APPENDIX

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Kern, J.P., Gesmer, Mendez, O'Neill Levy, Michael, JJ.

4112	THE PEOPLE OF THE STATE OF NEW YORK, Respondent,	Ind No. 3387/16 Case No. 2019-1469
	-against-	
	ARNOLD CONYERS, Defendant-Appellant.	

Jenay Nurse Guilford, Center for Appellate Litigation, New York (Sarah E. Siegel of counsel), for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Conor E. Byrnes of counsel), for respondent.

Judgment, Supreme Court, New York County (Curtis Farber, J.), rendered November 1, 2018, convicting defendant, upon his plea of guilty, of criminal possession of a weapon in the second degree, and sentencing him to a term of five years, unanimously affirmed.

Defendant lacks standing to raise his Second Amendment claims because he did not apply for a gun license (*see People v Johnson*, 225 AD3d 453, 455 [1st Dept 2024], *lv granted* 42 NY3d 939 [2024]; *see also People v Watts*, 234 AD3d 620, 621 [1st Dept 2025]). Defendant also failed to preserve his Second Amendment claims, and we decline to review them in the interest of justice (*see People v Cabrera*, 41 NY3d 35, 46-51 [2023]; *Watts*, 234 AD3d at 621). We reject defendant's claim that application of the preservation requirement to this case violates his right to procedural due process. As an alternative holding, defendant fails to establish that his conviction is unconstitutional

under *New York State Rifle & Pistol Assn. v Bruen* (597 US 1 [2022]) (*see Johnson*, 225 AD3d at 455).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: April 15, 2025

Susanna Molina Rojas
Clerk of the Court

State of New York
Court of Appeals

BEFORE: HON. JENNY RIVERA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

ARNOLD CONYERS,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: August 28, 2025

Associate Judge

*Description of Order: Order of the Appellate Division, First Department, decided April 15, 2025, affirming a judgment of the Supreme Court, New York County, rendered November 1, 2018.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CRIMINAL TERM PART TAP B

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ARNOLD CONYERS

INDICTMENT# 3387/2016 111 Centre Street
New York, New York 10013
October 15, 2018

B E F O R E: HONORABLE CURTIS FARBER, JSC

A P P E A R A N C E S:

FOR THE PEOPLE:
BY: MS. LINDA FORD, ESQ.
BY: MS. SARA WALLACE, ESQ.

FOR THE DEFENDANT:
BY: MR. EUGENE NATHANSON, ESQ.

MICHAEL RIZZO
SENIOR COURT REPORTER

THE CLERK: This is calendar number one, 3387 of 2016, Arnold Conyers.

MR. NATHANSON: Eugene Nathanson for Mr. Conyers.

THE COURT: Good morning.

MS. WALLACE: The People are ready for trial. The case should last for about three days. We are calling eight witnesses.

MR. NATHANSON: As I was speaking to my client he reminded me at the last date you said you would like to look at the file and consider making an offer to him.

He told me that he would take three years. I explained to him I don't know. He solicited from you if you were willing to make an offer to him, whatever that offer would be.

THE COURT: Could I see the file, please.

MS. WALLACE: The People are recommending eight years plus five years post-release supervision.

We will consent to the time running concurrent with his other indictment.

THE COURT: What is the other indictment?

MR. NATHANSON: He is sentenced to 3 1/2 to 7 years on a, basically, scalping tickets.

THE COURT: Why is your recommendation so

high on this case?

MS. FORD: The Defendant left a firearm with ammunition inside of his ex-girlfriend's apartment. His DNA was on the gun.

They were in an eight year long relationship which ended in May of 2016. She had changed the locks to her apartment and told him he was not permitted to return.

When she came home a few days later she had found the locks to her apartment were changed. When she gave access to her home the Defendant's duffle bag was inside of the apartment and there was a gun inside of that bag with ammunition.

He is a second felony offender. A predicate felon for Robbery in the Third Degree. He has 11 Misdemeanors.

At the time of this arrest he had two open indictments for Criminal Possession of a Forged Instrument in the Second Degree.

THE COURT: His prior is a violent felon?

MS. WALLACE: Robbery in the Third Degree. He is a second felony offender.

MR. NATHANSON: He has no crimes of violence. All of the previous records all concern scalping tickets inluding the bribery.

THE COURT: The minimum is five years.

MR. NATHANSON: I understand that.

THE COURT: I couldn't give him what he wants.

MR. NATHANSON: I mean, he appreciates that, Judge.

THE COURT: I am contrained to follow the sentencing guidelines. If the Prosecution amkes you a plea bargain, I can along with the plea bagain.

But, if they don't make you an offer, then I have to sentence you within the guidelines for whatever charge is the top charge, Criminal Possession of a Weapon in the Second Degree, a Class C violent felony offense.

As such, then I have to take a look at and see if you have any prior felony convictions.

You have one prior felony conviction which, I am told, is a non-violent.

Under the sentencing guidelines it looks like this. The minimum is 5 years on your charge. The maximum is 15.

So, I can't give you the three years that you are seeking. The minimum I can give you is five years.

Do you want a moment to think that over?

I want to look at his rap sheet real quick.

Do you have that?

MS. WALLACE: I have the predicate felony statement, not the Criminal Court papers, in the file that was sent to court. The robbery conviction was on June 9th of 2009.

THE COURT: The only counts in the indictment relate to the weapon. There are no Burglary charges here. He has a possession.

I would be prepared to offer the minimum, up to five years, if your client is interested.

MS. WALLACE: Are the Criminal Court papers in the court file?

I do not have the rap sheet. I just have the summary.

At the time of the arrest there were two indictments pending in Part 42.

THE COURT: There was what?

MS. WALLACE: There was the forgery indictments pending in Part 42.

THE COURT: The notations from the prior Judge indicate that the criminal record is non-violent in nature.

I would offer the five today if he wants it.

MS. WALLACE: I believe that is correct, Judge.

THE COURT: Just so you understand, I can't speak for what will happen if I send this case out to trial. I don't know what Judge you would get.

If you are convicted of the minimum you can get the five, which is what I am offering. The Judge could give you up to 15 years.

If you are not guilty of this crime, go to trial. If you are guilty and you don't think you can prevail at trial, then the only way to guarantee you will get the minimum is at this moment.

The Judge may go along with The People's recommendation of giving you eight years. Eight years six years, nine,, ten, up to fifteen.

So, that is all I can tell you. You have to make that decision. I can't tell you what to do.

MR. NATHANSON: If we could have a second call.

THE COURT: Do you want a second call?

MR. NATHANSON: Yes, Judge.

(Whereupon, the case was second called at this time.)

THE CLERK: This is calendar number one, indictment 3387 of 2016, Arnold Conyers.

THE COURT OFFICER: The Defendant would like to stand, Judge, is that okay?

THE COURT: That is fine.

MR. NATHANSON: Eugene Nathanson for Mr. Conyers.

Good afternoon, Judge.

THE COURT: All right, you had an opportunity to speak. Should I be looking for a trial part, or, what do you want me to do?

THE DEFENDANT: I would like to address The Court on the record.

THE COURT: Before you speak, I want to let you know the Reporter to my right is writing down everything that you are saying.

Don't talk about the facts of the case. If you do, it could be used againstt you; do you understand?

THE DEFENDANT: Your Honor, I feel like I would like to be appointed to a new counsel because me and counsel Nathanson are having a conflict, a conflict of interest.

And we do not see eye to eye pertaining to my case. And I am afraid for my life of what I am facing and going through right now. And I have been down this road before.

THE COURT: I see you have a lengthy record. During the break the Prosecutor did secure a copy of

your 28 page rap sheet and provided it to me.

THE DEFENDANT: I am just being forced to go to trial and go to trial for a new case.

THE COURT: You are not forced to do anything. You have full control over your future. You could decide to resolve this case by plea if you want.

If you don't want to, your right is to have a speedy trial.

Your case is two years old. I am not relieving Counsel. The case is a trial ready case.

I am sending the case out for trial today if you don't want to resolve it. I am not going to allow you to delay the case for the first day that it is ready for trial.

THE DEFENDANT: I told you on the record the second time. That was six months ago.

THE COURT: I wasn't here six months ago.

THE DEFENDANT: We are going through this same problem again for the second time.

THE COURT: Your application is denied.

Second call for a part.

(Whereupon, the case was third called at this time.)

THE CLERK: This is a recall of calendar number one as to Arnold Conyers.

MR. NATHANSON: Eugene Nathanson for Mr. Conyers.

THE COURT: Good afternoon.

MS. WALLACE: Sara Wallace for The People.

Good afternoon, Your Honor.

MR. NATHANSON: We were sent out to Judge Mullin and Mr. Conyers informed the Judge that he did, in fact, want to take the offer that you had made to him earlier in the day.

THE COURT: All right.

MR. NATHANSON: Therefore, The Defendant moves to withdraw his previously entered plea of not guilty and enters a plea of guilty according to the terms expressed by you by previously.

MS. WALLACE: I was not present for the calendar call this morning. The standing ADA was here.

I wanted to make sure, it is my understadning that The Court's offer is five years.

The offer is five years post-release supervision as well?

While in Part One I moved to amend the date in the indictment to a date change of May 5, 2016, through the 26th, 2016.

THE COURT: That was made out in the Grand Jury minutes?

MS. WALLACE: I have the the Grand jury minutes if you would like to review them.

Counsel has them also.

MR. NATHANSON: That is fine.

THE COURT: Do you have any objection?

MR. NATHANSON: No objection.

THE COURT: That is fine. I will make sure we allocute him accordingly.

Could we swear in Mr. Conyers.

THE CLERK: Do you solemnly swear or affirm that the statements you are about to give before The court shall be the truth, the whole truth, and nothing but the truth?

THE DEFENDANT: Yes.

THE COURT: I need to know the indictment number that it is running concurrent with.

MS. WALLACE: I have that, Judge.

The first is 3121 of 2016. And then the second is 2504 of 2016.

THE COURT: All right, he has already been sentenced on those two?

MS. WALLACE: Yes.

MR. NATHANSON: Yes.

THE COURT: Are we going to do another order to produce?

MS. WALLACE: I had done an order to produce. Then we discussed on the record on October 2nd I would submit an order to produce to produce him for today. We did that.

Then we were informed by DOC he was being held here in a City facility. To be safe, we did a DOC order to produce him.

I do imagine if it is adjourned for sentencing we will produce him for state custody.

THE COURT: Better safe then sorry.

Your Attorney has advised me that you wish to withdraw your previously entered plea of not guilty with the understanding that you will receive a promised sentence of five years jail and five years post-release supervision.

Is that what you want to do?

THE DEFENDANT: Yes.

THE COURT: Other than the plea and sentence agreement which was placed on the record, has anyone made a promise or committment of any kind to you to get you to plead guilty?

THE DEFENDANT: No.

THE COURT: Has anyone made any threats or forced you or pressured you to plead guilty?

THE DEFENDANT: No.

THE COURT: Are you therefore pleading guilty voluntarily?

THE DEFENDANT: Yes.

THE COURT: I must decide whether or not to accept your plea of guilty. No one could make that decision.

I will ask you some questions and evaluate your answers.

Before you answer any of my questions you may talk to your lawyer about the question, then answer.

Further, if you do not hear or understand me, please let me know.

THE DEFENDANT: Yes.

THE COURT: Do you understand by answering my questions and pleading guilty you give up your right to remain silent and not incriminate yourself?

THE DEFENDANT: Yes.

THE COURT: Please state your name for the record.

THE DEFENDANT: Arnold Conyers.

THE COURT: Do you understand English?

THE DEFENDANT: Yes.

THE COURT: Are you under the influence of any drugs, medications, alcohol, or, any other substance that is interfering, in any way, with your

ability to understand the proceedings today?

THE DEFENDANT: No.

THE COURT: Are you supposed to be taking any medications that you have not taken which would interfere, in any way, with your ability to understand the proceedings today?

THE DEFENDANT: No.

THE COURT: Is your attorney seated next to you?

THE DEFENDANT: Yes.

THE COURT: Did you discuss the case with your Attorney?

THE DEFENDANT: Yes.

THE COURT: Did you have enough time discuss this case with your Attorney?

THE DEFENDANT: Yes.

THE COURT: Are you satisfied with the services of your Attorney?

THE DEFENDANT: Yes.

THE COURT: By pleading guilty, you waive the right to have a trail by jury; do you understand that?

THE DEFENDANT: Yes.

THE COURT: At a trial by jury you are presumed to be innocent and would be entitled be to the following rights:.

The right to be represented by your Attorney.

The right to confront and cross examine your accuser and any other witnesses presented by the Government.

The right to call your own witnesses and testify yourself.

The right to remain silent.

Finally, you would have the right to require the Government to prove your guilt beyond a reasonable doubt.

Do you understand by pleading guilty, you give up each of those rights?

THE DEFENDANT: Yes.

THE COURT: Do you understand by pleading guilty you give up any defenses you may have to the charges?

THE DEFENDANT: Yes.

THE COURT: Do you understand that a plea of guilty is the same as a verdict of guilty rendered by a jury after trial?

THE DEFENDANT: Yes.

THE COURT: Have you discussed with your client immigration consequences involed with a plea of guilty?

MR. NATHANSON: Yes.

THE COURT: Mr. Conyers, do you understand that if you are not a United States citizen your plea of guilty will subject you to deportation, exclusion from the United States and denial of naturalization?

THE DEFENDANT: Yes.

THE COURT: Knowing what I said about the immigration consequences of this plea, do you still wish to enter into it?

THE DEFENDANT: Yes.

THE COURT: The promised sentence is five years jail, five years post-release supervision and further that that sentence will run concurrent with the sentences that you are serving on indictments 3121 of 2016 and 2504 of 2016.

With respect to the post-release supervision, that will commence when you are released and requires that you are subject to the supervision of a parole officer and that you adhere to certain conditions.

A violation of the condition of post-release can result in re-incarceration for the un-served portion of your determinant sentence plus up to the balance of the remaining period of post-release supervision.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: Do you understand that if you were convicted of another crime in the future, this conviction may be used against you to impose additional punishent for the new crime?

THE DEFENDANT: Yes.

THE COURT: When the Department of Probation interviews you that requires you first attend the probation interview and that you answer all questions asked of you.

In a moment, I will ask you what you did in this case that makes you guilty. If you are prepared to admit your guilt, I expect that you will say the same thing to the probation officer when you are interviewed.

If you say something different, if you try to negate your guilt, I will deem you not cooperative for the Department of Probation.

The plea will remain, but, I am not bound by the promised sentence.

Do you understand that?

THE DEFENDANT: Yes.

THE COURT: You asked to plead guilty to Criminal Possession of a Weapon in the Second Degree in violation of 265.03 subdivision 3, an armed felony

which charges, in the County of New York, on or about May 5, through May 26, 2016, that you possessed a loaded firearm in violation of subdivision 1; is that true?

THE DEFENDANT: Yes.

MS. WALLACE: Perhaps we could read -- inform him what section that is.

THE COURT: Which subdivision?

MS. WALLACE: Subdivision 1. Which refers back to 26501 because this count requires a special information.

THE COURT: I will read the special information next.

Do admit further that on that date, time and location that you possessed a firearm?

THE DEFENDANT: Yes.

THE COURT: What type of firearm did you possess?

THE DEFENDANT: Nine mllimeter.

THE COURT: Do you further admit that on or about April 26, 2009, in the Supreme Court of the State of New York that you were duly convicted of the crime of Robbery in the Third Degree?

THE DEFENDANT: Yes.

THE COURT: People satisfied?

MS. WALLACE: Yes. The only thing I would ask if the Defendant --

I am not certain that the Defendant responded to your initial question before which directed him to 265.02 then back to 265.01 about possessing a loaded firearm in the County of New York.

THE COURT: The firearm that you possessed, is that loaded?

THE DEFENDANT: Yes.

THE COURT: Satisfied?

MS. WALLACE: Yes, Judge.

THE COURT: Okay, let's arraign Mr. Conyers on the predicate felony statement.

THE CLERK: Mr. Conyers, a statement has been filed with by the D.A.'s Office that you have previously been convicted of a felony.

Did you receive a copy of the statement.

THE DEFENDANT: Yes.

THE CLERK: The statement reads as follows:

On April 16, 2009, in the Supreme Court, New York County, you were convicted of a felony of Robbery in the Third Degree, Penal Law 200.00 and sentenced with that conviction on June 9, 2009.

THE DEFENDANT: Yes.

THE CLERK: You may dispute the statement,

you must challenge the prior conviction.

After conferring with your Attorney do you wish to dispute any allegation made in the statement?

THE DEFENDANT: No.

THE CLERK: Do wish to challenge the constitutionality of the conviction?

THE DEFENDANT: No.

THE CLERK: Do you admit you are the person in that statement?

THE DEFENDANT: Yes.

THE COURT: I find that Mr. Conyers is a second felony offender.

The Court further finds that Mr. Conyers' plea is knowing, intelligent and voluntary. And accordingly accepts the plea and directs that it be entered.

THE CLERK: Mr. Conyers, do you now withdraw your previously entered plea of not guilty and plead guilty to the crime of Criminal Possession of a Weapon in the Second Degree to satisfy indictment 3387 of 2016, is this your plea, sir?

THE DEFENDANT: Yes.

THE COURT: Does October 31st work fork you?

Does that give you enough time?

Would you like November 1st?

MR. NATHANSON: Yes, November 1st in the afternoon.

THE COURT: Yes, at 2:15. November 1st.

MS. I will submit an order to produce him.

REPORTER'S CERTIFICATION

I hereby certify that the foregoing is a true and accurate transcript recorded by me.

Michael Rizzo
Senior Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK : CRIMINAL TERM : PART TAP B

----------X

THE PEOPLE OF THE STATE OF NEW YORK : Ind. No. 3387-16

- against - : C.P.W. 2

ARNOLD CONYERS, : SENTENCE

Defendant. :

----------x

100 Centre Street
New York, New York 10013
November 11, 2018

B E F O R E:

HONORABLE CURTIS J. FARBER,
Justice Supreme Court.

A P P E A R A N C E S:

For the People:
CYRUS R. VANCE, JR., ESQ.
District Attorney - New York County
BY: THOMAS MURPHY, ESQ.
Assistant District Attorney

For the Defendant:
EUGENE NATHANSON, ESQ.
(Assigned 18-B Counsel.)

ELLEN S. BRUNO
SENIOR COURT REPORTER

THE CLERK: Calendar number 33, Indictment Number 3387 of 2016, Arnold Conyers.

MR. MURPHY: Thomas Murphy, for the People.

MR. NATHANSON: Eugene Nathanson, for Mr. Conyers. Good afternoon, Judge.

THE COURT: Good afternoon.

Good afternoon, Mr. Conyers.

Matter is on for sentence.

Have you seen the pre-sentence report?

MR. NATHANSON: I have.

THE COURT: Have the People?

MR. MURPHY: Yes, your Honor.

THE COURT: Any reason we cannot go forward today?

MR. NATHANSON: No, Judge.

THE COURT: All right. Let's arraign Mr. Conyers for sentence, please.

THE CLERK: Arnold Conyers, you're before the Court for sentence following your conviction by plea to criminal possession of a weapon in the second degree.

Before being sentenced, the Court will allow you, your attorney and ADA an opportunity to address the Court with any matters relevant to sentencing.

People?

MR. MURPHY: The People rely on the promised sentence of five years State prison and five years of post

release supervision.

THE CLERK: Do you have an order for GORA registration?

MR. MURPHY: And GORA registration.

THE COURT: Counsel anything you wish to say before I impose sentence?

MR. NATHANSON: No, Judge.

THE COURT: Mr. Conyers, is there anything you would like to say before I impose sentence?

THE DEFENDANT: No.

THE COURT: As promised, the sentence imposed is five years jail, five years post release supervision.

The sentence will run concurrent with Indictment Numbers 3121 of 2016 and 2504 of 2016.

Are those both New York County indictment numbers?

MR. NATHANSON: Yes.

THE COURT: Both in New York County.

Civil judgment as to the mandatory surcharge.

DNA to be collected through the Department of Corrections.

There has been an executed GORA registration form. Please advise your clients of his right to appeal.

MR. NATHANSON: Yes.

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I, Ellen S. Bruno, Senior Court Reporter, certify the foregoing to be a true and accurate transcript to the best of my skill and ability.

Ellen S. Bruno

ELLEN S. BRUNO
SENIOR COURT REPORTER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ARNOLD CONYERS,

Defendant.

STATEMENT OF PREDICATE FELONY CONVICTION

PURSUANT TO CRIMINAL PROCEDURE LAW SECTION 400.21 AND PENAL LAW SECTION 70.06

RELATING TO DOCKET NO. ~~2016NY043167~~2 0140-2009

3387-2016

The above-named defendant has previously been subjected to one or more predicate felony convictions as defined in Penal Law §70.06(1)(b), to wit:

On April 16, 2009, in the Supreme Court of New York, in the County of New York, the defendant was convicted of the felony of Bribery in the 3rd Degree, Penal Law §200.00. Sentence upon that conviction was imposed on June 9, 2009.

Dated: New York, New York
July 13, 2016

Nabilah Hossain
Assistant District Attorney

To be argued by:
SARAH E. SIEGEL
Time Requested: 10 Minutes

New York Supreme Court

Appellate Division - First Department

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ARNOLD CONYERS, DEFENDANT-APPELLANT

New York County
Ind. No. 3387-16
App. Case No. 2019-1469

BRIEF FOR DEFENDANT-APPELLANT

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Of Counsel

September 12, 2024

INTRODUCTION

Mr. Arnold Conyers' "criminal record is non-violent in nature," P:4, 6. Yet Penal Law §§ 265.03(3) and 265.02(1) forbid him from exercising his Second Amendment rights under any circumstance, ever. Under *N.Y. State Rifle & Pistol Assoc'n v. Bruen*, 597 U.S. 1 (2022), the prosecution must identify a historical analogue for the prohibition under which it convicted Mr. Conyers. But that is impossible. No American law – state or federal – restricted gun ownership on the basis of criminal conviction until the 20th century. Former felons had guns at the founding; they served in the Revolutionary War. Early American legislators specifically addressed gun violence and felons' reentry into society without prospectively disarming anyone based on conviction. Within a generation of the founding, our own Court of Appeals explained why: unlike political rights such as voting or holding office, expressly enumerated and individually held civil rights "are secured to all: to criminals, as well as to others." *Barker v. People*, 3 Cow. 686, 706; 1824 WL 2277 (N.Y. 1824). Mr. Conyers' conviction for constructively possessing a gun despite prior non-violent felony convictions should be dismissed.

STATEMENT OF FACTS

Mr. Conyers, Someone Ineligible for a Gun License Due to his Non-Violent Prior Conviction, Pleads Guilty to Contructively Possessing a Gun, Without Appeal Waiver, Prior to *Bruen*.

On October 15, 2018, Mr. Arnold Conyers pleaded guilty to constructively possessing a handgun in May 2016, in violation of Penal Law § 265.03(3), in exchange for a court offer of the minimum sentence. Because he had a prior non-violent conviction for ticket scalping that was prosecuted using the third-degree robbery statute, as well as a prior bribery conviction, Mr. Conyers had violated New York's prohibition on unlicensed gun possession for anyone "previously convicted of any crime." Penal Law §§ 265.03(3); 265.02(1); P: 3, 17.[1] The same prior convictions had rendered him ineligible for a gun license. Penal Law § 400.00(1)(c). The gun was in a bag left in the home that Mr. Conyers had lately shared with a now ex-romantic partner, who tried to evict him by changing the locks but arrived home to find the locks changed again. P:3. Mr. Conyers was never charged with burglary, trespass, or criminal mischief. The Court undercut the People's offer of eight years and offered the minimum sentence of five years, noting that Mr. Conyers' "criminal record is non-violent in nature," but that the Court was "constrained to follow the sentencing guidelines." *Id.* at 4, 6. Mr. Conyers has now served his sentence. Yet the instant "conviction may be used against

[1] The plea proceeding of October 15, 2018, is hereinafter referred to as "P" followed by the relevant transcript page number.

[Mr. Conyers] to impose additional punishment for [any] new crime" and is itself a violent felony, Mr. Conyers' first such conviction. *Id.* at 16.

There was no waiver of appeal.

The *Bruen* Decision

While the present appeal was pending, the Supreme Court announced a new test for the constitutionality of laws governing gun possession. *Bruen*, 597 U.S. at 1. Under *Bruen*, no government interest can justify a gun law; only historical precedent can. *Id.* at 2126. "[T]he government . . . must demonstrate that [its gun law . . .] is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17. The government must show that that the law is sufficiently similar in both (1) justification, and (2) burden imposed, to the laws comprising the historical tradition the Second Amendment enshrines: laws that were (3) widespread across many states; (4) during the relevant historical time periods; and (5) not otherwise unconstitutional in their terms or enforcement. No American law, state or federal, criminalized gun possession on the basis of a criminal conviction until decades after the law that *Bruen* struck down as too new.

At the time of Mr. Conyers' plea, the Court of Appeals had already explicitly rejected a specific Second Amendment challenge to the law at issue here. *People v. Hughes*, 22 N.Y.3d 44 (2013).

ARGUMENT

POINT I

BY CRIMINALIZING MR. CONYERS' POSSESSION OF A FIREARM DUE TO A PRIOR NON-VIOLENT CONVICTION, DESPITE THE ABSENCE OF ANY AMERICAN HISTORICAL TRADITION TOTALLY DISARMING ANYONE BASED ON CRIMINAL CONVICTION, PENAL LAW §§ 265.03(3) AND 265.02(1) VIOLATE THE SECOND AMENDMENT.

Like other conviction-based disarmament statutes, Penal Law §§ 265.03(3) and 265.02(1) "target the whole right, including its core: they restrict even mere possession of a firearm in the home for the purpose of self-defense." *Kanter v. Barr*, 919 F.3d 437, 465 (7th Cir. 2019) (Barrett, J., dissenting).

A. Mr. Conyers – Like all Americans – is One of "The People" Whose Rights the Second Amendment Secures.

Mr. Conyers, like every other United States citizen, is one of "the People" whose right to keep and carry firearms the Second Amendment secures.

The constitutional text requires "a strong presumption that the Second Amendment right . . . belongs to all Americans." *D.C. v. Heller*, 554 U.S. 570, 580 (2008). When the Second Amendment "codified a preexisting right" to "possess and carry weapons in case of confrontation," *Bruen*, 597 U.S. at 20, it was the right of "the people," U.S. Const. amend. II, a "constitutional term of art" "unambiguously"

meaning "all Americans," *Heller*, 554 U.S. at 580-81, not some "unspecified subset." *Bruen*, 597 U.S at 70.

The Supreme Court "has *never* suggested that felons are not among 'the people' within the plain meaning of the Second Amendment." *United States v. Perez-Garcia*, 96 F.4th 1166, 1175 (9th Cir. 2024). *See also United States v. Duarte*, 101 F.4th 657, 671 (9th Cir. 2024) (the Ninth Circuit's own historical analysis confirms that, for Second Amendment purposes, "the people" "included, at a minimum, all American citizens – without qualification").

The same "term of art" meaning "all Americans" is used in the First and Fourth Amendments, which also guarantee rights no conviction can extinguish. *See Heller*, 54 U.S. at 579. While incarceration temporarily suspends one's ability to exercise certain rights, "[i]t is black letter law that even convicted felons retain rights under, *inter alia*, the First and Fourth Amendments." *U.S. v. Rowson*, 652 F. Supp. 3d 436, 462 (S.D.N.Y. 2023) (*citing Bell v. Wolfish*, 441 U.S. 520, 545 (1979) and *Pell v. Procunier*, 417 U.S. 817 (1974)).[2] There is no textual reason to define "the People" who have rights under the Second Amendment differently than "the People" who have rights under the First or

[2] The right to vote did not attain constitutional dimension until 1868, when the Fourteenth Amendment provided limited guarantees for the right to vote, but only to male inhabitants of a certain age. Unlike the Second Amendment, the Fourteenth explicitly contemplated that the right to vote might be limited on the basis of criminal conviction, insofar as it forbids state provisions denying the right to vote *except* on the basis of "rebellion, or other crime." U.S. Const. amend. XIV, § 2. There is no such exception in the Second Amendment. For a general discussion of rights that a sentence may limit, *see generally* Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789, 1810 (2012).

Fourth. *Heller*, 554 U.S. at *id.* at 581, 595 (requiring the manner of interpreting the Second Amendment to be consistent with that of the First and Fourth).

1. *Bruen*'s "Passing References" to "Presumptively Lawful . . . Longstanding Bans" on Felon Disarmament and the Second Amendment Rights of "Law-Abiding, Responsible Citizens" Are Dicta That Do Not Satisfy or Replace *Bruen*'s Historical Test.

The Supreme Court has never decided the constitutionality of felon disarmament. Neither *Heller* nor *McDonald* nor *Bruen* involved a petitioner who was anything less than "law-abiding" and "responsible" or who had a criminal record of any kind. Thus, as now-Justice Barrett explained while sitting on the Seventh Circuit, the "passing references . . . [to] 'presumptively lawful regulatory measures,' including 'longstanding prohibitions on the possession of firearms by felons'" in *Heller* and *McDonald* are "*dict[a]*." *Kanter*, 919 F.3d at 453-54 (emphasis added). So are *Bruen*'s. *Id.*; *see also Range v. Attorney Gen. U.S.*, 69 F.4th 96 (3rd Cir. 2023) (*Bruen* and its predecessors' "references to 'law-abiding, responsible citizens' were dicta."). The Supreme Court then explicitly "reject[ed]" the contention that someone "may be disarmed simply because he is not 'responsible'," having explained that it "used this term in *Heller* and *Bruen* to describe the class of citizens who undoubtedly enjoy the Second Amendment right. Those decisions, however, did not define the term and said nothing about the status of citizens who were not 'responsible.'" *United States v. Rahimi*, 2024 WL 3074728

at *3 (U.S. June 21, 2024). That precise reasoning applies to the identically used dicta regarding "law-abiding" citizens.

In recycling *Heller* and *McDonald*'s passing references to "presumptively lawful" laws disarming felons, *Bruen* admitted that any "presumptions" regarding which firearms regulations were lawful were merely what the Court "assume[d]," not having "undertake[n] an exhaustive historical analysis . . . of the full scope of the Second Amendment." *Heller*, 554 U.S. at 626-27 & n.26; *Bruen*, 591 U.S. at 31. Thus, the "scope" of the Court's "assertions" regarding what the court presumes about "longstanding" felon-in-possession laws "is unclear." *Kanter*, 919 F.3d at 453-54. Because neither *Bruen* nor *Rahimi* nor their predecessors "canvased the [historical] considerations" required and instead "hedged [their] statement[s] with the word 'presum[ptively]'," their language on "presumptively lawful" felon disarmament and the rights of "law-abiding" Americans are dicta; they have no precedential weight. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 548 (2013).

B. The Five-Part Historical Test of *Bruen*.

Bruen set a historical litmus test for laws regarding gun possession. Neither safety nor any other compelling interest can justify curtailing the right to keep and bear firearms. *Bruen*, 597 U.S. at 71-72 (Alito, J., concurring). The Second Amendment "is the very product of an interest balancing by the people" and it is that historical "balance

– struck by the traditions of the American people – that demands our unqualified deference." *Id.* at 26.

The government must show that its statutes are poised within that historical balance, which has five parameters. The government must present proof that the challenged law (1) imposes a *burden* that is sufficiently similar; and (2) with *justifications* sufficiently similar; to the burdens and justifications for historical gun laws that were (3) enacted across *many states* – requiring more than a few states and excluding the laws of territories; (4) in force *during the relevant time periods*; and (5) not otherwise unconstitutional in their terms or enforcement. *Bruen*, 597 U.S. 1, 3-4, 58. [3]

The laws under which Mr. Conyers was convicted – Penal Law §§ 265.03(3) and 265.02(1) – fail each *Bruen* prong. No law prohibiting gun ownership on the basis of a criminal conviction was passed in this country until the twentieth century, which is simply too late. "The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either time may not illuminate the scope of the right." *Bruen*, 597 U.S. at 4. By invalidating New York's licensing scheme as too novel, despite its dating back to 1911, the Court excluded post-1910

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[3] The requirement that the historical analogue is not otherwise unconstitutional in terms or enforcement derives from the Court's dismissal of New York's "evidence that authorities … enforced surety laws . . [insofar as the government offered] only a handful of other examples in Massachusetts and the District of Columbia, all involving black defendants who *may have been* targeted for selective or pretextual enforcement. . . that is surely too slender a reed on which to hang a historical tradition of restricting the right to public carry." *Bruen* at 58 (emphasis added). Thus, a historical tradition of firearms regulation that now would violate the Fourteenth Amendment does not create a tradition to which *Bruen* defers.

history from the "historical tradition" that is the only legitimate authority for modern gun laws. *Bruen*, 142 S.Ct. at 1, 5.

Non-violent felony offenses rendered Mr. Conyers ineligible for a gun license in this state, and continue to do so. Penal Law § 400.00(1)(c).

New York's laws, which not only prohibit Mr. Conyers' gun ownership but *criminalize* it, *even within the home*, *forever, without exception,* on the basis of any conviction of any degree and for any conduct, are unconstitutional. In the alternative, they are unconstitutional as applied to people like Mr. Conyers, whose predicate convictions are non-violent and who, unlike the litigant whose disarmament survived a facial challenge in *Rahimi*, have not recently been found by a judge to pose a credible ongoing threat of physical violence to specific person or group in the imminent future.

C. Our History Prevents the Government from Meeting its Burden.

1. No Historical Law Prohibited Gun Ownership Based on Criminal Conviction.

The government cannot meet its burden to demonstrate that permanently barring people from exercising the right to keep and carry firearms on the basis of criminal conviction "is consistent with this Nation's historical tradition of firearm regulation," *Bruen*, 597 U.S. at 1, because "[t]he Founding generation *had no laws* limiting gun possession by . . . people convicted of crimes." Adam Winkler, *Heller's Catch-22*, 56 UCLA L. Rev. 1551, 1563 (2009) (emphasis added).

The Government must "identify a well-established and representative historical analogue" to its no-exception, lifelong ban on anyone with a prior conviction of any kind – or at least anyone like Mr. Conyers, whose only prior felonies are nonviolent – possessing a firearm anywhere, including his home or place of business, on pain of felony conviction and imprisonment. *Bruen*, 597 U.S. at 29, 30. To be an analogue, the well-established and representative historical law need not be a historical twin, but must have "impose[d] a comparable burden on the right of armed self-defense" that was "comparably justified." *Id.*

It cannot do so because American felon disarmament laws "significantly postdate both the Second Amendment and the Fourteenth Amendment." Carlton F.W. Larson, *Four Exceptions in Search of a Theory*: *District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. 1371, 1376 (2009); *Bruen*, 597 U.S. at 4 ("Historical evidence that long predates or postdates either [the Second Amendment or the Fourteenth] . . . may not illuminate the scope of the right."). A federal felon-in-possession ban was first passed in 1938, *United States v. Bullock*, 679 F. Supp. 3d 501, 505 (S.D. Miss. 2023), and, until 1961, it only applied to violent convictions, of which Mr. Conyers has none. *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75 Stat. 757 (1961); *see also Duarte*, 101 F.4th at 676-77 (finding the federal felon-in-possession ban unconstitutional as applied to those with nonviolent felony convictions).

"Founding era-legislatures did not strip [even] felons of the right to bear arms simply because of their status as felons." *Kanter*, 919 F.3d at 451 (Barrett, J., dissenting).

Penal Law §§ 265.03(3) and 265.02(1) confront the problem of gun violence with "'a flat ban on the possession of []guns by [those who have completed penal sentences]," which is something "the Founders themselves could have adopted" if they thought it lawful. *Duarte* at 677. They did not. *Id.* The absence of any historical law that is "distinctly similar" to Penal Law § 265.03 "is strong if not conclusive evidence that the law 'is inconsistent with the Second Amendment.'" *Id.* (*quoting Bruen* at 27).

a. Former Offenders Were Part of the Founding Generation and Were Not Disarmed.

Former offenders who had completed their sentences were part of the founding generation and were not disarmed.

Colonists with prior convictions did not simply disappear; modern systems of incarceration did not yet exist[4] and "capital punishment in the colonies was used 'sparingly'," *Kanter*, 919 F.3d at 459 (internal citations omitted). Yet there were many free people with prior convictions. From 1718 to 1775, at least 50,000 felons from Great Britain were transported to America to serve a penal term of indentured servitude and then be automatically and fully pardoned, including felons with death-eligible

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[4] *See generally* Erin E. Braatz, *The Eighth Amendment's Milieu: Penal Reform in the Late Eighteenth Century*, 106 J. Crim. L. & Criminology 3, 405, 428; n.106 (2017) (explaining that, following the Declaration of Independence, Thomas Jefferson drafted a proposal for reform of the criminal law of Virginia with an avowed goal that "'reformation of offenders" should be a goal of punishment; that 'exterminat[ion] . . . of their fellow citizens . . . weakens the state by cutting off so many who, if reformed, might be restored sound members of society.")

convictions. *See* Alan Atkinson, *The Free-Born Englishman Transported: Convict Rights as a measure of Eighteenth-Century Empire*, Past and Present 144 (Oxford UP Aug. 1994), 92-93, 97-98. Every such pardon made the former offender "a new man; . . . acquit[ted] him of all … forfeitures . . . and [did] not so much . . . . restore his former, as . . . give him a new credit and capacity." 4 WILLIAM BLACKSTONE, COMMENTARIES, ch. 31, * 395.[5,6]

There were no laws disarming these or other felons in early America even though "[o]nly the most serious crimes were felonies at common law," and "many crimes now classified as felonies under federal or state law were treated as misdemeanors" at the founding. *United States v. Watson*, 423 U.S. 411, 438 (1976); *see also Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943) ("At common law [only] murder, manslaughter, arson, burglary, robbery, rape, sodomy, mayhem and larceny were felonies."); *Johnson v. United*

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[5] The practice of pardoning convicted felons after their sentences ended continued after the revolution. As Governor of Virginia, Thomas Jefferson pardoned felons convicted of death-eligible crimes so long as they performed certain community service. Braatz at 433, *see also* Nathan Dane, Digest of American Law 715 (1823) (same); Alexis de Tocqueville, Democracy in America (J.P. Mayer ed., George Lawrence trans., Perennial Classics 2000) (1848) 564-65 (observing that, as of 1831, America had broken with English tradition only to be kinder towards former offenders, unless the offender was not white).

[6] The other non-capital traditional punishments of "admonition," meaning "a formal admonition by the magistrate, a public confession of wrongdoing, and a pronouncement of sentence, wholly or partially suspended to symbolize forgiveness. . . fines (with sale into service being their alternative) and public punishments such as whipping, all ….reflected the fact of [an offender's] embeddedness within the community: the usual penalties . . . did not sever a criminal's ties with society." Braatz at 438-441 (internal citations and quotation marks omitted) (also explaining that the increasingly transient nature of the population in the late 18th century caused people to rethink these traditional punishments but that Americans particularly abhorred capital punishment and lesser but still "bloody" punishments associated with England's "bloody" laws such that "a number of state constitutions call[ed] . . . for a reduction in so-called 'sanguinary' laws.").

States, 559 U.S. 133, 149-50 (2010) (Alito, J., dissenting) ("At common law . . . many very serious crimes, such as kidnapping and assault with the intent to commit murder or rape, were … misdemeanors.").

Rather than disarm former offenders, founding-era laws required them to arm themselves on pain of a fine so that they could serve in colonial militias. The two states that had received virtually all transported British convicts, Virginia and Maryland,[7] are cases in point: both required white male citizens to arm themselves without exception for prior conviction or misconduct. *See* Thomas; Maryland Herty. Digest of the Laws of Maryland, Being an Abridgment, Alphabetically Arranged, of All the Public Acts of Assembly Now in Force, and of General Use (1799) at "Militia" (pp. 367 et seq.) §§ 7, 9, 12, 16, 19, 20; William Waller Hening, Statutes at Large; Being a Collection of All the Laws of Virginia, from the First Session of the Legislature (1777), 1777 Act for Regulating and Disciplining the Militia; ch. 1 at 268-269. The first federal Militia Act, passed just a year after the Second Amendment was ratified in 1791, did the same. Act of May 8, 1792, ch. 33, § 1, 1 Stat. 271, 271.

These were not mere formalities: former felons served as American soldiers in the Revolutionary War. *See* Edward C. Papenfuse and Gregory A. Stiverson, *General Smallwood's Recruits: The Peacetime Career of the Revolutionary War Private*, 30 WM. & MARY

[7] Atkinson, *supra*, at 98.

Q. REV. 1, 117, 125 (Chesapeake Soc'y Jan. 1973) 125 (cross-referencing militia service lists with lists of transported felons) (internal citations omitted).

The government cannot show a historical tradition of disarming felons when the Second Amendment exists in part due to the service of former felony offenders who were required to furnish their own guns for the fight. Rather, like any other people that "had to join the [revolutionary] militia and bring their own firearms,"[8] they "would have been understood to be covered by the Second Amendment at the Founding." *Hirschfeld v. Bureau of Alcohol, Firearms, Tobacco & Explosives*, 5 F.4th 407, 428–30 (4th Cir.), *as amended* (July 15, 2021), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021) (applying this logic to eighteen-year-olds).

[8] The requirement that each militia member bring his own gun flowed from a fear that a government responsible for arming people could then disarm them. When a federal select militia was debated in 1790-91, "[o]ne of the first rejected proposals suggested that the federal government would arm everyone, but this drew sharp rebukes, such as Representative Wadsworth arguing 'their parents would rather give them guns of their own, than let them take others from the U.S. which were liable to be taken away at the very moment they were most wanted.'" 14 Documentary History of the First Federal Congress: Debates in the House of Representatives, Third Session: December 1790–March 1791, at 62 (1995).

b. The Only Laws With a Similar Burden Regulated Non-Citizens

The one class of laws that did categorically prohibit gun ownership illustrates why there was no tradition of disarming former offenders: categorical disarmament laws disarmed people of color, based on racial exclusions from *citizenship itself*.

Early Americans categorically and completely disarmed not felons but people of color. *See* Emma Lutrell Shreefter, *Federal Felon-in-Possession Gun Laws: Criminalizing a Status, Disparately Affecting Black Defendants, and Continuing the Nation's Centuries-Old Methods to Disarm Black Communities*, 21 CUNY L. Rev. 143, 166-67 (2018); Stephen A. Siegel, *The Federal Government's Power to Enact Color-Conscious Laws: An Originalist Inquiry*, 92 Nw. U. L. Rev. 477, 498-500, 507-08, 511, 521-22 (1998). #

The groups categorically disarmed under these racist laws had first been excluded from citizenship itself and thus from "the People" the Second Amendment protects. *See Duarte* at 679. Unlike British loyalists, who declined to be Americans but could gain arms if they took a loyalty oath, or former Confederate soldiers, who retained Second Amendment rights after surrender, *see infra*, Native Americans and Blacks, whether slave or free, were not considered American citizens in the first place. *Duarte* at *679 ("There is a solid basis in history to infer that states could lawfully disarm [Indians and Blacks] . . . because they were written out of 'the People' altogether." (internal quotation marks and citations omitted)); *see also, e.g.*, *Dred Scott v. Sandford*, 60 U.S. 393, 393 (1857) ("[a] free negro. . . is not a 'citizen'"), *superseded by* U.S. Const. amend. XIV (1868); Wright &

Miller, Federal Practice and Procedure § 3622, ("Prior to [a] 1924 [statute] . . . a tribal Indian was not a citizen"). Because the historical laws that categorically disarmed whole groups only disarmed people already excluded from citizenship[9] and thus excluded from "the People" the Second Amendment protects, those historical laws "fail both the 'why' and 'how' of *Bruen*'s analogical test" when applied to conviction-disarmament laws. *Duarte* at *679.

2. Historical traditions of addressing gun violence and former offenders' reentry through materially different means.

Bruen held that, "if earlier generations addressed the societal problem . . . through materially different means, that could also be evidence that a modern regulation is unconstitutional." *Bruen*, 597 U.S. at 26-27.

Rahimi then identified "two distinct [historical American] legal regimes . . . that specifically addressed firearms violence," and, to the government's detriment, neither disarmed former offenders who had completed their sentences, let alone sentences for non-violent convictions. 144 S. Ct. 1889, 1891 (2024). Even when combined, they

[9] When the Fourteenth Amendment incorporated the Second Amendment against the states, it simultaneously redefined "the People" entitled to Second Amendment rights through its citizenship clause. This is the inverse of the Supreme Court's holdings that the Second Amendment belongs to all American citizens: the only free people who were historically excluded from the Second Amendment right were those who lacked any legal path to citizenship. Laws disarming British loyalists only unless and until they took loyalty oaths, *see infra*, show that there was no widespread tradition of disarming those who remained *eligible* for citizenship despite serious offenses against the United States.

amounted to a precedent that justified *temporary* disarmament where a judge had specifically found a particular person to present a credible and *ongoing* threat of physical violence to an intimate partner, only during the pendency of the order with that specific finding. *Id.*

In other words, *Rahimi* held that there is historical precedent for something like a Second Amendment analogue to the First Amendment's extremely limited clear and present danger rule, while requiring many more procedural protections. The first legal regime *Rahimi* identified, surety laws, permitted judges who found a particular individual posed an ongoing threat of physical harm to another – after notice and an opportunity to be heard – to require that individual to post a bond – of no more than six months – that would be forfeit in the event of misbehavior. *Id.* at 1899-1900. The second regime, "going armed laws," prohibited the kind of brandishing of unusual weapons in a terrifying way that "le[d] almost necessarily to actual violence" and was punishable through both imprisonment and forfeiture of the arms so misused. *Id.* Of course, as with every other criminal law, the going armed laws did not have any prohibition on the offender obtaining new arms in the future. *Rahimi* explicitly combined these two regimes in order to justify even a temporary disarmament, and each required individualized and *recent* judicial findings of extremely specific ongoing threats of actual physical violence before the government could act. *Id.* Further, *Rahimi*'s historical precedents had self-defense exceptions, and Justice Gorsuch specifically noted that the Court was not deciding whether the federal ban it was upholding against facial challenge

"may be constitutionally enforced against a person who uses a firearm [federal law forbids him from having] in self-defense." *Id.* at 1910 (Gorsuch, J., concurring). Penal Law §§ 265.03(3) and 265.02(1) bear no resemblance to *Rahimi*'s precedents or to the law it upheld against facial challenge.

But the government fares no better when reviewing the laws that *did* specifically limit the rights of former offenders, because those laws specifically extinguished *political* rights. Early Americans were familiar with addressing crime through limiting offenders' rights; that they chose to do so only for non-gun rights underlines that early Americans simply did not believe that future gun rights were on the chopping block after conviction.

Conviction endangered former offenders' *political* rights. From the founding generation through reconstruction, Americans divided what we now call "civil rights" into three distinct categories: (1) social rights; (2) civil rights; and (3) "civic" rights, also called political rights. *See generally* Travis Crum, *The Superfluous Fifteenth Amendment?* 114 Nw. U. L. Rev. 1549, 1580-84 (2020) (explaining that the division only collapsed during the twentieth century). Historical tradition extinguished some former offenders' political or "civic" rights, but not their *civil* ones. *See Barker v. People*, 3 Cow. 686, 706; 1824 WL 2277 (N.Y. 1824); *Kanter*, 919 F.3d at 463-64. Committing an "infamous"

crime, i..e. any felony and some misdemeanors involving dishonesty,[10] resulted in being "declared ineligible to serve on a jury, hold public office, or testify" in the future. CRIME, BLACK'S LAW DICTIONARY (11th ed. 2019).[11]

"Civil rights were inherent – were of God; political rights were conferred" by governments,[12] and so, unlike civil rights, could be curtailed by governments. Take the important case of voting. Traditionally, voting was not "a civil or social right, nor . . . viewed as inherent in citizenship[;]" Crum, *supra*, at 1581; and was not guaranteed even to all white adult men, most of whom did not gain the right to vote until generations after the founding. Reva Siegel, *She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 Harv. L. Rev. 947, 977 (2002); *see also* U.S. Const. amends. XV (forbidding race-based withholding of the vote in 1870, separate from the citizenship guaranteed by the Fourteenth Amendment in 1868) and XIX (extending franchise to women in 1920). Because political rights were not inherent, governments

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[10] An infamous crime was one "inconsistent with the common principles of honesty…. Infamous crimes were treason, felony, all offenses found in fraud and which came within the general notion of the *crimen falsi* of the civil law, piracy, swindling, cheating, barratry, and the bribing of a witness to absent himself from a trial, in order to get rid of his evidence." CRIME, Black's Law Dictionary (11th ed. 2019) (quoting Justin Miller, *Handbook of Criminal Law* § 8, at 25 (1934).

[11] With its distinct punishments, "infamous" crime was a distinct legal category with distinct procedural protections. For example, the Fifth Amendment's grand jury guarantee extends to "capital, *or otherwise infamous*, crime." U.S. Const. amend. V (emphasis added). That extinguishing someone's rights because of a conviction was considered a "punishment" at a time would also subject any conviction-based limitation of a right to Eighth Amendment proportionality analysis. *See also* Gabriel J. Chin, The New Civil Death: Rethinking Punishment in the Era of Mass Conviction, 160 U. Pa. L. Rev. 1789 (2012).

[12] Halbrook, Securing Civil Rights, dig. Ed. 123 at 36, n.162 (quoting Brevier Leg. Repts. 90 (Jan. 22, 1867) (remarks of Rep. Ross).

could withhold or extinguish political rights for people deemed unworthy. *See, e.g.*, R. Siegel, 115 Harv. L. Rev. n.90; Richard M. Re, Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 Yale L.J. 1584, 1603 (2012) (explaining that debates over ratifying the Fourteenth Amendment hinged on whether the amendment would extend only civil rights or also extend to civic/political rights to people of color).

But as now-Justice Barrett has explained, so-called "virtuous citizen" tests for Second Amendment rights violate our historical tradition because they ignore the critical historical distinction between political rights, which could be withheld based on lack of virtue, and civil rights, such as the right to bear arms, which could not. *Kanter*, 919 F.3d 462-63 (Barrett, J., dissenting).

Moreover, "virtue exclusions from the exercise of civic [political] rights were explicit. If the right to bear arms was similarly subject to a virtue exclusion, we would expect to see provisions expressly depriving felons of that right too – but we don't." *Id.* *Kanter*, 919 F.3d 437, 463-64 (Barrett, J., dissenting).[13] Instead, of the nine states that enacted their own right-to-arms provisions between 1790 and 1820, none excluded felons, even though seven of those same constitutions explicitly barred felons from

[13] By 1820, "ten states' constitutions included provisions excluding or authorizing the exclusion of those who 'had committed crimes, particularly felonies [and other] so-called infamous crimes' from" voting. *Kanter*, 919 F.3d 437, 463-64 (internal citations omitted). By 1857, the number of state constitutions excluding "infamous" convicts from political rights including the right to vote, serve on a jury or testify had expanded to 24. *Id.*

voting. *Id.* (four more had enacted such provisions prior to 1790). "The same pattern held true in 1857." *Id.* (also citing *Binderup v. Atty. Gen'l*, 836 F.3d 336, 372 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments) ("We have found no historical evidence on the public meaning of the right to keep and bear arms indicating that 'virtuousness' was a limitation on one's qualification for the right—contemporary insistence to the contrary falls somewhere between guesswork and *ipse dixit*.").

The tradition of extinguishing offenders' political rights rather than their gun rights held even as early American legislators tried to address an epidemic of armed duels. Early state constitutions and statutes explicitly excluded duelists from holding public office and sometimes from voting.[14] Anti-dueling provisions adopted before

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[14] *See, e.g.*, William Charles White, Compendium and Digest of the Laws of Massachusetts Vol. II pt. 1 (Boston: Thomas B. Wait, 1810) W, Title L: Dueling, 463-64 (HeinOnline) ("If any person shall voluntarily engage in a [non-fatal] duel with. . . pistol or other dangerous weapon. . . [he] shall be disqualified from holding, and incapable of any office or place of honour, profit or trust, under this commonwealth, during the term of twenty years from and after such conviction."); Public Statute Laws of Connecticut as Revised and Enacted by the General Assembly in May 1821 (Hartford: G. Goodrich, Huntington & Hopkins, 1821), 161, Title 22, Crimes and Punishments § 52 ("if any person shall challenge the person of another, or shall accept any such challenge, to fight at . . . pistol, . . . or other dangerous weapons, such person. . . being thereof duly convicted, shall forfeit and pay . . . [a large fine], find sufficient sureties, to the acceptance of the court having cognizance of the offence, for his good behavior, during life; and such person shall, forever after such conviction, be disabled from holding any office of profit or honor, under this state. . ."); William Littell and Jacob Swigert, A Digest of the Statute Law of Kentucky: Being a Collection of All the Acts of the General Assembly, of a Public and Permanent Nature, from the Commencement of the Government to May Session 1823. . . Vol. 1 (Frankfort: Kendall and Russell, 1822), Chapter LXII, Dueling, § 6, at p. 449 ("[a] person challenging and the person accepting the challenge, the person delivering the same and the person consenting to become a second to either of the parties, shall, for every such offence, be excluded from office and from suffrage within this commonwealth, for the space of seven years after conviction."); Wisconsin Constitution of 1848 Art. XIII §2 (barring duelists from voting or holding office); California Constitution of 1849 Art. XI §2 (barring duelists from voting or holding

1830 became ever more granular, being "designed to interrupt every step leading to a duel,"[15] but none of them interrupted the step of owning a pistol. *See* C.A. Harwell Wells, *The End of the Affair? Anti-Dueling Laws and Social Norms in Antebellum America*, 54 Vand. L. Rev. 1805, 1825-26, 1830 (2001).

State constitutions often simultaneously barred duelists from office while guaranteeing the right to keep and bear arms to "every citizen" or "the people" without exception.[16] Texas' 1845 Constitution, for example, barred from office anyone who

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office); Iowa Constitution of 1856 Art. I §5 (duelists barred from holding office); Nevada Constitution of 1864, Art. XV § 3 (barring duelists from voting or holding office); West Virginia Constitution of 1863, Art. III §11 (barring duelists and those who aided or abetted duelists from holding office);

[15] The lack of disarmament was not from lack of detail. In addition to barring duelists from office, states "broadened libel laws considerably to give an insulted party redress apart from the 'affair of honor'" and "made illegal insults likely to provoke violent reactions." Harwell Wells, 54 Vand. L. Rev. at 1830-31. If a challenge to duel was made nonetheless, "challenges to dueling were often criminalized in the same statutes that prohibited dueling itself," and anti-dueling laws "banned seconds from even carrying challenges, much less arranging duels." *Id.* at 1829-30. "New York prosecuted the men who helped [Alexander] Hamilton and [Aaron] Burr to arrange the[ir fatal] duel" by "denying them their voting rights." John M. Kang, *Manliness and the Constitution*, 32 Harv. J.L. & Pub. Pol'y 261, 318 (2009).

[16] *See, e.g.*, Kansas Constitution of 1859, *compare* § 4 ("the people have a right to bear arms. . ."), *with* Art. V§ 2 (barring felons from voting) *and* § 5 (barring duelists from office); Oregon Constitution of 1857, *compare* Art. I § 27 ("the people shall have the right to bear arms"), *with* Art. II §3 (barring duelists and their aiders from holding office); Indiana Constitution of 1851, *compare* Art. I § 32 ("the people shall have a right to bear arms") *with id.* at Art. II § 7 (barring from office anyone who dueled or assisted in dueling) *and* Art. II § 8 (giving the legislature power to bar anyone convicted of an infamous crime from voting); Art. II § 5 (barring anyone convicted of infamous crime from voting); Florida Constitution of 1838 (approved by Congress upon Florida's admission as a state in 1845): *compare* Art. I § 21 ("the free white men of this State shall have the right to keep and to bear arms") *with* Art. IV §5 (barring from office anyone who dueled or even accepted or sent a challenge to "a duel, the probable issue of which may be the death of the challenger") and Art. VI §§ 4, 13 (giving legislature power to exclude anyone convicted of infamous crime from the right to vote); Alabama Constitution of 1819: *compare* Art. I § 23 ("every citizen has a right to bear arms") *with* Art. IV § 3 (giving legislature "power to pass such . . . laws, to suppress the evil practice of Duelling, extending to disqualification from office or the tenure thereof, as they may deem expedient"); *see also, e.g.*, Tennessee Constitiution of 1834: *compare* Art. I § 26 ("that the free white men . . . have a right to keep and to bear arms") *with*

had either dueled or assisted in a duel with "deadly weapons," required members of the legislature to swear an oath that they had neither dueled nor assisted in a duel with deadly weapons, and simultaneously guaranteed the right of "every citizen" to keep and bear arms, without exception. Texas Const. of 1845 Art. I § 13, Art. VII §§ 1,5.

In 1824, our own Court of Appeals illuminated the line dividing rights that a conviction could curtail from those it could not: no conviction could extinguish a constitutional right "plainly expressed, and intended to be fundamental and inviolable." *Barker v. People*, 3 Cow. 686, 706; 1824 WL 2277 (N.Y. 1824). The right to keep and bear arms is, of course, a fundamental right,[17] and the Second Amendment itself guarantees that the right "shall not be infringed." U.S. Const. amend. II.

Examining New York's own law barring convicted duelists from office, the Court explained that "[t]hough the legislature have an undoubted power to prescribe capital punishment,[18] and other punishments which produce a disability to enjoy

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Art. IV § 2 (permitting disenfranchisement based on conviction for infamous crime); Arkansas Constitution of 1836: *compare* Art. II § 21 ("that the free white men of this State shall hve a right to keep and bear arms . . ." *with* Art. IV §§ 12 (barring from office anyone convicted of infamous crime).

[17] It is so "fundamental from an American perspective" that the Supreme Court incorporated it against the States. *McDonald*, 561 U.S. 742, 818-19 (2010) ("Consistent with their English heritage, the founding generation generally did not consider many of the rights identified in these amendments as new entitlements, but as inalienable rights of all men, given legal effect by their codification in the Constitution's text," including the right to keep and bear arms (internal citations omitted)).

[18] Notably, *Barker* rejected in advance an argument sometimes made today in favor of felon disarmament: that, because a felony was at one time defined by being a death-eligible crime, we might find an implied historical tradition containing every lesser-included consequence collaterally accomplished by killing the offender, including disarmament. *See, e.g., Duarte*, 101 F.4th 657 (not endorsing this view but suggesting in dicta it might be explored).

constitutional rights [such as incarceration]," no conviction or punishment could disable a right the constitutional text guaranteed against infringement:

> a … deprivation of rights [as such], would, even as a punishment, be, in many cases, repugnant to rules and rights expressly established. Many rights are plainly expressed, and intended to be fundamental and inviolable, in all circumstances. A law enacting that a criminal should, as a punishment for his offence, forfeit the right of trial by jury, would contravene the constitution; and a deprivation of this right, could not be allowed, in the form of a punishment. *Any* other *right thus secured*, as universal and inviolable, must equally prevail against the general power of the legislature to select and prescribe punishments. *These rights are secured to all; to criminals, as well as to others;* and a punishment consisting solely, in the deprivation of such a right, would be an evident infringement of the constitution. Any punishment operating as an infringement of some rule thus expressly established, or some right thus expressly secured, would be unconstitutional[.]

Barker v. People, 3 Cow. 686, 706; 1824 WL 2277 (N.Y. 1824) (emphasis added); *In re Prime*, 1 Barb. 340 (NY Sup. Ct. Gen. Term 1847) (citing same).

Barker's lucid reasoning is owed *Bruen* deference because it was influential across state lines in its own time. *See State ex rel. Tesch v. Von Baumbach*, 12 Wis. 310 (WI 1860) ("conceding the correctness of the principles laid down in *Barker vs. The People*, 3 Cow., 686"); *People ex rel. Atty Gen. v. Wells*, 2 Cal. 198, 212-13 (CA 1852) (citing *Barker* and treating its holding, which *Barker* had reached in part through the above reasoning, as

authoritative); *Dowling v. Smith*, 9 Md. 242, 246-47 (MD 1856) (same) *Hyde v. State*, 52 Miss. 665, 667 (MS 1876) (same).[19]

Penal Law §§ 265.03(3) and 265.02(1) violate *Barker*'s explicit warning that "a law that should declare it a crime, to exercise any fundamental right of the constitution. . . [is not] within the [legislature's] general power over crimes." *Barker* at *706.

3. Historical rejections of disarmament based on past misconduct as unconstitutional.

Finally, *Bruen* held that historical rejections on constitutional grounds of laws analogous to the one at issue "surely would provide some probative evidence of unconstitutionality." 597 U.S. at 26-27. There is ample such evidence here, even without *Barker*.

Congress itself refused to disarm even traitors because doing so was unconstitutional. Three quarters of a million confederate soldiers were still alive at the end of the Civil War. *See* James M. McPherson, The Battle Cry of Freedom: The Civil War Era 306-07 n.41 (1988). Congress refused to disarm them because doing so *would*

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[19] Where the founding generation believed that a criminal conviction could disable an otherwise expressly enumerated right, it said so. *Barker* was decided three years after New York amended its constitution regarding the right to vote, expanding the franchise but also specifically and explicitly providing that "laws may be passed excluding from the right of suffrage persons who have been, or may be, convicted of infamous crimes." N.Y. Const. of 1821, Art. II § 2, available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://history.nycourts.gov/wp-content/uploads/2018/11/Publications_1821-NY-Constitution.pdf; *see also Hayden v. Paterson,* 594 F.3d 150, 156 (2d Cir. 2010) (recounting the history of New York's constitutional and statutory felon disenfranchisement provisions, *citing* Ch. VI, tit. I, § 3, 1829 Rev. Stat. of N.Y., vol. 1 at 127; Act of April 5, 1842, ch. 130, § 3, 1842 N.Y. Laws 109; Act of May 27, 1896, ch. 909, § 168, 1896 N.Y. Laws 893, 978; Act of May 3, 1901, ch. 654, § 2, 1901 N.Y. Laws 1668, 1669.)

violate their Second Amendment rights. McDonald, 561 U.S. at 780 (2010); *see also, e.g.*, Ulysses S. Grant and Robert E. Lee, Terms of Surrender at Appomatox, Apr. 9, 1865 (surrender of arms "will not embrace the side-arms of the [Confederate] officers").[20] The Congress that rejected the disarmament of former confederates as unconstitutional, the 39th, also drafted and passed the Fourteenth Amendment in 1866, through which the Second Amendment was incorporated against the States. *See McDonald*, 561 U.S. at 779 (2010).

Conviction during peacetime did not extinguish one's gun rights, either. Within a decade of the Second Amendment's incorporation against the states, Texas' high court struck down a requirement that an offender forfeit the pistol he had used in an offense upon conviction even though he was permitted to obtain a different firearm in the future. *Jennings v. State*, 5 Tex. Ct. App. 298, 300 (1878); *see also Leatherwood v. State*, 6 Tex. Ct. App. 244 (1879) (affirming *Jennings*). While the legislature could regulate the way in which people carried weapons, "it has not the power by legislation to take a citizen's arms away from him. One of his most sacred rights is that of having arms for his own defen[s]e…This right is one of the surest safeguards of liberty and self-preservation." *Id.*[21]

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[20] *Available at* https://www.nps.gov/apco/learn/historyculture/surrender-documents.htm

[21] The "going armed" laws *Rahimi* relied on and which permitted forfeiture of the arm used specifically focused on *unusual* weapons, which are not protected by the Second Amendment in any event, and weapons actually used in terrifying ways. *Rahimi*, 144 S.Ct. at 1901. The "going armed" laws were also relatively few in the United States, *id.*, and *Rahimi* used them only in combination with the much more widespread surety laws. In any event, to the extent that there are differences in founding-era versus Civil War-era law on this point, and the difference matters, it is not at all clear that the founding-era law prevails, particularly where the challenged law is a State law, as it is here. *See Bruen* at 37-38 ("We .

These rules were consistent with the Second Amendment's drafting history, in which the founders declined suggestions to limit the right based on misconduct. The Second Amendment's drafters considered but declined three proposals to create exceptions to the Second Amendment right based on (1) treason; (2) failure to be a "peaceable citizen"; and (3) "crime or real danger of public injury." *Kanter*, 919 F.3d at 454-56 (Barrett, J., dissenting);[22] *see also United States v. Rahimi*, 144 S. Ct. 1889, 1936 (2024) (Thomas, J., dissenting) (explaining that, while the government sought to justify a gun regulation using the failed proposals, the majority does not mention them at all, and in any event a failed proposal cannot provide a *Bruen* analogue).

The founders had just fought a revolution, in part to protect against English abuses of the right to keep and bear arms that had used misconduct as a pretext. In that context, the founders' rejection of the proposed misconduct exceptions, together with the lack of any founding-era law prospectively disarming anyone based on misconduct, strongly suggests that past misconduct was not accepted as a basis to limit a citizen's Second Amendment rights.

. . acknowledge that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government). . . We need not address this issue today.").

[22] Two of the three losing proposals came from anti-federalists, people who opposed adopting any bill of rights. Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 Hastings L.J. at 1374-76.

Presaging the 39th Congress' view that disarming former confederates would violate their Second Amendment rights, the Second Amendment's drafters declined to limit the right to keep and carry arms even in cases of treason. *Kanter*, 919 F.3d at 454-55 (Barrett, J., dissenting). The New Hampshire ratifying convention proposed that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." Jonathan Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 326 (2d Ed. 1891). Ultimately, not even New Hampshire adopted the treason exception. [23]

The treason exception failed even though the Second Amendment's drafters had survived wave after wave of violent domestic rebellion. *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 L. & Hist. Rev. 139, 164–65 (2007). "[P]opular unrest such as

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[23] In fact, none of the language in the failed state proposals was adopted in those states' constitutions. Pennsylvania's original constitution of 1776 specified "that the people have a right to bear arms for the defence of themselves and the state" without exception. https://avalon.law.yale.edu/18th_century/pa08.asp. When Pennsylvania amended its constitution in 1790, Art. IX, § XXI provided "that the right of the citizens to bear arms, in defence of themselves and the state, shall not be questioned." It provided no exception for those with prior convictions. Further, Art. VI § II of Pennsylvania's 1790 constitution *required* that "the **freemen** of this commonwealth **shall be armed** and disciplined for its defence," without exception for people with prior convictions. https://www.paconstitution.org/texts-of-the-constitution/1790-2/ Massachusetts' constitution of 1780 provided that "the people have a right to keep and to bear arms for the common defence" without exception. Part the First, XVII. https://oll-resources.s3.us-east-2.amazonaws.com/oll3/store/titles/2676/Thorpe_1514-03_Bk.pdf at 1892. Massachusetts did not have another constitutional convention until 1821; those amendments did not change the right to bear arms. https://babel.hathitrust.org/cgi/pt?id=mdp.35112105213294&seq=13&q1=resolved New Hampshire's constitution only considered arms to the extent that it provided one could conscientiously object to bearing them. https://teachingamericanhistory.org/document/new-hampshire-bill-of-rights/

Bacon's Rebellion, the Regulator movements, New Jersey's anti-rent riots, and half a century of tenant unrest in the Hudson Valley must have illustrated the threat to public order posed by widespread gun ownership." *Id.*[24] The Federalist Papers cited the difficulty of quelling these pre-ratification rebellions as a reason to strengthen the federal government by adopting the federal constitution.[25]

Yet, in contrast with Penal Law § 265.03(3) totally disarming anyone with any conviction of any degree, the founding generation did not use even these politically electrifying armed rebellions to permanently disarm citizen rebels. In Shays' Rebellion of 1786-87, "the largest violent uprising in the new nation's history;" Massachusetts farmers, distraught over forced sales of their indebted land, armed themselves to close the courts foreclosing on their homesteads. Saul Cornell, A Well-Regulated Miitia: The Founding Fathers and the Origins of Gun Control in America, (Oxford UP 2006), digital edition at Ch. 1. The rebels tried to seize a federal arsenal. *Id.* New York categorically prohibits Mr. Conyers, who has no prior violent felonies, from possessing

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[24] *See also* Edward Countryman, *Out of the Bounds of the Law: Northern Land Rioters in the Eighteenth Century*, in *The American Revolution*, Alfred F. Young, ed., at 42-47 (DeKalb 1976) (In the Hudson Valley, a "great rising of 1766" involved the formation of rebel militias. An unofficial militia in a New Jersey uprising in 1746 "was stronger than the official militia" and was thought to threaten "the destruction of all government and all society."). Further, Congress was aware of smaller but significant uses of armed mob violence that had to be quelled by the various militias. *See* Letters of Delegates to Congress: Volume 25 March 1, 1788-December 31, 1789, Nicholas Gilman to John Sullivan, Apr. 19, 1788, *available at* https://memory.loc.gov/cgi-bin/query/D?hlaw:19:./temp/ ~ammem_sxU1::

[25] *See, e.g.*, Alexander Hamilton, Federalist No. 16, in The Federalist Papers 117-118 (New American Library: 1961) ("As to those partial commotions and insurrections which sometimes disquiet society … the [federal] … government could command more extensive resources for the suppression of disturbances of that kind than would be in the power of any single member.").

a handgun even within his own home. The Shays rebels were disarmed for only three years – with each year being before the Second Amendment was ratified – their rights were then restored. *See United States v. Berry*, 2024 WL 1141720 at *21 (N.D. Ohio March 15, 2024). That *temporary* preratification disarmament followed a historical pre-ratification pattern for citizens perceived to be enemies of the state: British Loyalists had been disarmed only unless and until they swore allegiance to the United States.[26] When Catholics were considered enemies of the Protestant English and colonial state after centuries of interreligious war, they, too, were disarmed only partially and temporarily. [27] The founding generation's choice *not* to permanentaly disarm even

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[26] *See, e.g.*, 1777 Pa. Laws 61, An Act Obliging the White Male Inhabitants of this State to Give Assurances of Allegiance to the Same, and for Other Purposes Therein Mentioned, Ch. XXI, §§ 2, 4 ("all male white inhabitants of this state . . . above the age of [18] . . . shall . . . take . . . the following [loyalty] oath . . . every person [of age] . . . refusing or neglecting to take [the loyalty oath] . . shall *during the time of such neglect or refusal* . . . be disarmed."); 1778 Pa. Laws 123, An Act for the Further Security of the Government, Ch. LXI, §§ 1-3, 5, 10, *available at* https://firearmslaw.duke.edu/laws/1778-pa-laws-123/ (anyone who continued to refuse to take the loyalty oath "forfeit[ed] . . [his] arms and ammunition to the State"); Churchill, *supra*, at 160 ("Noting that, 'in every state, allegiance and protection are reciprocal,' Maryland instituted a test oath in 1777 and barred those refusing from . . . keeping arms. In 1781, [Maryland] promised [effective pardons to] . . . those . . . who agreed to enroll for actual militia service," which required the furnishing of one's own arms and for which felons were already eligible, *see supra*, would be restored to the right to not only keep and bear the arms they were required to furnish for militia service, but other rights as well. "North Carolina followed suit, barring non-testors from basic liberties including the keeping of arms while promising that any who relented would be 'held and deemed a good subject of this state, and shall enjoy the privileges thereof.").

[27] Some English and colonial laws also disarmed Catholics. *Duarte* at 679-80. After centuries of war and political strife between Catholics and Protestants in England, William Blackstone reported the offensive but common view that Catholics were not truly loyal to any secular sovereign insofar as they "acknowledge a foreign power," i.e. the Pope, and could not "complain if the laws of [the] kingdom with not treat them upon the footing of good subject" unless "they could be brought to renounce the supremacy of the pope." 4 BLACKSTONE Ch. 4; *see also* John D. Bessler, *A Century in the Making: The Glorious Revolution, the American Revolution, and the Origins of the U.S. Constitution's Eighth Amendment*, 27 Wm. & Mary Bill Rts. J. 989, 1003 (2019) (In Britain, there was widespread fear of "Catholic tyranny" then identified with the French, Charles II, and James II, i.e. the English monarchs whose abuses

violent, armed rebels suggests that the founders did not view regulating citizens' gun ownership "as a legitimate exercise of the police power." Churchill, 25 Law & Hist. Rev. at 164–65.

The founders also declined to adopt a "peaceable citizen" test for gun rights. Samuel Adams unsuccessfully suggested in the Massachusetts convention that the proposed constitution "be never construed to authorize Congress to . . . prevent the people of the United States, *who are peaceable citizens*, from keeping their own arms." *See* 2 Bernard Schwartz, The Bill of Rights: A Documentary History 675, 681 (1971) (emphasis added). Despite Massachusetts having been home to the now-quashed Shays' Rebellion that saw armed men try to seize a federal arsenal, the proposed "peaceable citizen" exception did not carry even a majority of the Massachusetts convention. *Kanter*, 919 F.3d at 454-55 (Barrett, J., dissenting).

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caused the English to adopt the Declaration of Rights that forms the basis for our Bill of Rights). Much like disarming British Loyalists until they swore allegiance, one colonial Virginia law disarmed Catholics unless and until they swore a loyalty oath. *See also, e.g.*: 29 Geo II (1756) cap. 4 §III, in John Mercer, An Exact Abridgement of All the Public Acts of Assembly of Virginia in Force and Use [as of] January 1, 1758 (Glasgow: Bryce and Paterson, 1759) 262-63 (1756 law in colonial Virginia providing that, "[n]o papist [who refuses to take a loyalty oath] shall keep in his house or elsewhere, or in the possession of any other person, to his use, or at his disposition, any arms, weapons, gun-powder, or ammunition (other than such necessary weapons as shall be allowed to him by order of the justices at their court, for the defence [sic] of his house or person."). First Amendment concerns aside, the anti-Catholic laws were never numerous enough to constitute a *Bruen* analogue, and historical laws "that disarmed British Loyalists . . . fail both the 'why' and 'how' of *Bruen*'s analogical test." *Duarte* at 679. Rather than permanently disarm anyone convicted of a crime, the anti-loyalist and anti-Catholic laws disarmed members of groups seen as resident enemy aliens, and were *temporary* and *reversible* upon swearing loyalty oaths.

Disarming people deemed insufficiently "peacable" would have mirrored then-recent tyrannical abuses using that vague justification. In England, a 1662 act had given officers of King Charles II, newly restored to the throne after a decade of strife, the power to disarm anyone deemed "dangerous to the Peace of the Kingdom." Militia Act of 1662, 13 & 14 Car. 2, c.3, § 13 (1662),[28] available at https://firearmslaw.duke.edu/laws/militia-act-of-1662-13-14-car-2-c-3-%C2%A7-13-1662/. But the founders viewed the reigns of Charles II and his successors as a cautionary tale of tyranny that only ended with the enactment of the English Declaration of Rights of 1689, the "antecedent of our constitutional text." *Harmelin v. Michigan*, 501 U.S. 957, 966 (1991); *see also, e.g.*, Robert Harman, *The People's Right to Bear Arms – What the Second Amendment Protects*, 18 Whitter L. Rev 411, 416-17 (1997); Bessler, 27 Wm. & Mary Bill Rts. J. at 1000–1020. The English Declaration was adopted "[b]y way of rebuke" to these abuses. *Rahimi*, 144 S. Ct. at 1899; *see also Harmelin*, 501 U.S. at 966-67 (the circumstances of the English Declaration's "enactment … display the particular 'rights of English subjects' it was designed to vindicate.").

"Prominent among the many grievances" the antecedent of the Second Amendment was designed to rebuke was "the use of the [king's men] . . . to disarm . . . men without cause," i.e. under the pretence that, pursuant to the 1662 law, they were

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[28] Note that even this law, which colonists deemed tyrannical, did not provide for categorical permanent disarmament, providing that "arms so seized may be restored to the owners again if the said [officers]… shall so think fit." *Id.*

insufficiently peaceable. Lois G. Schwoerer, *To Hold and Bear Arms: The English Perspective*, 76 Chi.-Kent L. Rev. 27, 32 (2000). One nobleman complained that the king's officers offered the pretext of peace for their arbitrary disarmaments: "[t]he Militia, *under pretence [that those disarmed were*] *persons disturbing the government,* disarmed and imprisoned men without cause." *Id.* (emphasis added) (internal citations omitted).

This was not a history the founders wished to repeat. *Heller*, 554 U.S. at 612-13. The Second Amendment enshrined "the right of "the whole people, old and young, men, women and boys, and not militia only" to keep arms, protecting it from being "trampled under foot" as had been done "by Charles I and his two wicked sons and successors," in whose reigns the 1662 "dangerous to the Peace of the kingdom" disarmament law had been passed and enforced. *See id.* (*quoting Nunn v. State*, 1 Ga. 243, 251 (1846)); *see also Aymette v. State*, 21 Tenn. 154, 1840 WL 1554 at **2 (TN 1840) (citing the arbitrary disarmaments of Charles I's successors as what "produced the revolution by which he was compelled to abdicate the throne of England").

Rather, disarmament under the pretext of peace-keeping was something the founders themselves had experienced and fought a revolution to prevent. "King George III's attempt to disarm the colonists in the 1760s and 1770s [in light of possible

violence] 'provoked polemical reactions by Americans invoking their right as Englishmen to keep arms.'" *McDonald*, 561 U.S. at 76 (internal citations omitted)).[29]

Thus, it is unsurprising that constitutional drafters placed the right to bear arms above both "peaceableness" generally and a citizen's past crimes. The drafters also rejected a proposal from a majority of the Pennsylvania convention suggesting that: "no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals*…." 2 Schwartz, *supra*, at 662, 665 (emphasis added). At the time, "crimes" did not include misdemeanors, *see* BLACKSTONE, Ch. 4 §5, Ch. 5, § 7, and the vast majority of today's felonies would have been classified as misdemeanors at the founding. *Watson*, 423 U.S. at 438-40, n.7. Thus, constitutional drafters were unwilling to extinguish citizens' right to bear arms even after the most serious felonies. Neither were the drafters willing to curtail the right to bear arms based on "real danger of public injury from individuals." This language, of course, was remarkably similar to the "dangerous to the Peace of the Kingdom" language of the abusive 1662 Militia Act that loomed large as a cautionary tale as the Constitution was drafted.

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[29] The tension between the right to keep and bear arms, the specter of terrible political violence, and the English history of wrongly designating people as insufficiently peaceable might explain the only time a version of the word "peaceable" *does* appear in the Bill of Rights, where it does not designate *people* as peaceable or not, but rather *actions* as peaceable or not. The First Amendment protects the right of the people "peaceably to assemble." U.S. Const. amend. I.

Mr. Conyers is not a traitor, or someone whom any judge has found to be an ongoing credible threat of physical violence against another, or even someone with any prior violent felony conviction. His criminal conviction for merely possessing a gun would have shocked the founders.

a. The Right of Self-Defense is Never Extinguished.

In the United States, the right to self-defense encompasses the "individual right to possess and carry weapons in case of confrontation." *Heller*, 554 U.S. at 592. At its core, the question is whether the State may extinguish the right to self-defense for citizens who have completed their sentences, when they, too, face dangers in our streets and in their homes.[30]

"[I]ndividual self-defense is the *central component* of the Second Amendment right," *Bruen*, 587 U.S. at 3, and someone who has completed his sentence has lost neither his rights under the First Amendment*, Barker,* nor the right to self-defense, which "is the first law of nature." *Heller*, 570 U.S. at 606 (internal citations and quotation

[30] *See also McDonald*, 561 U.S. at 790 ("If, as petitioners believe, their safety and the safety of other law-abiding members of the community would be enhanced by the possession of handguns in the home for self-defense, then the Second Amendment right protects the rights of minorities and other residents of high-crime areas whose needs are not being met by elected public officials.").

marks omitted). Even if *something* could create an exception to that fundamental law, Mr. Conyers' non-violent prior conviction never did.

Justice Frankfurter warned that, to understand American tradition at the founding, one must struggle against the "inevitable habit of reading later [modern] ideas into earlier institutions," *see* Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv. L. Rev. 917, 922–23. Looking squarely at those earlier institutions on their own terms, as *Bruen* commands, requires the conclusion that Penal Law §§ 265.03(3) and 265.02(1) are unconstitutional. By withholding the right to possess and carry weapons forever, under any circumstances, on the basis of any conviction of any kind, Penal Law §§ 265.03(3) and 265.02(1) trample our historical tradition and thus violate the Second Amendment. In the alternative, they violate the Second Amendment as applied to Mr. Conyers.

D. There is No Bar to Review.

Mr. Conyers has standing to challenge his own felony conviction. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 151 (1969); *People v. Garcia*, 41 N.Y.3d 62, 73 (2023) (Rivera, J., dissenting) (explaining the standing issue, on which the majority had explicitly taken no position). Even if the question whether he originally applied for a gun license were relevant – and it is not, *id.* – New York's own laws mooted the question

by declaring him categorically ineligible for a gun license based on his prior conviction. Penal Law § 400.00(1)(c).

Neither is preservation a bar to review. In *People v. Hughes*, 22 N.Y.3d 44 (2013), the Court of Appeals specifically rejected a Second Amendment challenge to the law under which Mr. Conyers pleaded guilty: Penal Law §§ 265.03(3) and 265.02(1)'s joint command that anyone previously convicted of any crime is ineligible for the "home or business" exception to the felony ban on possessing an unlicensed firearm. That is, at the time of Mr. Conyers' initial prosecution and plea, the Court of Appeals had explicitly rendered futile any Second Amendment challenge that Mr. Conyers might have raised. Thus, preservation does not apply. *People v. Patterson*, 39 N.Y.2d 288, 296 (1976) ("[T]here was no doubt in this State that the [court's instruction] was constitutionally valid [at the time of trial]. The defendant's failure to object to a practice deemed valid in this State cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question."); *People v. Baker*, 23 N.Y.2d 307, 317 (1968).

People v. Cabrera, 41 N.Y.3d 35 (2023) does not require preservation under these circumstances. There, the Court of Appeals focused "first" on whether the relevant claims were "foreclosed by binding precedent from this Court," *id.* at 47, and, found that, where only intermediate appellate authority foreclosed a claim, preservation was required. But here, the claim *was* foreclosed by binding precedent from the Court of Appeals: *Hughes*, which not only rejected a Second Amendment challenge to the statutes

under which Mr. Conyers was convicted, but did so *using intermediate scrutiny*. 22 N.Y.3d 44 (2013). That is, the Court of Appeals analysis in *Hughes* foreclosed the historical analysis that *Bruen* requires and which does not simply invalidate the procedural issues at stake in *Patterson* and *Baker* but *renders lawful the conduct the statute of conviction criminalizes*, invalidating the indictment itself by rendering the statute unconstitutional, a claim that *Hughes* foreclosed but that is impossible to waive. *See People v. Iannone*, 45 N.Y.2d 589, 601 (1978); C.P.L. § 210.25(3). Thus, neither *Cabrera* nor anything else required Mr. Conyers to make a futile pre-*Bruen* objection to now have this Court hear the merits of this appeal. Neither could the State have made a record in the trial court different from the one it can now bring to the Court's attention. History has already happened, and its sources are part of the public record.

Retrofitting state preservation rules to insulate Mr. Conyers' unconstitutional conviction from review here would violate both state and federal due process.[31] *Mathews v. Eldridge*, 424 U.S. 319 (1976); *People v. Davis*, 13 N.Y.3d 17, 27 (2009). Indeed, doing so would constitute an irrational and exorbitant application of the preservation rule. *See Lee v. Kemna*, 534 U.S. 362, 376 (2002) (on federal habeas review, a federal court will not defer to a state court's "exorbitant application of a generally sound rule"). The Second Amendment claim raised here was squarely foreclosed by binding appellate precedent from the Court of Appeals requiring a materially different standard of review that would

[31] *People v. Pastrana*, 41 N.Y.3d 23 (2023), *Garcia,* and *Cabrera* did not address this argument.

permit if not require a different result than the historical test *Bruen* requires and which makes clear that Penal Law §§ 265.03(3) and 265.02(1) are unconstitutional. It would have been futile—at the time of Mr. Conyers' plea and sentence— to argue that the Court of Appeals had been wrong to demand a means-end-scrutiny test that *Bruen* had not yet declared unconstitutional. Accordingly, preservation should not apply. *See People v. Garcia*, 41 N.Y.3d 62, 74-75 (2023) (Rivera, J., dissenting) (requiring preservation of futile claims "places an unduly high burden on counsel" and "incentivizes clogging trial court dockets with meritless claims foreclosed by precedent") (citing *Reed v. Ross*, 468 U.S. 1, 15-16 (1984)); *Hughes,* 22 N.Y.3d 44 (2013) (applying intermediate scrutiny to gun restrictions—a position later rejected by *Bruen*); *Matter of Corbett v. City of New York*, 160 A.D.3d 415 (1st Dept. 2018) (squarely rejecting a pre-*Bruen* Second Amendment challenge to the proper-cause requirement); *Delgado v. Kelly*, 127 A.D.3d 644 (1st Dept. 2015); *Reed*, 468 U.S. at 15-16 (requiring litigants to raise futile claims serves no useful purpose and creates significant inefficiencies); *O'Connor v. Ohio*, 385 U.S. 92, 93 (1966) (defendant's failure to object "cannot strip him of his right to attack" a then-valid "practice following its invalidation by this Court.").

Applying preservation to a claim that was foreclosed by binding precedent during the trial-level proceedings would also violate procedural due process because it would: (1) undermine significant liberty interests, including the state constitutional right to appeal, the Second Amendment right to bear arms, and the freedom from conviction and incarceration; (2) advance no valid state interest as an objection would have

accomplished nothing since it was foreclosed by binding precedent; and (3) raise a grave risk that an otherwise valid claim will not lead to relief. *See People v. Davis*, 13 N.Y.3d 17, 27 (2009) (a procedural-due-process claim requires a balancing of (1) the government's interest in the challenged procedure; (2) the countervailing liberty interests; and (3) the risk of erroneous deprivation).[32]

As the Court of Appeals has not yet addressed this procedural due process issue—and instead only addressed the statutory preservation question in *Cabrera*—it is an open question here.

At a minimum, this fundamental constitutional claim warrants review in the interests of justice. C.P.L. § 470.15(3)(c),(6)(a); *see Davis v. United States*, 417 U.S. 333, 346 (1974) (where a person has been convicted for an act that "the law does not make criminal," "there can be no room for doubt that such a circumstance 'inherently results in a complete miscarriage of justice.'") (quoting *Hill v. United States*, 368 U.S. 424 (1962)).

Mr. Conyers has already completed the full terms of his sentence, yet stands convicted of a violent felony based solely on conduct "at the core" of the Second Amendment right that he and every other American possess, because Penal Law §§ 265.03(3) and 265.02(1) purport to completely disable the right to self defense in the

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[32] *See also People v. Pollenz*, 67 N.Y.2d 264 (1986) (a defendant has a state-constitutional right to appeal); N.Y. Const. art. VI, § 4(k) (guaranteeing a right to appeal); *see also M.L.B. v. S.L.J.*, 519 U.S. 102, 111 (1996) ("[O]nce [avenues of appellate review are] established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts").

home based on Mr. Conyers' prior *non-violent* convictions. The plea court itself undercut the People's offer of eight years and offered the minimum sentence of five years, noting that Mr. Conyers' "criminal record is non-violent in nature," that his possession of a handgun within the home was not accompanied by any burglary charge, and that the Court was nonetheless "constrained to follow the sentencing guidelines." P:4; 6. Mr. Conyers has served that sentence and remains tarred with a violent felony conviction for non-violent constitutionally protected conduct. The interest of justice requires that that stain be removed. *See People v. Tyrell*, 22 N.Y.3d 359, 366 (2013).

CONCLUSION

For the reasons stated herein, this Court should vacate Mr. Conyers' conviction and dismiss the indictment.

Respectfully submitted,

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To be argued by
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(10 MINUTES REQUESTED)

New York Supreme Court

Appellate Division - First Department

Ind. No. 3387/2016
Appellate Case No. 2019-1469

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

- against -

ARNOLD CONYERS,

Defendant-Appellant.

On Appeal from the Supreme Court of the State of New York, New York County

BRIEF FOR RESPONDENT

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SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,

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ARNOLD CONYERS,

Defendant-Appellant.

BRIEF FOR RESPONDENT

INTRODUCTION

Defendant Arnold Conyers appeals from a November 1, 2018 judgment of the Supreme Court, New York County (Curtis Farber, J.), convicting him, upon his guilty plea, of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]), and sentencing him, as a second felony offender, to a five-year determinate prison term, to be followed by five years of post-release supervision. Defendant has completed his sentence.

On May 5, 2016, Venecia Stevenson ended her eight-year relationship with defendant, told him not to return to her apartment, and changed the locks. But four days later, when Stevenson came home from work, she noticed that someone had changed the locks to her apartment again in her absence; when she finally gained access to her apartment, she saw defendant's duffle bag, which had not been there when she

left. On May 26, 2016, while Stevenson was cleaning her apartment, she found a drawstring bag containing a loaded 9mm pistol with a defaced serial number. She called the police, who recovered the gun and found defendant's DNA on it.[1]

By New York County Indictment Number 3387/2016, filed on September 30, 2016, a Grand Jury charged defendant with one count of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]) and two counts of Criminal Possession of a Weapon in the Third Degree (Penal Law § 265.02[1], [3]). On October 15, 2018, defendant appeared with counsel before the Honorable Curtis Farber and pled guilty to second-degree criminal possession of a weapon. On November 1, 2018, Justice Farber sentenced defendant as noted above.

On appeal, defendant claims that his conviction for firearm-possession is unconstitutional under the Supreme Court's decision in *New York State Rifle & Pistol Ass'n. v. Bruen*, 597 U.S. 1 (2022).

POINT

DEFENDANT'S *BRUEN* CLAIM IS UNPRESERVED AND HE LACKS STANDING TO RAISE IT. REGARDLESS, IT IS MERITLESS (Answering Defendant's Brief).

Defendant claims that *Bruen* invalidated his conviction of Criminal Possession of a Weapon in the Second Degree (Penal Law § 265.03[3]) (Defendant's Brief ["DB"]: 6-

[1] These facts were gleaned from the Pre-Sentence Report, the NYPD Firearms Analysis Section Laboratory Report, and the transcripts of the plea and sentencing proceedings.

43). In an apparent misreading of the relevant statutes, defendant argues that New York's gun laws violate *Bruen*'s historical tradition test because they prohibit firearm possession "on the basis of any conviction of any kind" (DB: 38).[2] Of course, New York does not prohibit firearm possession on the basis of any prior criminal conviction whatsoever, and defendant fails to identify any such law. Rather, defendant focuses on the "prior-crime exception" in Penal Law §§ 265.03(3) and 265.02(1), which merely provides that, where a defendant who lacked a firearm license nevertheless possessed a loaded firearm in his home, his weapon-possession charges may be increased from the fourth degree to the second degree if he had a prior criminal conviction. *People v. Hughes*, 22 N.Y.3d 44, 48-50 (2013) (discussing the "prior-crime exception"). Defendant also objects to a provision in the firearm-licensing statute disqualifying applicants who have been previously convicted of a felony or other "serious offense." Penal Law § 400.00(1)(c). Although he does not dispute that he never applied for a firearm license (*see* DB: 38-39), defendant nevertheless argues that it would have been unlawful to deny

[2] *See also* DB: 4 (describing Penal Law § 265.03[3]'s supposed "prohibition on unlicensed gun possession for anyone 'previously convicted of any crime'"); DB: 11 (New York's gun laws "prohibit [ ] gun ownership . . . on the basis of any conviction of any degree for any conduct"); DB: 31 (asserting that § 265.03[3] "totally disarm[s] anyone with any conviction of any degree"); DB: 38 (asserting that New York's gun laws "withhold[ ] the right to possess and carry weapons . . . on the basis of any conviction of any kind").

him one based on his prior felony conviction for Bribery in the Third Degree (Penal Law § 200.00) (DB: 11).[3]

Defendant's challenge to New York's weapon-possession statutes and firearm-licensing regime is unpreserved. *See People v. Cabrera*, 41 N.Y.3d 35, 46 (2023). Additionally, defendant lacks standing to challenge the licensing regime because he has not established that he ever applied for a license. *See People v. Castillo*, 226 A.D.3d 573, 574-75 (1st Dept. 2024) (citing *United States v. Decastro*, 682 F.3d 160, 164 [2d Cir. 2012]).

In any event, defendant's *Bruen* claim fails on the merits. The licensing requirement that disarms felons is entirely consistent with the nation's historical tradition of firearm regulation. Regardless, a constitutional deficiency in that licensing requirement could not invalidate the conviction of a defendant who possessed a firearm without a license, for that single requirement is severable from the rest of the licensing statute. Defendant's challenge to the weapon-possession statute's prior-crime exception rests on a fundamental misreading of the rule, which does not criminalize any act of firearm-possession but merely enhances the sentencing exposure of certain defendants who are otherwise liable for criminal possession of a weapon in the fourth degree. Although defendant has waived any objection to the prior-crime exception other than the mistaken one that he raised in his brief, it bears noting that, where a

[3] Defendant states that he also has a conviction for "ticket scalping that was prosecuted using the third-degree robbery statute" (DB: 4). There is no conviction for third-degree robbery listed on the Pre-Sentence Report or defendant's RAP sheet.

defendant possessed a loaded firearm without obtaining a license, nothing in *Bruen* precludes the State from using a prior criminal conviction to enhance his sentencing exposure.

A. Defendant's *Bruen* Claim is Unpreserved.

Second Amendment challenges to New Yorks' firearm-licensing scheme or weapon-possession statutes are subject to the general rule that "constitutional arguments [must be raised] before the trial court" to be preserved for appellate review. *Cabrera*, 41 N.Y.3d at 42-46; *accord People v. Adames*, 216 A.D.3d 519, 519 (1st Dept. 2023) (rejecting constitutional challenge to criminal weapon possession statute on preservation grounds); *People v. Artis*, 216 A.D.3d 516, 516 (1st Dept. 2023) (same). As the Court of Appeals explained in *Cabrera*, preservation is particularly important for *Bruen* claims because the historical tradition test involves a "complex inquiry" that cannot be conducted on an "underdeveloped record." *Cabrera*, 41 N.Y.3d at 50-51.

Here, defendant's arguments are unpreserved because he did not apprise the trial court that he sought to raise any constitutional challenge to the weapon-possession statutes or the firearm-licensing requirements. *See Cabrera*, 41 N.Y.3d at 42-46; *Adames*, 216 A.D.3d at 519; *Artis*, 216 A.D.3d at 516. His failure to raise those claims below foreclosed the development of the historical record that would have been necessary to allow this Court to give these weighty constitutional issues "the careful consideration they deserve." *Cabrera*, 41 N.Y.3d at 50. Moreover, defendant's failure to raise his argument about the prior conviction rule in Penal Law §§ 265.03(3) and 265.02(1)

deprived the People of an opportunity to avoid any constitutional error by permitting him to plead guilty to the lesser charge of Criminal Possession of a Weapon in the Fourth Degree (Penal Law § 265.01[1]), to which the prior conviction rule does not apply. *See Cabrera*, 41 N.Y.3d at 42 (preservation rule "helps ensure that errors are avoided or corrected at the earliest possible opportunity").

On appeal, defendant contends that preservation was not required because "any Second Amendment challenge that [he] might have raised" below would have been "futile" in light of the Court of Appeals' decision in *Hughes*, which rejected a constitutional challenge to the prior-crime exception in Penal Law §§ 265.03(3) and 265.02(1) (DB: 39). But the challenge in *Hughes* was very different from the one that defendant raises here. In *Hughes*, the defendant's objection to the prior-crime exception was that, in permitting his charges to be increased from fourth degree weapon possession to second degree weapon possession, which is a class C felony, the rule resulted in a sentence that was "unconstitutionally severe" for an incident in which he had possessed the gun at home. *Hughes*, 22 N.Y.3d at 50. Thus, the holding in *Hughes* was limited to whether at-home firearm possession could be punished as a class C felony; the case did not address whether the defendant's prior conviction was an appropriate ground for enhancing his sentencing exposure. *See Cabrera*, 41 N.Y.3d at 47 (noting that *Hughes* concerned only "the relative severity of punishment imposed"). Moreover, *Hughes* had no bearing on defendant's separate argument about the eligibility requirements in the firearm-licensing statute. *See id.* at 42, 47 (*Hughes* did not foreclose

claim that weapon-possession charges were invalid because firearm-licensing scheme was unconstitutional).

Regardless, even if *Hughes* could be interpreted as foreclosing the arguments that defendant now raises, he would still not be able to invoke any "futility" exception to the preservation rule, because there is no futility exception for unpreserved *Bruen* claims. *Cabrera*, 41 N.Y.3d at 42-51; *accord Adames*, 216 A.D.3d at 519 ("[D]efendant should not be permitted to avoid the consequences of the lack of preservation on the ground that a constitutional challenge to Penal Law § 265.03(3) would have been futile."). In *Cabrera*, the Court of Appeals held that any futility exception would be inappropriate for claims, such as *Bruen* claims, that cannot be reviewed on appeal absent the development of an adequate record in the trial court. *Cabrera*, 41 N.Y.3d at 45, 50 (finding that "preservation is essential where the failure to raise a claim in the court of first instance means that the appellate record is inadequate to fairly assess the merits," and failure to raise a *Bruen* claim in the trial court "stymie[s] the development of a record that would allow for careful consideration and deliberate adjudication on the merits"). Defendant's reliance on *People v. Patterson*, 39 N.Y.2d 288 (1976) and *People v. Baker*, 23 N.Y.2d 307 (1968) (DB: 39) is entirely misplaced. *Cabrera* thoroughly explained why *Patterson* and *Baker* do not exempt previously futile *Bruen* claims from the preservation rule. *Cabrera*, 41 N.Y.3d at 43-46; *accord Adames*, 216 A.D.3d at 519 (rejecting the argument that futile *Bruen* claims are exempted from the preservation rule under *Patterson*).

Defendant has not cited any cases supporting his contention that application of the preservation rule here would violate procedural due process (*see* DB: 41-42). On the contrary, *Cabrera* confirmed that the Constitution does not forbid the State from invoking the preservation rule to bar previously futile constitutional challenges that later became colorable due to "intervening U.S. Supreme Court precedent." *Cabrera*, 41 N.Y.3d at 44 (citing *Hankerson v. North Carolina*, 432 U.S. 233, 244 n.8 [1977]). Moreover, although *Cabrera* did not specifically address a procedural due process argument, it made clear that application of the preservation rule to previously futile *Bruen* claims is fully justified by the compelling governmental interest in ensuring that the weapon-possession statutes and firearm-licensing scheme are not erroneously struck down based on an inadequate record. *See Cabrera*, 41 N.Y.3d at 43 (preservation of constitutional challenges ensure that "the drastic step of striking duly enacted legislation" will be taken only after the statute's unconstitutionality has been established "beyond a reasonable doubt") (quoting *People v. Baumann & Sons Buses, Inc.*, 6 N.Y.3d 404, 408 [2006]); *see also People v. Mack*, 27 N.Y.3d 534, 544 (2016) (courts must not "diminish the important purposes underlying the preservation rule").

Finally, this court has repeatedly found that reviewing an unpreserved *Bruen* claim would not serve the interest of justice. *See, e.g.*, *Adames*, 216 A.D.3d at 520; *Artis*, 216 A.D.3d at 516; *People v. Quiles*, 217 A.D.3d 635, 636 (1st Dept. 2023). Defendant does not identify any circumstance that would distinguish his case from those in which this

Court has declined to exercise its interest of justice jurisdiction over an unpreserved *Bruen* claim (*see* DB: 42).

In short, defendant's constitutional challenge to the weapon-possession statutes and firearm-license scheme is unpreserved, and this Court should not review it in the interest of justice.

B. Defendant Lacks Standing to Challenge New York's Firearm Licensing Scheme.

This Court has repeatedly held that a defendant charged under the weapon-possession statutes lacks standing to raise a collateral constitutional challenge to the underlying firearm licensing scheme where, as here, "there is no indication that he applied for a gun license." *People v. Rodriguez*, 226 A.D.3d 459, 460 (1st Dept. 2024); *People v. Vega*, 228 A.D.3d 467, 467 (1st Dept. 2024); *Castillo*, 226 A.D.3d at 574-75; *People v. Johnson*, 225 A.D.3d 453, 455 (1st Dept. 2024); *accord Decastro*, 682 F.3d at 164 (criminal defendant "[l]acked standing to challenge" New York's "licensing laws" because he "failed to apply for a gun license in New York"). The burden to establish standing to challenge the licensing scheme falls on the defendant. *Vega*, 228 A.D.3d at 467. And as the Second Circuit explained in *Decastro*, "to establish standing to challenge an allegedly unconstitutional policy, a plaintiff must submit to the challenged policy." 682 F.3d at 164.

Nevertheless, defendant suggests that he has standing to challenge the firearm licensing requirements even without having applied for a firearm license because his prior felony conviction would have rendered his application futile (*see* DB: 38-39). This

argument fails. Even if it would have been futile to apply for a license, he would still lack standing because he would be unable to show that his application would not have been denied on some other constitutional ground. *See People v. Quiroga-Puma*, 24 Misc. 3d 29, 30-31 (App. Term, 2d Dept. 2009) (defendant lacked standing to assert constitutional claim regarding criminal conviction for unlicensed driving where record did not indicate that he "ever applied for a driver's license," and where his application may have been denied because of an "impediment" that was "unrelated to the constitutional issues herein raised").

Absent an application for a firearm license, defendant has no basis to claim that he would have been prevented from obtaining one due to any particular licensing requirement. Critically, because defendant never submitted to the licensing scheme—which would entail a background check—it is impossible to identify the full set of ineligibilities that might have applied to his license application, or what the bases of a denial would have been. For example, an applicant may be disqualified if, among other things, he has a prior conviction for a felony or other "serious offense"; he has an outstanding warrant for a felony or a serious offense; he is a fugitive from justice; he has a history of mental illness; he is an unlawful user of, or addicted to, a controlled substance as defined in section 21 U.S.C. 802; or an outstanding order of protection has been imposed against him. *See* Penal Law § 400.00(1)(c)-(n).

Thus, although defendant could certainly have been disqualified from obtaining a firearm license based on his prior felony conviction, the present record does not

permit this Court to rule out the possibility that defendant's application for a firearm license could have been denied based on one or more of the other valid disqualifying grounds in Penal Law § 400.00(1). *See People v. McLean*, 15 N.Y.3d 117, 121 (2010) (appellate court cannot consider claim absent "a factual record sufficient to permit appellate review") (quoting *People v. Kinchen*, 60 N.Y.2d 772, 773-74 [1983]). Defendant bears the full responsibility for the record's inadequacy with regard to the range of ineligibilities that might have applied to him, for his failure to apply for a license deprived the licensing officer of an opportunity to perform a background check, and his failure to raise his *Bruen* claim before the trial court deprived the People of an opportunity to introduce evidence bearing on this issue. Given that, absent a license application, it is impossible to know whether defendant would have been able to satisfy all of the licensing requirements, defendant cannot rely on *Bruen* to challenge his conviction for unlicensed firearm possession. *See Decastro*, 682 F.3d at 163 (""a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court"") (quoting *Parker v. Levy*, 417 U.S. 733, 59 [1974] [internal quotation marks omitted]); *accord People v. Nelson*, 69 N.Y.2d 302, 308 (1987) ("[A]ny element of vagueness in this statute has had no effect on these defendants and they have no standing to complain of it.").

If defendant wished to challenge the constitutionality of any of New York's firearm licensing requirements, the way to do so would have been to apply for a firearm

license and then, if his application was denied on an unconstitutional ground, challenge the determination through a civil suit. *See, e.g.*, *Callahan v. City of New York*, 208 A.D.3d 422, 423 (1st Dept. 2022) (granting Article 78 petition challenging pre-*Bruen* denial of firearm license on the ground that applicant lacked proper cause). This is precisely what the plaintiffs in *Bruen* did. *People v. Williams*, 76 Misc. 3d 925, 931 (Sup. Ct., Kings County 2022) ("the applicants in *Bruen*, unlike the defendant here, challenged the denial of their unrestricted carry licenses through proper legal procedures, and not by violating any Penal Law provisions").

Defendant, by contrast, ignored the licensing requirement altogether, obtained a handgun without a license to do so, and now seeks to raise a belated challenge to the licensing scheme only after being convicted of a weapon-possession offense. Under these circumstances, defendant lacks standing to assert his collateral challenges to various individual provisions of the licensing scheme. *See Decastro*, 682 F.3d at 163 ("a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court") (quoting *Levy*, 417 U.S. at 759 [internal quotation marks omitted]); *accord Nelson*, 69 N.Y.2d at 308 ("any element of vagueness in this statute has had no effect on these defendants and they have no standing to complain of it").

In short, because he has not demonstrated that he ever applied for a license, defendant lacks standing to challenge the State's firearm-licensing scheme.

C. Defendant's *Bruen* Claim is Meritless.

As discussed above, defendant's challenge to New York's gun laws rests on a fundamental misreading of them. Defendant argues that New York's gun laws violate *Bruen*'s historical tradition test because they forbid firearm possession "on the basis of any conviction of any kind" (DB: 38). But New York has no such law. Rather, New York's weapon-possession statutes prohibit firearm possession only if the defendant lacks a firearm license. *Hughes*, 22 N.Y.3d at 50; *see also* Penal Law § 265.20(a)(3) (exempting from liability for weapon-possession charges, including second-degree criminal possession of a weapon, any person "to whom a license therefor has been issued"). A prior criminal conviction can be a basis for denying a firearm license only if the conviction is for a felony or "other serious offense." Penal Law § 400.00(1)(c). The "prior crime exception" in Penal Law §§ 265.03(3) and 265.02(1) does not criminalize any act of firearm possession but simply enhances the sentencing exposure of certain defendants who possessed a firearm without a license. *See Hughes*, 22 N.Y.3d at 49. Moreover, New York's *actual* gun laws are entirely constitutional.

i. New York's Licensing Scheme is Constitutional.

There are two flaws in the argument that defendant's weapon-possession conviction is invalid because it is unconstitutional to deny firearm licenses to felons. First, that licensing requirement is entirely constitutional. Second, striking down that licensing requirement would not invalidate the weapon-possession statutes because the rest of the licensing scheme is severable from that single requirement. Indeed, this

Court has repeatedly found that *Bruen* challenges to the weapon-possession statutes were meritless even though the defendant possessed a firearm before 2022, when *Bruen* struck down the "proper cause" requirement in former Penal Law § 400.00(2)(f). *See, e.g.*, *People v. Guity*, 223 A.D.3d 598, 598 (1st Dept. 2024) (2020 conviction); *Quiles*, 217 A.D.3d at 636 (2019 conviction); *Artis*, 216 A.D.3d at 516 (2019 conviction, as amended January 31, 2022); *Adames*, 216 A.D.3d at 519 (2016 conviction); *People v. DeLarosa*, 219 A.D.3d 1230, 1230 (1st Dept. 2023) (2019 conviction).

(a) The Historical Tradition Test Does Not Forbid States from Denying Firearm Licenses to Convicted Felons.

The historical tradition test "permits more than just those regulations identical to ones that could be found in 1791." *United States v. Rahimi*, 602 U.S. 680, 691-92 (2024). Rather, the analysis turns on whether the challenged regulation is "consistent with the principles that underpin our regulatory tradition"; "central to this inquiry" are the "[w]hy and how" of the challenged regulation: it is "relevantly similar" to Founding Era laws if the latter imposed "similar restrictions for similar reasons." *Id.* at 692. Courts also consider "evidence from around the adoption of the Fourteenth Amendment" in 1868. *Bruen*, 597 U.S. at 60.

It is entirely "consistent with" the nation's historical tradition of firearm regulation, *Bruen*, 597 U.S. at 24, to disarm individuals who have previously been convicted of a felony. The Supreme Court has confirmed that its recent Second Amendment caselaw should not be "taken to cast doubt on longstanding prohibitions

on the possession of firearms by felons." *Bruen*, 597 U.S. at 81 (Kavanaugh, J., concurring) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 [2008]). *Bruen* also made clear that States may continue to maintain firearm-licensing requirements that are "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* at 38 n.9 (quoting *Heller*, 554 U.S. at 635).

Moreover, since the Supreme Court's decision in *Bruen*, courts have repeatedly upheld prohibitions on the possession of firearms by felons. *See, e.g.*, *United States v. Williams*, 113 F.4th 637, 657 (6th Cir. 2024); *United States v. Gay*, 98 F.4th 843, 846-47 (7th Cir. 2024); *Vincent v. Garland*, 80 F.4th 1197, 1200-02 (10th Cir. 2023), *vacated*, No. 23-683, --- U.S. ---, 144 S.Ct. 2708, --- L.Ed.2d ---- (Mem.) (U.S. July 2, 2024); *United States v. Dubois*, 94 F.4th 1284, 1291-93 (11th Cir. 2024), *vacated*, No. 24-5744, --- U.S. ---, --- S.Ct. ---, 2025 WL 76413 (Mem.) (U.S. Jan. 13, 2025);[4] *United States v. Fayton*, 704 F.Supp.3d 449, 454-55 (S.D.N.Y. 2023); *United States v. Riley*, 635 F.Supp.3d 411, 424-29 (E.D. Va. 2022); *United States v. Hill*, 629 F.Supp.3d 1027, 1029-31 (S.D. Cal. 2022); *see also United States v. Perez-Garcia*, 96 F.4th 1166, 1180-84 (9th Cir. 2024) (noting the "longstanding tradition of prohibiting convicted *felons* from possessing guns") (emphasis in original). Those decisions, and the cases they cite, provide ample historical precedent for New York's felon disarmament law. For example, during the Founding

[4] *Garland* and *Dubois* were vacated and remanded for further consideration in light of the Supreme Court's decision in *Rahimi*. This is a "common" practice: the Supreme Court "often vacates cases related to recently decided matters so that the courts of appeals can review those matters anew under the revised mode of analysis." *Williams*, 113 F.4th at 646 n.3.

Era, the "standard penalty" for a felony was death. *Perez-Garcia*, 96 F.4th at 1184-85 (quoting *Baze v. Rees*, 553 U.S. 35, 94 [2008] [Thomas, J., concurring]); *see, e.g.*, Act of Feb. 21, 1788, *reprinted in 2 Laws of the State of New York Passed at the Sessions of the Legislature 1785-1788*, at 664-65 ("N.Y. Act of 1788") (mandating death penalty for enumerated felonies upon a first offense and for any felony if the defendant had a prior felony conviction).[5] And, as the Sixth Circuit explained in *Williams*, the death penalty served the same purpose that is currently achieved by disarmament: safeguarding society from dangerous individuals. *Williams*, 113 F.4th at 658 ("the death penalty served to eliminate those too dangerous to have a place in society before the development of prisons").

On appeal, defendant argues that the licensing requirement was unconstitutional as applied to him because bribery is a non-violent felony (DB: 38). However, defendant has waived his as-applied challenge by pleading guilty. *See People v. Greenfield*, 100 A.D.2d 752, 752-53 (1st Dept. 1984) (guilty plea waived claim that Penal Law § 275.10 was "unconstitutional as applied to defendant"); *People v. Devers-Scott*, 248 A.D.2d 1024, 1024 (4th Dept. 1998) ("Although defendant by pleading guilty did not forfeit the right to challenge the constitutionality of the statute, she thereby forfeited the right . . . to contend that the statute was unconstitutionally applied to her."); *People v. Loday*, 73 Misc. 3d 137(A), *1 (App. Term, 1st Dept. 2021) (defendant's claim that unlicensed general

[5] Available at https://babel.hathitrust.org/cgi/pt?id=uc1.b4375239&seq=674 (accessed on January 28, 2025).

vending charge "was unconstitutionally applied to him was forfeited by the guilty plea") (citing *People v. Levin*, 57 N.Y.2d 1008, 1009 [1982]).

Regardless, the historical evidence confirms that it is constitutional to disarm a person based on a non-violent felony. *See Hill*, 629 F.Supp.3d at 1031 (rejecting post-*Bruen* as-applied challenge to felon-in-possession law on the ground that "the historical evidence . . . leads us to reject the argument that non-dangerous felons have a right to bear arms") (quoting *Medina v. Whitaker*, 913 F.3d 152, 158-60 [D.C. Cir. 2019]). Indeed, during the Founding Era, "nonviolent crimes such as forgery and horse theft were capital offenses." *Perez-Garcia*, 96 F.4th at 1183; *see also* N.Y. Act of 1788 (mandating death penalty for forgery and counterfeiting upon a first offense).

Furthermore, when reviewing a post-*Bruen* claim that a felon disarmament law is unconstitutional as applied to a particular defendant, the court must look to the defendant's "entire criminal record—not just the predicate offenses" that triggered his disarmament. *Williams*, 113 F.4th at 657. Two kinds of prior crimes are particularly useful indicators that a defendant may be dangerous: "crimes against the person," such as "assault," which are inherently "violent act[s]," and crimes that "often lead[ ] to violence," such as "burglary" or "drug trafficking." *Id.* at 658-59 (quotations omitted); *see also United States v. Strong*, 775 F.2d 504, 508 (3d Cir. 1985) (common sense supports the "equation of drug trafficking with dangerousness to the community"); *Perez-Garcia*, 96 F.4th at 1190 (same). Here, defendant had a prior misdemeanor conviction for Attempted Assault in the Third Degree (Penal Law § 120.00), which resulted in a

sentence that included an order of protection. Thus, even in courts that have entertained as-applied challenges to felon disarmament laws, defendant's criminal history would have readily distinguished him from those who have prevailed on such claims. *See, e.g.*, *Range v. Att'y Gen. of Am.*, 69 F.4th 96, 103-06 (3d Cir. 2023) (finding federal felon-in-possession statute unconstitutional as applied to the defendant with prior conviction for making false statement on food stamp application), *judgment vacated sub nom. Garland v. Range*, --- U.S. ---, 144 S.Ct. 2706, 219 L. Ed. 1313 (2024).

(b) Striking Down a Single Licensing Requirement Would Not Invalidate the Firearm Licensing Scheme.

Even if it is unconstitutional to withhold a firearm license based on an applicant's prior felony conviction, defendant's conviction of second-degree criminal possession of a weapon would still stand because the prior felony prohibition can be easily excised from Penal Law § 400.00, and the remainder of that statute—and the balance of New York's licensing scheme—would remain in force. As the Court of Appeals recognized, "unconstitutional subdivisions" of state statutes "may be severed from the valid and the remainder of the statute preserved." *People v. Viviani*, 36 N.Y.3d 564, 583 (2021) (quoting *Westinghouse Elec. Corp. v. Tully*, 63 N.Y.2d 191, 196 [1984]). Severance is a question of state law that turns on whether, if the Legislature had "foreseen" the "partial invalidity" of the statute in question, that body would have "wished the statute to be enforced with the valid part exscinded, or rejected altogether." *Viviani*, 36 N.Y.3d at 583 (quoting *People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N.Y. 48, 60 [1920]).

The answer to that question "must be reached pragmatically, by the exercise of good sense and sound judgment, by considering how the statutory rule will function if the knife is laid to the branch instead of at the roots." *Viviani*, 36 N.Y.3d at 583 (quoting *Alpha Portland Cement Co. v. Knapp*, 230 N.Y. at 60).

Here, there can be no question that the Legislature would *not* jettison New York's entire firearm licensing scheme simply because it could no longer deny a firearm license on the basis of a prior felony conviction. In all likelihood, the Legislature would do what it did after *Bruen* struck down the former "proper cause" requirement: enact legislation to excise the offending provision and buttress the other licensing requirements to ensure that licenses will be granted only to law-abiding citizens. *See* L.2022, ch. 371 § 1. For example, if a court found that States could not deny firearm licenses to non-violent felons, the Legislature could simply replace the existing licensing requirement with one that disqualified only violent felons. Thus, common sense and reality demonstrate that—if found unconstitutional—the requirement that an applicant not be a felon should be severed from the remainder of the licensing statute, leaving intact the other requirements for licensure in New York.

In sum, defendant's challenge to New York's firearm licensing scheme fails on the merits because the requirement that an applicant not be a felon is consistent with the nation's longstanding prohibitions against the possession of firearms by felons, and regardless, the rest of the licensing scheme is severable from that single provision.

ii. The "Prior Crime Exception" in Penal Law §§ 265.03(3) and 265.02(1) is Constitutional.

As the Court of Appeals explained in *Hughes*, the "prior crime exception" serves only to enhance the sentencing exposure of a defendant who is already liable for a weapon-possession offense:

> Under Penal Law § 265.01(1), a person who "possesses any firearm" is guilty of criminal possession of a weapon in the fourth degree, a misdemeanor. But a person who possesses "any loaded firearm" is guilty of criminal possession of a weapon in the second degree, a class C felony (Penal Law § 265.03[3]), unless "such possession takes place in such person's home or place of business" (*id.*). The home or business exception is inapplicable, however, if the person possessing the weapon "has been convicted of any crime" (Penal Law § 265.02[1]).

Hughes, 22 N.Y.3d at 49. *Hughes* also explained why, contrary to defendant's theory (DB: 11), the rule does not criminalize firearm possession due to a prior criminal conviction of any kind: New York's gun laws "prohibit only *unlicensed* possession of handguns," and, although an applicant will be disqualified for a license if he has a prior conviction for a felony or other serious offense, "most misdemeanants . . . are eligible for licenses to have guns." *Id.* at 50-52. (citing Penal Law §§ 265.20[a][3], 400.00[1][c]).

Defendant does not argue that, when a person is charged with an illegal act of unlicensed firearm possession, it is unconstitutional to use a prior criminal conviction to enhance his sentencing exposure. Defendant has thus abandoned that argument, and this Court should not entertain it. *See People v. Reid*, 97 A.D.3d 1037, 1039 (3d Dept. 2012) (declining to review defendant' argument that "could have been—but was not—

raised in his initial brief"); *see also Zhang v. Gonzalez*, 426 F.3d 540, 541 n.1 (2d Cir. 2005) (finding abandoned issues and claims not raised in opening brief).

Regardless, *Bruen*'s historical tradition test does not apply to the prior crime exception. The historical tradition test applies only when a challenged state law regulates "an individual's conduct." *Bruen*, 597 U.S. at 24. The prior crime exception does not regulate an individual's conduct, for there is no act of firearm possession that would be legal but-for the rule. Nothing in *Bruen* suggested that its test for evaluating statutes directly regulating firearm possession also applies to rules governing the sentencing exposure of individuals who illegally possess firearms. Moreover, entertaining a *Bruen* challenge to the prior crime exception would open the floodgates to defendants seeking to challenge their weapon-possession convictions on the dubious ground that the Second Amendment forbids the State from sentencing them as predicate felons. Furthermore, punishing offenders more severely based on prior criminal history is entirely consistent with the nation's historical tradition of firearm regulation. *See, e.g.*, N.Y. Act of 1788 (mandating death penalty for any felony if the defendant has a prior felony conviction).

Finally, defendant could not prevail on a facial constitutional challenge to the prior crime exception unless he could also show that the rule was unconstitutional as applied to him. *See United States v. Jackson*, 69 F.4th 495, 502 (8th Cir. 2023) (criminal defendant's Second Amendment challenge to federal weapon-possession statute failed where statute was constitutional as applied to him). However, defendant would be

unable to show that it would be unconstitutional to enhance his sentencing exposure for illegally possessing a firearm based on his own criminal history. To take but one example from that history, it would be perfectly constitutional to enhance defendant's sentencing exposure based on his prior conviction for attempted third-degree assault, which resulted in a sentence that included an order of protection. *See Williams*, 113 F.4th at 658 (a defendant's dangerousness can be demonstrated by prior "crimes against the person," including "assault").

* * *

In sum, defendant's unpreserved, and meritless constitutional challenge to his conviction under Penal Law § 265.03(3) should be rejected.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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January 2025

To be argued by:
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Time Requested: 10 Minutes

New York Supreme Court

Appellate Division -First Department

THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT

v.

ARNOLD CONYERS, DEFENDANT-APPELLANT

New York County
Ind. No. 3387-16
App. Case No. 2019-1469

REPLY BRIEF FOR DEFENDANT-APPELLANT

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March 7, 2025

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- ARNOLD CONYERS, Defendant-Appellant.	Ind. No. 3387-16 App. Case No. 2019-1469

STATEMENT IN REPLY

This reply responds to respondent's brief ("RB"). In *Wilson v. Hawaii*, 145 S. Ct. 18 (Dec. 9, 2024), three concurring justices specifically rejected Respondent's standing arguments and vitiated its preservation complaints on due process grounds. Failing its *Bruen* burden of historical proof, Respondent cites no historical law criminalizing felons' gun possession and ignores Justice Barrett's admonition there were none. It relies on non-binding, often already-vacated opinions that turn on failed amendments, dicta, and laws that – it does not dispute – disarmed non-citizens, not felons. It argues that the historical death penalty authorizes modern disarmament, but the Court of Appeals rejected that argument and Justice Barrett warned that its facts are wrong. Respondent does not dispute facts fatal to its burden, such as congressional statements that disarming former confederates would violate the Second Amendment, or laws requiring felons to arm themselves to fight the Revolutionary War. This unconstitutional conviction must be dismissed.

POINT I

A. Respondent's Procedural Arguments Violate Due Process and State Law

Respondent's procedural arguments violate federal and state due process and fail under state law.

"States cannot mandate that would-be gun owners go through an unconstitutional licensing process before they may invoke their Second Amendment rights" in criminal proceedings. *Wilson v. Hawaii*, 145 S. Ct. 18, 20-21 (2024) (Thomas, J., and Alito, J., concurring) (internal citations omitted)); *see also* Appellant's Brief ("AB") at 38-42. The memorandum opinion denied a writ of certiorari as premature, but three justices wrote separately to encourage the defendant to re-apply because Hawaii, like New York, cannot "invoke[e] state standing law to dodge [Mr. Conyers' Second Amendment] challenge" to his criminal gun possession conviction. *Wilson* at 20-21. Doing so violates federal due process and impermissibly relegates the Second Amendment to a "second-class right." *Id.*; *Baughcum v. Jackson*, 92 F.4th 1024, 1035 (11th Cir. 2024) (for Article III standing purposes, litigants need not make a "futile gesture" of first applying for a license when "they do not meet the state's requirements for license holders").

"The trouble with" the state's attempts to isolate the criminal gun laws from the gun licensing scheme "is that the …statutes under which [Mr. Conyers] was charged work hand-in-glove with" the licensing scheme. *Wilson* at 22-23 (Gorsuch, J., concurring). The prosecution does not dispute that P.L. § 400.00(1)(c) categorically

barred Mr. Conyers from obtaining a gun license on the basis of his prior non-violent felony convictions, meaning that he could not possess a gun even in his own home without committing the violent felony of second-degree criminal weapon possession. Because Mr. Conyers argues that, read "together – the prohibitions, even when read in light of the exceptions – restrict [his Second Amendment] right. . . more than the Constitution allows," this Court must grapple with that argument on the merits to honor due process. *Wilson* at 22-23.

Federal due process also forbids using preservation to bar review. *See id.* at 20-22. State procedural rules cannot be applied unequally to disfavored rights. *Id.* Respondent argues that, while a futility exception exists under current law for other kinds of constitutional arguments, "there is no futility exception for … *Bruen* claims." (RB at 7). An unequal, first-of-its-kind refusal to apply the futility exception to *Bruen* claims relegates the Second Amendment to being a second-class right and denies Mr. Conyers due process. In announcing a Second Amendment standard *Bruen* held unconstitutional, *People v. Hughes*, 22 N.Y.3d 44 (2013) – a case also involving prior conviction and possession in a home lately shared with an ex-romantic partner – rendered trial court objection futile by "foreclos[ing] the arguments" made here. Due process forbids denying this *Bruen* claim review on preservation grounds when the futility doctrine normally would apply to them. *Wilson* at 20-21; AB at 38-42.[1]

[1] Respondent's waiver arguments are unconstitutional for similar reasons. Respondent claims that Mr. Conyers "waived" his right to challenge the constitutionality of his conviction through a guilty plea.

Respondent is also wrong on state law grounds. *People v. Cabrera*, 41 N.Y.3d 35 (2023) did not require preservation for a Second Amendment challenge to (1) a prior conviction; (2) subjecting someone to violent felony conviction for gun possession; (3) under P.L. § 265.03(3) and 265.02(1); (4) even for possession in a home; (5) he had lately shared with a romantic partner. *Hughes* and this case both involve all five factors. *Cabrera* had none; it was a simple unlicensed possession matter. It thus did not decide whether *Hughes* rendered futile a Second Amendment objection in a case involving all five – and Mr. Conyers' does. *See id.*; AB at 39-40.

Under *Bruen*, Mr. Conyers' claim is functionally indistinguishable from *Hughes'*. *Bruen* held that punishment – the "how" of a law limiting gun possession – is, as Respondent admits, "central to the inquiry" whether that law is constitutional (RB at 14 (quoting *Bruen*)), just as "central" as the reason for the law, "the why," in this case, prior conviction. *Id.* Analyzing how much prior conviction may be used to burden the Second Amendment right is the whole *Bruen* ballgame. When *Hughes* made means-end scrutiny the umpire, it rendered futile the precise analysis that *Bruen* now demands.

RB at 38. First, accusing Mr. Conyers of conduct that cannot be constitutionally criminalized is a *non-waivable* jurisdictional defect in the indictment. AB at 40 (*citing*, e.g., *People v. Iannone* 45 N.Y.2d 589, 600-01 (1978)). Even if were waivable, the government must prove beyond a reasonable doubt that any alleged waiver of this "fundamental right" was "an intentional relinquishment of . . a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Because *Bruen* had not yet been decided and *Hughes* foreclosed the arguments that Mr. Conyers raises, it is impossible for the People to prove beyond a reasonable doubt that he "intentionally" relinquished a "known" right, particularly where the lower court lamented that, though Mr. Conyers' criminal record was non-violent, the statutory scheme nonetheless required the court to sentence Mr. Conyers to five years' imprisonment to be followed by five years' post-release supervision for simple possession within a residence where he had not trespassed. P:3-6.

In any event, *Cabrera* did not require *trial court* preservation of pre-*Bruen Bruen* facial challenges. *Cabrera* itself reviewed a First Department opinion entered a week before *Bruen* was decided, meaning that the *Cabrera* court had *no* prior *Bruen* analysis to review and that its holding was limited to matters where there was also no intermediate appellate development of the issue. While *Cabrera* was concerned that it had nothing like the voluminous briefing before the *Bruen* court, there are now dozens of readily available state and federal opinions, law review articles, and historical journals dealing with precisely these questions, publicly available sources extensively cited in the briefing now before the Court and on which other courts readily rely. Further, because *Bruen* only recognizes historical analogues that were *widespread across many jurisdictions* at the time, requiring individualized "historical record" development in state trial courts has no benefit and substantial risk for harm and abuse. History has already happened, laws or the lack of them are classic subjects for judicial notice, and busy trial courts are not better equipped to deal with scholarly research than appellate courts. That is particularly true where *amici* may be permitted entrance at any stage, and the same factual burden drawing from the same permissible sources is always on the same well-heeled party throughout every *Bruen* challenge to this statutory scheme: the government, rendering the normal purposes of individual factual record development useless.

Cabrera only wanted an individual record developed below for as-applied *Bruen* challenges for reasons *Wilson* undermines. *Cabrera* wanted the state's response to an as-applied challenge to include an opportunity "to argue that [appellant] would have been

otherwise ineligible to obtain a license." *Cabrera* at 51; *see also* RB at 9, 17-18 (speculation on other grounds to bar gun possession). But the *Wilson* opinions make that irrelevant. Mr. Conyers can challenge his conviction under an unconstitutional law "even if [his] 'conduct could [have been] proscribed by a properly drawn statute.'" *Wilson* at 20-21 (*quoting Freedman v. Maryland*, 380 U.S. 51, 53 (1965)). The question is not whether Mr. Conyers' *could have* been prosecuted and convicted lawfully, the question is whether he *was*, under the statutory scheme challenged here, which categorically and forever barred him from lawfully possessing a gun anywhere for any reason, even in the home. *Id.*

Respondent's only specific claim of prejudice evaporates on inspection. It complains there was no chance to "avoid any constitutional error" by prosecuting Mr. Conyers for a lesser-included count of fourth-degree weapon possession. RB at 17-18. But one cannot be guilty of*, inter alia*, fourth-degree possession of a handgun if "a license therefor has been issued . . . under § 400.00" P.L. § 265.20(a)(3). Penal Law §400.00(1)(c) renders Mr. Conyers categorically *ineligible* for any gun license because of his prior non-violent felony conviction. Respondent's purported escape route is another statutory scheme categorically criminalizing the exercise of Second Amendment rights on the basis of prior conviction; therefore, same *Bruen* problems afflict it.

The Constitution is not a shell game. Mr. Conyers is entitled to this Court's review of Respondent's failure to meet its burden of historical proof under *Bruen*.[2]

[2] Respondent's plea to avoid interest of justice review cites cases dealing with different legal prohibitions and different equitable concerns. RB at 8 (citing *People v. Adames*, 216 A.D.3d 635 (1st

B. Respondent's Burden-Shifting is Illegal

Respondent's insistence that Mr. Conyers' conviction cannot be overturned unless the statutory scheme's "unconstitutionality has been established beyond a reasonable doubt" inverts the controlling standard. RB at 8. Rather than requiring appellant to prove a statute's unconstitutionality, *Bruen* placed the burden of proof squarely on the *government*, which must offer historical analogues sufficient in kind and scope to justify a finding that its statute is constitutional. AB Point I(B). Because Mr. Conyers proved and Respondent does not dispute that he and other former offenders are part of "the People" the Second Amendment protects, AB Point I(A), "the burden [now] falls on respondent[] to show that New York's [challenged statutory scheme] is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. 1, 4 (2022).

C. Respondent Does not Meet its Burden

Respondent does not dispute scholars' and Justice Barrett's exhaustive research finding that no historical law or set of laws prohibited gun ownership based on criminal conviction. AB Point I(C)(1). The inquiry should end there, *id.*, because the lack of any historical law "distinctly similar" to the statutory scheme at issue "is strong if not

Dept. 2023) (defendant under 21); *People v. Artis*, 216 A.D.3d 516 (1st Dept. 2023) (defendant under 19); *People v. Quiles*, 217 A.D.3d 635 (1st Dept. 2023) (involving altercation in the street).

conclusive evidence that the law 'is inconsistent with the Second Amendment.'" *United States v. Duarte*, 101 F.4th 657, 677 (9th Cir. 2024) (*quoting Bruen* at 27).

1. Respondent's Only Specific Historical "Proof" is Factually Inaccurate and the Court of Appeals has Already Rejected it.

Respondent's single paragraph of historical "proof" argues that modern felon disarmament laws are lesser-included echoes of a historical "tradition" of capital punishment for felonies. RB at 17. That argument is factually wrong and barred by precedent from our own Court of Appeals. AB at 13-16, 25-26; *id.* at n.18.

First, capital punishment was rare and therefore not a historical "tradition" for *Bruen* purposes as a factual matter. Justice Barrett found that "capital punishment in the colonies was used 'sparingly'." *Kanter*, 919 F.3d 459 (Barrett, J., dissenting) (internal citations omitted). Death was a standardly *authorized* punishment but it was not a standardly *given* punishment[3] – people with death-eligible felony convictions were often

[3] *See* AB at 13-16; *see also, e.g.*, Joel Prentiss Bishop, Commentaries on Criminal Law (Boston, 1873) at §§ 749-50, 762) (describing importance of the pardon power). But it is also critical to understand that what constituted a death-eligible and thus felony offense during the *Bruen* historical period was radically different than it is today. *Id.* "To apply the rule [for felonies at common law] blindly today . . . makes as much sense as attempting to interpret Hamlet's admonition to Ophelia, 'Get thee to a nunnery, go' without understanding [that at the time "nunnery" referred to a house of prostitution] . . . for the fact is that a felony at common law and a felony today bear only slight resemblance." *United States v. Watson*, 423 U.S.411, 438-40 (1976); *see also, e.g.*, *United States v. Gallagher*, 25 F. Cas. 1241, 1241-42 (C.C.D.N.Y. 1832) ("In North Carolina, the court may [only] inflict a fine" for "assault and battery with intent to kill; they are not [even] bound to imprison. . . In Pennsylvania. . . assault and battery with intent to commit a capital offence. . . [are] offenses not capital" i.e. not felonies, and even terms of imprisonment for that offense were subject to excessive sentence reduction.); Miss. Act of 1837, An Act to Prevent the Evil Practice of Duelling in this State §9 (a person "carrying any . . . deadly weapon. . .[who] unlawfully use[s] the same in any fight or quarrel . . . shall be imprisoned not exceeding three months"). Respondent just does not have its facts straight.

entitled to automatic full pardons and often received full pardons after certain conditions were met. AB at Point I(C)(1)(a). There was no incarceration as we know it today, former offenders were not disarmed, and during the Revolutionary War, both state and federal governments passed laws requiring everyone – including felons – to arm themselves, resulting in historical proof that felony offenders fought for independence. *Id.* That is, historical capital punishment itself does not qualify as a tradition for *Bruen* purposes. *See id.* at Point I(B).

Second, our own Court of Appeals held that the great historical power to kill or incarcerate *did not include* a "lesser" historical power to extinguish constitutional rights for living, non-incarcerated former offenders. Examining New York's law barring convicted duelists from office, the Court of Appeals explained that "[t]hough the legislature have an undoubted power to prescribe capital punishment, and other punishments [such as incarceration] which produce a [temporary] disability to enjoy constitutional rights," those great powers did not imply the power to extinguish the underlying rights or limit them for free former offenders. *Barker v. People*, 3 Cow.686, 706; 1824 WL 2277 (N.Y. 1824). Fundamental, enumerated constitutional rights "are secured to criminals, as well as to others." *Id.* Because the challenged statutory scheme "operate[s] as an infringement of [an enumerated constitutional right on the basis of prior conviction, it is] unconstitutional." *Barker* at 706. *Barker* was influential across state lines in its own time, making *it* a historical tradition for *Bruen* purposes, one that requires dismissal of Mr. Conyers' conviction. *See* AB at 25-26 (collecting cases).

2. Respondent Otherwise Relies on Cases Recounting the Disarming of Non-Citizens, Proposed Constitutional Amendments that Failed, and Dicta.

Declining to marshal any other proof, Respondent deputizes a list of decisions "and the cases they cite" to meet its burden, failing abjectly. RB at 15. Its deputized decisions and their internal citations do not recount any historical law or tradition disarming someone on the basis of a conviction, let alone criminalizing gun possession on that basis. Rather, they recount laws disarming non-citizens not part of "the People" the Second Amendment protects, proposed constitutional amendments that failed, and *dicta*; several of the cited decisions have already been vacated and remanded for reconsideration. This motley crew does nothing to meet Respondent's burden of historical proof.

Respondent does not dispute that "the only [historical] laws with a similar burden [to the challenged statutory scheme][4] regulated non-citizens," and others excluded from "the People" the Second Amendment protects because they did not meet loyalty tests. AB Point I(C)(1)(b). The only American gun laws mentioned in Respondent's cases prove Appellant's point. Respondent cites *United States v. Williams*, 113 F.4th 637 (6th Cir. 2024), which only cites categorical American disarmament laws applying to "seditious" people (a colonial law only in force prior to 1789), Native Americans, and Blacks, *i.e.*, people whom racist historical laws had first excluded from citizenship itself.

[4] Respondent cites *United States v. Perez-Garcia*, 96 F.4th 1166, 1180-84 (9th Cir. 2024), but that only analyzed the question of whether someone facing *pending* criminal charges may *temporarily* be disarmed as a bail condition.

Duarte at 679, AB at 17. It otherwise cites laws disarming British loyalists and others disloyal to the United States who could nonetheless keep their guns if they swore loyalty oaths. *Williams* at, e.g., 651; *United States v. Riley*, 635 F. Sup. 3d 411 (E.D. Va. 2022) (same); *see also United States v. Perez-Garcia*, 96 F.4th 1166, 1180-84 (9th Cir. 2024) (holding that someone facing *pending* felony charges may *temporarily* be disarmed as a bail condition and, in *dicta*, recounting laws totally disarming people "because of perceived disloyalty to the government" as well as laws temporarily confiscating arms on other bases).[5] These are not permanent disarmaments on pain of imprisonment that support the challenged statutory scheme's "why and how" of permanently criminalizing gun possession on the basis of prior conviction, let alone Mr. Conyers' non-violent prior convictions.

Next, some of Respondent's deputized cases lean not on laws but on three failed proposals for constitutional language that never became law. *See Williams*, 113 F.4th at 654-56; *Riley*, 635 F. Supp.3d at 426-28; *Perez-Garcia*, 96 F.4th 1166, 1188. Language the

[5] *Perez-Garcia* also recounts pre-1689 English history that the English Declaration of Rights – and thus our own Constitution, which was modeled on that Declaration – was enacted *to reject*. *Compare Perez-Garcia* at 1186-87 to *Rahimi*, 144 S.Ct. at 1899 (the English Declaration was adopted "by way of rebuke" to pre-1689 abuses); AB at 34-36 (recounting early American legislators' and courts' rejection of the English practices on which *Perez-Garcia* partially relies). *Perez-Garcia* also cites Diarmuid F. O'Scannlain, *Glorious Revolution to American Revolution: The English Origin of the Right to Keep and Bear Arms*, 95 Notre Dame L. Rev. 397 (2019) for the proposition that the practice of disarming "dangerous" people "continued unabated" after the English Declaration was adopted, but that is not what the article recounts. Rather, it recounts that *Catholics* continued to be disarmed because they were perceived as disloyal to the English crown after decades of religious civil war in England, *id.* at 405, underlining the point that one had to be not merely "dangerous" to be totally disarmed but to be treated as a disloyal non-citizen. *See* AB at Point I(C)(1)(b).

Founders declined to adopt does not create any tradition, let alone one entitled to *Bruen* deference. AB at Point I(C)(3). Rather, given the historical context for each rejection – which appellant recounts at length and Respondent does not dispute – their failure is strong evidence that the founders did not believe that prior misconduct could or should extinguish someone's Second Amendment rights. *See id.*

The remaining "proof" in Respondent's deputized cases is not historical fact but abrogated *dicta*. Respondent lists *United States v. Gay*, 98 F.4th 843 (7th Cir. 2024), but *Gay* relies on the "law-abiding, responsible citizen" *dicta* that *Rahimi* specifically cautioned courts against using *because it is dicta*, not a *Bruen* regulatory tradition or historical fact or proof. *Gay* at 846-47; *United States v. Rahimi*, 2024 WL 3074728 at *3 (U.S. June 21, 2024); AB at Point I(A)(1) (collecting decisions discussing *Bruen dicta* problem). Indeed, many of Respondent's citations are not good law. The Supreme Court vacated and remanded several for further consideration in light of *Rahimi* after each refused to recognize that *Bruen* overruled federal intermediate appellate courts' *pre-Bruen* law on gun rights and relied on "law-abiding, responsible citizen" dicta *Rahimi* abrogated. *Vincent v. Garland*, 80 F.4th 1197 (2023), *vacated and remanded by Vincent v. Garland*, 144 S.Ct. 2708 (2024); *United States v. Dubois*, 94 F.4th 1284 (11th Cir. 2024), *vacated and remanded by Dubois v. United States*, 2025 WL 76413 (U.S. Jan. 13, 2025); *see also United States v. Fayton*, 704 F.Supp.3d 449, 454-55 (S.D.N.Y. 2023) (only relying on dicta that *Rahimi* abrogates); *United States v. Hill*, 629 F.Supp.3d 1027, 1029-31 (S.D. Cal. 2022)

(relying on pre-*Bruen* caselaw with different standard of historical proof); *Riley*, 635 F. Sup. 3d at 411 (relying on same abrogated pre-*Bruen* caselaw and dicta *Rahimi* rejects).

Respondent's "proof" is a house of cards.

Respondent is totally silent on Appellant's undisputed proof that our historical tradition rejected as unconstitutional various attempts to disarm people based on past misconduct at the Founding and at the point the Fourteenth Amendment incorporated the Second, all of which "surely . . . provide[s] some probative evidence of unconstitutionality." AB at Point I(C)(3) (*quoting Bruen* at 26-27). These include state and federal laws, congressional statements refusing to disarm confederate soldiers because doing so would violate their Second Amendment rights, state courts rejecting as unconstitutional state laws purporting to disarm people upon conviction. *Id.* Respondent also fails to dispute Appellant's proof that "earlier generations addressed the societal problem[s]" of armed violence and offender reentry "through materially different means," which tends to prove "that [the challenged] modern regulation is unconstitutional." AB at Point I(C)(2). These included *temporary* disarmament limited to ongoing specific threats of imminent violence and laws extinguishing only *political* rights for former offenders, rather than their gun rights, even in laws specifically aimed at a scourge of armed violence. *Id.*[6]

[6] Point I(C)(2) of Appellant's Brief and the analysis by now-Justice Barrett quoted within it explain why *Riley*, a case Respondent cites, is inapposite and that its "virtuous citizen" limitation for Second Amendment rights is wrong for many reasons, one being a fundamental misunderstanding of felon disenfranchisement, which is not valid authority for felon disarmament.

CONCLUSION

Respondent's procedural arguments violate due process, the two paragraphs it dedicates to meeting its *Bruen* burden of proof hold no water, and it leaves undisputed extensive historical proofs in Appellant's Brief that are fatal to its cause. The defense relies on and reincorporates its main briefing and asks this Court for dismissal.

Respectfully submitted,

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New York, New York
March 7, 2025