No. 24-795

In the
Supreme Court of the United States

IVAN ANTONYUK, et al.,

Petitioners,

v.

STEVEN G. JAMES, in his official capacity as 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

BRIEF OF AMICUS CURIAE SECOND AMENDMENT LAW CENTER, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., DELAWARE STATE SPORTSMEN'S ASSOCIATION, HAWAII RIFLE ASSOCIATION, GUN OWNERS OF CALIFORNIA, FEDERAL FIREARMS LICENSEES OF ILLINOIS, SECOND AMENDMENT DEFENSE AND EDUCATION COALITION, AND OPERATION BLAZING SWORD-PINK PISTOLS IN SUPPORT OF PETITIONERS

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AMICUS CURIAE STATEMENT OF INTEREST

The Second Amendment Law Center ("2ALC") is a nonprofit corporation in Henderson, Nevada. The Center defends the individual rights to keep and bear arms as envisioned by the Founders. 2ALC also educates the public about the social utility of firearm ownership and provides accurate historical, criminological, and technical information to policymakers, judges, and the public.[1]

Founded in 1875, the California Rifle and Pistol Association, Incorporated, ("CRPA") is a nonprofit organization that seeks to defend the Second Amendment and advance laws that protect the rights of individual citizens. CRPA works to preserve the constitutional and statutory rights of gun ownership, including the right to self-defense, the right to hunt, and the right to keep and bear arms. CRPA is also dedicated to promoting shooting sports, providing education, training, and competition for adult and junior shooters. CRPA's members include law enforcement officers, prosecutors, professionals, firearm experts, and members of the public. In service of these ends, CRPA regularly participates as a party or amicus in firearm-related litigation.

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[1] No counsel for a party authored this brief in whole or in part, nor did such counsel or any party make a monetary contribution to fund this brief. No person other than the amicus parties, its members or counsel, made a monetary contribution intended to fund the preparation or submission of this brief. The Parties were notified that this brief would be filed on January 29, 2025, in compliance with Rule 37.2.

The Delaware State Sportsmen's Association, Inc. (DSSA) is a Delaware non-stock, not-for-profit Delaware members corporation established for the specific purpose of serving as the official state affiliate of the National Rifle Association of America, Inc. in Delaware. Its total aggregate membership exceeds 5,000 members residing in Delaware and several additional states. DSSA has been protecting and defending the rights and servicing the needs of Delaware's sportsmen and women, gun owners, hunters, collectors and competitive shooters since 1968.

Hawaii Rifle Association is a non-profit organization, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Its mission is to protect Hawaiians' Second Amendment right to keep and bear arms, and to protect Hawaii's hunting and shooting traditions

Gun Owners of California ("GOC")[2] is a 501(c)(4) not-for-profit entity founded in 1975 to oppose infringements on Second Amendment rights. GOC is dedicated to the unequivocal defense of the Second Amendment and America's extraordinary heritage of firearm ownership. Its advocacy efforts regularly

[2] Both CRPA and GOC are plaintiffs in the challenge to California's related "sensitive places" carry ban, Senate Bill 2, *May v. Bonta*. The *May* Plaintiffs prevailed in the district court but had several portions of that victory undone by the Ninth Circuit with its flawed ruling in *Wolford v. Lopez*, 116 F.4th 959 (9th Cir. 2024). With en banc review recently denied by the Ninth Circuit over the dissent of eight judges, the *May* plaintiffs will head back to the district court to seek a final judgment, but further guidance from this Court is welcome in the meantime.

include participation in Second Amendment litigation.

The Second Amendment Defense and Education Coalition, Ltd. ("SADEC"), is an Illinois not-for-profit corporation. SADEC is dedicated to the defense of human and civil rights secured by law including, in particular, the right to bear arms. SADEC's activities are furthered by complementary programs of litigation and education.

Federal Firearms Licensees of Illinois ("FFL-IL") is an Illinois not-for-profit corporation that represents federally licensed gun dealers across the State of Illinois.

Finally, Operation Blazing Sword–Pink Pistols ("OBSPP") comprises two organizations, Operation Blazing Sword and Pink Pistols, which together advocate on behalf of lesbian, gay, bisexual, transgender, and queer ("LGBTQ") firearm owners, with specific emphasis on self-defense issues. Operation Blazing Sword maintains a network of over 1,800 volunteer firearm instructors in nearly a thousand locations across all fifty states. Pink Pistols, which was incorporated into Operation Blazing Sword in 2018, is a shooting society that honors gender and sexual diversity and advocates for the responsible use of firearms for self-defense. Membership is open to anyone, regardless of sexual orientation or gender identity, who supports the rights of LGBTQ firearm owners.

SUMMARY OF ARGUMENT

Less than three years ago, the Court ruled in *New York State Rifle & Pistol Association v. Bruen*, 597 U.S. 1, 33 (2022), that the Second Amendment protects the right to carry firearms in public for self-defense. The watershed decision invalidated a New York law limiting the right to those with a "special need for self-protection distinguishable from that of the general community," *id.* at 12, as well as the practices of other states with similar limitations. In response, several jurisdictions chose not to conform their laws to the clear command of this Court's precedent and, instead, adopted radical plans designed to undermine *Bruen* and the right to *bear* arms that it confirmed.

Among those detractors was the state of New York, which adopted sweeping restrictions on the ability to carry a firearm in public—even pursuant to a valid New York CCW permit. Among other things, the law designates many new locations as "sensitive," and thereby "off-limits" to public carry. It effectively limits carry in New York to "some streets" and sidewalks.[3] So, incredibly, New Yorkers with CCW permits now have *less* of a right to carry than they did before *Bruen*

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[3] Marcia Kramer & Dick Brennan, *Fresh Off Primary Win, Gov. Kathy Hochul Dives Right Into Guns—Who Can Get Them and Where They Can Take Them* (Jun. 29, 2022), https://www.cbsnews.com/newyork/news/fresh-off-primary-win-gov-kathy-hochul-dives-right-into-guns-who-can-get-them-and-where-they-can-take-them/ (New York Governor Kathy Hochul responds to reporter's question about where carry would still be permitted by saying "probably some streets.").

with many more locations now off-limits as supposedly "sensitive."

Thus, the question presented here is really this: Did this Court mean what it said in *Bruen*? And if it did, will the Court allow the very same state that nullified the right to carry through its unconstitutional "good cause" requirement to achieve the same result through other equally suspect methods?

It is unfortunate things have come to this. In a healthy court system, this Court's intervention would not be needed again so soon after *Bruen* was decided to vindicate the very right it recognized in that case. To be sure, this defiance is not an issue everywhere; in most states, the Second Amendment right to carry a firearm for self-defense was well-respected even *before* the Court mandated that the remaining states end their unconstitutional carry regimes. *Bruen,* 597 U.S. at 79 (Kavanaugh, J. concurring) (explaining that 43 states' carry regimes would not be affected by the ruling). *Bruen* should have settled at least that issue definitively, and when applied in good faith, it did.

American history teaches us, however, that when state and local governments are forced to comply with Supreme Court rulings they disfavor, provincial defiance must be promptly quashed before it becomes the sort of ingrained custom, habit, or practice that grew out of *Plessy v. Ferguson*, 163 U.S. 537 (1896). Like the "Massive Resistance" that sprang up in response to this Court's decision in *Brown v. Board of Education*, 347 U.S. 483 (1954), *see Cooper v. Aaron*, 358 U.S. 1, 7 (1958), a new "massive resistance" has

been declared in the states that should have changed their public carry practices in light of *Bruen*. This has been enabled by some courts, including the Second Circuit, when it upheld most of New York's "Bruen response" law, and the Ninth Circuit, when it upheld even the private property default rule that the Second Circuit had stricken, creating a circuit split. *Wolford v. Lopez*, 116 F.4th 959, 996 (9th Cir. 2024).

The Second Circuit's defiance is brazen for another reason: This Court already directed the circuit to reconsider its ruling in light of *Rahimi* (*see Antonyuk v. James*, 144 S. Ct. 2709 (2024)); yet *nothing* of substance changed in its new ruling. Given the length of the ruling and the large variety of issues here, *Rahimi* not changing the result at all cannot be a coincidence. Instead, it seems clear that the result was predetermined. And only this Court's intervention will bring order to courts, like the Second Circuit, that are hostile to the Second Amendment and are in open rebellion over *Bruen*.

Amici write because certiorari is necessary to quash this growing "massive resistance" to *Bruen*—both its analytical underpinnings and what it means for many modern gun-control laws. Indeed, to further tolerate this resistance invites the same constitutional anarchy that prevailed between *Plessy* and *Brown*. This brief will summarize post-*Bruen* public carry bans adopted in places like New York and California, as well as the animus for *Bruen* that spurred such laws. It will elaborate on how the *Antonyuk* analysis misapplies *Bruen* and *Rahimi* at every turn, using New York's ban on carrying at places where alcohol is served as an example. Finally, the brief will explain

why the analytical inquiry must not ignore—as both the Second Circuit and Ninth Circuit have—the differences between New York's carry regime and the permitless carry that was the standard practice before 1900.

ARGUMENT

I. In Response to *Bruen*, Several States Have Passed Laws Effectively Banning Public Carry in Open Defiance of the Court's Ruling

In the wake of the Court's seminal ruling in *Bruen*, many state officials who are antagonistic to gun rights made their disapproval known. New York Governor Kathy Hochul called the decision "reckless" and "reprehensible." *See* Anders Hagstrom, *NY Gov. Hochul Defiant After Supreme Court Gun Decision: 'We're Just Getting Started'*, Fox News (June 22, 2022), https://www.foxnews.com/politics/ny-gov-hochul-defiant-supreme-court-handgun-ruling-were-just-getting-started. Within weeks, she had signed the euphemistically named Concealed Carry Improvement Act ("CCIA")—a first-of-its-kind law that effectively bans public carry by arbitrarily designating nearly every public place "sensitive."[4]

None of this is constitutional. In *Bruen*, the Court held that "the Second Amendment guarantees a *general right to public carry*." 597 U.S. at 33 (emphasis

[4] The law also included a "vampire provision," prohibiting carry even on *private* property by default—that is, unless the property owner expressly invites in those who wish to carry. This provision would go too far even for the Second Circuit; it was the only CCIA-designated "sensitive place" the Second Circuit struck down. *Antonyuk v. James*, 120 F.4th 941, 1047 (2d Cir. 2024).

added). And it made clear that the government bears the burden of identifying an American tradition of firearm regulation sufficient to justify any restriction on that right. *Id.* at 17. But, as this Court already found, "[a]part from a few late-19th-century outlier jurisdictions, American governments simply have *not* broadly prohibited the public carry of commonly used firearms for personal defense." *Id.* at 70 (emphasis added). Since this is what the CCIA essentially does, that should be the end of it.

To be sure, there may be a few truly "sensitive places" where the right to carry has historically been restricted. *Id.* at 30 (identifying "legislative assemblies, polling places, and courthouses" as "'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment"). Courts can even "use analogies to those historical regulations … to determine that modern regulations prohibiting the carry of firearms in *new* and analogous 'sensitive places' are constitutionally permissible." *Id.* But the government may *not* simply designate large swaths of public space as "sensitive" just because people gather there. The Court rejected the very notion when New York raised it in *Bruen*. For doing so "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." *Id.* at 31; *see also id.* ("Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department.").

Unfortunately, neither New York nor the Second Circuit, in its decision below, took the Court's clear directive seriously. More unfortunate still, New York is not alone. New Jersey, Hawaii, Maryland, and California would all follow New York's lead, adopting nearly identical (and equally unconstitutional) *Bruen*-response laws in the months that followed.

Amici are most intimately familiar with Senate Bill 2 ("SB 2"), California's attempt to circumvent *Bruen*. Like the CCIA and the similar laws of other states, SB 2 declared most public places "sensitive" and thus off limits to the "general right to publicly carry arms for self-defense." *Id.*; S.B. 2, 2021-2022 Reg. Sess. (Cal. 2022). For instance, SB 2 bans carry in businesses that serve alcohol, banks, libraries, playgrounds, medical facilities, urban, rural, and state parks, on all public transportation, and on all private property by default (the "vampire rule"). Cal. Penal Code § 26230. The law even bans carry in the parking lots of these newly designated "sensitive places." *Id.* Worse yet, SB 2 made getting a permit to carry even harder than it was before. And many local issuing authorities, taking the state's lead, have erected their own barriers to the right. Permitting fees and related expenses exceed $1,000 in some cities, while other issuing authorities estimate it will take two years to process applications. *See, e.g.*, *Cal. Rifle & Pistol Ass'n, Inc. v. L.A. Cnty. Sheriff's Dep't*, No. 23-cv-10169, 2024 WL 4875390, at *8, 14 (C.D. Cal. Aug. 20, 2024).

In short, SB 2 is a broad and intrusive change to carry law as it existed in California before *Bruen*. This was by design. When introducing SB 2, Governor

Gavin Newsom angrily criticized the Court for its *Bruen* ruling and openly mocked the notion of a right to carry.[5] As in New York, California politicians conceived SB 2 to limit carry to just streets, sidewalks, and those private businesses willing to post signs affirmatively allowing visitors to carry. *See* Appellant's Mot. Stay Pending Appeal 22, *May v. Bonta*, No. 23-4356 (9th Cir. Dec. 22, 2023), ECF No. 4.1 ("[S]taying the injunction would still allow Plaintiffs to carry firearms in the quintessential public places (i.e., public streets and sidewalks)."). Indeed, Attorney General Rob Bonta publicly stated that he was "proud to support SB 2 this year, our concealed carry weapons *ban* law."[6]

II. The Second Circuit's Flawed Decision Has Already Emboldened Other Circuits to Ignore *Bruen* and Uphold the Broad Carry Bans of Other States

Efforts to dramatically over-designate "sensitive places" where carry is banned were at first rejected, in whole or in part, by the district courts that first examined them.[7] The Second Circuit—in striking the

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[5] Cal. Governor Gavin Newsom, *Governor Newsom, Attorney General Bonta, and Senator Portantino Announce New Gun Safety Legislation*, YouTube, at 41:10 (Feb. 1, 2023), https://www.youtube.com/watch?v=Ny_JkPZRiEw.

[6] Cal. Dep't of Just., *AG Bonta & Comm. Leaders Host Roundtable Addressing Best Practices & Efforts to Prevent Gun Violence*, YouTube, at 31:09 (Jan. 23, 2024), https://www.youtube.com/watch?v=EJY9lEEtdnA.

[7] *See, e.g.*, *May v. Bonta,* 709 F. Supp. 3d 940, 970 (C.D. Cal. 2023), *aff'd in part, rev'd in part sub nom. Wolford v. Lopez,* 116 F.4th 959 (9th Cir. 2024) (granting preliminary injunction as to most "sensitive places" designated by SB 2); *Koons v. Platkin*, 673 F. Supp. 3d 515, 670 (D.N.J. 2023) (enjoining New Jersey's

"vampire rule" but upholding all other "sensitive place" restrictions—is out of step with both *Bruen* and the district courts that have considered the issue. That said, appeals of successful challenges to these post-*Bruen* carry bans are currently winding through the courts.

For instance, the Ninth Circuit recently went even further than the Second Circuit, agreeing with much of its analysis but further destroying the right to carry in two respects. It upheld Hawaii's version of the "vampire rule" and ruled that carry could be banned even in the empty wilderness of state parks. *Wolford*, 116 F.4th at 995, 985.[8] After the Ninth Circuit denied

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restrictions on carrying on most government property, public gatherings, zoos, parks, libraries, museums, healthcare facilities, casinos, bars and restaurants serving alcohol, entertainment facilities, and the "vampire rule"); *Wolford v. Lopez,* 686 F. Supp. 3d 1034, 1076 (D. Haw. 2023), *aff'd in part, rev'd in part,* 116 F.4th 959 (9th Cir. 2024) (enjoining Hawaii's restrictions on carrying in parking areas adjacent to government buildings, places serving alcohol, beaches, parks, banks, and the vampire rule); *Kipke v. Moore*, No. 23-1293, 2023 WL 6381503 (D. Md. Sept. 29, 2023) (enjoining Maryland's restrictions on carrying in locations that sell alcohol, at public gatherings, and the "vampire rule"); *Nat'l Ass'n for Gun Rts. v. Grisham*, No. 23-771, 2023 WL 5951940, at *4 (D.N.M. Sept. 13, 2023) (restraining New Mexico Governor's executive order banning carry in most places in Albuquerque); *Springer v. Grisham*, No. 23-781, 2023 WL 8436312, at *8 (D.N.M. Dec. 5, 2023) (enjoining New Mexico Governor's executive order banning carry in public parks).

[8] In contrast with the Ninth Circuit, the Second Circuit refused to extend its park carry ban logic to parks outside of urban areas. *Antonyuk*, 120 F.4th at 1019 (upholding park carry ban "at least insofar as the regulation prohibits firearms in *urban* parks, though not necessarily as to *rural* parks").

en banc review, several dissenting judges explained, "[w]ith their new public carry bans, Hawaii and California have effectively disarmed law-abiding Hawaiians and Californians from publicly carrying during most of their daily lives." *Wolford v. Lopez*, No. 23-16164, 2025 WL 98026, at *14 (9th Cir. Jan. 15, 2025) (VanDyke, Callahan, Ikuta, R. Nelson, Lee, & Bumatay, JJ., dissenting from denial of rehearing en banc).

This Court's historic preference for taking on issues only where there is a conflict between the circuits—typically a wise form of judicial restraint—is an extraordinarily poor fit in the Second Amendment context. That is because the circuits historically more favorable to Second Amendment rights (like the Fifth, Eighth, and Eleventh Circuits) will rarely, if ever, have the occasion to rule on such issues as bans on carry in so-called "sensitive places," "assault weapon" restrictions, or magazine capacity limits, because the states within those circuits, by and large, do not pass such laws.

In contrast, circuit courts antagonistic to gun rights regularly strive to undermine Second Amendment litigants. The scathing dissents in these sorts of cases signal that there *would* be a circuit split if only more circuits had their say. *See, e.g.*, *Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke, J. dissenting) ("If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd.")

Enough is enough. It seems lower courts will not apply *Bruen* in good faith until this Court becomes more active in policing them. And this case—where the circuit court employed a flawed analysis and sanctioned New York's efforts to eliminate the right to carry in nearly all public places, and there are no factual disputes that would benefit from a more complete record—is as great a case as any to start.

A. The Second Circuit decision improperly narrows *Bruen* and *Rahimi* by ignoring key parts of the historical analysis.

The Second Circuit's *Antonyuk* ruling deliberately distorts *Bruen*'s test beyond recognition to a degree that requires this Court's immediate corrective action. The Second Circuit cited with approval a law review article that was extremely critical of *Bruen*, and it ultimately followed the article's advice for narrowing the *Bruen* analysis to circumscribe the right to carry. *Antonyuk*, 120 F.4th at 969 n.10 (citing Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 Duke L.J. 67, 153 (2023)). The Charles article expressly calls for lower courts to narrow the *Bruen* precedent from below rather than follow it faithfully. *Id.* The Second Circuit's reliance on the article to guide its analysis is worse than relying on a dissenting opinion for how to apply a rule. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) ("A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion."). The Court should step in now and disabuse lower courts of the notion that they are free to narrow *Bruen* on their own terms before such

treatment becomes baked into the Second Amendment jurisprudence of the circuit courts.

The *Antonyuk* decision is over 200 pages long, and it is rife with examples of the intentional misapplication of *Bruen*—too many to cover in this brief. But as an example, consider how it upheld the CCIA's ban on carry in places that serve alcohol. That prohibition applies even if the individual has no intention of drinking, such as when they are out for dinner with their family at a restaurant that also offers beer and wine. It is undisputed that establishments that serve alcohol existed in the Founding Era and before, as did fears that armed drunks might become violent. Yet New York presented no historical state law showing that carrying in bars or pubs was banned in the 18th or 19th centuries and instead offered only a few laws from pre-statehood territories and some 19th-century laws that prohibited *intoxicated* people from possessing arms. *Antonyuk*, 120 F.4th at 1030-31. But, as Professor Charles entreated, the Second Circuit abandoned its duty to faithfully apply the *Bruen* historical methodology and, instead, disregarded *Bruen* in at least four ways.

First, the Second Circuit ignored this Court's clear guidance that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is *inconsistent* with the Second Amendment." *Bruen*, 597 U.S. at 26 (emphasis added). Because both bars and pubs and societal concerns

about mixing alcohol with firearms have persisted since *at least* the founding, reasoning by analogy is inappropriate here. Instead, the government must produce evidence of a historical tradition that is "distinctly similar" to the modern law at issue. *Id.*; *see also Rahimi*, 602 U.S. at 709 (Gorsuch, J., concurring) ("[W]e seek to honor the fact that the Second Amendment 'codified a pre-existing right' belonging to the American people, one that carries the same 'scope' today that it was 'understood to have when the people adopted' it.").

The Second Circuit refused to hold New York to this burden, reasoning that *Bruen*'s guidance on this point applied only to the particular facts of that case "due to the exceptional nature of New York's proper-cause requirement, which conditioned the exercise of a federal constitutional right on the rightsholder's reasons for exercising the right." *Antonyuk*, 120 F.4th at 970. *Bruen* contains no language limiting its "distinctly similar" historical analysis to exceptionally severe laws. On the contrary, an analytical framework that would see courts applying different tests based on the severity of the burden is no more than a reinstatement of the interest-balancing analysis that *Bruen* explicitly rejected. And *Rahimi* reiterated that "[e]ven when a law regulates arms-bearing for a permissible reason, …, it may not be compatible with the right if it does so to an extent beyond what was done at the founding." 602 U.S. at 692.

Second, *Bruen* tells us that "if earlier generations addressed the societal problem, but did so through materially different means," that too is evidence that the modern law is unconstitutional. 597 U.S. at 26. As

the Second Circuit acknowledged, the few historical laws that dealt with the problem of drunken armed people simply barred intoxicated individuals from being armed. *Antonyuk*, 120 F.4th at 1030. They did not disarm both the drunk and sober in bars and pubs. Looking at similar laws, the Fifth Circuit more sensibly concluded that they would "support, at most, a ban on carrying firearms while an individual is *presently* under the influence." *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024). New York's modern prohibition does not only bar people from carrying when they are drunk or even just when they intend to drink; it bars them from carrying just because they are in a place where alcohol is served. There is no representative historical tradition of such a broad restriction on public carry that applied to sober individuals.

Third, the Second Circuit gave far too much weight to historical laws that regulated the conduct of only a small minority of the population and to the outlier laws of the Western Territories before they achieved statehood. For instance, the court held that historical analogues covering just 9.5% of the population were enough to justify the CCIA's ban on carry in establishments where alcohol is served. *Id.* at 1030. The circuit court reasoned that "[d]isqualifying proffered analogues based only on strict quantitative measures such as population size absent any other indication of historical deviation would turn *Bruen* into the very 'regulatory straightjacket' the Court warned against." *Id.* at 1010. But *Bruen* demands a "representative" tradition, not just a smattering of mere outliers. 597 U.S. at 30; *see also Rahimi*, 602 U.S. at 696 (citing laws passed by ten states as a

sufficient analogue). If a purportedly analogous tradition of regulation did not affect at least a significant minority of the population, it is hard to see how it could be "representative" of our historical tradition in any meaningful way. Such laws may have *some* relevance to the inquiry, but they hardly outweigh the overwhelming evidence that early American governments largely did not address the societal problem of *intoxicated* people from misusing firearms by banning *sober* people from carrying them.

Similarly, *Bruen* gave virtually no weight to the restrictions of the Western Territories, reasoning that territorial "legislative improvisations" that conflict with the Nation's earlier approach to firearm regulation are unlikely to reflect our nation's true historical tradition. 597 U.S. at 67. The Court also observed that the laws of the territorial West "were irrelevant to more than 99% of the American population." *Id.* Thus, the Court cautioned, it would "not stake [its] interpretation on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence. *Id.* at 67-68 (quoting *District of Columbia v. Heller,* 554 U.S. 570, 632 (2008)).

The Second Circuit did not heed that warning. Instead, it proceeded to rely on the laws of the territories, declaring that "the district court made too much of the fact that *Bruen* gave 'little weight' to territorial laws." *Antonyuk,* 120 F.4th at 1029. But how could that be so? *Bruen* was clear that such laws

"are most unlikely to reflect 'the origins and continuing significance of the Second Amendment'" and are not even "*instructive*." 597 U.S. at 67 (emphasis added). "[T]hey appear more as passing regulatory efforts by not-yet mature jurisdictions on the way to statehood, rather than part of an enduring American tradition of state regulation." *Id.* at 69. Instead of the district court giving *too much* weight to this Court's guidance that territorial laws offer almost nothing to the historical analysis, it seems the circuit gave it far *too little*.

Finally, even if analogical reasoning were appropriate here and assuming the few laws New York cited constitute a "representative" tradition, the government's reliance on laws that focused on guns in "crowded spaces" cannot be enough. *See Bruen*, 597 U.S. at 30-31. Even still, the Second Circuit ruled that "[w]hen paired with the crowded space analogues, even absent the historical statutes prohibiting carriage in liquor-serving establishments, the analogues prohibiting intoxicated persons from carrying or purchasing firearms justify [New York's law]." *Antonyuk,* 120 F.4th at 1031. This ignores the Court's rejection of New York's argument that it may ban carry in places where people typically congregate. *Bruen*, 597 U.S. at 30-31. There is no historical basis to restrict carry in a public space "simply because it is crowded and protected generally by the [police]." *Id.* Nor is there a basis to bundle completely unrelated historical prohibitions to manufacture a historical tradition by analogy. In effect, just like the Ninth Circuit in *Wolford*, the panel "extracted very broad principles from the historical record that could support the constitutionality of almost any firearms

restriction." 2025 WL 98026, at *12 (VanDyke, Callahan, Ikuta, R. Nelson, Lee, & Bumatay, JJ., dissenting from denial of rehearing en banc).

Amici need not conduct a similar analysis for every "sensitive place" provision the Second Circuit upheld. For even a cursory review of the *Antonyuk* decision will reveal to the Court that these sorts of errors repeat throughout the ruling. The Second Circuit has "let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs." *Rahimi*, 602 U.S. at 736 (Kavanaugh, J., concurring). Petitioners are correct that the lack of founding-era analogues is fatal to New York's argument, and the Second Circuit should have recognized that. But even if solely relying on 19th-century history *were* permissible, the panel's other errors are legion and independently doom its analysis.

B. The Second Circuit ignores a critical difference between carry regulations in New York today and the historical analogues it cites.

While a majority of states (29 in total) have adopted some form of permitless or "constitutional" carry under which anyone who may legally possess a firearm may carry it without a permit, New York has not done so. Like 20 other states, it only allows carry if the individual has gone through the process to get a concealed handgun license. Applicants for a CCW permit are extensively vetted, going through a police interview, a background check, a firearms safety training course, reference checks, and more. *Antonyuk*, 120 F.4th at 958.

The result of this vetting is that state-level data proves that Americans with CCW permits are exceptionally law-abiding, much more so than the general population as a whole. In their own litigation challenging California's law, Amici presented extensive data to that effect, and the district court acknowledged it in its ruling. "Simply put, CCW permitholders are not the gun wielders legislators should fear." *May*, 709 F. Supp. 3d at 969, *aff'd in part, rev'd in part sub nom. Wolford,* 116 F.4th at 959.[9] So law-abiding are those with permits that several major police organizations in California submitted an amicus brief in support of Amici in their case challenging California's similar law. "In California, CCW permit holders are some of the most highly vetted, trained, responsible and law-abiding citizens, who do not jeopardize public safety." *See* Amicus Brief of Peace Officers Research Association of California, et al. at 6, *May v. Bonta*, No. 23-4356 (9th Cir. Feb. 23, 2024), ECF No. 57.1. At least one research organization that typically argues for more gun control, RAND, has recognized the same: "[E]vidence generally shows that, as a group, license holders are particularly law abiding and rarely are convicted for violent crimes." Rosanna Smart, et al., *The Science of Gun Policy: A Critical Synthesis of Research Evidence*

[9] Other courts have found the same. "[T]he vast majority of conceal carry permit holders are law abiding." *Wolford v. Lopez,* 686 F. Supp. 3d 1034, 1076 (D. Haw. 2023), *aff'd in part, rev'd in part*, 116 F.4th 959 (9th Cir. 2024); "[D]espite ample opportunity for an evidentiary hearing, the State has failed to offer any evidence that law-abiding responsible citizens who carry firearms in public for self-defense are responsible for an increase in gun violence." *Koons v. Platkin*, 673 F. Supp. 3d 515, 577 (D.N.J. 2023).

on the Effect of Gun Policies in the United States, at 427 (4th ed. 2024), available online at https://www.rand.org/pubs/research_reports/RRA243-9.html.

This is critical to the sensitive places analysis. Up until the 20th century, almost any citizen could carry firearms openly in public without government vetting or licensing. While some towns and cities had permitting requirements in the late 19th century, those usually only applied to *concealed* carry, while open carry was almost always an option without a permit ever being required. Today, by contrast, New York does not allow for open carry in most instances, so concealed carry with a CCW permit is the only way for citizens to exercise their rights.

The Second Circuit did not even bother to consider this critical difference in "how" the modern laws at issue operate compared to proposed historical analogues. And the Ninth Circuit disregarded it, ruling that "[i]f a particular place is a 'sensitive place' such that firearms may be banned, then firearms may be banned—for everyone, including permit holders—consistent with the Second Amendment." *Wolford*, 116 F.4th at 981. That conclusion skips the *Bruen* analysis altogether because "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are 'central' considerations when engaging in an analogical inquiry." *Bruen*, 597 U.S. at 29. Considering the extensive vetting burden on permitholders in present-day New York that was absent before 1900, the modern location restrictions and the proposed historical analogues are plainly not

"comparably justified." Moreover, "our Nation's tradition of firearm regulation distinguishes citizens who have been found to pose a credible threat to the physical safety of others from those who have not." *Rahimi*, 602 U.S. at 700. New York has not shown (because it cannot) that the people it grants CCW permits are in any way dangerous. It's just the opposite; their most distinct shared characteristic is that they do not pose any notable criminal threat, as New York is allowed to confirm before even issuing them a permit!

To be sure, this does not mean that some truly sensitive places cannot also prohibit those with CCW permits from carrying. As the Court has confirmed, the historical record supports "relatively few" places where carry could be prohibited, but the three examples it provided were legislative assemblies, polling places, and courthouses. *Bruen*, 597 U.S. at 30. In their haste to try to ban carry in as many places as possible, New York and California ignored the real "why" behind those historical restrictions.

The shared "principle that underpin[s] our regulatory tradition," *Rahimi,* 602 U.S. at 692, is a limitation on carrying arms *where the deliberative business of governance is conducted*. That is what legislative assemblies, polling places, and courthouses all have in common under *Rahimi*'s approach, and what the places at issue here do not. The fear was not typical criminal violence, but the heightened passions and political intimidation that could arise if armed men could enter a polling place or courthouse (particularly in an era where arms were carried openly). In sum, our history supports that

"governments may restrict firearms possession in places where important and legally definitive governmental decisions are regularly made." *United States v. Ayala*, 711 F. Supp. 3d 1333, 1347 (M.D. Fla. 2024). Modern analogues might include places like city council chambers or voter registration centers, but they would not include the sorts of places people go to as part of their daily lives, such as run-of-the-mill parks or restaurants that offer beer or wine with dinner.

New York's law thus differs in "how" it operates compared to historical laws (everyone must go through a rigorous application process before carrying), and "why" it restricts carry (a fear of routine crime vs. a fear of political violence and intimidation).

CONCLUSION

The Court's intervention is necessary to protect its recent ruling in *Bruen*, and to correct errors in the analysis that have emerged in the lower courts since that landmark ruling. The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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