

TESTIMONY OF KEITH EMERSON REGARDING SENATE BILL 24-131, "CONCERNING PROHIBITING CARRYING A FIREARM IN SENSITIVE SPACES" (supplement)

to the Colorado Senate Judiciary Committee, March 13, 2024

My name is Keith Emerson. I live in Denver, Colorado, am a retired engineer and am here representing myself.

I hope all of you have had a chance to look over the testimony that I submitted earlier. Rather than a short quote that may not reflect the actual tone, I have given a number of extended excerpts from the Supreme Court's "Bruen" decision that I think are immediately relevant to what is proposed in this bill. I mentioned that the Federal Appeals Court in California has put their version of this sensitive spaces bill on hold while a determination works its way through the courts. I did not mention New York's version, where I understand the 2nd US Court of Appeals there declared restrictions in some areas, such as private property and specifically mentioning churches, to be unconstitutional while allowing other areas to be enforced pending the outcome of the lawsuit there.

I also did not mention that Denver has its own version of this bill. During discussions leading to the passage of that bill the Council was told that it could not enforce the restrictions in public parks unless signage was in place. No signage has gone up. There is also no allowance for such signage in the fiscal note for this bill.

Meanwhile, Louisiana has just become the 28th state with "constitutional carry" where a permit is not required to legally carry. The governor is quoted as saying "Law abiding citizens should never have to seek government permission to safeguard themselves and their families." To our north the Wyoming legislature has overwhelmingly passed a bill to allow adults to concealed carry in schools and government meetings.

Wyoming Senator Anthony Bouchard is quoted as saying, "People carry concealed guns in Wyoming all the time without stirring fear." The same is true in Colorado. This bill is unnecessary and likely unconstitutional. Please kill it here and now.

SUBMITTED February 24, 2024:

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to the Colorado Senate Judiciary Committee, March 13, 2024

My name is Keith Emerson. I live in Denver, Colorado, am a retired engineer and am here representing myself.

I am here today in opposition to Senate Bill 24-131. The bill is unconstitutional at both the Federal and State level. It is also unnecessary. It unjustly impedes the ability of individuals to defend themselves while offering no impediment to criminal use of firearms. Please vote down this bill now.

The State of California passed a very similar law recently, their Senate Bill 2. Enforcement has been put on hold by the courts while a constitutional determination is made. The hold has been approved by the 9th Circuit Court of Appeals. Why would Colorado want to pass a similar law?

At the State level I'm sure you are aware of the State of Colorado's Constitution. Article II, Bill of Rights, Section 13 states, "*Right to bear arms*. The right of no person to keep and bear arms in defense of his home, person and property, or in aid of the civil power when thereto legally summoned, shall be called in question; but nothing herein contained shall be construed to justify the practice of carrying concealed weapons."

At the Federal level, there seems to be some intentional confusion regarding what the Supreme Court of the United States considered unconstitutional as ruled in its 2021 decision titled "New York State Rifle & Pistol Association, Inc., Et All v. Bruen, Superintendent of New York State Police, Et All". I have taken the liberty of placing some excerpts from that decision related to "sensitive places" below and I hope you will take a few minutes to read them. Most are easily found by a simple word search.

As you will see when reading the "Bruen" decision excerpts, even some existing Colorado state, county and city regulations regarding carrying a firearm in "sensitive places" are not considered by our United States Supreme Court to be in accordance with historic traditions. The new restrictions proposed in this bill are way out of line with the guidelines set out in Bruen and will no doubt result in a successful lawsuit to void the bill, just as is happening in California.

Why can't a mother to legally carry a firearm to protect her children at a playground, "what-ifs" notwithstanding? Does the State really believe concealed carry in a library is a problem? The same question can be raised for a number of other public spaces listed.

In many private areas, from churches to banks to concert venues, business and property owners already have the right through previous Colorado law to not allow any firearms on the site through simply posting signs. The penalty would be potential trespassing charges. Even the minimum trespassing charge can result in a fine larger than the first-time offense given in this bill. There is no need for the State to do more on private property.

Similarly, the State of Colorado already prohibits concealed carry of a firearm in a restaurant or bar if the person is intoxicated.

One other point to note is that arming and disarming is the most dangerous time for a person carrying a concealed weapon. The more times that has to be done to meet these requirements the more danger there is of an accidental discharge. In addition, a weapon on the person of a concealed weapon permit holder is less likely to be stolen than, say, one locked in a container in a vehicle.

So please look over the excerpts from the United States Supreme Court decision below and choose to kill this bill.

Thank you.

Some excerpts related to sensitive places from “New York State Rifle & Pistol Assn., Inc. v. Bruen”:
(Underlining by Keith Emerson)

Syllabus, Holding (Page 2)

Held: New York’s proper-cause requirement violates the Fourteenth Amendment by preventing law-abiding citizens with ordinary self-defense needs from exercising their Second Amendment right to keep and bear arms in public for self-defense.

Syllabus, (a)(2) (Page 2)

Federal courts tasked with making difficult empirical judgments regarding firearm regulations under the banner of “intermediate scrutiny” often defer to the determinations of legislatures. While judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—it is not deference that the Constitution demands here.

Syllabus, (a)(3) (Page 3)

To be clear, even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster. For example, courts can use analogies to “longstanding” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings” to determine whether modern regulations are constitutionally permissible. *Id.*, at 626. That said, respondents’ attempt to characterize New York’s proper-cause requirement as a “sensitive-place” law lacks merit because there is no historical basis for New York to effectively declare the island of Manhattan a “sensitive place” simply because it is crowded and protected generally by the New York City Police Department.

Syllabus (b)(1) (Page 3)

It is undisputed that petitioners Koch and Nash—two ordinary, law-abiding, adult citizens—are part of “the people” whom the Second Amendment protects. See *Heller*, 554 U. S., at 580. And no party disputes that handguns are weapons “in common use” today for self-defense. See *id.*, at 627. The Court has little difficulty concluding also that the plain text of the Second Amendment protects Koch’s and Nash’s proposed course of conduct—carrying handguns publicly for self-defense. Nothing in the Second Amendment’s text draws a home/public distinction with respect to the right to keep and bear arms, and the definition of “bear” naturally encompasses public carry. Moreover, the Second Amendment guarantees an “individual right to possess and carry weapons in case of confrontation,” *id.*, at 592, and confrontation can surely take place outside the home.

Syllabus (b)(2)(ii) (Page 4)

While the Court doubts that just three colonial regulations could suffice to show a tradition of public-carry regulation, even looking at these laws on their own terms, the Court is not convinced that they regulated public carry akin to the New York law at issue. The statutes essentially prohibited bearing arms in a way that spread “fear” or “terror” among the people, including by carrying of “dangerous and unusual weapons.” See 554 U. S., at 627. Whatever the likelihood that handguns were considered “dangerous and unusual” during the colonial period, they are today “the quintessential self-defense weapon.” *Id.*, at 629. Thus, these colonial laws provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today. Pp. 37–42. (iii) Only after the ratification of the Second Amendment in 1791 did public-carry restrictions proliferate. Respondents rely heavily on these restrictions, which generally fell into three categories: common-law offenses, statutory

prohibitions, and “surety” statutes. None of these restrictions imposed a substantial burden on public carry analogous to that imposed by New York’s restrictive licensing regime.

Common-Law Offenses. As during the colonial and founding periods, the common-law offenses of “affray” or going armed “to the terror of the people” continued to impose some limits on firearm carry in the antebellum period. But there is no evidence indicating that these common-law limitations impaired the right of the general population to peaceable public carry.

Opinion of the Court II D (Page 21)

Consider, for example, Heller’s discussion of “longstanding” “laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.” 554 U. S., at 626. Although the historical record yields relatively few 18th- and 19th-century “sensitive places” where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. See D. Kopel & J. Greenlee, The “Sensitive Places” Doctrine, 13 Charleston L. Rev. 205, 229–236, 244– 247 (2018); see also Brief for Independent Institute as Amicus Curiae 11–17. We therefore can assume it settled that these locations were “sensitive places” where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of “sensitive places” to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible.

Although we have no occasion to comprehensively define “sensitive places” in this case, we do think respondents err in their attempt to characterize New York’s proper-cause requirement as a “sensitive-place” law. In their view, “sensitive places” where the government may lawfully disarm law-abiding citizens include all “places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.” Brief for Respondents 34. It is true that people sometimes congregate in “sensitive places,” and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding the category of “sensitive places” simply to all places of public congregation that are not isolated from law enforcement defines the category of “sensitive places” far too broadly. Respondents’ argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below.

Opinion of the Court III A (Page 23)

As we explained in Heller, the “textual elements” of the Second Amendment’s operative clause— “the right of the people to keep and bear Arms, shall not be infringed”—“guarantee the individual right to possess and carry weapons in case of confrontation.” 554 U. S., at 592. Heller further confirmed that the right to “bear arms” refers to the right to “wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person.” Id., at 584 (quoting *Muscarello v. United States*, 524 U. S. 125, 143 (1998) (Ginsburg, J., dissenting); internal quotation marks omitted).

This definition of “bear” naturally encompasses public carry. Most gun owners do not wear a holstered pistol at their hip in their bedroom or while sitting at the dinner table. Although individuals often “keep” firearms in their home, at the ready for self-defense, most do not “bear” (i.e., carry) them in the home

beyond moments of actual confrontation. To confine the right to “bear” arms to the home would nullify half of the Second Amendment’s operative protections.

Opinion of the Court III B 3 (Page 43)

Perhaps more telling was the North Carolina Supreme Court’s decision in *State v. Huntly*, 25 N. C. 418 (1843) (per curiam). Unlike the Tennessee Supreme Court in *Simpson*, the Huntly court held that the common-law offense codified by the Statute of Northampton was part of the State’s law. See 25 N. C., at 421–422. However, consistent with the Statute’s long-settled interpretation, the North Carolina Supreme Court acknowledged “that the carrying of a gun” for a lawful purpose “per se constitutes no offence.” *Id.*, at 422–423. Only carrying for a “wicked purpose” with a “mischievous result . . . constitute[d a] crime.” *Id.*, at 423; see also J. Haywood, *The Duty and Office of Justices of Peace* 10 (1800); H. Potter, *The Office and Duties of a Justice of the Peace* 39 (1816). Other state courts likewise recognized that the common law did not punish the carrying of deadly weapons per se, but only the carrying of such weapons “for the purpose of an affray, and in such manner as to strike terror to the people.” *O’Neil v. State*, 16 Ala. 65, 67 (1849). Therefore, those who sought to carry firearms publicly and peaceably in antebellum America were generally free to do so.

Statutory Prohibitions. In the early to mid-19th century, some States began enacting laws that proscribed the concealed carry of pistols and other small weapons. As we recognized in *Heller*, “the majority of the 19th-century courts to consider the question held that [these] prohibitions on carrying concealed weapons were lawful under the Second Amendment or state analogues.” 554 U. S., at 626. Respondents unsurprisingly cite these statutes¹⁶—and decisions upholding them—as evidence that States were historically free to ban public carry.

In fact, however, the history reveals a consensus that States could not ban public carry altogether. Respondents’ cited opinions agreed that concealed-carry prohibitions were constitutional only if they did not similarly prohibit open carry.