Case Nos. 23-4354 and 23-4356

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

RENO MAY, ET AL.,
Plaintiffs-Appellees,

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS
ATTORNEY GENERAL OF CALIFORNIA,
Defendant-Appellant.

**On Appeal from the United States District Court
for the Central District of California**
No. 8:23-cv-01696-CJC-ADSx
The Honorable Cormac J. Carney, Judge

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(*Additional caption appears on next page*)

February 16, 2024

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MARCO ANTONIO CARRALERO, ET AL.,
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v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS
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Defendant-Appellant.

On Appeal from the United States District Court
for the Central District of California
No. 8:23-cv-01798-CJC-ADSx
The Honorable Cormac J. Carney, Judge

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Under Rule 26.1(a) of the Federal Rules of Appellate Procedure, counsel for Plaintiffs-Appellees make these disclosures:

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over Plaintiffs' federal constitutional claims under 28 U.S.C. § 1331. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES

Whether the district court abused its discretion in preserving the decades-long status quo about where California concealed carry weapons permit holders could lawfully carry firearms in public, by enjoining portions of California's Senate Bill 2 ("SB 2").

ADDENDUM OF STATUTORY PROVISIONS

Except for the addendum of pertinent statutory provisions filed with this brief, all applicable statutes, etc., are contained in Appellant's Opening Brief.

STATEMENT OF THE CASE

Appellees adopt and incorporate the factual findings of the district court in its order granting preliminary injunction published at 1-ER-10-14.

ARGUMENT

I. Summary of Argument

The Supreme Court confirmed that "the Second Amendment guarantees a general right to public carry" (*N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 33 (2022)), and that while there may be a few truly "sensitive places" where that right to carry may be restricted, a broad notion of "sensitivity" is unconstitutional because gun-free zones were generally unknown to the Founders, and declaring lots of "sensitive places" would "eviscerate the general right to publicly carry arms for self-defense." *Id.* at 31.

Yet, construing *Bruen*'s warning as an invitation, SB 2 now classifies most publicly accessible places as "sensitive places" where a person who has qualified for and maintains a valid concealed carry weapons ("CCW") permit must disarm in order to participate in the day-to-day activities of society. Under the portions of California's Penal Code section 26230 challenged by Appellees, carry is banned on public transportation, in businesses that serve alcohol, in banks, libraries, playgrounds, urban, rural, and state parks, medical facilities, and more. Even carrying into other "non-sensitive" places of public accommodation is impermissible unless the owner of that business posts a sign affirmatively allowing carry,[1] upending decades of prior law for CCW holders and treating them like

[1] To date, constitutionally permissible restrictions on carrying in privately-owned businesses allow for individual business owners to choose to *exclude* concealed carriers by posting a sign to that effect on their property with attendant criminal penalties for disobeying the owner's sign. *See, e.g.,* Ariz. Rev. Stat. Ann. § 13-1502 (2024). Until SB 2, California treated carrying by a CCW holder in a private business in contravention of that business owner's "no guns" policy as grounds for a trespass charge if the carrier did not disarm or leave the property when instructed. *See* Cal. Penal Code § 602(*l*)(1), (m) & (t)(1) (West 2024).

vampires who must be invited to enter.

The law even prohibits carry in the parking lots of these nascently sensitive places. If someone carrying visits a business where carry is permitted, but that business shares a parking lot with, e.g., an Applebee's, a 7Eleven, or a Bank of America, carrying is prohibited. This new scheme is a vast and intrusive change to carry law as it previously existed in California.

The legislature intentionally conceived SB 2 as a way to limit carry to just streets, sidewalks, and the few standalone private businesses willing to post signs affirmatively allowing carry. The State does not deny this. *See* Appellant's Mot. for Stay Pending Appeal at 22, Dec. 22, 2023, ECF No. 4.1. Attorney General Bonta publicly stated that he was "proud to support SB 2 this year, our concealed carry weapons ban law." *See* AG Bonta & Comm. Leaders Host Roundtable Addressing Best Practices & Efforts to Prevent Gun Violence, YouTube.com, https://www.youtube.com/watch?v=EJY9lEEtdnA&t=1869s (at 31:09) (last visited Feb. 15, 2024). In announcing SB 2 last year, Governor Newsom angrily criticized the Supreme Court for the *Bruen* ruling and mocked the notion of a right to carry. *See* SB 2 Press Conference, YouTube.com (Feb. 1, 2023), https://www.youtube.com/watch?v=Kpxpj6yvFIo (at 36:10) (last visited Feb. 15, 2024).

Yet when questioned about whether people with CCW permits commit any notable amount of crime, Newsom demurred. *Id.* (at 55:15). The district court did not dodge the question, however. It found that people with CCW permits are

overwhelmingly law-abiding, based on data from several states.[2] 1-ER-48. That is why numerous law enforcement organizations, like the California State Sheriffs' Association, opposed SB 2 (11-ER-2196-97), and why the largest law enforcement organization in California, the Peace Officers Research Association of California ("PORAC"), submitted a declaration in support of granting the preliminary injunction. 1-SER-21-29.

Bruen may be a recent decision, but it explained a historically persistent right. California acknowledged the history of this right by never previously regulating carry for CCW permit holders in any of the challenged places that SB 2 now regulates. The district court's ruling merely preserved this status quo. The district court did not abuse its discretion in finding that Appellees were likely to succeed in showing there was no historical tradition in banning carry in the places challenged.

II. Standard of Review

Applicants seeking a preliminary injunction must establish that (1) they are likely to succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary relief; (3) the balance of equities tips in their favor; and (4) an injunction is in the public interest. *Am. Trucking Ass'ns v. City of Los Angeles*, 559 F.3d 1046, 1052 (9th Cir. 2009). The district court is given substantial deference in its decision to grant a preliminary injunction; the decision is reviewed

[2] A district court in Hawaii also acknowledged and relied on similar data submitted by some of the associational Plaintiffs here as amici in that matter. *See Wolford v. Lopez*, 2023 WL 5043805, at *32 (D. Haw. Aug. 8, 2023).

on appeal only for abuse of discretion. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011); *see also Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004) (noting that the Supreme Court, "like other appellate courts, has always applied the abuse of discretion standard on the review of a preliminary injunction"). It is particularly difficult to argue such an abuse occurred here, given how many other courts have reached similar conclusions.[3]

"An abuse of discretion will [only] be found if the district court based its decision 'on an erroneous legal standard or clearly erroneous finding of fact.'" *All. for Wild Rockies*, 632 F.3d at 1131 (quoting *Lands Council v. McNair*, 537 F.3d 981, 986 (9th Cir. 2008) (en banc)). This Court "will not reverse the district court where it 'got the law right,' even if [it] 'would have arrived at a different result,' so long as the district court did not clearly err in its factual determinations." *All. for*

[3] *See, e.g.*, *Koons v. Platkin*, 2023 WL 3478604 (D.N.J. May 16, 2023) (enjoining New Jersey's restrictions on carrying on most government property, public gatherings, zoos, parks, libraries, museums, healthcare facilities, casinos, bars and restaurants serving alcohol, entertainment facilities, and the vampire rule); *Wolford*, 2023 WL 5043805 (enjoining Hawaii's restrictions on carrying in parking areas adjacent to government buildings, places serving alcohol, beaches, parks, banks, and the vampire rule); *Kipke v. Moore*, 2023 WL 6381503 (D. Md. Sept. 29, 2023) (enjoining Maryland's restrictions on carrying in locations that sell alcohol, public gatherings, and the vampire rule); *Nat'l Ass'n for Gun Rts. v. Grisham*, 2023 WL 5951940, at *4 (D.N.M. Sept. 13, 2023) (restraining New Mexico Governor's executive order banning carry in most places in Albuquerque); *Springer v. Grisham*, 2023 WL 8436312, at *8 (D.N.M. Dec. 5, 2023) (enjoining New Mexico Governor's executive order banning carry in public parks); *Antonyuk v. Hochul*, 639 F. Supp. 3d 232, 316 (N.D.N.Y. 2022) (enjoining New York's restrictions on carrying in hospitals, places of worship, parks, zoos, some public transport, theaters, conference centers, banquet halls, public gatherings, and the vampire rule), *aff'd in part, vacated in part, remanded sub nom. Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023); *B&L Productions, Inc. v. Bonta*, 2023 WL 7132054, at *15 (C.D. Cal. Oct. 30, 2023) (government-owned fairgrounds are not a sensitive place).

Wild Rockies, 632 F.3d at 1131 (quoting *Lands Council*, 537 F.3d at 987).

Only when the district court's ruling rests *solely* on a premise of law and the facts are either established or undisputed, is de novo review appropriate. *Harris v. Bd. of Supervisors, L.A. Cnty.*, 366 F.3d 754, 760 (9th Cir. 2004). Appellant's argument that the entire order granting the preliminary injunction should be reviewed de novo (Appellant's Opening Br. ("Br.") at 10) is a tacit admission that the district court's findings of fact are undisputed and cannot be second-guessed by this Court unless clearly erroneous.

III. ARGUMENT

A. Appellees Are Likely to Succeed on the Merits.

1. Historical analysis under the Second Amendment.

In 2022, the Supreme Court reaffirmed the *District of Columbia v. Heller*, 554 U.S. 570 (2008) "original public meaning test" for analyzing Second Amendment challenges. Applying it, the Court found that the Second Amendment protects the right to armed self-defense in public. *Bruen*, 597 U.S. at 19, 31-33. *Bruen* reiterated that courts may not engage in any form of "intermediate scrutiny" or "strict scrutiny" in Second Amendment cases. *Id.* at 23.

Given this, the analysis applied by the district court to SB 2 was:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."

Bruen, 597 U.S. at 24. The burden that the Second Amendment imposes is "the

government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 17 (emphasis added); *see also id.* at 19, 24, 58 n.25, 59 & 70.

Moreover, the government cannot simply proffer just any historical law that references firearms. Rather, when challenged laws regulate conduct or circumstances that already existed at the time of the Founding, the absence of widespread historical laws restricting that same conduct or circumstances indicates that the Founders understood the Second Amendment to preclude such regulation. *Id.* at 27. In contrast, uniquely modern circumstances that did not exist at the time of the Founding call for an analogical analysis, based on the government's proffered historical record. *Id.* at 28-29.

Outlier statutes do not satisfy the requirement. A law must be a "well-established and representative historical analogue." *Id.* at 30. Courts simply may not uphold a modern law just because a few similar laws may be found from the past. *Id.* Doing so "risk[s] endorsing outliers that our ancestors would never have accepted." *Id*. (quoting *Drummond v. Robinson Township*, 9 F.4th 217, 226 (3d Cir. 2021)).

For example, in *Bruen*, New York presented three laws from the Colonial era, three turn-of-the-18th-century laws, three 19th-century laws, and five late-19th-century regulations from the Western Territories. *Bruen*, 597 U.S. at 37-70. The Court deemed them outliers insufficient to uphold New York's law, and emphasized, as it had in *Heller*, that it would not stake its interpretation of the Second Amendment upon historical outliers that contradict the overwhelming

weight of other evidence about the right to bear arms in public for self-defense. *Id.* at 65.[4]

Reconstruction-era evidence is relevant only if it provides confirmation of what had been established before, but "postratification adoption or acceptance of laws that are inconsistent with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id.* at 36 (quoting *Heller v. District of Columbia,* 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)); *see also Espinoza v. Mont. Dep't of Revenue*, 140 S. Ct. 2246, 2258-59 (2020) (noting that even "more than 30 States" adopting laws "in the second half of the 19th century . . . cannot by itself establish an early American tradition" because "such evidence may reinforce an early practice but cannot create one").[5] 20th-century evidence was deemed even less persuasive. *Bruen*, 597 U.S. at 66

[4] Some of these laws rejected by *Bruen* continue to be cited as relevant analogues supporting SB 2. *Compare* Def's. Opp. to Pls.' Motions for Prelim. Inj. at 13 & 20 (citing *Andrews v. State*, 50 Tenn. 165 (1871)), 20 & 23 (citing *State v. Shelby*, 90 Mo. 302, 2 S.W. 468 (1886)), *with Bruen*, 597 U.S. at 54 (citing *Andrews* to explain why the Tennessee statute is not a relevant analogue) & 68 n.30 (citing *Shelby* to reject the Missouri statute as an analogue). *See also* Br. at 34-35 (citing *State v. Shelby*, 90 Mo. 302 for the proposition that a Missouri law prohibiting concealed carry at public assemblies for education, literary, or social purposes is a valid analogue to SB 2's restrictions). Missouri's prohibition on concealed carry at assemblies was not a valid sensitive places analogue because Missouri allowed armed self-defense by open carry at such assemblies. *See Bruen* at 597 U.S. at 68 n.30 (citing *Shelby*, 90 Mo. 302). California, by contrast, bans open carry. *See* Cal. Penal Code § 26350 (West 2024).

[5] *See also* Mark W. Smith, *Attention Originalists: The Second Amendment Was Adopted in 1791, Not 1868*, 24 Harvard J.L. & Pub. Pol'y Per Curiam 31 (2022) ("No Supreme Court case has ever looked to 1868 as the principal period for determining the meaning of an individual right in the Bill of Rights. If periods after 1791 are consulted at all, it is only to confirm that subsequent authorities remained consistent with the public understanding in 1791").

n.28.

Finally, as to *Bruen*'s observation that "unprecedented societal concerns or dramatic technological changes may require a more nuanced approach" (*Bruen*, 597 U.S. at 27), this case is "fairly straightforward" because SB 2 purportedly "addresses a general societal problem that has persisted since the 18th century." *Id.* at 26. The social concern of criminals committing crimes with weapons they carry in public is not a 21st-century innovation. The Supreme Court made clear that the "lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Id.* (emphasis added).

Thus, even if California considers the lawful carry of firearms in public by permit holders a modern societal problem, it is not a novel problem. Allowing California to equivocate relevant analogues with irrelevant anachronisms in an attempt to fabricate an early American tradition that never existed would grant California the "blank check" *Bruen* forbids. *Id.* at 30.

2. Sensitive places are narrowly defined under *Bruen*.

As to whether there are any special locations where the right to bear arms might be restricted without infringing Second Amendment rights, the Court explained that "the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited." *Bruen*, 597 U.S. at 30. And:

> expanding the category of "sensitive places" simply to all places of public congregation that are not isolated from law enforcement

> defines the category of "sensitive places" far too broadly. . . [and] would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense.

Id. at 31. "[T]here is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place' simply because it is crowded and protected generally by the New York City Police Department." *Id*.

Indeed, sensitive places are intended to be the rare exception to the general right to public carry. Using the historical record, the Court acknowledged only three types of places where it suspected firearm carry might presumptively be foreclosed: legislative assemblies, polling places, and courthouses. *Id.* (citing D. Kopel & J. Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205, 229-236, 244-247 (2018)). Beyond that, the Court identified no other well-represented examples that would obviously and facially meet *Bruen*'s test.

By contrast, many of the specific places included in SB 2 are obviously and facially not sensitive. This Court should be suspicious that such a long list of prohibited places, "when considered in combination[,] . . . effectively exempt[s] cities from the Amendment's protections." *See* Leo Bernabei, *Taking Aim at New York's Concealed Carry Improvement Act*, Duke Center for Firearms Law Blog (Aug. 7, 2023), https://firearmslaw.duke.edu/2023/08/taking-aim-at-new-yorks-concealed-carry-improvement-act/. This "aggregate-effect" analysis was adopted by the Seventh Circuit in barring the City of Chicago from zoning gun ranges out of existence, because the "combined effect" of the various zoning rules left very little of the City of Chicago available for ranges. *Ezell v. City of Chicago*, 846 F.3d 888, 894 (7th Cir. 2017). It is equally applicable here due to the cumulative effect

of SB 2's restrictions.

Under Penal Code section 26230's aggregated list of 29 separate sensitive places, prohibited places are the majority, and places in which the right to carry in daily life remains are the exceptions. "[E]xpanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly." *Bruen*, 597 U.S. at 31. Yet this is what SB 2 has effectively done.

The Kopel & Greenlee article approvingly cited by *Bruen* explains:

> [W]hen a building, such as a courthouse, is protected by metal detectors and guards, the government shows the seriousness of the government's belief that the building is sensitive. . . . Conversely, when the government provides no security at all – such as in a Post Office or its parking lot – the government's behavior shows that the location is probably not sensitive; further, the disarmament burden inflicted on citizens is not mitigated by alternative protectors supplied by the government.

Kopel & Greenlee, *supra*, at 290.

Government-provided armed security is not alone sufficient to transform any given location into a constitutionally sensitive place. But the presence of security does at least provide some indication the government itself does (and perhaps in the past) truly consider a place sensitive. *See id*.

It is uncontroverted that SB 2 provides no resources to secure the places that now the State declares to be sensitive. Compare places like parks libraries, banks, bars, gambling halls, hospitals, and lotteries—all of which existed prior to Reconstruction without a sensitive designation or state-required security—with modern places like nuclear facilities, airports, spaceports, biological laboratories,

large military installations, and weapons development laboratories—i.e., the sort of modern locations with government-required security to which *Bruen's* nuanced approach language would actually apply. The government reveals the sincerity of its belief that such modern places are truly sensitive by requiring armed security and strict ingress/egress requirements. The places in SB 2, however, the State continues to leave unsecured and labels as sensitive now only as a political exercise in discouraging the exercise of the carry right.

3. California failed to carry its burden to show that SB 2 regulates historically sensitive places.

The State repeatedly argues that, even though a type of place existed in 1791 or the 19th century, it "did not exist in [its] modern form in the Founding and Reconstruction eras." Br. at 36-37, 39, 41, 47. That statement is obvious, tautological, and legally inconsequential under *Bruen*. No place is identical to its 18th-century version, but modernity alone does not per se trigger the elastic, nearly standardless analogical approach that the State desires for its historical arguments to have validity. If modernity were the trigger, then it would be hard to imagine a case where *Bruen*'s "more nuanced approach" would ever not apply.

Indeed, the State's contention that modern public spaces are dramatically different than those of the past is unpersuasive in the context of its burden.[6] "The

[6] *Heller* labeled a similar argument as "bordering on the frivolous," rejecting the notion "that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way … the First Amendment protects modern forms of communications … the Fourth Amendment applies to modern forms of search, [and] the Second Amendment extends, prima facie, to . . . arms . . . that were not in existence at the time of the founding." 554 U.S. at 582.

test in *Bruen* does not direct courts to look at when a historical place became akin to the modern place being regulated." *Wolford*, 2023 WL 5043805, at *21. A bar today serves a nearly identical purpose to a pub or tavern in 1791, just as a library today is comparable to libraries of the past. To the extent there is any claimed problem with carrying weapons in places that also existed in the past, "the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. A recent criminal case involving a defendant charged with carrying in a post office reached the same conclusion. *United States v. Ayala*, 2024 WL 132624, at *5 (M.D. Fla. Jan. 12, 2024) (invalidating federal carry ban because post offices have existed since the Founding era, but the first restriction on carry within them was enacted in 1972).

4. California fails to account for the regulation of permits in lieu of places.

From 1863 until the 21st century, California restricted only concealed carry, not open carry. 10-ER-2110. Open carry was generally allowed with no permit requirements at all. But today California bans open carry and imposes an onerous process to carry concealed. To obtain a CCW permit, a police interview, full-day training course, thorough DOJ background check, psychological exam at the issuing authority's discretion, wait times, and, in some cities, over $1,000 in expenses must be endured. *See* Cal. Penal Code § 26150, *et seq*. (West 2024) Thus, to the extent the State argues that places have changed compared to their earlier versions, fairness obligates it to concede that its regulation of carry in California

has also grown much more restrictive, *Bruen* notwithstanding. The district court rightly acknowledged this consideration. 1-ER-37.

The State complains that acknowledging this was a "pervasive legal error." Br. at 18. But if it is going to argue that, e.g., a modern library is meaningfully different than a library of two centuries ago when it comes to the places where the right to carry may be exercised, then it may not ignore the fact that the people who may exercise the right to carry in California today are subject to extensive vetting requirements that not only lack historical precedent, but to which library patrons of the past were not subject.

5. The State's "three principal attributes" have poor historical support, primarily relying on rebel outliers instead of a representative national tradition.

California proposes a "three principle attribute" test for identifying a "sensitive place" (Br. at 13). This attempt to weave a new judicial test from whole cloth does not comport with *Bruen*, which articulated a meaningful test for the right of public carry for self-defense in which sensitive places are necessarily a rare exception. Yet the State's proposed test for identifying a sensitive place would enable the contemplated exception to swallow *Bruen*'s rule. If virtually every place is sensitive, then the term is meaningless. *Bruen*, 597 U.S. at 30-31.

The first attribute the State proposes for identifying a sensitive place is identifying any place "central[] to civic life or the exercise of constitutional rights." Br. at 13-14. While Appellees generally agree that places identified and supported by the case law (such as legislative assemblies, polling places, and courthouses)

may be sensitive by virtue of the government activities taking place there, they only qualify as sensitive because the activities occurring there directly relate to the deliberative business of governance, not because they are a "part of civic life." *Cf. Ayala*, 2024 WL 132624 at *5 (post offices not sensitive places).

But the State lacks historical support when it asserts that restrictions at places of public governance can be transmuted into restrictions onto other places that are central to civic life. Br. at 13-14. Places "central to civic life" include banks, grocery stores, dry cleaners, internet cafes, neighborhood cul-de-sacs, etc. The association with other like-minded residents, engaging in speech to petition for new laws, backing and financing of candidates, propositions, or social movements—all activities central to civic life—do not just occur at a polling place, in a legislature's rotunda, or inside a courthouse.

And people exercise their constitutional rights everywhere, e.g., speech happens on freeway offramps, billboards, bus stop benches, and sidewalks. Engaging in religious activities is also ubiquitous: discussions in online fora, social gatherings at parks, basketball games at rec centers, prayer groups in library spaces, and of course, worship in churches. In nearly all these places, there is no historical tradition of banning carry consistent with *Bruen's* actual test. But the State's first inquiry in its proposed test is so vague, encompassing, subjective, and ultimately meaningless that any one of these otherwise clearly historically non-sensitive places could be swept within its ambit depending on the facts of the particular case or the impulses of judge handling it. It is unworkable.

The State's second proposed attribute—"whether [its] physical nature makes

a place [where] the presence of firearms [is] especially dangerous"—is merely another way of the State to lobby for banning carry in crowded places, a position that the Court already rejected. *Bruen*, 597 U.S. at 31. The State's supporting evidence for this principle is weaker, including citation to the same "going armed" laws that *Bruen* expressly rejected. Br. at 15. Even if there is a historical tradition of prohibiting carry in a manner likely to "terrify the people" to be found (*id.*), Appellees seek to carry their firearms concealed, not openly. The State does not cite one case or historical statute where carrying arms in a manner "likely to terrify the people" was ever understood to refer to unobtrusively carrying concealed.

Moreover, the State's own historical record does not support its contentions. Appellant cites a law restricting loaded firearms in parades, but this law applied only to members of the military participating in the parade, not civilians carrying for self-defense observing those parades. 4-ER-670. The other law prohibited throwing rocks at or shooting at trains and did not ban peaceable carry for self-defense. 5-ER-842.

Nor is the caselaw relied upon helpful to Appellant's cause. One case is an 1889 Texas Court of Appeals matter that is three paragraphs long, does not even mention much less analyze a state or federal right to bear arms, and addresses only whether the state law in question prohibited a school teacher from carrying within his own classroom. *See Alexander v. State*, 11 S.W. 628, 629 (Tex. App. 1889). One modern case, *Christopher v. Ramsey County*, has the bizarre distinction of being the only post-*Bruen* Second Amendment case that does not acknowledge or discuss *Bruen*. 621 F. Supp. 3d 972, 981 (D. Minn. 2022). Even worse, it applied

the means-end scrutiny abrogated by *Bruen*. *Id*. *Bruen* rejected the crowded places argument that the State makes the second inquiry of its fanciful ahistorical test, and the cases do not show a historical tradition supporting such a test.

Finally, the State's third proposed attribute of a modern sensitive place is one that hosts "the congregation of vulnerable populations. . . ." Br. at 16. California defines vulnerable populations as "children, the elderly, and those suffering from illness." *Id.* Of course, children are present everywhere now just as they were in the Founding era, and while their presence gives justification to SB 2's sweeping ambit, the State does not identify any historical tradition banning carrying of arms in places where children congregate specifically or in places where vulnerable populations congregate generally. Similarly, as for the elderly and sick, the State identifies no historical tradition of regulating firearms in the places they congregate. In fact, as discussed *infra*, the State's experts admitted there was no such tradition as to hospitals, the sick and elderly being *sine qua non* of hospitals.

In support of this third aspect of its proposed test, the State cites just three outlier historical laws. The first is from Texas (5-ER-792), the same state whose Reconstruction historical approach to the right to carry *Bruen* rejected. 597 U.S. at 65 (rejecting a similar 1871 Texas statute conditioning the right to carry as an outlier in part because only one other state had a similar law).

The next law cited, from Mississippi, does not actually restrict carry by adults in any particular place. 5-ER-859-860. Instead, it bars fathers from allowing their sons under the age of 16 to carry concealed, and bars students—but not

faculty or other adults—from carrying weapons in schools, and bans some concealed carry but not open carry. The Mississippi law also generally bans concealed carry, but not open carry. This law's subject is not, as the State contends, "vulnerable groups" at all. Br. at 16.

The final historical law cited is at 5-ER-868, a Missouri law of unknown provenance. How this outlier is not similar to the Texas law rejected in *Bruen* is also unexplained. 597 U.S. at 66 (citing *Heller*, 554 U.S. at 632).

Two other foundational flaws are present throughout the State's brief. Despite its insistence that schools are an established sensitive place and that many of SB 2's non-school places should be bootstrapped to schools, Appellant has not presented evidence of any such historical tradition. "Indeed, there does not appear to be a single regulation near the Founding that prohibits carrying a weapon at or near a school." 1-ER-22. To the contrary, *Bruen's* historical discussion recognized instances in which carrying firearms in schools was considered acceptable, describing when a "'superintendent of schools . . . brought [the teacher] a revolver' for his protection." *Bruen,* 597 U.S. at 61.

What do exist are a few historical school policies barring students from carrying weapons at schools, but not adults.[7] "Significantly, early regulation of firearms in schools applied only to students, not to faculty, staff, or other employees." 1-ER-32 (citing Kopel & Greenlee, *supra*, at 250 (stating that schools

[7] State bans on carrying in school buildings would mostly only start to arise towards the end of the 19th century in just a handful of states and Western Territories. *See United States v. Metcalf*, 2024 WL 358154, at *8 (D. Mont. Jan. 31, 2024) (discussing six laws ranging from 1871 to 1903).

were "not a place where arms were forbidden to responsible adults")); *see also United States v. Metcalf*, 2024 WL 358154, at *7 (D. Mont. Jan. 31, 2024) (early university firearm bans "were not regulations on carrying weapons in 'sensitive places.' Rather, they banned certain persons—students—from carrying weapons."). The State even cited one such historical law. 5-ER-859-60. The State has not demonstrated any historical tradition of banning carry in schools, let alone one that justifies broad bans on other modern places by analogizing them to schools.[8]

Second, while *Bruen* tells us to look for "representative" historical laws, the State predominantly cites laws from Southern states during Reconstruction or later. While such laws may be a part of a national tradition when similar laws are found throughout the country, when standing alone, they are suspect, and deservedly so. Reconstruction was a time of well-documented efforts in the Southern legislatures to disarm newly-freed Black Americans. President Grant himself complained in a letter to Congress that the Ku Klux Klan's objectives were "by force and terror, to prevent all political action not in accord with the views of the members, to deprive colored citizens of the right to bear arms . . . and to reduce the colored people to a condition closely akin to that of slavery." H. Journal, 42nd Cong., 2d Sess. 716 (1872).

Sadly, the few firearm laws addressing permits and public carry from the

[8] The State repeatedly relies on school restrictions to per se justify other restrictions without conducting the necessary historical analysis, and is thus building its general carry ban on a historical foundation that does not exist. Br. at 4, 12, 19, 26, 28, 40, 46, 48.

19th century were often designed to disarm Blacks. *See, e.g.*, *Watson v. Stone*, 4 So.2d 700, 703 (1941) (Buford, J., concurring) (discussing an 1893 repeating rifle permitting law that "was passed for the purpose of disarming the negro laborers. . . . The statute was never intended to be applied to the white population and in practice has never been so applied . . . because it has been generally conceded to be in contravention to the Constitution and non-enforceable if contested.").

In the sensitive places context, the relative dearth of Northern restrictions is especially damning because the Northern states were generally more urbanized and densely populated than their Southern and Western Territories counterparts. If the State's crowded places arguments were true, it should be able to present more laws or ordinances restricting carry in Northern cities. But it cannot, because such laws were not prevalent in Boston, New York, Washington, Philadelphia, Brooklyn, Baltimore, Cincinnati, Buffalo, etc.

6. The State's experts failed to carry the State's burden.

Appellant submitted thirteen expert declarations with thousands of pages of exhibits. Br. at 8. The trial court considered those declarations in making its findings of fact. 1-ER-26, 33, 69, 75, 76. The trial court also examined Appellees' single expert declaration (1-ER-21, 38, 64, 81) and likewise weighed the persuasive value of that testimony. The findings derived from this evidence may only be reviewed for clear error. Appellate courts "will not reverse the district court where it 'got the law right,' even if [it] 'would have arrived at a different result,' so long as the district court did not clearly err in its factual determinations."

All. for Wild Rockies, 632 F.3d at 1131 (9th Cir. 2011) (quoting *Lands Council*, 537 F.3d at 987) (9th Cir. 2008) (en banc).

Despite the voluminousness of Appellant's expert evidence, the substance of it is little more than excuse-making for why a particular regulatory tradition did not exist. For example, after laboring through a detailed but irrelevant discussion of public life in Colonial and Founding-era Philadelphia, one expert concedes that the city "did not enact weapon-specific regulations for these places of public assembly." 9-ER-1637. Admittedly having cited no evidence to support such an opinion, the same expert also opines that it would be unreasonable to infer that people had "permission to openly carry in populated places during a person's ordinary activities." 9-ER-1644. This opinion is indefensible not only because she bases it on pure surmise rather than a historical record banning open carry, but because it is also an opinion the Supreme Court squarely rejected in *Bruen*. 597 U.S. at 32-33.

The district court, after having given due weight to all of the experts' declarations and exhibits, came to the unremarkable conclusion that the absence of evidence really is just that and not an invitation to speculate what might have existed. California could not meet its core burden of producing evidence of historically relevant laws that are analogous to SB 2 under the *Bruen* test. That finding should not be disturbed on appeal absent clear error.

7. The Second Circuit's recent carry opinion defies *Bruen* and should be disregarded.

California's reliance on the Second Circuit's opinion in *Antonyuk v.*

Chiumento, 89 F.4th 271 (2d Cir. 2023) ("*Antonyuk II*"), is not well taken. Br. at 1, 11-13, 31, 38, 40-42, 45, 48. Appellant brought *Antonyuk II* to the attention of the trial court with a Notice of Supplemental Authority (ECF No. 40, Dec. 11, 2023) prior to Appellees' Motion for Preliminary Injunction, and the case was discussed extensively during hearing. *See* Tr. of Hr'g on Mot. for Prelim. Inj., 2-ER-127, 136, 139, 148, 149, 152. Given the Second Circuit's prior failure to faithfully apply the law from *Heller,* which failure gave rise the remedial tone of the opinion in *Bruen*,[9] it is not surprising that the trial court conducted its own independent analysis below.

Antonyuk II is unpersuasive because it distorts *Bruen*'s test beyond recognition. It approvingly cited a law review article that was highly critical of *Bruen,* and ultimately followed its advice on how to narrow the analysis to circumscribe the right to carry. *Antonyuk II,* 89 F.4th 271, 302 (citing Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 153 (2023)). The Charles article expressly called for lower courts to try to narrow the *Bruen* precedent from below rather than follow it faithfully. *Id. at* 149. The Second Circuit's reliance on the Charles article is akin to impermissibly relying on a dissenting opinion for how to apply a rule. *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) ("A dissenting opinion is generally not the best source of legal advice

[9] This remedial tone is evident in the Supreme Court's insistence that *Heller* had already provided the analytical framework to the Second Circuit to resolve the controversy raised in *Bruen. Bruen,* 597 U.S. at 19-32. "Having made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement." *Id*. at 31.

on how to comply with the majority opinion").

While the Second Circuit's *Antonyuk II* opinion is over 200 pages long, it is rife with examples of the intentional misapplication of *Bruen*. As but one, like SB 2, New York's law contained prohibitions on carrying in restaurants that serve alcohol. And just like SB 2, that prohibition applied even if the individual had no intention of drinking.

It is undisputed that establishments that serve alcohol existed in the Founding era and before, as did fears of armed drunks. Yet New York presented no historical state law showing that carrying in bars or pubs was banned in the 18th or 19th centuries, and offered only a few laws from pre-statehood territories and some 19th-century laws that prohibited intoxicated persons from possessing arms. In the *Antonyuk* district court, as here, that failure of proof was fatal to the government's ban on carry in bars. Yet, as Charles entreated, the Second Circuit in *Antonyuk II* abandoned its duty to faithfully apply the *Bruen* historical methodology, and instead reinstated enforcement of New York's law banning restaurant carry.

In doing so, the panel violated *Bruen* in at least five ways. First, *Bruen* gave virtually no weight to territorial restrictions, reasoning that territorial "legislative improvisations" that conflict with the Nation's earlier approach to firearm regulation are unlikely to reflect our true historical tradition. *Bruen*, 597 U.S. at 67. The Second Circuit disregarded that guidance, saying that "the district court made too much of the fact that *Bruen* gave 'little weight' to territorial laws." *Antonyuk II*, 89 F.4th at 366. The district court respected *Bruen*, the Second Circuit did not.

Second, because bars and pubs existed in the founding era, "when a

challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. Analogical reasoning is thus not appropriate, and the government needs something close to dead-ringer laws. The Second Circuit ignored this, fabricating an excuse that this guidance only applied to *Bruen's* particular facts "due to the exceptional nature of New York's proper-cause requirement, which conditioned the exercise of a federal constitutional right on the rightsholder's reasons for exercising the right." *Antonyuk II*, 89 F.4th at 302.

Third, "if earlier generations addressed the societal problem, but did so through materially different means," that is evidence that the modern law is unconstitutional. *Bruen*, 597 U.S. at 26. As the Second Circuit acknowledged, the few historical laws that dealt with the problem of drunken armed people simply barred the intoxicated from being armed, they did not disarm both the drunk and sober in bars and pubs. *Antonyuk II*, 89 F.4th at 366. New York's and California's modern prohibitions on restaurant carry are materially different ways of addressing this same age-old societal problem and are therefore impermissible.

Fourth, the analogical reasoning analysis is only to be used for rare cases implicating "unprecedented societal concerns or dramatic technological changes." *Bruen*, 597 U.S. at 27. If there are no such concerns or changes, the government must find far more closely related historical laws. Ignoring this, the Second Circuit expressly relied on analogical reasoning, even though the issue of armed people in places serving alcohol existed long before the Founding. *Antonyuk II*, 89 F.4th at

368.

Fifth, even if analogical reasoning were allowed in this circumstance, and assuming the very few laws cited could constitute a representative historical tradition as *Bruen* commands, the comparable factor cannot be as simple as "crowded places." *Bruen*, 597 U.S. at 30-31. The Second Circuit, however, ruled that "[w]hen paired with the crowded space analogues, even absent the historical statutes prohibiting carriage in liquor-serving establishments, the analogues prohibiting intoxicated persons from carrying or purchasing firearms justify [New York's law]." *Id*. This completely ignores the Supreme Court's rejection of New York's argument that it may ban carry in places where people typically congregate. *Bruen*, 597 U.S. at 30-31. There is no historical basis to restrict carry somewhere "simply because it is crowded and protected generally by the [police]." *Id*. Nor is there a basis to bundle completely unrelated historical prohibitions to manufacture an analogical tradition.

8. There is no historical tradition of banning carry in each of the challenged places.

a. Places of worship.

In the Founding era, there were "statutes all over America that required bringing guns into churches, and sometimes to other public assemblies." Kopel & Greenlee, *supra*, at 242; 10-ER-2136-38; *see also Koons*, 2023 WL 3478604, at *21 (noting that "several colonial governments passed laws requiring colonists to bring arms to church").

In response to this history, the State cites a few postbellum statutes. But

Bruen's treatment of such 19th-century history is clear: it can be used to confirm what began in the Founding era, but it "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 597 U.S. at 66 n.28. The State's argument essentially relies on disregarding Founding era laws in favor of "a handful of seemingly spasmodic enactments involving a small minority of jurisdictions governing a small minority of [the] population. And they were passed nearly a century after the Second Amendment's ratification in 1791." *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422, 442 (W.D.N.Y. 2022), *aff'd in part, vacated in part, remanded sub nom. Antonyuk II*, 89 F.4th 271.

The State argues the Founding era tradition was not about any right to bear arms, but rather was a concern with attacks from Native Americans or slave revolts. Br. at 23-24. Critically, *Bruen* instructs that, when "earlier generations addressed the societal problem [e.g., like attacks on churches], but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Bruen*, 597 U.S. at 26-27. Places of worship have long been enticing targets for those bent on violence against particular groups, from the Colonial era (hostile tribes) to today (hostile racists and antisemites). Founding era governments did not address this problem by declaring churches "gun free zones," instead, they encouraged armed parishioners to confront the problem.

b. Financial institutions.

Banks have existed since before the Founding. *See, e.g.*, Federal Reserve Bank of Philadelphia, *The First Bank of the United States: A Chapter in the*

History of Central Banking, PhiladelphiaFed.org (March 2021), https://www.philadelphiafed.org/-/media/frbp/assets/institutional/education/publications/the-first-bank-of-the-united-states.pdf (last visited Feb. 7, 2024). Yet the State "has not cited a single historical regulation in which guns were prohibited in banks."1-ER-40. The State instead complains that it should not have to find dead-ringer historical laws (Br. at 25), ignoring the requirement that when a problem existed in the past but there was no "distinctly similar" law addressing that problem, that is evidence the modern law is unconstitutional. *Bruen*, 597 U.S. at 26.

California is not entitled to the "more nuanced approach", which is reserved only for cases "implicating unprecedented societal concerns or dramatic technological changes." *Id*. at 27. Every sort of modern institution no doubt is different in some way than historical versions that preceded, but the fact that modern banks may be different than the banks of the Founding does not outweigh the absence of any historically relevant regulations.

While the lack of Founding-era laws is decisive, the State also failed to find any 19th-century examples. Private banks proliferated in that century, but not regulations concerning peaceable carry in them.[10] And while in defending other sensitive places categories, the State often relies on irrelevant 20th-century laws

[10] *See, e.g.,* Britannica Online, *Wells Fargo* (updated Feb. 3, 2024), https://www.britannica.com/topic/Wells-Fargo-American-corporation (last visited Feb. 7, 2024) ("The founders . . . established Wells, Fargo & Company in March 1852 to handle the banking and express business prompted by the California Gold Rush.").

supporting its claims, but cannot even identify 20th-century laws prohibiting carry in banks. *See, e.g.,* Br. at 42-46 (citing 20th-century park laws, rules, and ordinances).

Prior to *Bruen*, not one state completely restricted the legal carrying of firearms in banks—not even California. And to Appellees' knowledge only two states restricted or partially restricted the practice. *See* Mich. Comp. Laws Ann. § 750.234d(1) (West 2024); Neb. Rev. Stat. § 28-1202.01 (2024) (formerly § 69-2441(a)) (allowing open carry but not concealed carry).

In the absence of a historical regulation, the State further fails to provide a constitutional justification for why banks cannot decide for themselves how to secure their premises. Banks are private businesses with a storied history of assessing the risks of their trade and adopting security measures in response, e.g., armed security guards, cameras, Lexan barriers for tellers, etc. If a private bank wants to restrict carry on its premises, it is free to do so under the status quo. Without historical justification, SB 2 away the right not only of CCW holders to carry in banks but for banks themselves to decide if they wish to prohibit carry.

The State's remaining arguments are unserious. For instance, the State warns of "armed robbery and terrorist activity" (Br. at 24), but cites no evidence to support the illogical premise that there is a population of would-be terrorists and bank robbers who have yet to terrorize banks simply because they have been unable to lawfully carry concealed in them. Appellant also provided no evidence of a single bank robbery or other crime at a bank committed by a CCW permit holder.

Finally, banks are compared to government buildings like post offices. *Id.* at

25. But the cases it cites on that point are pre-*Bruen*. The first court to rule on that question post-*Bruen* has invalidated the restriction on carrying in post offices. *See Ayala*, 2024 WL 132624, at *5. And even disregarding *Ayala*, privately-owned banks are not government buildings.

c. Public transportation.

SB 2's prohibition on carrying arms while using public transportation effectively disarms all people who rely on public transportation to conduct their daily business or commute. Such individuals are often the very people more likely to need to exercise the right of self-defense.[11] In deciding *Bruen*, at least one Justice in the majority cited the need for self-defense of a person who gets off work at midnight, commutes home on public transportation, and then walks some distance through a high-crime area to get home. *See* Oyez, *New York State Rifle & Pistol Ass'n v. Bruen, Oral Argument* (Nov. 3, 2021), https://www.oyez.org/cases/2021/20-843 (at 1:02:45).

Under SB 2, such individuals are effectively disarmed for their entire trip. It just cannot be that the Supreme Court intended to exempt the people who had the

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[11] The State asserts that because none of the individual Plaintiffs testified they use public transportation due to economic circumstances, Plaintiffs may not continue to argue this issue on appeal. Br. at 28 n.4. Yet, Plaintiffs successfully argued this point in the district court and the State did not challenge Plaintiffs' standing.

Because this standing challenge is first raised on appeal, Plaintiffs have been denied the opportunity to present to the district court available evidence that members of the associational Plaintiffs do rely on public transportation for day-to-day travel. *See* C.D. Cal. L.R. 7-10; and *California Rifle & Pistol Ass'n, Inc. v. City of Glendale*, 644 F. Supp. 3d 610, 616 (C.D. Cal. 2022) ("Because Defendants challenged Plaintiffs' standing in their opposition, Plaintiffs were permitted to submit rebuttal evidence in their reply.").

greatest need for self-defense from the "general right to publicly carry arms." *Bruen*, 597 U.S. at 31. Public transportation is exactly "the type of place that may require exercising the right to self-defense." 1-ER-24.

California fails to cite a single historical law barring carry on public transportation, even though public transportation existed in some form in the 18th century before proliferating via railroad companies in the 19th century. The State argues that some private companies that provided transportation prohibited carry. Br. at 27. But it cannot validly rely entirely on the action of private companies in the 19th century as its historical analogue to establish "enduring American tradition of state regulation." *Bruen*, 597 U.S. at 69. *See also Shelley v. Kraemer,* 334 U.S. 1, 18-22 (1948) (private property regulations inextricably intertwined with state action are still subject to fundamental rights analysis).

But even if it could rely on the rules of private companies, such private sector practices were hardly common. The declaration of expert Rivas relies entirely on an as-yet unpublished law review article as to which private railroads banned carry: "At least six U.S. railroads between 1835 and 1900 acted pursuant to this authority to restrict the right to bear arms of their passengers." 9-ER-1661 (citing Josh Hochman, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, Yale Law Journal 133, forthcoming (July 27, 2023), 11-18, https://papers.ssrn.com/sol3/papers.cfm?abstract _id=4522818). But six railroad companies are a miniscule fraction of how many existed in total. In New York state alone, "[t]he list of railroads that operated in and through New York included such important carriers as the New York Central,

Erie, Long Island, Pennsylvania, New Haven, Lackawanna, Lehigh Valley, Ontario and Western, Delaware and Hudson, Rutland, Boston and Maine, and others (including smaller regional and short line carriers)." *See* New York State Department of Transportation, *Passenger Rail Service in New York State, History of Railroads in New York State*, https://www.dot.ny.gov/divisions/operating/opdm/passenger-rail/passenger-rail-service/history-railroads (last visited Feb. 15, 2024).

And even of the six cited in the Hochman draft, not all banned carry. The South Carolina Canal and Rail Road Company required only inspection of firearms before boarding. Hochman, *supra*, at 13. Another allowed firearms so long as they were unloaded. *Id*. at 14. For the Albany Railway and International & Great Northern Railroad Company, there do not appear to have been clear rules against carry of firearms, just reports of company employees that refused to allow certain passengers to carry. *Id*. at 15-16. Finally, Hochman concedes that "[t]his all said, some states recognized affirmative grounds for an individual to carry arms while on a journey—the 'traveler's exception.'" *Id*. That is a critical admission that is fatal to the State's argument. Those laws—public laws—are the relevant historical analogues, not the actions of a few private rail companies. *See, e.g.*, An Act to Prevent Carrying Concealed or Dangerous Weapons, and to Provide Punishment Therefor, Feb. 23, 1859, *reprinted in* LAWS OF THE STATE OF INDIANA, PASSED AT THE FORTIETH SESSION OF THE GENERAL ASSEMBLY 129 (1859) ("[E]very person <u>not being a traveler</u>, who shall wear or carry any dirk, pistol, bowie-knife, dagger, sword in cane, or any other dangerous or deadly

weapon concealed, or who shall carry or wear any such weapon openly, with the intent or avowed purpose of injuring his fellow man, shall, upon conviction thereof, be fined in any sum not exceeding five hundred dollars") (emphasis added).

The State's other expert on this topic, Salzmann, states that many of the rail company "rule books and timetables do not mention firearms at all . . . I found mentions of firearms in approximately fifteen percent of [the 70 documents examined]." 9-ER-1840. He cited just two 19th-century examples of rail companies prohibiting the carry of firearms, along with some 20th-century restrictions. 9-ER-1842. Thus, even if private company rules were relevant history satisfying *Bruen*, the State has failed to establish a private historical tradition during the relevant period of railroad companies barring the carry of firearms, in addition to, of course, failing to establish any historical tradition of state regulation of the same.

The State's argument that public transportation is like schools or government buildings borders on the frivolous. Yes, sometimes children may be present on public transportation, just as they may be present in almost every public place. That does not make a bus or train like a school in any relevant way. Nor is that bus or train at all like a legislative chamber or court. This sort of ridiculous comparison is exactly what the Supreme Court was talking about when it explained that " '[e]verything is similar in infinite ways to everything else'," and so more specific metrics are needed. *Bruen*, 597 U.S. at 29 (citing C. Sunstein, *On Analogical Reasoning*, 106 Harv. L. Rev. 741, 774 (1993)). As the district court

noted, "[t]his overbroad reasoning would impermissibly 'eviscerate the general right to publicly carry arms for self-defense.' " 1-ER-25 (citing *Bruen*, 597 U.S. at 31).

The State also argues it may restrict carry on public transportation owned or operated by the government. Br. at 28. But the "government as proprietor" theory has been rejected by numerous courts. "While it is certainly true that 'the government has, with respect to its own lands, the rights of an ordinary proprietor, to maintain its possession and to prosecute trespassers . . . [just] as a private individual' may, the State is not *exempt* from recognizing the protections afforded to individuals by the Constitution simply because it acts on government property." *Koons*, 2023 WL 3478604, at *51 (citations omitted); *see also United States v. Kokinda*, 497 U.S. 720, 725 (1990) ("The Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints, as does a private business"). The *Wolford* court also explained the ramifications of what an expansive reading of the "government as proprietor" argument would entail:

> If the government's capacity to act as a proprietor was a determinative factor in the first step of the analysis, then the fundamental right of public carry – as expressed fully in Bruen – would be jeopardized. Indeed, under such a theory, an argument could be made that the government possesses the unfettered power to restrict public carrying of firearms in many – if not most – public places because it has a proprietary interest in those areas. Whether the government acted as a proprietor may have been relevant when assessing Second Amendment challenges under a means-end scrutiny test, but it has no place under the first step of the Bruen analysis.

2023 WL 5043805, at *20; *see also Hunter v. Cortland Housing Authority,* 2024

WL 340775, at *11 (N.D.N.Y. Jan. 30, 2024) (enjoining a New York public housing authority that banned its tenants from keeping handguns in their homes).

The State's other arguments regarding public transportation are the same arguments presented for many other provisions, e.g., the rejected crowded places theory. Br. at 24-25. None of those arguments establish the historical tradition of firearm regulation required under the Second Amendment for Appellant to carry its burden.

d. Establishments serving liquor.

Of all the places SB 2 newly declares sensitive, few have historical regulatory roots reaching as deep as establishments that serve liquor. The negative public social effects of imbibing alcohol have been the subject of societal consternation for millennia prior the Founding.[12] Despite this, no historical tradition exists—before the Founding or after—that barred sober individuals from carrying in places that served alcohol.

If California had chosen merely to ban carrying while intoxicated in public—as almost every CCW holder is already barred from doing as a condition of being issued a permit[13]—the State might have found some support in the more

[12] E.g., "For the time that is past suffices for doing what the Gentiles want to do, living in sensuality, passions, drunkenness, orgies, drinking parties, and lawless idolatry." 1 Peter 4:3.

[13] *See, e.g.*, *Terms of License Acknowledgment, Concealed Carry Weapon (CCW)*, OCSheriff.gov, https://www.ocsheriff.gov/sites/ocsd/files/2022-08/CCW%20Terms_of_License.pdf ("License holder shall not carry a concealed weapon while taking medication or if in a condition which is likely to impair judgment, behavior, or dexterity, or while consuming alcohol.") (last visited Feb. 15, 2024)

recent historical record for such a prohibition, but not support during the Founding era. *See, e.g.*, *United States v. Daniels*, 77 F.4th 337, 346 (5th Cir. 2023) (discussing 19th-century prohibitions on carrying a firearm while intoxicated); *United States v. Harrison*, No. CR-22-00328, 2023 WL 1771138, at *7 (W.D. Okla. Feb. 3, 2023) (same).

But under SB 2, even teetotalers are prohibited from taking their families out to dinner and carrying for self-defense at any restaurant that also happens to serve beer and wine. "Unlike the proffered historical analogues, SB 2 prohibits law-abiding, responsible, ordinary citizens from carrying a firearm for self-defense even to a small, uncrowded restaurant if that restaurant sells wine to drink at the table. This affects a person's everyday life, not just their attendance at special events." 1-ER-28. This was the main concern for several Appellees, a few of whom never drink. 1-SER-47, 64, 86. There is no historical basis for such a prohibition.

The State submits only a few outlier enactments to support the extraordinary breadth of this prohibition. Br. at 31. None are from the Founding era, and none are federal or even state laws. The State identifies just two territorial restrictions and one local ordinance to carry its burden. And aside from the Oklahoma territorial law cited, these outlier laws are not the necessary "dead ringers" as the state claims because they did not prohibit carry at every location that served alcohol.

To consider these three laws as representative of a historical tradition of would render *Bruen*'s demand for a representative tradition meaningless, and modern laws could be upheld through a search for any similar outlier enactment

that only a couple of places adopted. As to the Texas law that was cited by New York as a dead-ringer in *Bruen*, "the Texas statute, and the rationales set forth in *English* and *Duke*, are outliers. In fact, only one other State, West Virginia, adopted a similar public-carry statute before 1900." *Bruen*, 597 U.S. at 65. If two historical *state laws* were outliers, two territorial enactments and a local ordinance cannot establish the necessary historic tradition of regulations banning carry in bars and restaurants. Several other courts have aligned with the district court's rejection of the prohibition of carrying in restaurants serving alcohol. *See Koons,* 2023 WL 3478604, at *86; *Wolford* 2023 WL 5043805, at *18; *Kipke*, 2023 WL 6381503, at *11.

When "earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Bruen*, 597 U.S. at 26-27. No state during the Founding era banned the carry of firearms by sober individuals in places that served alcohol. Exceedingly few jurisdictions did so even in the late 19th century.

e. Health care facilities.

One of the Appellees is a dentist who is barred by SB 2 from carrying in his own dental office that he operates as his business. 1-SER-86. Another is unable to carry during his frequent medical appointments that he needs due to his diabetes. 1-SER-65. And a member of the associational Appellees would not even be allowed to drop his grandchildren off for therapy sessions and wait for them in the parking lot. 1-SER-57.

As the district court noted, "the government does not offer a single historical prohibition on carrying firearms at hospitals or medical offices. . . ." 1-ER-21. It is not alone, as other courts have "uncovered no laws from the 18th or 19th centuries that banned firearms at hospitals, almshouses, asylums, or other medical facilities." *Koons*, 2023 WL 3478604, at *93; *see also* 10-ER-2127 (no known laws restricting carry in Founding-era hospitals).

In response, the State complains it should not be required to comply with *Bruen's* requirement to show a historical tradition insomuch as its experts wrote lengthy declarations about how much different hospitals are today. Br. at 38-39. No one doubts that hospitals are much more technologically advanced today than they were in 1791. But when it comes to the right to carry, the peaceable carry of firearms near ill individuals is no different a "problem" today than in the past. If anything, the fact that Californians today must be vetted by the government before they can exercise the right to carry in hospitals makes it *safer* than in the past. 1-ER-23.

And despite arguing that hospitals' change over time merits sensitive places status, the State does not point to any tradition of banning carry in hospitals even in the 19th or 20th centuries as hospitals evolved. If there were no carry restrictions because hospitals in 1791 were just too colloquial from hospitals today, then one should see a tradition of restrictions arising as hospitals took their more modern form. Yet no such bans have been identified, only a few dissimilar laws banning carry in places where people assembled for "educational" or "scientific" purposes are identified instead. Br. at 39. Nothing about "modern" hospitals in 2022 made

them any more sensitive than they were in 1920, 1950, or 1980, yet 2022 was the first time California decided they were a sensitive place. This fact alone betrays that the sensitive place designation is nothing more than a politically expedient label, severed from any objective tie to a technological or other advance legitimately placing hospitals into a role now so sensitive that constitutional protections can be nuanced away.

Because hospitals existed during the relevant historical period, "the lack of a distinctly similar historical regulation addressing [carry in hospitals] is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26. The district court properly enjoined SB 2's restrictions on carry in them.

f. Playgrounds.

Appellees readily acknowledge that the district court was the first to rule against restricting carry on playgrounds. 1-ER-32. That is because Appellees were the first to sufficiently distinguish playgrounds from schools in a sensitive places challenge. Specifically, when children are at school, their teachers and other school staff are acting *in loco parentis*. Their job is to supervise their students as a parent would, including keeping them safe. Some schools have metal detectors, many more have resource officers, and, most importantly, none allow unauthorized adults to walk freely around campus.

A playground has none of these characteristics, nor any entrustment to the state, meaning that the parents of the children retain their duty of care for their own

children and should also retain the right to exercise that duty. This is a critical difference in "how" the restrictions operate. Playgrounds may be superficially "like" schools in that they cater to children, but the similarities end there.

Through SB 2, the State does not provide the protections to a playground (like an armed guard or metal detectors) that are provided at traditional constitutionally-sound sensitive places like government buildings and courthouses. It doesn't even provide security fencing like it requires at schools. *See* Cal. Code Regs., tit. 5, § 14030(f)(6) (2024) (requiring fencing and other security features in the construction of public schools). Parents and guardians solely retain that protector role at a public playground, as they do when they shepherd children in any other place in public, whether artificially deemed a sensitive place or not. The State failed to establish that playgrounds hold any special historic significance warranting taking the right of parents to defend their children at playgrounds away from them, and the district court was correct to enjoin this aspect of SB 2.

g. Parks.

As to SB 2 banning carry in all urban, suburban, rural, and state parks, "there is no evidence that [the State's analogues] are well-established, representative, or consistent with a national tradition of prohibiting firearms in all public parks as SB 2 does." 1-ER-34. *Koons* similarly found that New Jersey "has failed to come forward with any laws from the 18th century that prohibited firearms in areas that today would be considered parks. Consistent with the *Koons* Plaintiffs' findings, this Court has only uncovered colonial laws that prohibited

discharging firearms in areas that were the forerunners of today's public park." 2023 WL 3478604, at *83. As to the late-19th century laws that New Jersey cited, they were not "representative of the entire nation. By 1890, those laws—one state law and about 25 local ordinances—governed less than 10% of the nation's entire population and thus are unrepresentative." *Id.* at *85; *see also* 10-ER-2127 (no known laws restricting carry in Founding-era "commons"); *Wolford*, 2023 WL 5043805, at *24; *Springer*, 2023 WL 8436312, at *8.

The State boasts that, "[b]y 1900, the carrying of firearms was prohibited in more than two dozen parks across at least ten different states." Setting aside that the State once again offers nothing from the Founding, that is hardly evidence of a historical tradition. There were 45 states in 1900.[14] "Six cities do not speak for, what was by 1893, 44 states. Under *Bruen*, the State's evidence is not sufficient for the broader proposition that carrying firearms can be forbidden in all public parks in the State of New Jersey." *Siegel v. Platkin*, 653 F. Supp. 3d 136, 153 (D.N.J. 2023). Even if such historical laws had been enacted in relevant analogical period rather than later, their scant application does not make for a representative historical tradition. *Bruen*, 597 U.S. at 30.

The State complains that percentages are of little relevance, Br. at 45.[15]

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[14] United States Census Bureau, *Library, Infographics & Visualizations, 2013, U.S. Territory and Statehood Status by Decade, 1790-1960* (Feb. 21, 2013), https://www.census.gov/dataviz/visualizations/048/.

[15] In support of this argument, the State cites that only one of the thirteen colonies enacted polling place restrictions, yet claims the Supreme Court considered that a valid tradition. Br. at 46. But the Court merely identified a *presumed* tradition that started at the Founding which was then confirmed by subsequent history expanding it. *Bruen*, 597 U.S. at 36. The Court certainly did

Appellant should read *Bruen* more closely. There, the Supreme Court engaged in precisely the sort of analysis the district court conducted below. *See* 597 U.S. at 67 (analyzing population data to conclude that certain analogues "were irrelevant to more than 99% of the American population"). "[W]e will not stake our interpretation on a handful of temporary territorial laws that . . . governed less than 1% of the American population." *Id.*

In order to save SB 2's challenged restrictions, the historical laws California presents must be "well-established and *representative*" historical analogues. *Id.* at 30 (emphasis added). Enactments affecting a small minority of the population or applicable to a specific park are not representative of a historical tradition. The overwhelming majority of 19th-century Americans could carry firearms for self-defense in their local parks, beaches, and similar places. Some of the State's examples did fully ban carry in a *specific* park, such as Central Park. 10-ER-1966-70. Even assuming that could be deemed a valid historical tradition, California explodes that purported tradition by banning carry not just in one or two urban parks, but "at all public parks and athletic facilities, of which there must be tens of thousands across California." 1-ER-34.[16] The burdens of a ban on carry in one park

not conduct an extensive historical analysis on an issue that was not before it. In the Reconstruction era and the years that followed, several more states enacted similar polling place restrictions, including Tennessee (1869), Louisiana (1870), Texas (1873), Maryland in two particular counties (1874 and 1886), and Missouri (1874). Kopel & Greenlee, *supra*, at 242-55. There is no equivalent for bans on carry in parks.

[16] Even the Second Circuit doubted that "the evidence presently in the record could set forth a well-established tradition of prohibiting firearm carriage in rural parks." *Antonyuk II*, 89 F.4th at 362.

and a ban on carry in all parks are simply not comparable. *Bruen*, 597 U.S. at 29.

The State also asserts that a few laws were total carry bans, but it cites only outlier restrictions on carry in the *state* parks of certain states, not all parks generally. *See, e.g.,* 3-ER-240. Many of these park rules (they are not laws) are clearly about game preservation when read in context, and not a concern with banning peaceable carry for self-defense. *See, e.g.*, 3-ER-248 (firearm rule is listed right after a rule banning hunting, and right before a rule banning fishing); 3-ER-263 (Connecticut State Parks rule banning firearms in the same sentence it forbade "killing or disturbing" wild animals); 3-ER-269 (Florida State Park rule banning firearms in the "Hunting" section). The ban on carrying firearms in Yellowstone that the State cites is similarly contained in a paragraph about the prohibition of *hunting* within the park. 6-ER-1122.

This context is highly relevant because even for very similar historical laws, *Bruen* teaches that "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing *that problem* is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 60 (emphasis added). If the historical rule presented did not address "that problem" (people carrying weapons) but some other unrelated problem (like poaching), it is neither distinctly similar nor analogous.

The evidence of a historical tradition of bans in parks is so poor, the State even relies upon a national park ban enacted in 1936 which was eventually repealed. Br. at 43-44. California cannot demonstrate any historical analogues that

are "well-established and representative" (*Id.* at 30) during the relevant analogical time frame.

h. Libraries.

Carrying a firearm in a room full of books is no more dangerous now than it was in 1791. If anything, there is less concern for the State nowadays because it vets anyone who wants a CCW permit. The State cites no Founding era history concerning banning carry in libraries, only a few 19th-century laws banning carry where people were assembled for educational, literary, or scientific purposes (but not libraries specifically). Br. at 47. But these laws are vague outliers, and they are not representative of the nation. *Koons*, 2023 WL 3478604, at *86.

The State also argues, as it does elsewhere, that libraries are "like" schools because children are present. But as repeatedly pointed out, children are ubiquitous in society, and "the mere presence of children is not, by itself, enough to make a certain location like a school." *Id*. at *85.

i. Parking lots.

Another example of the anti-*Bruen* animus infecting SB 2 is its expansive parking lot restrictions that turn many ordinary businesses' parking into unguarded but still sensitive places. The State continues to insist through appeal it can ban carry in the parking lots of the innumerable places declared de jure sensitive under SB 2. But the State makes no effort to justify historically or otherwise how the parking lot of a place it declares as sensitive—such as a 7Eleven selling lottery tickets—is as sensitive as the business it serves.

And the State makes no effort to explain or historically justify how a neighboring business—one even the State doesn't deem as sensitive under the expansive SB 2—that merely shares a parking lot with that same 7Eleven becomes sensitive even if the individual carrying a firearm is not parking in that shared parking lot to buy a soda, some beef jerky, or lottery scratchers.

The lack of a substantive explanation suggests that most if not all parking lots are clearly not sensitive places, and that the law's effect of wiping out the right to carry at any strip mall or shopping center that has a bank, bar, 7Eleven, or other sensitive place is a feature designed to discourage the exercise of the carry right, not identify a modern, *Bruen*-appropriate sensitive place. That is why the district court properly struck down restrictions on carrying in parking lots. 1-ER-44.[17]

To be sure, some curtilage might be found to be genuinely sensitive after historical analysis. As one partial dissenting opinion that has been vindicated by *Bruen* explained, "[t]he White House lawn, although not a building, is just as sensitive as the White House itself" but, "[a]t the spectrum's other end[,] we might find a public park associated with no particular sensitive government interests–or a post office parking lot surrounding a run-of-the-mill post office." *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1137 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part). The parking lots restricted by SB 2 clearly are not like the White House lawn; they are so numerous and ubiquitous as

[17] The district court did not disturb any laws other than Penal Code section 26230. To the extent certain parking lots are off-limits due to other state or federal laws, those restrictions remain in effect. *See, e.g.,* Cal. Penal Code § 626.9 (West 2024) (banning carry within 1,000 feet of a school.).

to render the term "sensitive places" meaningless.

The only historical laws the State cites deal with *temporary* surrounding area restrictions for polling places on election days. Br. at 49. It is not clear how common such restrictions were, and the State cites only two such laws. But even assuming enough existed to constitute a representative tradition, the comparative burden is completely different. *Bruen*, 597 U.S. at 29. Banning carry within half a mile from polling places for one day every two years is completely different than banning carry every day in all nineteen categories of places listed in SB 2 that incorporate parking restrictions. The parking lot restrictions are, like the vampire rule, a cynical ploy to effectively destroy the right to carry in as many places as possible.

j. The vampire rule.

SB 2's vampire rule (i.e., you may not enter unless invited) was explicitly conceived as a way to undermine the right to carry, as one of its main academic proponents has written that the point of it was to make carry inconvenient, so less people carry. Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. Med. & Ethics 183, 184 (2020); *But see Koons*, 2023 WL 3478604, at *57 n.34 (rebutting the amicus brief of Ian Ayres and Frederick E. Vars). This may be why every court that has heard a challenge to a vampire rule has struck it down. *See Antonyuk II*, 89 F.4th at 385; *Christian v. Nigrelli,* 642 F. Supp. 3d 393, 405 (W.D.N.Y. 2022); *Koons*, 2023 WL 3478604, at *67; *Wolford*, 2023 WL 5043805, at *27; *Kipke*, 2023 WL 6381503,

at *26-31.

This clear consensus also squares with our legal tradition regarding private property held open to the public. Usually, a private property owner who wants to exclude certain people must post signs letting the public know who or what actions or items are *prohibited*. While some spaces are so obviously private that there need not be signage to announce they exclude people, such as fenced-off private property, that does not apply to places of business open to the public because they are "by positive law and social convention, presumed accessible to members of the public unless the owner manifests his intention to exclude them." *Oliver v. United States*, 466 U.S. 170, 193 (1984) (Marshall, J., dissenting). *See also* Cal. Penal Code § 602 (requiring posted "no trespassing" signs or a verbal order to leave before the elements of a trespass have been satisfied).

Appellant insists everyone is wrong on this finding, even the *Antonyuk II* opinion that it cites favorably numerous times elsewhere. Br. at 53. California is now supposedly very concerned with private property rights, even as it ignored those rights as to several other places where SB 2 bans carry without exception for the property owner, such as Plaintiff Hough's dental office. The State's hypocrisy in this regard is farcical, as is its claim that no state action is involved. Br. at 54. The vampire rule is "state action insofar as the State is construing the sound of silence." *Koons*, 2023 WL 3478604, at *61; *see also Antonyuk II*, 89 F.4th at 347 (Plaintiff could carry in church before New York's law, now may not unless given permission, and this change was due to state action).

The historical laws cited by the State to support the vampire rule all restrict

private property not open to the public; they refer primarily to "inclosed" lands and plantations. Br. at 54. And as the district court has noted, at least some of these laws were concerned with illegal hunting. 1-ER-42.

The State asserts that even if this is true, the other four laws were not so limited. Br. at 55. But its own record says otherwise. The 1893 Oregon law, for example, in the same section also prohibited anyone armed with a gun to permit any dog "to enter upon any enclosed premises" without consent, unless already in pursuit of "deer or varmints". 6-ER-1050. This is a law concerned with hunting, not the right to carry for self-defense.

These same anti-poaching laws were examined and rejected as analogues by other courts as well. "No matter how expansively we analogize, we do not see how a tradition of prohibiting illegal hunting on private lands supports prohibiting the lawful carriage of firearms for self-defense on private property open the public." *Antonyuk II*, 89 F.4th at 385. Appellees do not claim any right to carry on fenced-off private property or other places not held open to the public. They simply want to continue the decades-old status quo, i.e., to be able to carry in businesses otherwise open to the public, like restaurants, grocery stores, and shopping malls, unless those businesses tell them otherwise. Those businesses may choose to ban carry if they want to, but the State may not alter the status quo to make that decision for those businesses by default and then claim that it is neither state action nor a radical change in the law worthy of a preliminary injunction.

B. The Remaining Preliminary Injunction Factors Favor Appellees.

"It is well established that the deprivation of constitutional rights 'unquestionably constitutes irreparable injury.'" *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). The Ninth Circuit has imported the First Amendment's irreparable-if-only-for-a-minute rule to cases involving other rights and, in doing so, has held a deprivation of these rights irreparable harm per se. *Monterey Mech. Co. v. Wilson*, 125 F.3d 702, 715 (9th Cir. 1997). Most recently, the Ninth Circuit has reaffirmed the importance of the likelihood of the success on the merits step, explaining that "[i]f a plaintiff bringing such a [constitutional] claim shows he is likely to prevail on the merits, that showing will almost always demonstrate he is suffering irreparable harm as well." *Baird v. Bonta,* No. 23-15016, 2023 WL 5763345, at *4 (9th Cir. Sept. 7, 2023).

The Second Amendment should be treated no differently. *See McDonald v. City of Chicago*, 561 U.S. 742, 780 (2010) (refusing to treat the Second Amendment as a second-class right); *see also Ezell v. City of Chicago*, 651 F.3d at 700 (a deprivation of the right to arms is "irreparable and ha[s] no adequate remedy at law").

Even though SB 2 creates restrictions that are completely new to California's history, the State asserts it will suffer harm if those new restrictions are not allowed to go into effect. It argues that "tens of millions of Californians will face a heightened risk of gun violence. . . ." Br. at 58. But it cites no reports or statistics to this effect, and if it pointed to states that already employed shall-issue CCW schemes prior to *Bruen*, it would find little support for its claims.

The State also argues that past CCW crime rates in California itself are not useful data because, pre-*Bruen*, there was a subjective "good cause" requirement that allowed the government to weed out who could get a carry permit. This claim ignores two things. First, many counties in California were effectively "shall-issue" for years before *Bruen,* and their officials issued permits to all law-abiding citizens who applied and took the required safety course without screening out applicants for "good cause." 11-ER-2190. These California counties that did not use the "good cause" requirement pre-*Bruen* to limit CCW permit issuances to their residents should therefore historically show higher rates of crime by their CCW holders if the gatekeeping function of the "good cause" requirement was as effective at weeding out bad apples as the State touts. But Appellant did not and cannot provide any data evidencing such a discrepancy in crime rates, eviscerating its claim.[18]

Second, Appellees presented data from four other states showing how extraordinarily law-abiding Americans with CCW permits are. 1-ER-48. And "CCW permitholders are not the gun wielders legislators should fear . . . CCW permitholders are not responsible for any of the mass shootings or horrific gun violence that has occurred in California." *Id.* Other courts in other states have concluded the same. *See Wolford*, 2023 WL 5043805, at *32 ("the vast majority of

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[18] The Sheriff of Fresno County, a county which has issued permits without regard to "good cause" for many years, recently said that out of its over 12,000 residents with CCW permits, none had committed *any* crime in at least two years. *See* Erika D. Smith and Anna Chabria, *Column: California says its new gun law is about public safety. But what about these women?*, LA Times (January 19, 2024), https://www.latimes.com/california/story/2024-01-19/california-gun-concealed-carry-law-women-domestic-violence-newsom.

conceal carry permit holders are law-abiding"); *Koons*, 2023 WL 3478604, at *108 ("[New Jersey] has failed to offer any evidence that law abiding responsible citizens who carry firearms in public for self-defense are responsible for an increase in gun violence.").

In the proceedings below, the State did not even attempt to rebut the data, nor does it do so in this appeal. It has implicitly conceded that Californians with CCW permits pose no serious public safety threat. In fact, there was a boisterous opposition to the passing of SB 2 from the law enforcement community in California that otherwise often supports so-called "public safety" measures like SB 2. 1-ER-49 (quoting the President of PORAC that, "[i]nstead of focusing on a law-abiding population, efforts should address preventing gun crimes committed by those who disobey the law and holding them accountable"). Almost two dozen other law enforcement groups also opposed the passage of SB 2. 11-ER-2196-97.

In sum, the most serious harm the State would suffer if it lost this appeal is the hurt pride of the politicians who enacted SB 2 to willingly frustrate and nullify the effects of *Bruen*. In contrast to Appellees' injury of being denied their Second Amendment right to carry in all relevant places that they previously lawfully could, Defendant suffers no injury because there is no plausible, identifiable interest that infringing Appellees' constitutional rights serves. Appellant "cannot suffer harm from an injunction that merely ends an unlawful practice." *Rodriguez v. Robbins*, 715 F.3d 1127, 1145 (9th Cir 2013); *see also Valle del Sol Inc. v. Whitting*, 732 F.3d 1006, 1029 (9th Cir. 2013) ("[I]t is clear that it would not be equitable . . . to allow the state . . . to violate the requirements of federal law . . . .").

IV. CONCLUSION

The district court was right to preserve the status quo as to the places Appellees challenged, because doing otherwise would have effectively eliminated the right to carry in California. Appellees are also likely to succeed on the merits, and the ruling should be affirmed.

Date: February 16, 2024

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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