BACKGROUND AND PROCEEDINGS BELOW

Applicant commenced an action in the district court on January 2, 2022, which was stayed pending a decision in *Bruen*. On October 7, 2022, Respondents filed an Answer.

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[3] New York City Administrative Code § 10-303.

[4] The City did not appeal the district court's permanent injunction of 10-303(a)(9).

[5] To reach its determination, the License Division looked to the written guidelines created by Respondent NYPD police commissioner for determining whether good moral character exists, as set forth in 38 RCNY 3-03 entitled, "Grounds for Denial."

Applicant's motion for summary judgment was filed on December 16, 2022; Respondents filed their opposition on February 21, 2023; and Applicant's reply was filed on March 28, 2023.

By Opinion and Order dated October 24, 2023, the district court granted Applicant's motion for summary judgment, in part.

In a tempered and well-reasoned 48-page opinion, the district court held that NYC Admin. Code 10-303(a)(2) (good moral character) and 10-303(a)(9) (good cause to deny) were facially unconstitutional, and the police commissioner's policies under 38 RCNY 3-03 for reaching a moral character determination, likewise violated the Second and Fourteenth Amendments.

> "…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 continues to lie in the broad discretion afforded to City officials in determining whether someone may exercise their Second Amendment right. Defendants have 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.'"[6]

The standard applied by the district court conforms to this Court's precedent. Beginning with the plain text of the Second Amendment, the district court proceeded to discuss the fundamentals of *District of Columbia v. Heller*, 554 U.S. 570 (2008) and

[6] Respondent police commissioner's "Grounds for Denial" under 38 RCNY 3-03 (rifles and shotguns) and 5-10 (handguns) were amended post-*Bruen*. The amended versions are not part of the district court order.

McDonald v. City of Chicago, 561 U.S. 742 (2010) (plurality), before turning to the text, history, and tradition standard for Second Amendment challenges reiterated by this Court in *Bruen*.

"The Supreme Court's recent decision in *Bruen* articulated the standard for applying the Second Amendment to a government firearm regulation: "When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2129-30. To determine whether a firearm regulation is consistent with the Nation's historical tradition of firearm regulation, a court is not required to embark on its own historical inquiry. Rather, a court is "entitled to decide a case based on the historical record compiled by the parties." *Id.* at 2130 n.6. The government bears the burden and must provide material that demonstrates its regulation is consistent with our country's history of firearm regulation. *Id.* at 2135 ("[T]he burden falls on the respondents to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation."); see *id.* at 2150 ("Of course, we are not obliged to sift the historical materials for evidence to sustain New York's statute."); *see also id.* at 2132 ("[W]e find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question.")." App.011.[7] The district court recited the standard

[7] The district court rebuked Respondents' repeated attempts to place the burden on Applicant to come forward with evidence that the challenged regulations are inconsistent with our country's historical tradition of firearm regulation – a burden borne by the government alone. App.011.

for a successful a facial challenge, the regulations at issue, and Article III standing before turning to the application of the *Bruen* test.

The district court found that Applicant met his burden of establishing that the conduct being regulated – the possession of rifles and shotguns – is protected by the plain text of the Second Amendment. App.023-024.

The district court went on to analogizing Respondents' 'moral character' requirement to the 'proper cause' factor for a concealed carry handgun license that was stricken by this Court in *Bruen*. Both statutes require individuals to "prove" something to a government official before being able to exercise a protected right. App.028-030.

Harkening to *Bruen*'s discussion contrasting outlier "may issue" regimes 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," the district court correctly observed that Respondents' regulations "land very close to the problematic "may issue" laws criticized in *Bruen*." App.028 (quoting *Bruen*, 142 S. Ct. at 2123-24).

"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." App.028 (quoting, *Bruen*, 142 S. Ct. at 2156).

The district court concluded that 10-303(a)(2) and (a)(9) "suffer from the very same constitutional flaws under *Bruen*." Observing that Section 10-303 fails to define "good moral character" in further detail, the court held that "without doubt, the very notions of "good moral character" and "good cause" are inherently exceedingly broad and discretionary. Someone may be deemed to have good moral character by one person, yet a very morally flawed character by another. Such unfettered discretion is hard, if not impossible, to reconcile with *Bruen*." App.030.

The district court then turned to whether Respondents met their burden under the *Bruen* test, but found they failed to produce any historical analogue for investing officials with the broad discretion to restrict an individual's Second Amendment rights based on a lack of moral character. App.031-032.

Respondents offered examples of criminal laws, loyalty oath requirements, and surety statutes -- laws preventing "dangerous or potentially dangerous" people from possessing firearms, which the district court found are "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"…The latter is far broader and sweeps in significantly more conduct." App.031-032.

Respondents' moral character requirement was created to address the same societal problems addressed in *Heller, McDonald,* and *Bruen:* public safety. App.031. A problem that the Founders could have addressed in the same manner, but did not.

The district court properly issued a permanent injunction of NYC Admin. Code 10-303(a)(2) and (9). App.048-049. Respondents moved for a stay of the opinion and order pending appeal, which was properly denied by the district court on October 26, 2023. App.050.

Respondents then moved the Second Circuit for a stay of the district court's permanent injunction of NYC Admin. Code 10-303(a)(2) pending appeal, which was granted by the Second Circuit panel in reliance on *Antonyuk v. Chiumento*, 89 F.4th 271, 312 (2d Cir. 2023). App.001.

REASONS FOR GRANTING THE APPLICATION

I. The Second Circuit Stay Order Provides No Analysis.

The Second Circuit order staying the district court's permanent injunction of NYC Admin. Code 10-303(a)(2) was not based on a "careful review and a meaningful decision." *Nken v. Holder*, 556 U.S. 418, 427 (2009). Claiming to have given "due consideration" to the factors outlined in *Nken*, the Order offers no discussion or analysis for its decision. App.001. Instead, the Second Circuit simply cited to *Antonyuk*.

Had "due consideration" been given, the Second Circuit would have realized that *Antonyuk* (i) is not binding on the appeal, as it involved review of a preliminary injunction, not a merits-based determination; (ii) its 'moral character' analysis is confined to *handgun* licensing (plaintiffs challenged the "Concealed Carry Improvement Act"); (iii) New York State's moral character statute for handguns is markedly narrower than NYC Admin. Code 10-303(a)(2) (still, any amount of discretion conflicts with the plain text); and (iv) contains no analysis of this Nation's

historical traditions of regulating *rifles and shotguns*, which is decidedly sparse. To be sure, when it comes to long guns, even the New York State Legislature acknowledged in 1965 that there was no 'National tradition' of licensing rifles and shotguns[8], never mind disarming the entire citizenry until a government official feels they possess "good moral character."

II. The Second Circuit's Stay Should Be Vacated Because All Four *Nken* Factors Weigh In Favor of Applicant.

A stay is an intrusion into the ordinary processes of administration and judicial review and is not a matter of right, even if irreparable injury might otherwise result to the appellant. *Nken*, 566 U.S. at 427 (cleaned up) quoting *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926). "The parties and the public, while entitled to both careful review and a meaningful decision, are also generally entitled to the prompt execution of orders..." *Id.*

Applicant succeeded on the merits of his facial challenge to NYC Admin. Code 10-303(a)(2), supported by a lengthy, meticulous, and well-reasoned opinion by the district court and he is entitled to the execution of the district court's order.

This Court has made clear that "[t]he parties and the public, [are] entitled to both careful review and a meaningful decision." *Nken* at 427. But Applicant received neither.

The Second Circuit was required to analyze the following when considering Respondents' motion for a stay pending appeal: (1) whether Respondents made a "strong showing" that they are likely to succeed on the merits; (2) whether

[8] App.092.

Respondents will be irreparably injured absent a stay; (3) whether Applicant will be substantially injured; and (4) where the public interest lies. *Nken*, 556 U.S. at 434.

Without any analysis, it is difficult to understand what the Second Circuit was thinking when it granted Respondents' motion; to be sure, there was neither "careful review" nor a "meaningful decision." The Second Circuit's reference to *Antonyuk* followed by a conclusion that the court "up[held the] constitutionality of New York State's requirement that an applicant for a firearm license have "good moral character" reveals that the Second Circuit paid no mind to *Nken*.

A. Respondents Are Unlikely to Succeed on the Merits of Their Appeal.

Respondents were required to make a 'strong showing' for a stay but, instead, they demonstrated no likelihood of succeeding on the merits of their appeal, as the district court recognized when denying Respondents' initial motion for a stay of its order pending appeal. App.050.

i. Respondents' Article III Argument is Meritless

The crux of Respondents' appeal is centered on Article III standing. Respondents contend that Applicant (somehow) lost standing; that he was required to *reapply and be denied again* because the police commissioner amended the rules for how the License Division would determine 'good moral character.'

But Respondents ignore well-established case law, which measures Article III standing by the facts that existed at the time the action was commenced. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 569 n.4 (1992) ("The existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed.") (internal

quotation marks, citation, and emphasis omitted); *Davis v. FEC*, 554 U.S. 724, 734 (2008) ("[T]he standing inquiry remains focused on whether the party invoking jurisdiction had the requisite stake in the outcome when the suit was filed.").

Applicant easily satisfies Article III standing. When the federal complaint was filed in 2020, Applicant had suffered an injury-in-fact by the 2019 denial of his right to possess rifles and shotguns for self-defense; his injury is directly traceable to the License Division's enforcement of the moral character requirement of NYAC 10-303(a)(2); and the harm was likely to be redressed by a favorable judicial decision -- the permanent injunction of NYAC 10-303(a)(2) removes a 'good moral character' assessment from the New York City rifle/shotgun licensing scheme.

ii. The Police Commissioner's Rules – Amended or Otherwise - Cannot Exist Absent a Statute

In their appeal, Respondents theorize that, because the police commissioner tweaked the language of the "Grounds for Denial of a R/S license [38 RCNY 3-03] before the district court order issued, a permanent injunction of NYC Admin. Code 10-303(a)(2) cannot stand. In other words, the district court should have considered how the police commissioner intends to administer the statute.

This too fails. The police commissioner's authority to license rifles and shotguns is granted by the City Council's statutes. With the permanent injunction of 10-303(a)(2), the police commissioner has no more ability to make 'moral character' assessments. His rules for determining 'good moral character' [38 RCNY 3-03] are a nullity. 38 RCNY 3 does not (and cannot) exist without legislative authority.

iii. Granting a Stay Based on Antonyuk Was Illogical and Erroneous

The only 'reason' offered by the Second Circuit for staying the district court's permanent injunction was a citation to *Antonyuk* – an illogical and erroneous choice for several reasons.

First, the absence of discussion in the Second Circuit's order creates the impression that the court believed it was bound by *Antonyuk*. As an interlocutory appeal of a preliminary injunction, *Antonyuk* was not binding on the motions panel. *Cayuga Indian Nation of New York v. Seneca Cnty., New York*, 978 F.3d 829, 834 (2d Cir. 2020) (It would be anomalous to regard the initial preliminary injunction ruling as foreclosing the subsequent, more thorough consideration of the merits that the preliminary injunction expressly envisions); *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir.1985); *Arthur Guinness & Sons, PLC v. Sterling Publishing Co.*, 732 F.2d 1095, 1099 (2d Cir.1984); *Diversified Mortgage Investors v. U.S. Life Title Ins. Co.*, 544 F.2d 571, 576 (2d Cir.1976).

If *Antonyuk* is not binding on its own district court's determination of the merits of those plaintiffs' claims, it was also not binding for purposes of Respondents' motion for a stay pending an appeal that involves overturning a well-reasoned and lengthy merits-based opinion, a separate governmental body, and a different firearm regulation that grants the licensing authority substantially broader discretion.

Second, the subject matter of *Antonyuk* - the "Concealed Carry Improvement Act" - restricts its decision to concealed carry handgun licenses.[9] No part of the *Antonyuk* decision involved licensing long guns.[10]

Third, *Antonyuk*'s historical analysis of the moral character requirement is constitutionally unsound. Rather than begin with the plain text of the Second Amendment or the Founding Era, that part of the Second Circuit's discussion *begins 100 years after the ratification* of the Bill of Rights, when concealed carry licensing schemes sporadically popped up in *local* municipalities.[11]

- "For as long as licensing has been used to regulate privately-owned firearms[12], issuance has been based on discretionary judgments by local officials. Licensing that includes discretion that is bounded by defined standards, we conclude, is part of this nation's history and tradition of firearm regulation and therefore in compliance with the Second Amendment." *Antonyuk*, 89 F.4th at 312.
- "For as long as American jurisdictions have issued concealed-carry-licenses, they have permitted certain individualized, discretionary determinations by decisionmakers." *Antonyuk*, 89 F.4th at 317, 319.

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[9] Excluding *Antonyuk's* separate and distinct discussion involving the CCIA's sensitive places and restricted areas bans.

[10] Unlike a moral character assessment, loyalty oaths are (i) objective – either the oath was taken or it was not; (ii) not analogues for the 'moral character' assessment; and (iii) disarmed those who would not take an oath – they were not a government requirement for possession in the first instance. See also, App.033.

[11] As this Court observed in *Heller* and *Bruen*, because post-Civil War discussions of the right to keep and bear arms took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." *Bruen*, 597 U.S. at 36 (cleaned up).

[12] "Firearms" in New York State means "handguns," and not the general reference to handguns, rifles, and shotguns overall. Penal Law § 265.00.

As this Court observed in *Heller* and *Bruen*, because post-Civil War discussions of the right to keep and bear arms took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources. *Bruen*, 597 U.S. at 36 (cleaned up).

Antonyuk cites a handful of late-1800s local ordinances requiring a license to carry a handgun concealed; which are not evidence of a *National* tradition, too far beyond the ratification period to bear on the *public understanding* of the right when the Second Amendment was ratified[13], conflict with the plain text of the Second Amendment, and are neither relevant nor material to the history of rifles and shotguns.

The permanent injunction of 10-303(a)(2) does not involve public carry or handguns; just the lawful possession of rifles and shotguns. At best, the historical tradition of regulating the peaceful possession of firearms is confined to the loyalty oaths, which sought to *disarm* those loyal to Great Britain as potential terrorists.[14] As the district court observed, loyalty oaths establish that the People were *already* armed. No government permission required. App.033.

Fourth, the discretionary language of Respondents' moral character assessment for long guns is far broader than the language in the State's handgun

[13] This Court's constitutional jurisprudence is based on the "general assumption that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Bruen*, 597 U.S. at 37 (cleaned up) (citing cases).

[14] Post-Civil War, regulations arose disarming classes of people deemed 'dangerous' based on their skin color, arbitrary and capricious classification.

statute. Even *Antonyuk* interpreted the State moral character factor as limited to a finding of 'dangerousness.'[15]

In stark contrast, NYC Admin. Code 10-303(a)(2) is undefined and limitless. In fact, the police commissioner's non-exhaustive list of 'events' used to determine whether an applicant possess the requisite moral character to possess rifles and shotguns includes a review of an applicant's driving history, dismissed charges, and a 'lack of candor towards lawful authorities.' 38 RCNY 3-03(a), (e), (h), (n) – factors enforced by the License Division to deny Applicant's R/S License that have no historical analogue.

'Dangerousness' is not the measure for Respondents' regulations, as observed by the district court:

> "To be sure, what is constitutionally problematic in this case is not necessarily assessing a license or permit applicant for dangerousness, but rather the excessive discretion vested in licensing officials in making that determination based on "good moral character" or "good cause." App.039 n.21.

The Second Circuit's reliance on *Antonyuk* to stay a successful merits-based facial challenge to NYC Admin. Code 10-303(a)(2) was in error. *Antonyuk* provides no support for Respondents' efforts to make a 'strong showing' of succeeding in its appeal.

[15] Under Penal Law 400.00(1)(b), moral character "shall mean 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."

iv. The District Court Opinion Was Constitutionally Sound and Loyal to the Text, History, Tradition Analysis Set Forth in Heller, McDonald, and Bruen

The district court's analysis was constitutionally sound. The district court began its analysis under the *Bruen* test with correctly finding that Applicant's proposed conduct, possessing rifles and shotguns, is presumptively protected by the plain text of the Second Amendment. App.23-26 see also, *Heller,* 554 U.S. at 592 ("the plain text guarantee[s] the individual right to possess and carry weapons in case of confrontation"); *Caetano v. Massachusetts,* 577 U.S. 411, 411-412 (2016) (the Second Amendment protects all weapons in common use) (stun guns); *Bruen*, 597 U.S. at 17 ("when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct").

Turning to whether Respondents justified their moral character requirement, the district court correctly found that Respondents failed to meet their burden under *Bruen*.

The only historical analogues offered by Respondents were criminal statutes, loyalty oaths, and narrow classes of people deemed dangerous, which are not an historical analogue for the peaceful possession of weapons for self-defense. App.31-41.

"In sum, having considered Defendants' proffered historical materials, and applying the standard set in *Bruen*, the Court determines 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." App.41.

As with the now-stricken New York State 'proper cause' requirement, NYC Admin. Code 10-303(a)(2) "prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Bruen*, 597 U.S. at 71.

This Court's opinion in *Bruen* decision was consistent with *Heller*, which confirmed that the Second Amendment codified a *pre-existing* right. *Heller*, 554 U.S. at 592 quoting *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). And the district court's analysis was consistent with the plain text of the Second Amendment, the Nation's historical traditions, and this Court's Second Amendment jurisprudence.

v. New York State Legislature Agrees With Applicant

There is simply no historical tradition of licensing long guns – and the New York State Legislature agreed. While taking to an overhaul of the original Sullivan Law in 1963, the New York Legislature observed that licensing rifles and shotguns was not an American pastime. See, Governor's Bill Jacket to Senate Bill 136, relevant provisions reproduced at App.092-096. The State Legislature's research revealed that the licensing and registering of rifles and shotguns in the fifty-one American jurisdictions was "virtually non-existent."

> "[T]he estimate of twenty to forty million rifles and shotguns in the hands of the civilian population of the United States is entirely credible. In recent years, hundreds of thousands of military rifles have been imported from Europe, with the pro forma approval of the United States Department of State. Thousands of other such rifles have been released by the Department of Defense…States surrounding New York have no restrictions, except those already pointed out, on rifles and shotguns.
>
> Under these circumstances, any proposal to register rifles and shotguns in the single State of New York would not only impose a governmental burden of Augean proportions but also would in all probability not prevent their possession by persons dangerously likely to use them in the commission of crimes." App.094.

There is no National historical tradition of requiring a license to possess rifles and shotguns, as New York State recognized in 1963.[16] New York City itself had no licensing requirement for rifles and shotguns until 1967. [2d Cir. 23-7549, Dkt. Entry 27.1 at 6].

It is well-settled by a long line Supreme Court decisions that "an ordinance which, like this one, makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official -- as by requiring a permit or license which may be granted or withheld in the discretion of such official -- is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms. *Shuttlesworth v. City of Birmingham, Ala.*, 394 U.S. 147, 151 (1969) (cleaned up); *c.f.*, *Bruen*, 597 U.S. at 39 (rejecting the government's "appraisal of facts, the exercise of judgment, and the formation of an opinion…features that

[16] Observing that "Under a unique provision, one state (Florida) requires a license for a certain type of rifle described as a Winchester or repeating rifle. In another state (Hawaii), in the unlikely case of a rifle or shotgun with barrel less than eighteen inches in length, a license is required. In New York, any sawed-off shotgun is flatly outlawed." [S.B. 136 Bill Jacket].

typify proper-cause standards like New York's" over the rights protected by the Second Amendment).

NYC Admin. Code 10-303(a)(2) conditions the right to keep and bear arms for self-protection on the subjective assessment of a government official, a regulation repugnant to the plain text of the Second Amendment, and this Nation's historical traditions. Respondents have no ability to make a strong showing of a likelihood of success on the merits of their appeal.

B. Applicant Is Being Irreparably Harmed by the Foreclosure of His Second Amendment Rights.

Nken prohibits a reviewing court from "reflexively holding a final order in abeyance pending review." *Nken*, 556 U.S. at 427. But the Second Circuit did just that. By blindly freefalling into the conclusion of the *Antonyuk* opinion, without considering the numerous reasons why *Antonyuk* does not apply to Applicant, the Second Circuit "reflexively" placed a constitutionally sound final order on hold pending review.

The Second Circuit's stay has caused Applicant substantial and irreparable harm, and will continue to cause harm to Applicant and countless other non-disqualified New Yorkers. The unfettered discretion imbued by NYC Admin. Code 10-303(a)(2) is an absolute prohibition on Applicant's ability to possess rifles and shotguns based on a regulation that is odious to the Second and Fourteenth Amendments.

C. The Public Interest Did Not Support a Stay and Respondents Will Suffer No Harm if the Stay is Vacated.

It is always in the public interest to enjoin an unconstitutional law. See *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Respondents claimed below that without the ability to make individual assessments, the public's safety will be at risk and the License Division would be 'confused' and unable to decide who should and should not be issued a license.

But federal and state law already prohibit disqualified individuals from possessing rifles and shotguns under 18 U.S.C. 922(g), Penal Law 265.00(17); 265.01(4), the violation of which imposes criminal penalties.

NYC Admin. Code 10-303(a)(2) is a complete bar to the possession of rifles and shotguns by ordinary people, like Applicant, who have no disqualifiers to firearm possession under state and federal law.

To the extent that licensing of long guns is constitutionally permissible, which it is decidedly not, the eligibility requirements of NYC Admin. Code 10-303 continue to provide Respondents with bright-line disqualifiers for objectively determining an applicant's eligibility to possess firearms. App.057.

The "right to keep and bear arms … is not the only constitutional right that has controversial public safety implications." *Bruen*, 597 U.S. at 17, n 3 quoting *McDonald*, 561 U.S. at 783. Indeed, "the Second Amendment is … the very product of an interest balancing by the people…." *Heller*, 554 U.S. at 635. And *Bruen*'s rejection of means end scrutiny precludes balancing the individual rights of the individual against the government interest. Respondents are not entitled to a stay of

a law that is repugnant to the Constitution and devoid of any historical footing based on the same 'public safety' arguments that have been rejected by this Court since *Heller*.

Nor does New York State's century-old moral character requirement for handgun possession under the Sullivan Law support Respondents' appeal. The licensing of rifles and shotguns in New York City is a modern-day burden that did not exist until 1967. See 2d Cir No. 23-759, Entry 7.1 at 25; Entry 27.1 at 6.

Notwithstanding the above, handguns, rifles, and shotguns are *all* weapons in common use for self-defense, equally protected by the Second Amendment from the whims of a government official.

CONCLUSION

For the reasons stated above, Applicant respectfully asks this Court to vacate the stay entered by the Court of Appeals pending full appellate consideration of the district court's decision permanently enjoining New York City's discretionary licensing of rifles and shotguns under Administrative Code 10-303(a)(2).

Respectfully submitted,

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