No. _____

IN THE
Supreme Court of the United States

IVAN ANTONYUK, COREY JOHNSON, ALFRED TERRILLE, JOSEPH MANN, LESLIE LEMAN, AND LAWRENCE SLOANE
Applicants,

v.

STEVEN P. NIGRELLI, IN HIS OFFICIAL CAPACITY AS ACTING-SUPERINTENDENT OF THE NEW YORK STATE POLICE, ET AL.
Respondents.

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT ON APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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DATED: DECEMBER 21, 2022

IDENTITY OF PARTIES AND RELATED PROCEEDINGS

The parties to the proceedings below are:

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

Respondents are Steven P. Nigrelli in his official capacity as Acting 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.

The related proceedings are:

Antonyuk v. Hochul, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944 (N.D.N.Y. Nov. 7, 2022) (order granting preliminary injunction).

Antonyuk v. Hochul, No. 22-2908 (2d Cir. Dec. 7, 2022) (order staying preliminary injunction).

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TO THE HONORABLE SONIA SOTOMAYOR,
ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE UNITED STATES
AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT:

Without providing any analysis or explanation, the Second Circuit has stayed a preliminary injunction issued by a federal district court in New York that was carefully designed to limit New York's enforcement of a sweeping gun control statute, enacted as retaliation against New York gun owners for having prevailed in this Court's decision in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022). The district court's injunction was supported by a detailed 184-page opinion, meticulously tailored to follow this Court's framework established in *Bruen*. In contrast, the Second Circuit's stay pending appeal was issued based only on a single conclusory assertion, yet with the effect of indefinitely suspending the protections afforded New Yorkers by the Second Amendment and affirmed by this Court in *Bruen*. The Second Circuit's stay should be vacated in order to uphold the right of New Yorkers to keep and bear arms, as well as to vindicate the authority of this Court over the circuit courts.

This Court's Opinion in *Bruen* was issued on June 23, 2022. Only hours later, New York Governor Hochul promised to "fight back":

> We just received some disturbing news ... the Supreme Court … has stripped away the State of New York's right and responsibility to protect its citizens … with a decision … which is frightful in its scope of how they are setting back this nation…. This decision is not just reckless, it's **reprehensible**. It's not what New Yorkers want, and we should have the right of … what we want to do in terms of gun laws in our state…. [O]ur governor has a moral responsibility to do what we can … because of what is going on, the **insanity** of the gun culture that has now possessed everyone up to the Supreme Court…. We've been ready for this … We've been working with a team of legal experts … I'm

> prepared to call the legislature back into session… **We are not going to cede our rights** that easily, despite the best efforts of the **politicized Supreme Court**…. No longer can we strike the balance… Shocking. They have taken away our rights…. This is New York. **We don't back down. We fight back**…. I'm prepared to go back to muskets…. We're just getting started here.[1]

Just eight days later on July 1, 2022, the New York Legislature responded to Governor Hochul's call to defy this Court's authority and resist *Bruen's* protection of Second Amendment rights, enacting the Concealed Carry Improvement Act ("CCIA"). After extensive briefing, a hearing, and oral argument, the district court enjoined portions of the CCIA in a 184-page opinion. Shortly thereafter the Second Circuit, without providing any reasoning or analysis, granted New York's request first for a temporary administrative stay, and then a stay pending appeal, allowing New York's repudiation of *Bruen* back into effect without so much as a brief explanation.

First, without providing any analysis of the factors for determining whether a stay is warranted, the panel nakedly asserted that it had "weighed the applicable factors ... and … upon due consideration … conclude[d] that a stay pending appeal is warranted." App.002a. Tellingly, the Second Circuit did not take issue with a single factual finding or legal conclusion from the district court's well-reasoned 184-page opinion. Nor did the Second Circuit claim that the district court had abused its discretion or otherwise erred in any part of its opinion granting Applicants preliminary relief. The Second Circuit's unexplained and unsupported order deprives

[1] A. Hagstrom, "NY Gov. Hochul defiant after Supreme Court gun decision: 'We're just getting started,'" *Fox News* (June 23, 2033). https://fxn.ws/3HPDiHu.

Applicants of the "careful review and a meaningful decision" to which they are "entitle[d]." *Nken v. Holder*, 556 U.S. 418, 427 (2009).

The CCIA stands in direct defiance to *Bruen*'s central holding that governments cannot keep "ordinary, law-abiding citizen[s]" with "ordinary self-defense needs from carrying arms in public for that purpose." *Bruen* at 2150. The Second Circuit's stay of the district court's preliminary injunction allows New York's novel, anti-*Bruen* law to strip New Yorkers of their right to keep and bear arms in a sweeping and unprecedented way, along with the collateral damage of violating multiple other constitutional provisions. Applicants, along with countless others like them, are being irreparably harmed each day this patently unconstitutional law remains in place, eviscerating the right of ordinary, law-abiding New Yorkers to carry firearms in public for self-defense. Additionally, this case presents issues of national importance with respect to states that enact laws in explicit defiance of this Court's decisions.

Nor does the district court's opinion represent an outlier, as its decision is not the only one striking down portions of the CCIA as unconstitutional. Rather, there have been a total of three opinions issued by district courts in New York concluding that various aspects of the CCIA are unconstitutional. Yet as in this case, the Second Circuit has granted stays pending appeal in those other cases as well – again, without providing any reasoning or analysis. *See Christian, et al. v. Nigrelli, et al.* (2d Cir. 22-2987, Document 40); *Hardaway, et al. v. Nigrelli, et al.* (2d Cir. 22-2933, Document 53). One might think that the Second Circuit – being the circuit whose opinion was

recently reversed by this Court in *Bruen* (*N.Y. State Rifle & Pistol Ass'n v. Beach*, 818 Fed. Appx. 99 (2d Cir. 2020)) – might find it appropriate to at least provide some basis for its decision to stay multiple lower court decisions which have faithfully applied the *Bruen* framework. But one would be wrong.

This Court should vacate the Second Circuit's unreasoned, knee-jerk order granting a stay pending appeal.

OPINIONS BELOW

The district court's order is available at 2022 U.S. Dist. LEXIS 201944 and reproduced at App.003a-186a. The Second Circuit's stay order is unreported and reproduced at App.002a.

JURISDICTION AND STANDARD OF REVIEW

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651. A "Circuit Justice has jurisdiction to vacate a stay where it appears that the rights of the parties to a case pending in the court of appeals, which case could and very likely would be reviewed here upon final disposition in the court of appeals, may be seriously and irreparably injured by the stay, and the Circuit Justice is of the opinion that the court of appeals is demonstrably wrong in its application of accepted standards in deciding the issue of the stay." *Western Airlines, Inc. v International Brotherhood of Teamsters*, 480 U.S. 1301, 1305 (1987) (O'Connor, J., in chambers) (citation omitted). *See also Chabad of S. Ohio v. City of Cincinnati*, 537 U.S. 1501 (2002) (vacating Sixth Circuit's stay of district court's injunction). *See also* Supreme Court Rule 23.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reproduced at App.187a-232a.

STATEMENT

On June 23, 2022, this Court issued its opinion in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111 (2022), striking down the State of New York's requirement that a person demonstrate that "proper cause exists" as a condition of being granted a license to possess and carry a handgun, and providing the appropriate framework for resolving future Second Amendment challenges. *Bruen* at 2127, 2156. In so doing, *Bruen* rejected the atextual "two-step" test adopted by several circuit courts, including the Second Circuit, instead establishing the requirement that any restriction on firearms freedom must be grounded in the text and "historical tradition" of the Second Amendment. *Bruen* at 2126.

Eight days later, the New York legislature and Governor Kathy Hochul fought back, enacting into law a poorly named and ineptly drafted statute called the "Concealed Carry Improvement Act" ("CCIA"). *See* 2022 N.Y. Sess. Laws ch. 371.[2] Rather than complying with this Court's *Bruen* decision, New York has thumbed its nose at this Court, creating a new statutory scheme wherein the concealed carry of firearms is far more restrictive, and the licensing process far more onerous, than before this Court's decision in *Bruen*.

[2] Reproduced herein at App.191a-232a.

Among its cornucopia of new restrictions, the CCIA replaces the *Bruen*-repudiated requirement that an applicant for licensure demonstrate "proper cause" with a requirement that the applicant demonstrate, to the satisfaction of the state, "good moral character" – defined as "having the essential character, temperament and judgment 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).

Purportedly to help licensing officials make this determination of "good moral character," the CCIA demands: (i) that the applicant attend an in-person "interview" with the licensing official to discuss whatever topics the official desires; (ii) that the applicant provide a list of the names and contact information for the applicant's spouse, *children*, and cohabitants; (iii) that the applicant provide the names and contact information of at least four "character references" who can attest to the applicant's "good moral character;" (iv) that the applicant complete sixteen hours of in-person training along with two hours of in-person "live fire" training (for a total of 18 hours, at a cost of several hundreds of dollars); (v) that the applicant provide a list of an applicant's social media accounts for the past three years; and (vi) that the applicant provide "such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application." N.Y. Penal Law § 400.00(1)(o)(i)-(v).

Next, apparently taking this Court's warning not "to effectively declare the island of Manhattan a 'sensitive place'" as a challenge, the CCIA declares *virtually the entire landmass* of New York to be off limits to the possession of firearms. First,

the CCIA declares 20 broad categories (including scores of sub-categories) of places to be so-called "sensitive locations" where firearm possession is entirely outlawed – including every medical office, church, public park, public conveyance, and entertainment venue within the state. N.Y. Penal Law § 265.01-e. App.206a-208a. For good measure, the CCIA adds to this expansive list of prohibited places "any gathering of individuals to collectively express their constitutional rights" (*id.* at (s)), meaning that New Yorkers are forced to choose between the Second Amendment and their other constitutional rights.

There is no way to opt out of the CCIA's broad ban on firearms in "sensitive locations." For example, under a plain reading of the CCIA's provisions, Pastor Joseph Mann (a plaintiff below) *could not even keep a firearm in his own home for self-defense*, because his parsonage is part of the same building as the sanctuary of his Baptist Church. Tellingly, the State did not even ask the Second Circuit to stay this portion of the district court's ruling. *See* Docket, 2nd Cir. 22-2908, Document 18 at 13 n.5. Similarly, Leslie Leman (also a plaintiff below) *cannot even acquire a firearm to keep at home*, because his small town in upstate New York is entirely surrounded by the rural Catskill Park – a place that the New York state constitution declares to be "forever … wild," but which the CCIA classifies as yet another one of the vast spaces entirely off limits to firearms. *See* N.Y. Penal Law § 265.01-e(2)(d) ("parks" as a sensitive location). App.206a.

Finally, seemingly as further retribution on gun owners for prevailing in *Bruen*, the CCIA declares *all private property* within New York to be a gun-free

"restricted location" – entirely banning firearm possession unless each property owner affirmatively opts out by posting "clear and conspicuous signage" or otherwise providing "express consent" to the presence of firearms on the property. N.Y. Penal Law § 265.01-d. App.209a-210a. Since it is reasonable to expect that the majority of otherwise pro-gun homeowners, along with most proprietors of businesses such as gas stations or grocery stores, will not bother to post such signage (a politically unpopular statement in many parts of New York), the CCIA functionally eliminates the carrying of firearms on private property. Together with its list of "sensitive locations," the CCIA all but eliminates concealed carry in New York. In fact when asked whether, under the CCIA, there would be *any* permissible locations left for public carry, Governor Hochul responded "probably some streets."[3]

At bottom, then, the CCIA replaces the "proper cause" requirement struck by *Bruen* with an even more objectionable process for obtaining a license to carry a firearm in public, by: (i) demanding that an applicant divulge protected speech and private associations to the government, (ii) vesting unbridled discretion in the hands of licensing officials to decide who should be granted a license, and (iii) creating a financial barrier to entry – estimated to be in the neighborhood of one thousand dollars – merely to exercise an enumerated right. Then, even if an applicant is successfully able to run the gauntlet and *obtain* a license, the CCIA makes it virtually impossible even to *use* that license in any meaningful way to carry a handgun outside

[3] 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 New York* (June 28, 2022). https://cbsn.ws/3v8RkfW.

the home, declaring nearly every conceivable category of public and private place to be entirely off limits to the possession of firearms. Falling far short of complying with this Court's *Bruen* decision, the CCIA instead extinguishes the right of "ordinary, law-abiding citizens … to carry handguns publicly for their self-defense." *Bruen* at 2127.

BACKGROUND AND PROCEEDINGS BELOW

On September 20, 2022, twenty days after the CCIA took effect,[4] Ivan Antonyuk, Corey Johnson, Alfred Terrille, Joseph Mann, Leslie Leman and Lawrence Sloane ("Applicants" or "Plaintiffs") filed their Complaint for Declaratory and Injunctive Relief challenging a number of provisions of the CCIA. App.233a-360a. In their Complaint, Applicants brought three Section 1983 claims pursuant to the First, Second, Fifth and Fourteenth Amendments. App.298a-304a. On September 22, 2022, Applicants filed their Motion for Temporary Restraining Order, Preliminary Injunction, and/or Permanent Injunction. The next day, the district court established a briefing schedule with oral argument set for September 29, 2022. On September 28, 2022, Defendants Governor Kathleen Hochul, Kevin P. Bruen, and Judge

[4] An earlier challenge to the CCIA was filed in the same district court on July 11, 2022, but was dismissed without prejudice due to lack of standing (i) for the individual plaintiff, (ii) for the organizational plaintiffs, as the Second Circuit concludes "that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983,' because the Second Circuit has 'interpret[ed] the rights [§ 1983] secures to be personal to those purportedly injured' [*Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011)]." *Antonyuk v. Bruen*, No. 1:22-CV-0734 (GTS/CFH), 2022 U.S. Dist. LEXIS 157874, at *53-54 (N.D.N.Y. Aug. 31, 2022). Thereafter, Mr. Antonyuk, joined by five additional plaintiffs, proceeded expeditiously to prepare and file a new complaint and a motion for injunctive relief in this case.

Matthew J. Doran (the licensing officer) ("State Defendants") filed their response. Oral argument was held, and the district court issued its opinion on October 6, 2022, granting a Temporary Restraining Order on several provisions of the CCIA. That opinion is reported at *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 182965 (N.D.N.Y. Oct. 6, 2022).

The State Defendants appealed the district court's temporary restraining order to the Second Circuit, which was docketed on October 7, 2022. *See* Docket, 2d Cir. No. 22-2379. On October 10, 2022, the State Defendants filed a Motion for an Emergency Interim Stay of Temporary Restraining Order, and Stay of Order Pending Appeal. 2nd Cir. No. 22-2379, Document 16. Plaintiffs submitted their Opposition on October 11, 2022. 2d Cir. No. 22-2379, Document 22. A single judge granted State Defendants' Motion for an "administrative stay" on October 12, 2022, and referred their motion to a "three-judge motions panel" for consideration. 2d Cir. No. 22-2379, Document 39. However, this first appeal by the State Defendants was later mooted, and subsequently was voluntarily dismissed by New York on November 14, 2022, after the district court granted in part and denied in part Plaintiffs' Motion for Preliminary Injunction. 2d Cir. No. 22-2908, Document 82.

On October 13, 2022, the State Defendants filed a 95-page Opposition to Plaintiffs' Motion for Preliminary Injunction in the district court, accompanied by over 500 pages of exhibits. On October 22, 2022, Plaintiffs filed their reply. The district court heard over two hours of oral argument on October 25, 2022, and issued its 184-page opinion on November 7, 2022, reported at *Antonyuk v. Hochul*, No. 1:22-

CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944 (N.D.N.Y. Nov. 7, 2022). App.003a-186a.

The district court's opinion meticulously analyzes (i) the standing of each Plaintiff to bring each claim, (ii) whether each Defendant is a proper party to be sued with respect to each provision, and (iii) the constitutionality under the *Bruen* framework of each challenged portion of the CCIA. After making numerous factual findings and legal conclusions, the district court's opinion enjoined the defendants from enforcing some (but not all) of the provisions of the CCIA, including (i) the requirement to demonstrate "good moral character" as a condition of licensure; (ii) the demand for names and contact information for family and household members, (iii) the demand for three years of social media accounts; (iv) the catch-all authority to demand "such other information" as necessary;[5] (v) the prohibition on firearms in some "sensitive locations," including certain healthcare settings, churches, parks, zoos, airports, buses, places where alcohol is served, theaters, conference centers, banquet halls, and "any gathering of individuals to collectively express their constitutional rights to protest or assemble." App.184a-186a.. The district court's opinion also enjoined the CCIA's ban on firearms in "restricted locations" defined as all private property within the state. App.186a.

[5] As to the provisions regarding applications for a concealed carry permit, the district court found that "Defendants ... would not even *process* an application from Plaintiff Sloane until October 24, 2023, due to a lack of available appointments, rendering his application futile for the purpose of standing to sue, because such a delay would effectively deny him his Second Amendment right for more than a year" relying on this Court's *Bruen* decision at footnote 9. App.025a.

On November 8, 2022, the State Defendants appealed to the Second Circuit for the second time.[6] Their appeal was docketed on November 10, 2022 (*See* Docket, 2d Cir. 22-2908) and, on November 12, 2022, the State Defendants again filed a motion seeking an "Emergency" Interim Stay of Preliminary Injunction, and Stay of Preliminary Injunction Pending Appeal. 2nd Cir. No. 22-2908, Document 18. Yet while the cover sheet to Defendants' filing styled itself as an "emergency," nothing in the body of the Memorandum of Law in Support supported that designation. Nevertheless, before Plaintiffs could respond to the State Defendants' filing, the Second Circuit again granted an "emergency interim stay." 2d Cir. No. 22-2908, Document 31. On November 19, 2022, Plaintiffs filed their Response in Opposition to the State Defendants' Motion. 2nd Cir. No. 22-2908, Document 38. The Second Circuit granted the State Defendants' Motion on December 12, 2022, claiming in conclusory fashion to have "weighed the applicable factors" from *In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d. Cir. 2007). App.002a.

REASONS FOR GRANTING THE APPLICATION

I. This Court Should Vacate the Second Circuit's Stay Because It Applied the Wrong Legal Standard.

Since the Second Circuit's four-sentence stay speaks only in conclusory language, the court's underlying analytical approach cannot be known. However, what is clear is that, in considering New York's motion, the Second Circuit failed to

[6] Although this matter involves an appeal only by the State Defendants, it is worth noting that, with one exception, the other defendants below (local sheriffs and district attorneys) declined to defend the CCIA's constitutionality, and did not object to the district court's entry of an injunction halting enforcement of the statute. App.009a.

apply current circuit precedent laying out the appropriate four-factor test for a stay, with the first two (including likelihood of success on the merits) being the "most critical." *Uniformed Fire Officers Ass'n v. De Blasio*, 973 F.3d 41, 48 (2d Cir. 2020).[7] Instead, the Second Circuit relied on an outdated and repudiated test from *In re World Trade Ctr. Disaster Site Litig*., 503 F.3d 167, 170 (2d Cir. 2007) which, in turn, had relied on *Thapa v. Gonzales*, 460 F.3d 323, 334 (2d Cir. 2006) for the proposition that the "degree to which a factor must be present varies with the strength of the other factors, meaning that 'more of one [factor] excuses less of the other.'" However, both of these Second Circuit cases were decided prior to this Court's decision in *Nken v. Holder*, 556 U.S. 418 (2009) which, irrespective of the strength of the equitable factors, *demands* a "strong showing" that the applicant is "likely to succeed on the merits." *Nken* at 434. Yet although this Court and the Second Circuit's precedents require such a showing, that is not the test the Second Circuit applied.[8] Having used a less demanding standard that was foreclosed by this Court's *Nken* decision, and

[7] Under this standard, the relevant factors to be considered are "[i] the applicant's strong showing that [they are] likely to succeed on the merits, [ii] irreparable injury to the applicant in the absence of a stay, [iii] substantial injury to the nonmoving party if a stay is issued, and [iv] the public interest." *Id*. A stay "is not a matter of right, *even if* irreparable injury might otherwise result;" rather "it is an exercise of judicial discretion, and [t]he party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id*. (emphasis added). Finally, where (as here) an applicant is "totally lacking" a strong showing of likelihood of success, "the aggregate assessment of the factors bearing on issuance of a stay pending appeal cannot possibly support a stay." *Uniformed Fire Officers Ass'n* at 49.

[8] Like the Second Circuit, the State Defendants' motion relied on this outdated case law, and focused primarily on the purported "overwhelming[]" strength of their arguments under the "three equitable criteria," turning only to the likelihood of success on the merits as an afterthought. *See* 2d Cir. No. 22-2908, Document 18 at 14.

which conflicts with more recent Second Circuit cases, the panel's stay is erroneous on its face, and should be vacated.

II. The Second Circuit's Stay Fails to Provide any Reasoned Analysis.

Even worse, the Second Circuit's analysis of the factors it did apply consisted of just five words: "[h]aving weighed the applicable factors..." App.002a. There is nothing that can be gleaned from this cursory statement, other than that the panel claimed to apply a standard from a pre-*Nken* case that has been implicitly overruled, to "conclude that a stay pending appeal is warranted." *Id.* This Court previously has criticized such deficiency of analysis, explaining that, "by failing to provide any factual findings or indeed any reasoning of its own, the Court of Appeals le[aves] this Court in the position of evaluating the Court of Appeals' bare order in light of the District Court's ultimate findings. There has been no explanation given by the Court of Appeals showing the ruling and findings of the District Court to be incorrect." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

Indeed, this Court has made clear that a stay should not be granted "reflexively," but instead that "[t]he parties and the public, [are] entitled to both careful review and a meaningful decision." *Nken* at 427. That did not occur with the Second Circuit's unreasoned order below. The evident care with which the District Court analyzed the merits of Applicants' claims, when contrasted with the lack of any legal analysis or assignment of error in the panel's stay, provides this Court with no reason to conclude that the District Court's opinion was wrong in any way, nor any reason that the Second Circuit's stay was appropriate. By reflexively overruling not

only the district court below, but no fewer than *three* well-reasoned opinions by federal district judges in New York striking down portions of the CCIA, the Second Circuit's order disrupts the appellate process, which otherwise would allow the orderly review of this highly-questionable statute, prior to it causing significant disruption to the millions whose lives it effects. In upsetting the ordinary process of judicial review, the Second Circuit's unexplained stay has allowed a "patently unconstitutional" statute back into effect, altering the status quo without so much as a sentence explaining why the district court was wrong and why the CCIA is constitutional. For that reason, this Court should vacate the stay.

III. The Stay Should Be Vacated Because All Four Factors Weigh Heavily in Favor of Applicants.

The Second Circuit's order staying the district court's preliminary injunction contains the following explanation: "Having weighed the applicable factors, *see In re World Trade Ctr. Disaster Site Litig.*, 503 F.3d 167, 170 (2d Cir. 2007), we conclude that a stay pending appeal is warranted." App.002a. At best a conclusory assertion, this statement is devoid of any factual analysis or legal reasoning as to how the court concluded that Respondents met the requisite factors entitling them to a stay.[9] Having declined to provide any express rationale for its stay, the Second Circuit makes it impossible for Applicants to critique its reasoning. It is possible, however, to examine the reasons offered by Respondents below in claiming that they met the four factors considered when granting a stay. *See Uniformed Fire Officers Ass'n* at

[9] Of course, Applicants believe that the authority relied on by the panel reveals that it applied the wrong test, as discussed *infra*.

48. Upon examination, it is evident that none of these four factors were established by Respondents below, and that all weigh strongly in Applicants' favor.

First, the State did not demonstrate any likelihood of succeeding on the merits, as there was no conceivable reason for the Second Circuit to believe this Court would uphold a law which had been enacted by New York specifically in order to "fight back" against this Court's *Bruen* decision. As the district court described, the CCIA is "a patently unconstitutional law." App.183a. Second, the Second Circuit's stay has caused, and will continue to cause, Applicants substantial and irreparable harm, as the CCIA imposes serious violations of First, Second, Fifth, and Fourteenth Amendment rights – including nearly extinguishing the ability of New Yorkers with carry licenses to bear arms in public for self-defense. Third, Respondents have not even begun to show how the district court's preliminary injunction – temporarily halting the enforcement of entirely novel and unprecedented restrictions on gun rights – will cause them any harm while a decision on the merits is obtained. The district court's order did not, for example, upset some long-standing statute, but merely returned the law in New York to the *status quo* immediately after *Bruen* was decided. Fourth, aside from nakedly asserting that law-abiding gun owners carrying their firearms in public (persons who have been stringently vetted and licensed) somehow will cause mass chaos and destruction, Respondents have not shown how the public interest possibly could be harmed by maintaining the district court's preliminary injunction.

Respondents cannot make the required showing under any of the requisite factors, as the CCIA was designed not as a public safety measure, but rather a political statement demonstrating New York's contempt for this Court's *Bruen* decision. While New York's hostility was directed at this Court, those in the fall-out zone of the state's retaliation are law-abiding gun owners across the state. Paradoxically, even existing concealed carry license holders found that, after the CCIA became effective, they had far less ability to carry a firearm in public than even before *Bruen*.

Tellingly, New York's *stated justification* for prohibiting firearms across such large swaths of the state is the fact that this Court's *Bruen* decision has allowed "ordinary, law-abiding citizen[s]" with "ordinary self-defense needs [to] carry[] arms in public for that purpose." *Cf. Bruen* at 2150 with 2nd Cir. No. 22-2908, Document 18 at 16-17; *see also* CCIA "Sponsor Memo"[10] ("As a result of [*Bruen*], the State must … take … steps to address the consequences of the Supreme Court decision and the resulting increase in licenses and in the number of individuals who will likely purchase and carry weapons in New York State."). Likewise, Governor Hochul has repeatedly attacked and maligned this Court's *Bruen* decision as "reckless" and "reprehensible," and stated that she has "been working around the clock" to "protect New Yorkers" from this Court's decision.[11] The CCIA must therefore be seen for what

[10] https://www.nysenate.gov/legislation/bills/2021/S51001.
[11] *See* "Governor Hochul Announces Extraordinary Session of the New York State Legislature to Begin on June 30, Governor Kathy Hochul" (June 24, 2022). https://on.ny.gov/3YETgdu.

it really is – a frontal attack on Second Amendment rights and the authority of this Court to guarantee their protection.

A. Respondents Are Unlikely to Succeed the Merits of their Appeal.

Among its many provisions, the CCIA establishes no fewer than 20 categories (comprised of dozens of sub-categories) of "sensitive locations," wherein the mere possession of any firearm is a felony. N.Y. Penal Law § 265.01-e. The CCIA also criminalizes possession of a firearm on all "private property" within the state, unless the "owner or lessee of such property" allows "such possession by clear and conspicuous signage … or has otherwise given express consent." N.Y. Penal Law § 265.01-d. Again, violation of this provision is a Class E felony. These provisions operate in tandem to transform virtually the entire state of New York into a "sensitive place," defying *Bruen*'s warning that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly." *Id. at* 2134. Not only, as the district court found (App.125a-182a), there few to no historical analogue (*Bruen* at 2133-34) to such prohibitions – from the founding to the present day – but also the vast majority of such places had been open to the lawful carrying of firearms by licensed persons prior to this Court's opinion in *Bruen*.

For those without a license to carry, even while removing the repudiated "proper cause" requirement, the CCIA substitutes a "good moral character" requirement in its place, which is no less subject to the unbridled discretion of licensing officials and makes the licensing process even more difficult than before.

Indeed, the district court characterized "good moral character as a "subjective and vague standard [which] could allow licensing officer to deny an application if they were to see reflected in a compulsively disclosed social-media handle any hobby, activity, political ideology, sexual preference, or social behavior that they personally deem to show bad 'temperament' or 'judgment.'" App.116a.

Purportedly in order to make the "good moral character" determination, the CCIA establishes a brand-new requirement that requires applicants for concealed carry licenses to provide licensing officers with a list of their social media accounts for the past three years, a demand that the district court saw as "present[ing] First Amendment concerns" due to the "unfortunate combination of compelled speech and an exercise of the extraordinary discretion conferred upon a licensing officer." App.116a. The district court was concerned that the social media requirement "may also present Fifth Amendment concerns..." App.116a. Then, after reviewing the State's purported historical analogues for requiring social media disclosure as a condition of exercising a constitutional right, the district court noted that the ratification of the "U.S. Constitution" was "hotly debated by Federalists and Anti-Federalists in essays published under pseudonyms such as Brutus, Cato, Centinel" and others. App.113a. The district court then "searched for any laws requiring persons to disclose, as a condition to carrying arms, information such as (1) any nicknames and/or aliases used among friends or professionally (so that those nicknames or aliases could be investigated further), or (2) any pseudonyms used in

any published writings (so that those writings may be reviewed for signs of danger)," but "[n]ot surprisingly … found none." App.112a.

Additionally, the CCIA requires that an applicant provide the "names and contact information for the applicant's current spouse, or domestic partner, any other adults residing in the applicant's home, including any adult children of the applicant, and whether or not there are minors residing, full time or part time, in the applicant's home." N.Y. Penal Law § 400.00(1). App.195a. After review, however, the district court could not find any "such comparable burdensomeness in the [State's] purported 'historical analogues,'" and concluded that "this is an example of what the Supreme Court warned against as an 'exorbitant' [licensing] requirement." App.110a (*quoting Bruen* at 2138, n.9).

Next, the CCIA creates a catch-all demand that an applicant submit "such other information required by the licensing officer that is reasonably necessary and related to the review of the licensing application." *Id*. at § 400.00(1)(o)(i)-(v). With respect to this "open-ended provision," the district court found it to contain precisely the sort of "unbridled discretion" explicitly prohibited in *Bruen*, "especially given the dearth of [historical analogues] adduced by the State Defendants" to justify the requirement under *Bruen's* framework. App.118a.

Finally, the district court explained that "Defendants ... would not even *process* an application from Plaintiff Sloane until October 24, 2023, due to a lack of available appointments, rendering his application futile … because such a delay would effectively deny him his Second Amendment right for more than a year," in

contravention of this Court's *Bruen* decision at footnote 9. App.025a. The Second Circuit's stay thus permits New York licensing officials to delay the issuance of permits *indefinitely*, in clear conflict with *Bruen*.

In other words, after conducting an exhaustive historical analysis, and considering each of the purported historical analogues presented by the State in more than 500 pages of exhibits, the district court concluded that there is no historical tradition of firearm regulation that comes anywhere close to the CCIA's enjoined provisions. On the contrary, the district court quite correctly concluded that "[t]he 'good moral character' requirement is just a dressed-up version of the State's improper 'special need for self-protection' requirement." App.103a.

The Second Circuit's stay, however, overrides the district court's meticulous analysis and application of Bruen without so much a sentence of explanation. The Second Circuit's stay leaves the CCIA's patently unconstitutional licensing provisions in place, granting licensing officials within New York the "open-ended discretion" to decide whether an otherwise law-abiding person should be trusted by the state with the right to keep and bear arms, in clear opposition to this Court's *Bruen* decision. This Court should vacate the Second Circuit's stay, as Respondents are unlikely to prevail on the merits of their appeal.

B. Applicants Are Being Irreparably Harmed by the CCIA's Continued Infringement of Their Constitutional Rights.

With respect to the Applicants in this case who possess valid New York carry licenses, they are nevertheless barred by the CCIA from bearing arms *almost everywhere* within the state of New York – including Pastor Mann *within his own*

home. In other words, the CCIA has eviscerated the right of "ordinary, law-abiding citizen[s]" with "ordinary self-defense needs from carrying arms in public for that purpose." *Bruen* at 2150. As "confrontation can surely take place outside the home," (*Bruen* at 2135), New York effectively has disarmed and made vulnerable to crime even the narrow class of persons it had licensed to carry under the repudiated "proper cause" standard.

As Applicants no longer may freely carry their firearms in public to defend themselves and their families, this unconstitutional statute places their safety and security in very real danger. And, as there are tens of thousands of New Yorkers who are similarly situated, but who can no longer defend themselves against violent criminal acts while in public, it is not a matter of if – but when – the CCIA quite literally means the difference between life and death.

As to Applicant Lawrence Sloane, who does not yet have a New York carry license, the CCIA enacts one unconstitutional roadblock after another, forcing him to devote significant time, to expend considerable resources, and to forfeit other constitutional protections, all in order to merely obtain a license to carry. App.316a-323a. Moreover, he has been prevented even from applying for a license, being forced to schedule an appointment merely to submit his application for more than a year in the future (App.022a, App.025a, App.321a), violating this Court's admonition that governments not put the licensing process to "abusive ends" by imposing "lengthy wait times in processing license applications or exorbitant fees" which "deny ordinary citizens their right to public carry." *Bruen* at 2138 n.9.

When considering whether to enter the stay below, the Second Circuit was *required* to consider these "substantial injur[ies] to the nonmoving party" (*Uniformed Fire Officers Ass'n* at 48), yet the panel failed to provide any analysis at all beyond merely asserting that the court had "weighed the applicable factors..." (and, even then, pre-*Nken* factors). Yet as this Court has recently explained "[t]the equities do not justify depriving the applicants of the District Court's judgment in their favor. The moratorium has put the applicants, along with millions of landlords across the country, at risk of irreparable harm by depriving them of rent payments with no guarantee of eventual recovery." *Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2489 (2021). While that case involved only economic harm, Applicants here are suffering harm from constitutional violations under the First, Second, Fifth, and Fourteenth Amendments. As this Court has held in the First Amendment context, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). *See also A.H. v. French*, 985 F.3d 165, 184 (2d Cir. 2021) (quoting *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996)) ("The denial of a constitutional right ordinarily warrants a finding of irreparable harm, even when the violation persists for 'minimal periods'…."). The harm is even greater in this context because "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home." *Bruen* at 2122.

After considerable analysis and careful reasoning, the district court concluded that the "Plaintiffs have made a strong showing that they will likely experience

irreparable harm if the Preliminary Injunction is not issued…." App.182a. This "irreparability of harm may not be casually suspended pending appeal." *Rodriguez by Rodriguez v. DeBuono*, 175 F.3d 227, 234-35 (2d Cir. 1998). Thus, "the grant of a stay of a preliminary injunction pending appeal will almost always be logically inconsistent with a prior finding of irreparable harm…." *Id.* By granting the stay below, the Second Circuit "casually suspended" the district court's careful analysis on this factor, without bothering to provide even a few words of analysis. This Court should vacate the stay in order to avert the serious irreparable harm the district court found likely to befall Applicants in the face of this unconstitutional statute.

C. Respondents Will Suffer No Harm if the Stay is Vacated

The district court's preliminary injunction will cause no harm to Respondents, as many of the CCIA's provisions – which have been in effect, on and off, barely a few months – are entirely novel in New York law, as well as lacking any historical pedigree. For example, prior to September 1, 2022, those with valid carry licenses could *and did* carry concealed handguns in most of the locations that the CCIA now declares verboten. Indeed, even under the district court's injunction, not just anyone may carry a firearm in such locations, but only those who have gone through a rigorous screening and vetting process to obtain a carry license. This is the same group of persons who *have always carried* in these locations, and who *have already demonstrated* to the state's satisfaction that they are law-abiding, trained, responsible gun owners. The sky did not fall prior to the CCIA's enactment, and the

sky will not fall now. Rather, the district court's injunction merely returned the state of the law to what it was a short time ago.

Although Respondents acknowledged in their motion for stay that they must demonstrate that harm they will suffer "will be *certain* and irreparable," they did not even bother to make such an allegation, claiming only that the district court's injunction "*risks* substantial harm," and that licenses "*may* be granted" to people lacking good moral character. *See* 2nd Cir. No. 22-2908, Document 18 at 14-16 (emphasis added). Focusing on fantastically speculative claims of harm to themselves and the public, Respondents first asserted that "public agencies" – presumably including entities who are *not* parties in this case – "have devoted significant effort to implementing the law and informing the public about it." *See* 2nd Cir. No. 22-2908, Document 18 at 15. Yet Respondents identified no such "efforts" that *they* had taken, but instead relied only on "efforts" by (i) New York State (not a defendant in this case) by construction of a website listing frequently asked questions; (ii) New York City (also, not a defendant here) by issuing a press release about the CCIA; and (iii) New York City's (again, not a defendant here) by using laminated paper and zip ties to put up some "gun free zone" signs around Times Square.[12] *See* 2d Cir. No. 22-2908, Document 18 at 15, n.6. Respondents claimed that, "if the injunction remains operative, *these agencies*" will need to communicate with the public "that guns are allowed in many places where the public was just told guns are *not* allowed." *See* 2d

[12] Although Respondents' Second Circuit stay motion relied on harm associated with removing signs in Times Square, Plaintiffs *did not challenge*, and the district court *did not enjoin,* the CCIA's ban on firearms in Times Square. App.082a-083a.

Cir. No. 22-2908, Document 18 at 15 (emphasis added). These allegations of trivial inconvenience hardly sufficed to show that irreparable harm will befall Respondents under the district court's injunction.

First, the standard for a stay below required a showing of "irreparable harm" *to the movant*, not entirely speculative allegations of trivial effects on *other entities* who are not even parties in the case. Second, even if Respondents had alleged any sort of harm *to themselves*, the minor inconvenience associated with communicating to the public that an unconstitutional law has been enjoined – and that the status quo has returned to how things have always been – hardly constitutes *irreparable* harm justifying a stay. Third, nothing in the district court's preliminary injunction required Respondents to do anything, but only to cease enforcing an unconstitutional law. App.184a-186a. Fourth, to the extent that Respondents chose to *voluntarily* "harm" themselves by communicating with the public about the legality of concealed carry following the district court's order (which they did not even allege that they had done), self-inflicted harm does not suffice. Having failed entirely to allege that *they themselves* will suffer any harm at all, Respondents fail this factor.

D. The Public Interest Did Not Support a Stay.

It is *always* in the public interest to enjoin an unconstitutional law. *See N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). In response, Respondents claimed below that the mere presence of firearms carried by licensed permit holders will cause a massive public safety crisis. *See* 2d Cir. No. 22-2908, Document 18 at 16-17. But as this Court has held, "[t]he right to keep and bear arms

… is not the only constitutional right that has controversial public safety implications." *Bruen* at 2126 n.3. Certainly, the fact that more Americans might exercise their constitutionally enumerated rights cannot possibly be considered a public safety concern justifying staying the district court's preliminary injunction. In fact, it is far more likely that the opposite is true – that the presence of responsible armed citizens enhances public safety.[13] What is more, *even if* Appellants had articulated some possible public safety benefit to enforcing their unconstitutional new legislation, it would come at the unacceptably high cost of disarmament of law-abiding gun owners. *See McDonald v. Chicago*, 561 U.S. 742, 783 (2010). Enumerated rights cannot be balanced away by legislators or judges, because "the Second Amendment is … the very product of an interest balancing by the people…." *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). Nor can Appellants plausibly claim irreparable harm from enjoining enforcement of an unconstitutional law: "the public consequences in employing the extraordinary remedy of [injunctive relief]" are not just the vindication of constitutional rights but also the prevention of their egregious curtailment. *Yang v. Kosinski*, 960 F.3d 119, 135-136 (2d Cir. 2020).

[13] *Bruen* at 2158 n.1 (Alito, J., concurring) (citing studies finding that "'[t]he overwhelming weight of statistical analysis on the effects of [right-to-carry] laws on violent crime concludes that RTC laws do not result in any statistically significant increase in violent crime rates.'").

CONCLUSION

For the reasons state above, Applicants respectfully ask this Court to vacate the stay entered by the Court of Appeals pending full appellate consideration of the district court's decision preliminarily enjoying several provisions of New York's CCIA.

Respectfully submitted,

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Dated: December 21, 2022

No. _____

IN THE
Supreme Court of the United States

IVAN ANTONYUK, COREY JOHNSON, ALFRED TERRILLE, JOSEPH MANN, LESLIE LEMAN, AND LAWRENCE SLOANE
Applicants,

v.

STEVEN P. NIGRELLI, IN HIS OFFICIAL CAPACITY AS ACTING-SUPERINTENDENT OF THE NEW YORK STATE POLICE, ET AL.
Respondents.

TO THE HONORABLE SONIA SOTOMAYOR, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE SECOND CIRCUIT ON APPLICATION TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX TO EMERGENCY APPLICATION FOR IMMEDIATE ADMINISTRATIVE RELIEF AND TO VACATE STAY OF PRELIMINARY INJUNCTION ISSUED BY THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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