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Don't Pull the Trigger on New York's Concealed Carry Improvement Act: Addressing First and Second Amendment Concerns

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DON'T PULL THE TRIGGER ON NEW YORK'S CONCEALED CARRY IMPROVEMENT ACT: ADDRESSING FIRST AND SECOND AMENDMENT CONCERNS

*Morgan Band**

*Despite the increasing prevalence of mass shootings in the United States, the U.S. Supreme Court in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen* struck down a 100-year-old New York statute that had restricted access to concealed carry permits. The statute had required applicants to demonstrate a "proper cause" for needing a concealed carry permit. But even if an applicant made the necessary showing, licensing officials retained discretion under the statute to decline to issue a permit. In striking down the statute, the Court distinguished between "may-issue" jurisdictions, such as New York, which give licensing officials discretion in issuing permits, and acceptable "shall-issue" jurisdictions, which automatically issue permits if applicants satisfy the statutory criteria. New York responded to this decision by removing the "proper cause" showing from its licensing regime and enacting the Concealed Carry Improvement Act, which imposed additional requirements. These requirements include having applicants turn over access to their social media accounts to determine if they have "good moral character."*

*These new requirements raise First and Second Amendment concerns, including the difficulty of determining if a particular social media post is troublesome, the uncertainty of deciding the type and number of online posts that should suffice as adequate evidence of future danger, and whether other activities on social media platforms—such as "liking" a post—should be considered. This Note begins by examining the legal background of the First and Second Amendments before discussing the debate surrounding how to balance these constitutional rights with protecting public safety. It concludes by suggesting how New York and other states can address these concerns, comport with *Bruen*, and allow for stronger gun control legislation to prevent additional tragedies from occurring.*

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INTRODUCTION

On January 5, 2018, a concerned citizen called the Federal Bureau of Investigation (FBI) and provided detailed information about the behavior of a teenager in Parkland, Florida, whose social media activity had troubled

her.¹ The teen had recently posted photos on Instagram of firearms, along with a caption saying that he wanted to “kill people.”² The caller believed that the individual would soon act on these words.³ This phone call was only one among twenty-four others that law enforcement officials had received about the same individual, dating back to 2008.⁴ One even included a tip (sent to the FBI) regarding a YouTube comment that read, “Im [sic] going to be a professional school shooter.”⁵ Months later, the same individual murdered seventeen people in a mass shooting at Marjory Stoneman Douglas High School.⁶ Each of those phone calls described alarming statements made by the shooter—warning signs left unaddressed by law enforcement.⁷ As one Stoneman Douglas student explained, people have become desensitized to threats, so when authorities “see something on the Internet they think, ‘eh, whatever.’”⁸ Yet, by November 23, 2022, there had been over 600 mass shootings in the United States in 2022 alone.⁹ As a response to these tragedies, state officials are grappling with how they should be examining these online “red flag” posts, as the demand for stronger gun control regulation grows.¹⁰

However, on June 23, 2022, the U.S. Supreme Court in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*¹¹ struck down New York’s 100-year-old Sullivan Act¹² that placed significant restrictions on citizens’ ability to carry firearms in public.¹³ One restriction required citizens to show “proper cause” in order to be issued a permit to publicly carry a firearm.¹⁴ In invalidating this restriction, the Court held that the Second¹⁵ and Fourteenth Amendment¹⁶ rights to carry a handgun for self-defense purposes extend outside the home.¹⁷ The Court filled a gap left by *District of Columbia v.*

1. See Del Quentin Wilber, *FBI Tip-Line Caller Said Nikolas Cruz ‘Is Going to Explode,’* WALL ST. J. (Feb. 23, 2018, 2:50 PM), <https://www.wsj.com/articles/fbi-tip-line-caller-said-nikolas-cruz-is-going-to-explode-1519415442> [<https://perma.cc/2VEH-932U>].

2. *Id.*

3. See *id.*

4. See Mark Berman & Kevin Sullivan, *Red Flags. Warnings. Cries for Help. How a System Built to Stop the Parkland School Shooter Repeatedly Broke Down*, WASH. POST (Feb. 23, 2018, 8:14 PM), https://www.washingtonpost.com/national/red-flags-warnings-cries-for-help-how-a-system-built-to-stop-the-parkland-school-shooter-broke-down/2018/02/23/3ccff52c-18d9-11e8-b681-2d4d462a1921_story.html [<https://perma.cc/N8MR-UUG9>].

5. *Id.*

6. See Wilber, *supra* note 1.

7. See Berman & Sullivan, *supra* note 4.

8. *Id.*

9. See Júlia Ledur & Kate Rabinowitz, *There Have Been More than 600 Mass Shootings So Far in 2022*, WASH. POST (Nov. 23, 2022), <https://www.washingtonpost.com/nation/2022/06/02/mass-shootings-in-2022/> [<https://perma.cc/GHJ5-27SG>].

10. See Berman & Sullivan, *supra* note 4.

11. 142 S. Ct. 2111 (2022).

12. 1911 N.Y. Laws 443, *invalidated by* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

13. See *Bruen*, 142 S. Ct. at 2117; see also *infra* Part II (discussing *Bruen* in more detail).

14. See *Bruen*, 142 S. Ct. at 2117.

15. U.S. CONST. amend. II.

16. *Id.* amend. XIV.

17. See *Bruen*, 142 S. Ct. at 2122.

*Heller*¹⁸ and *McDonald v. Chicago*,¹⁹ which protected the right to keep a firearm in one's home but did not address whether Second Amendment protections extend beyond one's front door.²⁰ Although the majority in *Bruen* decided that such a right exists, they also acknowledged that states may impose regulations on firearms.²¹ However, any restriction must be "consistent with the Second Amendment's text and historical understanding."²² As a result, the Court struck down New York's Sullivan Act because there is no "American tradition" that citizens must "demonstrate a special need for self-protection."²³

In his concurring opinion, Justice Kavanaugh emphasized that states may create additional requirements for concealed carry permits, specifically stating that the decision leaves "shall-issue" licensing regimes unaffected.²⁴ These types of regimes allow states to insist on background checks and firearm training.²⁵ However, these shall-issue regimes do not give licensing officials "open-ended discretion" or require that an applicant show a "special need" like the "may-issue" regimes that exist in six states, including New York.²⁶ Thus, these six states may require fingerprinting, mental health checks, and other similar policies, but they may no longer impose a requirement that applicants demonstrate a "special need" beyond self-defense in order to receive a concealed carry permit.²⁷

In response to *Bruen*, New York governor Kathy Hochul and the New York legislature promptly passed the Concealed Carry Improvement Act²⁸ (CCIA). The CCIA establishes strict eligibility requirements for permit applicants in New York but no longer requires them to show "proper cause" as to why the permit is needed.²⁹ The new legislation, signed on July 1, 2022, lists locations where carrying a concealed weapon is prohibited, creates eligibility requirements for obtaining a concealed carry permit, requires background checks for all applicants,³⁰ and requires applicants to participate

18. 554 U.S. 570 (2008).

19. 561 U.S. 742 (2010).

20. *See Heller*, 554 U.S. at 626, 635 (stating that the "District's ban on handgun possession *in the home* violate[d] the Second Amendment" and that the Court was not performing "an exhaustive . . . analysis . . . of the full scope of the Second Amendment" (emphasis added)); *see also* U.S. CONST. amend. II (protecting the right of the people "to keep and bear Arms").

21. *See Bruen*, 142 S. Ct. at 2122 ("[T]he Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home.").

22. *Id.* at 2118.

23. *Id.* at 2119.

24. *See id.* at 2161 (Kavanaugh, J., concurring).

25. *See id.* at 2162.

26. *See id.*

27. *See id.*

28. N.Y. PENAL LAW § 400.00 (McKinney 2022).

29. *See* Erin Durkin, Joseph Spector, Katelyn Cordero, Joe Anuta, Julian Shen-Berro & Max Jaeger, *'Frightful in Its Scope': New York Lawmakers Scramble to Counteract SCOTUS Gun Ruling*, POLITICO (June 23, 2022, 12:32 PM), <https://www.politico.com/news/2022/06/23/new-york-hochul-supreme-court-gun-00041715> [<https://perma.cc/8BZD-VWTS>].

30. *See* PENAL LAW § 400.00 (requiring that all applicants have a background check completed of federal, state, and local records to verify that the applicant does not have a

in a firearm safety course.³¹ The law also states that applicants must provide “a list of former and current social media accounts . . . from the past three years to confirm the information regarding the applicants [sic] character and conduct.”³² The information obtained from an applicant’s social media is used to ensure that the individual has “not engaged in any acts, or made any statements that suggest they are likely to . . . [cause] harm.”³³ Licensing officials use this content to decide if what the applicant has posted online is evidence of future dangerous behavior.³⁴ The CCIA aims to limit legal access to weapons for those who have indicated an “intent to hurt others.”³⁵ For instance, prior to the shooting in Uvalde, Texas, on May 24, 2022, the gunman had posted photos on Instagram showing “a hand holding a gun magazine”³⁶ and had written, “[k]ids be scared,” on his TikTok profile.³⁷

Controversy arises from the challenge of distinguishing posts that are causes for concern from those that are simply making a joke or saying something political.³⁸ The law thus raises several questions, including whether this type of speech is protected by the First Amendment³⁹ and whether online posts are sufficient evidence of future danger to deny an individual a permit under the Second Amendment. Another question is whether other uses of social media, such as “liking” a post or joining a group, can be indicative of “immoral character” without violating the First Amendment’s protection of freedom of association.⁴⁰

These questions are important. With the introduction of the *Bruen* test, the increased pressure from the federal government for nationwide gun control, and the current public sentiment surrounding this topic, the need to resolve

criminal record and has not been committed to a “mental hygiene” facility). In contrast to the information obtained from a background check, this Note examines whether an applicant, without a prior conviction, who has posted something concerning online can be issued a concealed carry permit.

31. *See id.*

32. *Id.* § 400.00(1)(o)(iv).

33. *Id.* § 400.00(1)(o)(ii). Speech is not the only criterion that licensing officers are evaluating, as the applicant’s character references must also attest that the “applicant has not engaged in any acts” that suggest that they will pose a danger. *See id.* The law lists specific “acts” that, on their own, are considered sufficient to deny an applicant a license, including having a prior felony conviction. *See id.* § 400.00(1)(c)–(n). This Note will cover only the evaluation of an applicant’s *speech* as the basis for denying a permit.

34. *See* Marina Villeneuve & Maysoun Khan, *Updated N.Y. Law Requires Gun Applicants Provide Social Media Accounts, Get Safety Training*, USA TODAY (July 9, 2022, 2:00 PM), <https://www.usatoday.com/story/news/nation/2022/07/09/new-york-gun-law-social-media-accounts/10013081002/> [<https://perma.cc/M4TV-VVRW>].

35. *Id.*

36. Amanda Seitz, *Shooter Warning Signs Get Lost in Sea of Social Media Posts*, AP NEWS (May 27, 2022), <https://apnews.com/article/uvalde-school-shooting-technology-shootings-social-media-texas-b8dc7a615765e17d46313bc83e2fe452> [<https://perma.cc/8PGM-2C53>].

37. *See id.*

38. *See* Villeneuve & Khan, *supra* note 34.

39. U.S. CONST. amend. I.

40. *See* N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2022) (defining “good moral character” as “having the essential character, temperament and judgement necessary to be entrusted with a weapon”).

the conflict that exists between upholding one's First and Second Amendment rights and protecting the community is crucial.

This Note seeks to resolve the First and Second Amendment challenges posed by the CCIA.⁴¹ Part I begins with background information about New York's concealed carry permit requirements. It then provides an overview of First Amendment protections, as well as a key exception: "true threats." Part II then examines the CCIA's potential conflict with the First Amendment's protection of free speech and freedom of association. Part II also addresses whether, to protect the community from future acts of violence, the state may deny a gun permit based on speech that would otherwise be protected from criminal or civil regulation. Finally, Part III suggests a resolution for how New York and other states can balance these constitutional concerns and still impose stronger gun control legislation to help prevent future tragedies.

I. NEW YORK'S HISTORY OF GUN CONTROL REGULATION AND FIRST AMENDMENT JURISPRUDENCE

In *Bruen*, the Supreme Court struck down New York's "proper cause" provision—which required an applicant to explain why they needed a concealed carry permit for reasons beyond self-defense—because it violated the Second Amendment.⁴² The Court said that New York followed a "may-issue" licensing regime, which gives licensing officials discretion in making application decisions.⁴³ Although requiring gun owners to have concealed carry permits is not per se unconstitutional, the licensing regime of a state must instead resemble a "shall-issue" jurisdiction to be permissible.⁴⁴ These jurisdictions mandate that applicants receive a permit if they satisfy all the statutory requirements.⁴⁵

Following *Bruen*, New York quickly responded by passing the CCIA.⁴⁶ The CCIA aimed to comport with the decision by replacing the special showing requirement with several other provisions that would allow only applicants of "good moral character" to be "entrusted with a weapon."⁴⁷ This part will explain the effect of these new provisions and how they might generate First Amendment concerns.

A. New York's Concealed Carry Permit Requirements

New York has a long history of regulating the possession and use of firearms.⁴⁸ This section will explain the state's original requirements, how

41. See Villeneuve & Khan, *supra* note 34.

42. See N.Y. State Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2156 (2022).

43. See *id.* at 2124.

44. See *id.*

45. See *id.* at 2123.

46. See N.Y. PENAL LAW § 400.00(1)(a) (McKinney 2022).

47. *Id.* § 400.00(1)(b).

48. See 1911 N.Y. Laws 443, *invalidated by* N.Y. State Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

Bruen altered these requirements, and what New York did to respond to the decision.

1. New York's Requirements Before *Bruen*

New York has regulated the use of firearms in public settings since the passage of its 1911 Sullivan Act, which established a license requirement for anyone seeking to carry a firearm in public.⁴⁹ In 1913, the state added the “proper cause” requirement to its licensing procedure.⁵⁰ Prior to *Bruen*, New York required individuals to obtain a license to possess a firearm both at home and in public.⁵¹ To keep a firearm at one’s home, an applicant needed to be over the age of twenty-one⁵² and possess “good moral character,”⁵³ in addition to other requirements.⁵⁴ Moreover, New York does not issue licenses to convicted felons,⁵⁵ people with substance addictions,⁵⁶ or individuals suffering from any mental illness.⁵⁷

To legally carry a firearm outside of one’s home, an applicant had to show “proper cause” beyond general self-defense.⁵⁸ Although there is no New York statute defining “proper cause,” state courts interpreted it to mean that an individual was exposed to “particular threats, attacks, or other extraordinary danger to personal safety” that distinguished them from the rest of the community.⁵⁹

The U.S. Court of Appeals for the Second Circuit in *Kachalsky v. County of Westchester*⁶⁰ held that New York’s “proper cause” requirement did not violate the Second Amendment because there is an “important governmental interest” in regulating the carriage of firearms in public.⁶¹ Thus, there was an “important governmental interest” that warranted the regulation.⁶² The court determined that a “heightened scrutiny standard would be appropriate.”⁶³ However, the court reasoned that this type of restriction would not need to be analyzed under the strict scrutiny standard.⁶⁴ The proper cause requirement restricted the ability to publicly carry a firearm, and

49. *See id.*

50. *See* 1913 N.Y. Laws 1629.

51. *See* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

52. *See* N.Y. PENAL LAW § 400.00(1)(a) (McKinney 2022).

53. *Id.* § 400.00(1)(b).

54. *See generally id.* § 400.00(1).

55. *See id.* § 400.00(1)(c).

56. *See id.* § 400.00(1)(e).

57. *See id.* § 400.00(1)(i).

58. *See id.* § 400.00(2)(f); *see also* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2117 (2022).

59. *See Bruen*, 142 S. Ct. at 2123 (quoting *In re Martinek*, 294 A.D.2d 221, 222 (N.Y. 2002)).

60. 701 F.3d 81 (2d Cir. 2012), *abrogated by* N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111 (2022).

61. *See id.*

62. *See id.* at 96 (upholding the “special need” requirement).

63. *Id.* at 93.

64. Strict scrutiny is the default standard applied to cases that fall within “core” Second Amendment protection. *See id.*

thus did not fall within the “core” Second Amendment protection,⁶⁵ which guarantees one’s right to “self-defense in [their] home.”⁶⁶ Applying intermediate scrutiny, the court held that New York could enforce this regulation because the government’s interest in protecting the public outweighed any “individual interests in self-defense.”⁶⁷ Many other states have also cited this reason as justification for regulating the bearing of firearms in public.⁶⁸ *Kachalsky* emphasized that, unlike other constitutional rights, the rights protected by the Second Amendment have always been more heavily regulated due to the increased threat to public safety that firearms pose.⁶⁹

2. The Supreme Court’s Decision in *Bruen*

In *Bruen*, the Supreme Court abrogated *Kachalsky*, reasoning that the application of a “means-end” scrutiny standard in this context was improper.⁷⁰ According to the Court, under *Heller* and *McDonald*, “the Second and Fourteenth Amendments protect an individual right to keep and bear arms for self-defense.”⁷¹ Lower courts had previously understood these decisions to have created a two-part test for analyzing whether a regulation is constitutional.⁷² First, a restriction must have been “consistent with the Nation’s historical tradition of firearm regulation.”⁷³ It had to then survive a “means-end” scrutiny test,⁷⁴ under which the state had to prove that there was an “important interest” in creating and enforcing the regulation that outweighed an individual’s interest in possessing a firearm.⁷⁵ However, in *Bruen*, the Court rejected this second step and said that, to be constitutional, a regulation must only be “consistent with the Second Amendment’s text and historical understanding.”⁷⁶

Because the Court maintained that “individual self-defense is ‘the central component’ of the Second Amendment,” the Court relied on two measures from *Heller* and *McDonald* that are essential “considerations when engaging in an analogical inquiry.”⁷⁷ Thus, to determine whether a regulation is constitutional, courts must analyze (1) whether a regulation “impose[s] a comparable burden on the right of armed self-defense” and (2) whether that

65. *See id.* at 94; *see also* *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (holding that the “core” of the Second Amendment is protecting a citizen’s right to use a firearm for self-defense at home).

66. *Kachalsky*, 701 F.3d at 93.

67. *Id.* at 94 (quoting *United States v. Masciandaro*, 638 F.3d 458, 470 (4th Cir. 2011)).

68. *See id.* at 94–95 (“There is a longstanding tradition of states regulating firearm possession and use in public because of the dangers posed to public safety.”).

69. *See id.* at 100.

70. *See* *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111, 2118 (2022).

71. *Id.* at 2125.

72. *See id.*

73. *Id.*

74. *See id.* at 2126.

75. *See id.*

76. *Id.* at 2131.

77. *Id.* at 2133.

burden is “comparably justified,” with both “comparables” measured by historical tradition.⁷⁸ After finding that the plain text of the Second Amendment covered the public carrying of a firearm, the Court held that the state had the burden to show that the proper cause requirement adhered to a tradition of regulatory history.⁷⁹

The Court was not satisfied with New York’s reliance on English and colonial history, finding it ambiguous.⁸⁰ Although the evidence “demonstrate[d] that *the manner* of public carry was subject to reasonable regulation,” none of these regulations prevented individuals from carrying a firearm in public purely for self-defense.⁸¹ The closest analogues to New York’s proper cause requirement were “surety statutes,” which were in place in certain states at the Founding and required some individuals to post bond before being allowed to carry a weapon in public.⁸² But these statutes required a special showing only after one was accused of harming another.⁸³ Therefore, the Court concluded that New York did not meet its burden of identifying a historical analogue to its proper cause requirement because “American governments simply have not . . . generally required law-abiding, responsible citizens to ‘demonstrate a special need for self-protection distinguishable from that of the general community.’”⁸⁴

When analyzing the New York law, Justice Thomas’s majority opinion explained that licensing officials have great discretion in deciding whether an applicant has demonstrated “proper cause.”⁸⁵ Further, he stated that the decision is reviewed under an “arbitrary and capricious” standard, giving applicants few options if their permit application is denied.⁸⁶ Five other states and the District of Columbia also impose what the Court called “may issue licensing laws.”⁸⁷ May-issue licensing regimes allow officials to deny a permit based on the applicant’s failure to show particularized need, even if the other statutory criteria are satisfied.⁸⁸ The Court found this to be constitutionally insufficient because of the discretion given to licensing officials.⁸⁹

Forty-three states require individuals to obtain a license to carry a firearm publicly, but these shall-issue jurisdictions do not grant officials a high level

78. *See id.* (citing *McDonald v. Chicago*, 561 U.S. 742, 767 (2010)).

79. *See id.*

80. *See id.* at 2136.

81. *See id.* at 2150.

82. *See id.*

83. *See id.* at 2148.

84. *Id.* at 2156 (quoting *Klenosky v. N.Y.C Police Dep’t*, 428 N.Y.S.2d 256, 257 (App. Div. 1980), *aff’d*, 421 N.E.2d 503 (N.Y. 1981), *abrogated by* *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022)).

85. *Id.* at 2123.

86. *See id.* (“[T]he decision ‘must be upheld if the record shows a rational basis for it.’” (quoting *Kaplan v. Bratton*, 673 N.Y.S.2d 66, 68 (App. Div. 1998), *abrogated by* *N.Y. State Rifle & Pistol Ass’n, Inc. v. Bruen*, 142 S. Ct. 2121 (2022))).

87. *Id.* at 2123–24.

88. *See id.*

89. *See id.*

of discretion when evaluating applications.⁹⁰ Justice Stephen Breyer argued in his dissent that the majority's holding would allow for some discretion in licensing decisions because the opinion cited three states that use "discretionary criteria . . . [and] the Court nonetheless counts them among the forty-three 'shall-issue' jurisdictions."⁹¹ One of the statutes that the majority cited was Connecticut's.⁹² Connecticut is considered a shall-issue jurisdiction because the state grants a permit to every individual who satisfies the criteria and denies permits only to those who are not found to be "suitable."⁹³ In his concurrence, Justice Kavanaugh clarified that these shall-issue licensing requirements remain unaffected by the majority's decision in *Bruen*.⁹⁴

3. New York's Response to *Bruen*

Following *Bruen*, several may-issue states responded by conceiving of ways to amend their laws to comply with the decision.⁹⁵ For example, some states considered removing the particularized need requirement from their licensing criteria.⁹⁶ New York responded to *Bruen* by updating its licensing criteria for concealed carry permits through CCIA.⁹⁷ As part of the updated legislation, applicants now must submit "no less than four character references who can attest to the applicant's good moral character."⁹⁸ The references must also confirm that "such applicant has not engaged in any acts, or made any statements [suggesting that] they are likely to engage in conduct that would result in harm to themselves or others."⁹⁹ Furthermore, the law requires applicants to include "a list of former and current social media accounts . . . from the past three years to confirm the information regarding [their] character and conduct" provided by these references.¹⁰⁰ The purpose of this provision is to prevent legal access to firearms for those who have expressed an "intent to hurt others" by dropping "hints."¹⁰¹ New

90. *See id.* at 2122.

91. *Id.* at 2172 (Breyer, J., dissenting).

92. *See id.* at 2123 n.1 (majority opinion) (citing *Dwyer v. Farrell*, 475 A.2d 257, 260 (Conn. 1984)).

93. CONN. GEN. STAT. § 29-28(b) (2022) (stating that an officer may issue a permit if they "find that such applicant intends to make no use of any pistol . . . other than a lawful use and that such person is a suitable person to receive such permit").

94. *See Bruen*, 142 S. Ct. at 2161 (Kavanaugh, J., concurring).

95. *See* Letter from Holly T. Shikada, Att'y Gen., Dep't of the Att'y Gen. of the State of Hawaii, to David Y. Ige, Governor of Hawaii (July 7, 2022), <https://ag.hawaii.gov/wp-content/uploads/2022/07/Attorney-General-Opinion-22-02.pdf> [<https://perma.cc/28W6-6PQC>].

96. *See* S.B. 918, 2021–2022 Leg., Reg. Sess. (Cal. 2022); *see also* Karina Elwood, *Maryland Lawmakers Could Change Gun Law After Supreme Court's Ruling*, WASH. POST (June 25, 2022, 8:00 AM), <https://www.washingtonpost.com/dc-md-va/2022/06/25/supreme-court-conceal-carry-maryland/> [<https://perma.cc/6J6A-ZNWW>].

97. *See* N.Y. PENAL LAW § 400.00 (McKinney 2022).

98. *Id.* § 400.00(1)(o)(ii).

99. *Id.*

100. *Id.* § 400.00(1)(o)(iv).

101. *See* Villeneuve & Khan, *supra* note 34 (explaining that Governor Hochul "noted shooters sometimes telegraph their intent to hurt others"). Additionally, the gunman in

York is currently the only state to have enacted this type of requirement.¹⁰² The CCIA also lists specific locations where carrying a concealed weapon is prohibited, creates additional eligibility requirements for obtaining a concealed carry permit, requires background checks for all applicants, and requires applicants to participate in a firearm safety training program.¹⁰³

Some of these new requirements have sparked controversy and are already the subject of litigation.¹⁰⁴ In August 2022, the U.S. District Court for the Northern District of New York declined to enjoin the new legislation because the litigants lacked standing to bring a pre-enforcement challenge.¹⁰⁵ However, Judge Glenn T. Suddaby agreed with several of the plaintiffs' concerns regarding various provisions, including the plaintiffs' First Amendment challenges to the social media disclosure requirement.¹⁰⁶

In response to an updated motion, on October 6, 2022, Judge Suddaby granted a temporary restraining order to enjoin the enforcement of multiple provisions, including the requirements that an applicant have "good moral character" and turn over their social media accounts.¹⁰⁷ Judge Suddaby stated that the law's "good moral character" standard is flawed because it does not qualify the requirement by stating "other than in self-defense."¹⁰⁸ The court also found that the law failed to comply with *Bruen*'s holding that licenses must be issued unless an applicant proves to be a danger.¹⁰⁹ Instead, the law flips the standard and denies a license unless the applicant proves that they are of "good moral character."¹¹⁰

Judge Suddaby invalidated the social media provision based on "an insufficient number of historical analogues."¹¹¹ As part of the decision, he

Uvalde, Texas, had posted photos on Instagram of his "hand holding a gun magazine" and had written, "[k]ids be scared," on his TikTok profile. *See Seitz, supra* note 36.

102. *See Villeneuve & Khan, supra* note 34.

103. *See* N.Y. PENAL LAW § 400.00(4), (19) (McKinney 2022).

104. The plaintiffs are challenging several provisions of the CCIA, including the requirements that an applicant be of "good moral character," disclose their social media accounts, attend an in-person meeting, provide character references, and participate in firearm training, as well as the provision listing "sensitive locations" where concealed carry is restricted. Oral arguments were scheduled for March 20, 2023. *See Antonyuk v. Bruen (Antonyuk I)*, No. 22-CV-0734, 2022 WL 3999791 (N.D.N.Y. Aug. 31, 2022); *see also* Antonyuk v. Hochul (*Antonyuk II*), No. 22-CV-0986, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022), *interim stay granted*, No. 22-2403 (2d Cir. Oct. 12, 2022); Antonyuk v. Hochul (*Antonyuk III*), No. 22-CV-0986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022), *appeal filed*, No. 22-CV-2908 (2d Cir. Nov. 9, 2022).

105. *See Antonyuk I*, 2022 WL 3999791, at *15–16.

106. *See id.* at *31.

107. *See Antonyuk II*, 2022 WL 5239895, at *24. Before evaluating the provisions, the court first determined that the plaintiffs had established standing by demonstrating that they faced a "credible threat of prosecution" under the CCIA. *See id.* at *7.

108. The law requires that an applicant be "of good moral character," such that the applicant will use a firearm "only in a manner that does not endanger oneself or others." *See* N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2022). However, using a firearm for self-defense reasons would inherently endanger another but would still be lawful. Thus, the court held that the provision must include this qualifying phrase. *See Antonyuk II*, 2022 WL 5239895, at *9.

109. *See Antonyuk II*, 2022 WL 5239895, at *10.

110. *Id.*

111. *Id.* at *12.

stayed the implementation of the restraining order for three business days, allowing the government to seek an emergency decision from the Second Circuit.¹¹² Accordingly, the government filed an emergency appeal and, on October 12, 2022, the Second Circuit issued an interim decision vacating the temporary restraining order.¹¹³ However, on November 7, 2022, the Northern District of New York again struck down the “good moral character” and social media provisions, once more ruling that they violated the Second Amendment.¹¹⁴ Judge Suddaby still found that the defendants did not adequately cite “historical analogues.”¹¹⁵ On November 9, 2022, the defendants once again appealed the decision.¹¹⁶ The Second Circuit again granted a temporary stay of the lower court’s ruling while the panel decides whether these provisions are constitutional.¹¹⁷

The plaintiffs challenged the social media provision on First Amendment grounds because the provision is not content neutral and forces applicants to “self-censor.”¹¹⁸ Additionally, the plaintiffs expressed concern about the discretion that licensing officials have when using this information to decide whether to issue a permit, a power that the plaintiffs believe defies *Bruen*’s instructions.¹¹⁹

Other First Amendment interests not fully addressed by these opinions arise from the discretion given to licensing officials when evaluating whether

112. *See id.* at *23.

113. *See Antonyuk II*, No. 22-2403 (2d Cir. Oct. 12, 2022).

114. *See Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022).

115. *Id.* at *51.

116. The defendants currently have not filed a brief on their appeal of the Northern District of New York’s November 7 opinion. However, the defendants will likely rely on similar “analogues” to those that they previously cited to establish the historical basis for the social media provision. Their arguments include that *Bruen* allows for background checks and evaluations of mental health records to ensure that an “individual has not demonstrated a serious risk to the public if entrusted with a weapon.” *See* State Defendants’ Memorandum of Law in Opposition to Plaintiffs’ Motion for a Preliminary Injunction at 37, *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022), ECF No. 48. The defendants argued that the provision is constitutional because there is a “long tradition of laws preventing dangerous persons from accessing firearms.” *Id.* The defendants explain that the social media provision accomplishes that same purpose, but instead uses evidence available publicly on the applicant’s profiles. *See id.* Further, the defendants analogize this provision to colonial times, when determining who was “dangerous” involved evaluating one’s reputation. *See id.* at 38. The only difference is that now evidence of one’s reputation is obtained from generalized knowledge online instead of generalized knowledge discussed among citizens. *See id.* The Second Circuit will, on appeal, address whether these “analogues” suffice, and, if so, will then likely consider the First Amendment issues.

117. *See Antonyuk III*, No. 22-CV-2908 (2d Cir. Nov. 15, 2022) (order granting temporary stay).

118. *Antonyuk I*, No. 22-CV-0734, 2022 WL 3999791, at *5 (N.D.N.Y. Aug. 31, 2022); *see also* Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for a Temporary Restraining Order, Preliminary Injunction, and/or Permanent Injunction at 22–23, *Antonyuk II*, No. 22-CV-0986, 2022 WL 5239895 (N.D.N.Y. Oct. 6, 2022), ECF No. 6-1.

119. *See* Memorandum of Points and Authorities in Support of Plaintiffs’ Motion for a Temporary Restraining Order, Preliminary Injunction, and/or Permanent Injunction, *supra* note 118, at 23.

an applicant has “good moral character” based on their online activity.¹²⁰ Some of the resulting controversies include (1) how licensing officials should determine which posts constitute a serious threat, (2) whether social media should be used as a predictive factor in assessing risks of future danger, and (3) how other types of online behavior, such as “liking” other accounts’ posts, may affect licensing decisions. Each of these concerns will be addressed in turn.

B. The First Amendment: What It Protects and What It Doesn't

The First Amendment of the U.S. Constitution grants individuals free exercise of religion, freedom of speech and of the press, the right to peaceably assemble, and the right to petition the government for redress of grievances.¹²¹ The foundation of this country is rooted in the tradition of encouraging public discourse on important topics, a right that the First Amendment aims to shield from government interference.¹²² This right also extends to allow people to associate with others for expressive purposes, such as to join a group of like-minded individuals who support a certain political belief.¹²³

This section contextualizes the constitutional debate surrounding the Concealed Carry Improvement Act by analyzing the spectrum of First Amendment protection of speech—from jokes to “true threats.” This section concludes by discussing the provision’s effect on one’s freedom to associate online.

1. Freedom of Speech: True Threats and Incitement

Over time, the Supreme Court has limited the scope of the First Amendment’s protection of speech and has repeatedly held that not all speech receives constitutional protection.¹²⁴ One category of speech that is not protected is “true threats.”¹²⁵ This doctrine was first established in *Watts v.*

120. Although Judge Suddaby enjoined the social media provision based solely on Second Amendment grounds, he did acknowledge and agree with the plaintiffs’ First Amendment concerns, indicating the importance of addressing these issues. See *Antonyuk III*, 2022 WL 16744700, at *53 (“[T]he requirement . . . may present First Amendment concerns resulting from an unfortunate combination of compelled speech and an exercise of the extraordinary discretion conferred upon a licensing officer.”); see also N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2022).

121. See U.S. CONST. amend. I.

122. See Casey Brown, Note, *A True Threat to First Amendment Rights: United States v. Turner and the True Threats Doctrine*, 18 TEX. WESLEYAN L. REV. 281, 282 (2011).

123. See *Roberts v. U.S. Jaycees*, 468 U.S. 609, 610, 623 (1984) (holding that the Minnesota Human Rights Act requiring the Jaycees to allow women as members did not violate men’s freedom of expressive association because the state had a “compelling interest in eradicating discrimination”).

124. See generally *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (establishing the fighting words doctrine); see also *Watts v. United States*, 394 U.S. 705 (1969) (holding that “true threats” are not constitutionally protected); *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (establishing that speech intended to and likely to incite “imminent lawless action” is not protected by the First Amendment).

125. See *Watts*, 394 U.S. at 708.

United States,¹²⁶ in which a young Vietnam War protester was criminally convicted for insinuating during a protest that he wanted to kill President Lyndon B. Johnson.¹²⁷ The Supreme Court overturned Watts's conviction, holding that, in context, the statement was not a "true threat," but rather "political hyperbole."¹²⁸ The Court particularly noted that when distinguishing between threats and constitutionally protected speech, statements must be evaluated based on the totality of the circumstances.¹²⁹ In *Watts*, the Court found that the statement was not a threat because it was made during a political protest and those listening laughed in response.¹³⁰

Watts also raised a question regarding the requisite intent standard,¹³¹ which the Court attempted to clarify decades later in *Virginia v. Black*.¹³² In *Black*, three individuals were found guilty of violating a Virginia law that criminalized burning crosses "with the intent [to intimidate]."¹³³ The trial court had instructed the jury that burning the cross was sufficient evidence of intent.¹³⁴ Although the Supreme Court found that the core criminalization of burning crosses as threats was constitutional, the Court invalidated the provision that treated cross-burning as "prima facie evidence of an intent to intimidate."¹³⁵ The Court did so because the provision did not take into account the context surrounding the speech, which the First Amendment requires.¹³⁶ The decision in *Black* explained that "[t]he speaker need not actually intend to carry out the threat," as "true threats" are not protected because of the "fear of violence and . . . the disruption that fear engenders."¹³⁷ The Court held that "[i]ntimidation . . . is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm."¹³⁸ The Court further defined "true threats" as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group."¹³⁹ As a result, a general statement of intent to commit an unlawful act that is not targeted at a particular group may not rise to the level of a "true threat."¹⁴⁰ But a statement that places a specific

126. 394 U.S. 705 (1969).

127. *See id.* at 708.

128. *See id.*; *see also* Robyn P. Mohr, *True Threats and the First Amendment: Why It Matters "What's on Your Mind?"*, COMM'NS LAW., Spring 2015, at 4.

129. *See Watts*, 394 U.S. at 707.

130. *See id.* at 708.

131. *See generally id.*; *see also* Mohr, *supra* note 128, at 5.

132. 538 U.S. 343 (2003).

133. *Id.* at 348.

134. *See id.*

135. *Id.*

136. *See id.* Invalidating the prima facie evidence provision protected an individual who might burn a cross in a nonthreatening situation, which, although a hateful act, is considered political speech protected by the First Amendment. *See id.* at 367; *see also* Mohr, *supra* note 128, at 5.

137. *Black*, 538 U.S. at 359–60.

138. *Id.* at 360.

139. *Id.* at 359.

140. *Id.*

individual or group in fear is not a protected form of speech.¹⁴¹ The Court failed to clearly specify, however, whether the speaker has to have an intent to threaten or whether it would be sufficient for the statement to put a reasonable person in fear.¹⁴²

The majority of courts facing the problem created by this gap follow an “objective listener standard.”¹⁴³ This standard examines whether a reasonable person would anticipate that those whom the statement targeted would interpret the statement to be a “serious expression” of intent to cause harm.¹⁴⁴ The Ninth Circuit has expressed concern with this standard and instead favors a subjective intent standard, in light of the “means to communicate” language in *Black*.¹⁴⁵ The debate about intent has become even more prevalent in the context of online speech, given the Court’s focus on interpreting statements in the context in which they are made.¹⁴⁶ The U.S. Court of Appeals for the Third Circuit has found that the internet sometimes alters a speaker’s meaning “[d]ue to the possibility . . . to become decontextualized and impersonal through third-party sharing.”¹⁴⁷

The Supreme Court examined the issue of intent in the digital age in *Elonis v. United States*.¹⁴⁸ In 2010, Anthony Elonis posted original rap lyrics on his Facebook profile that included “graphically violent language and imagery concerning his wife,” who had left him after seven years of marriage.¹⁴⁹ Along with the lyrics, Elonis provided disclaimers explaining that the material was “fictitious” and that Elonis was “doing this for [himself]” to help him cope with the situation.¹⁵⁰ Elonis was also fired from his job after posting a Halloween photo with a coworker, in which he was holding a fake knife against the coworker’s throat, with the caption, “I wish.”¹⁵¹ He continued to make threatening posts toward his wife, who became “extremely afraid for [her] life” after reading the lyrics and was granted a restraining order against Elonis.¹⁵² Elonis then posted about elementary schools and school shootings.¹⁵³ This caught the attention of the FBI, who later became the subject of Elonis’s next Facebook post after an agent visited

141. *See id.*

142. *See* Mohr, *supra* note 128, at 5.

143. *See* Brown, *supra* note 122, at 294 (explaining the various ways that different circuits have decided the question of intent).

144. *See id.*

145. *See* *United States v. Cassel*, 408 F.3d 622, 633 (9th Cir. 2005); *see also Black*, 538 U.S. at 359–60.

146. *See* P. Brooks Fuller, *Evaluating Intent in True Threats Cases: The Importance of Context in Analyzing Threatening Internet Messages*, 37 HASTINGS COMM’NS & ENT. L.J. 37, 45 (2015).

147. *Id.* at 53; *see also id.* at 55, 56 (discussing *United States v. Kosma*, 951 F.2d 549 (3d Cir. 1991), and *United States v. Fullmer*, 584 F.3d 132 (3d Cir. 2009)).

148. 575 U.S. 723 (2015).

149. *See id.* at 723.

150. *See id.* at 727.

151. *Id.*

152. *See id.* at 728–29.

153. *See id.* at 729.

him at his home.¹⁵⁴ Elonis was indicted for several of these posts for violating 18 U.S.C. § 875(c), which makes it a felony to “transmit[] in interstate or foreign commerce any communication containing . . . any threat to injure the person of another.”¹⁵⁵ He argued that the case should be dismissed because his posts were not intended to be threats—rather, the lyrics were similar to the rapper Eminem’s and were only “fantasies.”¹⁵⁶ The district court, relying on Third Circuit precedent, denied the motion to dismiss, holding that the only intent required was the intent to communicate, not to threaten.¹⁵⁷ The court also relied on the government’s witnesses, who had each read Elonis’s posts and testified that they were afraid and took the posts seriously.¹⁵⁸

Focusing only on the statute, as opposed to First Amendment “true threats” doctrine, the Supreme Court found that Elonis’s conviction should be overturned.¹⁵⁹ The Court held that although 18 U.S.C. § 875(c) did not expressly require the defendant to have a certain mental state, the Court presumed that criminal statutes require some subjective mens rea component.¹⁶⁰ Thus, it would not infer that Congress intended to allow conviction based merely on how a reasonable person would view the statement in question.¹⁶¹ Proof of a defendant’s intent to issue a threat, or of their knowledge that the recipient would view it as a threat, would satisfy this requirement.¹⁶² The Court, however, did not resolve whether a defendant’s recklessness regarding the threat would suffice.¹⁶³

Without clear guidance from the Supreme Court, the appropriate First Amendment standard for evaluating “true threats” remains unclear and disputed among various circuits.¹⁶⁴ Currently, courts do not view online threats differently from threats in other communication mediums.¹⁶⁵ On one hand, because the internet allows one’s statements to reach countless people across the world, the majority objective standard view would hold the speaker responsible if any individual could prove that a reasonable person would be afraid.¹⁶⁶ On the other hand, with a subjective intent standard,

154. *See id.* at 729–31.

155. 18 U.S.C. § 875(c).

156. *Elonis*, 575 U.S. at 731.

157. *See id.*

158. *See id.*

159. *See id.* at 740, 742.

160. *See id.* at 734–36.

161. *See id.* at 737–40.

162. *See id.* at 740.

163. *See id.* (“In response to a question at oral argument, Elonis stated that a finding of recklessness would not be sufficient. Neither Elonis nor the Government has briefed or argued that point, and we accordingly decline to address it.”).

164. *See Fuller*, *supra* note 146, at 38–39 (explaining that while the majority of federal circuits follow an “objective” standard, the Ninth Circuit is “one of the only federal circuit courts that require [sic] a finding of subjective intent”).

165. *See id.* at 74 (“[T]he Internet’s particular technological qualities have not served as grounds upon which to treat the Internet differently.”).

166. *See id.* at 77.

juries face an equally difficult task.¹⁶⁷ They need to determine if the defendant's love of rap music, for example, was the true inspiration for a statement, or if the speaker instead intended to threaten a person or group.¹⁶⁸ Determining the correct answer in this debate not only complicates criminal cases, but also creates uncertainty in other contexts, such as the discretion that licensing officials have in deciding if an online post should be considered evidence of future danger.¹⁶⁹ Additionally, the unresolved nature of this dilemma also complicates the original totality-of-the-circumstances standard established in *Watts*.¹⁷⁰ Without knowing whether to focus on the speaker's mental state or the audience's interpretation of the statement, it is challenging to know how to determine what is and is not a "true threat."¹⁷¹

The Supreme Court faced a similar task of balancing First Amendment rights against harm to others when deciding the appropriate mens rea and standard of proof required for defamation suits filed by public officials.¹⁷² Defamation, like "true threats," is a category of speech not protected by the First Amendment.¹⁷³ In *New York Times Co. v. Sullivan*,¹⁷⁴ the Supreme Court held that, for public officials to succeed on a defamation claim, they must prove by clear and convincing evidence that a speaker made a false statement with "actual malice."¹⁷⁵ A speaker has actual malice when they make a statement "with knowledge that it was false or with reckless disregard of whether it was false or not."¹⁷⁶ In *Sullivan*, the Court weighed the New York Times's First Amendment right to report on matters of public concern against an individual's right to protect their reputation against libelous statements.¹⁷⁷ Due to the importance of maintaining the press's right to report on these matters, the Court felt that both the actual malice standard and a heightened standard of proof beyond a mere preponderance of the evidence were necessary.¹⁷⁸

Another category of speech that is not protected under the First Amendment is speech that "incites imminent lawless action."¹⁷⁹ The leading case for this doctrine is *Brandenburg v. Ohio*.¹⁸⁰ In this case, Clarence Brandenburg, the leader of a local Ku Klux Klan group, was convicted under Ohio law for promoting "the duty, necessity, or propriety of crime" and for teaching "criminal syndicalism."¹⁸¹ The Supreme Court held that this Ohio

167. *See id.* at 76–77.

168. *See Elonis*, 575 U.S. at 732; *see also* Fuller, *supra* note 146, at 76–77.

169. *See infra* Part II.A.1.

170. *See* *Watts v. United States*, 394 U.S. 705, 707–08 (1969).

171. *See id.*

172. *See generally* *N.Y. Times Co. v. Sullivan*, 376 U.S. 254 (1964).

173. *See generally id.*

174. 376 U.S. 254 (1964).

175. *Id.* at 280.

176. *Id.*

177. *See generally Sullivan*, 376 U.S. 254.

178. *See id.* at 282.

179. Brown, *supra* note 122, at 290 (quoting *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969)).

180. 395 U.S. 444 (1969).

181. *Id.* at 444–45.

statute was unconstitutional because it criminalized “mere advocacy and . . . assembly with others merely to advocate the described type of action.”¹⁸² Although the speech was disgraceful and offensive, the First Amendment draws a fine line.¹⁸³ The First Amendment permits a state to regulate political speech of this sort only if the speech is “directed to inciting or producing imminent lawless action” and “is likely to incite or produce such action.”¹⁸⁴ The distinction is that speech that advocates for the use of force of violence, without more, does not merit governmental intrusion.¹⁸⁵

Although the First Amendment is intended to protect freedom of speech, especially in the context of public debate and political discourse, it is not absolute.¹⁸⁶ Courts struggle with deciding which speech is extreme, hateful, and offensive, yet still protected, and which speech rises to the level of inciting violence or threatening harm, which the Constitution does not protect.¹⁸⁷ Further, individuals may not make a statement directly, but instead, may express their support of a particular message by associating with like-minded individuals either in person or online. This also implicates the First Amendment, as explained in the next section.

2. Freedom of Association

The Supreme Court has interpreted the First Amendment to protect an individual’s freedom of expressive and intimate association from government interference.¹⁸⁸ The freedom of intimate association protects an individual’s right to choose to become a member of any political or religious group.¹⁸⁹ The freedom of expressive association protects the right to engage in First Amendment activities with that group.¹⁹⁰ Therefore, there are constitutional implications when a law requires a group to reveal its members’ identities or allows a defendant’s associations to be admitted as evidence in a criminal trial.¹⁹¹ These associations may also occur in an online context, such as being a member of a Facebook group.¹⁹²

In *NAACP v. Alabama ex rel. Patterson*,¹⁹³ the National Association for the Advancement of Colored People (NAACP) challenged an Alabama law that required the organization to provide the state with a list of its current members.¹⁹⁴ The NAACP worried that disclosing these names would lead to violence against its members.¹⁹⁵ The group was concerned that the

182. *Id.* at 449.

183. *See id.* at 447–48.

184. *Id.* at 447.

185. *See id.* at 447–48.

186. *See Brown, supra* note 122, at 282.

187. *See id.*

188. *See Roberts v. U.S. Jaycees*, 468 U.S. 609, 617–18, 623 (1984).

189. *See id.* at 617–18, 622.

190. *See id.*

191. *See infra* Part II.B.2.

192. *See infra* Part II.B.2.

193. 357 U.S. 449 (1958).

194. *See id.*

195. *See id.* at 460.

requirement would intimidate prospective members from joining the group, especially in a southern state during the middle of the civil rights movement.¹⁹⁶ The Supreme Court held that a right to privacy is intertwined with the freedom of association protected by the First and Fourteenth Amendments and that any government interference with these rights must survive “the closest scrutiny.”¹⁹⁷ Alabama could not provide an adequate reason for its disclosure requirement and so failed to meet this heightened burden.¹⁹⁸

However, in *Buckley v. Valeo*,¹⁹⁹ the Supreme Court upheld a compelled disclosure law that required political campaigns to reveal the names of any individual who donated over ten dollars.²⁰⁰ This law was permissible because the public interest in knowing this information outweighed the privacy interest implicated, especially since there may only be a minor deterrent effect on potential campaign contributors.²⁰¹ The case law surrounding the topic of compelled disclosures makes clear that the government can only interfere with the First Amendment right to associate if it states a reason that survives strict, exacting scrutiny.²⁰² This standard requires that the government’s interest be substantially related to the information requested.²⁰³

The freedom of association is also implicated when prosecutors attempt to admit evidence of a defendant’s membership in a particular group during a criminal trial.²⁰⁴ Although the First Amendment forbids the government from prohibiting an individual from choosing to associate with certain people or groups, *Dawson v. Delaware*²⁰⁵ concerned whether such associations could be used as evidence in a criminal case.²⁰⁶ The Supreme Court held in *Dawson* that a defendant’s membership in a racist gang should not have been introduced as evidence in that particular case.²⁰⁷ Yet, the Court stated that there may be instances in which “associational evidence might serve a

196. *See id.*

197. *Id.* at 461.

198. *See id.* at 460–61 (suggesting that a strict scrutiny standard is appropriate when examining whether the government can interfere with one’s freedom to associate); *see also* *Davis v. FEC*, 554 U.S. 724, 744 (2008) (holding that “a mere showing of some legitimate governmental interest” is not enough when the government is encroaching on the right to associate); *Citizens United v. FEC*, 558 U.S. 310, 371 (2010) (holding that the federal Bipartisan Campaign Reform Act of 2002’s disclosure requirement did not violate the First Amendment because “transparency enables the electorate to make informed decisions”).

199. 424 U.S. 1 (1976).

200. *See id.* at 66.

201. *See id.*

202. *See id.* at 64.

203. *See id.*; *see also* *Patterson*, 357 U.S. at 463; *Ams. for Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2385 (2021) (holding that California’s requirement was not narrowly tailored to the government’s interest in protecting consumers from fraud or preventing the misuse of charitable contributions).

204. *See generally* Dan T. Coenen, *Free Speech and the Law of Evidence*, 68 DUKE L.J. 639 (2019).

205. 503 U.S. 159 (1992).

206. *See generally id.*

207. *See id.* at 166.

legitimate purpose in showing that a defendant represents a future danger to society.”²⁰⁸ However, to be admitted, the evidence of association must indicate more than just the defendant’s abstract beliefs.²⁰⁹

Finally, the freedom of association has also been analyzed in the context of whether it is constitutional for states to withhold a right or benefit because of someone’s beliefs and associations.²¹⁰ For example, in *Baird v. State Bar of Arizona*,²¹¹ a law school graduate seeking admission to the State Bar of Arizona was asked to list all the organizations to which she belonged, as well as whether she had “ever been a member of the Communist Party.”²¹² Although her answer to the first question satisfied the committee, the committee denied her admission when she refused to state whether she was a member of the Communist Party.²¹³ After Baird appealed on First Amendment grounds, the Court held that a state is limited in its ability to ask about one’s beliefs or associations.²¹⁴ The Court found that a state cannot exclude someone from a profession or punish someone based “solely [on their membership in] a particular political organization or [because they have] certain beliefs.”²¹⁵ To get information about a person’s beliefs and associations, the state has to explain why this inquiry is necessary.²¹⁶ The Court found that Arizona had an interest in regulating the qualifications and characteristics required to practice law.²¹⁷ However, because the applicant had already answered other questions and provided “extensive” information to the committee regarding her professional fitness, the inquiry about her potential membership in the Communist Party was unconstitutional.²¹⁸ Additionally, the Court indicated that “a State may not inquire about a man’s views or associations solely for the purpose of withholding a right or benefit because of what he believes.”²¹⁹

Thus, although the First Amendment protects the freedom of speech and the freedom to associate, Supreme Court precedent indicates that these rights can be limited when a state demonstrates a strong interest in protecting public safety.²²⁰ The Court’s failure to clarify the standard for determining “true threats” and its precedent protecting the freedom to associate contribute to the difficulty in deciding whether the social media provision of the CCIA is constitutional. These concerns are addressed in Part II.

208. *Id.*

209. *See id.* at 166–67.

210. *See Baird v. State Bar of Ariz.*, 401 U.S. 1 (1971).

211. 401 U.S. 1 (1971).

212. *Id.* at 4.

213. *See id.* at 5.

214. *See id.* at 6.

215. *Id.*

216. *See id.* at 7.

217. *See id.*

218. *See id.*

219. *Id.*

220. *See Brown, supra* note 122, at 281.

II. NEW YORK'S CONCEALED CARRY IMPROVEMENT ACT: CONSISTENT WITH THE FREEDOMS OF SPEECH AND ASSOCIATION?

Concealed carry permit applicants in New York must now turn over their social media accounts to licensing officials to confirm that the information provided by character references is correct regarding an applicant's "moral character."²²¹ This includes whether an applicant has "made any statements that suggest they are likely to engage in conduct that would result in harm to themselves or others."²²² Gun rights activists want to ensure that this provision will be enforced in a way that does not violate applicants' Second Amendment rights and free speech protections.²²³ Proponents of the legislation, however, argue that the disclosure requirement does not violate the First or Second Amendment because "shooters are leaving digital trails that hint at what's to come long before they actually pull the trigger."²²⁴

Conversely, critics argue that it is often difficult to decipher "social media posts by younger people, who could simply be expressing themselves by posting a music video."²²⁵ There may be instances in which a social media post could be viewed as evidence of future danger but in actuality is a harmless photo or comment that a teenager posted while upset.²²⁶ Opponents of the law also believe that law enforcement officials should not be the ones making this determination, given their lack of training in interpreting social media conventions.²²⁷ Their argument is that the disclosure requirement violates the First Amendment's protection of free speech and free association.²²⁸ Due to the difficulty in determining which posts on social media are "true threats" or indicators of future wrongdoing, critics argue that the social media disclosure requirement is not substantially related to the state's interest in protecting public safety.²²⁹ Because the statute already provides adequate methods of conducting background checks, such as examining applicants' official criminal records, critics think that the requirement is unwarranted.²³⁰

On the other hand, advocates of the law argue that accessing applicants' social media accounts is essential to protecting the public by allowing officials to identify potential warning signs.²³¹ Although online speech is protected by the First Amendment, there is no "per se barrier" that prevents

221. N.Y. PENAL LAW § 400.00(1)(ii) (McKinney 2022).

222. *Id.*

223. *See* Villeneuve & Khan, *supra* note 34.

224. *See* Seitz, *supra* note 36.

225. *See* Villeneuve & Khan, *supra* note 34.

226. *See id.*

227. *See id.*

228. *See* Jake Fogleman, *New York Governor Claims Social Media Check Law Will Flag 'Radicalized' Gun Owners*, THE RELOAD (Aug. 25, 2022, 5:00 AM), <https://thereload.com/new-york-governor-claims-social-media-check-law-will-flag-radicalized-gun-owners/> [<https://perma.cc/9MED-A4HK>].

229. *See id.*

230. *See* N.Y. PENAL LAW § 400.00(3)(b) (McKinney 2022) (requiring licensing officials "to investigate and ascertain any previous criminal record of the applicant").

231. *See* Villeneuve & Khan, *supra* note 34.

the government from requiring the disclosure of information regarding one's associations and expressions.²³² Such disclosure requirements, courts have held, are permissible if the government has an important interest served by these disclosures.²³³ The CCIA implicates these First Amendment concerns, but proponents of the law believe that the state has a serious interest in preventing further massacres.²³⁴ They argue that this interest is more than substantially related to accessing applicants' social media accounts, given the online behavior of the gunmen responsible for recent mass shootings.²³⁵ This part discusses both sides of the debate surrounding the CCIA, including determining which posts are threats, whether online speech can be used as evidence of future danger, and how "liking" others' posts may affect one's permit application.

*A. Evaluating Social Media Posts as True Threats and
Evidence of Future Danger*

The Northern District of New York's November 7 decision notes several issues that arise from using the "subjective and vague standard" of "good moral character" to assess online speech.²³⁶ One of the most prominent concerns mentioned in the opinion is the discretion granted to licensing officials to consider an applicant's online speech while making permit decisions.²³⁷ The CCIA implicates the First Amendment because a state actor, the licensing official, may choose to deny a permit application if they personally find that a particular post or image shows that an applicant has "bad 'temperament' or 'judgment.'"²³⁸ Although "true threats" are not constitutionally protected, officials could base their decisions on statements that do not reach the level of a true threat,²³⁹ thereby raising the question of whether this assessment is permissible in the permit application context.²⁴⁰ This section will first discuss how to determine whether speech is a "true threat" directed against a given person. The section will then cover how to determine whether speech is more generally evidence of future danger, even if it does not rise to the level of a "true threat."

232. *See Wisconsin v. Mitchell*, 508 U.S. 476, 486 (1993). Although *Mitchell* does not explicitly refer to internet associations, the Court stated that there is no "per se barrier to the admission of evidence concerning one's beliefs and associations . . . simply because they are protected." *See id.* Therefore, because online speech is also constitutionally protected, it is likely that the same argument can apply to the disclosure of an individual's online posts regarding their beliefs and their online associations.

233. *See id.* at 477; *see also Dawson v. Delaware*, 503 U.S. 159, 168 (1992).

234. *See Seitz*, *supra* note 36.

235. *See id.*

236. *See Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at *53 (N.D.N.Y. Nov. 7, 2022), *appeal filed*, No. 22-CV-2908 (2d Cir. Nov. 9, 2022).

237. *See id.*

238. *Id.*

239. *See id.* *See generally Watts v. United States*, 394 U.S. 705 (1969).

240. *See Antonyuk III*, 2022 WL 16744700, at *53.

1. The Spectrum of Protection from Joke to Threat Online

Under the First Amendment, even the most distasteful tweets or Instagram photos may still be protected.²⁴¹ “Deeply offensive, racist or misogynistic comments” are protected by the First Amendment because this type of speech can be countered by others’ opinions and because allowing the government to interfere is too dangerous.²⁴² However, speech loses protection when the state can prove that the speech is a “serious expression of an intent to commit an act of unlawful violence to a particular individual or group.”²⁴³

Although a comment may be specifically directed at a certain person, the unique context of social media complicates the task of deciding whom to take seriously.²⁴⁴ For instance, limited character counts, the informal environment, the ability to post under a pseudonym, and the possibility of instantly reaching thousands of people are all factors that must be considered before determining a genuine threat.²⁴⁵ As stated in *Watts*, courts are required to analyze a statement in the context in which it was made.²⁴⁶ However, the CCIA provides no similar constraint or criteria for the licensing officials making these decisions.²⁴⁷

Online speech is “spontaneous, informal, unmediated, and often anonymous” and makes “the potential [of] incendiary language [crossing] the line to true threats” even more likely due to its ability to reach a “global audience.”²⁴⁸ These same characteristics also create a danger of misinterpretation.²⁴⁹ For example, reading a “heat of the moment” comment hours later, “the lack of tonal and other nonverbal cues that signal sarcasm, jests or hyperbole in oral communications” and the development of abbreviations and emoticons are all inherent characteristics of online communication that make misinterpretation more likely.²⁵⁰ Social media also presents a “generation gap problem,” which can lead to those “unfamiliar with [social media] conventions [criminalizing] normal or common adolescent behavior, which has increasingly included the use of hyperbole.”²⁵¹ Exaggeration has become popular among younger

241. See *Watts*, 394 U.S. at 707 (distinguishing speech that is considered to be a threat—and thus not protected—from speech that is constitutionally protected).

242. See Lyriisa Barnett Lidsky & Linda Riedemann Norbut, #143U: *Considering the Context of Online Threats*, 106 CALIF. L. REV. 1885, 1915 (2018).

243. *Virginia v. Black*, 538 U.S. 343, 359 (2003).

244. See Adrienne Scheffey, Note, *Defining Intent in 165 Characters or Less: A Call for Clarity in the Intent Standard of True Threats After Virginia v. Black*, 69 U. MIAMI L. REV. 861, 867 (2015).

245. See *id.*

246. See *Watts v. United States*, 394 U.S. 705, 708 (1969).

247. See generally N.Y. PENAL LAW § 400.00 (McKinney 2022).

248. Lidsky & Norbut, *supra* note 242, at 1903–04 (explaining that there is a heightened potential for online speech to become threatening, as different cultures may have varying interpretations of certain words and “hateful speakers [have] a platform to harass and terrorize targets with seeming impunity and spew vitriol that may spur others to violent actions”).

249. See *id.* at 1906.

250. See *id.* at 1907.

251. Lidsky & Norbut, *supra* note 242, at 1911–12; see also Jessica Bennett, *OMG! The Hyperbole of Internet-Speak*, N.Y. TIMES (Nov. 28, 2015), <https://www.nytimes.com/2015/>

generations as a way to get noticed by their peers, but even among young people, the person reading the exaggerated speech does not always understand the speaker's true meaning or intent.²⁵²

Opponents of the CCIA worry that without a precise, informed strategy for determining intent, licensing officials have too much discretion and will use otherwise innocent speech as the basis for denying an applicant a permit.²⁵³ For instance, if an individual who comments "you're dead" on an unflattering picture of herself posted by her friend were to apply for a permit, a licensing official, misunderstanding the relevant context, may view the comment as a serious threat.²⁵⁴ But this type of phrase is commonly used among young people as an expression of embarrassment and should not be understood as a statement of intent to harm anyone.²⁵⁵

In the social media threat context, Professor Lyriisa Barnett Lidsky and Linda Riedemann Norbut have proposed several solutions to help lawmakers better understand the confusing nature of online speech.²⁵⁶ For instance, they explain that there are experts trained in social media conventions who can provide insight about how this online speech should be interpreted generally.²⁵⁷ They have also proposed a procedure to use in criminal trials for evaluating online threats.²⁵⁸ Once a concerning post is identified, they write, the defendant should have the opportunity to offer evidence that the statement made was not actually a threat.²⁵⁹ After hearing this evidence, if the judge determines that there is "probable cause to believe the defendant intended" for a "reasonable reader" to view the post as a threat, the case can proceed.²⁶⁰

Examining the totality of circumstances in this way is especially important in an online setting because many people rely on social media as an expressive outlet where they share original music and artwork.²⁶¹ But if this content catches the attention of the licensing official, a person's art runs the risk of being used against them during the permit application process.²⁶²

11/29/fashion/death-by-internet-hyperbole-literally-dying-over-this-column.html [https://perma.cc/9CHY-YT6H].

252. See Lidsky & Norbut, *supra* note 242, at 1913.

253. See Villeneuve & Khan, *supra* note 34.

254. See Bennett, *supra* note 251; see also Lidsky & Norbut, *supra* note 242, at 1912.

255. See Bennett, *supra* note 251 ("It's almost like 'dying' has become a filler for anytime anyone says anything remotely entertaining.").

256. See Lidsky & Norbut, *supra* note 242, at 1922.

257. See *id.* at 1924–25 (suggesting that experts can provide context to the speech and explain how the speech's meaning may change in light of this context).

258. *Id.* at 1925–26; see also *infra* Part III.D.

259. The judge first must determine in a pretrial hearing whether the defendant actually made the statement. If the prosecution proves that the defendant did make the statement, the defendant may then provide mitigating contextual evidence. See Lidsky & Norbut, *supra* note 242, at 1925.

260. See *id.* at 1926.

261. See Scheffey, *supra* note 244, at 894–95.

262. See *id.* Further, in the context of works of art, a particularly concerning statement may not be a threat and, instead, should be considered a situation in which the speech is justified. See SEANA VALENTINE SHIFFRIN, SPEECH MATTERS: ON LYING, MORALITY, AND THE LAW 16 (2014). Professor Seana Valentine Shiffirin calls this a "justified suspended context."

These First Amendment concerns highlighted by scholars already exist in the context of criminal prosecutions, such as when prosecutors attempt to offer rap lyrics posted on social media platforms as evidence in criminal trials.²⁶³ Prosecutors often introduce rap lyrics as evidence for one of two purposes: (1) to suggest that the lyrics serve as a confession and that the defendant carried out a crime in exact accordance with what the lyrics literally say or (2) as evidence of a defendant's intent or motive.²⁶⁴ Based on the lyrics, jurors may conclude that a defendant has a propensity toward violence and acted in accordance with that trait.²⁶⁵ Similarly, licensing officials may conclude that an applicant's online speech, although only meant as a form of creative expression, signals an applicant's violent tendencies.²⁶⁶

Acknowledging that introducing a criminal defendant's creative expressions as evidence at trial raises First Amendment issues, New York has recently prohibited judges from admitting such evidence unless the government can prove by clear and convincing evidence that the expression is "literal."²⁶⁷ The government must also show a "strong factual nexus indicating that the creative expression refers to the specific facts of the crime alleged."²⁶⁸ The bill was created to offer additional protection of defendants' First Amendment rights and indicates that New York views creative expression as protected speech.²⁶⁹

Overall, CCIA opponents have expressed concern about the difficulty for licensing officials in determining which online posts are jokes and which are threats.²⁷⁰ However, states may be able to seek guidance by interpreting how

Id. In these instances, the normal presumption of harm is suspended because the speech serves another purpose "whose achievement depends upon the presumption's suspension." *Id.* Thus, the audience should understand that the speaker is not being sincere and should believe that the threat is merely a form of artistic expression. *Id.*

263. See *United States v. Recio*, 884 F.3d 230, 233 (4th Cir. 2018).

264. See Andrea L. Dennis, *Poetic (In)justice?: Rap Music Lyrics as Art, Life, and Criminal Evidence*, 31 COLUM. J.L. & ARTS 1, 2 (2007). In *United States v. Recio*, 884 F.3d 230 (4th Cir. 2018), for example, the defendant appealed the trial court's decision to admit rap lyrics that he had posted on Facebook. *Id.* at 234. The appellate court found that the lyrics were an adoptive admission. *Id.* at 235. The defendant "did not use quotation marks [or] attribute the lyric[s] to the artist," and he slightly adjusted the lyrics, indicating that he was adopting these words as his own. *Id.* The court also held that lyrics may speak about the same type of conduct for which a defendant is charged and can indicate the defendant's motive for committing a certain crime. See *id.*

265. See Dennis, *supra* note 264, at 11.

266. See, e.g., *Elonis v. United States*, 575 U.S. 723, 726–29 (2015) (describing how the lyrics that Elonis posted online raised questions regarding whether the lyrics were intended to be threats).

267. S.B. 7527, 2021–2022 Leg., Reg. Sess. (N.Y. 2021).

268. *Id.*

269. See *id.* State Senator Brad Hoylman-Sigal, the bill's sponsor, explained that the law's purpose is to "protect freedom of speech and artistic expression," as well as to "[ensure] that criminal defendants are tried based upon evidence of criminal conduct, not the provocative nature of their artistic works." See *id.* (sponsor memo available at <https://www.nysenate.gov/legislation/bills/2021/S7527> [https://perma.cc/G33U-4LBM]).

270. See *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at *53 (N.D.N.Y. Nov. 7, 2022), *appeal filed*, No. 22-CV-2908 (2d Cir. Nov. 9, 2022).

officials use online speech in the context of “red flag” laws, which allow for the temporary seizure of firearms from threatening individuals.²⁷¹ Similar to the CCIA, officials can consider online speech when deciding whether to confiscate a firearm, which creates comparable First Amendment implications, as discussed in the next section.²⁷²

2. How State “Red Flag” Laws Currently Use Online Speech to Predict Future Danger

Currently, under the CCIA, licensing officials can deny an applicant a permit based on protected speech, even absent any indication that the applicant has engaged in prior wrongdoing.²⁷³ Without language in the law to the contrary, the CCIA allows licensing officials to use an applicant’s social media posts as evidence that they will commit future violence and, thus, should not be granted a concealed carry permit.²⁷⁴ Many other states have taken a similar approach when enacting “red flag” laws.²⁷⁵

Red flag laws, also known as Extreme Risk Protection Order (ERPO) statutes, “allow the government to temporarily confiscate the weapons of individuals who are deemed by a judge to be a danger to themselves or others.”²⁷⁶ Depending on the statute, the government has the burden to prove that the individual poses a danger, either by a preponderance of the evidence or by clear and convincing evidence.²⁷⁷ These laws have been criticized for not only violating the Second Amendment, but also for lacking proper due process protections.²⁷⁸ Opponents have claimed that “mere allegations” can

271. See Kery Murakami, *The Big Question About Red Flag Laws with the Gun Safety Deal*, ROUTE FIFTY (June 13, 2022), <https://www.route-fifty.com/public-safety/2022/06/gun-safety-deal-prioritizes-red-flag-laws-will-states-pass-them/368130/> [https://perma.cc/47EA-2NQ2].

272. See *infra* Part II.A.2. However, unlike a permit denial, red flag laws are temporary. After the time limit specified in the order expires, an individual can regain possession of the firearm. See Amy Sherman, *Ask PolitiFact: What Are Red Flag Gun Laws and Do They Keep People Safe?*, POLITIFACT (June 10, 2022), <https://www.politifact.com/article/2022/jun/10/ask-politifact-what-are-red-flag-gun-laws-and-do-t/> [https://perma.cc/6XHG-52XW].

273. See generally N.Y. PENAL LAW § 400.00 (McKinney 2022).

274. The updated provision does not require licensing officials to first find a connection between an applicant’s potentially threatening post and a previous conviction or past violent act before determining that the applicant is not “of good moral character.” *Id.*

275. See Clay Calvert & Ashton Hampton, *Raising First Amendment Red Flags About Red Flag Laws: Safety, Speech and the Second Amendment*, 30 GEO. MASON C.R.L.J. 351, 352 (2020).

276. *Id.* The firearms are confiscated from the home, preventing the individual from accessing guns both in their home and in public. See Andy Newman, Benjamin Weiser & Ashley Southall, *How a New York County Used the State’s ‘Red Flag’ Law to Seize 160 Guns*, N.Y. TIMES (June 5, 2022), <https://www.nytimes.com/2022/06/05/nyregion/red-flag-law-shootings-new-york.html> [https://perma.cc/Z8SK-4L6X].

277. See Murakami, *supra* note 271. ERPOs that last longer than six months require a higher standard of proof (the most burdensome standard being “clear and convincing”). See Caitlin M. Johnson, *Raising the Red Flag: Examining the Constitutionality of Extreme Risk Laws*, 2021 U. ILL. L. REV. 1515, 1527.

278. See Calvert & Hampton, *supra* note 275, at 353.

lead to individuals losing their weapons “without notice and opportunity to contest an order.”²⁷⁹

However, these laws can also play an important role in protecting public safety and can be constitutional if there is a proper process in place for identifying what makes a person dangerous.²⁸⁰ For instance, when analyzing the effectiveness of red flag laws, a study found that these laws saved more than 7,000 lives in 2020.²⁸¹ If red flag laws existed “at the federal level,” it is estimated that “an additional 11,442 lives” would have been saved nationwide in the same year.²⁸²

To make an ERPO determination, “writings, words, posts, and even media consumption” can be introduced as evidence during hearings.²⁸³ Further, even speech typically protected by the First Amendment, such as hate speech that does not constitute a “true threat,” can justify confiscation of a weapon.²⁸⁴ Many of these statutes include a non-exhaustive list of factors that law enforcement officials may flag as a reason for a judge to issue an ERPO, such as any statement or action that may lead “to a reasonable fear of significant dangerous acts.”²⁸⁵ This does not necessarily require evidence that a violent act has already happened.²⁸⁶ For example, watching a particular television show, visiting a violent group’s website, or verbally expressing general support for the use of violence have all been cited as reasons for which police officers have sought ERPO petitions.²⁸⁷ All of these examples are protected speech under the First Amendment and do not rise to the level of a true threat.²⁸⁸ These statements and actions have been used in some states as indicators that an individual may possibly engage in future

279. *Id.*; see also Joseph Blocher & Jacob D. Charles, *Firearms, Extreme Risk, and Legal Design: “Red Flag” Laws and Due Process*, 106 VA. L. REV. 1285, 1344 (2020).

280. See Blocher & Charles, *supra* note 279, at 1344 (explaining that because Florida’s red flag law had procedural protections in place, including requiring a hearing and a temporal limit, the statute was constitutional).

281. See Daniel Merino, *Red Flag Laws Saved 7,300 Americans from Gun Deaths in 2020 Alone—and Could Have Saved 11,400 More*, THE CONVERSATION (June 23, 2022, 7:50 AM), <https://theconversation.com/red-flag-laws-saved-7-300-americans-from-gun-deaths-in-2020-alone-and-could-have-saved-11-400-more-185009> [https://perma.cc/XDZ8-QRF9] (describing a study that compared “states’ firearm death rates” in states that had red flag laws with those that did not and analyzing the number of firearm deaths across the country that would have occurred without red flag laws with the actual number of firearm deaths nationwide in 2020).

282. *Id.*

283. See Calvert & Hampton, *supra* note 275, at 354, 357 (describing a red flag law case in which police asked a teenager about watching *Vampire Diaries*, a popular television show, when deciding whether to issue an ERPO, indicating that the decision can also be based on “the media content they consume”).

284. See *id.* at 355.

285. FLA. STAT. § 790.401 (2023).

286. See Calvert & Hampton, *supra* note 275, at 356.

287. See *id.* at 357 (outlining various examples of state red flag laws that encompass protected forms of speech).

288. See *id.*

violence and, therefore, have been found to be sufficient justifications for taking away a person's weapon.²⁸⁹

Red flag laws may significantly curtail free expression.²⁹⁰ Professor Clay Calvert and Ashton Hampton explain that, to avoid these laws, affected citizens may refrain from “writing fictional stories involving graphic violence . . . creating artistic drawings and paintings of guns and assault rifles[,] or posting support online for extremist hate groups.”²⁹¹ The result is that individuals must trade their “First Amendment freedom of speech [right] . . . to protect and preserve another—the Second Amendment right to possess guns at home.”²⁹²

Accordingly, Professor Calvert and Hampton recommend removing protected speech from the list of statements that judges use when deciding whether to issue an ERPO.²⁹³ Instead, they suggest that judges should consider only “mental health issues, prior conduct, and speech that falls outside the confines of First Amendment protection.”²⁹⁴ They recommend that, if states continue to allow judges to consider protected speech, then “speech and social media activity occurring more than a specified period of time before an ERPO is sought should be deemed irrelevant” and that there needs to be more than one “disturbing, but protected” statement posted.²⁹⁵

The issues related to red flag laws can be applied to the CCIA and the permit application context.²⁹⁶ For instance, as with ERPO petitions, licensing officials can analyze otherwise protected speech on an individual's social media account to predict if there is a possibility that the individual will act violently in the future.²⁹⁷ There is no requirement that the official find evidence that the applicant has acted violently in the past.²⁹⁸ In addition, the statute does not require officials to identify more than one suggestive post, and the only temporal restriction in the statute is that applicants must turn over all of their accounts from within the last three years.²⁹⁹ However, as Professor Calvert and Hampton explain, if even “three months have passed

289. See Jacob Sullum, *This ‘Awesome Dude’ Lost His Gun Rights by Saying Stupid Stuff on Reddit*, REASON (Apr. 5, 2018, 2:15 PM), <https://reason.com/2018/04/05/this-awesome-dude-lost-his-second-amendm/> [<https://perma.cc/4NK9-ZWSG>]; see also Calvert & Hampton, *supra* note 275, at 359.

290. See Calvert & Hampton, *supra* note 275, at 362.

291. *Id.* (explaining that because these laws “do not specify what type of speech, other than threats may be relevant . . . their ‘chilling effect’ may be broad”).

292. *Id.* at 363.

293. See *id.* at 366.

294. *Id.* (acknowledging that because “judges are often faced with the difficult task of differentiating between facetious or hyperbolic declarations,” legislatures should eliminate protected speech from judicial consideration altogether).

295. See *id.* at 367 (suggesting that statutes should “impose clear temporal-recency requirements and quantity mandates,” such as limiting statements made more than three months in advance of a petition being filed).

296. See *id.* at 366.

297. See N.Y. PENAL LAW § 400.00(1)(o)(iv) (McKinney 2022) (omitting any qualification to the law that prohibits consideration of protected speech).

298. See *id.*

299. See *id.*

without the speaker engaging in violence . . . future violence is less assuredly predicted from that speech.”³⁰⁰

At the same time, New York, along with other states and the federal government, criminalizes the very act of making a threat.³⁰¹ However, these statutes call for a narrow interpretation of a true threat by requiring that the defendant have the “intent to harass,” as well as requiring that the threat be made against an identifiable person or their family.³⁰² Due to the severe penalties associated with criminal liability, there are often stricter elements that the prosecution must prove to criminally convict an individual of making a threat.³⁰³

In addition to the lack of clarity as to what constitutes a threat, the CCIA also does not specify what information a licensing official may use beyond the applicant’s own speech, such as if they “retweet” another user’s post.³⁰⁴ This adds to the overall problem of reconciling how to protect public safety with how to address the First and Second Amendment concerns created when an individual is denied a permit on this basis.

B. *What About Association?: “Liking” and Membership in Social Media Groups*

The CCIA does not provide clear guidelines as to how licensing officials should analyze the social media accounts turned over by permit applicants.³⁰⁵ Therefore, when scanning these accounts to confirm an applicant’s character, licensing officials may also choose to examine the content that an applicant has supported by “liking” a post or by joining an online group.³⁰⁶ This section will discuss the First Amendment implications related to online membership association.³⁰⁷

In *Bland v. Roberts*,³⁰⁸ the U.S. Court of Appeals for the Fourth Circuit held that “liking” a Facebook group page equated to “substantive speech”

300. See Calvert & Hampton, *supra* note 275, at 367.

301. See N.Y. PENAL LAW § 240.30(1)(a) (McKinney 2022) (criminalizing the act of communicating “a threat to cause physical harm” and requiring that “the actor know[] or reasonably should know that such communication will cause such person to reasonably fear harm”).

302. See *id.*

303. For a defendant to be found guilty of aggravated harassment, the prosecution must show that the defendant had “an intent to harass or threaten.” See *id.* § 240.30(1)–(4) (classifying this crime as a Class A misdemeanor, which is punishable by up to one year in jail and a fine of up to \$1,000).

304. See *infra* Part II.B.

305. See Kenichi Serino & Justin Stabley, *5 Questions About New York’s New Social Media Requirements for Gun Applicants*, PBS (Sept. 7, 2022, 4:49 PM), <https://www.pbs.org/newshour/politics/how-new-yorks-new-social-media-requirements-for-gun-permits-work-and-possible-challenges-ahead> [<https://perma.cc/WKU9-VR75>].

306. See *id.*

307. Others have noted additional First Amendment problems arising from the CCIA, including the concerns regarding one’s privacy rights. See Villeneuve & Khan, *supra* note 34. However, these issues are beyond the scope of this Note.

308. 730 F.3d 368 (4th Cir. 2013).

and “expressive conduct” protected by the First Amendment.³⁰⁹ After a user “likes” a Facebook page, the page’s title is listed on the user’s profile, others can see that the user has “liked” the page, and the user’s name appears on the page under those who “liked” it.³¹⁰ Hence, the “words appearing [on the page] are substantive because . . . it is as if the user actually typed the words herself.”³¹¹ It therefore follows that the user agrees with what the page is saying.³¹² The Fourth Circuit also explained that a Facebook “like” is similar to the protected expressive act of “displaying a political sign in one’s front yard.”³¹³ Just as a sign conveys that an individual is showing support for a cause, a “like” communicates support for an online post.³¹⁴

Another example analogous to “liking” a post on Facebook is “retweeting” content on Twitter.³¹⁵ An individual who “retweets” a message on Twitter adds that post to the user’s own profile and allows that user’s friends to see the content, even though the user did not originally create or post that message.³¹⁶ Twitter describes the purpose of this function as a way to “pass along news.”³¹⁷ This feature has been described as a “tiny, powerful printing press,” allowing information to be distributed and shared across the platform.³¹⁸ Unlike Facebook’s “like” function, however, a “retweet” is not as clear an indicator of support for a message, as users can add their own comments and may be sharing the post to express their disagreement with it.³¹⁹ No court has decided whether a “retweet” is considered substantive speech or expressive conduct in the same manner as a Facebook “like.”³²⁰

Even though these forms of speech, including the Facebook “like,” may be protected by the First Amendment, they are still likely subject to the same constitutional exceptions rendering speech unprotected, including “true threats.”³²¹ For example, Safya Roe Yassin, an American citizen, “retweeted” posts that indicated her support for ISIS.³²² Some of these tweets included personal information about U.S. military members along

309. *Id.* at 386.

310. See Bethany C. Stein, Note, *A Bland Interpretation: Why A Facebook “Like” Should Be Protected First Amendment Speech*, 44 SETON HALL L. REV. 1255, 1257–58 (2014).

311. *Id.* at 1258.

312. See *id.*

313. *Bland*, F.3d at 386; *City of Ladue v. Gilleo*, 512 U.S. 43 (1994) (holding that placing a political campaign sign in an individual’s front yard is protected expressive conduct).

314. See *Bland*, F.3d at 386.

315. See Taylor Spencer, Note, *Twitter in the Age of Terrorism: Can a Retweet Constitute a “True Threat?”*, 15 FIRST AMEND. L. REV. 497, 514 (2017).

316. See *Retweeting Another Tweet*, TWITTER, <https://help.twitter.com/en/using-twitter/how-to-retweet> [<https://perma.cc/2Y8T-UAH3>] (last visited Mar. 6, 2023).

317. Spencer, *supra* note 315, at 514.

318. See *id.*

319. See *id.* at 515 (explaining that Facebook’s “like” function “more clearly indicates support”).

320. See Stein, *supra* note 310, at 1277.

321. See Spencer, *supra* note 315, at 515.

322. See Affidavit in Support of Complaint, *United States v. Yassin*, No. 16-CR-03024 (W.D. Mo. Feb. 17, 2016), ECF No. 1-1.

with phrases indicating her desire to harm these individuals.³²³ Following these “retweets,” multiple U.S. Air Force members were threatened, resulting in the arrest of Yassin, who was charged with violating 18 U.S.C. § 875(c)—the same statute Anthony Elonis was charged under.³²⁴ When analyzing whether this action constituted a threat or was simply disseminating information, Taylor Spencer explains that the context of these statements demonstrates that they were meant to be threats.³²⁵ By “retweeting” these messages, Yassin was showing “her support for the terrorist organization” and threatening “violence against U.S. military and government employees.”³²⁶ Thus, even if “retweets” are generally protected, they fall outside of First Amendment protection if they constitute “true threats.”³²⁷

Licensing officials may be considering “likes” and “retweets,” as well as an applicant’s online group memberships, in their permit application decisions. Although constitutional violations in this setting have not been fully examined, the Supreme Court in *Scales v. United States*³²⁸ reviewed a statute aimed at restricting “active membership” in an organization that wanted to “overthrow the government of the United States.”³²⁹ In *Scales*, the Court upheld the Smith Act,³³⁰ which prohibited membership in groups

323. See Affidavit in Support of Complaint, *supra* note 322; see also Spencer, *supra* note 315, at 497, 506 (explaining that Yassin “retweeted” personal information about FBI agents along with the words, “[w]anted to kill,” as well as the location and contact information for U.S. military members with the Quran quote: “And slay them wherever you may come upon them”).

324. See Affidavit in Support of Complaint, *supra* note 322; see also *Elonis v. United States*, 575 U.S. 723 (2015); Spencer, *supra* note 315, at 515.

325. See Spencer, *supra* note 315, at 518 (“The statements ‘wanted to kill’ and the portion of a verse from the Koran both indicate what Yassin intended her posts to do: incite violence . . .”). The Ninth Circuit has also analyzed this question in a case involving antiabortion activism. See *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 290 F.3d 1058, 1088 (9th Cir. 2002) (holding that antiabortion activist organizations posting “wanted”-type posters and contact information of abortion providers on a website were “true threats”—and thus were not constitutionally protected—because there was “substantial evidence” that the posts were intended to intimidate and harm the providers, given that multiple doctors on the list were killed). The court interpreted the statute’s “threat of force” to mean a statement that, “in the entire context and under all the circumstances, a reasonable person would foresee [that] the statement is communicated as a serious expression of intent to inflict bodily harm.” *Id.* at 1077.

326. Affidavit in Support of Complaint, *supra* note 322; see also Spencer, *supra* note 315, at 506, 518 (explaining that when considering the full context of Yassin’s posts, such as writing “wanted to kill” along with the retweets, posting photos of children holding ISIS flags, and making statements on other social media sites that were consistent in suggesting her support of ISIS’s use of violence, Yassin’s intention to threaten to cause harm to U.S. military members was clear).

327. See Spencer, *supra* note 315, at 519.

328. 367 U.S. 203 (1961).

329. *Id.* at 205; see also 18 U.S.C. § 2385; Raffy Astvasadoorian, *California’s Two-Prong Attack Against Gang Crime and Violence: The Street Terrorism Enforcement and Prevention Act and Anti-Gang Injunctions*, 19 J. JUV. L. 272, 280 (1998). The Smith Act was criticized for targeting members of the Communist Party, but the language of the statute is broad. See 18 U.S.C. § 2385. The act includes “any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any such government by force or violence.” *Id.*

330. 18 U.S.C. § 2385 (1956).

known to advocate for overthrow of the government.³³¹ Because the act required more than mere association with members and only criminalized “active” involvement in pursuing and furthering the group’s unlawful activities, the law was found to be constitutional.³³²

Applying this to the CCIA, it is unclear how being a member of an online group, such as by following a certain group on Instagram, is relevant in the permit application context and how much weight it should carry.³³³ When an applicant turns over their social media account, all of their group memberships will be apparent to the licensing official.³³⁴ As the statute contains no prohibition on officials’ discretion to consider these memberships, the official may use an applicant’s group membership as a reason to deny them a permit.³³⁵ This may violate the First Amendment because, unless an individual is “actively” and “knowingly” partaking in activities to further a group’s illegal goal (which arguably is not achieved solely by following a group on social media), an individual has the right to associate with anyone they want.³³⁶ In this way, the CCIA will foreseeably pit the freedom of association and the right to possess a firearm against one another.

III. RECOMMENDATIONS TO PROTECT THE CCIA FROM FIRST AND SECOND AMENDMENT CHALLENGES

Despite the CCIA’s constitutional challenges, there is a heightened need for stronger gun control legislation, given the recent increase in the number of mass shootings.³³⁷ New York justifiably takes a proactive approach to preventing another tragedy from occurring. However, to prevent a court from enjoining the CCIA, like the Northern District of New York did,³³⁸ the state must revise the law to limit licensing officials’ discretion and protect individuals’ freedom of speech and association.³³⁹

331. *See id.*; *see also Scales*, 367 U.S. at 206.

332. *See Scales*, 367 U.S. at 206; *see also* 18 U.S.C. § 2385; Astvasadoorian, *supra* note 329, at 281.

333. *See* N.Y. PENAL LAW § 400.00 (McKinney 2022) (omitting any information on how being a member of a social media group impacts the application).

334. *See id.* (turning over access to an applicant’s social media accounts broadly will show which accounts the applicant follows and the groups they have joined).

335. *See id.*

336. *See Scales*, 367 U.S. at 227.

337. *See* Ledur & Rabinowitz, *supra* note 9.

338. *See Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022), *appeal filed*, No. 22-CV-2908 (2d Cir. Nov. 9, 2022).

339. Due to ongoing litigation regarding the CCIA, there is a possibility that an injunction will be granted against the social media provision based on constitutional grounds. *See id.* If the law is enjoined, the state should respond by removing the provision requiring that applicants turn over their social media accounts and instead have the officials run their own search, integrating online statements as an indication of the applicant’s conduct. *See* 18 PA. STAT. AND CONS. STAT. ANN. § 6109 (West 2011) (allowing a sheriff to “investigate whether the applicant’s character . . . [is] such that the applicant will not be likely to act in a manner dangerous to public safety”). This Pennsylvania statute is cited by the Court in *Bruen* as one of the forty-three shall-issue jurisdictions, despite the discretion given to officials. *See* N.Y. State Pistol Ass’n, Inc. v. Bruen, 142 S. Ct. 2111, 2123 n.1 (2022).

Opponents of the CCIA may respond to the following suggestions by arguing that denying a permit based on a threatening statement, without evidence that the individual intends to act on it, is not sufficient.³⁴⁰ However, making a threat alone is a crime.³⁴¹ Thus, if it is well-established that making a threat without taking additional steps to act on it can result in criminal penalties, it follows that a state may also deprive an individual of a permit for the same action.³⁴²

Under the current law, speech that passes the Supreme Court's test for a true threat should always be permissible grounds for denying an applicant a permit.³⁴³ In addition, even speech that falls short of a true threat but that serves as evidence of future danger should be considered.³⁴⁴ This is because, although there may be instances when one piece of evidence is not sufficient on its own to pass the threshold, these pieces of evidence, cumulatively, (including an individual's online associations) can be enough.³⁴⁵ Further, applying the rationale of red flag laws to the permit application context and allowing licensing officials to base their decision on online speech will be beneficial for protecting public safety, given the proven effectiveness of red flag laws.³⁴⁶ Therefore, implementing the following revisions together can help safeguard the CCIA and the community.³⁴⁷

A. *New York Should Rewrite the Statute to Resemble the Shall-Issue Regimes Left Unaffected by Bruen*

This Note first recommends that New York rewrite its statute to incorporate the language of the subset of shall-issue jurisdictions identified in *Bruen* whose permit licensing statutes still include discretionary criteria.³⁴⁸ For example, the *Bruen* Court cited Connecticut's statute, which gives officials discretion to deny a permit to a person who is not "suitable."³⁴⁹ Yet, the Court nonetheless identified Connecticut as a shall-issue regime because this statute disqualifies only those "whose conduct has shown them to be lacking the essential character or temperament necessary to be entrusted with a weapon."³⁵⁰

340. See *supra* Part II.A.2.

341. See N.Y. PENAL LAW § 240.30(1)(a) (McKinney 2022); see also *supra* Part II.A.2.

342. See *infra* Parts III.C–D.

343. See *supra* Part I.B.1 (explaining what a "true threat" is); *supra* Part II.A.1.

344. See *supra* Part II.A.2.

345. See *infra* Parts III.C–D.

346. See Merino, *supra* note 281.

347. See *supra* Part II.A.2 (discussing the effectiveness of red flag laws).

348. See *supra* text accompanying note 91 (discussing Justice Breyer's dissent); see also *N.Y. State Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2123 (2022); *CONN. GEN. STAT. § 29-28(b)* (2022); *DEL. CODE ANN. tit. 11, § 1441* (2022); *11 R.I. GEN. LAWS § 11-47-11* (2002).

349. *Bruen*, 142 S. Ct. at 2123 n.1 (quoting *Dwyer v. Farrell*, 475 A.2d 257, 260 (Conn. 1984)); *CONN. GEN. STAT. § 29-28(b)*.

350. *Bruen*, 142 S. Ct. at 2123 n.1 (quoting *Dwyer v. Farrell*, 475 A.2d 257, 260 (Conn. 1984)); *CONN. GEN. STAT. § 29-28(b)*.

Therefore, to comply with *Bruen*, New York should rewrite the “good moral character” provision. Licensing officials should grant a permit to every individual who satisfies the requirements, provided that the official finds that the applicant intends to use the firearm for lawful reasons.³⁵¹ The licensing official must deny a permit if the evidence shows that the applicant lacks “the essential character, temperament, and judgment necessary to be entrusted with a weapon.”³⁵² By rewriting the statute, New York can change how the regime works in practice. Granting a permit to every individual except those who are found to have improper character is expressly permitted by *Bruen*—unlike the current regime, which grants a permit only to an applicant who can prove that they have good character.³⁵³

B. Discerning What Type and Amount of Evidence Is Sufficient

When analyzing an applicant’s social media accounts, licensing officials may come across various types of online speech.³⁵⁴ For instance, they may encounter an applicant who has posted a comment saying “you’re dead” or who has “retweeted” another user’s violent statement.³⁵⁵ These examples in isolation may not, on their own, rise to the level of a true threat or suggest that the individual has a clear propensity to use a weapon for an unlawful purpose.³⁵⁶ However, devising an exact formula to determine the type and amount of evidence needed before an official can deny a permit is difficult. Currently, there is no guidance from courts as to what is considered sufficient.³⁵⁷

The process of issuing concealed carry permits arguably more closely resembles the process for confiscating firearms under red flag laws.³⁵⁸ Thus, instead of requiring evidence of an intent to harm an identifiable target (a true threat), the comparison between red flag laws and the permit application process suggests that evidence of a more general disposition to harm others is sufficient.³⁵⁹ Permit applications and red flag laws both consider the

351. See N.Y. PENAL LAW § 400.00(1)(b) (McKinney 2022).

352. *Id.* This new language would permit the official to consider only (1) whether the applicant’s conduct violates the nondiscretionary criteria of § 400.00(1), such as if the applicant has a felony conviction; or (2) whether the applicant’s speech, evaluated cumulatively, suggests that the applicant will pose a danger to himself or others. See *id.* § 400.00(1); see also *infra* Part III.C. The rewritten statute also comports with *Bruen* by creating a standard that presumes that everyone can be granted a permit to carry a firearm in public, unless shown that they are likely to endanger others beyond self-defense. See *supra* Part I.A.2.

353. See *supra* Part I.A.2 (explaining the Supreme Court’s decision in *Bruen*).

354. See *supra* Part II.A.1 (discussing the spectrum of posts from jokes to threats).

355. See *supra* note 251 and accompanying text (explaining the common use of exaggeration online); see also *supra* note 323 and accompanying text (discussing the case of Safya Yassin).

356. See *supra* Part II.A.1 (emphasizing the need for a totality-of-the-circumstances approach).

357. See *supra* note 270 and accompanying text (referring to the difficulty in determining what is considered a true threat).

358. See *supra* Part II.A.2.

359. See *supra* note 302 and accompanying text.

consequences of a certain individual possessing a firearm based on an evaluation of that person's character and the likelihood of using the firearm for unlawful reasons.³⁶⁰ Therefore, licensing officials should be able to interpret speech more broadly as evidence of future danger when issuing permits than in the context of a criminal prosecution.³⁶¹ Officials should be able to consider speech that might not rise to the level of a "true threat" but that may show that the applicant has a clear intention to use a weapon illegally, even against those who may not be identified.³⁶² As there are more signs suggesting that a post is moving down the spectrum—away from being a joke and closer to resembling a threat—there is more reason to understand the online speech as evidence that the applicant will use the firearm to hurt others in the future.³⁶³

Critics may argue that protected speech should not be examined as part of the decision-making process because an applicant who is denied a permit does not have the same recourse available as an individual who has their firearm confiscated under an ERPO.³⁶⁴ Even though applicants have the ability to appeal, the law does not mention whether an applicant can reapply after a license denial is upheld.³⁶⁵ To combat potential arguments by critics, a licensing official should be required to rigorously weigh different types of posts as evidence that the applicant will use the firearm for reasons other than in self-defense.³⁶⁶

An example of when an official can make a more straightforward decision occurs when the official finds multiple posts that threaten a group.³⁶⁷ Photos of firearms accompanied by statements indicating that an applicant plans to intimidate or harm others can be seen as strong evidence that they pose a future danger and do not have suitable character to be issued a permit.³⁶⁸ Conversely, an applicant who has not posted anything concerning but is a member of a Facebook group that promotes hateful, antagonistic views likely cannot be denied a permit without violating the First Amendment (absent

360. *See* Calvert & Hampton, *supra* note 275, at 353.

361. *See id.*

362. For example, although the gunman who killed twenty-one people at a Texas elementary school did not identify a specific target, he did post photos on Instagram and write, "[k]ids be scared," on his TikTok profile. *See* Seitz, *supra* note 36. Although this may not rise to the level of a true threat under a criminal statute and would thus be constitutionally protected, the photo and statement together indicate that the speaker *intends* to use the firearm for an unlawful purpose (not for self-defense reasons). *See id.*

363. *See* *Watts v. United States*, 394 U.S. 705, 707 (1969); *see also supra* Part II.A.2.

364. *See* Sherman, *supra* note 272 (explaining that an ERPO is only a temporary measure).

365. *See* N.Y. PENAL LAW § 400.00(4-a) (McKinney 2022).

366. Because ERPOs that last longer than six months require a higher standard of proof, decisions denying an individual a concealed carry permit, which are more permanent in nature than ERPOs, would also likely impose a similar higher standard. *See* Johnson, *supra* note 277; *see also infra* Part III.C (arguing for a clear and convincing standard); *infra* Part III.D (arguing for a totality-of-the-circumstances approach).

367. *See* Seitz, *supra* note 36.

368. *See id.* ("When somebody starts posting pictures of guns they started purchasing . . . [i]t absolutely is a cry for help. It's a tease: can you catch me?").

further indication that the applicant plans to act on those beliefs).³⁶⁹ Situations such as an applicant posting a photo holding a firearm and then weeks later also “liking” another user’s post expressing disdain and animosity toward a political figure will be the most challenging to resolve.

As another example, in *Elonis*, if Elonis were to apply for a permit in New York, his application should be denied because of the threatening lyrics he posted, even with a disclaimer, in combination with his other posts.³⁷⁰ However, Elonis’s lyrics were meant to mimic the style of the rapper Eminem, who also “rapped about killing his ex-wife.”³⁷¹ Yet, it is unlikely that anyone would take Eminem seriously because they would view the lyrics as part of his artistry.³⁷² Without this context, these same lyrics posted by an ordinary person would cause licensing officials to struggle with making the determination of whether these statements are threats or not.³⁷³

Although it is complex to create a precise formula to determine the amount of evidence that suffices to find that an applicant poses a danger, teaching licensing officials how to decipher social media posts can mitigate the risk of misinterpretation. As a result, licensing officials should have to undergo training by experts.³⁷⁴ Experts could explain how to interpret common abbreviations, the limitations of certain platforms, the likely audience, and online conventions that are not common in everyday formal rhetoric.³⁷⁵ These experts can develop clearer guidelines or criteria that licensing officials should implement in their decision-making process.³⁷⁶ This recommendation will limit the discretion licensing officials have and help ensure that the officials are considering only posts that serve as evidence of future danger when making this determination.

369. See Astvasadoorian, *supra* note 329, at 281 (explaining that an individual must “actively participate” to further a group’s “unlawful goal” before the state can regulate their conduct without violating the First Amendment); see also *Scales v. United States*, 367 U.S. 203 (1961) (holding that, to avoid a constitutional challenge, a violation of the Smith Act needs to involve an individual actively pursuing a group’s unlawful activity as opposed to merely being a member).

370. A licensing official weighing Elonis’s statements and photos together would likely be able to prove that his application includes sufficient evidence of future danger. See generally *Elonis v. United States*, 575 U.S. 723 (2015) (detailing the types of posts examined in the case, such as the photo of him with a knife to his coworker’s throat and his commentary about school shootings).

371. *Id.* at 731; see also Scheffey, *supra* note 244, at 895.

372. See Scheffey, *supra* note 244, at 895; see also *supra* Part II.A.1 (discussing the importance of a totality-of-the-circumstances approach due to social media being an expressive outlet); *infra* Part III.D.

373. See *supra* note 262 and accompanying text.

374. See Lidsky & Norbut, *supra* note 242, at 1922 n.213 (explaining that expert testimony interpreting other types of “jargon,” such as “drug slang,” is routinely admitted in criminal trials, and thus, it follows that experts explaining how to interpret “social media speech” should also be allowed).

375. Expert witnesses are often allowed to testify during criminal trials as to topics that may be difficult for the general public to understand on their own. Therefore, it would not be atypical to allow experts to offer their knowledge about how to understand online content. See *id.* at 1924–25.

376. See *id.* at 1923.

In this setting, license denials should not be limited only to speech that rises to the level of a true threat or incites violence. This stringent requirement would force officials to grant permits to some applicants who have demonstrated a propensity for violence just short of making a threat or inciting violence. However, the state also cannot be given too much leeway in denying permits without facing the risk of violating an individual's First Amendment right to speak freely and to associate and of violating the Second Amendment right protected in *Bruen*.³⁷⁷ Therefore, the licensing official should have to meet a high burden to prove that these posts indicate that the individual plans to use the weapon for an unlawful purpose when viewed in the totality of the circumstances.³⁷⁸

C. Licensing Officials Should Have to Prove by Clear and Convincing Evidence That the Applicant Poses a Danger

The only court to address the issue regarding the evidentiary standard that should be used in the permit application context has required the state to show by a preponderance of the evidence that an applicant is likely to endanger themselves or others.³⁷⁹ However, given the importance of balancing an individual's First and Second Amendment rights against protecting public safety, the appropriate standard should be for the state to prove by clear and convincing evidence that the applicant poses a danger.

As an analogy, this situation can be compared to the high standard used in trials for defamation of public officials.³⁸⁰ Similar to the Court's reasoning in *Sullivan* that it is important to establish a standard that respects and upholds the delicate balance of conflicting rights and interests, here too is a situation that requires a heightened standard.³⁸¹ In requiring applicants to turn over social media accounts to receive a concealed carry permit, the state also must balance conflicting rights. In this context, a licensing official has the task of reconciling the conflict between protecting public safety and upholding an applicant's First Amendment right to freedom of speech and association and their Second Amendment right to possess a firearm in public for self-defense. Determining whether an applicant should receive a permit does not rise to the same level of severity as a criminal trial in which life and liberty are at stake (which triggers the burden of proving guilt beyond a reasonable doubt). However, the importance of protecting individuals' First and Second Amendment rights suggests that the standard needs to be higher than a preponderance of evidence. Thus, implementing the intermediate clear and convincing standard is appropriate and would further prevent an official from arbitrarily denying an individual a permit.³⁸²

377. See generally *N.Y. State Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022).

378. See *infra* Parts III.C–D.

379. See *Antonyuk II*, No. 22-CV-0986, 2022 WL 5239895, at *9 (N.D.N.Y. Oct. 6, 2022).

380. See *supra* note 178 and accompanying text.

381. See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 282 (1964) (balancing common-law libel protection and the First Amendment rights of the press).

382. The clear and convincing standard is also utilized in the context of red flag laws. See *supra* note 366 and accompanying text.

In addition, requiring that applicants have a requisite mens rea is reasonable in the permit application context, given the heightened risk of depriving an individual of a constitutional right. For criminal statutes that are silent about what level of mens rea is required, as was the case in *Elonis*, it is typical to infer nothing “more than recklessness is needed.”³⁸³ Yet, the majority in *Elonis* declined to address whether “recklessness” would be sufficient.³⁸⁴ However, in his concurring opinion, Justice Alito suggested that “someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct.”³⁸⁵

In the permit application setting, requiring that the state prove by clear and convincing evidence that the applicant was, at a minimum, reckless would involve proving that the applicant consciously disregarded the known risk that an average person would interpret the post as a threat. Based on Justice Alito’s concurrence and the fact that permit applications do not rise to the same level of criminal prosecutions, it seems more appropriate to infer that recklessness would suffice, as opposed to requiring knowledge or intent.³⁸⁶ Because an individual who acts recklessly recognizes and chooses to ignore the risk that they are putting reasonable people in fear, they arguably do not have the essential character necessary to be entrusted with a weapon. Ignoring this risk raises the concern that the individual will also consciously ignore other significant risks, such as using a firearm to endanger and put others in fear.

D. Officials Should Adopt a Totality-of-the-Circumstances Approach

To further limit the discretion given to licensing officials,³⁸⁷ the rewritten statute should require officials to adopt a totality-of-the-circumstances approach to interpreting the content on an applicant’s social media account.³⁸⁸ This should include reviewing all posts that the individual has made in the last three years, the comments they have made on others’ posts, the groups of which they are a member, the other accounts that they follow, the contexts in which posts were made, and the nature of the platforms.³⁸⁹ Licensing officials can consider what the applicant has “liked” and “retweeted,” but this should be only one of many factors used in this

383. *Elonis v. United States*, 575 U.S. 723, 745 (2015) (Alito, J., concurring).

384. *See id.* at 725 (majority opinion).

385. *Id.* at 745–46 (Alito, J., concurring).

386. In the permit application setting, a recklessness floor standard is more appropriate, despite scholars’ recommendation that the judge in a criminal trial find that the defendant “either purposely or knowingly” made a reasonable person view the statement as a threat. *See Lidsky & Norbut*, *supra* note 242, at 1926. In the criminal trial context, a “purposely or knowingly” standard is appropriate, given that life and liberty are at stake. *See id.*

387. *See Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700, at *52 (N.D.N.Y. Nov. 7, 2022) (“[T]he requirement that license applicants reveal their anonymous social media handles may present First Amendment concerns resulting from . . . an exercise of the extraordinary discretion conferred upon a licensing officer.”).

388. *See supra* note 129 and accompanying text; *see also Watts v. United States*, 394 U.S. 705, 707 (1969).

389. *See supra* notes 253–58 and accompanying text; *see also supra* note 295.

determination.³⁹⁰ Not only is this approach consistent with *Watts*, but it would also remove some of the discretion currently given to licensing officials.³⁹¹ This recommendation would help mitigate the risk of an official misinterpreting an otherwise harmless post when determining whether to issue a permit.

New York should also adopt a procedure for determining online threats in the permit application setting, similar to the procedure suggested for criminal trials.³⁹² Once licensing officials find a concerning post, the state should have to prove by clear and convincing evidence that the applicant poses a danger because they knew or consciously ignored the risk that the post would put others in fear.³⁹³ If the state meets this standard, the burden should then shift to the applicant, who should have the opportunity to invoke a defense.³⁹⁴ The applicant can then present evidence as to why these statements or photos were not threats when examined in their full context.³⁹⁵ The licensing official, considering all the information, can then decide whether the applicant should receive a permit or not. If denied, the applicant should retain the ability to appeal the decision.³⁹⁶

CONCLUSION

New York's updated legislation jeopardizes individuals' First and Second Amendment rights. To avoid a similar outcome to the decision from the Northern District of New York,³⁹⁷ the legislature should rewrite the statute so that it resembles the shall-issue regimes that the Court approved in *Bruen*.³⁹⁸ To protect applicants' constitutional rights, before a state denies an individual a permit, it should have to prove by clear and convincing evidence that an applicant will use the weapon to endanger themselves or others for reasons other than self-defense. When interpreting what constitutes a threat, the official should have to prove that the speaker knew that the online post in question would put a reasonable person in fear or that they consciously disregarded this risk. To meet this burden, the official should utilize a totality-of-the-circumstances approach when reviewing an applicant's social media accounts.³⁹⁹

These recommendations will help protect the law from constitutional challenges and comport with *Bruen*. Having experts create a list of criteria

390. See *supra* note 336 and accompanying text.

391. See *Watts*, 394 U.S. at 707; see also *supra* note 226 and accompanying text.

392. See Lidsky & Norbut, *supra* note 242, at 1925–26; see also *supra* Part II.A.1 (outlining Professor Lidsky and Norbut's suggested procedure).

393. See *supra* Part III.C.

394. See Lidsky & Norbut, *supra* note 242, at 1925.

395. See *id.* (explaining that “context affects both the mens rea and actus reus of the offense”).

396. See N.Y. PENAL LAW § 400.00(4)(a) (McKinney 2022) (giving the applicant the ability to appeal a denial).

397. See *Antonyuk III*, No. 22-CV-0986, 2022 WL 16744700 (N.D.N.Y. Nov. 7, 2022).

398. See *N.Y. State Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2161 (2022) (Kavanaugh, J., concurring).

399. See *Watts v. United States*, 394 U.S. 705, 707 (1969).

for licensing officials to use—in addition to the high burden that the state must satisfy to prove that an individual poses a danger—limits licensing officials' discretion. Incorporating all of these recommendations will allow states to continue to take aggressive steps to protect the community.