No. 23-1900

In The United States Court of Appeals
For the Third Circuit

RONALD KOONS, ET AL.,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL NEW JERSEY, ET AL.,
Defendants-Appellants.

AARON SIEGEL, ET AL.,
Plaintiffs-Appellees,

v.

ATTORNEY GENERAL NEW JERSEY, ET AL.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(Nos. 22-cv-07464 & 22-cv-07463 (RMB))

PLAINTIFFS-APPELLEES' RESPONSE IN OPPOSITION TO DEFENDANTS-APPELLANTS' MOTION FOR STAY PENDING APPEAL

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INTRODUCTION

In an exhaustive 230-page opinion, the district court enjoined enforcement of several provisions of New Jersey law, the vast majority of which were enacted in direct response to and in an apparent attempt to undercut the effects of the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). As relevant to the *Koons* plaintiffs, the district court enjoined enforcement of New Jersey's prohibition on the carrying of firearms by licensed citizens in parks, beaches, and recreation facilities, in publicly owned libraries and museums, in bars and restaurants where alcohol is served, entertainment facilities, and certain health care facilities. The court additionally enjoined enforcement of New Jersey's Anti-Carry Default to the extent it banned firearms on property held open to the public and New Jersey's ban on carrying operable firearms in vehicles. The district court did so after a careful analysis of each provision and determining for each it was not "consistent with the Nation's historical tradition of firearm regulation." *Koons v. Platkin*, No. 1:22-cv-7464, Dist. Ct. Op. at 119 (D. N.J. May 16, 2023), Dkt. 124 (quoting *Bruen*, 142 S. Ct. at 2130) ("Op.").

The State, in its request for a stay pending appeal, takes the opposite approach, eschewing the careful and targeted historical analysis that the Second Amendment commands. Instead, the State asks this Court to adopt a simplistic approach, claiming that so long as it can get to a certain number of claimed historical analogues, the

Court need not look any further and should find the State's current laws constitutional. State's Mot. to Stay at 7 ("State Mot."). Yet *Bruen* counsels that the historical burden on the State is much more rigorous. The State cannot point to just *any* laws from the past. Instead, historical restrictions on the right to bear arms must be "well-established," "representative," "relevantly similar," and grounded in Founding era understandings to be able to "justify" a modern restriction. *Bruen,* 142 S. Ct. at 2130, 2132–33. Because the Second Amendment "presumptively protects" Plaintiffs' conduct, restrictions on where Plaintiffs can carry are "exceptional circumstances." *Id.* at 2130, 2138.

The State did not meet its burden before the district court, and it cannot meet it in this Court, thus a stay pending appeal should be denied. Moreover, given the irreparable harm that Plaintiffs will suffer so long as the challenged provisions are in effect, the equities do not favor a stay. Accordingly, the Court should deny Defendants' motion for a stay pending appeal.

FACTUAL BACKGROUND

In response to the Supreme Court's decision in *Bruen*, the State greatly restricted where licensed citizens may carry their firearms for self-defense. 2022 N.J. Sess. Law Serv. ch. 131. The newly enacted Chapter 131 specifies 25 categories of places where it is a crime "to knowingly carry a firearm." *See id.* § 7(a). The *Koons* Plaintiffs did not challenge all of these now-prohibited areas, but instead focused on

those that most egregiously interfere with their day-to-day lives. The Koons plaintiffs challenged the ban on parks, beaches, and recreation facilities, publicly owned museums and libraries, bars and restaurants where alcohol is severed, entertainment facilities, airports (before TSA security), public transportation hubs, and the presumptive ban on private property. The *Koons* plaintiffs also challenged the ban on carrying operable firearms in vehicles.

After granting a temporary restraining order in both *Koons* and the related *Siegel* case, the district court issued a preliminary injunction on all of these areas save private property not open to the public, public transportation hubs, and airports.

ARGUMENT

To demonstrate that a stay of the district court's preliminary injunction order is warranted, the State must demonstrate that it is likely to succeed on the merits, that it will be irreparably injured absent a stay, and that the balance of equities are in favor of granting a stay. *Nken v. Holder*, 556 U.S. 418, 434 (2009); *In re Revel AC, Inc.*, 802 F.3d 558, 568 (3d Cir. 2015). The State has not done so.

I. Plaintiffs are likely to succeed on the merits.

A. Plaintiffs' conduct is presumptively protected by the text of the Second Amendment.

"[T]he Second Amendment guarantees a general right to public carry," meaning ordinary, law-abiding citizens may "'bear' arms in public for self-defense." *Bruen*, 142 S. Ct. at 2135. If the plaintiffs' proposed course of conduct falls within

the Second Amendment's plain text, then "the Constitution presumptively protects that conduct" and the burden falls on the State to prove its modern restriction is consistent with this Nation's historical tradition of firearm regulation. *Id.* at 2126.

In this case, the textual inquiry is straightforward. The Supreme Court has defined all of the Second Amendment's key terms. "The people" means "all Americans"; "Arms" includes "all instruments that constitute bearable arms"; and, most relevant here, to bear simply means to "carry." *District of Columbia v. Heller*, 554 U.S. 570, 580–82, 584 (2008). "Nothing in the Second Amendment's text draws a home/public distinction," *Bruen*, 142 S. Ct. at 2134—or for that matter, any distinction between locations at all. That makes the Second Amendment unlike other Amendments. *See* U.S. CONST. amend. III; U.S. CONST. amend. IV. And it means that any locational restrictions on Second Amendment rights must come from history, not from the plain text.

The Supreme Court's binding determination of the meaning of these words and phrases definitively resolves the question of whether Plaintiffs' proposed conduct is presumptively protected by the Second Amendment. Plaintiffs and their members are Americans who seek to carry bearable arms for self-defense. As in *Bruen*, these undisputed facts end the textual inquiry: "the plain text of the Second Amendment protects [Plaintiffs'] proposed course of conduct—carrying handguns publicly for self-defense." 142 S. Ct. at 2134. As the district court explained, "[t]he

right to armed self-defense follows the individual everywhere he or she lawfully goes." Op. at 128. Accordingly, "the burden falls on [the State] to show that [the challenged ban] is consistent with this Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2135.

B. Controlling historical considerations under *Bruen.*

i. Historical analogues must be "well-established," "representative," and "relevantly" similar to the challenged law.

First, the relevant time period for the historical analogue must be the Founding, centering on 1791. *Bruen*, 142 S. Ct. at 2135–36; *see also* Mark W. Smith, *'Not all History is Created Equal': In the Post-Bruen World, the Critical Period for Historical Analogues Is when the Second Amendment Was Ratified in 1791, and not 1868*, SSRN (Oct. 1, 2022), https://bit.ly/3CMSKjw. That is because "'[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35). Although the Court in *Bruen* noted an academic debate surrounding whether courts should look to 1868 and Reconstruction (when the Fourteenth Amendment was adopted), the Court found no need to address the point as the result with respect to carry was the same. *Id.* at 2138 ("[T]he public understanding of the right to keep and bear arms in both 1791 and 1868 was, *for all relevant purposes*, the same with respect to public carry." (emphasis added)). But the analysis of the Court was focused on 1791. *See Worth v. Harrington,* No. 21-cv-1348, 2023 WL 2745673, at *11 (D. Minn. Mar. 31, 2023)

(noting the "rather clear signs that the Supreme Court favors 1791 as the date for determining the historical snapshot of 'the people' whose understanding of the Second Amendment matters").

The emphasis on Founding era evidence is fully in accord with past Supreme Court precedent. For example, in *Espinoza v. Mont. Dep't of Rev.*, the Court held that "more than 30" provisions of state law enacted "in the second half of the 19th Century" could not "evince a tradition that should inform our understanding of the Free Exercise Clause" when those provisions lacked grounding in Founding era practice. 140 S. Ct. 2246, 2258–59 (2020); *see also Ramos v. Louisiana*, 140 S. Ct. 1390, 1396 (2020); *Timbs v. Indiana*, 139 S. Ct. 682, 687–88 (2019); *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019); *Virginia v. Moore*, 553 U.S. 164, 168 (2008).

This focus on the Founding follows inexorably from the fact that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Bruen*, 142 S. Ct. at 2137. In *McDonald v. City of Chicago*, the Court decisively rejected a different standard for States under the Second Amendment, holding that "incorporated Bill of Rights protections are all to be enforced against the States under the Fourteenth Amendment according to the same standards that protect those personal rights against federal encroachment" 561 U.S. 742, 765 (2010) (internal quotation marks omitted). There should be no dispute that 1791 is controlling as to the federal

government and, since the standard is the same, that standard is likewise applicable to the States.

Second, historical analogues must be "well-established" and "representative." Historical "outlier" requirements of a few jurisdictions or of territorial governments are to be disregarded. *Bruen*, 142 S. Ct. at 2133, 2153, 2147 n.22 & 2156. This means regulations from only a handful of states or those that cover only a small portion of the population or only persist for a few years are not enough to demonstrate that modern regulations are consistent with the Second Amendment. *Id.* at 2155. *Bruen* categorically rejected reliance on laws enacted in the Territories, including expressly "Arizona, Idaho, New Mexico, Oklahoma," holding that such laws "are *most unlikely* to reflect 'the origins and continuing significance of the Second Amendment'" *Id*. at 2154 (quoting *Heller*, 554 U.S. at 614) (emphasis added).

Third, the historical analogues must be "relevantly similar," which is to say that they must burden ordinary, law-abiding citizens' right to carry for self-defense in a similar manner and for similar reasons. *Id*. at 2132. *Bruen* held that the inquiry into whether an analogue is proper is controlled by two "metrics" of "how and why" any restriction was historically imposed during the Founding era. *Id.* at 2133. "[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are '*central*' considerations when engaging in an analogical inquiry." *Id.* (emphasis in original).

ii. Recognized sensitive places.

The Supreme Court has endorsed only three sensitive places "where weapons were altogether prohibited," naming "legislative assemblies, polling places, and courthouses." *Id*. The Court stated explicitly that "courts can use analogies to *those* historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." *Id.* (emphasis added). What ties all these locations together and therefore what is relevant is the long tradition of the government providing comprehensive security, *see, e.g.* THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 271 (Grimke, ed. 1790) ("The said sheriffs shall by themselves, or their lawful deputies respectively, attend all the courts hereby appointed, or directed to be held, within their respective districts."),[1] because, for example,

[1] Other examples of Founding Era regulations in these places: VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND: NOVEMBER SESSION 1791, at *2 (Green ed., 1795) (appointing sergeant at arms and door-keeper for state legislature); PENNSYLVANIA STATUTES AT LARGE, VOLUME X: 1779-81, 378 (Stanley Ray ed., 1904) ("sergeant-at-arms" and "door-keeper" for legislature); 1 LAWS OF THE STATE OF NEW YORK 176 (2d ed., Albany: Websters & Skinner 1807) (requiring during court "all justices of the peace, coroners, bailiffs, and constables within their respective counties, that they be then and there in their own persons… . And the said respective sheriffs and their officers shall then and there attend in their own proper persons."); ABRIDGEMENT OF THE PUBLIC PERMANENT LAWS OF VIRGINIA 42 (Davis ed., 1796) (court's "serjeant at arms"); A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, 1800 Ga. Laws 611 (Watkins ed., 1800) ("[T]he sheriff of each county or his deputy, is required to attend at such elections, for the purpose of enforcing the orders of the presiding magistrates in preserving good order."); 1 LAWS OF THE STATE OF NEW JERSEY 36 (Bloomfield ed.,

government officials are "at acute personal risk of being targets of assassination," David B. Kopel & Joseph G.S. Greenlee, *The "Sensitive Places" Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 290 (2018); *see also Hardaway v. Nigrelli*, No. 22-cv-771, 2022 WL 16646220, at *14 (W.D.N.Y. Nov. 3, 2022).At the Founding, comprehensive security meant officials who were armed and able to control every point of access. Today, it means security akin to that provided before entering courthouses or the TSA-secured areas of an airport, i.e., armed guards and metal detectors at a minimum at every point of entry. *See* Op. at 188. ("Airports have many security measures such as Transportation Security Administration (TSA) officers, air marshals, police officers, metal detectors, and luggage scanners that all check people and their baggage for weapons and dangerous devices, like explosives."); *Hardaway*, 2022 WL 16646220, at *14 (explaining sensitive places are "typically secured locations"). That the government can prohibit firearms in these sensitive places makes sense. The historic central purpose of the Second Amendment is ensuring Americans can be "armed and ready" for "ordinary self-defense needs." *Bruen*, 142 S. Ct. at 2150. But when the government secures a location and protects Americans, there is less of a need for ordinary, law-abiding Americans to be ready to defend themselves.

1811) (polling places); 2 LAWS OF THE STATE OF DELAWARE 984 (Samuel & John Adams, eds., 1797) (polling places).

The State argues that the district court erred by not broadly holding that sensitive places extend to any place where "children or vulnerable people gather." State Mot. at 10. For one, the evidence at the Founding suggests firearms restrictions in schools only applied to students or were otherwise justified by governments' *in loco parentis* authority. *See* Amicus Br. of Ctr. for Human Liberty at 20–22, *Antonyuk v Nigrelli*, No. 22-2908 (2d Cir. Jan. 17, 2023), Doc. 313 (collecting historical restrictions in schools). But the State does not seek to exercise such a limited authority with its widespread bans on ordinary, law-abiding adults. For another, "sensitive places" cannot be construed "too broadly" so as to authorize restrictions that "would in effect exempt cities" or entire States "from the Second Amendment." *Bruen*, 142 S. Ct. at 2134. Sensitive places may not be used to "eviscerate the general right to publicly carry arms for self-defense." *Id*. To hold that the State may bar the carrying of firearms by ordinary, law-abiding citizens in every place "where children or vulnerable gather" would do just that. State Mot. at 10. After all, governments may bar the carrying of firearms in only "*exceptional* circumstances." *Bruen*, 142 S. Ct. at 2138 (emphasis added). The exception cannot become the rule. Indeed, up to the Founding era the government often *required* individuals to be armed at religious services and other places where people gathered. Op. at 153–56.

iii. There is no government proprietor exception to the Second Amendment.

The State attempts to take a shortcut through this historical inquiry by asserting that "the Legislature can restrict firearms at places where the Government is the proprietor." State Mot. at 11. The State argues that the district court "provided little first-principles reasoning" for why such an exception should not exist. *Id.* at 12. But it is the State that fails to explain how its atextual government-as-proprietor exception is consistent with the first principles of the Second Amendment, namely that it is history and analogies to historical regulations alone that demonstrate the constitutionality of modern firearms restrictions. Pre-*Bruen* caselaw that did not engage in the requisite historical inquiry cannot support its claim. *Id*. at 11–13 (citing *United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019); *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1123 (10th Cir. 2015)).

The State additionally cites cases involving the Commerce Clause and preemption—neither involved the Second Amendment nor involved the imposition of criminal penalties for violations of rules. *Id*. at 12 (citing *Reeves v. Stake*, 447 U.S. 429, 440 (1980) (state selling cement); *Bldg. & Constr. Trades Council of Metro. Dist. v. Associated Builders & Contractors of Mass./R.I., Inc.*, 507 U.S. 218, 221 (1993) (state hiring contractor)). The State has not explained how a government entity can claim to be exercising the role of a private proprietor when it imposes criminal penalties that only sovereign authority can impose. *Cf. Marsh v. State of*

Ala., 326 U.S. 501, 504 (1946). Because it cannot. As with other rights, the State does not have a blank check to restrict Plaintiffs' Second Amendment rights under the guise of "proprietorship." *See United States v. Kokinda*, 497 U.S. 720, 725 (1990); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). Instead, the State is limited by the relevant constitutional provision and implementing case law. Both here and below, the State presented *zero* historical evidence of "proprietorship" serving as a basis for the *government* to exclude firearms in a manner consistent with the Second Amendment. Under *Bruen*, that is the end of the matter.

C. The Anti-Carry Default is inconsistent with this Nation's historical tradition of firearms regulation.

To defend the Anti-Carry Default, the State points to the same evidence that the district court rightly found to be insufficient to demonstrate it is constitutional. To begin with, Plaintiffs are not challenging property owners' right to exclude firearms owners, so the State's rhetoric regarding the solicitude of the right to exclude is wholly beside the point. What is at issue is whether the *State* can interpose in property owners' decision to change the default rule for the first time in New Jersey history and for only the second time in U.S. history (the first being just six months earlier in New York). The answer is no because history is entirely on Plaintiffs' side.

The Anti-Carry Default is the *exact opposite* of this Nation's traditional

regulatory approach, which has entrusted "private property owners" with principal responsibility to exercise the "right to exclude others from their property" throughout American history. *Christian v. Nigrelli*, No. 1:22-cv-695, 2022 WL 17100631, at *9 (W.D.N.Y. Nov. 22, 2022). The historical default rule has been that "carrying on private property" is "generally permitted absent *the owner*'s prohibition." *Id.* (emphasis added). This concept is basic to the law of trespass. "[T]the well-developed concept of implied license … operates to grant permission to enter another's premises according to custom or other indicia of consent." Op. at 123–24. Accordingly, the traditional rule has been that, unless the owner affirmatively "withdraw[s] consent," the right to carry for self-defense thus extends to private property open to the public. *Id*. at 128.

Even the academic proponents behind the Anti-Carry Default have conceded that it is a novel and significant departure from this Nation's history of firearm regulation. In their book expanding on anti-carry default rules, the proponents stated that "[a]n implied condition of every invitation [onto another's property] is that the invitee is welcome to bring a firearm." *Id*. at 124 n.35. In fact, as of 2020, "*no state* ha[d] adopted generalized 'no carry' defaults for retail establishments." Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J L. MED. & ETHICS 183 (2020) (emphasis added).

In the Second Amendment analysis, the fact a law is unprecedented is nearly dispositive that it is unconstitutional. The State's historical evidence below comprised of hunting regulations from the Founding and hunting regulations from Reconstruction. Neither set of enactments are sufficient analogues because they do not burden the right to self-defense for similar reasons ("why") or in a similar manner ("how") as the Anti-Carry Default.

For instance, the State's cited Founding era laws were hunting regulations, which is evident from the substantive provisions that make repeated references to hunting, the season for deer, and preserving the rights of property owners to hunt on their own land. *See* Op. at 132–141 (discussing the text and purpose of provisions from New Jersey, Pennsylvania, New York, Massachusetts, and Maryland).

Moreover, how the State's cited Founding era laws burdened the right to self-defense is materially different than the Anti-Carry Default. While the Anti-Carry Default applies to all private property open to the public, the statutes that the State presented were limited to trespassing on land, rather than entering into taverns, shops, or dwelling houses. For instance, New Jersey's 1722 statute, New York's 1763 law, and Pennsylvania's 1721 statute all refer to "inclosed Land" when referencing carrying guns. *See id*. at 132, 139–40. As the Supreme Court of Judicature of New Jersey explained in 1842, "improvements is a legal and technical word, and means inclosures, or inclosed fields: lands fenced in, and thus withdrawn

and separated from the wastes or common lands." *State v. Hopping*, 18 N.J.L. 423, 424 (1842). Moreover, the use of the broader term "lands" not only further exemplifies that these were hunting laws but also represents a notable omission: *none* of the relevant provisions make any reference to dwelling-houses or buildings of any kind. But contemporaneous statutes did.[2] That the legislatures at the time directly regulated conduct in and around such places leads to the strong inference that the State's claimed analogues simply did not apply to business on main street.

To make up for its lack of analogues, the State below cited three post-Civil War laws. These come too late. *See supra* II.B.i. And two of these are, if anything, *anti*-analogues, i.e., they demonstrate practices that the right to keep and bear arms was meant to *combat*. These are the 1865 Louisiana and 1866 Texas statutes, Op. at 142, which were part of those states' black codes and were enacted before they were even readmitted to the Union. An 1866 news article quoted the Louisiana law in support of its argument that the government of Louisiana was "nothing but a machine for restoring to political power the rebels who, in 1861, … engineered the State out of the Union." *A Test Case For the President*, NEW YORK TRIBUNE (Mar. 7, 1866), *in* 9 PUBLIC OPINION: A COMPREHENSIVE SUMMARY OF THE PRESS

[2] For instance, Pennsylvania's 1721 statute made it unlawful "to carry any gun or hunt on the improved or inclosed lands of any plantation," but banned only *shooting* in "the open streets of Philadelphia" or "gardens, orchards, and inclosures adjoining upon and belonging to any of the dwelling houses."

THROUGHOUT THE WORLD ON ALL IMPORTANT CURRENT TOPICS 304 (1866). As *McDonald* explained, "[i]n the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense" because it "presumably would have permitted the possession of guns by those acting under the authority of the State and would thus have left firearms in the hands of the militia and local peace officers," who "were widely involved in harassing blacks in the South." 561 U.S. at 779. The Louisiana and Texas statutes fit this description perfectly. And these are the types of statutes incorporation of the Second Amendment was meant to invalidate, not perpetuate. *Cf. Bruen*, 142 S. Ct. at 2149 (cautioning against reliance on laws where prosecutions were directed only against "black defendants who may have been targeted for selective or pretextual enforcement").

In all events, the Louisiana and Texas laws did not sweep as far as New Jersey's. The statutes applied to "premises or plantations" or "inclosed premises or plantation," respectively. Both premises and plantations could mean land or farmland. *See, e.g.*, *Plantation*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("[p]lantation" as "[i]n the United States and the West Indies" is "a cultivated estate; a farm"); *Premises*, WEBSTER'S AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) ("[i]n law, land or other things mentioned in the preceding part of a deed"). The use of "inclosed" to modify premises in the Texas

statute, along with its being used in parallel with plantation, supports reading the word in this sense. In any event, there is no evidence that the laws were interpreted to apply to businesses and other similar private property open to the public. And to the extent there is any ambiguity, it must be interpreted in favor of the Second Amendment. *See Bruen*, 142 S. Ct. at 2141 n.11. Read this way, the laws more closely approximate the colonial hunting statutes than New Jersey's Anti-Carry Default.

That leaves the State's third law, an 1893 enactment from Oregon law, which was similar to the Louisiana and Texas laws. Regardless of whether this law had similarly unsavory origins, *cf. Ramos*, 140 S. Ct. at 1405, it too appears not to reach businesses and other similar private property open to the public, *see Antonyuk v. Hochul*, No. 1:22-cv-986, 2022 WL 16744700, at *79 (N.D.N.Y. Nov. 7, 2022), and in any event it is a single outlier enacted over 100 years after adoption of the Second Amendment. Such a law provides little if any insight into the original meaning of the Second Amendment. *See Bruen*, 142 S. Ct. at 2153–54. Indeed, the 1893 Oregon law was enacted only twenty years before the original enactment of the New York may-issue policy invalidated in *Bruen*. *Id*. at 2132.

D. The State has not demonstrated the prohibited locations or the vehicle prohibition are historically justified.

The State's argument in favor of a stay of the injunction enjoining enforcement of New Jersey's bans on firearms in certain locations and in vehicles is

completely deficient. The State eschews the careful historical analysis by the district court and does not meaningfully contest it. Instead, the State italicizes the numbers of claimed analogues as though historical analysis were merely a numbers game. It is not. The question is whether *those* regulations are "well-established," "representative," and "relevantly similar" regulations from the Founding. They are not.

Parks, beaches, entertainment facilities, establishments serving alcohol, and health care facilities all existed at the time of the Founding. Yet the State brings forward exactly *zero* Founding era restrictions on possession of firearms by ordinary, law-abiding citizens in these locations. Op. at 172–74, 180–84, 195. This is all the more remarkable given that there is no dispute firearms existed and so too did potential social ills related to them in these places. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 142 S. Ct. at 2131; *see also Worth*, 2023 WL 2745673, at *15. New Jersey's restriction of firearms in vehicles is differently situated only to the extent that automobiles did not exist at the Founding, nevertheless the district court correctly held that no history justified an outright ban on conceal carry of handguns by ordinary, law-abiding citizens in vehicles, as American jurisdictions have long

permitted firearms for those traveling. Op. at 198–206. And even the earliest restrictions of firearms in vehicles applied only to long guns and not handguns. *Id.*

The State takes a blunderbuss approach to the district court's reasoning, but none of its errant points hit the mark. The State argues that it is improper to put weight on the lack of regulation dating to the Founding. State Mot. at 9–10. But *Bruen* holds otherwise. 142 S. Ct. at 2131. The State argues that the district court below should have placed greater weight on the smattering of Reconstruction era laws that it cited. But these laws failed for at least five reasons. They were not relevantly similar, as carefully explicated by the district court. Even if relevantly similar, they were too few to overcome the tradition at the Founding where such regulations did not exist. *Espinoza*, 140 S. Ct. at 2258–59 (over *thirty* Reconstruction era laws insufficient to overcome Founding history). They covered an insignificant percentage of the American population at the time, so they could not be said to be representative. Op. at 165, 178 (10–15% of American population insufficient); *Bruen*, 142 S. Ct. at 2154–55 (noting that Arizona, Idaho, New Mexico, Oklahoma, and Wyoming combined for less than 1% of the entire United States' population in 1890). Several emerged from jurisdictions with an erroneous view of the Second Amendment as a collective, rather than individual right. Op. at 160–61 (rejecting laws from Texas and Georgia); *Bruen*, 142 S. Ct. at 2153. Such mistaken "outlier" jurisdictions cannot be relied upon to justify modern regulations. And, finally, a

recognized "sensitive place" requires, at a minimum, government-provided comprehensive security akin to TSA magnetometers and armed guards. *See supra* II.b.ii. But the State presented no evidence such security exists in the places where the State has now broadly banned firearms.

II. The balance of equities do not weigh in favor of a stay of the district court's preliminary injunction.

Plaintiffs will be irreparably harmed without an injunction especially because "the threat of [criminal] prosecution for engaging in constitutionally protected conduct certainly is" irreparable. Op. at 221 (quoting *A.H. by & through Hester v. French*, 985 F.3d 165, 176 (2d Cir. 2021)). In all events, the State does not contest that the denial of constitutional rights is generally irreparable. To hold that a violation of the Second Amendment is not irreparable would be to impermissibly treat it as a "'second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.'" *Bruen*, 142 S. Ct. at 2156 (quoting *McDonald*, 561 U.S. at 780).

While it may be the case that the State has an interest in enforcing *constitutional* laws, "neither the Government nor the public generally can claim an interest in the enforcement of an unconstitutional law." *Am. Civ. Lib. Union v. Ashcroft*, 322 F.3d 240, 251 n.11 (3d Cir. 2003).

The State is left with speculative public-safety and public-confusion arguments. Yet the Supreme Court has twice-rejected an argument that the vindication of Second

Amendment rights should be treated differently because of an alleged public safety rationale. The Supreme Court rejected such a Second-Amendment-is-different argument in *McDonald*, with the lead opinion noting that it is "not the only constitutional right that has controversial public safety implications." 561 U.S. at 783 (plurality). This statement was reiterated by a majority of the Court in *Bruen*. 142 S. Ct. at 2126 n.3. "All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *McDonald*, 561 U.S. at 783 (plurality). Public safety is no basis to permit an unconstitutional law to continue.

As for the State's argument with respect to confusion, the district court's preliminary injunction is clear that it alone applies to enjoin the State's unconstitutional laws. And to the extent there were a risk of confusion, granting the State's request for a stay would exacerbate it. The State does not explain how *another* order, promulgated after expedited briefing, would lessen confusion.

CONCLUSION

The State's motion should be denied.

Dated: May 30, 2023

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

I hereby certify that I am a member of the bar of this Court.

Dated: May 30, 2023

s/ David H. Thompson
David H. Thompson

Counsel for Plaintiffs-Appellees Ronald Koons, Nicholas Gaudio, Jeffrey M. Muller, Gil Tal, Second Amendment Foundation, Firearms Policy Coalition, Inc., Coalition of New Jersey Firearm Owners, and New Jersey Second Amendment Society.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(A) because this brief contains 5,200 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Microsoft Word for Microsoft Office 365 in 14-point Times New Roman font.

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Dated: May 30, 2023

s/ David H. Thompson
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system on May 30, 2023. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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