Case No. 23-4354 and 23-4356

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENO MAY, ET AL.,
Plaintiffs- Appellees,

v.

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

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

PLAINTIFFS-APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL AND FOR AN INTERIM ADMINISTRATIVE STAY RELIEF REQUESTED BY DECEMBER 31, 2023

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December 27, 2023

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I. INTRODUCTION

In *Bruen*, the Supreme Court confirmed that the historical record reveals "relatively few" sensitive places, and warned that abusing that label would "eviscerate the general right to publicly carry." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen,* 597 U.S. 1, 31 (2022). Thus, expanding the sensitive places doctrine to "all places of public congregation" is unconstitutional. *Id*.

Until *Bruen*, California law authorized the concealed carry of arms via permit that encompassed most of the public sphere. The State's laws on where concealed carry weapon ("CCW") permit holders could lawfully carry were broad and unchanged for decades. In a reflexive and petulant response to *Bruen* – one intentionally designed to make a political statement opposing the *Bruen* decision rather than enact constitutionally sound law – it was the California legislature who fundamentally altered more than half a century status quo by passing Senate Bill 2 ("SB 2").

The District Court preserved the status quo by enjoining SB 2, thus allowing California's rigorously vetted CCW permit holders to continue to exercise their self-defense right in the same manner as they had previously.

If this Court stays the district court's injunction, every law-abiding citizen who has complied with California's extensive and costly CCW permit process, including these Plaintiffs-Respondents ("Plaintiffs"), will effectively lose their right to carry on January 1.

A. THERE IS A MARKED LACK OF EMERGENCY

In claiming a need for an emergency stay, the Attorney General is pinning his hopes on the rumors and innuendo about the Ninth Circuit's antipathy toward the Second Amendment, and then, with a seeming wink and nod, expecting this Court to ignore the standard of review, ignore the gaping holes in the evidentiary record below, and sign on to the State's false claim of a dire emergency warranting unusual relief.

A faux-emergency was also central to the issues raised in *Cooper v. Aaron,* 358 U.S. 1 (1958). The legislature and governor of Arkansas—claiming dire consequences if children of different races attended public schools together—defied the Supreme Court's interpretation of the Fourteenth Amendment. With SB 2, the legislature and governor of California are similarly claiming there will be dire consequences if the State is required to comply with the Second Amendment.

The evidence of a falling sky was more credible given the facts in *Cooper*, as there undoubtedly were people prepared to commit violence in defiance of the Supreme Court's order that public schools be desegregated "with all deliberate speed." *Brown v. Board of Educ. Of Topeka, Kan*., 349 U.S. 294, 301 ("*Brown II*"). President Eisenhower mobilized the 101st Airborne to address that possibility after Governor Orval Faubus had activated the Arkansas National Guard. Even so, the Supreme Court was not persuaded to set aside or delay its holding in *Brown.* It did what federal courts are supposed to do, it insisted on compliance with its decisions on matters of constitutional law. California's poor imitation of Arkansas (Governor Newsom isn't even threatening to activate the California National

Guard) is entirely unpersuasive. When asked about the potential for criminal conduct by CCW permit holders, the California Attorney General was unable to provide *any* evidence that CCW permit holders will engage in lawless conduct if permitted to bear arms in places they have been bearing arms for decades.

California's response to *Bruen* was SB 2. It echoes Arkansas's response after *Brown II* was issued. Facing the pressure to comply with *Brown*, Arkansas shifted from regulating "who" was entitled to equal protection of the law, to restricting "where" the state would deign to comply. Arkansas went so far as to close the public high schools for a year, rather than comply. *See* Sondra Gordy, *Empty Classrooms, Empty Hearts: Little Rock Secondary Teachers, 1958-1959,* The Arkansas Historical Quarterly, Vol. 56, No. 4, 427–42 (1997), https://doi.org/10.2307/40027889 (last accessed December 26, 2023). For more than 70 years California has regulated "who" could obtain a CCW permit with only narrow restrictions on "where." It was only after *Bruen* that California, like Arkansas, switched from oppressing "who" could exercise the enumerated right, to "where" that right could be exercised, doing so in a manner that—like the closing of schools—is intentionally designed to suppress the exercise of that right.

The controversy presented by this case is not about public safety, at least not directly. The crisis presented here is over whether an independent judiciary will retain its role in preserving constitutional rights, as the district court has already done. SB 2 "necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court's considered interpretation of the United States Constitution." *Cooper v.*

Aaron, 358 U.S. 1, 4 (1958). The trial court rendered a well-reasoned opinion, taking evidence from both parties, and applying relevant, recent, and unambiguous Supreme Court precedent. The State can point to no impending lawless conduct by CCW permit holders to justify an emergency stay. In asking this Court to find an emergency exists, the Attorney General is asking this Court to accede to California's defiance of the judicial branch of our government. Doing so "raises questions of the highest importance to the maintenance of our federal system of government." *Cooper*, 358 U.S. at 4. This Court should decline to participate in or sanction California's defiance of *Bruen* by granting the Attorney General the extraordinary relief he requests.

B. SB 2 Upends a Decades-long Status Quo

Under SB 2, most public places utilized by people in their day-to-day activities will be carved out from the right to carry. SB 2 even restricts carry at all private businesses held open to the public unless the owner takes affirmative steps to post a sign allowing carry. This provision, nicknamed the "vampire rule," and enacted in five states post-*Bruen*, has now been enjoined by courts from enforcement *in all five* as blatantly unconstitutional.

At a February 2023 press conference announcing SB 2, Governor Newsom angrily criticized the Supreme Court for the *Bruen* ruling and mocked the notion of a right to carry.[1] Yet when questioned about whether people with CCW permits commit any notable amount of crime, he unsurprisingly dodged the question, as

[1] *See* https://twitter.com/i/broadcasts/1vAxRAXgXRVJl (at 41:23) (last accessed December 15, 2023).

people with CCW permits are overwhelmingly law-abiding, as the district court recognized based on data from several states that Plaintiffs presented.[2] That is also why numerous large law enforcement organizations, like the California State Sheriffs' Association, opposed SB 2, and why the largest law enforcement organization in California (the Peace Officers Research Association of California) submitted a declaration in support of Plaintiffs' motion to enjoin various provisions of SB 2.

Accordingly, the district court's well-reasoned ruling should not be stayed, because "individuals must be able to effectuate their right to self-defense by, if they so choose, responsibly bearing arms." Order at 2. Also weighing against a stay is the fact that a preliminary injunction against Hawaii's very similar *Bruen*-response law has remained in effect since August after both this Court and the district court took no action on that State's request to stay the injunction pending appeal. *See Wolford v. Lopez*, 2023 WL 5043805, at *32-33 (D. Haw. Aug. 8, 2023). As the State acknowledges (Mot. at 3), that ruling also enjoined every designated place the plaintiffs challenged, just as the district court's ruling here did. As expected, no harm has resulted from that injunction in the months since. It would thus be unjust and unprincipled for Californians with CCW permits to effectively lose their right to carry on January 1 and be left in a much *worse* position than they were in before *Bruen*, a case that was intended to *vindicate* their

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

rights. This Court should therefore deny the State's emergency motion in its entirety.

II. ARGUMENT

A. THE DISTRICT COURT'S INJUNCTION PRESERVES THE STATUS QUO

Completely missing from the State's motion is the acknowledgment that a grant of a preliminary injunction is reviewed for **abuse of discretion**. *Saravia for A.H. v. Sessions*, 905 F.3d 1137, 1141 (9th Cir. 2018). And the abuse of discretion standard is highly deferential to the district court. *Microsoft Corp. v. Motorola, Inc.*, 696 F.3d 872, 881 (9th Cir. 2012). That said, the Attorney General seems to be counting on those well-established standards being cast aside because the State's request for emergency relief involves a Second Amendment-related ruling. *See Duncan v. Bonta*, 83 F.4th 803, 808 (9th Cir. 2023) (Bumatay, J., Ikuta, J., R. Nelson, J., and VanDyke, J. dissenting) ("If the protection of the people's fundamental rights wasn't such a serious matter, our court's attitude toward the Second Amendment would be laughably absurd.")

If any preliminary injunction should stand, it is this one. The only thing the district court's thorough ruling does is preserve the status quo as it exists today, and has existed for nearly all of California's history.[3] Plaintiffs did not seek to enjoin any place listed in SB 2 that was already off-limits under existing state or

[3] The State attempts to mislead this Court by claiming that, if the injunction is not stayed, SB 2 will be blocked, "allowing concealed carry licensees to carry handguns in a host of sensitive public places." Mot. at 3-4. It would be correct to say that licensees will *continue to be allowed* to carry in such places, as they always have.

federal law, including the various places listed in Background section A of the State's motion. Mot. at 4. Indeed, California has *never* banned carry in the listed places the District Court enjoined, and tens of thousands of Californians with CCW permits were carrying in such places, long before *Bruen*, without any evidence of harm.[4] The district court's ruling thus serves the most basic purpose of a preliminary injunction, which is to "preserve the status quo pending a determination of the action on the merits." *King v. Saddleback Junior Coll. Dist.*, 425 F.2d 426, 427 (9th Cir. 1970); *see also P. v. Riles*, 502 F.2d 963, 965 (9th Cir. 1974) ("It is so well settled as not to require citation of authority that the usual function of a preliminary injunction is to preserve the status quo ante litem pending a determination of the action on the merits.").

Furthermore, while disagreement on the merits is understandable, it would be absurd to argue that the district court *abused its discretion*, which is probably why the State omitted any reference to the standard. Almost every one of SB 2's places the District Court enjoined has also been enjoined by at least one other federal court, and usually more than one.[5] With several other judges around the

[4] Even in 2015, several years before *Bruen*, over 70,000 Californians had CCW permits. Matt Drange, *Concealed weapons of California: The numbers*, Reveal News (June 16, 2015), https://revealnews.org/article/concealed-weapons-of-california-the-numbers/ (last accessed December 22, 2023).

[5] *See, e.g., Koons v. Platkin*, 2023 WL 3478604 (D.N.J. May 16, 2023) (enjoining New Jersey's restrictions on carrying on most government property, public gatherings, zoos, parks, libraries, museums, healthcare facilities, casinos, bars and restaurants serving alcohol, entertainment facilities, and the vampire rule); *Wolford*, 2023 WL 5043805 (enjoining Hawaii's restrictions on carrying in parking areas adjacent to government buildings, places serving alcohol, beaches, parks, banks, and the vampire rule); *Antonyuk v. Hochul*, 639 F. Supp. 3d 232, 316 (N.D.N.Y. 2022 (enjoining New York's restrictions on carrying in hospitals, places

country independently reaching similar conclusions, there clearly is no abuse of discretion. Lacking any such abuse, and with this injunction merely preserving the status quo, it would be extraordinary for this Court to issue a stay pending appeal.

B. PLAINTIFFS ARE LIKELY TO SUCCEED ON THE MERITS

The district court properly ruled that each of SB 2's places challenged by Plaintiffs has no "well-established and representative" historical tradition of States banning carry. *Bruen*, 597 U.S. at 30. Indeed, most of the places the injunction applied to existed in the 18th or 19th centuries and, with very limited exceptions, carry was not banned within them. That decisively favors Plaintiffs because, "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." *Id*. at 26.

Nevertheless, the State argues the district court's ruling is at odds with those of other courts, Mot. at 11. But while many of the rulings it cites enjoined key provisions of the SB 2-copycat laws challenged therein, the State here demands a stay as to the district court's *entire* injunction. *See* discussion *supra* note 5 (summarizing several courts that ruled similarly to the district court).

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of worship, parks, zoos, some public transport, theaters, conference centers, banquet halls, public gatherings, and the vampire rule); *Kipke v. Moore*, 2023 WL 6381503 (D. Md. Sept. 29, 2023) (enjoining Maryland's restrictions on carrying in locations that sell alcohol, public gatherings, and the vampire rule); *Nat'l Ass'n for Gun Rts. v. Grisham*, 2023 WL 5951940, at *4 (D.N.M. Sept. 13, 2023) (restraining New Mexico Governor's executive order banning carry in most places in Bernalillo County); *Springer v. Grisham*, 2023 WL 8436312, at *8 (D.N.M. Dec. 5, 2023) (enjoining New Mexico Governor's executive order banning carry in public parks).

The State also complains that the district court should not have considered the fact that California reserves the right to carry only for those who have gone through its extensive CCW permit application process. Mot. at 15-16. But weighing that in the analysis was entirely appropriate and necessary. As Plaintiffs argued below, during the Reconstruction era, California restricted only concealed carry, not open carry. Open carry was generally allowed with no permit requirements at all. Today, however, California imposes an onerous process to obtain a CCW permit, complete with a police interview, full-day training course, thorough DOJ background check, psychological exam at the issuing authority's discretion, significant processing times, and significant application and renewal fees. Cal. Penal Code § 26150, *et seq*. (West 2023). Thus, to the extent the State argues that *places* have changed compared to their earlier versions (*see, e.g.* Mot. at 17) it is only fair for it to concede that its regulation of the *people* permitted to exercise the right to carry in California has also changed, as the requirements to bear arms in public are significantly stricter today. The district court was right to consider that important difference.

As to "the more nuanced approach" that the State complains the district court did not allow it to engage with, that approach only applies in cases "implicating unprecedented societal concerns or dramatic technological changes". Mot. at 17; *Bruen*, 597 U.S. at 27. To be sure, that doctrine may apply in the sensitive places context. For example, SB 2 prohibits carry at nuclear facilities. Penal Code § 26230(a)(21). A nuclear facility, one might argue, is unlike any facility that existed prior to 1900. But whereas nuclear facilities arguably are

unusually situated, nearly all the places that SB 2 impacted and that the district court enjoined existed prior to 1900. And while every type of public place no doubt has changed from its 18th or 19th century version to some degree, such changes are immaterial for *Bruen*-compliant review purposes. Whether or not a park, bar, library, or bank is more modern now than 150 years ago, the claimed problem of armed individuals in these places is not significantly different than it was back then. The State's analytical approach would permit use of the "more nuanced" approach in every case, on the theory that every place is somewhat different than it was in the late 18th century. Thus, the State's invitation to dispose of the strict historical scrutiny that *Bruen* expects and requires is unsupportable.

In support of that invitation, the State papered the district court with thirteen purported expert declarations aimed at minimizing the *lack* of state laws regulating carry supporting the state's overregulation under SB 2. Very little of these experts' evidence discussed firearms regulations, instead focusing on non-central topics like the purported difficulty of researching history, reasons the Court should vary its analysis from the analogical standards identified in *Heller* and *Bruen*, and why Frederick Olmsted's opinion about the functionality and design of public parks should displace a *Bruen*-compliant analogical inquiry.

One of the State's experts even summarily conceded that the City of Philadelphia "did not enact weapon-specific regulations for these places of public assembly." Rivas Decl., ¶ 34. Another expert presented an interesting account of the history of hospitals, but presented no evidence of restricting the carrying of

arms in hospitals.[6] Kisacky Decl., *passim*. Still another discussed railroads and even conceded there was no historical tradition of banning carry on trains, but did discuss a handful of *private* companies' restrictions that regulated whether or how people could carry on trains. Salzmann Decl., *passim*. This pattern repeated for almost every place challenged, with no discernable *Bruen*-compliant identification of a historical tradition of state regulation. As interesting as some of the State's experts' declarations may be, they have no bearing on the historical hunt for distinctly similar or even analogous regulatory traditions.

Although the State claims to have found "historical twins" (Mot. at 17) for nearly all of the places challenged, it did not find anything remotely close. The best the State could muster as to parks was the argument that, "[b]y 1900, the carrying of firearms was prohibited in more than two dozen parks across at least ten different states." State's Opp. to Mtn. for Prelim. Inj., at 33 (Dkt. No. 21). But even if a period as late as 1900 was relevant under *Bruen* (it is not), there were 45 total states in 1900, of which the state claims about 20 percent banned the carrying of firearms in *some* specific parks. That showing is completely dissimilar to SB 2, which does not single out one or two major parks with unique characteristics that allegedly make them sensitive. Instead, the law bans carry in *all* of California's

[6] Plaintiff Hough operates his own dental practice and would be barred by SB 2 from continuing to carry at his workplace. His dental practice would be considered a "sensitive place" health care facility under SB 2 and thus his own carry would be prohibited within it by Cal. Penal Code § 26230(a)(7), notwithstanding that he owns and wholly controls the practice and wishes to continue to exercise his Second Amendment rights in it. He also has never had a problem with his patients carrying if they so desire; SB 2 would end that choice for him as well.

thousands of parks, whether they are urban, suburban, rural, or even in the wilderness of a state park. That has no historical precedent and is why the State failed to satisfy its obligation under *Bruen* to present such precedent.

With other places, the State failed to show even a *modern* tradition of banning carry. For example, prior to *Bruen*, not one state completely restricted the legal carrying of firearms in banks—not even California— and, to Plaintiffs' knowledge only two states partially restricted the practice. *See* Mich. Comp. Laws Serv. § 750.234d(1) (allowing concealed carry but not open carry); Neb. Rev. Stat. § 69-2441(a) (allowing open carry but not concealed carry). Perhaps *Bruen* leaves some things to be decided, but a valid historical tradition of firearm regulation clearly cannot begin in 2023. Indeed, the law struck down in *Bruen* dated to the early 20th century. *Bruen*, 597 U.S. at 11.

Notably, the State audaciously demands a stay of the injunction even as to some of SB 2's most damaging provisions. Those include the vampire rule, which even the State must acknowledge has been struck down by every court to examine it. Mot. at 19. It also includes public transportation, a restriction which would effectively eliminate the right to carry for anyone who lacks a vehicle and uses public transportation to get around (a means test on constitutional rights). Yet the Supreme Court had in mind exactly these sorts of individuals when deciding *Bruen,* and it would be manifestly unjust to eliminate their right to carry.[7]

[7] During the *Bruen* oral argument, Justice Alito described some who were wrongfully denied carry permits as follows: "None of these people has a criminal record. They're all law-abiding citizens. They get off work around midnight, maybe even after midnight. ***They have to commute home by subway, maybe by bus.*** When they arrive at the subway station or the bus stop, they have to walk

As for those who do have cars, the State insists it can ban carry in the *parking lots* of the innumerable places declared sensitive under SB 2. Mot. at 18. That would mean if a business shares a parking lot with a sensitive place, the entire parking area is off-limits, even if the individual carrying a firearm is not visiting the prohibited establishment. That is unacceptable, as the overwhelming majority of parking lots are clearly not sensitive places.

To be sure, some curtilage might be found to be sensitive. As one concurring opinion that has been vindicated by *Bruen* explained, "[t]he White House lawn, although not a building, is just as sensitive as the White House itself" but, "[a]t the spectrum's other end[,] we might find a public park associated with no particular sensitive government interests – or a post office parking lot surrounding a run-of-the-mill post office." *Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 1137 (10th Cir. 2015) (Tymkovich, J., concurring in part and dissenting in part). The parking lots restricted by SB 2 clearly are not like the White House lawn; they are so numerous and ubiquitous as to render the term "sensitive places" meaningless. *Cf.* Brad Bird, *The Incredibles*, Orig. Script at p. 103, https://thescriptlab.com/wp-content/uploads/scripts/the-incredibles.pdf (last accessed December 26, 2023) ("And when everyone's Super . . . no one will be.").

Thus, the State has not shown any likelihood of success on the merits (let alone enough to stay the entire injunction). That seems implicitly apparent in the State's motion, given that the absence of conviction or confidence in the arguments

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some distance through a high-crime area. . . ." *See* Transcript of Oral Argument, *New York State Rifle & Pistol Ass'n v. Bruen* (20-843), Oyez, https://www.oyez.org/cases/2021/20-843 (last accessed August 31, 2022) (emphasis added).

presented jumps off the page. For example, despite the State's halfhearted insistence that it can constitutionally block the right to carry everywhere save for some streets and sidewalks, it alternatively proposes a far narrower stay at the close of its motion. Mot. at 23. That bargaining should be rejected, and this Court should deny the requested stay in its entirety. Indeed, California has *never* banned carry in the places SB 2 targets, and to allow it to do so pending resolution of an injunction that merely preserves the historical status quo, would be unreasonable.

C. A Single Circuit's Ruling Neither Evidences the Required Emergency nor Overcomes the Weight of Other Precedent That Did Faithfully Apply *Bruen*

The State's reliance on the Second Circuit's recent ruling in *Antonyuk v. Chiumento* is wholly misgiven. That ruling is flagrantly flawed and will not survive eventual Supreme Court scrutiny. Moreover, even in the Second Circuit's constitutionally-infirm decision, no public health emergency of the sort the State claims will arise here was found to exist in *Antonyuk* or warrant extraordinary relief. Thus, even if an appeals panel here is eventually inclined to agree with *Antonyuk*'s analysis, its reasoning does not imbue this case with the facts or circumstances warranting the emergency stay the State seeks. And as demonstrated below, an appeals panel here is more likely to agree with the many post-*Bruen* federal cases faithful to *Bruen*'s historical and analogical test that struck down sweeping and unconstitutional sensitive places findings than such a panel is likely to agree with an outlier like *Antonyuk.*

Indeed, the panel in *Antonyuk* attempted to and succeeded in distorting *Bruen*'s test beyond recognition. It approvingly cited a law review article that was

highly critical of *Bruen,* and ultimately followed its advice on how to narrow the analysis to the detriment of the right to carry. *Antonyuk v. Chiumento*, 2023 WL 8518003, at *13, n.10 (2d Cir. Dec. 8, 2023) ("*Antonyuk II*") (citing Jacob D. Charles, *The Dead Hand of a Silent Past: Bruen, Gun Rights, and the Shackles of History*, 73 DUKE L.J. 67, 153 (2023)).[8] This is akin to relying on a dissenting opinion for how to apply a rule, a practice which afflicted post-*Heller* jurisprudence and which the Supreme Court has rejected. *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 230 (2023) ("A dissenting opinion is generally not the best source of legal advice on how to comply with the majority opinion.").

Unfortunately, the Second Circuit's *Antonyuk* opinion is over 200 pages long, and a thorough rebuttal of it here is neither warranted nor feasible in this short opposition to an emergency motion. However, a single example may suffice to illustrate the point.

Like here, the district court in *Antonyuk* enjoined New York's new, post *Bruen* prohibitions on carrying in places that serve alcohol. And just like SB 2, that prohibition applied even if the individual had no intention of drinking and was merely out to dinner at a restaurant that happens to serve alcohol.[9] Of course, it is

[8] Charles expressly called for lower courts to try to impermissibly narrow the *Bruen* precedent from below. *See* Charles, 73 DUKE L.J. 67, at 149. The Second Circuit clearly listened.

[9] Plaintiffs here, like the Plaintiffs in *Antonyuk*, do not seek the right to carry while drinking or intoxicated, but merely the right to carry in places that happen to serve alcohol when they are *not* drinking. Indeed, some of the Plaintiffs confirmed in their declarations below that they never drink, but do frequent restaurants that offer beer and wine.

undisputed that establishments that serve alcohol existed in the founding era and before, as did fears of drunken people attending such places causing harm because they are armed. Yet New York presented no historical state law showing that carrying in bars or pubs was banned in the 18th or 19th centuries, and offered only a few laws from pre-statehood territories and some 19th century laws forbidding firearm possession by intoxicated persons. The Second Circuit held this enough to uphold New York's restriction.

In doing so, the panel violated *Bruen* in at least *five* ways. First, *Bruen* gave virtually no weight to territorial restrictions. *Bruen*, 597 U.S. at 67. The Second Circuit disregarded that guidance. *Antonyuk II*, 2023 WL 8518003, at *67 (2d Cir. Dec. 8, 2023).

Second, because bars and pubs existed in the founding era, *Bruen* teaches that "the lack of a ***distinctly similar*** historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen*, 597 U.S. at 26 (emphasis added). The Second Circuit ignored this too, fabricating a rule that this guidance only applied "due to the exceptional nature of New York's proper-cause requirement, which conditioned the exercise of a federal constitutional right on the rightsholder's reasons for exercising the right."[10] *Antonyuk II*, 2023 WL 8518003, at *13. *Bruen* said no such thing, and its historical analysis does not shift based on *how* the Second

[10] Ironically, it was the Second Circuit itself which had upheld the proper cause requirement it now acknowledges as so obviously unconstitutional.

Amendment is implicated. If it did, that would just be interest-balancing by another name.

Third, *Bruen* also tells us that if earlier generations addressed the same problem through different means, that is evidence that the modern law is unconstitutional. *Bruen*, 597 U.S. at 26. As the Second Circuit acknowledged, the few historical laws that dealt with the problem of drunken armed people simply barred people who were intoxicated from being armed. They did not stop *everyone* from carrying in places that sell alcohol. *Antonyuk II*, 2023 WL 8518003, at *68.

Fourth, *Bruen* expressly reserved the analogical reasoning analysis for cases implicating "unprecedented societal concerns or dramatic technological changes." *Bruen*, 597 U.S. at 27. The Second Circuit expressly relied on analogical reasoning, even though no new societal concern was implicated. *Antonyuk II*, 2023 WL 8518003, at *67.

Fifth, even if analogical reasoning were allowed in this circumstance, the comparable factor cannot be as simple as "crowded places." The Second Circuit, however, relied on exactly that, *id.* at *69, and ignored the Supreme Court's rejection of New York's argument that it may ban carry in places where people typically congregate. *Bruen*, 597 U.S. at 30-31.

Last, it's worth noting that, despite its misapplication of *Bruen* and stacking the deck in the government's favor, even the Second Circuit struck down New York's vampire rule. *Antonyuk II*, 2023 WL 8518003, at *85. And it also opined that non-urban parks are likely not sensitive places. *Id*. at *59.

D. THE STATE WILL NOT SUFFER IRREPARABLE HARM, YET PLAINTIFFS WILL EFFECTIVELY LOSE THE RIGHT TO CARRY IF A STAY IS IMPOSED

If the district court's injunction is stayed, Plaintiffs and all Californians with CCW permits will lose the right to carry on January 1 for a minimum of several months while the State's appeal proceeds. As the State admits, all that would be left of the "right to carry" would be some streets and sidewalks, a far cry from what existed before January 1. Mot. at 22. The "general right to publicly carry arms for self-defense" is more meaningful than carrying on streets and sidewalks with no place to go to transact one's daily business. *Bruen*, 597 U.S. at 31; *see also id*. at 32 ("This definition of 'bear' naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table.").

On the other hand, even though SB 2 creates restrictions that are completely new to California's history, the State asserts it will suffer harm if those restrictions are not allowed to go into effect. It argues that "tens of millions of Californians will face a heightened risk of gun violence..." Mot. at 21. Heightened compared to what? If the injunction stays in place, the law will merely stay as it is today. And today, Americans with CCW permits are the most law-abiding demographic of which Plaintiffs are aware. In the district court, Plaintiffs presented data from four different states showing how extraordinarily law-abiding Americans with CCW permits are compared to the general population. Order at 42 ("CCW permitholders are not the gun wielders legislators should fear…CCW permitholders are not

responsible for any of the mass shootings or horrific gun violence that has occurred in California.").[11]

Plaintiffs will not reiterate all of that data here. It is enough to say that, in the district court proceedings below, the State did not even *attempt* to rebut the data, nor does it do so in this motion. By this silence, it has implicitly conceded that Californians with CCW permits pose no serious public safety threat. But that was no secret. In fact, there was a boisterous opposition to the passing of SB 2 from the law enforcement community in California that otherwise often supports so-called "public safety" measures like SB 2. Order at 42 (quoting the declaration of the President of PORAC, California's largest law enforcement organization, who agreed with the California State Sheriffs' Association that, "[i]nstead of focusing on a law-abiding population, efforts should address preventing gun crimes committed by those who disobey the law and holding them accountable").

In sum, the most serious harm the State would suffer if no stay were issued is the hurt pride of the politicians who enacted SB 2 to willingly frustrate and nullify the Supreme Court's recognition that the Second Amendment protects the right to carry. But if the requested stay is issued, Plaintiffs would suffer the effective elimination of a constitutional right.

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[11] Other courts have agreed, including within this Circuit. *See Wolford*, 2023 WL 5043805, at *32 ("the vast majority of conceal carry permit holders are law-abiding"); *see also Koons*, 2023 WL 3478604, at *108 ("the State has failed to offer any evidence that lawabiding responsible citizens who carry firearms in public for self-defense are responsible for an increase in gun violence.").

III. CONCLUSION

There is no reason for the district court's injunction to be stayed, and the State's emergency motion to do so is meritless. The injunction merely maintains the status quo, Plaintiffs are likely to succeed on the merits, and the data as well as the law enforcement community confirm that Californians with CCW permits are overwhelmingly law abiding and pose no danger by continuing to do what they have previously done for decades in exercising their self-defense rights.

This is amply demonstrated by no emergency having arisen in similar circumstances: the district court injunction against enforcement of Hawaii's version of SB 2 has remained in effect since August, without any resulting harm. Hawaiians are no more or less law-abiding than Californians, yet a stay here would impose on Californians a disparate burden, denying valid CCW permit holders their self-defense right, causing them to either disarm themselves or cease their daily routines in order to comply with a stay of the district court's order while this dispute plays out on appeal. This Court should not inflict such harm on law-abiding Californians' constitutional rights.

Date: December 27, 2023

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2023, an electronic PDF of PLAINTIFFS-APPELLEES' OPPOSITION TO APPELLANT'S EMERGENCY MOTION UNDER CIRCUIT RULE 27-3 FOR A STAY PENDING APPEAL AND FOR AN INTERIM ADMINISTRATIVE STAY RELIEF REQUESTED BY DECEMBER 31, 2023 was uploaded to the Court's CM/ECF system, which will automatically generate and send by electronic mail a Notice of Docket Activity to all registered attorneys participating in the case. Such notice constitutes service on those registered attorneys.

Date: December 27, 2023

MICHEL & ASSOCIATES, P.C.

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