Nos. 23-4354 and 23-4356

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RENO MAY, ET AL.,
Plaintiffs-Appellees,

v.

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

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

APPELLANT'S EXCERPTS OF RECORD
VOLUME 2 of 11

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January 19, 2024

(*Additional caption appears on next page*)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARCO ANTONIO CARRALERO, 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-01798-CJC-ADSx
The Honorable Cormac J. Carney, Judge

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION

HONORABLE CORMAC J. CARNEY, U.S. DISTRICT JUDGE

RENO MAY, et al., Plaintiffs, vs. ROBERT BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA Defendant.	**Certified Transcript** Case Number: 8:23-cv-01696-CJC-ADS
MARCO ANTONIO CARRALERO, et al.; Plaintiffs, V. ROB BONTA, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF CALIFORNIA, Defendant.	Case Number: 8:23-cv-01798-CJC-ADS

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION FOR PRELIMINARY INJUNCTION
WEDNESDAY, DECEMBER 20, 2023
1:29 P.M.
SANTA ANA, CALIFORNIA

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SANTA ANA, CALIFORNIA; WEDNESDAY, DECEMBER 20, 2023

1:29 P.M.

- - -

01:29PM THE COURTROOM DEPUTY: Calling Item Number 2, SACV-23-1696, Reno May, et al. vs. Robert Bonta, et al.; SACV-23-01798, Carralero, et al. vs. Rob Bonta.

Counsel, please state your appearances.

MR. MOROS: Konstadinos Moros on behalf of the May plaintiff and specially appearing for the Second Amendment Foundation.

THE COURT: Sir.

MR. FRANK: Alexander Frank for the May plaintiffs, and also specially appearing on behalf of the SAF.

THE COURT: Hello, sir.

MR. BENBROOK: Bradley Benbrook for the Carralero plaintiffs.

THE COURT: Hello, sir.

MR. DUVERNAY: Steve Duvernay for the Carralero plaintiffs.

THE COURT: Hello, sir.

MR. MEYERHOFF: Robert Meyerhoff on behalf of the Attorney General.

MR. GRABARSKY: Todd Grabarsky for the Attorney General as well.

THE COURT: Hello, sir.

MS. REILLEY: Jane Reilley for the Attorney General.

THE COURT: Hello.

MS. PLANK: Lisa Plank for the Attorney General.

01:30PM THE COURT: Hello.

I feel outgunned. No pun intended.

All right. Well, I have the motion before me. I have a few general questions that I think kind of apply to both sides, and then I'd like to hear from everybody.

01:31PM The general question is -- I just like to understand from a context -- did the California Legislature or the Governor make any attempt or effort to analyze *Bruen* before SB 2 was enacted and is set to go into effect.

And again, this is a general question. I'm not so 01:31PM sure it's relevant to the actual legal analysis, but I'm trying to understand the true purpose behind SB 2 in that it's geared towards concealed carry permit holders. And are concealed carry permit holders the real source of the horrific problem of these mass shootings and school shootings?

01:32PM And then another question I have is what are the public places that are left for concealed carry permit holders to carry their firearms or handguns in light of the scope of SB 2?

And then here's one question that I know that is 01:32PM part of the legal analysis of *Bruen*: Is there any dispute

among the parties that the plain text of the Second Amendment protects the plaintiff's right to carry and use their handguns to protect themselves in public?

All right. Pretty general questions, but I thought the briefing on both sides was quite thorough and quite helpful, and I appreciate it. And everybody submitted their historical analog; so I get that.

So these questions, I know, are -- most of my questions are really more big picture in context, but I'd like to understand it.

Should I hear from the plaintiffs first?

MR. FRANK: Yes, Your Honor. Should I approach?

THE COURT: Please.

MR. FRANK: So unsurprisingly, Your Honor, I prepared some remarks. I'm going to address the Court's questions before I proceed to that.

Prior to entering, I conferred with the Carralero plaintiff's counsel. And because there's some overlap in what we were seeking to enjoin, we've tentatively agreed to split up those issues to conserve time here today. So there may be things that you might expect me to hear about -- or my co-counsel to talk about which may be a little bit of a left wing -- or rather a left-field change, but with that, I'll proceed.

So, to respond to the Court's first question, I

believe in the preamble to SB 2, there was some -- something to the effect of we've researched and determined that SB 2 would withstand scrutiny under *Bruen*. They didn't say a whole lot more than that. And I remember when I read it myself, I thought, oh, that's interesting. I'd like to see how to build -- how that essentially converts the mere entirety of the space outside the home into a sensitive place could comport with the *Bruen* ruling. Seems to be incongruous.

Be that as it may, I didn't see much in the legislative record on anybody's behalf, whether it was the Attorney General or the state legislature or the Governor, to actually dig into the historical analysis to see whether or not SB 2 would withstand scrutiny under *Bruen*. And by that, I mean historical scrutiny.

THE COURT: Was there any public statements made by the Governor or any of the proponents of SB 2 about *Bruen* and whether it was a good decision or bad decision?

MR. FRANK: There were. I believe the Governor, in no uncertain terms, expressed his displeasure with the Supreme Court. I believe he said something to the effect of "this is going to create chaos and how could it possibly be wise of the Supreme Court to expand the right to be armed outside of the home to the whole nation." He -- I don't believe he had anything positive to say about it at all.

I believe shortly after the *Bruen* decision came down

in 2022, the Attorney General posted some official press releases that announced that certain aspects of California law were likely -- couldn't be reconciled with the Supreme Court decision, and that specifically the good cause requirement would have to be struck down because it was essentially the same as the good cause requirement that the -- that was at issue before the Supreme Court in *Bruen* was struck down. He -- I don't believe the Attorney General used any language as sharply critical as Governor Newsom did.

01:36PM So going to the next question, the Court is correct, that SB 2 regulates people who are lawfully carrying pursuant to permits. And that does create a strange question to ask here, which is the State of California mandates that people go through rather extensive vetting, you know. You have to be a nonprohibited person to get a permit to own a gun to lawfully have possession of a firearm everywhere in the country, especially in California.

And in addition to that, you have to take classes, you have to pay, in which -- in some cases, exorbitant fees. They're never less than a few hundred dollars. And it begs the question: Well, if the utility of that permit with SB 2 in place is brought to a near nullity, well, what's the point of getting it?

And why is the State so concerned about preventing people who have proven that they are not prohibited people?

And the people who have been willing to go through all the hoops that the State has directed for them, why are we turning this into a nullity for them? We should be rewarding them. They have a constitutional right to be armed outside the home for self-defense.

01:37PM

And turning to the third question in which I think I've probably answered to some degree, under my reading of SB 2, it sure seems like there isn't much more than the sidewalk left for somebody. There are a couple provisions in particular, particularly what's colloquially become known as the vampire rule, which is the rule that provides that -- believe it's Subdivision (a)(26) of 2630, that creates a default presumption on any commercial private property, which is the vast sum of places where people actually spend their time outside of their home, that carry is not okay. And in order to veto that default presumption, you have to post signage. Not a gigantic sign, but you have to make it clear, and now people can carry.

01:37PM

01:38PM

We live in a -- in an area that's politically diverse, and it's, you know, not going to surprise me to see that hardly any of the places that I frequent don't have that sign.

01:38PM

So this is a big problem. This is a total inversion of what it means to have a right to be armed outside the house in public. Most of the time when we're out in public -- I

mean, maybe I'm a bad exception because I'm an attorney and I spend a lot of time in government buildings.

THE REPORTER: I'm sorry, Counsel, can you slow down, please.

01:38PM MR. FRANK: I can. My apologies.

For most people what they think is the public space is not the public space. It's privately-owned commercial property. That's where most people spend most of their time. Even office buildings most of the time are considered

01:39PM commercial property.

So the vast majority of places that people actually are and presume that the right that *Bruen* recognized to be armed outside of your home for self-defense are within the scope of this one provision of SB 2, which is extraordinarily

01:39PM powerful. And it's really no surprise that every jurisdiction that's enacted a law like this, post-*Bruen*, has seen a Federal District Court strike it down. It effectively nullifies the right that *Bruen* announced.

And then, when you look at all the other places that

01:39PM are specifically precluded under SB 2, it makes you scratch your head and wonder, "Well, where can I do this? I suppose when I'm walking my dog outside on the public sidewalk or in my car driving somewhere. But the way that the law is written, I really have to be careful about where I'm driving."

01:39PM Because if I'm driving to, say, meet a friend for

lunch and I do not plan on having any alcohol, if there's a parking lot that's shared with an establishment that serves alcohol on premises consumption, well, driving to that parking lot and getting in my car is illegal. So I might as well just leave my gun at home.

01:40PM

I think there is definitely -- you can definitely see the intent to nullify *Bruen* in certain subdivisions of SB 2, particularly those two.

THE COURT: Before you go to the last question, I just take it from the briefs -- and you said that too, I think, already -- you don't believe that SB 2 is going to mitigate, reduce the horrific shootings that we see across the country.

01:40PM

All right. So let's assume I agree with you. Then why do you think California legislature has enacted this law? What's the purpose?

01:40PM

MR. FRANK: I think it's animosity towards the Second Amendment. I think that there is -- you know, there's a raging culture war in our country, and the Second Amendment is one of the key battle zones of that culture war. And it's no surprise to me when I see elected representatives in our state or any other states that skew politically the way the State does, they announce that. They think that not just *Bruen* is a disaster decision, but that *Heller* was a disaster decision, it was erroneously decided.

01:41PM

01:41PM

And the militia clause of the Second Amendment means

that you're only allowed to have a gun in the context of the malicious service. There's been intransigence of that issue since day one of the federalization of the right to bear arms and that that hasn't abated.

01:41PM So I really do think that California has -- at least most of the elected representatives in the state of California just have a barely concealed animosity for the right to bear arms, and they think that -- they don't really draw much of a distinction between, you know, an honest citizen with a firearm

01:42PM and criminals who would do terrible things.

And it strains all -- it strains common sense for me to, you know, to look at all the evidence that we have of all the horrific carnage that unfortunately has been committed with firearms in our society in recent memory, terrible mass

01:42PM shootings, and think, well, this criminal violated every gun law there is.

I mean, murder is already a crime, and clearly the sign that said this is a gun-free zone didn't stop this criminal from walking into a purportedly gun-free zone and

01:42PM murdering strangers who were defenseless because they were complying with the law that said they can't have a gun. But, clearly, that law didn't stop the mass murderer from entering and taking an innocent life.

THE COURT: These mass shootings, to your knowledge,

01:42PM at least limited to California, any done by concealed carry

permit holders?

MR. FRANK: Not to my knowledge. I'm aware that in some cases -- and probably more than some cases, the people who perpetrate mass shootings obtain their firearms illegally because they are not prohibited persons. They lack the criminal record and, in most cases, seem to be demonstratively mentally ill, but for various reasons have slipped through the cracks in the health care system. They can go pass a background check and they get a gun and do something horrible with it.

But as far as concealed carry permit holders committing crimes, the data that I'm aware of is highly questionable, because in some cases the data, it lumps in -- it takes situations where people who have permits have been arrested for, say, DUI or for fraud or crimes that have nothing to do with violence and then uses these statistics to say that people who carry permits are X times more likely to commit crimes or commit crimes at a certain percentage.

There's a famous study done by a well-known academic who often is an expert witness on behalf of state government Second Amendment cases. And when you dig into the data, you say, okay, this data has been -- it's questionable. The way that they have constructed this data clearly was to reach a predetermined conclusion, and that's to honestly and scientifically say, "What do we know about people who are

permit holders?"

To my knowledge, there's no data that says any concealed carry permit holder in California or anywhere has perpetrated a mass shooting.

01:44PM THE COURT: Now, you said it in a, quite frankly, a little bit of a negative way, that you believe the legislators have a hostility towards the Second Amendment. Could you say it in a positive way, that they feel in this modern day and age that if you're not in the military, you're not in the police, 01:44PM we should be pacifists and we shouldn't have -- it's not good for our psyche, our morale to arm ourselves and defend ourselves in public?

MR. FRANK: I think that debate is as old as time. And I can probably -- if I strain myself, I can -- I probably 01:45PM don't have to actually strain myself. There are reasonable people on the opposite side of the political spectrum on this issue who think that if we just had fewer guns, we'd be better off. I don't think these people are necessarily lying about that. I think it's a philosophical difference of opinion 01:45PM about, you know, what is the proper approach to weapons in society.

But I think in many cases there's a -- that point of view, very often it doesn't leave enough space for the -- for the legitimate concerns on the other side, which are that 01:45PM people have a right to self-defense. Some people think that's

a God-given right. Some people view it as foreign from the Constitution or from other humanistic principles. It doesn't matter.

Most people would agree that people have a moral -- there's a moral -- it's morally legitimate to exercise self-defense even if that means killing in self-defense. And whether that's inside your home or outside your home shouldn't make a difference. And that's what the Supreme Court echoed in *Heller*, and that's what the Supreme Court echoed in *Bruen*. It predates the Constitution. Second Amendment codified a preexisting right, I believe was the language that Justice Scalia used.

So, yeah, it's hard --

THE REPORTER: Counsel, slow down.

MR. FRANK: My apologies.

It is a -- there's a limit to the charity to which I'm willing to extend because of the shear volume of noises coming from elected representatives that would like to see the Second Amendment be nullified.

THE COURT: I want to confirm. What's before me in effect is handguns; right? We're not talking about assault rifles or machine guns?

MR. FRANK: That's correct, Your Honor. You cannot get a permit -- well, first of all, you can't own a machine gun in California. That's been an awful long time and we're not

challenging that here today. You cannot put an assault weapon on a permit card. Most restrictions will limit the number of firearms you're allowed to have.

THE COURT: It's pretty hard to conceal it on your person.

01:47PM

MR. FRANK: It is. It is.

THE COURT: So that -- because I understand there is cases out there where that's being challenged. That's not before me.

MR. FRANK: That's correct, Your Honor.

THE COURT: The focus is just on handguns.

MR. FRANK: Correct. And if I recall, the statute -- the concealed carry issue and statute might reference handguns specifically. I think it probably does.

01:47PM

But, yeah, there's obviously an issue with concealing a rifle of any sort. It's nearly impossible without completely changing, you know, one's everyday clothes.

THE COURT: I think I was the one who diverted you. You were about ready to address my fourth question.

01:47PM

MR. FRANK: Right. The dispute over the plain text. I believe in the State's briefing there was some argument to the effect of -- and this goes to the question of how does the *Bruen* test apply. There's this language that courts have interpreted as establishing a threshold inquiry about whether the plaintiff's conduct is covered by the Second Amendment's

01:48PM

text.

And I believe there were some -- at least as far as some of the subdivisions that we're challenging here today, there was some dispute as to whether or not plaintiffs have passed the threshold inquiry, whether the Second Amendment extends to carrying those particular places that we believe it does and State believes it doesn't.

But there really shouldn't be -- in my opinion, you can't read -- you can't read *Bruen* and dispute that the plain text doesn't -- is not implicated when we're talking about carrying handguns in public. I believe that the express formulation under the *Bruen* opinion is that the conduct here is carrying handguns in public. It wasn't even carrying concealed handguns in public, and it wasn't carrying handguns in most of the places that people go in public; it was general. And the word "general" appears in *Bruen*. We're supposed to define the conduct at issue in this threshold inquiry generally.

The State contends we don't. The State thinks we define it as narrowly as possible because that would help the State. But you can't reconcile that with the plain text under *Bruen*. It says we do this generally. And the same issue here is the same issue in *Bruen*.

THE COURT: All right. What did you want to go over? You said you had --

MR. FRANK: I feel like I've been up here a while.

I don't want to deny the Carralero counsel an opportunity to address some of those same questions. I'm happy to continue. It's your courtroom, Your Honor.

THE COURT: Whatever you want. It's your record.

01:49PM MR. FRANK: I take it I'll have another opportunity to come up here?

THE COURT: You will.

MR. FRANK: Thank you.

MR. BENBROOK: Afternoon, Your Honor.

01:50PM THE COURT: Good afternoon, sir.

MR. BENBROOK: Getting to your first couple of questions about attempts to analyze *Bruen*, comply with *Bruen*, and the true purpose of the law, I don't think there can be any legitimate dispute that the true purpose of this law is to -- 01:50PM for the State legislature to thumb its nose at the Supreme Court and the *Bruen* decision. This is referred to generally by many people as a *Bruen* response bill that many states had that enacted. And the response to *Bruen* is to say "We object. We don't like it, and we're going to do something about it."

01:50PM *Bruen* established a general right to public carry. You carry -- you can carry for self-defense when you leave your home. The Court was very explicit that you cannot treat areas as sensitive just because they're crowded. Indeed, it's stressed. There are relatively few sensitive places, 01:51PM historically, and it identified only three.

California, reading that, has decided now all of a sudden, nearly every place outside the home is sensitive, just as counsel acknowledged. And we agree with respect to Your Honor's question, where is it left to carry? Basically, all we can come up with is sidewalks.

01:51PM

So how can it be that all of a sudden every place is sensitive? By definition, a sensitive place is different than a normal place. If these places at issue in this lawsuit were actually sensitive, California could have and would have treated them as such long before *Bruen*. But California has been carrying in these locations for 173 years, since the State became a state in 1850.

01:51PM

And just a side note, Your Honor, which we might get back to later, the fact that SB 2 is now radically changing the status quo is really worth emphasizing in the preliminary injunction stage. And joining these new bans will maintain the status quo.

01:52PM

I'd like to go over a couple of additional -- couple themes, big picture points, and whether you'd like -- we're at Your Honor's disposal whether you'd like us to start running through the different supposed sensitive places with the plaintiffs first or sensitive to the State's burden. We might suggest that they go first when it comes to identifying the specific locations, and we can respond.

01:52PM

But while I'm here, I'd like to take a few minutes

to go over additional themes and points that we ask Your Honor to keep in mind as you're hearing from the State.

THE COURT: Well, I would welcome and I appreciate the themes. I -- there's a lot of different places that the Attorney General is -- wants to designate as sensitive. And I thought the briefing on the historical analogs was very thorough on both sides. So I want to use this time efficiently.

So I encourage big themes and issues you want me to have front and center. If there are any specific places that you think that briefing addresses but you want to reiterate your points, I encourage that too. But I don't think it's necessary, at least from where I'm sitting, to go through each of the individual areas.

MR. BENBROOK: Okay.

THE COURT: Because there are so many.

MR. BENBROOK: That's helpful, Your Honor. And I may have to put that in mind. We may go through my notes and come back up a little bit, but I'll do my best.

At this point, I'd like --

THE COURT: I have no -- what I was intending to do was give plaintiffs their first, then give the defense their shot, give plaintiffs their shot, and then defendants have the last word as far as the procedure.

MR. BENBROOK: Okay. Well, I'll try to be as

efficient as possible, Your Honor.

So in terms of big pictures and themes, one of the -- the unifying theme for sensitive places identified in *Bruen* is that the Government provided comprehensive security at those locations. When the Government is providing security, the people do not need to carry to defend themselves. This is referred to in the *Kopel* and *Greenlee* article, the sensitive places doctrine, and *Bruen* cited it. *Bruen* recognized that concept.

01:54PM

01:54PM

The Government claims, one of -- its principal claim here really is that there is a very different unifying theme, and that theme is that crowded areas are sensitive. But *Bruen* categorically rejects this argument in its discussion of sensitive places. It says:

01:55PM

> "Expanding the category of sensitive places simply to all places of public congregation that are not isolated from law enforcement would eviscerate the general right to public carry."

It's far -- it would be "expand the category of sensitive places far too broadly," it says.

01:55PM

Next theme -- next big picture point. To carry its burden, the State needs to be able to point to distinctly similar historical regulations, but it can't. In fact, after *Bruen* identified the few sensitive places that had been recognized, it said that states trying to establish new

01:55PM

sensitive places can try to -- try to analogize to those few sensitive places to justifying, meaning the three places that identify: courthouses, legislative assemblies and polling places. The State doesn't even try to do that.

01:56PM Again, the central theme of the argument is that locations are sensitive because people congregate in them. But *Bruen* was very clear, that concern over gun violence in crowded places has existed since the founding. As a result, any new regulation that addresses the social problem that's been around 01:56PM that long -- in order to justify that new regulation, the State needs to point to a distinctly similar historical regulation.

Bruen said it's a straightforward historical inquiry when a new law addresses an old problem. And when the founders could have adopted a regulation to address that problem, but 01:56PM didn't, that's good evidence that the new regulation going in a different direction is unconstitutional.

Next, important to point out, Your Honor, that regulations from the late 1800s that are inconsistent with the regulatory tradition of the founding cannot suffice to carry 01:57PM the State's burden. If there was no well-established practice of limiting carry, the founding for a particular type of location, new regulations limiting carry that started appearing in the late 1800s are -- and are inconsistent with the founding era should not be considered.

01:57PM This is very important because throughout the

State's briefing, location after location after location, they use the same five or six laws, supposed historical analogs, two of them from the late 1700s and then the rest from the mid-to-late 1800s, which we can -- we have addressed in detail in the briefing. I'm happy to address it further. But the point is from the laws in the 1850s and beyond that are inconsistent with the founding should not be considered.

Now, they may point to *Bruen's* language saying that "Well, there's a scholarly debate about whether the founding controls or the adoption of the Fourteenth Amendment should control or even be relevant or equally relevant." But *Bruen* really left little doubt about how that debate would be resolved.

It said courts look to mid and late 1800s laws to see whether they confirm a preexisting condition. Set in footnote 28, evidence of late 19th and early 20th Century regulations that does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence and will not even be considered as a result.

So, Your Honor, if in the scholarly debate the Civil War era were equally as important in 1791, the Court would not have said that. And the *Espinoza* case is really a perfect example of this. This dealt with a claim that Government aid to religious schools violated the establishment clause.

By the late 1800s, 30 states had adopted the so-called "No-Aid" clause. But in *Espinoza*, the Court said that number doesn't matter. If in the late 1800s those laws were inconsistent with the understanding of the First Amendment establishment clause right at the founding, they don't control. And Justice Barrett, in *Bruen*, pointed to *Espinoza* and said *Espinoza* shows how you can't have freewheeling reliance on late 1800s regulations.

If, however, laws from the understanding of right from the mid-to-late 1800s should play a role here, it's important to note that California has zero history of regulating in 170 years, since its statehood was established in 1850. Any of these locations as sensitive, despite a history of significant violence throughout the state in the second half of the 1800s, is literally the Wild West that California never called any of these places sensitive.

So again, if Your Honor is inclined to consider these 1800s regulations, which we have explained in great detail why they shouldn't be considered, why they're not analogous, California's history should play an important role as well.

So with that, Your Honor, I do have a couple of little points, but I would like -- if Your Honor wouldn't mind, I'll -- we'll give the State a chance to talk. Or if Mr. Frank would like to talk, I'll get a little bit more organized since

Your Honor -- in light of Your Honor's request.

THE COURT: That would be fine.

MR. BENBROOK: Thank you.

THE COURT: Okay. So why don't I hear, then, from the State.

02:01PM

MR. MEYERHOFF: Good afternoon, Your Honor.

To address the questions you raised in your opening, I'll take them in order. First as to the motivations of the legislature, the legislature did make express findings in passing this law. One of those express findings was to protect California in their exercise of other fundamental rights and to prevent them from being killed, injured, or traumatized by gun violence. Indeed, the statute identifies research which shows that California would be less likely to exercise fundamental rights, including voting and other rights, if firearms were present in particular sensitive locations.

02:01PM

02:02PM

I would submit, however, that the intentions of legislatures that are relevant are the historical legislatures in the historical analogs we identify, not California's legislature today. However, I will note that California's legislature expressly said that they were passing this law to comply with the Supreme Court's decision in *Bruen*.

02:02PM

Second, as to concealed carry weapons permit holders, as I mentioned, the role -- the legislature passed SB 2 not simply to protect -- to prevent crime, but also to

02:02PM

prevent intimidation or to prevent people from being deterred in the exercise of other fundamental rights.

It's also important to note that while -- even if it's true that concealed carry permit holders are less likely 02:03PM to participate in mass shootings, as Your Honor made the point, there's still the danger of accidental shootings and shootings in self-defense, both of which potentially would not be criminal acts by concealed permit holders. We can understand that in sensitive places, for example, schools, the legislature 02:03PM could be rightly concerned about accidental shootings or self-defense shootings.

THE COURT: But don't you think that there is almost a natural right of self-defense, even if you don't want to exercise that right? But traditionally -- and I have to 02:03PM believe that what was behind the founders' thinking when they enacted the Second Amendment was people have a right to defend themselves in public and harm. They don't have a right to arm themselves to create terror. I get that. But isn't there a very strong right that you can go out in public and protect 02:04PM yourself?

Maybe this is an unfair analogy or question for you. But we all know what's going on in Gaza and it's horrifying. And I've seen many things on the news about the intense hostile rhetoric on campuses. I see rabbis at synagogues, they're 02:04PM actually learning how to use a firearm and training the women

how to use firearms.

And if I were Jewish, at this day and age with all that rhetoric, I'd be concerned having my child at a Jewish daycare center with what I see. And shouldn't they be able to arm themselves to defend from that kind of harm?

MR. MEYERHOFF: I would note as an initial matter that Subsection (a)(22), which governs places of worship, does provide that if the operator of that place of worship wishes to permit individuals to carry firearms on the property, they can post a sign to that effect.

I think you're exactly right to point to the public understanding of the Second Amendment at the time it was ratified. The way to identify that public understanding, in addition to other evidence, is to look at the statutes that existed at the time. So the *Bruen* opinion is not about sensitive places, but there is a discussion of sensitive places, and it identifies legislatures, polling places, and courthouses as three examples that uses an e.g., not an i.e., it lists them as examples. It also approvingly acknowledges that *Heller* listed schools and government buildings, which plaintiffs didn't mention.

So we know that that universe of five sensitive places, those are examples, as plaintiffs' counsel admitted, the Court in *Bruen* expressly acknowledges that governments can analogize to other sensitive places using the broader *Bruen*

test.

I will say that, for example, when it comes to legislative assemblies and polling places, the Court in *Bruen* cited to the article by David Kopel, which I believe that plaintiffs' counsel mentioned as well. In that article, the professors who wrote that article identified two Maryland colonial statutes, one from 1647 and one from 1650, in support of restrictions on legislative assemblies. And they noted one constitutional provision from Delaware from 1776 as to polling places.

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There's no evidence in the record, and I'm unaware of any evidence, that there was -- Delaware was a particular site of political violence that required these restrictions in 1776 at polling places. Similarly, that the Maryland legislature had experienced types of mass shootings. I think the reality is when we consider -- Your Honor was discussing certain, perhaps, policy considerations. And certainly, the Second Amendment -- there's an outer limit of the Second Amendment. And that has been defined by *Bruen*, and that is the test set forth at Stage 2 of the *Bruen* analysis.

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But within that, legislatures are free to make policy choices, assuming they don't offend the Second Amendment. So that's the historical analysis that we have to proceed through, sensitive place by sensitive place is --

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THE COURT: I agree with that. One of the struggles

for me, and sometimes you can say things that are just going to get you in trouble, but there just seems, from the judicial standpoint, such a disagreement on what the law is. You have the majority in *Bruen*, but, of course, you have the justices -- the liberal justices saying something completely different on how this test should be applied. And then, fortunately or unfortunately, depending on how you're looking at it, I'm in the Ninth Circuit, and I found it frustrating, quite frankly, seeing the strong different views.

02:08PM I mean, reasonable people can disagree on many issues, and I see that on use of police force and, you know, what is reasonable under the circumstances what type of force you should use. I can get that. But I don't have nearly the frustration in that area that I do with the Second Amendment. 02:09PM And it's a very, very different view. That's the way I read it. I don't know. If you share my frustration or even if you don't, how do I manage myself between these two competing camps?

MR. MEYERHOFF: I would say two things in response 02:09PM to that. The first is while there was obviously disagreement in *Bruen* on the standard and whether, you know, all the circuits have previously used intermediate scrutiny, *Bruen* struck it down.

What there was an agreement on by all of the 02:09PM justices, both the majority and the dissent, was that sensitive

places restrictions, at least the five listed in sensitive places -- and those were listed as examples by the majority, those were constitutional. You have the majority opinion, and then you even have the dissenting opinion. Justice Breyer says the Court affirms Heller's recognition that states may forbid public carriage in sensitive places.

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So there is agreement, at least on the issue of sensitive places, that those five examples are settled sensitive places, and that the courts and the Government can analogize to new sensitive places.

I would submit the other response is that the Court must go provision by provision, go through the historical record, go through the *Bruen* two-stage analysis, and for each sensitive place, determine whether that sensitive place provision is constitutional. We would welcome the opportunity to do that.

I want to address your other questions. And then to the extent I don't discuss the *Bruen* standard more generally, I'd like to take a minute or two just to discuss that.

THE COURT: Absolutely.

MR. MEYERHOFF: Thank you, Your Honor.

I think the question number 3 was what is the scope of SB 2? I heard Your Honor's concern about the scope. I think it's interesting plaintiffs' counsel acknowledged that most of the -- that most of the places that they would be

restricted from going into are subject only to Subsection (a)(26). That's the restriction on carriage onto private property without the owner's express consent.

I'd like to address that provision separately, but I think that plaintiffs have acknowledged that as to the other provisions, those aren't place that people necessarily mostly go to.

I'd also like to note that there are exceptions to the law. There's an exception at Subsection (c) which applies to if I drive to a parking lot, I can put my firearm in a locked container, and I can go and, you know, do what I need to do in the parking lot, come back in.

I would note -- and we can discuss this later, but many of the historical analogs contain no such exception. Subsection (e) provides for if you're using a public right-of-way that touches or crosses one of these sensitive places, as long as you move through that, you're not in violation of the statute.

Again, (a)(10) specifically, Subsection (a)(10), which applies to permitted public gatherings and special events, that provides another exception if you need to go to your residence, business, or vehicle.

And then I'll note that Subsection 25605 which is separate from the concealed carry permitting regime, that that says that you don't need a permit or license in order to carry

in your home, your place of business or privately-owned property that you lawfully possess or privately owned.

SB 2 doesn't change that with the exception of college dormitories. And we've established a rich historical tradition of regulation therein.

If I have addressed your initial questions, I'd like to return to the broader *Bruen* standard, if that's possible.

THE COURT: Please do so.

MR. MEYERHOFF: So the *Bruen* standard generally is two stages we've discussed. And we believe that at Stage 1, it's -- is plaintiffs' proposed course of conduct, is it covered by the plain text of the Second Amendment?

Now, plaintiffs argue that you can define that course of conduct at a high degree of generality, but we've cited cases, the *Renna* case as well as another in our briefing, that discuss how the course of conduct needs to be specifically defined. Otherwise, Stage 2 becomes a nullity.

Assuming that the course of conduct is covered by the Second Amendment's plain text, the burden shifts to the Government to identify a relevantly similar -- not distinctly similar -- the Court says relatively similar historical analog or analogs that fit within the nation's historical tradition of firearms regulation.

I think it's important to contrast the law that's at issue in *Bruen* and the law that's at issue here. Because I

think sometimes in plaintiffs' briefing, a lot of their misapprehensions and misapplications come from confusing the *Bruen* test itself with the application of the *Bruen* test to the law and facts in that case.

02:14PM So as a Second Circuit recently noted in the opinion in *Antonyuk*, which came out earlier this month and relates to sensitive places, we filed a notice of supplemental authority. The law that was at issue in *Bruen* was, quote/unquote, "exceptional." And it was exceptional for two reasons.

02:14PM The first reason is that the Court in *Bruen* said unlike any other right we're aware of, the law that was challenged in *Bruen* conditions the exercise of that right on a Government -- on Government's discretion. It was an individualized determination of who can exercise that right and

02:15PM who can't. Plaintiffs raised other constitutional challenges to SB 2, but for these sensitive places provisions, there's no discussion of an individual discretion.

Now, the other distinction in *Bruen* was *Bruen* identified an overwhelming evidence of an enduring American

02:15PM tradition of permitting carriage outside of the home. Now contrast that with *Bruen's* discussion of sensitive places where it listed the five sensitive places and said, "We're aware of no disputes regarding the constitutionality of such prohibitions."

02:15PM Another important distinction between *Bruen* and here

is *Bruen* identified a number of 19 Century opinions that struck down or otherwise challenged the constitutionality of the historical analogs that New York and *Bruen* identified.

Here, by contrast, we are unaware of any challenges from the 19th Century that were successful to sensitive places provisions. Plaintiffs have identified none. And, in fact, quite the opposite. At page 20 and 21 of our opposition, we've identified numerous cases from the second half of the 19th Century, including *Owens*, *Shelby*, *Alexander*, and several others that affirm convictions and otherwise rejected constitutional challenges to sensitive places laws, broad sensitive places laws in many cases.

So in *Bruen*, in light of this overwhelming evidence of a countervailing tradition of permitting carry outside the home, the Court seemed to require more evidence and more analogs. But *Bruen* noted in the context of sensitive places provisions, the historical record yields relatively few of these provisions. Yet, as the Court in *Allam* noted, *Bruen* seemed to find those few precursors to be compelling. And, in fact, we discussed that with having two Maryland laws which predate the ratification of the Second Amendment by 140 years, and one Delaware law that's also 15 years before the Second Amendment.

So with that in mind, I think there's a few apprehensions in plaintiffs' briefing in that we discuss to

some extent they repeat it at argument. The first is they said that evidence beyond laws cannot be considered. Well, that's not what *Bruen* did at all. *Bruen* considered contemporaneous legal treatises. It considered modern law review articles. It even considered reports from the Freedmen's Bureau during the reconstruction era. Moreover, plaintiff seems to suggest that evidence from before the founding or after 1868 cannot be relied on at all.

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Now, what *Bruen* said is that evidence from those time periods cannot be given much weight, whereas, contrasted with laws from the founding and brief construction that contradict that. But in this case, as explained before, there is no contradiction because there was no dispute as to the constitutionality of sensitive places laws.

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Similarly, plaintiffs in their briefing said that territorial and local restrictions cannot be relied upon. Well, again that's not what *Bruen* said. Indeed, these laws can reflect the public understanding of the scope of the Second Amendment. *Bruen* said nothing about local ordinances, and it discounted territorial restrictions only because they contrasted with the overwhelming evidence permitting carry outside the home.

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Finally, plaintiffs appear to say that there is some percentage of the population that needs to be met in order for a relevantly historical analog to fit within the nation's

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historical tradition. But *Bruen* talks nothing of thresholds. It only says laws which governed less than 1 percent of the American population should be given little weight where they contradict the overwhelming evidence of other more contemporaneous historical evidence.

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I think with those broad outlines of the case, we would like the opportunity to go provision by provision. And I think some of the themes will come out through that.

THE COURT: You may.

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MR. MEYERHOFF: Thank you, Your Honor.

First, turning to the places of worship provision, that's Subsection (a)(22), the State has identified numerous historical analogs. We identify a Georgia analog from 1870 at Compendium Exhibit 74; a Texas 1870 law at Compendium Exhibit 77; a Missouri law from 1875 at compendium Exhibit 92; and numerous other ones in our opposition at pages 12 through 13.

02:19PM

I think it bears repeating the discussion of temporality. Plaintiffs appear to say that because these laws were either after 1868 or perhaps because they were too far from the founding, they can't be considered as historical analogs. That's not what *Bruen* says. And, in fact, as to the point they raised previously, the Ninth Circuit in both *Alaniz*, which came out in 2023 and is cited in our brief, and in *Baird* considered 19 Century evidence. In fact, the Court in *Alaniz*

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found a historical tradition to be, quote/unquote, "well-established" based on only 19th Century laws.

Moreover, to take a step back, once the State has identified relevantly similar historical analogs, the Court in *Bruen* has not -- did not decide what "relevantly similar" meant. But what they did say was one possible indication, and the one they used in the *Bruen* case, was whether there were comparable burdens and comparable justification. Well, in this case, the burdens and justifications are the same. The burden is the prevention of carriage inside of houses of worship. And, indeed, the justification is the same to prevent violence and intimidation to allow people to worship in peace.

And, in fact, California's law is less burdensome than many of these historical analogs we've identified. Because again, it allows houses of worship that wish to permit permittees to bring firearms in to do so, provided they put up a sign.

Now, to situate that relevantly similar historical analog within the historical tradition, we point to numerous other states, territories, and localities that have laws prohibiting carrying in houses of worship. We cite those at our opposition at 12 and 13.

To make one other note about temporality, the Court in *Heller* said that schools were sensitive places. The Court in *McDonald* repeated that. And then the Court in *Bruen*, again,

discussed how Government buildings and schools were sensitive places. It is worth noting that the first state statutes prohibiting guns in schools emerge in the second half of the 19th Century. For example, Vermont law that emerges towards the end of the 19th Century.

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So I think when you consider how *Bruen* and *Heller* have defined sensitive places, that can't really be squared with plaintiffs' argument that only laws at the founding matter.

In terms of the historical tradition, we've also provided expert declarations from Patrick Charles and Dr. Rivas, both of whom recount the numerous restrictions on houses of worship.

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Now, I will note that plaintiffs discuss these laws that require -- that required individuals to bring their firearms to church. However, our historical experts have contextualized those laws and explained that in northern states, they were in response to organized Native American attacks. And in southern states, they were in response to a fear of slave insurrections. Both of those rationales do not sound, and as Your Honor discussed, the individual right to bear arms but more in a collective militia action.

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In any event, they merely reflect that under the public understanding of the Second Amendment at the time, governments had the ability to regulate the carriage of

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firearms in houses of worship.

We also have case law citations to *Goldstein* and to *Maryland Shall Issue, Incorporated,* both of which are post-*Bruen* cases that have denied preliminary injunctions to restrictions on houses of worship.

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I think it makes sense to next turn to public gatherings and special events. That's Subsection (a)(10). We've identified numerous historical analogs. Here again, the 1786 Virginia law at Compendium Exhibit 31; the 1792 North Carolina law at Compendium Exhibit 33; 1831 law from Louisiana, Compendium Exhibit 44, and many others.

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Again, if we consider relevant similarity and we look at comparable burden and comparable justification, the burden from California's law is, in fact, much less than the laws -- than these historical analogs from the relevant time period. It's so, because California's law applies only to permitted special events and public gatherings and, as we discussed before, contains an exception for those who are passing through.

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Contrast with many of these historical laws which contain no exception for passing through and which applied to all public gatherings, not merely permitted ones. And, indeed, if we think to the 19th Century, there may well have been no permitted events. Every public gathering may have occurred without a permit, given the sophistication of the government at

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the time. So, in fact, California's law is much less restrictive than these historical analogs.

Now, these fit within the historical tradition because there is a tradition in England going back to the 14th Century of restricting firearms at fairs and markets.

Now, in plaintiffs' briefing, they said that English history was irrelevant and can't be considered. That's not what *Bruen* said. *Bruen* said that English history can't be considered when there's no evidence that that tradition crossed the Atlantic or existed at the time of the founding. But here, both the Virginia law and the North Carolina law I just mentioned were closely patterned on the Statue of Northampton.

So far, from there being no evidence that the tradition made it, there's strong evidence that that tradition made it across the Atlantic.

We've also cited numerous other state territorial and local laws at page 18 and 19 in our opposition which restrict public gathering. If the Court looks at the specific quotations from those at page 18 and 19, you'll see the breadth. They list specific places, but in many cases they say "and any other public assembly."

Again, repeating a point I mentioned earlier, we point to numerous court cases at page 20 of our opposition and 21 -- *Andrews*, *Hill*, *Owen*, *Shelby*, *Alexander*, *Maupin*, *Pigg*, and *Wynne* -- all of which upheld these laws which contained broad

restrictions on public carry at public gatherings. And, indeed, if we look at where the cases upheld these restrictions, they even upheld them at Fourth of July barbecues at a mill where workers and customers went to.

02:26PM We also have Patrick Charles's expert declaration, as well as the declaration of Adam Winkler, a leading Second Amendment historian, both of whom discuss how these special event and public gathering restrictions fit squarely within America's tradition of firearms regulation.

02:26PM If we can move on to Subsection (a)(9), locations where liquor is sold for consumption on-site. Now, the State has identified historical analogs, dead-ringer historical analogs. The historical twin that *Bruen* said expressly it is not required. We've identified them anyway: An 1853 New

02:27PM Mexico law, that's at Compendium Exhibit 58; an 1870 San Antonio restriction, that's at Compendium Exhibit 76; and an 1890 Oklahoma law, that's at Compendium Exhibit 144.

Now, these laws -- the burden and justifications are the same. They're certainly relevantly similar. Now, do they

02:27PM fit within the historical tradition? We certainly put forward evidence to that effect. We have a historical tradition, not simply of those dead ringer laws, but also of similar laws that evince a concern with the mixing of alcohol and firearms.

So we have prohibitions on sales of alcohol to

02:27PM militia men, prohibitions of sales of alcohol within a certain

distance of militia. We have laws prohibiting firearms carriage by intoxicated people, and we have the declarations of Professor Mancall and Professor Winkler, both of whom discuss the dangers of mixing firearms and alcohol.

02:28PM Now, again, I think this goes back to a misapplication throughout plaintiffs' briefing. They say that if we haven't identified a dead ringer, that the modern regulation cannot survive. Well, in many, if not most of these cases, we have identified that dead ringer, but we're not 02:28PM required to. And, indeed, we've situated these laws within the nation's historical tradition. I'd also note that the Second Circuit in *Antonyuk* -- the First Circuit Court to deal with sensitive places provisions -- upheld a similar provision.

THE COURT: Mr. Meyerhoff, why don't we give our 02:28PM court reporter a break, and then we'll pick back up, okay?

MR. MEYERHOFF: Thank you, Your Honor. Of course.

THE COURTROOM DEPUTY: All right.

(Recess from 2:28 p.m. to 2:42 p.m.)

THE COURT: All right. Mr. Meyerhoff, please 02:42PM proceed, sir.

MR. MEYERHOFF: Thank you, Your Honor. With your indulgence, I'd like to continue proceeding provision by provision.

I would like to take a step back for a second. I 02:42PM don't want to lose the forest for the trees here. If we take a

step back, when we look at *Heller*, *Heller* rejected the idea that the -- that a locality jurisdiction could totally ban firearms. And it left open the question of whether firearms could be confined to the home effectively. And *Bruen* answered that question. It said that firearms cannot -- the right -- a government cannot confine the right to bear firearms to the home.

Bruen also said, and is part of the reasoning for that, said, quote:

> "A person is a good deal more likely to be attacked on a sidewalk in a rough neighborhood than in his apartment."

And it was echoed by Your Honor's opinion in *Boland* which discussed that ordinary people feel the need to possess handguns because, quote, "they live in high-crime neighborhoods," end quote, or "because they must traverse 'dark and dangerous streets.'"

Now, as Senate Bill 2 reflects that, it permits individuals to traverse the streets on their way to places, and it doesn't, unlike the law in the *Bruen* case or, as plaintiff suggests, criminalize the possession of firearms in all crowded places. Indeed, if a permit holder walks up to a crowded sidewalk and there's many people there, they're not required to turn around and walk in the other direction.

So I think in terms of -- it's important to think

about what does "public carry" mean? That's what *Bruen* talks about. It talks about public carry.

Now, *Bruen* doesn't define that, but in its discussion of public carry, at the same time it acknowledges that there are numerous -- at least five examples of sensitive places where, notwithstanding the fact that firearms cannot be confined to the home, individuals cannot carry there. And it talks about new and other analogous sensitive places. So I think that's just a -- before we move into more sensitive places, I just want to emphasize that point.

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So if we look at Subsection (a)(8), public transit, we've identified historical analogs in the form of broad public gathering laws that we mentioned previously, as well as school laws that are undisputed by *Bruen*. And those school laws are motivated by the protection of a vulnerable population: children. Many -- as we put in the record, many public school children take public transportation to work. We've also identified as a historical analog Government building laws. Those are recognized again by *Heller* as being settled.

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I think there's two points to note here. It seems as though plaintiffs are requiring a dead ringer in the public transit space or historical twin. That's not what *Bruen* requires. The other thing to note -- and this is where the expert evidence is particularly important -- is that we've presented evidence for Professor Salzmann and Professor Rivas

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that demonstrate that public transportation did not exist in the form it is today or any meaningful form until the 20th Century.

We also provided evidence in their declarations that 02:45PM private railroad companies, which did operate railroads in the 19th Century, restricted the carriage of firearms. It would be puzzling indeed if the mere fact that the Government has taken on a service, which private companies did in the 19th Century, could expand the scope of the Second Amendment.

02:46PM Indeed, if in the 19th Century -- 18th or 19th Century, if you ask an individual, you know, "Can you carry on a railroad?" they would have said, based on the evidence we put forward, "Probably not."

And so the mere fact that the Government is now 02:46PM providing that service, it would be puzzling if that were to expand the scope of the Second Amendment. We've identified the *Kipke* case which denied a preliminary injunction for public transit. We also cited the *Marique* case in our briefing, which is a government building case. It's an NIH case. Now, NIH 02:46PM provides services today that perhaps the Government did not provide in the 19th Century, but nonetheless, the Government building exception applies.

Now, I think it's important in concerning public transit, for example, to think about the idea of silence in the 02:46PM record. And as the Second Circuit in *Antonyuk* noted,

interpreting from silence is risky. I think one of the places where our expert testimony is particularly helpful is that it explained the silences in the record. So in this case, for example, we put forward strong evidence that there was no public transit, and so the search for 18th or 19th Century historical twins or dead ringers would be fruitless, but that does not mean that those laws do not fit -- those modern regulations do not fit within the nation's tradition of firearms regulation.

02:47PM THE COURT: Mr. Meyerhoff, let me ask you a few questions about public transit.

MR. MEYERHOFF: Yes, Your Honor.

THE COURT: I'm just trying to understand how I apply this analysis to these facts. And I guess there has to

02:47PM be hypothetical facts because they're not in the record. But I've taken public transportation in and around Los Angeles, and I've taken it in and around Santa Ana. I don't know if you've ever been in L.A. or Santa Ana after 6:00 o'clock, but it's quite a criminal element. Some of it being homeless are out

02:48PM and about.

And candidly, I'm not a tiny guy, but I feel quite unsafe. And I do know that court staff, both in Los Angeles and in Santa Ana, going to and from those public transport areas, transit areas, they've been assaulted and attacked, and

02:48PM some knife has been brought out.

I think the point -- what I'm trying to say is don't they have the right to defend themselves? You know, I have to take public transit to get to work to make a living, and this day in age, the government, I don't think they can protect us at all times, at all places, nor can police. And especially with the climate and some of our cities and municipalities of defunding the police, people are not safe going to use public transit meaningfully. Tell me why they shouldn't be able to defend themselves, you know -- and by carrying -- if they can meet the qualifications for carrying a concealed permit.

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MR. MEYERHOFF: I think it's important to note at the outset -- I believe it's Section 25605 -- you had mentioned the State would have the last word, and so I can -- I will confirm that with my colleagues, but I believe that section of the Penal Code provides as long -- when you're acting in self-defense with a firearm, as long as you, you know, quickly attempt to contact law enforcement -- I can provide the exact citation when I come back up to the podium, but there is an exception in California law for self-defense. So I think that addresses your concern.

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THE COURT: Doesn't -- because I'm trying to understand that. How do I know whether I'm going to be assaulted or I'm going to need it and the law says I can't carry it? So it would seem to me what you're saying is, okay, I can violate the law, and if I have a problem and I have to

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use my firearm, I'm not going to be prosecuted? Is that what you're saying? Or am I missing your response?

MR. MEYERHOFF: I mean, I think ultimately the prosecution decisions are left up to local jurisdictions. I'm just pointing to a section of the statute that does provide a self-defense exemption. I think the broader point is in these discussions about whether firearms should be allowed on public transit.

Ultimately, state legislatures have the authority to make these policy decisions unless they offend the Second Amendment. And so an individual citizen or Your Honor may disagree with the California's legislature's decision to restrict the carriage of firearms on public transit.

THE COURT: But it's not my place. And I -- if I'm understanding you, I can't tell the legislature how to do their job, but I can say if you're violating the Constitution. And so that goes back to some of my earlier questions: Isn't there a natural right codified in the Second Amendment that you have the right to carry a firearm, in this case, a handgun, to protect yourself from harm?

I'm just trying to understand how the Second Amendment, in the sensitive places, in practical reality work. And some of these sensitive places, I don't have a lot of firsthand experience. I can't really identify with it. But I can tell you, depending on the day of time [sic], I am nervous

going to and from public transit areas. And I can certainly understand how a person would want to carry a handgun to protect himself or herself.

And if I had certain individuals who are smaller, like a five-three young woman and she's going at that late hour, I would want her to be able to protect herself. I don't feel comfortable saying, "You can't protect yourself. You got to just take your risk." And it just seems to me that the way SB 2 is working is you can't -- you can't carry your firearm to and from your work or you're going to have to leave early when the risk of attack or assault are low. Am I missing something? I mean, you can -- please feel free to tell me if I'm misunderstanding how the statute works.

MR. MEYERHOFF: Yes, Your Honor. So I think the first question is you're discussing it, and I think it's the appropriate question, what is the -- doesn't one have a Second Amendment right to bear arms for self-defense? And the Court in *Heller* acknowledged that in the home, and the Court in *Bruen* said you have the right to carry outside of the home. But in the same breath, it acknowledges you have the right to public carry -- and again, it didn't define what "public carry" means. It can't mean all places open to the public because in the same breath, it describes courthouses which are -- foundationally and constitutionally they are fundamentally public places. And so, obviously, when the --

THE COURT: I feel -- I feel very safe in this courthouse. And I don't have any court security in here because it's a secured -- it's a civil matter. But for my criminal matters I've got a team of marshals, and then I've got court security officers. I've got buttons here (indicating). At any point -- if you want me to test it, I'll show you -- they'll come locked and loaded ready to go. An entirely different sense of comfort and security. I have the opposite, they're never leaving me alone. Whereas, when I'm outside the courthouse going to the train station or going to the bus station, which is the main terminal right by the train station, or in Downtown Los Angeles, trying to take some of the buses to go to different areas, you know, I don't feel safe.

MR. MEYERHOFF: Well, to answer your most pressing question, no, I do not think you need to test out the button on me, at least.

I think to address sort of two of the points you brought up, ultimately, we are talking about policy choices. And so there are many courthouses throughout the country that do not provide security. In fact, we've cited materials in our briefing that show that up until the 2000s, most schools did not provide security or even armed security. And so those are policy choices that the individual legislatures of those states have made.

And so the State of Idaho may decide to not prohibit

carriage of firearms in sensitive places like public transit. Certainly those five sensitive places are not requirements for the State, you know, it didn't say states must secure federal courthouses, they must secure schools, they must secure polling places. Indeed, most polling places, as far as I understand them, are not secured by armed guards or panic buttons or anything like that.

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And I think the Supreme Court, including many justices on the Court in *Bruen* have often extolled states as the laboratory of democracy. So policy choices are made there. California has made a different set of policy choices and people may be upset about any one of those policy choices. But unless that policy choice offends the Second Amendment, their address is to the legislature, through petition, through voting.

So I think that is sort of the answer to the question that you are raising. I'd like to address a slightly different point that I think you brought up and plaintiffs brought up. They attack our theory of the case, our theory of sensitive places, and they say they want all crowded places to be sensitive places. Again, we're not arguing that Los Angeles is a crowded place or San Francisco is a sensitive place, as New York tried to do at argument in *Bruen*.

Their theory of the case or their theory of sensitive places is both underinclusive and ahistorical. So

they say government buildings, schools, courthouses, legislative assemblies and polling places, those are sensitive places because they're secured by armed guards. Federal court houses may be an example of that. But as we said before, many 02:57PM schools don't have armed guards. Many DMV offices don't have armed guards. Many polling places don't have metal detectors.

At the time, we cite in our brief that the State -- the U.S. Capitol had one security guard who may have been a groundskeeper through the 19th Century. The metal detectors 02:57PM didn't exist in the capital until the 1983 bombing, or at least generally in the capitol. The senate chamber had it slightly earlier because sensitive places then and today don't necessarily have those features.

It's also underinclusive because -- I don't know if 02:58PM you're a Dodger's fan, but if you go to Dodger Stadium today, they have metal detectors. That is a private place. I believe they also have security, some of which are probably armed. So that --

THE COURT: They also have a lot more LAPD because 02:58PM of some of the terrible tragic incidents that have happened.

MR. MEYERHOFF: That's correct. And I will note that Justice Roberts, in the *Bruen* argument, appeared to assume that, of course, stadiums would be sensitive places perhaps due to their crowded nature. He didn't say all crowded places are 02:58PM sensitive, but that was certainly a factor he considered in

opining that sensitive places appeared -- stadiums appeared to be sensitive places.

If I may return to the provision-by-provision analysis. So we discussed public transit. Turning to Subsection (a)(12) and (13), we've identified numerous historical analogs, including Compendium Exhibit 60, the restriction at Central Park; Compendium Exhibit 67, the restriction at Prospect Park; Compendium Exhibit 83, the restriction at Golden Gate Park, and many other municipal restrictions.

Again, when we discuss expert testimony, in the role of expert testimony, we put forward evidence from leading historians on the topic that -- contrary to plaintiffs' claim -- that Boston Common was like a park, it was not. And public parks, as we understand them today, only emerged in the second half of the 19th Century. The historical analysis that we identified, it follows closely in time to those merely contemporaneously. And we put forward declarations from Professor Young and Professor Glaser to that effect.

Similarly, with state parks, we identify Compendium Exhibits 198 through 200, as well as Professor Glaser's surrebuttal declarations at Exhibit 1 through 15, numerous state park restrictions from California, Connecticut, Kansas, Michigan, New York, across the country.

Moreover, the burdens and justifications of the

modern regulation and the historical regulation, which the Court in *Bruen* said determines whether they're relevantly similar are the same, a flat ban to protect parks as places that propose relaxation and recreation.

03:00PM The other thing to note, of course, is that Exhibit 201, we point out that close in time to the founding of national parks, there was a ban on firearms in federal parks that lasted for almost 70 years. That's at Compendium Exhibit 201.

03:00PM We also cite the *Antonyuk* case and *Kipke* case, both of which are post-*Bruen* and uphold restrictions at parks, both state and/or municipal.

Turning to Subsection (a)(7), which is the restriction on hospitals. We've identified numerous historical

03:01PM analogs that restrict carriage of firearms at places of educational and/or scientific purposes, and 1870 Texas law at Compendium Exhibit 77; 1874 at Missouri; 1889 at Arizona. That's at -- 1889 Arizona law, that's at 138.

Again, I think it bears repeating that *Heller* and

03:01PM *Bruen*, which recognize schools as sensitive places, we don't see the emergence of state laws prohibiting firearms in schools until the exact same time period. So plaintiffs' argument about "Oh, these come too late," both don't reflect the *Bruen* analysis we discussed earlier where laws after reconstruction

03:01PM can be considered or during reconstruction. It also doesn't

reflect the Supreme Court's own jurisprudence on sensitive places.

The Second Circuit in *Antonyuk* makes a good point which is obviously the Second Amendment is ratified in 1868. It doesn't mean that in 1869 the voters and legislatures have a completely different conception of the Second Amendment. In fact, the voters who approve these laws or the legislatures may have been the exact same voters and legislatures who ratified the Fourteenth Amendment.

03:02PM So clearly these close-in-time restrictions are relevant particularly when we consider the Court credited 1650s restrictions in Maryland as to legislative assemblies and finding those places were settled.

In terms of hospitals, we also identified analogs in 03:02PM schools and colleges. There's the presence of vulnerable populations. The burdens and justifications are the same in both. There are bans on carriage and they prevent the disruption of scientific and educational purposes and protect vulnerable populations.

03:02PM Again, we put forward evidence from leading historians, Dr. Fissell and Dr. Kisacky, who explain the modern hospital did not exist in the form we understand it with sensitive equipment and teaching facilities until the 20th Century.

03:03PM Again, many of these experts -- *Bruen* countenanced

when there is a dramatic technological chain or unprecedented societal concerns, the Court should apply a more nuanced approach. One of the ways the nuance approach comes into effect is when there is a reason to explain the silence on why there may not have been hospital laws in 1791. Indeed, practice, custom, private rules, which we talked about in the railroads context as well, are relevant in determining that historical tradition.

03:03PM

Turning to libraries, zoos, and museums, at (a)(17) and (a)(20), again, we identified those historical analogs for scientific and educational purposes throughout the 19th Century. We also identify the restrictions in schools and colleges, the presence of education and -- presence of children, both are relevantly similar. We have comparable burdens and comparable justifications. And we point to the declaration of Leah Glaser, who talks about these are places where children gather.

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We also point to the declaration of Professor Brewer. And she cites to four restrictions on carrying and keeping firearms on campuses, at Yale College, the University of Georgia, the University of North Carolina, and the University of Virginia.

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Now, these technically may not be statutes, but we're not arguing that they are the historical analogs. Rather we're arguing this evidence as well as our expert evidence and

03:04PM

other secondary sources defines the historical tradition that *Bruen* talks about. So we are required to identify a relevantly similar analog or analogs and place those within the historical tradition.

03:05PM And, indeed, in *Jones v. Bonta*, which we didn't cite in our briefs, but which was issued on December 8th in the Southern District of California, that's a 2023 WL 8530834, at page 9, the Court said:

> "Contrary to plaintiffs' assertions, defendants do not conflate these university rules with laws, but use them to demonstrate the general understanding during the relevant historical period."

Now, *Jones* involved a challenge to California's restriction on the purchase of certain firearms by 18- to 20-year-olds, but the point remains the same.

Turning to Subsection (a)(11), we're looking at playgrounds. We identify schools as strong historical analogs. They are relevantly similar. the burdens and justifications are the same: no carriage of firearms is the burden; the justification and protection of the children. Again, our declarations help explain the particular silence: Why were there no restrictions on playgrounds at the founding? Playgrounds did not exist in the founding era. And additionally, they were often -- later they were often found

within schools and parks.

I think it's important to stop here for just a moment and discuss, for example, public transit. Plaintiffs identify -- they say there was public transit, and they identify a single 1725 South Carolina example of public transit. We present evidence from Dr. Rivas to show that that's not really a relevant example. But more to the point, and this is, again, a point that *Antonyuk* raises -- the Second Circuit in *Antonyuk* raises. And I think it's applicable here. They point out that there may be a variety of reasons why a legislature or a municipality may have chosen not to regulate a particular location, and they provide the example of a town that has a single daycare.

Now, there may be a variety of reasons why the State did not pass a law or locality did not pass a law addressing that daycare. One of the reasons may have been that daycare had its own private rule, and so it was considered unnecessary.

Indeed, legislatures, we would hope, are seeking to address problems and provide solutions to them, not find solutions and then identify problems. And so I think interpreting silence as meaning that there's a countervailing tradition is risky, because that's not what it means. Indeed, that's what the Second Circuit found.

We also have restrictions on playgrounds at a Subsection 11, that *We Are Patriots* case which we cite in our

brief from New Mexico refuse to enjoin those restrictions on playgrounds.

If we look at (a)(15), (a)(16) and (a)(19) -- those are casinos, stadiums, and amusement parks -- we identify numerous historical analogs restricting carriage of firearms in places of amusement and social gathering. We identify an 1816 New Orleans law at Compendium Exhibit 38 that restricts carriage in public ballrooms, an 1871 Texas law at Compendium Exhibit 80 that restricts assemblies for amusement, an 1889 Arizona law at 138 that restricts circuses, a 1903 Montana law where -- which restricts where persons are assembled for amusement.

Again, for these institutions, a more nuanced approach is required because these types of places did not exist at the founding. I mean, for example, casinos were largely regulated out of existence until the second half of the 20th Century. And as I mentioned before, Justice Roberts, in oral argument in *Bruen*, suggested strongly that he believed that stadiums would classify as sensitive places.

The May plaintiffs specifically also challenge the parking lot restrictions or certain of SB 2's provisions restrict carriage in parking lots as well. We have addressed this in our briefing. We have identified dead-ringer historical analogs or at least very closely similar.

There's a 1776 Delaware constitutional provision at

Compendium Exhibit 28, which outlaws battalions or companies from coming within a mile of polling places during the election.

We identify an 1870 law which prohibits -- which restricts the carriage of firearms within a half-mile of a place of registration. Indeed, these laws -- the burden is less severe because none of California's restrictions cover 5,280 feet or half of that. And the justification is the same, to prevent the disruption that firearms would cause.

I think it's important to look additionally at a number of cases. I would recommend to you most prominently the D.C. Circuit's opinion in 2019 in the class case which we cite in our brief. In class, the D.C. Circuit found the same security interest which remit regulation of firearms in a Government building, permit regulation of firearms on the property surrounding those buildings. We can certainly understand why in legislative assemblies and courthouses.

We would not want to restrict firearms within them, but someone standing on the sidewalk 15 feet away, the same logic applies to the sensitive places restrictions we've identified. And, indeed, both pre-*Bruen* and post-*Bruen*, numerous courts have upheld buffer zones and parking lot restrictions.

We identify the *Bonidy* case, the *Dorosan* case. Those are pre-*Bruen*. We identified the post-*Bruen Maryland*

case. And we also identified a number of school zone cases. The federal Gun-Free School Zones Act provides for 1,000-foot buffer around schools.

We cited numerous District Court cases -- *Walters*, *Allam*, *Lewis*, pre- and post-*Bruen* that uphold those restrictions.

I'd like to turn briefly to (a)(23), which is the restriction on financial institutions. We've identified historical analogs that are relevantly similar in the form of government buildings and courthouses in the 18th and 19th Century. We presented evidence from a leading financial historian, Professor Murphy, who demonstrates that banks did not hold the place in American society they do today. There was no mass commercial banking, financial institutions or the province of a few elite individuals and, indeed, some of the functions that banks hold today, including notaries public were actually resided in courthouses in the 18th and 19th Century.

And, indeed, the other concern which motivates and which would go to the justification, the justification for restrictions on government buildings and courthouses is clearly the disruption of American civic life. In the same way, banks and financial institutions occupy a central place in American life today. And again, considering the dramatic technological change, we can consider the more nuanced approach which allows us to analogize at a higher level.

I'd also note that financial institutions fits squarely within airports. They are places that are sites of organized group violence. And, in fact, just as airports and airplanes have been the site of political terrorism, banks have also been the site of political terrorism, both to send a message as well as to collect resources for terrorist organizations. Thus, the Ninth Circuit, in its *Davis* opinion in 2008 have little trouble finding that airports were affirming -- had little trouble affirming a conviction for carrying a firearm in an airport.

I'd like to turn to the private property provision, (a)(26). Now, (a)(26) is unique in our argument because there, we have made what we see as a compelling Stage 1 argument that plaintiffs' proposed course of conduct is not covered by the plain text of the Second Amendment. Put simply, the Second Amendment does not extend to private property.

As we discussed in *Heller*, *Heller* said you cannot ban guns in the home. It left open the question about confining them to the home. *Bruen* answered that question. But it did not define what "public carry" meant.

Now, plaintiffs argue that "public carry" means "includes private property open to the public." They believe in some sense -- their argument relies on the fact that in some sense the Second Amendment extends to private property. Without some sort of conclusion to that effect, their course of

conduct does not implicate the Second Amendment. And frankly, respectfully, if a court is to make a determination that the Second Amendment extends to another's private property, that decision should come from the highest court in the land.

03:14PM *Bruen*, as we understand it, the Second Amendment was enshrined within the scope. It was understood at the time. Now, there's no evidence that carriage on private property during the founding or reconstruction eras on another's private property during that time period was derived from some Second 03:14PM Amendment right as opposed to state property law.

Additionally, on the private property provision, plaintiffs lack Article III standing. There is no state action that is fairly attributable to their supposed injury here. Shifting the means by which a property owner gives consent is 03:15PM not state action.

Now, plaintiffs say that this court does not enjoin this provision. It will be the State deciding as a default presumption who can enter and who cannot. But Your Honor, that's true regardless of whether you enjoin this provision, 03:15PM either as a default everyone will be permitted to carry on private property -- private commercial property, unless the owner consents, or no one will. But either way, that's a decision, in their view, being made by the State. In reality, it's not a decision being made by the State; it's a decision, 03:15PM regardless of whether you enjoin the law or not, being made by

private property owners.

Now, at Stage 2 of the analysis, even if we proceed there, the State would still be able to show that the law -- that this subsection fits within the nation's historical 03:16PM tradition of firearms regulation. We've identified numerous analogs including a 1721 Pennsylvania law at Compendium Exhibit 17, a 1722 New Jersey law at Compendium Exhibit 18, and five other historical analogs. Now, contrary to plaintiffs' argument, these analogs do not apply only to hunting, they 03:16PM apply broadly to private property.

Now, these historical laws fit within the nation's historical tradition of firearms regulation, and, indeed, the sanctity of private property. Other rights derived from the Constitution do not extend on to another's private property. 03:16PM And, indeed, it's likely that these historical restrictions were just as broad, if not broader, than California's challenged private property provision today. Because even though these restrictions mention plantations and farms, America, at the time, is a profoundly agrarian society. And so 03:17PM it's likely that these provisions acted even more broadly in restricting firearms carriage than these modern restrictions do.

If I could briefly address the May plaintiffs' First Amendment claim.

03:17PM THE COURT: A lot of what you said -- I mean, it's

been helpful, but we've almost been going for two hours and I still got to give everybody a round. So a lot of what you said, it has been in the briefs. So I'm just trying to think as time management, because I know the plaintiffs are going to say, "Hey, listen, we spoke for about 25 to 30 minutes, and you've been speaking for an hour and a half." I appreciate it. I don't want you to feel bad. It's just now I think I got to time manage this better.

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MR. MEYERHOFF: Yes, Your Honor. Will we have an opportunity to briefly respond?

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THE COURT: Yes, you will.

MR. MEYERHOFF: Thank you. I appreciate it.

MR. BENBROOK: Few quick points of specific responses to counsel's argument, Your Honor. First, counsel suggests that, "Hey, under SB 2, people can traverse the streets and sidewalks. So what's the big deal?" The big deal is you can't go anywhere else. You can -- under these restrictions. Because if you go to a parking lot to go to a place that is, for example, a private business or a Government building, you can't be in the parking lot with the firearm.

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So the point is, *Bruen* repeatedly says there is a general right to public carry. Not a right to carry on sidewalks and streets, but a general right to public carry.

Relatedly, counsel found it significant that Mr. Frank, for the May plaintiffs, said that mostly these

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restrictions are -- fall within the private default rule, and so again, kind of "What's the big deal with all the others -- all the other restrictions?" Well, that's not the test. It's not a how burdensome is this in the whole?

03:19PM If Your Honor takes each location one by one -- and we do not concede as to all people that the private default is the most onerous. All the ones we've chosen we believe offend the Second Amendment. So we take each location one at a time. And maybe I misheard or didn't hear, but it's -- to me, I think 03:20PM counsel failed to address Your Honor's question of what's left. He said, basically, I guess his answer is streets and sidewalks.

Next, with respect to counsel's argument that *Heller* and *Bruen* establish five sensitive places including a broad 03:20PM category of Government buildings, I point Your Honor to pages 11 and 24 of the reply brief where we respond to that argument and note in reference to government building was a reference to the subset of government buildings that have previously been identified.

03:21PM Counsel mentioned that it's significant that there are -- is not much, if any, record of challenges to these few sensitive locations laws or regulations that they've identified. And perhaps the answer to that is because there are so few of them, but also because, in fact, many of the 03:21PM locations -- the so-called sensitive location regulations

they're talking about are actually codifications of the law of affray and not sensitive location restrictions at all. They're restrictions on carrying to terrify the public. And we'll get to that in a second.

03:21PM With respect to the contradiction point and how that works, again, it's important to emphasize that *Bruen* itself says that 18 -- 19th Century regulations can contradict the founding era tradition when there is no regulation of the same kind in the founding era. In other words, it says that when 03:22PM the founders could have addressed it the same way subsequent legislatures chose to but didn't, that's important evidence to show that the new regulations are inconsistent with the Second Amendment.

And I was trying to take notes with respect to the 03:22PM very odd, confusing exchange Your Honor had with counsel about the alleged self-defense exception.

I would ask counsel which number was it that you were referring to so we can look at that?

And I won't be able to respond right here, but we 03:23PM will.

THE COURT: While they're trying to find that, let me ask you a bigger picture context. And maybe it's just that's a problem that I've got to face, but the Supreme Court in *Bruen* said there are sensitive places, and one of those 03:23PM sensitive places are schools. And it just seems to me in this

day and age, a lot of our schools, there's not adequate protection provided by police. And if you're dropping one of your kids off at these schools or you're around the area when one of these mass shooters -- because some of these horrific
03:24PM shootings have happened at schools, Sandy Hook and others -- maybe the body count wouldn't have been so horrific if there were several concealed carry permit holders around.

So here's my question. It's probably not a good one. So if the Supreme Court says, "Even in these situations,
03:24PM you know, you got to leave schools alone under our analysis," I'm thinking, well, the whole point of the Second Amendment is so a person can protect himself, herself, and their loved ones. How can you not protect yourselves in this day and age?

MR. BENBROOK: I agree, Your Honor. I'll start with
03:24PM the caveat that I don't -- we have not raised a challenge to schools or playgrounds. The May plaintiffs did challenge the playgrounds, so counsel can address that. But one way of looking at it, Your Honor, is while the State suggests that, "Oh, *Heller* set aside -- identified schools as a sensitive
03:25PM place," that is not ironclad, Your Honor. That was among the so-called presumptively lawful regulations including sensitive places that was referred to as a presumptively lawful regulation.

But *Bruen* clarified in its discussion of sensitive
03:25PM places that particular sensitive place restrictions, if they're

challenged, still need to satisfy the history test. So, I mean, our case is not about schools. I agree with Your Honor. But I would just offer that as a partial response.

THE COURT: So let's see if I can drill down on that. The Supreme Court have said schools is a sensitive place, but my point is schools are not safe. Our history shows that they're not safe. Are you saying that under the *Bruen* analysis, even though they recognize that exception, that you can readdress whether you can have a concealed carry permit holder at schools? I'm not talking about the students.

MR. BENBROOK: Right.

THE COURT: But teachers, parents -- parents aren't allowed to roam around the school property. I found that out the hard way once when I was trying to check up on my kids. But certainly in the parking lots or waiting outside, as I understand SB 2, you can't have a gun there.

MR. BENBROOK: Including parking lots, Your Honor, which is particularly onerous.

THE COURT: Right. And what I'm trying to understand is how do I analyze this when you have the Supreme Court saying, in *Bruen*, that there are certain sensitive places, schools being one of them, and we're not challenging that, and then these other places, playgrounds where there's children and centers, youth centers, why is that not within this exception that the Supreme Court had been talking about?

MR. BENBROOK: Your Honor, I don't think I can add much more than what I mentioned. To my -- again, the caveat that we're not challenging here, my understanding is schools are among the presumptively lawful but not ironclad. No one can ever challenge this ever again. It has to satisfy the history test. And at the risk of venturing into an area we're not talking about, you know, one important theory or one important aspect of that, perhaps the most important is the analogs, the rules, the rules of the schools that the State points to all arise in the context of strict *in loco parentis* controls of the schools. While the students may have been disarmed, the faculty and others were not.

THE COURT: Okay.

MR. BENBROOK: So moving on, Your Honor -- and again, if counsel has identified that self-defense --

MR. MEYERHOFF: May I?

THE COURT: Please.

MR. MEYERHOFF: Penal Code Section 26045.

MR. BENBROOK: I'll ask my colleagues to look at that. Thank you. Thank you, Counsel.

All right. Let's talk about Subsection 10, public gatherings. We dispute the suggestion of the State that this is not a big deal, this is not a big burden. We point out in the brief that it is a significant restriction. It applies to public meetings that require a permit. And many events do

require such a permit. We've identified them.

This is an important part of the briefing, though, because a lot of the meat comes in there and gets repeated and refers back, so I'm going to cover it.

03:29PM Counsel talked about the churches, the rule of requiring citizens to bring their arms to church, but I didn't hear counsel address the requirements in Connecticut, Massachusetts, Maryland, Rhode Island, and Virginia that we cite, all requiring them to bring their guns to public

03:30PM meetings. When there is evidence of a founding era requirement to carry in public gatherings, it's impossible for the State to meet its burden of showing the opposite tradition. In fact, some of the State's declaration support us.

For example, the Rivas declaration, he details all

03:30PM sorts of public meeting places in Philadelphia in the late 1700s and concludes at paragraph 34 that the City did not enact weapon specific regulations for these places of public assembly. And again, *Bruen* tells this, the absence of regulations that the founders could have adopted but did not is

03:31PM evidence that new regulations are not consistent with the Second Amendment.

Otherwise, the State rolls out a set of laws that it's using to justify in many of the other circumstances, and we've covered extensively in the brief why the Statute of

03:31PM Northampton should not -- is not a proper analog here.

So I want to focus on four that the State does and focus on and that apply in many other settings. First is the 1786 Virginia law, Exhibit 31. This is very important. They say that this is an example of a founding era, Northampton statute that restricted carrying at public gatherings. But as I read it in the details of the statute, the actual text shows this was not a sensitive place regulation at all. It did not distinguish between places since acting in terror of the county was the main offense. It says:

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"You may not go nor ride armed by day nor by" -- "by night or day in fairs or markets or in other places in terror of the county."

So to my reading, that's not a sensitive place restriction. That says you cannot ride to terrorize the people, and that's not challenged here.

03:32PM

The next, quickly, is the 1792 supposed North Carolina law. We addressed this in the reply brief. But I would add *Bruen* tells us at 142 S.Ct. 2145 that in *State v. Huntley*, in 1843, North Carolina Supreme Court confirmed, quote, "that the carrying of a gun for a lawful purpose per se constitutes no offense." And again, accepting and reading it to the -- limited to affray or terrorizing the people.

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Third, 1820 New Hampshire law regarding parades. The State's brief says a prohibited carry, quote, "near parades." But the details show otherwise. It actually applied

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only to noncommissioned officers who come on to parade, they could not carry armed. Did not apply beyond them and did not apply to the people watching the parade. It's more akin to saying if you're going to be in a public performance, you can't have live ammunition. It's nothing like an across-the-board prohibition.

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Next, the 1876 Iowa law, the State says in its brief that this prohibits firearms on trains. The details show otherwise. It actually banned, quote:

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"...presenting or discharging any gun, pistol, or other firearm at any railroad, train, car, or locomotive engine."

Right after, it also barred, quote, "throwing any stone or other substance of any nature." Has nothing to do with carrying on a train.

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So we continue, Your Honor, when it comes to Subsection 10, these analogs do not come anywhere close to satisfying the State's burden. I've got a couple more, and then I'll turn it over to co-counsel to cover some of the other locations.

03:34PM

THE COURT: Very well.

MR. BENBROOK: As to stadiums and amusement parks, Subsection 16 and 19, these fail for the same reasons that the public gatherings fail. There is no tradition. Again, the State falls back on the fairs or markets from the Statute of

03:34PM

Northampton and the Virginia law that I just described which was not the sensitive location law.

It's important to stress here that while the State says over and over again, "Well, there's just so many different things, you can't" -- founders couldn't have imagined something as big and ornate as Dodger Stadium, not withstanding the thousand years before the Romans had built the Colosseum, which is bigger than Dodger Stadium. There were many forms of entertainment where lots of people gather.

Our brief references the proliferation of racetracks in the 1700s, the existence of circuses dating back to George Washington's time. The State's own evidence shows this as well.

The Blakey article cited by the State in the *Rutgers Law Journal* knows there was an opera occurring in Charleston in 1735.

The Rivas declaration at paragraph 32 talks about a major theater in Philadelphia in the late 1700s, right next to Independence Hall, that housed 2,000 people. And then he tells us two paragraphs later in paragraph 34 that Philadelphia never banned guns there.

In short, the founders were very familiar with the idea of amusement and sporting events and gatherings for those purposes, but they didn't think to ban firearms there.

And while public transport isn't one of my

subsections, my co-counsel will cover, but I can't help but observed that since the State has referred to the oral argument at *Bruen* and Justice Roberts' comment about Giants Stadium, I come in, Your Honor, to the transcript of the oral argument and Justice Alito's line of questioning from the New York Attorney General's office where he asked how it's possibly fair that law-abiding citizens can't carry a gun to defend themselves on the subway when everyone in the world knows that criminals are riding the subways with their own guns.

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Second to the last for me, gambling casinos, Subsection 15. The State argues that nothing like casinos existed and totally ignores the Louisiana law or the fact that we point out that the Louisiana government itself established a casino in 1753 and didn't ban carry.

State says it's sensitive now because gambling takes place in the casino and that attracts bad people, so they shouldn't be allowed to carry. This is the policy argument. And counsel talked about policy considerations over and over again. But certainly, in this context as a justification, *Bruen* says those policy justifications do not apply. It's a text and history test.

So as a matter of history, again, when it comes to gambling, the State's own materials make our case for us. They show that gambling was very common at the founding. The Mancall declaration tells us about gambling and taverns.

Mancall declaration tell us about gambling at horse races. The Brewer declaration refers to gambling at cock fights.

The State also offers the Mancall declaration and the Blakey article to show that gambling was heavily regulated, but nowhere can they point to any founding era regulation that limited guns where people gamble. Under *Bruen*, that's the end of the story.

Finally, for me, Your Honor, the private-property default rule, again, *Bruen*, quote, "...guarantees a general right" -- says in the Second Amendment "...guarantees a general right to public carry."

Subsection 26, the private-property default rule, says on its face that it applies to commercial establishments that are open to the public.

SB 2 says we don't care what *Bruen* says about general right to public carry. You don't have a general right to carry in public unless the business owner affirmatively consents. Counsel talks -- and we -- we talk in the brief about the history of the -- the justification for the assumption that people bring their -- come to publicly open businesses attendant with all their other rights arises from the concept that members of the public have implied consent to be there with their rights unless the consent is affirmatively conditioned or withdrawn, and the State wants to flip that presumption.

With respect to the test itself, the State says we don't even get to history because the text doesn't cover. Well, it actually does cover. The Second Amendment text does not distinguish where the right to keep and bear arms shall not be infringed. It says the right to keep and bear arms shall not be infringed. The argument about where it implies is what we're here to talk about. We're talking about the so-called sensitive places.

So when counsel says, "Oh, you know, this doesn't even pass the textual point," the reality is the argument about whether it applies to private property by necessity falls within the second *Bruen* prong. That's the whole point of what we're here to talk about.

In any even, the concept that there's no State action here doesn't make any sense. Candidly, Your Honor, respectfully, it's like saying a state can ban speech on property or can say certain things can be said on private businesses, but certain things -- basically content -- a noncontent neutral speech restriction and say, "Well, hey, the State -- this is not State action." It is State action.

The supposed analogs justifying this don't come close. We've covered it in the brief. The laws -- the text of those laws speak for themselves. They refer to hunting. They're about enclosed lands. They're radically different how they limit long guns on farms for hunting. Nothing like saying

no carrying in any private business. The scope is totally different. It's erratically different. Why? To prevent long gun violence against animals, not to prevent violence among people.

03:42PM Finally, it's worth noting that every court -- my understanding is each of the reported decisions to cover this similar rule have rejected it.

So I will conclude with that and turn it over to co-counsel. Thank you, Your Honor.

03:42PM THE COURT: I appreciate your argument. Thank you.

MR. FRANK: Thank you for the opportunity to be heard again, Your Honor. Appreciate it.

One of the themes that I picked up on when listening to the Attorney General speak, Your Honor, was that the proper

03:42PM way to proceed with the analogical analysis, meaning when we're looking at places today that are very different than they were during the ratification era, or even places that may be completely new that have no real analog -- what I'm hearing the Deputy Attorney General argue for is that the Second Amendment

03:43PM is only coterminous with a degree that we can recognize modern places and say that they're similar to those in the past. But if we can't, the Second Amendment doesn't apply.

And this argument has been made in other civil rights situations -- circumstances, and *Heller* had to remind us

03:43PM that that's not how we deal with constitutional civil liberty

interest. The First Amendment extends to any place where people -- any instrumentality that people are using to communicate. And just because we didn't have satellites in 1791 doesn't mean that the Government doesn't need to get a 03:43PM warrant to use a satellite to pry into the content of your communications. And it's easy to lose track of that, but that is a logical consequence of this very expansive approach to the more nuanced approach that the Attorney General advances, which is that if we can't really find a reasonable location analog, 03:44PM well, then the tie goes to the State's police interest and we can forget about the constitutional nature of the right that we're talking about here.

And when you look at the consequence of that, what's left is the sidewalk. That can't be what the Supreme Court had 03:44PM in mind. It's not possible. And it is hard to know. It's hard to discern what to make of *Heller's* language about sensitive places. Those issues were not squarely before the Court in *Heller* or *Bruen*. *Heller* did not -- was not asked are schools sensitive places, are local government buildings 03:44PM sensitive places. It just -- in fashion, it looks more like dicta than holding.

It said these places are presumptively. Well, presumptively means subject to rebuttal. It's bizarre to start thinking about the question about whether or not the Supreme 03:45PM Court did that intentionally, whether they intentionally

announced that there were carve-outs from historical Second Amendment scrutiny and started with those three. There might have been prudential reasons why they did that. But I'm of the opinion that when the Supreme Court establishes a standard of review, they expect courts to apply that standard of review. And that standard of review is the historical scrutiny that we're here today to apply.

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And related to that question of what really makes a place sensitive, I think we have to look at -- well, we can start with this building, which we all agree we feel very safe. I know I do. I know Your Honor does. There are armed men at every point of ingress and egress, and the people who are in this building most of the time are people of importance. You have jurists, you have assistant U.S. attorneys, you have members of law enforcement community.

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And so the Government says, you know, this space needs to be safe because important government activities are unfolding here on a daily basis. And people with appointed positions of power in our society are often the targets of violence. And so, of course, this place is a sensitive place, so is the White House.

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And I believe in a 2015 opinion, Judge Tymkovich said, you know, the White House and the curtilage, essentially, of the White House is all sensitive. We're not going to split hairs and say the White House lawn is less important than the

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interior of the Oval Office. It's all important. But when you go down the hierarchy of the significance of the people and the government buildings and the nature of the work that they're doing, it starts to look much more fuzzy of what really is a sensitive location.

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If I take -- if I need to get a replacement driver's license at the DMV, is that -- is the local government DMV building really as important as the White House or the Ronald Reagan Federal Court that we're in right now? I think reasonable minds can disagree about that. And that all flows from taking a very specific look at what is actually going on in these places. And it's not enough to point to areas in society and say that these places are dense like a metro car or that there are vulnerable people such as children who often use the metro cars in public transportation.

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I see children everywhere I go. I see children when I go shopping. I see children when I play golf. I see children at the shooting range. I see them everywhere I go. Under the State's expansive notion of how we spot and identify a sensitive place, virtually everything starts to look pretty sensitive. And paradoxically, that's what makes the right to carry so important because people want to go with families wherever they go. And if the they have a right to carry a gun with them, if something terrible happens, they can at least have some shot at self-defense. They should have that right,

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and that's what the Supreme Court said.

We saw Roberts and Alito allude to that. Alito gave the -- at oral argument, Alito gave the example of, well, what about if somebody has a job working late at a restaurant and they get off work late at night and have to ride the subway home? If density is what makes a sensitive place, well, then they can't carry on the subway. It seemed very clear -- it didn't make it into the text of the *Bruen* opinion, but it seemed clear that we're not going to narrowly construe this right that we're recognizing in the Second Amendment text to be outside the home.

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So if under the State's conception of what *Bruen* will tolerate, government property is a place where a lawfully issued permit is not -- is not going to be recognized. And private property -- at least private commercial property is also a place where it's presumptively not going to be recognized. What's left? Not much. And that is not -- that is not consistent with the right announced in *Bruen*.

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With those points made, I'd like to address just a few things about the specific subdivisions that the May plaintiffs have targeted.

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THE COURT: If you could be brief.

MR. FRANK: I will absolutely attempt to be brief. I'll begin with health care facilities. So the State fails to show any historical tradition of banning arms at hospitals.

03:49PM

And while it's true that health care facilities in the 1790s were very different than modern health care facilities of today, we still know that they had health care facilities.

And given this State's expert's descriptions of these places, they seem like the kind of place that is more akin to almost a correctional facility, in some sense, than a hospital. These indigent people had nowhere else to go and quality of medical care was not very modern, to say the least. But we see no tradition. So it's not enough for the State to say, "Well, modern hospitals are different and there's vulnerable people there; therefore, the right to carry doesn't extend that."

And the State's attempt to slip in hospitals into the back door of these -- of schools being sensitive places or being educational facilities kind of leads us back to a fundamental problem which is that we need to look at what it is about these facilities that make them look like schools. There's not much that I can see on the record.

And moving to public transportation, which I briefly talked about, the State is right, that public transportation as we know it didn't exist in the 1790s. But we know that railroads emerged in the 1800s --

(Reporter requests clarification for the record.)

MR. FRANK: We know that the only regulations that

we see for railroads are a few private company rules about if you're going to bring a firearm, you're going to have to stow it or something like that.

So it's not enough to point to the density and the people in close locations. And it also isn't enough to say, well, most public transportation is publicly owned. So it's a public building and therefore we can slip in public transportation into that exception. Because, like I explained, government buildings are not all created equal. And public transportation, in some sense, is the opposite of a place like the building that we're in now or the White House. It's public transportation. Anyone can go there. There is no controlled points of ingress or egress. There are occasionally guards, but these days not so often. But that alone wouldn't suffice to make it a sensitive place.

Now, the playgrounds and parks aspect of SB 2 do merge a little bit. In some respects, playgrounds are going to be similar to schools because virtually every school has a playground. But there are also places that are not affiliated with schools that also have playgrounds. Occasionally, I see playgrounds at pop-up farmers markets and public streets. I also see them inside shopping malls. And I see them in places that I can't always discern whether they're a public park or private property, which is a good thing. It's good to see communities build playgrounds.

But it's not enough to simply say playgrounds are often associated with schools and therefore schools are sensitive, because of what *Heller* and *Bruen* said about them. We still have to -- we still have to show why they are like that. And at least at public playgrounds and parks, there is no *in loco parentis* dimension to that. Any member of the public can visit a park as we know. Most parks today have at least some small area of the park that's set aside seemingly for homeless encampments. So anyone can be there.

If I start to think of a place that anyone can be, it starts to look a lot like the general public, which is what I believe the Supreme Court had in mind when they were establishing there's a right to be armed when you're out in public areas.

Regarding parks, the problem with the State's argument is that it throws *Bruen's* requirement for a -- to demonstrate -- to marshal evidence of a well-subscribed and representative tradition of regulation. We know that parks were, in some sense, a creature of the 19th Century. But what we see are a handful of regulations that ban carry in a handful of specific parks across ten states at a time where I believe there were an average of 45 or so states admitted to the union. So this is a minority of states selecting only a few parks. And the State doesn't do enough -- doesn't pay enough attention to the difference between an urban park and rural park, which

is somebody that Justice Roberts brought up at oral argument. He joked about it being the only threat is a deer. It's a point well taken. There's no historical tradition banning carry in parks just broadly. The most that the State has mustered is insufficient to satisfy the *Bruen* requirement.

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Continuing on to -- forgive me -- places of worship. So as Your Honor noted earlier, there's been terrible acts of violence at places of worship. And the place of worship aspect of SB 2 is, I'd say, a high rate of vampire rule because it imposes an obligation on places of worship to opt out of a default presumption.

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But it should go without saying that houses of worship were present in the 1790s. And the historical tradition that we actually see is a historical tradition of requiring people to bring arms. And the Attorney General has characterized that as a quasi-militia type of law. I don't see that in my review of the record. I see a lot that requires you to bring arms into a church as frankly it speaks for itself. And nor is it appropriately characterized as an indication that the right to bear arms could be regulated. I mean that completely inverts the analysis.

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The argument that I believe I heard the Attorney General make was that this is proof that we can regulate. Well, it seems to me like they're telling you to bring arms to church, not telling you can't have them. So accept that as a

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historical regulatory analog for a ban to me -- I'm not sure what that means, but I wouldn't make that argument.

And then turning to financial institutions, it's true that modern financial retail banking institutions are something of a creature of modernity. But what we know is that we don't really see any laws regulating them, and we can't just say, "oh, banks are similar to airports or banks are similar to government buildings," which is an argument that the Attorney General makes. In what sense is a bank truly like a government building? Banks aren't owned by the government. There's no government employees transacting business there. I fail to see any factual basis to say -- to hold these akin. Nor are they like airports.

When I go visit the bank, I don't surrender myself to the territory of the federal government and pass through multiple metal detectors and armed men. These are not in any sense similar enough to qualify as sensitive places under that.

And the final thing I'd like to make a few remarks about is the vampire rule, the opt-out provision. So *Bruen* expressly says that expanding the category of sensitive places simply to all places of public congregation that are not isolated from law enforcement defines the category of sensitive places far too broadly.

And to be clear, we are not stating that we have a right superior to the right of any commercial private property

owner. They have the right. If they do not want to carry on their premises, that's fine. Similarly, the State can install a default rule that restricts people's right to carry in places that are open to the public. I don't need to pass through a
03:57PM metal detector to go to In-N-Out Burgers. This is true of the vast majority of the people in the public space.

So the State says that private property has the sanctity to it. It doesn't want to intrude into the domain of private property owners but then passes a law that makes a
03:57PM decision for every private property owner in the State. So that doesn't work. That does way too much damage to the right that *Bruen* established.

So with that, unless the Court has any questions for me, I'm --

03:58PM THE COURT: No. It's been very thorough.

MR. BENBROOK: Your Honor, I'm sorry, I should have mentioned Mr. Duvernay will address the self-defense issue raised by counsel and --

THE COURT: Briefly.

03:58PM MR. BENBROOK: -- and briefly talk about alcohol and maybe zoos, but brief.

MR. DUVERNAY: I promise I've been allocated to locations that are nearest and dearest to the heart.

Good afternoon, Your Honor. Earlier you asked our
03:58PM friend on the other side about the possibility that a staff

member or someone may want to carry a firearm and feel the need for self-defense while riding on public transits and walking to and from, say, a government building or place of work. And Mr. Meyerhoff identified Penal Code Section 26045 as a possible safety net here.

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That statute provides your staff member or any of our friends in that situation no solace in this instance. It's a defense of justifiable violation of law when carrying a firearm is necessary to preserve life or property against an immediate grave danger. And immediate is defined by that statute as the brief interval to allow for law enforcement response. So this does not provide for a freewheeling right to evade the general prohibitions on carry in the instance that you provided. It is circumscribed to a precise situation, and it's a defense to a criminal charge.

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Turning briefly to the prohibition against carrying in any place where intoxicating liquors are sold for on-site consumption, this does not just apply to a crowded nightclub or rowdy dive bar, it applies to Olive Garden, to wineries, even the coffee shop down the street that sells hard kombucha. And it applies not just to people who are intoxicated or consuming alcohol but to anyone who's present there.

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And here, it's important to focus on what the State has actually provided in its evidence. It has declarations from Mr. Charles, Mr. Mancall, and Professor Winkler that show

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a long history of licensing and government regulations dating back to the 18th Century of saloons and similar establishments. But what they don't show is a comparable history of analogous regulation.

04:00PM The State's identified a handful of territorial and local laws prohibiting the carrying of firearms in bars and similar establishments. Those aren't well established or representative. But even if they were, the majority of the laws they identify are aimed at keeping folks who are active 04:01PM members of the militia from carrying firearms in a bar or similar establishment, not carrying if you are intoxicated, criminalizing that sort of conduct.

But *Bruen* teaches that when a general societal problem has persisted since the 18th Century, those regulations 04:01PM have to be distinctly similar. And there's an absence of distinctly similar regulation here.

Turning finally to zoos, museums, and libraries, I will be very brief here. The State's arguments focus on the general presence of crowded areas on the one hand and 04:02PM vulnerable populations of the other. My colleagues have addressed those both with respect to the general affray and similar statutes as well as the regulations governing schools and playgrounds.

I will direct Your Honor, though, to the *Koons* 04:02PM decision out of -- that's K-o-o-n-s -- *v. Platkin*, out of the

District of New Jersey, that rejected identical arguments from the State there in each of those locations.

THE COURT: Thank you.

All right. Mr. Meyerhoff.

04:02PM MR. MEYERHOFF: Thank you, Your Honor.

I'd like to address the point that I think multiple plaintiffs' counsel made where they said the State of California thinks it's not a big deal. That's not true. The State of California has recognized a range of societal

04:03PM problems. And as we talked about at the beginning, issued legislative findings had passed a law compliant with *Bruen* that restricts the carry in certain sensitive places.

Plaintiffs' counsel I believe agreed that ultimately analysis needs to go provision by provision. We certainly

04:03PM agree with that. I think it's interesting that at one point -- I can't recall the exact terminology, but they said, you know, "We've only identified the onerous provisions."

And at another point they talked about that there's something intuitive about the White House. Of course the White

04:03PM House would be protected. It's intuitive that airports are sensitive places, but they don't really provide a framework for why. And if *Bruen* is concerned with the text of the Second Amendment and limiting governments, of course, and intuitions, and seems like it makes sense, that can't be the test. And

04:04PM indeed, if we talk about these places we discussed earlier that

schools -- many schools do not have armed security. I think an argument was made about the *in loco parentis* idea that because parents drop their kids off at school and because there's security there that -- or that that's the reason, but, in fact, if you look at many of the early statutes that we've identified relating to schools, including an 1870 Texas law, which is in our compendium, 1874 Missouri law, 1893 Oklahoma law, those broadly restrict carry within school rooms. There's no exception for teachers. There's no exception for other faculty. So the idea that there's an *in loco parentis* and does school have armed guards, that's a historical. That's not reflected in the historical record.

I also heard from plaintiffs' counsel an attempt to balance, to say, well, a courthouse feels more secure than a post office. So that should be sufficient. Well, I don't know if that's true. The New York Stock Exchange is a financial institution. One could imagine its importance is perhaps greater than a school. I would not make that argument, but certainly some could. But this attempt to sort of interest balance and intuit and think, of course, this is how it should be, that can't drive the analysis.

And, indeed, airports were mentioned. I don't want to reveal my age because I -- but I remember a time when you didn't need to have a ticket to go to the -- to go to the gate. And I'm not even sure you need it to pass through a metal

detector. I think security at airports only really emerged in any real form beginning in the 1970s with hijackings and things like that. So I think there's a danger in looking at today identifying features of sensitive places and then trying to read that back to 1791. The Court in *Bruen* doesn't allow that.

I think when we look at health care facilities and public transit, again we hear from plaintiffs the desire for a dead ringer. They don't have the same statute, but that's not what the Court in *Bruen* required. The court in *Bruen* said it was examples that used an e.g., not an i.e., and it's specifically countenanced new and analogous sensitive places.

On the municipal parks and state parks point, we identify numerous municipal parks in major cities. There's no evidence that those restrictions were challenged either in court or in secondary sources that could have been presented to the court in which people complain that those restrictions were unconstitutional.

We also, in our compendium of exhibits -- we identify numerous, at least more than a dozen, state park restrictions all from the beginning of the 20th Century when the state park system emerged.

I think in terms of houses of worship, plaintiff said, well, how could the Attorney General make the argument that these requirements bring firearms to church reflected the sense that the legislatures have long exercised significant

regulatory power over firearm carry in churches? Well, they suggested it's outlandish. It's not. In fact, the court, in *Goldstein*, which we cited in our briefs -- that's a quotation from there. They refused to preliminarily enjoin firearms restrictions.

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Again, I think with racetracks and circuses, they mention "Here's a single historical example." "Here's another singular historical example." I think, again, we need to caution the fact that an opera may or may not have existed in a single city in America in a particular period. The fact that we don't see numerous legislatures or even the legislature of the State regulating against that, I think that's the danger of reading silence as a contrary tradition. As the Court may have mentioned, that's a risky proposition.

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Indeed, there's a variety of reasons that a legislature may not choose to pass a law. Legislatures do not legislate to their constitutional limits. Indeed, I think we would all hope that they don't, that they don't, in every particular case, pass as many laws as is constitutionally possible. Instead of saying where are the multitude of laws from the particular period, that's how plaintiffs want to read *Bruen*. But instead, what *Bruen* commands us is that we look at the public understanding of the right. And so the mere fact that legislatures chose not to address a particular problem in a particular time period may be reflective of a variety of

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reasons.

I think in terms of the private property restriction, the question is not whether there is state action, SB 2, it's obviously a state action, the question is, is plaintiffs' harm fairly attributable to that state action? And I think plaintiffs can't circle the square. Either the Second Amendment has some application to private property or it doesn't. And there's no evidence in the historical record that it does.

04:09PM I think -- the analogy I can think of is if I have a friend who lives across from the embassy of a country whose policies I oppose, and they say, "You can come onto my property and protest that country," I go onto their property and protest, I'm exercising my First Amendment rights to protest 04:09PM this country that I oppose, but I'm not on this person's property pursuant to my First Amendment right.

The First Amendment gives me no right or presumption to be on their property. I'm simply exercising a right free of government interference on someone's private property because I 04:10PM have permission to do so. And I don't believe the Second Amendment codifies how that permission is granted. Is it express? Is it implied? And I don't think plaintiffs have pointed to anything around the time of the Second Amendment or around reconstruction that suggests it codified that.

04:10PM In terms of the exception that we mentioned, which

is in the record, we interpret that exception, for example, that if I am walking on a public thoroughfare, a dark and dangerous street, as Your Honor mentioned, and I'm walking by a playground and I see someone committing a crime on that playground, well, I think there's an argument made that CCW holders are law-abiding citizens. They want to contribute to the safety of society. Our interpretation of that section is that would permit an individual to go into that playground with their concealed firearm and potentially use that firearm in defense of themselves or another.

So I think that is the exception that comes into play. And again, we're operating against the backdrop of broad restrictions on carriage and any public assembly that didn't contain the exceptions that we talk about.

I think finally plaintiffs have suggested in their briefing here today that it is the State that has a limitless interpretation of *Bruen*. There is no restriction on what the State can do. That is their opinion of our argument. It's not. We are the ones who have gone provision by provision and followed the *Bruen* test. Where is the relevantly similar historical analog? Are the comparable burdens and justifications the same or similar?

And then we take that law and situate it within the nation's historical tradition. We do so because *Bruen* talked about laws that were outliers. And so those laws did not fit

within the nation's historical tradition. But we brought forward leading experts, not only on the Second Amendment, but also individuals who have never opined on the Second Amendment before, historians on specific places who can provide context for those places. In fact, it appears that it is plaintiffs who have a limitless argument.

I read *Bruen* to find that the five sensitive places that are listed there are settled, that they're aware of no dispute as to the constitutionally of these places. But it appears that even plaintiffs suggest maybe that's not settled, which seems to fly in the face of *Bruen* but also goes back to the point I brought up earlier, which is it's plaintiffs who seem to say an airplane kind of feels like a place that we shouldn't have firearms, so we won't have them. And I guess a school feels like a place that we shouldn't have firearms.

But these things change over time. When I was in high school, parents could wander in and out of the school. There was no problem. They could wander in, wander out. Alumni could come, they could come back. When I visit my school today, 23 years later, I have to get a pass. There's security everywhere. So modernity has changed. Places have changed, but that can't alter the constitutional analysis.

So while plaintiffs seem to be proposing some sort of free-floating test based on course and balancing and what places are more sensitive than others, defendants have, place

by place, gone through the *Bruen* analysis, identified those relevant historical analogs and situated them within the historical tradition. For those reasons and those set forth in the briefing, this Court should deny the preliminary injunction in its entirety.

04:14PM

I will say, and we mentioned in our briefing as well, to the extent the Court is inclined to enjoin any of the provisions, we would ask for a stay pending appeal.

Thank you, Your Honor.

04:14PM THE COURT: Well, I appreciate the briefing, and I appreciate all the arguments that I heard today. I'll take it under submission and try to get a decision out as soon as possible and forthwith.

THE COURTROOM DEPUTY: All rise.

04:14PM **(Proceedings concluded at 4:14 p.m.)**

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CERTIFICATE OF OFFICIAL REPORTER

COUNTY OF LOS ANGELES)
)
STATE OF CALIFORNIA)

I, DEBBIE HINO-SPAAN, FEDERAL OFFICIAL REALTIME COURT REPORTER, in and for the United States District Court for the Central District of California, do hereby certify that pursuant to Section 753, Title 28, United States Code that the foregoing is a true and correct transcript of the stenographically reported proceedings held in the above-entitled matter and that the transcript page format is in conformance with the regulations of the Judicial Conference of the United States.

Date: January 11, 2024

/S/ DEBBIE HINO-SPAAN

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RENO MAY, an individual, et al.,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of the State of California, and Does 1-10,

Defendants.

MARCO ANTONIO CARRALERO, an individual, et al.,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California,

Defendant.

Case Nos. 8:23-cv-01696 CJC (ADSx)
8:23-cv-01798 CJC (ADSx)

SUR-REBUTTAL DECLARATION OF PROF. ADAM WINKLER IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Date: December 20, 2023
Time: 1:30 p.m.
Courtroom: 9B
Judge: Hon. Cormac J. Carney
Action Filed: September 15, 2023

SUR-REBUTTAL DECLARATION OF PROF. ADAM WINKLER

Pursuant to 28 U.S.C. § 1746, I, Adam Winkler, declare and state as follows:

1. I am over the age of eighteen (18) years, competent to testify to the matters contained in this declaration and testify based on my personal knowledge and information.

2. I have been retained by the Office of the Attorney General for California as a historical and constitutional expert on Second Amendment matters. I also have expertise in legal history and its multiple uses in adjudicating constitutional questions.

3. I previously provided a declaration in the above-captioned matters in support of the State of California's opposition to the plaintiffs' motions for preliminary injunction. *See* Decl. of Prof. Adam Winkler, *May v. Bonta*, C.D. Cal. No. 8:23-cv-01696 CJC (ADSx) (Dkt. No. 21-12); *Carralero v. Bonta*, C.D. Cal. No. 8:23-cv-01798 CJC (ADSx) (Dkt. No. 20-12).

4. I have been asked by the Office of the Attorney General to review and provide an expert opinion regarding some of the statements made in the plaintiffs' reply briefs and supporting documents in these matters. *May* Dkt. Nos. 29, 29-1, 29-14, 29-15; *Carralero* Dkt. No. 29. I have reviewed those briefs and documents, and have prepared this sur-rebuttal declaration in response.

5. Although Plaintiffs and their declarant Clayton Cramer generally dispute the breadth of many historical restrictions on the carrying of firearms in sensitive places, the plain meaning of those statutes, is clear—they prohibited the carrying of arms in broad categories of places, including public assemblies. To give some examples: Tennessee in 1869 prohibited the carrying of arms "concealed or otherwise" at "any fair, race course, or *other public assembly of the people*." 1869 Tenn. Pub. Acts 23 (emphasis added). Georgia in 1870 prohibited the carrying of deadly weapons "to any court of justice, or any election ground or precinct, or any place of public worship, or *any other public gathering* in this State, except militia

muster-grounds." 1870 Ga. Laws 421 (emphasis added). Texas's 1870 law barred the carrying of firearms in a wide range of sensitive places, including churches, schools, "or other place where persons are assembled for educational, literary or scientific purposes, or into a ballroom, social party or other social gathering composed of ladies and gentlemen." 1870 Tex. Gen. Laws 63. Missouri's 1879 sensitive places law went even further than Texas, prohibiting the carrying of firearms into churches, schools, and "any . . . place where people are assembled for educational, literary or social purposes . . . or into *any other public assemblage of persons met for any lawful purpose*, other than for militia drill or meetings called under the militia law of this state . . . ." 1879 Mo. Laws 224 (emphasis added).

6. Cramer criticizes any reliance on the Statute of Northampton as rejected by *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), but he misunderstands why that law is relevant in analyzing historical laws restricting firearms in sensitive places. *See* Clayton Cramer Rebuttal Decl. ¶¶ 166-172. One reason the Court refused to rely heavily on the Statute was because it was unclear which types of weapons were covered by the law. *Bruen*, 142 S. Ct. at 2140 (expressing uncertainly whether the Statute applied beyond armor to offensive weapons like launcegays). What is unambiguous about the Statute of Northampton, however, is the special concern it shows for sensitive places like "fairs" and "markets." Regardless of which weapons it covered, the law clearly imposed special limits on the possession of them in these places of public gathering. Individuals were lawfully able to wear or carry the covered weaponry or armor elsewhere in public but explicitly prohibited from doing do in fairs and markets.

7. Cramer correctly notes that my earlier declaration mistakenly cited 1857, not 1836, as the date of Colt's patent on the revolver. Cramer Rebuttal Decl. ¶ 175. What my earlier declaration meant to say was that Colt's revolver patent *expired* in 1857. The result was that legal limits on copying his popular design were lifted and numerous other gun manufacturers began selling the firearm. *See*

Lee A. Silva, "Sam Colt's Big Business Blunder Was a Boon to Other Gunmakers," *Wild West* (February 2013), at p. 68 (attached hereto as **Exhibit A);** WILLIAM HOSLEY, COLT: THE MAKING OF AN AMERICAN LEGEND 47 (1996) ("With the expiration of Colt's patent in 1857, a rash of imitators [including Remington, Josyln Arms Company, and Starr Arms] . . . all entered into competition with Colt's.") (attached hereto as **Exhibit B**).

8. What Cramer seems to ignore is the point of referring to Colt's patent in the first place: that after the Civil War, the popularity of personal firearms rose dramatically, spurring concerns about gun violence and with it gun safety legislation. Gun manufacturers that had ramped up production capacity to support the war effort turned to the civilian market once the war ended. By the end of the 1870s, numerous gunmakers were producing abundant cheap revolvers, marketing them through mail order catalogues and newspapers, and selling them at low cost to consumers. See Robert J. Spitzer, *Understanding Gun Law History After Bruen: Moving Forward By Looking Back*, 51 FORDHAM URB. L.J. 57, 81-82 (2023). Prices plummeted, and whereas Colt's initial revolvers sold for a then-expensive $35, by 1900 the two-dollar pistol was commonplace. *Id.* at 81.

9. Cramer's contention that only pre-1868 laws are relevant fails to account for constitutional history. Prior to the ratification of the Fourteenth Amendment, which incorporated the Bill of Rights to the states, state and local governments were not bound by the Second Amendment. *See Barron v. Baltimore*, 32 U.S. 243 (1833). Laws adopted at the state level prior to 1868 did not reflect the original public understanding of governmental authority under the Second Amendment. It was only after the Fourteenth Amendment was adopted that state lawmakers had any reason to concern themselves with the meaning and scope of the Second Amendment. Thus, laws adopted immediately after the Fourteenth Amendment's ratification—such as the aforementioned sensitive places laws of Tennessee, Georgia, Texas, and Missouri—are strong evidence of the original

public understanding of government authority over firearms once the Second Amendment was binding on the states. Unlike earlier state laws, these sensitive places restrictions were enacted with the Second Amendment in mind.

10. While Cramer characterizes as "irrelevant" that no court in the nineteenth century held sensitive places legislation unconstitutional under the Second Amendment or similar state constitutional guarantees, he does not dispute this historical fact. Cramer Rebuttal Decl. ¶ 182.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 4, 2023, at Los Angeles, CA.

ADAM WINKLER

Exhibit A

Sam Colt's Big Business Blunder Was a Boon to Other Gunmakers

He turned down Rollin White's offer, transforming the firearms world By Lee A. Silva

During the shoot-'em-up days of the last half of the 1800s there were plenty of newspaper articles and pulp fiction stories written that described an Old West gunman reaching for his trusty Colt revolver. But you can bet your bottom dollar that there were never any words written about a gunman reaching for his trusty Rollin White revolver. And therein lies one of the strangest and most ironic true stories of the American firearms industry.

For centuries the three major components that were needed to fire a projectile from a gun—the lead ball, the powder charge and the ignition system (first flintlock and then percussion cap) that provided the spark to ignite the powder charge—all had to be loaded into the gun separately. So most guns were single-shot or double-barreled.

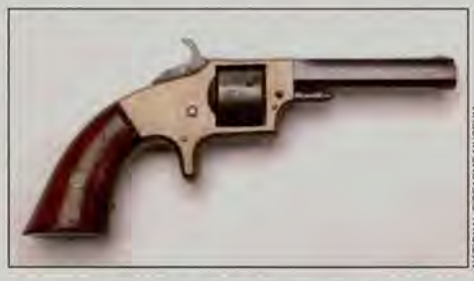
But in 1836 Samuel Colt was granted a U.S. patent for a cap-and-ball pistol with a revolving cylinder that could fire five or six shots before it had to be reloaded. Even after an initial production failure, with a patent extension Sam Colt ended up owning the exclusive right to manufacture cap-and-ball revolvers in the United States until his patent expired in 1857. Especially during the California Gold Rush days, no man on the frontier was considered to be properly armed unless he carried one or two of Colt's revolvers. And with a giant new factory in Hartford, Conn., cranking out revolvers by the thousands, by the middle 1850s Sam Colt had become one of the wealthiest manufacturers in the country.

In the meantime, during the 1850s the race was on in both the United States and Europe to develop what was called the "self-contained cartridge"—a metal "sleeve" that could be loaded into the open breech of a gun with the powder, ball and ignition source already sealed inside the sleeve for instant loading and firing. But the metal sleeve would take several years of experimentation and failure before it would become the common cartridge of today.

ROCK ISLAND AUCTION CO.

The Smith & Wesson .41-caliber Volcanic pistol.

Enter a young gunsmith named Rollin White, born in 1818, who went to work in Sam Colt's revolver factory in 1849. White was also an inventive tinkerer. Loyal to Colt, he even paid the factory $18.50 in 1852 for a revolver to experiment with in order to create a workable cartridge revolver. And then he quit the Colt factory in December 1854.



NATIONAL FIREARMS MUSEUM

The .22-caliber Rollin White–marked revolver.

On April 3, 1855, Rollin White was granted a U.S. patent for his newfangled cartridge revolver. Whereas Sam Colt's revolver patent had been granted specifically for a cap-and-ball revolver cylinder with chambers that weren't bored all the way through it, the key to White's new patent was that it was granted for a revolver cylinder with chambers that *were* bored all the way through so that "cartridges" could be inserted into the open back ends of the chambers. It was an act of fate that, out of all the other gunsmiths who were trying to perfect a workable cartridge revolver, it was Rollin White who had first applied for a patent on a revolver cylinder with the simple innovation that its chambers were open from end to end. And now, still loyal to Colt, White offered to sell Colt the exclusive rights to produce cartridge revolvers in the United States.

Legend has Sam Colt throwing White out of his office in anger for developing his cartridge-revolver patent on Colt company time. But a future patent-infringement lawsuit by White against another firearms maker merely notes, "After the said patents were granted, he [White] applied to and endeavored to make some arrangements with Col. Colt to manufacture arms on the plan of his said inventions, but without success."

And so, for whatever his reasons, Sam Colt flatly turned down Rollin White's offer to sell him the rights to manufacture cartridge revolvers until White's patent expired in 1869. The stage was now set for one of the most bizarre chain of events in the history of the American firearms industry.

Over in Norwich, Conn., gunsmiths Horace Smith, Daniel Wesson and B. Tyler Henry had been working on a contrary, years-old, tubular magazine, lever-action, repeating rifle mechanism

that fired a special self-contained cartridge developed by Wesson. In 1854 this mechanism became Smith & Wesson's first pistol, made in .31- and .41-caliber sizes, and it is known today as the Smith & Wesson lever-action Volcanic pistol. About 1,700 were produced before Smith & Wesson sold out its interest in them in 1855.

And on November 17, 1856, Smith & Wesson signed an agreement with Rollin White that gave it, not Colt, exclusive rights to manufacture cartridge revolvers in the States until White's patent expired in 1869.

After the Volcanic Co. went bankrupt in 1857, its biggest investor, Oliver Winchester, inherited the company and its assets and moved it to New Haven, Conn. He kept B. Tyler Henry working on its balky lever-action mechanism, and in 1862 the .44-caliber, 15-shot Henry repeating cartridge rifle became an instant hit on the frontier. And the Henry, in turn, evolved into the first Winchester, the Model 1866.

In 1868 the venerable old Remington factory, having overbuilt its production facilities during the Civil War, made a deal with Smith & Wesson to produce 5,000 Army Model cartridge revolvers in .46 caliber. These Remingtons became the first large-caliber cartridge revolvers produced in the United States, and they also temporarily saved the Remington Arms Co. from bankruptcy.

Always undercapitalized, Smith & Wesson started out slowly in its small plant in Springfield, Mass, producing a .22-caliber Model No. 1 revolver beginning in 1857, and the .32- caliber rimfire Models No. 2 and No. 1 1/2 in 1861 and 1865. But Smith & Wesson would not make a big-caliber cartridge revolver, the .44-caliber Model No. 3 American, until 1870, after the Rollin White patent expired.

150 years later we can only speculate on what might have been.

But one thing is certain: If Sam Colt had bought the rights to Rollin White's patent for cartridge revolvers, there would never have been a Smith & Wesson revolver company.

And it is probable: If Colt had sauntered over to the financially strapped Volcanic Co. in New Haven and laid some cash on the frustrated Oliver Winchester before the Henry rifle was perfected, Colt could have ether shut down the factory or produced his own Colt lever-action repeating rifles. And there never would have been a Winchester rifle company.

Also probable: If Colt had bought Rollin White's patent for cartridge revolvers, he probably wouldn't have assigned the rights to Remington to produce its first cartridge revolvers. And Remington might have gone bankrupt years earlier than it finally did.

In 1861, with Smith & Wesson's permission, Rollin White produced about 5,000 .22-caliber cartridge revolvers with his own name on them for the war effort. For 10 years he tried in vain to get a patent extension granted to him for his exclusive rights to produce cartridge revolvers. But he died in firearms history obscurity in 1892.

Samuel Colt died in 1862 without knowing that he had inadvertently created two of the biggest U.S. firearms makers of the 19th century, Smith & Wesson and Winchester, and prolonged the life of a third one, Remington.

In the late 1860s the Colt factory tried to get permission from Smith & Wesson to produce cartridge revolvers. Not surprisingly, Colt was turned down. It was not until 1873, four years after Rollin White's patent for cartridge revolvers expired in 1869, that Colt began producing what became the most popular cartridge six-shooter of the Old West, the Single-Action Army Model. WW

An American Firearms Family Tree

Colt
(Cap-and-ball period)

1836
Paterson model

1842
Bankruptcy

1847
Walker model
1848
Dragoon model
1849
Patent extension
1850
Navy model
1855
Root model
Colt refuses Rollin White's cartridge-revolver patent

1857
Colt's cap-and-ball–revolver patent expires

1858
Pocket model of Navy caliber
1860
Models 1860, 1861 and 1862

1861
Civil War begins

1865
Civil War ends

1868
Theur front-loading cartridge conversions

(Cartridge period)

1871
First conversions to cartridge revolvers

1872
1872 Open-top model

1873
Single Action Army model .45 caliber

Remington
(Flintlock and cap-and-ball period)

1816
Founded

1816 to 1857
Single-shot pistols and rifles produced

1857
First revolver produced, Beal's pocket model
1860
Beal's Army, Navy and Rider models

1861
Civil War begins

1862
1861 models
1863
New model revolvers

1865
Civil War ends

(Cartridge period)

1868
Remington produces first large-caliber cartridge revolver by permission of Smith & Wesson

1869
.44-caliber conversions

1874
Frontier model, .44 caliber

(Experimental cartridge period)

1848
Walter Hunt patents his bullet
1849
Walter Hunt patents his rifle
1850
Jennings rifles
1851
Smith-Jennings rifles

1854
Smith & Wesson lever-action pistols
1855
Volcanic Arms Co.

(Early cartridge period)

Smith & Wesson revolvers

1856
Smith & Wesson buys Rollin White's cartridge-revolver patent

1857
First cartridge revolver produced, Model No. 1

1861
Civil War begins
Model No. 2 introduced
Rollin White–marked revolvers

1865
Civil War ends
Model 1½ introduced

1868
Allows Remington to make large-caliber cartridge revolvers

1869
Rollin White patent expires

1870
No. 3 American .44 caliber

Winchester lever-action rifles

1857
New Haven Arms Co.

1861
Civil War begins

1862
Henry rifle

1865
Civil War ends

1866
Winchester Model 1866

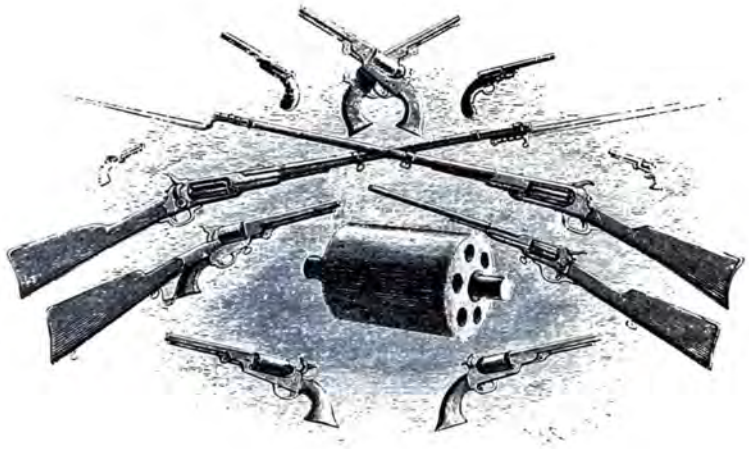
1873
Model 1873, .44 caliber

Exhibit B

COLT

The Making of an American Legend

William Hosley



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Published in association with the Wadsworth Atheneum, Hartford

In memory of Eileen (Tony) Learned (1908-1995). She embodied the qualities of self-sovereignty.

To Christine Ermenc, whose companionship, wisdom, and love are my constant inspiration.

To Hartford, Connecticut—the inner mounting flame of cantankerous old New England.
Its light is inextinguishable so long as memory endures.

THE ROAD LESS TAKEN IS PAVED WITH LOVE.

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Page three: Illustration from *Armsmear* depicting a variety of Colt firearms. Engraving by Nathaniel Orr.
Unless otherwise credited, all illustrated items belong to the Wadsworth Atheneum.

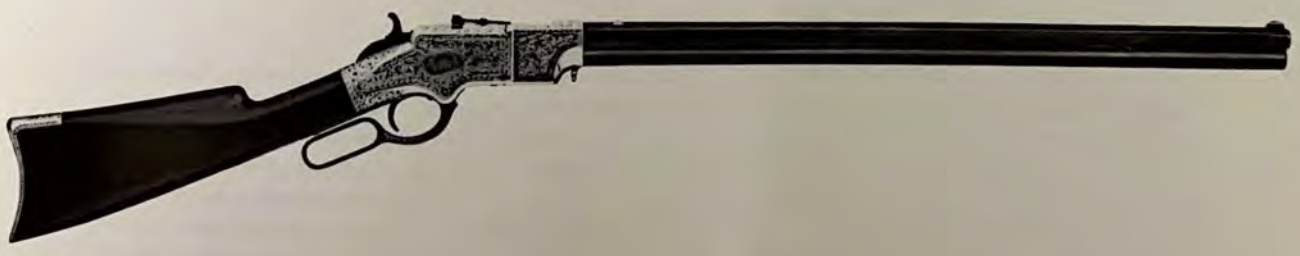
Cheney Brothers Silk Mills, devised a tube-fed, breech-loading rifle of his own that surpassed even the Henry rifle in speed and firepower. Patented in March 1860, the Spencer rifle contained a magazine of seven spring-fed metallic cartridges in a tube with a lever-action trigger guard that fed and ejected cartridges and empty cases at breakneck speed. With the financial backing of Charles Cheney, the Spencer Repeating Rifle Co. was incorporated in January 1862, with manufacturing based in the Chickering and Sons piano factory in Boston.[51]

The Spencer rifle could discharge seven bullets in twelve seconds, or twenty-one per minute and was renowned during the Civil War as the rifle that "was loaded on Sunday and fired all week." Maj. Gen. James H. Wilson field tested the Spencer, which he described as "the best fire-arm yet put into the hands of the soldier.... I have never seen anything else like the confidence inspired by it."[52] The Henry rifle and the Sharps rifle were also widely used during the war, contributing to Hartford's reputation as the center of firearms manufacturing in the United States.

In spite of the deadly effectiveness of the breech-loader and the tube-fed repeater as instruments of warfare, it was not the rifle but the revolver—especially the Colt revolver—that became synonymous in the popular imagination with "the fast gun." Although Colt himself claimed to have invented the revolver, the evidence suggests otherwise. The first U.S. patent revolver, Elisha Collier's revolving flintlock of 1813, was almost certainly known to Colt when he began dabbling in the design of chambered-breech, revolving pistols. Moreover, Colt's own collection of repeating firearms (fig. 24), the first assembled in the United States, contains specimens of European and American make clustered around and predating the time of his own invention.

Nor was Colt's revolver the best or only design of its type. The British-made Adams and Deane double-action revolver, patented by Robert Adams in 1851, was in many ways a better gun.[53] With the expiration of Colt's patent in 1857, a rash of imitators, notably the Joslyn Arms Company's (Stonington, Connecticut) revolver of 1858, Savage and North's (Middletown, Connecticut) patent of 1859, the Starr Arms Company's (New York City) double-action revolver of 1859, the Remington Arms Company (Ilion, New York) solid-frame revolver patented in 1858, and a near duplicate of Colt's revolver manufactured by Rogers and Spencer in Utica, New York, all entered into competition with Colt's. But Colt created the market and retained a production advantage that earned his gun its status as the standard by which all others were judged. Design considerations aside, the convergence of myth and reality gained Colt's revolver a status that transcended the particulars of design during a period when Colt's design and engineering were never far behind and often ahead of all his direct competitors. By the time the *Hartford Times* reported that a "tailor in London has invented a waistcoat on the principle of Colt's revolver... a garment with four fronts," the association between Colt and the revolver had already entered the realm of mythology.[54]

Sam Colt never acknowledged his indebtedness to his predecessors or his competitors. Nor did he recognize the role of the Springfield Armory as an incubator of technological innovation in the arms industry. Even during his controversial feud with the Hartford Common Council, when he threatened to relocate to New York City,



23. Model 1860 Henry Rifle, 1861, .44 caliber, 15-shot, serial #9, gold mounted and engraved as a presentation to President Abraham Lincoln from the New Haven Arms Co. (Courtesy of the National Museum of American History, Smithsonian Institution.)

CERTIFICATE OF SERVICE

Case Names: ***Reno May, et al. v. Robert Bonta, et al.;***
Carralero, Marco Antonio, et al. v. Rob Bonta

Case Nos. **8:23-cv-01696-CJC (ADSx); 8:23-cv-01798-CJC (ADSx)**

I hereby certify that on December 7, 2023, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

SUR-REBUTTAL DECLARATION OF PROF. ADAM WINKLER IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION (with Exhibits A-B)

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on December 7, 2023, at San Francisco, California.

Vanessa Jordan
Declarant

Vanessa Jordan
Signature

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RENO MAY, an individual, et al.;

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of the State of California, and Does 1-10,

MARCO ANTONIO CARRALERO, an individual, et al.,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California,

Defendant.

Case No. 8:23-cv-01696 CJC (ADSx)
8:23-cv-01798 CJC (ADSx)

SUR-REBUTTAL DECLARATION OF JOSHUA SALZMANN IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Date: December 20, 2023
Time: 1:30 p.m.
Courtroom: 9B
Judge: Hon. Cormac J. Carney
Action Filed: September 15, 2023

SUR-REBUTTAL DECLARATION OF PROFESSOR JOSHUA SALZMANN

I, Joshua Salzmann, declare under penalty of perjury that the following is true and correct:

1. This declaration is based on my own personal knowledge and experience, and if I am called to testify as a witness, I could and would testify competently to the truth of the matters discussed in this declaration.

2. I have been retained by the Office of the Attorney General for California as an expert on the history of passenger transportation in the United States from the Colonial Period to the 21st century, with an emphasis on towns, cities, and settled, urban areas.

3. I previously provided a declaration in the above-captioned matters in support of the State of California's opposition to the *May* and *Carralero* Plaintiffs' motions for preliminary injunction. See Decl. of Joshua Salzmann, *May v. Bonta*, C.D. Cal. No. 8:23-cv-01696 CJC (ADSx) (Dkt. No. 21-10); *Carralero v. Bonta*, C.D. Cal. No. 8:23-cv-01798 CJC (ADSx) (Dkt. No. 20-10) (Salzmann Decl.). My professional background and qualifications, as well as my retention and compensation information, are set forth in Paragraphs 3 through 6 of my prior declaration.

4. I have been asked by the Office of the Attorney General to review and provide an expert opinion regarding some of the statements made in the Plaintiffs' reply briefs and supporting documents in these matters. *May* Dkt. Nos. 29, 29-9, 29-14, 29-15; *Carralero* Dkt. No. 29. I have reviewed those briefs and documents, and have prepared this sur-rebuttal declaration in response.

I. RESPONSE TO PLAINTIFFS' STATEMENTS REGARDING FOUNDING-ERA TRANSPORTATION SYSTEMS

5. The *Carralero* Plaintiffs contest my opinion that "[t]he first public transit systems as we understand them today emerged in the United States during

the first half of the 20th century." Salzmann Decl. ¶ 80. In doing so, the *Carralero* Plaintiffs conflate Founding-era forms of private, long-distance travel with public, mass-transit used largely by daily commuters in the modern era.

6. The *Carralero* Plaintiffs claim: "While the Founding generation may not have imagined particular modes of public transportation like subways or buses, public transportation in some forms did exist at the Founding. As explained, passengers used to share stagecoaches on journeys throughout the colonies before the Revolution and in the states after it." *Carralero* Dkt. No. 29 at 23. This claim is problematic for two reasons. First, it suggests that what has changed about transportation since the founding are merely the "particular modes of public transportation." The changes in public transportation since the colonial era were not simply a matter of modes of getting around. Rather, as detailed in my declaration, the transportation systems we have today are of an entirely different scale from and have distinctive political, economic, and social functions than those that existed in the Founding period. *See* Salzmann Decl. ¶¶ 10-68.

7. For instance, the stagecoaches and ferries of America's Founding era, to which the *Carralero* Plaintiffs cite, did not mainly serve local, daily commuters. Rather, stagecoaches and ferries were often used by long-distance travelers and could take many hours and even days. To illustrate this point, my declaration cites examples of passengers waiting for days at the ferry crossing from Brooklyn to Manhattan and of a stagecoach journey from Philadelphia to northern New Jersey that started at 4:00 AM and continued to after nightfall. *See* Salzmann Decl. ¶¶ 31, 33. Moreover, stagecoaches were a form of transportation largely used by the well-to-do (*id.* ¶¶ 28, 31), and they functioned not just as a mode of human transit but also as a means of transporting mail, legal documents, and money (*id.* ¶¶ 28-30). Thus, with respect to its cargo, a Founding-era stagecoach is more analogous to an armored car than to a modern city bus. To suggest that embarking on a stagecoach journey or crossing a body of water on a ferry was tantamount to using a

contemporary public transit system is to disregard a key purpose of historical inquiry: to understand and describe change over time.

8. The second issue with the *Carralero* Plaintiffs' criticism of my opinion that "the first public transit systems as we understand them today emerged in the United States during the first half of the 20th century" is that the *Carralero* Plaintiffs are imprecise about the meaning of the word "public."

9. After the *Carralero* Plaintiffs claim that "public transportation in some forms did exist at the Founding," they follow with a reference to stagecoaches, stating that "passengers used to share stagecoaches on journeys throughout the colonies before the Revolution and in the states after it." *Carralero* Dkt. No. 29 at 23. But the fact that "passengers used to share stagecoaches" does not change the fact that the vast majority of these stagecoaches—as well as other forms of Founding-era transit—were owned and operated by private individuals and companies. Thus, they were distinct from the contemporary "public" transit systems that are owned and operated by government entities.

10. Accordingly, and notwithstanding the *Carralero* Plaintiffs' arguments, it remains true that "[t]he first public transit systems as we understand them today emerged in the United States during the first half of the 20th century." Salzmann Decl. ¶ 80.

II. RESPONSE TO PLAINTIFFS' STATEMENTS REGARDING RAILROAD RULE BOOKS AND TIMETABLES

11. Given that public transit as we know it today did not begin to emerge until the 20th century, I examined rule books and timetables from privately owned railroad companies to determine what policies, if any, those private companies had with respect to transporting firearms. The section of my declaration that discusses these policies is the subject of several objections raised by the *May* Plaintiffs and their declarant, Clayton Cramer, which I am happy to address.

12. First, the *May* Plaintiffs claim that I did not provide citations to support my statements regarding railroad firearm policies set forth in Paragraphs 69 and 70 of my declaration. *See* Pls.' Evidentiary Objections to Salzmann Decl. ¶ 9, *May v. Bonta* Dkt. No. 29-9. These two paragraphs contain a transition to a new section of my declaration and a short overview of the types of sources I consulted as a basis for the section; source citations follow in the subsequent paragraphs. *See* Salzmann Decl. ¶¶ 71-76. In those introductory paragraphs (Paragraphs 69 and 70), I note that I consulted railroad rule books and timetables in online and brick and mortar archives, and that some sources did mention firearms while others did not.

13. The *May* Plaintiffs objected that I had not specified which archives I consulted. To clarify, I consulted sources from the Newberry Library in Chicago, IL, The Illinois Railroad Museum, Hathi Trust, Wx4 Historical Maps and Timetables, Internet Archive, and Google Books. The Plaintiffs also object that I did not specifically identify the sources which made no mention of firearms. I did not identify each historical document that made no mention of firearms (nor did the Plaintiffs) for purposes of clarity and brevity.

14. I did, however, cite numerous sources of railroad rules and regulations about transporting firearms in the section following Paragraphs 69 and 70. *See* Salzmann Decl. ¶¶ 71-76. I cited twelve specific rules to be exact, and I included a digital link to the rules in my citation if one existed. I also wrote the full text of several of the firearm policies of the railroads in the body of my declaration for the purposes of transparency and clarity.

15. Both sets of Plaintiffs attempt to use my acknowledgement of the scope and results of my research as a basis to impugn my work. The *May* Plaintiffs' declarant, Clayton Cramer, claims that "[Salzmann] admits that he 'was not able to perform an exhaustive search and analysis of all historic railroad rule books that are still in existence today." *See* Clayton Cramer Rebuttal Decl. ¶ 93, *May* Dkt. No. 29-15. The *Carralero* Plaintiffs state that I "concede" that many rule

books do not mention firearms at all. *See Carralero* Dkt. No. 29 at 23. However, I do not regard these points as "admissions" or "concessions," but rather as instances of my taking care to specify the nature and scope of the evidence I consulted, which is my duty as a historian.

16. I first address the claim that I did not perform an exhaustive search. Performing an exhaustive search of every pre-20th century railroad rule and regulation in the nation is an immense undertaking that would require extensive time, travel, and effort searching for and analyzing all evidence that still remains in existence, which was not possible to undertake given the timing constraints of the Plaintiffs' motions for preliminary injunction. I did, however, consult a substantial sample size of over seventy railroad companies' rule books and timetables in formulating my expert opinions.

17. Second, in characterizing my statement that many railroad rule books do not mention firearms as a "concession," the Plaintiffs suggest that the absence of a discussion of firearms lends support to their position. This logic does not follow. As discussed below and in my declaration, state and local concealed carry laws also applied to the transit systems that fell within each law's purview, and railroad rule books did not often forbid passengers and employees from taking actions on railroads that would violate an established law. And yet, Cramer claims (without citing to any historical evidence) that "unless there was a prohibition on carrying guns on the train, there is no evidence that the practice was prohibited." Clayton Cramer Rebuttal Decl. ¶ 97, *May* Dkt. No. 29-15. I do not view this claim as logical or credible.

18. Moreover, my declaration offers evidence that certain railroads—including the Union Pacific Railroad and the Central Pacific Railroad—did not allow passengers to take loaded weapons on passenger cars, starting at least as early as the 1880s. *See* Salzmann Decl. ¶¶ 71-77. The *May* Plaintiffs, in turn, attempt to dismiss these rules as "outlier examples." *See* Pls.' Evidentiary Objections to

Salzmann Decl. ¶ 9, *May* Dkt. No. 29-9. However, this argument evidences a misunderstanding of the magnitude and significance of these railroad systems.

19. The Union Pacific Railroad and the Central Pacific Railroad—which both had prohibitions on carrying loaded guns on passenger cars—were among the largest and most important railroads in the United States of America. Those two railroads comprised, respectively, the eastern and western halves of America's first transcontinental railroad, which was completed with much fanfare on May 10, 1869 at Promontory Point, Utah when California's Leland Stanford used a silver hammer to tap the spike uniting the two lines. The Union Pacific began in Omaha, Nebraska and extended west for a total of 1,032 miles, and the Central Pacific started in Sacramento, California and stretched east through the mountains for 881 miles. The completion of the first transcontinental railroad triggered celebratory cannon fire in New York and San Francisco, as the nation marked the monumental achievement of connecting the Atlantic and Pacific coasts by land. In sum, these two railroads cannot be dismissed as peripheral to the story of U.S. transportation history. Rather, the Central Pacific and the Union Pacific—and their policies—comprise a key chapter in our nation's transportation history.[1]

20. Cramer also objects to my discussion of railroad rules on the basis that "these were only institutional rules, not laws." Clayton Cramer Rebuttal Decl. ¶ 97, *May* Dkt. No. 29-15. Given that most transportation was private in the 19th century, institutional rules are important in helping us understand the history of the regulation of firearms on transit systems. But because private company rules are not laws, I noted in my declaration that "it is also necessary to consider state and municipal laws that would have applied to travelers to understand the rules about carrying guns on mass transit." Salzmann Decl. ¶ 78. I also cited such laws in my declaration, starting with a concealed carry statute from Chicago passed in 1871,

[1] RICHARD WHITE, RAILROADED: THE TRANSCONTINENTALS AND THE MAKING OF MODERN AMERICA 37 (2011).

just three years after the ratification of the Fourteenth Amendment and squarely in the period of Reconstruction (1865-1877). *Id.* ¶¶ 78-79.

21. The *May* Plaintiffs object to my citing the Chicago statute, as follows: "There is no citation to authority that state or municipal laws on firearms carry would apply to interstate railroad travelers or were understood to apply to such travelers. There is also insufficient citation to such state and municipal laws supporting the opinion, with only one Post-Reconstruction era municipal law cited." *See* Pls.' Evidentiary Objections to Salzmann Decl. ¶ 12, *May* Dkt. No. 29-9.

22. There are several problems with the *May* Plaintiffs' claims. First, the Chicago statute is not a "Post-Reconstruction Era municipal law." Reconstruction ended in 1877, which is a well-established historical fact, and the Chicago statute dates to 1871.

23. Second, I did not cite to only a single law. I wrote about a single law in the body of the text of my declaration (the Chicago statute) and also cited to the numerous state and local concealed carry laws included in the compendium filed by the Office of the Attorney General. *See* Salzmann Decl. ¶ 79, n.88 ("*See, generally*, Defendants' compendium of historical analogues filed concurrently herewith."). I did not reiterate all of the state and local concealed carry laws included in the compendium in the body of the text of my declaration for purposes of brevity.

24. Third, the *May* Plaintiffs claim that there is "no citation to authority that state or municipal laws…were understood to apply to such travelers." *See* Pls.' Evidentiary Objections to Salzmann Decl. ¶ 12, *May* Dkt. No. 29-9. But by its plain terms, the Chicago concealed carry law applied within the city limits and did not include an exception for transit systems. *See* Salzmann Decl. ¶ 78 ("[The Chicago law] read: 'That all persons within the limits of the city of Chicago are hereby prohibited from carrying or wearing under their clothes, or concealed about their persons…any…dangerous or deadly weapon."). That would mean that

Chicago's concealed carry prohibition would apply to people who were commuting locally on the transportation systems that brought people to and from work and other destinations. The Chicago statute was, moreover, enforced by the police department, as my inclusion of data about arrests for violation of the city's concealed carry ordinance in the 1870s attests. *Id.* ¶ 79.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 1, 2023, at Chicago, Illinois.

Joshua Salzmann

Joshua Salzmann

CERTIFICATE OF SERVICE

Case Names: ***Reno May, et al. v. Robert Bonta, et al.;***
Carralero, Marco Antonio, et al. v. Rob Bonta

Case Nos. **8:23-cv-01696-CJC (ADSx); 8:23-cv-01798-CJC (ADSx)**

I hereby certify that on December 7, 2023, I electronically filed the following document with the Clerk of the Court by using the CM/ECF system:

SUR-REBUTTAL DECLARATION OF JOSHUA SALZMANN IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished electronically by the CM/ECF system.

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on December 7, 2023, at San Francisco, California.

Vanessa Jordan	*Vanessa Jordan*
Declarant	Signature

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IN THE UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

RENO MAY, an individual, et al.;

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of the State of California, and Does 1-10,

MARCO ANTONIO CARRALERO, an individual, et al.,

Plaintiffs,

v.

ROBERT BONTA, in his official capacity as Attorney General of California,

Defendant.

Case No. 8:23-cv-01696 CJC (ADSx)
8:23-cv-01798 CJC (ADSx)

SUR-REBUTTAL DECLARATION OF DR. BRENNAN RIVAS IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION

Date: December 20, 2023
Time: 1:30 p.m.
Courtroom: 9B
Judge: Hon. Cormac J. Carney
Action Filed: September 15, 2023

SUR-REBUTTAL DECLARATION OF DR. BRENNAN GARDNER RIVAS

I, Dr. Brennan Gardner Rivas, declare under penalty of perjury that the following is true and correct:

1. This declaration is based on my own personal knowledge and experience, and if I am called to testify as a witness, I could and would testify competently to the truth of the matters discussed in this declaration.

2. I have been retained by the Office of the Attorney General for California as a historical expert on gun regulations that pertained to public carry laws and sensitive places, with a particular focus on regulations related to travelers, transit companies, and transportation-related spaces.

3. I previously provided a declaration in the above-captioned matters in support of the State of California's opposition to the *May* and *Carralero* Plaintiffs' motions for preliminary injunction. See Decl. of Brennan Rivas, *May v. Bonta*, C.D. Cal. No. 8:23-cv-01696 CJC (ADSx) (Dkt. No. 21-9); *Carralero v. Bonta*, C.D. Cal. No. 8:23-cv-01798 CJC (ADSx) (Dkt. No. 20-9) (Rivas Decl.). My professional background and qualifications, and my retention and compensation information, are set forth in Paragraphs 3 through 6 of this previous declaration.

4. I have been asked by the Office of the Attorney General to review and provide an expert opinion regarding some of the statements made in the plaintiffs' reply briefs and supporting documents in these matters. *May* Dkt. Nos. 29, 29-9, 29-14, 29-15; *Carralero* Dkt. No. 29. I have reviewed those briefs and documents, and have prepared this sur-rebuttal declaration in response.

I. RESPONSE TO STATEMENTS MADE IN *MAY* PLAINTIFFS' EVIDENTIARY OBJECTIONS TO RIVAS DECLARATION

5. The *May* Plaintiffs object to several portions of my declaration, claiming that I have provided insufficient citations for my conclusions. *See* Pls.' Evidentiary Objections to Rivas Decl. ¶¶ 4, 7-10, 13-16, 19-21, *May v. Bonta* Dkt. No. 29-2. To the extent that Plaintiffs raise this objection to the sections of my

declaration that summarize my conclusions (*see id.* ¶¶ 9, 13, 20-21; *see also* Rivas Decl. ¶¶ 57, 62, 76, 82), they misunderstand scholarly writing practice. These portions of my declaration do not quote directly from other sources, but rather discuss and explain the numerous historical sources and evidence that I cite to throughout my declaration. The expert analysis and opinions that I provide in Paragraphs 57, 62, 76, and 82 of my declaration are properly grounded in these sources and evidence.

6. The *May* Plaintiffs' claim that I provided "no citation" in support of Paragraphs 67 and 75 (*see* Pls.' Evidentiary Objections to Rivas Decl. ¶¶ 15, 19, *May v. Bonta* Dkt. No. 29-2) is inaccurate. Both of these paragraphs contain, and are soundly based upon, several citations to the historical record.

7. Similarly, the *May* Plaintiffs' claim that I cited only to my own scholarship in support of my statements in Paragraph 56 (*see id.* ¶ 8) is also untrue. In addition to my own publication, I also cited to John Thomas Shepherd's law review article, "Who is the Arkansas Traveler," in support of the statements made in this Paragraph. *See* Rivas Decl. ¶ 56, n.98.

8. The *May* Plaintiffs also object to my statement in Paragraph 36 of my declaration, that "[b]y the Civil War Era, the carrying of concealed weapons was more common than it had been in the eighteenth century, and pocket-sized pistols were more readily available to consumers." *See* Pls.' Evidentiary Objections to Rivas Decl. ¶ 4, *May v. Bonta* Dkt. No. 29-2. But this statement is clearly supported by the historical evidence set forth in my declaration, including but not limited to evidence of the influx of less expensive pistols throughout the country following the expiration of Samuel Colt's patent on his revolver design in 1857. *See* Rivas Decl. ¶ 43; *see also* Randolph Roth, *American Homicide* (Cambridge: Belknap Press of Harvard University Press, 2009), 56 (stating that few eighteenth-century Americans owned handguns).

9. Further, the *May* Plaintiffs object to my high-level discussion of the development of transportation infrastructure in the nineteenth-century United States, set forth in Paragraph 65 of my declaration, by claiming that these statements are not supported by sufficient citations. *See* Pls.' Evidentiary Objections to Rivas Decl. ¶ 14, *May v. Bonta* Dkt. No. 29-2. To clarify, these statements were drawn from knowledge that I have gained from reading numerous peer-reviewed books and articles in the course of my historical scholarship, as well as from the research I conducted in preparing my declaration in these cases (particularly sources pertaining to colonial Philadelphia). Additional readings related to river and rail transportation in the United States which I have read include but are not limited to: Michael Allen, *Western Rivermen, 1763-1861: Ohio and Mississippi Boatmen and the Myth of the Alligator Horse* (Baton Rouge: Louisiana State University Press, 1990; Bonnie Stepenhoff, *Working the Mississippi: Two Centuries of Life on the River* (Columbia: University of Missouri Press, 2015); Richard White, *Railroaded: The Transcontinentals and the Making of Modern America* (New York: W.W. Norton, 2011); for general histories of the United States that discuss transportation, see Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007); and Richard White, *The Republic for Which It Stands: The United States during Reconstruction and the Gilded Age, 1865-1896* (New York: Oxford University Press, 2015).

10. Finally, the *May* Plaintiffs object to several sections of my declaration that relate to historical appellate cases by attempting to characterize them as "legal argument." *See* Pls.' Evidentiary Objections to Rivas Decl. ¶ ¶ 6, 11, 12 and 18, *May v. Bonta* Dkt. No. 29-2. However, I do not purport to provide legal arguments or opinions regarding these historical appellate cases; rather, I treat them as primary sources that provide firsthand accounts of how American gun laws were understood and interpreted at the time they were in effect. In the instances where I discussed

historical appellate cases in my declaration, they formed a crucial part of the history which I described and analyzed. Using such historical legal opinions as primary sources is a proper historical practice.

II. RESPONSE TO STATEMENTS MADE IN CLAYTON CRAMER'S REBUTTAL DECLARATION FILED IN SUPPORT OF *MAY* PLAINTIFFS' REPLY

11. In two important respects, the *May* Plaintiffs' declarant, Clayton Cramer, concurs with the opinions and conclusions set forth in my declaration. First, Cramer is in agreement that the 1753 Philadelphia mayoral proclamation—which mandated that no person carry any unlawful weapon and indicates that the Statute of Northampton was in effect in colonial Philadelphia—"might well be tradition." *See* Clayton Cramer Rebuttal Decl. ¶ 112, *May v. Bonta* Dkt. No. 29-15. Second, in Paragraph 41 of my declaration, I cited to *State v. Smith* (1856) as evidence that partially concealed weapons were considered violations of Louisiana's then-existing concealed carry law; notwithstanding Cramer's objections to my analysis, he did agree that "carrying fully or even partially concealed [weapons] was illegal." *Id.* ¶ 136.

12. Despite his concurrence with the foregoing points, Cramer raises several purported criticisms of my declaration, which I address below.

A. Cramer's Statements Regarding Historical Appellate Cases

13. Cramer takes issue with quotations that I used from cases *State v. Huntley* and *State v. Smith,* even claiming that I "quote[d] out of context" from *Huntley*. *See* Clayton Cramer Rebuttal Decl. ¶¶ 132-136, *May v. Bonta* Dkt. No. 29-15. A quotation taken directly from a source document is not "out of context" when it accurately represents the viewpoint of the original statement. The plain language of *Huntley* shows that the court understood the right to bear arms as extending to the carrying of firearms for specific purposes, but not "as one of his every day accoutrements—as a part of his dress," or "as an appendage of manly equipment." *See* Rivas Decl. ¶ 41, n.63.

14. In my declaration, I consulted various historical appellate cases as one of several types of primary sources that help us understand the views, customs, practices, beliefs, and behaviors of the people who lived during that era. Cramer, on the other hand, engages in a narrow reading of appellate cases, often focusing exclusively on a single line or passage and missing the bigger picture as a result.

15. Cramer's statements regarding the case of *Wright v. Commonwealth* (an appellate decision which I did not discuss in my report) illustrate this point. The takeaway from the *Wright* case is that a concealed-carry law, constitutionally challenged as obnoxious to the Pennsylvania constitution's right to bear arms, was upheld as constitutional by the state supreme court. Cramer recounts the setting and disposition of the case and then focuses upon phrases within this short opinion and its headnotes, ultimately positing an unanswerable question about whether that court considered carrying a weapon concealed to be prima facie evidence of malicious intent. *See* Clayton Cramer Rebuttal Decl. ¶¶ 120-122, *May v. Bonta* Dkt. No. 29-15. This question is unanswerable because it is not addressed in the opinion, as the jury found the defendant not guilty. We cannot know if the jury decision rested upon the defendant's proving that he *had not* actually concealed the weapon, or that he *had not* carried it with malicious intent. But we can take away from the case that the defendant engaged in a behavior that at least appeared to violate the law, that he subsequently convinced a jury that he was not guilty of such criminal behavior, and that the state supreme court upheld the challenged statute as constitutional.

16. None of Cramer's statements regarding *Wright v. Commonwealth* undermine the evidence presented in my declaration, nor do they rebut the portion of my declaration which Mr. Cramer claims that they do. Paragraph 36 of my declaration describes certain weapon regulations that were enacted in Philadelphia in the nineteenth century; it does not make claims about concealment of weapons as prima facie evidence of malintent. *See* Rivas Decl. ¶ 36. Furthermore, *Wright v.*

Commonwealth involved a public carry law that was not in effect in Philadelphia, but rather in in Schuylkill County, Pennsylvania.

17. Moreover, Cramer's rebuttal declaration contains significant misreadings of certain historical appellate cases. One striking example is his handling of nineteenth-century Texas history and *English v. State*. *See* Clayton Cramer Rebuttal Decl. ¶ 138, *May v. Bonta* Dkt. No. 29-15. Cramer holds up *Cockrum v. State* (1859) as a guiding precedent over *English v. State* (1872), when in fact it was decided under a different constitution and in regard to a sentence enhancement for manslaughter committed by bowie knife (not a public carry law). Moreover, the author of the *Cockrum* opinion later led the state high court during its hearing of *State v. Duke* (1875), which (like *English*) upheld the constitutionality of the deadly weapon law.

18. Cramer also claims that I "ignore[d] *English*'s incorrect blaming the Texas arms provision's origin on Mexicans." *Id.* ¶ 139. In making this claim, Cramer seems to erroneously read a portion of the opinion as attributing the weapon regulations of 1870 and 1871 to Texas's Hispano-Mexican heritage. In fact, that portion of the opinion responds to one of three arguments mounted against the challenged statutes (a public carry law and a sensitive places law): that they violated the customs of the people of Texas. Judge Moses Walker's words in the *English* opinion point to a low view of the Hispano-Mexican legacy in Texas, but he connected its influence to *weapon-carrying*, not weapon regulation. The bigoted and racist sentiments of historical Americans are rightfully viewed as deplorable from our modern perspective, but sifting through such material with the guidance of quality historical scholarship is an important part of the historian's task. Cramer seemingly reads and attempts to analyze legal opinions in a vacuum, divorced from their context and without such guidance from appropriate secondary sources. As a result, he errs in his reading of *English*.

19. Cramer's objection to my review of historical appellate cases also reaches to travel-related cases, again focusing narrowly on particular phrases and missing the bigger picture. For example, Cramer objects to my description of *Eslava v. State* and its import. *See* Clayton Cramer Rebuttal Decl. ¶¶ 145-147, *May v. Bonta* Dkt. No. 29-15. In my declaration, I stated that the *Eslava* decision described the traveler exception as only applying outside of organized towns and cities, meaning that it did not apply to everyday, intracity transportation. *See* Rivas Decl. ¶ 59. In response, Cramer focuses upon a single sentence from the opinion: that the man charged with carrying unlawfully did not deposit his guns upon arriving in town or adjust the manner of wearing them (from concealed to open carry). *See* Clayton Cramer Rebuttal Decl. ¶ 146, *May v. Bonta* Dkt. No. 29-15. However, this point does nothing to rebut or contradict the opinions set forth in Paragraphs 56-62 of my declaration, which explain how nineteenth-century courts interpreted travel exceptions.

20. Finally, regarding the case *Carr v. State* (1879), Cramer focuses only upon the fact that the case was reversed and remanded because the guns carried by the defendant were unloaded and inoperable, rather than what the case had to say about the scope of the traveler exception. *See* Clayton Cramer Rebuttal Decl. ¶ 144, *May v. Bonta* Dkt. No. 29-15. Again, nothing in Cramer's declaration negates the *Carr* court's holding that "[t]ravelers do not need weapons, whilst stopping in towns, any more than citizens do." Rivas Decl. ¶ 59.

B. Cramer's Statements Regarding Evidence Cited in my Declaration

21. In addition, Cramer repeatedly misconstrues evidence presented in my declaration. For example, Cramer appears to believe that I invoked the 1725 South Carolina ferry law as an example of a historical gun regulation. *See* Clayton Cramer Rebuttal Decl. ¶ 150, *May v. Bonta* Dkt. No. 29-15. I did not. In fact, plaintiffs invoked that law in an attempt to support their position that carrying weapons aboard public transportation was common at the time of the Founding.

My discussion of the law in question sought to place it within its regional and political context. In doing so, I offered a *potential explanation* for why ferry operators were mandated not to charge armed men in times of emergency, not a positive argument about whether firearms were carried aboard ferries during times of peace. *See* Rivas Decl. ¶ 64. Cramer appears to believe that a "formal logic term" can highlight some fallacy on my part, when in fact it is Cramer who makes the redundant argument that not charging armed men to ride the ferry during emergencies necessarily means that armed men rode the ferry. Of course, this sheds absolutely no light on the question that matters—whether carrying weapons aboard ferries was common—because the no-charge rule only applied during *emergencies* when such arming was a matter of communal security. This is another point that I made in my declaration: that the law does not indicate "that customers carried weapons on their person in times of peace." *Id.*

22. Cramer also raises the point that laws authorizing railroad police do not in and of themselves limit the rights of train passengers to carry weapons. *See* Clayton Cramer Rebuttal Decl. ¶ 158, *May v. Bonta* Dkt. No. 29-15. I did not introduce the subject of railroad police in an effort to make that assertion. Rather, I explained that the authorization of railroad police demonstrates that nineteenth-century Americans understood laws and statutes (including public carry laws) to apply aboard trains. *See* Rivas Decl. ¶ 68.

C. Cramer's Statements Regarding the Statute of Northampton

23. Cramer suggests that the Statute of Northampton and common law precedent regarding the carrying of weapons were not in effect in the nineteenth-century United States. *See* Clayton Cramer Rebuttal Decl. ¶¶ 128-129, *May v. Bonta* Dkt. No. 29-15. He is mistaken.

24. The fact that Francois Xavier Martin (who, according to Cramer, was tasked with compiling all British laws that may have effect in North Carolina, *see* Clayton Cramer Rebuttal Decl. ¶ 129, *May v. Bonta* Dkt. No. 29-15) included the

Statute of Northampton in his compilation indeed proves its efficacy. Cramer also points to the court in *Huntley* (1843) rejecting the Statute of Northampton as good law in North Carolina as a result of state legislation dating to 1838 that abandoned English common law. *Id.* ¶ 135. But headnotes from the case state that "[t]he offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at common law, and is indictable in this State."[1] The *Huntley* court may have read the 1838 legislation to replace the Statute of Northampton itself, but it did not reject the common law tradition regarding the restriction of weapon carrying that derived from the Statute of Northampton.

25. This evidence from North Carolina's *Huntley* decision supports the notion that Americans absorbed into their law and legal practice the common law traditions regarding weapon-carrying, which were most succinctly encapsulated in the Statute of Northampton. Moreover, I quoted a Tennessee statute from 1801 which used very similar language to the Statute of Northampton, and reviewed the "Massachusetts Model" laws that did much the same. *See* Rivas Decl. ¶¶ 40 n.59. Finally, the 1753 Philadelphia mayoral proclamation that opened the market days (*id.* ¶ 18) used language quite similar to the Statute of Northampton. As previously noted, Cramer's rebuttal declaration concedes that "[t]his might well be tradition." *See* Clayton Cramer Rebuttal Decl. ¶ 112, *May v. Bonta* Dkt. No. 29-15.

D. Cramer's Statements Regarding UPRR Special Agents

26. Finally, Cramer points out that Paragraph 70 of my declaration was missing a footnote related to UPRR special agents. *See* Clayton Cramer Rebuttal Decl. ¶ 161, *May v. Bonta* Dkt. No. 29-15. The information regarding the Federal Bureau of Investigation's 1950 correspondence comes from the Union Pacific Railroad Collection housed at the California State Railroad Museum Library and Archives. The following text should have been included in a footnote: "Firearms

[1] *State v. Huntley*, 25 N. C. 418 (1843). This sentence from *Huntley*'s headnotes was subsequently quoted in *Roten v. State*, 86 N. C. 701 (1882).

Records," MS 54, Box 3, Folder 1, Union Pacific Railroad collection. California State Railroad Museum Library and Archives.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on December 7, 2023, at Fort Worth, Texas.

Brennan Gardner Rivas

Dr. Brennan Gardner Rivas

CERTIFICATE OF SERVICE

Case Names: ***Reno May, et al. v. Robert Bonta, et al.;***
Carralero, Marco Antonio, et al. v. Rob Bonta

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Vanessa Jordan
Declarant

Vanessa Jordan
Signature