No. 23-910

IN THE

Supreme Court of the United States

IVAN ANTONYUK, et al.,
Petitioners,

v.

STEVEN G. JAMES, in His Official Capacity as Superintendent of New York State Police, et al.,
Respondents.

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the court of appeals properly considered nineteenth-century history alongside consistent Founding-era history for purposes of evaluating plaintiffs' likelihood of success on a facial Second Amendment challenge to state laws regulating firearms.

2. Whether the court of appeals properly determined that plaintiffs were unlikely to succeed on the merits of a facial Second Amendment challenge to New York's requirement that an applicant for a firearm license must demonstrate the ability to carry and use a firearm "in a manner that does not endanger oneself or others," N.Y. Penal Law § 400.00(1)(b).

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INTRODUCTION

In July 2022, the New York State Legislature enacted the Concealed Carry Improvement Act (CCIA) to make necessary changes to the State's firearm licensing and possession laws following this Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, 597 U.S. 1 (2022). Shortly after the CCIA took effect, petitioners—five individuals with licenses to carry firearms and one individual who has never applied for such a license—filed this lawsuit against several state and local officials challenging nearly every provision of the CCIA as unconstitutional.[1] After a district court preliminarily enjoined several provisions of the CCIA, the U.S. Court of Appeals for the Second Circuit (Jacobs, Lynch, and Lee, JJ.) issued an exhaustive opinion vacating the preliminary injunction in part, and affirming it in part.

The petition for certiorari should be denied. As an initial matter, this Court's ordinary practice of denying interlocutory review is especially advisable here, where the court of appeals merely found that plaintiffs did not establish a likelihood of success on the merits at the preliminary injunction stage, either for lack of standing or for lack of a meritorious legal claim. The preliminary injunction record in this case was developed in a matter of just weeks, and, to date, no fact or expert discovery has taken place. Further litigation may obviate any need for this Court's review, and, at a minimum, such

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[1] Respondents are Steven G. James, in his official capacity as Superintendent of the New York State Police; Judge Matthew J. Doran, in his official capacity as licensing official for Onondaga County (which includes the City of Syracuse); and Joseph Cecile, in his official capacity as Chief of Police of the City of Syracuse. Respondents jointly file this brief.

review would be aided by a complete record and merits determination.

In any event, neither question presented by the petition merits this Court's review in this case. The first question asks whether evidence from the nineteenth century may be considered in evaluating the constitutionality of state firearm laws. Contrary to plaintiffs' contention, the answer to this question is not dispositive in this case because the challenged state laws are supported by consistent history from both the Founding era and subsequent periods including the nineteenth-century Reconstruction era when the right to bear arms was incorporated against the States. This case does not present any conflict between Founding-era laws and later legal developments. Moreover, this Court has never held—and should not now consider holding—that nineteenth-century history is categorically irrelevant or inadmissible in evaluating Second Amendment challenges; to the contrary, this Court and numerous courts of appeals have routinely considered Reconstruction-era history in evaluating Second Amendment challenges to firearm laws.

The second question presented is also flawed, both as a vehicle and on the merits. Petitioners raise only a facial constitutional challenge to New York's "good moral character" licensing requirement, which is statutorily defined to require a showing that an applicant can use a firearm "in a manner that does not endanger oneself or others," N.Y. Penal Law § 400.00(1)(b). The court of appeals correctly concluded that such a requirement could not possibly be unconstitutional in every application, as is required to sustain a facial challenge. Moreover, no petitioner has applied for a license under the challenged licensing scheme, much less been denied a license based on the "good moral character" require-

ment, and there is no record supporting petitioners' speculative assertions about the license review and adjudication process.

STATEMENT

A. Legal Background

1. This Court's decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*

New York law requires a license to carry a concealed handgun in public. *See, e.g.*, N.Y. Penal Law §§ 265.03 (criminalizing possession of loaded handgun), 265.20(a)(3) (exempting license holders). New York law has long set forth basic eligibility criteria for a license, including being at least twenty-one years old, not having a felony record, and otherwise having "good moral character." *Id.* § 400.00(1)(a)-(c). Until recently, New York also required demonstrating "proper cause" to obtain a concealed-carry license. *Id.* § 400.00(2)(f) (effective through June 23, 2022).

In *Bruen*, this Court concluded that insofar as "proper cause" demanded showing "a special need for self-defense," this requirement implicated the Second Amendment right of law-abiding, responsible citizens to carry arms in public for self-defense and was invalid because it was unsupported by historical tradition. *See* 597 U.S. at 11, 24-26. In so holding, *Bruen* rejected the framework previously used by nearly all federal courts of appeals to evaluate Second Amendment challenges in favor of a restated standard: if "the Second Amendment's plain text covers an individual's conduct," then the government seeking to regulate that conduct "must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.*

at 17. In applying that standard, the Court considered historical sources from before the Founding-era enactment of the Second Amendment in 1791, through the era when the Second Amendment right was incorporated against the States in the Fourteenth Amendment in 1868. *See id.* at 38-70. Because the Court determined that "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same," the Court found it appropriate to consider history from both periods. *See id.* at 38.

Bruen was explicit about areas of law left undisturbed by the decision. First, the Court announced that "nothing in [its] analysis" was meant to undermine the constitutionality of "shall-issue" licensing regimes employed by dozens of States. *Id.* at 38 n.9. These laws "often require applicants to undergo a background check or pass a firearms safety course" and "are designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens.'" *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)); *see also id.* at 79-80 (Kavanaugh, J., concurring). The Court also noted the broad range of state licensing regimes operating on a "shall-issue"-type basis, including several that have good-moral-character or "suitability" requirements to ensure that individuals issued licenses can be trusted to use firearms safely. *Id.* at 13 n.1.

Second, the Court "assume[d] it settled" that certain locations are "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." *Id.* at 30. The opinion endorsed such longstanding bans in schools, legislative assemblies, polling places, and courthouses, while recognizing that this list was nonexhaustive and "that modern regulations prohibiting the carry of firearms in *new* and analogous

sensitive places are constitutionally permissible." *Id.* In other words, *Bruen* did not disavow any existing "restrictions that may be imposed on the possession or carrying of guns," other than the proper-cause requirement. *Id.* at 72 (Alito, J., concurring).

In addition, *Bruen* was clear that application of the restated Second Amendment standard would require substantial development in the lower courts, in accordance with traditional patterns of constitutional litigation. For example, the court declined to "undertake an exhaustive historical analysis of the full scope of the Second Amendment." *Id.* at 31 (quotation and alteration marks omitted). At the same time, *Bruen* cautioned that its standard was not intended to be a "regulatory straightjacket" and made clear that the government need not identify a "historical twin" or "dead ringer" to support a modern regulation. *Id.* at 30 (emphasis omitted). The Court recognized that "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868," and further underscored that "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.* at 27-28. Accordingly, when "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." *Id.* at 80 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 636).

2. New York's Concealed Carry Improvement Act

The day after *Bruen* was decided, New York Governor Kathy Hochul announced that she would convene an extraordinary legislative session to bring New York's law into compliance with the decision. N.Y. Governor, Proclamation (June 24, 2022).[2] On July 1, 2022, the Legislature passed the CCIA, which removed the proper-cause requirement that *Bruen* declared unconstitutional and made several other changes to New York's firearm licensing and possession laws. *See* Ch. 371, 2022 N.Y. Laws (eff. Sept. 1, 2022). The amendments relevant to this petition are discussed below.

First, the CCIA deleted the requirement of "proper cause" for a license to carry a firearm, struck down by *Bruen*. *See id.* § 2(f). The CCIA also narrowed and made more precise the longstanding requirement of "good moral character" for a firearm license; under this provision, the State had long denied licenses to people with criminal records and other evidence of a propensity for violence. The CCIA expressly defined the term "good moral character" to mean "having the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it only in a manner that does not endanger oneself or others." N.Y. Penal Law § 400.00(1)(b). The CCIA also required that applicants for licenses to carry firearms in public complete firearm training, *id.* §§ 400.00(1)(o)(iii), 400.00(19), meet with a licensing officer for an interview, *id.* § 400.00(1)(o), and submit statutorily specified information to the licensing officer, including references who

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[2] Available at https://www.governor.ny.gov/sites/default/files/2022-06/Proclamation_Extraordinary_Session_June_2022.pdf (last visited on May 9, 2024).

could "attest to the applicant's good moral character" by representing that the applicant is not "likely to engage in conduct that would result in harm to themselves or others," *id.* § 400.00(1)(o)(ii).[3] Under the amended statute, anyone satisfying the license requirements "shall be issued" a license. *See id.* § 400.00(2). If an application is denied, the licensing officer must explain in writing the reasons for the denial, and an applicant has the right to appeal the decision. *See id.* § 400.00(4-a).

Second, the CCIA codified several sensitive locations in which carrying a firearm would not be allowed, including government buildings such as courthouses, polling places, schools, healthcare facilities, public parks, and crowded venues like theaters and stadiums. *Id.* § 265.01-e(1)-(2). The sensitive-location provision exempts law-enforcement officers, military personnel, armed security guards, and persons lawfully hunting. *Id.* § 265.01-d(2).[4]

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[3] The statute also requires applicants to provide a list of recent social-media accounts, Penal Law § 400.00(1)(o)(iv). The court of appeals in this case upheld a preliminary injunction against enforcement of that provision (App. 96-100), and the New York State Police has since removed the social-media-accounts question from the licensing application form.

[4] The CCIA separately bars possessing a firearm on another person's private property without the owner or lessee's express consent. Penal Law § 265.01-d(1). The court of appeals upheld a preliminary injunction against enforcement of that provision with respect to property open to the general public, and the provision is not at issue on this appeal. (App. 196-214.)

B. Procedural Background

1. The district court's preliminary injunction

Several weeks after the CCIA took effect, petitioners filed this lawsuit pursuant to 42 U.S.C. § 1983 in the U.S. District Court for the Northern District of New York, challenging nearly every aspect of the CCIA, including the provisions described above, principally under the Second and Fourteenth Amendments. (CA2 J.A. 17-89.) Five of the six petitioners have firearm carrying licenses in New York, and therefore challenged the restrictions on carrying firearms in sensitive places or on others' private property without consent. (CA2 J.A. 18-19.) The sixth petitioner (Lawrence Sloane) did not have a carry license (and indeed had never applied for one), and challenged each of the CCIA's licensing requirements, as well as the sensitive-place and private-property provisions. (CA2 J.A. 19, 79-82.)

When they filed their lawsuit, petitioners moved for a temporary restraining order (TRO), preliminary injunction, and permanent injunction. (CA2 J.A. 197-201.) The district court gave defendants five days to respond to the TRO request (which it then granted), and three weeks to oppose the preliminary injunction motion with respect to dozens of challenged provisions. (CA2 J.A. 5-11.) On that timetable, defendants had no opportunity to engage historical experts and as a result the district court did not have the benefit of expert testimony in the record. At the preliminary injunction hearing, the parties presented only oral argument and no evidence. (CA2 J.A. 13 (ECF No. 72).)

The district court granted plaintiffs' motion in part, and preliminarily enjoined defendants from enforcing the good-moral-character licensing requirement and

various related disclosure requirements, approximately a dozen sensitive-place restrictions (including, e.g., prohibitions on firearms in public parks, restaurants serving alcohol, and concert venues), and the private-property requirement. (App. 314-424.)

2. The court of appeals' vacatur of much of the preliminary injunction

The U.S. Court of Appeals for the Second Circuit (Sack, Wesley, and Bianco, JJ.) unanimously granted respondents' motion for a stay pending appeal. (CA2 ECF No. 76.) This Court denied petitioners' application to vacate the stay, *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023).

Following briefing and argument on this appeal and three related cases, a different panel of the Second Circuit (Jacobs, Lynch, and Lee, JJ.) jointly issued a comprehensive 261-page slip opinion, unanimously vacating the district court's preliminary injunction against enforcement of the good-moral-character requirement and most of the licensing disclosures and sensitive-place provisions enjoined by the district court. (App. 1-215.)[5] The court emphasized that it was "reviewing facial challenges to these provisions at a very early stage of this litigation" and that this decision "does not determine the ultimate constitutionality of the chal-

[5] As noted earlier (at nn. 3-4), the court of appeals affirmed the preliminary injunction as to the social-media-disclosure requirement and the private-property requirement to the extent it applies to property open to the general public. The court also affirmed a preliminary injunction entered by a different district court against enforcement of the CCIA's restriction on firearms in places of worship based on an as-applied Free Exercise Clause challenge that petitioners here did not raise. (App. 126-139.)

lenged CCIA provisions, which await further briefing, discovery, and historical analysis." (App. 215 n.116.)

As relevant here, the court of appeals rejected petitioners' categorical argument that a court may consider only Founding-era history in evaluating a plaintiff's likelihood of success on Second Amendment challenges to state firearm laws. The court recognized that it would be improper to rely on post-Founding history that is "*inconsistent* with prior practices," but concluded that, when later laws "reflect previously settled practices and assumptions, they remain probative as to the existence of an American tradition of regulation." (App. 71-72 n.32 (citing *Bruen*, 597 U.S. at 36-37).) The court further "agree[d] with the decisions of [its] sister circuits" that, for state laws like the CCIA, the understanding of the right to bear arms around 1791, when the Second Amendment was originally ratified, and around 1868, when the people incorporated the Second Amendment against the States through the Fourteenth Amendment, both may be relevant, particularly where, as in this case, there is consistent history in both periods. (App. 39-42.)

In concluding that petitioners were unlikely to succeed on the merits of their facial challenge to the good-moral-character licensing requirement, the court of appeals concluded that the requirement served as an appropriate "proxy for dangerousness." (App. 55.) The court further underscored the "widespread agreement among both courts of appeals and scholars that restrictions forbidding dangerous individuals from carrying guns" are consistent with longstanding historical tradition (App. 59). And the court rejected the argument that the "bounded discretion" given to licensing officials applying the good-moral-character requirement (App. 66) violated the Second Amendment, noting *Bruen*'s

approval of shall-issue regimes with comparable good-moral-character requirements and the historical evidence of similar licensing regimes (App. 81-89).

REASONS FOR DENYING THE PETITION

I. REVIEW OF THIS INTERLOCUTORY APPEAL IS PREMATURE.

This petition for certiorari seeks review of an interlocutory appeal of a preliminary injunction decision. As the court of appeals emphasized below, its preliminary decision is "not a full merits decision," and may change pending further record development in the district court and further briefing. (App. 216 n.116.) And as noted above (at 8), the record on this appeal was developed in merely three weeks and there was no opportunity to present expert evidence below.

This Court's ordinary practice is to deny interlocutory review irrespective of whether a case presents an arguably significant statutory or constitutional question.[6] This Court has departed from that practice in very rare circumstances, such as, for example, when an important question would be "effectively unreviewable" after final judgment, *Will v. Hallock*, 546 U.S. 345, 349-50 (2006) (quotation marks omitted), or when an immunity from suit, rather than a mere defense to liability, is implicated, *Ashcroft v. Iqbal*,

[6] *See, e.g., Abbott v. Veasey*, 580 U.S. 1104 (2017) (Roberts, C.J., respecting denial of certiorari); *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J.); *Wrotten v. New York*, 560 U.S. 959 (2010) (Sotomayor, J.); *Moreland v. Federal Bureau of Prisons*, 547 U.S. 1106, 1107 (2006) (Stevens, J.); *see also Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam).

556 U.S. 662, 671-72 (2009). Nothing in this case will become effectively unreviewable if this Court takes its ordinary course by waiting until after final judgment—and the development of a complete record—to review any remaining issues.

II. PETITIONERS' METHODOLOGICAL QUESTION AS TO THE RELEVANCE OF INCORPORATION-ERA HISTORY DOES NOT MERIT THIS COURT'S REVIEW.

A. This Case Is a Poor Vehicle for Addressing the Methodological Question.

Petitioners' first question presented is a methodological one, asking whether courts addressing the constitutionality of state firearm laws are precluded from considering nineteenth-century history.

Contrary to petitioners' unsupported assertion (Pet. 11, 31), this question is far from "outcome determinative" in this case because the court of appeals considered nineteenth-century history alongside consistent evidence from the Founding era and earlier. For example, the court of appeals explained that "the State has made a robust showing of a well-established and representative tradition of regulating firearms in public forums and quintessentially crowded places," like many of the sensitive places governed by the CCIA. (App. 149.) That tradition "endur[ed] from medieval England to Reconstruction America and beyond" (App. 149), in "a 'long, unbroken line'" (App. 152 (quoting *Bruen*, 597 U.S. at 35)).

As for the Founding era, the court of appeals correctly recognized that at least two large States—Virginia (then the largest State) and North Carolina (the third largest)—and the District of Columbia had regulations in that era similar to the CCIA's sensitive-

place regulations, "prohibiting firearms in fairs and markets, *i.e.*, the traditional, crowded public forum." (App. 149-151, 157.) Even the district court recognized that a large proportion of the national population was governed by such laws in 1791. (App. 306-307 n.66.) And the court of appeals recognized that laws from the Founding era support other provisions of the CCIA too. For instance, as respondents demonstrated, the good-moral-character requirement is consistent with many Founding-era laws disarming individuals deemed dangerous, including laws that disarmed those who refused a loyalty oath, or appeared at militia musters unfit to bear arms. (*See* CA2 J.A. 297-320, 361-429; *see also* App. 59-62.)

Petitioners are therefore simply incorrect to suggest that the court of appeals' opinion is supported only by incorporation-era history. (*E.g.*, Pet. 11, 21-22.) For example, petitioners cite a reference in the court of appeals' opinion to firearm licensing schemes being a post-Civil War phenomenon. (Pet. 21 (citing App. 111).) But they ignore the opinion's extensive earlier discussion of the "widespread consensus" that similar schemes to disarm dangerous individuals have always been an integral part of the nation's historical tradition of firearm regulation—including in the Founding era. (*See* App. 55, 59-63 (citing, e.g., *Kanter v. Barr*, 919 F.3d 437, 451, 454-64 (7th Cir. 2019) (Barrett, J., dissenting) (documenting long history of Founding-era and subsequent laws prohibiting dangerous individuals from possessing firearms)).) Petitioners also misplace their reliance (Pet. 21, 24) on a reference in the court of appeals' opinion to restrictions of firearms in parks (one of the sensitive places covered by the CCIA) emerging in the nineteenth century. As the court of appeals correctly explained, modern parks came into existence

in the nineteenth century, so there could have been no earlier firearm restrictions in parks. (App. 154-155.) And earlier commons and greens on which petitioners rely served different purposes from modern parks, i.e., animal grazing and militia mustering—for which firearm restriction was likely deemed unnecessary or inappropriate.[7] (App. 159-161.)

Petitioners likewise err in their attempt (Pet. 22-23) to discount Founding-era laws on which the courts below relied. As the court of appeals correctly explained—and petitioners ignore—this Court declined to rely on some of those laws in *Bruen* only "within the context in which th[e] statute[s] w[ere] offered: as . . . analogue[s] supporting a carriage ban in public *generally*." (App. 150 n.74 (citing *Bruen*, 597 U.S. at 40-41).) By contrast, this Court did not address the laws' specific location restrictions, e.g., in fairs and markets, as an analogue for modern sensitive-place restrictions, because no such sensitive-place restriction was at issue in *Bruen*. (*See* App. 150.) Further, petitioners are incorrect to suggest (Pet. 23 n.16) that *Bruen* expressed "doubt that *three* colonial regulations could suffice" to show a historical tradition (citing *Bruen*, 597 U.S. at 46). The regulations discussed there were from the seventeenth century, not the Founding era, and they were not supported by a long

[7] Petitioners' assertion (Pet. 24-25) that there were Founding-era traditions contrary to the CCIA is also unsupported. The pages from court of appeals briefs they cite refer to a handful of secondary sources from decades after the Founding referencing instances of drinking in connection with militia musters—not a tradition of firearms at non-military-related locations like those covered by the CCIA.

line of earlier and subsequent history, like the Founding-era regulations at issue here.[8] *See id.* at 46-48.

B. The Decision Below on the Methodological Question Is Correct and Consistent with This Court's Precedent.

The courts below also were correct to recognize that incorporation-era history is relevant in analyzing the constitutionality of state firearm laws like the CCIA, particularly where, as here, that history is consistent with Founding-era history. As this Court explained in *Bruen*, a "long, unbroken line" of consistent history supporting a contemporary firearm law provides important support for such a law. *See* 597 U.S. at 35. Thus, where, as here, "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same," history from both periods may be considered. *Id.* at 38; *see also id.* at 82 (Barrett, J., concurring) (consistency of historical evidence in Founding and incorporation eras "makes it unnecessary to choose between them"). By contrast, it is only historical "laws that are *inconsistent* with the original meaning of the constitutional text" that may be rejected as evidence. *See id.* at 36.

Indeed, this Court has repeatedly embraced post-Founding-era—including incorporation-era—history in

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[8] There also is no merit to petitioners' effort (Pet. 22-23 n.15) to cast doubt on the North Carolina law on which the courts below relied merely because the 1791 text the courts cited appeared in a compilation of laws that a subsequent compiler deemed "unworthy of the talents and industry of the distinguished compiler," *Revised Code of North Carolina* xiii (1855) (reprinting preface to 1837 edition). Petitioners' own cited case confirms that the same law had "always" been in force in North Carolina through common law. *See State v. Huntly*, 25 N.C. 418, 420-21 (1843).

interpreting the constitutional right to bear arms. *District of Columbia v. Heller* described evidence of postratification understanding of a right as a "critical tool of constitutional interpretation." 554 U.S. 570, 605 (2008). And *McDonald v. City of Chicago* exhaustively retraced incorporation-era public understanding of the right to bear arms to support this Court's conclusions that the Second Amendment right was considered fundamental and that the Fourteenth Amendment therefore incorporated that right against the States; in so doing, *McDonald* necessarily used incorporation-era evidence to illuminate the original scope of the Second Amendment. 561 U.S. 742, 767-78 (2010). *Bruen* likewise examined both incorporation-era and other nineteenth-century history at length. *See* 597 U.S. at 50-70.

Petitioners cite (Pet. 15-16) a number of decisions of this Court that relied on Founding-era history to interpret the scope of other incorporated constitutional rights. But the cited cases, much like *Heller*, *McDonald*, and *Bruen*, in fact considered a wide range of history—including from the nineteenth-century incorporation era. *See, e.g.*, *Ramos v. Louisiana*, 140 S. Ct. 1390, 1395-96 (2020) (considering history from fourteenth- through late-nineteenth centuries to interpret Sixth Amendment); *Timbs v. Indiana*, 139 S. Ct. 682, 687-89 (2019) (considering history from Magna Carta through twentieth century to interpret Eighth Amendment); *Virginia v. Moore*, 553 U.S. 164, 168-71 & nn.3-4 (2008) (considering nineteenth-century, including incorporation-era, history to interpret Fourth Amendment); *Lynch v. Donnelly*, 465 U.S. 668, 673-78 (1984) (considering

history from late eighteenth century through twentieth century to interpret Establishment Clause).[9]

Accordingly, this Court has consistently made clear that post-1791 history remains relevant, either as postenactment history to shed further light on the Framers' intent in 1791, or as contemporaneous history to understand the right when reevaluated and ultimately incorporated against the States in 1868, or both. While petitioners note that this Court has recognized that the meaning of a constitutional provision "'does not alter,'" and "'[t]hat which it meant when adopted, it means now'" (Pet. 15 (quoting *South Carolina v. United States*, 199 U.S. 437, 448 (1905))), that observation supports the relevance of postenactment history in interpreting original meaning, and does not preclude the relevance of history from the incorporation era when the Fourteenth Amendment was adopted.

Contrary to petitioners' suggestion, *Bruen* did not decide that the scope of incorporated rights is pegged exclusively "'to the public understanding . . . when the Bill of Rights was adopted in 1791'" (Pet. 26 (quoting *Bruen*, 597 U.S. at 37)). As the beginning of the quoted sentence makes clear, the Court sometimes "assumed" —without deciding—that the scope of such rights was defined by the 1791 understanding. *See Bruen*, 597 U.S. at 37. But petitioners omit the further context casting doubt on this assumption, because "[s]trictly speaking, New York is bound to respect the right to keep and bear

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[9] One other case that petitioners cite, *Gamble v. United States*, 587 U.S. 678 (2019), did not involve any incorporated right, but rather a right applied against the federal government. In any event, that case still considered postenactment historical sources, including from the nineteenth century. *See id.* at 685-86.

arms because of the Fourteenth Amendment, not the Second." *Id*.

Finally, petitioners are wrong to suggest (Pet. 18) that the court of appeals sought to marginalize *Bruen* as an "exceptional" decision. Rather, the court of appeals said—citing *Bruen* itself—that the *proper-cause requirement* at issue in *Bruen* was exceptional, in that it conditioned the exercise of a constitutional right on the rightsholder's reasons for exercising the right. (App. 35; *accord* App. 28, 37, 112.) The court of appeals merely distinguished—correctly—the exceptional nature of the proper-cause requirement at issue in *Bruen* from the wholly unexceptional provisions presented by this petition, namely, regulations that restrict firearms in specified sensitive places and disarm demonstrably dangerous individuals, each supported by extensive and longstanding history. Likewise, the court of appeals made the commonsense point (not addressed in *Bruen*) that an absence of prior laws is relevant but not dispositive, because "Legislatures past and present have not generally legislated to their constitutional limits." (App. 33.) Thus, the absence of historical precedents can in some cases be more a reflection of "'lack of political demand" or need than of the scope of the constitutional right. (App. 75 (quoting *Binderup v. Attorney Gen.*, 836 F.3d 336, 369 (3d Cir. 2016) (Hardiman, J., concurring in part and concurring in the judgments).)[10]

[10] The fact that the court of appeals also cited a law review article making the same commonsense point does not demonstrate that the court agreed with unrelated criticism of *Bruen* elsewhere in that article—much less that the court intended to defy *Bruen* sub silentio, as petitioners suggest (Pet. 2, 19-20).

C. There Is No Circuit Split on the Methodological Question and the Issue Is Still Percolating in the Lower Courts.

Petitioners are incorrect to contend (Pet. 26-31) that the court of appeals' decision below creates a circuit split. The court of appeals expressly "agree[d] with the decisions of [its] sister circuits" in recognizing that incorporation-era history is, along with Founding-era history, "a relevant consideration" in constitutional challenges to state firearm laws. (App. 41 (citing cases).) Indeed, all courts of appeals to have addressed the issue, and many other courts—like the district court below and this Court in *Bruen*—have found incorporation-era history relevant to such challenges, where, as here, the incorporation-era history is consistent with Founding-era history.

Although courts have varied somewhat in their precise descriptions of the weight to be given to incorporation-era history, the courts—including those cited by petitioners—have consistently agreed with the courts below in this case that at least some weight should be given to such history. And the courts have consistently considered incorporation-era history themselves in analyzing the scope of the Second Amendment. *See, e.g.*, *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 48, 51 (1st Cir. 2024) (considering history from Founding era through early twentieth century); *Bevis v. City of Naperville*, 85 F.4th 1175, 1201-02 (7th Cir. 2023) (considering history from mid-eighteenth century through early-twentieth century), *petition for cert. filed sub nom. National Ass'n for Gun Rights v. City of Naperville*, No. 23-880 (Feb. 12, 2024); *Teter v. Lopez*, 76 F.4th 938, 950-53 (9th Cir. 2023) (considering history from early nineteenth century through early twentieth century), *reh'g en banc granted & op. vacated*, 93 F.4th

1150 (9th Cir. 2024); *National Rifle Ass'n v. Bondi*, 61 F.4th 1317, 1325-32 (11th Cir.) (considering history from Founding era through late nineteenth century), *reh'g en banc granted & op. vacated*, 72 F.4th 1346 (11th Cir. 2023).[11]

No case on which petitioners or their amici rely conflicts with the decision below. *First*, petitioners cite some cases involving Second Amendment challenges to *federal*—rather than state—laws. The period when the right to bear arms was incorporated against the States through the Fourteenth Amendment is not so clearly and directly relevant to those federal laws, as it is in the case of state laws. Thus, those cases' focus on the Founding era is consistent with the decisions below. *See United States v. Daniels*, 77 F.4th 337, 348 (5th Cir. 2023) (focusing on Founding-era history because "the instant case involves a federal statute and therefore implicates the Second Amendment, not the Fourteenth"); *United States v. Ayala*, No. 8:22-cr-369, 2024 WL 132624, at *5 & n.4 (M.D. Fla. Jan. 12, 2024) (same), *appeal docketed*,

[11] *See We the Patriots, Inc. v. Grisham*, No. 1:23-cv-771, 2023 WL 6622042, at *7-9 (D.N.M. Oct. 11, 2023), *appeal docketed*, No. 23-2166 (10th Cir. Oct. 20, 2023); *Duncan v. Bonta*, No. 3:17-cv-1017, 2023 WL 6180472, at *20-35 (S.D. Cal. Sept. 22, 2023), *appeal docketed*, No. 23-55805 (9th Cir. Sept. 25, 2023); *Maryland Shall Issue, Inc. v. Montgomery Cnty.*, 680 F. Supp. 3d 537, 582-87 (D. Md. 2023); *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 391-91 (S.D.N.Y. 2023); *Worth v. Harrington*, 666 F. Supp. 3d 902, 920-25 (D. Minn. 2023), *appeal docketed sub nom. Worth v. Jacobson*, No. 23-2248 (8th Cir. May 22, 2023); *Frey v. Nigrelli*, 661 F. Supp. 3d 176, 197-206 (S.D.N.Y. 2023), *appeal docketed sub nom. Frey v. Bruen*, No. 23-365 (2d Cir. Mar. 16, 2023); *State v. Wilson*, 154 Hawai'i 8, 15-19 (2024); *Wade v. University of Mich.*, No. 330555, 2023 WL 4670440, at *8-9 (Mich. Ct. App. July 20, 2023); *Matter of Gonyo v. D.S.*, No. 2023-796, 2024 N.Y. Slip Op. 24018, *9-17 (N.Y. Sup. Ct. Dutchess Cnty. Jan. 19, 2024).

No. 24-10462 (11th Cir. Feb. 14, 2024); *Brown v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 1:22-cv-80, 2023 WL 8361745, at *12 n.8 (N.D.W. Va. Dec. 1, 2023) (same), *appeal docketed*, No. 23-2275 (4th Cir. Dec. 11, 2023).

Second, the only case petitioners cite involving a challenge to a state law where the court rejected reliance on incorporation-era history did so because the court identified a conflict between incorporation-era history and Founding-era history. Specifically, in *Lara v. Commissioner Pennsylvania State Police*, the court rejected the defendant's reliance on incorporation-era history restricting firearm possession by 18-to-20-year-olds because the court found that such history conflicted with Founding-era history permitting such possession. 91 F.4th 122, 132-37 (3d Cir.), *rehr'g en banc denied*, 97 F.4th 156 (3d Cir. 2024). By contrast, as discussed (*supra* at 12-14), there is no conflict between incorporation-era and Founding-era history here.

Moreover, to the extent that courts have varied somewhat in their articulations of the weight to be given to incorporation-era history, the issue is actively percolating in the lower courts. Most of the trial-court decisions on which petitioners rely are on appeal, and the Ninth and Eleventh Circuits have granted rehearing en banc in *Teter*, 93 F.4th 1150 (2024), and *Bondi*, 72 F.4th 1346 (2023), respectively. These lower courts should be given an opportunity to crystallize—and potentially further unify—their own law before this Court grants review. That is because, "when frontier legal problems are presented, periods of 'percolation' in, and diverse opinions from, state and federal appellate courts may yield a better informed and more enduring final pronouncement by this Court." *Arizona v. Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting); *see*

also Maslenjak v. United States, 582 U.S. 335, 354 (2017) (Gorsuch, J., concurring in part and concurring in the judgment) ("[T]he crucible of adversarial testing on which we usually depend, along with the experience of our thoughtful colleagues on the district and circuit benches, could yield insights (or reveal pitfalls) we cannot muster guided only by our own lights.").

As noted (*supra* at 11-12), this Court routinely denies premature requests for review of constitutional disputes, either to allow further development below in the litigation at issue, or to allow further percolation in courts around the country. Following such an approach would be especially appropriate here given both that there are many cases addressing this issue in the lower courts, and that most of those cases are—like this case—still in early stages, and thus will provide better insights to this Court only after further record development.

III. PETITIONERS' FACIAL CHALLENGE TO NEW YORK'S LICENSING STANDARD FOR ASSESSING DANGEROUSNESS DOES NOT MERIT THIS COURT'S REVIEW.

A. This Case Is a Poor Vehicle for Addressing the Licensing Question.

Petitioners' second question presented asks whether the CCIA's requirement that firearm license applicants show "good moral character"—i.e., that they can use a firearm "in a manner that does not endanger oneself or others," N.Y. Penal Law § 400.00(1)(b)—violates the Second Amendment on its face. "A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the

Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "Facial challenges are disfavored" because they "often rest on speculation" and thus "raise the risk of premature interpretation of statutes on the basis of factually barebones records." *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) (quotation marks omitted). Facial challenges are also inconsistent with principles of judicial restraint because they force courts to "anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.* (quotation marks omitted). And "facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from being implemented in a manner consistent with the Constitution." *Id.* at 451.

Here, as the court of appeals correctly recognized (*e.g.*, App. 65-66, 88), petitioners' challenge displays all the deficiencies of a facial challenge. Petitioners plainly cannot establish that there is "no set of circumstances," *Salerno*, 481 U.S. at 745, in which respondents could constitutionally refuse a firearm license to someone lacking good moral character, i.e., likely to use a firearm "in a manner that . . . endanger[s] oneself or others," Penal Law § 400.00(1)(b). Petitioners' challenge rests on speculation that the good-moral-character requirement permits "open-ended" discretion. (Br. 31.) But none of them has actually sought or been denied a license under the challenged scheme; nor is there any record to assess how the challenged licensing scheme operates in practice.[12] Petitioners' challenge therefore anticipates a

[12] Petitioners' citation (Pet. 35 n.22) to other cases with records not before this Court fails to show that the CCIA's good-moral-character requirement results in denial of licenses to individuals

(*continued on the next page*)

theoretical constitutional dispute before it has ever appeared in practice. And their challenge seeks to undermine the democratic process by blocking a duly enacted state statute without any evidence that the statute has been applied in an unconstitutional manner. Petitioners cannot state a facial claim—much less provide a basis for this Court's review on certiorari—by ignoring the licensing requirement's lawful applications and proceeding based solely on hypothetical unconstitutional applications.

Moreover, only one of the petitioners (Sloane) even arguably has standing to challenge the licensing provisions. (*See* CA2 J.A. 18-19.) Although the court of appeals found that Sloane had standing to challenge the constitutionality of a licensing requirement that has never been applied to him, that ruling is highly contestable, and ultimately this Court may conclude that it lacks jurisdiction to reach the merits of the question presented. In addition, if Sloane did decide to apply for a license during the pendency of this case, the challenge could be mooted, because he attests that he is a law-abiding person and has good moral character, which should qualify him for a license (CA2 J.A. 144 ¶ 3, 146

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who could safely carry firearms. One of those cases involved a challenge to county-specific licensing requirements not at issue in this case. *See Matter of Kamenshchik v. Ryder*, 78 Misc. 3d 646 (N.Y. Sup. Ct. Nassau Cnty. 2023), *notice of appeal docketed*, No. 2023-05877 (N.Y. 2d Dep't May 21, 2023). And the other two cases on which petitioners rely predate the CCIA's addition of the expressly dangerousness-based good-moral-character definition at issue here. *See Sibley v. Watches*, 501 F. Supp. 3d 210 (W.D.N.Y. 2020); *Matter of Dimino v. McGinty*, 210 A.D.3d 1150 (N.Y. 3d Dep't 2022). That definition eliminates any discretion licensing officers previously could have had to deny licenses to individuals who could safely carry firearms. See *infra* at 25-26.

¶ 14). Accordingly, this case is an exceedingly poor vehicle to address petitioners' question presented.

B. The Decision Below on the Licensing Question Is Consistent with *Bruen*.

The second question presented does not warrant this Court's review for the additional reason that the court of appeals' decision on that point is consistent with *Bruen*. The good-moral-character requirement at issue here denies firearm licenses only to individuals who are demonstrably dangerous: those who lack "the essential character, temperament and judgement necessary to be entrusted with a weapon and to use it *only in a manner that does not endanger oneself or others*." Penal Law § 400.00(1)(b) (emphasis added). As the court of appeals correctly explained, the requirement is merely "a proxy for dangerousness." (App. 55.)

Requirements similar, or indeed nearly identical, to the good-moral-character requirement are a feature of many other States' firearm licensing regimes, which were favorably referenced in *Bruen* as "shall issue"-type regimes appropriately "designed to ensure only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens,'" *Bruen*, 597 U.S. at 38 n.9 (quoting *Heller*, 554 U.S. at 635). *See id.* at 13 n.1 (collecting statutes). Some of those States expressly require good moral character. *See*, *e.g.*, Del. Code Ann. tit. 11, § 1441(a) (applicant must be of "good moral character"); Ga. Code Ann. § 16-11-129(d)(4) ("of good moral character"); Ind. Code § 35-47-2-3(g)(2) ("of good character and reputation"); Me. Rev. Stat. Ann., tit. 25, § 2003(1) ("demonstrate[] good moral character"). And others use similar dangerousness proxies, for instance referring to "suitability" for a license, *see*, *e.g.*, Conn. Gen. Stat. § 29-28(b)(2); 11 R.I. Gen. Laws Ann. § 11-47-

11(a), or not posing a likelihood of using a weapon in a "manner as would endanger the person's self or others," Iowa Code Ann. § 724.8(3). *See also, e.g.*, Ala. Code § 13A-11-75(c)(11) (applicant must not cause "justifiable concern for public safety"); Colo. Rev. Stat. Ann. § 18-12-203(2) (not likely to "present a danger to self or others"); Tex. Gov. Code Ann. § 411.172(a)(7) ("not incapable of exercising sound judgment with respect to the proper use and storage"); Va. Code Ann. § 18.2-308.09(13) (not "likely to use a weapon unlawfully or negligently to endanger others"). (*See also* App. 82-86 (citing additional examples).)

Petitioners' contention (*see*, *e.g.*, Pet. 31, 35-36) that the CCIA's good-moral-character requirement would give licensing officers "open-ended" discretion to deny licenses to law-abiding and responsible citizens is incorrect. Under the CCIA, anyone satisfying the statutorily defined license requirements—i.e., as relevant here, anyone who will "not endanger oneself or others" with a firearm—"shall be issued" a license. *See* N.Y. Penal Law § 400.00(2). The licensing officer has no more discretion than in the other shall-issue regimes discussed above that this Court approved in *Bruen*. And, under the CCIA, the officer must explain the reasons for the denial in writing, and the applicant is entitled to appellate review, both administratively in some jurisdictions and judicially in a state court challenge. *See id.* § 400.00(4-a); N.Y. C.P.L.R. §§ 7801-7806.

Petitioners are also wrong to assert (Pet. 31) that New York "replaced" the proper-cause requirement this Court found unconstitutional in *Bruen* with the good-moral-character requirement. The good-moral-character requirement dates back more than a century, *see* Ch. 608, § 1, 1913 N.Y. Laws 1627, 1629, and serves the independent purpose of ensuring that firearm license

applicants are not dangerous, regardless of what, if any, cause they might have for carrying a firearm. What *has* changed after *Bruen* is the CCIA's clarifying definition of good moral character, explicitly tying that term to dangerousness. *See* N.Y. Penal Law § 400.00(1)(b). This definition expressly cabins licensing officers' discretion, and closely mirrors language from licensing schemes in other States that this Court approved in *Bruen*, 597 U.S. at 13 n.1, 38 n.9. Petitioners simply misread *Bruen* in suggesting (Pet. 33) that this Court rejected a statutory standard like the CCIA's that denies licenses to those lacking the character or temperament necessary to be entrusted with a weapon safely. On the contrary, this Court endorsed a nearly identical standard as a valid "shall issue"-type regime. *See Bruen*, 597 U.S. at 13 n.1, 38 n.9 (approving standard precluding licenses for those "whose conduct has shown them to be lacking the essential character o[r] temperament necessary to be entrusted with a weapon" (quotation marks omitted)).[13]

Because the CCIA's good-moral-character requirement "ensure[s] only that those bearing arms in the jurisdiction are, in fact, 'law-abiding, responsible citizens,'" *see Bruen*, 597 U.S. at 38 n.9 (quoting *Heller*,

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[13] *Srour v. New York City*, No. 22-cv-3, 2023 WL 7005172 (S.D.N.Y. Oct. 24, 2023), on which petitioners (Pet. 33) and an amicus rely, is no help to them. *Srour* predates the Second Circuit's governing decision in this case and was abrogated by the latter decision to the extent *Srour*'s reasoning was inconsistent. Accordingly, the Second Circuit stayed the district court's decision in *Srour* pending appeal. *See* Order, *Srour v. New York City*, No. 23-7549 (2d Cir. Feb. 21, 2024), ECF No. 31. In any event, *Srour* addresses a pre-*Bruen* New York City law, which lacked the dangerousness-based definition of good moral character implemented in the CCIA. *See* 2023 WL 7005172, at *2-4.

554 U.S. at 635), protected by the Second Amendment in the first instance, respondents were not required to proffer historical evidence to support the requirement. But even if a historical showing were required, the court of appeals was correct to conclude that respondents easily satisfied it. The historical record confirms that a "legislature may disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety," *Kanter v. Barr*, 919 F.3d 437, 454 (7th Cir. 2019) (Barrett, J., dissenting). The good-moral-character requirement, especially as defined by the CCIA, serves precisely the same purpose. Respondents identified many relevant historical analogues, from Founding-era loyalty and militia laws disarming dangerous individuals, to incorporation-era firearm licensing laws, in their papers below. (*See*, *e.g.*, Br. for Appellants Nigrelli & Doran at 34-36 (Jan. 9, 2023), CA2 ECF No. 95.) And the court of appeals rightly recognized both that "[t]here are a lot" of early licensing laws like the CCIA's (App. 67-70), and that, "[s]trikingly . . . these laws and ordinances did not merely exist—they appear to have existed without constitutional qualms or challenges" (App. 73).

C. There Is No Circuit Split on the Licensing Question.

Finally, petitioners are wrong to assert (Pet. 34-37) that the decision below creates a circuit split. Petitioners cite no decision of another circuit holding a licensing requirement like the CCIA's good-moral-character requirement inconsistent with the Second Amendment, and respondents are aware of none.

The cases on which petitioners rely address wholly different issues. The Third Circuit's decision in *Range v. Attorney General* held that a federal statute categori-

cally prohibiting firearm possession by convicted felons was not consistent with the Second Amendment as applied in that case. *See* 69 F.4th 96, 106 (3d Cir. 2023) (en banc). The Fifth Circuit's decision in *United States v. Daniels* held that a federal statute categorically prohibiting firearm possession by a user of a controlled substance was not consistent with the Second Amendment as applied in that case. *See* 77 F.4th at 353.[14] These cases address categorical prohibitions, and they turn on the observation that not all convicted felons, and not all occasional drug users, pose a sufficient threat to warrant a ban on possession of firearms. The cases do not involve an individualized licensing requirement like the CCIA's, and so they could not create a circuit split with the decision below.[15]

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[14] Petitioners also rely on a dissent from denial of rehearing (Pet. 37 n.23), which likewise addressed a federal statute categorically prohibiting the sale of certain firearms, in that case, to people under twenty-one years old. *See National Rifle Ass'n v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 714 F.3d 334, 335 (5th Cir. 2013) (Jones, J., dissenting).

[15] Moreover, because the decision below expressly did not reach the issue of whether the "people" protected by the Second Amendment include only law-abiding and responsible citizens (App. 56-58), the decision below cannot be in conflict with the Third Circuit's *Range* decision on that issue, as petitioners suggest (Pet. 36).

CONCLUSION

The petition for certiorari should be denied.[16]

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[16] Respondents take no position as to whether this Court should hold this petition pending the forthcoming decision in *United States v. Rahimi*, No. 22-915.