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 Acting Superintendent of the New York State Police, *et al.*,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF

The same state whose "proper-cause" standard was struck down by *Bruen* now urges this Court to postpone review of its "*Bruen* response bill." While Respondents admit their prior standard was "exceptional," to accept their claim that their latest enactment is "wholly unexceptional" would allow foxes to guard the henhouse. Respondents make no attempt to walk back Governor Hochul's denigration of *Bruen* or her legislative plan to contravene *Bruen*, not comply with it.

Respondents' arguments against review are unavailing. As two Justices of this Court already observed, "[t]he New York law at issue ... presents novel and serious questions under both the First and the Second Amendments." *Antonyuk v. Nigrelli*, 143 S. Ct. 481 (2023). No benefit will come from delaying review of lower-court rebellion against *Bruen*. Rather, this case presents a critical opportunity to course-correct and resolve the circuit splits that have emerged in *Bruen*'s wake.

I. RESPONDENTS MISSTATE THE PRACTICE GOVERNING CERTIORARI REVIEW OF INJUNCTIONS.

Respondents urge this Court to deny interlocutory review, which they claim is the "ordinary practice" except for "very rare circumstances." Brief in Opposition("Opp.") at 11. In support, Respondents offer two purported "depart[ures] from that practice," citing *Will v. Hallock*, 546 U.S. 345, 349-50 (2006), and *Ashcroft v. Iqbal*, 556 U.S. 662, 671-72 (2009). *Id.* But the language Respondents pincite from those decisions

has nothing to do with when *this Court* grants certiorari. Rather, in both instances Respondents point to discussion of 28 U.S.C. § 1291, governing *circuit court review* of district court decisions and the collateral order doctrine.

Respondents also reference five cases where this Court denied certiorari review of non-final judgments. Opp.11 n.6. Each is readily distinguishable. Here, the Second Circuit remanded "for proceedings consistent with this opinion." App.6. In contrast, three of Respondents' cases involved remand of complex factual issues to the trial court. *See Abbott v. Veasey*, 580 U.S. 1104, 1105 (2017) ("remanded for further consideration of the facts"); *Wrotten v. New York*, 560 U.S. 959, 960 (2010) (same); *Bhd. of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (same). One involved remand to craft a remedy. *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944, 945 (2012). And the last involved a denial when 10 circuits were uniform on the question presented. *Moreland v. Fed. Bureau of Prisons*, 547 U.S. 1106, 1107 (2006).[1]

[1] Respondents object that they had only three weeks to identify historical analogues. Opp.8, 11. But the Concealed Carry Improvement Act ("CCIA") was enacted July 1, 2022, and Second Circuit appellate argument was held March 20, 2023, giving Respondents more than eight months to locate and present historical analogues.

While certiorari review of non-final orders is not routine, it certainly is not extraordinary.[2] What is extraordinary is the Second Circuit's defiance of this Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). Multiple Justices have expressed concern about delaying review in similar situations. *See, e.g.*, *Peruta v. California*, 582 U.S. 943, 947-48 (2017) (Justices Thomas and Gorsuch); *Rogers v. Grewal*, 140 S. Ct. 1865, 1866 (2020) (Justices Thomas and Kavanaugh); *N.Y. State Rifle & Pistol Ass'n v. City of New York*, 140 S. Ct. 1525, 1527 (2020) (Justices Kavanaugh, Alito, Gorsuch, and Thomas).

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

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

As Petitioners explained, the Second Circuit erroneously upheld the CCIA based almost exclusively on Reconstruction-era (and later) sources. Petition for Writ of Certiorari at 22 ("Pet."). And the few Founding-era statutes the court did identify were rejected in *Bruen*. Pet.23. Meanwhile, the court ignored the contrary Founding-era tradition. *See* Pet.25. In other words, the Second Circuit determined the Second Amendment's original meaning with

[2] *See, e.g.*, *Whole Woman's Health v. Jackson*, 595 U.S. 30 (2021); *Coinbase, Inc. v. Bielski*, 599 U.S. 736 (2023); *Warner Chappell Music, Inc. v. Nealy*, 2024 U.S. LEXIS 1978 (May 9, 2024).

virtually no reference to the time period when it was ratified.

Attempting to rehabilitate this deficiency, Respondents claim that the Virginia and North Carolina "'fairs and markets'" statutes (along with a later one from the District of Columbia) governed a sufficiently "large proportion of the national population" to establish a historical tradition. Opp.13. But Respondents omit that none of those statutes prohibited mere carriage, but rather offensive conduct — "bearing arms in 'terror' of the county." App.150 n.74; *see also* Pet.23. Minimizing *Bruen*'s rejection of these very laws (*id.* at 47, 122), Respondents split hairs, claiming that *Bruen*'s rejection was "only 'within the context in which th[e] statute[s] w[ere] offered'" — "'a carriage ban in public *generally*,'" not the "specific location restrictions" here. Opp.14. *But see Bruen* at 49-50. Glaringly, Respondents never mention the Statute of Northampton, on which these laws were based, perhaps because this Court broadly (not in any specific "context") said it "has little bearing on the Second Amendment...." *Id.* at 41.

Papering over the dearth of Founding-era analogues in the Second Circuit's opinion, Respondents curiously attempt to shoehorn as authority *their own briefing* below. Opp.13 (*citing* CA2 J.A. 297-320, 361-429).[3] But the Second Circuit plainly *did not rely*

[3] Respondents also cite four pages of the Second Circuit's opinion which reference more than a dozen judicial opinions and three law review articles (*see* Opp.13, *citing* App.59-62) — but identify precisely zero Founding-era historical analogues. *Cf.* Opp.14 n.7 (criticizing Petitioners for offering "secondary sources").

on Respondents' sources, apparently finding them unhelpful or unpersuasive.

Alternatively, Respondents offer a smattering of reasons why the Second Circuit was right to uphold the CCIA *even without* any Founding-era analogues. Opp.13-15. First, Respondents opine that the lack of gun control in "commons and greens" (and a robust tradition of bearing arms in such places, *see* Pet.24-25) is not dispositive because, for unstated reasons, such places are entirely unlike "modern parks" which "emerg[ed] in the nineteenth century...." Opp.13-14. Second, Respondents assert that *Bruen*'s rejection of three "'colonial regulations'" as insufficient does not apply to "Founding era ... regulations." Opp.14. On the contrary, *Bruen* repeatedly discounted historical laws that were few in number. *Id.* at 65, 67-69. Finally, although it appears the North Carolina statute cited by the Second Circuit was never actually on the books, Respondents claim this is of no moment, alleging it was "in force … through common law." Opp.15 n.8 (*citing State v. Huntly*, 25 N.C. 418, 420-21 (1843)). But that is *not* what the North Carolina court said. Rather, the court questioned "*whether* this statute *was or was not* formerly in force in this State...." *Id.* at 420 (emphasis added). The passage Respondents reference was a quotation from a legal treatise, not the court's opinion. And even if true, "this Court has long cautioned that the English common law 'is not to be taken in all respects to be that of America.'" *Bruen* at 39.

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

Respondents claim that courts routinely find "post-1791 history" relevant and this Court's precedents "do[] not preclude the relevance of history from the incorporation era...." Opp.17. But Petitioners never claimed such history to be irrelevant, only that, "[t]o the extent that earlier or later sources are utilized, it is only to confirm the understanding that existed at the Founding." Pet.12 ("1791 [i]s the proper focal point," as *Heller* "primarily examin[ed] sources from the Founding," and only "secondarily considered" later evidence); *see also* Pet.13 (same for *McDonald*); Pet.14 (same for *Bruen*). *See also* Pet.15-16 ("preceding or subsequent history serv[es] a merely confirmatory role"); Pet.17 n.11 (later sources "must confirm (not create or contradict)"). Respondents' numerous citations to cases using that very approach (Opp.16-17) prove nothing.

Next, Respondents dispute that the Second Amendment's meaning is "pegged ... 'to ... 1791.'" Opp.17. Ignoring that this Court said just that, in so many words (*Bruen* at 37), Respondents theorize that "the Court sometimes 'assumed'" this "without deciding," but other statements "cast[] doubt on this assumption...." *Id.* But even if true, this merely underscores *why* the Petition presents an important question that this Court should resolve.

Respondents next disagree that the Second Circuit "marginalize[d] *Bruen*." Opp.18. But Respondents do

as well, characterizing *Bruen* as addressing the "exceptional ... proper-cause requirement," unlike the CCIA's purportedly "wholly unexceptional provisions" which require proving one's "good moral character" to the government, and convert virtually the entire State into a gun-free zone. *Id.*; *see also* Pet.18, 7-8. Respondents also omit *why* the Second Circuit deemed *Bruen* "exceptional" — so that it could declare *Bruen*'s analytical framework inapplicable. *See* Pet.18-19. Indeed, Respondents do the same as the Second Circuit, asserting that even a complete "absence of prior laws is relevant but not dispositive." Opp.18 (erroneously claiming that this "commonsense point" was "not addressed in *Bruen*"). *But see Bruen* at 26 ("the lack of a distinctly similar historical regulation … is relevant evidence that the challenged regulation is" unconstitutional); *cf.* App.28, 35 (admitting "a lack of [historical] precedent was … dispositive in *Bruen*...."). Indeed, *Bruen* declined even to rely on laws when there was "little evidence" they were "ever enforced" (*Bruen* at 58), making it highly unlikely that a *complete absence* of analogues is "not dispositive."

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

Responding to Petitioners' argument that the courts of appeals are deeply divided on the appropriate temporal focal point for Second Amendment review, Respondents take different positions — at first flatly denying that any such split exists, but eventually conceding "vari[ance]." Pet.26-31.

Initially, Respondents claim that "there is no circuit split on th[is] methodological question," as "the lower courts ... have consistently agreed ... that at least some weight should be given to ... incorporation-era history." Opp.19-20. But again, Petitioners never claimed a circuit split as to whether reconstruction-era history is *irrelevant* — indeed, *Bruen* said it was secondary and confirmatory. *See* Pet.12, 17 n.11.

Shifting gears, Respondents object that some of Petitioners' cases involved "challenges to *federal* — rather than state — laws," which naturally focused on 1791 (because the Fourteenth Amendment was not implicated). Opp.20. But Respondents ignore what those courts said. In *United States v. Daniels*, 77 F.4th 337, 348 (5th Cir. 2023), the Fifth Circuit made clear that "the meaning of the Second Amendment ... was fixed ... in 1791." A West Virginia district court was similarly unequivocal: "reliance on mostly 19th century gun safety regulations … is misplaced under *Heller* and *Bruen*." *Brown v. BATFE*, 2023 U.S. Dist. LEXIS 214615, at *31 (N.D. W. Va. 2023). Yet "mostly 19th century gun safety regulations" is all the Second Circuit offered below.

Next, Respondents admit that the Third Circuit "rejected reliance on incorporation-era history," but claim this was only because there was "a conflict between incorporation-era history and Founding-era history." Opp.21 (citing *Lara v. Comm'r Pa. State Police*, 91 F.4th 122 (3d Cir. 2024)). Respondents seek to create a facade of harmony, referencing the Second Circuit's statement that "[w]e ... agree with the decisions of our sister circuits." Opp.19, App.41. But

of the four "sister circuits" the Second Circuit referenced, two were pre-*Bruen*, and the other two directly conflict with *Lara*. *See Range v. AG United States*, 69 F.4th 96, 112 (3d Cir. 2023) (Ambro, J., concurring) ("Founding-era regulations remain instructive unless contradicted by something specific in the Reconstruction-era"); *NRA v. Bondi*, 61 F.4th 1317, 1321-22 (11th Cir. 2023) (vacated by grant of rehearing *en banc*) ("Reconstruction Era ... historical sources ... more probative ... than those from the Founding Era."). These divergent positions cannot be reconciled.

Finally forced to concede that "courts have varied somewhat" (*i.e.*, that a circuit split exists) on the methodological question, Respondents suggest that "the issue is actively percolating in the lower courts," which "should be given an opportunity to crystallize ... their own law…." Opp.21 (lauding the benefit of "'diverse opinions'"). But if, as Respondents claimed, the lower courts are "consistent" on this issue, why would "diverse opinions" need further "percolation" in order to "crystallize"? Respondents thus identify the very circuit split they denied.

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

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

Respondents attack what they characterize as the "facial" nature of Petitioners' challenge to the "good

moral character" requirement. Opp.22-25. Opining that its open-ended, discretion-conveying language "could not possibly be unconstitutional in every application," Respondents conclude that "Petitioners cannot state a facial claim" in the first place. Opp.2, 24. Yet a similar facial challenge to the similar "good cause" standard presented no problem in *Bruen*.

Respondents object to examples of how the "good moral character" standard[4] has been abused (Pet.35 n.22) because those cases "predate the CCIA's addition of the ... good-moral-character definition," which they claim "narrowed and made more precise the longstanding requirement...." Opp.6, 24 n.12. In fact, CCIA adopted the very language used in those decisions. *See Kamenshchik v. Ryder*, 78 Misc. 3d 646, 651 (N.Y. Sup. Ct. Nassau Cnty. 2023) ("likely to engage in conduct that would result in harm to themselves or others"); *Sibley v. Watches*, 501 F. Supp. 3d 210, 219 (W.D.N.Y. 2020) ("the essential temperament of character which should be present in one entrusted with a dangerous [weapon]"). The CCIA generally codified what has been the law in New York since at least 1976. *See Pelose v. County Court of Westchester County*, 53 A.D.2d 645 (N.Y. App. Div. 1976).

[4] Respondents cannot seem to land upon a consistent position as to how much discretion "good moral character" bestows. First, they claim it "eliminates any discretion" (Opp.24 n.12), then that it allows "'bounded discretion'" (Opp.10), but then that it provides "no more discretion than in the other shall-issue regimes" (Opp.26).

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

Respondents defend the requirement that an applicant demonstrate "good moral character" to a licensing official prior to receiving permission to exercise enumerated rights, claiming this is "nearly identical" to other states' regimes which this Court "endorsed" in *Bruen*. Opp.27.[5] On the contrary, *Bruen* neither scrutinized nor validated other states' various licensing restrictions. The only "favorabl[e] reference[]" *Bruen* made to other states' laws was to note that those other states did not require "proper cause." *Bruen* at 38 n.9.

Next, Respondents contend that discretion is limited because applicants whose rights are infringed by denial of a permit are entitled to the "writ[ten] ... reasons for the denial" and are "entitled to appellate review...." Opp.26. But as this Court held in another context, an "inherent denial" of a constitutional right "is not saved by ... immediate appeal" or "the right to

[5] Respondents' position on this issue continues to evolve. In the district court, Respondents claimed that *Bruen*'s footnote 9 had "approved of" a multitude of other states' divergent licensing regimes, even though none was before the Court. *Antonyuk v. Hochul*, No. 1:22-cv-00986 (N.D.N.Y. Oct. 13, 2022), ECF #48 at 40. The district court rejected this argument as "just disingenuous." Hr'g Tr. 60:15, *Antonyuk* (Oct. 25, 2022), ECF#72. Respondents now assert that this Court merely "noted" other states' laws, but left them "undisturbed" and did not "undermine" them. Opp.4. Later, Respondents claim these laws "were favorably referenced in *Bruen*...." Opp.25-26. And just a page later, Respondents again claim that "good moral character" was "approv[ed]" in *Bruen*. Opp.27.

review … in the courts...." *Phillips v. Commissioner*, 283 U.S. 589, 594 (1931).

Respondents then describe the "good moral character" standard as nothing more than a determination whether a person is dangerous. *See* Opp.27 ("explicitly tying that term to dangerousness"); Opp.24 n.12. But Respondents repeatedly omit the first half of the definition — "having the essential character, temperament and judgement necessary to be entrusted with a weapon" — conspicuously quoting only the second half — "to use it only in a manner that does not endanger oneself or others." *See* Opp.*i*, 2, 7, 22, 23, 26. The statute requires both — "to be entrusted with a weapon **and** to use it" appropriately. App.436 (emphasis added). Respondents ignore the "entrust[ment]" requirement, because it is hard to imagine a broader grant of prohibited "open-ended discretion." *See Bruen* at 79 (Kavanaugh, J., concurring).

Lastly, Respondents claim they "were not required to proffer historical evidence to support ... good-moral-character," a standard which merely describes "'law-abiding, responsible citizens.'" Opp.27-28 (citing *Bruen* at 38 n.9). But *Bruen* never said that only government-deemed "responsible" people have Second Amendment rights. Nor did *Bruen* recognize any exception to its methodological framework, instructing that "[o]nly if a firearm regulation is consistent with this Nation's historical tradition" can it be declared constitutional. *Bruen* at 17. Nor does history "confirm[]" the CCIA's constitutional fidelity. Opp.28. Rather, "good moral character" is precisely the sort of

"suitability" determination this Court foreclosed in *Bruen*. *Id.* at 13; *Srour v. New York City*, 2023 U.S. Dist. LEXIS 190340, at *39-40 (S.D.N.Y. 2023). Even if "[t]he historical record confirms" the government's ability to "disarm[] dangerous individuals" (Opp.28), that does not support the "good moral character" standard.

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

Respondents claim "no … []other circuit" has held unconstitutional "a licensing requirement like the CCIA's good-moral-character requirement...." Opp.28. But this ignores the Second Circuit's holding that good moral "'character' is a *proxy for dangerousness*." App.55 (emphasis added). The circuits are indeed split as to whether the government may disarm over a subjective opinion of dangerousness. Pet.34-37. The Third Circuit rejected the proposition that a traffic ticket could exclude an American from the Second Amendment's protection. *Range* at 102. Likewise, the Fifth Circuit held that legislatures "cannot have unchecked power to designate a group of persons as 'dangerous' and thereby disarm them." *Daniels* at 353. But the "good moral character" standard, sanctioned by the Second Circuit below, allows just that.

Respectfully submitted,

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