No. 26-46

In the Supreme Court of the United States

NUNZIO CALCE, et al.,

Petitioners,

v.

CITY OF NEW YORK, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

STEVEN BANKS
Corporation Counsel of the City of New York
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

RICHARD DEARING
Counsel of Record
CLAUDE S. PLATTON
INGRID R. GUSTAFSON
ELINA DRUKER

QUESTIONS PRESENTED

Petitioners brought a Second Amendment challenge to New York City's and New York State's prohibitions of electronic weapons. By summary order, the U.S. Court of Appeals for the Second Circuit affirmed the suit's dismissal at summary judgment, citing petitioners' failure to tender any evidence showing that electronic weapons are "in common use for lawful purposes"—an issue that then-extant circuit precedent placed at step one of the *Bruen* inquiry. The questions presented are:

1. Should this Court deny certiorari, where the summary order turned on deficiencies in this particular record, without resolving any broader question about the Second Amendment status of electronic weapons, and subsequent Second Circuit precedent has held that the formulation of *Bruen*'s step one in *Wolford v. Lopez*, 146 S. Ct. 2032 (2026), supplanted the prior circuit framework placing "common use" at that step?

2. Alternatively, should the Court hold the petition pending its decision in *Viramontes v. Cook County,* Case No. 25-238, and *Grant v. Higgins*, Case No. 25-566, where common use and its placement in the *Bruen* inquiry are key questions?

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INTRODUCTION

Petitioners assert a Second Amendment challenge to New York City's prohibition of the "sale and possession" of "electronic stun guns," N.Y.C. Admin. Code § 10-135, and a broader state-law prohibition of electronic weapons, N.Y. Penal Law § 265.01. In a nonprecedential decision, the Second Circuit upheld the grant of summary judgment to the respondents because petitioners had submitted "no evidence establishing common use" of electronic weapons "for lawful purposes" (Pet. App. 5a). The court held only that petitioners failed to carry their burden of production at summary judgment on the particular record here.

This Court should deny the petition for certiorari. To start, the Second Circuit's narrow, case-specific determination does not warrant this Court's review. The court of appeals did not resolve whether electronic stun and dart guns are in common use, whether they are covered by the plain text of the Second Amendment, or whether the challenged prohibitions of electronic weapons are constitutional. Instead, the court held only that, under Rule 56 of the Federal Rules of Civil Procedure, petitioners had failed to raise a material issue of fact as to a question on which they bore the burden of proof. Because the appeal was resolved based on the burden of proof

and deficiencies in the record here, the court had no occasion to reach any broader doctrinal questions.

What is more, the threshold legal question petitioners pose has been overtaken by subsequent doctrinal developments. Petitioners ask the Court to decide whether the Second Circuit applied the correct framework at step one of the two-step inquiry announced in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1 (2022), in placing the burden on the challenger to establish that the challenged laws prohibit weapons that are in common use. But the Second Circuit has since expressly departed from its prior precedent's framing of the step-one inquiry. In *Mills v. City of New York,* Case No. 24-3306, 2026 U.S. App. LEXIS 34484, at *15–17 & n.8 (2d Cir. Nov. 10, 2026)—issued after the petition here was filed—the court modified its framework in light of *Wolford*. The court reasoned that *Wolford* had clarified the inquiry at step one, and it adopted *Wolford*'s formulation, stating that *Wolford* had "supplanted" the court's prior framework placing the question whether arms are in common use at step one.

The court of appeals should be given an opportunity to apply *Wolford*, as it did in *Mills*, when assessing whether electronic weapons are protected by the Second Amendment. Since the court's decision

did not resolve that question, leaving it open for a subsequent challenge, there is no reason for this Court to take up the question in this case.

In the alternative, the Court should hold the petition until it decides *Viramontes v. Cook County,* and *Grant v. Higgins*. Those cases implicate key doctrinal questions posed by this petition, including what evidentiary burden Second Amendment challengers bear, whether "Arms" are properly limited to weapons in common use for lawful purposes, whether that inquiry is relevant at step one or step two, and whether the "common use" question is a function of historical restrictions on dangerous and unusual weapons. Given the likelihood that this Court will shortly resolve at least some of these questions, it would be appropriate to hold the petition pending decision of *Viramontes* and *Grant*, as petitioners themselves concede.

STATEMENT

1. In this lawsuit, petitioners allege that New York State's and New York City's prohibitions of electronic dart guns and stun guns for self-defense violate the Second Amendment (2d Cir. Appendix ("A") 16–18). State law, which the City enforces within its borders, generally makes it unlawful to

possess both stun guns—devices that pass "a high voltage electrical shock to [a] person" upon contact—and electronic dart guns (i.e., tasers)—devices that pass an electrical shock "by means of a dart or projectile." N.Y. Penal L. §§ 265.01, 265.00(15-a).[1] City law prohibits the sale and possession of electronic stun guns, but not electronic dart guns. N.Y.C. Admin. Code § 10-135.

2. After the close of discovery (SDNY Dkt. Minute Entry 10/19/2023), the parties cross-moved for summary judgment (SDNY Dkt. Nos. 25, 38). The City submitted a lengthy expert declaration detailing the history of electronic weapons in the United States. The expert averred that electronic weapons were not developed for self-defense; that, through the early 2000s, they were unlawful for civilians to carry in at least 17 states and 130 localities; and that despite their reputation as being "non-lethal," the use of electronic dart and stun guns often unexpectedly results in death (A293–300).

[1] Although the State is permanently enjoined from enforcing its prohibition on the possession and use of electronic dart and stun guns, the City was not party to that case. *Avitabile v. Beach*, 368 F. Supp. 3d 404, 421 (N.D.N.Y. 2019).

The City also argued that petitioners had failed to offer even a shred of evidence about electronic weapons. Then-extant circuit precedent had held that, at *Bruen*'s first step, the relevant questions included whether the weapons the challengers wish to carry were "in common use," and thus "Arms" within the Second Amendment's plain text. *Antonyuk v. James*, 120 F.4th 941, 981 (2d. Cir. 2024) (quoting *Bruen*, 597 U.S. at 31–32), *cert. denied* 145 S. Ct. 1900 (2025). Yet petitioners made no attempt to show that electronic weapons are in common use (SDNY Dkt. No. 43 at 7–13). Although the City invited petitioners to submit even "the most basic statistics" on the prevalence of electronic weapons (*id.* at 11), petitioners declined (SDNY Dkt. No. 49 at 4–9).

Thus, in their submissions made in response to the City's summary judgment motion, petitioners submitted no evidence going to the use of electronic weapons beyond evidence about their own desired use of such weapons and one plaintiff's past use of them on a single occasion (A40–52).

3. Based on this record, the district court granted summary judgment to the City in March 2025 (Pet. App. 6a–35a). The court reasoned that, since *Bruen*, the majority of federal courts to address the issue at

that time had held the question of common use is a step-one inquiry on which the challenger bears the burden of proof (*id.* at 21a–30a). The court held that petitioners had failed to offer any evidence to satisfy that burden (*id.* at 30a–33a). The court concluded that, as a result, it did not need to examine the government's showing that the laws at issue are consistent with the Nation's historical tradition (*id.* at 34a–35a).

4. Petitioners appealed. During oral argument before the Second Circuit, petitioners' counsel admitted that petitioners "did not put in evidence about how [stun and dart guns] are used, except how our plaintiffs used them." *See* https://ww3.ca2.uscourts.gov/audio/25-861.mp3 (Recording of Mar. 25, 2026 Oral Arg.) at 07:05. For its part, the City emphasized at oral argument that affirming the district court's grant of summary judgment would not preclude another plaintiff from challenging the same laws. The City explained that the district court had not held that stun and dart guns fall outside the scope of "Arms" protected by the Second Amendment, but only that these challengers had offered no evidence from which to draw any conclusions about the prevalence and use of electronic weapons. *Id.* at 26:30–27:04. When pressed on rebuttal about whether a different plaintiff could bring a similar

lawsuit and offer such evidence, petitioners' counsel admitted that they could have "presented this case in a different way, and the district court maybe would have come to a different conclusion." *Id.* at 30:33.

5. In a brief summary order issued in April 2026, the Second Circuit affirmed (Pet. App. 1a–5a). The court applied the step-one framework that had been established by its precedents, including *United States v. Gomez*, 159 F.4th 172 (2d Cir. 2025), which had, in turn, applied the framework articulated in *Antonyuk v. James*, 120 F.4th at 1044 (Pet. App. 3a–5a). *Gomez* affirmed that common use is a step-one inquiry on which the party bringing a Second Amendment challenge bears the burden of proof. 159 F.4th at 177–78.

Applying this precedent, the court of appeals held that the lack of any evidence in the record about the prevalence or use of electronic weapons required affirmance (Pet. App. 4a–5a). The court emphasized that its decision was narrow (*id.* at 5a). It did not purport to resolve the questions whether electronic weapons are covered by the Second Amendment's plain text or whether a prohibition on such weapons is constitutional.

ARGUMENT

This Court should deny the petition. Further review is unwarranted because the Second Circuit's decision is narrow and record-specific, resolving no broader Second Amendment question regarding electronic weapons, and relies on a formulation of the step-one inquiry that the court of appeals has since found to have been superseded by this Court's intervening decision in *Wolford*. The legal questions that petitioners seek to raise remain open in the Second Circuit and would, going forward, be decided based on post-*Wolford* precedent.

In the alternative, this Court should hold the petition because the Court is poised to address key doctrinal questions raised in the petition this Term in *Viramontes* and *Grant*. The Court's decision in those cases is likely to inform the proper disposition of this petition.

A. This Court should deny certiorari.

1. This case is a poor vehicle to litigate the issues petitioners wish to raise. The court of appeals' unpublished summary order was narrow, turned solely on deficiencies in the particular record here, and broke no new ground. Contrary to petitioners' contentions (Pet. 1), the decision does not foreclose a

future challenge to the City's and State's electronic weapons laws.

Petitioners ask this Court to grant certiorari to resolve whether electronic weapons are "Arms" that implicate the Second Amendment's plain text and whether prohibiting them is unconstitutional (Pet. i). But the Second Circuit did not resolve those questions. It did not decide whether electronic weapons are "Arms" within the plain text of the Second Amendment at *Bruen*'s first step. Nor did it decide whether the challenged city and state laws prohibiting them are consistent with our national tradition of regulating weapons at *Bruen*'s second step. Rather, applying the burdens at summary judgment and rules of party presentation, the court expressly limited its holding to petitioners' failure to adduce any evidence as to common use, an issue on which, under then-extant circuit precedent, they bore the burden of proof (Pet. App. 5a).

In reaching that result, the court of appeals applied what was then its framework for analyzing step one of the *Bruen* inquiry. It had previously held in *Antonyuk* that, at the first step, courts must assess whether the weapons concerned are "in common use," and thus "Arms" within the plain text of the Second Amendment. *Antonyuk*, 120 F.4th at 981

(quoting *Bruen*, 597 U.S. at 31–32). As the district court noted, that result accorded with the weight of authority in the lower courts at the time (Pet. App. 22a–24a). *See, e.g.*, *Bianchi v. Brown*, 111 F.4th 438, 448 (4th Cir. 2024); *Bevis v. City of Naperville*, 85 F.4th 1175, 1193 (7th Cir. 2023); *see also Hanson v. Smith*, 120 F.4th 223, 232 n.3 (D.C. 2024) (analyzing common use at step one). Later, in *Gomez*, the Circuit affirmed that, at step one, the challenger has the burden of adducing "non-speculative evidence" that the weapon at issue is in common use. 159 F.4th at 178.

Notwithstanding the state of the law at the pertinent time, petitioners chose to adduce no evidence before the district court about how many stun guns or dart guns had been manufactured, how many were in civilian versus law enforcement or military hands, or how the weapons are regulated across the country. Nor did they assert that they had tried to locate this evidence but were unable to do so. Instead, they relied on allegations about electronic weapons taken from complaints in other cases, facts conceded or stipulated to in other cases, or factual propositions recited in judicial decisions. On appeal, petitioners sought to expand their presentation with articles about electronic weapons from outside the record.

In concluding that these materials did not meet petitioners' burden, the Second Circuit applied Federal Rule of Civil Procedure 56 and established rules of party presentation (Pet. App. 4a–5a). Petitioners' assertions were impermissibly speculative. And on appeal, they could not fill that gap by improperly offering new materials that were not before the district court. *See* Fed. R. Civ. P. 56(c)(3).

The Second Circuit's summary order was thus highly case- and record-specific. It has no lasting implications for Second Amendment jurisprudence, and it leaves open the possibility that other plaintiffs could challenge the City's and State's laws regulating electronic weapons. Indeed, the City conceded at oral argument that an affirmance would not preclude another plaintiff from bringing a lawsuit asserting the same claims. Recording of Mar. 25, 2026 Oral Arg at 26:30–27:04). And when pressed on rebuttal about whether a different plaintiff could bring a suit and put in evidence, petitioners' counsel agreed, and he admitted that petitioners could have "presented this case in a different way, and the district court maybe would have come to a different conclusion." *Id.* at 30:33. Given the court of appeals' narrow, record-bound holding, further review is unwarranted.

2. Review is also unwarranted because the legal standard from prior Second Circuit precedent that the court of appeals' summary order applied here has already been superseded. Petitioners contend that the Second Circuit improperly considered common use at step one of the *Bruen* inquiry and thus improperly placed the burden of proving common use on petitioners (Pet. i). But, in response to this Court's decision in *Wolford*, the Second Circuit repudiated the formulation of the step-one inquiry underlying its summary order here. Any future challenge regarding electronic stun and dart guns will be evaluated in light of that subsequent precedent. The court's application of its previous step-one framework in this case will have no enduring implications.

As explained above (at 10–11), in placing the burden to establish common use on petitioners, the summary order below relied on the Second Circuit's then-controlling precedent. The court had held that the step-one inquiry includes whether the weapon concerned is in common use. *Antonyuk*, 120 F.4th at 981; *accord Bianchi*, 111 F.4th at 448; *Bevis*, 85 F.4th at 1193; *see also Hanson*, 120 F.4th at 232 n.3.

After the Second Circuit issued its summary order here, this Court decided *Wolford*, which rejected Hawaii's contention that the validity of its law

prohibiting licensees from carrying handguns on private property without the property owner's express permission could properly be resolved in its favor at step one. 146 S. Ct. at 2049. The majority described the step-one inquiry as involving three subsidiary questions: (1) whether the law applies to "the people"—that is, "all members of the political community," (2) whether it concerns any form of "Arms"—that is, "any weapon customarily used for offensive or defensive purposes"—and (3) whether the law places any restrictions on either the "keeping" or the "bearing" of arms. *Id*. at 2043–44 (cleaned up).

While this petition has been pending, a panel of the Second Circuit held in a published decision that *Antonyuk*'s step-one framework has been superseded by *Wolford*'s. *See Mills v. New York City*, No. 24-3308-cv, 2026 U.S. App. LEXIS 34484 (2d Cir. Nov. 10, 2026). In *Mills*, the Second Circuit considered a challenge to New York City's one-gun limit for concealed carry and 90-day waiting period between gun purchases, among other things. The court rejected the City's contention that the challenges to these provisions failed at step one and reversed a district court's decision dismissing them on that basis. *See id.* at *31–39.

Judge Raggi, writing for a unanimous panel, explained that *Wolford* had construed the key textual elements; after *Wolford*, "Arms" means "all instruments that constitute bearable arms, even those that were not in existence at the time of the founding" and includes "any weapon customarily used for offensive or defensive purposes." *Id.* at *16–17 (cleaned up). The decision observed that *Wolford*'s approach "as pertinent to *Bruen* step one analysis now supplants [the framework] articulated by this court in *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024), *cert. denied*, 145 S. Ct. 1900 (2025)." *Mills*, 2026 U.S. App. LEXIS 34484, at *17 n.8. The decision noted that the now-superseded *Antonyuk* framework had placed the "common use" inquiry, among other questions, at step one. *Id.*

Because the Second Circuit has already modified the step-one framework on which the summary order below rests, further review of the court's step-one framework is unwarranted at this time. Instead, lower courts considering challenges to electronic weapons should be given the opportunity to apply *Wolford*, as the Second Circuit did in *Mills*.

3. Alternatively, the City also recognizes that this Court could plausibly grant, vacate, and remand in light of *Wolford*, as petitioners urge (Pet. 25).

Wolford is an "intervening development" that might reasonably cause the lower courts to alter course if given the opportunity for further consideration. *Lawrence v. Chater*, 516 U.S. 163, 167 (1996). Indeed, the Second Circuit itself recognized in *Mills* that its earlier approach to the step-one inquiry had been modified by *Wolford*. Nonetheless, outright denial of the petition is more appropriate, given that the Second Circuit's summary order made no definitive constitutional ruling and applied a legal standard that has already been superseded.

Petitioners are incorrect that *Wolford* warrants summary reversal (Pet. 15–17, 24). This Court generally reserves summary reversals for when a lower court's decision was not only "wrong" but also "committed fundamental errors that this Court has repeatedly admonished courts to avoid." *Sexton v. Beaudreaux*, 585 U.S. 961, 967 (2018) (per curiam). By contrast, the Second Circuit did not have the benefit of *Wolford* when it ruled here. And, because the challenged Hawaii law at issue in *Wolford* concerned licensed firearms that were undisputedly "Arms" within the plain meaning of the Second Amendment, the Court did not have occasion to apply its definition of "Arms" or address common use. 146 S. Ct. at 2047.

Nor is summary reversal warranted based on *Caetano v. Massachusetts*, 577 U.S. 411 (2016), as petitioners contend (Pet. 3, 22–24). Petitioners assert that *Caetano* effectively held that electronic weapons are "Arms" covered by the plain text of the Second Amendment (Pet. 23). But that is incorrect. *Caetano* was a *per curiam* reversal of a state court's decision holding that stun guns could not be "Arms" within the meaning of the Second Amendment because they did not exist at the time of the founding and had not been used by militia members. 577 U.S. at 412.

The Court held in *Caetano* that the lower court's reasoning contravened baseline teachings of *District of Columbia v. Heller*, 554 U.S. 570 (2008), that the Second Amendment extends to arms "that were not in existence at the time of the founding" and covers weapons beyond those "useful in warfare." 577 U.S. at 412 (cleaned up). The Court remanded for the state courts to apply that guidance and make a determination about stun guns in the first instance, while specifically refraining from holding that the law at issue contravened the Second Amendment. *Caetano* thus stands for the proposition that "the pertinent Second Amendment inquiry is whether stun guns are commonly possessed by law-abiding

citizens for lawful purposes today." *Id.* at 420 (Alito, J., concurring).

To the extent language in *Caetano*'s concurrence could be interpreted to suggest that two members of this Court would have found stun guns protected by the Second Amendment, that part of the concurrence did not garner the support of a majority of the Court. *See Maryland v. Wilson*, 519 U.S. 408, 413 (1997) (noting that a statement in a concurrence is not binding precedent). Thus, nothing in *Caetano* indicates that the result here was plainly wrong, such that summary reversal would be warranted. Instead, the constitutionality of restrictions on electronic arms remained an open question after *Caetano*, as it does after the Second Circuit's summary order here. And summary reversal would be particularly inappropriate, given that the Court is poised to address questions relating to common use and its role within the *Bruen* framework in resolving *Viramontes* and *Grant*.

B. In the alternative, this Court should hold the petition pending its decision in *Viramontes* and *Grant*.

Indeed, if this Court does not deny the petition at this time, it should hold the petition until after the decision in *Viramontes* and *Grant*. The petition

acknowledges that such a hold would be a reasonable step (Pet. 25).

The proper scope of the "common use" question and its placement in the *Bruen* two-step inquiry are central to *Viramontes* and *Grant*. Accordingly, the Court's ruling is highly likely to either support or undermine the proposition underlying the Second Circuit's summary order here—or at minimum to provide important insight into the questions that petitioners seek to raise. After the decision in *Viramontes* and *Grant*, the Court may assess whether to deny the petition or to grant, vacate, and remand for further proceedings.

This Court granted certiorari in *Viramontes* and *Grant* to resolve whether Cook County, Illinois and the State of Connecticut lawfully banned semiautomatic rifles. The Court consolidated the cases for argument on the question of whether the Second Amendment guarantees the right to possess AR-15s and similar semiautomatic rifles. They will be heard on December 2, 2026.

In deciding *Viramontes* and *Grant*, this Court is poised to address doctrinal questions that overlap with the questions petitioners ask this Court to consider here. In the decision on review in *Viramontes*,

the Seventh Circuit began its analysis with the conclusion that "it is the plaintiff's burden to demonstrate that the text of the Second Amendment, viewed through the lens of historical tradition, protects the regulated conduct." *Viramontes v. Cook County*, No. 24-1437, 2025 U.S. App. LEXIS 13331, at *4 (7th Cir. June 2, 2025). The Seventh Circuit reached that conclusion in reliance on its earlier decision in *Bevis*, 85 F.4th at 1193. *Bevis*, just like the Second Circuit's decision in *Antonyuk*, concluded that the historical understanding of the term "Arms" protected only weapons in common use because the Second Amendment codified a preexisting right to keep weapons of the kind in common use at the time in defense of person and home. *Id.* (citing *Heller*, 554 U.S. at 584–85). Per the Seventh Circuit, this preexisting right did "not protect those weapons not typically possessed by law-abiding citizens for lawful purposes." *Id.* (quoting *Heller*, 554 U.S. at 625).

The petitioners in *Viramontes* and *Grant*, moreover, expressly dispute several of these questions in the merits briefing. They assert that the Seventh Circuit erred in placing the burden on them to "demonstrate that the text of the Second Amendment, viewed through the lens of historical tradition, protects the regulated conduct," *Viramontes*, 2025 U.S. App. LEXIS 13331, at *4, because the only

appropriate question at step one is whether the item they wish to carry is a weapon (Pet'rs Br. 26–28). They argue that "[w]hile common use is relevant to the question of whether a particular firearm ultimately is protected, it is irrelevant to whether it is an arm under the plain text" (*id.* at 28). Thus, a key part of the petitioners' argument is that "[c]ommon use is not something that plaintiffs must prove to show the Second Amendment 'extends, prima facie,' to any type of firearm," but "something that government defendants must *disprove* to justify a ban on any type of firearm" (*id.* at 27–28).

The United States as amicus curiae in support of petitioners likewise contends that, at *Bruen*'s first step, "Arms" should be read to mean any weapon that can be used "for offense or defense" (U.S. Amicus Br. 9 (quoting *Wolford*, 146 S. Ct. at 2041)). It further argues that common use is a step-two question because it reflects the country's regulatory tradition that commonly used weapons cannot be banned (*id.* at 9–14).

Moreover, the petitioners in *Viramontes* and *Grant*, just like the petitioners in this case, argue that *Heller* adopted the "common use" requirement in response to the regulatory tradition of restricting "dangerous and unusual" weapons and thus that

common use is properly considered at step two (*compare* Pet'rs Br. 25–33, *with Calce* 2d Cir. App. Br. 17–18 *and* Pet. 12).

Respondents in both cases rejoin that "common use" is a distinct inquiry from whether a weapon is dangerous and unusual, and they delve into the historical tradition of prohibiting commonly used weapons that were unusually dangerous (*see Grant* Resp. Br. 37–44; *Viramontes* Resp. Br. 15–25). In addition, the *Viramontes* respondents argue that the "common use" inquiry that originates from *Heller* is part of the step-one analysis and that petitioners misconstrue what common use means (*Viramontes* Resp. Br. 47–51).

In short, in resolving *Viramontes* and *Grant*, this Court is likely to address at least some of the questions on which petitioners seek review. Accordingly, the Court's decision in those cases is likely to bear on the proper disposition of this petition. If the Court does not deny the petition at this time, it should hold the petition pending the resolution of *Viramontes* and *Grant*.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, this Court should hold this petition pending its decision in *Viramontes* and *Grant*.

STEVEN BANKS
Corporation Counsel of
the City of New York

Counsel for Respondents

RICHARD DEARING
Counsel of Record
CLAUDE S. PLATTON
INGRID R. GUSTAFSON
ELINA DRUKER
New York City Law Department
100 Church Street
New York, NY 10007
(212) 356-2500
rdearing@law.nyc.gov

NOVEMBER 2026