# 22-2987

## United States Court of Appeals for the Second Circuit

BRETT CHRISTIAN, FIREARMS POLICY COALITION, INC., SECOND AMENDMENT FOUNDATION, INC.,

*Plaintiffs-Appellees*,

v.

STEVEN A. NIGRELLI, in his official capacity as Superintendent of the New York State Police,

*Defendant-Appellant*,

(*Caption continues inside front cover.*)

On Appeal from the United States District Court for the Western District of New York

**REPLY BRIEF FOR APPELLANT**

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Dated: March 15, 2023

(*Caption continues from front cover.*)

JOHN BROWN,

*Plaintiff*,

v.

JOHN J. FLYNN, in his official capacity as
District Attorney for the County of Erie, New York,

*Defendant-Appellee*.

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## PRELIMINARY STATEMENT

In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court clarified the legal framework for analyzing Second Amendment challenges, but it did not, contrary to plaintiffs' insistence, eliminate the authority and obligation of States to regulate guns to protect public safety. In this case, plaintiffs' challenge to New York's determination to require persons to obtain express consent from proprietors before entering someone else's private property with a firearm is fundamentally a policy disagreement, and not a justiciable constitutional claim.

At the outset, plaintiffs' lack of standing should resolve this appeal. Plaintiff Brett Christian does not have standing to challenge the private-property provision because the injury he asserts—the inability to carry a firearm onto private property—is traceable not to the law but to the individual decisions of private property owners about whether to consent to such activity and, if so, how to convey such consent. New York's law merely sets a default rule about the meaning of an owner's silence on a condition of entry. Plaintiffs' insistence that a default rule is determinative of property owners' decisions is not supported by the text of the statute

and is, in any event, refuted by Christian's own testimony indicating that some property owners have permitted him to carry on their property when he sought consent.

As to plaintiffs Firearms Policy Coalition, Inc. (FPC) and Second Amendment Foundation, Inc. (SAF), the district court has already properly determined that they lack standing to challenge the law. This Court's settled precedent prohibits organizations from asserting claims under 42 U.S.C. § 1983 on behalf of their members, and neither organization has alleged a burden on its established core activities sufficient to assert its own claim.

Plaintiffs' constitutional challenge also fails on the merits because the Second Amendment provides no right to carry firearms onto others' private property without the owner's consent. Contrary to plaintiffs' assertions, the Second Amendment was enacted against the backdrop of existing property law and did not abrogate the right of private property owners to exclude others from their property at will. Moreover, plaintiffs fail to meaningfully controvert the State's evidence of a long history of laws analogous to the private-property provision, instead relying on a new (and incorrect) argument that such provisions were limited to excluding

long guns. Plaintiffs also urge this Court to sweep aside the State's evidence by adopting arbitrary rules limiting the relevant historical record to the Founding era. That approach, which the Supreme Court has never endorsed, is illogical given that the Second Amendment did not apply to the States until the adoption of the Fourteenth Amendment in 1868.

Finally, plaintiffs fail to rebut the State's arguments as to the remaining preliminary-injunction factors. Instead, plaintiffs insist that the finding of a likelihood of success on the merits alone requires a preliminary injunction in Second Amendment cases. Nothing in *Bruen* authorizes this departure from settled law, and plaintiffs have failed to show a likelihood of success on the merits in any event.

## ARGUMENT

## POINT I

### PLAINTIFFS LACK STANDING TO CHALLENGE THE PRIVATE-PROPERTY PROVISION

### A. Christian Lacks Article III Standing.

Christian lacks Article III standing to bring this preenforcement challenge because the specific constitutional injury about which he complains—the inability to carry a concealed handgun onto private

property otherwise open to the public—is neither traceable to the private-property provision nor redressable by an injunction.

Christian's argument is fundamentally flawed because the private-property provision does not, in fact, prohibit carrying a concealed handgun onto private property. The provision simply requires persons like Christian to obtain consent from the proprietor before entering private property with a concealed weapon. The law does not prevent Christian from seeking consent nor does it prevent a property owner of a non-sensitive establishment from providing such consent through a sign or some other means of communication. Indeed, Christian acknowledged at his deposition that at least one proprietor of a store that he frequents has already given express consent to the carriage of firearms. (J.A. 456-457.)

To the extent Christian is presently unable to enter a particular establishment with a firearm, that injury is traceable not to a government action, but either to his refusal to seek and obtain consent, or to the property owner's "*independent* action" in granting or denying consent. *See Bennett v. Spear*, 520 U.S. 154, 169 (1997) (quotation marks omitted). Plaintiffs are wrong to argue that the private-property provision has a "'determinative or coercive effect'" on property owners because it "'alters

the legal regime.'"[1] *See* Br. of Pls.-Appellees (Br.) at 18-19 (quoting *Bennett*, 520 U.S. at 169). Plaintiffs suggest that the private-property provision "has been completely determinative of Christian's ability to carry firearms in several locations" because some property owners have chosen to remain silent on the question of whether guns are permitted on their property. *See id.* But silence in the face of a changed default rule represents a voluntary decision by those property owners not to give express consent to the carriage of firearms. The private-property provision in no way "cajole[s], coerce[s], [or] command[s]" owners to make that decision and, therefore, cannot provide the requisite link for purposes of traceability. *See Turaani v. Wray*, 988 F.3d 313, 316 (6th Cir.), *cert. denied*, 142 S. Ct. 225 (2021).

By contrast, in *Bennett*, the Supreme Court found that a group of ranch operators and irrigation districts could sue the U.S. Fish and Wildlife Service because they were suffering from reduced use of reservoir water due to the decision of third parties to comply with the federal

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[1] Plaintiffs misplace their reliance (Br. at 19) on *Clinton v. City of New York*, which does not address traceability and instead focuses on injury-in-fact, an element that is not in dispute on this appeal, *see* 524 U.S. 417, 431 (1998).

agency's advisory opinion on the taking of certain endangered animals. The Court determined that the injury was traceable to the agency because of the "powerful coercive effect" of the advisory opinion, which established conditions that, if violated, could have resulted in "substantial civil and criminal penalties, including imprisonment." 520 U.S. at 169-70. Here, however, New York imposes no adverse consequences on property owners who consent (or do not consent) to armed carriage on their property.

Plaintiffs' reliance (Br. at 17-18) on *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011), is similarly misplaced. Neither of these cases involved standing; instead, these cases involved First Amendment challenges to provisions regulating conduct that may have been separately proscribed by private actors. Specifically, the ordinance at issue in *R.A.V.* banned the placement of hate symbols on public or private property, while the state law at issue in *Brown* prohibited the sale or rental of violent video games to minors. These cases are categorically dissimilar, because in each circumstance, the decision of a private party is not dispositive as to liability under the law. For example, a property owner might consent to the placement of hate speech on his or her lawn, but the ordinance at issue in

*R.A.V.* would still prohibit that activity. Likewise, a parent may consent to a merchant selling to the parent's 15-year-old child a violent video game, but the merchant would still be liable if it sold the game to the child directly. By contrast, a private-property owner's express consent to Christian's carriage of firearms is dispositive as to his lack of liability under New York's law.

Plaintiffs also fail to meaningfully address the State's argument as to redressability. Plaintiffs contend that an injunction would provide relief from "the State's enforcement of the unconstitutional law" (Br. at 19), but that is not the same as redressing the asserted injury, *see Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 534-35 (2021). An injunction against enforcement of the law would not control the decisions of myriad property owners as to whether to consent to or prohibit concealed carry on their property.

### B. The Organizational Plaintiffs Lack Article III Standing.

Plaintiffs concede (Br. at 20-21) that this Court's precedent does not allow organizational plaintiffs to bring suit under § 1983 on their members' behalf, *see Connecticut Citizens Def. League, Inc. v. Lamont*, 6 F.4th 439,

447 (2d Cir. 2021). FPC and SAF also lack standing to sue on behalf of themselves.

Where, as here, an organization is not directly regulated by a challenged law or action, it must show "not merely harm [to] its abstract social interests" but that its "established core activities" have been "perceptibly impaired" by "an involuntary material burden." *Connecticut Parents Union v. Russell-Tucker*, 8 F.4th 167, 173 (2d Cir. 2021) (quotation marks omitted). However, an advocacy organization cannot establish standing by merely citing to the burden of maintaining its usual advocacy activities. *See Connecticut Citizens Def. League, Inc.*, 6 F.4th at 447.

Here, FPC and SAF contend that they have "incurred material costs" in preparing informational memoranda about the law, addressing member inquiries, and operating hotlines. Br. at 21-22. However, these activities are the usual work of these organizations, as alleged in the complaint and attested in supporting declarations. FPC, for example, alleges that it defends and promotes Second Amendment rights through, among other things, "research, education, outreach, and other programs." (J.A. 16, 77.) Similarly, SAF alleges that it "seeks to preserve the effectiveness of the Second Amendment through education, research, publishing, and legal

action programs." (J.A. 16, 81.) The purported burden identified by the organizational plaintiffs is the need to engage in their usual advocacy activities, which is not a burden created by the Concealed Carry Improvement Act (CCIA), *see Connecticut Citizens Def. League, Inc.*, 6 F.4th at 447, nor does it constitute a diversion from "core activities," *see Connecticut Parents Union*, 8 F.4th at 173.

## POINT II

### PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS OF THEIR CHALLENGE TO THE PRIVATE-PROPERTY PROVISION

Plaintiffs fail to meet their heightened burden to show a clear likelihood of success on the merits of their Second Amendment claim because Christian's desire to enter others' private property absent express consent is not protected by the Second Amendment, and even if it were, the private-property provision is amply supported by historical analogs.[2]

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[2] The sole amicus brief filed in support of plaintiffs casts various aspersions on other aspects of New York's firearms law but does not discuss the private-property provision at issue in this case. *See* Br. of Amicus Project 21. To the extent plaintiffs' amicus took advantage of the later filing deadline in this case to file a brief intended to influence the outcome of other pending appeals challenging the CCIA, this Court should "disregard" the brief as untimely. *See Connecticut v. American Elec. Power Co.*, 582 F.3d 309, 320 n.2 (2d Cir. 2009), *rev'd on other grounds*, 564 U.S. 410 (2011).

As a threshold matter, plaintiffs err in contending that they do not bear a heightened burden to show a clear likelihood of success. *See* Br. at 12-13. Contrary to plaintiffs' argument, an injunction here would alter the status quo. *See Wright v. Giuliani*, 230 F.3d 543, 547 (2d Cir. 2000). It is undisputed that the CCIA was already in effect when plaintiffs filed this lawsuit and sought a preliminary injunction. Enjoining enforcement of such a law that "has been in effect" would necessarily "disrupt, not preserve, the status quo," even if the law is new, because the government would need to revert to the prior legal regime if the injunction were granted. *See, e.g.*, *Adventist Health Sys./SunBelt, Inc. v. United States Dep't of Health & Hum. Servs.*, 17 F.4th 793, 806 (8th Cir. 2021).

### A. The Second Amendment Does Not Bestow a Right to Carry Firearms onto Others' Private Property Absent Consent.

Even if plaintiffs had standing, they would have no Second Amendment claim, because the Second Amendment provides no right to carry firearms onto others' private property without the owner's consent. *See* Br. of Amici Professors of Prop. Law at 4-22.

As *Bruen* explains, a government's obligation to defend a firearm regulation as "consistent with the Nation's historical tradition of firearm

regulation" does not arise until the court has determined at step one that "the Second Amendment's plain text covers an individual's conduct." 142 S. Ct. at 2129-30; *see National Rifle Ass'n v. Bondi*, No. 21-12314, 2023 WL 2416683, at *3 (11th Cir. Mar. 9, 2023) (applying a two-step inquiry). As the State has explained, consistent with other constitutional claims, the burden at the first step is on the plaintiff, not the government. See Br. for Appellant ("State Br.") at 25. And the first step, like the second step, requires a historical analysis: the court's inquiry is "rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S. Ct. at 2127; *see District of Columbia v. Heller*, 554 U.S. 570, 592 (2008); *Bondi*, 2023 WL 2416683, at *3.

Plaintiffs offer no response except to claim that the first step is "irrelevant" because *Bruen* established that the text of the Second Amendment covers Christian's proposed conduct. *See* Br. at 23-24. But *Bruen* did not hold that carrying firearms onto others' private property equates with "carrying handguns publicly." *See* 142 S. Ct. at 2134. Plaintiffs would have this Court read *Bruen* to create a constitutional right to carry a firearm under any circumstances where a confrontation might occur. *See* Br. at 25. But *Bruen* rejected that position, finding that a prohibition

on carrying arms in certain places was "constitutionally permissible" even if a confrontation might occur there. *See* 142 S. Ct. at 2133. And the Court expressly did "'not undertake an exhaustive historical analysis . . . of the full scope of the Second Amendment,'" as plaintiffs suggest. *See id.* at 2134 (quoting *Heller*, 554 U.S. at 626). Instead, the Supreme Court stated that it expected judges to analyze the scope of the Second Amendment's text as the facts of individual cases were presented, just as judges do in other contexts. *Id.*

Plaintiffs' attempt to distinguish (Br. at 26-27) the directly applicable decision in *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244 (11th Cir. 2012), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111, also fails. In *GeorgiaCarry*, the Eleventh Circuit unambiguously concluded that "the pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm [on private property] . . . against the owner's wishes."[3] *Id.* at 1264. Plaintiffs are incorrect that this

[3] The *GeorgiaCarry* court reasoned that because plaintiffs brought a facial challenge (as plaintiffs do here), they had to show that the Georgia law would be unconstitutional in all its applications, including where a property owner had prohibited carrying. *See* 687 F.3d at 1260-61 (citing *United States v. Salerno*, 481 U.S. 739 (1987)).

Court should ignore the analysis in *GeorgiaCarry* because it was decided before *Bruen*. *Bruen* explicitly confirmed that "[s]tep one" of the "predominant framework" employed by appellate courts before *Bruen*—i.e., the analysis applied by the court in *GeorgiaCarry*—is the proper application of *Heller*. *See* 142 S. Ct. at 2127. *Bruen* abrogated only the application of means-end scrutiny, a test the court in *GeorgiaCarry* did not apply, as the failure of the plaintiffs' claim at the textual step in that case was dispositive. For the same reason, plaintiffs' contention that *GeorgiaCarry* never reached the State's historical burden is irrelevant, because the burden only arises at step two of the analysis.

Nor do plaintiffs offer any substantive response to *GeorgiaCarry*'s reasoning. As *GeorgiaCarry* pointed out, there is simply no evidence that the Second Amendment was intended to supersede the property-law right to exclude. The right to exclude "is a fundamental element of the property right that cannot be balanced away." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2077 (2021) (citation and quotation marks omitted). And when the Framers codified the common-law right to bear arms in the Second Amendment, they preserved the "well established property law, tort law, and criminal law" limiting that right to protect "a private property owner's

exclusive right to be king of his own castle." *See GeorgiaCarry*, 687 F.3d at 1264. For that reason, New York's private-property provision does not implicate the Second Amendment's text, ending the analysis.

## B. The Private-Property Provision Is Consistent with the Historical Tradition of Firearm Regulation.

### 1. The private-property provision is supported by numerous relevantly similar historical analogs.

Even if the Second Amendment did apply to the private-property provision, the State has produced ample historical evidence that the provision is consistent with this Nation's historical tradition of firearm regulation. The State identified eight historical analogs from seven States, spanning the colonial era through the Founding and Reconstruction eras, that forbade carrying guns onto others' property without their permission. See State Br. at 29-31. Contrary to plaintiffs' arguments, these historical analogs are "relevantly similar" to the private-property provision. *See Bruen*, 142 S. Ct. at 2132.

First, the historical analogs cited by the State were enacted in large part for the same purpose as the private-property provision: to enhance public safety. *See* Assembly Sponsor's Mem. A41001 (2022); Senate

Sponsor's Mem. S51001 (2022);[4] *cf. Bondi*, 2023 WL 2416683, at *7 (identifying "enhancing public safety" as the historically analogous purpose). For example, New York's 1763 statute was expressly intended "more effectually to punish and prevent" the practice of "idle and disorderly" individuals "to hunt with Fire-Arms . . . to the great Danger of the Lives of his Majesty's Subjects" and "the grievous Injury of the Proprietors." (J.A. 123-124.) The 1721 Pennsylvania statute aimed to prevent and remedy the "divers[e] abuses, damages and inconveniencies" caused "by persons carrying guns and presuming to hunt on other people's lands." (J.A. 113.) The 1722 statute from New Jersey similarly recognized that "divers[e] abuses have been committed, and great Damages and Inconveniences arisen" by people carrying on private property without consent. (J.A. 119.)

Plaintiffs err in contending that these statutes are not analogous because they regulated only hunting or were motivated chiefly by concerns about poaching. *See* Br. at 28. Plaintiffs do not dispute that four of the statutes—New Jersey's 1771 law and the laws from Louisiana, Texas,

[4] For sources available online, full URLs appear in the Table of Authorities. All URLs were last visited on March 15, 2023.

and Oregon—did not refer to hunting at all. (J.A. 127, 137, 144, 151.) And all the laws, whether they referred to hunting or not, ultimately prohibited *any* carrying of firearms onto others' land without consent—just like the CCIA's private-property provision. For example, Maryland's 1715 law imposed penalties on any person convicted of certain crimes or otherwise of ill repute who "shall shoot, kill or hunt, or be seen to carry a gun" on another's property absent consent.[5] (J.A. 108.) Pennsylvania's 1721 law made it illegal to "carry any gun or hunt" on private property absent consent (J.A. 113), as did New Jersey's 1722 law (J.A. 119). New York's 1763 law similarly provided that no one shall "carry, shoot, or discharge any Musket, Fowling-Piece, or other Fire-Arm whatsoever" on private property without the owner's consent. (J.A. 124.)

Plaintiffs also rely on the titles of the relevant statutes, but those titles confirm only that the statutes regulated more than hunting. *See* Br. at 30. Plaintiffs ignore the titles of the statutes that do not fit their argu-

[5] Plaintiffs attempts to "dispatch" Maryland's law are unavailing. *See* Br. at 31. Even if the law is understood as a prohibition on people who were not ordinary, law-abiding citizens, there is no reason to think that the statute was not also justified as a regulation seeking to protect private property rights and public safety.

ment, including Louisiana's ("AN ACT: To prohibit the carrying of firearms on premises or plantations of any citizen, without the consent of the owner" (J.A. 137)), Texas's ("Act to Prohibit the Carrying of Firearms on Premises or Plantations of any Citizen Without the Consent of the Owner" (J.A. 144)), Oregon's ("To Prevent a Person from Trespassing upon any Enclosed Premises or Lands not His Own Being Armed with a Gun, Pistol, or other Firearm, and to Prevent Shooting upon or from the Public Highway" (J.A. 151)), and Maryland's ("ACT for the speedy trial of criminals, and ascertaining their punishment in the county courts when prosecuted there, and for the payment of fees due from criminal persons" (J.A. 106)).

In any event, even plaintiffs' cherry-picked examples do not support their point. For example, the title of Pennsylvania's law, "An Act to Prevent the Killing of Deer Out of Season, *and Against Carrying of Guns* or Hunting by Persons Not Qualified," plainly encompasses a broader goal of preventing the carrying of guns on private property. (*See* J.A. 112 (capitalization omitted) (emphasis added); *see also* J.A. 118 (New Jersey's 1722 law).) So too with New Jersey's 1771 law, titled "Act for the Preservation of Deer and other Game, *and to prevent trespassing with Guns*." (*See* J.A. 90 (emphasis added).) Plaintiffs would have the Court focus on the

references to hunting and ignore the rest, but it is indisputable that these titles indicate a broad intent to regulate the carrying of firearms on private property.

Regardless, refusing to consider close historical analogs because they served in part a now-anachronistic anti-poaching purpose defies *Bruen*'s lesson that "[t]he regulatory challenges posed by firearms today" need not be "the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868" in order to justify analogous modern regulation. *See* 142 S. Ct. at 2132. Here, New York reasonably concluded that allowing concealed carry on private property without the owner's consent posed a "great Danger [to] the Lives" of others, including the property owners, no less than trespassing armed on someone's property did in 1763. (*See* J.A. 123-134.) Regulating either serves the same longstanding tradition of conditioning access to private property on the informed consent of the property owner.[6]

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[6] Plaintiffs also analogize the private-property provision to "'English game laws'" which abridged the English right to keep and bear arms by prohibiting the keeping of arms for hunting. Br. at 35-36 (quoting *Heller*, 554 U.S. at 606). But that analogy cuts against plaintiffs' argument here, because it shows that the States enacting prohibitions on hunting would

(*continued on the next page*)

Second, the historical analogs cited by the State regulated the carry of firearms in a manner analogous to the private-property provision. Specifically, each of these statutes prohibited carrying firearms onto another person's property without consent, exactly as the private-property provision does.

Plaintiffs contend for the first time on appeal that the State's historical analogs are not relevantly similar because they applied only to long guns used for hunting, and not to handguns. *See* Br. at 28-35. This argument is factually incorrect and legally irrelevant. As a threshold matter, four of the State's historical analogs explicitly regulated "firearms" and "pistols" (J.A. 124 (New York), 137 (Louisiana), 144 (Texas), 151 (Oregon)), which plaintiffs concede plainly include handguns (*see* Br. at 32-33).

More fundamentally, plaintiffs' argument is based primarily on a dictionary definition of the term "gun" from 1828 (*id.* at 31), which postdates the historical analogs that use the word "gun" exclusively (J.A. 108,

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have understood those regulations as limiting the right to keep and bear arms, just as plaintiffs contend New York's private-property provision does.

113, 119, 127 (statutes enacted between 1715 and 1771)).[7] Definitions of the term "gun" from eighteenth-century sources demonstrate that the term was understood to include handguns. For example, Samuel Johnson's 1755 dictionary defines "gun" broadly as "[*t*]*he general name for firearms*; the instrument from which shot is discharged by fire." 1 Samuel Johnson, *A Dictionary of the English Language* (1755) (emphasis added). Four editions of the preeminent legal dictionary in that era, published between 1744 and 1782, similarly refer to a "gun" broadly as a "*Gun*, Hand gun, &c." *A New Law-Dictionary* (G. Jacob comp.; enlarged eds. 1744, 1756, 1762, 1782). Perhaps recognizing this flaw, plaintiffs also cite a series of statutes that refer to both pistols and guns, or firearms and guns, arguing that this shows that the terms had different meanings. But even if that is true, it does not follow that "gun" referred exclusively to long guns used for hunting and not to handguns, as plaintiffs contend.

Equally unpersuasive is plaintiffs' argument that the State's historical analogs are irrelevant because they govern the carriage of firearms

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[7] The blog post cited by plaintiffs (Br. at 33) similarly focuses on the meaning of "gun" in the nineteenth and twentieth centuries, *see* Catie Carberry, *What's in a Name? The Evolution of the Term "Gun,"* Duke Ctr. for Firearms L. (July 24, 2019).

on land rather than in business establishments generally open to the public. As an initial matter, three of the statutes cited by the State prohibit carrying firearms on the "premises" of a property owner without consent. (*See* J.A. 137 (Louisiana), 144 (Texas), 151 (Oregon).) Contrary to plaintiffs' view, the term "premises" is not itself limited to open land. *See* Br. at 39-40. In the parlance of the time when these statutes where enacted (1865 to 1893), the word "premises" encompassed businesses as well as land. *See, e.g.*, *City of Elizabeth v. American Nicholson Pavement Co.*, 97 U.S. 126, 134-35 (1877) (machine that "may be tested and tried in a building" need not be "used only in the inventor's own shop or premises," but may also be "used in the premises of another"); *Thurlow v. Massachusetts*, 46 U.S. 504, 512 (1847) (explaining that "[w]ithout a license, no one can sell . . . spirits to be used on the premises of the vendor"). In addition, particularly when the earliest of the State's historical analogs were enacted, there were far fewer businesses, and far more open parcels of land, than there are today. Plaintiffs' argument that the burden of New York's private-property law is greater therefore ignores the historical context of these analogs.

### 2. Plaintiffs' remaining challenges to the State's historical evidence are meritless.

Plaintiffs' remaining challenges to the State's extensive historical evidence either parrot the district court's erroneous reasoning or rest on arbitrary rules and distinctions that have no place in responsible historical analysis.

First, plaintiffs attempt to cast doubt on the State's historical analogs because the State did not provide evidence of their enforcement. *See* Br. at 34. As a leading historian of firearm regulations has explained, the vast majority of records of local-law enforcement before the twentieth century "have either been lost to time or are woefully incomplete," and those records that have "miraculously" survived ordinarily require demanding archival research to locate. *See* Patrick J. Charles, *The Fugazi Second Amendment* 35 (2022) (forthcoming Clev. St. L. Rev.). The State did not have a reasonable opportunity to complete such archival research on the accelerated preliminary-injunction timeline below—much less in dozens of localities nationwide. More fundamentally, plaintiffs' insistence that the State identify not only a historical analog but detail a history of enforcement that meets some unknown metric of robustness is unsupported by *Bruen* or any other constitutional standard.

Second, plaintiffs offer several other arguments for excluding wholesale certain categories of historical analogs, none of which is persuasive. For example, plaintiffs improperly attempt to limit this Court's analysis to regulations from the Founding era, as the district court did. *See* Br. at 36-37. But that was error, as the State explained in its opening brief. *Heller*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Bruen* all make clear that evidence from after the Founding era is relevant. *Heller* describes evidence of post-ratification understanding of a right as a "critical tool of constitutional interpretation." 554 U.S. at 605. And *McDonald* exhaustively retraced Reconstruction-era public understanding of the right to bear arms to support the Supreme Court's conclusion that the Fourteenth Amendment incorporated the Second Amendment against the States. 561 U.S. at 770-78. Although *Bruen* declined to limit the historical evidence courts should consider, 142 S. Ct. at 2138, *Bruen*'s author has previously remarked that it was appropriate to "begin the assessment of the scope of . . . rights incorporated against the States by looking to what ordinary citizens at the time of the Fourteenth Amendment's ratification would have understood the right to encompass," *Mahanoy Area Sch. Dist.*

*v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting) (quotation and alteration marks omitted).

The only appellate court to address the issue since *Bruen* has concluded historical evidence from the time of the ratification of the Fourteenth Amendment is not only relevant, but even "more probative of the Second Amendment's scope than" evidence from the Founding era, at least as to challenges to state laws. *See Bondi*, 2023 WL 2416683, at *3-4 & n.10 (surveying support for this position from "prominent judges and scholars—across the political spectrum"); *see also Frey v. Nigrelli*, No. 21-cv-5334, 2023 WL 2473375, at *5 (S.D.N.Y. Mar. 13, 2023). Logic demands the same approach: because the Fourteenth Amendment caused the Second Amendment to apply to the States, evidence of the understanding of the right from the era in which the States ratified it cannot be irrelevant.

Similarly, plaintiffs seek to disqualify the laws from Texas and Louisiana on the grounds that those laws were enacted by racist state legislatures. *See* Br. at 37-39. But the history of gun regulation in southern States after the Civil War is more complex than plaintiffs acknowledge. As historian Saul Cornell has explained, although "Confederate sympathizers in the Reconstruction South did attempt to use gun regulations

in a racially targeted fashion, as part of the infamous Black Codes, . . . Republicans also used government power proactively to rebuild the militia system and pass a range of racially neutral gun control measures aimed at promoting public safety." *See* Saul Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. Davis L. Rev. Online 65, 70-71 (2021). In fact, as Cornell points out, military orders issued by the occupying federal forces during Reconstruction, while reaffirming the right of all to bear arms, reflect the same private-property limit on the right to bear arms embodied in the Texas and Louisiana laws. An 1866 order stated: "'[T]he constitutional rights of all loyal and well-disposed inhabitants to bear arms will not be infringed; nevertheless this shall not be construed . . . to authorize any person to enter with arms on the premises of another without his consent.'" *Id.* at 71 (quoting Walter L. Fleming, *Documentary History of Reconstruction: Political, Military, Social, Religious, Educational & Industrial, 1865 to The Present Time* 208-09 (1906)).

In any event, the unfortunate reality is that the eighteenth- and nineteenth-century laws to which *Bruen* directs the Second Amendment

inquiry often codified prejudices that existed at the time. This has not prevented courts from treating such laws as relevant to the historical inquiry. *See, e.g.*, *Kanter v. Barr*, 919 F.3d 437, 457 (7th Cir. 2019) (Barrett, J., dissenting), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111. Disregarding historical precedents on the ground of possible racist motivation or attitudes would result in "afford[ing] legislatures less regulatory authority than the original understanding and historical traditions of the Second Amendment would otherwise permit." Adam Winkler, *Racist Gun Laws and the Second Amendment*, 135 Harv. L. Rev. F. 537, 541-42 (2022). The State does not endorse any racist motivations behind certain historical gun regulations; it merely cites these laws to show the public understanding of the Second Amendment's limitation (or lack thereof) on a State's ability to regulate.

Next, plaintiffs agree with the district court that certain historical analogs should be ignored based on census data showing that these States had small populations at the time. *See* Br. at 41-42. But plaintiffs refuse to acknowledge that this argument has bizarre implications, suggesting that the historical tradition of certain States like New Jersey and Louisiana should be categorically excluded from the Second Amendment analysis

altogether because those States had consistently smaller populations. It is an affront to the very concept of state sovereignty to suggest that certain States play no role in the Nation's tradition of firearm regulation merely because they were small. And even accepting plaintiffs' argument at face value, it suggests that New York's 1763 law and Pennsylvania's 1721 law should each receive extra deference because those States together made up more than twenty percent of the population of the United States by the end of the eighteenth century. *See* U.S. Dep't of State, *Return of the Whole Number of Persons Within the Several Districts of the United States: 1790*, at 3 (1791).

Finally, plaintiffs erroneously suggest that the State's historical analogs should be discounted because other States historically regulated the carrying of firearms on private property in different ways. *See* Br. at 34-35. However, the Constitution does not require States and localities to adopt uniform approaches to regulating firearms. As *McDonald* emphasized, the Second Amendment "by no means eliminates" the States' "ability to devise solutions to social problems that suit local needs and values." 561 U.S. at 784-85.

For the same reason, plaintiffs are wrong to focus on the purported "outlier" status of New York's present-day law. *See* Br. at 43. Setting aside whether that issue is relevant to the Court's inquiry, New York is not alone in regulating concealed carry on private property. *See* Br. of Amici District of Columbia, et al. at 14-18. To the contrary, New Jersey has recently enacted a law similar to the private-property provision. *See* Ch. 131, § 7(a)(24), 2022 N.J. Laws, pp. 16-17 (codified at N.J. Stat. Ann. § 2C:58-4.6). Connecticut similarly requires express consent to bring an "assault weapon" onto private property. Conn. Gen. Stat. Ann. § 53-202d(f)(1). And States across the country require affirmative consent from the owner to carry a firearm in someone's residence. *See, e.g.*, Alaska Stat. Ann. § 11.61.220(a)(1)(B); La. Stat. Ann. § 40:1379.3(O); S.C. Code Ann. § 23-31-225; *see also* D.C. Code Ann. § 7-2509.07(b)(1).[8]

[8] These laws are especially relevant, because although plaintiffs requested a preliminary injunction only as to private property open to the public, the district court stated that its reasoning applied equally to private residences. (*See* S.A. 3 n.5.)

## POINT III

### THE DISTRICT ERRED IN APPLYING THE REMAINING PRELIMINARY-INJUNCTION FACTORS

Plaintiffs also have not rebutted the State's showing that the remaining preliminary-injunction factors—irreparable harm, the balance of equities, and the public interest—weigh overwhelmingly in favor of continued enforcement of the private-property provision while plaintiffs' challenge is litigated.

Plaintiffs' argument regarding irreparable harm is largely a rehash of their argument on the merits. Plaintiffs have no explanation for Christian's several-weeks delay in seeking relief from the CCIA (see State Br. at 38) which weighs against a finding of irreparable harm. *See, e.g.*, *Weight Watchers Int'l, Inc. v. Luigino's, Inc.*, 423 F.3d 137, 144 (2d Cir. 2005). Nor do plaintiffs respond to the State's argument that Christian's harm is hardly irreparable. When Christian inquired about consent to carry at the businesses he frequents shortly after the CCIA came into effect, at least one of those businesses promptly gave him consent, resulting in no burden to his right to carry there. (*See* J.A. 456-457.) Christian contends that he cannot "driv[e] or run[] errands" because he is unable to use the bathroom, buy gas, and stop for meals without removing his firearm.

(J.A. 75.) But nothing prevents Christian from seeking consent to concealed carry at any business where he wishes to stop, and the process of removing his firearm is apparently minimally burdensome, taking only thirty to forty seconds. (*See* J.A. 450.)

Plaintiffs' arguments regarding the public-interest considerations are similarly flawed. Plaintiffs contend that "banning firearms" may not have a positive impact on public safety. *See* Br. at 49. Plaintiffs cite a single research review from 2004, ignoring a large body of more recent research reaching the opposite conclusion. *See, e.g.*, Br. of Amici Giffords L. Ctr., Brady, & March for Our Lives at 18-26 (citing numerous studies from 2009 to 2022). That includes specific evidence of the public-safety risk posed by firearms carried by licensed individuals. *See, e.g.*, Violence Pol'y Ctr., *Concealed Carry Killers* (identifying 2,240 people killed by those licensed to carry concealed since 2007, including in 37 mass shootings).

In any event, as noted above (at 4), the private-property provision does not ban firearms. It ensures that property owners have explicitly consented before anyone enters their property with a firearm. Plaintiffs argue that this distinction should make no difference to property owners, because they can ban guns on their property without the default rule. But

many property owners may not be aware that people are carrying firearms concealed on their property. And research has shown that it *does* make a difference to property owners, regardless of what plaintiffs believe: property owners prefer a no-carry default, nationally and in New York. *See* Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. Med. & Ethics 183, 189-90, app. at 7 (2020). Moreover, "the legislature is far better equipped than the judiciary to make sensitive public policy judgments (within constitutional limits) concerning the dangers in carrying firearms and the manner to combat those risks." *New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015) (quotation marks omitted).

## CONCLUSION

This Court should reverse the district court's order granting a preliminary injunction against enforcement of the private-property provision.

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## CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,225 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*