No. 24-_____

IN THE
Supreme Court of the United States

IVAN ANTONYUK, *et al.*,

Petitioners,

v.

STEVEN G. JAMES, in his official capacity as the 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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Moments after this Court issued *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), striking down New York's discretionary firearms licensing regime, state politicians decried the decision as "reprehensible," vowing to resist the "insanity" of "gun culture" that "possessed … the Supreme Court." Rather than following *Bruen*, New York enacted a "Concealed Carry Improvement Act" that makes it more difficult to bear arms than before *Bruen* was decided.

A panel of the Second Circuit upheld much of this law in an opinion this Court vacated in light of *United States v. Rahimi*, 602 U.S. 680 (2024). But on remand, the panel doubled down, reissuing a nearly identical opinion and dismissing *Rahimi* as having "little direct bearing on our conclusions." Relying almost entirely on a few late-19th-century outlier laws rather than Founding-era practice, the panel again affirmed New York's requirement of "good moral character" as a precondition to public carry, along with most of its gun bans in all manner of nonsensitive public places. These holdings clearly contravene *Bruen*'s rejection of discretionary "suitability" assessments and warning not to declare all of Manhattan a "sensitive place." The questions presented are:

1. Whether the proper historical time period for ascertaining the Second Amendment's original meaning as applied to the states is 1791, rather than 1868; and
2. Whether "the people" must convince government officials of their "good moral character" before exercising their Second Amendment right to bear arms.

PARTIES TO THE PROCEEDING

Petitioners

Ivan Antonyuk, Corey Johnson, Alfred Terrille, Joseph Mann, Leslie Leman, and Lawrence Sloane.

Respondents

Steven G. James in his official capacity as Superintendent of the New York State Police, Judge Matthew J. Doran in his official capacity as the Licensing Official of Onondaga County, New York, and Joseph Cecile in his official capacity as the Chief of Police of Syracuse, New York.[1]

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioners state as follows:

The Petitioners are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Antonyuk v. James*, No. 22-2908 (lead), 22-2972 (consolidated) (2d Cir.) (opinion affirming in part and denying in part the district court's preliminary injunction) 120 F.4th 941 (Oct. 24, 2024);

[1] Steven G. James was appointed Acting Superintendent on January 31, 2024, replacing Dominick L. Chiumento, who had replaced Steven A. Nigrelli.

- *Antonyuk v. James*, No. 23-910 (U.S.) (order granting petition for writ of certiorari, vacating December 8, 2023 opinion, and remanding for further consideration) 144 S.Ct. 2709 (July 2, 2024);

- *Antonyuk v. Chiumento*, Nos. 22-2908 (lead), 22-2972 (consolidated) (2d Cir.) (opinion affirming in part and denying in part the district court's preliminary injunction) 89 F.4th 271 (Dec. 8, 2023); and

- *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH) (N.D.N.Y.) (order granting preliminary injunction) 639 F. Supp. 3d 232 (Nov. 7, 2022).

The district court continued its stay of this matter pending Petitioners' filing this Petition for Writ of Certiorari:

- *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH) (N.D.N.Y.) (Text Order 126, filed December 2, 2024).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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The Second Amendment "guarantees a general right to public carry." *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 33 (2022). But just days after *Bruen* issued, New York passed a defiant "response bill" seeking to nullify its effects. Intent on maintaining its *de facto* prohibition on public carry, New York decided that, if it must issue carry licenses after *Bruen*, it would discourage applicants by imposing novel and onerous licensing requirements, and then discourage license holders by declaring most of the State a "sensitive location" off-limits to firearms.

Although the district court issued a "thorough opinion" carefully applying the *Bruen* framework, finding Petitioners "likely to succeed on a number of their claims," and enjoining large portions of the Concealed Carry Improvement Act ("CCIA"), the Second Circuit quickly stayed that order without "any explanation for its ruling." Later, a merits panel ("the panel") issued an opinion largely vacating the district court's injunction, affirming only as to a few of the CCIA's least defensible provisions.

This Court summarily vacated the panel's opinion in light of *United States v. Rahimi*, 602 U.S. 680 (2024), which focused singularly on Founding-era history and repudiated any notion that so-called "irresponsible" Americans lose Second Amendment protection. But on remand, rather than applying *Rahimi*'s guidance, the panel doubled down, reissuing a lightly edited but substantively identical opinion. Casually dismissing this Court's explicit guidance as "dictum," the panel claimed *Rahimi* to have "little direct bearing on our conclusions."

Again justifying New York's widespread carry ban across most of the State, the panel ignored *Bruen* and *Rahimi*'s Founding-era emphasis, concocting a historical tradition composed almost entirely (and often exclusively) of mid-to-late 19th-century statutes that reveal nothing about the Second Amendment's original meaning. Similarly justifying New York's requirement that a person prove "good moral character" before being "entrusted" with an enumerated right – a "standard [which] *requires* the exercise of judgment" – the panel sanctioned precisely the "open-ended discretion" to adjudge "suitability" and "responsibility" that *Bruen* and *Rahimi* rejected.

The panel repeatedly justified its rejection of the *Bruen* methodology, claiming *Bruen* was an "exceptional" case, while in "less exceptional" cases – like this one, apparently – lower courts are free to contrive a different approach. And on remand, the panel flipped *Rahimi* on its head, claiming that historical surety laws – which *presumed public carry* – justify New York's regime which imposes *disarmament by default*. Brazenly, the panel all but acknowledged circumventing this Court's precedents, citing a law review article explaining how "lower courts" can "mitigate" *Bruen* by "engag[ing] in the time-honored practice of 'narrowing Supreme Court precedent from below.'"

This Court's intervention is necessary for several reasons. First, to correct the panel's flagrant methodological errors which conflict with this Court's precedents. Second, to repudiate the panel's unabashed refusal to abide by *Bruen*, and now *Rahimi*. And third, to provide lower courts with

further guidance on how to analyze Second Amendment cases.

To that end, this Court should definitively announce that the proper time period for ascertaining the scope of the Second Amendment is the Founding – not the last two decades of the 19th century as the panel apparently believed. In addition, this Court should clarify that government may not selectively disarm members of "the people" whenever government officials feel they are of poor "character" or "temperament," "irresponsible," lacking "judgment," or not perfectly "law-abiding." These necessary course corrections not only would rectify the errors in the panel's decision, but also would provide critical guidance to lower courts which are divided on the questions presented here.

OPINIONS BELOW

The opinion of the Court of Appeals (App.1-215) is reported at 120 F.4th 941. The district court's opinion (App.216-430) issuing a preliminary injunction is reported at 639 F. Supp. 3d 232.

JURISDICTION

The opinion of the Court of Appeals was issued on October 24, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the U.S. Constitution and the relevant portions of the New York Penal Law are reproduced at App.431-42.

STATEMENT OF THE CASE

A. The *Bruen* Decision

When this Court decided *District of Columbia v. Heller*, 554 U.S. 570 (2008), its recognition of a pre-existing, individual right to keep and bear arms was met with swift resistance. Nearly uniformly, the lower courts refused to believe that *Heller*'s rejection of "a freestanding 'interest-balancing' approach" would deny them the "power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634. Years of constitutional infidelity followed, during which lower courts invented atextual tests applying their own conceptions about which laws infringed the Second Amendment.

With *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), declaring the Second Amendment a "second-class right" no longer, this Court decisively ended the Second Amendment's relegation to constitutional steerage. Recognizing the traditional American right to public carry, *Bruen* rejected a New York law that treated the right as a mere privilege granted only after demonstrating "proper cause" to licensing authorities. *Id.* at 70. And repudiating atextual, ahistorical, "judge-empowering" interest balancing, *Bruen* explicitly reaffirmed *Heller*'s standard of review "centered on constitutional text and history." *Id.* at 22. Reiterating *Heller*'s first principles, *Bruen* instructed lower courts to ascertain the scope of the Second Amendment as originally understood by the people who adopted it. *Id.* This standard rightly places the burden on the government to prove affirmatively that any interposition between

"the people" and their right to "keep and bear arms" comports with early American practice. *Id.* at 24.

B. New York's "*Bruen* Response Bill"

Even before *Bruen*'s ink was dry, New York Governor Kathleen Hochul decried it as "reckless" and "reprehensible."[2] Alarmed at the prospect of an independent populace empowered against the criminal element, the Governor made her plan clear: "This decision … [is] not what New Yorkers want. We should have the right of determination … [we] have a moral responsibility to do what we can … because of … the insanity of the gun culture that has now possessed … the Supreme Court." *Id.*

The CCIA passed almost immediately. Its "swift and bold action" to address this Court's purportedly "senseless[]" decision sought to combat "the resulting increase in licenses and … number of individuals who will likely purchase and carry weapons" in *Bruen*'s wake.[3] Accordingly, the CCIA maintains business as usual in the Empire State where, one way or another, ordinary citizens are prevented from publicly carrying firearms for self-defense. The CCIA – by design and intent – makes the licensing process so onerous, and the list of newly "sensitive" places so expansive that, in New York, it is as if *Bruen* was never decided.

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[2] "Governor Kathy Hochul Issues Response to Supreme Court Ruling Striking Down New York's Concealed Carry Restriction," *N.Y. State* (June 23, 2022).

[3] "Press Release: Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision," *N.Y. State* (July 1, 2022).

The CCIA effectuates its *Bruen* nullification scheme first by overhauling New York's licensing regime. In place of the invalidated "proper cause" standard, the CCIA imposes an equally discretionary "good moral character" test, defined as "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." App.438. To implement this ahistorical morality test, the CCIA demands character references, information about cohabitants and adult children, a personal "interview" with a licensing official, more than two full days of firearms training, a list of social media accounts, and "such other information" as might be demanded. App.440-42.

For those who persevere through this process, the CCIA then restricts *where* a licensee may carry a firearm, declaring not just "the island of Manhattan" but virtually the *entire landmass* of New York a "sensitive place," making public carrying so risky that even the hyper-law-abiding licensee would not dare. In fact, when asked where New Yorkers *could* carry under the CCIA, Governor Hochul responded "[p]robably some streets."[4] These so-called "sensitive locations" comprise 20 categories, and more subcategories, including most ordinary locations normal people visit daily. *See* App.434-36. Finally, filling the gaps in this disarmament scheme, the CCIA effectively commandeers *all private properties* in New York, declaring them "restricted locations" where

[4] M. Kramer & D. Brennan, "Fresh Off Primary Win, Gov. Kathy Hochul Drives Right into Guns – Who Can Get Them and Where They Can Take Them," *CBS NY* (June 28, 2022).

firearms by default are prohibited unless the owner posts "clear and conspicuous signage" or "giv[es] express consent." App.433.

C. Proceedings Below

Petitioners filed suit in the Northern District of New York on September 20, 2022, challenging various CCIA provisions under the First, Second, Fifth, and Fourteenth Amendments. The district court partially granted preliminary relief on November 7, 2022, enjoining enforcement of many provisions. App.428-30.

Respondents appealed to the Second Circuit, seeking an emergency interim stay and a stay pending appeal. The Second Circuit reflexively granted Respondents first a "temporary stay" before Petitioners could respond, and later a stay pending appeal without any analysis.

On December 21, 2022, Petitioners sought emergency relief from this Court to vacate the Second Circuit's unexplained stay. Although this Court declined to intervene prior to appellate review, Justices Alito and Thomas explained that the CCIA "presents novel and serious questions under both the First and the Second Amendments," noting that the district court's "thorough opinion" found "that the applicants were likely to succeed … as to twelve provisions of the challenged law." *Antonyuk v. Nigrelli*, 143 S.Ct. 481 (2023) (Alito, J., and Thomas, J., respecting denial of application to vacate stay).

After briefing and oral argument, the panel issued its opinion in a consolidated appeal on December 8, 2023. *Antonyuk v. Chiumento*, 89 F.4th 271, 299 (2d Cir. 2023). Distinguishing *Bruen* as an "exceptional"

case, the panel vacated much of the district court's injunction, finding virtually all of the CCIA to be facially constitutional under the Second Amendment. Petitioners filed a petition for writ of certiorari on February 20, 2024.

Soon thereafter, this Court decided *United States v. Rahimi*, 602 U.S. 680 (2024), upholding temporary disarmament of individuals subject to domestic violence restraining orders. Like *Bruen*, *Rahimi* focused singularly on Founding-era history, reiterating that courts must apply "faithfully the balance struck by the founding generation...." *Id.* at 692. And this history showed a broad and enduring tradition of allowing public carry *by default*, with individualized assessments of dangerousness occurring only upon credible accusation – not as a precondition to public carry in the first place. *See id.* at 696-97. Finally, *Rahimi* repudiated the notion that only the "responsible" enjoy Second Amendment rights, noting the term's inherent "vague[ness]" and explaining that it does not "derive from our case law." *Id.* at 701.

After issuing *Rahimi*, this Court granted the petition in this case on July 2, 2024, vacated the panel opinion, and remanded "for further consideration in light of" *Rahimi*. After supplemental briefing, the Second Circuit issued a largely unchanged opinion on October 24, 2024, reiterating its prior holdings and dismissing *Rahimi* as having "little direct bearing on our conclusions." App.7.

REASONS FOR GRANTING THE PETITION

I. THIS CASE PRESENTS AN EXCEPTIONALLY IMPORTANT QUESTION WHOSE ANSWER WILL AFFECT MANY SECOND AMENDMENT CASES.

A. *Bruen* and *Rahimi* Left Unresolved the Appropriate Temporal Focal Point for Second Amendment Analysis.

Although acknowledging "an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding" when the Fourteenth Amendment was ratified in 1868, or when the Second Amendment was ratified in 1791, *Bruen* ultimately left the question unresolved "because … the public understanding … in both 1791 and 1868 was … the same...." *Bruen* at 37-38. Yet Justice Barrett anticipated that this question "might make a difference in another case," explaining that "1791 is the benchmark" and "Reconstruction-era history" alone is "simply too late" and "too little." *Id.* at 82 (Barrett, J., concurring). Cautioning the lower courts, Justice Barrett rejected any "freewheeling reliance on historical practice from the mid-to-late 19th century...." *Id.* at 83.

But following *Bruen*, the lower courts have failed to coalesce on this temporal question and, like *Bruen*, *Rahimi* did not "resolv[e] the dispute." *Rahimi* at 692 n.1. And like Justice Barrett in *Bruen*, Justice Jackson called the temporal question an "[e]xtremely pertinent inquir[y]" which "await[s] resolution...." *Id.* at 746 n.4 (Jackson, J., concurring). Indeed, there is a multi-way circuit split on the question, and the district

courts are in disarray, with divergent approaches continuing to multiply as to *which* historical sources to use.

This case presents an excellent vehicle for this Court to resolve the debate between 1791 and 1868, which presents at all stages of litigation. Below, the panel relied – almost exclusively – on historical laws enacted well after the Second Amendment's ratification, with the earliest being nearly half a century after the Founding. Strikingly, *Bruen* considered and rejected each of the three earlier purported analogues the panel did reference. Thus, the panel's singular focus on mid-to-late 19th-century sources was outcome-determinative in this case because, "apart from a handful of late-19th-century jurisdictions" (*Bruen* at 38), no historical tradition exists to justify the CCIA. Resolution of the temporal question not only will correct the panel's errors below, but also will provide critical guidance to innumerable lower courts analyzing similar challenges.

B. This Court's Second Amendment Decisions Confirm 1791 Is the Proper Focal Point.

Although *Bruen* found it unnecessary to definitively resolve the temporal "scholarly debate," that does not mean the lower courts lack guidance. Indeed, *Heller*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), *Bruen*, and *Rahimi* each demonstrate that the Second Amendment should be construed as originally understood in 1791. To the extent that earlier or later sources are utilized, it is only to confirm a tradition that existed at the Founding. As

Bruen stated, this is the Court's "general[] assum[ption]." *Id.* at 37.

Heller explained that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them...." *Id.* at 634-35; *see also* at 614 (post-Civil War "discussions took place 75 years after the ratification of the Second Amendment," and thus "do not provide as much insight into its original meaning as earlier sources."). Therefore, after primarily examining Founding-era sources (*id.* at 582-603), the Court considered sources "through the end of the 19th century" only to confirm what already had been established (*id.* at 605-19). Thus, in *Heller*, as in *Bruen*, the tradition of both time periods was "the same...." *Bruen* at 38.

McDonald provides further confirmation, rejecting "'the notion that the Fourteenth Amendment applies to the States only a watered-down, subjective version of the individual guarantees of the Bill of Rights....'" *Id.* at 765. Like *Heller*, *McDonald* examined "[e]vidence from the period immediately following the ratification of the Fourteenth Amendment," but only because it "confirms that the right to keep and bear arms was considered fundamental." *Id.* at 776; *see also* at 780.[5]

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[5] The panel misread *McDonald*, claiming its examination of "evidence of the pre-Civil War and Reconstruction Eras" supported its singular focus on 1868. App.48 (citing *McDonald* at 770-78). But this ignores *McDonald*'s preceding pages, which examined 19th-century sources *only after* recounting the English tradition, noting that this tradition continued to the colonies, and explaining that "[t]his understanding persisted in the years

Bruen further confirmed that 1791 is the focal point for Second Amendment interpretation. First, the Court described the Second Amendment as being "'intended to endure for ages to come,'" noting that "its meaning is fixed according to the understandings of those who ratified it...." *Id.* at 28. Second, the Court reaffirmed that constitutional rights have the same meaning "against the States … as against the Federal Government." *Id.* at 37. Third, the Court noted that "we have generally assumed that the scope of the protection applicable to the … States is pegged to … 1791." *Id.* Fourth, the Court again made clear that 19th-century history "'do[es] not provide as much insight into [] original meaning as earlier sources.'" *Id.* at 36. And fifth, the Court explained that, to the extent 19th-century evidence is to be consulted at all, it only provides "'mere confirmation of what the Court thought had already been established.'" *Id.* at 37.

Rahimi, too, focused entirely on 1791, undermining the notion that *Bruen* was somehow "exceptional." App.44; *cf. Rahimi* at 714 (Gorsuch, J., concurring) ("following exactly the path we described in *Bruen*"). As *Rahimi* explained, "[*s*]*ince the founding*, our Nation's firearm laws have" supported temporary disarmament based on individualized

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immediately following the ratification of the Bill of Rights." *Id.* at 767-69. According to the panel, "[i]t would be incongruous to deem" the Second Amendment "fully applicable to the States by Reconstruction standards but then define its scope and limitations exclusively by 1791 standards." App.48-49. But *McDonald* did precisely that, stating "that incorporated Bill of Rights protections 'are all to be enforced against the States … according to the same standards'" as "'against federal encroachment.'" *Id.* at 765.

dangerousness. *Id.* at 690 (emphasis added). Indeed, *Rahimi*'s Founding-era focus was pervasive, extending to both concurrences and dissent. *See, e.g.*, *id.* at 710 (Gorsuch, J., concurring) ("'admitting only those exceptions established at the time of the founding'"); *id.* at 705 (Sotomayor, J., concurring) (discussing issues "'persist[ing] since the 18th century'"); *id.* at 737 (Barrett, J., concurring) (Second Amendment's "meaning … is fixed at the time of its ratification"); *id.* at 750 (Thomas, J., dissenting) (noting "a general societal problem that has persisted since the 18th century").

This Court's precedents thus provide unwavering confirmation that the Second Amendment is to be understood based on the original "public understanding of the right" when it was adopted in 1791. Yet despite seemingly widespread agreement among the Justices, the panel read *Rahimi* differently, claiming it had "little direct bearing on our conclusion[]" that 1868 is a focal point of Second Amendment analysis. App.7, 46-47 n.16.

C. This Court's Other Decisions Confirm 1791 as the Proper Focal Point.

In addition to *Heller*, *McDonald*, *Bruen*, and *Rahimi*, other decisions indicate that 1791 is the appropriate focus for determining original meaning. Indeed, *Bruen* referenced several such decisions (*Bruen* at 37, collecting cases), which make several analytical precepts clear.

First, this Court consistently holds that incorporated constitutional provisions mean the same "against the States … as against the Federal Government." *Bruen* at 37; *see also South Carolina v.*

United States, 199 U.S. 437, 448 (1905) ("The Constitution['s] … meaning does not alter. That which it meant when adopted it means now."). Consequently, this Court has observed "no daylight between the federal and state conduct" for incorporated Bill of Rights provisions. *Timbs v. Indiana*, 586 U.S. 146, 150 (2019).

Second, this Court consistently has used 1791 as the focal point of analysis, second only to "the text," and with preceding or subsequent history serving a merely confirmatory role. *See, e.g.*, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 536 (2022) (Establishment Clause application to state action must "'faithfully reflec[t] the [Founders'] understanding....'"); *Virginia v. Moore*, 553 U.S. 164, 168 (2008) ("look[ing] to … the founding era to determine" Fourth Amendment "norms."); *Gamble v. United States*, 587 U.S. 678, 683, 685 (2019) (examining how the Fifth Amendment "was commonly understood in 1791," before turning to "antebellum case[s]" which "reflect the same reading"); *Ramos v. Louisiana*, 590 U.S. 83, 91 (2020) (looking to "[i]nfluential, postadoption treatises [to] confirm" the Sixth Amendment's "backdrop"); *Timbs*, 586 U.S. at 152 (examining "colonial-era provisions" and the "constitutions of eight States" to determine the Eighth Amendment's original meaning, before finding further confirmation in "[a]n even broader consensus … in 1868").

Third, never has this Court looked to 1868, or beyond, as the primary historical period for determining the meaning of an enumerated right

adopted in 1791 and later applied to the states.[6] Rather, subsequent history can only "confirm[] … what the Court thought had already been established." *Bruen* at 37; *see also Espinoza v. Mont. Dep't of Revenue*, 591 U.S. 464, 482 (2020) (a tradition arising "in the second half of the 19th century … cannot by itself establish an early American tradition").[7]

There is no question that this Court's uniform 1791-centric approach should (and does) apply to the Second Amendment, which is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *McDonald* at 780. Thus, any entirely academic "ongoing scholarly debate" between 1791 and 1868 (*Bruen* at 37) has long been laid to rest. *Id.* at 82 (Barrett, J., concurring). Yet the panel claimed otherwise, asserting that "1868 and 1791 are *both* focal points" because "it is implausible that the public understanding of a fundamental liberty would arise at a historical moment, rather than over the preceding era." App.46-47 (emphasis added). But this methodology bears no resemblance to this Court's

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[6] The one exception, *Apodaca v. Oregon*, 406 U.S. 404 (1972), formed from a "badly fractured set of opinions" and was overruled. *Ramos* at 93.

[7] Nor may courts rely on pre-American sources to manufacture a tradition that was not adopted at the Founding. *Bruen* at 39 (cautioning "that the English common law 'is not to be taken in all respects to be that of America'"); *Powell v. Alabama*, 287 U.S. 45, 64 (1932) ("English common law" was "definitely rejected"). Thus, as with Reconstruction-era sources, to the extent that pre-Founding sources are to be used at all, they must confirm (not create or contradict) a tradition that existed at the Founding.

precedents, and this Court should grant certiorari to clarify that 1791 is *the* singular focal point for Second Amendment analysis.

II. THE DECISION BELOW DEFIES THIS COURT'S PRECEDENTS.

A. The Panel Boldly Stated Its Intent to Evade *Bruen*'s Framework.

Repeatedly, the panel asserted that it was not bound to apply *Bruen*'s methodology, surmising that *Bruen* was a case of "exceptional nature," and courts maintain flexibility when examining "less exceptional regulations." App.41. The panel repeated this claim no fewer than four times to justify circumvention of *Bruen*'s framework. *See, e.g.*, App.41 ("[A] lack of [historical] precedent was … dispositive in *Bruen*. But that was due to [its] exceptional nature...."); App.44-45 (*Bruen* rejected analogues affecting "'minuscule [and] territorial populations'" only because of "the exceptional context.... Outside such exceptional contexts," the lack of analogues "does not command the [same] inference...."); App.129 ("True, *Bruen* did utilize the number of states … and their relative populations as indicia of the orthodoxy and representativeness … but New York's requirement was exceptional....").

But although *Bruen* was a landmark decision, there was nothing "exceptional" about the historical framework the Court established. *See Rahimi* at 714 (Gorsuch, J., concurring) ("following exactly the path we described in *Bruen*"). Even Justice Breyer agreed that the Court was establishing rules for future cases. *Bruen* at 111 (Breyer, J., dissenting). As this Court

explained, *Bruen*'s methodology is the "[o]nly" way to analyze Second Amendment challenges. *Id.* at 17.

Not so, according to the panel. Justifying its refusal to strike down purportedly "less exceptional" CCIA provisions, the panel disagreed that "[t]he government must … justify its regulation [as being] consistent with the Nation's historical tradition...." *Bruen* at 24. Rather, the panel surmised, "the absence of a distinctly similar historical regulation … can only prove so much."[8] App.39-40. In support of this *Bruen*-defying conclusion, the panel cited a recent law review article (App.40 n.14) that labels *Bruen* "unsatisfying," claims *Bruen* "places outsized importance … on historical silence," and suggests "judicial … responses to the decision" in order to "read[] *Bruen* narrowly" and "engage in the time-honored practice of 'narrowing Supreme Court precedent from below.'" Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 67-149 (2023). Maligning this nation's historical tradition as "the dead hands of the past," the article recommends that, "though the Supreme Court may desire to sit as a superlegislature over nationwide gun policy, lower courts … need not easily cede the people's ultimate authority." *Id.* at 71, 155.

Even the panel's reference to this law review article is disturbing, as it boldly recommends "pathways for … lower courts to implement [*Bruen*]" with "significant refinement" and to decide cases "without voiding all reasonable attempts to regulate

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[8] *Cf.* App.42 ("lack of a distinctly similar historical regulation, … may not be reliably dispositive") *with Bruen* at 26 ("lack of a distinctly similar historical regulation … is relevant evidence").

guns," advocating for judicial opinions which make this Court "rethink whether the test *Bruen* mandated should be continued." *Id.* at 80, 146, 154. But then, after referencing this detailed plan to defy this Court, the panel's opinion then implemented the playbook.

B. As It Had with *Bruen*, the Panel Cast *Rahimi* Aside.

If *Bruen* left any questions unanswered, *Rahimi* laid them to rest. Contrary to the panel's insistence that *Bruen* was an "exceptional" case warranting uniquely heightened historical stringency, *Rahimi* confirmed that *Bruen* simply "explain[s]" the "appropriate analysis...." *Id.* at 692; *see also* at 714 (Gorsuch, J., concurring) ("following exactly the path we described in *Bruen*"). Thus, *Bruen* and *Rahimi* establish *the norm*, and do not "permit a 'more nuanced approach'" whenever a court declares a challenged regulation to be "less exceptional." App.41.[9]

But the panel read *Rahimi* differently, casting it aside as having "little direct bearing" despite being *the reason* behind this Court's remand. App.7. To reach this strange conclusion, the panel minimized (or ignored) much of this Court's latest pronouncement. First, the panel limited *Rahimi* to its facts, claiming the regulation examined in *Rahimi* is "quite different" from the CCIA and never "addressed" the issues presented here. App.7. Second, conceding that

[9] The "more nuanced approach" *Bruen* contemplated was the need for analogical reasoning in the absence of a persistent societal issue. *Bruen* at 26-28. *Bruen* did not sanction "nuance" as to the appropriate *temporal period*.

Rahimi nevertheless might provide some guidance, the panel summarily concluded that "*Rahimi* is consonant with the [approach] applied" previously. App.8. How the panel's focus on Reconstruction could be "consonant" with *Rahimi*'s focus on the founding, the panel never explained. And third, while *Rahimi* rejected the notion that only those deemed "responsible" have Second Amendment rights, the panel repeatedly discounted that statement as mere "dictum." *Rahimi* at 701; App.68 n.26, 71 n.30.

C. Freed from *Bruen* and *Rahimi*, the Panel Manufactured Its Own Framework.

Viewing *Bruen*'s methodology as applicable only to "exceptional" challenges, and *Rahimi*'s guidance as mere "dictum" with "little direct bearing," the panel charted its own course, engaging in precisely the sort of "freewheeling reliance on historical practice from the mid-to-late 19th century" that this Court implicitly – and Justice Barrett explicitly – rejected. *Bruen* at 83 (Barrett, J., concurring); *Rahimi* at 738 (Barrett, J., concurring).

First, the panel upheld many of the CCIA's novel restrictions despite admittedly locating *no Founding-era analogue at all*.[10] *See, e.g.*, App.82 n.40 (conceding that "[l]icensing schemes" requiring good moral character "were a post-Civil War phenomenon"); App.127 (admitting the "absence of 18th- [or even] 19th-century regulations prohibiting firearms in

[10] Tellingly, when the panel *did* examine a series of Founding-era statutes, it *struck down* New York's "prohibition on carriage on private property open to the public," affirming the district court's injunction on that issue. App.212.

medical establishments"); App.145 (recognizing "statutes banning firearms in analogous places [to parks] … were … absent from the historical record"). These concessions are in open war with *Bruen*'s teaching that "the lack of a distinctly similar historical regulation … is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* at 26; *see also Rahimi* at 692 (law "may not be compatible with the right if it [regulates] to an extent beyond what was done at the founding."). Apparently seeking to justify its divergent approach, the panel theorized that *Rahimi* found "no *close* parallel in 1791," and the Court "was untroubled by the absence of such a *close* analogue." App.34, 44 (emphasis added). But regardless of whether that characterization is correct, this absence of a "*close* analogue" was no justification for the panel upholding the CCIA with *no* analogue "from the 18th century." *See id.* at 44.

Second, the panel fabricated its own "historical record" piecemeal, based entirely on a smattering of late-in-time analogues, mostly from the 1860s and later. *See, e.g.*, App.79 (upholding "good moral character" based on "firearm licensing schemes from the years immediately following ratification of the Fourteenth Amendment"); App.140-68 (allowing gun ban in "parks and zoos" based on laws enacted between 1861 and 1897); App.168-78 (upholding firearm ban in bars and restaurants based on state and territorial laws from 1867 through 1890); App.178-95 (approving firearm ban in "theaters" using five laws from 1869 through 1890). Justifying this polestar reliance on post-Reconstruction laws, the panel postulated that "evidence from the

Reconstruction Era … is *at least as relevant* as evidence from the Founding Era," and the "period of relevance extends past 1868" itself. App.79 n.36 (emphasis added); *see also* App.83 n.41 (claiming that even "[t]wentieth-century evidence is … not weightless"). On the contrary, this Court has made clear that "19th-century evidence [i]s 'treated as mere confirmation of what the Court thought had already been established.'" *Bruen* at 37.

Third, the panel referenced three pre-Reconstruction-era sources to uphold portions of the CCIA: (1) the 1328 Statute of Northampton; (2) a 1786 Virginia statute; and (3) a 1792 North Carolina statute. App.148, 151, 152, 188, 190, 193. But as this Court already explained, the Statute of Northampton "has little bearing on the Second Amendment adopted in 1791," and the 1786 Virginia statute "merely codified … the Statute of Northampton," and thus "provide[s] no justification for laws restricting the public carry of weapons." *Bruen* at 41, 47; *see also* at 122 (Breyer, J., dissenting) (identifying the 1792 North Carolina law as "discount[ed] ... because [it was] modeled on the Statute of Northampton"). In other words, *Bruen* considered and rejected the only three pre-Reconstruction-era laws the panel identified.[11]

Fourth, the panel frequently chided the district court for its faithful adherence to *Bruen*'s methodology, refusing to believe that *Bruen* meant what it said. *See, e.g.*, App.87 (criticizing that "[t]he district court … seemed to draw strong and specific

[11] Even so, *Bruen* expressed "doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation." *Id.* at 46.

inferences from historical silence"); App.161, 145 (disparaging as "analogical error" the district court's observation that comparable analogues "were … absent from the historical record"). The panel even claimed the district court's "fail[ure] to appreciate" the repudiated 1792 North Carolina statute "tainted the rest of the district court's analysis." App.193, 159.

Fifth, the panel minimized – or simply ignored – Petitioners' showings of *contrary* Founding-era traditions. *See, e.g.*, App.160 ("[U]nconvinced by [Petitioners'] argument that the former use of Boston Common and similar spaces as gathering grounds for the militia undermines a tradition of regulating firearms in urban public parks.");[12] App.168-178 (ignoring evidence[13] that firearms and alcohol were ubiquitously mixed during colonial times); App.178-195 (ignoring Founding-era sources[14] showing firearms were regularly carried in assemblies and taverns akin to "theaters"). Of course, *Bruen* expressly rejected "'legislative improvisations[]' which … contradict[] earlier evidence." *Bruen* at 66-67.

Sixth, the panel failed to engage with the racist pedigree of its analogues. Although acknowledging obliquely that "many 18th-century restrictions … were based on … racial[] … categories," App.99 n.55, the panel whitewashed the CCIA's "good moral

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[12] *See Carralero v. Bonta*, 2025 U.S. App. LEXIS 929, at *35 (9th Cir. Jan. 15, 2025) (VanDyke, J., dissenting from denial of reh'g en banc) ("public parks existed well before the Founding" and "no evidence of firearm bans from that time period").

[13] *See* Plaintiffs-Appellees' Answering Brief in Response to Defendant-Appellant Cecile at 29 (Feb. 1, 2023).

[14] *See* Answering Brief at 26-27.

character" requirement, ignoring its codification of a morality test imposed by early immigration and occupational licensing laws, various states' slave codes, and the earliest carry licensing regimes, all of which were designed to oppress (among others) blacks and Italians.[15] In contrast, the district court did not shy away from placing such analogues in their proper context, noting an 1832 Delaware law which required "that such free negro or free mulatto [be] a person of *fair character*...." *Antonyuk v. Hochul*, 635 F. Supp. 3d 111, 135 n.22 (N.D.N.Y. 2022). Of course, such racist laws were adopted to disarm a disfavored subset of the population, not only failing *Bruen*'s analogical "how" and "why," but also being "probative of what the Constitution does *not* mean." *Bruen* at 29; *Rahimi* at 720 (Kavanaugh, J., concurring). But rather than engage with this uncomfortable history, the panel ignored it.

Thus, despite marshaling *not even one* non-repudiated Founding-era law to support the CCIA, the panel upheld infringement after infringement based on a smattering of Reconstruction-era (or later) statutes which fail to demonstrate the sort of enduring Founding-era historical tradition *Bruen* requires. The earliest of these sources arose nearly half a century after the Second Amendment's ratification, with the vast majority occurring well after ratification of the Fourteenth Amendment – stretching nearly to the 20th Century. Declaring this Court's emphasis on original meaning "implausible," the panel instead offered the *Bruen*-rejecting acumen that "public

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[15] *See* Plaintiffs-Appellees' Supplemental Brief on *United States v. Rahimi* at 18 (Sept. 4, 2024).

understanding" of constitutional rights can *evolve* "over the preceding era" – and beyond. App.47; *see also* App.50 (emphasis added) (disputing that "was calcified in either 1791 *or* 1868," and positing that "adjacent and intervening periods" may hold relevant evidence). But *Heller* rejected this sort of revisionist 'living constitutionalism,' announcing that "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them...." *Id.* at 634-35. *Bruen* was similarly unequivocal: the meaning of enumerated rights is "pegged to the public understanding … in 1791." *Id.* at 37. And *Rahimi* reiterated this singular focus on discerning meaning "[a]t the founding." *Id.* at 691.

III. THE SECOND CIRCUIT'S OPINION CREATES A THREE-WAY CIRCUIT SPLIT, AND THE DISTRICT COURTS ARE IN DISARRAY.

Lower courts are significantly divided as to whether 1791 or 1868 is the proper focal point in Second Amendment analysis of state laws. The panel's decision conflicts directly with three other circuit courts that have addressed the issue, and deviates even from circuits that accept later history. While one circuit employed similar reasoning to the panel, that opinion was vacated by grant of *en banc* review. In addition to this circuit split, the federal district courts and state courts have failed to coalesce, taking multiple inconsistent approaches irreconcilable with *Bruen*.

The panel asserted that, "[b]ecause the CCIA is a state law, the prevailing understanding of the right to bear arms in 1868 and 1791 *are both focal points* of our

analysis." App.46 (emphasis added). In fact, the panel gave the nod to 1868, asserting that "evidence from … Reconstruction … *is at least as relevant* as evidence from the Founding Era." App.79 n.36 (emphasis added); *see also* App.50 ("adjacent and intervening periods" also relevant). Indeed, finding no Founding-era sources to justify most of the CCIA, the panel by necessity relied almost entirely on post-Reconstruction sources as late as 1897.

In stark contrast to the panel, the Third and Fifth Circuits have focused their historical analyses on the Founding. Thus, in *Lara v. Comm'r Pa. State Police*, 2025 U.S. App. LEXIS 813, at *20 (3d Cir. Jan. 13, 2025), the Third Circuit reiterated that "the constitutional right to keep and bear arms should be understood according to its public meaning in 1791...."[16] The Fifth Circuit likewise centered its analysis on the Founding. *United States v. Connelly*, 117 F.4th 269, 275 (5th Cir. 2024) (finding "no clear sets of positive-law statutes … from the Founding); *id.* at 276, 281 (confirming English practice "comports with the Founding-era conception of rights," but dismissing "Post-Reconstruction laws" as "not provid[ing] as much insight"). The Eighth Circuit also favors the Founding, observing that "*Bruen* strongly suggests that we should prioritize Founding-era history." *Worth v. Jacobson*, 108 F.4th 677, 692 (8th Cir. 2024); *id.* at 696 ("it is questionable whether the Reconstruction-era sources have much weight," and

[16] The panel acknowledged its creation of a split with the Third Circuit. App.49.

"postenactment history of the Fourteenth Amendment is not given weight.").

Taking a different approach entirely, the Seventh Circuit seems ambivalent as to which time period is preferable. *Bevis v. City of Naperville*, 85 F.4th 1175, 1194 (7th Cir. 2023) (The "relevant time to consult is 1791, or maybe 1868."). And the Ninth Circuit "agree[d] with the Second Circuit," looking to "both [] the time of the ratification of the Second Amendment in 1791 and at the time of the ratification of the Fourteenth Amendment in 1868." *Wolford v. Lopez*, 116 F.4th 959, 980 (9th Cir. 2024). Finally, the First Circuit concluded that a "lack of directly on-point tradition does not end our historical inquiry, but it does affect our mode of analysis." *Ocean State Tactical, LLC v. Rhode Island*, 95 F.4th 38, 44 (1st Cir. 2024); *id*. at 46 (finding nothing from the Founding or Reconstruction, and looking to *the 20th century* to uphold a ban on commonly owned magazines, based on laws from 1934 and 1986). *See id.* at 46.

The only circuit court to have adopted the Second Circuit's focus on 1868 and later was the Eleventh Circuit in *NRA v. Bondi*, 61 F.4th 1317 (11th Cir.), *vacated, reh'g granted*, 72 F.4th 1346 (11th Cir. 2023). Beginning and ending its analysis with "the Reconstruction Era" (61 F.4th at 1319, 1332), that court found such "historical sources … *more probative* of the Second Amendment's scope than those from the Founding Era." *Id.* at 1321-22 (emphasis added). As *Bondi* reasoned, "because the Fourteenth Amendment is what *caused* the Second Amendment to apply to the States," and because "originalism's claim to democratic legitimacy" is based on "respect[ing] the

choice" of "those who bound themselves to be governed by the constitutional provision in question," the "Reconstruction Era … is what matters." *Id.* at 1322.

In addition to this entrenched, multi-way circuit split, both district and state courts have struggled to choose between 1791 and 1868, generating further division. Some district courts favor 1791. *See Springer v. Grisham*, 704 F. Supp. 3d 1206, 1219 (D.N.M. 2023) (*Bruen* "considered late 19th century laws only to the extent they were consistent with earlier laws."); *Brown v. BATFE*, 704 F. Supp. 3d 687, 704 (N.D. W. Va. 2023) ("[R]eliance on mostly 19th century gun safety regulations … is misplaced under *Heller* and *Bruen*."). Other district courts have chosen 1868. *See Md. Shall Issue, Inc. v. Montgomery County*, 680 F. Supp. 3d 567, 582 (D. Md. 2023) (1868 "equally if not more probative"); *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 391-92 (S.D.N.Y. 2023) (using mostly late 19th-century laws to uphold "house of worship" gun ban). One district court seemed to have no preference. *See Frey v. Nigrelli*, 661 F. Supp. 3d 176, 198 (S.D.N.Y. 2023) ("no issue in considering" analogues "from 1750 to the late 19th century."). Another took the "it depends" approach. *See United States v. Ayala*, 711 F. Supp. 3d 1333, 1340, 1342 n.4 (M.D. Fla. 2024) (applying 1791 to "*federal* statute," but claiming a Fourteenth Amendment challenge could be different). Finally, at least two state courts are dissatisfied with *Bruen*, rejecting *both* 1791 and 1868. *See Wade v. Univ. of Mich.*, 2023 Mich. App. LEXIS 5143, at *24 (July 20, 2023) ("[I]t is not clear that either 1791 or 1868 are the correct time periods...."); *State v. Wilson*, 543 P.3d 440, 453, 459 (Haw. 2024) (*Bruen* "distorts and cherry-picks

historical evidence," and instead applying the "Aloha Spirit" and the "Law of the Splintered Paddle").

But whether viewed as clear guidance or "strong[] suggest[ions]," it is evident from this Court's precedents that 1791 is the focal point for Second Amendment analysis. Nevertheless, there continues to be an abundance of confusion – and division – in the lower courts. Because the choice of reference point will be outcome-determinative in many cases, the nationwide importance of this issue cannot be overstated. This Court's intervention is necessary to provide clear and definitive guidance as to the appropriate temporal guidepost for analyzing Second Amendment challenges.

IV. REQUIRING NEW YORKERS TO PERSUADE THE GOVERNMENT TO "ENTRUST" THEM WITH ENUMERATED RIGHTS, THE PANEL'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND CREATES A CIRCUIT SPLIT.

A. The Panel's Decision Upholding the "Good Moral Character" Requirement Conflicts with *Bruen*.

In *Bruen*, this Court rejected the requirement that, to be authorized to bear arms in public, citizens first must demonstrate "proper cause" – defined as "a special need for self-protection." *Id.* at 12. Here, the panel sanctioned New York's replacement requirement that requires citizens convince licensing officials of their "good moral character" prior to licensure, defined as "having the essential character, temperament and judgement necessary to be

entrusted with a weapon." App.438. As the district court recognized, New York simply "replaced" proper cause with good moral character, "while retaining (and even expanding) the open-ended discretion afforded to its licensing officers." *Antonyuk,* 635 F. Supp. 3d at 133.

Rejecting the "proper cause" standard in *Bruen*, this Court explained that the problem with such an ahistoric standard is that it grants licensing officials "discretion to deny … licenses even when the applicant satisfies" ostensibly "objective criteria." *Bruen* at 14, 11; *see also* at 79 (Kavanaugh, J., concurring) (rejecting the grant of "unchanneled" and "open-ended discretion to licensing officials"). Importantly, *Bruen* contrasted 43 so-called "shall-issue" states, "where authorities *must issue* concealed-carry licenses" based on "'narrow, objective, and definite standards,'" with six so-called "may-issue" regimes where "authorities have *discretion* to deny concealed-carry licenses...." *Id.* at 13, 38 n.9, 14 (emphases added). As this Court explained, under "may-issue" regimes, applicants may be denied unless they have "demonstrated cause *or suitability* for the relevant license," based on a licensing official's "'appraisal of facts, the exercise of judgment, and the formation of an opinion.'" *Id.* at 14-15 (emphasis added), 38 n.9. To be sure, *Bruen* specifically addressed New York's "discretion" to determine "proper cause," but its broader commentary on "discretion[ary]" standards like "suitability" (*id.* at 13) reflects that "proper cause" is not the only impermissible form of discretion.

New York's "good moral character" standard is just such a prohibited "suitability" determination. As the

district court correctly noted, "good moral character" is merely a surrogate for the "proper cause" standard that *Bruen* struck down, App.217, 313, under which a "license applicant … *must convince* a 'licensing officer'" of his good moral character. *Bruen* at 12 (emphasis added); *see also* at 11 (emphasis added) (license issued "only if that person *proved* 'good moral character'"); App.322 (emphasis added) ("[U]nless he or she *can persuade* a licensing officer that he or she is of 'good moral character'"). Indeed, under the CCIA, New York officials "exercise … judgment" to decide whether a person "ha[s] the essential character, temperament and judgement necessary to be entrusted with a weapon...." *Bruen* at 38 n.9; App.438. Even the *panel* admitted the "New York statute … requires the exercise of judgment by the licensing authorities...." App.103.

It is difficult to view *Bruen*'s criticism of "suitability" as not directly applicable to the amorphous, discretionary standard of "good moral character." And it is even more difficult to believe that this Court would approve of such discretionary power to deny the right to "bear arms" to "all Americans" unless they first "convince a 'licensing officer'" of their general morality. As one district court concluded, "good moral character" is equivalent to "suitability." *See Srour v. New York City*, 699 F. Supp. 3d 258, 278 (S.D.N.Y. 2023) (dismissed as moot, vacated by *Srour v. New York City*, 117 F.4th 72, 86-87 (2d Cir. 2024)) ("the very notion[] of 'good moral character' … [is] inherently exceedingly broad and discretionary.... Such unfettered discretion is hard, if not impossible, to reconcile with *Bruen*.").

But reaching the conclusion *Srour* found "impossible" was easy for the panel. Amorphously distinguishing between "discretion in the strong sense" versus "a certain bounded area of discretion" or a "modicum of discretion," the panel asserted that *Bruen* forbids only "impermissibly discretionary" licensing regimes. App.79, 93-98. But *Bruen* made no such nebulous distinctions, instead pointing to "'narrow, objective, and definite standards'" (*Bruen* at 38 n.9) – a test the indeterminate concept of "good moral character" cannot meet.

The panel found further support for its affirmation of "good moral character" in *Bruen*'s reference to the licensing regimes of Connecticut, Delaware, and Rhode Island. But as the Court explained, although those regimes *facially* contain suitability requirements, they operate as "shall-issue" in practice, conferring no measure of discretion on licensing officials. App.100-01; *Bruen* at 13 n.1. And, as the Court noted, Delaware allows open carry without a permit. *Bruen* at 13 n.1. *Bruen*'s commentary on "shall-issue" regimes was not the resounding affirmation of "good moral character" that the panel believed.

B. New York's Morality Test Conflicts with *Rahimi*'s Rejection of "Irresponsibility" as a Pretext to Deny Rights.

Lest there be any doubt that the panel erred in finding support for the CCIA's "good moral character" standard in this Court's decisions, *Rahimi* provided explicit guidance in a penultimate paragraph tailor-made to guide the panel below. Rejecting the notion that only "responsible" Americans have Second

Amendment rights, this Court explained that this idea does not "derive from our case law," and moreover that "'[r]esponsible' is a vague term" and "[i]t is unclear what such a rule would entail." *Rahimi* at 701. But on remand, the panel glossed over the obvious parallels between "responsibility" and "good moral character."

First, choosing to overlook New York's concessions that "the character requirement requires only that licensees can be entrusted to wield a gun responsibly" and thus "impairs the ability to bear arms only of … the irresponsible" (App., 66), the panel also ignored its own characterization of "good moral character in the sense that [one is] not law-abiding and responsible and pose[s] a danger to the community if licensed to carry...." App.70. Instead, the panel sought to rewrite the CCIA, doubling down on the claim that "good moral character" is nothing more than "a proxy for dangerousness" (App.64).[17] Reaching that strained conclusion required the panel to ignore the CCIA's definition, which employs the terms "character," "temperament," "judgement," and "entrust[ment]" – obvious words of "responsibility," not of "dangerousness."

Second, the panel demurred that *Rahimi*'s rejection of "responsibility" as a precondition to bearing arms "did not address *other terms* … such as 'law-abiding,'" and "licensing statutes … defined in

[17] Justices of this Court challenged a similar false equivalence at oral argument in *Rahimi*, questioning the Solicitor General's use of "responsible" as a "placeholder" for dangerousness then. *See* Oral Argument Transcript at 10-12, *United States v. Rahimi*, No. 22-915 (U.S. Nov. 7, 2023), https://tinyurl.com/2d2rsdnt.

terms of … whether [applicants] are law-abiding … are permissible...." App.68 n.26, 79. But CCIA's definition of "good moral character" looks well beyond one's law-abiding status, to suitable "character," "judgement," and temperament." Or, as one New York court put it, "good moral character" constitutes the "ideal state of a person's beliefs and values that provides the most benefit to a healthy and worthy society...." including "behav[ing] in an ethical manner...." *Sibley v. Watches*, 501 F. Supp. 3d 210, 219 (W.D.N.Y. 2020). Even so, "[n]ot a single Member of the Court adopt[ed] the Government's theory" that "the Second Amendment allows Congress to disarm anyone who is not 'responsible' and 'law-abiding.'" *Rahimi* at 772-73 (Thomas, J., dissenting). Indeed, "law-abiding" is, like "good moral character," a "spongy concept" (App.76), as such terminology would untenably suggest "that every American who gets a traffic ticket is no longer among 'the people' protected by the Second Amendment." *Range v. AG U.S.*, 2024 U.S. App. LEXIS 32560, at *13 (3d Cir. Dec. 23, 2024).[18] Tellingly, one post-CCIA court posited that "[a] person with numerous traffic infractions is potentially someone with a lesser respect for the law," which "could impact whether one is fit" to exercise

[18] *See also* Oral Argument Transcript, *supra*, at 8:1-4 (Chief Justice Roberts: "Is someone who drives 30 miles an hour in a 25 … mile-an-hour zone – does that person qualify as law-abiding or – or not?"); at 49:3-4 (Justice Barrett noting "the ambiguities in that phrase").

Second Amendment rights. *Kamenshchik v. Ryder*, 186 N.Y.S.3d 797, 806 (Nassau Cnty. 2023).[19]

Whether understood in terms of "suitability," "responsibility," or perfect "law-abiding" status, "good moral character" is an entirely discretionary standard that has no place in the context of enumerated rights.[20]

Third, repeatedly minimizing *Rahimi*'s discussion of "responsibility" as mere "dicta" (App.68-71, nn.26, 30), the panel asserted that this Court "did not definitively rule on[] the constitutionality of a licensing regime that adopted some specific and narrow definition of 'responsibility'" – whatever that might be. Thus, the panel concluded, *Rahimi* "has little direct bearing on our conclusions." App.7. On the contrary, it is impossible to square *Bruen*'s rejection of "suitability" and *Rahimi*'s rejection of "responsibility" with the panel's affirmation of "good moral character" which – definitionally – requires an affirmative showing of one's "character," "temperament," "moral[ity]," and "judgement." To claim some 'potato, potahto' difference between these terms is to "elevate[] semantics over substance."

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[19] Another applicant was denied for providing "character references … who were unaware of [an] arrest" as a minor two decades prior. *Dimino v. McGinty*, 177 N.Y.S.3d 788, 790 (App. Div. 2022). If only those whose character has attained "the ideal state" may be "entrusted" to bear arms, it seems unlikely that the Second Amendment truly applies to "all Americans" – or any Americans at all. *See Bruen* at 70; *Romans* 3:10; 3:23.

[20] Post-*Bruen*, "California … 'removed the good character and good cause requirements from the issuance criteria' for its concealed carry permits." *Carralero*, 2025 U.S. App. LEXIS 929 at *9 (VanDyke, J., dissenting from denial of rehearing *en banc*).

Coventry Health Care of Mo., Inc. v. Nevils, 581 U.S. 87, 99 (2017).

C. A Circuit Split Exists as to Whether Governments May Disarm People Based on *Character Judgments.*

Dissenting in *Kanter v. Barr*, 919 F.3d 437 (7th Cir. 2019), then-Judge Barrett found no "evidence that founding-era legislatures imposed virtue-based restrictions on the right," and rejected the notion that "the legislature can disarm [persons] because of their poor character, without regard to whether they are dangerous." *Id.* at 451, 462 (Barrett, J., dissenting). *Bruen* was consistent on this point, repudiating "may-issue" regimes that "requir[e] the 'appraisal of facts, the exercise of judgment, and the formation of an opinion'" about one's "suitability." *Bruen* at 38 n.9, 13. *Rahimi* likewise laid to rest the notion that notions of "responsibility" – "a vague term" – may serve a basis for disarmament. *Id.* at 701. In other words, Second Amendment rights cannot turn on judgments of character, virtuousness, trustworthiness, or any other amorphous synonym for one's "suitability."

The panel took a starkly different view, sanctioning the CCIA's morality test despite Respondents' admission that "the character requirement … entrust[s]" only those deemed suitable "to wield a gun responsibly," and the panel's own admission that "good moral character … may be seen as a spongy concept[21] susceptible to abuse," and which

[21] On remand, the panel altered this language from its original opinion, attempting to downplay the CCIA's discretionary standard. *Cf. Antonyuk*, 89 F.4th at 316 ("'good moral character'

could be used "as a smokescreen to deny licenses" on such bases as "lifestyle or political preferences." App.77.

The panel's endorsement of a Second Amendment morality test directly conflicts with the decisions of at least two other circuits. The Third Circuit, for example, flatly rejected character judgments, stating that "citizens are not excluded from Second Amendment protections just because they are not 'responsible' [or] 'law-abiding.'" *Range*, 2024 U.S. App. LEXIS 32560, at *12; *see also* at *14 ("such 'extreme deference gives legislatures unreviewable power to manipulate the Second Amendment by choosing a label'").[22] Likewise, the Sixth Circuit noted that "[t]he problem" with morality tests "is that the founding generation applied this virtuous-citizen approach to civic rights only," leaving Second Amendment rights intact. *United States v. Williams*, 113 F.4th 637, 647 (6th Cir. 2024). This discretionary approach therefore "fails as a matter of history and tradition." *Id.* *See also United States v. Duarte*, 101 F.4th 657, 671 (9th Cir. 2024) (vacated and *en banc* rehearing granted by *United States v. Duarte*, 108 F.4th 786 (9th Cir. 2024)) ("reject[ing] the Government's position that 'the

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is a spongy concept susceptible to abuse...."), *with* App.76 ("'good moral character' – at least if untethered from the CCIA's limiting definition – may be seen as a spongy concept susceptible to abuse....").

[22] *See also NRA v. BATFE*, 714 F.3d 334, 335, 345, 335 (5th Cir. 2013) (Jones, J., dissenting) (notion "that a whole class of adult citizens … can have its constitutional rights truncated," "so long as the legislature finds the suspect 'discrete' class to be … 'irresponsible,'" "[is] far-reaching").

people' … refers to a narrower, 'unspecified subset' of virtuous citizens.").

In contrast, the Eighth Circuit acknowledged these divergent "schools of thought" but, ambivalent as to which is correct, upheld a conviction under either. *United States v. Jackson*, 110 F.4th 1120, 1126 (8th Cir. 2024); *see also* at 1127 ("historical record suggest[ing] that legislatures traditionally possessed discretion to disqualify categories of people … who deviated from legal norms," in addition to those who posed "a risk of dangerousness").

This case presents an excellent vehicle to resolve the circuit split on this important issue. No other constitutional provision is subject to a bureaucrat's guess as to whether a member of "the people" can be "entrusted" to exercise enumerated rights "responsib[ly]." Rather, the Second Amendment presumes that "all Americans" possess the full panoply of rights, unless and until the government proves that they "are *dangerous*." *Kanter* at 451 (Barrett, J., dissenting); *see also Rahimi* at 698. Because the Second Amendment is not "a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees," *McDonald* at 780, this Court should grant the petition and set the record straight. Indeed, the panel's "reasoning is a virus that may spread if not promptly eliminated." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 218 L. Ed. 2d 71, 75 (2024) (Alito, J., and Thomas, J., dissenting from denial of certiorari).

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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