No. 23-16164

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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

Plaintiffs-Appellees,

v.

ANNE E. LOPEZ, in her official capacity as the Attorney General of the State of Hawai'i,

Defendant-Appellant

On Appeal from the United States District Court
for the District of Hawai'i
Case No. 1:23-CV-00265 | The Honorable Leslie E. Kobayashi

BRIEF OF PATRICK J. CHARLES AS *AMICUS CURIAE* SUPPORTING REVERSAL

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INTEREST OF *AMICUS CURIAE**

This *amicus curiae* brief is submitted on behalf of historian and legal scholar Patrick J. Charles to provide a firearms historian's perspective about how best to apply the "historical tradition" approach espoused by *New York Rifle & Pistol Association, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022), to the "sensitive places" doctrine.

Mr. Charles is the author of several books, including *Vote Gun: How Gun Rights Became Politicized in the United States* (2023) and *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* (2018), as well as more than 20 articles on the history of the Second Amendment, firearm regulations, and the use of history as a jurisprudential tool. The federal courts of appeal and justices of the Supreme Court have cited and relied on Mr. Charles's scholarship. Mr. Charles currently serves as the Division Chief for the Air Force Historical Research Agency's (AFHRA) Oral History and Studies Division. For over a decade, Mr. Charles has served as a United States Air Force (USAF)

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* No party's counsel authored this *amicus curiae* brief in whole or in part, and no party, party's counsel, or any other person contributed money that was intended to fund preparing or submitting the brief. All parties have consented to the filing of this *amicus curiae* brief.

historian in several capacities, including recently serving as the head of AFHRA's Research Division, where Mr. Charles oversaw all official historical information and archival requests for the USAF. This brief reflects the views of Mr. Charles, not those of the USAF or the Department of Defense.

INTRODUCTION AND SUMMARY OF ARGUMENT

Second Amendment litigation now proceeds by historical analogy. Under the Supreme Court's latest decision, modern gun laws must have some foundation in "this Nation's historical tradition of firearm regulation." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2126 (2022). *Bruen* asks much from parties and judges—that they master the historical record, understand the laws in their original context, and extend those principles forward to this day and age.

That is no small feat: The past can be hard to uncover and, even then, often hard to understand. And past regulatory solutions never map perfectly onto today's problems, especially now that a single person with a semi-automatic firearm can cause immeasurably more damage in a blink of an eye than his musket-toting counterpart at the Founding. Still, *Bruen* does not ask *so* much from parties and judges that the Second Amendment eviscerates modern firearm regulations with a deep historical pedigree.

The Supreme Court has set forth general principles on how to analogize our present to the past. Under *Bruen*, the key questions are "how and why the regulations burden a law-abiding citizen's right to armed

self-defense." 142 S. Ct. at 2133. Reasonable similarity is the touchstone: A "modern-day regulation" need not be a "dead ringer for historical precursors," so long as the new and old share more than a "'remote[] resembl[ance].'" *Ibid.* In other words, "the Second Amendment is neither a regulatory straightjacket nor a regulatory blank check." *Ibid.* But apart from that general guidance, *Bruen* leaves much unanswered about how courts should determine (1) whether a tradition of regulation exists in the historical record and (2) whether a modern law falls in the sweep of that tradition.

In the first half of this brief, *amicus curiae* offers his views on how courts can implement *Bruen* in a workable fashion that takes history on its own terms, rather than on opportunistic pick-and-choose terms. Courts should rely on context to define the tradition at an appropriately high level of generality and reject attempts to infer an absence of authority to regulate firearms from gaps in the historical record. This approach not only is consistent with *Bruen*, but also adheres to rigorous historical methods that are less prone to manipulation in litigation and provides courts with a predictable template for deciding Second Amendment disputes going forward.

In the second half of this brief, *amicus curiae* details his research into the historical tradition of location-based restrictions on firearms possession. These laws did not use the nomenclature of "sensitive places." But the concept dates back at least to the early 14th century when Parliament restricted the carrying of arms into fairs and markets. Before and after the Founding, States, Territories, and municipalities alike regulated firearms in places where people assembled to conduct public business (e.g., statehouses, courts, and polling places), to engage in religious exercise (e.g., churches), to enjoy entertainment together (e.g., parks and town squares), and to consume alcohol (e.g., dancehalls and taverns). These historical laws, viewed holistically, support modern-day regulations of the carrying of dangerous weapons in a variety of places where people are known to congregate.

ARGUMENT

I. This Court should approach the historical tradition of firearms regulation in a contextual manner.

The Supreme Court in *Bruen* largely left for another day the question of how to define a "historical tradition" for purposes of analogizing to a modern regulation. 142 S. Ct. at 2131–33. One option, exemplified by the decision below, is to knock down each comparable regulation, one by

one, for arbitrary and even contradictory reasons. Here, the district court rejected various historical examples as "territorial laws" that predated statehood, 1-ER-57, "local ordinances, not state laws," 1-ER-67, or regulations of antiquated-sounding places (such as fairs or markets) rather than modern equivalents (such as banks), 1-ER-79, all without ever explaining *why* those distinctions undercut the tradition of firearms regulation. Only by nitpicking every example out of existence could the district court arrive at the remarkably wrong conclusion that restrictions on firearms possession in banks, bars, and beaches had *no* analogous predecessors in the historical record. 1-ER-59; 1-ER-74; 1-ER-77.

The other option—and the only one consistent with rigorous methods—is to perform a contextual review of all the historical evidence available, considering not just how many laws were on the books at a particular time, but why they were enacted, how they worked in the real world, and whether there was any serious legal argument that they violated the right to keep and bear arms. This approach accounts for absences, uncertainties, and shortcomings in the historical record, and recognizes the underlying conditions that caused traditions to shift and evolve. Only by accounting for this context and analyzing the historical record at an

appropriately high level of generality can courts predictably identify traditions of regulation in a way that is less susceptible to parties' opportunistic inferences from gaps in the record.

A. Context should inform this Court in deciding what counts as a historical tradition.

Courts should rely on historical context to situate a tradition of regulation even where underlying conditions have changed, different levels of government have taken charge of policing the risks of firearms, and records have been lost to time.

To start, context can connect the dots between seemingly different laws, showing a consistent trend of regulation despite changing facts on the ground. Consider, for example, the demise of so-called surety laws. At the turn of the 18th century, a number of States enacted laws providing that a person who chose to go armed "without reasonable cause to fear an assault or other injury" could "be required to find sureties"—that is, to post a bond—"for keeping the peace." Mass. Rev. Stat. ch. 134, § 16 (1836); see, e.g., 1786 Va. Acts ch. 49 at 35; see also P. Charles, *The Fugazi Second Amendment:* Bruen*'s Text, History, and Tradition Problem and How to Fix It*, 71 Clev. St. L. Rev. 623, 641 n.122 (2023) (collecting examples).

The surety-of-the-peace system worked well when people mostly lived (and stayed) in small communities, but that model of regulation broke down as the country's population exploded and people started to move around more. Charles, *The Fugazi Second Amendment*, *supra*, at 652. As a result, States and local governments began replacing surety laws with concrete punishments and armed-carriage licensing laws. P. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373, 419–22 (2016). The fact that surety laws are absent from the later record does not mean they were an isolated phenomenon that vanished after the Industrial Revolution, but rather that they were part of a tradition that endured as it evolved. And conversely, the fact that certain licensing laws are absent from the earlier record doesn't mean that people at the Founding thought that licensing laws violated the right to keep and bear arms, but rather that licensing is a later phase in an ongoing tradition of regulation that began with surety laws.

Another contextual point that courts should consider is that, before and after the Founding, most historical regulation occurred through local enforcement of common-law prohibitions and municipal laws, rather

than across-the-board enactments of Parliament, Congress, or state legislatures. Charles, *The Fugazi Second Amendment*, *supra*, at 650–53. Justices of the peace and constables enforced the common law of firearms regulation, which was flexible by design or, said otherwise, "adapted to the wants of every civilized community." J.B. Bishop, *Commentaries of the Law of Statutory Crimes* § 784 at 494 (1873). Often, cities with dense urban populations, such as London or New York City, also supplemented the common law with more specific prohibitions. J. Blocher, *Firearms Localism*, 123 Yale L. J. 82, 112–16 (2013).

Several States and Territories even explicitly delegated to municipalities the authority to regulate the carrying of weapons within their borders. Charles, *The Fugazi Second Amendment*, *supra*, at 662 n.256, 685 n.406. For example, New Jersey devolved on towns the authority "to regulate or prohibit the use of firearms and the carrying of weapons of any kind." 1888 N.J. Laws ch. 325, § 47 at 501. So the absence of regulation at the *state* level doesn't tell us much about a tradition of firearms regulation at a time when most regulations across all subjects occurred at the *local* level. Courts will overlook the majority of firearms regulation

if they discount local examples in a single-minded search for state statutes.

Variation is also baked into the historical context for reasons other than the Second Amendment's legal constraints on the bounds of democratic lawmaking. States and municipalities frequently experimented with different policy responses to the same problem, as one would expect given the longstanding "role of the States as laboratories for devising solutions to difficult legal problems." *Oregon v. Ice*, 555 U.S. 160, 171 (2009). The decision to adopt one approach rather than another often reflected local conditions and preferences, not a hard-edged judgment about constitutional imperatives.

Take, for instance, age restrictions on firearms use. Based on *amicus curiae*'s 15 years of experience researching historical firearm regulations, age-based restrictions draw on one of the most robust traditions of firearms regulation in this Nation's history. But even these regulations varied from place to place. Although a majority of jurisdictions that passed such laws restricted firearms possession by those under 21, e.g., Franklin, Ind., Ordinance No. 20 (Apr. 15, 1881) (Ex. 8), some jurisdictions allowed firearms possession when a person turned 18, e.g.,

Portland, Or., Ordinance No. 14027 § 1 (June 2, 1904) (Ex. 25), or even as young as 14, e.g., Yazoo, Miss., Ordinance § 2 (Sept. 17, 1890) (Ex. 33). The laws also varied their means: Some jurisdictions enacted laws that forbade selling firearms to minors, e.g., Maysville, Ky., Ordinance § 22 (Nov. 25, 1895) (Ex. 20), while others regulated the age at which a person could carry or possess firearms, e.g., Chadron, Neb., Ordinance No. 45 § 6 (Feb. 20, 1888) (Ex. 5).

The point is not that there was no consistent history of firearms regulation for those under 21—the opposite was true. Yet these examples reveal that an approach that slices and dices the historical record based on irrelevant factors can manipulate away even the most entrenched traditions. If courts were to focus narrowly on whether there was a *uniform* historical tradition of forbidding firearms *possession* by (rather than sales to) those younger than 21 (rather than 18 or another age), the answer may, strangely enough, be no. But if courts frame the question at an appropriate level of generality—whether jurisdictions exercised the authority to impose reasonable age limits on firearms possession and sales—the answer is doubtless yes.

Context can also help courts to navigate around the inevitable shortcomings in the historical record. As mentioned, justices of the peace and other local officials enforced firearms regulations in a wide range of circumstances at the time of the Founding and for well over a century thereafter. These local decisions are an important source for defining the contours of the right to keep and bear arms because the Second Amendment was "meant to codify a *pre-existing* right" possessed by Englishmen. *Bruen*, 142 S. Ct. at 2130. But most of these records "have been lost to time," leaving only a "tiny fraction of the whole." Charles, *The Fugazi Second Amendment*, *supra*, at 671; see L. Edwards & M. Cooper, *The Sounds of Silence: An Examination of Local Legal Records Reveals Robust Historical Regulation of the Public Peace*, Duke Center for Firearms Law (Aug. 18, 2023), https://tinyurl.com/mr4pr2xh.

Amicus curiae can speak from his own experience to the difficulty of tracking down archival records scattered from jurisdiction to jurisdiction. For example, ordinances were sometimes published in local newspapers, which have largely not been preserved for posterity. See Addendum, *infra*. But the absence of records does not mean an absence of historical regulation. When historians, despite the long odds, are able to get

their hands on these records, they shed light on a legitimate tradition of regulation stretching back to before the Founding.

Only the context-based approach that *amicus curiae* proposes here can prevent *Bruen* from invalidating the "longstanding prohibitions on the possession of firearms by felons and the mentally ill, [and] laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" that the Supreme Court has also preserved. *District of Columbia v. Heller*, 554 U.S. 570, 626 (2008); see *Bruen*, 142 S. Ct. at 2133. Justice Kavanaugh, together with Chief Justice Roberts, joined the *Bruen* majority only on the understanding that, "[p]roperly interpreted, the Second Amendment allows a 'variety' of gun regulations." 142 S. Ct. at 2162 (concurring opinion) (quoting *Heller*, 554 U.S. at 636). Courts should not read *Bruen* to obliterate its own limits.

B. This Court should draw analogies based on the purpose and substance of a given regulation.

Once this Court has identified the relevant historical tradition, it should carry forward that same contextual understanding in drawing analogies to modern regulations. The analysis should not abstract away from a historical tradition to such a degree that *all* modern regulations are constitutional. But neither should courts get lost in minutiae of

exactly how the law operated—through surety, licensing, and so on. *Supra*, at 8. *No* modern regulations would survive this approach because the past and present are never identical in every way. See E. Cheyney, *Law in History and Other Essays* 27–28, 169 (1927). After all, "[t]he past is a foreign country: they do things differently there." L.P. Hartley, *The Go-Between* 1 (1953).

In general, courts should reason from historical traditions based on the purposes those traditions served. A modern law that serves the same purpose in substance as earlier regulations—say, by responding to a like risk—should be upheld as the next installment in an existing historical tradition. That is so even if the modern law uses superficially different means to achieve the same end.

This contextual approach is on all fours with *Bruen*. The Supreme Court recognized that courts drawing analogies from the historical record need "'some metric enabling the analogizer to assess which similarities are important and which are not.'" 142 S. Ct. at 2132. In deciding when a historical tradition is "relevantly similar" to a modern law, the Court stressed that the proper metrics are "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *Id.* at 2132–33.

In other words, the Court endorsed an approach where historical analogies depend on a particular law's rationale and real-world impact rather than its precise form.

In addition, courts should assess the weight of the tradition of firearms regulation without turning the Second Amendment into a nose-counting competition. The Supreme Court has explained that if a new regulation "addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation" can suggest that governments believed that they didn't possess such power. *Bruen*, 142 S. Ct. at 2131. That means, necessarily, that if a risk *didn't* come into being until later, the absence of earlier regulation doesn't imply an absence of authority to regulate the later-arising risks. For instance, some firearms-related risks were specific to urban areas, which made up a tiny 5% slice of the overwhelmingly rural American population in 1790 and still only a quarter of Americans by 1880. A blinkered population-percentage approach can overlook that restrictions were prevalent where (and only where) they were needed. Charles, *The Fugazi Second Amendment*, *supra*, at 684 n.404. Modern lawmakers also face new risks that were not present at the Founding because of the massive advances in

firearms technology, such as lethality, firing rate, and firing range. *Id.* at 686.

Legal challenges (and the lack thereof) also provide critical context. Some types of regulations, even if "relatively few" in number, engendered "no disputes regarding [their] lawfulness." *Bruen*, 142 S. Ct. at 2133. The absence of such disputes is telling. In the 19th century, people who objected to state and local laws had ready access to state courts, which generally recognized both the federal and state constitutional rights to keep and bear arms even before the Supreme Court held that the Due Process Clause incorporates the Second Amendment against the States. *McDonald v. Chicago*, 561 U.S. 742, 777–78 (2010); see, e.g., *Nunn v. State*, 1 Ga. 243, 250 (1846). People also could bring Second Amendment challenges against territorial laws because the Bill of Rights has always applied in the Territories. E.g., *Reynolds v. United States*, 98 U.S. 145, 162 (1879) (so holding for First Amendment); see A. Willinger, *The Territories under Text, History, and Tradition*, 101 Wash. U. L. Rev. 1, 28–37 (2023). Courts that neglect the unchallenged nature of commonplace regulations and instead embrace litmus tests based on population or time

period are destined to invalidate settled, though not universal, traditions of regulation.

For example, the Eighth Circuit modeled proper analogical reasoning in *United States v. Jackson*, 69 F.4th 495 (8th Cir. 2023), which addressed whether the Second Amendment invalidated a federal prohibition on gun possession by felons whose drug offenses were not violent. *Id.* at 501. The Eighth Circuit saw a long tradition of disarming groups of people "who are not 'law-abiding.'" *Id.* at 502. That tradition, judged at the appropriate level of generality, supported the modern prohibition—even though the historical prohibitions did not concern drugs and even though some of them (religion- and race-based bans on gun possession) "would be impermissible today under *other* constitutional provisions." *Id.* at 502–04 (emphasis added); accord *Kanter v. Barr*, 919 F.3d 437, 456–58 & n.7 (7th Cir. 2019) (Barrett, J., dissenting).

Simply put, context and common sense dictate that there must be a line *somewhere*, based in historical tradition, that allows lawmakers to pass some firearms regulations but not others. The tools that allow courts to draw these lines are not novel. Courts are already well versed

in applying common sense and context. They should not check those skills at the door when it comes to the Second Amendment.

II. History and tradition support a robust understanding of the sensitive-places doctrine.

The historical record confirms that governments have restricted the right to bear arms in a broad range of public places for centuries. The historical evidence, here as elsewhere, is never as complete as one would like. But what does exist in the historical record establishes a long tradition of unchallenged government regulations restricting arms carrying in a range of public places going back at least to 14th-century England. Given the Supreme Court's pronouncement that "sensitive places" restrictions are presumptively lawful in the absence of disputes to the contrary, *Bruen*, 142 S. Ct. at 2133, these historical regulations compel the conclusion that a wide variety of locations can count as "sensitive" for purposes of the Second Amendment today.

A. Governments consistently enacted location-based arms restrictions before, at the time of, and in the decades after the Second Amendment's ratification.

Neither English law nor early American law explicitly recognized a formal "sensitive places" doctrine. But even though the label is new, the concept of location-based restrictions goes at least as far back as

Edward III's reign in the 14th century. Such restrictions have continued to evolve since the Founding in response to society's needs at a given time.

1. Location-based restrictions under English law are a natural starting point. That is true both chronologically and analytically. As the Supreme Court has recognized on multiple occasions, firearms restrictions under English law illuminate the scope of the Second Amendment's protections because the Amendment "codified a right inherited from our English ancestors." *Bruen*, 142 S. Ct. at 2127; see, e.g., *United States v. Cruikshank*, 92 U.S. 542, 553 (1876). The Framers of course did not necessarily adopt every aspect of English custom. But English law nevertheless supplies the backdrop for the Second Amendment's ratification.

Parliament regulated arms bearing in a range of public spaces where people would frequently congregate. As early as 1328, Parliament enacted the Statute of Northampton, which prohibited people from going "armed by night nor by day, in Fairs, Markets, nor in the presence of the [King's] Justices and other Ministers." 2 Edw. 3 c. 3 (1328). Parliament reaffirmed the Statute of Northampton twice during Richard II's reign.

7 Rich. 2 c. 13 (1383); 20 Rich. 2 c. 1 (1396). Parliament later extended the prohibition on the bearing of arms from fairs and markets (places of commerce) to "Churches" and "Highways" (places of religious exercise and public travel). 4 Hen. 4 c. 29 (1402).

Location-based restrictions on the public carrying of firearms continued into the 16th and 17th centuries. In 1534, Parliament updated the Statute of Northampton to forbid arms in court (and within a two-mile radius of a court), as well as in "any towne, churche, fayre, markett or other congregacion." 26 Hen. 8 c. 6, § 3 (1534). Just a few years later, Parliament prohibited individuals from riding on highways with certain types of arms, including loaded guns. 33 Hen. 8 c. 6, § 3 (1541). And in the 17th century, justices of the peace had the power to arrest people who went "armed offensively . . . in Fairs, Markets, or elsewhere." M. Dalton, *The Countrey Justice, Containing the Practices of the Justices of the Peace* 38 (1666 ed.); accord J. Keble, *An Assistance to the Justices of the Peace for the Easier Performance of Their Duty* 224 (1683) (explaining that English law authorized arrest and forfeiture for those who "shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places" against the Statute of Northampton).

In *Bruen*, the Supreme Court concluded that the Statute of Northampton did not provide a basis for categorically limiting the right to carry a firearm publicly "only to those who demonstrate some special need for self-protection." 142 S. Ct. at 2142. But the Court didn't consider any of the location-specific restrictions in follow-on revisions to the Statute of Northampton because *Bruen* did not present that question. As to this question of first impression regarding the sensitive-places doctrine, an unbroken series of English laws regulated firearms possession in a broad range of public places where people assembled to conduct business, hear mass, and partake in entertainment.

2. Location-specific restrictions soon crossed the Atlantic to the Colonies. In the mid-17th century, Maryland adopted two statutes forbidding individuals to bear arms in its legislative houses, much like the Statute of Northampton's prohibition on arms carrying in the presence of the King's justices and ministers. 1647 Md. Laws 216; 1650 Md. Laws 273. And in 1776, Delaware adopted a constitutional provision restricting the carrying of arms and gathering of militias at a then-new place of public congregation—polling places. Del. Const. art. 28 (1776) (providing

that "no persons shall come armed to any [elections], and no muster of the militia shall be made on that day").

More generally, States and local governments began enacting laws that cemented their authority to restrict armed assemblies that operated without government consent. See, e.g., 1705 Pa. Laws ch. 128 at 30; 1763 N.Y. Laws ch. 1233 at 441–42; 1786 Mass. Laws ch. 8 at 502–04; 1797 N.J. Laws ch. 637 at 179–80; see also P. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 Geo. J. L. & Pub. Pol'y 323, 326–27, 374–90 (2011). Although these statutes didn't necessarily restrict arms carrying at *specific* locations, they confirmed the broader governmental authority underlying such restrictions—that regulations of firearms in public spaces are a proper exercise of the State's police power.

3. As American society evolved in the 19th and early 20th century, so too did the ways in which States and Territories exercised their longstanding authority to restrict firearms possession in public areas. The Nation's population was soaring, leading communities to find new ways and places to gather. See P. Charles, *Armed in America: A History of Gun Rights from Colonial Militias to Concealed Carry* 141 (2018).

During the same period, firearms technology also developed apace, particularly in lethality, firing rate, and firing range. See *id.* at 150–56.

States and Territories responded to these changes by enacting laws that broadly restricted firearms possession in a range of public areas where people regularly congregated. Building on restrictions from England and Founding-era America, several of these laws banned the carrying of firearms in churches and polling locations. But many States and Territories also expanded their prohibitions to new gathering places, such as schools, event spaces, places of public assembly, and places where alcohol was consumed or sold.

The year after the ratification of the Fourteenth Amendment, which incorporated the Second Amendment against the States, Tennessee restricted the carrying of firearms into "any election . . . fair, race course, or other public assembly of the people." 1869 Tenn. Pub. Acts ch. 22, § 2 at 23–24. Georgia then prohibited the carrying of arms "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." 1870 Ga. Laws no. 285, § 1 at 421. Texas also prohibited arms not just in places of worship and election precincts, but also in "any school room, or other place where persons

are assembled for amusement or for educational or scientific purposes, or into any circus, show, or public exhibition of any kind, or into a ball room, social party, or social gathering" or "any other place where people may be assembled to muster, or to perform any other public duty, . . . or any other public assembly." 1871 Tex. Gen. Laws ch. 34, § 3 at 25–26. Arizona and Oklahoma soon followed these States' lead. Both Territories embraced not only time-tested bans on firearms in courthouses, places of worship, and polling places, but also similar restrictions for schools, places of public assembly, and social venues. 1889 Ariz. Sess. Laws no. 13, § 3 at 30–31; 1890 Okla. Stats. ch. 25, art. 47, § 7 at 496.

Other States adopted relatively more limited regulations in specific places. Louisiana forbade people to carry firearms "on any day of election during the hours the polls are open." 1870 La. Acts no. 100, § 73 at 159–60. Maryland also enacted prohibitions on carrying weapons on election days in Kent, Queen Anne's, Montgomery and Calvert Counties. 1874 Md. Laws ch. 250, § 1 at 366–67; 1886 Md. Laws ch. 189, § 1 at 315. And Pennsylvania forbade the carrying of firearms in Fairmount Park, the largest park in Philadelphia. 1868 Pa. Laws no. 1020, § 21 at 1088. Just eight years later, nine million visitors gathered in Fairmount Park for

the Centennial Exposition, the first world's fair held in the United States. See *Philadelphia Centennial Exposition*, Historical Society of Pennsylvania, https://tinyurl.com/mttca4sj (last visited Oct. 12, 2023).

A number of state and territorial laws curbed the potentially deadly mix of firearms and alcohol. New Mexico flatly prohibited people from carrying arms into certain places where "Liquors are sold." 1852 N.M. Laws § 3 at 69. Oklahoma also banned firearms in "any place where intoxicating liquors are sold" in its first legislative session as a newly created Territory. 1890 Okla. Stats. ch. 25, § 7 at 496. Kansas, Missouri, and Wisconsin took the somewhat different approach of banning intoxicated people in particular from bearing arms. 1867 Kan. Sess. Laws ch. 12, § 1 at 25; Mo. Rev. Stat. ch. 24, § 1274 (1879); 1883 Wis. Sess. Laws ch. 329, § 3 at 290. Mississippi, for its part, put the onus on merchants, banning the sale of arms to any intoxicated person. 1878 Miss. Laws ch. 46, § 2 at 175.

Still other States restricted *how* individuals could carry in public places in lieu of outright bans on possession. For example, Minnesota and Wisconsin allowed individuals to possess guns in state parks only if

they were unloaded. 1905 Minn. Laws ch. 344, § 53 at 620; 1917 Wis. Sess. Laws ch. 668, § 29.57(4) at 1243–44.

4. Because firearms localism prevailed in the 19th and early 20th century, location-specific restrictions were even more common at the local level. See *supra*, at 9–10. But the limits of record-keeping mean that many local ordinances have been lost over time. Fortunately, *amicus curiae* was able to locate some of the following examples through archival copies of local newspapers, which periodically published ordinances.

Several cities broadly prohibited firearms in locations where people would assemble for public or private purposes. Olympia banned possession of deadly weapons "in the usual walks of life, within the limits of this town." Olympia, Wash., Ordinance No. 13 § 2 (Mar. 3, 1860) (Ex. 24). Tucson defined the firearms-free area as "the inhabited portions of [its] corporate limits." Tucson, Ariz., Ordinance No. 9 § 1 (Jan. 28, 1873) (Ex. 29). And Gainesville, Missouri, prohibited the carrying of firearms "into any public gathering or place where people are assembled for any lawful purpose." Gainesville, Mo., Ordinance § 9 (May 26, 1896) (Ex. 9).

Other cities enumerated specific locations where people could not carry firearms (such as churches, places of worship, schools, courts,

election precincts, and places of public amusement) and even then often included a catchall ban on possession in public assemblies. E.g., Greenfield, Mo., Ordinance No. 39 § 1 (Jan. 4, 1886) (Ex. 12); Stockton, Kan., Ordinance No. 76 § 1 (July 1, 1887) (Ex. 28); Columbia, Mo., General Ordinances ch. 17, § 163 (May 22, 1890) (Ex. 7); Leonard, Mo., Ordinance No. 23 § 1 (July 6, 1891) (Ex. 16); Waco, Tex., Ordinance, art. 119a § 1 (July 9, 1891) (Ex. 30); Marceline, Mo., Ordinance No. 9 § 8 (Mar. 12, 1892) (Ex. 19); Ridgeway, Mo., Town Ordinance No. 28 § 12 (Apr. 3, 1893) (Ex. 26). For example, Huntsville, Missouri banned all forms of carry "into any church or place where people have assembled for religious worship, or into any school room or place where people are assembled for educational, literary or social purposes, or to any election precinct on any election day, or into any court room during the sitting of court, or into any other public assemblage of persons met for any lawful purpose." Huntsville, Mo., Ordinance in Relation to Carrying Deadly Weapons § 1 (July 17, 1894) (Ex. 14).

Other local governments adopted location-based arms restrictions presumably geared toward the highest-risk areas in those localities. For instance, two North Carolina counties that were home to religious

campgrounds prohibited arms carrying "within the incorporate limits of [the] Camp Ground" when people were "assembled for public worship." Gaston County, N.C., Regulation no. 5 (Sept. 17, 1873) (Ex. 10); Lincoln County, N.C., Regulation no. 5 (July 20, 1872) (Ex. 17). And many cities across the country, including Buffalo, Chicago, Wilmington, and New Haven, banned firearms from being carried or discharged in public parks. E.g., Buffalo, N.Y., Park Ordinances ch. 1, § 1 (May 13, 1873) (Ex. 4); Chicago, Ill., Municipal Code art. 42, § 1690 at 391 (1881) (Ex. 6); Wilmington, Del., Park Regulation no. 7 (July 13, 1888) (Ex. 32); New Haven, Conn., Rules and Regulations of the Park Commissioner no. 3 (1898) (Ex. 21); see Charles, *The Fugazi Second Amendment*, *supra*, at 710–12 nn.556–66 (more park bans).

Local governments also mirrored state restrictions related to the carrying of arms and the use of alcohol. New York City and Brooklyn enacted sweeping prohibitions on selling or otherwise providing arms to persons that posed "any danger to life," such as intoxicated persons. New York, N.Y., Health Ordinances § 147 at 52 (1866) (Ex. 23); Brooklyn, N.Y., Sanitary Code § 174 (July 15, 1873) (Ex. 3). Other jurisdictions adopted more specific bans that outright prohibited arms carrying by

those under the influence of alcohol. E.g., Greenfield, Mo., Ordinance No. 39 § 1 (Jan. 4, 1886) (Ex. 12); Wallace, Kan., Ordinance § 3 (Dec. 22, 1887) (Ex. 31); Rocheport, Mo., Ordinance § 2 (1895) (Ex. 27); Lyons, Kan., Ordinance No. 179 § 1 (Sept. 7, 1891) (Ex. 18); Grand Junction, Colo., Ordinance No. 83 § 6 (June 30, 1899) (Ex. 11); see also Blackwell, Okla., Town Ordinance No. 21 § 3 (Aug. 7, 1894) (Ex. 2) (forbidding public officers, the only people allowed to carry firearms within the town's borders, to carry firearms while intoxicated).

Many other cities simply prohibited all carrying within their corporate or commercial limits. E.g., Asheville, N.C., Ordinance § 61 (June 1, 1882) (Ex. 1); New Salem, Pa., Ordinance § 24 (Sept. 26, 1876) (Ex. 22); Lake Charles, La., Ordinance § 1 (June 20, 1874) (Ex. 15); Harrisburg, Pa., Weapons Ordinance § 1 (Apr. 12, 1873) (Ex. 13); see also Charles, *The Fugazi Second Amendment*, *supra*, at 708–710 nn.551–54. In *Bruen*, the Supreme Court refused to interpret the sensitive-places doctrine so broadly as to include "all places of public congregation," which would allow New York to "effectively declare the island of Manhattan a 'sensitive place.'" 142 S. Ct. at 2133–34. But there is no evidence that anyone questioned the legality of even these broad corporate- and commercial-

limit prohibitions, which lends strong support to the constitutionality of more tailored location-specific prohibitions.

* * *

Despite the limitations in the historical record, what little has survived confirms that governments possessed (and often wielded) the authority to restrict public carriage in churches, schools, courthouses, polling places, places where large numbers of people congregated for amusement, and places where alcohol was purchased or consumed.

B. Courts uniformly upheld historical location-specific regulations of firearms possession.

The Supreme Court has deemed sensitive-places regulations "presumptively lawful." *Heller*, 554 U.S. at 626–27 & n.26. That presumption of constitutionality exists because the Court was "aware of no disputes regarding the lawfulness of such prohibitions" on "the carrying of firearms in sensitive places." *Bruen*, 142 S. Ct. at 2133. By *amicus curiae*'s count, too, no court ever invalidated a historical restriction on firearms in public gatherings under the Second Amendment or a state constitution's equivalent. Courts said just the opposite, time and again, when discussing these predecessors to the modern sensitive-places doctrine:

- In *Andrews v. State*, 50 Tenn. 165 (1871), the Tennessee Supreme Court observed that "a man may well be prohibited from carrying his arms *to church, or other public assemblage*, as the carrying them to such places is not an appropriate use of them." *Id.* at 182 (emphasis added). The Supreme Court has relied on the *Andrews* decision. *Bruen*, 142 S. Ct. at 2147; *Heller*, 554 U.S. at 629.
- In *English v. State*, 35 Tex. 473 (1872), the Texas Supreme Court rejected a challenge to a statutory prohibition on carrying firearms in sensitive places, "confess[ing] that it appears to us little short of ridiculous, that any one should claim the right to carry upon his person any of the mischievous devices inhibited by the statute, into a peaceable public assembly, as, for instance into a church, a lecture room, a ball room, or any other place where ladies and gentlemen are congregated together." *Id.* at 478–79.
- In *Hill v. State*, 53 Ga. 472 (1874), the Georgia Supreme Court upheld a law that prohibited the carrying of any weapon "'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.'" *Id.* at 474. This proto-sensitive-places law balanced the people's competing rights to access the courts, practice their religions, and cast their ballots, all of which would be "seriously interfered with if it is the right and the custom of 'people' to attend such meetings armed as though for battle." *Id.* at 478.

- In *Owens v. State*, 3 Tex. App. 404 (1878), the Texas Court of Appeals affirmed the conviction of a man who violated the state prohibition on the carrying of weapons into any public assembly whatsoever. *Id.* at 405–06. The court admonished that, even if the defendant was "in dread of an immediate and pressing attack" in a covered place—there, a ballroom—that would "afford[] no excuse" to "wear[] deadly weapons to church, or in a ballroom, or other places mentioned where [an] attack may be made and the lives of innocent people there assembled placed in jeopardy or sacrificed." *Id.* at 407.
- In *State v. Shelby*, 90 Mo. 302 (1886), the Missouri Supreme Court upheld the prohibition on firearms possession by the intoxicated, noting that the "mischief to be apprehended from an

> intoxicated person going abroad with fire-arms upon his person is equally as great as that to be feared from one who goes [armed] into an assemblage of persons," which Missouri law likewise restricted. *Id.* at 305; see also *State v. Reando* (Mo. 1878) (unpublished decision upholding location bans) (Ex. 34).

In short, courts uniformly upheld location-specific regulations on the theory that the right to bear arms did not extend to places where people assembled in large numbers.

C. A contextual review of the longstanding historical regulations on public carriage suggests a broad conception of what counts as a sensitive place.

The history of location-based firearms regulation, as well as the judicial decisions resoundingly batting back constitutional challenges, takes this Court much of the way to the finish line. What remains is the question whether the Hawai‘i restrictions challenged in this case are analogous to longstanding traditions of location-specific firearms regulations. Although *amicus curiae* will not address the particulars of the challenged Hawai‘i law, he does submit that a contextual reading of the historical record leaves States and cities ample leeway to define sensitive places where the carrying of firearms threatens health and safety.

The historical record compels a broad understanding of the types of places where governments can regulate the carrying of firearms consistent with the Second Amendment. At the very least, the doctrine would permit firearm restrictions in the same range of public places protected by the historical regulations, including courts, schools, places of public assembly and amusement, parks, and places where alcohol is consumed or sold. See *supra*, at 19–30. Modern restrictions in these sensitive areas are "a dead ringer for historical precursors" even though the Second Amendment does not demand such a close overlap. *Bruen*, 142 S. Ct. at 2133.

Bruen also expressly left the door open for "analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." 142 S. Ct. at 2133. As *amicus curiae* understands the historical record, the location-specific regulations in fairs, city parks, religious campgrounds, and other places of public assembly were all animated by the same concern of reducing injury and violence in places where the public congregates. E.g., *Andrews*, 50 Tenn. at 182; *English*, 35 Tex. at 478–79. The "how and why" rule of thumb

from *Bruen* therefore suggests that courts should ask whether a state law similarly seeks to minimize firearm possession in public gatherings to reduce that same risk of violence or accidental injury. 142 S. Ct. at 2132–33; see J. Blocher, J. Charles, and D. Miller, *"A Map Is Not the Territory": The Theory and Future of Sensitive Places Doctrine*, N.Y.U. L. Rev. Online (forthcoming), https://tinyurl.com/bdenf25k (urging courts to consider *why* a location is sensitive, not precisely *what* place the prior laws regulated).

To be clear, governments can't deem any place where people are present to be a "sensitive place." The Supreme Court foreclosed any such interpretation of the Second Amendment. *Bruen*, 142 S. Ct. at 2133–34. Still, there is a world of difference between cutting the government a blank check and expecting the historical record to provide ready-made comparisons and perfect analogies. History is often uncertain, sparse, and even contradictory. But in the case of sensitive-places restrictions, a view that takes into account why regulations were passed, how they were understood, and how they evolved supports the conclusion that this tradition of firearms regulation was well settled and widespread.

CONCLUSION

This Court should adopt a contextual approach under the Second Amendment to drawing high-level analogies to historical firearms regulations and hold that the historical tradition of firearms regulation in a wide variety of public assemblies supports a broad conception of the modern sensitive-places doctrine.

Dated: October 12, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limit of Federal Rule of Appellate Procedure 29(a)(5) because it contains 6,994 words, excluding the portions exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

The brief complies with the typeface and type-style requirements of Rule 32(a)(5)(A) and (a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point, New Century Schoolbook font.

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ADDENDUM