No. 24-

IN THE

Supreme Court of the United States

JASON WOLFORD, ALISON WOLFORD, ATOM KASPRZYCKI AND THE HAWAII FIREARMS COALITION,

Petitioners,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAII,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

KEVIN O'GRADY
ATTORNEY AT LAW
1164 Bishop Street,
Suite 1605
Honolulu, Hawaii 96813
(808) 521-3367
kevin@kevinogradylaw.com

ALAN ALEXANDER BECK
Counsel of Record
ATTORNEY AT LAW
2692 Harcourt Drive
San Diego, CA 92123
(619) 905-9105
alan.alexander.beck@gmail.com

Counsel for Petitioners

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COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

New York State Rifle & Pistol Association, Inc. v. Bruen, 597 U.S. 1, 33 (2022), holds that "the Second Amendment guarantees a general right to public carry" of arms, meaning ordinary, law-abiding citizens may "'bear' arms in public for self-defense." In this case, the Ninth Circuit sustained a Hawaii law that makes it a crime for a concealed carry permit holder to carry a handgun on private property unless he has been "given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property." H.R.S. § 134-9.5. That holding is in acknowledged direct conflict with the Second Circuit's holding in *Antonyuk v. James,* 120 F.4th 941 (2d Cir. 2024), a decision that struck down an *identical* State law in the same procedural posture as this case.

The Ninth Circuit also sustained a multitude of other location bans on carry by permit holders, relying solely on post-Reconstruction Era and later laws. That doctrinal approach is in direct conflict with the Third Circuit's decision in *Lara v. Commissioner Pennsylvania State Police,* 125 F.4th 428 (3d Cir. 2025), the Fifth Circuit's decision in *United States v. Connelly*, 117 F.4th 269 (5th Cir. 2024), the Eighth Circuit's decision in *Worth v. Jacobson,* 108 F.4th 677 (8th Cir. 2024), and, most recently, the Eleventh Circuit's en banc decision in *NRA v. Bondi*, No. 21-12314, 2025 WL 815734 at *5 (11th Cir. March 14, 2025) (en banc), all of which hold that primary focus must be on Founding generation laws and tradition in applying the text, history and tradition test *Bruen* mandates.

The questions presented are:

1. Whether the Ninth Circuit erred in holding, in direct conflict with the Second Circuit, that Hawaii may

presumptively prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public unless the property owner affirmatively gives express permission to the handgun carrier?

2. Whether the Ninth Circuit erred in solely relying on post-Reconstruction Era and later laws in applying *Bruen*'s text, history and tradition test in direct conflict with the holdings of the Third, Fifth, Eighth and Eleventh Circuits?

PARTIES TO THE PROCEEDING

Petitioners are Jason Wolford, Alison Wolford, Atom Kasprzycki and the Hawaii Firearms Coalition. Petitioners were the plaintiffs in the district court and the plaintiffs-appellees in the court of appeals.

Respondent is Anne E. Lopez, in her official capacity as Hawaii's Attorney General.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioner states as follows:

Petitioner Hawaii Firearms Coalition has no parent corporation and no publicly held company owns 10 percent or more of its stock. Petitioners Jason Wolford, Alison Wolford, Atom Kasprzycki are individuals.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Wolford v. Lopez,* 125 F.4th 1230 (9th Cir. 2025) (order denying rehearing and rehearing en banc);

- *Wolford v. Lopez,* 116 F.4th 959 (9th Cir. 2024)); and

- *Wolford v. Lopez,* 686 F.Supp.3d 1034 (D. Haw. 2023) (order granting temporary restraining order, filed September 6, 2023).

The Second Circuit's decision in *Antonyuk v. James,* 120 F.4th 941 (2d Cir. 2024), is currently before this Court on a petition for certiorari in *Antonyuk v. James*, No. 24-795 (docketed Jan. 22, 2025). The second question presented in this case concerning the relevant analogue reference period is also presented to this Court in *Jacobson v. Worth*, No. 24-782 (docketed Jan. 17, 2025).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case within the meaning of this Court's Rule 14.1(b)(iii).

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PETITION FOR WRIT OF CERTIORARI

The Ninth Circuit sustained Hawaii's near-universal restriction on handgun carry by licensed carry concealed permit holders on property open to the public. Carry is permitted only if a permit holder has been "given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property." *Id.* That holding creates a direct circuit split with the Second Circuit's holding in in *Antonyuk v. James,* 120 F.4th 941 (2d Cir. 2024), which struck down an identical New York state law.

The Ninth Circuit also erred by giving decisive weight to local and state laws enacted well outside the Founding Era to sustain total bans on firearms in all parks and beaches (App. 32a), playgrounds and youth centers (App. 39a), bars and restaurants that serve liquor (App. 40a), and places of amusement and libraries (App. 43a). Such reliance is incompatible with *Bruen* and *Rahimi,* where this Court admonished that "[a] court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, 'apply[ing] faithfully the balance struck *by the founding generation* to modern circumstances.'" *United States v. Rahimi,* 602 U.S. 680 (2024), quoting *Bruen*, 597 U.S. at 29 (emphasis added).

The Ninth Circuit's reliance on such analogues also conflicts with the decisions of the Third, Fifth, Eighth and the Eleventh Circuits, all of which faithfully follow *Bruen* and *Rahimi* and hold that the Founding Era is the primary reference point for conducting the historical inquiry *Bruen* and *Rahimi* require. *See Lara v. Commissioner Pennsylvania State Police*, 125 F.4th at 432, *Worth v.*

Jacobson, 108 F.4th 677, 696 (8th Cir. 2024), *petition for cert. pending*, No. 24-782; *United States v. Connelly*, 117 F.4th 269, 281 (5th Cir. 2024); *Reese v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 127 F.4th 583, 599-600 (5th Cir. 2025); *NRA v. Bondi*, No. 21-12314, 2025 WL 815734 at *5 (11th Cir. March 14, 2025) (en banc).

In holding the Second Amendment does not apply to private property open to the public, the Ninth Circuit's decision renders illusory the right to carry in public. The Ninth Circuit's reliance on non-Founding Era analogues allows States to enact laws the "founding generation" would have never allowed. The Ninth Circuit effectively has allowed Hawaii to "eviscerate the general right to publicly carry arms for self-defense" recognized in *Bruen*, 597 U.S. at 31. For these reasons, the Ninth Circuit's decision should not be allowed to stand.

OPINIONS BELOW

The court of appeals' denial of Plaintiffs' petition for rehearing or rehearing en banc is reported at 125 F.4th 1230 (9th Cir. 2025) and reproduced at App. 168a. The panel opinion is reported at 116 F.4th 959 (9th Cir. 2024) and reproduced at App. 1a. The district court's opinion is reported at 686 F.Supp.3d 1034 (D. Haw. 2023) and reproduced at App. 82a.

JURISDICTION

The jurisdiction of the district court was founded on 28 U.S.C. § 1331 and § 1343. The jurisdiction of the court of appeals reviewing the district court's opinion was based on 28 U.S.C. § 1292(a)(1). The decision of the

three-judge panel of the court of appeals was issued on September 6, 2024. App. 1a. Plaintiffs-appellees filed a timely petition for rehearing and the Ninth Circuit's order denying rehearing and rehearing en banc was entered January 15, 2025. App. 168a. This petition is timely filed. *See* 28 U.S.C. § 2101(c). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Second and Fourteenth Amendments to the United States Constitution and relevant portions of the Hawaii law are reproduced at App. 203a-214a.

STATEMENT OF THE CASE

A. Hawaii's Statutory Scheme

In 2023, the Hawaii legislature enacted Act 52, specifically to negate *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022). The legislation criminally prohibits a person with a concealed carry permit from bringing a handgun onto fifteen types of property. Haw. Rev. Stat.§ 134-9.1. The law also flips the default rule on all private property. Whereas prior law allowed a person with a carry permit to bring firearms onto private property open to the public unless the owner prohibited it, the new legislation generally prohibits the carry of firearms onto private property open to the public unless the owner affirmatively gives permission by "[u]nambiguous written or verbal authorization" or by the "posting of clear and conspicuous signage." *Id.* § 134-9.5(b). App. 213a. Petitioner challenged this "default rule" provision.

Petitioners also challenged several other provisions enacted at the same time. App 6a-18a. Those provisions prohibit a carry permit holder from carrying or possessing any firearm in (1) "[a]ny building or office owned, leased, or used by the State or a county, and adjacent grounds and parking areas," (2) "[a]ny beach, playground, park, or adjacent parking area," (3) "[a]ny bar or restaurant serving alcohol or intoxicating liquor," and "[t]he premises of any bank or financial institution. "H.R.S., §134-9.1(a)(1); (a)(9), and (a)(12). App. 206a-208a.

The Ninth Circuit panel ruled in Petitioners' favor as to H.R.S. §134-9.1 (a) (12) (banks) (App.70a) and partially in their favor as to H.R.S. §134-9.1(a)(1) to the extent that their challenge deals with parking lots shared with a prohibited location and a nonprohibited location. (App 49a). The court, however, sustained Hawaii's default rule presumptively banning carry on private property otherwise open to the public. App 56a. It also sustained the bans on possession and carry in any beach, playground, park or adjacent parking area (App.32) and in any bar or restaurant serving alcohol (App. 40a).

B. Factual Background

Plaintiffs are three residents of the County of Maui and an organizational plaintiff which has members who have been issued concealed carry permits in Hawaii. All individual plaintiffs possess a valid license to carry a concealed handgun. Prior to the enactment of HRS §§134-9.1 and 9.5, all three individual plaintiffs carried handguns at beaches, parks, restaurants that serve alcohol, on private property locations otherwise open to the public and in parking lots now regulated by HRS §§134-9.1 and

9.5. But for the challenged regulations, Plaintiffs would carry in all the areas at issue in this litigation.

C. Procedural History

On June 23, 2023, Petitioners filed suit seeking a temporary restraining order and permanent injunction of Haw. Rev. Stat. §§ 134-9.1(a)(1), 134-9.1(a)(4), 134-9.1(a)(9), 134-9.1(a)(12) and 134-9.5. The district court granted a temporary restraining order against the challenged laws, App. 86a, and converted that order into a preliminary injunction by stipulation of the parties. App. 215a. The State appealed and on September 6, 2024, the Ninth Circuit *sua sponte* consolidated Hawaii's appeal in this case with California's appeals in two other cases (*Carralero v. Bonta* and *May v. Bonta*) involving a post-*Bruen* California statute that imposed a similar default rule as well as creating similar location bans on permit holders. App.1a.

Relying on the Second Circuit's initial decision in *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023) (*Antonyuk I*), that this Court vacated and remanded for further consideration in light of *Rahimi*,[1] the Ninth Circuit held that because "the laws at issue here are state laws," App. 28a, "[w]e … agree with the Second Circuit [in

1. *Antonyuk v. Chiumento*, 89 F.4th 271 (2d Cir. 2023), *vacated and remanded*, *Antonyuk v. James*, 144 S.Ct. 2709 (2024). On remand, and after the decision of the Ninth Circuit in this case, the Second Circuit reaffirmed its earlier decision. *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024) (*Antonyuk II*). The plaintiffs in *Antonyuk* have filed a second petition for certiorari from that decision. *See Antonyuk v. James*, No. 24-795 (docketed Jan. 22, 2025).

Antonyuk] that, at least when considering the "sensitive places" doctrine, we look to the understanding of the right to bear arms both at the time of the ratification of the Second Amendment in 1791 *and* at the time of the ratification of the Fourteenth Amendment in 1868." App. 29a (emphasis the Ninth Circuit's). Applying that principle the court relied solely on purported analogues enacted well outside the Founding Era. On that basis the panel reversed the preliminary injunctions with respect to bars and restaurants that serve alcohol, beaches, parks, and similar areas, and parking areas adjacent to all those places. App. 32a-49a.

The Ninth Circuit also reversed the preliminary injunction as to Hawaii's default rule, but struck down California's default rule at issue in *Carralero* and *May*. The court reasoned that in "California, a property owner may consent to the carrying of firearms only by 'clearly and conspicuously post[ing] a sign at the entrance of the building or on the premises indicating that license holders are permitted to carry firearms on the property.'" App. 11a. "Other forms of permission, such as oral or written consent, do not suffice." App. 11a. The court found that difference dispositive, holding that Hawaii's default rule was constitutional because Hawaii's law permitted a private property owner to consent to carry either through posting a sign, verbally or in writing. *See* H.R.S. § 134-9.5. App.63a. On January 15, 2025, the Ninth Circuit denied rehearing and rehearing en banc. App. 168a. In a subsequent order, the court stayed its mandate pending disposition of a petition for certiorari to this Court. App. 219a.

Judge VanDyke filed a lengthy and vigorous dissenting opinion from the denial of rehearing en banc, joined by Judges Callahan, Ikuta, R. Nelson, Lee and Bumatay. Judge Collins filed a separate dissent joined by Judge Bress. Judge VanDyke concluded en banc review was appropriate to address the acknowledged conflict with *Antonyuk* with respect to Hawaii's default rule. App. 201a. On that point, Judge VanDyke opined that the panel had erred in relying on "outlier" laws consisting of one law from the 1865 Louisiana Black Codes and an otherwise inapt 1771 New Jersey law that failed *Bruen's* "how and why" test. App. 185a-189a.

Judge VanDyke's dissent also maintained that en banc review was necessary because "the panel stretched to draw principles from unrelated laws that simply do not support its stated regulatory principle." App. 193a. In short, "[t]he nuts-and-bolts of the panel's analysis is also inconsistent with how the Court has instructed lower courts to conduct our text-history-and-tradition analysis." App.181a.

Judge Collins dissented for "many of the same reasons set forth by Judge VanDyke." App. 169. Judge Collins thus agreed that en banc consideration was appropriate because "the panel in these cases failed to apply the proper standards for evaluating Second Amendment challenges, as set forth in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022), and *United States v. Rahimi*, 602 U.S. 680 (2024), and that, in doing so, the panel largely vitiated 'the right to bear commonly used arms in public' that the Supreme Court recognized in *Bruen*." App. 169a.

REASONS FOR GRANTING THE PETITION

The petition presents two separate sets of circuit splits, one for each question presented. First, a direct conflict exists between the Ninth Circuit's decision in this case and the Second Circuit's decision in *Antonyuk I* and *Antonyuk II* on the constitutionality of Hawaii's default rule that presumptively bans carry on private property open to the public. The Second Circuit had held that "the State's analogues fail to establish a national tradition motivated by a similar 'how' or 'why' of regulating firearms in property open to the public." *Antonyuk II*, 120 F.4th at 78. Yet, the Ninth Circuit found sufficient *these very same* analogues in sustaining Hawaii's default rule that is *identical* to New York's. Thus, there is a circuit split between the Second Circuit and Ninth Circuit on this important issue.

Second, a multi-circuit split exists whether it is permissible to rely solely on laws enacted outside the Founding Era to uphold modern day gun control laws. Here, the Ninth Circuit agreed with the Second Circuit's *Antonyuk I* decision that such laws are entitled to controlling weight, at least where a State law is at issue. The Ninth Circuit's and the Second Circuit's approach conflicts with the holdings of the Third, Fifth, Eighth and Eleventh Circuits. *See Lara,* 125 F.4th at 432; *Connelly*, 117 F.4th at 281, 2024); *Worth,* 108 F.4th at 696; and *Bondi,* No., 2025 WL 815734 at *5, all of which (save *Connelly*) involve challenges to State laws and all of which hold that Founding Era analogues are controlling and that post-ratification analogues may only be looked to for mere confirmation. This Court's intervention is needed to resolve these multifaceted conflicts among the circuit courts of appeals on these important issues.

I. THIS COURT SHOULD RESOLVE THE CIRCUIT SPLIT ON WHETHER PRIVATE PROPERTY NO CARRY DEFAULT LAWS VIOLATE THE SECOND AMENDMENT.

A. The Ninth Circuit's Decision Creates A Circuit Split With The Second Circuit

The Ninth Circuit's decision in this case creates a circuit split on whether governments may presumptively prohibit the carrying of handguns by licensed permit holders on private property open to the public without the owner's affirmative permission. Both the Ninth Circuit and Second Circuit acknowledge this split. The Ninth Circuit panel stated "[w]e acknowledge that our primary holding—that a national tradition likely exists of prohibiting the carrying of firearms on private property without the owner's oral or written consent—differs from the decisions by the Second Circuit and some district courts." App. 64a. In *Antonyuk II*, the Second Circuit agreed, stating "we are therefore unable to agree with the Ninth Circuit in *Wolford*, 116 F.4th at 995, that any of these statutes 'applied to all private property,' regardless of whether the property was open to the public, so as to be a sufficient analog for the provision at issue here." *Antonyuk*, 120 F.4th at 1047. Six of the Ninth Circuit judges who dissented from the denial of rehearing en banc recognized this circuit split as well. App. 171a.

On this point, the Second Circuit got it right. To be sure, private-property owners may decide to exclude people from their property. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139 (2021). But that power resides with the property owner, not the government. There is no comparable historical—or even modern-day—tradition

of allowing the government to create a no-carry default rule for private property open to the public. *Antonyuk I*, 89 F.4th. at 386 ("The State has produced no evidence that those terms were in fact otherwise understood to apply to private property open to the public or that the statutes were in practice applied to private property open to the public."). "The Nation's historical tradition is that individuals may carry arms on private property unless the property owner chooses otherwise." *Christian v. Nigrelli,* 642 F. Supp.3d 393, 407 n.19. (W.D.N.Y. 2022), *aff'd*, *Antonyuk II*, 120 F.4th at 955 n.3.

The Ninth Circuit's ruling stands alone. The two district courts to have considered the question have likewise rejected default statutes identical to Hawaii's. *See Kipke v. Moore*, 695 F.Supp.3d 638, 646 (D.Md. 2023), *appeals pending* No. 24-1799(L) (4th Cir.) (consolidated); *Koons v. Platkin*, 673 F.Supp.3d 515, 607 (D.N.J. 2023), *appeal pending* No. 23-1900 (3d Cir.). *See also Christian v. James*, ___ F.Supp.3d ___, 2024 WL 4458385 at *11-*18 (W.D.N.Y. Oct. 10, 2024), *appeal pending* No. 24-2847 (2d Cir.).[2]

B. No Historical Justification Exists For The Ninth Circuit's Decision.

The Ninth Circuit first correctly found that carrying on private property open to the public falls within the Second Amendment right. App. 59a. The panel then cited

2. On remand from the Second Circuit's decision in *Antonyuk I*, the district court granted summary judgment for plaintiffs on this issue. *Christian v. James*, ___ F.Supp.3d ___, 2024 WL 4458385 (W.D.N.Y. Oct. 10, 2024), *appeal pending* No. 24-2847 (2d Cir.), and incorporated that ruling in a later decision separately addressing parks. *Christian v. James*, 2025 WL 50413 (W.D.N.Y. Jan. 8, 2025), *appeal pending* No. 25-384 (2d Cir.).

to a series of laws that prohibited the carry of firearms onto "subsets of private land, such as plantations or enclosed lands," App. 60a, holding that "those laws likely did not apply to property that was generally open to the public" and that "the primary aim of some of those laws was to prevent poaching." App. 61a. However, the panel then went astray when it relied on two other laws; a New Jersey law enacted in 1771 and a Louisiana statute enacted in 1865, to sustain Hawaii's no carry default rule. App. 61a. The Ninth Circuit's decision was based solely on these two laws even though the Second Circuit expressly rejected both as insufficient. *Antonyuk II*, 120 F.4th at 1043-44. The Ninth Circuit's reliance was error for multiple reasons.

First, the Louisiana 1865 law was part of the Louisiana Black Codes, and was enacted right after the Civil War before Louisiana was readmitted to the Union. "The centerpiece of the [Black] Codes was their 'attempt to stabilize the black work force and limit its economic options apart from plantation labor.' " *Timbs v. Indiana*, 586 U.S. 146, 168 (2019) (Thomas, J., concurring in judgment) (quoting E. Foner, *Reconstruction: America's Unfinished Revolution 1863–1877*, 199 (1988)). *See also* Brian Sawers, *Property Law as Labor Control In The Postbellum South*, 33 Law & Hist. Rev. 351, 366 (2015).

The Black Codes were also designed to deprive newly freed slaves of their civil rights, including the right to keep and bear arms otherwise protected by state law. *See McDonald v. City of Chicago*, 561 U.S. 742, 771, 779 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008). *See* App. 187a (VanDyke, J., dissenting from the denial of rehearing en banc) ("It was enacted as part of Louisiana's notorious Black Codes that sought to deprive

African Americans of their rights, including the right to keep and bear arms otherwise protected by state law.").[3] Courts should "not infer a historical tradition of regulation consistent with the private building consent rule" from such a statute. *Kipke*, 695 F. Supp. at 659, citing *McDonald*, 561 U.S. at 771. *See also Koons*, 673 F. Supp.3d at 568-69.

Until this case, to our knowledge, no court has relied on any Black Code statute as a suitable analogue under *Bruen*, especially where such a law was enacted by a former Confederate State prior to being readmitted to the Union and before Congress had enacted The Freemen's Bureau Act of 1866 or the Civil Rights Act of 1866. *See McDonald*, 561 U.S. at 774-75; *Timbs*, 586 U.S. at 168 (Thomas, J., concurring in judgment). The panel's decision is the first. An outlier law designed to disarm former slaves enacted by a former Confederate State before readmission to the Union cannot be a proper part of our nation's historical tradition of firearms regulation. Full stop. The Ninth Circuit erred by giving meaningful weight (and a federal appellate court's official imprimatur) to that shameful legacy.

That leaves only New Jersey's 1771 law which generally banned "the carrying of firearms on any lands

3. *A Test Case for the President*, New York Tribune, March 7, 1866, in IX Public Opinion: A Comprehensive Summary of The Press Throughout the World on All Important Current Topics, Jan.–June 1866, https://bit.ly/4evpaQE (quoting the Louisiana law as evidence that Louisiana was "nothing but a machine for restoring to political power the rebels" and "reenacting slavery in fact"); 3 Cong. Rec. 1648 (1875) (Report of Representative Hoar) (describing law as "depriving the great mass of the colored laborers of the State of the right to keep and bear arms").

owned by another." App 61a. That law is both an outlier and not comparable to Hawaii's law. *See Christian*, 2024 WL 4458385 at *15. An analogue need not be a "historical twin," but it must be "well-established and representative," and it can serve as an analogue only if it is "distinctly similar" and comparable to "how" and "why" a law restricted the general right to carry in public at the Founding. *Bruen*, 597 U.S. at 29-30. *Bruen* expressly rejected placing "meaningful weight" on a "solitary statute," 597 U.S. at 49, and further held that "three colonial regulations" were insufficient "to show a tradition of public-carry regulation." 597 U.S. at 46.

In *Rahimi*, the surety and affray laws on which the Court relied, were rooted in the common law at the Founding and were codified in Founding Era statutes in "at least four States—Massachusetts, New Hampshire, North Carolina, and Virginia." *Rahimi*, 602 U.S. at 697-98. "Outlier" regulations do not and cannot establish a national tradition. *Bruen*, 597 U.S. at 30, 55 n.22, 65, & 70. *See also Connelly*, 117 F.4th at 281 (rejecting the use of "three states, between 1868 and 1883, [which] barred citizens from carrying guns while drunk: Kansas, Missouri, and Wisconsin").

Moreover, New Jersey's 1771 law is not a proper analogue for other reasons. To be a relevant analogue a law must impose "a comparable burden on the right of armed self-defense" and that "burden" must be "comparably justified" that means the "how and why the regulations burden a law-abiding citizen's right to armed self-defense" must be comparable. *Bruen*, 597 U.S. at 29. "Why and how the regulation burdens the right are central to this inquiry." *Rahimi*, 602 U.S. at 681 (citation omitted).

The New Jersey "why" for its 1771 ban was to prevent trespass on enclosed lands by poachers hunting with "Guns." Its preamble demonstrates its anti-poaching purpose: "Preservation of Deer and other Game" and "to prevent trespassing with Guns, Traps and Dogs." Nearly every other provision of this law expressly regulated hunting or trapping. Even New Jersey's Supreme Court characterized it as "punish[ing] violations of fish and gaming statute." *New Jersey v. One 1990 Honda Accord*, 154 N.J. 373, 389–90 (1998). *See also Christian*, 2024 WL 4458385 at *14 ("the New Jersey enactment addresses poaching, hunting, trapping, and trespass").

The Ninth Circuit thought this 1771 New Jersey law was a "dead ringer" to Hawaii's private property default rule because it "applied to all private property." App. 61a. In contrast, the Second Circuit in *Antonyuk* held this *same law* was not a proper analogue because it applied only to private property *that was not open to the public*. *Antonyuk II*, 120 F.4th at 1046–47. As the Second Circuit stated in *Antonyuk I*, "[n]o 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." 89 F.4th at 385.

On this issue the Second Circuit is right and the Ninth Circuit is wrong. The law in question made it unlawful "to carry any Gun on any Lands not his own, and for which the Owner pays Taxes, or is in his lawful Possession, unless he hath License or Permission in Writing from the Owner." In New Jersey in 1771, saying "Lands … for which the Owner pays Taxes" was the same as saying "improved" or "inclosed" lands. New Jersey, at the time, taxed only

improved land. *See* Brian Sawers, *Keeping Up with the Joneses: Making Sure Your History Is Just as Wrong as Everyone Else's*, 111 Mich. L. Rev. First Impressions, 21, 25-26 (2013). The statute simply codified the American rule that hunters could hunt on unimproved lands not their own, while improved lands remained off limits. *Id.* at 25– 26 & nn.36–38 (discussing this specific law as another example of a law drawing this balance).

Similarly, Section 6 of the New Jersey statute set property qualifications for hunting on "waste and unimproved Lands"—suggesting that the earlier provision had not prohibited hunting on unimproved private land. *See id.* Other provisions of the 1771 enactment were likewise focused on regulating the time and manner of hunting. Thus, § 18 of the 1771 law provided for repeal of "all former Laws made in this Colony for the Preservation of Deer and other Game, and to prevent trespassing with Guns, and regulating the Size of Traps." *See* An Act for the Preservation of Deer, and other Game, and to prevent trespassing with Guns," 1771, New Jersey Session Laws.

Finally, the New Jersey law applied to carrying "any Gun" not a "firearm." At the Founding, "guns" were long guns or cannons, not pistols. *See* Noah Webster's American Dictionary of the English Language (1828) (defining "gun" and noting that "one species of fire-arms, the pistol, is never called a gun"). Pistols at the Founding were short range weapons suitable for self-defense, not hunting and were not regulated by trespass statutes aimed at punishing trespassers using "Guns" to poach game.

The "why" of the 1771 law is not remotely comparable to the "why" of Hawaii's law. A person on private property

otherwise open to the public is simply not "trespassing," much less poaching or hunting. *See Koons*, 673 F.Supp.3d at 612-13; *Christian,* 642 F.Supp.3d at 407-08. And there is no evidence the New Jersey law was "ever enforced" against anyone who was neither a poacher nor a trespasser. *See Bruen*, 597 U.S. at 58 (looking to enforcement history).

The "how" is also different. Hawaii's presumptive ban applies to **all** private property held open to the public. The New Jersey law had a narrow scope because it affected only "improved" lands. *See* Sawers, *Keeping Up with the Joneses,* 111 Mich. L. Rev. First Impressions, at 25–26 (2013). *Bruen* holds that "[t]o the extent there are multiple plausible interpretations of [statutes]," a court must "favor the one that is more consistent with the Second Amendment's command." *Bruen*, 597 U.S. at 44 n.11. The Ninth Circuit did the opposite.

Certainly, nothing in history or tradition supports the Ninth Circuit's frankly bizarre distinction between California's default rule, which the panel struck down because it allowed permission to be granted *only* through signage, and Hawaii's default rule which allows permission via signage or orally. App. 63a. *See* App. 180a n.1 (VanDyke, J., dissenting from denial of rehearing en banc) ("The panel's distinction between the two states' presumption-flipping rules may give the illusion of analytical precision, but it strains the proverbial gnat while swallowing the camel.").

The panel never explained why or how this distinction in the manner by which permission is given mattered under *Bruen's* text, history and tradition test. The panel noted

only there was "no historical support for that stringent limitation" the California law imposed. *Id.* That statement is unquestionably true, but the point is hardly controlling under *Bruen*. The pertinent historical tradition concerns stopping people from trespassing on enclosed land for the purpose of poaching with "Guns." The law of trespass does not turn in the slightest on whether permission is given orally, in writing or by signage. As noted, at the Founding, carry on private property open to the public was "generally permitted absent the owner's prohibition." *Christian*, 642 F. Supp. 3d at 407. The Ninth Circuit panel did not dispute that point; the panel just ignored it.

The right to carry on property open to the public flows from "the well-developed concept of implied license." *Koons v. Platkin*, 673 F.Supp.3d 515, 610 (D.N.J. 2023). Generally, the public has implied consent to enter property open to the public, "unless such consent is conditioned or subsequently revoked by the property owner." *Id.* And because "[t]he right to armed self-defense follows the individual everywhere he or she lawfully goes" in public, carrying on property open to the public is permitted unless the property owner "withdraw[s] consent[.]" *Id.* There is no tradition, either at the Founding or even in the modern era, of requiring prior permission (of any type) from a property owner when entering land that is otherwise held open to the public. *See* App. 184a-187a (VanDyke, J. dissenting from the denial of rehearing en banc). *Antonyuk I* and *Antonyuk II* so held and the panel in this case erred in its unreasoned refusal to follow that correct holding.

C. The Ninth Circuit's Decision Makes It Impossible As A Practical Matter to Carry a Firearm for Lawful Self-Defense in Hawaii.

Bruen held that "the Second Amendment guarantees a general right to public carry," meaning ordinary, law-abiding citizens may "'bear' arms in public for self-defense." 597 U.S. at 33. Private property open to the public is part of that "public" space. As *Bruen* holds, "there 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." 597 U.S. at 31.

Bruen found such a rule swept "far too broadly" because it "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." Hawaii's law effectively does the same thing. As Judge VanDyke wrote, "Hawaii's law prohibits, presumptively or outright, the carrying of a handgun on 96.4% of the publicly accessible land in Maui County," App. 174a, and has "effectively nullified the Second Amendment rights of millions of Hawaiians . . . to bear firearms as they go about their daily lives in public." App. 181a.

Default rules are inherently sticky. *See generally* Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87 (1989). The default rule was designed to make carrying firearms very inconvenient, so that fewer people will carry them. Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry"*

Defaults on Private Land, 48 J.L. Med. & Ethics 183, 184 (2020). As the Ninth Circuit noted (App. 57a), Hawaii adopted its default rule knowing it would be an effective means of discouraging lawful carry. *See* Joseph Blocher & Darrell A. H. Miller, *What is Gun Control? Direct Burdens Incidental Burdens, and the Boundaries of the Second Amendment*, 83 University of Chicago Law Review 295, 316 (2016) ("Though both of these rules give business owners the final say over whether to permit guns, the former regime would almost certainly result in less gun carrying overall due to the inevitable stickiness of default rules."). That purpose, which is to discourage the exercise of constitutional rights, is illegitimate. *See, e.g.*, *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 471 n.15 (1981) (discriminatory purpose).

The record reveals this practical reality. As the Ninth Circuit noted, "many property owners will not post signs of any sort or give specialized permission, regardless of the default rule" and that reality was "the impetus" for Hawaii's rule." App. 57a. The net result is that Hawaiians, including Petitioners, no longer may carry firearms for lawful self-defense in tens of thousands of private property locations in Hawaii. That result is impossible to square with the "general right" to carry in public *Bruen* recognized. App. 202a (VanDyke, J., dissenting from the denial of rehearing en banc) ("With their new public carry bans, Hawaii and California have effectively disarmed law-abiding Hawaiians and Californians from publicly carrying during most of their daily lives."). The Ninth Circuit has thus permitted Hawaii to eviscerate the Second Amendment right *Bruen* recognized.

II. THE NINTH CIRCUIT DEEPENED AN ALREADY EXISTING CIRCUIT SPLIT AS TO THE USE OF NON-FOUNDING ERA ANALOGUES

A. There Is A Substantial Circuit Split On This Issue

The Ninth Circuit's opinion deepened an already existing circuit split as to whether it is permissible for courts to place primary reliance on Reconstruction Era and later laws to uphold modern day gun control regulations. Noting that "the laws at issue here are state laws," App. 28a, the Ninth Circuit stated "[w]e thus agree with the Second Circuit [in *Antonyuk*] that, at least when considering the "sensitive places" doctrine, we look to the understanding of the right to bear arms both at the time of the ratification of the Second Amendment in 1791 *and* at the time of the ratification of the Fourteenth Amendment in 1868." App. 29a (emphasis the Ninth Circuit's).

That premise is flawed. That this case involves a state law is irrelevant because the Second Amendment applies to the federal government and the States in equal measure. *Bruen* squarely held that "we have made clear that individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." 597 U.S. at 37. That error led to the Ninth Circuit's extensive and misplaced reliance on Reconstruction and post-Reconstruction Era laws in sustaining Hawaii's location bans on parks and beaches (App. 38a), places of amusement (App. 40a) and restaurants that serve alcohol. (App. 43a).

In erecting a special rule for state laws, the Ninth Circuit aligned with the Second Circuit's approach in

Antonyuk, which relied on Reconstruction Era and later analogues to sustain "sensitive places" restrictions. *See* App. 29a. The plaintiffs in *Antonyuk* sought certiorari from the Second Circuit's heavy reliance on such laws[4] and this Court granted the petition and vacated the Second Circuit's decision, remanding for further consideration in light of *Rahimi*. *Antonyuk v. James*,144 S.Ct. 2709 (2024).

Rahimi spoke directly to this point, holding that "[a] court must ascertain whether the new law is "relevantly similar" to laws that our tradition is understood to permit, "apply[ing] faithfully the balance struck *by the founding generation* to modern circumstances." 602 U.S. at 692 (emphasis added). That focus on "the balance struck by the founding generation" is repeated throughout the opinion where the Court relied exclusively on Founding Era analogues and tradition. *Id*. at 694, 698. Although, as in *Bruen*, the Court in *Rahimi* found it "unnecessary" to decide formally whether courts should "primarily rely on the prevailing understanding" in 1791 or 1868 (*id*. at 692 n.1), this Court did not cite a single Reconstruction Era or later statute, practice or tradition. By remanding in light of *Rahimi*, this Court directed the Second Circuit to reconsider its holding on this question presented in the certiorari petition.

Remarkably, the Second Circuit in *Antonyuk II* refused to accept the guidance afforded by *Rahimi*, holding that *Rahimi* had "little direct bearing on our conclusions." 120 F.4th at 955. The court thus once again applied Reconstruction Era and later analogues to reach

4. Question 1 of the *Antonyuk* petition sought certiorari on "[w]hether the proper historical time period for ascertaining the Second Amendment's original meaning is 1791, rather than 1868."

the same conclusions as it did in the court's original opinion in *Antonyuk I,* where the court held that Reconstruction Era and later statutes were applicable because the case involved a state law, rather than a federal statute. Thus, once again, the plaintiffs in *Antonyuk* have sought certiorari on this very same question.[5]

The Ninth Circuit in this case repeated the same error, concluding, *ipse dixit*, that "the reasoning of *Antonyuk* is consistent with the Supreme Court's decision in *Rahimi* and therefore retains its persuasive worth." App. 27a n.1. That conclusion is impossible to reconcile with *Rahimi*'s instruction that the courts are to "faithfully" apply "the balance struck *by the founding generation* to modern circumstances." 602 U.S. at 692 (emphasis added). *See also Bruen*, 142 S.Ct. at 2163 (Barrett, J., concurring) (the Court's decision "should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights"), *Rahimi*, 6602 U.S. at 695 (Barrett, J., concurring) ("scattered cases or regulations pulled from history may have little bearing on the meaning of the text"), citing *Samia v. United States*, 599 U.S. 635, 656–657 (2023) (Barrett, J., concurring in part and concurring in judgment).

Reliance on Reconstruction Era and later laws in *Antonyuk* and by the panel in this case, are also in

5. *See Antonyuk v. James*, No. 24-795 (docketed Jan. 22, 2025). This issue is also presented by the petition for certiorari filed by Minnesota in *Jacobson v. Worth*, No. 24-782 (docketed January 17, 2025). *See Worth* Petition at 14, Response of *Worth* Respondents at 11-12 (filed March 10, 2025). Should this Court grant the petition for certiorari in *Antonyuk* or in *Worth*, then the Court should, at a minimum, hold the petition in this case.

direct conflict with the Third Circuit's decision in *Lara,* 125 F.4th at 441 ("the constitutional right to keep and bear arms should be understood according to its public meaning in 1791, as that 'meaning is fixed according to the understandings of those who ratified it'"), quoting *Bruen*, 597 U.S. at 28; with the Fifth Circuit's decisions in *Connelly*, 117 F.4th at 281 ("Offering three laws passed scores of years post-Ratification (and a fourth passed nearly half a century beyond that) misses the mark by a wide margin.") and in *Reese*, 127 F.4th at 599-600 ("The limitation of these late 19th century analogues is * * * that the laws were passed too late in time"); with the Eighth Circuit's decision in *Worth*, 108 F.4th at 677 ("it is questionable whether the Reconstruction Era sources have much weight"); and, most recently, with the Eleventh Circuit's en banc decision in *Bondi*, 2025 WL 815734 at *5 ("we first look to the Founding").[6]

The panel's reliance on Reconstruction and post-Reconstruction Era laws was decisive. Take, for example, Hawaii's carry prohibitions in bars and restaurants that serve alcohol. HRS § 134-9.1(a)(4). As Judge VanDyke's dissent from the denial of rehearing notes, "[b]ecause the panel could point to no laws from that [Founding] era outlawing the carrying of firearms in those locations, the panel's analysis should have stopped there." App. 191a. Instead, the panel relied upon "four localized mid- to late-19th-century ordinances and territorial laws" to

6. *See also Hirschfeld v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 5 F.4th 407, 419 (4th Cir.), *vacated as moot*, 14 F.4th 322 (4th Cir. 2021) ("When evaluating the original understanding of the Second Amendment, 1791—the year of ratification—is 'the critical year for determining the amendment's historical meaning.'"), quoting *Moore v. Madigan*, 702 F.3d 933, 935 (7th Cir. 2012).

uphold the ban. App. 192a. *See Kipke*, 695 F.Supp.3d at 656 ("the Court concludes that [Maryland's] restriction on locations selling alcohol is not consistent with historical regulations").

The panel used the same misguided methodology to uphold Hawaii's ban in parks and on beaches. As Judge VanDyke's dissent notes, "[d]espite the undeniable presence of recreational-use parks at the Founding, the panel—and California and Hawaii—fail to provide any Founding-era laws prohibiting firearms in those places." App. 195a. Instead, "the panel looked to precedent from the mid- to late-19th century" to uphold Hawaii's ban on the carry of handguns in parks and beaches. App. 196a. In short, the historical era question is determinative.

B. The Relevant Time Period Is A Fundamentally Important Question The Ninth Circuit Got Wrong

The relevant time period for an historical analogue is the Founding- centering on 1791. *Bruen*, 597 U.S. at 32. *See also* Mark W. Smith, *'Not all History is Created Equal': In the Post-Bruen World, the Critical Period for Historical Analogues Is when the Second Amendment Was Ratified in 1791, and not 1868*, SSRN (Oct. 1, 2022), https://bit.ly/3CMSKjw. That is because "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*.'" *Bruen*, 597 U.S. at 34, quoting *District of Columbia v. Heller*, 554 U.S. 570, 634–35) (2008) (emphasis the Court's).

Although the Court in *Bruen* noted an academic debate surrounding whether courts should look to 1868 (when the Fourteenth Amendment was adopted), the

Court found no need to address the point as the result with respect to carry was the same. *Id.* at 38 ("[T]he public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." Likewise, and for the same reason, in *Rahimi,* the Court found it "unnecessary" to decide formally whether courts should "primarily rely on the prevailing understanding" in 1791 or 1868. 602 U.S. at 692 n.1.

But as the Third, Fifth, Eighth and Eleventh Circuits have all recognized, the analysis of the Court in *Rahimi* and *Bruen* was focused on 1791. *See also Gamble v. United States*, 587 U.S. 678, 702 (2019) (treating post-ratification treatises "as mere confirmation of what the Court thought had already been established" concerning "the public understanding in 1791 of the right codified by the Second Amendment"). And again, that focus on 1791 applies without regard to whether the federal government imposes the restriction or a state. *See Timbs*, 586 U.S. 150 ("there is no daylight between the federal and state conduct" concerning the scope of incorporated constitutional rights); *McDonald*, 561 U.S. at 784-85 (rejecting the argument for a "special incorporation test applicable only to the Second Amendment").

Thus, in *Bruen* the Court "assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.* at 37. And, again, in *Rahimi*, this Court focused exclusively on analogues from the "founding generation." 602 U.S. at 692. *See also Rahimi*, 602 U.S. at 737-38 (Barrett, J., concurring ("So for an originalist, the history that matters most is

the history surrounding the ratification of the text; that backdrop illuminates the meaning of the enacted law."); *id.*, 602 U.S. at 710 (Gorsuch, J. concurring) ("litigants and courts alike must consult history when seeking to discern the meaning and scope of a constitutional provision" and they "'must exercise care'" in doing so).

Bruen explains that "post-Civil War discussions of the right to keep and bear arms 'took place 75 years [or more] after the ratification of the Second Amendment,'" so "'they do not provide as much insight into its original meaning as earlier sources.'" *Bruen*, 597 U.S. at 66. A right incorporated under the Fourteenth Amendment thus brings with it the original meaning of the right as it was understood at the Founding, not some new version based on 1868 or later understandings.

This emphasis on Founding Era evidence is fully in accord with this Court's precedent. For example, in *Espinoza v. Mont. Dep't of Rev.*, the Court held that "more than 30" provisions of state law enacted "in the second half of the 19th Century" could not "evince a tradition that should inform our understanding of the Free Exercise Clause" when those provisions lacked grounding in Founding Eera practice. 591 U.S. 464, 482 (2020). *See also Ramos v. Louisiana*, 590 U.S. 83, 91 (2020); *Timbs,* 586 U.S. at 150; *Gamble*, 587 U.S. at 702; *Virginia v. Moore*, 553 U.S. 164, 168 (2008). Indeed, any ruling that 1868 controls would upend 80 years of this Court's jurisprudence that looks to 1791 in construing the scope of incorporated constitutional provisions. The Second Amendment is not a special case. *Bruen*, 597 U.S. at 70 ("The constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to

an entirely different body of rules than the other Bill of Rights guarantees.'"), quoting *McDonald*, 561 U.S. at 780.

C. The Merits Favor Petitioners

Parks have existed since long before the Founding Era. Bowling Green, founded in 1733, served as a place for "Recreation & delight." N.Y. City Dep't Of Parks, Bowling Green, https://on.nyc.gov/41zEOWp (last visited Jan. 26, 2025). Boston Common, established in 1634, has served as a place of "recreation of the people" since "time immemorial," *Steele v. City of Boston*, 128 Mass. 583, 583 (1880), and "as a site for informal socializing and recreation" as early as the 1660s, Anne Beamish, *Before Parks: Public Landscapes in Seventeenth and Eighteenth-Century Boston, New York, and Philadelphia*, 40 Landscape J. 1, 3 (2021). When the English revivalist, George Whitfield, visited Boston in 1740, his preaching was so popular that the meeting houses could no longer accommodate him and his followers—over 20,000 on one day—met to hear him in Boston Common. *See* Ronald Fleming, *On Common Ground* 21 (1982), https://bit.ly/3DZyGyO. "Despite the undeniable presence of recreational-use parks at the Founding, the panel—and California and Hawaii—fail to provide any Founding Era laws prohibiting firearms in those places." App. 195a.

Moreover, Hawaii's statewide ban almost entirely targets non-urban, rural areas. Hawaii has not shown any tradition that could justify its ban in state and county parks and beaches. These bans are applicable to hundreds of thousands of acres of public land throughout Hawaii, even though the State allows hunting with firearms in many areas of these parks and forests. *See e.g.* https://bit.

ly/3DWfIZV (detailing numerous parks where firearms are allowed for hunting). *See also* Haw. Code R. § 13-123-22 (detailing rules for using firearms in state park lands).

Allowing firearms for hunting but not for self-defense cannot be squared with the Second Amendment. *See Bruen*, 597 U.S. at 29 ("As we stated in *Heller* and repeated in *McDonald*, individual self-defense is 'the central component' of the Second Amendment right."); *Heller*, 554 U.S. at 630 (referring to "the core lawful purpose of self-defense"). An area in which hunting is allowed cannot possibly be a "sensitive area" in which carry for self-defense is banned. Localized urban bans cannot serve as analogues for such rural bans. *Antonyuk*, 120 F.4th at 1019 (recognizing the disconnect between "urban parks" and "rural parks"); *Christian*, 2025 WL 50413 at *1 (noting that *Antonyuk I* had "recognized a potential distinction between urban and rural parks").

The same reasoning applies to Hawaii's ban on establishments that serve alcohol. The Founders were intimately familiar with taverns, with violence relating to them, and with regulation of taverns and alcohol. "Consuming alcohol was one of the most widespread practices in the American colonies," and "[t]averns served as the most common drinking and gathering place for colonists." Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to its Roots in Colonial Taverns*, 39 Hastings Const. L.Q. 593, 595 (2012).

Taverns played an indispensable role in our Nation's birth. Taverns are where the Boston Tea Party and the Revolution were planned, where George Washington

gave his post-war farewell address, where decisions were made during the Constitutional Convention and where federalists and anti-federalists jockeyed for political support. Christine Sismondo, *America Walks Into a Bar,* 66–67, 71–72, 76, 82–83 (2011). The Founders were familiar with firearm violence in taverns. *Id.* at 16 ("taverns were plagued with pernicious loitering and the . . . shooting off of guns." (internal quotation marks omitted). As early as Colonial America, "tavern legislation was involved and constantly changing." *Id.* at 15. The United States Marine Corps was even founded in a bar called Tun Tavern. https://bit.ly/3DApOQl. And yet, there was no Founding Era tradition of banning the mere possession of firearms in taverns or other places selling alcohol.

As Judge VanDyke's dissent notes, "[t]he panel acknowledged that '[e]stablishments serving alcohol have existed since the Founding,' " and yet "the panel could point to no laws from that era outlawing the carrying of firearms in those locations." App. 191a. Instead, the panel relied upon inapposite gunpowder laws and "four localized mid- to late-19th-century ordinances and territorial laws." *Id.* App. 192a. *See also Id.* App. 199a ("the breadth of California's and Hawaii's laws bears no resemblance to the limited impact of the historical laws the panel pointed to for historical support").

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

KEVIN O'GRADY
ATTORNEY AT LAW
1164 Bishop Street,
Suite 1605
Honolulu, Hawaii 96813
(808) 521-3367
kevin@kevinogradylaw.com

ALAN ALEXANDER BECK
Counsel of Record
ATTORNEY AT LAW
2692 Harcourt Drive
San Diego, CA 92123
(619) 905-9105
alan.alexander.beck@gmail.com

Counsel for Petitioners

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED SEPTEMBER 6, 2024

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16164
D.C. No. 1:23-cv-00265-LEK-WRP

JASON WOLFORD; ALISON WOLFORD; ATOM KASPRZYCKI; HAWAII FIREARMS COALITION,

Plaintiffs-Appellees,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAII,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Hawaii
Leslie E. Kobayashi, District Judge, Presiding

No. 23-4354
D.C. No. 8:23-cv-01798-CJC-ADS

MARCO ANTONIO CARRALERO; GARRISON HAM; MICHAEL SCHWARTZ; ORANGE COUNTY GUN OWNERS PAC; SAN DIEGO COUNTY GUN OWNERS PAC; CALIFORNIA GUN RIGHTS FOUNDATION; FIREARMS POLICY COALITION, INC.,

Plaintiffs-Appellees,

Appendix A

v.

ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA,

Defendant-Appellant.

No. 23-4356
D.C. No. 8:23-cv-01696-CJC-ADS

RENO MAY, AN INDIVIDUAL; ANTHONY MIRANDA, AN INDIVIDUAL; ERIC HANS, AN INDIVIDUAL; GARY BRENNAN, AN INDIVIDUAL; OSCAR A. BARRETTO, JR., AN INDIVIDUAL; ISABELLE R. BARRETTO, AN INDIVIDUAL; BARRY BAHRAMI, AN INDIVIDUAL; PETE STEPHENSON, AN INDIVIDUAL; ANDREW HARMS, AN INDIVIDUAL; JOSE FLORES, AN INDIVIDUAL; DR. SHELDON HOUGH, DDS, AN INDIVIDUAL; SECOND AMENDMENT FOUNDATION; GUN OWNERS OF AMERICA, INC.; GUN OWNERS FOUNDATION; GUN OWNERS OF CALIFORNIA, INC.; LIBERAL GUN OWNERS ASSOCIATION; CALIFORNIA RIFLE & PISTOL ASSOCIATION,

Plaintiffs-Appellees,

v.

ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF CALIFORNIA,

Defendant-Appellant,

Appendix A

DOES, 1-10,

Defendant.

Appeal from the United States District Court
for the Central District of California
Cormac J. Carney, District Judge, Presiding

Argued and Submitted April 11, 2024
San Francisco, California

Filed September 6, 2024

Before: Mary M. Schroeder, Susan P. Graber, and Jennifer Sung, Circuit Judges.

Opinion by Judge Graber

OPINION

GRABER, Circuit Judge:

In its modern decisions concerning the Second Amendment, the Supreme Court has emphasized that its rulings do not call into question longstanding laws prohibiting the carry of firearms at sensitive places such as schools and government buildings. *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 30, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022); *McDonald v. City of Chicago*, 561 U.S. 742, 786, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010) (plurality opinion); *District of Columbia v. Heller*, 554 U.S. 570, 626, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008); *see also United States v. Rahimi*, 602 U.S. , 144 S. Ct. 1889, 1923, 219 L. Ed. 2d 351 (2024) (Kavanaugh, J., concurring) (stressing this point); *Bruen*, 597 U.S. at

81 (Kavanaugh, J., concurring, joined by Roberts, C.J.) (same). In *Bruen*, the Court provided specific guidance on how to determine what kinds of places qualify as "sensitive places" such that firearms may be prohibited. 597 U.S. at 30-31. Applying that guidance to laws recently enacted by the Hawaii and California legislatures, we conclude that some—but not all—of the places specified by those laws likely fall within the national tradition of prohibiting firearms at sensitive places.

Parks in modern form, for example, first arose in the middle of the 19th century; governments throughout the nation immediately imposed prohibitions on firearms in parks; the constitutionality of those bans was unquestioned; and those regulations are akin to laws recognized by *Bruen* as sufficiently representative to qualify a location as a "sensitive place." States permissibly may prohibit firearms in most parks. By contrast, banks have existed throughout our Nation's history, but the historical record does not demonstrate a comparable national tradition of banning firearms at banks. Applying *Bruen*'s guidance, we conclude that the Second Amendment likely prohibits a State from banning firearms in banks. But that conclusion is less restrictive than it may appear at first glance. As the owner or operator of private property, a bank may prohibit firearms as a matter of the ordinary property-law right to exclude. And if a State operates a bank, the State, too, may exercise its proprietary right to exclude, just as a private property owner may. *See Bldg. & Constr. Trades Council v. Associated Builders & Contractors of Mass./R. I., Inc.*, 507 U.S. 218, 231-32, 113 S. Ct. 1190, 122 L. Ed. 2d 565 (1993) (explaining that a State generally may "manage

its own property when it pursues its purely proprietary interests . . . where analogous private conduct would be permitted"). But we conclude that, because there is no comparable historical tradition as required by *Bruen*, a State may not prohibit a bank's owner from permitting the carry of firearms if the bank's owner wishes to allow patrons to carry firearms into the bank.

In the cases before us, the district courts preliminarily enjoined the implementation or enforcement of several provisions of the Hawaii and California laws. Because we conclude that the district courts erred in applying *Bruen* with respect to most of those provisions, we reverse in large part. But because Plaintiffs are likely to prevail with respect to some aspects of the laws, we also affirm in part.

FACTUAL AND PROCEDURAL HISTORY

A. Factual and Procedural Background in Hawaii

In 2023, the Hawaii legislature enacted Act 52, which has been codified, as relevant here, in Hawaii Revised Statutes sections 134-9.1 and 134-9.5. The statute generally prohibits a person with a carry permit from bringing a firearm onto fifteen types of property. Haw. Rev. Stat. § 134-9.1(a). A violation of the law is a misdemeanor. *Id.* § 134-9.1(f).

The law also flips the default rule on all private property: Whereas the old rule allowed a person with a carry permit to bring firearms onto private property unless the owner prohibited it, the new rule generally

prohibits the carry of firearms onto private property unless the owner allows it. *Id.* § 134-9.5(a). Under Hawaii's law, an owner may consent either by "[u]nambiguous written or verbal authorization" or by the "posting of clear and conspicuous signage." *Id.* § 134-9.5(b). A violation of the law is a misdemeanor. *Id.* § 134-9.5(e).

We reproduce the relevant portions of Hawaii's law. Section 134-9.1 states, in relevant part:

> (a) A person with a license issued under section 134-9, or authorized to carry a firearm in accordance with title 18 United States Code section 926B or 926C, shall not intentionally, knowingly, or recklessly carry or possess a loaded or unloaded firearm, whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, while in any of the following locations and premises within the State:
>
> (1) Any building or office owned, leased, or used by the State or a county, and adjacent grounds and parking areas, including any portion of a building or office used for court proceedings, legislative business, contested case hearings, agency rulemaking, or other activities of state or county government;
>
> . . . .
>
> (4) Any bar or restaurant serving alcohol or intoxicating liquor as defined in section 281-1

> for consumption on the premises, including adjacent parking areas;
>
> . . . .
>
> (9) Any beach, playground, park, or adjacent parking area, including any state park, state monument, county park, tennis court, golf course, swimming pool, or other recreation area or facility under control, maintenance, and management of the State or a county, but not including an authorized target range or shooting complex;
>
> . . . .
>
> (12) The premises of any bank or financial institution as defined in section 211D-1, including adjacent parking areas;
>
> . . . .
>
> (f) Any person who violates this section shall be guilty of a misdemeanor.

Id. § 134-9.1. Section 134-9.5 states:

> (a) A person carrying a firearm pursuant to a license issued under section 134-9 shall not intentionally, knowingly, or recklessly enter or remain on private property of another person while carrying a loaded or unloaded

firearm, whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property.

(b) For purposes of this section, express authorization to carry or possess a firearm on private property shall be signified by:

(1) Unambiguous written or verbal authorization; or

(2) The posting of clear and conspicuous signage at the entrance of the building or on the premises,

by the owner, lessee, operator, or manager of the property, or agent thereof, indicating that carrying or possessing a firearm is authorized.

(c) For purposes of this section:

"Private entity" means any homeowners' association, community association, planned community association, condominium association, cooperative, or any other nongovernmental entity with covenants, bylaws, or administrative rules, regulations, or provisions governing the use of private property.

> "Private property" does not include property that is owned or leased by any governmental entity.
>
> "Private property of another person" means residential, commercial, industrial, agricultural, institutional, or undeveloped property that is privately owned or leased, unless the person carrying a firearm is an owner, lessee, operator, or manager of the property, including an ownership interest in a common element or limited common element of the property; provided that nothing in this chapter shall be construed to limit the enforceability of a provision in any private rental agreement restricting a tenant's possession or use of firearms, the enforceability of a restrictive covenant restricting the possession or use of firearms, or the authority of any private entity to restrict the possession or use of firearms on private property.
>
> (d) This section shall not apply to a person in an exempt category identified in section 134-11(a).
>
> (e) Any person who violates this section shall be guilty of a misdemeanor.

Id. § 134-9.5.

In *Wolford*, Plaintiffs Jason Wolford, Alison Wolford, and Atom Kasprzycki live in Maui, and each individual

Plaintiff has a concealed-carry permit. Plaintiff Hawaii Firearms Coalition is incorporated in Hawaii and has 33 members who possess valid concealed-carry permits. Plaintiffs allege, among other claims, that the quoted portions of the new law are unconstitutional restrictions on their Second Amendment right to keep and bear arms. Plaintiffs brought this 42 U.S.C. § 1983 action against Defendant Anne E. Lopez, in her official capacity as Attorney General of Hawaii.

Plaintiffs moved for a temporary restraining order and a preliminary injunction. Plaintiffs challenged only a limited subset of the law's provisions. The district court granted in part and denied in part a temporary restraining order. *Wolford v. Lopez*, 686 F. Supp. 3d 1034 (D. Haw. 2023). The court later converted the temporary restraining order into a preliminary injunction. In particular, the court enjoined the law's prohibition on the carrying of firearms in parking lots shared by government buildings and non-government buildings; banks, financial institutions, and their adjacent parking areas; public beaches, public parks, and their adjacent parking areas; and bars, restaurants that serve alcohol, and their adjacent parking areas. *Id.* at 1076-77. The court also enjoined the new default rule for private property but limited the injunction to private property held open to the public. *Id.* at 1077.

Defendant timely appeals. Before us, Defendant has not sought a stay of the injunction on appeal. Plaintiffs have not filed a separate appeal or a cross-appeal challenging the district court's partial denial of a preliminary injunction.

B. Factual and Procedural Background in California

Also in 2023, the California legislature enacted Senate Bill 2, which has been codified, as relevant here, in California Penal Code section 26230. The law generally prohibits a person with a concealed-carry permit from carrying a firearm onto more than two dozen types of property. Cal. Penal Code § 26230(a). The law also flips the default rule on all private property that is open to the public. *Id.* § 26230(a)(26). But California's statute is stricter than Hawaii's law with respect to how a private-property owner may overcome the new default rule prohibiting firearms. In California, a property owner may consent to the carrying of firearms only by "clearly and conspicuously post[ing] a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property." *Id.* Other forms of permission, such as oral or written consent, do not suffice.

We reproduce the relevant parts of California Penal Code section 26230:

> (a) A person granted a license to carry a pistol, revolver, or other firearm capable of being concealed upon the person pursuant to Section 26150, 26155, or 26170 shall not carry a firearm on or into any of the following:
>
> (1) A place prohibited by Section 626.9.
>
> (2) A building, real property, or parking area under the control of a preschool or childcare

facility, including a room or portion of a building under the control of a preschool or childcare facility. Nothing in this paragraph shall prevent the operator of a childcare facility in a family home from owning or possessing a firearm in the home if no child under child care at the home is present in the home or the firearm in the home is unloaded, stored in a locked container, and stored separately from ammunition when a child under child care at the home is present in the home so long as the childcare provider notifies clients that there is a firearm in the home.

(3) A building, parking area, or portion of a building under the control of an officer of the executive or legislative branch of the state government, except as allowed pursuant to paragraph (2) of subdivision (b) of Section 171c.

(4) A building designated for a court proceeding, including matters before a superior court, district court of appeal, or the California Supreme Court, parking area under the control of the owner or operator of that building, or a building or portion of a building under the control of the Supreme Court, unless the person is a justice, judge, or commissioner of that court.

(5) A building, parking area, or portion of a building under the control of a unit of local

government, unless the firearm is being carried for purposes of training pursuant to Section 26165.

(6) A building, real property, and parking area under the control of an adult or juvenile detention or correctional institution, prison, or jail.

(7) A building, real property, and parking area under the control of a public or private hospital or hospital affiliate, mental health facility, nursing home, medical office, urgent care facility, or other place at which medical services are customarily provided.

(8) A bus, train, or other form of transportation paid for in whole or in part with public funds, and a building, real property, or parking area under the control of a transportation authority supported in whole or in part with public funds.

(9) A building, real property, and parking area under the control of a vendor or an establishment where intoxicating liquor is sold for consumption on the premises.

(10) A public gathering or special event conducted on property open to the public that requires the issuance of a permit from a federal, state, or local government and sidewalk or street immediately adjacent to the public

gathering or special event but is not more than 1,000 feet from the event or gathering, provided this prohibition shall not apply to a licensee who must walk through a public gathering in order to access their residence, place of business, or vehicle.

(11) A playground or public or private youth center, as defined in Section 626.95, and a street or sidewalk immediately adjacent to the playground or youth center.

(12) A park, athletic area, or athletic facility that is open to the public and a street or sidewalk immediately adjacent to those areas, provided this prohibition shall not apply to a licensee who must walk through such a place in order to access their residence, place of business, or vehicle.

(13) Real property under the control of the Department of Parks and Recreation or Department of Fish and Wildlife, except those areas designated for hunting pursuant to Section 5003.1 of the Public Resources Code, Section 4501 of Title 14 of the California Code of Regulations, or any other designated public hunting area, public shooting ground, or building where firearm possession is permitted by applicable law.

(14) Any area under the control of a public or private community college, college, or

university, including, but not limited to, buildings, classrooms, laboratories, medical clinics, hospitals, artistic venues, athletic fields or venues, entertainment venues, officially recognized university-related organization properties, whether owned or leased, and any real property, including parking areas, sidewalks, and common areas.

(15) A building, real property, or parking area that is or would be used for gambling or gaming of any kind whatsoever, including, but not limited to, casinos, gambling establishments, gaming clubs, bingo operations, facilities licensed by the California Horse Racing Board, or a facility wherein banked or percentage games, any form of gambling device, or lotteries, other than the California State Lottery, are or will be played.

(16) A stadium, arena, or the real property or parking area under the control of a stadium, arena, or a collegiate or professional sporting or eSporting event.

(17) A building, real property, or parking area under the control of a public library.

(18) A building, real property, or parking area under the control of an airport or passenger vessel terminal, as those terms are defined in subdivision (a) of Section 171.5.

(19) A building, real property, or parking area under the control of an amusement park.

(20) A building, real property, or parking area under the control of a zoo or museum.

(21) A street, driveway, parking area, property, building, or facility, owned, leased, controlled, or used by a nuclear energy, storage, weapons, or development site or facility regulated by the federal Nuclear Regulatory Commission.

(22) A church, synagogue, mosque, or other place of worship, including in any parking area immediately adjacent thereto, unless the operator of the place of worship clearly and conspicuously posts a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property. Signs shall be of a uniform design as prescribed by the Department of Justice and shall be at least four inches by six inches in size.

(23) A financial institution or parking area under the control of a financial institution.

(24) A police, sheriff, or highway patrol station or parking area under control of a law enforcement agency.

(25) A polling place, voting center, precinct, or other area or location where votes are being cast or cast ballots are being returned or counted, or

> the streets or sidewalks immediately adjacent to any of these places.
>
> (26) Any other privately owned commercial establishment that is open to the public, unless the operator of the establishment clearly and conspicuously posts a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property. Signs shall be of a uniform design as prescribed by the Department of Justice and shall be at least four inches by six inches in size.
>
> (27) Any other place or area prohibited by other provisions of state law.
>
> (28) Any other place or area prohibited by federal law.
>
> (29) Any other place or area prohibited by local law.

Id. § 26230(a).

In *May* and *Carralero*, Plaintiffs Marco Antonio Carralero, Garrison Ham, Michael Schwartz, Reno May, Anthony Miranda, Eric Hans, Gary Brennan, Oscar A. Barretto, Jr., Isabelle R. Barretto, Barry Bahrami, Pete Stephenson, Jose Flores, Andrew Harms, and Dr. Sheldon Hough, DDS, live in California and have concealed-carry permits. Plaintiffs Orange County Gun Owners PAC, San

Diego County Gun Owners PAC, California Gun Rights Foundation, Firearms Policy Coalition, Inc., Second Amendment Foundation, Gun Owners of America, Gun Owners Foundation, Gun Owners of California, Inc., the Liberal Gun Owners Association, and the California Rifle & Pistol Association, Inc., have members who hold concealed-carry permits. Plaintiffs allege that many provisions of the new law are unconstitutional restrictions on their Second Amendment right to keep and bear arms. Plaintiffs brought two separate actions, pursuant to 42 U.S.C. § 1983, against Defendant Rob Bonta, in his official capacity as Attorney General of California.

Plaintiffs moved for a preliminary injunction, seeking to enjoin many parts of section 26230. The district court issued an opinion addressing the motions in both cases, and the court granted in full the requested injunctive relief. *May v. Bonta*, Nos. SACV 23-01696-CJC (ADSx) & SACV 23-01798-CJC (ADSx), 2023 U.S. Dist. LEXIS 231208, 2023 WL 8946212 (S.D. Cal. Dec. 20, 2023). In particular, the court enjoined Defendant from implementing the law concerning California's ban on concealed carry in hospitals; playgrounds; public transit; parks and athletic facilities; property controlled by the Parks and Recreation Department; bars and restaurants that serve alcohol; gatherings that require a permit; libraries; casinos; zoos; stadiums and arenas; amusement parks; museums; places of worship; banks; and all parking lots adjacent to sensitive places, including sensitive places unchallenged by Plaintiffs. The court also enjoined the new default rule for private property held open to the public.

Defendant timely appealed in both California cases, and we consolidated the appeals. In order to preserve the status quo, we denied Defendant's request for a stay pending appeal.

STANDARDS OF REVIEW

We review de novo whether Plaintiffs have standing. *Tucson v. City of Seattle*, 91 F.4th 1318, 1324 (9th Cir. 2024). We review for abuse of discretion the district court's grant of a preliminary injunction. *Id.* "A district court abuses its discretion if it rests its decision on an erroneous legal standard or on clearly erroneous factual findings." *Am. Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749, 754 (9th Cir. 2019) (en banc) (citation and internal quotation marks omitted).

DISCUSSION

To warrant the extraordinary relief of a preliminary injunction, Plaintiffs must show a likelihood of success on the merits, irreparable harm in the absence of preliminary relief, a favorable balance of the equities, and favorable public interest in an injunction. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). Because the government is a party, the "last two factors merge." *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014).

We address together the issues from the Hawaii case and the California cases, differentiating where appropriate. For each case, we have considered only

the *evidence* in the record in that case. *See, e.g.*, *Bruen*, 597 U.S. at 25 n.6 (holding that courts are "entitled to decide a case based on the historical record compiled by the parties"). With respect to *legal* sources, however, we may—but are not required to—consider laws and other legal sources whether or not the parties have focused on those specific laws or judicial decisions. *See id.* at 60 (conducting independent legal research as a matter of discretion). Similarly, context dictates whether our references to "Defendant," "Defendants," or "Plaintiffs" pertain to the parties in the Hawaii case, the California cases, or the cases in both states.

A. Likelihood of Success on the Merits

The Second Amendment states: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Amendment creates an individual right to keep and bear arms for self-defense. *Heller*, 554 U.S. at 602. The right applies against States via the Fourteenth Amendment. *McDonald*, 561 U.S. at 750, 791.

In *Bruen*, the Supreme Court announced the appropriate general methodology for deciding Second Amendment challenges to state laws:

> 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.

597 U.S. at 24. With respect to the historical analysis at *Bruen*'s second step, the Court required a different showing depending on whether the government's regulation addresses a societal problem that has persisted since the Founding or one that is more modern:

> [W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a *distinctly similar* historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment. Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality.

Id. at 26-27 (emphasis added). We refer to this standard as the "distinctly similar" test.

By contrast, "cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *Id.* at 27. "When

confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy . . . . [D]etermining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are 'relevantly similar.'" *Id.* at 28-29 (citation omitted). "[T]wo metrics" guide this comparison: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 29. In other words, we assess "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified." *Id.* Analogical reasoning "is neither a regulatory straightjacket nor a regulatory blank check." *Id.* at 30. The government must "identify a well-established and representative historical *analogue*, not a historical *twin*" or a "dead ringer." *Id.*

Rather than taking the "more nuanced approach," the Supreme Court applied the "distinctly similar" test in both *Heller*, which concerned a ban on handguns, and *Bruen*, which concerned conditions for obtaining a concealed-carry permit. *Id.* at 27. In applying that test in *Bruen*, the Court was strict in its search for a distinctly similar regulation that could justify New York's "proper cause" concealed-carry permitting requirement. *Id.* at 11, 39-70. In an exhaustive historical analysis, the Court held that no early law was analogous to the "proper cause" requirement, and the Court also noted that several state courts had ruled in ways that were contrary to a "proper cause" requirement. *Id.* at 39-55. Although the Court ruled that the defendants' proffered colonial laws were not on

point, the Court began its analysis with this dictum: "For starters, we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation." *Id.* at 46. The Court next acknowledged that an 1871 Texas law and a pair of Texas court decisions supported New York's law. *Id.* at 64-65. But the Court dismissed that evidence as insufficient in light of the weighty conflicting evidence; that is, the Texas examples were "outliers." *Id.* at 65 . Similarly, the Court discounted the significance of several late-1800s territorial laws because they "contradicted earlier evidence." *Id.* at 66. The Court explained that the territories were not part of the Union at the time; the laws governed "miniscule" populations; the laws were rarely subject to judicial scrutiny, so we do not know if or how the laws were viewed as constitutional; and the laws were short-lived. *Id.* at 67-70. In sum, *Heller* and *Bruen* imposed a challenging burden on the government where the regulation in question addressed an issue that has existed since the Founding, had not been affected by a technological change, and did not concern a uniquely modern problem. In that context, *Bruen* instructs that historical analogues inconsistent with the "overwhelming weight of other evidence" are undeserving of much weight, especially those laws that governed only a few colonies or territories, affected a small population, or were enacted in the late 19th century or later. *Id.* at 66 (quoting *Heller*, 554 U.S. at 632).

The Court's analysis in *Bruen* misled some courts into imposing too rigid a test when considering historical sources. In *Rahimi*, the Court clarified that *Bruen* did not require stringent adherence to Founding-era

laws, emphasizing that its "precedents were not meant to suggest a law trapped in amber." 144 S. Ct. at 1897. Instead of looking for a precise historical match, "the appropriate analysis involves considering whether the challenged regulation is consistent with the principles that underpin our regulatory tradition." *Id.* at 1898. The Court emphasized that a challenged law "must comport with the principles underlying the Second Amendment, but it need not be a 'dead ringer' or a 'historical twin.'" *Id.* (quoting *Bruen*, 597 U.S. at 30).

The Court went on to demonstrate how such principles may be derived from historical analogues. The law challenged in *Rahimi* prohibits persons subject to a domestic-violence order from possessing any firearm. *Id.* at 1895. The Court considered two types of historical analogues that were "by no means identical" to the challenged law: (a) historical surety laws that targeted the misuse of firearms but imposed no firearms restrictions at all and (b) "going armed" laws that regulated only publicly threatening conduct, including a threatening use of firearms, and that imposed criminal penalties only after a trial with full constitutional protections. *Id.* at 1899-1901; *see id.* at 1938-43 (Thomas, J., dissenting) (describing the historical laws). From those laws, the Court distilled the principle that it is consistent with the Second Amendment to disarm individuals when they pose a clear threat of violence to another. *Id.* at 1901. Because the challenged law restricts the use of firearms to mitigate demonstrated threats of violence, the Court held that the law fits within the national tradition of regulating firearms. *Id.* at 1901-02. *Rahimi* therefore instructs that, even where historical

analogues are not close matches to the challenged law, they may evince principles underpinning our Nation's regulatory tradition, and it is sufficient for the government to show that its law is consistent with those principles.

In addition to laying out this approach, the Court has provided specific guidance on the appropriate analysis when assessing the regulation of firearms in sensitive places in particular. In *Heller*, the Court wrote:

> Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to cast doubt on . . . laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . .

554 U.S. at 626; *see also id.* at 627 n.26 (emphasizing that the list is not exhaustive). In *McDonald*, the Court expressly "repeat[ed] those assurances" and quoted the passage from *Heller*. 561 U.S. at 786 (plurality opinion).

In *Bruen*, the Court elaborated on the appropriate methodology for assessing whether a place qualifies as a "sensitive place":

> Consider, for example, *Heller*'s discussion of "longstanding" "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings." 554 U.S. at 626. Although the historical record yields relatively

> few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. *See* D. Kopel & J. Greenlee, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. 205, 229-236, 244-247 (2018); *see also* Brief for Independent Institute as Amicus Curiae 11-17. We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of "sensitive places" to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible.

597 U.S. at 30 (one citation omitted). The following regulations justified the Court's conclusion that legislative assemblies, polling places, courthouses, and schools were "sensitive places" where firearms could be banned: a pair of Maryland statutes from 1647 and 1650 banning arms at legislative assemblies; a 1776 Delaware law and a 1787 New York law prohibiting arms at polling places, as well as some state laws enacted after 1868; a single 1786 Virginia law prohibiting arms at courthouses and a 19th century Georgia law prohibiting weapons in a court of justice; and localized bans on the carry of firearms at a few schools beginning in 1824. Kopel, The "Sensitive Places" Doctrine, 13 Charleston L. Rev. at 229-236, 244-

247; Brief for Independent Institute as Amicus Curiae, pp. 11-17, *Bruen*, 597 U.S. 1; *see also Antonyuk v. Chiumento*, 89 F.4th 271, 303-04 (2d Cir. 2023) (examining these same sources), *petition for cert. granted, decision vacated, & case remanded sub nom. Antonyuk v. James*, No. 23-910, 144 S. Ct. 2709, 2024 WL 3259671 (U.S. July 2, 2024);[1] *Goldstein v. Hochul*, 680 F. Supp. 3d 370, 392-93 & n.12 (S.D.N.Y. June 28, 2023) (same), *appeal filed*, No. 23-995 (2d Cir. July 6, 2023).

We pause to note the difference between the "distinctly similar" test applied in *Bruen* to New York's law and the more lenient standard that applies when analyzing the regulation of firearms at "sensitive places." After all, only one or two colonial laws provided sufficient justification for the Court to designate several places as sensitive. The Court placed schools in this category, even though no law prohibited firearms in schools until more than thirty years after the ratification of the Second Amendment. By contrast, when *Bruen* applied the "distinctly similar" test to New York's probable-cause law, the Court's analysis was more stringent. It noted, for example, that "we doubt that *three* colonial regulations could suffice to show a tradition of public-carry regulation," 597 U.S. at 46, and insisting on a close match between the historical regulation and the modern one, *e.g., id.* at 47-50.

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1. Throughout this opinion, we cite the Second Circuit's pre-*Rahimi* decision in *Antonyuk* for its persuasive value. Except as specifically noted otherwise, we conclude that the reasoning of *Antonyuk* is consistent with the Supreme Court's decision in *Rahimi* and therefore retains its persuasive worth.

The "proper cause" requirement at issue in *Bruen* addressed a societal problem that had been present since the Founding, which caused the Court to apply the stricter "distinctly similar" test. *Id.* at 26-27. Moreover, *Bruen* emphasized that much evidence—primarily state court decisions—weighed strongly against the constitutionality of New York's law. In that circumstance, a few outlier statutes, especially in places with tiny populations and especially when enacted well after the Founding, did not suffice to identify a national historical tradition.

With respect to sensitive places, however, those concerns are diminished. Our Nation has a clear historical tradition of banning firearms at sensitive places. *Bruen*, 597 U.S. at 30; *McDonald*, 561 U.S. at 786 (plurality opinion); *Heller*, 554 U.S. at 626. When examining whether a *particular* place falls within that tradition, a small number of laws, even localized laws, can suffice, *if* those laws were viewed as non-controversial. Nor did the Founders have a rigid conception of what kinds of places qualified as sensitive. The Supreme Court held that schools qualify as sensitive places because of localized, non-controversial laws that prohibited firearms at a few schools, and those laws were first enacted in 1824—more than three decades after the ratification of the Second Amendment. The relevant tradition—regulation of firearms at sensitive places—existed at the Founding. Whether a place falls within that tradition requires an examination of laws, including 19th-century laws.

It bears emphasizing that the laws at issue here are *state* laws. The Second Amendment applies to the States

because of the Fourteenth Amendment's ratification in 1868. *McDonald*, 561 U.S. at 750. We thus agree with the Second Circuit that, at least when considering the "sensitive places" doctrine, we look to the understanding of the right to bear arms *both* at the time of the ratification of the Second Amendment in 1791 *and* at the time of the ratification of the Fourteenth Amendment in 1868. *Antonyuk*, 89 F.4th at 304-05. "[T]he understanding that prevailed when the States adopted the Fourteenth Amendment . . . is, along with the understanding of that right held by the founders in 1791, a relevant consideration." *Id.* at 305 (citations and internal quotation marks omitted); *see McDonald*, 561 U.S. at 778 (plurality opinion) ("[I]t is clear that the Framers *and ratifiers of the Fourteenth Amendment* counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." (emphasis added)).

We conclude that the proper approach for determining whether a place is sensitive is as follows. For places that have existed since the Founding, it suffices for Defendant to identify historical regulations similar in number and timeframe to the regulations that the Supreme Court cited as justification for designating other places as sensitive. For places that are newer, Defendant must point to regulations that are analogous to the regulations cited by the Court, taking into account that it is illogical to expect a government to regulate a place before it existed in its modern form. For example, it makes little sense to ask whether the Founders regulated firearms at nuclear power plants.

For both types of places, historical regulations need not be a close match to the challenged law; they need only evince a principle underpinning our Nation's historical tradition of regulating firearms in places relevantly similar to those covered by the challenged law. *Rahimi*, 144 S. Ct. at 1898. A key factor is whether the constitutionality of the historical regulations was disputed. A dispute as to constitutionality may tip the scales in favor of Plaintiffs, particularly if the evidence in favor of Defendants is weak. *Bruen*, 597 U.S. at 27. By the same token, if the constitutionality of historical laws went undisputed in the courts in the Nation's early years, that evidence suggests that the laws were constitutional. *Id.* at 30. Similarly, if courts unanimously confirmed laws as constitutional, that evidence, too, suggests that the laws were constitutional; the fact that a criminal defendant or two raised a Second Amendment argument that courts quickly rejected does not create a meaningful dispute as to the constitutionality of the law.

In sum, one way that Defendants can show a historical tradition is by establishing that, when a type of place first arose, or first arose in modern form, states and municipalities began to regulate the possession of firearms at that type of place, the regulations were considered constitutional at the time, and the regulations were comparable to a tradition of regulating a similar place or places in the earlier years of the Nation.

Before turning to the specific challenges here, we address a few general arguments made by the parties. First, some Plaintiffs assert that the only type of sensitive

place that qualifies is a place that has "armed government guards and metal detectors at a minimum at every point of entry." That assertion flatly contradicts *Bruen*. Many schools and polling places have few security measures—now or in the past—yet the Supreme Court listed those places as conclusively sensitive. *Id.* Put simply, lack of comprehensive government security is not a determinative factor.

Other Plaintiffs suggest that, whatever bans may have been enacted with respect to the general population, there is no national historical tradition of banning the carry of firearms by those who have concealed-carry permits. We reject that suggestion as illogical. The issue in this case concerns categories of property, not categories of people. If a particular place is a "sensitive place" such that firearms may be banned, then firearms may be banned—for *everyone*, including permit holders—consistent with the Second Amendment. The Nation *also* has a tradition of requiring concealed-carry permits, as *Bruen* recognized, *id.* at 38 & n.9, and that tradition is an *additional* permissible restraint on the carry of firearms. But just because a person has qualified for a concealed-carry permit does not give that person the right to carry at a banned location. Persons in California or Hawaii need a permit to carry a concealed weapon; that Plaintiffs have permits does not affect the constitutional analysis as to whether those States may ban the carry of firearms at specific locations like schools and government buildings.

For their part, Defendants suggest that, if a place shares some characteristic with one of the sensitive places

identified by the Supreme Court, then that place, too, necessarily is a sensitive place—without much, or any, need to show relevant historical analogues. That view also is inconsistent with *Bruen*. For example, it is true that schools contain children, who are a vulnerable population. But it does not follow that all possible locations that serve children or another vulnerable population are necessarily sensitive places. Similarly, people gather at polling places, one of *Bruen*'s sensitive places, but that fact does not mean that all places where people gather are necessarily sensitive places. The historical record, in addition to those facts, must inform the analysis.

With those principles in mind, we turn to the specific challenges here. We address the injunctions with respect to: (1) parks and similar areas; (2) playgrounds and youth centers; (3) bars and restaurants that serve alcohol; (4) places of amusement; (5) parking areas connected to sensitive places; (6) the default rule on private property; (7) places of worship; (8) gatherings that require a permit; (9) financial institutions; (10) hospitals and other medical facilities; and (11) public transit.

1. Parks and Similar Areas

Both state laws prohibit the carry of firearms in a "park." Haw. Rev. Stat. § 134-9.1(a)(9); Cal. Penal Code § 26230(a)(12). Plaintiffs in both cases brought facial challenges to the relevant provision, and the district courts in both cases concluded that Plaintiffs are likely to succeed on their facial claims. We disagree.

Parks in modern form are outdoor gathering places where people engage in social, political, and recreational activities. On the present record, Plaintiffs are unlikely to succeed in their assertion that the public green spaces that existed in 1791 were akin to a modern park. In the Hawaii case, the district court concluded that "parks around 1791 were not comparable to modern parks," *Wolford*, 686 F. Supp. 3d at 1064, a determination amply supported by the record. The district court in the California cases did not address that issue specifically, but significant evidence in the record in that case, too, suggests that modern parks differ from the green spaces that existed in 1791. Plaintiffs point to Boston Common as an example of a "park" at the time of the Founding, but the record in each case establishes that Boston Common was used primarily for grazing animals and for holding military exercises and was not akin to modern parks. Nor does the record in either case contain evidence of any other public green space akin in use and purpose to a modern park. We agree with the Second Circuit, and at least one district court, that such examples from the Founding were not relevantly similar to parks in their modern form. *Antonyuk*, 89 F.4th at 361-62; *Kipke v. Moore*, 695 F. Supp. 3d 638, 654 (D. Md. 2023).

As soon as green spaces began to take the shape of a modern park, in the middle of the 19th century, municipalities and other governments imposed bans on carrying firearms into the parks. Central Park in New York City is perhaps the Nation's first modern public park. In 1858—the year the park opened—New York prohibited

the carrying of firearms in Central Park.[2] Governments enacted similar prohibitions as parks emerged across the Nation, including at Prospect Park (New York City, 1866); Fairmount Park (Pennsylvania, 1868); Golden Gate and Buena Vista Parks (San Francisco, 1872); and Liberty Park (Salt Lake City, 1888). Many municipalities, including major cities, prohibited the carry of firearms at all parks: Chicago (1872); South Park, Illinois (1875); Phoenixville, Pennsylvania (1878); Saint Louis (1881); Danville, Illinois (1883); Boston (1886); Reading, Pennsylvania (1887); St. Paul, Minnesota (1888); Trenton, New Jersey (1890); Grand Rapids, Michigan (1891); Springfield, Massachusetts (1891); Lynn, Massachusetts (1892); Spokane, Washington (1892); Pittsburg, Pennsylvania (1893); Wilmington, Delaware (1893); Canton, Illinois (1895); Detroit, Michigan (1895); Indianapolis, Indiana (1896); Kansas City, Missouri (1898); New Haven, Connecticut (1898); and Boulder, Colorado (1899). *See Md. Shall Issue, Inc. v. Montgomery County*, 680 F. Supp. 3d 567, 585-86 (D. Md. July 6, 2023) (summarizing similar evidence concerning parks), *appeal filed*, No. 23-1719, 2023 U.S. Dist. LEXIS 79887; *Kipke*, 695 F. Supp. 3d at 654-55 (same). Despite the widespread nature of the laws, Plaintiffs have not pointed to—and we have not found—*any* evidence that those laws were questioned as unconstitutional.

Because many laws prohibited carrying firearms in parks, and the constitutionality of those laws was not in dispute, we agree with the Second Circuit and several

2. Unless otherwise noted, the historical laws cited in this opinion are found in the Excerpts of Record and Addenda filed by the parties.

district courts that the Nation's historical tradition includes regulating firearms in parks. *Antonyuk*, 89 F.4th at 355-63; *Kipke*, 695 F. Supp. 3d at 654-55; *Md. Shall Issue*, 680 F. Supp. 3d at 585-88. *Contra Koons v. Platkin*, 673 F. Supp. 3d 515, 639-42 (D.N.J. 2023), *appeal filed*, No. 23-2043 (3d Cir. June 9, 2023); *Springer v. Grisham*, No. 1:23-cv-00781 KWR/LF, 2023 U.S. Dist. LEXIS 217447, 2023 WL 8436312, at *5-*8 (D.N.M. Dec. 5, 2023), *appeals filed*, No. 23-2192 (10th Cir. Dec. 11, 2023) and No. 23-2194 (10th Cir. Dec. 15, 2023).

Plaintiffs' arguments to the contrary are unpersuasive. It is irrelevant that many of the ordinances were local, and not state, laws. Parks are fundamentally local, and it is unsurprising—and, in our view, constitutionally insignificant—that the first modern parks were regulated, as parks are regulated today, primarily by municipalities rather than by States.

Similarly, it makes little sense to focus on the population of a particular city compared to the population of the nation as a whole, and then to dismiss the significance of the law because the resulting ratio is small. By contrast to regulations that apply broadly, such as the concealed-carry restrictions at issue in *Bruen*, the regulations here governed very specific places. For example, when New York banned firearms from Central Park in 1858, no other city (or town) in New York had a modern park. It makes little sense to say that only a small number of people in New York were subject to a park regulation; 100 percent of parks were regulated.

Plaintiffs overlook that the Supreme Court designated schools as sensitive places, even though less historical support justified that designation. The relevant historical analogues were limited to a few local laws that post-dated the ratification of the Second Amendment and governed only a very small percentage of the national population. The numerous historical laws prohibiting the carry of firearms in parks share some of these characteristics and similarly support designating parks as sensitive places.

We acknowledge that many of the laws cited above were implemented in the years immediately following the ratification of the Fourteenth Amendment. But we conclude that those postbellum laws carry meaningful evidentiary weight. The ordinances were fully consistent with pre-ratification practice, they emerged shortly following ratification, and Plaintiffs have not offered any evidence that anyone anywhere viewed the laws as unconstitutional or even questionably constitutional.

In sum, as soon as modern parks arose, municipalities and states enacted laws prohibiting the carrying of firearms into parks. Those laws both pre-dated and post-dated 1868, and nothing in the record suggests that courts considered the laws unconstitutional. The laws are analogous to other historical laws establishing a national historical tradition of banning firearms at sensitive places. Plaintiffs are unlikely to succeed on their facial challenge as to parks.

Some Plaintiffs suggest that, even if the analysis above permits the conclusion that regulating firearms at *urban*

parks falls within the Nation's historical tradition, the analysis does not justify the conclusion that States may ban firearms at large, rural, and sparsely visited parks. Plaintiffs then leap to the conclusion that, because *some* parks might fall outside the national historical tradition,[3] Plaintiffs *prevail* on their *facial* claim.

Plaintiffs have the analysis with respect to a facial claim precisely backward. To succeed on a facial challenge, Plaintiffs must show either that the law is "unconstitutional in every conceivable application" or that the law "seeks to prohibit such a broad range of protected conduct that it is unconstitutionally overbroad." *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) (citation omitted); *see also United States v. Salerno*, 481 U.S. 739, 745, 107 S. Ct. 2095, 95 L. Ed. 2d 697 (1987) ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."). Indeed, the Supreme Court recently reiterated this principle in *Rahimi*, holding in the specific context of a Second Amendment challenge that, "to prevail, the Government need only demonstrate that [a challenged law] is constitutional in some of its applications." 144 S. Ct. at 1898. As discussed above, because of the national historical tradition of banning firearms at a wide array of parks, the state laws here are constitutionally valid with respect to many, if not all, of the parks in Hawaii and California. Accordingly, Plaintiffs' facial challenges fail.

3. We need not, and do not, reach whether the ban on firearms comports with the Second Amendment with respect to each individual park in Hawaii and California.

We therefore hold that Plaintiffs are unlikely to succeed with respect to the challenged state laws' provisions concerning parks.[4]

Our conclusion with respect to parks applies equally to other, related places. In the Hawaii case, the district court began its analysis by agreeing with Defendant that public beaches in Hawaii are akin to parks. The court "therefore consider[ed] the issue of beaches and parks as operating under the same analysis." *Wolford*, 686 F. Supp. 3d at 1063. The record supports the conclusion that modern-day beaches in Hawaii, particularly in urban or resort areas, often resemble modern-day parks far more than they resemble, say, beaches at the Founding, and we do not read Plaintiffs' brief as challenging that conclusion or as raising an independent argument as to beaches. We therefore conclude that, for the same reasons just discussed with respect to parks, Plaintiffs are unlikely to succeed on their claim as to beaches.

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4. To the extent that Plaintiffs argue that the aggregate effect of Hawaii's law is to ban firearms across much of Maui County, such that the law must be unconstitutional, we reject that argument for two main reasons. First, because we affirm parts of the injunction, and because Plaintiffs have raised only facial challenges to most aspects of the law at this preliminary stage, the precise reach of Hawaii's law is uncertain. Second, because Plaintiffs may take their firearms onto the public streets and sidewalks throughout Maui County (and elsewhere in Hawaii), as well as into many commercial establishments and other locations, the situation in this case is unlike the argument that *Bruen* rejected, which would have meant, effectively, that firearms could be banned from the entire island of Manhattan. *Bruen*, 597 U.S. at 31.

In the California cases, in addition to holding that Plaintiffs are likely to succeed with respect to parks specifically, the district court reached the same conclusion as to three separate park-like areas: "athletic areas," "athletic facilities," and most real property "under the control of the Department of Parks and Recreation or Department of Fish and Wildlife." *May*, 2023 U.S. Dist. LEXIS 231208, 2023 WL 8946212, at *12-*13. We see no reason why the analysis with respect to parks does not apply equally to those places as well, and Plaintiffs have not argued on appeal that those places differ meaningfully from parks. We therefore hold that Plaintiffs are unlikely to succeed in their challenges with respect to athletic areas, athletic facilities, and real property controlled by the specified agencies.

2. Playgrounds and Youth Centers

In the California cases, the district court held that Plaintiffs are likely to succeed in their challenge to California Penal Code section 26230(a)(11), which prohibits carry in "[a] playground or public or private youth center, as defined in Section 626.95, and a street or sidewalk immediately adjacent to the playground or youth center." Except for the district court in this case, every court has rejected the argument that firearms must be allowed on playgrounds. *Antonyuk v. Hochul*, 639 F. Supp. 3d 232, 324 (N.D.N.Y. 2022) (unchallenged on appeal), *aff'd in part, vacated in part, and remanded sub nom. Antonyuk v. Chiumento*, 89 F.4th 271, 293; *Koons*, 673 F. Supp. 3d at 639; *Siegel v. Platkin*, 653 F. Supp. 3d 136, 152 (D.N.J. 2023); *We the Patriots USA,*

Inc. v. Grisham, No. 1:23-cv-00773-DHU-LF, 2023 U.S. Dist. LEXIS 177503, 2023 WL 6377288, at *3 (D.N.M. Sept. 29, 2023). Those other decisions are persuasive. Playgrounds did not exist in modern form at the time of the Founding (or even at Reconstruction); playgrounds are found primarily at schools and parks; both categories of places qualify as "sensitive places" that have a historical tradition of firearm bans; by extension, there is a historical tradition of banning firearms at playgrounds. Plaintiffs do not present any separate argument concerning youth centers, which are akin to schools. In sum, Plaintiffs are unlikely to succeed on these claims.

3. Bars and Restaurants that Serve Liquor

In the Hawaii case, the district court held that Plaintiffs are likely to succeed in challenging Hawaii Revised Statutes section 134-9.1(a)(4), which prohibits the carrying of firearms into "[a]ny bar or restaurant serving alcohol or intoxicating liquor." Haw. Rev. Stat. § 134-9.1(a)(4). In the California cases, the district court ruled that Plaintiffs are likely to succeed in challenging California Penal Code section 26230(a)(9), which prohibits carry in establishments "where intoxicating liquor is sold for consumption on the premises." We disagree.

Establishments serving alcohol have existed since the Founding. In determining whether a place that serves alcohol qualifies as a "sensitive place," we find relevant three sets of historical regulations. *First*, in a long line of regulations dating back to the colonial era, colonies, states, and cities have regulated in ways reflecting their

understanding that firearms and intoxication are a dangerous mix. Some cities—for example, Chicago in 1851 and St. Paul, Minnesota, in 1858—prohibited retailers of liquor from keeping gunpowder. Some states—Kansas in 1867, Missouri in 1883, and Wisconsin in 1883—prohibited the carry of firearms while intoxicated. Several colonial laws separated the militia—which at the time included nearly all men, *Heller*, 554 U.S. at 595-96—from liquor: A 1746 New Jersey law prohibited the sale of liquor to members of the militia while on duty; a 1756 Delaware law prohibited the militia from meeting within half a mile from a tavern and prohibited the sale of liquor at any militia meeting; and a 1756 Maryland law prohibited the sale of liquor within five miles of a training exercise for the militia. That line of regulations is not directly on point; the legislatures may have had several purposes, and those laws did not prohibit firearms at all places serving alcohol. But the regulations show that, from before the Founding and continuing throughout the Nation's history, governments have regulated in order to mitigate the dangers of mixing alcohol and firearms. We are not aware of any dispute as to the constitutionality of the laws just listed or of any similar law.

The *second* line of regulations, which we discuss in more detail elsewhere in this opinion, broadly prohibited the carry of firearms at ballrooms and at social gatherings. For example, New Orleans prohibited firearms at ballrooms in 1817, as did Texas in 1870. And other states, such as Missouri in 1875, prohibited firearms at public assemblies of persons. These laws, too, are not directly on point. Bars and restaurants are not ballrooms; and

although people gather socially at restaurants, restaurants do not always contain a gathering of people. But these laws show a well-established tradition of prohibiting firearms at crowded places, which included, at times, bars and restaurants. And, as with the other laws, we are not aware of any question as to the constitutionality of those laws.

Third, and perhaps most importantly, Defendants point to several laws that are directly on point. In 1853, New Mexico prohibited firearms at a "Ball or Fandango"[5] and at any "room adjoining said ball where Liquors are sold." In 1870, San Antonio, Texas, banned firearms at any "bar-room" or "drinking saloon." In 1879, New Orleans banned firearms at any "public hall" or "tavern." In 1890, Oklahoma banned firearms at "any place where intoxicating liquors are sold." No evidence in the record suggests that anyone disputed the constitutionality of those laws.

When considered in conjunction with the other two lines of regulations, we conclude that those laws establish that bars and restaurants that sell alcohol are among the Nation's "sensitive places" where firearms may be prohibited. The four on-point laws were enacted both before and soon after the ratification of the Fourteenth Amendment and are similar in all material respects to Hawaii's and California's modern laws; the historical laws

5. The term "fandango" as used in New Mexico at the time meant a social gathering akin to a ball; an "assembl[y] where dancing and frolicking are carried on." *See Fandango*, Dictionary of American Regional English (1991) (citing 19th century sources pertaining to New Mexico usage of the term).

are consistent with and related to the similar traditions of separating firearms and the intoxicated and of separating firearms and crowds; and no evidence suggests that any of the laws was viewed as unconstitutional. It is true that the four on-point laws post-dated the ratification of the Second Amendment, governed only a small population, and were, to some extent, localized. But the laws provide support analogous to that provided by the few, local, post-ratification regulations that justified designating schools as sensitive places. In sum, Hawaii's and California's modern laws are "consistent with the principles that underpin our regulatory tradition," *Rahimi*, 144 S. Ct. at 1898, of prohibiting the carry of firearms at sensitive places.

Our conclusion that places that serve alcohol fall within the national historical tradition of prohibiting firearms at sensitive places comports with the only other circuit decision to have reached the issue. In *Antonyuk*, the Second Circuit held that the plaintiffs were unlikely to succeed in a challenge to New York's law that prohibits firearms at places with a liquor license. 89 F.4th at 365-69.

For all of those reasons, we hold that Plaintiffs are unlikely to succeed on their claims with respect to places that serve alcohol.

4. Places of Amusement

In the California cases, the district court held that Plaintiffs are likely to succeed in challenging California Penal Code section 26230(a) with respect to places of

amusement: casinos, stadiums, amusement parks, zoos, museums, and libraries. The parties and the district court did not distinguish among the first three types of places, each of which is a modern social gathering place for amusement. We follow the parties' lead in analyzing those places as a group. We also include zoos, museums, and libraries, which are places visited for both amusement and educational purposes. As noted below, historical laws banning firearms frequently classified those categories of places together. We hold that Plaintiffs are unlikely to prevail on these claims.

Defendant has put forth persuasive evidence that casinos, stadiums, amusement parks, zoos, museums, and libraries did not exist in modern form at the Founding. Instead, those venues are modern forms of Founding-era places where balls, fandangos, and other social gatherings for amusement occurred. Accordingly, we look to the historical record for analogous regulations of those places.

Convincing evidence supports the conclusion that prohibitions on firearms at places of amusement fall within the national historical tradition of prohibiting firearms at sensitive places. Both before and shortly following the ratification of the Fourteenth Amendment, cities, states, and territories prohibited firearms at a wide range of places for social gathering and amusement that are analogous to modern casinos, stadiums, amusement parks, zoos, museums, and libraries. In 1817, New Orleans prohibited firearms at any public ballroom. In 1853, New Mexico prohibited firearms at any ball or fandango. In 1869, Tennessee prohibited firearms at any fair or race

course. In 1870, Georgia prohibited firearms at some specified places and "any other public gathering." That same year, Texas prohibited firearms at any ballroom, "social party," or "other social gathering" and at any "place where persons are assembled for educational, literary or scientific purposes." The next year, in 1871, Texas amended its law to ban firearms also specifically at "any circus, show, or public exhibition of any kind." In 1875, Missouri banned firearms at any gathering for educational, literary, or social purposes, including any non-military public assembly.[6] In 1879, reflecting the evolution of places of amusement occurring in the Nation, New Orleans expanded its list of places where firearms are prohibited to include any "place for shows or exhibitions," as well as any "house or other place of public entertainment or amusement." In 1889, Arizona prohibited firearms at any ballroom, social party, or social gathering; any other place of amusement, including "any circus, show or public exhibition"; and any place where people are gathered for educational or scientific purposes. In 1890, Oklahoma prohibited firearms at the same general list of places: any ballroom, social party, or social gathering; other places of amusement, including "any circus, show, or public exhibition of any kind"; and any place where people are gathered for educational or scientific purposes. In 1903, Montana prohibited firearms at the same list of places.

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6. In 1874, Missouri had banned only concealed carry at those locations, and the Missouri Supreme Court upheld the constitutionality of that statute. Missouri amended the statute the next year to prohibit all forms of carry at those locations.

The evidence suggests that courts were in agreement that those laws were constitutional. Indeed, state court decisions at the time rejected arguments that the provisions conflicted with the Second Amendment. *See, e.g., Hill v. State*, 53 Ga. 472, 476 (1874) (rejecting a Second Amendment challenge and opining that "the bearing [at a concert] of arms of any sort, is an eye-sore to good citizens, offensive to peaceable people, an indication of a want of a proper respect for the majesty of the laws, and a marked breach of good manners"); *English v. State*, 35 Tex. 473, 478-79 (1871) (holding that it was "little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into . . . a ball room . . . or any other place where ladies and gentlemen are congregated together"); *Andrews v. State*, 50 Tenn. 165, 182 (1871) (holding, in the context of a Second Amendment challenge, that "a man may well be prohibited from carrying his arms to . . . [a] public assemblage"). State courts also regularly upheld convictions for violating the statutes without even questioning the constitutionality of the laws. *See, e.g., Wynne v. State*, 123 Ga. 566, 51 S.E. 636, 637 (Ga. 1905) ("carrying about his person a shotgun to a public gathering"); *State v. Pigg*, 85 Mo. App. 399, 402 (1900) ("going into the dwelling house of Josiah Jones, where there was a social gathering, having about his person a deadly weapon"); *Maupin v. State*, 89 Tenn. 367, 17 S.W. 1038, 1039 (Tenn. 1890) (carrying a pocket-pistol at a grist mill that was "a public place,–a place to which customers were constantly invited and daily expected to go"); *Alexander v. State*, 27 Tex. Ct. App. 533, 11 S.W. 628, 629 (Tex. Ct. App. 1889) ("the defendant went into a place

where persons were assembled for amusement, carrying about his person a pistol"); *Owens v. State*, 3 Tex. App. 404, 405 (1878) ("did unlawfully and willfully go into a ball-room with a pistol about his person").

The extensive set of historical regulations banning firearms at places of amusement and social gathering, consistently upheld and accepted as constitutional, justifies the conclusion that modern-day places of amusement such as casinos, stadiums, amusement parks, zoos, museums, and libraries fall within the national historical tradition of prohibiting firearms at sensitive places. The regulations date from before and shortly after the ratification of the Fourteenth Amendment, and the laws governed in cities, states, and territories. Those laws provide more evidence of a tradition of prohibiting firearms in places of amusement than the few, local regulations that evinced a tradition of prohibiting firearms in schools.

For two of the places of amusement—zoos and libraries—we note that the historical practice of banning firearms at these locations extends even further back. As other courts have noted, many of the first modern zoos were located in parks, and some of those parks banned firearms. *Koons*, 673 F. Supp. 3d at 637. "Those parks, and in effect zoos, did ban firearms." *Id.* We agree with the Second Circuit: "That zoos were unproblematically covered by the firearm regulations of their surrounding parks tends to show that our forebearers took no Second Amendment issue with the regulation of firearms at zoos." *Antonyuk*, 89 F.4th at 364. Similar reasoning applies to libraries. Many libraries are housed in schools and

courthouses, for example, and regulation of firearms in those places is plainly constitutional and within the Nation's historical tradition.

Our holding that places of amusement likely fall within the historical tradition of regulating sensitive places comports with the Second Circuit's decision concerning similar provisions in New York's law. In *Antonyuk*, the Second Circuit held that the plaintiffs were unlikely to succeed on a challenge to New York's ban on firearms at theaters and zoos. 89 F.4th at 363-64, 373-76. The court looked to many of the same laws that we listed above and concluded that a ban on firearms at theaters was justified as part of a tradition of banning firearms at "discrete, densely crowded physical spaces wherein people assemble for amusement." *Id.* at 375; *see also Kipke*, 695 F. Supp. 3d at 652 (holding that Maryland's "prohibition on carrying in museums is supported by a representative number of historical statutes that demonstrate a historical tradition of firearm regulation in places of gathering for education, literary, or scientific purposes"); 695 F. Supp. 3d 638, *id.* at *15 (holding that Maryland's "regulations restricting firearms in stadiums, racetracks, amusement parks, and casinos are analogous to historical statutes banning [firearms] in gathering places for entertainment"); *Md. Shall Issue*, 680 F. Supp. 3d at 588 (holding that "a representative number of historical statutes . . . demonstrate a historical tradition of firearm regulation in places of gathering for literary or educational purposes, including public libraries"). *But see Koons*, 673 F. Supp. 3d at 646-47 (holding that the plaintiffs were likely to succeed on a challenge to New Jersey's ban on firearms

at entertainment facilities); *Siegel*, 653 F. Supp. 3d at 156-57 (same district judge as in *Koons* reaching the same conclusion with respect to casinos).

In sum, we hold that Plaintiffs are unlikely to prevail in challenging California's law with respect to casinos, stadiums, amusement parks, zoos, museums, and libraries.

5. Parking Areas Connected to Sensitive Places

The topic of parking areas connected to sensitive places arises in both the California and Hawaii cases, but the issues on appeal are distinct, so we address them separately.

a. California Cases

California Penal Code section 26230(a) prohibits concealed carry in many parking areas associated with the sensitive places listed in that section. *See, e.g.*, Cal. Penal Code § 26230(a)(20) (prohibiting carry at any "building, real property, or parking area under the control of a zoo or museum"); *id.* § 26230(a)(24) (prohibiting carry at any "parking area under control of a law enforcement agency"). The district court held that Plaintiffs are likely to succeed in challenging the *entire* California Penal Code section 26230 as it pertains to all parking areas listed in that section. *May*, 2023 U.S. Dist. LEXIS 231208, 2023 WL 8946212, at *16-*17. The preliminary injunction therefore allows concealed carry in the parking areas at most listed places, even those not challenged by Plaintiffs. In other words, in addition to parking areas at most of the

sensitive places discussed in this opinion, the injunction applies to parking areas at preschools, childcare facilities, government buildings, courthouses, jails, prisons, juvenile detention centers, schools, airports, nuclear power plants, and police stations. Cal. Penal Code § 26230(a)(2)-(6), (14), (18), (21), (24). We reject the district court's sweeping conclusion, and we hold that Plaintiffs are unlikely to succeed on this claim.

Some parking areas—such as a parking garage located in the basement of a courthouse or jail—are likely so intertwined with the main structure as to be considered part of the sensitive area itself. Other parking areas—such as a student-only parking area at a school or a fenced, gated, parking lot at a jail or nuclear power plant—likely fall within a reasonable buffer zone such that firearms may be prohibited there. We agree with those courts that have held that, depending on the factual circumstances, firearms may be prohibited at some parking areas connected to sensitive places. *See, e.g., Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1125 (10th Cir. 2015) (holding, "on the facts of this case, that the parking lot should be considered as a single unit with the postal building itself to which it is attached and which it exclusively serves"); *United States v. Dorosan*, 350 F. App'x 874, 875 (5th Cir. 2009) (per curiam) (unpublished) ("Given this usage of the parking lot by the Postal Service as a place of regular government business, it falls under the 'sensitive places' exception recognized by *Heller*."); *United States v. Allam*, 677 F. Supp. 3d 545, 578 (E.D. Tex. 2023) ("[T]his Nation is no stranger to prohibiting individuals from possessing or carrying firearms, or other weapons for that matter,

within a certain proximity of sensitive places."); *Md. Shall Issue*, 680 F. Supp. 3d at 589 (finding "numerous examples of laws prohibiting firearms in buffer zones of a certain distance around a 'sensitive place' or other location at which the government could prohibit the carrying of firearms"); *United States v. Walter*, No. 3:20-cr-0039, 2023 U.S. Dist. LEXIS 69163, 2023 WL 3020321, at *7 (D.V.I. Apr. 20, 2023) ("Not only is there historical evidence of regulation on firearms in sensitive places, but there is also evidence of laws creating 'buffer zones' around those places as well."). Thus, to the extent that Plaintiffs suggest that firearms may *never* be prohibited in parking areas, no matter the circumstances, we reject that extreme position.

Plaintiffs primarily argue that *some* parking areas are insufficiently connected to a sensitive place such that the parking area is not reasonably covered by the ban on firearms at the sensitive place. For example, a parking area that is shared with ordinary businesses or a parking area that is geographically remote from the sensitive place might fall outside the Nation's tradition of regulating sensitive places and the corresponding buffer zones. Plaintiffs contend that, because it would be unconstitutional to ban concealed carry in some parking areas, California's ban must fail on its face. That mode of analysis is contrary to the proper analysis of a facial challenge. *Rahimi*, 144 S. Ct. at 1898. We easily conclude that the ban on firearms at some parking lots—parking garages under government buildings, fenced parking areas adjacent to nuclear power plants, student-only parking areas at schools, and so on—are permissible. This is particularly true because, with few exceptions, persons

may store their firearms securely in their vehicles in the parking areas of a location where firearms are otherwise prohibited. Cal. Penal Code § 26230(c)(2). Because the law's reach is constitutional in many legitimate instances, the facial challenge must fail. *Rahimi*, 144 S. Ct. at 1898; *Foti*, 146 F.3d at 635. Plaintiffs could have asked, as the Plaintiffs in the Hawaii case did, for more tailored relief with respect to parking areas, but they did not.

In the California cases, we hold that Plaintiffs are unlikely to prevail on their facial challenge with respect to parking areas at all sensitive places.

b. Hawaii Case

By contrast to the injunction entered in the California cases, the district court in the Hawaii case enjoined Defendant solely from enforcing the law in parking areas *shared* by governmental buildings and non-governmental buildings: "parking areas owned, leased, or used by the State or a county which share the parking area with non-governmental entities, are not reserved for State or county employees, or do not exclusively serve the State or county building."[7] *Wolford*, 686 F. Supp. 3d at 1076-

7. The district court also enjoined the enforcement of the ban in parking areas adjacent to parks, beaches, bars, restaurants that serve alcohol, and financial institutions. As discussed earlier, we hold that Plaintiffs are unlikely to succeed on their claim as to the first four of those places: parks, beaches, bars, and restaurants that serve alcohol. Plaintiffs do *not* argue that they are likely to succeed independently as to the parking areas adjacent to those places. For the reasons that we just discussed with respect to the parking

77. Neither party appears to dispute that persons may carry firearms onto that subset of parking areas, but the parties disagree as to why. In Defendant's view, the state law prohibits persons from bringing firearms only into areas used *exclusively* by the State. Plaintiffs want to bring their firearms only onto *shared* lots, not exclusive lots. Defendant thus urges us to conclude that Plaintiffs lack standing to challenge the law with respect to shared lots. In Plaintiffs' view, the law appears to proscribe their desired conduct, so they have standing to seek injunctive relief. And the injunction is proper because they prevail on the merits of the Second Amendment challenge with respect to the law's apparent prohibition on carrying firearms onto shared lots. On appeal, Defendant has not challenged meaningfully the Second Amendment analysis as to shared parking lots; we hold that, at least for the purpose of the preliminary injunction, Defendant has forfeited any argument as to the merits. *Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir. 1999).

Because standing is a jurisdictional requirement, though, we must address the issue. *Friery v. L.A. Unified*

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areas at issue in the California cases, we conclude that Plaintiffs in the Hawaii case are unlikely to succeed on their challenge to the parking areas adjacent to parks, beaches, bars, and restaurants that serve alcohol.

Similarly, as we discuss later, we hold that Plaintiffs are likely to succeed on their challenge as to financial institutions. The ban on firearms at the adjacent parking areas is justified only if financial institutions qualify as a "sensitive place." We accordingly hold that Plaintiffs are likely to succeed on their challenge as to parking areas adjacent to financial institutions.

Sch. Dist., 448 F.3d 1146, 1148 (9th Cir. 2006). Plaintiffs do not allege an actual injury; they allege an imminent future injury—criminal prosecution for taking their firearms onto shared lots. For that reason, Plaintiffs have standing only if: "(1) [they] ha[ve] alleged 'an intention to engage in a course of conduct arguably affected with a constitutional interest;' (2) but the conduct is 'proscribed by a statute;' and (3) 'there exists a credible threat of prosecution thereunder.'" *Isaacson v. Mayes*, 84 F.4th 1089, 1098 (9th Cir. 2023) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159, 134 S. Ct. 2334, 189 L. Ed. 2d 246 (2014)) (some internal quotation marks omitted). As several courts have remarked in similar circumstances, the situation is peculiar in that "the would-be sanctioned party . . . must argue that the law *does* apply, while the would-be enforcing party, the Attorney General, could defeat standing by conceding that the law does *not* apply." *Peace Ranch, LLC v. Bonta*, 93 F.4th 482, 489 (9th Cir. 2024); *see FEC v. Cruz*, 596 U.S. 289, 299-300, 142 S. Ct. 1638, 212 L. Ed. 2d 654 (2022) (describing the reversed roles in similar terms). We follow the approach taken in *Peace Ranch* and, as we did there, conclude that Plaintiffs have standing. 93 F.4th at 489; *see also Cruz*, 596 U.S. at 301-02 (holding that the plaintiffs had standing in similar circumstances); *Antonyuk*, 89 F.4th at 333-36 (concluding that the plaintiffs had standing to challenge New York's sensitive-places law, describing the Supreme Court's analysis and holding in *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 99 S. Ct. 2301, 60 L. Ed. 2d 895 (1979), and concluding that the inquiry in this context sets a "low" bar and requires a "quite forgiving" approach).

All three requirements are met here. First, Plaintiffs intend to take their firearms onto shared parking lots, an action that is affected by a constitutional interest. Second, Plaintiffs have alleged that the state law *arguably* proscribes their proposed conduct. *Peace Ranch*, 93 F.4th at 489 (citing *Driehaus*, 573 U.S. at 162). The broad text of the law prohibits the carrying of firearms onto "[a]ny building or office owned, leased, or used by the State or a county, and *adjacent grounds and parking areas*." Haw. Rev. Stat. § 134-9.1(a)(1) (emphasis added). Parking areas adjacent, that is, next to, government buildings fall, without qualification, within the text of the law. Defendant suggests that the Hawaii legislature in fact intended a narrower meaning of "adjacent" that encompasses only those areas both "next to" and "*exclusively serving*" the sensitive place. Defendant may be right that the legislature intended a specialized use of the word, but Plaintiffs' interpretation is a reasonable one, so the statute "arguably" proscribes their conduct. *Peace Ranch*, 93 F.4th at 489. Finally, given Plaintiffs' strong textual argument and the variety and number of shared parking areas in the state of Hawaii that might lead to a prosecution, we conclude that Plaintiffs have alleged a sufficiently credible threat of prosecution.

Accordingly, we agree with the district court that Plaintiffs have standing. Because Defendant has forfeited any argument on the merits challenging the injunction as to shared parking lots, we also agree with the district court that Plaintiffs are likely to succeed on the merits with respect to shared parking lots. Notably, the injunction has no effect, under Defendant's interpretation of state

law, on any parking area covered by the state law. On remand, Defendant is free to raise any relevant argument with respect to this topic. If, for example, Defendant disavows enforcement of the law in the relevant respect, Plaintiffs' challenge in this regard may become moot. *See id.* at 490 (holding that the plaintiffs' standing "often rises or falls with the enforcing authority's willingness to disavow enforcement").

6. Private-Property Default Rule

In both the Hawaii case and the California cases, the district courts held that Plaintiffs are likely to succeed on their challenges to the respective bans on the carry of firearms on private property held open to the public unless the owner or operator consents. Haw. Rev. Stat § 134-9.5(a); Cal. Penal Code § 26230(a)(26).[8] Although the state statutes are similar, they differ in one key respect. Hawaii's law allows a property owner to consent orally, in writing, or by posting appropriate signage on site. Haw. Rev. Stat. § 134-9.5(b). California's law, by contrast, allows a property owner to consent *only* by "clearly and

8. California's law applies only to "privately owned commercial properties open to the public." Cal. Penal Code § 26230(a)(26). Hawaii's law applies more broadly, to nearly all private property, Haw Rev. Stat. § 134-9.5(a), but the district court preliminarily enjoined enforcement of that provision only with respect to private property "open to the public." *Wolford*, 686 F. Supp. 3d at 1077. Plaintiffs did not file a cross-appeal challenging the district court's holding that the Second Amendment does not apply to private property not open to the public. We therefore address only whether Hawaii's law comports with the Second Amendment with respect to private property that is open to the public.

conspicuously post[ing] a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property." Cal. Penal Code § 26230(a)(26).

As an initial matter, we hold that Plaintiffs have standing. Defendant in the Hawaii case contends that Plaintiffs lack standing to challenge the private-property rule because Hawaii's law does not prevent Plaintiffs from carrying firearms on any particular property; a property owner's choice to withhold consent prevents Plaintiffs from doing so. We agree with the courts that have unanimously and persuasively rejected this argument. *Antonyuk*, 89 F.4th at 379-80; *Kipke*, 695 F. Supp. 3d at 656-58; *Koons*, 673 F. Supp. 3d at 598; *Frey v. Nigrelli*, 661 F. Supp. 3d 176, 191-92 (S.D.N.Y. 2023), *appeal filed sub nom. Frey v. Bruen*, No. 23-365 (2d Cir. Mar. 16, 2023). Plaintiffs' injury does not depend on the decisions of property owners. Plaintiffs allege that they intend to continue carrying firearms on private property, and the law requires that they seek permission before doing so, placing a new burden on their right to carry. If they carry firearms on private property without first seeking consent, as they have alleged, they will violate the law and will face a threat of criminal prosecution, whether the owner decides to grant or withhold consent. Moreover, Plaintiffs plausibly allege that many property owners will not post signs of any sort or give specialized permission, regardless of the default rule. Indeed, that group of owners appears to be the impetus for Hawaii to enact the law; if that group were small or did not exist, Hawaii's law would accomplish little or nothing. On a practical level, then, Plaintiffs plausibly

attest that they lawfully visit many places with firearms but that, under Hawaii's new law, they will not be able to visit those places lawfully with firearms. They are thus injured by the law, and a court can redress the injury. Plaintiffs have standing.[9]

For similar reasons, we conclude that the conduct proscribed by the state laws falls within the text of the Second Amendment at the first step of the *Bruen* analysis. Plaintiffs allege that, but for the challenged laws, they would be able to carry firearms onto many private properties that are open to the public. The Supreme Court held that the Second Amendment's text covers carrying firearms publicly outside the home, *Bruen*, 597 U.S. at 24, so carrying onto properties held open to the public is conduct that likely falls within the plain text of the Second Amendment. Accordingly, courts unanimously have concluded that a law changing the default rule on private property falls within the text of the Second Amendment. *Antonyuk*, 89 F.4th at 379-84; *Kipke*, 695 F. Supp. 3d at 658 n.9; *Koons*, 673 F. Supp. 3d at 607-15.

We are unpersuaded that the Second Amendment is limited strictly to property that is publicly owned. The text of the Second Amendment does not limit the right to bear arms to publicly owned spaces. *Bruen*'s repeated mention of "public carry" or "carry in public" appears to encompass the right to carry firearms on private property

9. Our holding that Plaintiffs have standing also applies to other aspects of this case, such as Plaintiffs' standing to challenge the provisions prohibiting the carry of firearms in banks and other commercial establishments open to the public.

that is open to the public. *See, e.g., Bruen*, 597 U.S. at 33 (quoting a party's brief concerning "areas 'frequented by the general public'"); *id.* at 56 (discussing restrictions on "public carry in locations frequented by the general community"). We agree with the Second Circuit and with the district court's thoughtful analysis in the Hawaii case that the Second Amendment encompasses the right to bear arms not only in publicly owned spaces, but also on private property that is generally open to the public. *Wolford*, 686 F. Supp. 3d at 1057-59; *Antonyuk*, 89 F.4th at 383-84; *see also Antonyuk v. Hochul*, 639 F. Supp. 3d at 316-17 (concluding that the right extends to private property open to the public). No court appears to have embraced the narrow view that the Second Amendment applies only on public property. Plaintiffs are likely to succeed on the argument that the Second Amendment encompasses a right to bear arms on private property held open to the public.

Equally clear, however, is the right of a private property owner to exclude others, including those bearing arms. *See, e.g., Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021) ("[T]he right to exclude is 'universally held to be a fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-180, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979))). Nothing in the text of the Second Amendment or otherwise suggests that a private property owner—even owners who open their private property to the public—must allow persons who bear arms

to enter. *See, e.g., Siegel*, 653 F. Supp. 3d at 158 ("[T]he pre-existing right codified in the Second Amendment does not include protection for a right to carry a firearm in a place against the owner's wishes." (ellipsis and emphasis omitted)); *Kipke*, 695 F. Supp. 3d at 658 n.9 ("Again, private property owners can freely exclude firearms ...."). With that understanding, we hold that Plaintiffs are likely to succeed at the first step of the *Bruen* analysis, and we turn to whether Defendants have shown a relevant national historical tradition.

We categorize the pertinent colonial and state laws into two sets. The first set of laws prohibited the carry of firearms onto subsets of private land, such as plantations or enclosed lands. In 1721, Pennsylvania prohibited "carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation." In 1722, New Jersey prohibited persons from "carry[ing] any Gun, or Hunt[ing] on the Improved or Inclosed Lands in any Plantation, . . . unless he have License or Permission from the owner of such Lands or Plantation." In 1763, New York criminalized "carry[ing], shoot[ing], or discharg[ing] any Musket, Fowling-Piece, or other Fire-Arm whatsoever, into, upon, or through any Orchard, Garden, Corn-Field, or other inclosed Land whatsoever . . . without Licence in Writing first had and obtained for that Purpose from such Owner, Proprietor, or Possessor [of the land]." Finally, in 1893, Oregon provided that it is unlawful for a person "being armed with a gun, pistol, or other firearm, to go or trespass upon any enclosed premises or lands without the consent of the owner or possessor thereof."

The second set of laws contained broader prohibitions, banning the carrying of firearms onto *any* private property without the owner's consent. In 1771, New Jersey amended its laws to prohibit the carrying of firearms on any lands owned by another: "to carry any Gun on any Lands not his own, and for which the Owner pays Taxes, or is in his lawful Possession, unless he hath License or Permission in Writing from the Owner or Owners or legal Possessor." Similarly, in 1865, Louisiana prohibited "carry[ing] fire-arms on the premises or plantation of any citizen, without the consent of the owner or proprietor."

The record—in these cases or in any other case, so far as we can tell—contains no evidence whatsoever that these laws were viewed as controversial or constitutionally questionable. Instead, they were viewed as falling well within the colony's or the State's ordinary police power to regulate the default rules concerning private property.

We acknowledge that the first set of laws likely was limited to only a subset of private property; those laws likely did not apply to property that was generally open to the public. [10] Similarly, the primary aim of some of those laws was to prevent poaching. But those limitations did *not* apply to the second set of laws. New Jersey's 1771 law applied to *all* private property, and the purpose of that specific provision—found in Section 1 of the Act—was

10. Defendant in the Hawaii case has argued that "inclosed" lands were not necessarily those lands physically enclosed by a fence or waterway; instead, they encompassed any property where, for example, the owner paid taxes. We need not consider that argument because, for the reasons described in text, we hold that Plaintiffs in the Hawaii case are unlikely to prevail.

"to prevent trespassing with Guns." The New Jersey law also sought to preserve game, but the provisions effecting that aim were found in a separate provision—Section 2 of the Act. The 1865 Louisiana law, too, applied to *all* private property, encompassing any citizen's "premises or plantation." *See, e.g., Bailey v. Quick*, 28 La. Ann. 432, 433 (1876) (describing "a room at No. 90 Baronne street" as the "leased premises"); *Westermeier v. Street*, 21 La. Ann. 714, 714-15 (1869) (discussing the "the delivery of the premises to the lessee [who was a business owner] in a leaky and otherwise untenantable condition"); *Reynolds v. Swain*, 13 La. 193, 194 (1839) (referring to a brick building operated by apothecaries as the "leased premises"). And the law made no mention of hunting or game; the sole stated purpose of the law was to "prohibit the carrying of fire-arms on premises or plantations of any citizen without the consent of the owner."

We conclude, then, that the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property. Collectively, the laws establish that colonies and States freely arranged the relevant default rules. And the 1771 New Jersey law and the 1865 Louisiana law are historical "dead ringers": they simply prohibited the carry of firearms on private property without consent. Those laws—enacted shortly before the ratification of the Second Amendment and very shortly before the ratification of the Fourteenth Amendment—were uncontroversial. They are easily analogous to the "sensitive places" laws mentioned by the Supreme Court.

Hawaii's modern law falls well within the historical tradition. The law prohibits the carrying of firearms onto private property unless the owner has posted signs, otherwise has given written consent, or has given oral consent. We therefore conclude that Plaintiffs in the Hawaii case are unlikely to succeed on the merits.

But we conclude that California's law falls outside the historical tradition. As noted at the outset of this section, California prohibits the carry of firearms on private property *only* if the owner has consented in one specific way: posting signs of a particular size. We find no historical support for that stringent limitation. Although two of the laws mentioned above required a person to obtain consent in writing, all of the other laws allowed a person to obtain consent in any manner. None of the laws forbade a person from obtaining permission only by convincing the owner to post signs of a specific size. Nor do modern circumstances appear to justify California's imposing a much more stringent consent requirement; ordinary signs existed in 1791, in 1868, and today.

We recognize that a historical twin is not required. *Rahimi*, 144 S. Ct. at 1898. But California's law differs substantially from the historical laws. Under the historical laws, a property owner could give on-the-spot, granular permission to a particular person or persons for a specified time: "Sure, you may carry your musket on my property, but only this week and only one musket." Under California's law, by contrast, permission may not be given on the spot: a property owner must post a public sign of a

specific size and with other attributes to be defined by a state agency. Nor may permission be granular: the sign must allow *all* licenseholders to carry and must allow them to carry whatever firearms are permissible under state law. Nor may permission be given specific to a particular timeframe, unless the owner laboriously posts and unposts the required sign. For all of those reasons, we conclude that Plaintiffs in the California cases are likely to succeed on the merits.

We acknowledge that our primary holding—that a national tradition likely exists of prohibiting the carrying of firearms on private property without the owner's oral or written consent—differs from the decisions by the Second Circuit and some district courts. *Antonyuk*, 89 F.4th at 384-86; *Kipke*, 695 F. Supp. 3d at 658-59; *Koons*, 673 F. Supp. 3d at 615-23. In reaching our limited conclusion, we carefully have examined the record in the Hawaii case and, to the extent that our decision conflicts with the analysis by other courts addressing the likelihood of success in those cases, we respectfully disagree with their preliminary, pre-*Rahimi* analyses.

7. Places of Worship

In the California cases, the district court held that Plaintiffs are likely to succeed in challenging California Penal Code section 26230(a)(22), which prohibits the carry of firearms at places of worship. Although the issue is a close one, we agree with the district court's conclusion in this regard.

Places of worship indisputably have been around since the Founding, and much earlier, of course. We must examine whether the Nation has a tradition of banning firearms in places of worship, comparable to the regulations banning firearms at schools, polling places, and the like. *Bruen*, 597 U.S. at 30. We conclude that Plaintiffs are likely to succeed on their challenge.

From the colonial times through the ratification of the Second Amendment and continuing through the ratification of the Fourteenth Amendment, Defendant has not pointed to a single regulation banning firearms at places of worship or at any analogous place. The lack of any regulation is especially probative given the prevalence of places of worship during that period. We acknowledge that, shortly after ratification of the Fourteenth Amendment, several States and two territories prohibited firearms at places of worship specifically. In particular, in 1870, Georgia prohibited firearms at any "place of public worship"; that same year, Texas prohibited firearms at any "church or religious assembly"; in 1875 Missouri banned firearms at any "church or place where people have assembled for religious worship"; in 1878 Virginia banned guns at "any place of worship while a meeting for religious purposes is being held at such place"; in 1889 Arizona banned firearms at "any church or religious assembly"; and in 1890 Oklahoma enacted the same prohibition.[11]

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11. An English law from 1403 banned weapons at "Merchant Towns Churches." But that very old regulation, which was not brought to the colonies, carries little weight. *Bruen*, 597 U.S. at 40-41.

In our view, though, those regulations do not evince a historical tradition similar to the tradition of regulating firearms at sensitive places. For polling places and other locations, the Supreme Court noted the existence of at least one colonial regulation on point. *Bruen*, 597 U.S. at 30. And the bans on firearms at schools began in 1824—a few decades after the ratification of the Second Amendment and nearly a half-century before the ratification of the Fourteenth Amendment.

Plaintiffs also point out that some colonial regulations required certain people to bring firearms to church services. We conclude that those regulations have limited importance in the *Bruen* analysis here because they differ from California's law in "how" and "why" they burden the right to bear arms. 597 U.S. at 29. Those laws clearly addressed a different perceived societal problem—*protection of the colony* from raids by Native Americans and from slave revolts. California's law is aimed at guaranteeing a *congregant's ability to worship safely* and without concern that firearms are present and may cause harm. But we nonetheless conclude that Plaintiffs are likely to succeed because of the lack of any prohibition on the carry of firearms in places of worship until *after* the ratification of the Fourteenth Amendment.

District courts have divided on this question. *Compare Spencer v. Nigrelli*, 648 F. Supp. 3d 451, 467-68 (W.D.N.Y. 2022) (holding that the plaintiffs were likely to succeed on a Second Amendment challenge to a ban on firearms at places of worship because of the insufficiency of the historical laws offered by the defendant), *affirmed on*

other grounds by Antonyuk v. Chiumento, 89 F.4th 271; *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422, 439-43 (W.D.N.Y. 2022) (same), *affirmed in part, vacated in part, and remanded by* 89 F.4th 271; *and Antonyuk v. Hochul*, 639 F. Supp. 3d at 319-22 (same); *with Goldstein*, 680 F. Supp. 3d at 389-97 (reaching the opposite conclusion); *Md. Shall Issue*, 680 F. Supp. 3d at 584-85 (same). For its part, the Second Circuit declined to reach the issue. *Antonyuk*, 89 F.4th at 346. The court vacated the injunctions in two cases because of mootness and the court *affirmed* the injunction in one case as to New York's ban on the carry of firearms at places of worship—but on First Amendment grounds, declining to reach the Second Amendment question. *Antonyuk*, 89 F.4th at 345-52.

In sum, places of worship have been prevalent throughout our Nation's history, but no colony, state, or territory banned firearms at places of worship until after the ratification of the Fourteenth Amendment. At this preliminary stage, we conclude that Plaintiffs are likely to succeed on their Second Amendment challenge with respect to California Penal Code section 26230(a)(22).

We emphasize two points. First, nothing in the law and nothing in this opinion prevents the owner or operator of a place of worship from prohibiting the carry of firearms as a matter of ordinary property law, consistent with the requirements of state law. The preliminary injunction means only that the State cannot ban firearms from places of worship where the owner or operator wishes to allow firearms at the place of worship. Second, our ruling in this regard is merely a prediction of Plaintiffs' likelihood

of success. As in all instances, we express no view on the constitutional analysis once the parties have had a full opportunity to present and brief the issue. Further Supreme Court and circuit-court guidance also may affect the ultimate resolution of this issue.

8. Gatherings that Require a Permit

In the California cases, the district court held that Plaintiffs are likely to succeed in challenging California Penal Code section 26230(a)(10), which prohibits carry in:

> [a] public gathering or special event conducted on property open to the public that requires the issuance of a permit from a federal, state, or local government and sidewalk or street immediately adjacent to the public gathering or special event but is not more than 1,000 feet from the event or gathering, provided this prohibition shall not apply to a licensee who must walk through a public gathering in order to access their residence, place of business, or vehicle.

Cal. Penal Code § 26230(a)(10). Defendant does not argue that there is a national tradition of banning firearms specifically at permitted public gatherings. Instead, Defendant argues that there is a national tradition of banning firearms at public gatherings in general and, because permitted gatherings are a subset of all public gatherings, the challenged provision falls within the tradition. We agree with the district court that Plaintiffs are likely to succeed.

Public gatherings have existed since before the Founding, so Defendant must show an enduring national tradition with respect to public gatherings. As with places of worship, Defendant cannot point to a single regulation of public gatherings until after the ratification of the Fourteenth Amendment. Shortly after 1868, several States and territories prohibited the carry of firearms at public gatherings: Georgia and Texas in 1870, Missouri in 1879, Arizona in 1889, Oklahoma in 1890, and Montana in 1903.[12] We agree with Defendant that those statutes carry some evidentiary weight, particularly because they were enacted soon after the ratification of the Fourteenth Amendment. But, as we determined with respect to places of worship, we conclude that Plaintiffs are likely to succeed because of the lack of any prohibition on the carry of firearms in public gatherings until *after* the ratification of the Fourteenth Amendment.

Our conclusion is buttressed in part by the Supreme Court's admonition not to interpret the "sensitive places" doctrine too broadly. *See Bruen*, 597 U.S. at 31 (rejecting as "far too broad[]" the notion that "all places of public congregation that are not isolated from law enforcement" could qualify as "sensitive"). California's law applies to all gatherings that require any governmental permit, as well as to the adjoining sidewalk or road.

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12. Defendant also points to colonial laws in Virginia and North Carolina that were successors to the Statute of Northampton. But the Supreme Court has explained that those laws prohibited the carry of firearms only to the "terror" of the people or for a "wicked purpose"; lawful carry was permitted. *Bruen*, 597 U.S. at 49-51; *see also Rahimi*, 144 S. Ct. at 1901 (describing these laws).

Our holding is consistent with the only other decisions to have addressed similar issues. In *Koons*, the district court held that the plaintiffs were likely to succeed on a Second Amendment challenge to New Jersey's law that, like California's law, broadly prohibits the carry of firearms at permitted public gatherings. 673 F. Supp. 3d at 627-36. And in *Antonyuk v. Hochul*, the district court enjoined the provision of New York's law that prohibits the carry of firearms at any assembly or protest. 639 F. Supp. 3d at 335-39. For its part, the Second Circuit did not reach the question of the constitutionality of New York's law, holding instead that the plaintiffs lacked standing to challenge the provision. *Antonyuk*, 89 F.4th at 376-79.

In sum, because no jurisdiction had prohibited the carry of firearms at public gatherings until after the ratification of the Fourteenth Amendment, we hold that Plaintiffs are likely to succeed on their challenge to California Penal Code section 26230(a)(10).

9. Financial Institutions

In both the Hawaii case and the California cases, the district courts held that Plaintiffs are likely to succeed in challenging the relevant provisions of state law that prohibit the carry of firearms in financial institutions such as banks: Hawaii Revised Statutes section 134-9.1(a)(12) and California Penal Code section 26230(a)(23). We agree with the district courts.

The district court in the Hawaii case found that "banks and firearms existed at the time of the Second Amendment's ratification." *Wolford*, 686 F. Supp. 3d at

1068. Defendant did "not challenge Plaintiffs' contention" that private banks existed at the time of the Founding. *Id.* Defendant "also d[id] not make any argument that [the district court] should analogize to different historical regulations because banks at the time of the Second Amendment's ratification are substantially different than modern banks." *Id.* at 1069. In short, modern banks are roughly the same as banks in 1791. Nor do we understand Defendant in the California case to be making an argument to the contrary.

Regardless of the similarity between banks now and in 1791, Defendants have not pointed to any evidence of a historical regulation—or even a more modern regulation—prohibiting the carry of firearms in banks. And Defendants have not pointed to a historical regulation prohibiting carry in another type of place analogous to a bank or financial institution. Regulations concerning robust events such as fairs and markets, or balls and other social or political gatherings, are not "analogous enough" to an ordinary commercial establishment such as a bank. *Bruen*, 597 U.S. at 30. A dynamic, congested gathering of persons with commercial, political, and social elements is not particularly analogous to a trip to a bank to deposit a check. Nor do federal laws criminalizing bank robberies or requiring banks to take measures to prevent robberies justify a complete ban on firearms. Finally, even assuming that a ban on firearms in most governmental buildings is constitutional, those laws are not analogous because financial institutions generally are privately owned and operated and because they serve a commercial, non-governmental purpose.

In sum, we agree with the district courts in both cases that Plaintiffs are likely to succeed on the challenge to the prohibition on carrying firearms in financial institutions. We note that, as with places of worship, nothing in this opinion precludes a financial institution from banning firearms as a matter of property law, consistent with applicable state law. The preliminary injunction means merely that any bank operator who wishes to allow firearms on site may do so.

10. Hospitals and Other Medical Facilities

In the California cases, the district court held that Plaintiffs are likely to succeed in their challenges to California Penal Code section 26230(a)(7), which prohibits carry in "[a] building, real property, and parking area under the control of a public or private hospital or hospital affiliate, mental health facility, nursing home, medical office, urgent care facility, or other place at which medical services are customarily provided." We agree with the district court.

Defendant likely is correct that, as his expert states, modern hospitals and medical facilities do not resemble the hospitals at the Founding. But medical facilities of some sort have existed since colonial times. As the district court here concluded, Defendant has not introduced any evidence of a historical ban on firearms in medical facilities of any type. *May*, 2023 U.S. Dist. LEXIS 231208, 2023 WL 8946212, at *7; *see also Koons*, 673 F. Supp. 3d at 651 ("This Court has uncovered no laws from the 18th or 19th centuries that banned firearms at hospitals, almshouses, asylums, or other medical facilities.").

Defendant points, instead, to a few late 19th-century laws, enacted after the ratification of the Fourteenth Amendment, that banned firearms in places where people assembled for "educational" or "scientific" purposes. Even assuming that medical facilities in the 19th century were understood to perform educational or scientific services, we decline to find, as discussed above, a national historical tradition of regulation from a few post-Fourteenth-Amendment enactments. We also acknowledge that, just as schools contain children, which are a vulnerable population, hospitals and other medical facilities contain medical patients, another vulnerable population. But, at least for the purpose of preliminary relief, we find it unlikely that Defendant will establish a tradition of regulating firearms at all places that contain a vulnerable population. The Supreme Court did not hold that schools were sensitive solely because they contain a vulnerable population; instead, the Court pointed to 19th century laws specifically regulating firearms in or near schools. *Bruen*, 597 U.S. at 30.

District courts have divided on the question whether a national historical tradition of banning firearms at medical facilities exists. *Compare Koons*, 673 F. Supp. 3d at 651-52 (holding that the plaintiffs were likely to succeed on a challenge to New Jersey's law); *with Kipke*, 695 F. Supp. 3d at 653 (reaching the opposite conclusion with respect to Maryland's law); *and Md. Shall Issue*, 680 F. Supp. 3d at 590-92 (same). The Second Circuit held that the plaintiffs were likely to succeed with respect to a challenge to New York's prohibition on firearms at locations providing behavioral health and chemical dependent care or services. *Antonyuk*, 89 F.4th at 337-42.

But the court's analysis focused on historical laws—not mentioned by Defendant here—concerning persons with mental or chemical-dependency issues.[13] *Id.*

On the current record, and for the purpose of preliminary relief, we hold that Plaintiffs are likely to succeed on their challenge to California's prohibition of firearms at hospitals and other medical facilities. We emphasize that nothing prevents an operator of a medical facility—whether privately owned or State-run—from banning firearms under ordinary principles of property law. *See Bldg. & Constr. Trades Council*, 507 U.S. at 231 (explaining that a State generally may "manage its own property when it pursues its purely proprietary interests . . . where analogous private conduct would be permitted"). The preliminary injunction means only that a medical-facility operator may allow firearms at its facility.

11. Public Transit

In the California cases, the district court held that Plaintiffs are likely to prevail on their challenge to California Penal Code section 26230(a)(8), which prohibits carry in "[a] bus, train, or other form of transportation paid for in whole or in part with public funds, and a building, real property, or parking area under the control of a transportation authority supported in whole or in

13. Although New York's law covers locations also providing undifferentiated "health" services, the plaintiff had standing only with respect to locations providing "behavioral health, or chemical dependence care or services," and the district court and the Second Circuit limited their analyses and holdings to those locations. *Id.* at 294, 337, 342.

part with public funds." Unlike other parts of the law, section 26230(a)(8) contains no exceptions for carrying an unloaded and secured firearm. Because the ban is categorical, we agree with the district court that Plaintiffs are likely to succeed on this challenge.

Public transit did not exist in modern form until the 20th century, so Defendant has to point only to a relevantly similar historical regulation, not a dead ringer. *Rahimi*, 144 S. Ct. at 1898. Defendant relies primarily on the rules and regulations of some private railroad operators in the 19th century. As one scholar has explained, six railroad companies in the 19th century regulated the carry of firearms on trains. Joshua Hochman, Note, *The Second Amendment on Board: Public and Private Historical Traditions of Firearm Regulation*, 133 Yale L. J. 1676, 1690-96 (2024).

We agree with Defendant's premise that, in examining historical evidence, rules and regulations by private entities may inform the historical analysis, particularly where, as with train companies operating on the public right of way, the "private" entities were providing essentially a public service and were more properly characterized as mixed public-private entities. But our examination of the relevant regulations suggests that California's law is too broad; the historical regulations are insufficiently analogous. In particular, most of the companies appeared to prohibit only carriage without pre-boarding inspection, carriage in the passenger cars (the firearms had to be checked as luggage), carriage of *loaded* firearms, or carriage of "dangerous" weapons, such as rifles with bayonets attached. *Id.* Moreover, several

States enacted a "traveler's exception," whereby persons traveling longer distances could carry their firearms on board. *Id.* at 1696-97.

We conclude from our examination of the 19th century railroad rules that Defendant likely has proved a historical tradition of prohibiting the carry of loaded firearms or the carry of firearms not properly stored. But California's broad law does not fit that more limited tradition. California's law provides exceptions applicable to the carry of firearms in *private* vehicles. First, the law allows a person to transport a firearm in a private vehicle if the firearm is locked in an appropriate lock box. Cal. Penal Code § 26230(b). Second, the law allows a person to store a firearm in a private vehicle in most parking areas where carriage of a firearm is otherwise prohibited, provided that certain requirements are met. *Id.* § 26230(c). But California's law does not appear to have—and Defendant has not argued that California's law has—a similar exception on public transit, allowing (for example) the carry of an unloaded and secured firearm on a bus.[14] The lack of such an exception appears particularly concerning in this context. For those who cannot afford private transportation, a complete ban on carry in public transit effectively disarms those persons entirely when they leave home in a vehicle. In other words, unlike a ban on carrying at, say, the circus, a ban on carrying on public

14. Hawaii's law, by contrast, does have an exception for public transit. *See* Haw. Rev. Stat. § 134-9.1(b)(8) (providing an affirmative defense for a person who is "[p]ossessing a firearm in an airport or any place, facility, or vehicle used for public transportation or public transit; provided that the firearm is unloaded and in a locked hard-sided container for the purpose of transporting the firearm").

transit unavoidably affects some persons' rights to bear arms on a nearly daily basis.

We acknowledge that public transit bears some features common to other sensitive places, such as government buildings and schools. Transit facilities are often crowded, they serve some vulnerable populations, and they are State-owned. But the breadth of California's law—in particular the lack of any exception allowing the carry of any firearm in any manner—persuades us that Plaintiffs are likely to prevail on this claim. Finally, we note that our holding is consistent with the district court's holding here and with two other district court decisions. *See Koons*, 673 F. Supp. 3d at 649-50 (holding that the plaintiffs are likely to succeed on their challenge to New Jersey's ban on firearms at airports to the extent that the ban does not exempt firearms properly secured and intended to be checked as luggage); *Antonyuk v. Hochul*, 639 F. Supp. 3d at 328-31 (holding that the plaintiffs are likely to succeed on their challenge to New York's ban on firearms on buses and vans); *but see Kipke*, 695 F. Supp. 3d at 655-56 (holding that the plaintiffs are unlikely to prevail on the challenge to Maryland's ban on firearms at mass transit facilities). The Second Circuit did not reach this issue because, although the New York State defendants appealed every *other* ruling in the plaintiffs' favor, they did not appeal the district court's injunction as to buses and vans. *Antonyuk*, 89 F.4th at 294.

In sum, we hold that Plaintiffs are likely to succeed in their challenge to California's broad prohibition on the carry of firearms on public transit. But we emphasize that our holding hinges on the law's categorical nature. A ban

on the carry of firearms on public transit almost certainly would be constitutionally permissible if the law allowed the carry of unloaded and secured firearms.

B. The Remaining *Winter* Factors

In addition to showing a likelihood of success, Plaintiffs must demonstrate that they will suffer irreparable harm in the absence of preliminary relief and that injunctive relief is consistent with the equities and the public interest. *Winter*, 555 U.S. at 20. For the challenges as to which Plaintiffs have failed to show a likelihood of success, we reverse the preliminary injunction. *Id.*; *see Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (en banc) ("[W]hen a plaintiff has failed to show the likelihood of success on the merits, we need not consider the remaining [*Winter* factors]." (citation and internal quotation marks omitted)).

For the challenges as to which Plaintiffs have shown a likelihood of success, we affirm the preliminary injunction. Our reasoning is threefold. First, we review for abuse of discretion the grant of a preliminary injunction. *Tucson*, 91 F.4th at 1324. Second, each claim alleges a violation of a constitutional right, which strongly suggests that the remaining *Winter* factors are met. *Melendres v. Arpaio*, 695 F.3d 990, 1002 (9th Cir. 2012). Finally, the injunction here merely preserved the status quo before each law was set to go into effect. *City & County of San Francisco v. USCIS*, 944 F.3d 773, 789 (9th Cir. 2019). We have considered carefully Defendants' counter-arguments but are unpersuaded that the district courts abused their discretion in granting preliminary relief.

Appendix A

CONCLUSION

In *Wolford*, we affirm the preliminary injunction with respect to financial institutions, parking lots adjacent to financial institutions, and parking lots shared by government buildings and non-governmental buildings. We otherwise reverse the preliminary injunction, thereby reversing the injunction with respect to bars and restaurants that serve alcohol; beaches, parks, and similar areas; parking areas adjacent to all of those places; and the new default rule prohibiting the carry of firearms onto private property without consent. More specifically, we affirm the injunction insofar as it enjoins Hawaii Revised Statutes section 134-9.1(a)(12) and "the portions of [Hawaii Revised Statutes section 134-9.1](a)(1) that prohibit carrying firearms in parking areas owned, leased, or used by the State or a county which share the parking area with non-governmental entities, are not reserved for State or county employees, or do not exclusively serve the State or county building." We reverse the injunction insofar as it enjoins Hawaii Revised Statutes sections 134-9.1(a)(4), 134-9.1(a)(9), and 134-9.5.

In *May* and *Carralero*, we affirm the injunction with respect to hospitals and similar medical facilities, public transit, gatherings that require a permit, places of worship, financial institutions, parking areas and similar areas connected to those places, and the new default rule as to private property. We otherwise reverse the preliminary injunction, thereby reversing the injunction with respect to bars and restaurants that serve alcohol, playgrounds, youth centers, parks, athletic areas, athletic facilities, most real property under the control of the Department

of Parks and Recreation or Department of Fish and Wildlife, casinos and similar gambling establishments, stadiums, arenas, public libraries, amusement parks, zoos, and museums; parking areas and similar areas connected to those places; and all parking areas connected to other sensitive places listed in the statute. More specifically, we affirm the injunction insofar as it enjoins Defendant from implementing or enforcing California Penal Code sections 26230(a)(7), (8), (10), (22), (23), and (26). We reverse the injunction insofar as it enjoins Defendant from implementing or enforcing California Penal Code sections 26230(a)(9), (11), (12), (13), (15), (16), (17), (19), and (20) and insofar as it enjoins Defendant from implementing or enforcing California Penal Code section 26230(a) with respect to parking areas connected to sensitive places.

Having concluded the historical analysis required by *Bruen* and the Supreme Court's other Second Amendment cases, we close with a few general observations. First, taking a step back from the historical analysis, the lists of places where a State likely may ban, or may not ban, the carry of firearms appear arbitrary. A State likely may ban firearms in museums but not churches; in restaurants but not hospitals; in libraries but not banks. The deep historical analysis required by the Supreme Court provides the missing link, but the lack of an apparent logical connection among the sensitive places is hard to explain in ordinary terms. In addition, the seemingly arbitrary nature of Second Amendment rulings undoubtedly will inspire further litigation as state and local jurisdictions attempt to legislate within constitutional bounds.

Second, we stress that owners of private property remain free to ban the carry of firearms on their private property. Nothing in the Second Amendment disturbs that basic background principle of property law. For the places where we hold that the States likely may not prohibit the carry of firearms, the practical effect of our ruling is merely that private-property owners may choose to allow the carry of firearms. Owners of hospitals, banks, and churches, for example, remain free to ban firearms at those locations.

Finally, we emphasize that an analysis about the constitutional limits of what a State may ban has no effect whatsoever on the choice by legislatures in other States *not* to ban the carry of firearms. *See generally Bianchi v. Brown*, 2024 U.S. App. LEXIS 19624, 2024 WL 3666180, at *5 (4th Cir. Aug. 6, 2024) (en banc) (opinion by Wilkinson, J.) (making this same general point), *petition for cert. filed sub nom., Snope v. Brown*, No. 24-203 (U.S. Aug. 21, 2024). That is, a ruling that California permissibly may ban the carry of firearms in, for example, museums does not have any effect on the choice by other States not to ban firearms in museums. Persons residing in other States are unaffected by California's law or Hawaii's law—or our decision—unless, of course, they choose to travel to California or Hawaii with firearms.

AFFIRMED IN PART AND REVERSED IN PART.

The parties shall bear their own costs on appeal.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII, FILED AUGUST 8, 2023

UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

CV 23-00265 LEK-WRP

JASON WOLFORD, ALISON WOLFORD, ATOM KASPRZYCKI, HAWAII FIREARMS COALITION,

Plaintiffs,

vs.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAII;

Defendant.

ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

An alarming increase in violent crimes involving firearms in Hawai'i has heightened public concerns about guns and safety.[1] State officials recently responded by enacting a law prohibiting the carrying or possessing of

1. *See, e.g.*, Kirstin Downey, *An Increase in 'Violent, Brazen' Crime Raises Concerns on Oahu*, HONOLULU CIVIL BEAT (Aug. 30, 2022), https://www.civilbeat.org/2022/08/an-increase-in-violent-brazen-crime-raises-concerns-on-oahu/ (last visited Aug. 8, 2023).

firearms in certain defined locations and premises, such as banks, beaches, and bars. *See generally* Act 52 (June 2, 2023) (to be codified at Haw. Rev. Stat. Chapter 134) ("Act 52" and "the Act"). Whether a firearm regulation is consistent with the constitutional protection of the Second Amendment to carry handguns publicly for self-defense has been recently articulated in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). It is this powerful collision between Hawai'i officials' concern for the safety and welfare of its citizens and "the Second and Fourteenth Amendments['] [protections of] an individual's right to carry a handgun for self-defense outside the home" that is before this Court today. *See Bruen*, 142 S. Ct. at 2122

In their present motion, Plaintiffs Jason Wolford ("J. Wolford"), Alison Wolford ("A. Wolford"), Atom Kasprzycki ("Kasprzycki"), and Hawaii Firearms Coalition ("HRC" and collectively "Plaintiffs") seek to enjoin the State of Hawai'i from enforcing certain provisions of the Act that prohibit carrying handguns in particular areas.[2] These areas are: parking areas adjacent to buildings or offices owned, leased, or used by the State or a county; restaurants or bars serving alcohol, and their adjacent parking areas; beaches and parks, and their adjacent

2. On June 23, 2023, Plaintiffs filed their Motion for Temporary Restraining Order and Preliminary Injunction ("TRO Motion"). [Dkt. no. 7.] Plaintiffs filed their reply on July 21, 2023. [Dkt. no. 61.] The instant Order addresses only Plaintiffs' request for a temporary restraining order ("TRO"). Plaintiffs' request for a preliminary injunction will be subsequently and separately briefed, heard, and ruled on.

parking areas; and banks or financial institutions, and their adjacent parking areas. In addition, Plaintiffs seek to enjoin enforcement of the Act's provision that prohibits carrying handguns on the private property of another person (for instance, a home, community association, or condominium) unless the property owner or manager gives unambiguous written or verbal authorization, or posts a sign on the property expressing authorization. Hawai'i, acting through its attorney general, opposes the TRO Motion.[3]

Plaintiffs' TRO Motion is hereby granted in part and denied in part for the reasons set forth below, insofar as the following challenged provisions (or portions thereof) are enjoined:

> -the portions of Haw. Rev. Stat. § 134-A(a)(1) that prohibit carrying firearms in parking areas owned, leased, or used by the State or a county which share the parking area with non-governmental entities, are not reserved for State or county employees, or

3. On July 14, 2023, Defendant Anne E. Lopez, in her official capacity as the Attorney General of the State of Hawai'i ("the State"), filed its Memorandum in Opposition to Plaintiffs' Motion for Temporary Restraining (ECF No. 7) ("Memorandum in Opposition."). [Dkt. no. 55.] Because Plaintiffs sue Defendant Anne E. Lopez in her official capacity as the State of Hawai'i Attorney General, [Complaint at ¶ 5,] their claims are against the State, *see Hafer v. Melo*, 502 U.S. 21, 25, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991) ("Suits against state officials in their official capacity therefore should be treated as suits against the State." (citation omitted)). This matter came on for hearing on July 28, 2023.

do not exclusively serve the State or county building;

-the entirety of Haw. Rev. Stat. §§ 134-A(a)(4) and (a)(12);

-the portions of Haw. Rev. Stat. § 134-A(a)(9) prohibiting the carrying of firearms in beaches, parks, and their adjacent parking areas; and

-the portion of Haw. Rev. Stat. § 134-E that prohibits carrying firearms on private properties held open to the public.

The TRO Motion is denied in all other respects.

BACKGROUND

Plaintiffs filed their Verified Complaint for Declaratory and Injunctive Relief ("Complaint") on June 23, 2023. [Dkt. no. 1.] Plaintiffs' Complaint and TRO Motion challenge five State of Hawai'i laws on the grounds that the laws violate either the First Amendment, Second Amendment, and/or Fourteenth Amendment of the United States Constitution. Specifically, Plaintiffs challenge the following Hawai'i laws: (1) Haw. Rev. Stat. § 134-A(a)(1); (2) Haw. Rev. Stat. § 134-A(a)(4); (3) Haw. Rev. Stat. § 134-A(a)(9); (4) Haw. Rev. Stat. § 134-A(a)(12); and (5) Haw. Rev. Stat. § 134-E. *See* Complaint at ¶¶ 57-58; TRO Motion, Mem. in Supp. at 3. Plaintiffs, however, take care to state that they

> do not challenge the prohibitions in all areas under [the Act], instead, [they] challenge only a limited subset that impose particularly egregious restrictions on their Second Amendment right to bear arms.

[Complaint at ¶ 42.]

On June 2, 2023, Hawai'i Governor Josh Green, M.D., signed into law Hawai'i Senate Bill No. 1230 – A Bill for an Act Relating to Firearms. The Act was passed "to clarify, revise, and update Hawaii's firearms laws to mitigate the serious hazards to public health, safety, and welfare associated with firearms and gun violence, while respecting and protecting the lawful exercise of individual rights." Act 52, § 1 at pgs. 1-2. Amongst other things, and relevant here, the Act "defines locations and premises within the State where carrying or possessing a firearm is prohibited . . . ." *Id.* at pg. 2. The Act further provides: "In prohibiting carrying or possessing firearms in certain locations and premises within the State, this Act is intended to protect areas in which carrying or possessing dangerous weapons has traditionally been restricted, such as schools and other places frequented by children, government buildings, polling places, and other analogous locations." *Id.*

Chapter 134 of the Hawai'i Revised Statutes relates to Hawaii's regulations and laws for firearms, ammunition, and dangerous weapons. Part I concerns the general regulations provided in Haw. Rev. Stat. Chapter 134. Under Chapter 134 part 1, the chief of police of a county

within the State may grant licenses to carry a pistol or revolver — either concealed or unconcealed — if an applicant meets certain requirements. *See generally* Haw. Rev. Stat. § 134-9. Section 2 of the Act amended part I of Chapter 134 to include the following language, in pertinent part:

> **§ 134-A Carrying or possessing a firearm in certain locations and premises prohibited; penalty.** (a) A person with a license issued under section 134-9, or authorized to carry a firearm in accordance with title 18 United States Code section 926B or 926C, shall not intentionally, knowingly, or recklessly carry or possess a loaded or unloaded firearm, whether the firearm is operable or not, and whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, while in any of the following locations and premises within the State:
>
> (1) Any building or office owned, leased, or used by the State or a county, and adjacent grounds and parking areas, including any portion of a building or office used for court proceedings, legislative business, contested case hearings, agency rulemaking, or other activities of state or county government;
>
> . . . .

(4) Any bar or restaurant serving alcohol or intoxicating liquor as defined in section 281-1 for consumption on the premises, including adjacent parking areas;

. . . .

(9) Any beach, playground, park, or adjacent parking area, including any state park, state monument, county park, tennis court, golf course, swimming pool, or other recreation area or facility under control, maintenance, and management of the State or a county, but not including an authorized target range or shooting complex;

. . . .

(12) The premises of any bank or financial institutions as defined in section 211D-1, including adjacent parking areas;

. . . .

. . . .

(f) Any person who violates this section shall be guilty of a misdemeanor.

Appendix B

Act 52, § 2 at pgs. 3-6, 10 (emphases in original and some emphases and quotation marks omitted). Section 2 of the Act further provides:

> **§ 134-E Carrying or possessing a firearm on private property of another person without authorization; penalty.** (a) A person carrying a firearm pursuant to a license issued under section 134-9 shall not intentionally, knowingly, or recklessly enter or remain on private property of another person while carrying a loaded or unloaded firearm, whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property.
>
> (b) For purposes of this section, express authorization to carry or possess a firearm on private property shall be signified by:
>
> (1) Unambiguous written or verbal authorization; or
>
> (2) The posting of clear and conspicuous signage at the entrance of the building or on the premises,
>
> by the owner, lessee, operator, or manager of the property, or agent thereof, indicating that carrying or possessing a firearm is authorized.

(c) For purposes of this section:

"Private entity" means any homeowners' association, community association, planned community association, condominium association, cooperative, or any other nongovernmental entity with covenants, bylaws, or administrative rules, regulations, or provisions governing the use of private property.

"Private property" does not include property that is owned or leased by any governmental entity.

"Private property of another person" means residential, commercial, industrial, agricultural, institutional, or undeveloped property that is privately owned or leased, unless the person carrying a firearm is an owner, lessee, operator, or manager of the property, including an ownership interest in a common element or limited common element of the property; provided that nothing in this chapter shall be construed to limit the enforceability of a provision in any private rental agreement restricting a tenant's possession or use of firearms, the enforceability of a restrictive covenant restricting the possession or use of firearms, or the authority of any private entity to restrict the possession or use of firearms on private property.

> (d) This section shall not apply to a person in an exempt category identified in section 134-11(a).
>
> (e) Any person who violates this section shall be guilty of a misdemeanor.

Id. § 2 at pgs. 14-16 (emphases in original and some emphases and quotation marks omitted).[4] In short, § 134-A(a) lists "sensitive places" where individuals with a license to carry firearms are prohibited from carrying their firearms. Section 134-E creates a default rule that individuals with a license to carry firearms cannot carry their firearms on private property unless the owner of that property gives them consent. These pertinent provisions became effective on July 1, 2023. *See id.* § 18 at pg. 76.

J. Wolford, A. Wolford, and Kasprzycki ("the Individual Plaintiffs") are individuals living in the County of Maui. *See* Complaint at ¶¶ 1-3. They allege that each was granted, and now possess, a permit to carry a firearm pursuant to § 134-9. *See id.* at ¶¶ 59(E) (as to J. Wolford), 60(E) (as to A. Wolford), 61(E) (as to Kasprzycki). HFC is an organization incorporated under Hawai'i law with its principal place of business in Honolulu, Hawai'i. It has thirty-three members with valid concealed carry permits. HFC brings this suit on behalf of its members with a concealed carry permit issued by any county in Hawai'i. [*Id.* at ¶ 4.] The Individual Plaintiffs are members of HFC.

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4. Although these statutes have not yet been numerated in the Hawai'i Revised Statutes, for simplicity this Court will cite to the nomenclature used in Act 52.

[*Id.* at ¶ 51.] The Individual Plaintiffs allege they are impacted by the challenged regulations because they each attend and frequent beaches, parks, and their adjacent parking areas, bars and restaurants serving alcohol and their adjacent parking areas, banks and their adjacent parking areas, and parking areas adjacent to government buildings, all within the County of Maui. *See generally id.* at ¶¶ 59-61. As such, Plaintiffs contend §§ 134-A(a)(1), (4), (9), and (12) are unconstitutional restrictions on their ability to carry their firearms in these respective places, in violation of the Second and Fourteenth Amendment.

Further, Kasprzycki owns and operates his own business along with the associated business property/space. His business is open to the public. *See id.* at ¶¶ 62-63, 66b.[5] Kasprzycki states that some of his clients do not support the concealed carrying of firearms. Kasprzycki does not wish to involve his business in any issues related to the Second Amendment. [*Id.* at ¶¶ 64-65.] He alleges that, "[o]nce H.R.S. § 134-E goes into effect, [he] will not put up a sign or otherwise give prior written or verbal consent to carry a firearm. But for H.R.S. § 134-E Kasprzycki would allow people to carry firearms in his business." [*Id.* at ¶ 65.] Accordingly, Kasprzycki and HFC contend § 134-E compels speech in violation of the First Amendment.

Plaintiffs bring this action against the State for injunctive and declaratory relief under 42 U.S.C. § 1983,

5. Plaintiffs' Complaint has two consecutive paragraphs numbered 66. For clarity, the Court refers to the first paragraph 66 as "paragraph 66a" and the second paragraph 66 as "paragraph 66b."

alleging the State violated, and continues to violate, their First, Second, and Fourteenth Amendment rights by restricting certain conduct of individuals with a license to carry firearms. They bring facial and as-applied challenges to §§ 134-A(a)(1), (a)(4), (a)(9), (a)(12), and 134-E. In the TRO Motion, Plaintiffs seek a TRO to enjoin the challenged laws. *See* TRO Motion at 2.

STANDARD

"[T]he legal standards applicable to TROs and preliminary injunctions are 'substantially identical.'" *Washington v. Trump*, 847 F.3d 1151, 1159 n.3 (9th Cir. 2017) (quoting *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 839 n.7 (9th Cir. 2001)).

> A party moving for preliminary injunctive relief must establish (1) a likelihood of success on the merits, (2) a likelihood of irreparable harm, (3) that the balance of harm tips in the movant's favor, and (4) that the injunction is in the public interest. *See All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011). "The first factor—likelihood of success on the merits—is the most important factor." *California by & through Becerra v. Azar*, 950 F.3d 1067, 1083 (9th Cir. 2020) (en banc) (citation and quotation marks omitted). Additionally, when a party seeks a preliminary injunction against the government, as is the case here, the balance of the equities and public interest factors merge. *See Drakes Bay Oyster Co. v.*

> *Jewell*, 747 F.3d 1073, 1092 (9th Cir. 2014) (citing *Nken v. Holder*, 556 U.S. 418, 435, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009)).

Chamber of Com. of the U.S. v. Bonta, 62 F.4th 473, 481 (9th Cir. 2023).

DISCUSSION

I. The Second Amendment and the United States Supreme Court

A. Prior to the Twenty-First Century

Ratified in 1791, the Second Amendment reads: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. To this Court's knowledge, the Supreme Court's first mention of the people's right to bear arms was in the infamous case *Dred Scott v. Sandford*, 60 U.S. 393, 15 L. Ed. 691 (1857). There, the Supreme Court held that, because Dred Scott was black, he was not a United States citizen and, as such, he was not entitled to any of the rights guaranteed to United States citizens under the United States Constitution. *See* id. at 404-05. The Supreme Court reasoned, in part, that slaveholder states could not have regarded black people as citizens because then

> it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold

> public meetings upon political affairs, and **to keep and carry arms wherever they went**. And all of this would be done in the face of the subject race of the same color, both free and slaves, and inevitably producing discontent and insubordination among them, and endangering the peace and safety of the State.

Id. at 417 (emphasis added). A possible implication of the Supreme Court's statement is that United States citizens could "keep and carry arms wherever they went." *See id.* To that end, this Court notes two vital points: (1) to the extent that the Supreme Court intended to make any holding regarding the right to bear arms in *Dred Scott*, its statement was purely dictum;[6] and (2) *Dred Scott* is no longer good law because it was superseded by the Thirteenth and Fourteenth Amendments.

In *United State v. Cruikshank*, the Supreme Court held that the Second Amendment contains the right "of bearing arms for a lawful purpose. This is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence." 92 U.S. 542, 553, 23 L. Ed. 588 (1875) (internal quotation marks omitted). The Supreme Court further held that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the

6. "A statement is dictum when it is made during the course of delivering a judicial opinion, but . . . is unnecessary to the decision in the case and is therefore not precedential." *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1173 (9th Cir. 2004) (alteration in *Cetacean Cmty.*) (brackets, citation, and internal quotation marks omitted).

national government . . . ." *Id.* In other words, the Second Amendment does not create a right; rather, it protects a preexisting right from federal overreach.

In *Presser v. Illinois*, the Supreme Court reaffirmed the holding in *Cruikshank* and held that a military code which prohibited "bodies of men to associate together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law, d[id] not infringe the right of the people to keep and bear arms." 116 U.S. 252, 264-65, 6 S. Ct. 580, 29 L. Ed. 615 (1886). The Supreme Court further concluded that states could not "prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government." *Id.* at 265. In dictum, the Supreme Court in *Robertson v. Baldwin*, mentioned that "the right of the people to keep and bear arms . . . is not infringed by laws prohibiting the carrying of concealed weapons . . . ." 165 U.S. 275, 281-82, 17 S. Ct. 326, 41 L. Ed. 715 (1897).

Forty-two years later, the Supreme Court in *United States v. Miller*, stated that: "With obvious purpose to assure the continuation and render possible the effectiveness of [Militias (as set forth in Article I, Section 8 of the United States Constitution),] the declaration and guarantee of the Second Amendment were made." 307 U.S. 174, 178, 59 S. Ct. 816, 83 L. Ed. 1206, 1939-1 C.B. 373 (1939). Thus, the Supreme Court concluded that the Second Amendment "must be interpreted and applied with that end in view." *Id.* Under that interpretation, the Supreme Court held that the Second Amendment did not

guarantee the right to keep and bear "a shotgun having a barrel of less than eighteen inches in length" because there was insufficient evidence to show that such a firearm had "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* (internal quotation marks and citation omitted). The Supreme Court did not decide another Second Amendment case until almost seventy years later.

B. In the Twenty-First Century

In 2008, the Supreme Court in *District of Columbia v. Heller*, held that the Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation." 554 U.S. 570, 592, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). The Supreme Court came to its conclusion by analyzing the text of the amendment. After its textual analysis, it reviewed some historical background to determine whether that historical background comported with its conclusion; it held that it did. *See, e.g., id.* at 592-95.

The Supreme Court emphasized, however, that "the right secured by the Second Amendment is not unlimited." *Id.* at 626. It cautioned that "nothing in [its] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings . . . ." *Id.*

Although the Supreme Court conducted some historical analysis of the people's right to bear arms, the majority did not provide any reasoning or analysis as to

why those enumerated prohibitions pass "constitutional muster," *see id.* at 629; indeed, it presumed them to be constitutional restrictions, *see id.* at 627 n.26 ("We identify these **presumptively** lawful regulatory measures only as examples; our list does not purport to be exhaustive." (emphasis added)). The Supreme Court in the end held that a Washington, D.C. ban on firearms in the home violated the Second Amendment. *See id.* at 628-29. Following on the heels of *Heller*, in 2010, the Supreme Court in *McDonald v. City of Chicago*, held that the Second Amendment rights recognized in *Heller* were incorporated against the states through the Fourteenth Amendment. *See* 561 U.S. 742, 791, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010).[7]

After *Heller* and *McDonald*, many courts implemented a two-step test to review challenges to regulations that invoked protections secured by the Second Amendment. The two-step test required courts to: (1) determine if the challenged law affected protected conduct under the Second Amendment; and, if so, then (2) apply the appropriate level of scrutiny, based upon the extent to which the challenged law implicates the Second Amendment right. *See, e.g., Young v. Hawaii*, 992 F.3d 765, 783-84 (9th Cir. 2021) (en banc), *vacated and remanded*, 142 S. Ct. 2895, 213 L. Ed. 2d 1108 (2022).

In 2022, the Supreme Court issued its decision in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022). There, the Supreme

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7. Justice Scalia's concurring opinion begins on page 791, but, for clarity, this cite is to the majority opinion ending on that page.

Court relied on *Heller* and *McDonald* and held that the two-step test — sometimes called "means-end scrutiny" — utilized by lower courts was wrong and declined to adopt it. *See Bruen*, 142 S. Ct. at 2125-26. Instead, it held

> that when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command." *Konigsberg v. State Bar of Cal.*, 366 U.S. 36, 50, n.10, 81 S. Ct. 997, 6 L. Ed. 2d 105 (1961).

Id. at 2126.

After establishing this constitutional standard for reviewing challenges under the Second Amendment, the Supreme Court applied it to a challenge to a New York regulation. That regulation required applicants who sought a license to conceal carry a firearm outside of the home to prove that they had a "proper cause" to be issued such a license. *See id.* at 2123. The Supreme Court determined that the plain text of the Second Amendment covered the conduct that the challenged law

regulated because the Second Amendment "presumptively guarantees . . . a right to bear arms in public for self-defense." *Id.* at 2135 (internal quotation marks omitted). Because "the Second Amendment guarantees a general right to public carry," the Supreme Court stated the government had "the burden . . . to show that New York's proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2135. It further stated that, "[o]nly if [the government] carr[ies] that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect [the challenger's] proposed course of conduct." *Id.*

The Supreme Court then reviewed the historical evidence that the government provided. It clustered the historical evidence into five categories: "(1) medieval to early modern England; (2) the American Colonies and the early Republic; (3) antebellum America; (4) Reconstruction; and (5) the late-19th and early-20th centuries." *Id.* at 2135-36. The Supreme Court did not find the government's evidence regarding any of these categories convincing. As to the first category, it stated that, "[a]t the very least, we cannot conclude from this historical record that, by the time of the founding, English law would have justified restricting the right to publicly bear arms suited for self-defense only to those who demonstrate some special need for self-protection." *Id.* at 2142. As to the second category, it concluded that "in the century leading up to the Second Amendment and in the first decade after its adoption, there is no historical basis for concluding that the pre-existing right enshrined

in the Second Amendment permitted broad prohibitions on all forms of public carry." *Id.* at 2145.

For the third category, it summarized:

> The historical evidence from antebellum America does demonstrate that **the manner** of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly.

Id. at 2150 (emphasis in *Bruen*).

In beginning its discussion of the fourth category, the Supreme Court relied on *Dred Scott*, stating that *Dred Scott* "indirectly affirmed the importance of the right to keep and bear arms in public." *Id.* It further explained that Chief Justice Taney, writing for the Court in *Dred Scott*, "recognized . . . that public carry was a component of the right to keep and bear arms-a right free blacks were often denied in antebellum America." *Id.* at 2151. It is important to reiterate that *Dred Scott*'s discussion of a right to bear arms is dictum. *See supra* Discussion Section I.A. Moreover, to the extent that the mention of a right to bear arms in *Dred Scott* provides any historical insight

into the legal bounds of the Second Amendment, it should be cautioned that it is equally plausible that Chief Justice Taney exaggerated certain rights in a pursuit to justify the enslavement of black Americans. In any event, after some additional historical analysis, the Supreme Court in *Bruen* concluded that, "[a]s for Reconstruction-era state regulations, there was little innovation over the kinds of public-carry restrictions that had been commonplace in the early 19th century." *Id.* at 2152.

Finally, in assessing the fifth category, the Supreme Court stated that the late-19th century evidence, particularly as to evidence regarding the newer western states, "cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry." *Id.* at 2154. The Supreme Court ultimately held that:

> At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to "all Americans" the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. *Heller*, 554 U.S. at 581, 128 S. Ct. 2783. Those restrictions, for example, limited the intent for which one could carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government

> officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. . . .

Id. at 2156.

C. Framework for Analyzing this Nation's Historical Tradition

Bruen's directive is clear: once an individual's conduct is covered by the plain text of the Second Amendment, the burden is on the government to establish that the regulation is consistent with this Nation's historical tradition of firearm regulation. *See id.* at 2129-30. The exception being, of course, exclusion of firearms in traditionally "sensitive places." Then, and only then, is a gun regulation constitutional. Although the burden is on the government to proffer evidence that the regulation is consistent with this Nation's historical tradition of firearm regulation, a reviewing court must analyze the government's proffered historical evidence. A core element of this analysis is assessing how "the Second Amendment's historically fixed meaning applies to new circumstances . . . ." *Id.* at 2132. This task "will often involve reasoning by analogy" and "[l]ike all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are **relevantly similar**." *Id.* (emphasis added) (citation and internal quotation marks omitted).

Appendix B

In assessing whether regulations are "relevantly similar under the Second Amendment," courts should look "toward at least two metrics: **how** and **why** the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132-33 (emphases added). But, "analogical reasoning under the Second Amendment is neither a regulatory straightjacket nor a regulatory black check." *Id.* at 2133. "[A]nalogical reasoning requires only that the government identify a well-established and representative **analogue**, not a historical **twin**. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id.* (emphases in *Bruen*).

Relevant here, "[a]lthough the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—" the Supreme Court stated it was "aware of no disputes regarding the lawfulness of such prohibitions." *Id.* (citations omitted). The Supreme Court assumed, then, that it was "settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in **new** and analogous sensitive places are constitutionally permissible." *Id.* (emphasis in *Bruen*).

Moreover, "when it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they were understood

to have **when the people adopted them**.'" *Id.* at 2136 (emphasis in *Bruen*) (quoting *Heller*, 554 U.S. at 634-35, 128 S. Ct. 2783). The Supreme Court stated that "courts must be careful when assessing evidence concerning English common-law rights"; it stated, for example: "A long, unbroken line of common-law precedent stretching from Bracton to Blackstone is far more likely to be part of our law than a short-lived, 14th-century English practice." *Id.* It also "guard[ed] against giving postenactment history more weight than it can rightly bear." *Id.* While it is true that "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision[,] . . . . to the extent that history contradicts what the text says, the text controls." *Id.* at 2137 (citations and internal quotation marks omitted). That is, "post-ratification adoption or acceptance of laws that are **inconsistent** with the original meaning of the constitutional text obviously cannot overcome or alter that text." *Id.* (emphasis in *Bruen*) (quotation marks and citations omitted).

The Supreme Court also "acknowledge[d] that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 when defining its scope (as well as the scope of the right against the Federal Government)." *Id.* at 2138 (citations omitted). But, it did "not address this issue . . . because . . . the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry."

Id. With this framework and understanding, this Court turns to the instant case.

II. Preliminary Matters

A. Standing

The State contends Plaintiffs lack standing to challenge Haw. Rev. Stat. §§ 134-A(a)(4), (a)(12), and 134-E. *See* Mem. in Opp. at 7, 16, 19. Because standing goes to the issue of whether this Court has jurisdiction to hear the case, the State's argument must be addressed. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338, 136 S. Ct. 1540, 194 L. Ed. 2d 635 (2016) (stating that the standing doctrine "ensure[s] that federal courts do not exceed their authority . . . ." (citation omitted)). To establish the "irreducible constitutional minimum of standing," a "plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Id.* at 338 (quotation marks and citations omitted). "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical." *Id.* at 339 (citation and internal quotation marks omitted).

Here, Plaintiffs possess standing to challenge §§ 134-A(a)(4), (a)(12), and 134-E. As to § 134-A(a)(4), which prohibits carrying firearms in bars and restaurants that serve alcohol, the State argues Plaintiffs "have not identified any bar or restaurant that has authorized

(or would authorize) [them] to carry a gun into their premises." [Mem. in Opp. at 7.] The State's argument fails because § 134-A(a)(4) flatly bans the carrying of firearms in bars and restaurants that serve alcohol.

The Individual Plaintiffs allege they frequently visit and will continue to visit bars and restaurants that serve alcohol. *See* Complaint at ¶¶ 59(H) ("Jason Wolford has in the past regularly frequented the following areas which are . . . restaurants that serves alcohol or intoxicating liquor . . . on the premises, and he has, in the past carried a concealed arm with his permit in the locations referenced herein, and he intends to . . . in the future, own, possess, and carry a firearm with his concealed carry permit in these locations and locations like them."); 60(H) (same as to A. Wolford); 61(H) (same as to Kasprzycki). Because they frequently visit these spaces in their ordinary daily lives, the Individual Plaintiffs sufficiently establish that they face imminent harm that is concrete and particularized. *See* Haw. Rev. Stat. § 134-A(f) (stating a violation of § 134-A constitute misdemeanors). The harm is fairly traceable to the State's conduct because the Individual Plaintiffs face criminal penalties if they are found to be carrying a firearm in that prohibited spaces. *See O'Handley v. Weber*, 62 F.4th 1145, 1161 (9th Cir. 2023) ("[T]he traceability requirement is less demanding than proximate causation, and thus the causation chain does not fail solely because there are several links or because a single third party's actions intervened." (citations and internal quotation marks omitted)). Stated another way, "[i]t is possible to draw a causal line from" the State implementing the challenged provision to Plaintiffs' potential criminal

penalties for violating the challenged provisions, "even if [the causal line] is one with several twists and turns." *See id.* at 1161-62.

The State's argument appears to also rely on § 134-E. That is, because § 134-E requires private commercial owners to give express permission to carry firearms on their property, if a private owner gives permission to carry firearms on their property, then an individual is not penalized and, thus, there is no harm. But, § 134-E does not negate the default ban set forth in § 134-A(a)(4). Before the enactment of § 134-A(a)(4), the Individual Plaintiffs — as licensed firearm carriers — could conceal carry into bars and restaurants serving alcohol without facing criminal penalty. Although the owners of those establishments could prohibit the Individual Plaintiffs from carrying in their establishments, the Individual Plaintiffs did not face criminal penalties.

Despite the possibility that a commercial owner could override the prohibition set forth in § 134-A(a)(4), without more, such a third-party's possible intervention does not destroy the causal chain needed to show traceability. *See O'Handley*, 62 F.4th at 1161; *see also Winsor v. Sequoia Benefits & Ins. Servs., LLC*, 62 F.4th 517, 525 (9th Cir. 2023) (stating a plaintiff must allege "a substantial probability" that the defendant caused the alleged harm (citation and internal quotation marks omitted)). Finally, the Individual Plaintiffs' injury can also be redressed by a favorable judicial decision because a favorable judicial decision would enjoin the restriction set forth in § 134-A(a)(4) and the accompanying criminal penalty for any

violation. The Individual Plaintiffs therefore have standing to challenge § 134-A(a)(4).[8]

The State contests Plaintiffs' standing to challenge § 134-A(a)(12) for the same reason as it provided for § 134-A(a)(4). *See* Mem. in Opp. at 16 ("As with bars and restaurants serving alcohol, Plaintiffs lack standing because they provide no allegations or evidence that any financial institution has authorized (or would authorize) carrying firearms on it premises."). This Court's analysis in finding that the Individual Plaintiffs have standing to challenge § 134-A(a)(4) equally applies to this argument and, therefore, the Individual Plaintiffs have standing to challenge § 134-A(a)(12).[9] *See* Complaint at ¶¶ 59(I) ("Jason Wolford has in the past regularly frequented . . . banks or financial institutions . . . and has in the past carried a concealed arm with his permit and intends to . . . in the future, own, possess, and carry a firearm with his concealed carry permit in these locations and locations

8. In a similar case involving challenges to a New Jersey regulation for, among other things, restrictions on "sensitive places" including bars and restaurants serving alcohol, the district court similarly found that the plaintiffs had standing to challenge that particular "sensitive place" regulation. *See Koons v. Platkin*, Civil No. 22-7464 (RMB/AMD), 2023 U.S. Dist. LEXIS 85235, 2023 WL 3478604, at *46 (D.N.J. May 16, 2023), *appeal filed*, 2023 WL 3478601 (June 9, 2023).

9. Although the State does not contest the Individual Plaintiffs' standing as to the other challenged provisions under § 134-A(a), the Individual Plaintiffs have standing to challenge those provisions for the same reason they have standing to challenge §§ 134-A(a)(4) and (a)(12).

like them."); 60(I) (same as to A. Wolford); 61(I) (same as to Kasprzycki).

The State argues Plaintiffs lack standing to challenge § 134-E because "property owners could prohibit firearms even if HRS § 134-E were enjoined, leaving Plaintiffs in the exact same position." [Mem. in Opp. at 19.] It also contends that, "because Plaintiffs 'fail[] to provide any statement . . . indicating that [they] will not seek permission before carrying in a private property,' they 'fail to establish an injury-in-fact.'" [*Id.* at 19 n.35 (alterations in original) (quoting *Frey v. Nigrelli*, 21 CV 05334 (NSR), 2023 U.S. Dist. LEXIS 42067, 2023 WL 2473375, at *9 (S.D.N.Y. Mar. 13, 2023)).[10]] The Individual Plaintiffs submitted supplemental declarations stating they have been to private businesses in the County of Maui while carrying a concealed firearm and would continue to frequent those businesses but for the threat of prosecution under § 134-E. *See* Reply, Exh 5 at PageID.1328-30 (Suppl. Decl. of Jason Wolford) at ¶¶ 3-4; *id.* at PageID.1331-33 (Suppl. Decl. of Alison Wolford) at ¶¶ 3-4; *id.* at PageID.1334-36 (Suppl. Decl. of Atom Kasprzycki) at ¶¶ 8-9.

The State's first argument is not persuasive because, although private businesses could prohibit firearms on their premises, some would not. Plaintiffs provide declarations from some business owners, each stating that the business owner has not displayed a sign allowing the public to carry firearms on the premises, but if § 134-E was no longer in effect, the business owner would allow

10. An appeal has been filed. *Frey v. Bruen*, No. 23-365 (2d Cir. Mar. 16, 2023).

the public to conceal-carry firearms on the premises. *See generally* Reply, Exh. 3 (collection of declarations from Maui business owners). The State's second argument also fails because the Individual Plaintiffs have proffered some evidence that, but for § 134-E, they would conceal-carry their firearms on private businesses' properties. Further, the Individual Plaintiffs' declarations imply that before § 134-E became effective they would not seek explicit permission from those businesses. Plaintiffs would conceal carry in businesses in their ordinary daily lives and were not faced with criminal penalty. Insofar as businesses did not display a sign prohibiting the carrying of firearms on their premises, the Individual Plaintiffs could conceal carry freely and the businesses would unlikely be aware that the Individual Plaintiffs were conceal carrying.

Accordingly, the Individual Plaintiffs have standing to challenge § 134-E. Because the Individual Plaintiffs have standing to pursue their challenges to §§ 134-A(a)(4), (a)(12), and 134-E, this Court does not address HFC's standing. *See Leonard v. Clark*, 12 F.3d 885, 888 (9th Cir. 1993) ("The general rule applicable to federal court suits with multiple plaintiffs is that once the court determines that one of the plaintiffs has standing, it need not decide the standing of the others." (citation omitted)).

B. Facial and As-Applied Challenges

Plaintiffs raise facial and as-applied challenges to the challenged provisions. *See, e.g.*, Complaint at ¶¶ 73-77. "A facial challenge is . . . a claim that the law or policy at issue is unconstitutional in all its applications." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127, 203 L. Ed.

2d 521 (2019). "[A] plaintiff can only succeed in a facial challenge by establish[ing] that no set of circumstances exists under which the Act would be valid, *i.e.*, that the law is unconstitutional in all of its applications." *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008) (some alterations in *Wash. State Grange*) (citation and internal quotation marks omitted).

> Facial challenges are disfavored for several reasons. Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004) (internal quotation marks and brackets omitted). Facial challenges also run contrary to the fundamental principle of judicial restraint that courts should neither "'anticipate a question of constitutional law in advance of the necessity of deciding it'" nor "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.'" *Ashwander v. TVA*, 297 U.S. 288, 346-347, 56 S. Ct. 466, 80 L. Ed. 688 (1936) (Brandeis, J., concurring) (quoting *Liverpool, New York & Philadelphia S.S. Co. v. Commissioners of Emigration*, 113 U.S. 33, 39, 5 S. Ct. 352, 28 L. Ed. 899 (1885)). Finally, facial challenges threaten to short circuit the democratic process by preventing laws embodying the will of the people from

> being implemented in a manner consistent with the Constitution. We must keep in mind that "'[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people.'" *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006) (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984) (plurality opinion)). . . .

Id. at 450-51 (some alterations in *Wash. State Grange*).

"An as-applied challenge, meanwhile, focuses on the statute's application to the plaintiff, and requires the court to only assess the circumstances of the case at hand." *Rodriguez Diaz v. Garland*, 53 F.4th 1189, 1203 (9th Cir. 2022) (citation and internal quotation marks omitted). "Facial and as-applied challenges differ in **the extent to** which the invalidity of a statute need be demonstrated." *Isaacson v. Horne*, 716 F.3d 1213, 1230 (9th Cir. 2013) (emphasis in *Isaacson*) (quotation marks and citation omitted). "While a successful challenge to the facial constitutionality of a law invalidates the law itself, a successful as-applied challenge invalidates only the particular application of the law." *Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1175 (9th Cir. 2018) (citation and internal quotation marks omitted).

Importantly, though, the Ninth Circuit has also stated:

> "[T]he distinction between facial and as-applied challenges is not so well defined that it has some

> automatic effect or that it must always control the pleadings and disposition in every case involving a constitutional challenge." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010). Instead, the distinction matters primarily as to the remedy appropriate if a constitutional violation is found. *Id.* The substantive legal tests used in facial and as-applied challenges are "invariant[.]" . . .

Isaacson, 716 F.3d at 1230 (some alterations in *Isaacson*).

III. Likelihood of Success on the Merits

"To establish a substantial likelihood of success on the merits, [a plaintiff] must show 'a fair chance of success.'" *In re Focus Media, Inc.*, 387 F.3d 1077, 1086 (9th Cir. 2004) (quoting *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (en banc)). This Court reviews each challenged provision in turn to determine whether Plaintiffs establish a likelihood of success on the merits on their respective facial and as-applied challenges.

A. Haw. Rev. Stat. § 134-A(a)(1) – Government Buildings and Adjacent Parking Areas

Plaintiffs request a TRO to enjoin the portion of § 134-A(a)(1) that prohibits people from carrying a firearm in parking areas adjacent to government buildings. *See* TRO Motion, Mem. in Supp. at 24. During the hearing for the TRO Motion, Plaintiffs' counsel clarified Plaintiffs'

challenge to § 134-A(a)(1). Plaintiffs' counsel stated that Plaintiffs were not seeking to enjoin the portion of § 134-A(a)(1) that covers all parking areas adjacent to government buildings. Instead, Plaintiffs seek to enjoin § 134-A(a)(1) insofar as it prohibits carrying firearms in the parking areas mentioned in their Complaint and parking areas similar to those listed areas.

Specifically, Plaintiffs challenge the following parking areas and/or parking areas similar to them: the parking area adjacent to Ace Hardware and Ross which shares a parking area with the County of Maui Department of Motor Vehicles ("Maui DMV"); *see* Complaint at ¶¶ 59(J)(i), 60(J)(i); *see also* Complaint, Exh. 5 (map depicting the parking area of Ace Hardware, Ross, and the Maui DMV); and the parking area adjacent to D.T. Fleming Beach Park in the County of Maui which shares a parking area with a county or State lifeguard building, *see* Complaint at ¶¶ 60(F)(vii), 61(G)(iv).[11] This Court therefore construes Plaintiffs' challenge as an as-applied challenge and not a facial challenge. In the hearing on the TRO Motion, counsel for the State maintained that the State's position concerning § 134-A(a)(1) is that the word "adjacent" in that provision related to parking areas means "parking areas that exclusively serve a particular place." It appears, then, that the State's position is that a parking area is adjacent to a government building if the parking area exclusively serves the government building. Section 134-A(a)(1) as

11. During the hearing on the TRO Motion, Plaintiffs' counsel also stated they are not challenging the prohibition of carrying firearms in parking areas that are reserved for government employees.

written does not stand for what the State now claims it does. The State, however, appears to concede that the parking areas adjacent to government buildings which are listed in the Complaint are not considered areas protected by § 134-A(a)(1).

Plaintiffs' challenge to § 134-A(a)(1) is much narrower than initially raised in the TRO Motion. In light of the parties' updated positions, this Court will only address the limited challenge to § 134-A(a)(1) insofar as it prohibits carrying firearms in parking areas adjacent to government buildings where the parking area: (1) does not exclusively serve the government building; (2) is not reserved for government employees, *i.e.*, non-government employees use the parking area; and (3) shares a parking area with a non-governmental building. Although the State appears to concede that some of Plaintiffs' challenged areas are not sensitive places – particularly the two parking areas listed in the Complaint – this Court must analyze the challenged areas, nonetheless, because Plaintiffs challenge portions of § 134-A(a)(1) as written.

This Court begins with determining whether the regulated conduct in the challenged portion of § 134-A(a)(1) is covered by the plain text of the Second Amendment. Section 134-A(a)(1) prohibits, in part, a person who is licensed to carry or possess a firearm from carrying or possessing a firearm in "parking areas" that are "owned, leased, or used by the State or a county" Haw. Rev. Stat. § 134-A(a)(1). To the extent that the challenged parking areas are shared with non-government buildings, do not exclusively serve the government building, and are not

reserved for government employees, they are generally public spaces.[12] It is clear, therefore, that the plain text of the Second Amendment covers the regulated conduct set forth in § 134-A(a)(1), as narrowly construed for the present challenge, because the Supreme Court has conclusively held that "[t]he Second Amendment's plain text . . . presumptively guarantees . . . a right to 'bear' arms in public for self-defense." *See Bruen*, 142 S. Ct. at 2135. The question, then, is whether the challenged parking areas are sensitive places such that the State may permissibly limit the general right to carry firearms publicly for self-defense.

Importantly, *Heller* and *Bruen* did not concern the issue of determining the legal bounds of "sensitive places." But more importantly, the parties are not in dispute as to the specific areas being challenged by Plaintiffs. That is, the parties agree that the specific parking areas that Plaintiffs seek to enjoin the State from enforcing its firearms ban are **not** sensitive places.

At this stage, the State fails to meet its burden in rebutting Plaintiffs' narrow challenge to § 134-A(a)(1). In fact, the State at oral argument conceded to Plaintiffs' position. For the sake of completeness, however, this Court addresses the State's lack of evidence. In its memorandum

12. Neither party explicitly addresses privately owned parking areas that are held open to the public. This Court does not address that issue here, but this Court's discussions regarding Haw. Rev. Stat. §§ 134-A(a)(4) and 134-E are applicable to privately owned parking areas that are held to the public. *See infra* Discussion Sections III.B, III.E.

in opposition, the State fails to cite to any historical evidence regarding possible analogues to restrictions on parking areas that some government buildings use (limited in scope to the aforementioned areas). This Court is "not obligated to sift the historical materials for evidence to sustain" the State's law. *See Bruen*, 142 S. Ct. at 2150. "That is [the State's] burden." *See id.* In lieu of historical analogues, the State cites in a footnote to a case from the Eastern District of Virginia for the proposition that some parking areas could or should be viewed as sensitive spaces because they are used by many people including children. *See* Mem. in Opp. at 18 n.33 (citing *United States v. Masciandaro*, 648 F. Supp. 2d 779, 790 (E.D. Va. 2009)).

Masciandaro, however, is not binding on this Court, is not relevant, and, in light of *Bruen*, is no longer good law. There, the district court conducted the now-rejected "means-end scrutiny" analysis and, as such, no historical analysis was properly conducted. *See Masciandaro*, 648 F. Supp. 2d at 789 (stating the challenged regulation survived strict scrutiny, intermediate scrutiny, or an undue burden analysis). Although the district court concluded that parking lots "are even more sensitive" because "parking lots are extensively regulated thoroughfares frequented by large numbers of strangers, including children," *see id.* at 790, the district court did not assess any evidence of historical analogues. The district court, of course, did not have the benefit of the *Bruen* analysis in informing its decision, and therefore the State's reliance on *Masciandaro* is unhelpful here.

Section 134-A(a)(1) does not differentiate between government parking areas. It is possible that a parking area adjacent to a post office is not a constitutionally protected sensitive place whereas the parking area adjacent to the State's legislative building is a constitutionally protected sensitive place. This Court makes no finding as to this possibility, but the State's concessions during the hearing on the TRO Motion show that the State understands this important distinction. Section 134-A(a)(1) in its current form does not reflect the State's now-held understanding.

Because the State fails to "justify" the portion of § 134-A(a)(1) that regulates the challenged government parking areas by "demonstrate[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation," it is likely that "the Constitution presumptively protects that conduct." *See Bruen*, 142 S. Ct. at 2125. Accordingly, Plaintiffs have a likelihood of success on the merits as to their as-applied challenge to § 134-A(a)(1); namely, the challenge to the portions of § 134-A(a)(1) that prohibit carrying firearms in parking areas owned, leased, or used by the State or county which share the parking area with non-governmental entities, are not reserved for State or county employees, and/or do not exclusively serve the State or county building.

This Court notes that this conclusion is, and should be, narrowly construed. The two parking areas listed in the Complaint, and similarly situated parking areas next to a government building, fall within the category of areas being challenged. The parking area shared by the Maui

DMV, Ace Hardware, and Ross meet at least some of these criteria because that parking area is shared with non-governmental entities. As to the parking area next to the lifeguard station at D.T. Fleming Beach Park, that parking area is also covered by some of these criteria because the parking area does not exclusively serve the lifeguard station; that is, members of the public also use that parking area when they go to the beach. To the extent that there are other parking areas adjacent to a government building that meet some of these challenged criteria, this Court does not address the State's argument that those areas are sensitive places under § 134-A(a)(1) because the State has not proffered evidence or cited any legal authority to support their contention.

B. Haw. Rev. Stat. § 134-A(a)(4) – Bars and Restaurants Serving Alcohol and Adjacent Parking Areas

Plaintiffs also seek a TRO to enjoin § 134-A(a)(4) in its entirety. *See* TRO Motion, Mem. in Supp. at 21-22. This Court therefore analyzes this challenge as a facial and as-applied challenge. Section 134-A(a)(4) prohibits a person with a license to carry a firearm from carrying a firearm in "[a]ny bar or restaurant serving alcohol or intoxicating liquor . . . for consumption on the premises, including adjacent parking areas[.]" The State argues Plaintiffs fail to satisfy their burden of showing that the plain text of the Second Amendment covers the conduct regulated in § 134-A(a)(4). *See* Mem. in Opp. at 7-8. The State is incorrect.

Appendix B

"The Second Amendment's plain text . . . presumptively guarantees . . . a right to bear arms **in public** for self-defense." *Bruen*, 142 S. Ct. at 2135 (emphasis added) (internal quotation marks omitted). In analyzing the text of the Second Amendment, the Supreme Court held that the "definition of 'bear' naturally encompasses **public** carry." *Id.* at 2134 (emphasis added). Because "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms[,]" *id.*, it follows that there is nothing in the Second Amendment's plain text that makes a distinction between public places. The Second Amendment's plain text, therefore, also naturally encompasses places that are generally held open to the public. To be sure, *Bruen* uniformly rejected the respondents' argument that a state is permitted "to condition handgun carrying in **areas frequented by the general public** on a showing of a nonspeculative need for armed self-defense in those areas." *See id.* at 2135 (emphasis added) (citation and internal quotation marks omitted); *see also id.* at 2148 ("[T]he surety laws [of the mide-19th century] did not **prohibit** public carry in **locations frequented by the general community**." (first emphasis in *Bruen*)). Put differently, for the respondents in *Bruen* to justify the regulation, they needed to show that prohibiting the carrying of firearms in areas frequented by the general public was consistent with this Nation's historical tradition. The Supreme Court held that they did not make such a showing.

While bars and restaurants are private businesses, they are generally held open to the public, *i.e.*, they

are frequented by the general public. Members of the public have a general invitation or license to enter those businesses' properties. That invitation or license is not absolute, of course, and may be revoked if, for example, an invitee or licensee is engaging in unlawful behavior or behavior that the business deems unacceptable. But, the general rule is that members of the public are welcome to enter those establishments. Thus, the conduct of carrying a firearm in a bar or restaurant that serves alcohol is covered by the plain text of the Second Amendment because those establishments are public to the extent that members of the public are invitees or licensees who may enter those establishments during business hours, unless their invitation or license is revoked.

Although not dispositive of the issue, this understanding of the word "public" also comports with the common use of the word "public" in this general context. *See Public*, Black's Law Dictionary (11th ed. 2019) ("Open or available for all to use, share, or enjoy."). The use of the word "public" or derivations of this word in some Hawai'i laws further illustrates this common understanding of the word. Hawaii's disorderly conduct law, for instance, includes businesses in its definition of "public place." *See* Haw. Rev. Stat. § 711-1101(1) ("A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person: (e) Impedes or obstructs, for the purpose of begging or soliciting alms, any person in any **public place**" (emphasis added)); Haw. Rev. Stat. § 711-1100 ("'**Public place**' means a place to which the public or a substantial

group of person has access and includes . . . **places of amusement or business**" (emphases added)).

Hawaii's law prohibiting discriminatory practices in public places incorporates a similar definition. *See* Haw. Rev. Stat. § 489-3 ("Unfair discriminatory practices that deny, or attempt to deny, a person the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of a **place of public accommodation** on the basis of race; sex, including gender identity or expression; sexual orientation; color; religion; ancestry; or disability, including the use of a service animal, are prohibited." (emphasis added)); Haw. Rev. Stat. § 489-2 ("'Place of public accommodation' means a **business** . . . of any kind whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the **general public** as customers, clients, or visitors" (emphases added)). So does Hawaii's laws governing intoxicating liquors. *See* Haw. Rev. Stat. § 281-1 ("'Public place' means any publicly owned property or **privately owned property open for public use or to which the public is invited for entertainment or business purposes**." (emphasis added)).

Some federal laws similarly classify private businesses held open to the public as public places. *See, e.g.*, 42 U.S.C. § 2000a(a)-(b) (statue prohibiting discrimination or segregation in places of public accommodations and including within "a place of public accommodation" "establishments which serve[] the public" whose "operations affect commerce"). In sum, based on a common understanding of the word "public," it is not controversial

for Second Amendment purposes to classify certain private businesses held open to the public – *e.g.*, bars and restaurants serving alcohol – as public places.

Indeed, some district courts have reached the same conclusion that certain locations (and specifically bars and restaurants serving alcohol) held open to the public are covered by the Second Amendment's right to bear arms in public. *See, e.g., Koons*, 2023 U.S. Dist. LEXIS 85235, 2023 WL 3478604, at *58 ("Plaintiffs' right to carry for self-defense in public naturally encompasses entry onto the property of another, **provided** that such property is held open to the public and entry is otherwise lawful." (emphasis in *Koons*)); *Antonyuk v. Hochul*, 1:22-CV-0986 (GTS/CFH), 639 F. Supp. 3d 232, 2022 U.S. Dist. LEXIS 201944, 2022 WL 16744700, at *71 (N.D.N.Y. Nov. 7, 2022) ("The Court finds that the Second Amendment's plain text covers the conduct in question (i.e., carrying a concealed handgun for self-defense in public in any establishment issued a license for on-premise consumption pursuant to . . . the alcoholic beverage control law where alcohol is consumed)" (first alteration in *Antonyuk*) (internal quotation marks omitted)), *stayed*, 2022 U.S. App. LEXIS 36240, 2022 WL 18228317 (2d Cir. Dec. 7, 2022).

It is important to note, however, that this conclusion is not without caveats. The right to bear arms in public is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *See Bruen*, 142 S. Ct. at 2128 (quotation marks and citation omitted). In cases where a business revokes a licensee or invitee's permission to enter the business's property,

the business is no longer a public place to that licensee or invitee. The licensee or invitee's conduct would not be covered by the Second Amendment's plain text in such a scenario. Similarly, if a business is closed or otherwise restricts access to the public, the business would not be considered to be held open to the public. This Court's conclusion is narrow; it only concludes that, to the extent that the conduct regulated by § 134-A(a)(4) is covered by the plain text of the Second Amendment, Plaintiffs have met their burden.

Because the plain text of the Second Amendment covers Plaintiffs' conduct of carrying a firearm in a bar or restaurant that serves alcohol, it is presumptively protected under the Constitution. The burden shifts to the State to justify its regulation by showing that such a regulation is consistent with this Nation's historical tradition of firearm regulation. The State attempts to establish § 134-A(a)(4)'s constitutionality by citing to "[a] 1746 New Jersey law prohibit[ing] the selling of 'any strong Liquor' to members of the militia[.]" [Mem. in Opp. at 8 (quoting Mem in Opp., Decl. of Nicholas M. McLean ("McLean Decl."), Exh. 2 (1746 N.J. Laws 301-12 (An Act for better settling and regulating the Militia of this Colony of New Jersey, for the Repelling Invasions, and Suppressing Insurrections and Rebellions, ch. 84)) at § 26).]

That law is not relevant here because it restricted militia members from being sold strong liquors. Such a law may be important to ensure militia members are not intoxicated for the protection and security of the state,

but it does not implicate the general public's right to bear arms. Prohibiting militia members from being sold certain types of alcohol is not closely analogous to restricting all individuals who are licensed to publicly carry a firearm from entering a bar or restaurant serving alcohol.

The State also cites to a 1756 Delaware law and a 1756 Maryland law that similarly restricted either militia officers from meeting near an inn or tavern, or militia members from being intoxicated on "any Muster-day." *See id.* at 8-9 (citing McClean Decl., Exh. 3 (An Act for establishing a Militia in this Government (Delaware, 1756), *reprinted in* The Selective Serv. Sys., 2 Backgrounds of Selective Service(Arthur Vollmer, ed. 1947)), pt. 3 at 10-15, Exh. 4 (An Act for Regulating the Militia of the Province of Maryland (1756), *reprinted in* The Selective Serv. Sys., 2 Backgrounds of Selective Service (Arthur Vollmer, ed. 1947)), pt. 5 at 83-108). Those laws are also unpersuasive in finding that there was a national historical tradition of prohibiting members of the public – rather than members of the militia – from public carrying in places serving alcohol.

The same principle holds true for the State's reliance on a 1780 Pennsylvania law that prohibited non-commissioned officers or privates from "parading drunk" and militia companies or battalions from meeting at taverns on days of military exercises. *See id.* at 9 (citing McLean Decl., Exh. 5 (An Act for the Regulation of the Militia of the Commonwealth of Pennsylvania (1780), ch. 902), § 45 (§ 57, P.L.); § 48 (§ 60, P.L.), 12th rule, *reprinted in* The Selective Serv. Sys., 2 Backgrounds of Selective

Service (Arthur Vollmer, ed. 1947), pt. 11 at 75-104). Other citations to similar militia laws also fail for the same reason. *See id.* at 9 n.13.

The State further cites multiple laws from the mid- to late-19th century that regulated firearm possession by intoxicated individuals. *See id.* at 9 n.14. For instance, an 1867 Kansas law prohibited "any person under the influence of intoxicating drink" from "carrying on his person a pistol . . . or other deadly weapon" [McLean Decl., Exh. 14 (An Act to prevent the carrying of Deadly Weapons, ch. 12) at § 1).] An 1883 Missouri law also prohibited any person from carrying a firearm or other deadly weapon "when intoxicated or under the influence of intoxicating drinks." [*Id.*, Exh. 15 (An Act to amend section 1274, article 2, chapter 24 of the Revised Statutes of Missouri, entitled "Of Crimes and Criminal Procedure") at § 1.[13]] An 1883 Wisconsin law made it "unlawful for any person in a state of intoxication, to go armed with any pistol or revolver." [*Id.*, Exh. 16 (1883 Wis. Sess. Laws 290 (An Act to prohibit the use and sale of pistols and revolvers), ch. 329) at § 3.]

Although this Court declines to make a finding as to whether those laws conclusively establish a national historical tradition of regulating intoxicated individuals from carrying firearms, even if such a conclusion were assumed, § 134-A(a)(4) is broader than those laws. Section

13. This Act also prohibited the concealed carrying of firearms as well as carrying firearms in churches, schools, an election precinct on election day, courtrooms during court sessions, among other prohibitions.

134-A(a)(4) prohibits people from carrying firearms in bars and restaurants that **serve alcohol**. It includes individuals carrying in those establishments regardless of whether they are **consuming** alcohol. The historical laws cited by the State do not reach as far as § 134-A(a)(4). Those laws, therefore, do not show a national historical tradition of regulating people from carrying firearms in establishments serving alcohol irrespective of whether the individual carrying is consuming alcohol. For that reason, reliance on those laws is unpersuasive to support the restriction set forth in § 134-A(a)(4).

The State also relies on a few laws prohibiting people from carrying firearms where alcohol is sold. An 1853 New Mexico law, for instance, prohibited people from carrying firearms in a "Ball or Fandango" and "room adjoining said ball where Liquors are sold" [McLean Decl., Exh. 19 (1853 N.M. Laws 67-69 (An Act Prohibiting the carrying of a certain class of Arms, within the Settlements and in Balls)) at § 3).] An 1879 New Orleans city ordinance made it unlawful "for any person to carry a dangerous weapon, concealed or otherwise, into any . . . tavern" [*Id.*, Exh. 20 (1879 New Orleans, La., Gen. Ordinances (Concealed weapons or otherwise in balls or theatres), tit. I, ch. 1, art. 1, *reprinted in* Jewell's Digest of the City Ordinances Together with the Constitutional Provisions, Act of the General Assembly and Decisions of the Courts Relative to Government of the City of New Orleans (Edwin L. Jewell, ed., New Orleans, L. Graham & Son 1882)) at 1-2.] An 1890 Oklahoma law made it unlawful for a person to carry a firearm into "any place where intoxicating liquors are sold" [*Id.*, Exh. 17 (1890 Okla. Sess. Laws. at 495-96,

ch. 25, art. 47 (Concealed Weapons)) at § 7.[14]] These legal restrictions focus on the availability or access to alcohol or intoxicating liquor (not the consumption) and therefore they are comparable to the statute at issue.

Courts have been cautioned that "the bare existence of [some] localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry." *See Bruen*, 142 S. Ct. at 2154. This Court therefore does not give much weight to the State's reliance on the 1879 New Orleans city ordinance, which only represents one city ordinance and was enacted after the ratification of the Fourteenth Amendment. In assessing the 1853 New Mexico law and the 1890 Oklahoma law here, this Court notes *Bruen*'s warning against giving such western territorial laws too much weight because, at the time of the 1890 census, "Arizona, Idaho, **New Mexico, Oklahoma**, and Wyoming combined to account for only 420,000 of [the roughly 62 million people living in the United States at the time]—about two-thirds of 1% of the population." *See id.* (emphases added) (citation omitted).

This is confounding. On one hand, *Bruen* emphasizes the need to sift through historical evidence to assess the tradition of firearm regulations. On the other, *Bruen* seems to dismiss any law enacted unless it was done in a state where a significant percentage of the people – insofar

14. This Act also prohibited the concealed carrying of firearms in addition to prohibiting carrying firearms in sensitive areas such as churches, schools, political conventions, public assemblies, and other areas.

as they counted as living in the United States – resided at the time that the Fourteenth Amendment was enacted.[15] This is also a curious way of evaluating the weight of territorial laws. Where did the people in the territories, other than the native people who were not counted in the census, come from? Some were foreigners but many were American citizens seeking the opportunity to own land. *See, e.g.*, the Homestead Act of 1862, ch. 75, 12 Stat. 392 (codified at 43 U.S.C. §§ 161-284) (repealed 1976).

The word "tradition" is defined as "an inherited, established, or customary pattern of thought, action, or behavior (such as a religious practice or a social custom)." *Tradition*, Merriam-Webster.com, https://www.merriam-webster.com/dictionary/tradition (last visited Aug. 8, 2023). Should this Court consider territorial laws as reflecting the "Nation's historical tradition" because many of the people who moved to the territories came from the states and brought traditional thoughts and ways – legal governance, marriage, agricultural practices, and the like – and enacted laws in the territories reflecting those traditions? That is, where New Mexico, Oklahoma, and New Orleans enacted similar prohibitions, does that reflect the national attitude at that time? Laws restricting the carrying of firearms have been described by some legal scholars as being "widely enacted" by 1867. *See, e.g.*, Robert J. Spitzer, *Gun Law History in the United States*

15. For instance, Native Americans were not counted as part of the census until the Census Act of 1879. *See Censuses of American Indians*, U.S. Census Bureau https://www.census.gov/history/www/genealogy/decennial_census_records/censuses_of_american_indians.html (last visited Aug. 8, 2023).

and Second Amendment Rights, 80 L. & Contemp. Probs. 55, 63-64 (2017). If there is evidence of such laws being widely enacted, although in territories rather than states, is the Court necessarily compelled to discount these laws because the majority national population resided in the states and not in the territories? *Bruen* leaves these questions unanswered.

At this point in the matter before this Court, the State has offered few relevant laws and, therefore, this Court cannot conclude on the current record that the State has met its burden in establishing that § 134-A(a)(4) is consistent with this Nation's historical tradition of gun regulation. That is, the State has failed to show there is a national historical tradition of prohibiting individuals from carrying firearms in bars and restaurants that serve alcohol and their adjacent parking areas. Accordingly, and based solely on the evidence presented at this point, Plaintiffs are likely to succeed on the merits of their facial and as-applied challenge to § 134-A(a)(4).

C. Haw. Rev. Stat. § 134-A(a)(9) – Beaches, Parks, and Adjacent Parking Areas

Plaintiffs request a TRO to enjoin the portions of § 134-A(a)(9) that prohibit carrying firearms at any beach, park, and adjacent parking area. *See* TRO Motion, Mem. in Supp. at 19. The State first argues that the conduct of carrying a firearm at beaches and parks is not covered by the plain text of the Second Amendment. *See* Mem. in Opp. at 10. The Court rejects the State's argument because beaches and parks in Hawai'i are public areas owned by

the State. *See, e.g.*, Haw. Rev. Stat. § 115-1 ("The purpose of this chapter is to guarantee the right of **public access** to the sea, shorelines, and inland recreational areas" (emphasis added)). Because beaches, parks, and their adjacent parking areas are public areas, the carrying of firearms in those areas is covered by the plain text of the Second Amendment. The burden shifts to the State to offer evidence that § 134-A(a)(9) is consistent with this Nation's historical tradition of gun regulation.

The State contends that, because it owns public parks and beaches, its "role as proprietor weighs in favor of upholding a regulation." [Mem. in Opp. at 11.] The State cites *Nordyke v. King*, 681 F.3d 1041 (9th Cir. 2012) (en banc), to support its contention, but that case is inapposite. That case concerned an exception to a city ordinance that prohibited the carrying and possession of firearms on county property. *See Nordyke*, 681 F.3d at 1044. At issue was an exception to the general prohibition, which allowed the possession of a firearm on country property by an authorized participant of an event such as a gun show provided that, when an authorized participant was not in actual possession of the firearm, the firearm was secured. *See id.* The plaintiffs challenged the exception on Second Amendment grounds, but the Ninth Circuit held that the ordinance was constitutional because it "regulates the sale of firearms at Plaintiffs' gun shows only minimally, and only on County property." *Id.* It further held that the plaintiffs could not succeed on their claim "no matter what form of scrutiny applies to Second Amendment claims." *Id.* at 1045. The Ninth Circuit in *Nordyke*, however, predates *Bruen* and thus could not apply *Bruen*'s holding that the

Second Amendment protects the right to bear arms **in public**. This Court therefore cannot apply *Nordyke*'s reasoning to the instant case.

The State asks this Court to make the distinction "'between the government exercising the power to regulate or license, as lawmaker, and the government acting as proprietor, to manage its internal operation.'" [Mem. in Opp. at 11 (quoting *Nordyke*, 681 F.3d at 1045 (cleaned up)).] The State makes this distinction to argue that it may regulate conduct on its property when it is acting as a proprietor. *See id.* at 11 n.17 (citations omitted). This distinction in a post-*Bruen* world makes no difference. What matters at the first step of the inquiry is whether the regulated conduct is covered by the Second Amendment's plain text.

Relevant here, the determinative issue at the first step is whether the conduct concerns the public carrying of firearms irrespective of the proprietary interest the government possesses. 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.

Next, the State argues "the nature of public parks and beaches clearly demonstrates that they are sensitive locations" because "[c]hildren and families congregate at parks and beaches" and "[p]arks and beaches often host crowded gatherings, like concerts, fairs, competitions, and cultural exhibitions, and they are places where important expressive activities occur." [Mem. in Opp. at 11-12 (footnotes omitted).] It is beyond question that: children and families congregate at beaches and parks in Hawai'i; beaches and parks are integral and highly valued in Hawaiian culture; and beaches and parks are critical components of Hawaii's economy. Alas, these considerations by themselves do not matter under the *Bruen* analysis. The Supreme Court recognizes that firearms can be prohibited in "sensitive places" consistent with the Second Amendment. *See Bruen* 142 S. Ct. at 2133 (recognizing undisputed lawfulness of prohibitions in places such as legislatures, polling places, courthouse, schools, and government buildings). But, for firearms to be prohibited in parks and beaches consistent with the Second Amendment, the State must come forth with "analogies to those historical regulations of 'sensitive places'" so this Court can "determine [whether] modern regulations prohibiting the carry of firearms in **new** and analogous sensitive places are constitutionally permissible." *See id.* (emphasis in *Bruen*). The record is absent of analogies to historical "sensitive places" for parks and beaches.

The State does not provide any evidence that this Nation has a historical tradition of regulating or prohibiting the carrying of firearms on beaches. Instead, it appears to analogize gun regulations regarding beaches with gun

regulations regarding parks. Fair enough, this Court will therefore consider the issue of beaches and parks as operating under the same analysis. The State begins with the proposition that "[t]here were no modern-style parks in the era of the Second Amendment." *See* Mem. in Opp., Expert Decl. of Saul Cornell ("Cornell Decl.") at ¶ 55;[16] *see also id.* at ¶ 56 ("The creation of parks as we now know them began in the middle of the nineteenth century "). Plaintiffs, however, point to reports that the Boston Common, established in 1634, served as a site for informal socialization, recreation, sports, entertainment, and celebrations. *See* TRO Motion, Mem. in Supp. at 19 (quoting Anne Beamish, *Before Parks: Public Landscapes in Seventeenth- and Eighteenth-Century Boston, New York, and Philadelphia*, 40 Landscape J. 1, 4-6 (2021)). They further argue the City Hall Park in New York City "began as a 'public common' in the 17th century," and "New York's Bowling Green Park was established 'for the Recreation & Delight of the Inhabitants of [New York] City' in 1733." *Id.* at 19-20 (alteration by Plaintiffs) (quoting *The Earliest New York City Parks*, N. Y. City Dep't. of Parks and Recreation, available at https://on.nyc.gov/3hBZXfe (last visited June 23, 2022)).

The question becomes whether parks at the ratification of the Second Amendment were sufficiently similar to today's parks. If so, then an assessment must be made as to whether, at the time of the Second Amendment's ratification, guns were regulated in a similar manner as

16. Saul Cornell is "the Paul and Diane Guenther Chair in American History at Fordham University." [Cornell Decl. at ¶ 3.]

the State's gun regulation concerning parks. The State appears to argue that parks, as we view them today, did not become common place until around 1850 and, therefore, the relevant historical period to scrutinize in determining the historical tradition of gun regulation involving parks should begin in 1850. This Court addresses each scenario; namely, it addresses whether there is a historical tradition of gun regulation, at the time of the Second Amendment's ratification, limiting public carry at parks when parks are (1) viewed similarly with modern parks or (2) not viewed similarly with modern parks. Under either scenario, however, the State fails to meet its burden.

If, during the time of the Second Amendment's ratification, parks were sufficiently analogous to parks today, as Plaintiffs contend, then the State has not proffered evidence that there was a historical tradition of prohibiting the carrying of firearms in parks. Plaintiffs have proffered some evidence that shows some cities in the 1700's had some form of a public park. Because the State has not presented any evidence, it has not met its burden. *See Koons*, 2023 U.S. Dist. LEXIS 85235, 2023 WL 3478604, at *83 ("Despite the existence of such common lands since the colonial period, the State has failed to come forward with any laws from the 18th century that prohibited firearms in areas that today would be considered parks.").

If, during the time of the Second Amendment's ratification, parks were not sufficiently analogous to modern parks, as the State argues, then it urges this Court to consider the gun laws around the mid-19th

century – when parks became more akin to modern parks – to determine whether § 134-A(a)(9) is consistent with those laws. The State's position is misplaced. The test in *Bruen* does not direct courts to look at when a historical place became akin to the modern place being regulated. Rather, the focus is on "determining whether a historical **regulation** is a proper analogue for a distinctly modern firearm **regulation**" which "requires a determination of whether two **regulations** are relevantly similar." *See Bruen*, 142 S. Ct. at 2132 (emphases added) (citation and internal quotation marks omitted). The distinction is subtle, yet materially significant. *See, e.g., id.* at 2133 ("[W]hether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified are central considerations when engaging in an analogical inquiry." (emphasis, citation, and internal quotation marks omitted)).

As such, the inquiry must start with comparing the challenged regulation and a historical analogue that is relevantly similar, if one exists. For purposes of the TRO Motion, the Court finds that parks around 1791 were not comparable to modern parks. The States' burden is thus to demonstrate a historical tradition of gun regulation prohibiting the carrying of firearms in public spaces that were relevantly similar to parks. The State relies on: an 1858 ordinance adopted by the Board of Commissioners of New York's Central Park prohibiting people from carrying firearms within the park; an 1866 ordinance adopted by the Commissioners of Prospect Park in the City of Brooklyn with a similar prohibition as the 1858

ordinance; and an 1868 Pennsylvania law prohibiting people from carrying firearms or shooting birds in Fairmount Park in Philadelphia. *See* McLean Decl., Exhs. 21 (1858 N.Y.C., N.Y. *in* Minutes of Proceedings of the Board of Commissioners of the Central Park for the Year ending April 30, 1958, (New York, Wm. C. Bryant & Co. 1858)) at 166-68, 22 (1873 Brooklyn, N.Y., Park Ordinances (Ordinance No. 1), *reprinted in* Annual Reports of the Brooklyn Park Commissioners 1861-1873 (1873) at 136, art. 1) at § 4, 23 (1868 Pa. Laws 1083-90 (A Supplement to an act entitled "An Act appropriating ground for public purposes in the City of Philadelphia"), pt. II) at § 21.

The 1858 and 1866 ordinances were local ordinances, not state laws, passed by the respective board of commissioners, both within New York. Local ordinances reflect the citizenry's values in the most basic and essential way. Moreover, since the parks were under local — not state — governance, it is not surprising that state laws were silent about permissible conduct in the parks. The two ordinances were enacted by one of the most populous states at the time, but the two ordinances reflect only New York's historical tradition of gun regulations. Taking these ordinances into account along with the 1868 Pennsylvania law, the State's evidence establishes that, at the time of the Fourteenth Amendment's ratification in 1868, only about 4% of this Nation had a historical tradition of prohibiting carrying firearms in parks.[17] Even if the laws established

17. The population of the United States was 31,443,321 in 1860 with New York's population reported as 3,880,735 and Pennsylvania's population reported as 2,906,215. *See* U.S. Census Bureau, https://www2.census.gov/library/publications/decennial/1900/volume-1/volume-1-p2.pdf (last visited Aug. 8, 2023), at Table VII (Population

a tradition of regulating carrying firearms in certain parks in Pennsylvania and New York, this Court cannot conclude that these laws sufficiently establish this Nation's historical tradition of gun regulation in parks by 1868.

Finally, the State cites numerous local ordinances that regulated firearms in parks, but those ordinances are from 1872 through 1886. *See* Mem. in Opp. at 15 (citations omitted). Because those local ordinances were passed after the Fourteenth Amendment's ratification in 1868, the Court is constrained in considering them as to the Nation's historical tradition of gun regulation at the time of either the Second Amendment's ratification or the Fourteenth Amendment's ratification. *See Bruen*, 142 S. Ct. at 2136 ("[W]e must also guard against giving postenactment history more weight than it can rightly bear.").[18]

The State further contends "[t]here is a robust historical tradition of restricting guns in places like parks and beaches." [Mem. in Opp. at 14.] It relies on a recent District of Maryland case, *Maryland Shall*

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of states and territories, arranged geographically: 1790 to 1900), pg. xxii.

18. The Supreme Court in *Bruen* "avoid[ed] another ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the Fourteenth Amendment was ratified in 1868 or when the Bill of Rights was ratified in 1791." 142 S. Ct. at 2163 (Barrett, J., concurring) (citation and internal quotation marks omitted). Regardless of that debate, the reliance on local ordinances that were enacted **after the ratification** of the Fourteenth Amendment cannot sufficiently assist in determining the prevailing understanding of the right to bear arms in public **at the time of ratification**.

Issue, Inc. v. Montgomery County, ___ F. Supp. 3d ___, Civil Action No. TDC-21-1736, 2023 U.S. Dist. LEXIS 117902, 2023 WL 4373260 (D. Md. July 6, 2023),[19] to support its position. There, the district court found that the plaintiffs were not likely to succeed on the merits of their challenge to a Maryland regulation prohibiting the carrying of firearms at public parks, recreational facilities, and multipurpose exhibition facilities. *See Md. Shall Issue*, 2023 U.S. Dist. LEXIS 117902, 2023 WL 4373260, at *12. After reviewing some historical laws, the district court concluded that those laws "demonstrate that there is 'historical precedent' from before, during, and after the ratification of the Fourteenth Amendment that 'evinces a comparable tradition of regulation' of firearms in parks." 2023 U.S. Dist. LEXIS 117902, [WL] at *11 (quoting *Bruen*, 142 S. Ct. at 2131-32). To the extent that the State relies on *Maryland Shall Issue* to support § 134-A(a)(9)'s restriction on publicly carrying firearms in parks and on beaches, this Court respectfully disagrees with that district court's finding that the laws it reviewed demonstrate a national historical tradition of prohibiting carrying firearms in parks.

The district court there relied on the following laws and ordinances:

> an **1857 ordinance** stating that "[a]ll persons are forbidden . . . [t]o carry firearms or to throw stones or other missiles" within Central Park

19. An appeal has been filed. *Md. Shall Issue*, No. 23-1719 (4th Cir. July 10, 2023).

in New York City, *see* First Annual Report on the Improvement of the Central Park, New York at 106 (1857); an **1870 law** enacted by the Commonwealth of Pennsylvania stating that "[n]o persons shall carry fire-arms" in Fairmount Park in Philadelphia, Pennsylvania, *see* Acts of Assembly Relating to Fairmount Park at 18, § 21.II (1870); an **1895 Michigan state law** providing that "No person shall fire or discharge any gun or pistol or carry firearms, or throw stones or other missiles" within a park in the City of Detroit, *see* 1895 Mich. Local Acts at 596, § 44; and a **1905 ordinance** in Chicago, Illinois stating that "all persons are forbidden to carry firearms or to throw stones or other missiles within any of the Parks . . . of the City," 1905 Chi. Revised Mun. Code, ch. XLV, art. I, § 1562. Similar restrictions were enacted to bar the carrying of firearms in (I) Saint Paul, Minnesota, *see* Annual Reports of the City Officers and City Boards of the City of Saint Paul at 689 (**1888**); (2) Williamsport, Pennsylvania, *see* **1891** Williamsport, Pa. Laws and Ordinances at 141, § 1; (3) Wilmington, Delaware, *see* **1893** Wilmington, Del. Charter, Part VII, § 7; (4) Reading, Pennsylvania, *see* A Digest of the Laws and Ordinances for the Government of the Municipal Corporation of the City of Reading, Pennsylvania at 240, § 20(8) (**1897**); (5) Boulder, Colorado, *see* **1899** Boulder, Colo. Revised Ordinances at 157, § 511; (6) Trenton, New Jersey, *see* **1903**

> Trenton, N.J. Charter and Ordinances at 390; (7) Phoenixville, Pennsylvania, *see* A Digest of the Ordinances of Town Council of the Borough of Phoenixville at 135, § 1 (**1906**); (8) Oakland, California, *see* **1909** Oakland, Cal. Gen. Mun. Ordinances at 15, § 9; (9) Staunton, Virginia, *see* **1910** Staunton, Va. Code, ch. II, § 135; and (10) Birmingham, Alabama, *see* **1917** Birmingham, Ala. Code, ch. XLIV, § 1544.
>
> On a state level, in **1905**, Minnesota prohibited the possession of firearms within state parks unless they were unloaded and sealed by a park commissioner. 1905 Minn. Laws, ch. 344, § 53. In **1917**, Wisconsin prohibited bringing a "gun or rifle" into any "wild life refuge, state park, or state fish hatchery lands" unless it was unloaded and in a carrying case. 1917 Wis. Sess. Laws, ch. 668, § 29.57(4). In **1921**, North Carolina enacted a law prohibiting the carrying of firearms in both private and public parks without the permission of the owner or manager of that park. *See* 1921 N.C. Sess. Laws 53-54, Pub. Laws Extra Sess., ch. 6, §§ 1, 3.

Md. Shall Issue, 2023 U.S. Dist. LEXIS 117902, 2023 WL 4373260, at *11 (alterations in *Md. Shall Issue*) (emphases added) (some citations omitted).

In finding that the cited laws demonstrated a national historical tradition of carrying firearms in parks, the district court relied on only one local ordinance that was in effect prior to the Fourteenth Amendment's ratification.

The other sixteen laws or ordinances were passed after the Fourteenth Amendment's ratification, and nine of those laws were passed in the twentieth century. Of the sixteen laws and ordinances passed after the Fourteenth Amendment's ratification, fifteen of those were passed **at least** twenty years after the Fourteenth Amendment's ratification.

Put another way: out of the seventeen laws the district court reviewed, only one local ordinance was enacted before the Fourteenth Amendment's ratification and only one state law was enacted "during" the time of the Fourteenth Amendment's ratification.[20] This Court is not convinced that evidence of one local ordinance and one state law is sufficient to find that there was a national historical tradition of prohibiting the carrying of firearms in parks at the time of the Fourteenth Amendment's ratification. As to the other fifteen laws passed at least twenty years after the Fourteenth Amendment's ratification, this Court is constrained from placing too much "weight" on "postenactment history" given *Bruen*'s directive to determine whether the modern prohibition against the carrying of firearms has a historical analogue that was clearly established at either the Second Amendment's ratification or the Fourteenth Amendment's ratification. *See Bruen*, 142 S. Ct. at 2136.

Additionally, the ten most populated cities reviewed by the district court — New York City, Chicago,

20. The 1870 Commonwealth of Pennsylvania law was enacted around two years after the Fourteenth Amendment's ratification, but this Court will consider the enactment as "during" the Fourteenth Amendment's ratification for the sake of argument.

Philadelphia, Detroit, St. Paul, Wilmington, Trenton, Oakland, Birmingham, and Williamsport — amounted to roughly 9.3% of the total population of the United States in 1900.[21] *See* U.S. Census Bureau, https://www2.census.gov/library/publications/decennial/1900/volume-1/volume-1-p2.pdf (last visited Aug. 8, 2023), at Table XXII (Population of cities having 25,000 inhabitants or more in 1900, arranged according to population: 1880 to 1900), pgs. lxix—lxx. This is certainly more than 4%, but what percentage that must be reached to find national representation and whether the general population of the United States must be considered when, presumably, there were at least some states, cities, or counties that did not have parks at the time are inquiries not considered in *Bruen*. Based on the record before it, this Court cannot find that the laws and ordinances cited in *Maryland Shall Issue*, which covered, at most, less than ten percent of the United States' population, are sufficient to restrict this Nation's history and tradition of an individual's right to carry firearms in public.[22] The State's reliance on *Maryland Shall Issue* is therefore unpersuasive.

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21. Although some of the ordinances or laws were enacted before or after 1900, this Court uses 1900 as a general time period to illustrate that these laws and ordinances did not reflect the state of the law applicable to the vast majority of the Nation.

22. This Court is wary about calculating the percentage of states' populations and it does not think comparing percentages is dispositive. This Court also does not make a finding as to what percentage of the Nation's population is needed to be under similar regulations to find a historical tradition, but less than ten percent is likely too low of a percentage to represent the Nation's population as a whole.

The State fails to meet its burden to show that there is a national historical tradition prohibiting carrying firearms in parks. Because the State argues beaches are analogous to parks to support its restriction on beaches, the State also fails to meet its burden showing that there is a national historical tradition prohibiting carrying firearms on beaches. Finally, the State does not provide any evidence that prohibiting carrying firearms in parking areas adjacent to parks and beaches is consistent with this Nation's history and tradition of gun regulation. Accordingly, Plaintiffs are likely to succeed on the merits of their facial and as-applied challenge to the portions of § 134-A(a)(9) that prohibit carrying firearms at beaches, parks, and their adjacent parking areas. *See Koons*, 2023 U.S. Dist. LEXIS 85235, 2023 WL 3478604, at *85 ("Plaintiffs have thus established a reasonable likelihood of success on their Second Amendment challenge to Chapter 131's prohibition on handguns at parks, beaches, and recreation areas, as well as the state regulation banning handguns at state parks."); *Antonyuk*, 2022 U.S. Dist. LEXIS 201944, 2022 WL 16744700, at *67 (similar finding).

D. Haw. Rev. Stat. § 134-A(a)(12) – Banks, Financial Institutions, and Adjacent Parking Areas

Plaintiffs also request a TRO to enjoin § 134-A(a)(12) in its entirety. *See* TRO Motion, Mem. in Supp. at 23. That provision prohibits carrying a firearm on "[t]he premises of any bank or financial institution . . ., including adjacent parking areas[.]" Haw. Rev. Stat. § 134-A(a)(12).

The State argues "banks and financial institutions plainly are sensitive locations where carrying firearms may be restricted[,]" in part because "[a]s the Hawai'i Bankers Association testified during legislative hearings on Act 52, 'the elevated risk of danger in bank crimes that involve firearms' means that 'it makes good policy sense and is appropriate to restrict firearms on bank premises.'" [Mem. in Opp. at 16 (citation omitted).] Bankers may raise good policy concerns related to allowing guns in their businesses, but policy concerns like these, by themselves, are irrelevant under *Bruen* when state restrictions on carrying firearms are under consideration. Policy concerns might be relevant insofar as they help the government "identify a well-established and representative historical analogue" to the regulation at issue. *Bruen*, 142 S. Ct. at 2133 (emphasis omitted). The State, however, does not argue how these policy concerns negate the Second Amendment's plain text. As with § 134-A(a)(4) — the provision prohibiting carrying firearms in restaurants and bars serving alcohol — the plain text of the Second Amendment covers carrying firearms in banks because they are held open to the public. *See supra* Discussion Section III.B. Thus, insofar as banks are held open to the public and do not revoke the general license or invitation to enter, they are public places for purposes of the Second Amendment. The onus is on the State to rebut the presumption that carrying firearms in banks is constitutionally protected conduct.

In *Bruen*, the Supreme Court stated:

> The test that we set forth in *Heller* and apply today requires courts to assess whether

> modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, **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**. . . .

142 S. Ct. at 2131 (emphasis added). Here, the inquiry is "fairly straightforward" because banks and firearms existed at the time of the Second Amendment's ratification. Plaintiffs point to a few banks that existed around the time of the founding. *See* TRO Motion, Mem. in Supp. at 23 (citing Todd Wallack, *Which bank is the oldest? Accounts vary*, The Boston Globe (Dec. 20, 2011, 12:00 AM), https://www.bostonglobe.com/business/2011/12/20/oldest-bank-america-accounts-vary/WAqvIlmipfFhyKsx8bhgAJ/story.html). The State does not challenge Plaintiffs' contention. It is likely that "the elevated risk of danger in bank crimes that involve firearms" has persisted since 1791. *See* Mem. in Opp. at 16 (quotation marks and citation omitted). The State's lack of evidence regarding regulations prohibiting carrying firearms in banks is telling and suggests "that the challenged regulation is inconsistent with the Second Amendment." *See Bruen*, 142 S. Ct. at 2131. The State also does not make any argument that this Court should analogize to different historical regulations because banks at the time of the Second Amendment's ratification are substantially different than

modern banks. Without more, the State has not met its burden.

Despite the existence of banks and firearms at the time of the Second Amendment's ratification, the State urges this Court to consider historical evidence that purportedly shows a tradition of prohibiting the carrying of firearms in fairs and markets. *See* Mem. in Opp. at 17 (citations omitted). Because the State does not establish that prohibiting the carrying of firearms in banks or financial institutions is a "modern regulation[] that w[as] unimaginable at the founding," *see Bruen*, 142 S. Ct. at 2132, this Court need not consider whether § 134-A(a)(12) is "relevantly similar" to a historical analogue, *see id.* (quotation marks and citation omitted). Yet, for the sake of completeness, this Court addresses the State's reliance on historical regulations that it contends is relevantly similar to § 134-A(a)(12).

The State cites a case from the Southern District of New York, *Frey*, 2023 U.S. Dist. LEXIS 42067, 2023 WL 2473375, to support its position that there is "a long historical tradition of prohibiting firearms in sensitive commercial centers." *See* Mem. in Opp. at 17. Relevant to the State's reliance on *Frey*, the district court there considered whether a regulation prohibiting carrying firearms in the Time Square area was constitutional under the Second Amendment. *See* 2023 U.S. Dist. LEXIS 42067, 2023 WL 2473375, at *16-17. In finding that the plaintiffs did not establish a substantial likelihood of success on the merits to challenge the regulation, the district court relied in part on a 1786 Virginia law and a 1792 North

Carolina law which "contain[ed] a 'fairs' and 'markets' prohibition . . . ." *See* 2023 U.S. Dist. LEXIS 42067, [WL] at *16. The district court noted that it was persuaded with the defendants' argument that the regulation was "in line with the historical tradition of banning firearms in locations where **large groups of people congregated for commercial, social, and cultural activities**." 2023 U.S. Dist. LEXIS 42067, [WL] at *17 (emphasis added).

Here, the State likewise depends on the 1786 Virginia law and the 1792 North Carolina law. *See* Mem. in Opp. at 17. It appears, then, that the State contends banks and financial institutions are relevantly similar to large gathering places like fairs, markets, or Time Square.[23] This Court finds that the State fails to establish such an analogue. The State does not argue or show that there is a feature that sufficiently connects banks to fairs or markets. Unlike in *Frey*, where the district court found that Time Square was similarly relevant to historical fairs and markets because of the large congregation of people, here banks are not likely to be so congested or heavily congregated such that they are akin to a place like Time Square. If they are similar in that regard, the State fails to establish the similarity. The State instead asks this Court to take its word for it. This Court cannot do so.

In addition, the State fails to make any showing that similar prohibitions in adjacent parking areas are

23. The State also cites to a string of laws from the 1800s that prohibited carrying firearms in social gatherings, *see* Mem. in Opp. at 18 n.31, but those laws are unavailing for a substantially similar reason as the 1786 Virginia law and the 1792 North Carolina law.

consistent with this Nation's historical tradition of gun regulation. Because the State has failed to show that § 134-A(a)(12) is consistent with this Nation's historical tradition of gun regulation, Plaintiffs have a likelihood of success on the merits of their facial and as-applied challenge to § 134-A(a)(12).

E. Haw. Rev. Stat. § 134-E – Private Property and Express Authorization

Plaintiffs' final request is a TRO to enjoin § 134-E because, as they argue, it violates the Second Amendment right to carry firearms in public, and the portion of § 134-E requiring private property owners to give express authorization to carry on their property violates the First Amendment. *See* TRO Motion, Mem. in Supp. at 14-18. This Court turns first to Plaintiffs' Second Amendment challenge.

1. Second Amendment Challenge

The State contends the conduct that § 134-E regulates — *i.e.*, carrying a firearm on private property without express authorization — is not covered by the Second Amendment's plain text. *See* Mem. in Opp. at 19. Plaintiffs argue § 134-E "enacts . . . a presumption against carrying firearms in property open to the public." [TRO Motion, Mem. in Supp. at 15.] The parties are both correct to a certain extent. Section 134-E regulates carrying firearms on private properties that are, at least sometimes, held open to the public, such as some "commercial, industrial, agricultural, institutional, or undeveloped propert[ies] . . . ."

See Haw. Rev. Stat. § 134-E(c). To the extent that § 134-E regulates private properties held open to the public, it is covered by the Second Amendment's plain text. *See supra* Discussion Sections III.B., III.D. The portion of § 134-E that regulates private property not held open to the public — *e.g.*, residential properties — is not covered by the Second Amendment's plain text.

The State argues "HRS § 134-E does no more than vindicate the traditional right to exclude by preventing Plaintiffs from carrying firearms onto private property absent the owner's consent." [Mem. in Opp. at 20.] But, § 134-E is not needed to "**vindicate** the traditional right to exclude," *see id.* (emphasis added), because since the time of the founding, "[o]ur law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close without his neighbor's leave," *see Florida v. Jardines*, 569 U.S. 1, 8, 133 S. Ct. 1409, 185 L. Ed. 2d 495 (2013) (quotation marks and citation omitted). The State asserts "the Second Amendment does **not** include a right to carry guns on others' property without their consent," *see* Mem. in Opp. at 19 (emphasis in original), but that is inaccurate. The Second Amendment guarantees a right to carry a firearm in public, which includes private properties held open to the public so long as those places are not sensitive areas as evidenced by this Nation's historical tradition. If an owner of a private property that is held open to the public revokes a general license or invitation, then the property is no longer held open to the public and, therefore, the right to carry on that property is not presumptively protected under the Second Amendment. Similarly, because the Second Amendment

concerns the public carrying of firearms, it is silent as to private property not held open to the public.

In other words, and contrary to the State's assertion, the Second Amendment **does** grant a presumptive right to carry on **some** private property, insofar as the private property is held open to the public. That presumption can change, for instance, if an owner of the private property rescinds a general license or invitation to enter the property: such as limiting entrance to members or prohibiting certain attire. There is no conflict between the two rights — the right to bear arms and the right to exclude others from one's property — both of which preexisted the ratification of the Bill of Rights. *See, e.g., Bruen*, 142 S. Ct. at 2142 ("[B]y the time of the founding, the right to keep and bear arms was understood to be an individual right protecting against both public and private violence." (citation and internal quotation marks omitted)); *Jardines*, 569 U.S. at 7-8.

What § 134-E does, and what cannot be constitutionally permitted, is remove the presumption of the right to carry a firearm on private property held open to the public. Under § 134-E, conduct that was presumptively protected under the Second Amendment is now presumptively not protected. Such a change runs afoul of the Second Amendment's "guarantee[] to all Americans [of] the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions." *See Bruen*, 142 S. Ct. at 2156 (citation and internal quotation marks omitted).

The State argues "[t]here is extensive historical support for prohibitions on carriage on private property

without consent, and for governmental regulation of this conduct." [Mem. in Opp. at 21.] In support of its contention, the State cites three laws from the mid- to late-19th century:

> -an 1865 Louisiana law prohibiting "any person or persons to carry fire-arms on the premises or plantations of any citizen, without the consent of the owner or proprietor"; [*id.*, Exh. 43 (1865 La. Acts 14-16 (An Act To prohibit the carrying of fire-arms on premises or plantations of any citizen, without the consent of the owner), no. 10), § 1;]
>
> -an 1866 Texas law prohibiting "for any person or person to carry fire-arms on the enclosed premises or plantation of any citizen, without the consent of the owner or proprietor"; [*id.*, Exh. 44 (1866 Tex. Gen. Laws 90 (An Act to prohibit the carrying of Fire-Arms on premises or plantations of any citizens without the consent of the owner), ch. 92) at § 1;] and
>
> -an 1893 Oregon law prohibiting "any person, other than an officer on lawful business, being armed with a gun, pistol, or other firearm, to go or trespass upon any enclosed premises or lands without the consent of the owner or possessor thereof," [*id.*, Exh. 45 (1893 Or. Laws 79 (An Act To Prevent a Person from Trespassing upon any

Enclosed Premises or Lands not His Own Being Armed with a Gun, Pistol, or other Firearm, and to Prevent Shooting upon or from the Public Highway)) at § 1].

The State also cites to five laws from the 1700's:

-a 1715 Maryland law that was passed "to prevent the abusing, hurting or worrying of any stock of hogs, cattle or horses, with dogs, or otherwise," and prohibited "any person . . . that ha[s] been convicted of any of the crimes aforesaid, or other crimes, . . . that shall shoot, kill or hunt, or be seen to carry a gun, upon any person's land, whereon there shall be a seated plantation, without the owner's leave . . . ."; [*id.*, Exh. 38 (1715 Md. Laws 88-91 (An Act for the speedy trial of criminals, and ascertaining their punishment in the county courts when prosecuted there, and for payment of fees due from criminal persons), ch. 26) at § VII;]

-a 1721 Pennsylvania law prohibiting "any person or persons" from "carry[ing] any gun or hunt[ing] on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner . . . ."; [*id.*; Exh. 39 (1721 Pa. Laws, ch. 246, (An Act to prevent the killing of deer out of season, and against carrying of guns or hunting by persons not qualified)) at § III, *reprinted in* 3 James T. Mitchell

& Henry Flanders, The Statutes at Large of Pennsylvania from 1682 to 1801 (Pa., Clarence M. Busch, 1896);]

-a 1722 New Jersey law prohibiting "any Person or Persons" from "carry[ing] any Gun, or Hunt[ing] on the Improved or Inclosed Lands in any Plantation, and on other than his own, unless he have Lisence or Permission from the owner . . . ."; [*id.*; Exh. 40 (1722 N.J. Laws 141-42 (An Act to prevent the Killing of Deer out of Season, and against Carrying of Guns and Hunting by Persons not qualified) at 141;]

-a 1763 New York law prohibiting "any Person or Persons whatsoever, other than the Owner, Proprietor, or Possessor" from "carry[ing], shoot[ing], or discharg[ing] any Musket, Fowling-Piece, or other Fire-Arm whatsoever, into, upon, or through any Orchard, Garden, Corn-Field, or other inclosed Land, whatsoever, within the City of New York . . . without License in Writing first had and obtained for that Purpose from such Owner, Proprietor, or Possessor . . . ."; [*id.*, Exh. 41 (1763 N.Y. Laws, ch. 1233 (An Act to prevent hunting with Fire-Arms in the City of New York, and the Liberties Thereof)) at § 1, *reprinted in* 1 Laws of New-York from The Year 1691, to 1773 Inclusive 441-42 (N.Y., Hugh Gaine 1774);] and

> -a 1771 New Jersey law prohibiting "any Person or Persons" from "carry[ing] any Gun on any Lands not his own, and for which the Owner pays Taxes, or is in his lawful possession, unless he hath License or Permission in Writing from the Owner or Owners or legal Possessors . . . .," [*id.*, Exh. 42 (1771 N.J. Laws 343-347, ch. 540 (An Act for the Preservation of Deer and other Game, and to prevent trespassing with Guns)) at § 1)].

These eight laws do not support the State's contention that this Nation has a historical tradition of prohibiting the carrying of firearms on private property held open to the public. Those laws concern prohibiting carrying firearms on enclosed premises or plantations. The definitions of the relevant words in those laws are helpful in establishing that the laws concerned private property like residential lands, which were not generally held open to the public. The word "enclose" means "[t]o surround or encompass; to fence or hem in all sides." *Enclose*, Black's Law Dictionary (11th ed. 2019). In relation to land, "enclosed land" means "[l]and that is actually enclosed and surrounded with fences." *Land*, Black's Law Dictionary (11th ed. 2019). Moreover, the word "plantation" means "[a]n estate or large farm . . . ." *Plantation*, Oxford English Dictionary (3d ed. Revised June 2006). Because those eight laws prohibited carrying firearms on private property that consisted of fenced off lands or estates, the laws did not likely concern private property that was generally held open to the public. Accordingly, the conduct regulated in those laws are not covered by the Second Amendment's plain text.

The only law out of those eight laws that does not use the words "enclosed," "inclosed," or "plantation," is the 1771 New Jersey law which prohibited persons from carrying firearms on "any [l]ands" not their own. *See* McLean Decl., Exh. 42. Even assuming this meant any private property regardless of whether it was held open to the public, one New Jersey law does not show that such a law was "representative" of the laws applicable throughout the Nation. *See Bruen*, 142 S. Ct. at 2133. The State's reliance on these laws is therefore unpersuasive. The State has not established that the portion of § 134-E that prohibits carrying firearms on private property held open to the public is consistent with this Nation's historical tradition of gun regulation. Because the State has not met its burden, Plaintiffs are likely to succeed on the merits of their challenge to § 134-E to the extent that § 134-E prohibits carrying firearms on private property held open to the public. Plaintiffs are not likely to succeed on the merits of their challenge to § 134-E to the extent that § 134-E prohibits carrying firearms on private properly not held open to the public. Plaintiffs' facial challenge is therefore unlikely to succeed, but their as-applied challenge regarding private property held open to the public is likely to succeed.

2. First Amendment Challenge

Plaintiffs next contend § 134-E(b) requires them to engage in compelled speech in violation of the First Amendment. *See* TRO Motion, Mem. in Supp. at 18-19. Section 134-E prohibits carrying firearms on private property unless the property owner gives "express authorization." Haw. Rev. Stat. § 134-E(b). Plaintiffs

argue § 134-E "requires property owners and lessees to espouse a belief one way or the other on the carriage of firearms outside the home by requiring them to expressly consent or post a sign." [TRO Motion, Mem. in Supp. at 19.] Plaintiffs are mistaken.

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371, 201 L. Ed. 2d 835 (2018). This includes laws that "compel[] individuals to speak a particular message" so as to "alter the content of their speech." *See id.* (brackets, quotation marks, and citations omitted). Compelled-speech violations "result[] from the fact that the complaining speaker's own message [is] affected by the speech it [is] **forced** to accommodate." *See Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 63, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (emphasis added).

Here, Plaintiffs', and particularly Kasprzycki's, message is not affected by any speech they are forced to accommodate. Kasprzycki is not forced to speak at all. If he chooses to allow clients to carry firearms on his business's property, then he may do so. He determines whether he wants to give express authorization. He is not required to say anything. There is no coercion. There is no specific message Plaintiffs must speak. Therefore, § 134-E does not regulate speech within the scope of the First Amendment. Plaintiffs are not likely to succeed on the merits of their facial and as-applied challenge to § 134-E on the ground that it compels speech in violation of the First Amendment.

IV. Irreparable Harm

"A plaintiff seeking preliminary relief must 'demonstrate that irreparable injury is likely in the absence of an injunction.'" *California v. Azar*, 911 F.3d 558, 581 (9th Cir. 2018) (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (emphasis omitted)). "Irreparable harm is traditionally defined as harm for which there is no adequate legal remedy, such as an award of damages." *Ariz. Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1068 (9th Cir. 2014) (citation omitted). The Ninth Circuit "has ruled that speculative injury does not constitute irreparable injury sufficient to warrant granting a preliminary injunction. A plaintiff must do more than merely allege imminent harm sufficient to establish standing; a plaintiff must **demonstrate** immediate threatened injury as a prerequisite to preliminary injunctive relief." *Boardman v. Pac. Seafood Grp.*, 822 F.3d 1011, 1022 (9th Cir. 2016) (emphasis in *Boardman*) (brackets, citation, and internal quotation marks omitted). "A threat of irreparable harm is sufficiently immediate to warrant preliminary injunctive relief if the plaintiff is likely to suffer irreparable harm before a decision on the merits can be rendered." *Id.* at 1023 (citing *Winter*, 555 U.S. at 22, 129 S. Ct. 365 (quoting 11A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (2d ed. 1995))).

Plaintiffs argue they will face irreparable harm per se because their constitutional rights have been violated. *See* TRO Motion, Mem. in Supp. at 24. The Court finds that Plaintiffs have sufficiently established they will likely face immediate irreparable harm. "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, 96 S. Ct. 2673, 49 L. Ed. 2d 547 (1976)). The Ninth Circuit does "not require a strong showing of irreparable harm for constitutional injuries." *Cuviello v. City of Vallejo*, 944 F.3d 816, 833 (9th Cir. 2019).

Neither the Supreme Court nor the Ninth Circuit have addressed whether a violation of the Second Amendment "unquestionably constitutes irreparable injury." *See Melendres*, 695 F.3d at 1002 (quotation marks and citation omitted). In *Elrod*, the Supreme Court held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." 427 U.S. at 373 (citation omitted). The Ninth Circuit in *Melendres* applied the same principle to violations of the Fourth Amendment's protection against unreasonable searches and seizures. *See* 695 F.3d at 1002. So has the Ninth Circuit for violations of the Fifth Amendment's Due Process Clause. *See Hernandez v. Sessions*, 872 F.3d 979, 994-95 (9th Cir. 2017). A court in this district also applied the same principle to violations of the Fifth Amendment's Takings Clause, made applicable to the State by the Fourteenth Amendment. *See Haw. Legal Short-Term All. v. City and Cnty. of Honolulu*, Case No. 22-cv-247-DKW-RT, 2022 U.S. Dist. LEXIS 187189, 2022 WL 7471692, at *11 (D. Hawai'i Oct. 13, 2022).

This Court finds no reason not to apply the principle relied on in *Elrod, Melendres*, *Hernandez*, and *Hawai'i Legal* to violations of the Second Amendment because "[t]he constitutional right to bear arms in public for self-

defense is not a secondclass right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *See Bruen*, 142 S. Ct. at 2156 (citation and internal quotation marks omitted). To the extent that this Court finds that Plaintiffs are likely to succeed on the merits on some of their challenges, this Court also finds that they will likely face irreparable harm for the probable violation of their Second Amendment rights.

Additionally, Plaintiffs sufficiently establish that the irreparable harm is immediate because they intend to continue to carry their firearms in accordance with their permits in places where carrying firearms are now prohibited. They are therefore likely to be in violation of the challenged provisions now that they are in effect, and will likely face criminal penalties.

The State contends that a finding of immediate irreparable harm is unwarranted because Plaintiffs purportedly delayed in filing their TRO Motion. *See* Mem. in Opp. at 24. Specifically, the State asserts Plaintiffs delayed because they did not file their action until three weeks after Governor Green signed the Act into law. Plaintiffs state they did not delay because they filed their action eight days before the challenged provisions became effective. *See* Reply at 15.

> It is generally recognized that a "long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm," *Oakland Tribune, Inc. v. Chronicle Publishing Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985), but "[d]elay by itself is not a determinative factor

> in whether the grant of interim relief is just and proper." *Aguayo ex rel. N.L.R.B. v. Tomco Carburetor Co.*, 853 F.2d 744, 750 (9th Cir. 1988). "Usually, delay is but a single factor to consider in evaluating irreparable injury"; indeed, "courts are loath to withhold relief **solely on that ground**." *Arc of Cal. v. Douglas*, 757 F.3d 975, (9th Cir. 2014) (emphasis added) (quoting *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1214 (9th Cir. 1984)).

Cuviello, 944 F.3d at 833 (alteration and emphasis in *Cuviello*). Filing before the challenged provisions became effective is not likely to result in an unreasonable delay. But, even assuming that Plaintiffs delayed to a certain extent in bringing the TRO Motion, in light of the likelihood of success on the merits and the likelihood of immediate irreparable harm, this Court declines to withhold relief on that basis only. Thus, Plaintiffs have shown that they will likely face immediate irreparable harm.

V. Balancing of the Equities and Public Interest

"Generally, public interest concerns are implicated when a constitutional right has been violated, because all citizens have a stake in upholding the Constitution." *Preminger v. Principi*, 422 F.3d 815, 826 (9th Cir. 2005) (citation omitted); *see also Melendres*, 695 F.3d at 1002 ("[I]t is always in the public interest to prevent the violation of a party's constitutional rights." (quotation marks and citation omitted)).

The State argues the interest in protecting public safety strongly weighs against issuing a TRO because of

the dangers and safety concerns associated with firearms. *See* Mem. in Opp. at 25. In their Reply, Plaintiffs rely on an amicus brief submitted by Amici Gun Owners of America, Inc., Second Amendment Law Center, Hawaii Rifle Association, California Rifle & Pistol Association, Inc., Gun Owners of California, and Gun Owners Foundation to rebut the safety issues the State raises.[24] *See* Reply at 15; *see also* the GOA Amici's amicus brief in support of Plaintiffs' TRO Motion, filed 7/14/23 (dkt. no. 53) ("GOA Amicus Brief"). According to the GOA Amicus Brief, the vast majority of individuals in the United States with concealed carry permits are law-abiding. *See* GOA Amicus Brief at 20-25 (discussing the statistics of people with concealed carry permits to support the proposition that people with concealed carry permits are significantly less likely to commit gun-related crimes). Although the State raises important safety concerns, it fails to demonstrate that the public safety concerns overcome the public's interest in preventing constitutional violations.

This is particularly relevant for this analysis because the challenged provisions only affect those individuals who have been granted a permit to carry firearms, either openly or concealed. *See, e.g.*, Haw. Rev. Stat. § 134-A(a) (stating that the statute, including the twelve enumerated sensitive areas, apply to "[a] person with a license issued under section 134-9, or authorized to carry a firearm in accordance with title 18 United States Code section 926B or 926C . . . ."); *see also* Haw. Rev. Stat. § 134-9 (listing the requirements an applicant must meet to be issued a

24. For the sake of simplicity, this Court refers to this group of Amici as "the GOA Amici."

carry permit, which is granted by the chief of police of a county). Further, Plaintiffs allege that, prior to *Bruen*, the counties within the State "had only issued less than a half-dozen carry concealed permits in the prior decades[.]" [Complaint at ¶ 28 (citing *Young v. County of Hawaii*, 142 S. Ct. 2895, 213 L. Ed. 2d 1108).] As such, the challenged provisions only impact a substantially small subset of gun owners and, thus, the State's public safety argument is not persuasive. Although it is possible post-*Bruen* that more conceal carry permits are eventually issued in Hawai'i, that alone does not negate Plaintiffs' position that the vast majority of conceal carry permit holders are law-abiding. *See, e.g.*, GOA Amicus Brief at 21-22 (stating that Texas in 2020 had 1,4441 convictions for aggravated assault with a deadly weapon but only four of those convictions were people with valid concealed carry permits — roughly 0.278% of the total).

Based on the foregoing, this Court finds that the balance of the equities and the public interest weigh in favor of issuing a TRO. The public has an interest in preventing constitutional violations, and the State has not established a factual basis for the public safety concerns regarding permit-carrying gun-owners who wish to exercise their Second Amendment right to carry a firearm in public.

VI. Summary of this Court's Ruling

Plaintiffs have established a substantial likelihood of success on the merits of their: as-applied challenge to § 134-A(a)(1); facial and as-applied challenges to §§ 134-

A(a)(4), (a)(12), and the portions of § 134-A(a)(9) prohibiting the carrying of firearms in beaches, parks, and their adjacent parking areas; and as-applied challenge to § 134-E on the ground that it violates the Second Amendment, applicable to the State through the Fourteenth Amendment. For these challenges, Plaintiffs have also sufficiently established that they will face immediate irreparable harm and that the public interest and the balancing of the equities weigh in favor of issuing a TRO. Accordingly, the TRO Motion is granted in part, to the extent that these challenged provisions (or challenged portions of the respective provisions) are enjoined.

Conversely, insofar as Plaintiffs have abandoned their facial challenge to § 134-A(a)(1), they have not established a substantial likelihood of success on the merits of that challenge. Plaintiffs also have not established a substantial likelihood of success on the merits of their: facial challenge to § 134-E on the ground that it violates the Second Amendment, applicable to the State through the Fourteenth Amendment; and facial and as-applied challenge to § 134-E on the ground that it violates the First Amendment, applicable to the State through the Fourteenth Amendment. Because Plaintiffs fail to establish a substantial likelihood of success on the merits of these challenges, Plaintiffs' TRO Motion is denied as to those challenges.

This Court notes, however, that these rulings could be changed at the preliminary injunction stage because the State may be able to proffer adequate evidence to meet its burden as to any of the challenges. Thus, it is important

to understand that the State's failure to provide sufficient evidence as to some of the challenges at this stage is not necessarily fatal at the preliminary injunction stage, assuming the State is able to provide more evidence to meet its burden under *Heller* and *Bruen* .

CONCLUSION

For the foregoing reasons, Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction,[25] filed June 23, 2023, is HEREBY GRANTED IN PART AND DENIED IN PART. The TRO Motion is GRANTED to the extent that the following provisions are enjoined:

> -the portions of § 134-A(a)(1) that prohibit carrying firearms in parking areas owned, leased, or used by the State or a county which share the parking area with non-governmental entities, are not reserved for State or county employees, or do not exclusively serve the State or county building;
>
> -the entirety of §§ 134-A(a)(4) and (a)(12);
>
> -the portions of § 134-A(a)(9) prohibiting the carrying of firearms in beaches, parks, and their adjacent parking areas; and

25. Again, this Order only addresses the portion of the motion seeking a TRO.

-the portion of § 134-E that prohibits carrying firearms on private properties held open to the public.

The TRO Motion is DENIED in all other respects.

IT IS SO ORDERED.

DATED AT HONOLULU, HAWAII, August 8, 2023.

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

APPENDIX C — ORDER DENYING REHEARING EN BANC AND DISSENT OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 15, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16164
D.C. No. 1:23-cv-00265-LEK-WRP

JASON WOLFORD; ALISON WOLFORD; ATOM KASPRZYCKI; HAWAII FIREARMS COALITION,

Plaintiffs-Appellees,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAII,

Defendant-Appellant.

Filed January 15, 2025

Before: Mary M. Schroeder, Susan P. Graber, and Jennifer Sung, Circuit Judges.

Order;
Dissent by Judge Collins;
Dissent by Judge VanDyke.

Appendix C

ORDER

The panel has voted to deny Appellees' petition for panel rehearing. Judge Sung has voted to deny Appellees' petition for rehearing en banc, and Judges Schroeder and Graber have so recommended.

The full court was advised of Appellees' petition for rehearing en banc. A judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35. Judges Bennett, H.A. Thomas, and Johnstone did not participate in the deliberations or vote in this case.

Appellees' petition for panel rehearing and petition for rehearing en banc, Docket No. 105, is DENIED.

COLLINS, Circuit Judge, joined by BRESS, Circuit Judge, dissenting from the denial of rehearing en banc:

For many of the same reasons set forth by Judge VanDyke, I agree that the panel in these cases failed to apply the proper standards for evaluating Second Amendment challenges, as set forth in *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), and *United States v. Rahimi*, 602 U.S. 680, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024), and that, in doing so, the panel largely vitiated the "the right to bear commonly used arms in public" that the Supreme Court recognized in *Bruen*. *See Bruen*, 597 U.S.

at 70. We therefore should have reheard these important cases en banc.

VANDYKE, Circuit Judge, joined by CALLAHAN, IKUTA, R. NELSON, LEE, and BUMATAY, Circuit Judges, dissenting from the denial of rehearing en banc:

Just a few years ago in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 10, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), the Supreme Court made clear that the Second Amendment includes the right to bear firearms in public. With its decision in these cases our court allows governments in our circuit to practically eliminate most of that right. In response to *Bruen*, both Hawaii and California declared a broad and unprecedented number of locations to be prohibited "sensitive places," and on top of that imposed novel criminal sanctions for concealed carry onto private property absent express permission received in advance. With this court's blessing, law-abiding and licensed citizens in this circuit can now be banned from carrying firearms in most public and private spaces. Apparently, notwithstanding *Bruen*'s instruction that the Second Amendment protects a right to carry a firearm in public, what it really protects is the right to carry only while taking your dog out for a walk on a city sidewalk. If only New York City had been as creative as California and Hawaii, it too could have avoided *Bruen* and succeeded in banning firearms throughout most of Manhattan.

I don't think that's right. Hawaii's and California's creative attempts to declare almost all cities and public locations as either prohibited "sensitive places" or

presumptive gun-free zones cannot be squared with *Bruen*. There, the Supreme Court concluded that designating entire cities "sensitive places" and prohibiting the carrying of firearms in those locations would effectively "exempt cities from the Second Amendment" and "eviscerate the general right to publicly carry arms for self-defense." *Id.* at 31. Yet California's and Hawaii's bans practically accomplish close to the same thing rejected in *Bruen*.

In upholding most of these new laws, the panel distorted *Bruen*'s text-history-and-tradition analysis. It failed to identify any Founding-era tradition justifying laws that flip the presumption like California and Hawaii have attempted. Instead, it justified its conclusion by pointing to just two outlier laws—one an anti-poaching colonial law and the other a discriminatory Reconstruction era Black Code. Some of the sensitive place restrictions allowed by the panel ban carry in locations that have existed since the Founding, with no comparable prohibition in those locations at that time. The panel upheld those and other provisions of Hawaii's and California's bans by extracting overbroad principles from strained analogies to unrelated laws and by looking to late-19th and early-20th-century laws enacted long after the proper historical time period.

Among other things, our court's decision in these cases results in a split with the Second Circuit, which ruled that the application of New York's similar private-property law was unconstitutional. We should have taken these cases en banc to rectify this, and I respectfully dissent from our failure to do so.

Appendix C

I.

First, some background. In *Bruen*, the Supreme Court recognized the Second Amendment protects the "right to carry a handgun for self-defense outside the home." *Id.* at 10. The Court thus held that New York's proper-cause requirement for its licensing and permitting regime was unconstitutional, *id.* at 71, and threw constitutional doubt on California's and Hawaii's similarly aggressive licensed-carry bans. *See id.* at 57 (rejecting our en banc court's holding in *Young v. Hawaii*, 992 F.3d 765, 813 (9th Cir. 2021) (en banc), that "the government may regulate, and even prohibit, in public places" the carrying of firearms). California appropriately responded by "remov[ing] the good character and good cause requirements from the issuance criteria" for its concealed carry permits. 2023 Cal. Legis. Serv. Ch. 249. But that's not all California did. It also enacted new laws that prohibit the concealed carrying of firearms in many new locations—what *Bruen* referred to as "sensitive places" prohibitions. Hawaii did the same. It amended its carry permit statute—which before *Bruen* restricted the right to obtain a carry permit outside the home to only "an exceptional case," 2023 Haw. Sess. Laws 113 (Act 52)—to now make it possible for the ordinary, law-abiding citizen to obtain a carry permit, again as required by *Bruen*, HRS § 134-9. But like California, Hawaii took away with its other hand what it purported to grant, imposing its own broad new restrictions on *where* such permit holders may carry. *See* HRS §§ 134-9.1, 134-9.5.

California's new law makes it a criminal offense to carry in 26 different places—even with a permit—

including locations where liquor is sold for consumption on the premises (whether the permit-holder is drinking or not), parks and athletic facilities, and casinos. Cal. Pen. Code § 26230(a)(9), (12), (15). And Hawaii's law makes it a criminal offense to carry a firearm onto 15 different types of property—again, even with a permit—including government buildings, bars and restaurants serving alcohol, and parks and beaches. HRS § 134-9.1(a)(1), (4), (9).

Perhaps most far-reaching, both states also flipped the default rule for carrying on private property. Under traditional property law principles, a person with a carry permit is allowed to bring firearms onto private property unless the owner prohibits it. *See, e.g.*, *Christian v. Nigrelli*, 642 F. Supp. 3d 393, 407 (W.D.N.Y. 2022) (observing that at the Founding "private property owners" were principally responsible for "exclud[ing] others from their property"); I. Ayres & S. Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. Med. & Ethics 183, 184 (2020). Hawaii's and California's statutes invert that longstanding principle. By statute, both states now prohibit carrying firearms onto private property unless the proprietor affirmatively gives advance permission. *See* Cal. Pen. Code § 26230(a)(26); HRS § 134-9.5. California's law allows for permission to be granted only if "the operator of the establishment clearly and conspicuously posts a sign" stating that carry is allowed, Cal. Pen. Code § 26230(a)(26), while Hawaii's law allows permission to be granted through any "[u]nambiguous written or verbal authorization" or by the "posting of clear and conspicuous signage." HRS § 134-9.5(b).

Both laws dramatically restrict the practical ability to carry in public in their states. For example, Hawaii's law prohibits, presumptively or outright, the carrying of a handgun on 96.4% of the publicly accessible land in Maui County. And California's law "turns nearly every public place in California into a 'sensitive place,'" *May v. Bonta*, 709 F. Supp. 3d 940, 947 (C.D. Cal. 2023), effectively limiting carrying—in one plaintiff's apt characterization—"to just streets, sidewalks, and the few standalone private business willing to post signs affirmatively allowing carry."

Plaintiffs challenged the laws in both California and Hawaii. In California, the *Carralero* and *May* plaintiffs sought preliminary injunctions. They requested that the district court enjoin enforcement of the statute with respect to only some of the "sensitive places" created by California's law. They did not challenge, for example, the statute's application to locations such as schools, certain government buildings, or places of higher education. *See Wolford*, 116 F.4th at 973, 975-76.

The district court granted in full the plaintiffs' requested injunctive relief, enjoining enforcement of the law with respect to California's ban in hospitals, playgrounds, public transit facilities, parks and athletic facilities, property controlled by the Parks and Recreation Department, bars and restaurants that serve alcohol, gatherings that require a permit, libraries, casinos, zoos, stadiums and arenas, amusement parks, museums, places of worship, banks, and all parking lots adjacent to sensitive places. *May*, 709 F. Supp. 3d at 947. The district court

also enjoined enforcement of California's new default rule flipping the presumption for private property held open to the public. *Id.* at 967.

In Hawaii, the *Wolford* plaintiffs also sought injunctive relief. *Wolford v. Lopez*, 686 F. Supp. 3d 1034, 1042 (D. Haw. 2023). As with the California plaintiffs, the Hawaii plaintiffs "did not challenge the prohibitions in all areas under the Act. Instead, they challenged only a limited subset that impose particularly egregious restrictions on their Second Amendment right to bear arms." *Id.* (cleaned up).

The district court granted in part and denied in part a temporary restraining order, which was then converted into a preliminary injunction. *Id.* at 1077. Specifically, the district court enjoined enforcement of Hawaii's prohibition on carrying firearms in parking lots shared by government buildings and nongovernment buildings, banks, financial institutions and their adjacent parking areas, public beaches, public parks and their adjacent parking areas, bars, and restaurants that serve alcohol and their adjacent parking areas. *Id.* The district court also enjoined enforcement of the new default rule for private property, but limited the injunction to private property held open to the public. *Id.*

Both Hawaii and California appealed. The two California cases were consolidated, and a panel of this court issued a single opinion for all three cases. *Wolford*, 116 F.4th at 976. With respect to the California law, the panel upheld the district court's injunction as to

medical facilities, public transportation facilities, public gatherings, places of worship, financial institutions, parking areas connected to those places, and the new private property default rule. *Id.* at 1003. The panel otherwise reversed the injunction, allowing California's restrictions to go into effect with respect to bars and restaurants that serve alcohol, playgrounds, youth centers, parks, athletic areas, athletic facilities, most real property under the control of the Department of Parks and Recreation or Department of Fish and Wildlife, casinos and similar gambling establishments, stadiums, arenas, public libraries, amusement parks, zoos and museums, parking areas and similar areas connected to those places, and all parking areas connected to other sensitive places listed in the statute. *Id.* at 1003.

With respect to Hawaii's law, the panel upheld the preliminary injunction as applied to financial institutions and certain parking lots. *Id.* at 1002. The panel otherwise reversed the injunction, allowing Hawaii's restrictions to go into effect with respect to bars and restaurants that serve alcohol, beaches, parks, and similar areas, parking areas adjacent to all those places, and Hawaii's new private property default rule. *Id.* at 1002-03.

Given the procedural posture of these cases—appeals from grants of preliminary injunctions—the panel applied the *Winter* factors, which require that a movant show: (1) a likelihood of success on the merits, (2) the presence of irreparable harm in the absence of preliminary relief, (3) the balance of the equities tips in the movant's favor, and (4) the public interest tips in favor of an injunction.

Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008). But the panel and both district courts appropriately focused their analyses on the first factor, which "is a threshold inquiry and is the most important factor." *Env't Prot. Info. Ctr. v. Carlson*, 968 F.3d 985, 989 (9th Cir. 2020); *see also Disney Enters., Inc. v. VidAngel, Inc.*, 869 F.3d 848, 856 (9th Cir. 2017) (noting that a "court need not consider the other factors" if a movant fails to show a likelihood of success on the merits).

The *Wolford, Carralero* , and *May* plaintiffs each sought en banc review, which a majority of our court has now declined to grant. In refusing to correct the panel's opinion, our court left in place a decision directly contrary to Supreme Court precedent and locked in an unnecessary circuit split of our own creation.

II.

A good starting place to analyze how the panel in these cases went wrong is with the Supreme Court's discussion of sensitive places laws, and to compare that discussion with what our court has allowed California and Hawaii to do in these cases. In *Bruen* the Court explained that "relatively few" public locations can be properly classified as "sensitive places" "where arms carrying c[an] be prohibited consistent with the Second Amendment." 597 U.S. at 30. The few locations *Bruen* identified include schools, government buildings, "legislative assemblies, polling places, and courthouses." *Id.* Apart from these locations, "the historical record yields relatively few

18th- and 19th-century 'sensitive places' where weapons were altogether prohibited." *Id.* The Court rejected New York's attempted characterization of its proper-cause licensing requirement as an appropriate "sensitive places" law, after the government attempted to label as sensitive places public places "where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." *Id.* at 30-31. The Court reasoned that while people often congregate in sensitive places and law enforcement professionals are presumptively available in those locations, applying the tradition associated with sensitive places to all locations that fit those two characteristics expanded it "far too broadly." *Id.* at 31. Such a reading would "in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." *Id.* The Court ultimately concluded that "there 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.*

Hawaii's response to *Bruen*—which practically renders nearly all the publicly accessible areas of the entire island of Maui a "sensitive place"—seeks to accomplish by other means most of what the Supreme Court rejected in *Bruen*. As noted, Hawaii's law completely or presumptively restricts the licensed carrying of a handgun in 96.4% of the publicly accessible land in Maui County. While New York sought to ban most public carry of firearms by sharply curtailing *who* may carry, Hawaii accomplishes the same feat by banning most places *where* someone may carry.

Hawaii's law is the same sort of "broad prohibit[ory]" regime that the Court already rejected, as it still makes most public places off limits notwithstanding the "general right to public carry." *Id.* at 33, 50.

The panel's opinion addressed the obvious tension between its conclusions in this case and those reached by the Supreme Court in *Bruen* in a mere footnote:

> because Plaintiffs may take their firearms onto the public streets and sidewalks throughout Maui County (and elsewhere in Hawaii), as well as into many commercial establishments and other locations, the situation in this case is unlike the argument that *Bruen* rejected, which would have meant, effectively, that firearms could be banned from the entire island of Manhattan.

Wolford, 116 F.4th at 984 n.4 (citing *Bruen*, 597 U.S. at 31). The panel's assertion that licensed individuals may still carry in "many commercial establishments" is belied by the record, which, as the panel acknowledged, evinces what common sense suggests: that "many property owners will not post signs of any sort or give specialized permission, regardless of the default rule." *Id.* at 993. Indeed, the panel recognized that there would be little reason for Hawaii to have flipped the presumption unless it reasonably anticipated that many—indeed, most—private property owners will simply let the default rule govern. *See id.* ("if that group were small or did not exist, Hawaii's law would accomplish little or nothing"). So what we're

left with is a law mostly limiting the Second Amendment's right to publicly carry to just the "public streets and sidewalks," *id.* at 984 n.4, which obviously dramatically curtails an individual's practical ability to be prepared in public to defend themselves—"the *central component* of the [Second Amendment] right." *District of Columbia v. Heller*, 554 U.S. 570, 599, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008). Realistically, only those who aimlessly wander streets and sidewalks without ever planning to enter a store, park, or other private or public establishment will be able to carry a firearm in Hawaii. Is that really what the Supreme Court meant when it recognized a historically grounded "general right to public carry" in *Bruen?*[1]

The panel's self-proclaimed "arbitrary" and "[il]logical" outcome—allowing Hawaii to presumptively prohibit

1. It is no solace that the panel found fault with California's private property default law while blessing Hawaii's. *Wolford*, 116 F.4th at 995-96. The panel concluded that California's law, which allows someone to avoid its new private property carry ban only if they receive permission in *written* form, was too restrictive for the Second Amendment. By contrast, Hawaii's law, which requires the same advance permission but allows it to be granted in multiple ways (including orally), passed the panel's Second Amendment scrutiny. But the novelty of the two states' attempts to flip the presumption has little to do with nuances of how someone might go about restoring permission to bear a firearm on their property. The overwhelming impact of California's and Hawaii's innovation is the reversal in the presumption itself. The panel's distinction between the two states' presumption-flipping rules may give the illusion of analytical precision, but it strains the proverbial gnat while swallowing the camel. And practically, it just means California and other governments that desire to flip the presumption will now follow the approach sanctioned by the panel: Hawaii's, not California's.

all firearms on all private property—called for en banc review. *Wolford*, 116 F.4th at 1003. It effectively nullified the Second Amendment rights of millions of Hawaiians and Californians to bear firearms as they go about their daily lives in public. Except, of course, for those who aimlessly wander the streets.

III.

The panel's decision is not just generally in tension with the Supreme Court's recent holding in *Bruen*, however. The nuts-and-bolts of the panel's analysis is also inconsistent with how the Court has instructed lower courts to conduct our text-history-and-tradition analysis. The panel discerned a historical tradition supporting Hawaii's novel private property law, even though there is no such tradition. The panel added to the Supreme Court's guidance on *when* lower courts should turn to analogies to draw constitutional principles from the historical record. It drew principles from unrelated laws regulating some aspect of firearm use, even when the historical record reveals no examples of comparable locational restrictions at the same types of places that existed at the Founding. And the panel broadly redefined what it means to be a historically unprecedented location permitting very loose analogizing. Finally, the panel continued our court's troubling trend of drawing analogies at such a high level of generality that any challenged ban could pass constitutional muster.

Appendix C

A.

Hawaii's private property default law cannot survive *Bruen*'s two-step framework. Under that framework, if the Second Amendment's plain text covers regulated conduct, the regulation will stand only if the government can "affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms" in the United States. *Bruen*, 597 U.S. at 19, 24. While the government need not identify a "dead ringer" to show a historical tradition supporting its modern regulation, it must locate a "well-established and representative historical *analogue*." *Id.* at 30. Not any loose analogue will suffice: the historical regulation must have been "relevantly similar" to the challenged regulation in "how and why" it "burden[ed] a law-abiding citizen's right to armed self-defense." *Id.* at 29. As the Supreme Court has cautioned, upholding a modern regulation that only "remotely resembles a historical analogue" would entail "endorsing outliers that our ancestors would never have accepted" and thus be inconsistent with the historical inquiry required by *Bruen*. *Id.* at 30 (quoting *Drummond v. Robinson Twp.*, 9 F.4th 217, 226 (3d Cir. 2021)). Only when applied in this manner is "analogical reasoning under the Second Amendment" done correctly, as "neither a regulatory straightjacket nor a regulatory blank check." *Id.*

Bruen's first step asks whether "the Second Amendment's plain text covers an individual's conduct." *Id.* at 24. The Supreme Court has already told us that the text of the Second Amendment protects the right to bear

arms outside of the home. *Id.* at 33. And that right makes no distinction between public property or private property held open to the public, as lower courts have consistently recognized. *Antonyuk v. James*, 120 F.4th 941, 1044-45 (2d Cir. 2024); *Christian v. James*, No. 22-CV-695 (JLS), 2024 U.S. Dist. LEXIS 185551, 2024 WL 4458385, at *11 (W.D.N.Y. Oct. 10, 2024); *Kipke v. Moore*, 695 F. Supp. 3d 638, 658 n.9 (D. Md. 2023); *Koons v. Platkin*, 673 F. Supp. 3d 515, 607-15 (D.N.J. 2023). So *Bruen*'s first step is easily met by Hawaii's law, and the law is presumptively unconstitutional. *Bruen*, 597 U.S. at 19.

Hawaii's use of a new statutory presumption—rather than an outright prohibition—does not change the analysis. "[A] constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions." *Speiser v. Randall*, 357 U.S. 513, 526, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958) (quoting *Bailey v. Alabama*, 219 U.S. 219, 239, 31 S. Ct. 145, 55 L. Ed. 191 (1911)). The Second Amendment's text protects against a presumptive ban on carrying firearms on publicly accessible private property no less than it protects from attempts to directly ban the same conduct.

To be sure, the Second Amendment does not restrict private-property owners' ability to decide whether to exclude firearms, or certain people for that matter, from their property. *See Cedar Point Nursery v. Hassid*, 594 U.S. 139, 150, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021). "[T]he right to exclude is 'universally held to be a

fundamental element of the property right,' and is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Id.* (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-80, 100 S. Ct. 383, 62 L. Ed. 2d 332 (1979)). But that is the property owner's right, not the government's. Nothing about a property owner's authority to exclude would extend to the government a correlative power to make new presumptions that control the exclusion of firearms from private property without any decision by the property owner.

So we reach *Bruen*'s second step. To overcome the presumption of unconstitutionality, Hawaii must show that its law "is consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 597 U.S. at 24. The panel concluded that Hawaii's private property default rule is consistent with one abstract principle derived from the historical tradition: "the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property." *Wolford*, 116 F.4th at 995. Setting aside the staggering generality of the principle the panel extracted (more on that in a minute), the historical record the panel relied on simply does not support it even in the capacious form articulated by the panel.

The panel pointed to two sets of laws as supporting its principle. The first set includes laws that "prohibited the carry of firearms onto subsets of private land, such as plantations or enclosed lands." *Id.* at 994. But the panel itself acknowledged that these laws bear little resemblance to Hawaii's and California's new laws.

The historical laws the panel relied on were "limited to only a subset of private property; those laws likely did not apply to property that was generally open to the public"; and their aim was to prevent poaching, not the dangerous use of firearms. *Id.* The "how" (prohibiting carrying on a narrow subset of all enclosed private property) and the "why" (preventing poaching) of these historical regulations bear no resemblance to Hawaii's and California's laws presumptively outlawing carrying on *all* private property, ostensibly to reduce gun violence (not poaching). *See* 2023 Cal. Legis. Serv. Ch. 249 § 1(c). Given the lack of a tenable analogy, the panel rightly discounted reliance on these anti-poaching laws.

But the second set of laws—in fact just *two* laws—that the panel and the states relied upon to justify the states' presumptive bans fares no better. A 1771 New Jersey law and an 1865 Louisiana law purportedly "bann[ed] the carrying of firearms onto *any* private property without the owner's consent." *Wolford*, 116 F.4th at 994. But as an initial matter, two state laws—nearly a century apart—cannot establish a historical tradition at odds with the text of the Second Amendment. *Bruen*, 597 U.S. at 46 ("[W]e doubt that three colonial regulations could suffice to show a tradition of public-carry regulation."). And even if such scarcity was not alone fatal, there is no consistent record of enforcement of these laws to the breadth that the states rely upon them. *Id.* at 58 & n.25 (noting that a "barren record of enforcement" is an "additional reason to discount [laws'] relevance"). The two laws simply fail to provide analogical support for the broad presumptive rule of disarmament the panel found.

Even if two laws alone were enough to establish a historical tradition, these particular two laws are far different than California's and Hawaii's novel bans. The first claimed analogy, New Jersey's 1771 law, made it unlawful for someone "to carry any Gun on any Lands not his own ... unless he hath License or Permission in Writing from the Owner or Owners or legal Posessor." 1771 N.J. Laws 343-347, ch. 540, § 1. This law was an antipoaching and antitrespassing ordinance—not a broad disarmament statute. Indeed, the Act's title was "An Act for the Preservation of Deer and other Game, and to prevent trespassing with Guns." *Id.* The "why" behind New Jersey's law was to stop people from trespassing on private land with firearms for the purpose of poaching. The "why" of New Jersey's law is thus not remotely comparable to the "why" of Hawaii's law. In effect New Jersey's law imposed strict liability restrictions on trespassing with guns, presumably because proving the intent behind poaching can be particularly burdensome. Picture Elmer Fudd creeping across your property, who, when caught, says: "Um ... I was just out for a weisurely strowl across your pwoperty with my twusty musket. I certainwy was *not* pwanning to shoot anything ...." New Jersey's law made it easier to prosecute ol' Elmer for poaching, even if you couldn't catch him in the act of blasting a wabbit.

And even if the "why" of New Jersey's anti-poaching law was more akin to Hawaii's, New Jersey's solitary colonial law is an "outlier" and thus an inappropriate analogue. *Bruen*, 597 U.S. at 30. As the panel acknowledged, other colonial laws that purported to adjust the default presumption for carrying firearms onto private property

were "limited to only a subset of private property; th[e]se laws likely did not apply to property that was generally open to the public." *Wolford*, 116 F.4th at 994. Maryland's 1715 law, Pennsylvania's 1721 law, and New Jersey's 1722 law were all limited to "seated plantations" or "improved or inclosed lands." 1715 Md. Laws 88-91, ch. 26, § VII; 1721 Pa. Laws, ch. 246, § III, *reprinted in* 3 James T. Mitchell & Henry Flanders, The Statutes at Large of Pennsylvania from 1682 to 1801, at 254-57 (Pa., Clarence M. Busch, 1896); 1722 N.J. Laws 141-42. And New York's 1763 statute covered just "Orchard[s], Garden[s], Corn-Field[s], or other inclosed Land." 1763 N.Y. Laws, ch. 1233, § 1, *reprinted in* 1 Laws of New-York from the Year 1691 to 1773 Inclusive, at 441-42 (N.Y., Hugh Gaine 1774). Allowing Hawaii to presumptively outlaw carrying firearms on *all* private property on the basis of an idiosyncratic anti-poaching law amounts to "endorsing [an] outlier[] that our ancestors would never have accepted"—precisely what the Supreme Court has instructed lower courts not to do. *Bruen*, 597 U.S. at 30 (quoting *Drummond*, 9 F.4th at 226).

The second supposed analogue relied on by the panel is an 1865 Louisiana law. Louisiana's law prohibited "carry[ing] fire-arms on the premises or plantation of any citizen, without the consent of the owner or proprietor, other than in lawful discharge of a civil or military order." 1865 La. Acts 14-16, no. 10, § 1. It was enacted as part of Louisiana's notorious Black Codes that sought to deprive African Americans of their rights, including the right to keep and bear arms otherwise protected by state law. *See McDonald v. City of Chicago*, 561 U.S. 742, 771, 779, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010); *id.* at 845-47 (Thomas,

J., concurring) (detailing the sordid history of these laws, which were part of the "systematic efforts in the old Confederacy to disarm the more than 180,000 freedmen who had served in the Union Army, as well as other free blacks" (internal quotation marks omitted)); *Heller*, 554 U.S. at 614; *Koons*, 673 F. Supp. 3d at 568-69. The law was enacted right after the Civil War, by a former Confederate State, *before* Louisiana was even readmitted to the Union. Courts have correctly observed that "[t]he Supreme Court has cautioned against relying on such laws." *Kipke*, 695 F. Supp. 3d at 659. In *Bruen*, the Court explained that two discriminatory statutes were "too slender a reed on which to hang a historical tradition of restricting the right to public carry." 597 U.S. at 58. Nor should our court "infer a historical tradition of regulation consistent" with Hawaii's novel private property presumption from a Black Code *that was invidiously designed to undermine civil rights. Kipke*, 695 F. Supp. 3d at 659; *see also Koons*, 673 F. Supp. 3d at 568-69.

Applying the analytical framework provided by the Supreme Court, it should be easy to see that the "why" behind Louisiana's law does not map onto Hawaii's purported "why." Louisiana's "intent was to discriminate, rather than to advance public safety." *Kipke*, 695 F. Supp. 3d at 659. This discriminatory animus is not part of the history baked into our legitimate constitutional tradition, and we "must exercise care to rely only on the history that the Constitution actually incorporated and not on the history that the Constitution left behind." *United States v. Rahimi*, 602 U.S. 680, 723, 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024) (Kavanaugh, J., concurring). Southern legislatures and their political supporters during Reconstruction made

efforts "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) (statement of President Grant). Louisiana's 1865 law is part of *that* invidious tradition and, far from being indicative of the Constitution's meaning, is "probative of what the Constitution does *not* mean." *Rahimi*, 602 U.S. at 720 (Kavanaugh, J., concurring).

And just as New Jersey's 1771 law is an outlier, Louisiana's law too is a one-of-a-kind law, even in comparison to other Reconstruction era laws. Only two other states purported to adjust the default private property presumption in this era—Texas in 1866 and Oregon in 1893. *See* 1866 Tex. Gen. Laws 90, ch. 91, § 1; 1893 Or. Laws 79, § 1. But those states' laws applied to only "enclosed premises or plantation[s]," 1866 Tex. Gen. Laws 90, ch. 91, § 1, or "enclosed premises or lands," 1893 Or. Laws 79, § 1. Just as in the colonial era, only one law, on its face, applied to properties generally held open to the public. The breadth of Louisiana's discriminatory law is a clear "outlier" in its era and so for that reason too cannot form the basis of a constitutional tradition. *Bruen*, 597 U.S. at 29.

In sum, the panel's broad principle—"that the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property," *Wolford*, 116 F.4th at 995—has no grounding in the historical record. The panel abstracts from an anti-poaching ordinance and a discriminatory Black Code—both of which fail to share the same "why" as Hawaii's law, and both of which were clear outliers in their

times in any event. Since there is no historical tradition that supports Hawaii's private property default law, we should have taken this case en banc to fix the panel's error in upholding Hawaii's novel law.

B.

The panel also erred in its approach for other locational restrictions it upheld, and we should have taken these cases en banc to correct those multiple departures from *Bruen*'s and *Rahimi*'s framework for analogizing. *See Bruen*, 597 U.S. at 29-30; *Rahimi*, 602 U.S. at 692. First, even in instances where the same or similar properties existed at the Founding and the government pointed to no historical prohibitions for those locations, the panel nonetheless upheld the states' modern bans by broadly analogizing to unrelated historical laws. Second and relatedly, the panel discounted the non-regulation of the same or similar historical properties by pointing to purported changes in how society now perceives those properties. And third, the panel abstracted at too high a level of generality, pulling principles out of historical precedent with little to no correlation between "how and why" these historical regulations affected the right to bear arms in self-defense and "how and why" the Hawaii and California laws seek to ban the public carry of firearms.

1.

The panel's first methodological departure from the analogical approach of *Bruen* and *Rahimi* is drawing analogies to unrelated laws even where the same or similar

locations existed at the Founding, and the historical record shows no historical tradition of regulating those locations. *Bruen* instructs against that approach: "[w]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." 597 U.S. at 26-27.

Take one example from the panel's opinion: its analysis of California's and Hawaii's carry prohibitions in bars and restaurants that serve alcohol. Cal. Pen. Code § 26230(a)(9); HRS § 134-9.1(a)(4). The panel acknowledged that "[e]stablishments serving alcohol have existed since the Founding." *Wolford*, 116 F.4th at 986. Nor could it dispute that "[c]onsuming alcohol was one of the most widespread practices in the American colonies" and "[t]averns served as the most common drinking and gathering place for colonists." Baylen J. Linnekin, *"Tavern Talk" and the Origins of the Assembly Clause: Tracing the First Amendment's Assembly Clause Back to Its Roots in Colonial Taverns*, 39 Hastings Const. L.Q. 593, 595 (2012). Because the panel could point to *no* laws from that era outlawing the carrying of firearms in those locations, the panel's analysis should have stopped there.

Instead, the panel looked to a panoply of laws separating the storage of gunpowder from bars, limiting the carrying of firearms while intoxicated, and restricting militiamen from alcohol. *Wolford*, 116 F.4th at 985-86. From this broader hodgepodge, the panel then abstracted

a general principle: "governments have regulated in order to mitigate the dangers of mixing alcohol and firearms." *Id.* at 986. And from laws prohibiting carrying firearms at ballrooms and social gatherings, the panel drew the principle of "prohibiting firearms at crowded places, which included, at times, bars and restaurants." *Id.*

On the flimsy framework of these over-generalized principles and four localized mid- to late-19th-century ordinances and territorial laws, the panel produced the conclusion that "Hawaii's and California's modern laws are 'consistent with the principles that underpin our regulatory tradition.'" *Id.* at 986 (quoting *Rahimi*, 602 U.S. at 692). Once again, the panel failed to heed *Bruen*'s instructions. "[H]istorical analogues inconsistent with the 'overwhelming weight of other evidence' are undeserving of much weight, especially those laws that governed only a few colonies or territories, affected a small population, or were enacted in the late 19th century or later." *Id.* at 978 (quoting *Bruen*, 597 U.S. at 66). The only colonial or Founding era laws that the panel points to are those that separated the militia and alcohol. *Wolford*, 116 F.4th at 985. Otherwise, the panel primarily relies on later territorial laws (New Mexico in 1853), local ordinances (New Orleans in 1817 and 1879, Chicago in 1851, and St. Paul in 1858), and late-19th-century ordinances. While the panel does rely on three Reconstruction era laws that prohibited carrying a firearm while intoxicated—Kansas in 1867, Missouri in 1883, and Wisconsin in 1883—our sister circuit has correctly concluded that those same laws, even assuming they are relevant, would "support, at most, a ban on carrying firearms while an individual is *presently*

under the influence." *United States v. Connelly*, 117 F.4th 269, 282 (5th Cir. 2024). Moreover, the panel's principle of banning firearms in "crowded places"—which the panel drew from one local ordinance (New Orleans in 1817) and several late-19th-century laws banning carrying firearms in ballrooms and assemblies—runs squarely into *Bruen*'s rejection of Manhattan's designation as a sensitive place "simply because it is crowded and protected generally by the New York City Police Department." 597 U.S. at 30-31. In short, the panel stretched to draw principles from unrelated laws that simply do not support its stated regulatory principle.

But I repeat: the panel should not have felt licensed to extract principles from these unrelated laws in the first place. When the same locations that existed at the Founding still exist today, and there is *no* historical tradition of banning carry in those locations at the Founding, that lack of historical regulations must count for something. Indeed, in most instances it should be dispositive. *Bruen*, 597 U.S. at 26-27.

2.

The panel used another feint to ignore the lack of historical regulations of locations that have existed since the Founding. The panel looked instead at how those types of locations might have changed in the intervening years and asked whether those Founding-era categories are sufficiently similar to their "modern" equivalents. By adding this step, the panel introduced yet one more path permitting our court to broadly analogize from historical

laws that on first blush seem far afield from the modern law, especially as compared to the glaring lack of historical regulation of the same locations now being banned.

This is well-illustrated by the panel's analysis of California's and Hawaii's laws prohibiting carrying firearms in "park[s]." *Wolford*, 116 F.4th at 982-85; HRS § 134-9.1(a)(9); Cal. Pen. Code § 26230(a)(12). Even though public parks existed well before the Founding and the states provide no evidence of firearm bans from that time period, the panel divined a historical tradition by redefining the inquiry to search for more recent regulations of "modern" parks. *Wolford*, 116 F.4th at 983.

To be clear, the starting point for the panel's historical detour seems itself suspect. The panel concluded that modern parks were too dissimilar to Founding-era parks because today we use parks differently. *Wolford*, 116 F.4th at 982. While I suppose it's certainly true that the Founders didn't ride ten-speeds or talk on cell phones in public parks, there is ample historical evidence of public parks used for recreational purposes in the colonial and Founding eras. In Massachusetts, Boston Common—established in 1634—was used for drilling militiamen, but it "also served as a site for informal socializing and recreation" including "[s]trolling," "[h]orse- and carriage-riding," "sports," "entertainment," and "raucous celebrations." Anne Beamish, *Before Parks: Public Landscapes in Seventeenth-and Eighteenth-Century Boston, New York, and Philadelphia*, 40 Landscape J. 1, 4-6 (2021); *see also Steele v. City of Boston*, 128 Mass. 583, 583 (1880) (describing the Common "as a place of

public resort for the recreation of the people" "from time immemorial"). In New York, City Hall Park began as a "public commons" in the 17th century, and Bowling Green was established as a place for the "Recreation & Delight of the Inhabitants of this City" in 1733. *The Earliest New York City Parks*, N.Y. City Dep't of Parks and Recreation, available at https://perma.cc/MBM5-FWRZ (last visited Jan. 2, 2025). In Pennsylvania, Philadelphia was described by 1830 as a city with many "public squares, and gardens" for "general resort" and "promenade." E.L. Carey & A. Hart, *Philadelphia in 1830-1*, at 145-46 (1830). In New Jersey, Newark's Washington Park functioned as "a space for recreation." *See* Washington Park Newark, *History*, https://perma.cc/UC8K-5L8N (last visited Jan. 2, 2025). And in Georgia, Savannah was planned around open public squares, which were turned into landscaped parks around 1800. *See* Turpin Bannister, *Oglethorpe's Sources for the Savannah Plan*, 20 J. of Soc'y of Arch. Hist. 47, 48 (1961).

Despite the undeniable presence of recreational-use parks at the Founding, the panel—and California and Hawaii—fail to provide any Founding-era laws prohibiting firearms in those places. Again, their failure to do so should be dispositive. Given that parks have "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 26-27.

But the panel did not stop there. To compensate for the lack of any historical bans in public parks, the panel reconceptualized parks at the Founding as merely "public

green spaces," as opposed to the "outdoor gathering places" that "modern" parks serve as today. *Wolford*, 116 F.4th at 982. The panel then redefined its inquiry—rather than looking at the historical precedent at the time of the Founding, the panel looked to precedent from the mid- to late-19th century, when, according to the panel, "green spaces began to take the shape of a modern park." *Id.* After reframing the inquiry in this way, the panel then cited a panoply of laws restricting firearms in public parks, only one of which—New York City's—was dated prior to 1868, when the Fourteenth Amendment was ratified. *Id.* at 982-83. But apparently because similar public parks didn't exist at the Founding (per the panel), the panel felt authorized to derive its historical tradition from whatever time period the panel concluded that such spaces started to exist in their "modern" form.

As was always the case when the panel turned to analogizing, once it concluded that a "modern" place is meaningfully different from its Founding-era precursors, the outcome was predetermined. Each time the panel determined that a type of location did not exist at the Founding (or was too changed), the panel was able to find a historical tradition broad enough to support banning firearms in those locations. *E.g.*, *Wolford*, 116 F.4th at 983 (parks and similar areas); *id.* at 985 (playgrounds and youth centers); *id.* at 987 (places of amusement). Apparently the original understanding of the Second Amendment was that it would not apply to any new types of public spaces that would develop in the future.

But that is not how the Supreme Court has treated changes between then and now. Under the panel's approach,

the Second Amendment protects new "modern" firearms, but not new "modern" places? *Bruen* confirmed—as did *Heller*—that the Second Amendment applies to modern arms: "even though the Second Amendment's definition of 'arms' is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." *Bruen*, 597 U.S. at 28; *see also Heller*, 554 U.S. at 582 ("[T]he Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the [F]ounding."). But our court's approach in these cases allows judges to rule away Second Amendment rights from modern places to the extent those locations differ at all from their historical precursors—which, of course, they always will. So even while an individual might have the right to carry a modern firearm "in common use" today, *see Heller*, 554 U.S. at 627, under the panel's reasoning that person may only have the right to carry her modern firearm in primitive locations indistinguishable from those that existed at the Founding.

3.

The panel's approach in these cases also further entrenched our court's practice of analogizing at too high a level of generality. The panel extracted very broad principles from the historical record that could support the constitutionality of almost any firearms restriction. Whenever the panel analogized to historical regulations, it found Hawaii's or California's laws constitutional. *See Wolford*, 116 F.4th at 982-83 (parks and beaches); *id.* at 986 (bars and restaurants); *id.* at 987 (places of amusement); *id.* at 993 (private property). This appearance of foreordained

outcomes is a strong hint that something is wrong with how the panel analogized. Such predetermined results happen because the panel inevitably extracted analogies at too high a level of generality, precisely what the Supreme Court in *Bruen* and *Rahimi* instructed lower courts *not* to do. *Bruen*, 597 U.S. at 30; *Rahimi*, 602 U.S. at 692.

To guard against this tendency, the Supreme Court has instructed that to confirm whether historical laws are "relevantly similar" we must look carefully at the "how and why" of the regulations; that is, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense [the 'how'] and whether that burden is comparably justified [the 'why'] are '*central*' considerations when engaging in an analogical inquiry." *Bruen*, 597 U.S. at 29 (quoting *McDonald*, 561 U.S. at 767); *see also Rahimi*, 602 U.S. at 692. The panel repeated these instructions but failed to apply them.

The "regulatory principles" that the panel extracted from the historical traditions bear little resemblance to the "why" behind the historical regulations to which the panel analogized. For example, from laws limiting poaching and hunting on private property, the panel drew the broad principle "that the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property." *Wolford*, 116 F.4th at 995. From, among others, laws segregating the militia from alcohol, the panel drew the untethered principle that governments can regulate "to mitigate the dangers of mixing alcohol and firearms." *Id.* at 986. And from laws prohibiting the carrying of firearms at

ballrooms and social gatherings, the panel drew the exceedingly broad principle of "prohibiting firearms at crowded places." *Id.* With each capacious "principle" the panel extracted from the historical laws, it disregarded the narrow reason "why" those laws were enacted.

And in reaching its overbroad analogies, the panel also failed to consider "how" the historical regulations were effectuated—that is whether the modern regulations "impose a comparable burden on the right of armed self-defense." *Bruen*, 597 U.S. at 29. For example, as discussed above, from laws prohibiting the carrying of firearms without consent on a small subset of private property—enclosed lands—the panel concluded that *all* private property can be presumptively excluded, effectively rendering almost entire cities "no-carry" zones by default. *Wolford*, 116 F.4th at 996. And from laws prohibiting firearms at balls and other isolated social gatherings, the panel concluded that firearms can be prohibited at all bars and any restaurant that serves alcohol. *Id.* at 985-86. Put simply, the breadth of California's and Hawaii's laws bears no resemblance to the limited impact of the historical laws the panel pointed to for historical support.

By ignoring the "why" and the "how," the panel ran afoul of the Supreme Court's warnings not to over-generalize when drawing a historical analogy. Three Justices have explained that the Court's decisions in *Bruen* and *Rahimi* do not license lower courts to abstract to such high levels of generality. "[A] court must be careful not to read a principle at such a high level of generality that it waters down the right." *Rahimi*, 602 U.S. at 740

(Barrett, J., concurring). "Courts must proceed with care in making comparisons to historic firearms regulations, or else they risk gaming away an individual right the people expressly preserved for themselves in the Constitution's text." *Id.* at 711 (Gorsuch, J., concurring). And judges must not "let constitutional analysis morph into policy preferences under the guise of a balancing test that churns out the judge's own policy beliefs." *Id.* at 736 (Kavanaugh, J., concurring). By employing such broad analogizing, the panel turned the Second Amendment into a Rorschach inkblot—permitting judges to reason from abstract, broad constitutional principles whatever image of the right to bear arms that their personal preferences compel. And in doing so, states are given the very "regulatory blank check" that *Bruen* instructed against. 597 U.S. at 30.

* * *

The panel's acknowledgment that the results of its analysis are both "arbitrary" and "[il]logical" should have been a wake-up call that something was wrong and merited correction by our court. *Wolford*, 116 F.4th at 1003. Not all Second Amendment questions are straightforward, but these cases presented one of the easier ones for our en banc court to fix. It is unfortunate we failed to do so.

IV.

There is one more reason we should have taken these cases en banc. The panel unnecessarily created a circuit split. By upholding Hawaii's default private property rule, the panel departed from the holding of every other court to have considered similar private property default rules.

Appendix C

In *Antonyuk v. James*, 120 F.4th 941 (2d Cir. 2024), the Second Circuit held that New York's enactment of a similarly novel private property default rule violated the Second Amendment as applied to private property open to the public. *Id.* at 1048. The court concluded that "the State's analogues fail to establish a national tradition motivated by a similar 'how' or 'why' of regulating firearms in property open to the public in the manner attempted by [New York's private property default rule]. Accordingly, the State has not carried its burden under *Bruen*." *Id.* at 1047. The Second Circuit reviewed a set of historical materials nearly identical to those presented by Hawaii and California in these cases, including both the 1771 New Jersey poaching law and the 1865 Louisiana Black Code relied on by the panel. *Compare id.* at 1046-47, *with Wolford*, 116 F.4th at 994-96. The Second Circuit concluded that "*none* of the State's proffered analogues burdened Second Amendment rights in the same way as [New York's private property default rule]." *Antonyuk*, 120 F.4th at 1046. Instead, it observed that "[a]ll of the State's analogues appear to, by their own terms, have created a default presumption against carriage only on private lands *not open to the public*." *Id.*

Each district court that has addressed similar laws has also reached a conclusion at odds with this court's. *E.g., Kipke*, 695 F. Supp. 3d at 659 ("[T]he Court finds that Plaintiffs are clearly likely to succeed in their challenge of SB 1's private building consent rule."); *Koons*, 673 F. Supp. 3d at 607 ("[T]he Court concludes that the Default Rule impermissibly burdens Plaintiffs' Second Amendment right to carry for self-defense in public as applied to private property that is held open to the public

and for which an implied invitation to enter is extended ...."); *Christian*, 2024 WL 4458385, at *11 ("The State's criminal enactment barring carrying of arms on private property open to the public violates the Constitution.").

With this panel decision upholding Hawaii's default private property law, our court once again becomes a Second Amendment outlier among the circuits. We should have corrected it en banc.

V.

With their new public carry bans, Hawaii and California have effectively disarmed law-abiding Hawaiians and Californians from publicly carrying during most of their daily lives. *Bruen* said the Second Amendment protects a "general right to publicly carry arms for self-defense." 597 U.S. at 31. It is hard to see how any such right "generally" applies in Hawaii and California after our court has sanctioned laws that flip the default rule into a "general right" *not* to carry on private property or most public property other than streets and sidewalks. If rigorously applying the mode of analysis mandated by *Bruen* led us to that shocking conclusion, perhaps we would be forced to conclude that the Supreme Court simply misspoke in characterizing the right to publicly carry as the "general" rule. But as explained, the panel's analysis fails to follow the Supreme Court's text-history-and-tradition guidance at almost every turn. Because I believe the Second Amendment does not countenance that approach, I respectfully dissent from the denial of rehearing en banc.

APPENDIX D — CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

SECOND AMENDMENT

A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.

Appendix D

CONSTITUTION OF THE UNITED STATES

FOURTEENTH AMENDMENT

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2

Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Appendix D

Section 3

No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4

The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5

The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Appendix D

HAW. REV. STAT. § 134-9.1

Current through the 2024 Legislative Session

Section 134-9.1 – Carrying or possessing a firearm in certain locations and premises prohibited; penalty

(**a**) A person with a license issued under section 134-9, or authorized to carry a firearm in accordance with title 18 United States Code section 926B or 926C, shall not intentionally, knowingly, or recklessly carry or possess a loaded or unloaded firearm, whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, while in any of the following locations and premises within the State:

> (**1**) Any building or office owned, leased, or used by the State ora county, and adjacent grounds and parking areas, including any portion of a building or office used for court proceedings,legislative business, contested case hearings, agency rulemaking, or other activities of state or county government;
>
> (**2**) Any public or private hospital, mental health facility, nursing home, clinic, medical office, urgent care facility, or other place at which medical or health services are customarily provided, including adjacent parking areas;
>
> (**3**) Any adult or juvenile detention or correctional facility, prison, or jail, including adjacent parking areas;

(**4**) Any bar or restaurant serving alcohol or intoxicating liquor as defined in section 281-1 for consumption on the premises, including adjacent parking areas;

(**5**) Any stadium, movie theater, or concert hall, or any place at which a professional, collegiate, high school, amateur, or student sporting event is being held, including adjacent parking areas;

(**6**) All public library property, including buildings, facilities, meeting rooms, spaces used for community programming, adjacent grounds, and parking areas;

(**7**) The campus or premises of any public or private community college, college, or university, and adjacent parking areas, including buildings, classrooms, laboratories, research facilities, artistic venues, and athletic fields or venues;

(8) The campus or premises of any public school, charter school, private school, preschool, summer camp, or child care facility as defined in section 346-151, including adjacent parking areas, but not including:

> (**A**) A private residence at which education is provided for children who are all related to one another by blood, marriage, or adoption; or

(**B**) A dwelling when not used as a child care facility;

(**9**) Any beach, playground, park, or adjacent parking area, including any state park, state monument, county park, tennis court, golf course, swimming pool, or other recreation area or facility under control, maintenance, and management of the State or a county, but not including an authorized target range or shooting complex;

(**10**) Any shelter, residential, or programmatic facility or adjacent parking area operated by a government entity or charitable organization serving unhoused persons, victims of domestic violence, or children, including children involved in the juvenile justice system;

(**11**) Any voter service center as defined in section 11-1 or other polling place, including adjacent parking areas;

(**12**) The premises of any bank or financial institution as defined in section 211D-1, including adjacent parking areas;

(**13**) Any place, facility, or vehicle used for public transportation or public transit, and adjacent parking areas, including buses, paratransit vans, bus shelters and terminals (but not including bus stops located on public sidewalks), trains, rail stations, and airports;

(**14**) Any amusement park, aquarium, carnival, circus, fair, museum, water park, or zoo, including adjacent parking areas; or

(**15**) Any public gathering, public assembly, or special event conducted on property open to the public, including any demonstration, march, rally, vigil, protest, picketing, or other public assembly, for which a permit is obtained from the federal government, the State, or a county, and the sidewalk or street immediately adjacent to the public gathering, public assembly, or special event; provided that there are signs clearly and conspicuously posted at visible places along the perimeter of the public gathering, public assembly, or special event.

(**b**) This section shall not apply to a person in an exempt category identified in section 134-11(a). It shall be an affirmative defense to any prosecution under this section that a person is:

(**1**) Carrying or possessing an unloaded firearm in a police station in accordance with section 134-23(a)(6), 134-24(a)(6), or 134-25(a)(6);

(**2**) Carrying or possessing an unloaded firearm at an organized, scheduled firearms show or exhibit;

(**3**) Lawfully carrying or possessing a firearm for hunting in compliance with section 134-5;

(**4**) A private security officer expressly authorized to carry or possess a weapon in a location or premises listed in subsection (a) by the owner, lessee, operator, or manager of the location or premises; provided that the private security officer is acting within the private security officer's scope of employment;

(**5**) Carrying or possessing an unloaded firearm in a courthouse for evidentiary purposes with the prior express authorization of the court;

(**6**) Lawfully present within the person's own home, other than a college or university dormitory or shelter or residential facility serving unhoused persons or victims of domestic violence;

(**7**) Carrying a firearm pursuant to a license issued under section 134-9 or in accordance with title 18 United States Code section 926B or 926C in the immediate area surrounding the person's vehicle within a parking area for the limited purpose of storing or retrieving the firearm;

(8) Possessing a firearm in an airport or any place, facility, or vehicle used for public transportation or public transit; provided that the firearm is unloaded and in a locked hard-sided container for the purpose of transporting the firearm;

(**9**) Walking through a public gathering, public assembly, or special event if necessary to access the person's residence, place of business, or vehicle; provided that the person does not loiter or remain longer than necessary to complete their travel or business; or

(**10**) Carrying a concealed firearm in accordance with title 18 United States Code section 926B or 926C in a location or premises within the State that is not a State or county property, installation, building, base, or park, and not a location or premises where a private person or entity has prohibited or restricted the possession of concealed firearms on their property.

(**c**) The presence of a person in any location or premises listed in subsection (a) shall be prima facie evidence that the person knew it was a location or premises listed in subsection (a).

(**d**) Where only a portion of a building or office is owned, leased, or used by the State or a county, this section shall not apply to the portion of the building or office that is not owned, leased, or used by the State or a county, unless carrying or possessing a firearm within that portion is otherwise prohibited by this section.

(**e**) As used in this section, "private security officer" means any person employed and duly licensed to engage in the private detective or guard business pursuant to chapter 463.

(**f**) Any person who violates this section shall be guilty of a misdemeanor.

(**g**) If any ordinance of any county of the State establishing locations where the carrying of firearms is prohibited is inconsistent with this section or with section 134-9.5, the ordinance shall be void to the extent of the inconsistency.

Appendix D

2024 HAWAII REVISED STATUTES
TITLE 10. PUBLIC SAFETY AND INTERNAL SECURITY
134. FIREARMS, AMMUNITION AND DANGEROUS WEAPONS

§134-9.5 Carrying or possessing a firearm on private property of another person without authorization; penalty. (a) A person carrying a firearm pursuant to a license issued under section 134-9 shall not intentionally, knowingly, or recklessly enter or remain on private property of another person while carrying a loaded or unloaded firearm, whether the firearm is operable or not, and whether the firearm is concealed or unconcealed, unless the person has been given express authorization to carry a firearm on the property by the owner, lessee, operator, or manager of the property.

(b) For purposes of this section, express authorization to carry or possess a firearm on private property shall be signified by:

(1) Unambiguous written or verbal authorization; or

(2) The posting of clear and conspicuous signage at the entrance of the building or on the premises,

by the owner, lessee, operator, or manager of the property, or agent thereof, indicating that carrying or possessing a firearm is authorized.

(c) For purposes of this section:

"Private entity" means any homeowners' association, community association, planned community association, condominium association, cooperative, or any other nongovernmental entity with covenants, bylaws, or administrative rules, regulations, or provisions governing the use of private property.

"Private property" does not include property that is owned or leased by any governmental entity.

"Private property of another person" means residential, commercial, industrial, agricultural, institutional, or undeveloped property that is privately owned or leased, unless the person carrying a firearm is an owner, lessee, operator, or manager of the property, including an ownership interest in a common element or limited common element of the property; provided that nothing in this chapter shall be construed to limit the enforceability of a provision in any private rental agreement restricting a tenant's possession or use of firearms, the enforceability of a restrictive covenant restricting the possession or use of firearms, or the authority of any private entity to restrict the possession or use of firearms on private property.

(d) This section shall not apply to a person in an exempt category identified in section 134-11(a).

(e) Any person who violates this section shall be guilty of a misdemeanor. [L 2023, c 52, pt of §2]

APPENDIX E — JOINT STIPULATION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAIʻI, DATED SEPTEMBER 6, 2023

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAIʻI

Civil No. 1:23-cv-00265-LEK-WRP

JASON WOLFORD; ALISON WOLFORD; ATOM KASPRZYCKI; HAWAII FIREARMS COALITION,

Plaintiffs,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAIʻI,

Defendant.

Dated September 6, 2023

JOINT STIPULATION TO CONVERT TEMPORARY RESTRAINING ORDER TO PRELIMINARY INJUNCTION AND TO STAY FURTHER PROCEEDINGS IN THE DISTRICT COURT PENDING APPEAL

District Judge: Hon. Leslie E. Kobayashi
Magistrate Judge: Hon. Wes Reber Porter

Appendix E

Pursuant to Local Rule 10.5, Plaintiffs Jason Wolford, Alison Wolford, Atom Kasprzycki, and Hawaii Firearms Coalition, and Defendant Anne E. Lopez, in her official capacity as the Attorney General of the State of Hawai'i, by their respective counsel, hereby agree and stipulate that the District Court's August 8, 2023, Order Granting in Part and Denying in Part Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction, Dkt. 66, shall be converted to a preliminary injunction, on the same basis and for the same reasons as those given in the August 8 Order. *See Washington v. Trump*, 847 F.3d 1151, 1159 n.3 (9th Cir. 2017) (per curiam). After the District Court converts the temporary restraining order to a preliminary injunction, the parties shall, within forty-eight (48) hours, file a stipulated motion to voluntarily dismiss the appeal from the temporary restraining order, pursuant to Federal Rule of Appellate Procedure 42(b)(1), with each party responsible for bearing its own costs and fees in connection with that appeal. Defendant expressly reserves its right to appeal—and intends to appeal—the preliminary injunction. The parties agree that Defendant's request that the temporary restraining order be stayed pending appeal shall be construed as a request that the preliminary injunction be stayed pending appeal. *See* Dkt. 67 (motion); *see also* Dkt. 79 (reply). The parties also agree that Plaintiffs' opposition to Defendant's request for a stay of the temporary restraining order, now construed as a request to stay the preliminary injunction, shall be construed as Plaintiffs' opposition to Defendant's request that the preliminary injunction be stayed pending appeal. *See* Dkt. 78 (opposition).

Appendix E

The parties hereby agree and stipulate that all further deadlines and proceedings in this Court will be stayed during the pendency of Defendant's appeal from the preliminary injunction.

DATED: Washington, DC, September 6, 2023.

/s/ Ben Gifford
KALIKOʻONĀLANI D. FERNANDES
Solicitor General
NICHOLAS M. MCLEAN
First Deputy Solicitor General
NEAL K. KATYAL*
MARY B. MCCORD*
BEN GIFFORD*
RUPA BHATTACHARYYA*
DANA A. RAPHAEL*
Special Deputy Attorneys General

* Pro Hac Vice

Attorneys for Defendant

DATED: Honolulu, Hawaiʻi, September 6, 2023.

/s/ Kevin O'Grady
KEVIN GERARD O'GRADY
ALAN ALEXANDER BECK

Attorneys for Plaintiffs

Appendix E

APPROVED AND SO ORDERED:

DATED: Honolulu, Hawai‘i, September 6, 2023

/s/ Leslie E. Kobayashi
Leslie E. Kobayashi
United States District Judge

APPENDIX F — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, FILED JANUARY 17, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 23-16164
D.C. No. 1:23-cv-00265-LEK-WRP
District of Hawaii, Honolulu

JASON WOLFORD; *et al.*,

Plaintiffs-Appellees,

v.

ANNE E. LOPEZ, IN HER OFFICIAL CAPACITY AS THE ATTORNEY GENERAL OF THE STATE OF HAWAI'I,

Defendant-Appellant.

Filed January 17, 2025

ORDER

Before: SCHROEDER, GRABER, and SUNG, Circuit Judges.

The order filed January 16, 2025, is vacated and this order is filed in its place. Appellees' motion to stay the mandate, Docket No. 112, is GRANTED. The mandate is stayed for ninety (90) days from the date this order is filed.

If, within that period, the Clerk of the Supreme Court advises the Clerk of this Court that a petition for certiorari has been filed, then the mandate shall be further stayed until final disposition of the matter by the Supreme Court.