No. 23-1900, 23-2043

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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. 1:22-cv-07464, 1:22-cv-07463

REPLY BRIEF
FOR *SIEGEL* PLAINTIFFS-APPELLEES/CROSS-APPELLANTS

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INTRODUCTION

The Supreme Court's decision in *Bruen* made clear that states may neither require individuals to satisfy ahistorical preconditions to obtain permits to carry handguns in public nor seek to nullify Second Amendment rights by declaring most locations "sensitive places" where handguns are prohibited. *See N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen,* 142 S.Ct. 2111 (2022). Instead of respecting those commands, New Jersey promptly sprang into action to defy them. The district court correctly recognized the error of the state's ways as to many of its sweeping new permitting and sensitive-places restrictions. The court's only mistake was in not going further. In particular, it should have enjoined two additional aspects of Chapter 131's permitting regime: the application-fee requirement and the four-reputable-persons requirement. And it should have enjoined in full additional provisions prohibiting firearms in particular locations: the playground and youth-sports-events provisions, the medical-facilities provisions, and the fish-and-game provisions.

The state's response brief does nothing to justify these *Bruen*-defying provisions. As to the $200 application fee—$50 of which must, by statute, be deposited for purposes other than defraying the administrative costs of the state's permitting regime—the state insists that plaintiffs have invoked the wrong legal test and claims that the fee necessarily passes muster because it is not "exorbitant." As

for the former, there is no tension between *Bruen*, which plaintiffs fully embrace, and Supreme Court precedents condemning efforts to condition the exercise of constitutional rights on fees that raise revenue for purposes beyond defraying administrative costs. As for the latter, *Bruen* nowhere suggested that states may impose licensing fees that raise revenue for purposes beyond defraying administrative costs so long as they do not force applicants to break the bank. Instead, *Bruen* held that firearms regulations are permissible only if they accord with historical tradition, and the Supreme Court has already held that our Nation's tradition precludes the imposition of fees that go beyond defraying administrative costs. The state thus is forced to speculate that its administrative costs may exceed the $150 that it is collecting to defray them. That is doubtful, but also beside the point, as there is no denying that the state has mandated that $50 be diverted to something other than defraying administrative costs. The state cannot defend that facially unconstitutional regime by rewriting it.

The state's defense of the four-reputable-persons requirement, which conditions the exercise of a constitutional right on the subjective views of both fellow citizens and state permitting authorities, is equally unsound. The state's primary argument is that plaintiffs do not have standing to challenge the requirement because the state thinks that they can ultimately comply with it. But the fact that plaintiffs must comply suffices to give them standing to challenge it. Indeed, the

state cites no authority for its extraordinary claim that citizens are barred from challenging allegedly unconstitutional requirements so long as they can satisfy them. Nor does the state offer a viable defense on the merits. Its position boils down to the proposition that there is nothing wrong with discretionary permitting regimes after *Bruen*—even though *Bruen* said precisely the opposite.

The state's arguments regarding its sensitive-place provisions also miss the mark. The state claims that it may prohibit handguns at off-campus playgrounds and youth sports events because they are like schools, given the presence of "vulnerable" children, and claims a historical tradition of banning firearms wherever vulnerable people gather. But the state overlooks critical features of schools that make them nothing like off-campus locations, and it comes nowhere close to demonstrating that earlier generations protected the vulnerable by leaving them defenseless. Moreover, the state's suggestion that the Court should decline to enjoin the medical-facilities provisions *in toto* overlooks that plaintiffs brought a facial challenge that requires a facial remedy. And the state seeks to preserve its fish-and-game restrictions only by insisting that there is no constitutional right to hunt, which is non-responsive when the right plaintiffs seek to vindicate is self-defense. Because the state all but concedes the remaining injunctive factors, the path forward is clear: The Court should not only affirm the injunction, but expand its scope.

ARGUMENT

I. Plaintiffs Are Likely To Succeed On The Merits Of Their Cross-Appeal Challenges.

Chapter 131's permitting scheme violates the Second Amendment thrice over. Although the district court correctly enjoined one aspect of that scheme (the insurance requirement), it should have enjoined Chapter 131's application-fee and four-reputable-persons requirements too. The state's contrary arguments are meritless.[1]

A. The Permitting Scheme Violates the Second Amendment.

1. Application fee (N.J. Stat. Ann. §2C:58-4(c)).

Chapter 131 declares that, to obtain a permit to carry a handgun, an individual must pay a $200 application fee. *See* N.J. Stat. Ann. §2C:58-4(c). But only a portion of that amount ($150) "shall be used to defray the costs of investigation, administration, and processing of the permit to carry handgun applications"; the remainder ($50) "shall be deposited into the Victims of Crime Compensation Office account." *Id.* That revenue-raising regime is patently unconstitutional, as it conditions conduct that the Second Amendment's plain text covers on compliance with a regulation that is unmoored from historical tradition. Because "[a] state may not impose a charge for the enjoyment of a right granted by the federal constitution,"

[1] The intervenors' second brief is a "reply brief," Intervenors.Reply.Br.1, not a reply-and-response brief that also addresses the *Siegel* plaintiffs' cross-appeal.

the Supreme Court has already held that fees on the exercise of constitutional rights are permissible only when they are confined to "defray[ing]" administrative costs reasonably associated with regulation of the "activities in question." *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943); *see Cox v. New Hampshire*, 312 U.S. 569 (1941). Chapter 131 makes plain on its face that it is not so confined, as it commands that $50 shall *not* "be used to defray the costs of investigation, administration, and processing of the permit to carry handgun applications," but rather "shall" be put to a different use entirely.

The state first counters with the curious argument that plaintiffs "apply the wrong test," "which is *Bruen*, not *Cox*/*Murdoc*[*k*]." NJ.Resp.Br.74. But that presents a false dichotomy. As plaintiffs have explained, "*Bruen*'s textual inquiry" is easily satisfied in this context, and "the state did not and could not demonstrate that forcing law-abiding citizens who wish to carry firearms to" "grow[] a fund to compensate victims of violent crime" "is consistent with this Nation's tradition of firearm regulation, which is what it must establish" under "*Bruen*." *Siegel*.Br.25. Cases like *Cox* and *Murdock* simply inform the historical inquiry, as imposing a fee on Second Amendment rights for some reason other than defraying administrative costs could hardly be consistent with this Nation's history when this Nation's highest court already held long ago that the Constitution precludes *all* efforts to "impose[]" "a license tax … on the exercise of a privilege granted by the Bill of Rights."

Murdock, 319 U.S. at 113. The state tries to confine that rule to the First Amendment, *see* NJ.Resp.Br.74, but *Cox* and *Murdock* plainly address "Bill of Rights" guarantees writ large, *Murdock*, 319 U.S. at 113. Allowing states to levy needless charges in the Second Amendment context alone thus would convert the Amendment into "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. That is precisely what *Bruen* forbids.[2]

In reality, it is the state that "misunderstand[s] the legal test." NJ.Resp.Br.74. Seizing on a footnote in *Bruen*, the state claims that "many regulatory preconditions to bearing arms do not implicate the Second Amendment" at all and that application-fee requirements do so *only* if the fee is so "'exorbitant'" as to effectively "'deny ordinary citizens their right to public carry.'" NJ.Resp.Br.66, 75 (quoting *Bruen*, 142 S.Ct. at 2138 n.9). That argument is a non-starter. A "regulatory precondition" to "bearing arms," NJ.Resp.Br.66, is self-evidently a "regulation" on "conduct" that

[2] The state also suggests that determining whether a fee is confined to defraying administrative costs equates to an impermissible "means-end balancing test." NJ.Resp.Br.74. But nothing in the *Cox*/*Murdock* test requires courts to engage in abstract "balancing" of whether a "statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests." *Bruen*, 142 S.Ct. at 2129. The test simply requires courts to determine whether the fee a state has imposed is confined to offsetting its administrative costs. Here, New Jersey has already answered that question, as Chapter 131 says right on its face that $50 of the fee shall *not* be used to defray licensing costs.

"the Second Amendment's plain text covers," which is all that is necessary to shift the burden to the state to produce historical evidence to justify its regulation, *Bruen*, 142 S.Ct. at 2126; *see also Teter v. Lopez*, 76 F.4th 938, 948 (9th Cir. 2023) ("the first question in *Bruen* … analyzed only the 'Second Amendment's text,'" after which the burden shifts to the state). Footnote 9 in *Bruen* does not suggest otherwise. As the state does not dispute, that footnote came *after* the Supreme Court had "turn[ed] to [the] historical evidence," *id.* at 2138—*i.e.*, after the Court had *already* found the Second Amendment implicated. And while the footnote offers "example[s]" of regulatory preconditions (*e.g.*, "exorbitant fees") that are unlikely to survive the historical inquiry, *id.* at 2138 n.9, that hardly suggests that anything short of such patently "abusive" practices does not even *implicate* the Second Amendment. To the contrary, it underscores the Court's recognition that, just as with any other fundamental constitutional right, imposing *unnecessary* fees on the exercise of Second Amendment rights "inevitably tends to suppress their exercise." *Murdock*, 319 U.S. at 114.

The three district court cases on which the state relies likewise lend no support to its argument that only "exorbitant" fees violate the Second Amendment. None of those cases involved a challenge to an application fee on the ground that it was not confined to defraying administrative costs. Indeed, *Doe v. Bonta*, 2023 WL 187574 (S.D. Cal. Jan. 12, 2023), did not involve a challenge to an application fee at all. As

for the other two, the plaintiffs in both cases argued that the fee violated the Second Amendment not because it required payment into a victim's compensation fund, but simply because it was "exorbitant," which makes it not terribly surprising that each court acknowledged that exorbitant licensing fees violate the Second Amendment. *See Williams v. McFadden,* 2023 WL 4919691, at *6 (W.D.N.C. Aug. 1, 2023); *Nat'l Ass'n for Gun Rts., Inc. v. City of San Jose*, 2023 WL 4552284, at *8 (N.D. Cal. July 13, 2023). But neither purported to hold that "exorbitance" is the *only* constitutional constraint on taxing Second Amendment rights—nor could they without impermissibly demoting those rights to second-class status.

Because fees imposed on the exercise of Second Amendment rights plainly implicate the Second Amendment, the state bears the burden of proving that requiring those who wish to exercise Second Amendment rights to shoulder the cost of compensating victims of violent criminals is "supported by substantial historical evidence." NJ.Resp.Br.75. But even setting aside the problem that virtually all the laws it cites are from the second half of the 19th century or even the 20th century,[3]

[3] The state continues to insist that "Reconstruction-era evidence" (and seemingly 20th-century evidence) is "more persuasive" than "Founding-era … evidence." NJ.Resp.Br.18. *Bruen* begs to differ. *See, e.g.*, 142 S.Ct. at 2154 (concluding that "reliance on late-19th-century laws" has "serious flaws"). And while the state continues to speculate that the lack of early historical support just reflects "our federalist system," NJ.Resp.Br.2, it has no answer to *Bruen*'s admonitions that the "lack" of support cuts against it and that "speculat[ion]" is insufficient to overcome it, 142 S.Ct. at 2131, 2149 n.25; *see also New State Ice Co. v. Liebmann*, 285 U.S.

but see, e.g., *Bruen*, 142 S.Ct. at 2163 (Barrett, J., concurring) ("[A] practice that 'arose in the second half of the 19th century … cannot by itself establish an early American tradition' informing our understanding of the First Amendment." (citing *Espinoza v. Mont. Dep't of Revenue*, 140 S.Ct. 2246, 2258-59 (2020)), the state offers no evidence that the fees or taxes referenced in those laws were imposed for purposes other than defraying licensing or other administrative costs, *see* NJ.Resp.Br.76. The state thus falls far short of its burden of proving that the Second Amendment was a historical exception to the rule that "imposing fees on the exercise of constitutional rights is permissible" only "when the fees are designed to defray (and do not exceed) the administrative costs of regulating the protected activity." *Kwong v. Bloomberg*, 723 F.3d 160, 165 (2d Cir. 2013).

Unable to reconcile its victim-compensation-fund command with any historical (or even present-day) tradition, the state makes the exceedingly strained and atextual argument that, though Chapter 131 explicitly sets aside only $150 of the $200 application fee "to defray the costs of investigation, administration, and processing of the permit to carry handgun applications," N.J. Stat. Ann. §2C:58-4(c), that "does not … suggest[] the [$200] fee is somehow more than necessary to

262, 280 (1932) ("[I]n our constitutional system … there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments.").

'defray' the costs of administration," NJ.Resp.Br.76. The state posits that its *actual* administrative costs may exceed $150, and that the legislature could always revise the law to redirect the extra $50 away from the Victims of Crime Compensation Office and toward defraying those hypothetical costs. NJ.Resp.Br.76-77. This argument did not occur to the state below, and it cannot rescue it now.

For one thing, the state bears the burden to affirmatively "demonstrate" that its application-fee requirement "is consistent with this Nation's historical tradition of firearm regulation," *Bruen*, 142 S.Ct. at 2126—*i.e.*, the tradition that fees must be confined to administrative costs. Mere "speculat[ion]," *id.* at 2149 n.25, that there are additional (but apparently unquantifiable) administrative costs that the legislature apparently forgot to defray when updating the application fee "for the first time in 50 years," NJ.Resp.Br.4, does not get the job done. But more to the point, whatever the state's actual costs of administering its permitting regime may be, Chapter 131 unambiguously commands that $50 of the $200 fee shall *not* be used "to defray the costs of investigation, administration, and processing of the permit to carry handgun applications," but rather "shall be forwarded to the superintendent" and "deposited into the Victims of Crime Compensation Office account." N.J. Stat. Ann. §2C:58-4(c). As a matter of New Jersey law, then, anyone who wants to carry a handgun must pay $50 into the Victims of Crime Compensation Office account.

New Jersey cannot defend that command by positing that the legislature could always repeal and replace it with some other application-fee regime.

The state is thus forced to resort to the dubious argument that forcing law-abiding applicants to provide "[f]inancial assistance to gun-violence victims" *does* defray an "administrative cost" because *Cox* and *Murdock* allow the state to offset the costs associated with "'policing the activities in question.'" NJ.Resp.Br.77-78. But the "activities in question" mean the activities in which the *fee-payer seeks to engage*—here, law-abiding citizens' efforts to obtain a license to carry a handgun—not the activities of wholly unrelated third parties who commit violent crimes. That is why *Murdock* condemned a "license tax" "unrelated to the scope of the activities *of petitioners*." 319 U.S. at 113 (emphasis added). Just as a state cannot force all newspapers to pay into a compensation fund for victims of libelous articles, or compel all court-filers to pay into a preemptive contempt fund, New Jersey cannot impose costs created by those who abuse Second Amendments rights on those who seek only to exercise them.

2. Endorsement from four reputable persons (N.J. Stat. Ann. §2C:58-4(b)).

The state fares no better in defending Chapter 131's novel four-reputable-persons requirement, which requires an applicant to obtain the "endorse[ment]" of at least "four reputable persons who are not related by blood or by law to the applicant and have known the applicant for at least three years," to attest that the

applicant "has not engaged in any acts or made any statements that suggest the applicant is likely to engage in conduct, other than lawful self-defense, that would pose a danger to the applicant or others." N.J. Stat. Ann. §2C:58-4(b). That requirement necessarily entails an "appraisal of facts, the exercise of judgment, and the formation of an opinion" by permitting authorities, which *Bruen* deemed the hallmarks of an unconstitutional permitting regime. 142 S.Ct. at 2138 n.9.

The state's lead response is to claim that plaintiffs lack Article III standing to challenge the four-reputable-persons requirement because they have offered "no basis to believe they cannot find references." NJ.Resp.Br.78-79. That is entirely beside the point. In order to exercise their Second Amendment rights, plaintiffs must affirmatively do something that they maintain the state cannot require them to do—namely, supply the "endorse[ment]" of at least "four reputable persons." N.J. Stat. Ann. §2C:58-4(b). Just as plaintiffs need not prove that they cannot afford a $200 licensing fee to challenge the state's command that they pay it, *see, e.g.*, *Kwong v. Bloomberg*, 876 F.Supp.2d 246, 251 (S.D.N.Y. 2012) (plaintiffs "have suffered a concrete and actual injury because they have all paid the … application fee that is challenged as unconstitutional"), *aff'd*, 723 F.3d 160 (2d Cir. 2013); *Sullivan v. City of Augusta*, 511 F.3d 16, 31 (1st Cir. 2007) ("notwithstanding their apparent ability to comply, we believe the plaintiffs have standing to challenge … the constitutionality of the … application provision"); *Ctr. for Auto Safety Inc. v. Athey*,

37 F.3d 139, 141 (4th Cir. 1994) (plaintiff had standing to challenge charitable solicitation fee even though it "refus[ed] to pay the $200 fee"), they need not prove that they cannot find four "reputable" character references to challenge the state's command that they produce them. Indeed, if a state required a citizen to secure the endorsement of four reputable persons or to pay a small tax to go to church, no one would question the citizen's injury or ability to file suit even if those unconstitutional requirements did not actually preclude her from getting to the pew.

The state thus must defend the four-reputable-persons requirement on the merits, and its efforts fall far short. While the state appears to concede that the requirement furnishes it with considerable "'discretion'" to deny handgun permits, it tries to downplay that problem on the theory that only "individual justices" in *Bruen* expressed concern about discretionary permitting regimes. NJ.Resp.Br.79. That claim is mystifying. The *Bruen* majority, joined in full by six members of the Court, expressly condemned permitting regimes "under which authorities have discretion to deny concealed-carry licenses" based on subjective determinations that the applicant "has not demonstrated … suitability for the relevant license." 142 S.Ct. at 2124. That perfectly describes the problem with the four-reputable-persons requirement. Indeed, the notion that the *Bruen* majority would be unperturbed by a novel character-endorsement regime that looks like something plucked from a Jim-Crow-era voting law strains credulity.

Invoking another *Bruen* footnote, the state contends that the Supreme Court already effectively sanctioned New Jersey's (not-yet-then-extant) four-reputable-persons requirement when it included Connecticut in the list of states with "shall issue" permitting regimes. *See* NJ.Resp.Br.79-80 (citing *Bruen*, 142 S.Ct. at 2123 & n.1). That claim is difficult to comprehend given that Connecticut's law contains no reputable-persons requirement. *See* Conn. Gen. Stat. §29-28 (2021). And while Connecticut grants licensing officials discretion to deny a permit to someone who is not a "suitable person," *id.*, *Bruen* explained that the regime actually "appear[s] to operate like" licensing laws in "'shall issue' jurisdictions," as Connecticut courts have interpreted that discretion narrowly to "preclude[] permits only to those 'individuals whose *conduct has shown* them to be lacking the essential character of temperament necessary to be entrusted with a weapon.'" 142 S.Ct. at 2123 & n.1 (emphasis added). Licensing authorities make that determination, moreover, after considering only *objective* criteria, like the results from "a state and national criminal history records check" and whether the applicant has "failed to successfully complete a course … in the safety and use of pistols and revolvers," Conn. Gen. Stat. §29-28(b). That is miles away from what the state proposes to do here, which is to preclude an applicant from exercising a constitutional right until licensing authorities make an on-the-spot subjective determination that those with sufficient standing in the community have sufficiently favorable things to say about him.

The state protests that plaintiffs' argument is "unsupported by the statutory text" and "would strip law enforcement from obtaining information about … public-safety concerns." NJ.Resp.Br.80-81. As for the former, the statutory text speaks for itself, and it explicitly says that an applicant must "be endorsed by not less than four reputable persons" who are willing to discuss the "nature and extent of their relationship with the applicant." N.J. Stat. Ann. §2C:58-4(b). As for the latter, the state fails to explain why the *objective* criteria used in shall-issue states all throughout the country are inadequate to supply the requisite information to determine whether someone is disqualified from exercising Second Amendment rights. More fundamentally, no matter how much the state wishes to preserve a licensing regime that turns on the "appraisal of facts, the exercise of judgment, and the formation of an opinion," *Bruen*, 142 S.Ct. at 2138 n.9, there is no longer any room for debate that this is one of the "policy choices" that the Second Amendment "takes … off the table," *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

Even assuming this Court *could* second-guess the Supreme Court, the state provides no basis to do so. Although it "identified no historical evidence" below to support its four-reputable-persons requirement, JA72, the state belatedly asserts that "considerable historical evidence supports character-reference requirements like this one," NJ.Resp.Br.81. In reality, its evidence just underscores the novelty of New Jersey's approach. The state first observes that states have traditionally "disarmed"

"dangerous[]" individuals. NJ.Resp.Br.81. But while those laws may support state efforts to dispossess of firearms people who actually engage in misconduct, they lend no support to New Jersey's effort to restrict the exercise of Second Amendment rights *ab initio* unless and until a law-abiding citizen secures the blessing of four "reputable" persons. The state's only other historical evidence consists of a grand total of four municipal laws from the late-19th century or later. But two of those laws (from the City of New York and the then-City of Brooklyn) contain no character-reference requirement,[4] so the state really has only two: an 1871 Jersey City ordinance and a 1903 Trenton ordinance that conditioned the exercise of Second Amendment rights on the endorsement of "three reputable freeholders." NJ.Resp.Br.81. While the state seems to believe that its historical burden is exceedingly light, *see* NJ.Resp.Br.11-14, *Bruen* confirmed that states must show that their firearms regulation are "part of an *enduring* American tradition," 142 S.Ct. at 2155 (emphasis added). To state what should be obvious, two ordinances of dubious facial validity, one of which post-dates even the Fourteenth Amendment by 35 years,

[4] The New York laws allowed the "officer in command" at the local police precinct to make a "recommendation" on whether to approve a permit application. NJ.Resp.Br.81-82. The state argues that "allowing police investigations is to allow collecting the very information character references provide today." NJ.Resp.Br.82 n.22. But the state offers no evidence that New York and Brooklyn police conducted "investigations" into permit applicants at all, much less conducted investigations that are "closely analogous" to its four-reputable-persons requirement. *Baird v. Bonta*, __ F.4th __, 2023 WL 5763345, at *8 (9th Cir. Sept. 7, 2023).

does not an enduring tradition make. *See id.* at 2154 ("[W]e will not stake our interpretation of the Second Amendment upon a law in effect in a single State[.]"); *United States v. Daniels*, 77 F.4th 337, 347 (5th Cir. 2023) ("The *Bruen* Court doubted that three colonial-era laws could suffice to show a tradition, let alone three laws passed eighty to ninety years after the Second Amendment was ratified."). All aspects of Chapter 131's permitting regime at issue on appeal should therefore be enjoined.

B. The Sensitive-Place Provisions Violate the Second Amendment.

The same goes for the sensitive-place provisions. As the state does not dispute, Chapter 131 places "most of New Jersey off limits for law-abiding citizens" by declaring most of the state a "sensitive place." JA19. Both the Supreme Court and this Court have already admonished that such an indiscriminate approach is unconstitutional. *See Bruen*, 142 S.Ct. at 2133, 2156 (explaining that sensitive places are "few" and "exceptional"); *Range v. Att'y Gen.*, 69 F.4th 96, 105 (3d Cir. 2023) ("[H]istorical restrictions on firearms in 'sensitive places' do not empower legislatures to designate any place 'sensitive' and then ban firearms there[.]"). And although the district court correctly enjoined many of the challenged sensitive-place provisions, it should have enjoined others or otherwise expanded the relief it granted.

1. Playgrounds and youth sports events (N.J. Stat. Ann. §§2C:58-4.6(a)(10), (11)).

The district court held that the state can flatly prohibit carrying handguns at all playgrounds and youth sports events—even though it acknowledged that the state supplied "no meaningful analysis" to support those prohibitions. JA186, 192-93, 780-82, 786-88. The state applauds that undeserved result as "unquestionably correct." NJ.Resp.Br.35. In its view, the "historical evidence" confirms that it may prohibit firearms anywhere "vulnerable persons gather," which includes all "playgrounds and youth sports events" because children sometimes "congregate" in those locations. NJ.Resp.Br.35. That theory is flawed on multiple levels.[5]

To start, while the state tries to analogize playgrounds and youth sports events to schools, that effort ignores features that render schools meaningfully different from virtually all other locations.[6] Unlike most other places, a school exercises "*in*

[5] The state suggests that plaintiffs have not "squarely" presented their challenges to the playground and youth-sports-events provisions because they appeared in part in a "footnote." NJ.Resp.Br.35. But the body of the brief explicitly challenges the entirety of the "beach, park, recreational-facility, and playground provision," *Siegel*.Br.47, and the footnote incorporates the same arguments as to the youth-sports provision, *Siegel*.Br.49 n.9; *see also Siegel*.Br.9-10 (identifying both provisions as "relevant to this appeal"). In all events, the state understood plaintiffs' arguments well enough to respond to them, and its protest takes considerable chutzpah given its own repeated footnoting of arguments. *See, e.g.*, NJ.Opening.Br.18 n.3; NJ.Resp.Br.30 n.7.

[6] Chapter 131 contains one sensitive-place provision prohibiting firearms at "schools"—which plaintiffs have not challenged—and a separate sensitive-place provision prohibiting firearms at "youth sports events" and "playgrounds." *See* N.J.

loco parentis" authority over children—*i.e.*, a school stands "in the place of a parent," who does not physically accompany the child to the school that the child is compelled to attend. *In Loco Parentis*, Black's Law Dictionary (11th ed. 2019); *State v. Pendergrass*, 19 N.C. 365, 366 (1837) ("The teacher is the substitute of the parent" and "is invested with his power."). It is thus the school's duty to protect the children who are confined to its premises during the school day, *Mahanoy Area Sch. Dist. v. B. L.*, 141 S.Ct. 2038, 2046 (2021), which gives schools greater leeway to determine how best to do so, *see Koons*.Br.29-30.

But none of that means that the state can declare *every* location where children congregate a "sensitive place." *Cf. Mahanoy*, 141 S.Ct. at 2046 ("[A] school, in relation to off-campus speech, will rarely stand *in loco parentis*."). That would "define[] the category of 'sensitive places' far too broadly," *Bruen*, 142 S.Ct. at 2134, as there are all manner of places where children sometimes congregate. Worse still, it would prohibit parents from protecting their children when they retain the responsibility to do so and would prohibit all law-abiding citizens from protecting themselves even when nobody else can. After all, the state certainly has not offered to guarantee the safety of those gathered at playgrounds and youth sports events by

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Stat. Ann. §§2C:58-4.6(a)(7), (10), (11). The playground and youth-sports-events provisions thus concern *off-campus* locations—*e.g.*, "Tae Kwon Do classes" in a "strip mall." JA768.

providing security itself, which would at least compensate for the loss of their self-defense rights. New Jersey's proposed state of affairs is antithetical to the Second Amendment. *See Heller*, 554 U.S. at 628 (explaining that "the inherent right of self-defense has been central to the Second Amendment right" and includes the right to defend one's "self" and "family").

The state claims that "historical evidence" corroborates its irrational theory that it may categorically strip people of their Second Amendment rights wherever "vulnerable" people congregate, but the evidence it supplies does nothing of the sort. The state first invokes the 1328 Statute of Northampton and subsequent laws modeled after it. *See* NJ.Resp.Br.35 (citing NJ.Opening.Br.13). While the state now concedes (as it must) that *Bruen* held that these laws prohibited carrying a firearm only "in a way that spreads 'fear' or 'terror' among the people," 142 S.Ct. at 2145, it suggests that *Bruen* "did not discuss" the "more specific statutory prohibitions on being armed "in Fairs, markets, []or in the presence of the Justices or other Ministers," NJ.Resp.Br.28 n.6. And according to the state's "expert"—who has ridiculed *Bruen* as "complete and utter fugazi," Patrick J. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 Clev. St. L. Rev. 623, 667 (2023)—the "Fairs and markets" language allows states to prohibit firearms anywhere "where people regularly congregate[]," JA310-11, which is to say pretty much everywhere. Setting aside the problem that *Bruen*

squarely *rejected* the argument that all "places where people typically congregate" may be deemed "sensitive," 142 S.Ct. at 2133, *Bruen* also expressly rejected the argument that the "fairs [and] markets" language in Northampton laws equated to total bans on carrying in those locales, *id.* at 2139, 2144-45.

And those are not even the only respects in which the state's reliance on the Statute of Northampton backfires. While the Statute of Northampton prohibited the carrying of firearms "in the presence of the Justices or other Ministers," JA1223, the state overlooks that it expressly exempted "Ministers" from that prohibition, JA1223, and the King's ministers included arms-bearing and security-providing individuals like "sheriffs" and "bailiffs" (*i.e.*, "sheriff's officers"), 1 William Blackstone, *Commentaries on the Laws of England* *332, *334 (1769). Similar exceptions appeared in American statutes modeled on the Statute of Northampton. *See, e.g.*, JA1233, 1508. The Statute of Northampton and its progeny therefore only underscore that earlier generations generally protected sensitive places by treating them as in need of *heightened* security, not by leaving those who visit them defenseless. *See Koons*.Br.24-26. Consistent with that understanding, *Bruen* explained that the "relatively few" "sensitive places" that exist are locations where "law enforcement professionals are usually presumptively available." 142 S.Ct. at 2133-34.

The state attempts to bolster its vulnerable-people theory by citing the handful of state, territorial, and municipal laws from the late-19th and early-20th centuries that purportedly prohibited firearms at public libraries and museums. *See* NJ.Resp.Br.35 (citing NJ.Opening.Br.19). While these laws' "temporal distance from the founding" is a "serious flaw[]" with the state's argument, *Bruen*, 142 S.Ct. at 2154, *see* Siegel.Resp.Br.41, it is hardly the only one. The state offers precisely zero evidence that any of these jurisdictions enacted these laws due to the presence of "vulnerable" people in such locations, whether children or otherwise. NJ.Resp.Br.35 & n.10. Instead, the state works backwards: It assumes that late-19th- and early-20th-century libraries and museums must have catered principally to children because "*modern* public libraries and museums are popular for families with children." NJ.Opening.Br.20 (emphasis added). But *Bruen* does not tolerate such shortcuts; it demands an assessment of "how and why" earlier generations actually regulated firearms. 142 S.Ct. at 2133, 2149 n.25; *see Range*, 69 F.4th at 103-04. And the state offers no evidence that earlier generations viewed libraries and museums as the functional equivalent of schools.

The only other evidence the state cites for its vulnerable-people theory is its prior efforts to justify its firearms restrictions at medical facilities. *See* NJ.Resp.Br.35 (citing NJ.Opening.Br.22-23). But the state never actually found any historical evidence suggesting that earlier generations prohibited firearms at medical

facilities. To the contrary, it just adamantly insisted that medical facilities are materially indistinguishable from "parks," "zoos," and "establishments serving liquor," where the state can supposedly prohibit firearms consistent with historical tradition. NJ.Opening.Br.23. The premise of that effort is not even correct, *see Siegel*.Br.45-49, 51-52, but in all events, that the state can defend its sweeping law only by deeming playgrounds and youth sporting events equivalent to places as disparate as hospitals, zoos, and bars vindicates the wisdom of the Supreme Court's admonition that "analogical reasoning under the Second Amendment" is not "a regulatory blank check." *Bruen*, 142 S.Ct. at 2133.

2. Health care facilities or treatment centers (N.J. Stat. Ann. §2C:58-4.6(a)(21), (22)).

As plaintiffs explained, the district court correctly concluded that there is a total "lack" of "historical laws" to support the state's firearms prohibition at medical facilities. JA208-10. But although plaintiffs brought a facial challenge, the court limited injunctive relief to "the medical offices and ambulatory care facilities listed in Plaintiffs' declarations." JA210. That is not how remedies work. The court instead should have granted a facial remedy.

The state suggests otherwise, asserting that any additional relief would "fail[] under Article III" because "the pleadings contain no allegations that the *Siegel* Plaintiffs will be visiting" other medical facilities. NJ.Resp.Br.36-37. The state offers no support for that argument, and none exists. But in all events, it does not

matter. "In a facial constitutional challenge, individual application facts do not matter"; "[o]nce standing is established, the plaintiff's personal situation becomes irrelevant." *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011). Instead, "[i]n a facial challenge," "the claimed constitutional violation inheres in the terms of the statute," so "a successful facial attack means the statute is wholly invalid and cannot be applied *to anyone.*" *Id.* at 698; *see id.* ("These are not application-specific harms calling for individual remedies."); *see also, e.g.*, *CMR D.N. Corp. v. City of Philadelphia*, 703 F.3d 612, 624 (3d Cir. 2013). That bedrock rule means that the court should have enjoined the medical-facilities provisions across the board.

3. Fish and Game Restrictions (N.J.A.C. §7:25-5.23(a), (c), (f), (i), (m)).

The state also falls short in defending its fish-and-game restrictions. Its argument is premised on the notion that "the Second Amendment does not encompass a right to recreational hunting." NJ.Resp.Br.41; *see* NJ.Resp.Br.42 (referencing "history of state regulation of game hunting"). But even accepting that premise, the state's argument is misplaced. The Second Amendment unquestionably encompasses a right "to carry a handgun for self-defense outside the home," *Bruen*, 142 S.Ct. at 2122, and *that* is the right that plaintiffs are asserting here—*i.e.*, the right to *defend* themselves while they are engaged in recreational hunting. The state's fish-and-game provisions plainly violate that right, for they prohibit bow-hunters from carrying a handgun, N.J.A.C. §7:25-5.23(m), prohibit handgun

ammunition "in the woods, fields, marshlands, or on the water" or while hunting certain game, *id.* §7:25-5.23(a), (c), (f), and prohibit handguns "within the limits of a state game refuge," *id.* §7:25-5.23(i). While the state insists that "[n]othing in *Heller* … suggests there is a right to carry both handguns and other weapons simultaneously while engaging in hunting," NJ.Resp.Br.42, it does not attempt to square that *ipse dixit* with *Heller*'s admonition that "[i]t is no answer to say … that it is permissible to ban the possession of handguns so long as the possession of other firearms (*i.e.*, long guns) is allowed." 554 U.S. at 629.

Lacking a serious merits defense, the state resorts to another misguided Article III argument. In its view, plaintiffs lack standing because, even if they are right that the fish-and-game provisions violate the Second Amendment, this Court cannot "redress[]" that injury because those provisions are "enforced by the Division of Fish and Wildlife, not Defendants." NJ.Resp.Br.41 n.11. But the lead defendant here is New Jersey's Attorney General, and he has ultimate authority over whether the state brings criminal charges for violations of the fish-and-game provisions. *See* N.J. Stat. Ann. §23:2A-10(a)(5), (f). This Court thus can remedy plaintiffs' injury at least in part by enjoining the Attorney General from enforcing those provisions. Redressability requires nothing more. *See, e.g.*, *Uzuegbunam v. Preczewski*, 141 S.Ct. 792, 801 (2021) (reiterating that even "partial" relief suffices for redressability).

II. The Remaining Factors Favor Injunctive Relief.

As with its own appeal, the state does not meaningfully contest that the remaining factors all favor injunctive relief if the Court agrees that plaintiffs are likely to prevail on the merits in their cross-appeal. *See Baird*, 2023 WL 5763345, at *2-3. Indeed, the state makes no argument at all about the public-interest and balance-of-equities factors. And with the lone exception of plaintiffs' challenge to the fish-and-game restrictions, the state does not dispute the irreparable-harm factor either.[7] And the state's argument regarding those fish-and-game restrictions does not move the needle. The state observes that it enacted those restrictions decades ago, which supposedly undermines the claim of irreparable injury. *See* NJ.Resp.Br.41 n.11. But the state ignores that *Bruen* only recently confirmed the right to carry handguns in public and that the state only recently made the decision to ignore *Bruen*'s teachings. The state does not and cannot explain why plaintiffs' prompt challenge to the state's continued refusal to align its fish-and-game provisions with *Bruen* is nevertheless too late. Accordingly, the Court should affirm the injunction already granted and remand with instructions for the district court to

[7] The state does not defend the district court's erroneous conclusion that, even though the state defendants enjoy sovereign immunity that they are not willing to waive, plaintiffs could somehow obtain monetary damages (and thus cannot establish irreparable harm) if they succeed on their challenge to the application-fee requirement. *See* JA81.

broaden that relief to ensure that plaintiffs need not live under those unconstitutional provisions while this litigation runs its course.

CONCLUSION

The Court should affirm to the extent the district court granted a preliminary injunction but otherwise reverse.

Respectfully submitted,

s/Erin E. Murphy

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September 18, 2023

CERTIFICATE OF BAR MEMBERSHIP

The undersigned hereby certifies pursuant to L.A.R. 46.1 that the attorney whose name appears on the Brief of Appellant was duly admitted to the Bar of the United States Court of Appeals for the Third Circuit in 2013 and is presently a member in good standing at the Bar of said court.

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I hereby certify that this brief complies with the type-volume requirements and limitations of Fed. R. App. P. 28.1(e)(2)(B)(i). Specifically, this brief contains 6,352 words in 14-point Times New Roman font.

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