UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

IVAN ANTONYUK, et al.,

Plaintiffs-Appellees,

v.

KATHLEEN HOCHUL, STEVEN A. NIGRELLI, MATTHEW J. DORAN, and JOSEPH CECILE,

Defendants-Appellants,

WILLIAM FITZPATRICK, et al.,

Defendants.

No. 22-2379

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL AND AN ADMINISTRATIVE STAY PENDING RESOLUTION OF THE MOTION

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PRELIMINARY STATEMENT

Appellants seek a stay pending appeal of a district court order enjoining the statewide enforcement of vital portions of New York's Concealed Carry Improvement Act (CCIA). Contrary to appellees' suggestion, *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), did not set aside legal standards governing injunctive relief to authorize immediate relief to any party raising a Second Amendment claim.

Appellees chiefly contend that the Order is not appealable, although they concede that the Order lacks temporal limitation, was issued after notice and hearing, and hews closely to the same district court's advisory opinion issued in an earlier case brought by the same lead plaintiff. The Order is an appealable injunction in everything but name. Appellees also insist that the Order will not cause irreparable harm but will merely return New York law to a pre-CCIA norm. However, appellees conveniently ignore that the pre-CCIA norm was predicated on the "proper cause" licensing requirement that *Bruen* invalidated. If allowed to take effect, the Order, in combination with *Bruen*, could result in many additional guns being carried in myriad places, with the corresponding risks of gun-related injuries and deaths. The substantial risk of harm to the public

(together with the confusion that the Order has already wrought) necessitates an immediate appeal.

Appellees likewise fail to rebut appellants' showing of an entitlement to a stay pending appeal. Appellees insist that the equities weigh against a stay because, in their view, the CCIA is constitutionally flawed. But merely raising a Second Amendment challenge does not entitle a plaintiff to immediate statewide relief, especially where, as here, appellants are not given an opportunity to meaningfully defend the law. In any event, the Order is riddled with errors on the merits, including the improper application of *Bruen* and an analysis of claims for which no plaintiff had standing. And if the Order is not stayed in its entirety, it should at least be narrowed to the six appellees.

ARGUMENT

POINT I

THE ORDER IS IMMEDIATELY APPEALABLE

Appellees' insistence that the Order is not appealable (Opp. at 2-12) is belied by the Order's plain terms and by the events leading up to the interim relief the district court improperly ordered here.

First, appellees do not (and cannot) dispute that the Order has no fixed temporal limitation, given that the district court had not scheduled a preliminary injunction hearing,[1] has not committed to decide the preliminary injunction motion by a particular date, and has not set an expiration date for the purported TRO. To the contrary, the court preemptively waived the temporal limitations of Federal Rule of Civil Procedure 65(b)(2). (Order at 49.)

As this Court has explained, TROs are generally not appealable only because they are subject to Rule 65(b)'s protective provisions, including "the limitation on the time during which such an order can continue

[1] After appellants filed this stay motion, the district court set a preliminary injunction hearing for October 25, 2022. *See* Text Notice of Hearing (Oct. 12, 2022).

to be effective." *Pan Am. World Airways, Inc. v. Flight Eng'rs' Int'l Ass'n*, 306 F.2d 840, 843 (2d Cir. 1962). By contrast, Congress authorized immediate appeal of preliminary injunctions precisely because of "the possibility of drastic consequences" stemming from open-ended relief. *Id.* (citing 28 U.S.C. § 1291(a)(1)). Appellees' conjecture (Opp. at 8) that the district court will promptly decide the preliminary injunction motion is no substitute for a fixed time limit; and, if this appeal were dismissed, appellants would have no remedy short of a writ of mandamus to compel a decision on any timetable. A district court cannot "shield its orders from appellate review merely by designating them as temporary restraining orders, rather than as preliminary injunctions," without running afoul of Congress's express direction. *Sampson v. Murray*, 415 U.S. 61, 87 (1974).

Second, appellees argue that the Order is unappealable because it is "limited in scope" and "does not address many issues in depth." Opp. at 11-12 (emphasis omitted). In fact, the Order is fifty-three-pages long, with extensive analysis and nearly fifty footnotes containing legal and historical citations. TROs are typically issued within days of a request to prevent "immediate and irreparable injury" that could occur "before the adverse party can be heard in opposition." Fed. R. Civ. P. 65(b)(1)(A). By

contrast, this Order was issued two weeks after appellees' request, one week after oral argument, and after briefing from the parties, giving the Order all the markings of a preliminary injunction ruling after notice and hearing. *See In re Criminal Contempt Proceedings Against Crawford*, 329 F.3d 131, 138 (2d Cir. 2003).

Third, appellees now insist that the Order is "subject to change, revision, or wholesale reversal at the preliminary injunction stage." Opp. at 12; *see also id.* at 8-9. This case's history would say otherwise.

As explained in appellants' moving papers (at 8-10), Ivan Antonyuk first filed this challenge and moved for a preliminary injunction in July 2022; notably, that motion did *not* include a TRO request. *See Antonyuk I*, ECF No. 9. After the district court dismissed the case for lack of standing, denied the preliminary injunction motion as moot, and rendered an advisory opinion on the merits, Antonyuk together with new parties filed a new action and marked it as related to the dismissed lawsuit.

Having directed the new case to their judge of choice, appellees then moved for a TRO and unsurprisingly obtained an order enjoining the enforcement of much of the CCIA. There is no reason to think that the district court's views on the merits are likely to materially change in a

later preliminary injunction decision when the same court issued a *prior* (and ultra vires) preliminary injunction decision announcing broad agreement with appellees' claims. Indeed, in arguing that appellants delayed filing this stay motion, appellees contend that the advisory opinion in *Antonyuk I* offered "notice that the district court might find much of the CCIA to be unconstitutional when the case was refiled."[2] Opp. at 20.

Finally, appellees assert that the Order does not cause irreparable harm, but merely "places a temporary pause" on certain CCIA provisions, returning the world "to what it was just a few short weeks ago." *Id.* at 5. But the CCIA was a response to the regulatory sea change caused by *Bruen*'s elimination of a "proper cause" permitting requirement, 142 S. Ct. at 2122, 2130-31, the indisputable result of which is that many additional handgun permits will be issued. And research confirms that the proliferation of guns in public spaces increases the likelihood of gun

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[2] Appellants filed this motion on October 10, four days after the Order's issuance and during a holiday weekend. Appellants provided opposing counsel with 24-hour notice of the motion.

Appellees' suggestion that the stay motion should have been prepared after *Antonyuk I* is misplaced. Appellants reasonably expected *Antonyuk II* to be randomly assigned to a new judge, as the district court had no jurisdiction in *Antonyuk I* to reach merits questions and therefore no basis to retain *Antonyuk II* as related on grounds of judicial efficiency.

injuries and deaths. *See* Br. of Giffords Law Center to Prevent Gun Violence as Amicus Curiae at 6-11, *Antonyuk I*, No. 22-cv-734 (Aug. 17, 2022), ECF No. 30. Among other things, even with mandatory training, many people will lack the tactical skills or judgment needed to use guns in self-defense, leading to accidental shootings of innocent bystanders and other lethal accidents. *Id.* at 11-12. Moreover, the presence of guns (including legally owned guns) can escalate commonplace disputes into dangerous confrontations. *See id.* at 12.

It is no answer to say that shootings will happen in sensitive locations despite the CCIA. Opp. at 4 n.3. Even if so, the Constitution "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970).

Appellees equally miss the mark in citing the Supreme Court's observation that the Second Amendment "'has controversial public safety implications.'" Opp. at 6 (quoting *McDonald v. City of Chicago*, 561 U.S. 742, 783 (2010) (plurality op.)). Accepting appellees' logic, the government could never show irreparable harm from an adverse Second Amendment decision, no matter how improvident, because the Constitution supposedly

enshrines a tolerance of preventable gun violence. That is not—and cannot be—the law.[3]

POINT II

THE ORDER SHOULD BE STAYED PENDING APPEAL

A. The Equities Support a Stay Pending Appeal.

As explained above and in appellants' moving papers (at 19-21), many of the considerations supporting appealability likewise demonstrate that the equities favor a stay pending appeal. The potential for irreparable harm to public safety and law-enforcement administration from indefinitely halting key provisions of the CCIA—including, inter alia, the prohibition of handguns in public transit, playgrounds, libraries, nightclubs, and homeless shelters—far outweighs the putative injuries identified by appellees.

In response, appellees primarily argue that the alleged denial of their constitutional rights is sufficient to establish their own irreparable

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[3] Appellees' concerns about judicial economy and party resources (Opp. at 10) can be addressed in several ways, including a stay of district court proceedings pending the resolution of this appeal, or a stipulated vacatur of the Order pending the district court's resolution of the preliminary injunction motion.

injury. *See* Opp. at 6-7, 18-19. To be sure, the constitutional issues presented in this case are worthy of serious consideration. However, state statutes are presumed constitutional, and fundamental principles of due process and federalism require that appellants be given a meaningful opportunity to present a defense before being subject to an indefinite injunction.

No such opportunity has been given here. The district court enjoined dozens of distinct CCIA provisions after giving appellants less than a week to submit a letter brief in opposition to the TRO request.[4] *See* Text Order (Sept. 23, 2022), ECF No. 8. But *Bruen* announced a new standard for Second Amendment challenges that materially altered the standards from prior precedent. In many circumstances, defending firearm regulations may require obtaining expert testimony from legal historians and other scholars. The relevant legal issues are complicated and dense; for example, a post-*Bruen* challenge to the District of Columbia's ban on firearms on public transit has generated hundreds of pages of briefing and expert reports, submitted months after a motion seeking injunctive

[4] The court likewise gave appellants only three weeks to respond to the preliminary injunction motion.

relief was filed.[5] The district court's inequitable refusal to give appellants a chance to mount a meaningful defense—including to theories the court first unveiled in the Order—itself warrants a stay pending appeal.

B. The Order Is Flawed on the Merits.

Appellants' likelihood of success on the merits further supports staying the Order pending appeal. Contrary to appellees' contention (Opp. at 12-14 & n.6), prevailing legal standards allow for calibrating the required merits showing to the strength of the equities. In arguing otherwise, appellees point to the Supreme Court's formulation of the first stay factor as whether the movant "'has made a strong showing that [it] is likely to succeed on the merits.'" *See Hassoun v. Searls*, 968 F.3d 190, 195 (2d Cir. 2020) (quoting *Nken v. Holder*, 556 U.S. 418, 434 (2009)). But the Supreme Court and this Court have held that interim injunctive relief may be granted where the questions presented "'are grave, and the injury to the moving party'" without such relief "'will be certain and irreparable.'" *Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 36 (2d Cir. 2010) (quoting *Ohio Oil Co. v. Conway*, 279

[5] *See Angelo v. District of Columbia*, No. 22-cv-1878 (D.D.C.).

U.S. 813, 814 (1929)). *Nken* did not pass "at all, much less negatively," on this "more flexible approach" to injunctive relief or even "address the issue of a moving party's likelihood of success on the merits." *Id.* at 37. In any event, the Order's evident flaws give rise to appellants' likelihood of success on appeal under any applicable standard.

First, the district court recast appellees' blunderbuss facial challenge to the CCIA's sensitive location statute (Compl. ¶¶ 116, 119, 238 (Sept. 20, 2022), ECF No. 1) as a series of discrete challenges to each and every statutory subsection, then evaluated those reinvented claims without regard to whether appellees had Article III standing to bring them. As the Order observed (at 15), "a plaintiff must demonstrate standing for each claim he seeks to press," *Davis v. FEC*, 554 U.S. 724, 734 (2008) (quotation marks omitted). And as appellees concede, a party lacks standing to raise constitutional challenges to provisions that do not apply to that party's actual or intended conduct. *See Picard v. Magliano*, 42 F.4th 89, 98-99 (2d Cir. 2022) (intended); *United States v. Smith*, 945 F.3d 729, 737 (2d Cir. 2019) (actual). The bulk of the Order's legal analysis pertains to sensitive places, and the district court's overlooking these bedrock principles alone warrants a stay pending appeal.

Second, for every type of claim—regarding sensitive locations, restricted locations, or provisions relating to "good moral character"—the district court excised the first step from *Bruen*'s two-step, burden-shifting framework. Appellees retort that the district court was entitled to enjoin these CCIA provisions merely on appellees' say so, unless the State, in a week's time, proffered sufficient historical support for each of the CCIA's provisions. *See* Opp. at 14-16. *Bruen* does not dictate that remarkable result, which contravenes normal constitutional analysis and preliminary injunction practice.

Bruen expressly equated its two-step test with that for the First Amendment. 142 S. Ct. at 2130. In the latter context, "a plaintiff bears certain burdens to demonstrate an infringement of his rights," and the government must justify its law only "[i]f the plaintiff carries these burdens." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). Similarly in both *Heller* and *Bruen*, the challengers—and the Court—"canvassed the historical record" in depth for evidence supporting their textual interpretations before shifting the burden to the government to respond. *Bruen*, 142 S. Ct. at 2127; *see also* Br. for Pet'rs at 25-40, *Bruen*, 142 S. Ct. 2111 (No. 20-843). Indeed, *Bruen* cannot be read to relieve the

challengers of their initial burden, or to confront the government with a "demand for a historical analysis in every case" (Opp. at 17 (emphasis omitted)), when the Court in *Bruen* endorsed certain licensing laws without any such analysis, *see* 142 S. Ct. at 2138 n.9; *see also id.* at 2161-62 (Kavanaugh, J., joined by Roberts, J., concurring).

Third, at a minimum, the Order overreached by granting disproportionate statewide injunctive relief. Appellees barely dispute this point, except to argue that narrower, as-applied relief will somehow confuse law enforcement. Opp. at 18. But allowing a handful of known license holders to carry their weapons during this lawsuit cannot be more confusing than provisionally replacing the CCIA with the district court's bespoke version of the law, which would then apply only to a subset of law-enforcement agencies in the State.

CONCLUSION

This Court should grant a stay pending appeal of the district court's order.

Dated: New York, New York
October 13, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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/s/ Kelly Cheung