UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 23-1900

RONALD KOONS et al.,
Plaintiffs-Appellees,

v.

MATTHEW J. PLATKIN et al.,
Defendants-Appellants

AARON SIEGEL et al.,
Plaintiffs-Appellees,

v.

MATTHEW J. PLATKIN et al.,
Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
(Nos. 22-cv-7463, 22-cv-7464 (RMB))

Reply in Support of Emergency Motion for Stay Pending Appeal

MATTHEW J. PLATKIN
Attorney General of New Jersey

JEREMY M. FEIGENBAUM
Solicitor General

ANGELA CAI
Deputy Solicitor General

JEAN REILLY
Assistant Attorney General

DAVID CHEN
VIVIANA HANLEY
Deputy Attorneys General

Office of the New Jersey Attorney General
R.J. Hughes Justice Complex
25 Market Street, P.O. Box 080
Trenton, NJ 08625-0080
(609) 414-5954
angela.cai@njoag.gov

Attorneys for Defendants-Appellants
New Jersey Attorney General
Matthew J. Platkin and Superintendent of
New Jersey State Police Colonel
Patrick Callahan

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

INTRODUCTION

When New York district courts issued near-identical preliminary injunctions against a near-identical statute, the Second Circuit issued a stay pending that State's appeal. D.E. 88-2. Plaintiffs-Appellees neither distinguish nor address those cases. Instead, they make the same merits and equities arguments the Second Circuit stay panel rejected. As to sensitive places, Plaintiffs-Appellees repeat the district court's errors: advancing artificial numerical requirements, misunderstanding the historical evidence, misconstruing the analogical reasoning from *New York State Rifle & Pistol Ass'n v. Bruen*, 142 S.Ct. 2111 (2022), and misapprehending the government-as-proprietor doctrine. And as to the private-property rule, Plaintiffs-Appellees decline to defend the district court's reasoning, and advance a broader rule inconsistent with the constitutional text and reams of history. New Jersey will succeed on the merits, the equities favor a stay, and no procedural roadblocks bar this motion.

ARGUMENT

I. THE STATE WILL LIKELY PREVAIL ON APPEAL.

A. The Sensitive-Places Provisions Are Constitutional.

1. The record amply supports the constitutionality of Chapter 131's sensitive-place provisions: dozens of historical laws prohibited firearms-carry in identical or analogous places and none were ever invalidated. Mot.6-8. It follows that this Court should stay the district court order allowing carry in many sensitive places, including zoos, libraries, public gatherings, parks, and bars.

a. Plaintiffs-Appellees fail to rehabilitate the district court's central errors.

First, they fail to successfully defend the district court's artificial numerosity requirements. *See* Mot.8. The *Siegel* Plaintiffs deny the court applied such a test, but the court's opinion repeatedly rejected historical evidence based upon the number of States involved or population covered. *Compare* Stay Opposition (Siegel.Opp.) 17, *with* Op. 165, 170, 178 180, 184, 186, 193, 196, 198. The *Koons* Plaintiffs do try to defend the district court's test, Koons.Opp.19, but they do not and cannot deny that *Bruen* identified a sufficient historical tradition for carry restrictions at legislative assemblies, polling places, and courthouses from (at most) *two* analogous historical regulations. Mot.8. Nor can they square this numerosity requirement with *Bruen*'s endorsement of restrictions at schools. *See* 142 S.Ct. at 2133.

Plaintiffs-Appellees also err in arguing that *Bruen* agrees three historical laws are never enough. *Bruen*'s analysis turns on what policies States originally saw as constitutionally *available* to them. 142 S.Ct. at 2133 (asking whether policy was one "our ancestors would never have accepted"). So if the State can identify only a few historical predecessors, and the challengers offer contrary evidence that other States or courts viewed them as *unconstitutional*, the State falls short. *Id.* at 2153 (rejecting "interpretation of the Second Amendment" based upon one law in a single State that "contradicts the overwhelming weight of other evidence"). But if the evidence shows that some States enacted "twins" or "analogies" and that *none* were invalidated or

questioned, that is evidence of *constitutionality*—regardless of the precise number of laws. That is this record, which has a substantial number of supportive laws and no contrary evidence. *See* Mot.7-8.

Second, Plaintiffs-Appellees and the court err in claiming that the fact some States historically chose to adopt these sensitive-place restrictions, while other States "lacked" such restrictions, somehow helps them. *Bruen* certainly remarked that the general "lack of a distinctly similar historical regulation addressing that problem" would be evidence against the law's validity, because if no State historically enacted a similar law, they likely perceived it as legally unavailable. 142 S.Ct. at 2131. But this case is entirely different. Far from such a "lack," this record reveals that multiple States adopted uncontroversial and unchallenged twins and analogues, and some did not. That is an everyday occurrence in our federalist system, and it is consistent with how States approach *constitutional* policy options. *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (Constitution is a "floor, not a uniform standard"); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (discussing laboratories of democracy); Mot.9 (discussing divergence in permitting laws). Said another way, this divergence among the States—quite unlike a tradition in which the States consistently lacked such a policy—supports a "prevailing understanding" (*see* 142 S.Ct. at 2138) that the Second Amendment left this option to them.

Third, Plaintiffs-Appellees repeat the district court's errors on the tightness of the analogical fit. The *Koons* Plaintiffs contend that firearms may be prohibited only if "the government provid[es] comprehensive security" akin to "TSA-secur[ity]." Koons.Opp.8-9. But nothing in *Bruen* endorses this test. Indeed, Plaintiffs-Appellees offer no support for their argument that, historically, armed officials at established sensitive places "control[led] every point of access." *Id.* Rather, Plaintiffs-Appellees merely cite laws providing for *some* officer presence, *id.*, but that is true at a range of locations where Plaintiffs-Appellees now *resist* firearms regulation, like permitted protests and concert venues. And their rule conflicts with *Bruen*'s confirmation that modern "schools" and "polling places" are "sensitive." *Bruen*, 142 S.Ct. at 2133. The district court was inconsistent on this too, sometimes agreeing with the *Koons* Plaintiffs that such security defines a sensitive-place, Op.166, yet simultaneously finding playgrounds sensitive, Op.172.

Nor is that Plaintiffs-Appellees' only error. For one, Plaintiffs-Appellees say that no analogical reasoning is proper because the underlying sensitive places existed at the Founding or Reconstruction. Siegel.Opp.19-20. But the record disproves this: vehicles, casinos, film sets, zoos, recreational parks, ambulatory-care centers, public libraries, or stadiums like MetLife (with an 82,000-person capacity) did not exist in anything remotely like their current forms. PI.Opp.52-53, 58-59, 60, 63. And today such places present drastically different public-safety risks—a valid consideration

under *Bruen*. 142 S.Ct. at 2132. For another, Plaintiffs-Appellees offer no defense of the court's extremely thin slicing—as when it refused to analogize ballrooms to concert venues when both served similar purposes. *See* Mot.10.[1] Finally, contrary to Plaintiffs-Appellees' portrayal of *Bruen*, the majority explicitly left the door open for the introduction of additional historical evidence that would justify sensitive-place restrictions. *See, e.g.*, 142 S.Ct. at 2133-34; *id.* at 2162 (Kavanaugh, J., concurring) (confirming "Second Amendment allows a 'variety' of gun regulations" and *Bruen*'s sensitive-place list not "exhaustive").

b. Plaintiffs-Appellees make two additional primary errors.

First, Plaintiffs-Appellees incorrectly reject consideration of Reconstruction-era evidence. *Compare* Op.224 (citing such laws), *with* Koons.Opp.5. But "it makes no sense to suggest that the States would have bound themselves to an understanding of the Bill of Rights—including that of the Second Amendment—that they did not share when they ratified the Fourteenth Amendment." *NRA v. Bondi*, 61 F.4th 1317, 1324 (11th Cir. 2023); *see* PI.Opp.32-33. Nor do Plaintiffs-Appellees' cases help them. *Gamble v. United States*, 139 S.Ct. 1960 (2019), cited 19th-century evidence to understand the Double Jeopardy Clause given the lack of Founding-era evidence. *Id.* at 1967; *id.* at 1980 (Thomas, J., concurring). *Timbs v. Indiana,* 139 S.Ct. 682

[1] Plaintiffs-Appellees note *Bruen* rejected some of these statutes as analogous to New York's broad "proper cause" requirement, Siegel.Opp.17, but that is irrelevant to whether they are analogous to New Jersey's tailored sensitive-place restrictions.

(2019), assessed evidence from the Founding and 1868 in interpreting the Excessive Fines Clause. *Id.* at 688. And *Ramos v. Louisiana*, 140 S.Ct. 1390, 1395 (2020), and *Espinoza v. Montana Department of Revenue*, 140 S.Ct. 2246, 2258 (2020), noted laws decades *after* 1868 cannot defeat a consistent view from the Founding through Reconstruction. None support Plaintiffs-Appellees' view: that firearms laws States believed they could maintain in 1868, when handguns first became widely-available, *see* Mot.8, and at the very time they were ratifying the Fourteenth Amendment, are constitutionally prohibited in 2023—contrary to *Bruen*'s logic.

Second, Plaintiffs-Appellees slice-and-dice which state laws can be reviewed to gerrymander their preferred historical results. They reject all Reconstruction-era evidence. They consider only States that had recognized an individual-rights version of the Second Amendment. They reject all evidence from territories—even when the evidence is *consistent* with the States' practice. And they discount analogues from any "former Confederate states," which "resist[ed] Reconstruction." Siegel.Opp.17. Their specific arguments are wrong: *Bruen* acknowledged the relevance of laws by Southern states after readmission, *see* 142 S.Ct. at 2147 (1870 Tennessee law), and many such laws were adopted by Republicans to curb violence, *see* D.E.85 at 17-18 (expert analysis), and survived long past Reconstruction, *id.*; D.E.89-29 (Missouri). But the problem runs deeper: by insisting on a high number of statutes, *supra* at 2-3, while excluding so many States, their test is all-but-impossible to meet—contrary

to *Bruen*'s promise. *Supra* at 5. The State offered uncontroverted historical evidence from multiple States for each challenged place. Its law passes muster.

2. At the very least, the Legislature can restrict firearms if the Government is the proprietor—at public libraries, public buses, government-owned entertainment venues, and public medical clinics. *See* Mot.11-13. Plaintiffs-Appellees' response is that the Second Amendment's text includes no such exception, Siegel.Opp.12-13; Koons.Opp.11-12, which badly misunderstands the doctrine. No constitutional text addresses government-as-proprietor directly—including the Commerce Clause and Supremacy Clause, for which the doctrine is well-established. *See* Mot.12. But these provisions constrain the government, not private actors. So in certain circumstances, where the government acts akin to such private parties, it may do so "free" of those "constraints." *Reeves v. Stake*, 447 U.S. 429, 436-39 & n.12 (1980); *Camfield v. United States*, 167 U.S. 518, 524 (1897). The Second Amendment is the same, *see* Siegel.Opp.18 ("private-property owners" not covered by the Second Amendment): where New Jersey restricts carry on its property just like a private owner, it faces no such constraints. *See United States v. Class*, 930 F.3d 460, 464 (D.C. Cir. 2019). The *Siegel* Plaintiffs ignore these cases, and the *Koons* Plaintiffs reject them as pre-dating *Bruen*, but *Bruen* never considered this issue and does not undermine their logic.[2]

[2] Nor does it matter that the Legislature adopted criminal penalties for trespass onto government-owned sensitive places, Koons.Opp.11; equivalent criminal penalties address carrying on private property without the owner's consent, too, *infra* at 8-10.

B. The Private Property Rule Is Constitutional.

Plaintiffs-Appellees have no right to carry on another's property without first obtaining the owner's consent. Strikingly, Plaintiffs-Appellees decline to defend the district court's actual reasoning, which enjoined the owner-consent requirement for properties open to the public, but left it in place for homes, based on its construction of trespass and implied licenses. *See* Mot.15-17 (highlighting unrebutted flaws in district court's analysis). But Plaintiffs-Appellees' arguments are no stronger than the trespass/license discussion below. And while Plaintiffs-Appellees do not actually seek this relief on this posture, the logical consequences of their view would be more radical, because it would authorize individuals to carry into their neighbors' homes without seeking permission (and without even informing them).

Plaintiffs-Appellees fail to establish that Section 7(a)(24) implicates the Second Amendment's text. Importantly, they fail to rebut three core points. First, Plaintiffs-Appellees recognize "private-property owners can exclude those who wish to carry firearms from their property"—*i.e.*, carry on private property is a matter of property law, not of constitutional right. Siegel.Opp.13. Second, Plaintiffs-Appellees do not deny that laws must establish a default (in either direction) for when private property owners never communicated their preferences. Third, Plaintiffs-Appellees do not address or rebut the State's evidence that its private-

property rule reflects the likely preferences of property owners. Mot.14. [3] That is fatal; it shows the private-property rule accurately reflects property owners' preferences on a question within their legal prerogative. And this disproves any assertion that Chapter 131's default somehow "prohibit[s] the carrying of firearms on private property," or remotely supports "a law that prohibit[s] firearms on private property even when the property owner *welcomes* them." SiegelOpp.13. The Second Amendment does not stop States from protecting private-property owners' rights consistent with owners' intent.

Plaintiffs-Appellees fare no better when addressing the robust Founding- and Reconstruction-era history across multiple states—including New Jersey itself—that likewise limits carry on private property without owner consent. Plaintiffs-Appellees primarily disregard these laws as hunting regulations. Siegel.Opp.15. But for one, when there is a historical twin, it evidences that a law imposing an identical burden was believed to be consistent with the Second Amendment—whatever *motivations* underlay it. *See* Mot.6, 17 (explaining *Bruen*'s test comparing modern and historical statutes' "how" and "why" is for defenses based upon *analogies*, not "twins"). And importantly, the hunting-only theory is inconsistent with the statutes' text, including

[3] This undermines the *Siegel* Plaintiffs' claim that New Jersey law is "mak[ing]" the decision for "private property owners in the first instance." Siegel.Opp.15. Plaintiffs-Appellees' preferred rule would likewise fill a property owner's silence, and would do so in ways *less* consistent with the owners' likely intent. *See* Mot.14.

standalone sections on owner consent; contemporaneous newspapers and treatises; and expert evidence. PI.Opp.12-14; D.Es.76, 86. For another, the *Koons* Plaintiffs' claim that these laws did not apply to buildings (Koons.Opp.15) is wrong: as expert historians noted, the 1771 and 1846 New Jersey laws broadly applied to "*any* Land." PI.Opp.14-15; D.Es.76, 86; Op.133. Nor are the *Koons* Plaintiffs right to newly attack the Louisiana and Texas laws as rooted in their black codes (Opp.15), as they rely only on one unattributed opinion piece and no record evidence, and these laws were in effect during Reconstruction and were replicated by Oregon. At the Founding, at Reconstruction, and today, States protected private-property rights in the same manner as Chapter 131's private-property rule.

II. THE EQUITIES SUPPORT THE STATE.

The State amply met its burden to show harm. Plaintiffs-Appellants do not meaningfully dispute harms inherent when a democratically-enacted law is enjoined; the evidence of decreased law enforcement effectiveness and net increases in violent crime; or the risks of accidental shootings, stolen weapons, and aggression. Mot.18-19. Nor do they substantiate any alleged countervailing risks to their safety, instead merely repeating their position that the law is unconstitutional. But this circuit has long distinguished the equities and the merits. *See, e.g.*, *Hohe v. Casey*, 868 F.2d 69, 73 (3d Cir. 1989). At bottom, a stay is necessary to restore the last status quo before judicial-intervention, Mot.8, especially after New Jersey, law enforcement, and the

public have endured three different orders imposing different restraints. Mot.20-21. That is the familiar domain of stays pending appeal, to protect both public safety and private-property owners' rights.

III. THE STATE'S MOTION IS PROPER.

The State repeatedly urged the district court to stay any preliminary injunction pending appeal. PI.Opp.100, *Siegel* D.E.15 at 50 n.31. The court did not.

The *Siegel* Plaintiffs alone wrongly argue that was insufficient absent separate motion papers. But FRAP 8 nowhere requires this formalism. And as to DNJ's Local Rules, they do not bind this Court, and importantly, do not address this scenario—where a stay request would be necessary only *if* the court awards preliminary relief, and would be premature as a standalone motion. *See Hitachi v. Nussbaum Sales*, No. 09-731, 2010 WL 1379804, *3 (D.N.J. Mar. 30, 2010) (DNJ rules "tempered" by "due consideration of the circumstances"). That is why New York took this approach in near-identical challenges to a near-identical statute, notwithstanding similar rules, *see* N.D.N.Y.L.R. 7.1(b); W.D.N.Y.L.R. 7(a), and the Second Circuit granted stays. *See* D.E. 88-2. Other courts of appeals are in accord. *See* Mot.5 n.3.

The *Siegel* Plaintiffs' procedural objections are particularly weak because the district court had already *thrice* preliminarily enjoined the State's law—based on the same merits and equities questions the stay request implicates. *See* FRAP 8(a)(2)(A) (practicable or futile exception). It is senseless to require relitigation before the same

judge for weeks, all while the injunction could *immediately* pose dangers to public safety and property rights. *See Bos. Parent Coal. for Acad. Excellence Corp. v. Sch. Comm. of City of Bos.*, 996 F.3d 37, 44 (1st Cir. 2021) (motion to district court "impracticable" due to "tight timeframe"). No roadblock bars relief.

CONCLUSION

This Court should grant a stay.

Respectfully submitted,

MATTHEW J. PLATKIN
Attorney General of New Jersey

By: /s/ Angela Cai
Deputy Solicitor General

Dated: June 2, 2023

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 27(d) and L.A.R. 31.1(c), I certify that:

1. This brief complies with the type-volume limitations of Fed. R. App. P. 27(d)(2)(C) because the brief contains 2,595 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), and thus does not exceed the 2,600-word limit.

2. 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 the brief has been prepared in a proportionally spaced typeface using the Microsoft Word word-processing system in Times New Roman that is at least 14 points.

3. This brief complies with L.A.R. 31.1(c) in that prior to being electronically submitted, it was scanned by the following virus-detection software and found to be free from computer viruses:

Company: McAfee, Inc.

Product: McAfee VirusScan Enterprise + AntiSpyware Enterprise, version 8.8.

Dated: June 2, 2023

/s/ Angela Cai
Angela Cai
Deputy Solicitor General
Office of the New Jersey Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit using the appellate CM/ECF system. Counsel of record for all parties are registered CM/ECF users and will be served by the appellate CM/ECF system.

Dated: June 2, 2023

/s/ Angela Cai
Angela Cai
Deputy Solicitor General
Office of the New Jersey Attorney General