23-1900, 23-2043

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

RONALD KOONS; NICHOLAS GAUDIO; JEFFREY M. MULLER; GIL TAL;
SECOND AMENDMENT FOUNDATION, INC.; FIREARMS POLICY COALITION, INC.;
COALITION OF NEW JERSEY FIREARM OWNERS;
NEW JERSEY SECOND AMENDMENT SOCIETY,

Plaintiffs-Appellees,

—v.—

ATTORNEY GENERAL NEW JERSEY;
SUPERINTENDENT NEW JERSEY STATE POLICE,

Defendants-Appellants,

PRESIDENT OF THE NEW JERSEY STATE SENATE;
SPEAKER OF THE NEW JERSEY GENERAL ASSEMBLY,

Defendants-Intervenors-Appellees.

(D.N.J. No. 1:22-cv-07464)

(*Caption continued on inside cover*)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

BRIEF OF GIFFORDS LAW CENTER TO PREVENT GUN VIOLENCE AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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OF NEW JERSEY RIFLE AND PISTOL CLUBS, INC.,

Plaintiffs-Appellees,

—v.—

ATTORNEY GENERAL NEW JERSEY;
SUPERINTENDENT NEW JERSEY STATE POLICE,

Defendants-Appellants,

PRESIDENT OF THE NEW JERSEY STATE SENATE;
SPEAKER OF THE NEW JERSEY GENERAL ASSEMBLY,

Defendants-Intervenors-Appellees.

(D.N.J. No. 1:22-cv-07463)

United States Court of Appeals for the Third Circuit

Corporate Disclosure Statement and Statement of Financial Interest

No. 23-1900; 23-2043

Ronald Koons, et al.

v.

Attorney General New Jersey, et al.

Instructions

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure any nongovernmental corporate party to a proceeding before this Court must file a statement identifying all of its parent corporations and listing any publicly held company that owns 10% or more of the party's stock.

Third Circuit LAR 26.1(b) requires that every party to an appeal must identify on the Corporate Disclosure Statement required by Rule 26.1, Federal Rules of Appellate Procedure, every publicly owned corporation not a party to the appeal, if any, that has a financial interest in the outcome of the litigation and the nature of that interest. This information need be provided only if a party has something to report under that section of the LAR.

In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate shall provide a list identifying: 1) the debtor if not named in the caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is an active participant in the bankruptcy proceedings. If the debtor or the bankruptcy estate is not a party to the proceedings before this Court, the appellant must file this list. LAR 26.1(c).

The purpose of collecting the information in the Corporate Disclosure and Financial Interest Statements is to provide the judges with information about any conflicts of interest which would prevent them from hearing the case.

The completed Corporate Disclosure Statement and Statement of Financial Interest Form must, if required, must be filed upon the filing of a motion, response, petition or answer in this Court, or upon the filing of the party's principal brief, whichever occurs first. A copy of the statement must also be included in the party's principal brief before the table of contents regardless of whether the statement has previously been filed. Rule 26.1(b) and (c), Federal Rules of Appellate Procedure.

If additional space is needed, please attach a new page.

Pursuant to Rule 26.1 and Third Circuit LAR 26.1, Giffords Law Center to Prevent Gun Violence makes the following disclosure:
(Name of Party)

1) For non-governmental corporate parties please list all parent corporations:

None

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock:

None

3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has as a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests:

N/A

4) In all bankruptcy appeals counsel for the debtor or trustee of the bankruptcy estate must list: 1) the debtor, if not identified in the case caption; 2) the members of the creditors' committee or the top 20 unsecured creditors; and, 3) any entity not named in the caption which is active participant in the bankruptcy proceeding. If the debtor or trustee is not participating in the appeal, this information must be provided by appellant.

N/A

/s/ Amit Jain
(Signature of Counsel or Party)

Dated: July 27, 2023

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Giffords Law Center to Prevent Gun Violence ("Giffords Law Center" or "Giffords") is a nonprofit policy organization dedicated to researching, writing, enacting, and defending laws and programs proven to reduce gun violence and save lives. The organization was founded in 1993 after a gun massacre at a San Francisco law firm, and it was renamed in 2017 after joining forces with the gun safety organization led by former Congresswoman Gabrielle Giffords.

Giffords Law Center partners with gun-violence researchers, public health experts, and community organizations, and it provides free assistance and expertise to lawmakers, advocates, law-enforcement officials, gun-violence survivors, and others seeking to make their communities safer from gun violence. Its attorneys track and analyze firearm legislation, evaluate policy proposals regarding gun-violence prevention, and participate in Second Amendment litigation nationwide. The organization has provided courts at all levels with amicus assistance in many important cases involving guns and gun violence.

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[1] No counsel for a party authored this brief in any part, and no person or entity, other than Giffords Law Center and its counsel, made a monetary contribution to fund its preparation and submission. All parties consent to the filing of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court held that "may-issue" firearm permitting regimes were invalid under the Second Amendment. 142 S. Ct. 2111, 2156 (2022). As *Bruen* commanded, the State of New Jersey—which had long employed a "may-issue" framework—shifted to a "shall-issue" regime, eliminating the requirement that applicants show a justifiable need to carry a handgun. 2022 N.J. Laws, ch. 131 ("Chapter 131"), §§ 1, 2. At the same time, the State enacted reasonable regulations to protect public safety. For instance, heeding *Bruen*'s directive that firearm regulations must be "consistent with this Nation's historical tradition," the State Legislature "forb[ade] the carrying of firearms in [longstanding] sensitive places such as schools and government buildings," and it "use[d] analogies to . . . historical regulations of 'sensitive places'" to fashion "modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places." *Bruen*, 142 S. Ct. at 2126, 2133 (internal quotation marks omitted); *see* Chapter 131 § 1(f)–(h); N.J. Stat. Ann. § 2C:58-4.6(a). The district court preliminarily enjoined a broad swath of these provisions. It erred gravely in doing so.

First, each factor in the preliminary injunction standard, including Appellees' likelihood of success on the merits under *Bruen*, demands consideration of reliable empirical evidence. That evidence overwhelmingly demonstrates that Chapter 131

will prevent increases in gun violence and save lives. The district court was wrong to dismiss this scientific evidence based on a series of unfounded assumptions and unscientific writings.

Second, the district court's staggering conception of the Second Amendment collides with other vital aspects of our constitutional framework, including its protections for political speech and assembly, property rights, and public order. Each of these clashes highlights the sheer implausibility of the court's result and the error-laden nature of its *Bruen* analysis. This Court should reverse the district court's order and vacate the preliminary injunction.

ARGUMENT

I. EVIDENCE-BASED RESEARCH ESTABLISHES THAT THE REASONABLE REGULATIONS ENJOINED BELOW ARE NECESSARY AND WILL SAVE LIVES

Empirical evidence pertaining to the efficacy of, and justification for, gun regulations bears on each factor in the injunctive relief analysis, including Appellees' likelihood of success on the merits under *Bruen*. Here, the empirical evidence is clear: Chapter 131's reasonable regulations will save lives by reducing violence and preventing misuse of firearms. The district court clearly erred in rejecting this robust scientific evidence in favor of armchair rebuttals and discredited analyses.

A. This Court Must Consider Empirical Evidence Regarding the Efficacy of and Need for Gun Laws in Reviewing the District Court's Injunction.

Because Appellees sought and received injunctive relief against several provisions of Chapter 131, this Court must review whether "the balance of equities tips in [their] favor"; whether "an injunction is in the public interest"; whether Appellees are "likely to succeed on the merits"; and whether they are "likely to suffer irreparable harm in the absence of [such] relief." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). Empirical evidence of the enjoined provisions' justifications and efficacy bears on all four of these factors.

As the district court acknowledged, empirical evidence is undeniably relevant when analyzing the balance of equities and the public interest. *See* J.A. 238–43. These factors are vital (and sometimes dispositive) in evaluating the propriety of injunctive relief. *See Winter*, 555 U.S. at 23–31 (reversing grant of preliminary injunction because "a proper consideration of [the public interest and balance of equities] alone requires denial," and deeming merits analysis "not necessary"). Thus, courts routinely review empirical evidence to inform their analyses of these factors. *See, e.g.*, *Holland v. Rosen*, 277 F. Supp. 3d 707, 714–15, 748–49 (D.N.J. 2017) (declining to enjoin pretrial release system after reviewing empirical evidence on its risks and benefits), *aff'd*, 895 F.3d 272 (3d Cir. 2018).

Empirical evidence also bears on Appellees' likelihood of success on the merits (and, in turn, their ability to establish irreparable harm).[2] As is familiar, in *Bruen*, the Court established a historical test to evaluate the constitutionality of firearm regulations. A court first asks whether the "plain text" of the Second Amendment protects the relevant conduct. *Bruen*, 142 S. Ct. at 2129–30; *Range v. Att'y Gen. U.S.*, 69 F.4th 96, 103 (3d Cir. 2023) (en banc). If it does, the government bears the burden of demonstrating that its regulation is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130; *Range*, 69 F.4th at 103. Importantly, a modern regulation, especially one that implicates "unprecedented societal concerns," need not be a "twin" of a historical law; it need only be "analogous to" its precursor. *Bruen*, 142 S. Ct. at 2132–33; *accord Range*, 69 F.4th at 103. *Bruen* identified two "central" considerations for this analogical inquiry: (1) "how" a modern regulation burdens the right to self-defense (*i.e.*, "whether modern and historical regulations impose a comparable burden on the right") and (2) "why" the modern regulation burdens the right to self-defense (*i.e.*, "whether that burden is comparably justified"). *Bruen*, 142 S. Ct. at 2132–33; *accord Range*, 69 F.4th at 103.

[2] The district court held that Appellees had demonstrated irreparable harm because they faced sanctions for engaging in conduct purportedly subject to constitutional protection. *See* J.A. 235–37. But this finding is contingent on whether the enjoined provisions are unconstitutional.

Empirical evidence bears on the *Bruen* analysis in at least two important respects. *First*, such evidence informs whether a firearm regulation implicates "unprecedented societal concerns or dramatic technological changes" as opposed to "societal problem[s] that ha[ve] persisted since the 18th century." *Bruen*, 142 S. Ct. at 2131–32. In particular, where empirical evidence demonstrates that a modern concern is "unprecedented" (*i.e.*, that it differs significantly in scale or impact from anything the Founders faced), courts must take "a more nuanced approach" to the analogical inquiry. *Id.* at 2132; *accord Range*, 69 F.4th at 103. *Second*, because legislators routinely use empirical evidence to justify modifications to firearm regulations, such evidence is relevant when evaluating whether a regulation's burden on Second Amendment rights is "comparably justified" to the burden imposed by a historical precursor—a "*central* consideration[] when engaging in an analogical inquiry." *Bruen*, 142 S. Ct. at 2133 (internal quotation marks omitted); *accord Range*, 69 F.4th at 103. To ignore such facts would be to "exhibit a naiveté from which ordinary citizens are free." *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977) (Friendly, J.)).

Consistent with this understanding, courts in this Circuit and others have consulted empirical evidence on the justifications for and efficacy of gun regulations to inform their reasoning under *Bruen*. For example, in *Delaware State Sportsmen's*

Ass'n, Inc. v. Delaware Department of Safety & Homeland Security, No. 22-cv-951 (RGA), __ F. Supp. 3d __, 2023 WL 2655150 (D. Del. Mar. 27, 2023), the plaintiffs sought a preliminary injunction against regulations of assault weapons and large-capacity magazines. In its analysis of the merits, the district court cited studies concerning these arms' stunning impacts on casualties in mass shootings. *See id.* at *10–11. These stark realities, the court explained, supported the conclusion that such firearms implicated "unprecedented societal concerns for public safety." *Id.* at *11. They also demonstrated that the regulations were "comparably justified" to their precursors. *Id.* at *13. Based in part on this empirical evidence, the court denied preliminary injunctive relief. *Id.*; *see also, e.g.*, *Hartford v. Ferguson*, No. 3:23-cv-5364 (RJB), __ F. Supp. 3d __, 2023 WL 3836230, at *5–6 (W.D. Wash. June 6, 2023) (consulting empirical evidence to conclude that assault weapons generated "unprecedented social concerns" and that a regulation's burdens were "comparably justified" to those of its predecessors).

As these decisions and others like them illustrate, empirical evidence remains a paramount consideration here, including in analyzing Appellees' likelihood of success on the merits.

B. Reliable Empirical Evidence Overwhelmingly Demonstrates That the Enjoined Provisions of Chapter 131 Will Reduce Gun Violence and Enhance Public Safety.

Here, the empirical evidence strongly supports reversal of the district court's preliminary injunction. Credible and respected research studies show that the enjoined provisions of Chapter 131 are necessary to reduce gun violence, enhance public safety, and save lives.

First, reliable, peer-reviewed studies have found that the adoption of "shall-issue" concealed-carry laws to replace "no-issue" laws or "may-issue" laws (as *Bruen* required in New Jersey) is associated with significant increases in violent crime, thereby justifying New Jersey's corresponding efforts to reduce that violence. For example, in a September 2022 study analyzing data from 36 states, Johns Hopkins Professor Mitchell L. Doucette and his colleagues found statistically significant increases in violent crime during the first decade after "shall-issue" laws were adopted. States that adopted "shall-issue" laws to replace "no-issue" or "may-issue" laws saw a 9.5% increase in rates of aggravated gun assault and an 8.8% increase in rates of non-gun homicide after controlling for relevant variables. *See* Mitchell L. Doucette et al., *Impact of Changes to Concealed-Carry Weapons Laws on Fatal and Nonfatal Violent Crime, 1980–2019*, 192 Am. J. Epidemiology 342, 342, 344 (2022).

The Doucette study is no outlier. An April 2019 study conducted by Stanford Professor John J. Donohue and his colleagues found that the adoption of "shall-issue" regimes resulted in a 13 to 15% increase in aggregate violent crime rates, including murder, rape, robbery, and aggravated assault. That increase in violent crime was so substantial that, if all such crimes had led to incarceration, the average "shall-issue" state would have doubled its prison population. *See* John J. Donohue et al., *Right to Carry Laws and Violent Crime: A Comprehensive Assessment Using Data and a State-Level Synthetic Control Analysis*, 16 J. Empirical Legal Stud. 198, 230 (2019). Similarly, a December 2017 study by researchers at Duke University and Boston University found that "shall-issue" regimes were associated with 6.5% higher total homicide rates, 8.6% higher firearm homicide rates, and 10.6% higher handgun homicide rates than "may-issue" regimes. *See* Michael Siegel et al., *Easiness of Legal Access to Concealed Firearm Permits and Homicide Rates in the United States*, 107 Am. J. Pub. Health 1923, 1923 (2017). This devastating evidence demonstrates that the provisions enjoined by the district court address a problem of an unprecedented magnitude and that the public interest and equities strongly favor allowing the State to mitigate these effects through reasonable regulations.

Second, empirical studies disprove the unfounded assertion that allowing more guns to be carried in public enhances public safety. The data show that permit holders almost never use firearms in self-defense. For instance, an FBI study of 160

active shooter incidents between 2000 and 2013 found only one case in which a private, armed permit holder other than a security guard stopped an active shooter, and that individual was an active-duty Marine. *See* Donohue et al. (2019), *supra*, at 206. Furthermore, because many permit holders lack formal training in crisis response, they often cause more harm by intervening, endangering themselves and the people around them. *See, e.g.*, *id.* at 206–07 (describing incidents where permit holders shot bystanders or were themselves killed by shooters after a confrontation); Laura Cutilletta, *The "Good Guy with a Gun" Myth*, Giffords (Oct. 1, 2020) (collecting studies and describing how an armed individual who helped subdue the man who shot Congresswoman Giffords "almost shot [a] survivor who had helped to disarm the shooter").

Finally, scientific evidence shows that looser gun regulations lead to more gun violence and that targeted restrictions on firearm carry can meaningfully reduce the risk of gun violence. Empirical studies document many incidents in which permit holders have killed others over minor issues—such as merging on a highway, talking on a phone in a theater, and playing music at a gas station. *See* Donohue et al. (2019), *supra*, at 203–04. These tragic acts of violence are consistent with a body of psychological research demonstrating that firearms can increase aggressive thoughts and appraisals. *See* Arlin J. Benjamin, Jr. et al., *Effects of Weapons on Aggressive Thoughts, Angry Feelings, Hostile Appraisals, and Aggressive Behavior: A Meta-*

Analytic Review of the Weapons Effect Literature, 22 Personality & Soc. Psych. Rev. 347, 353 (2018) (meta-analysis of 78 studies).

In addition, studies establish causal links between more lenient concealed-carry laws and increased crime by individuals who acquire guns via loss and theft. *See* John J. Donohue et al., *Why Does Right-to-Carry Cause Violent Crime to Increase?* 7 (Nat'l Bureau of Econ. Res., Working Paper No. 30190, 2023) (finding that substantial increases in gun theft after the adoption of right-to-carry laws contributed to a roughly 20% increase in violent crime in large cities); David Hemenway et al., *Whose Guns Are Stolen? The Epidemiology of Gun Theft Victims*, 4 Injury Epidemiology 1, 3 (2017) (finding that owners who carry firearms on their person are three times more likely to have those firearms stolen).

The upshot of this robust body of research is not that "all guns are bad." J.A. 238. The point is that the science overwhelmingly supports reasonable regulations (like the enjoined portions of Chapter 131) that respect Second Amendment rights while simultaneously protecting the public from the scourge of gun violence.

C. The District Court Clearly Erred in Dismissing These Peer-Reviewed Scientific Studies.

The district court rejected this body of empirical evidence because the State and Intervenors did not present "statistics involving law-abiding citizens with carry permits who used their firearms to save lives," and because the studies they cited did

not explicitly distinguish between crimes committed by "law-abiding citizens" and those committed by "criminals." J.A. 238, 240–41. The court then identified several unpersuasive, outdated, and extra-record sources to support its view that permit holders could not be responsible for increases in violent crime. J.A. 241–42. In so doing, the court committed four interrelated errors.

First, the district court presumed that gun-carrying permit holders had a significant impact on reducing gun violence. J.A. 238–39. But the court failed to identify any reliable empirical evidence to support that unsubstantiated presumption. Instead, the court described two isolated incidents where permit holders shot gunmen and cited an op-ed listing ten similar accounts, asserting that these examples were "just a few of many." *Id.* These individual anecdotes are insufficient to justify extraordinary relief, especially when pitted against the contrary consensus among the reputable, peer-reviewed studies discussed above. Furthermore, although the court faulted the State and Intervenors for not presenting specific examples in which a New Jersey Carry Permit holder had committed a violent crime, J.A. 242, it was *Appellees* who bore the burden of proving their entitlement to injunctive relief, and they seemingly failed to identify a single example in which a New Jersey Carry Permit holder had used a firearm to prevent a violent crime, *see* J.A. 237–43.

Second, the district court drew a false dichotomy between "law-abiding citizens" (who have concealed-carry permits and use guns to protect themselves and

others) and "criminals" (who do not have concealed-carry permits and only use guns to harm others). But that dividing line is unhelpful and unsupported by the facts. For one thing, every "criminal" is a "law-abiding citizen" until they are convicted of a crime. And as the data discussed above show, many "law-abiding" permit holders have killed people over minor issues. *See supra* Section I.B. Others who lack appropriate training often make fatal mistakes in stressful situations and endanger themselves and the people around them. *See* Donohue et al. (2019), *supra*, at 205–06. All in all, cases in which private firearm use saves lives are the rare exception, not the rule.

Third, the district court concluded that gun regulations have no impact on violent crime based on the mistaken assumption that "criminals are not deterred by firearm laws" and will obtain and unlawfully use firearms, "whatever the permitting regime" may be. J.A. 240. Again, the evidence debunks that myth. Peer-reviewed studies show that loosening gun restrictions—including transitioning from a "may-issue" permitting regime to a "shall-issue" regime, as *Bruen* commanded New Jersey to do—leads to statistically significant increases in violent crimes. *See supra* Section I.B.

Finally, the district court clearly erred in crediting armchair rebuttals over the rigorous, peer-reviewed scientific studies cited by the State and Intervenors. In its attempt to rebut the robust consensus across these empirical studies, the court

unearthed four contrary "studies" of its own. But each of those sources is demonstrably unsound, concededly inconclusive, or outdated. *See* J.A. 241–42.

Take, for starters, the district court's citation to a law review article by John Lott—a gun activist who is infamous for his "debunked" research involving questionable math, as well as his use of a fabricated identity to defend himself against criticism. Mike Spies, *The Shoddy Conclusions of the Man Shaping the Gun-Rights Debate*, New Yorker (Nov. 3, 2022); *see* J.A. 241. To support the notion that permit holders are not responsible for increases in violent crime, the court quoted Lott's claim that "[t]he third edition of *More Guns, Less Crime* presents detailed data for 25 right-to-carry states, and any type of firearms-related violation [by permit holders] is at hundredths or thousandths of one percent." J.A. 241 (quoting John R. Lott, Jr., *What A Balancing Test Will Show for Right-to-Carry Laws*, 71 Md. L. Rev. 1205, 1212 (2012)). Tellingly, Lott's article cites only his own book in support of that tenuous claim. Many respected scholars have discredited the analysis in Lott's book as methodologically unsound, biased, and impossible to replicate. *See, e.g.*, Ian Ayres & John J. Donohue III, *Shooting Down the "More Guns, Less Crime" Hypothesis*, 55 Stan. L. Rev. 1193, 1201, 1284 (2003) ("[Lott's] statistical evidence that [right-to-carry] laws have reduced crime is limited, sporadic, and extraordinarily fragile."); Abhay Aneja et al., *The Impact of Right to Carry Laws and the NRC Report: The Latest Lessons for the Empirical Evaluation of Law and Policy* 3, 7–10,

22–25, 80–81 (Nat'l Bureau of Econ. Res., Working Paper No. 18294, 2014) (finding clear errors in Lott's data and flaws in his methodology and that RTC laws lead to "substantial," statistically significant increases in crime); Mark Duggan, *More Guns, More Crime*, 109 J. of Pol. Econ. 1086, 1089, 1112 (2001) (concluding that "[Lott's] central results are inaccurate" and that "increases in gun ownership lead to substantial increases in the overall homicide rate"). So have nonpartisan research organizations. *See, e.g.*, Rosanna Smart, *Effects of Concealed-Carry Laws on Violent Crime*, RAND Corp. (Jan. 10, 2023) (finding Lott's analysis rife with data errors and methodological flaws that "led to gross exaggerations of the statistical significance of study results"). Even sources cited by the district court concluded that Lott's research was inconclusive and imprecise. *See* Nat'l Research Council, *Firearms and Violence: A Critical Review* 120–21 (2004); J.A. 242.

Equally misplaced was the district court's reliance on an article by Professor Carlisle Moody. J.A. 241 (quoting Carlisle E. Moody et al., *The Impact of Right-to-Carry Laws on Crime: An Exercise in Replication*, 4 R. of Econ. & Fin. 33, 42 (2014)). That article—which criticized a prior study finding that right-to-carry laws increased violent crime—was discredited by a leading nonpartisan report, which concluded that Professor Moody's findings were "not sufficient to demonstrate the claim that the [prior study's] model suffered from omitted-variable bias or that [Moody's model] offered a less biased estimate." *See* Smart, *supra*.

The district court's remaining extra-record sources were grossly outdated. For example, the court quoted a 1995 law review article stating that "the experience of the carry reform states plainly shows that homicide rates will not increase as a result of crimes committed by persons with carry permits." J.A. 241–42 (quoting Clayton E. Cramer & David B. Kopel, *"Shall Issue": The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679, 709 (1995)).[3] And then it cited a two-decade-old National Research Council report from 2004 concluding that "*with the current evidence* it is not possible to determine that there is a causal link between the passage of right-to-carry laws and crime rates." J.A. 242 (quoting Nat'l Research Council, *supra*, at 150) (emphasis added). But the more "current evidence" discussed above compels a different conclusion, as reflected in the "experience" of the decades since these documents were published.

* * *

In sum, methodologically sound empirical studies establish that the provisions the district court enjoined will save lives and reduce gun violence as New Jersey

[3] Notably, the authors of the 1995 law review article conceded (on the same page quoted by the court) that four of their nine state analyses were "inconclusive" and that evaluating the effects of permitting reforms in an additional two states would be "impossible" in one case and require "much more detailed . . . analysis" in the other. Cramer & Kopel, 62 Tenn. L. Rev. at 709.

implements its post-*Bruen* "shall-issue" regime. Accordingly, this Court should reverse the district court's order and dissolve the preliminary injunction.

II. THE DISTRICT COURT'S ORDER IS AT ODDS WITH THE CONSTITUTIONAL STRUCTURE

In addition to botching its analysis of the scientific evidence, the district court erred by failing to grapple with the serious constitutional conflicts generated by its unsound view of the Second Amendment.

To be sure, *Bruen* stated that "the constitutional right to bear arms in public for self-defense is not 'a second-class right.'" 142 S. Ct. at 2156 (internal quotation marks omitted). But the Second Amendment does not render the remainder of the Constitution second-class, either. In fact, *Bruen* rejected the notion that the Second Amendment was "subject to an entirely different body of rules than the other Bill of Rights guarantees." *Id.* (internal quotation marks omitted). By its terms, *Bruen* placed the Second Amendment on par with other constitutional provisions. *See, e.g.*, *id.* at 2130 (explaining that the *Bruen* "standard accords with how we protect other constitutional rights" and "comports with how we assess many other constitutional claims"); *cf. District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008) (rejecting approach that applied to "no other enumerated constitutional right"). Thus, *Bruen* is premised on the understanding that the Second Amendment is a co-equal facet of

the framework enshrined in our founding charter. *See Bruen*, 142 S. Ct. at 2131, 2156.

Defying the delicate "balance" struck by the Founders in the Bill of Rights, *id.*, the district court elevated gun rights above all other constitutional guarantees. That was a grave mistake. Left undisturbed, the Second Amendment supremacy endorsed by the district court would undercut vital constitutional protections for civic engagement, property rights, and the preservation of public order.

A. The District Court's Order Clashes with First Amendment Protections for Civic Engagement.

The district court enjoined Chapter 131's sensitive-place prohibition against carrying firearms at public gatherings, demonstrations, and events that require government permits. *See* N.J. Stat. Ann. § 2C:58-4.6(a)(6). This Court has stayed this portion of the injunction pending appeal. *See* J.A. 7. For good reason: The district court's breathtaking conception of the Second Amendment needlessly pits gun rights against the values protected by the First Amendment.

The freedoms of speech, press, assembly, and petition, as enshrined in the First Amendment, constitute the lifeblood of our constitutional republic. As the Supreme Court has reiterated time and again, "[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy." *Cox v. Louisiana*, 379 U.S. 536, 552 (1965); *see also Brown v. Hartlage*, 456 U.S. 45, 52

(1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); *Buckley v. Valeo*, 424 U.S. 1, 93 n.127 (1976) ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish."). And as the structure of the Bill of Rights recognizes, uninhibited public discussion could not exist without peaceful assembly:

> It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.

Thomas v. Collins, 323 U.S. 516, 530 (1945).

But if Second Amendment rights are inflated beyond historical bounds, they risk severely circumscribing the ability to speak freely and assemble peacefully. Giving individuals free rein to carry guns at large public assemblies will make it much more dangerous to speak, assemble, and express controversial ideas. *See, e.g.*, Gregory P. Magarian, *Conflicting Reports: When Gun Rights Threaten Free Speech*, 83 Law & Contemp. Probs. 169, 169 (2020) ("In the real world . . . guns far more commonly impede and chill free speech than protect or promote it."). That chilling effect will likely be especially pronounced in communities that have historically

been silenced by targeted violence—including racial, social, sexual, and religious minorities. *Cf., e.g.*, Ari Freilich & Ariel Lowrey, *How America's Gun Laws Fuel Armed Hate*, Giffords (May 23, 2022) (collecting recent high-profile shootings targeting minority groups); Daniel Lathrop & Anna Flagg, *Killings of Black Men by Whites are Far More Likely to be Ruled "Justifiable"*, Marshall Project (Aug. 14, 2017).

Now is not the time to curb our expressive rights. Social cohesion and community bonds among Americans have reached historical lows, while polarization and distrust are at all-time highs. *See, e.g.*, Taylor Orth, *Two in Five Americans Say a Civil War Is At Least Somewhat Likely in the Next Decade*, YouGov (Aug. 26, 2022). In these tense times, many people have chosen to exercise their constitutional rights to speak, assemble, and protest. But far too often, those efforts at peaceful democratic discourse have been thwarted by individuals who deliberately wield weapons to chill and terrify. *See, e.g.*, *Armed Protesters Inspire Fear, Chill Free Speech*, Giffords (Dec. 15, 2022) (collecting examples); Mike McIntire, *At Protests, Guns Are Doing the Talking*, N.Y. Times (Nov. 26, 2022) (noting that the frequency of armed civilians appearing at protests and government proceedings "exploded in 2020"). In these fraught circumstances, a single spark of fear or frustration can lead to carnage and tragedy. *See, e.g.*, *Armed Assembly: Guns, Demonstrations, and Political Violence in America*, Everytown Rsch. & Pol'y (Aug.

23, 2021) (finding that demonstrations with armed individuals are six times as likely to grow violent or destructive as unarmed demonstrations); *see also supra* p. 10–11.

Regrettably, these actions have already warped our democratic discourse, and the decision below will accelerate the damage. Even four years ago, one-third of U.S. adults reported that fear of mass shootings stopped them from going to certain places and events. *See* Am. Psych. Assoc., *One-Third of US Adults Say Fear of Mass Shootings Prevents Them from Going to Certain Places or Events* (Aug. 15, 2019). And in 2021, a scholar at Northwestern University found that Americans were less likely to attend a protest, express their opinions at a protest, or bring children to a protest if guns were present. *See* Diana Palmer, *Fired Up or Shut Down: The Chilling Effect of Open Carry on First Amendment Expression at Public Protests* 113 (May 28, 2021); *cf. MacIntosh v. Clous*, 69 F.4th 309, 320–21 (6th Cir. 2023) (plaintiff stated claim for First Amendment retaliation where she alleged that county commissioner produced and displayed high-powered rifle during her remarks in Zoom commission meeting, chilling her speech).

The chill has impacted not only citizens, but also their elected representatives. As Congresswoman Giffords has experienced firsthand, armed individuals have used their weapons to intimidate government officials and grind lawmaking to a halt. *See, e.g.*, Allison Anderman, *Protecting Democracy from Armed Intimidation: A Guide for States*, Giffords (Sept. 16, 2022) (collecting examples); Joseph Blocher &

Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 Nw. U. L. Rev. 139, 146–59 (2021) (describing how armed protesters effectively impeded legislative proceedings at the Michigan State Capitol in 2020); Kelly Drane, *The Role of Guns in Rising Political Violence*, Giffords (Jan. 6, 2023) (describing how guns have been used to threaten government officials, particularly female lawmakers and lawmakers of color). Put simply, firearms have successfully been exploited to silence citizens and their leaders at every stage of the democratic process.

The district court's flawed analysis supercharges these concerns. Although the court acknowledged that "the reasoning behind" Chapter 131's sensitive-place restriction for permitted assemblies was "to protect First Amendment interests," J.A. 170, it repeatedly neglected these interests. For instance, the court improperly dismissed several closely analogous sensitive-place restrictions from the 1800s on the ground that they were unrepresentative. *See* J.A. 179. This overly rigid analysis ran headlong into *Bruen*'s teachings, including that analogical reasoning "is [not] a regulatory straightjacket" and that "courts can use analogies to . . . 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.

Moreover, the district court conceded that there was a history and tradition of prohibiting firearms at "location[s] involv[ing] a citizen's fundamental right to participate in the political process," yet it limited that tradition to polling places. J.A. 180. By this logic, participation in the political process begins and ends in the voting booth. But the Framers knew better. They understood that the right to vote would mean little without public assembly, exchanges of ideas, and discussions of controversial topics and issues—precisely the activities that New Jersey undertook to protect here. It is therefore unsurprising that ample historical precedent supports New Jersey's effort to protect these avenues of the political process through reasonable firearm regulation. *See* Opening Brief of Defendants-Appellants at 14–16, *Koons v. Att'y Gen. N.J.*, No. 23-1900 (3d Cir. filed July 20, 2023) ("Opening Brief").

The Constitution does not demand that New Jerseyans endure mortal terror when they peacefully and collectively exercise their First Amendment rights in public. This Court should reject the district court's blinkered view of history and tradition and reverse the portion of the preliminary injunction order requiring New Jersey to allow firearm carry at permitted public assemblies and gatherings.

B. The District Court's Order Undercuts New Jerseyans' Property Rights.

The district court also enjoined Chapter 131's requirement that property owners must consent to firearm carry on premises held open to the public. *See* N.J. Stat. Ann. § 2C:58-4.6(a)(24); J.A. 132. In doing so, the court engendered unnecessary conflict between the Second Amendment and the property rights of New Jerseyans. The injunction should therefore be dissolved.

The Constitution insulates private property from unwarranted interference. The Fourth Amendment protects "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). The Due Process Clauses, meanwhile, broadly prohibit the government from "depriv[ing]" any person of property "without due process of law." U.S. Const. amend. V; *id.* amend. XIV, § 1. And the Takings Clause restricts the government's ability to revoke the "right to exclude"—"'one of the most treasured' rights of property ownership." *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2072 (2021).

Consistent with these principles, New Jerseyans believe that gun owners should ask for permission before carrying guns on private property. *See* Ian Ayres & Spurthi Jonnalagadda, *Guests with Guns: Public Support for "No Carry" Defaults on Private Land*, 48 J.L. Med. & Ethics 183, 187–89, tbl.A4 (2020) (finding that just

one-third of New Jersey respondents believed a customer should be allowed to bring a gun onto private commercial property without express permission). So their elected representatives specified that individuals cannot bring firearms onto private property without the express consent of the property owner. *See* N.J. Stat. Ann. § 2C:58-4.6(a)(24). In so doing, these elected representatives did no more than codify the unremarkable and longstanding expectations of New Jersey voters.

Nevertheless, the district court nullified this default rule as applied to property held open to the public. It was wrong to do so. As the State and *amici* Professors of Property Law have explained, such regulation of other individuals' private property simply does not implicate Second Amendment rights—and even if it does, it is supported by ample historical precedent. *See* Opening Brief at 37–48; *see generally* Brief for Professors of Property Law as Amici Curiae, *Koons v. Platkin*, No. 1:22-cv-7464 (D.N.J.), ECF No. 93-2.

The district court failed to meaningfully rebut these points. It completely disregarded key cases illustrating that the Second Amendment does not entitle one person to disregard the property rights of another. *See, e.g.*, *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 737–38 (1970) (holding that "[t]he asserted [constitutional] right of a mailer" to send unwanted material to an unreceptive addressee "stops at the outer boundary of every person's domain" and that "[t]o hold less would tend to license a form of trespass"). The court then compounded that error

by committing others: It seriously misread a comparable Founding-era trespass statute in New Jersey itself, limiting the statute to hunting despite its plain text, and it inaccurately distinguished similar historical regulations in other states as not "analogous" or "representative." J.A. 154, 157. These errors led the court to effectively conclude that Second Amendment rights trump property rights when, in fact, each of these is an important facet of the same constitutional plan. This Court should remedy this needless conflict by reversing this portion of the preliminary injunction order.

C. The District Court's Holding Undermines the Constitutional Plan for Preserving Public Order.

Finally, the district court's view of the Second Amendment unnecessarily conflicts with the Framers' vision of public order. This incongruity is most clearly exemplified by the court's rejection of New Jersey's sensitive-place restrictions pertaining to government property.

"Our Constitution provides for ordered liberty." *Tinius v. Choi*, No. 22-7047, __ F. 4th __, 2023 WL 4378742, at *8 (D.C. Cir. July 7, 2023). It not only protects "We the People" from a tyrannical government—it also seeks to create a society in which "We the People" coexist peacefully as we go about our lives. To that end, the Constitution does not contemplate a lawless state of nature; rather, it strives towards

the maintenance of public order and presumes the state's monopoly on the public use of force.

This design is evident throughout the Constitution, several aspects of which directly promote public safety and personal security. For instance, the Constitution empowers the state and federal governments to enforce criminal codes. *See* U.S. Const. art. I, § 8, cls. 3, 18; amend. X. It simultaneously disciplines and regulates the exercise of this criminal justice authority. *See id.* amends. IV, V, VI, VIII. And it authorizes governments to enact policies that enhance the general welfare, maintain order, and mitigate socioeconomic conditions that may precipitate private strife. *Cf. id.* art. I, § 8; amend. X.

More broadly, the Constitution establishes the federal courts as a forum to peacefully resolve private grievances. *See id.* art. III; *id.* amend. VII. It creates an accountable Legislature and an empowered Executive to respond to new threats, including private violence. *See id.* arts. I, II; *see also, e.g.*, 42 U.S.C. § 1985(3). It imposes checks and balances to protect minority rights and avoid domestic discord. *See* U.S. Const. arts. I, II. It provides for a system of federalism so that communities can more effectively address local evils and adjudicate local controversies. *See Printz v. United States*, 521 U.S. 898, 918–22 (1997); *New York v. United States*, 505 U.S 144, 155–59, 168–69 (1992). And it establishes rights and structures that protect the rule of law, promote nonviolent methods for resolving disputes, and

mitigate private violence. *See* U.S. Const. art. III; *id.* amends. I, V, XIV; *see also, e.g.*, Thomas I. Emerson, *Toward a General Theory of the First Amendment*, 72 Yale L.J. 877, 884–85 (1963) (freedom of speech affords "a method of achieving a . . . more stable community" by allowing for discourse in forms "consistent with law and order").

Our system of government is not perfect, but it is replete with mechanisms to promote the rule of law and to minimize private violence. And under this framework, nowhere is the governmental mandate to preserve public order greater, and vigilante self-help less appropriate, than on government property. For these and other reasons, New Jerseyans' elected representatives enacted sensible sensitive-place restrictions on firearm carry in government buildings, such as public libraries and museums, airports and transit hubs, public buses, and government-owned entertainment facilities and hospitals. *See generally* N.J. Stat. Ann. § 2C:58-4.6(a).

The district court enjoined several of these provisions based on a flawed doctrinal and historical analysis. Relevant here, it held that the government's proprietorship did not justify the regulations; instead, it "limited" government proprietorship rights to "when the government is acting *as an employer* to manage its internal affairs." J.A. 124. That ruling was erroneous. As the principles above demonstrate, the State enjoys broad authority to protect the public order. Indeed, our constitutional framework, as reflected in our history and traditions, contemplates that

we will act collectively to ensure our safety rather than resorting to private violence. This Court should therefore reverse the portions of the district court's order enjoining the sensitive-place restrictions pertaining to government property.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's grant of a preliminary injunction.

Dated: July 27, 2023

Respectfully submitted,

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CERTIFICATES OF BAR MEMBERSHIP

I, Amit Jain, counsel for *amicus curiae*, hereby certify pursuant to Third Circuit Rule 28.3(d) that I am a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF COMPLIANCE

I, Amit Jain, counsel for *amicus curiae*, certify that this brief contains 6,435 words, based on the "Word Count" feature of Microsoft Word, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). I also certify that this document has been prepared in a proportionally spaced typeface using Word for Microsoft 365 in 14-point Times New Roman. I further certify that the text of the electronic brief is identical to the text in the paper copies and that the virus detection software SentinelOne Agent has been run on the file and no virus was detected.

Dated: July 27, 2023

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CERTIFICATE OF SERVICE

I, Amit Jain, counsel for *amicus curiae*, certify that on July 27, 2023, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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