No. 23-910

In the
Supreme Court of the United States

IVAN ANTONYUK, ET AL.,

Petitioners,

v.

STEVEN G. JAMES, IN HIS OFFICIAL CAPACITY AS ACTING SUPERINTENDENT OF THE NEW YORK STATE POLICE, ET AL.,

Respondents.

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

BRIEF OF AMICUS CURIAE SECOND AMENDMENT LAW CENTER, CALIFORNIA RIFLE & PISTOL ASSOCIATION, INC., 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

C.D. Michel
Counsel of Record
Anna M. Barvir
Konstadinos T. Moros
MICHEL & ASSOCIATES, P.C.
180 East Ocean Blvd., Suite 200
Long Beach, CA 90802
(562) 216-4444
CMichel@michellawyers.com
Counsel for Amicus Curiae

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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.

Gun Owners of California ("GOC") is a 501(c)(4) not-for-profit entity founded in 1975 to oppose

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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 March 12, 2024, in compliance with Rule 37.2.

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 include participation in Second Amendment litigation.

Both CRPA and GOC are plaintiffs in the challenge to California's related "sensitive places" carry ban, Senate Bill 2, currently pending before the Ninth Circuit Court of Appeals. *May v. Bonta*, No. 23-01696, 2023 WL 8946212, at *19 (C.D. Cal. Dec. 20, 2023) (granting preliminary injunction as to most places designated as "sensitive" by SB 2).

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

1,600 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

It is unfortunate that the Court's intervention is needed again so soon after *Bruen* was decided in order to vindicate the fundamental right to keep and bear arms in a handful of recalcitrant states. In most states, the Second Amendment right to carry a firearm for self-defense was already well-respected even *before* the Court mandated that the remaining states end their unconstitutional schemes aimed at preventing regular citizens from exercising that right. *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 79 (2022) (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. To countenance this form of "resistance" invites the same constitutional anarchy that prevailed between *Plessy* and *Brown*.

Petitioners are correct that the Court's intervention is necessary to correct methodological errors made by the Second Circuit to keep them from spreading to other circuits—chief among them is perhaps the refusal to focus on the Founding Era even though *Bruen* did not "endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights." 597 U.S. at 83 (Barrett, J., concurring). Amici do not intend to simply rehash Petitioners' arguments on this point.

Instead, they write separately to add that certiorari is also necessary to quash the growing "massive resistance" to *Bruen*—both its analytical underpinnings and what it means for many modern gun-control laws. Amici 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. They will elaborate on how the *Antonyuk* analysis misapplies *Bruen* at every turn, using New York's ban on carrying at places where alcohol is served as an example. And finally, Amici will explain why certiorari is necessary to correct

course on the misguided new "two-step" test that lower courts are embracing in *Bruen*'s wake.

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." Pet. 7 (citing 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, New York passed the euphemistically named Concealed Carry Improvement Act ("CCIA")—a first-of-its-kind law adopted in response to *Bruen* that effectively bans public carry by arbitrarily designating nearly every public place "sensitive."[2] Under the CCIA, carry in New York is effectively limited to "some streets" and sidewalks according to Governor Hochul herself.[3]

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[2] 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. Chiumento*, 89 F.4th 271, 386 (2d Cir. 2023).

[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-

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

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where-they-can-take-them/ (Governor Hochul responds to reporter's question about where carry would still be permitted by saying "probably some streets.").

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 years to process applications. *See, e.g.*, Complaint,

Cal. Rifle & Pistol Ass'n, Inc. v. L.A. Cnty. Sheriff's Dep't, No. 23-cv-10169 (Dec. 4, 2023), ECF No. 1.[4]

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] And, as in New York, California politicians conceived SB 2 as a way 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]

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[4] Amici California Rifle & Pistol Association and Gun Owners of California are currently battling California's bad faith carry laws and practices in court. *May v. Bonta*, 2023 WL 8946212, at *19 (C.D. Cal. Dec. 20, 2023); Plaintiffs' Notice of Motion & Motion for Preliminary Injunction, *Cal. Rifle & Pistol Ass'n, Inc. v. L.A. Cnty. Sheriff's Dep't*, No. 23-cv-10169 (Jan. 26, 2024), ECF No. 20.

[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.

II. If Left Unchecked, the Second Circuit's Flawed Decision Will Embolden Other Circuits to Ignore *Bruen* and Uphold the Broad Carry Bans of Other States

Thankfully, efforts to dramatically over-designate "sensitive places" where carry is banned have largely been rejected, in whole or in part, by the district courts that have examined them.[7] The Second Circuit—in striking the "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 pending before the Third and Ninth Circuits. And countless

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[7] *See, e.g.*, *May*, 2023 WL 8946212 (granting preliminary injunction as to most "sensitive places" designated by California's SB 2); *Koons v. Platkin*, 673 F. Supp. 3d 515 (D.N.J. 2023) (enjoining New Jersey's 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*, No. 23-265, 2023 WL 5043805 (D. Haw. Aug. 8, 2023) (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); *see also B&L Prods., Inc. v. Newsom*, No. 22-01518, 2023 WL 7132054, at *15 (C.D. Cal. Oct. 30, 2023) (holding that government-owned fairgrounds are not sensitive places); *United States v. Ayala*, No. 22-369, 2024 WL 132624 (M.D. Fla. Jan. 12, 2024) (invalidating ban on carrying in post offices because post offices have existed since the Founding, but the first restriction on carry within them was enacted in 1972).

other Second Amendment challenges are currently winding through the courts; they too could benefit from this Court's further guidance.

Indeed, the Court should grant certiorari because several lower courts are in open rebellion over *Bruen*. The Second Circuit and its ruling here is but one example. Other circuits are reaching results that are unbelievable under a good faith reading and application of *Bruen*. For instance, the Seventh Circuit held that common semiautomatic rifles are not even "arms" under the Second Amendment, so the plain text is not implicated and the government need not establish any historical tradition to prevail. *Bevis v. City of Naperville, Illinois*, 85 F.4th 1175, 1197 (7th Cir. 2023). Other courts have imported a sort of interest-balancing analysis into their fabricated "first step" of *Bruen*, requiring that Second Amendment challengers establish a severe or meaningful burden on the right before holding the government to its burden. *See, e.g.*, *Ocean State Tactical, LLC v. Rhode Island*, No. 23-1072, 2024 WL 980633, at *4 (1st Cir. Mar. 7, 2024) ("Given the lack of evidence that LCMs are used in self-defense, it reasonably follows that banning them imposes no meaningful burden on the ability of Rhode Island's residents to defend themselves."); *B&L Prods., Inc. v. Newsom*, 661 F. Supp. 3d 999 (S.D. Cal. 2023) (dismissing Second Amendment claim because plaintiffs had not alleged the law bars them "from acquiring or purchasing firearms or ammunition *altogether*, *amounting to a prohibition of that right*") (emphasis added). The analysis turns *Bruen* on its head.

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. For instance, the Fourth Circuit recently resorted to en banc review before the three-judge panel even issued its ruling, but not before first making the plaintiffs wait *over a year*. *Bianchi v. Brown*, No. 21-1255, 2024 WL 163085, at *1 (4th Cir. Jan. 12, 2024) (granting en banc review over a year after oral argument before the three-judge panel). 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. This Court should become more active in policing the lower courts until they apply *Bruen* in good faith. 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—is as great a case as any to start.

A. The Second Circuit decision improperly narrows *Bruen* 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*, 89 F.4th at 301 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.* at 149. 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 and narrowing of *Bruen*. Consider, for

example, 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 to dinner with their family at a restaurant that happens to also offer 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* persons from possessing arms. But, as Professor Charles entreated, the Second Circuit abandoned its duty to faithfully apply the *Bruen* historical methodology and, instead, it disregarded *Bruen* in at least four ways.

First, the Second Circuit ignored (or least undervalued) 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.*

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*, 89 F.4th at 302. *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.

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 the intoxicated from being armed. *Antonyuk*, 89 F.4th at 366. *They did* ***not*** *disarm both the drunk and sober in bars and pubs.* New York's modern prohibition does not bar people from carrying when they drunk, or even just when they intend to drink; it bars them from carrying just because they are in a place where alcohol is sold. There no representative historical tradition of such a broad restriction on public carry.

Third, though not as critical as the errors described above, 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 circuit court held that

historical analogues covering just 8% of the population were enough to justify the CCIA's ban on carry in establishments where alcohol is served. *Id.* at 360. 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 339. But *Bruen* demands a "representative" tradition, not just a smattering of mere outliers. 597 U.S. at 30. 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*, 89 F.4th at 366. 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*, 89 F.4th at 368. 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.

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. 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. Pet. 21. But even if solely relying on 19th-century history were permissible, the panel's other errors are legion and also doom its analysis.

B. The Second Circuit decision incorrectly treats the Second Amendment analysis as a two-step test.

In proceeding with its review, the Second Circuit explained that "*Bruen* requires courts to engage in two analytical steps when assessing Second Amendment challenges: first, by interpreting the plain text of the Amendment as historically understood; and second, by determining whether the challenged law is consistent with this Nation's historical tradition of firearms regulation…." *Antonyuk*, 89 F.4th at 300. This is incorrect; *Bruen* calls for a one-step test. Surely, the Court did not intend to replace the two-step, tiers-of-scrutiny analysis it explicitly rejected with yet another two-step test. As the Court explained: "Despite the popularity of th[e] two-step

approach, it is one step too many." *Bruen*, 597 U.S. at 19.

Because the Second Circuit fundamentally misunderstood the approach *Bruen* requires, this case presents an opportunity for this Court to clarify the correct way to apply *Bruen*' text, history, and tradition analysis. While it did not ultimately affect the result in this particular case, this error affects many post-*Bruen* rulings in far more serious ways. Indeed, courts have seized on this manufactured "first step" to relieve the government of its burden under the historical test altogether.

Take the Seventh Circuit's ruling in *Bevis v. City of Naperville*, for instance. The court in that case astonishingly held that a ban on extremely popular rifles and magazines *does not even implicate* the Second Amendment because the semiautomatic AR-15 is not a protected "arm" because it is apparently indistinguishable from the fully automatic M-16. *Id.* at 1197. In fact, according to the Seventh Circuit's reasoning in *Bevis*, no weapon used by the military is an "arm." *Id.* at 1191. And despite this Court saying repeatedly in *Bruen* that the burden is on the government, *Bevis* places the burden on *plaintiffs* to prove that the banned firearms "are Arms that ordinary people would keep at home for purposes of self-defense…." *Id.* at 1194.

That, of course, is all contrived nonsense. This Court has been abundantly clear that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the

founding." *Heller,* 554 U.S. at 582. In fact, even M-16s meet the definition of an "arm" because they are "[w]eapons of offence." *Id*. at 581. That does not mean that such weapons cannot be regulated (or even banned) if our historical tradition supports it. But courts should not be short-circuiting *Bruen* with a made-up "first step" to help the government dodge the rigors of historical scrutiny.

To be sure, for there to be a viable Second Amendment challenge, the right to keep and bear arms must at least be implicated. *Id*. at 17. Just as a First Amendment free speech case must involve speech,[8] so too must a Second Amendment case involve the peaceable use or ownership of arms. But this should be no more than a qualifier, not an independent "step" requiring in-depth analysis. Further, "implicating" the Second Amendment may be direct or indirect because "[t]he Second Amendment also protects attendant rights that make the underlying right to keep and bear arms meaningful." *Boland v. Bonta*, 662 F. Supp. 3d 1077, 1085 (C.D. Cal. 2023) (citing *Jackson v. City & Cnty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014)); *Ezell v. City of Chicago*, 651 F.3d 684, 704 (7th Cir. 2011); *Rigby v. Jennings*, 630 F. Supp. 3d 602, 615 (D. Del. Sept. 23, 2022)).

[8] Even in the context of commercial speech, there is no extended handwringing over whether the First Amendment is at least implicated because commercial speech is still plainly speech. Instead, courts quickly move past that question and apply the test laid out in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557 (1980).

This case provides an excellent opportunity for this Court to clarify that the simple requirement for a Second Amendment case to implicate the right to keep or bear arms is not to be a giant hurdle that constitutes a deep analytical "step," but only a simple qualifier.

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.

March 25, 2024

Respectfully submitted,

C.D. Michel
Counsel of Record
Anna M. Barvir
Konstadinos T. Moros
Michel & Associates, P.C.
180 E. Ocean Blvd., Ste. 200
Long Beach, CA 90802
Telephone: (562) 216-4444
cmichel@michellawyers.com
Counsel for Amicus Curiae