UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

RONALD KOONS, et al. ***Plaintiffs*,** **vs.** **WILLIAM REYNOLDS, in his official capacity as the Prosecutor of Atlantic County New Jersey, et al.,** ***Defendants*.** **and** **NICHOLAS P. SCUTARI, President of The New Jersey Senate, and CRAIG J. COUGHLIN, Speaker of the New Jersey General Assembly,** ***Intervenors-Applicants*.**	)	**CIVIL ACTION NUMBER: 1:22-cv-07464-RMB-AMD** **ORAL ARGUMENT ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION** ***CONSOLIDATED CASES***

Mitchell H. Cohen Building & U.S. Courthouse
4th and Cooper Streets
Camden, New Jersey 08101
Friday, March 17, 2023
Commencing at 10:09 a.m.

B E F O R E: **THE HONORABLE RENÉE MARIE BUMB, CHIEF UNITED STATES DISTRICT JUDGE**

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Proceedings recorded by mechanical stenography; transcript produced by computer-aided transcription.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AARON SIEGEL; JAMES COOK; JOSEPH DELUCA; NICOLE CUOZZO; TIMOTHY VARGA; CHRISTOPHER STAMOS; KIM HENRY; and ASSOCIATION OF NEW JERSEY RIFLE & PISTOL CLUBS, INC., *Plaintiffs*,	**CIVIL ACTION NUMBER: 1:22-cv-07463-RMB-AMD**
vs.	***CONSOLIDATED CASES***
MATTHEW J. PLATKIN, in his official capacity as Attorney General of New Jersey; and PATRICK J. CALLAHAN, in his official capacity as Superintendent of the New Jersey Division of State Police, *Defendants*.	
and	
NICHOLAS P. SCUTARI, President of the New Jersey Senate, and CRAIG J. COUGHLIN, Speaker of the New Jersey General Assembly, *Intervenors-Applicants*.	**ORAL ARGUMENT ON PLAINTIFFS' MOTIONS FOR PRELIMINARY INJUNCTION**

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(PROCEEDINGS held in open court before The Honorable Renée Marie Bumb, Chief United States District Judge, at 10:09 a.m. as follows:)

THE COURTROOM DEPUTY: All rise.

THE COURT: Good morning. Good morning. Have a seat, you all. Thank you.

Okay. So we're here for oral argument in the case, consolidated case Koons, et al., Siegel, et al., versus Reynolds. The docket number is 22-7464. So I'll start with appearances, please.

MR. JENSEN: Good morning, Your Honor. David Jensen. I am counsel for plaintiffs, the plaintiffs in Koons.

THE COURT: Okay. Good morning.

MR. SCHMUTTER: Good morning, Your Honor. Daniel Schmutter from the firm of Hartman & Winniki for the Siegel plaintiffs.

THE COURT: Okay. Good morning.

MS. CAI: Good morning, Your Honor. Angela Cai for the State defendants.

THE COURT: Good morning.

MS. REILLY: Assistant Attorney General Jean Reilly for the State, Your Honor. Good morning.

THE COURT: Good morning.

MR. KOLOGI: Good morning, Your Honor. Edward J. Kologi, Kologi Simitz, on behalf of Senate President

Nicholas Scutari and Speaker Craig Coughlin.

THE COURT: Good morning.

MR. SIEGEL: Good morning, Your Honor. Steven Siegel with the firm of Cullen and Dykman. We're co-counsel for the Senate President and the Assembly Speaker.

THE COURT: All right. Good morning.

MR. SIEGEL: Good morning.

THE COURT: So we'll start with, as I said, this is oral argument on the motions for preliminary injunction. I have been advised by all parties that there is no intent on the part of either side to present testimony.

So, Mr. Jensen, Mr. Schmutter, have you collaborated with each other to figure out division of labor, or how do you wish?

MR. SCHMUTTER: No, Judge. But certainly, since Koons is the lead case, I have no problem if Mr. Jensen begins.

THE COURT: All right. I'll hear from you, Mr. Jensen. And my practice is to interrupt when I have questions, if you don't mind.

MR. JENSEN: Okay. That sounds good.

THE COURT: Okay. Thank you.

MR. JENSEN: Okay. Well, good morning, Your Honor. It was about two and a half months ago when I first appeared before you in this case, and we had a discussion about the governing law and went through the historical analogs that the

State had provided in support of these sensitive place restrictions or denominated sensitive place restrictions. And I think what we would submit at this juncture is not that much has actually changed since the hearing we had at the beginning of January.

Certainly a number of briefs have been submitted and there has been some points made. There's some things I'd like to clarify; I'm sure Dan would as well. But overall, the big-picture question, which is have we shown the existence of an enduring American tradition that upholds these types of regulations, I think the question [sic] is no.

One other big-picture issue we have is, which I think has been alluded to some in the briefing, but is this question of on standing, the issue of standing, which was somewhat significant to some of the claims, not so much the claims that were in our original case, although potentially one or two of the claims that have been added to that case, and the question of does the requirement of standing change when the posture moves from a temporary restraining order to a preliminary injunction? And I would submit that it does on the rationale that a temporary restraining order is looking to address an exigency that is going to arise between the time that the application for relief is being filed and the time that the Court is actually ruling on the merits of the motion, whether it's a preliminary injunction or a final injunction.

In the context we're at now, you know, ostensibly this is a preliminary injunction. I don't think it's really much of a secret that there's going to be at least one notice of appeal filed following this hearing and that from here, to a large extent, this controversy is going to move up to the Circuit.

THE COURT: But I wanted to back up, what do you mean by the requirement of standing? You're not saying that standing is not necessary.

MR. JENSEN: No. But I'm saying that the window of when injury is likely to be imminent opens up more when the context is a preliminary or, for that matter, a permanent injunction as opposed to a temporary restraining order.

So one thing I would point to you specifically is one issue that came up, and now I'm kind of stepping on Dan's toes here, but one issue that came up in the Court's decision on the Siegel motion in the context of airports was, well, is this actually imminent? Does anyone have any plans of going to the airport in a way that's going to be jeopardized or impacted by these restrictions between now and when the Court is going to be addressing things more at length?

Now, as an aside, I'm not -- you know, one of the things that actually came up when we were putting in our affidavits on that point, you know, Gil Tal is actually a pilot with a plane at a small airport. Nick Gaudio, one of our

plaintiffs, I didn't even know this at the time we were putting our papers together, but was actually taking a trip with his family over Christmas and routed the flight through Philadelphia in part to avoid the risk of arrest at the Camden airport.

So the point being that it's not always that easy to say that something -- that an injury isn't necessarily imminent in no small measure because our lives are not always that planned out in such methodical detail.

THE COURT: I think what you're saying is that at the time of a TRO inquiry, it's whether or not the injury is imminent. At the time of a permanent injunction, it is less so. I think that's what you're saying.

MR. JENSEN: Or -- that's what I'm saying. I think an alternative way of saying it would be that the proximity needed for an injury to be imminent is probably longer in the context of a preliminary injunction than a temporary restraining order, although that may be six of one and half dozen of the other.

Definitely one of the big-picture issues that emerges in the briefs, and in particular, in reading over the Court's decision in the Siegel matter, I saw this as something that the Court seemed to really be reaching out for -- and to be fair, I think if I was in the context of being the judge or a law clerk for the Court, I would be having similar questions -- is this

idea of, you know, in *Bruen*'s discussion of sensitive places, we have basically two sets of data points, and the Court doesn't really tell us how we get from one to the other. But we start out saying -- and where am I looking at here?

We start out talking -- so pages 21, 33 to 34 of the decision, but the section that's discussing sensitive place restrictions, let me just read to you from sort of the key part of the decision.

"Although the historical record yields relatively few 18th- and 19th-Century 'sensitive places' where weapons were altogether prohibited -- for example, legislative assemblies, polling places, and courthouses -- we are also aware of no disputes regarding the lawfulness of such prohibitions." Following that, there's a citation to an article by David Kopel and Joseph Greenlee called the "Sensitive Places Doctrine," as well as a reference to one of the amicus briefs that was submitted in the case. "We therefore can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment." And then it goes on to talk about how well, you know, in both *Heller* and *McDonald* we said, we don't mean to cast doubt on longstanding prohibitions on the carry of firearms in schools and government buildings.

Now, I mean, the issue or at least one of the issues that comes up here is when you actually look up, in particular,

this article by David Kopel and Joseph Greenlee, what you see that their conclusion is, is that as far as this idea of prohibiting firearms from schools and, for that matter, probably a generalized interest in prohibiting firearms from government buildings, you don't actually really see any direct historical analog, and that's true whether we're citing the focus of inquiry at 1791 or 1868.

THE COURT: I think that's -- and you are correct, that the article discusses that there are, in fact, no historical analogs to support that conclusion.

But I think it's fair to say that the Supreme Court was, in essence, saying it's just not fairly debatable, but that there should be no guns in schools. Isn't that what the Supreme Court was really saying?

MR. JENSEN: Well, I think at the end of the day, it's kind of hard to get around that, because it -- you know, *Heller*, *McDonald*, and *Bruen* all refer to restrictions on carrying guns in government buildings and schools as being presumptively lawful. And certainly at least prior to *Bruen* coming down, there was a significant amount of debate in the federal courts about exactly what that presumptively lawful language meant. You know, at one extreme it means that these are categorically lawful, discussion over. And at the other extreme it means that the Court has to apply scrutiny, but it looks like presumptively these pass.

I'm going to suggest that, particularly given that the statements are dicta, it's probably better to look at the presumptively lawful examples as things that are presumptively lawful, meaning they pass scrutiny. But in the big picture, I think it would be a little bit daft to say that the Court isn't communicating in pretty clear terms that they think that restrictions on schools and government buildings as a general proposition are going to be held up, right?

So the two data points we have are -- we've got three examples that were provided: legislative assemblies, polling places, and courthouses. And we've got an end result that says government buildings and schools. And as a side note, simply by virtue of the categories we've been naming, I'm not sure that any building that is simply owned by the government is going to qualify as a government building because if it did, for one thing, you wouldn't need to list schools. Schools are normally owned by the government.

How do we bridge the gap these between those two points? And normally when we're talking about rules of law, we're using deductive reasoning. Negligence is the failure to observe reasonable care. What is reasonable care? We take general principles, we apply those to specific facts, we come to a result.

THE COURT: Can I interrupt you, Mr. Jensen?

MR. JENSEN: Of course.

THE COURT: I'm not quite sure I'm following exactly where you are going. Are you suggesting that what the Supreme Court ruled, which you say in dicta, is an exception to the *Bruen* ruling or a part of the *Bruen* ruling? What exactly are you saying?

MR. JENSEN: I think we have to take it as an application of the *Bruen* ruling or an application of *Heller*, *McDonald*, and *Bruen* that hasn't come before the Court yet. If we accept it as a general proposition that the Court is going to wind up upholding schools and government buildings and that the historical record in terms of a tradition of regulation supports legislative assemblies, polling places, and courthouses --

THE COURT: Which those are the government buildings. Because you've said government buildings much more broadly. But *Bruen* discusses government buildings in terms of legislative assemblies, courthouses, and polling places.

MR. JENSEN: Well, *Bruen* discusses legislative assemblies, polling places, and courthouses as the examples that can be found in the historical record showing traditions, which is also my takeaway of what the Kopel and the Greenlee article says. But the Kopel and the Greenlee article also says, well, this doesn't really get you to schools.

So how do we take --

THE COURT: No. But are you reading "government

buildings" more expansively than legislative assemblies, polling places, and courthouses?

MR. JENSEN: Well, I think inferentially government buildings can't mean simply any building that's owned by the government, because otherwise there would be no reason to specify courthouses and legislative bodies. Polling places are a little bit different because a lot of times those are privately owned.

THE COURT: No. I just wanted to understand what your argument was, because you keep saying "government buildings," and I didn't know if you were expanding that beyond legislative assemblies and courthouses. And you are or you aren't?

MR. JENSEN: I am and I'm not. Sorry. I realize that's not a really square answer. But normally we're using deductive reasoning. Here we need to use inductive reasoning. What are the common threads that run between legislative assemblies, polling places, and courthouses that would get us to an end result that includes schools?

And I think the answer to that is all of these are places that have a certain level of security attached to them, right?

THE COURT: Tell me why you're making this argument. What sensitive place restrictions is it going to in this legislation, so I can follow your argument?

MR. JENSEN: Well, I think, frankly, it goes to all of them, because what we're talking about is what's the actual analytic model that we're going to use to address whether these pass muster. And in particular, do they line up with the historical tradition?

THE COURT: Okay.

MR. JENSEN: So what we can take as more or less a given is the Supreme Court saying legislative chambers, polling places, and courthouses, there's a historical tradition for those. The Supreme Court is also saying we can use analogy to build out other acceptable sensitive place restrictions, and it's basically offering up we think "schools" passes muster.

So if you're looking at it from that perspective, which I think is a good perspective to be looking at it from, the question becomes: What are the defining characteristics of those three historical categories, legislative assemblies, polling places, and courthouses?

And what I would suggest to you is the defining characteristic in all of those places is there is some level of security present and a restriction on entry. And one thing that's significant to note about that, and in particular, when we're looking at the lack of support for schools and any relevant time period is that the nature of schools has very likely changed in the time period from 1791 or even 1868 to the present.

Now, if you go to a school, a school normally has a controlled perimeter. You have to get buzzed through via a security camera. That would also be true of places like the secured portion of an airport. Because the big-picture idea here is that --

THE COURT: And a stadium.

MR. JENSEN: I suppose it depends on exactly what the nature of the stadium is. I mean, is it -- again, taking that -- taking the approach I just offered up as an example, you'd have to say that a pretty significant question would be what's the level of security that's present there?

Maybe an alternative way of framing it is saying that, well, people always have a constitutional interest in being able to protect themselves. Is there something about this particular place where we can say that someone isn't really giving that up by walking in there without a defensive weapon.

Certainly, again, if we're talking about places like courthouses, legislative assemblies and, to some extent, polling places, depending on exactly how the polling place is being run, that would be true.

The one other example we have, and it's not clear -- the one other clear historical example we have and the only thing that's a little up in the air is exactly how much weight do we give to this, but we have the Statute of Northampton and

derivatives of it that were enacted in various colonial states. And, you know, the Supreme Court discussed the Statute of Northampton at some length in *Bruen*. Most of that discussion focused on the -- here, let's actually start out -- well, not start out, let's take a look just briefly at what the Statute of Northampton said.

"No person shall come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor go nor ride armed by night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere, upon pain to forfeit their armor to the King and their bodies to prison at the King's pleasure."

So a significant amount of the Court's discussion is addressing this language about fairs and markets and to the terror of the people. But what's also not really being discussed too much is that this also prohibits coming before the King's justices or the King's ministers doing their offices with arms. The King's ministers doing their offices has the qualification of with force, which means that it may not be an absolute prohibition, but certainly I think it's fair to say that a takeaway from here is that, as a matter of English law in existence at the time of the Declaration of Independence, it would be fair to say that there was a tradition of restricting the ability to bring arms in front of the King's justices,

which basically amounts to courthouses.

THE COURT: I want to make sure I'm understanding what you're saying to me. Because for a moment I thought you might have been undercutting Mr. Schmutter's position. I thought that what you were saying to me is that if we look at to what the Supreme Court's underlying reasoning might be as to why the historical analogs support such restrictions, one of the characteristics that you focused on is that these were places where typically there's some level of security and there's a restrictive entry.

That characteristic applies in stadiums, airports, casinos, whatever. And we can debate that in a moment. Is that what you're saying? Or are you adding to that characteristic but it must be in advance of a government function?

And what do you say the Supreme Court said? Because if it's only the characteristic of, well, if there's some level of security there, then I don't think that's the position your co-counsel takes.

MR. JENSEN: Well, no, I don't think that some level of security on its own is enough. And in particular, when we're talking about stadiums and casinos, because while there may be some level of security, this isn't a situation where people are going through metal detectors and there's armed security present or very readily available.

With regard to an airport, the secure part of it, yeah, that would definitely be the case. But I thought we had made it pretty clear, we weren't trying to challenge restrictions on carrying within the secure area of an airport. We're talking about both the ability to access a private plane as well as the ability to check baggage.

THE COURT: No; with respect to airports.

But I just thought you were taking somewhat of a detour by making the argument that what was really most present in the mind of the Supreme Court was, well, if there's traditionally a level of security at the establishment, whatever that is, then the restriction would be acceptable. I'm just -- are you qualifying that or is that your position? Because I don't think that's Mr. Schmutter's position.

MR. JENSEN: Well, I think it has to be a fairly high level of security. If -- if -- preliminarily, if a property isn't being used in the actual administration of government, it's a little difficult to see how this would be anything other than an application of private property owner rights in the first place, meaning that I think it's implicit that if we're talking about security restrictions, well, starting out with the first three, legislative assemblies, polling places and courthouses, by definition, these are government buildings carrying out government functions.

I have trouble actually coming up with a really

direct -- a really good analogy that wouldn't involve governmental functions. Although perhaps a couple that would be good would be the ones you just offered up, would be stadiums and casinos where there may be some level of entrance restriction, but this isn't a level of entrance restriction that it's that easy to analogize to a court or to a legislative assembly, right?

THE COURT: Well, talk to me about -- and the State makes much of this -- talk to me about, for example, the PNC Center. It's government owned, right?

MR. JENSEN: It -- it's government owned. It could be privately owned, which is significant. It's significant because -- why should the level of restriction depend on who the owner of the property is when we're not talking about something that is a governmental function?

THE COURT: Well, that's my question to you. Are you limiting -- we seem to be going around in circles. But are you limiting -- are you saying to me that if there is a presence of security present, that there are measures in place to restrict entry, that in addition to those characteristics there must be a governmental function and those are the types of places the Supreme Court has said in *Bruen* are proper to restrict guns. Is that what you're saying? Is it those two characteristics?

MR. JENSEN: Well, okay. It --

THE COURT: Because as I sit here and listen to you

now, Mr. Jensen, it seems to me that you're almost advocating that the restriction to the PNC Center is proper under *Bruen*. What am I missing?

MR. JENSEN: Okay. So, first of all, this has to be something that we can analogize to those three restrictions that have already been offered up as historically valid examples.

THE COURT: Right. And I thought that you had made the State's case for them on the PNC Center by your arguments. I just want to make sure I'm understanding you correctly.

MR. JENSEN: Okay. So the fact that something is a government building standing alone doesn't make it analogous to those three categories.

THE COURT: Okay. Because?

MR. JENSEN: Well, first of all, because all three of those categories are carrying on government functions.

What I don't want to foreclose is the possibility that sensitive place restrictions can validly apply in places that are owned by private parties.

The starting premise is we have those examples, the three, you know, legislative assemblies, polling places, courthouses.

THE COURT: So it's critical to your argument that there be a government function?

MR. JENSEN: I wouldn't necessarily say it's

critical, but I think that's a pretty key component of it.

THE COURT: Okay.

MR. JENSEN: And let me give you a good -- what I think is a good example.

What if an airport is privately owned and they have a TSA-controlled security perimeter? An airport is not really performing a government function, and here it's not owned by the government, but it's much easier, at least for me, to analogize between those three examples and the example of the secure area inside an airport.

If we're talking about stadiums in general, this sounds a lot more like fairs and markets where the simple fact that you have a number of people assembled together is historically not a valid reason for the regulation.

So I appreciate the back-and-forth because I think we actually did dress up the nuances here some. But what I would say is that the fact of governmental function is not an absolute requirement, but certainly, certainly that is a common theme that runs between those three examples the Supreme Court gave.

Another common theme as stated is this notion of security. I think it might be a little bit much to read that as saying that a sensitive place restriction would never be valid anywhere that was not a government building carrying on a government function.

THE COURT: Okay. Fair enough.

And if it were the government providing the security, what would you say to that?

MR. JENSEN: I think it's going to be the same thing about whether or not it needs to be a government building performing a government function. That would certainly be a factor that would weigh somewhat strongly in favor of saying it's easier to analogize this to the historical examples we have. But if you're looking at something like a school, it may not be the government that's providing the security. It could -- it could -- you could have police officers providing security at the school. You could have private officers, private security companies providing security at the school. I don't know that you can attach dispositive significance to that. But I think it would be a very strong factor.

Okay. Honestly, there's probably a long list of things I could potentially go into, but one of the points that I don't think really came out that well in the briefing but I think needs to be observed, and this is going in a somewhat different direction than we've been talking about, but one of the sensitive place restrictions at issue here is the restriction on restaurants and bars that serve alcohol. And one of the points that's been made is, well, can we limit this as being valid just in the context of bars?

And so the first -- I mean, one question of course

is, would the restriction be valid in bars? But stepping back from that, there's a somewhat more basic issue here, which is that if you look through the actual liquor laws of New Jersey, we really don't have a license classification that applies to bars per se. We've got a whole bunch of licenses that allow for on premises alcohol sales, but it's not like you can say someone who has this license or that license is running a bar versus someone who has that license or this license is running a restaurant.

The Legislature didn't provide a definition for the term "bar." And while I think most of us can come up with a rough definition of bar or maybe what we think a bar looks like, that does really make some problems of application in terms of how you would even be able to limit that order because how would you provide any sort of bright line rule saying so this is where the restriction is valid and this is where it isn't?

Beyond that, unless you have anything further, it might be a good time to turn this over to Mr. Schmutter.

THE COURT: Mr. Schmutter. Thank you, Mr. Jensen.

MR. JENSEN: Thank you.

THE COURT: Good morning.

MR. SCHMUTTER: Thank you, Your Honor. You know, I think I'll go first to the security sensitive places thing that Your Honor was just discussing with Mr. Jensen.

THE COURT: And I know you will talk very slowly, Mr. Schmutter.

MR. SCHMUTTER: Very slowly, Your Honor.

THE COURT: Because if I don't ask you, Mr. Kurz will.

MR. SCHMUTTER: By the way, I think Your Honor's approach last time was actually extremely helpful, not that it's your responsibility to do that, but thank you for doing that.

We don't think security gets you there.

THE COURT: Okay.

MR. SCHMUTTER: As Your Honor is aware, we so far have only seen one thing that gets you a sensitive place. That's "governance." And it's actually narrower than government functions, because as Your Honor knows, the State claims that libraries and museums and all that stuff is government functions. It's the function of governance. Legislatures, courthouses, polling places, those are the three *Bruen* sensitive places.

The thing they have in common is they are all governance activities. The Legislature governs. The courts are part of government governance. Voting is part of that whole process. There is nothing else in the record that shows any kind of historical tradition. And I want to make an important point. I think we make this in our brief, but it

bears emphasizing.

When you read *Bruen* carefully and you read the "sensitive place" section carefully, and I think we talked about this at the TRO stage, there is a difference between *Bruen*'s discussion of the *Heller* dicta, schools and government buildings, and the following sentence in which they actually identify actual historical sensitive places: legislatures, courthouses, and polling places.

I think Your Honor pointed out something very important in the colloquy with Mr. Jensen. The *Heller* dicta is just that. It's dicta. When the Court throws out government buildings, sensitive places and government buildings were not an issue in *Heller*. That's, as we all know, now that Justice Stevens has retired, we all know where all that dicta came from. There's a whole bunch of dicta in *Heller* that's very frustrating because it has nothing to do with the case. We now know that that was basically to get Justice Kennedy's vote. That's what Justice Stevens told us in his book.

So the Court goes there, but *Bruen* does not adopt -- the Court in *Bruen* did not adopt that. It mentions the dicta. It then goes on to do its own analysis for the sensitive places which is just the three governance functions, because --

THE COURT: Are you deviating from Mr. Jensen or are you expanding upon what he said? This is where I'm having somewhat of -- I want to make sure I'm not misunderstanding.

And I think Mr. Jensen has sort of steered me clear in my thinking.

I thought at one point Mr. Jensen was saying that what was critical in the *Bruen* decision is that there must be some element of security. It wasn't an essential -- it wasn't the ingredient, but it was a key component. Do you agree with that or don't agree with that?

MR. SCHMUTTER: We agree that the three *Bruen* examples all exhibit security. Security by itself doesn't get you there.

THE COURT: Okay.

MR. SCHMUTTER: Which is why the PNC Bank Center, which is why stadiums, which is why other plainly not historical locations don't get to be sensitive places because they have security. That's not -- that's not the historical tradition. Remember, it's about historical tradition. And when you look at Kopel and Greenlee, it's about governance. And the reason is because it is historically critical that the governance function not be subject to violent coercion. You don't want legislatures to fear violent coercion in the Legislature. Judges --

THE COURT: Do you agree -- I am digressing, but I am curious since you have discussed your position about dicta in *Heller*, do you find that this is dicta in *Bruen*?

MR. SCHMUTTER: No. Because sensitive places was a

position that New York took in *Bruen*. So New York said oh, yeah, it's really crowded, so it's all sensitive, these are all sensitive places. So they actually argued that. So it did -- it was -- it did matter to the outcome of the case, they talked about sensitive places, not so in *Heller*. That was thrown in there for the benefit of getting that vote which, you know, happens. It's a shame, but it happens. It's just one of those things, I guess, you do on a -- at the Supreme Court. But *Bruen*, it was an actual issue, so it's not dicta in *Bruen*.

But importantly, you know, we -- it's critical to distinguish between the previous sentence that talks about the *Heller* dicta and *Bruen*'s actual holding, which is that there are three sensitive places that they're aware of: Legislatures, courthouses, polling places. And that remains true. There's nothing in this record that expands beyond those sensitive places. And we've talked about this a lot. We talked about it at the TRO. We talked about it again because of the Patrick Charles affidavit, which, as Your Honor knows, we think it's improper; but nevertheless, let's talk about what Charles said. His opening line practically is this concept of macro-level historical analysis.

Macro-level historical analysis is just the same let's aggregate, let's make these arbitrary aggregations because we know that we don't have enough historical citations to justify any of these sensitive places. So Charles goes into

the same analysis that we argued was improper at the TRO stage. It's just as improper now. You don't get to aggregate just because you know that you only have one or two or three citations to rely on, because we know that one or two or three are not good enough. The Court told us that in *Bruen*.

So as we stand here, there's still nothing in the record to support anything other than legislatures, courthouses, and polling places.

You know, I think, as Mr. Jensen said, the record hasn't improved since the TRO stage. They've tried and they've dressed it up. I mean, my God, the Rivas declaration literally, I mean Your Honor saw it in our brief. We have this giant string cite in which we show how in *Bruen* the Court disapproved of every single one of her citations, but they're -- you know, this is --

THE COURT: I didn't hear you. Disapprove what?

MR. SCHMUTTER: Disapproved of every single one of Rivas's citations, is literally rejected in *Bruen*. Your Honor saw that giant string cite that we had basically, like here's a citation, here's the citation to *Bruen*. Here's another one of her citations, here's the citation to *Bruen*, one after the next after the next after the next.

The State's position is fundamentally we don't like *Bruen*. That's what it's been from the beginning. It's what it remains today. All they're doing is they're saying we don't

like *Bruen*. It's what all this interest balancing stuff is.

You know, we've got all these government officials submitting declarations about how terrible guns are. That's interest balancing. Yeah, I get it, the State of New Jersey doesn't like people -- doesn't want people carrying guns, but the Supreme Court says you can't do that. People have a right to exercise the right to keep and bear arms.

So, you know, we are here today with basically the same record that they tried to produce at the TRO stage. They haven't made it any better.

Now, one thing that has improved, and Your Honor alluded to this as well in the colloquy with Mr. Jensen, is standing. So we agree that it is much easier to show standing at the PI stage than at the TRO stage, because as Your Honor observed in the ruling, the TRO ruling in Siegel, Your Honor held that some of the sensitive place challenges, there was not a reasonable prospect that the injury would occur during the TRO phase, which is typically a couple weeks. In this case it's a couple months. But the PI extends out to the end of the case. So the PI time frame is really literally years.

And so, you know, look, Your Honor, we -- our contention is and has been from the beginning that we've pled and shown plenty of standing facts from the beginning that satisfy standing in every one of the claims. However, because the State, I mean the State has focused on standing so much,

Your Honor may recall the question to counsel, don't you want -- don't you want an up or down ruling on the merits? Don't you want to know if your statute is constitutional or not? The answer is obviously no, they don't. They don't want a ruling on the merits. I think they recognize how vulnerable the statute is from a constitutional perspective, so they're doing everything they possibly can to bring these standing arguments. So we, in our supplemental submissions, both our initial supplemental submissions at the beginning of the PI briefing and then subsequently as well in our reply papers, we went belt and suspenders and another belt and another pair of suspenders with standing facts. Our people have actual doctor's appointments. Our people have checked and they're allowed to carry. Aaron Siegel is allowed to carry at his urgent care center where he works. We have people who actually are going to the zoos Memorial Day weekend and things like that. So we have, you know, like -- I don't think it was necessary. I think we made an adequate record before, for the PI phase.

But nevertheless, we really -- we just wanted to just load the record up as much as we possibly could because this case should not be decided on standing. It should be decided on the merits.

THE COURT: Let me ask you about standing with respect to the permit process.

MR. SCHMUTTER: Yes.

THE COURT: All of your plaintiffs already have their permits, other than from my reading, other than Cuozzo; am I right?

MR. SCHMUTTER: No. Kim Henry. Kim Henry has none of the permits. She is a single mom who's hiding from her violent ex-boyfriend. She's not currently working because she's in danger from her boyfriend and so she's very low income. She's on assistance essentially, lives with her mother. She hasn't applied for any of that stuff because she can't afford it. So she is one of the key --

THE COURT: What steps has she taken?

MR. SCHMUTTER: She hasn't done anything yet.

THE COURT: Okay. And what about Cuozzo? What steps has she taken?

MR. SCHMUTTER: Cuozzo, I don't recall. I think she has applied -- I'm not sure. I have to go back and look at the record, Your Honor. I don't recall what Cuozzo has done.

THE COURT: Because isn't the concern there is that if -- let's use Cuozzo, for example, applies and is granted a permit, where's the issue?

MR. SCHMUTTER: Cuozzo or Henry? I'm not following.

THE COURT: Well, Cuozzo hasn't finished her permit process, has she?

MR. SCHMUTTER: I believe that's correct.

THE COURT: Okay. If she's granted a permit, where is there a standing issue?

MR. SCHMUTTER: As to which claim? I'm sorry, I'm not following.

THE COURT: As to the -- well, you've challenged the issue with respect to the permit process.

MR. SCHMUTTER: Oh, oh. I'm sorry. Everybody has to renew every two years. Everybody is going to have to renew within the reasonable time frame of a preliminary injunction.

THE COURT: But the law says that if you have to reapply -- or you have to renew in two years, the law on its face says what is applicable two years from now are the same standards that were in place when you applied. And for I don't know how many of the plaintiffs, most of them, the law doesn't apply by the plain terms of the legislation. Do you agree with that?

MR. SCHMUTTER: No. I'm not following. Is Your Honor saying that if I got a permit before December 22nd, the new standards never apply to me?

THE COURT: That's how I read the legislation.

MR. SCHMUTTER: I don't believe that's what the statute says. If I --

THE COURT: Well, let's have a look at it.

MR. SCHMUTTER: I'm pretty sure when you renew, you're subject to the new standards, the new fees, the new

standards, everything. I don't think you're forever governed by the old standard.

THE COURT: Well, let's take a look.

MR. SCHMUTTER: I don't have the statute in front of me, Judge. It's the first I've --

THE COURT: You don't have it memorized?

MR. SCHMUTTER: Almost. 98 percent memorized, Judge. But I've not heard this argument before. So I didn't look at it from that perspective, but I'm almost positive that's not correct.

THE COURT: "And they thereafter be renewed every two years, in the same manner and subject to the same conditions as in any case of original applications."

Seems pretty clear to me.

MR. SCHMUTTER: Is that the old law or is that the new statute? Because that --

THE COURT: That is the new statute, Mr. Schmutter.

MR. SCHMUTTER: Judge, I'm sorry. I apologize. I'm going to have to look at the context. This is the first time I'm hearing about this.

THE COURT: Okay. Well, it just seems to me that -- and maybe it's a legislative oversight, but, you know, it's not for this Court to rewrite legislation. But it seems to me that the Legislature contemplated that if you got your application to carry before the law was enacted, that the standards that

were in place before the legislation, pardon the pun, carry with you.

MR. SCHMUTTER: Well, on behalf of all the people who already had their permits, I certainly -- I'm sure they would love that to be the case. I don't think it's the case.

THE COURT: Well, it seems to me to be pretty plain on its face unless someone tells me that I'm interpreting it incorrectly. "In the same manner and subject to the same conditions as in the case of original application." Seems pretty clear to me.

MR. SCHMUTTER: And so Your Honor's thought is that applies to fees as well; is that right?

THE COURT: It's not My Honor's thought. This is what the Legislature ruled.

MR. SCHMUTTER: No. Judge, look, I apologize. It's literally the first time I --

THE COURT: And perhaps some of you might say this is because it was rushed to legislation, perhaps. But it's not for this Court to rewrite legislation.

MR. SCHMUTTER: Well, certainly then Nicole Cuozzo and Kim Henry have standing.

THE COURT: That's why I'm raising the question.

MR. SCHMUTTER: Well, certainly they have standing then, because if they don't have their permits yet, they're subject to the new rules.

THE COURT: But my question is, is that who's to say they won't get their permits?

MR. SCHMUTTER: But then --

THE COURT: And then let me follow this through with you.

MR. SCHMUTTER: Sure.

THE COURT: And then the question becomes, assuming you're correct and I agree with you, your argument will then be, but two years down the road, Judge, they'll have to go through this process again. Let's just play it out.

And my question for you then, is that, you know, that seems to me to be more of a permanent injunction as opposed to a preliminary injunction issue because two years down the road is two years down the road.

MR. SCHMUTTER: So two thoughts on that. So to the extent that Cuozzo and Henry do not yet have their permits, they currently have standing to object to the procedures. It's not a matter of not getting the permits. This isn't a permit denial concept. This is it's unconstitutional to require them to do the things that the statute requires. So it's unconstitutional to make them go through the procedures that we're objecting to, and it's unconstitutional to subject them to the standards we're objecting to, and it's unconstitutional to subject them to the fees that we're objecting to.

So to the extent that neither Cuozzo nor Henry

currently have a permit, they have standing right now to object to that right now.

THE COURT: Okay.

MR. SCHMUTTER: Now, the second argument is, I do think actually two years is within the preliminary injunction time frame.

THE COURT: Preliminary or permanent?

MR. SCHMUTTER: Preliminary.

THE COURT: Well, why?

MR. SCHMUTTER: Because preliminary goes out till the end of the case. We don't know when this case is going to end. As Your Honor knows, cases last years. We shouldn't -- I don't think for standing purposes we can prejudge when the end of the case is going to be.

THE COURT: But why can't I just revisit it at a later date? Why do I have to visit now in a preliminary injunction if it's not even pending for two more years? That doesn't seem correct to me.

MR. SCHMUTTER: Because I don't -- I'm not aware --

THE COURT: Because what I would say to you is, Mr. Schmutter, let's revisit this issue in a more timely fashion two years from now or a year and a half from now, but --

MR. SCHMUTTER: Yeah. I think we have the right to seek preliminarily injunctive relief for injury at any time

during the relevant time frame. Unlike a TRO, which is emergency, you know, hair-on-fire stuff, preliminary injunction is not. Preliminary injunction is simply what should the conditions be while the case is being litigated. And it's generally dealt with at the beginning of the case. I'm not aware that --

THE COURT: And if I decline to issue it now and say I'll decide it down when it becomes more quote-unquote ripe, would you fault me?

MR. SCHMUTTER: I think so, yeah. I think that's wrong, Judge. I think that's not the correct approach.

THE COURT: Okay.

MR. SCHMUTTER: I mean, I hear Your Honor and I hear the point Your Honor is making. I don't think that's the correct way for preliminary injunctions to happen.

I think preliminary injunctions, a litigant is entitled to a preliminary injunction if they satisfy the requirements at the time that the motion is made.

THE COURT: Okay.

MR. SCHMUTTER: And it applies through the time frame of the preliminary injunction, which is the entire case.

THE COURT: Fair enough.

So assume you're correct and all of the factors for the issuance of a preliminary injunction are met, irreparable injury, balancing of the equities, et cetera, et cetera, you

have some facial attacks on some of this legislation. Why do I have to decide those now? Because where's the irreparable injury?

Let me start with the one that comes to my mind is your challenge, your equal protection challenge as to the provision that exempts judges and others. Why do I have to decide that now?

MR. SCHMUTTER: Because all of the plaintiffs suffer that injury now.

THE COURT: How are they being injured by the fact that someone else might be getting a carry permit when they themselves have one?

MR. SCHMUTTER: Because they can't carry in places --

THE COURT: After all, I mean, you are promoting the right to carry a firearm. So how can you argue that your plaintiffs are being irreparably injured when someone else also has the right to carry a firearm? What am I missing?

MR. SCHMUTTER: Because right now -- I'm sorry, Judge. I interrupted you.

THE COURT: What am I missing?

MR. SCHMUTTER: Right now today the constitutional injury is that they can't carry in the sensitive places that judges, prosecutors, and attorneys general can.

THE COURT: But if I say they can?

MR. SCHMUTTER: I'm sorry?

THE COURT: If I say they can, what's the irreparable injury? If I say, if this Court rules that your clients can, what is the irreparable injury now with respect to your challenge, the equal protection challenge?

MR. SCHMUTTER: Because they're all -- there's still restrictions. We haven't challenged everything in the statute. We've sought relief on some things. But there are all sorts of things we haven't challenged that judges, prosecutors, and attorneys general have the right to do that we don't. For example, judges can carry in schools. Attorneys general that work for the Attorney General's Office can --

THE COURT: But you don't want to -- okay.

MR. SCHMUTTER: -- can carry in schools. I mean --

THE COURT: You don't want to carry in schools, so I -- can you focus --

MR. SCHMUTTER: You can carry in -- I mean, we can pick a -- I'm sorry, Judge. I interrupted you.

THE COURT: I want you to focus on the irreparable injury part of the aspect. Because if I don't have to decide the equal protection challenge with respect to that provision, I don't want to.

And so you would have to persuade me, and the reason -- the way I get there is I find no irreparable injury. So you will have to -- and maybe I'll order further briefing on it -- you'd have to show me how your plaintiffs are being

irreparably injured. Here's the example that we just discussed. You say, well, judges can carry in schools, but your plaintiffs don't seek to carry in schools. So that's not irreparable injury, right?

MR. SCHMUTTER: Well --

THE COURT: What I'm saying is, you have to at least address the irreparable injury stage to persuade me why I need to rule now. That's all I'm saying. And I don't know that you've done that. Have you?

MR. SCHMUTTER: Yes. So let me answer in two ways, Judge, because there's actually more to it than I think is clear.

The exemption that we're challenging doesn't just allow judges, prosecutors, attorneys general to carry in the sensitive places. They're exempt from all of the restrictions in 2C:39-5. That means that Your Honor could walk into a school with a machine gun. I mean, that is -- this exemption is really, really broad. And so there's a whole swath of things that my clients can't do that the exempt individuals can, including carrying in schools or carrying in other places that we haven't challenged.

THE COURT: That's a statement that you've made. But now let's deal in reality. What is it that your plaintiffs want to do that you say these other individuals can do? And by the way, what's your classification on your equal protection

challenge?

MR. SCHMUTTER: I'm sorry?

THE COURT: What is the classification?

MR. SCHMUTTER: Classification is -- is the exercise of a constitutional right. So you can't discriminate -- under the equal protection clause, you can't discriminate on the exercise of a constitutional right. So our people want to exercise their Second Amendment rights. They're being discriminated against in the exercise of their constitutional right because they don't fall into the classification of judges, prosecutors, and attorneys general.

THE COURT: Okay. And so now let's flesh that further out. Where?

MR. SCHMUTTER: Everywhere they want to. Our people, my plaintiffs, the allegations regarding the suspect classification is about they would carry anywhere. They would carry everywhere. But they're not asserting that they have a Second Amendment right to carry in the nonchallenged locations. They're asserting that they should be able to carry where these other people should be able to carry, and that's an equal protection claim.

And I guess I don't know if Your Honor is looking for an allegation in the complaint that says -- where Aaron Siegel says I would carry in schools if only I were a judge or a prosecutor. That's not in the record.

THE COURT: No. It's not only if I were a judge. But why can a judge carry in a school and I can't carry in a school? But your clients are not looking to carry in schools.

MR. SCHMUTTER: That's not true.

THE COURT: They are?

MR. SCHMUTTER: They would carry anywhere they were allowed to carry. What these plaintiffs have made clear is that they carry for personal defense, they carry for defense of themselves, their families and the people around them.

All you have to do is look at Varga and Cuozzo, the church plaintiffs. They're not just protecting themselves. They're protecting the church community. That's what this is all about for them. So these plaintiffs would carry anywhere they could carry. I think the record reflects that -- for example, let's look at Varga. They have the 14-acre campus and they lease one of their buildings to a school. I think it's absolutely clear that Tim Varga would carry in that school if he could. I think that if he -- if there were a way for him to carry in the school constitutionally and lawfully, I think he absolutely would carry in the school if he walked into that building. He's on the security committee.

THE COURT: If the classification is one that's professional-based, then it's a rational basis test, correct?

MR. SCHMUTTER: I'm sorry?

THE COURT: It's a rational basis test, correct?

MR. SCHMUTTER: No. It's strict scrutiny.

THE COURT: If it's professional-based?

MR. SCHMUTTER: It's still strict scrutiny because it implicates -- it impairs the exercise of a constitutional right. It's only rational basis if there's no constitutional right involved, right?

So if I said --

THE COURT: But how is that a suspect class?

MR. SCHMUTTER: I mean, the cases that we cite make that clear. If I said, oh, judges are allowed to buy 50-ounce Slurpees and I'm not, that's rational basis because there's no suspect class. There's no impairment of a constitutional right. I don't know if you have a constitutional right to -- maybe you do actually because the New York case, it was stricken. But if we're talking about Slurpees, that's probably rational basis. If we're talking about a right to keep and bear arms, that's strict scrutiny. That's a pretty bright line.

If you're being discriminated against in the exercise of a constitutional right, you get strict scrutiny. I think the law is -- I think the citations support that really pretty plainly, Judge.

THE COURT: Okay.

MR. SCHMUTTER: Did I answer all Your Honor's questions on those? I hope I did.

Okay. I want to talk a little bit more about irreparable harm because -- and there's a few cases that I want to cite to the Court that were not in the briefs. I circulated them to counsel on Monday so they know that I'm going to be talking about some of these cases.

I guess I want to talk about -- because the State has argued that the economic harms like the fees and the insurance are not irreparable. And that really -- that takes an incorrectly non-nuanced approach to what economic harm is.

Of course, the general rule is that when you have money damages, you don't have irreparable harm. But the first thing you have to do, first of all, is look at things like sovereign immunity, right? I have no idea how we would recover the cost of insurance from the State. I don't know if the State is going to waive sovereign immunity. I tend to doubt it. But, I mean, you look at cases like *Baker Electric Cooperative vs. Chaske*. By the way, I have copies for the Court. Did Your Honor want me to --

THE COURT: Just give me the citations, please.

MR. SCHMUTTER: Okay. So *Baker Electric Cooperative vs. Chaske,* it's 28 F.3d 1466. That's an Eighth Circuit case. That stands for the basic principal that just because there's economic harm, if there's a sovereign immunity problem, you can't recover. That's irreparable harm. So that's just one of the classic examples.

Another example is where you can't be reasonably certain about damages.

THE COURT: But there's no sovereign immunity against the individual who's collecting on behalf of the State. So I don't think that the plaintiffs need to be concerned there. I don't know that we need to get too bogged down in this analysis, Mr. Schmutter.

MR. SCHMUTTER: That's fine, Judge. Let me just -- if I could just throw a couple citations out real quick. I just want to make sure it's in the record.

THE COURT: All right. Go ahead.

MR. SCHMUTTER: I know, Your Honor. I understand. I hear Your Honor.

Husky Ventures vs. B55 Investments, that's a Tenth Circuit case, 911 F.3d 1000, that talks about, you know, you have to have a reasonable certainty about the damages to recover, and if you don't, it's irreparable.

One thing I do want to talk about though and emphasize is I want to go back to Kim Henry. Because it is incorrect for the State to say if it's just about money, pay up and then maybe at the end of the case you can recover the fees. That is not the case with people who are indigent and poor and can't afford the fees.

Now, this is what Kim Henry has to do when she wants to protect herself from her violent ex-boyfriend. So she needs

a permit to purchase a handgun. That fee went from $2 to $25. She has to get an FID card, Firearms Purchaser Identification card. That fee went from $5 to $50, $75. Then she has to do her $200 carry permit fee. So $275 just to exercise the right to keep arms and the right to bear arms, but she also has to buy a firearm. She has to buy ammunition. She has to buy training. And every dollar that she has to expend, which she doesn't have for the $275 in fees, is money that she cannot spend on the actual exercise of her right.

And actually, there's an unreported decision out of Illinois, I know it's not authoritative, but just conceptually I think it's relevant to discuss. It's ACLU of Illinois versus -- I forgot who the defendant is. But it's a district court case in Illinois, and that's a case where there was -- they had a $1,000 lobbying fee. Couldn't lobby without paying the $1,000 fee, and the Court struck it down and issued a preliminary injunction and said every dollar that ACLU of Illinois has to spend on their lobbying fee is a dollar they can't spend on their First Amendment activities, so it's irreparable and we can enjoin them.

That's exactly Kim Henry and everybody like her who for every dollar they to spend on these exorbitant fees -- and Your Honor will recall exorbitant fees is right out of footnote 9 in *Bruen* -- is money that they can't be spending on what they need to be purchasing, such as their firearm, their

ammunition, their training.

THE COURT: And how do you suggest the Court go about resolving the issue you have raised? Is it an individualized inquiry as to whether or not someone's Second Amendment right is being infringed because of the nature of the fee? Because $25 to one individual may not be the same as to another individual. And so how do you suggest that this Court go about determining it, the issue you've raised?

MR. SCHMUTTER: We think it's a facial challenge, Judge.

THE COURT: It's a facial challenge?

MR. SCHMUTTER: Correct. We think that all you need is some people for whom it is a hardship and demonstrates the footnote 9 problem of an exorbitant fee. And of course as Your Honor knows from the papers, there's all kinds of other problems with the fees. There's the *Cox* problem. There's the *Bruen* problem. You know, there's all sorts of issues.

THE COURT: So am I to just look at the record as a whole? Just help me understand your argument. Am I to look at the record as a whole and say well, every other plaintiff who is part of this record has been able to afford the fee but one and therefore the Court concludes? Or am I to say because one of all of the plaintiffs cannot afford to pay the fee, the Court concludes? Which is it that I'm to do?

MR. SCHMUTTER: The second. It's a facial challenge,

Judge.

THE COURT: Okay.

MR. SCHMUTTER: By the way, it's not just Kim Henry. Because don't forget --

THE COURT: How do you get around the Second Circuit upholding a fee of $300? You just say they're wrong, right?

MR. SCHMUTTER: I'm sorry?

THE COURT: The Second Circuit upheld a fee of $300. Do you say the Second Circuit got it wrong? Is that what you say?

MR. SCHMUTTER: Is Your Honor talking about *Kwong*?

THE COURT: Yes.

MR. SCHMUTTER: Well, first of all, *Kwong* is pre-*Bruen*. But, yes, the Second Circuit got it wrong in *Kwong*, and here's why. And this goes to *Cox*, because *Kwong* is a *Cox* case. So -- and actually I was a little surprised. The State has not tried to defend the fees under *Cox* at all. The *Cox* analysis is twofold. *Cox* tells us that the fee connected to the exercise of a constitutional right is invalid if it does not directly cover the costs of regulation.

So already the victims-of-compensation-fund stuff, that is unlawful. We know that immediately, and each of the fees has a victims-of-compensation-fund component. That goes away, right away. That's easy. They didn't even try to defend it. But there's more to *Cox*, right. But -- and this is in our

brief and Your Honor read this, but before you even get to does the fee -- is the fee directly related to covering the cost of regulation, the activities that give rise to the cost have to have the *Bruen* justification.

So, for example, the State of New Jersey could pass a statute that says we are going to evaluate an application --

(Pause.) (Microphone feedback.)

The State of New Jersey could pass a law that says we think it's so important that people be vetted properly before they get a carry permit, we're going to have seven different police officers do seven independent investigations just to make sure we get it right, and that's going to cost $1,500 or $2,000.

If you take the *Kwong* approach, all you're doing is you're comparing the cost of seven investigations versus the actual fee. If it matches, boom, it's constitutional. That misses the point.

You first have to ensure that the process itself is constitutional before you even figure out what the cost is. So the seven investigations would be subject to a *Bruen* analysis. Is there a historical tradition that supports this process? And that's the argument we made, and they didn't even try to justify it.

So they don't even get to *Cox*. They can't justify their process. And they don't even argue that the numbers are

consistent with the costs. They don't even go to *Cox*, which I don't understand. Well, I'm not going to say another -- but I was surprised not to see that. So there are so many things, they lose on the fees for so many independent reasons we think that's absolutely critical.

Now, there's another aspect of irreparable harm. I know Your Honor didn't want to talk so much about irreparable harm, but I'll throw one thing out. *Lingle vs. Chevron*, which is nominally a takings case, but what *Lingle* says -- and I'll give Your Honor the citation, 125 Supreme Court 2074. It's a 2005 Supreme Court case. It is ostensibly a takings case. And it's a case in which the Supreme Court rejects what had theretofore been a basis to find a taking. And the Supreme Court said you know what, this is not a valid taking theory. So they rejected that case.

But there's something else implicit in what they say, which is actually really important. So what they say is this might or might not be a taking, but it's also an argument for due process violation. It demonstrates that violations can be dual violations.

The fees, for example, are not just monetary actions. They're not just monetary penalties. They're also themselves constitutional violations, that is, they have a separate status as a Second Amendment violation. So making someone pay the fee is not simply taking money out of their pocket. It's violating

their Second Amendment right. That's an irreparable harm that getting your fee back at the end of the case somehow doesn't -- doesn't compensate for. So you don't have compensation for the constitutional harm itself. That's an independent basis for irreparable harm. So we're going to ask the Court to think about it from that perspective because that's sort of implicit in what *Lingle* is talking about by showing the dual nature of the taking allegation.

THE COURT: What do you think the fee should be?

MR. SCHMUTTER: Well, I mean, as a standard today, I think the fee should be what it was before. Now, are those constitutionally justifiable? I don't know. We're not challenging the old fees. The old fees may be challengeable as well.

THE COURT: Well, let me press you. You don't have a position as to whether or not the old fee was unconstitutional?

MR. SCHMUTTER: We don't. We're not taking a position on that, Judge. We really haven't -- we haven't thought about the analysis of that.

I will say I'm not aware of any historical tradition for these kinds of fees.

THE COURT: So then why wouldn't you be challenging it?

MR. SCHMUTTER: I mean, Judge, we have to make decisions when we litigate. There's other stuff we're not

challenging as well that we probably could.

THE COURT: Okay.

MR. SCHMUTTER: By the way, honestly, Judge, there's other stuff in the statute we probably could be challenging, but we're not. And that doesn't mean we won't one day challenge them. But importantly, we think going from 2 to 25 and going from 5 to 50 and going from 50 to 200 is plainly unconstitutional. And if we're back before Your Honor some day saying the old fees are unconstitutional, too, there's nothing wrong with that, you know, we have to decide which claims we're going to bring when we're going to bring them.

Judge, I'm not going to talk about traceability or redressability. We've briefed that. The briefs are very clear.

I do want to point out one thing, though. And it's in our brief, but I do want to emphasize it. When we were here on the TRO, the Court did a very helpful analysis with my friend on the other side about the breadth and scope of schools, the school's provision, and the breadth and scope of multi-use property problem. And in the Opinion, the Court, as I read it, and I just want to make sure I'm not misunderstanding it, the Court basically said the State conceded these issues and therefore we don't have to go there. That's kind of how I read the Opinion, and that was very helpful.

Here's the problem we face: I'm not sure that people like my clients and others, members of ANJRPC or anybody in New Jersey who wants to exercise their Second Amendment rights, I'm not sure they can rely on a concession of counsel during oral argument. I believe we need a finding or a holding or a construction of those statutes as the State has conceded.

In other words, I think we need, in the PI phase, the Court to actually find that those statutes mean that.

THE COURT: It will be an order embodying the concession. That's your finding. That's the Court's finding.

MR. SCHMUTTER: As long as the order says that.

THE COURT: Okay.

MR. SCHMUTTER: I don't think the previous order said that. I don't think the previous Opinion went that far. So that's what we're asking for. We're asking for the Court to take it to the level that is actually enforceable, because I worry that -- I worry that the record in the TRO phase is a little bit unclear that -- I'm not 100 percent sure that if a police officer arrested someone in the parking lot of a multi-use property, I'm not 100 percent sure that that person can completely rely on the record in the TRO. So we're just asking for something more enforceable. That's all.

THE COURT: I will take it under advisement. But thank you.

MR. SCHMUTTER: Thank you, Judge.

I want to actually point out something really interesting.

We received an email from counsel the other day. I'm reluctant to cite --

THE COURT: From Ms. Cai?

MR. SCHMUTTER: Yes. I'm reluctant to cite cases that the other side says they want to cite, but it's such a good case for us I can't help it. So the email said oh, we may cite *NRA* vs. *Bondi*, Eleventh Circuit case.

This case to me is the absolute best example of why 1791 is the time frame and not 1868. So *Bondi* just came out, I guess, last week. *Bondi* is a challenge to Florida's law prohibiting the acquisition -- or I'm sorry, the purchase of firearms for adults age 18 to 20. So no purchases. Not just handguns, because many states in many jurisdictions --

THE COURT: I thought it was a Ninth Circuit case. Am I wrong?

MR. SCHMUTTER: Eleventh Circuit case. It's Florida. It's Florida law.

THE COURT: Okay.

MR. SCHMUTTER: And so the Court -- what the Court says is they come straight out and say it's Fourteenth Amendment, that means it's 1868, not 1791. And the reason *Bondi* is such a great case is that the Court makes it absolutely clear there are no historical citations from the

Founding, none, that support the law.

So we have this great binary situation. No citations from 1791 and then a bunch of citations the courts rely on from Civil War and construction time frame. And they say it's 1868, therefore, the law is valid.

Now, what does this illustrate? It illustrates why that can't possibly be right. As the Supreme Court said in *Bruen*, there is only one version of the right. First Amendment, the Second Amendment, the Fourth Amendment, they mean the same thing as to the federal government as to state government. There aren't two different versions of it. What does that mean?

Under the *Bondi* reasoning of the Eleventh Circuit, if Congress enacted the exact same law, because 18 U.S.C. 922 works differently. But if 18 U.S.C. 922 were amended to provide the exact same restriction as the Florida law, according to the way the Eleventh Circuit looks at it, the federal statute would be invalid because the Fourteenth Amendment has nothing to do with federal law, right? The federal government is governed by 1791 because that's the time frame, but the state law is governed by 1868, the result would be different.

The federal law would be unconstitutional under the Second Amendment but the state law would be constitutional. The Supreme Court is 100 percent clear that that's not how it

works. You can't have a provision of the Constitution that applies differently to state law and federal law. So *Bondi* is a magnificent illustration on why the time frame has to be 1791.

The only other thing I think that I'll point out, Your Honor saw our briefing on playgrounds and youth sports. We think there's a very good bright-line rule that the Court can apply, school ones and nonschool ones, and we think that's what the Court should do.

I guess the last thing I'll say is simply that it's in our briefs, but we want to emphasize because the State hasn't really responded to this at any point, *Bruen* doesn't -- you don't automatically go to analogies in *Bruen*. You only get analogies -- get to analogize under three circumstances, right? It's unprecedented societal concerns.

THE COURT REPORTER: I'm sorry?

(Clarified the record.)

MR. SCHMUTTER: Unprecedented societal concerns, which we know doesn't apply here because the concerns here are exactly the same as in *Heller*, *McDonald*, and *Bruen*, handgun violence, right? They didn't parse technology. They didn't parse modern versus historic. It's just handgun violence, okay. So that's the -- so they don't get to analogize on ground one.

Ground two is, you know, massive changes in

technology. Again, that doesn't apply here because the technology of handguns is not what counts. Again, *Heller*, *McDonald*, *Bruen*, a technology didn't fall into it. So, again, it's handguns and handgun violence.

And the third one is regulations that could not have been imagined at the time of the Founding. They don't have any of that either. So they don't get to analogize. They actually have to provide the specific things. There were museums back then. There were libraries back then. There were entertainment venues back then. It doesn't matter that PNC Bank Art Center looks different than a theater in Boston in the 18th century. None of the cases differentiate between what the modern look is and what the historical look is. That's not a thing. So they actually don't get to analogize. They actually have to bring specific examples of the same thing.

Now --

THE COURT: How do you get to --

MR. SCHMUTTER: -- their analogies don't work anyway.

THE COURT: Well, okay. I was going to ask you about airports, how you get there.

MR. SCHMUTTER: Well, you get to airports because all airports really is are crowded places.

THE COURT: Are what?

MR. SCHMUTTER: All airports really are are crowded places. There's nothing about dropping, you know, there's

nothing about checking in at the counter or curbside check-in or going to have a bite to eat at McDonald's that's outside the TSA area, there's nothing different about those things. The fact that there are airplanes on the tarmac, that has nothing to do with security because you're not bringing guns onto the airplane. So what they care about with airplanes and transportation terminals is just a place where people gather. There's nothing modern about that condition, right? If we were saying, Judge, we should be allowed to carry guns on airplanes, okay, that's a totally different thing, right? Airplanes have their own special concerns, right? They're pressurized. They get hijacked. We're not arguing that.

The thing that they say they're protecting against is an ordinary condition of people just milling about in crowds. There's nothing modern about that. That is the same thing that we've seen before, and we know that crowds don't work. *Bruen* was 100 percent clear that simply because something is crowded, that is not a proper sensitive place.

If Your Honor doesn't have any more questions, I'll sit down. I don't know if Your Honor has any questions for me.

THE COURT: Thank you.

MR. SCHMUTTER: Thank you, Judge.

THE COURT: We'll take a five-minute break. And, Ms. Cai, I'll hear from you.

THE COURTROOM DEPUTY: All rise.

(Recess was taken from 11:25 a.m. to 11:31 a.m.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Okay. You can have a seat. Thank you.

Mr. Schmutter, you wanted to say a few more things?

MR. SCHMUTTER: Yes, Judge.

THE COURT: Okay.

MR. SCHMUTTER: So since we took a break, we have two clarifying helpful things hopefully.

THE COURT: Okay.

MR. SCHMUTTER: On the issue of renewal.

THE COURT: Yeah.

MR. SCHMUTTER: So we looked at the language. We think that the language that says "and they may thereafter be renewed every two years in the same manner and subject to the same conditions as in the case of original applications," the plural we think makes it clear that they're not saying that individual person's original application, but renewals work the same way as original applications in the general sense.

So when you renew --

THE COURT: Okay. You lost me.

MR. SCHMUTTER: Okay.

THE COURT: Why are you making the State's case for them?

MR. SCHMUTTER: Well, we're not making the State's case for them. We just want to make sure -- I mean I

understand that for people who --

THE COURT: Why are you quarreling with the Court's interpretation?

MR. SCHMUTTER: Because some people benefit from that interpretation but some people don't.

THE COURT: Right. That's true. And I have no idea in the case of Muller, for example, who got an application based upon justifiable need, which is now unconstitutional, and in two years from now when he goes forward and tries to show a justifiable need which is now unconstitutional, I have no idea what happens. But it seems to me that this is indicative of legislation that was not clearly thought out.

MR. SCHMUTTER: Well, we agree that there's plenty in here that was not thought out, Judge.

THE COURT: Okay. So I don't understand why you're making the State's case.

MR. SCHMUTTER: I'm not sure that I'm making the State's case. Well, we're making a record, Judge.

THE COURT: Okay.

MR. SCHMUTTER: And --

THE COURT: So how could this Court be faulted if, in the same manner and subject to the same conditions as in the case of original applications, this Court rules that with respect to all of the plaintiffs who have carry permits, they are subject to the same conditions before? I have no idea in

Mr. Muller's case what happens. But is it the Court's problem or is it the Legislature's problem? It seems to me the latter.

MR. SCHMUTTER: Certainly when the Legislature does ridiculous stuff, it is their problem, and I totally understand.

THE COURT: Okay. And so if this Court interprets it that way and part of it as a result is unconstitutional because Mr. Muller cannot be forced to reapply showing justifiable need, I don't know the answer. But my guess is neither does the State.

MR. SCHMUTTER: Thank you, Judge.

I guess the bottom line is, I wouldn't want to have an adverse standing ruling turn on that, I guess.

To the extent -- and I don't know what the Court is going to rule, and I don't know exactly how that plays out. My point is simply that I'm hoping that there's no adverse standing ruling that turns on this interpretation. That's all, Judge.

THE COURT: Okay. So let me assume you're playing devil's advocate. Try it again.

MR. SCHMUTTER: The analysis? Oh.

The statute can be read and perhaps should be read when the Legislature refers to "the same manner and subject to the same conditions as in the case of original applications," plural, they're simply referring to a comparison of the two

processes generally, not the process that a particular applicant undertook the first time versus the second time.

So if you want to know how to renew, you look to the requirements when you first apply, the original application. So you go to the part of the statute that says how to apply for the first time. That's how you know the things you have to do on renewal. That's the interpretation that I was just ascribing.

THE COURT: That's a stretch.

MR. SCHMUTTER: Thank you, Your Honor.

THE COURT: This is the same language that applied in the former law. You would not be making that argument to me, I suspect, under the former law.

MR. SCHMUTTER: Well, we're not under the former law, I guess, Judge, so I'm not sure. But I understand the Court's thought process.

THE COURT: Yeah. Okay.

MR. SCHMUTTER: Thank you.

THE COURT: Okay.

MR. SCHMUTTER: And just a quick citation. We talked a lot about equal protection as to the suspect classification. I just want to go over one more citation, *Illinois State Board of Elections,* 440 U.S. 173. That's a strict scrutiny case. Well, the Court does strict scrutiny but doesn't call it strict scrutiny. But Justice Blackmun in concurrence makes it clear

that he understands that it's strict scrutiny -- they're talking about strict scrutiny. When you look at the case, they're clearly talking about strict scrutiny. So that's just an additional citation that the Court can rely on.

I do apologize. Can I make one more point? I know I sat down and I know Your Honor wants to hear from Ms. Cai.

THE COURT: Go ahead.

MR. SCHMUTTER: So I forgot to get to this. This is something -- I think this is actually very important. It applies to the challenged standards, the new standards.

The amended standard under 2C:58-3(c)(5), the public health, safety and welfare, the new version of that, and also this new sort of general language known in the community, Your Honor is aware of the couple of challenges we're making.

Just to clarify what the actual challenge is, there are -- there is no historical traditions, and this is a straight-up *Bruen* analysis, there is no historical tradition for a freestanding ad hoc dangerousness assessment. Every historical citation in any case, *Range*, *Rahimi*, any of these cases that deal with individuals and who they are, they're always citing to categorical disqualifiers, legislative categorial disqualifiers. There is no precedent *and no Bruen* history that justifies these ad hoc determinations, and that's why these approaches are problematic. Because what they do is they basically vest in an individual the discretion to decide

on their own I think that guy's facts are problematic, and therefore, I'm going to say he's divested of his right to keep and bear arms. It's an enormous difference to have vested that kind of discretion in a public official and basically say, ah, you don't like it, tell it to the judge. You know, these constitutional rights don't work under a "tell it to the judge" approach. That's very important. And *Range* hasn't been cited --

THE COURT: Would you ever draft or be in favor of legislation that does give some flexibility to an approving official if there are red flags that are going off in his or her mind?

MR. SCHMUTTER: No. I think what we need is the Legislature has to say what counts. That's what matters.

And the Legislature can say whatever they want and then we get to test that ex ante against the historical tradition. That's why it's so -- that's what the big difference is.

THE COURT: But the legislation here refers to acts or statements, for example. You're not suggesting that the legislation has to lay out with specificity what those acts or statements might be that cause a police chief to say this person really should not be carrying a firearm?

MR. SCHMUTTER: There needs to be enough that the applicant knows in advance what's going to get him in trouble.

You need to know. That's why --

THE COURT: Getting him in trouble or prevent him from carrying a firearm?

MR. SCHMUTTER: That's what I meant. In other words, that's going to prevent him -- divest him of his constitutional right. If you look at how --

THE COURT: But there's a give-and-take. There's a back-and-forth in this legislation. There's an appeal process; you agree with that?

MR. SCHMUTTER: There is an appeal process.

THE COURT: Okay.

MR. SCHMUTTER: That's the "tell it to the judge" approach.

THE COURT: But are the plaintiffs really suggesting to this Court that there should not be some sort of gatekeeping function on the part of the police chief?

MR. SCHMUTTER: Correct. The gatekeeping function is the Legislature. The Legislature's job is to do that. And the historical tradition shows that. It's always categorical. There's never been in the relevant history this ad hoc ability to divest people of the constitutional right to keep and bear arms.

THE COURT: And so help me understand that. So according to you, the Legislature should be prescient and list out every conceivable scenario, act, or statement that might

cause a police chief concern to say to himself or herself: This person should not carry a handgun. Is that your position?

MR. SCHMUTTER: Our position is that the Legislature needs to spell out enough specificity that a person can know in advance which behaviors and which conduct and which facts will prevent them from exercising their right. And, in fact, Judge, that's how most of the country works. Most statutes, most statutes dealing with the right to carry or the right to possession have only enumerated categories. It's very unusual to do it this way.

THE COURT: So is it a void-for-vagueness challenge that you're bringing?

MR. SCHMUTTER: We're bringing both. We are bringing a void-for-vagueness challenge. It's in the case because vagueness, you get both a notice problem and an arbitrary -- you know, an unbridled discretion problem. There's two pieces, two different components.

THE COURT: But if there's a give-and-take and there's an appeal process and the process is taken out of the hands of the police chief and into the hands of a court, what do you say about that?

MR. SCHMUTTER: That doesn't solve the problem, because you still have the notice issue, right? So once you are litigating whether your denial was valid, it's too late, right? So you don't have the notice issue of what kinds of

behaviors actually will divest you. Because when you look at legislatures, you look at Congress, right? You look at 18 U.S.C. 922(b) and (g), you look at legislatures all over the country, they take an enumerated approach in almost every instance. It's only in sort of the quote-unquote anti-gun states, like New Jersey, New York and a couple others, that have these sort of ad hoc, this reservation of an ad hoc process. And it's not satisfactory to deprive someone a constitutional right by simply saying, oh, you can always go to court, because it's a deterrent -- it is a problem --

THE COURT: But it seems to me that you're asking for too much, Mr. Schmutter. It seems to me that you're asking for a laundry list of disqualifiers so that someone who wants to carry a handgun knows whether or not he or she should even bother.

MR. SCHMUTTER: That's how it's done almost everywhere in the country, Judge.

THE COURT: A laundry list?

MR. SCHMUTTER: Yeah. Yeah. Literally in the statute A, B, C, D. That's how it's done. In fact, it's done in New Jersey, too. New Jersey has its list of disqualifiers and then it has these ad hoc additional catch-all categories. It's the ad hoc additional catch-all categories that are the problem.

THE COURT: All right. I want further briefing on

that issue.

MR. SCHMUTTER: Thank you, Judge.

MR. JENSEN: Can I just finish very briefly? I promise I'll be quick. It was just one point. With both Mr. Schmutter and I, there was a great deal of discussion about sensitive places and the historical analogies, government functions, security.

What I want to just throw out there was this: I think Mr. Schmutter and I, our approaches here are pretty consistent. There's one distinction here where things are a little bit different. The statement that we don't intend to cast doubt on longstanding restrictions on carrying firearms in government -- sensitive places such as government buildings and schools. We're both in agreement that's dicta. I think the difference is I'm reading that dicta a little stronger than Mr. Schmutter is. And what I'm reading it is to say that, you know, it may be dicta, but this is dicta the Supreme Court said three times in 14 years, it seems like they're going to get to that end result. If we --

THE COURT: But the dicta that you're reading is two key components. One is security is in place. The second is that there is a governmental/governance issue at play.

MR. JENSEN: Well, how do we get to an end result that says that a restriction in schools is valid if the only factor is whether there is a government function at play? At

least under San Antonio Independent School District, there's no fundamental right to education. That's not, I don't think, fairly stated to be a governmental function. So if governmental function was the only criteria, a restriction in schools would not be valid. And at least, to an extent, I'd say the Supreme Court has indicated pretty clearly, yeah, we're going to uphold a restriction in schools. So --

THE COURT: I think it's not even debatable. And how the Supreme Court got there, one can debate.

MR. JENSEN: Well, that's the whole issue though, isn't it?

THE COURT: Well, perhaps it is. Perhaps it isn't. But I think the Supreme Court was very clear, no guns in schools, period, full stop. And we can have this academic exercise about whether or not that was right, that was wrong. It's an academic exercise. The Supreme Court ruled no guns in schools, full stop. Right?

MR. JENSEN: I'll be sure not to take my gun to a school.

THE COURT: I hope not.

MR. JENSEN: But --

THE COURT: I mean, it's not -- it's not even debatable.

MR. JENSEN: But if it's not even --

THE COURT: Nor should it be.

MR. JENSEN: If it's not even debatable, how do we get from those three historical examples to schools? And it has to be more than just governmental function.

THE COURT: Well, you'll all find out once I get this off my plate, okay?

MR. JENSEN: Fair enough.

The other thing that goes along with that is the fact that children are present, which I took to be a key part of the Court's prior ruling, doesn't really factor into this because however you were drawing these analogistic lines, I don't see how the presence of children bears on this.

THE COURT: Well, I think that it's a fair -- I think that is a question that has been raised by any academicians as well as others. Was that in the mind of the Supreme Court? There have been many who have written of it. It's a question. It's a question that the Supreme Court will have to answer. We all recognize that.

MR. JENSEN: Yeah.

THE COURT: We all recognize that *Bruen* has left open some issues. It is for the lower courts to figure them out as best we can. But I think we can all agree, we are waiting for the Supreme Court.

MR. JENSEN: We're waiting for the Supreme Court, but we need to do our best job of using predictive judgment to try to get the right result.

THE COURT: 100 percent.

MR. JENSEN: And that's why I'm trying to nurse this discussion in the direction of we've got three examples, we've got two inconclusions. How do we get from those examples to those conclusions? And that's it. Thank you for indulging the additional time.

THE COURT: Ms. Cai, you've waited very patiently. So I would like you to respond to anything that you have heard here today and then I do have, as I promised, a series of questions for you.

MS. CAI: Of course, Your Honor. And let me just set the stage organizationally.

THE COURT: Yes.

MS. CAI: I think there will be a pretty clean division between me and Ms. Reilly as well as Mr. Kologi. So I am going to speak on the challenges to the place-based restrictions, so basically parts 1 and 2 of our brief, and those arguments raised today as well as in the reply briefs.

Ms. Reilly will address the vagueness challenges, the insurance challenges, permitting challenges, and the equal protection exemption challenges.

THE COURT: Okay.

MS. CAI: So those other sections, and Mr. Kologi of course will speak for the Legislature.

If Your Honor wants to go in a certain order, I'm

happy to do that. And what I did want to do today is, you know, there's already been a lot of discussion, what I want to do is focus on the merits. And I want to focus on new points either raised today or in the reply briefs because of course Your Honor already has our submissions.

And this is the order I want to go in, but I'm happy to change that order. The first is just, you know, what does *Bruen* direct us to do, some big-picture observations, which both Mr. Jensen and Mr. Schmutter spent a lot of time on, I want to respond to that.

Two, I want to highlight a few provisions, place-specific provisions. I'm happy to talk about any provision that Your Honor wants to talk about, but I did want to highlight public assemblies, parks and zoos, hospitals and casinos.

THE COURT: Transportation hubs; we'll get to that.

MS. CAI: All right. I'll add that to the list.

And that will relate to the third thing I want to talk about which didn't -- well, it came up a little bit today, but we did want to respond to their arguments about the government-as-proprietor or government-as-market-participant doctrines. I did want to talk a little bit about the private property rule, but mostly so that I can get some documentary responsive evidence into the record.

Finally, a quick response on the objection to the use

of experts, and maybe a word or two on the scope of any injunction. That's what I plan to do today. And I'm happy to answer Your Honor's questions as they come or, you know, at the end or whatever it is. And of course then Ms. Reilly will present on the other issues, and Mr. Kologi will speak on behalf of the presiding officers.

All right. So let's get to it. On the merits, I want to make a couple of points that we want to highlight for the Court's consideration. For what is *Bruen* asking for? It's asking for historical evidence of what the people understood the Second Amendment allowed. That's the point of the historical analogy. And that's what all of the cases that have taken *Bruen*, including the Eleventh Circuit case *NRA vs. Bondi* is trying to do. And I think on that we do agree. But how to do that analysis I think is an important one.

And I want to start with something that plaintiffs talk about in their brief but don't talk about today, which is what to do with the absence of analogs at a particular point in time when there is the existence of analogs at other points in time.

And so generally speaking, this is really just about burden of proof and what's enough to evaluate that under the *Bruen* test.

So I want to highlight what *Bruen* actually said. It said that what matters for adjudicating Second Amendment cases

is, as in all cases, party burdens. In footnote 6 of the majority opinion, the Court said: "Courts are thus entitled to decide a case based on the historical record compiled by the parties."

Here, the State has compiled a large historical record in support of its position. We've amply met, I think, the burden of production with respect to historical documents and expert declarations that provide historical contextual facts. Against this, the plaintiffs haven't offered counteracting historical evidence. They do nitpick at specific pieces of evidence, but they haven't come up with here's an example of a similar restriction that either the populous thought was unconstitutional, that the courts held were unconstitutional, or was very quickly abrogated by a later Legislature either on the basis that it was unconstitutional or invalid in some way. And so --

THE COURT: That's because they can't find restrictions.

MS. CAI: Right. But I think that's key because why at any given point in time restrictions may be lacking is not necessarily constitutional evidence. So let me give you an example.

I am unaware of -- and perhaps there is and we just haven't found it yet -- historical evidence of New Jersey banning firearms specifically at ballrooms. That is true. We

have evidence of other states or other jurisdictions doing so but not New Jersey. But what does that mean, right?

I think if you think about what everyone agrees on is in 1791 through 1868, the Second Amendment did not apply to New Jersey. It only applied against the federal government. There is no New Jersey constitutional provision on an individual right to bear arms at the time. And so the State's lack of restriction on firearms is almost certainly not because it was concerned about the Second Amendment because that didn't even exist. The lack of an analog is most likely the product of policy. So the State doesn't regulate any number of things because it doesn't see a policy problem, perhaps because it doesn't notice the policy problem. That is true sometimes. Or because people have not behaved in such a manner to create a policy problem. So the absence of analogs at any given point in time by itself is not counterfactual or countervailing evidence against what we presented.

And so at no point does the plaintiffs -- do the plaintiffs bring what the *Bruen* Court had, which is New York provided historical evidence and the Court said actually courts interpreting that evidence at the time did not think that that regulation was actually constitutional, or it did not believe that that regulation actually covered what you think it covers. That is lacking here in most respects. And I think that's really important in terms of what *Bruen* says the burdens of the

parties have to be. And it's not different than in any other, you know, litigation where you provide fact evidence.

THE COURT: So you make some fair points. But it seems to me that you're sort of sweeping over the principle that the lack of evidence itself can stand for the proposition that the restriction is unconstitutional.

MS. CAI: So I think it depends, Your Honor. So if there is a lack of evidence because the location -- we're talking about locations here, not types of guns. If the location simply didn't exist until the 20th century, there couldn't possibly be that kind of exact kind of analogy.

The other thing is if the location technically existed but the way in which people interacted at that location was so different, right? So we give the example of mental health and addiction treatment centers. Historically they were more in the form of incarceration than voluntary treatment, and so there's no such analog, even though the place literally did exist in the exact same way. Ben Franklin's library did exist, but it's not a place where general members of the public and children went to spend time to learn, right? And so that's the kind of analysis and nuance that we need.

And the second is, I think it's one thing if there were no examples whatsoever. That might be, you know, one of the things a court would want to consider. What we have here certainly for at least several of the provisions, and I think,

you know, almost all of them, is more nearly identical historical regulations that were then upheld by the state courts evaluating them at the relevant time -- and I'll talk about that in a second -- as well as historical evidence from other contexts, such as legal commentators and treatises, historical newspapers, discussing them as entirely valid and uncontroversial. So I think we have to take all of that into context. And so that was point one.

Point two is what is the kind of analogizing the level of specificity that we're doing here? I think it's interesting because what I heard from the plaintiffs are a couple of things and I just want to state the State's position on them. The first is the line about government and schools being presumptively constitutional regulations, just dicta or not. I'm actually not sure who thinks it's dicta and who doesn't. It's not dicta, and I think Mr. Schmutter said in *Bruen* it wasn't dicta. But whatever the analysis is, it was repeated three times, right. It started in *Heller*, which evaluated the historical tradition. It was repeated in *McDonald* in a very specific manner. At page 786 of *McDonald* --

THE COURT: Are we talking about guns in schools?

MS. CAI: This is government buildings and schools, that line in general.

THE COURT: Okay.

MS. CAI: And so *in McDonald*, the Court said we are

reassuring the states that just because we're now recognizing the incorporation of the Second Amendment against states, we're not -- that does not disturb what we said in *Heller*, which is that regulations at government buildings and schools are presumptively constitutional, and then it was said again in *Bruen*.

So I think it's one thing if it's a stray line in one decision, right? But the Court's commitment to that makes it much less -- much stronger than mere dicta. And I think even if you agree with Mr. Jensen that the Court was just looking at the historical record on an issue that wasn't squarely before it yet, I think what you would still have to look at is how the Court would be applying its own stated test for how to do historical analysis. And from there, there are a few observations that I think are worth making.

The first is that there is now I think no dispute that the record that the Supreme Court was looking at was not terribly fleshed out. It was two sources. It was an amicus brief and the Kopel and Greenlee article. And I don't think there's any difference in terms of what they presented. And the Kopel and Greenlee article we don't think is a comprehensive view of what is out there certainly on all sensitive places. But I don't know if we've come up with any other legislative assemblies, for example, that ban firearms than the two that Kopel and Greenlee identify.

On that specific record the Court specifically cited, it could draw the conclusion definitively three times that legislative assemblies are presumptively constitutional. And it is true that Kopel and Greenlee didn't find any historical evidence on schools. I think there actually are some, but that's of course not before this Court. Nonetheless that's not the point. The point is, what is the Court doing when it does the historical analogy test? And I think it does what it said it did. You're looking for evidence of a historical tradition at the relevant time that was longstanding and unchallenged, and that's exactly what we presented to this Court.

Now, I do want to make an observation about how -- what I think is a contradiction in what the plaintiffs have been saying but it became crystallized today, and that is what level of abrogation you can do.

So Mr. Jensen has always said that their position is that if there is high levels of security at a particular location, and he pointed to this courtroom as an example, and perhaps there were others, that is one basis for which you can analogize. And so if you had, you know, a ton of security at schools -- I think he alluded to that. I don't actually think most schools have that level of security -- but if you did, then perhaps that would go in favor of that justification.

We don't agree with that as the actual justification, but just running with that idea for a second, that's an

aggregation, right? That is taking something that may or may not have existed in the historical record based on a principle and applying it analogically to other locations. And so I think that is what *Bruen* is asking for. And I agree with the more philosophical or the underlying methodology that Mr. Jensen was pointing out there. But I think what's interesting is how they pick and choose what they want to analogize and what they don't.

So, for example, Mr. Jensen read to you the Statute of Northampton, specifically the provision -- and I may not have every single word here. I was just writing it down, but that a person cannot go ride armed by day -- by night or day in fairs, markets, nor in the presence of justices and ministers. He highlights how the last part about justices and ministers is the basis for restriction -- sensitive places restriction at courthouses. Perhaps that's so. We're fine with that. That may be so, and there may be other justifications. That challenge is not before us.

But what he wants to read out of that very sentence is where it also says one cannot go ride by night or day in fairs and markets. And so you can't have it both ways. You can't rely on the Statute of Northampton for the provision of courthouses but then you read out the fairs and markets language.

THE COURT: Well, but in fairness, I think the State

is guilty of the same sin, if you will, because the State seems to ignore the "in terrorem" language.

MS. CAI: We can discuss what that means. I think the State's position is that additional historical evidence that the *Bruen* court did not consider demonstrates that the words "in terrorem," in terrorem of the people or in terrorem of the county, is not a qualifier on the way in which a person is behaving, but rather the act of carrying in those places would be in terrorem of the county.

Now, that's an open debate, right? I agree with Your Honor that that is something that you'd have to look at the history and interpret what that means, and that's very important. That's just our position on that. But I don't think there's a way to read "in the presence of justices and ministers" as applying legitimately to restrictions at courthouses and reading out of the very same statute fairs and markets which all were collected together.

All right. So one last question, and I don't think the Court needs to resolve this question, but the plaintiffs talk about it a lot so I do want to address it and put a couple points into the record is the time frame analysis.

I find it interesting that Mr. Schmutter cites *NRA vs. Bondi* for the opposite conclusion that the Eleventh Circuit made, but I'll put that aside for one second, which is it would be one thing if there was countervailing evidence that

the Founding generation saw certain sensitive place restrictions as unconstitutional and then that changed in 1868. Then you would have a conflict between those two interpretations and then the question would be which interpretation matters. I agree with that. That's not what we have here. You have -- we say -- I mean, we do have evidence, and I understand that Your Honor is not necessarily persuaded, but, you know, we think it's persuasive, that the English common law tradition had been incorporated into certainly the common law of states as well as the statutes of states in terms of the Statute of Northampton and what it prohibited even at the Founding era. Certainly on the private property rule, there were specific statutes, and I'll get to that later.

But even if Your Honor did not agree, all there would be would be the absence of analogs at the Founding and then the presence of many analogs in the Reconstruction period beginning in the 1860s. And, in fact, what you saw was like a -- I want to say resurgence, but that's not the quite right word -- a move to adopt more sensitive place restrictions precisely at the moment when the states ratify the Fourteenth Amendment. And so it would be very strange, I think, for states to understand this is now incorporated against us, which cases like *English versus Texas* do recognize, and now we're adopting additional regulations and we're interpreting them to be constitutional, if that was all incorrect.

But I think one thing that plaintiffs cite that I think actually makes this point very well is the *Gamble* case, which the Koons plaintiffs cite. And there, you know, it's a case -- the case is about double jeopardy, but the key is that the Court declined to overrule the longstanding dual sovereignty doctrine in interpreting the double jeopardy clause, but it interpreted 19th century evidence. Why did it do that?

Justice Thomas pointed out in his concurrence that the reason there were few Founding era examples of dual sovereignty prosecutions is not because it was believed to be unconstitutional, rather he said: "The Founding generation saw very limited potential for overlapping prosecutions by the states and the federal governments. Thus, the founders, therefore, had no reason to address the double jeopardy question that the court resolves today."

I submit to you this is the exact same situation we're in, especially as to places like airports, train stations, public libraries, zoos, recreational parks, casinos, hospitals. And I think that's important for how to resolve a situation like today. You would look at the methodology that the *Gamble* Court used, which is to look at cases on the double jeopardy clause from 1847, 1850, 1852, and then 1922 as "cementing the foundation laid by those prior 19th century cases."

If this Court sees a conflict between actual evidence at the Founding and evidence at Reconstruction, I want to make one clarification. We don't think and we couldn't think that the Second Amendment means different things against the federal or state government. That is foreclosed by Supreme Court precedent. But our argument is not that. Our argument, which is also the same position advanced by many leading constitutional scholars, the only ones that the *Bruen* court cited is when states adopted or ratified the Fourteenth Amendment so that the Second Amendment incorporated against them. The Second Amendment took on the meaning and took on the meaning that the states understood at the time such that whatever conflict there was with the 1791 meaning had changed, and so the same meaning now applies against everybody, the states and the federal government.

And as the *Bondi* Court explained, the opposite rule would be illogical. And what the Court said, it said it makes no sense to suggest that the states would have bound themselves to an understanding of the Bill of Rights that they did not share when they ratified the Fourteenth Amendment.

And I'll give you an example outside of the Second Amendment context that I think makes this fairly clear. And this is from the Amar book that we cite in our brief, although in a slightly different section. I can send Your Honor the pages. The right to petition government under the First

Amendment obviously existed since the Founding, but it was thought of as a political right of people who held the right to vote and, you know, the participated democracy at that time.

By 1866, however, the right was seen to cover more than just those individuals, white male voters. It was seen to cover the right of nonvoters, specifically women, to petition the government for representation.

Obviously today, we don't look to the right to petition as defined by the 1791 meaning. We look to it as found by the 1860 meaning, to encompass those who do not have a right to vote. That's just another -- I mean, there are other examples like that, but that one I think is relatively uncontroversial.

And so if it's the case that the Founding generation saw sensitive place restrictions at public assemblies as unconstitutional and then in 1868 and onwards the state saw it as constitutional, you wouldn't be going into this analysis. We don't have that here. Instead what you have is a longstanding tradition beginning with really British common law but certainly lasting through and invigorated by the states during the critical Reconstruction period when, you know, the relationship between states and federal governments changed in a way that still exists today.

Okay. So that's the three big-picture observations I had about *Bruen*. And now I just want to discuss the specific

provisions. And since we are on the topic of public assemblies, I'll start there.

What's very interesting from what Mr. Jensen talked about is, in addition to security, one of the other things that Your Honor and Mr. Jensen were talking about is whether or not a place-based restriction would be constitutional if the place was used for governance. And it's not clear to me there's anything in the historical record supporting that governance as the rationale, but there is historical evidence for supporting the idea of exercising other constitutional rights as a rationale for why a place-based restriction would occur.

And so that comes from some of the cases that we've cited to this Court, including cases like *Andrews*, the *Tennessee* case, and the *Shelby* case. But backing up for a second, in terms of what we've actually provided to this Court, we've cited examples of eight different jurisdictions that enacted firearms restrictions specifically on public assemblies and gatherings. Some of these are one-for-one analogs. They literally say public gatherings or public assemblies in the same way.

And as we noted in our brief, these restrictions are nothing new because English common law and statutes prohibited armed assemblies as well, and this is well supported by the historical evidence in the Charles declaration. And what's telling about these statutory restrictions is that as soon as

the laws were enacted, the courts uniformly upheld them. And that is precisely the kind of evidence that the *Bruen* Court says is particularly helpful.

THE COURT: Along those lines, the State cites laws, ordinances, primarily from southern states, some Midwest states. Is it your position that that is representative of the nation?

MS. CAI: It is, Your Honor. And I have two points to make on that. The fact that some states in a geographic region tended to see a policy problem arise such that they wanted to respond to it is a matter of policy, right? I don't think there's any understanding that northern states and southern states understood the right to bear arms differently, especially for the ones that had similar state constitutions. And I don't think there's any reason to discount analogs, especially when they were -- it would be one thing if you thought that the analogs were justified or sorry, were motivated by some kind of animus or tradition that we didn't believe anymore. That's an open question of whether or not those analogs are equally applicable.

The analogs that we're citing from the Reconstruction period, as the Rivas declaration makes very clear -- and she is an expert on Reconstruction Texas firearm law, so it's really hard to get any better than that -- is that this was the response of radical Reconstruction Republican government trying

to provide safety for freed people exercising their right to just be around the world. And so that's why they started enacting these restrictions. And perhaps those were controversial as a policy matter at the time, but they were certainly held to be constitutional. And even when the Republicans left office in Texas, those laws remained on the books.

And so I heard -- I don't remember which brief it was, but one of the reply briefs made the argument that because Texas and Missouri were western states, that we should discount those. I mean, I haven't -- I'm not an expert in history, but this is sort of a high school level understanding, Missouri's joining of the union and Texas's joining of the union were pivotal moments in understanding why we fought the Civil War, why all of this happened in the first place. So I don't think you can discount them just because they were to the west of some other states and in the south.

And it would be one thing if the territorial laws, of which we cite very few, were the only evidence, right? I would understand if, you know, the Yukon -- or not Yukon territory, because that's not in the United States, but some territory at one time had a statute that no other state adopted, that would be shaky evidence; not dispositive, but shaky. We don't have that here.

When we cite territorial laws, those are just

demonstrating the breadth of the tradition; that it began in states and other places that wanted to become states, were about to become states, also adopted the same regulations.

And so I think the final thing I wanted to note is that even the security rationale I think would justify banning guns at public assemblies and demonstrations because we only restrict firearms carry when they're permitted public assemblies and demonstrations, right? It's things that the government has advanced notice of. The whole point of the permit process is so the government can manage the security around a big rally or a big protest. And so I think that is a very direct example of why the security justification would also apply to this situation.

And so to the extent the State is providing security of the people gathered there to exercise one of their most fundamental rights to public assembly and public speech, I think that very well is the same kind of rationale that Mr. Jensen is using to justify or to say that the Supreme Court's decisions in *Heller*, *McDonald*, and *Bruen*, when it said that constitutional restrictions on government buildings are constitutional. So that's public assemblies.

The next I wanted to talk about is parks and zoos. And the analytical link there is the earliest relevant versions of historical zoos were all in parks. And, in fact, the earliest zoos were in the earliest recreational parks, so the

historical evidence is the same.

THE COURT: Can I back up for a second? So what's your position on public gatherings outdoors where there's no metal detectors?

MS. CAI: Yeah, I don't think you need metal detectors, right? So security is not -- I don't think the founders had metal detectors when they enacted some of those restrictions at public assemblies in Maryland, for example. That's not quite the same.

THE COURT: But how do I get there with this legislation, because it restricts public assemblies? It doesn't say public assemblies where the government is providing security. It doesn't say -- none of these restrictions say "where the State is providing security." So help me understand how I get there.

MS. CAI: Your Honor, the permitting process, right, puts the government on notice that a gathering of some size is happening.

THE COURT: Okay.

MS. CAI: And the point of that is to respond to security concerns at those gatherings. And so it may not be possible --

THE COURT: But you're not standing here before me saying -- I don't think you are -- that once there is a gathering for which a permit is required, that the State will

guarantee that it will secure the gathering?

MS. CAI: Of course not. But the State is now on notice that a gathering is occurring. And depending on the number of people and the kind of gathering it is will calibrate how much security and law enforcement to be there as a backup for if anything happens.

And so I don't know if there's any support in the record that the level of security provided at legislative assemblies, polling places, or courthouses is what the historical analysis turned on. There's no --

THE COURT: No. But I think you've got a *Bruen* problem, because that's exactly what the Court talked about; that the State can't get up and say -- because they gave the example of Manhattan, you got police everywhere.

MS. CAI: Of course.

THE COURT: And so if you're going to have a gathering at Times Square and the State is going to take the position, well, you got police everywhere, they're on the lookout, I think *Bruen* squarely rejected that.

MS. CAI: And we're not saying --

THE COURT: How do you get around that?

MS. CAI: We're not saying that all of Jersey City, all of Camden is a sensitive place. That's not what we're saying at all. But of course, *Bruen* recognized that some government-provided security specifically for that location --

and I don't mean all police officers in Camden protect Camden. I mean for the very location and the very activity that's going on there --

THE COURT: I.e., the polling place and the courthouse?

MS. CAI: You know, Your Honor, polling places actually, you know, there's no armed security at polling places by law in New Jersey and many other states. So I don't think it turns -- I don't think it turns on that. And so we're talking about something that I think is not really the justification. It's just an alternative argument.

THE COURT: No. But I think --

MS. CAI: But I think it's interesting because I think it may help some places that don't have other justifications that are analogically relevant, right?

So I suppose one could argue that if the security provided is analogous to what the historical level of security was provided at legislative assemblies, polling places, again, that would be a very deep historical analysis that I acknowledge no party has submitted to the Court on what level of security was provided at these locations. That's why I don't think that's actually the justification. It has to be what I think comes from the language of the statutes that we're citing, right? What they're concerned about is both places where volatile conditions could occur, because the statutes

from Texas and Missouri and Tennessee, they all looked at places where people are gathered socially and/or in some kind of assembly in that meaning.

And also they were especially concerned about places where those gatherings were for all purposes but also especially for educational, literary, and scientific purposes and social purposes.

So you can think and draw some lines for why those things were singled out as especially important. But we would submit to you that the thing that matters for drawing the analogy in this case is the exercise of constitutional rights. And so just as it is so important that when people go to vote, they are not intimidated by the presence of guns. When they go to participate in petitioning the government and to seek redress for grievances at the courthouses, that the same is true. When they go and participate in democracy by attending legislative assemblies, that is the same rationale that applies to when people go and protest or gather to express their freedom of speech.

All right. So parks and zoos. All I want to say here is that the level of even if we were going with a numerosity standard, which we don't agree is what *Bruen* calls for, the State has provided nearly 30 state and local firearms prohibitions. I actually have now become aware of more. But I don't think the difference is going to turn on 30 versus 40.

So we can submit that to the Court if Your Honor wants, but that's kind of not the point, right?

The point is that the most prominent recreational parks in America at the time and today, Central Park and Fairmount Park, when they opened, prohibited firearms immediately, and other parks followed thereafter. When national parks first became a thing in the late 19th and early 20th century, they did the same. And that spans big cities as Your Honor noted in your TRO Opinion and also smaller towns like Springfield, Massachusetts and some of the other towns that we've cited. And plaintiffs have nothing to refute this evidence.

Instead, they cite to laws regulating firearm discharge at public squares and commons in the Colonial era. So it's not clear to me why more restrictions or other restrictions at other places somehow discount restrictions that were also adopted at other places. That doesn't really logically make sense to me. But I think what's also key is that the very language of the 18th century statutes they cite don't say "parks." Instead they group things like "greens" with streets, alleys or lanes.

And so under the doctrine -- I can never pronounce this right -- noscitur a sociis, or something like that, things generally take on the meaning of the list that they're a part of, these statutes clearly indicate that there's a difference

between recreational parks and the proverbial Boston common town square that you would stroll through on your way to something else.

And that's true in Mr. Jensen's Exhibit 19. The 1789 Rhode Island statute that says no shooting guns in or across any road, street, square or lane. I don't think that means that historically firearm restrictions at large parks would be prohibited just because they only restricted discharge in the lane that you -- or the square on the lane that you're walking through. And our evidence shows the concept of a park was defined to be different from a town square. That was the whole point that parks became a thing in the 19th century. And so Exhibit 50 has the progenitor of Central Park and Prospect Park and many other parks, Frederick Law Olmsted explaining that parks were created to be a contrast to the town square.

THE COURT: You can have firearms in national parks now, can't you?

MS. CAI: Your Honor, I don't know the answer to that.

THE COURT: I think you can.

MS. CAI: And it may depend on the location and the specifics, but that's also what Chapter 131 does. It provides for the specific regulator of the park to set rules for what parks are off limits and what are not.

Let me just remind myself of where else I'm going

next. Hospitals. Okay.

THE COURT: I think the law is, is that it depends if the national park is located in a state which allows firearms, then you can. And you don't -- well, okay.

MS. CAI: Right. But I guess, Your Honor, to that, we don't look to the current policy decisions, right, and that there could be policy decisions there. What matters is when they were created, and we have an exhibit showing the policies at that time.

THE COURT: Yes.

MS. CAI: Okay. Hospitals, I did want to get to because there is a difference in terms of what has been alleged before and now at least in terms of standing.

THE COURT: I think we can pass by hospitals.

MS. CAI: Okay, Your Honor. I just -- okay.

So casinos, I don't actually want to spend too much time on this, except Mr. Jensen -- or Mr. Schmutter filed a number of items on the docket last night that I do want to --

THE COURT: So here's my question on casinos.

MS. CAI: Yes.

THE COURT: If an individual, if a plaintiff with a concealed carry permit walks into the Tropicana, is the State going to prosecute him for trespassing or for a violation of A18?

MS. CAI: Currently, Your Honor, because of your

injunction, trespassing.

THE COURT: Okay. And if the injunction does not issue?

MS. CAI: I think it -- well, if the injunction does not issue but the casino also maintains its current rules, I think you could do either.

THE COURT: Okay.

MS. CAI: Now let me give you another example that may be clarifying. If the injunction is in place --

THE COURT: Yes.

MS. CAI: -- and the Tropicana says actually we are not prohibiting firearms, the State would not be prosecuting just the presence of firearms at the Tropicana.

THE COURT: Try that again.

MS. CAI: So if Your Honor's injunction stands, and let's say the Tropicana -- I'm not saying they will, but, you know, if they decide we changed our mind, we're changing our policy to say firearms allowed, the State would not be prosecuting someone from carrying a handgun into the Tropicana in that instance. Because the injunction on Chapter 131 would be in place so there is no --

THE COURT: No. I want you to assume this Court has had no involvement in this case.

MS. CAI: Okay.

THE COURT: A18 is on the books.

MS. CAI: Okay. So first, the DGE regulations that have existed since 1970 already prohibited this. So whether it's that or A18, that would be the thing.

THE COURT: Is the State going to prosecute on the A18? If Mr. Koons walks into the Tropicana with a firearm, is he getting prosecuted under A18?

MS. CAI: Let me ask you a question about what the other relevant fact, which is has the Tropicana in your hypothetical, Your Honor, also prohibited firearms?

THE COURT: Let's answer that -- how about I answer that with a question or answer it with let's assume -- let's take it one by one. The Tropicana doesn't take a position. A18 is on the books, okay, and Mr. Koons walks in with his firearm, is the State prosecuting him?

MS. CAI: Yes.

THE COURT: Okay.

MS. CAI: Unless he's a law enforcement officer or other exemption carrier.

THE COURT: The Tropicana says no firearms allowed, A18 is on the books. When Mr. Koons walks into the casino, is he getting prosecuted for trespassing or A18?

MS. CAI: It could be either, Your Honor.

THE COURT: Okay. And then I guess the third scenario is -- I'll leave it at that.

MS. CAI: Okay. So what I wanted to make clear on

the record is that Mr. Schmutter appears to acknowledge that the casino's independent choice in February to ban firearms dooms their application for a PI. Instead, he files --

THE COURT: Well, no, I don't think so. I think he basically has said that the individual casino owners are in cahoots with the State.

MS. CAI: Right. But that's why he's trying to say that. And I'm just trying to clarify to Your Honor that that is absolutely not true.

THE COURT: Okay.

MS. CAI: So number one, the DGE director never directed the casinos to ban firearms in any way, shape or form. And I say that as an officer of the court. No evidence suggests that.

THE COURT: Well, they certainly were communicating with each other; we can agree on that.

MS. CAI: What the evidence shows, yes, is that there was communication.

THE COURT: And the State was certainly very curious what the casinos were doing.

MS. CAI: Yes. And that's very important. And that's what I wanted to address.

The DGE director inquired as to what decisions the casinos had made and what the association was going to announce and when it was going to announce it. That's highly relevant

to the law enforcement's ability to enforce security appropriately and to understand the security posture at the casinos.

There are a lot of -- there are a lot of responsibilities at the casinos from law enforcement that's divided up between different branches of the Attorney General's Office as well as local law enforcement in Atlantic City, and they need to know whether firearms are going to be allowed inside casinos or not so that if there is an incident, they know how to respond. And that's especially true in February when Super Bowl weekend was coming up and there's more activity. I don't have anything to show for that. But I think it's a commonly known fact that sports wagering goes up in the casinos around that time.

And the timing of the casinos' decisions, Mr. Schmutter was trying to cast aspersions on that. It's obviously because they needed to make a decision in response to this Court's January 30th injunction which for the first time in about 50 years restricted firearms at casinos -- or lifted the restrictions on firearms at casinos. And so the fact that they made the decision in that time period is an obvious reaction to the reality they're facing.

And what the documents that Mr. Schmutter submitted shows is that after the casinos had already made that decision, the casino association, which is just a trade association that

the DGE does not regulate, told the DGE that it was going to publicize that information, and the email shows the director was asking whether that has happened yet, the publicization. And he was sent just a final copy of the press release. That's all. And so --

THE COURT: I don't think we really need to belabor the record. I don't know that it's really relevant. I think that Mr. Schmutter raises an interesting issue as to really the back-and-forth between the casino commission and the State. It's an interesting issue. It's not one I don't think that this Court needs to resolve once I have now understood that the State retains the discretion whether to prosecute under trespassing or A18. I think it really -- that resolves the issue of standing, so I think we can move on.

MS. CAI: If I may say one more point on that particular point.

THE COURT: Yes.

MS. CAI: I don't think plaintiffs have alleged that they would be going to the casino with a firearm if they were only going to be facing criminal trespass penalties, but they wouldn't be going if they were facing Chapter 131 penalties.

THE COURT: Well, but I think the issue is that I don't know at what point will the casinos change their mind. I don't know.

MS. CAI: That's true.

THE COURT: And so none of us do. I mean, the casinos may change their mind tomorrow, just like any private property owner might change his mind or her mind tomorrow. So I don't think that the State can stand before me and say there's no standing because the private property owner has a no guns sign. I think we have to presume that that is fluid.

MS. CAI: Respectfully, Your Honor, I disagree. Article III requires there to be a present case for controversy, and right now there is not. And what it also requires is that even cases that plaintiff cites makes clear that it has to be the cause of the -- or rather, if they received a favorable court ruling, it could then do the thing that they want to do. And that is clearly not the case presently. A favorable court ruling which Your Honor had already issued in the TRO, but if it were to reissue it, would not allow plaintiffs to carry firearms in a casino.

And so under their own language, they cite --

THE COURT: But that's a but-for causation, which the Third Circuit doesn't require.

MS. CAI: So, Your Honor, I'm quoting from *Sherwin Williams*, which is a 2020 decision written by Judge Hardiman, which makes clear that the operative fact in the case that plaintiffs cite, *Khodara*, was, quote, "it was undisputed," in that case, "if the plaintiff received a favorable ruling, it would develop the landfill," which is the remedy he was

seeking. So that's just not true in our case.

And so if we prevail on -- they're not saying, you know, if I prevail on Chapter 131, I am walking into the casino with a firearm. They can't say that.

THE COURT: All right.

MS. CAI: Okay. So finally, Your Honor wanted to talk about transit hubs. You know, the beginning of my analysis on transit hubs actually begins with the government-as-proprietor doctrine, but I can skip over that part and just talk about --

THE COURT: I want you to -- yeah.

MS. CAI: -- historical evidence.

THE COURT: I want you to tell me, what is a public transportation hub? There is no definition in the legislation. Could you help me understand what that is? And then I'm going to give you some examples and you tell me whether or not that is a public transportation hub.

MS. CAI: Sure, Your Honor.

THE COURT: Because if I don't know, I'm not so sure the plaintiffs know.

MS. CAI: Okay. Your Honor, I think, and I don't have the specific cite right in front of me, I think there are state either statutes, regulations, or other understandings and in the transportation context that transportation hubs are places where multiple modes of transportation intersect. And

it doesn't have to be modes as in trains and buses.

THE COURT: Okay.

MS. CAI: But, for example, Trenton Transit Center is certainly a transit hub because both Amtrak and New Jersey Transit and the -- and the SEPTA, for example, those modes of transit all intersect there.

THE COURT: So where modes of transportation, are you giving me -- is there a definition somewhere that I should be looking to? Or are you just going from case law? Tell me what you're doing.

MS. CAI: My understanding is that that's certainly the Port Authority's understanding. Now, obviously that's a different agency than the State.

THE COURT: Yes.

MS. CAI: And I'm sorry, Your Honor. I don't have that specific citation, but we can provide that to the Court.

THE COURT: Well, let me ask you some questions. Is a bus stop at Exit 3 of the turnpike a --

MS. CAI: No, no, it is not.

THE COURT: Okay. But that's where cars and trucks and, I don't know, horses intersect.

MS. CAI: I think the fact that the bus stop happens to be on another road, I mean it's the same road that carries both buses and -- well, I guess that's not really the distinction.

That's just not a hub in any way, right? That's just one station where you're only going to that station for the purpose of getting on one mode of transportation, which is the bus. You're not going to the bus stop to get in a car or a truck or a train or anything like that.

THE COURT: So tell me -- okay. Well, let's continue. So is a marina a transportation hub?

MS. CAI: I don't think so, Your Honor, because my understanding is only boats are there.

THE COURT: Okay.

MS. CAI: I confess, I don't know enough about marinas to have an understanding of that.

THE COURT: But that's my point, Ms. Cai. And I don't -- if you don't know what a transportation hub is, how would these plaintiffs?

MS. CAI: Well, Your Honor, I don't think a void-for-vagueness -- and Ms. Reilly is going to address this in a bit, but I can preview, which is that a void-for-vagueness analysis, which I don't think plaintiffs have even brought against transportation hubs, doesn't turn on whether or not any particular person, including a particular lawyer, has questions on the edge cases or certain applications thereof. They're trying to invalidate the statute, period. And so there are definitely places that I think everyone agrees are obviously transportation hubs.

THE COURT: But before -- they're asking this Court to invalidate a restriction. I have to know what restriction it is that they're asking me to invalidate. So would it be error for me to sua sponte raise the question of what a transportation hub is? Because I certainly don't want to go there.

MS. CAI: I do think that a plaintiff would have to demonstrate that they -- well, if they have not pled or nor has anyone averred that they are confused by what a transit hub is, and so there is no constitutional injury in that sense.

THE COURT: I'm not so sure that's fair. I think they have submitted several declarations where they have talked about driving through or near or by the Newark Airport or by the -- one of the -- I don't remember now.

And that raises, I think, very fair points, which is, is someone who is on the turnpike in the perimeter of the Newark Airport violating this restriction?

MS. CAI: No, Your Honor. It has to be the airport itself. And of course there's also the exception for -- and this is in Section 7(d) on accessing the roads at a public right-of-way where you're not restricted. And so if you're driving on the pickup lane of Newark Airport, that's not a violation to have -- well, you would have to abide by the vehicle restrictions, but that's not a violation of Section A20.

THE COURT: Okay. You can understand my concern. And one of the plaintiffs has a boat at one of the marinas, I think by Atlantic City. So your view is that's not considered a transportation hub or it would not -- it certainly isn't an airport. We can all agree on that.

What about privately owned airports?

MS. CAI: Your Honor, I think they are airports. The definition of airport is -- I mean, they have "airport" in the name, and so it doesn't matter if they're privately owned or publicly owned.

I will note, however, that it's not clear to me that plaintiffs have demonstrated that there is a self-defense right to have a handgun when they're on an airplane, which is what they're trying to do, right? They're trying to bring the handgun on to their private aircraft when they fly. It's not clear to me what kind of right, Second Amendment right would be vindicated by that kind of activity. It's a very unusual set of circumstances. I clearly have not thought about private planes.

But I don't think that the prohibition -- rather I do think that the prohibition on airports does apply generally to airports even if they're privately owned.

THE COURT: Okay. And then they've made the argument about like a restaurant or a store on that property. Is that considered a transportation hub?

MS. CAI: No, Your Honor. I mean, the restaurant that they've pointed to, we've gathered from the, you know, reporting on what the restaurant is, it's just a stand-alone building that serves food. It's not an airport at all.

Now, it's one thing if it's the McDonald's inside the Newark Airport Terminal B, right? That's a very different situation because you're in the airport in order to be in the restaurant.

THE COURT: Yeah. That's a different situation.

And what about what many of the plaintiffs -- well, not many, I think a couple, talk about dropping off family and friends at the airport. Are they in violation of this provision?

MS. CAI: No, Your Honor.

THE COURT: Why?

MS. CAI: Because they are -- well, so this is the provision in Section 7(d) where it says the holder of a validly and lawfully issued permit shall not be in violation of subsection (a) -- which is where all the places are enumerated -- while the holder is traveling along a public right-of-way that touches or crosses any of the places enumerated in section (a) of this section.

THE COURT: Where are you?

MS. CAI: This is subsection 7(d).

THE COURT: All right. I'll find it.

MS. CAI: Yes, Your Honor.

I will note that I think in one of the supplemental declarations, and I apologize, I don't remember the name of the plaintiff, I think he noted that he may want to go into the airport terminal with the firearm.

THE COURT: Yeah.

MS. CAI: On picking up and dropping, that is prohibited, right. The rule says, the whole point is, you know, even outside of the TSA area but in the airport itself you can't be carrying a handgun on your hip in those areas.

THE COURT: Yeah. So what about one of the plaintiffs who I think he travels to New Hampshire and so he avoids -- and he's permitted to take his firearm to New Hampshire, but he has to fly out of another airport? He disassembles the firearm, he takes it to that other airport, and he travels to New Hampshire. Can he -- he can't -- there's no way under this legislation that he can disassemble his firearm and take it, fly on a plane out of Newark to New Hampshire?

MS. CAI: So certainly he couldn't take it as carry-on luggage. That's already prohibited by TSA rules. As to checked luggage, I think it depends on the facts of the case, how long he's lingering in the pre-TSA area. If he's just dropping off the luggage, and I think there's actually when you go to the airport, they're actually outside, luggage

drop-off areas, I would think that would have to be at least just a de minimis, if any, violation at all of the statute.

THE COURT: So where is that? Is that the 7(d) you just cited to me?

MS. CAI: The de minimis is in Section 7(a). We've discussed this before.

THE COURT: We talked about that the last time.

MS. CAI: Exactly, we did.

THE COURT: So the State would take the position that you can take your firearm to the airport as long as you're just dropping off your checked luggage, and so he could fly from Newark to New Hampshire?

MS. CAI: If that's all he is doing.

THE COURT: What do you mean all he is doing?

MS. CAI: Some people are doing other things with the firearm. They're going into --

THE COURT: He's having a cup of coffee on the sidewalk; you'd have a problem with that?

MS. CAI: Correct. If he's having a cup of coffee in the Starbucks before the TSA check area, before he drops off his bag, if he's going to be sitting there for hours and hours, I think that would be a problem. Because what we're concerned about or what the state -- the legislation is concerned about is gun events at airports, which is a place that did not exist at the Founding. And in light of 9/11 and many other

incidents, having a gun in any way, shape or form in that area is a huge security concern not just for the State, but for Port Authority, national security, et cetera.

THE COURT: Yeah. And we talked about this before, and I don't want to digress, but the de minimis, so even though it is de minimis, the problem with the argument, the de minimis argument that the State has made -- and they've made it to me before -- is that it really by then, the plaintiff is already charged and the plaintiff then bears the burden under the statute, as I recall it, to check -- to persuade the Court that it was de minimis.

But in any event, I don't want to get too bogged down in that. Your next point, please.

MS. CAI: Those are all the places that we wanted to cover.

THE COURT: Okay.

MS. CAI: But if you wanted to talk about more on transit, I'm happy to answer any other questions from the Court.

THE COURT: I think I'm good.

MS. CAI: Okay. So I did, and this part does relate to public transit as well. The government-as-proprietor and government-as-market-participant doctrines, those are related but different doctrines. I think the bottom line is that the plaintiffs have not really responded to the core constitutional

principles here.

And what the two doctrines say is the following: When the government is operating a premise like a library, a hospital, a jail, a stadium, whatever it is, and it sets building rules or premises rules, it is operating as the proprietor of the premises and not as a sovereign regulator of the people. I think Mr. Jensen basically acknowledged this in his argument earlier.

We're not talking about highways, the streets, the town square. We're talking about places where it is obvious from the kind of regulation and what the government is doing that it is taking the place of the owner as the owner of the building or the land just as a private individual who happens to own that would.

THE COURT: Yeah. And I don't really understand this argument. I think it's -- I mean, if the State is the proprietor like any other private business owner, it can post a sign "no guns." We all agree on that. It's not acting as a sovereign, it's acting as a proprietor, right?

MS. CAI: I agree with that, Your Honor. But I don't think plaintiffs agree with that.

THE COURT: Well, what they say, and this is what I would like you to address is, so you don't need -- this legislation -- this legislation is dealing with the state as a sovereign, not the state as a proprietor. Because there is

nothing preventing the state as a proprietor. If it owns the -- if it owns the car vehicle, then it doesn't want guns in its vehicle. They're not quarreling with that, at least I don't think they are. But when you are acting as a sovereign is where they quarrel.

MS. CAI: I guess I'm a little confused, Your Honor, because I think this is the State's way of saying in one fell swoop, these are the places where we act as proprietor --

THE COURT: Well, you can't pretend to act as a proprietor. You either own it or you don't, right?

MS. CAI: Yes, Your Honor. And to be clear, this argument only applies to the state-owned libraries, hospitals, jails. So I understand that there are other parts of the statute that this government-as-proprietor doctrine would not apply to. And so let's take the section on zoos, for example, right?

THE COURT: Yeah.

MS. CAI: So plaintiffs say some zoos are private, some zoos are public. This justification, this constitutional justification I've offered to the Court admittedly would not apply to -- I don't remember which zoo was privately owned, but whatever the privately owned zoo was, but it would apply to the publicly owned zoo. And so that's why we're making this distinction.

When the State is acting as the owner of the zoo, it

is not restricted from being able to restrict firearms and restrict a number of other activity in order to protect its status as the owner of that property.

THE COURT: So I think it's somewhat of a disingenuous argument in this regard, and you tell me, you persuade me differently. If the State owns the property, it has every right to say "no guns allowed." And if someone comes in, the librarian says get out, you can't have a gun in here, then the remedy is trespass, right? The State can prosecute that person for trespass.

But here, what the State is doing is it's criminalizing the behavior as a sovereign. It's not simply putting up a no trespassing or a no guns sign, it is acting as a sovereign and criminalizing the behavior.

So what it seems to me the State is doing is saying, oh, no, Judge, we're just simply acting as a proprietor. But you have that right. Prosecute them for trespass. You're going further and you're criminalizing and making it a crime, and that's acting as a sovereign. Tell me where I'm wrong.

MS. CAI: I don't think that the analysis turns on whether or not the State's prohibition is on a sign or in a statute. I may be wrong, but I'm pretty sure that --

THE COURT: But I think that's the distinction between whether you are acting as a proprietor or a sovereign.

MS. CAI: I just -- I would have to disagree with

that, Your Honor. I don't think that the State's only way of acting as proprietor is posting a sign on a door. It has --

THE COURT: Okay. Tell me -- let me ask the question this way: What is the source of authority when the State criminalizes this behavior, is it an owner or is it a state?

MS. CAI: So it's a combination -- it has to be a combination. Because when states criminalize trespass for anybody, it's also the State.

THE COURT: Bingo.

MS. CAI: But, but, Your Honor, it also has the ability to do so as an owner. And so there's no distinction between the State's ability to do both and when it's rolled up into the same regulation, that doesn't mean that it's not acting as an owner. Sorry. That's a lot. Let me back up for a second.

So let's start with *United States vs. Class.* This is the D.C. Circuit decision. I also wanted to clarify that plaintiffs are dead wrong to say that *Bruen* abrogated the holding in *Class*. What *Bruen* abrogated was *Class's* description of the legal standard, the two-part legal standard, the second part of which *Bruen* abrogated, the means-end test. But *Class* specifically said we are not doing that. We are not going to that second step. We're only doing the first step, does the activity constitute Second Amendment activity at all?

And I am pretty sure that the regulation at issue in

Class on the U.S. Capitol parking lot was a statute rather than a sign at the parking lot. It might have been both. I'm not aware of, you know, if there are facts on that. But there was a statute that was violated that regulated Capitol Grounds.

And so in the same way that the federal government was using a statute, a criminal statute to regulate its property, the Capitol Grounds, the same thing is true when the State here in Chapter 131 is doing the same for public libraries and museums.

THE COURT: Yeah. I think the problem you have with that argument, Ms. Cai, is that that's the U.S. Capitol where government function is at its apex. And that's exactly what *Bruen* talked about.

MS. CAI: But the holding in *Class* was not about -- well, first of all, it was the parking lot which I guess -- I don't know if the federal government would agree, but I don't think the parking lot is where the actual activity is at its apex, rather it's because the government owns that parking lot. It's not different from when a parking lot owner -- I don't know the names of any household names for parking lot owners, but if someone else is doing that. And I think that's also a slightly different argument and an even stronger one when the government is not just the owner of the property, but also a participant in the marketplace. And so that's a different line of cases that come from the same genesis, and in the

Commerce Clause context, in the preemption context. So these are constitutional provisions that courts say we don't even do the preemption analysis or the very complicated "dormant" Commerce Clause analysis when you don't even reach that question because the government is not acting as a sovereign.

All of plaintiffs' arguments are saying some version of, well, *Bruen* didn't talk about this in its historical test, that's true. But *Bruen* wasn't concerned with this problem, right?

Cases like *Pike vs. Bruce Church*, which lays out a very complex dormant Commerce Clause analysis, that doesn't talk about government as participant. You don't do the *Pike* test if the government is a participant. That's the whole point of this part of the analysis.

Okay. So on the private property role, I don't want to belabor the point. We've had a lot of conversations about this, but I did want to respond to the brand new argument that Mr. Jensen raised in his reply brief, which is to say that the word "gun" in these historical statutes spanning from the 18th century through the 19th century only meant long gun and not handguns.

A few different levels of analysis. And I'll start with the ones that don't require me to provide the Court with documents. The first is that this argument obviously doesn't apply to the Texas, Louisiana, Oregon, or New York laws which

use the word "firearms." And so even that alone, that would establish the tradition that we're looking at here.

But even on the New Jersey, Massachusetts, and Pennsylvania laws, I'll make this point: Even if Mr. Jensen were correct, they still regulated other kinds of guns. *Bruen* says you don't need an analog -- or you don't need a historical twin, you need an analog. Certainly people exercised their Second Amendment right with long guns and they were still restricted. But the key point I want to make to Your Honor is that their argument relies on a single dictionary definition from 1828, the weight of the authority from the 18th century period that is contemporaneous with the enactment of the 1722 and 1771 New Jersey statutes is otherwise. So what we did is we looked at dictionaries relied on by the Supreme Court in *Heller*, and what they show was that the word "gun" was a broad term for firearms, and that pistol was a type of gun and handguns were a type of gun.

What I have for Your Honor, and plaintiffs already have this because I've already sent it up to them last night, is a binder. If I may approach, Your Honor.

THE COURT: Yes. Thank you.

MS. CAI: I have a nonbinder version for the clerks, if they need it, I have that here.

(Handing documents to the Court.)

THE COURT: Yeah. Thank you.

MS. CAI: So tab 1 is this Sheridan dictionary from 1796, which was cited in *Heller*. You can access it on the U Penn library website, but it's easier to print it out. And there, and I know it's hard to read the historical documents. I'll try to point the Court geographically on the page. On the second, the right-hand column about halfway down the page, under "gummy" it defines gun. And it says it's the general name for firearms, the instrument from which shot is discharged by fire.

And on the last page of that exhibit on the upper left-hand corner, it defines pistol as a small handgun.

Tab 2 is the Samuel Johnson dictionary from 1755, which was cited by *Heller* and by another case that plaintiffs cite, *Espinosa*, Justice Gorsuch's concurring opinion.

There, on the third page of the exhibit, the right-hand column halfway down the page, it defines gun again as "the general name for firearm, the instrument from which shot is discharged by fire."

If you turn to the last page of that exhibit, on the right-hand side halfway down the page, it defines pistol again as a small handgun.

The Cunningham dictionary is Exhibit 3. This is actually from 1771, which is the same year that the relevant New Jersey statute was reenacted, cited in *Heller* and actually described as important. It has a very long entry for guns

starting on the second page, right-hand column about three quarters of the way down the page.

And what it does is it describes a number of laws or cases that used the word "gun," and in the very first entry it talks about a handgun. Second entry does the same. And then on the following page, about halfway down the page, it talks about an execution of a sheriff's office to carry such a handgun, that it was lawful and that a dag was a handgun within the statute. *Bruen*, on page 2140, describes "dag" as a handgun. I did not know that. You learn something new every day.

Outside of *Heller*, another dictionary that was cited by another case that plaintiffs cite to, *Gamble*, is Exhibit 4, the Dictionarium Britannicum from 1722, which is very relevant because that's very close in time to when the New Jersey statute was first enacted. It describes -- or it defines gun on the second page, upper left-hand side, as warlike machine used before the invention of guns, or a firearm or weapon of several sorts and sizes.

On the next page, upper left-hand side, it defines pistol as a short, small gun or firearms worn on the saddle bow, the girdle, or in the pocket. And 19th century evidence also confirms this. So Exhibit 5 is Samuel Colt's 1836 patent for the revolver, which, as the Rivas declaration explains, is what led to the popularization of handguns in general. It

literally describes his invention as a revolving gun.

Exhibit 6 is a dictionary or a cyclopedia of costume or dress from 17 -- or sorry, 1876. Now, I note this is a British dictionary, but to the extent that we're looking at the English language, it's at least somewhat relevant, although I agree it's less relevant than the others. It goes through and describes in detail all kinds of guns and pistols. And on page 234 it talks about the etymology of the word "gun." It says the word gun, although still retained in the language, was henceforth -- thenceforth used in a general sense only. The constant improvements in hand firearms during the 16th and 17th centuries giving rise to various other names.

And so I think all of this demonstrates that the one dictionary definition that plaintiffs rely on was not indicative and is not evidence supporting the idea that the New Jersey statute which lasted two centuries and using the word "gun" meant to say, well, you can just carry a handgun on to other's property without their consent in contravention of the word. And some of the statutory context evidence that plaintiffs cite actually disprove their point.

And so, for example, Exhibit 9 to Mr. Jensen's declaration is an 1812 Delaware law that prohibited the discharge of "any gun, musket or pistol."

Mr. Jensen's argument is that guns were long guns like muskets, but if it's using the word gun, musket, pistol

disjunctively, that disproves his point, right. Because if a musket is a gun, then the use of the word gun doesn't exclude musket any more than it excludes the word pistol. And that's true for several of the other statutes. Exhibit 10, Vermont law. In Exhibit 11, a New Hampshire law, and so forth.

And I'll just note that even if sometimes we use words colloquially to mean slightly different things, that doesn't mean that the definitional use in the statute is the same. So let me give you an example. A car, right? Car is anything that's got four wheels and drives like an automobile. It includes SUVs in probably the legal definition. So if you had a statute that says all persons are prohibited from driving any car onto another's private property without expressed permission, we wouldn't say aha, that exempts SUVs even though sometimes in colloquial language you may say oh, there's a bunch of cars parked on the street and a bunch of SUVs, too, right? You wouldn't think of that as a reason to read the statute as excluding SUVs. So that's my bit on the private property rule. Obviously there's a lot more there on the principle and all that, but I did want to get that into the record.

THE COURT: Okay. I want to move things along, and I don't want to deprive the others of their time. Were you going to speak on the default rule?

MS. CAI: Oh. That was what this was, yes.

THE COURT: Further on it with respect -- well, obviously.

MS. CAI: Only to the extent Your Honor has any questions.

THE COURT: I wanted to focus on the First Amendment, the compelled speech.

MS. CAI: Sure, Your Honor.

THE COURT: The State focuses on the framing of the Second Amendment right, but it doesn't do a means-end analysis. So assume I disagree with your framing, what level of scrutiny should I apply?

MS. CAI: I think it would have to be rational basis or intermediate perhaps. I mean, the problem with the entire First Amendment theory of the plaintiffs is that someone is speaking about their property, no matter what.

THE COURT: Right.

MS. CAI: So under the rule that they want, the person who doesn't want guns on their property has to speak. It has to put up a no trespass sign, right. That's speech. They say that's -- they say their version in our world is compelled speech, but that's not compelled speech. I think that's logically impossible. In both cases, someone is putting up a sign saying what their preference is. But I don't think -- the key to the analysis is that the fact that someone has to express their preference to the outside world is not

compelled speech. So that's true in contracting. That's true in wills. Now, the point is not what the dead person, their rights, it's what they have to say before they're dead to communicate their rights.

There is a -- by definition there has to be a default rule, right, to set aside what it is the rights and responsibilities are of people vis-a-vis the thing we're talking about, be it a will, a property, whatever it is. And so it logically cannot --

THE COURT: But what's the governmental interest?

MS. CAI: I'm saying, Your Honor, that there is no speech infringement at all. When the principle is you have to speak to express your preference, that's not a regulation of your speech.

THE COURT: Okay.

MS. CAI: But if there was a government interest at stake under that analysis, Your Honor, it would be this: First, we have evidence in the record that at best, New Jerseyans are confused about what they're supposed to say and not say under the prior regime before Chapter 131. So Exhibit 21 is empirical report, empirical study by Ayres and Jonnalagadda, which demonstrate --

THE COURT: Yeah. And you've been --

MS. CAI: Yeah. I know it's hard to read. So we can send you an electronic copy if you'd like.

THE COURT: No. It's been in the record. I'm familiar with it.

MS. CAI: Your Honor, so I think the government's compelling interest is making sure that private property owners are accurately communicating what they actually believe.

THE COURT: Right. And we've discussed this a little ad nauseam before.

MS. CAI: Yes, Your Honor.

THE COURT: And I've asked the question. I've never really quite gotten an answer to it, so run a radio campaign.

MS. CAI: Your Honor, I don't even think that under intermediate scrutiny the analysis is whether or not there are other alternatives. I'm not actually sure if that's more restrictive of speech or less restrictive of speech.

I mean, it's a matter -- and it's the same that people would have to post their information in a certain way for the outside world to know it. I don't even know if that's a least restrictive means or just an alternative restrictive means.

I think what's clear, though, is that there is no compelled speech. There is no content-based regulation. It's not based on what you -- you can say whatever you want about your property. The government is not telling you that you can't or that you have to speak a certain message. There's no compelled speech. And so I don't think there's a speech

problem at all.

To the extent it even touches on the First Amendment, it would be a lower tier of scrutiny. And so the idea that there is other ways of accomplishing lesser goals, I would say that the radio announcement, probably not very effective, but I --

THE COURT: One last question, because it looks like you're sitting down, but what are you going to do about the citizens who they don't want guns on their property but they don't want to broadcast it? What's your response to that?

MS. CAI: Well, they don't have to broadcast it at all under Chapter 131. And that's exactly what Chapter 131 allows. So if you don't want guns on your property, you don't have to say anything.

THE COURT: But the --

MS. CAI: The default rule under Chapter 131 is if you don't say anything, guns are not allowed.

THE COURT: But you have to -- okay. Fair enough. Okay.

MS. CAI: I don't know if Your Honor had any questions about the use of expert declarations. I'll just note that many post-*Bruen* courts have allowed them, have found them useful. The Seventh Circuit recently remanded to do that precise analysis.

THE COURT: Can I just go back for a second? And

maybe I didn't ask the question that I thought I asked. Hang on a second.

Oh, yeah. The question I was asking is, what about those who they want -- they're fine with guns.

MS. CAI: Oh.

THE COURT: But they don't want to broadcast that, what do you say to them? I think you misheard me. Yeah. That's the -- well, in any event, that's my question. What do you say to those who they want guns, they want the protection, they whatever, but they don't want to broadcast it, what do you say to those?

MS. CAI: I don't think they have to broadcast it. They can just communicate that to whoever they want to have guns on their property, right? They don't have to post a sign. They can email, call, put it on their website, whatever other means.

THE COURT: Yeah. And we talked about this before. So if, you know, the local hardware store would prefer that people come to its establishment with guns, but they certainly don't want to post a sign, it's the State's position well, to get in touch with your customers somehow and let them know, I guess.

MS. CAI: Yeah. Or, you know, you could -- there are probably other ways of doing that in advertising or other things. But the point, Your Honor, is that the hardware store

that does want to prohibit guns, under plaintiffs' view of the world, would have to post a -- so it's the same problem to the extent it is a problem.

Our position is that expressing your preference to people that is an accurate reflection of your preference is not a prohibition on speech or a restriction on speech.

THE COURT: Understood. Thank you.

MS. CAI: Thank you, Your Honor.

THE COURT: Okay. Ms. Reilly. Thank you.

MS. REILLY: Your Honor, could we have a brief sustenance break, like five minutes?

THE COURT: Five minutes. And then I'm really hoping to go maybe a half an hour more or so.

MS. REILLY: Thank you.

THE COURT: Because we've covered a lot of ground, and I do want to give you all your due time, but I think we've covered a lot of ground. But, yes, five minutes, okay. Thank you.

MS. REILLY: Thank you, Your Honor.

THE COURTROOM DEPUTY: All rise.

(Recess was taken at 1:07 p.m. until 1:16 p.m.)

THE COURTROOM DEPUTY: All rise.

THE COURT: Okay. You can all have a seat. Thank you.

Okay. Ms. Cai, can I ask you just some follow-up

questions?

MS. CAI: Sure.

THE COURT: I have some questions I want to focus on before I turn to Ms. Reilly. And this really focuses on the equal protection challenge to the default rule.

MS. CAI: Okay.

THE COURT: I don't think you like it when I call it "default rule."

MS. CAI: Oh, I think it's fine.

THE COURT: Okay. Assume I think that the rule implicates a fundamental right, what's your asserted governmental interest? And then how is it narrowly tailored to achieve that interest?

MS. CAI: So I think the interest would be the same, it's the same interest analysis that we just talked about in the First Amendment context.

THE WITNESS: The right to know?

MS. CAI: It's not the right to know. It's the right to have the accurate reflection of the private property owner's belief. So, for example, someone who lives in a house who thinks that by being silent they're actually allowing the plumber to come into their house with a handgun unknowingly or thinks the opposite rule is in effect, so it's the same as that.

THE COURT: And so how is that narrowly tailored then

to achieve that interest?

MS. CAI: Because there's only two defaults that the government can set. Default is either what plaintiffs want, which is silence means come in with a gun or it means don't come in with a gun, come in without a gun. And so there's only two options. And so it's kind of strange to think about tailoring as one or the other when that's the only way to accomplish that objective.

A radio campaign does not -- it's not going to reach everybody. It's not -- there's no way for the government to ensure that people actually understand that's what that means. And so that's the interest there.

I will say that I don't know what fundamental right would be implicated if the other flip side of that, right, would be similarly restricted. So the person who is -- so you're comparing two groups of people, the person who wants to restrict firearms and has to speak today and under Chapter 131 the person who doesn't and would have to speak. So it's a very strange equal protection theory that under either world, there would be a classification on the exact same thing and a set of rules and whatever analysis in terms of the interest would be at play there.

THE COURT: Well, I'm going to throw out two possibilities. One, there could be no default rule at all. Or two, it could apply only to private property and not property

open to the public. Do you agree with that?

MS. CAI: So I think there has to be a default rule, because if the rule is no restriction, that's actually a default rule in the other direction. So that's one. And as to a default rule that's only on I think Your Honor said commercial property, or am I getting it backwards?

THE COURT: Private property open to the public.

MS. CAI: Open to the public. So that would just be setting a default rule for those.

THE COURT: Because this is all private property.

MS. CAI: Correct, correct, correct. I just wanted to make sure I was getting the analysis as Your Honor had stated it.

So all that would mean is that there's a different default rule for homes or businesses that are not open to the public and places that are open to the public. It would be two different default rules for those types of locations. So I think the analysis is still the same.

THE COURT: Okay.

MS. CAI: Thank you, Your Honor.

THE COURT: All right. Thank you. Ms. Reilly.

Take your time.

MS. REILLY: Your Honor, I would like to start with the, just because I think it's easiest, with the equal protection challenge to the judges, the prosecutors, and the

deputy attorney generals.

THE COURT: Okay.

MS. REILLY: First of all, the exemption for prosecutors has existed since 1937. And that's N.J.S. 2:176.43, and that goes for assistant prosecutors as well.

The exemption for a deputy attorney general has existed since at least 1983. And that's L1983, Chapter 552. So it's unclear why there's a, you know, sudden rush for a preliminary injunction now of, you know, exemptions that have existed for decades.

THE COURT: Yeah. And that's the question I was asking earlier. What is the -- yeah. Okay. Go ahead.

MS. REILLY: And as for judges, there was an exemption for court attendance dating back to 1937. And the Court has -- the Legislature has now just expanded that to include judges because of, you know, current events that have happened. And that's the same statute that also addressed prosecutors and assistant prosecutors.

With regard to plaintiff said that strict scrutiny applies to this equal protection challenge. And at least four circuits, and that would be the First, Second, Fifth, and Ninth, have said that if a Second Amendment challenge fails, the equal protection claim is subject to rational basis, not strict scrutiny. And that's because no fundamental right is

involved.

So plaintiffs are already challenging the sensitive places on Second Amendment grounds. If they prevail, then the equal protection claim is moot. If they don't prevail, then that's because there's no fundamental right, so rational basis applies.

And here, there's definitely rational basis. The exempt categories, professional categories, they're simply not similarly situated. And the State has listed all of this in its brief. They've been vetted. They're subject to oaths and codes of conduct. But most importantly, given the nature of their jobs, they're subject to a heightened risk of danger and a heightened need for self-protection. And so that's certainly a rational basis. And they're also subject to more stringent requirements regarding how they qualify. They must qualify annually in the use of a handgun.

To turn now to what Your Honor mentioned before with regard to permitting. So Your Honor was pointing to Section 3A and raised the question of when somebody who currently has a permit is seeking to renew, sort of what sets of rules apply. And here, the State agrees completely with the plaintiffs, that that language, for many reasons -- first of which is syntax and then I'll get into other reasons -- means that the person who seeks to renew is subject to whatever rule is currently in place for original applications.

And you see that I believe as plaintiffs were also pointing to in the syntax, it doesn't say as in the case of their original application. It says, you know, as happens to be the case of original applications at the time. But beyond the syntax argument, there are other arguments, Your Honor.

First is, as the Legislature said in Section 1A of Chapter 131, they specifically addressed *Bruen*. And they specifically said in light of *Bruen*, we are getting rid of this justifiable need requirement. That would be nonsensical for them to have said that if this was going to -- if 3A was like oh, but that doesn't apply to folks who already have permits.

Another reason why it just doesn't make sense is it's simply the way the statute has always operated. So the disqualifiers are in section 2C:5. And the Legislature keeps adding to them. So you see 2C:9, like oh, my goodness, we need to add the terrorist watch list. And then you see the next one they add, C:10, the Extreme Risk Protective Order Act, the Red Flag Law that Your Honor was saying.

Under no circumstance did someone say, oh, okay, you're renewing your permit and now we have the terrorist watch list or the Red Flag Law, but we didn't have it then so we won't bother applying those to you. The history of how this law has been applied is whatever the current regulations are, those are the ones that apply to your renewal.

And another reason is that there are, you know,

different requirements. This 3A must be read in the context of the entire act, which also says, you know, section 4, you need liability insurance and then training requirements and fees, and oh, yeah, we haven't raised the fees in 50 years, but you're sort of grandfathered if you already have a permit. These other sections don't make sense unless this means that you're subject to whatever, at renewal, whatever the current requirements are.

And I think that if there's an interpretation of this provision that makes the statute constitutional, as we are asserting there is, then the Court should take that interpretation rather than one which renders it unconstitutional by keeping in place the very justifiable need standard that the Legislature said it was getting rid of. So that was that point.

With regard to the fee increases themselves, just a couple of quick points. One, it's plaintiffs' burden to prove under the Third Circuit Boyd case, it's plaintiffs' burden --

THE COURT: Ms. Reilly, can you push the mic away from you? I'm getting feedback.

MS. REILLY: Sorry.

THE COURT: Try it again, yeah.

(Discussion was held off the record in open court.)

THE COURT: Okay. Good. Thank you.

MS. REILLY: So plaintiffs have -- it's plaintiffs'

burden under the Third Circuit, the Boyd case, their burden to prove the first step of the *Bruen* analysis, which is that the regulation falls within the scope of the Second Amendment to begin with, and they have not proven that at all. They don't seem to be implying, although maybe they are today, but they don't seem to be -- they never raised an objection to permit fees as a whole. They just seem to be objecting to oh, well, you know, $25 is not okay, but a lesser amount is okay. And it's not unusual at all for there to be sort of fees charged for folks.

So in a prosecutorial context, right, everybody has a right to go in and defend themselves in court and to get an appeal and there are fees attached to that, and that's exactly what we have here. So that mere charging of a fee does not fall within that first step of *Bruen*. And we see that also in Justice Kavanaugh and Justice Alito's concurrences where they're like oh, yeah, permitting processes and background checks and all that, you know, that's fine, we're not doing anything to tinker with that.

Second...

(Pause.) (Microphone feedback.)

Second, you know, these are -- *Bruen* said something about, well, maybe if the fees are exorbitant. But they're not exorbitant here. They're very modest. They haven't been raised in 50 years. The Legislature in section 1(i) lists out,

well, we're doing this because of inflation and because the cost of background checks and sort of new technology upgrades that were needed.

And Your Honor asked the question before, well, like what about the one plaintiff, Plaintiff Henry, I guess, who's saying like, you know, I can't really afford that. Because there's one person saying that they can't afford it, that doesn't mean, under a facial challenge, which plainly has a legitimate sweep, you knock out the entire statute. If Plaintiff Henry wanted to bring an as-applied challenge and like, listen, I feel as if I can afford the guns but I can't afford the permit and she were to document that, you know, then that's a different story. The State, you know, would also be willing to say, as to that one plaintiff, if she wanted somehow to ask the Court to put the money in escrows to be sure she gets it back or whatever, you know, we're willing to -- to stipulate to that.

THE COURT: What about the argument that having part of the money go into the victim compensation fund is illegal? Can you talk to me quickly about that?

MS. REILLY: Absolutely, Your Honor. And that, frankly, is an appropriations clause issue under the state constitution and actually has nothing to do with this. So I think it's important first to look at the exact language instead of just sort of the sweeping generalizations plaintiffs

make.

So the victims compensation fund for all the permits to purchase and the identification cards that the superintendent issued, so state employee issued, go into the victims compensation fund, which is the state fund.

Just because, no offense to the legislative intervenors, but just because this Legislature said they're going to the victims compensation fund, 100 percent of them, does not mean that, you know, the Legislature that enacts the next budget in July, on July 1st, has to abide by that. They could be like no, actually, we're going to use the money for this other thing. They can sweep that money there.

THE COURT: But I thought the legislation talks about defraying the cost of investigations; no?

MS. REILLY: Yes. So then, right. But, yes, it adjusts for inflation. It defrays the cost of investigations. It does the whole well, we needed a technology upgrade. So it has legitimate purpose and meets those needs. But what the State then does with that money, that's irrelevant to a Second Amendment analysis.

The Legislature three years down the road isn't bound by what this Legislature said. Oh, this Legislature expressed a wish to go to the victims compensation fund. Three years down the road we could be in the middle of another pandemic and the Legislature could be like no, we want to use the money for

that. So where the money ultimately ends up in the state treasury, irrelevant. And as --

THE COURT: But do the plaintiffs have a remedy to -- let's say I agree with the plaintiffs, is it irreparable? Is there a means for them to get the money back?

MS. REILLY: Your Honor, the question of -- first of all, I think there's a predicate question here, an open question of whether they can even seek damages for this type of harm. And you see that plaintiffs had sort of their new cases. You see that in the *Freedom* case, which is 408 F.3d 112, where it said the cost of ordinary compliance, even if it can't receive compensation later, is not irreparable harm.

THE COURT: But is this a fee to exercise a Second Amendment right?

MS. REILLY: No. It's entirely outside of the Second Amendment context, as I said before, because it fails -- it fails step one. And there are fees, and I mentioned the right of the person to come to court and their charged fees. And I recognize, it is not a perfect analogy because --

THE COURT: Do you also recognize that they can't have their Second Amendment right until they pay the fee? Do you concede that?

MS. REILLY: But it's the fee itself, which they don't seem to challenge the fact of the fee; they seem to challenge the exorbitance, as they phrase it, of it. It's not

directly regulating the right to bear arms any more than in, and this is what I was saying doesn't quite fit, in the First Amendment context, you know, you have to pay for a permit in order to do that. It's irrelevant to the right.

There's a legitimate cost associated with issuing permits, and issuing permits goes to core state interest. Like we really can't have people who are a danger to themselves or others, you know, possessing, carrying handguns. And so this is -- and, Your Honor, dating back to -- the State cites nine historical analogs where historically fees were imposed.

THE COURT: Okay.

MS. REILLY: That's it there.

With regard to the --

THE COURT: Insurance?

MS. REILLY: -- insurance.

THE COURT: Okay. If you don't have anything other than what's in your brief, I do -- do you?

MS. REILLY: I have -- I have, I think, some.

THE COURT: Okay. I'll hear you.

MS. REILLY: Okay. So, first of all, with regard to insurance, I wanted to focus on the practicalities for a moment of the situation. The record shows now that there are four types of policies available. There's the homeowner's policy. You can get a personal liability policy that covers all the same risk. You can get an umbrella policy, or now you can get

a stand-alone firearm policy. Prime Insurance is offering this, and they are licensed to do business in New Jersey.

With regard to the cost, the State has demonstrated that, you know, a lot of folks are already covered by virtue of their homeowner's policy, and --

THE COURT: Do you know the answer to this question? I was surprised to learn it, that...

(Feedback.)

THE COURT: It's that I'm permitting remote access, and I think it's through the remote access. So it's coming from those listening in.

I was surprised to learn this, that some homeowner's policies have exclusions -- or maybe they all do, I don't know -- for willful conduct. And there is state law that says that willful conduct includes the exercise of self-defense. That was surprising for me to learn. Do you know what New Jersey law says?

MS. REILLY: I am not familiar with that law, Your Honor. And if you --

THE COURT: It would change your analysis; would it not?

MS. REILLY: That it says self -- so what I think is at issue here is what the policies cover and what the liability insurance provision is intended to cover is accidental discharges, not intentional conduct, whether that conduct --

THE COURT: But the core of the -- I don't -- well...

MS. REILLY: So when you're exercising your right to self-defense, you are intentionally engaging in conduct. Whether or not that's justified, that's another issue. But what the liability provision is designed to do is to cover accidental discharges of weapons.

THE COURT: Okay.

MS. REILLY: And we see that in the Kochenburger certification where he defines an occurrence as a defined term which requires it to be an accident.

I think the idea is that you don't want to encourage the intentional discharge of a gun at another person by giving the person like oh, well, I shot him. Like, say it's not self-defense. Yeah, well, I shot him, but all my costs are going to be covered here. I think that's what it's trying to get at by focusing only on the accidental because the incentive --

THE COURT: Right. But I still think you -- and I really don't want to dwell on it, but I think you have a real problem if in the act of self-defense a bystander is harmed.

MS. REILLY: Then that's different.

THE COURT: That would be accidental. You're exercising your Second Amendment right to self-defense. And so I can see a parade of horribles.

MS. REILLY: And absolutely. There's a -- and that

would be a case-by-case determination of intentionality. And you see that the New Jersey Supreme Court actually addressed this issue. So kids were like firing a BB gun at a car and they intentionally were firing that gun, but like, oh, my goodness, the gun, it hit the car and ricocheted into the driver's eye, blinding them. And the question was, you know, was that covered? And the Supreme Court was like no, he never -- they never intended to injure the driver, and they deemed that it was covered under the insurance policy. But questions like that are insurance determinations, you know, they're not Second Amendment determinations.

And then, again, with regard to the plain text argument, the first prong of *Bruen* there, we would again say that the plaintiffs have not met their burden of proving that, you know, merely having insurance falls within the scope of the Second Amendment. There -- you know, it's part of the way of making sure like background checks are of, you know, promoting safe carry.

And then as the *Sebelius* case stated, the compelled purchase of the first isn't a regulation of the second. And they were saying that in regard to the health insurance context, but the same principle applies here.

And I would just like to point out with regard to the surety laws. You know, as the Rivas declaration says, it was the common law during Colonial times to have such surety

statutes. Later on, ten jurisdictions actually codified them. Of those ten, two of them, Virginia and West Virginia, didn't require any sort of accusation to be made against the person.

And as for the others, they're actually...

(Feedback.)

They're actually very close to what the State's doing with liability insurance and have the same why and how metrics. So the others, Massachusetts being an example, say on complaint of any person having reason to fear injury or breach of the peace.

So what's happening here is under a reasonable person standard saying there's a cause to fear injury from accidental discharge of firearms. And what the insurance companies do is they calibrate it to the level of risk for each person.

So the why, why are we doing this, are the same in both instances. Why? We're shifting the cost of any accidental damage away from the victim to the owner, and we're also incentivizing safe carry. And how are we doing it? We're doing it by putting -- by putting -- because of the fear of injury of accidental injury.

And I won't go into what the State has already addressed --

THE COURT: In your submissions, yes.

MS. REILLY: -- strict liability. And I would just like to address the criminal penalty if I could for a moment.

So I think a useful analogy here is with the -- the National Firearms Act, it causes -- it requires the makers, importers and transferors of firearms to have to pay a registration fee. And if you don't -- if you're found to have violated that, then you have a $10,000 fine or you face imprisonment for ten years.

And so courts addressed that, like is that a burden there? And they said under federal law on the Second Amendment and said no, because the burden imposed on the National Firearms Act is the tack -- or is the fee...

(Feedback.)

The burden imposed by the National Firearms Act is the fee itself, not the penalty that the Legislature chooses. The Legislature retains plenary discretion to decide how they want to make the penalty by the degree of enforcement that they want to have.

Does Your Honor have any specific questions?

THE COURT: I don't. Thank you.

MS. REILLY: Okay. Any questions on the permit disqualifiers or the dangerous standard or the First Amendment claims that plaintiffs raise?

THE COURT: I don't have any further -- I have one last question for you, Ms. Reilly. Thank you. How do you define unjustifiable display?

MS. REILLY: Yes, Your Honor.

THE COURT: And who decides it?

MS. REILLY: So, first of all, Your Honor, I'd like to just start with the standard. Under the vagueness standard, if it's a facial challenge, as we have here, plaintiffs have to prove that it's vague in all of its applications. It's okay it's imprecise, as long as it's comprehensible. It just has to --

THE COURT: So let's just spend a minute on it. What is an unjustified display?

MS. REILLY: Okay. So --

THE COURT: And can it be -- can one officer believe that it's unjustified and another believe that it is?

MS. REILLY: So, Your Honor, I'll give the simplified answer first and then I'll be happy to go back and go into the text to see how we got there.

So the simple answer is unjustified display is a knowing display of a firearm outside of the holster for a purpose other than self-defense.

THE COURT: Is it a strict liability offense?

MS. REILLY: It's a knowing display.

THE COURT: Okay. So it's not a strict liability?

MS. REILLY: It is not. And the way we get there is -- so under the criminal code 2C:2-2(c)(3), if the mens rea is not specified, then it's knowingly. And then under the criminal code 2C:2-2(b)(2), knowingly means either the person

is aware or they have -- that, you know, such circumstances exist or they're aware that there's a high probability of their existence.

And then to look at the text of Chapter 131 itself, section 3(a) defines how you have to carry. You have to carry in a holster. And then section 3(h) gives the holster specifications. It has to be a sheath that securely retains the handgun. The main body of the firearm has to be concealed, and the trigger has to be covered and inaccessible.

And then section 3A again exempts sort of brief incidental exposure. So it expressly says like, okay, so your clothing shifted while, you know, you were moving, that doesn't count. If it's a brief incidental exposure, does not count. And then what is a justifiable purpose? We know what a justifiable purpose is from *Bruen* and *Heller* saying that the core of the Second Amendment is your right to self-defense. So the simple definition again is a knowing display of a firearm outside of the holster for a purpose other than self-defense.

And if it would be helpful for me to give a few examples of sort of what's in and out there.

THE COURT: Well, let me just ask: Who decides whether or not it was self-defense, the police officer or the holder?

MS. REILLY: And, again, on any individual challenge, and there's always going to be some like hypotheticals, well,

what about this, what about that, but under the facial challenge that they've brought, they have to show it's vague in all of its applications. And I think we would all agree if someone, despite the holster carry requirements and despite the self-defense requirement, were to go into the parent-teacher meeting and unholster their gun and put it on the desk and say I would like to discuss with you my daughter's grade in history, is that used for self-defense? No.

What if a person were to be like, oh, my goodness, this is so cool, I just got my new gun and they're outside with their friend in public and they're spinning it on -- it's not in the holster, they're spinning it on their finger or they're like here, look at this, passing it around where it could drop, things like that, I think we could all agree that that would be an unjustified display of the handgun because it's not in the holster and it's not for purposes of self-defense.

THE COURT: Right.

MS. REILLY: So I think the State has --

THE COURT: I think what this illustrates though is I think that there is some room for disagreement. Can we agree on that?

MS. REILLY: And -- and that is fine under the vagueness standard. You know, even if there's a, you know, it just has to give fair notice of...

(Feedback.)

THE COURT: Of what the legislation prohibits, yes.

MS. REILLY: Yeah. And it's fine if it is imprecise. It's fine if it's imprecise but comprehensible enough. And that's the *Fullmer*, Third Circuit.

And as the U.S. Supreme Court said in *Colten*, like just because we have practical difficulties in sort of drafting a statute so it's not too general, but it's also not so specific that you don't get -- you know, capture all the conduct you want, that does not raise it into a constitutional challenge.

So I think the State has proven all it needs to with regard to vagueness.

THE COURT: Okay. Thank you, Ms. Reilly. You may step down. Thank you.

Okay. Mr. Kologi, if you could limit your comments, please, to those that you have not already made in your briefs.

MR. KOLOGI: Your Honor, I promise that I will not be duplicative in any way, shape or form, to an extent I can.

THE COURT: Okay.

MR. KOLOGI: Judge, at the outset, I trust that in Your Honor's career, you've dealt with many situations where you're dealing with a challenge to a local piece of legislation either at the ordinance level, the county level, regulations, the state level, a statute, and very often they're drafted in a very cursory, I'll say, you know, just not a really

well-drafted document, which makes it much harder for the Court to answer a lot of questions and discern things it has to discern. That's not the case here. We're here on behalf of the Assembly Speaker and the Senate President. And what I am offering to the Court is on its face, this document, the bill that we're talking about, goes light years ahead of where most legislation goes in terms of its drafting.

Section 1, this lengthy preamble, number one, it recognizes *Bruen* is controlling. Number two, it does away with justifiable need. Number three, it recognizes the need to deal with historical analogs. So on its face, this is a good, solid piece of legislation. It's followed the protocols. The issue is going to be, does the Court agree with the historical analogs. At the end of the day, that's pretty much what it's going to --

THE COURT: I do want to back up to the preamble though, Mr. Kologi, because I do think the legislation misrepresents the Johns Hopkins study. I was disappointed to see that. I think it misrepresents what the Johns Hopkins study said. Because the analysis in the Johns Hopkins study dealt with going from a "shall" issue to a permitless state, and that's what the focus of that study was, which is not what we have here.

So I was disappointed to see that the Legislature would put in its legislation a study that really is not

applicable to the legislation. And the study is alarming, but it's not applicable here.

I guess I say that as an observation. But I think that if the State's going to rely upon the Johns Hopkins study, it should characterize it correctly, and I'll leave it at that.

MR. KOLOGI: Judge, I will certainly, you know, acknowledge that. And without having the whole study in front of me, that, you know, there could be different interpretations. I take Your Honor's point, and I will certainly, you know, review that further.

As I said, at the end of the day, it's going to be up to this Court to determine whether the historical analogs fit. But the point is, the State has followed the process and has basically agreed to the process that we're following, which is probably a lot more than Your Honor gets in many other cases involving legislation.

Now, Judge, I'd like to address something that really is being addressed for the first time here today, and again, keeping in mind, we're here today for the limited purpose of a preliminary injunction. We're not here to litigate the whole case, although I've heard a lot of great stuff and there's a lot of great stuff in the record. But the limited purpose of us here today is the preliminary injunction. And under the *Riley* case, obviously there's four prongs, and the plaintiffs have to -- actually, the one plaintiff has to satisfy four of

them.

My understanding is that the Koons plaintiffs are not seeking anything on the insurance issue, on 4A, only the Siegel plaintiffs are. And I believe I'm correct on that. I think the Koons plaintiffs submitted two certifications or declarations which basically supported standing, but they are not into the merits of it.

And if you look at the submissions, number one, today, I heard nothing -- the silence was deafening -- I heard nothing in the proffers by plaintiffs' attorney about the insurance issue.

Number two, if you look at the submissions, the totality of the --

THE COURT: Well, I want to be fair to all of you. I did cut some of you off. Some of you I told you I wasn't interested in hearing. So just because they didn't talk about it doesn't mean they don't care about it.

MR. KOLOGI: Okay. Just pointing it out for the record, Your Honor.

If Your Honor takes a look at the brief, and I believe it's page 16 of the Siegel brief, it's less than a page, it's like a half a page on one, another half a page on the next one, maybe 16 and 17, and it basically just gives a kind of conclusory net opinion argument that, well, the insurance will be more expensive. That is basically the

totality, to my knowledge, of what has been submitted on this issue of insurance. And I submit that, you know, obviously they have to prove a likelihood of success on the merits.

Now, looking at what we have provided the Court with, number one, again, this is the first time it's being argued, so there's really not a lot here. But if you compare it to the allegations in the complaint that the insurance would impose a crushing financial burden, there's a substantial financial burden, there are insurance requirements that have no precedent in history. And I've got all the pages and the cites, but these are all in the Siegel complaint.

Our position is that the insurance requirement is no different in terms of substance than any of the other minor or significant requirements of licensure, firearms training course, fingerprinting, background checks and all that other type of thing.

And the plaintiffs who have the burden have not come forward with anything to dispute that, which goes, again, directly to the issue of their ability to carry this matter on the merits. The Kochenburger certification, and, Your Honor, you brought --

(Feedback.)

THE COURT: Go ahead.

MR. KOLOGI: You brought up a great point which I'm going to get to momentarily, but if I'm saying his name right,

the Kochenburger certification basically says that coverage for accidental firearms injuries, deaths, et cetera, are under most homeowner's insurance policies and that he is unaware of any that had any exclusions.

Now, I understand Your Honor's comments earlier that it had come to your attention. That was the first I heard that because I didn't see it in the paperwork. But I know from years of being a little bit of a PI lawyer that there's a whole body of law on what is an intentional act in the context of did you intend to do the act vis-a-vis intend to bring about the result. And I think the deputy attorney general, the BB gun example was very illustrative of that fact. You could shoot at a car with a BB gun and it somehow ricochets and you hit the guy in the eye. So you intended to do the act but not the result. There's a whole body of case law on that. And since I just heard it for the first time, I'm not in a position to argue it, but it certainly is an issue.

But the point is, in the papers that are before Your Honor today, you know, there is nothing other than everything that we've given and a net allegation by the other side that it's going to be expensive.

And, again, we are viewing this. Now, if Your Honor somehow viewed this differently that this impacted -- we're saying this does not impact on the Second Amendment. This is not something that goes -- you know, it's not an infringement

on the Second Amendment. It doesn't violate your ability to carry a gun, to transport a gun, to fire a gun, to do anything like that. This is another paperwork type of requirement. And that's all it is. And to characterize it as anything else, you know, I think would be really taking it out of context.

Now, if for whatever reason Your Honor found that it did impact on the Second Amendment, then Your Honor would have to get into the analogs and we have the surety analogs and we have all of that stuff, and I'm not going to beat the horse to death on that now. You've got thousands of pages, and certainly it's all in there. But I think when we look at the big picture here, there is nothing to defeat allowing the insurance requirement to continue. And I would ask that you allow that to continue and not issue any injunctive relief on that.

My last point, Judge, and it's in point three of our brief, two of the factors that are required under *Riley* is the possibility of harm to other parties and the public interest. I understand Your Honor is, you know -- and unfortunately, I have it here in my notes, the Johns Hopkins study, and there's another study. But to the extent our position is that those studies indicate, no matter how you read them, that the states that have let's say lightened up on the requirements of gun carrying have had an increase in gun-related incidents. I mean, I think it seems like a reasonable inference to be drawn.

You're not going to have less inference -- less of a problem. The more guns out there, it shouldn't go down. It should, you know, likely go up. And these two studies that are cited in our brief support that proposition.

If that's the case, we're talking about -- I mean, guns only have two functions -- to kill or to seriously injure. So if you have a situation where the danger to the public --

THE COURT: You forgot the right to self-defense.

MR. KOLOGI: I'm sorry, Your Honor?

THE COURT: You forgot about the right to self-defense. You said guns only have two functions -- to kill or to seriously injure. But you forgot about the right to self-defense.

MR. KOLOGI: Well, let me qualify it. The gun itself, the metal object that has the cylinders or that's the automatic, there's only two things that that could do if it makes contact with somebody. It's either going to injure them or kill them, okay.

THE COURT: Or defend the --

MR. KOLOGI: The purpose of using it --

THE COURT: Excuse me.

MR. KOLOGI: I'm sorry, Your Honor.

THE COURT: Or to defend the person.

MR. KOLOGI: Well, I would say that goes to the purpose as opposed to the mechanics, but I defer to Your

Honor's -- I think we're saying the same thing.

THE COURT: Well, I hope we are. But I think it's important to the conversation that we be careful with the words we use.

Do guns kill? Yes. Do guns give someone the right to self-defense? Yes. So I think it's important that when we have this conversation, we have a fair one. That's all I'm saying.

MR. KOLOGI: Judge, I certainly didn't mean to not be fair. But the point is, there's no coming back from it. The danger to the public and the danger to other people, whether it's a death by a gun or a serious injury by a gun, right, wrong or indifferent, at the end of the day there's no coming back from that. So that is the factor that we're saying how can you possibly say that there's not a public interest in not having gun-related deaths or gun-related injuries?

THE COURT: I don't think anyone is saying that, Mr. Kologi. In fairness to the plaintiffs, I don't think these plaintiffs are standing before this Court or any court and saying that that's not a public interest. I don't think that's what they're saying.

MR. KOLOGI: But to get a TRO, they would have to demonstrate to Your Honor's satisfaction that there is no adverse public interest to people carrying guns.

THE COURT: Say it again. Try it again.

MR. KOLOGI: I'm sorry. I said TRO. To get a preliminary injunction today to meet those other two prongs, would they not have to demonstrate that there is no significant adversity to the public interest or to the safety of others? I think our conversation was just, I mean, it clearly is.

THE COURT: Well, I think the law requires a balancing of the interest. It's not an either -- it's not a none or all. It's a balancing of the interest. And so clearly the State has, as it has argued, has a right to protect its citizens. And the plaintiffs have a right to self-defense under the Second Amendment. And so it's not an all-or-nothing. You seem to be saying it's an all-or-nothing. It isn't. It's a balancing of. And that's what the law requires, the balancing of the equities.

MR. KOLOGI: Well, again, Judge, if we balance the equities, I didn't really want to get into balancing, but if we're going to do it, that's fine.

THE COURT: But that's what the factor is, though, yeah.

MR. KOLOGI: Okay. But the balancing on the side of the gun owner is I'm not going to be able to carry my gun into this particular place. I can carry it. I can carry it a lot of places. This particular place I can't carry it. The balance in terms of the injury to the other person is there's either a death or a serious injury, or the significant

potential for a death or a serious injury. So when you weigh the two, I mean, I wouldn't use the word "inconvenience" because we're talking about a significant constitutional right, but just for the purposes of our argument with a small eye.

THE COURT: Okay. So you seem to be saying -- and let me see if I can ask the question this way, because we're talking about the balancing of the equities -- you seem to be saying to me that there is no difference between a law-abiding citizen who fulfills the requirements that the legislation requires to obtain a carry permit versus those who do not. That's what you seem to be saying to me. Who's more dangerous?

MR. KOLOGI: Well, Judge, I mean, you've characterized it in a broader sense than I think what we spoke about. I would just like to make it more limited, that when we're talking about something where the possibility on one side of the scale is a death or a serious injury, to me that is a significant problem for the public safety and for affected people.

When we're talking about the balancing on the other side is I can't bring my gun into this particular place. And again, this isn't forever. We're only here today on a preliminary injunction.

THE COURT: No, no. But I really want to hold you to it, because you don't seem to be making a distinction between the types of plaintiffs here who have gone through these

rigorous requirements and have obtained a carry permit to felons who haven't. You just seem to be saying well, anyone who walks into a restaurant and there's a death versus a non-death, that's the analysis, but I don't think that's a fair analysis. I don't think that's the fair analysis that this Court should be doing, unless you're going to tell me, maybe this is the better question, do you have evidence to support the position that there is an increased -- that there is increased violence by issuing more permits in the manner that this legislation requires? Do you have that evidence?

MR. KOLOGI: Well, Judge, there will be no evidence, and I think this was brought up earlier in either the paperwork or a transcript, in New Jersey because this is a relatively new statute. And government being what it is, statistics wouldn't be compiled. So we have to look to extrinsic sources. Of course, one of the sources I was going to cite was the Johns Hopkins study, and then there was a second study.

THE COURT: Right. Just to be clear, the reason I'm taking you a little bit to task on the Johns Hopkins study is that in that study, they analyzed going to a permitless scenario. We don't have that here. This legislation requires a very rigorous, extensive background permit process.

So I think it's unfair to say look at these studies and look at the increase in shootings and officer involvement when they don't apply to the facts of this case. That's what I

want you to focus on.

MR. KOLOGI: Well, Judge, if you're asking me to articulate what are the dangers to the public interest and to individuals, we thought that obviously injury or death by firearms are the most significant. I don't have anything in front of me at the moment in addition to that. But we think that that, you know, is the gravamen of the issue. I'm sorry if I, respectfully, am not responding, or I'm not meaning to disagree with you. I'm just saying that that's our viewpoint of it.

THE COURT: No. I think that -- I guess to sum it up, your viewpoint is that when there's more guns, there's more violence, that's it. In a nutshell, that's what you're saying, regardless of how those guns are obtained, whether lawfully through law-abiding citizens, such as the plaintiffs here, or through felons, because there's more guns, there's more violence. And that's the analysis you want me to engage in, right?

MR. KOLOGI: Well, that's correct, Your Honor.

THE COURT: But that's not the record before me. The record before me is I have to look at the evidence, it seems to me, when I look at the balancing of the equities under the law, is it has to be -- it has to deal with the evidence that relates to law-abiding citizens who obtain carry permits.

MR. KOLOGI: Well, Judge --

THE COURT: It just seems to me. Maybe we're saying the same thing, and maybe we're going in circles. I don't know.

MR. KOLOGI: I think we're pretty much -- I just need to get a little clarification from the Court, if I may.

THE COURT: Yeah.

MR. KOLOGI: They have the burden of proving prongs three and four, the public interest and the injury to other people.

THE COURT: Yes.

MR. KOLOGI: We just gave you what we believe are the most compelling examples of that, death, serious injury.

I don't know if the Court's saying they don't have to prove that now. I'm just trying to understand Your Honor's process. I'm sorry.

THE COURT: No. But -- because I think that in your comments, when you make those kinds of comments, you are asking this Court to presume that those who have valid carry permits will somehow engage in violence. And I think that is a step taken too far unless you can show me evidence of such.

MR. KOLOGI: Judge, I will say that that is not what I'm asking. What I'm asking is the Court to rely on the studies that were submitted because we don't have any actual empirical data from New Jersey or statistics. It's too soon. I'm asking the Court to rely on the studies submitted for the

general proposition that the more guns out there, the more gun incidents, the more likely there's going to be deaths or there's going to be injuries, that's it.

THE COURT: And that --

MR. KOLOGI: I'm not saying it's going to come from law-abiding citizens. They could be law abiding 364 days a year and on that one day go awry, you know.

THE COURT: Okay. And that helps clarify it.

MR. KOLOGI: I appreciate it, Judge. Thank you.

THE COURT: That is how I understood your argument. Because in a nutshell, it is the State's position that there should be no guns?

MR. KOLOGI: I'm getting less articulate as I'm getting older, but thank you for reaching out for it.

THE COURT: Yes. Okay.

MR. KOLOGI: Judge, that's the essence of my submission. We're going to rely on everything -- I mean, the Attorney General's Office and the Deputy Solicitor General did a phenomenal job, I mean, pelting this Court. At the TRO stage, you had this much to work with. I think you've got quite a bit more now, which, in my mind, would enable the Court to, you know, obviously potentially reach different conclusions than at the TRO.

And with that, I will sit down unless you have any other questions.

THE COURT: Thank you, Mr. Kologi.

MR. KOLOGI: Thank you, Judge. Nice to see you.

THE COURT: Nice to see you. Nice to see all of you. We have gone very long. It's now four hours. I am very appreciative of all of the hard work that you've all done and the great advocacy that you have all done on behalf of your clients.

I don't want to deprive the plaintiffs of their responsibility to respond, but it is late. We're all getting a little tired. Here's what I'm going to do: I'm going to give you an opportunity to give me a submission, no more than eight pages per side, of anything you want to respond to that was said here today, all right? And by eight pages, I mean eight pages, no exhibits, no -- okay. Eight pages.

There were one or two areas where I thought I would want further briefing, and I can't remember what they are.

Yes, Mr. Schmutter.

MR. SCHMUTTER: Judge, I think you wanted additional briefing on the enumeration of disqualifying categories versus the ad hoc, right?

THE COURT: Okay. So I'll give you a couple more pages on that, and a couple more pages on that, Ms. Cai, in response. But it's eight, and so if you add that, then I'll make it ten and ten, okay?

MR. SCHMUTTER: So, Judge, I have a question about

the enumeration versus ad hoc. What exactly does Your Honor want to know? Our contention about what other states do and what New Jersey does or --

THE COURT: Well, as I recall, I was asking you questions about, well, what are you really expecting the State to do? You don't like the language that's in the legislation, and your comments to me were, well, other states do it so why can't New Jersey? I would be interested to see what it is that you are speaking of.

MR. SCHMUTTER: Okay. Thank you, Judge.

MS. CAI: Okay. Your Honor, two questions. Ten pages, single- or double-spaced? And what date would you like the submissions? There's a huge difference in terms of how much you would have to read, Your Honor, so...

THE COURT: Double-spaced, please. Ten days, a week. I don't -- most respectfully, I don't want the State telling me I'm taking too long. So how much time do you want?

(Laughter.)

THE COURT: Ms. Cai, I'll let you set the date.

MS. CAI: Sure, Your Honor. How about -- we're happy to do it sooner rather than later. So whatever date Your Honor wants. Next Wednesday would be fine with us.

THE COURT: I won't get to it by Wednesday, so make it next Friday.

MS. CAI: Okay. That's fine, Your Honor.

THE COURT: Next Friday, okay? Yes?

MR. JENSEN: All right. Two things. Could I maybe please ask for Monday because I was supposed to be on vacation all day next week?

THE COURT: For what?

MS. CAI: Of course.

THE COURT: Ms. Cai said yes. Thank you.

MR. JENSEN: Second thing, we really need to do something to brief this gun definition issue a little more. Could we also get --

THE COURT: I really don't think you do.

MR. JENSEN: You don't think so?

THE COURT: No.

MR. JENSEN: All right.

MR. SCHMUTTER: Judge, I'm sorry. Are we simultaneously submitting on Monday?

THE COURT: Yes. Yeah. I'm not going to have you two going back and forth. You folks can't hardly agree on anything.

(Laughter.)

MR. KOLOGI: Your Honor, will a text order follow embodying what you want?

THE COURT: No; wasn't planning on it.

MR. KOLOGI: Or we're relying on our notes?

THE COURT: Yeah, you're relying on your notes.

MR. KOLOGI: Thank you.

THE COURT: And you'll have the transcript. I presume you're ordering it.

MR. SCHMUTTER: And it's ten pages, not eight, correct?

THE COURT: I'm giving you ten if you're addressing this issue which I would like further briefing on, yeah.

MR. SCHMUTTER: Yes. Okay.

THE COURT: Ms. Cai, you had said something in your oral argument, and I think I may have intimated I wanted further briefing on it, so when you review the transcript, look and see.

MS. CAI: Yes, Your Honor.

THE COURT: Just try to include that, because it's obviously something I would be interested in if I said that to you, so...

Okay. I thank you all. It's great to see you all. Okay. I'll take it under advisement. Thank you.

MR. JENSEN: Thank you, Your Honor.

MR. SCHMUTTER: Thank you, Judge.

THE COURTROOM DEPUTY: All rise.

(Proceedings concluded at 2:15 p.m.)

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FEDERAL OFFICIAL COURT REPORTER'S CERTIFICATE

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I certify that the foregoing is a correct transcript

from the record of proceedings in the above-entitled matter.

/S/John J. Kurz, RDR-RMR-CRR-CRC March 18, 2023

Court Reporter/Transcriber