SENIOR PARTNER
C. D. Michel*

PARTNERS
Anna M. Barvir
Matthew D. Cubeiro
Joshua Robert Dale**
W. Lee Smith

* Also admitted in Texas and the District of Columbia
** Also admitted in Nevada

MICHEL & ASSOCIATES, P.C.
Attorneys at Law

ASSOCIATES
Tiffany D. Cheuvront
Alexander A. Frank
Konstadinos T. Moros

OF COUNSEL
Sean A. Brady
Jason A. Davis
Joseph Di Monda
Scott M. Franklin
Michael W. Price

WRITER'S DIRECT CONTACT:
562-216-4475
KMoros@michellawyers.com

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VIA U.S. CERTIFIED MAIL
Board of Supervisors
City Hall
1 Dr. Carlton B. Goodlett Place, Room 244
San Francisco, CA 94102-4689

City Attorney David Chiu
City Hall, Room 234
1 Dr. Carlton B. Goodlett Pl.
San Francisco, CA 94102

Re: Proposed Ordinance on "Sensitive Places" (File No. 230736)

Hon. Supervisors and City Attorney Chiu:

We represent the California Rifle & Pistol Association and the Second Amendment Foundation. These two organizations have been fighting for the civil rights of Californians for decades. With members in the tens of thousands and over six million gun owners in California, some of those law-abiding citizens are in the City and County of San Francisco.

Our clients oppose the proposed "sensitive places" ordinance (File No. 230736, and hereinafter referred to as "the Ordinance"). A member of the board, who recently announced that she is running for State Assembly, brought forward the Ordinance.

The Ordinance attempts to undermine the fundamental right to obtain a license to carry a firearm for self-defense, confirmed by the Supreme Court in the landmark case *N.Y. State Rifle & Pistol Association v. Bruen*. The Ordinance is unconstitutional because it effectively denies the right to carry a firearm in most places in San Francisco, and the Ordinance inappropriately designates nearly every place in the City as a "sensitive place." Several federal court rulings since Bruen examined New York and New Jersey laws enacting similar "sensitive place" restrictions and found most of what the Ordinance would do to be unconstitutional.

Because the Ordinance is unconstitutional, our clients strongly oppose it and intend to challenge it in federal court if passed.

Aside from being unconstitutional, the Ordinance is also pointless. The same style of unconstitutional state-level legislation[1] is expected to pass this year and will ban carrying a firearm even with a concealed firearms license (CCW) in the same places that the Ordinance does. Numerous law enforcement organizations oppose Senate Bill 2, and CRPA and SAF already have a lawsuit ready to file should it become law. San Francisco should wait and see how the inevitable litigation over SB 2 plays out instead of passing a duplicative Ordinance that exposes San Francisco to significant legal expense for its own legal costs and to reimburse our clients' fees when we prevail in court.

I. Current Second Amendment Precedent from the Supreme Court

A. Historical References and the Second Amendment

In 2008, the United States Supreme Court held that the Second Amendment protects an individual right to keep and bear arms.[2] *Heller* described the right to self-defense as the "central component" of the Second Amendment right. *Id*. at 628. Two years later, the Supreme Court confirmed that said right is fundamental and then, through the Fourteenth Amendment, incorporated it to protect against state and local infringement.[3]

Most critically, the *Heller* Court established a "text, history, and tradition" framework for evaluating the constitutionality of a law under the Second Amendment questions. The Court assessed historical evidence to determine the prevailing understanding of the Second Amendment at the time of its ratification in 1791, and thereafter. Based on that assessment, the Court concluded that the District of Columbia statute prohibiting possession of the most commonplace type of firearm in the nation (the handgun) lacked a historical analog, did not comport with the historical understanding of the scope of the right, and therefore violated the core Second Amendment right.[4]

Last year, the Supreme Court reaffirmed the validity of the "text, history, and tradition" approach for analyzing Second Amendment challenges and recognized that the Second Amendment protects the right to armed self-defense in public just as much as in the home. *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. ___, 142 S. Ct. 2111, 2134-35 (2022) ("*Bruen*").[5] The *Bruen* Court expressly rejected the "means-ends" interest balancing test that courts in some jurisdictions had been applying.[6] Instead, the Bruen analysis concludes that courts must inspect the historical records of the ratification era and then apply analogical analysis to determine whether the modern-day restriction infringes on Second Amendment rights.[7]

The *Bruen* court clarified in crystal-clear language how proper Second Amendment analysis shall be applied:

[1] https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=202320240SB2
[2] *District of Columbia v. Heller*, 554 U.S. 570 (2008).
[3] *McDonald v. City of Chicago*, 561 U.S. 742 (2010).
[4] *Heller*, 554 U.S. at 629.
[5] This case did speak to self-defense, but the main crux of the case was about the right to carry outside of the person's home.
[6] *Id*. at 2129.
[7] *Id*. at 2129-30.

> We reiterate that the standard for applying the Second Amendment is as follows: When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's "unqualified command."[8]

Examining the proposed Ordinance under the Bruen test is straightforward. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment."[9]

People carrying firearms is not novel in American history and there is no history or tradition of banning public carry for firearms. As New York found when a federal court struck down its attempt to designate nearly every place as "sensitive", "[G]enerally, a historical statute cannot earn the title "analogue" if it is clearly more distinguishable than it is similar to the thing to which it is compared."[10]

B. The Supreme Court's Discussion of "Sensitive Places" in Bruen, and the New York and New Jersey Federal District Court Rulings that Followed

Under *Bruen,* the burden of proof would be on San Francisco to establish that the Ordinance's limitations on where people can legally carry are historically justified. Speaking to the issue of "sensitive places" where the right to bear arms may be restricted, the Court explained that "the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited . . . ."[11] So far, the Supreme Court has only provided the examples of schools and certain government buildings such as "legislative assemblies, polling places, and courthouses" as truly being such "sensitive places."[12] The Supreme Court also warned that "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."[13] This aversion to allowing huge arbitrary areas of land in a state to be designated as "sensitive places" is exactly what the Supreme Court warned against in *Bruen*.

Following the *Bruen* decision, New York moved quickly to undermine the ruling by passing a law that made acquiring a permit more difficult and made most places "sensitive" where carry was prohibited. The first Federal District court judges to look at New York's law have all ruled against it as contrary to *Bruen*. Besides *Antonyuk I,* other rulings include: *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 201944 (N.D.N.Y. Nov. 7, 2022) ("*Antonyuk II*"); *Hardaway v. Nigrelli*, No. 22-CV-771 (JLS), 2022 U.S. Dist.

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[8] *Id*. at 2126.
[9] *Id*. at 2131.
[10] ." *Antonyuk v. Hochul*, No. 1:22-CV-0986 (GTS/CFH), 2022 U.S. Dist. LEXIS 182965, at *20 (N.D.N.Y. Oct. 6, 2022) ("*Antonyuk I*").
[11] *Bruen*, 142 S. Ct. at 2133.
[12] *Bruen*, 142 S. Ct. at 2133.
[13] *Id.* at 2118-19.

LEXIS 200813 (W.D.N.Y. Nov. 3, 2022) ("*Hardaway*"); *Christian v. Nigrelli*, No. 22-CV-695 (JLS), 2022 U.S. Dist. LEXIS 211652 (W.D.N.Y. Nov. 22, 2022) ("*Christian*"); and *Spencer v. Nigrelli*, No. 22-CV-6486 (JLS), 2022 U.S. Dist. LEXIS 233341 (W.D.N.Y. Dec. 29, 2022).

New Jersey followed New York by passing a very similar law that also designated many areas as "sensitive places." Predictably, just like New York's law, New Jersey's version has thus far struck out in federal courts. *See Koons v. Reynolds*, No. 22-7464 (RMB/EAP), 2023 U.S. Dist. LEXIS 3293 (D.N.J. Jan. 9, 2023) ("*Koons*"); *Siegel v. Platkin*, No. 22-7464 (RMB/AMD), 2023 U.S. Dist. LEXIS 15096 (D.N.J. Jan. 30, 2023) ("*Siegel*"); and *Koons v. Platkin*, No. CV 22-7463 (RMB/AMD), 2023 WL 3478604 (D.N.J. May 16, 2023) (*Koons II*).

Each of these rulings went into tremendous detail about why New York's "sensitive places" laws (which San Francisco now seeks to largely copy) are unconstitutional under *Bruen*.

II. The Ordinance Violates *Bruen*

Several of the "sensitive places" in the Ordinance violate *Bruen* and consequently are unconstitutional under the Second Amendment.

In *Bruen*, the Supreme Court cautioned that "expanding the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' far too broadly . . . [it] would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense."[14] That is the Ordinance's obvious goal.

At a minimum, the following places are not "sensitive" and cannot be designated as areas where a permit to carry in public would be invalid.

A. City Property Restrictions

The Ordinance would make all City-owned or controlled property off-limits for carry, with only a few exceptions (mainly streets and sidewalks). But public property is simply not a default "sensitive area." For example, the Tennessee Court of Appeals ruled that tenants in public housing did not forfeit their Second Amendment rights.[15] ("The regulation banning the use of handguns on Corps' property by law-abiding citizens for self-defense purposes violates the Second Amendment. . . .").

Similarly, the *Antonyuk II* court ruled that New York may not ban public carry of firearms in a variety of public property, such as public parks and buses.[16] And the *Siegel* and *Koons II* court held the same when referring to government-owned property: "[W]hat is clear is that the fact that whether the Government is the proprietor is not relevant before and after *Bruen*. Under the State's theory, any property it owned could be designated as gun-free. Yet, no one

[14] *Bruen*, 142 S. Ct. at 2133-34.
[15] *Columbia Hous. & Redevelopment Corp. v. Braden*, No. M2021-00329-COA-R3-CV, 2022 Tenn. App. LEXIS 395, *10 (Ct. App. Oct. 13, 2022); *see also Morris v. United States Army Corps of Eng'rs*, 60 F. Supp. 3d 1120, 1125 (D. Idaho 2014)
[16] *Antonyuk II*, 2022 U.S. Dist. LEXIS 201944, at *190-192, 197-203.

could seriously contend, for example, that the State could impose a gun-free highway system simply because it owns the infrastructure." *Siegel*, 2023 U.S. Dist. LEXIS 15096, at *37; "[T]he Second Amendment cases that the State cites do not support the sweeping proposition that carrying for self-defense in public does not extend to any location in which the government owns the land. In each of the cases cited, the courts found that the government property was integrally connected to a government building that it regarded as a "sensitive place" where prohibition on carrying firearms is presumptively lawful."[17]

In the speech context, the City would never suggest that all of its property is off limits for free speech, yet the Ordinance does just that for the equally fundamental right to bear arms. In light of *Bruen*, the Second Amendment is no longer a "disfavored right."[18] The plain text of the Second Amendment protects the right to carry a firearm on most city property.

Crucially, there is a distinction between the Supreme Court's discussion of *government buildings*[19] and the Ordinance's prohibition of carrying in government-owned, leased, or used *real property*. Maybe San Francisco can restrict firearm carry at certain sensitive government buildings where legislative business is conducted. For example, San Francisco City Hall is perhaps analogous to the "legislative assemblies" mentioned in *Heller* and *Bruen*. But the distinction between government buildings where the business of government is conducted, and all public property generally, is critical. *Bruen* suggested that restrictions on the former had a historical basis, while the latter did not.

B. Parks Restrictions

The Ordinance defines "Parks" to include all "privately owned or leased outdoor space utilized for children's outdoor recreation" (presumably because the ban on carrying on all City Property already covers public parks). Of course, any parks that adults use for recreation may be used for children's recreation as well. Restricting carry just because *some* children may be present does not make it a constitutional restriction. The *Antonyuk II* court already rejected this argument as contrary to *Bruen.* For example, in discussing why a law prohibiting carry in libraries would not be acceptable, the court explained: "[T]he Court acknowledges the frequent presence and activities of children in libraries (and the general analogousness of this regulation to historical laws prohibiting firearms in schools). However, the regulation does not limit the ban to 'school libraries' or the 'children's sections of libraries;' and public libraries are also commonly patronized by adults."[20]

[17] *Koons II*, 2023 WL 3478604, at *54.

[18] *Peruta v. California*, 137 S. Ct. 1995, 1999 (2017) (Thomas, J., dissenting from denial of certiorari).

[19] Even being a government building doesn't mean the building is automatically sensitive: "Thus, this Court reads the *Bruen* discussion for the proposition that prohibitions on carrying firearms at government buildings tend not to violate the Second Amendment, but to the extent that a dispute arises concerning a prohibition at a particular government building, resolution will turn on whether analogies to historical regulations can justify the challenged law. In his seemingly prescient concurring opinion, Judge Tymkovich essentially adopted this position, noting that a prohibition's presumption of lawfulness depends on the nature of the government property at issue." *Koons II*, 2023 WL 3478604, at *55 (referencing concurrence in *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1135 (10th Cir. 2015)).

[20] *Antonyuk II*, 2022 U.S. Dist. LEXIS 201944, at *42 n.24.

As to public parks and other places of recreation, the *Antonyuk I* court explained that aside from "the lack of historical analogues supporting these particular provisions, in the Court's view, the common thread tying them together is the fact that they all regard locations where (1) people typically congregate or visit and (2) law-enforcement or other security professionals are—presumably—readily available. This is precisely the definition of 'sensitive locations' that the Supreme Court in [*Bruen*] considered and rejected."[21] In *Antonyuk II*, the same court only allowed specific restrictions on carrying within playgrounds to stand, but not all parks or recreation facilities generally because adults used them too.[22] The *Siegel* court similarly upheld the restriction on playgrounds, but not parks, beaches, and recreation facilities more generally, where it said carry must be allowed.[23] *The Koons II* ruling from that court likewise explained "the State has failed to come forward with any laws from the 18th century that prohibited firearms in areas that today would be considered parks. Consistent with the *Koons* Plaintiffs' findings, this Court has only uncovered colonial laws that prohibited discharging firearms in areas that were the forerunners of today's public park."[24]

C. Places of Worship Restrictions

The fact that places of worship have been frequent targets of attack should lead any sane person to desire more law-abiding people to carry within them. Many houses of worship of all denominations are in fact moving towards more lawful carry to protect their congregants. After all, it's not as if laws like the Ordinance will stop such crimes, because someone bent on mass murder isn't going to desist from his violent plans just because he might violate a local ordinance. Moreover, we've seen that people who carry can stop attacks on churches before more people are harmed. For example, on December 29, 2019, two people were killed in a crowded church in Texas when an attacker opened fire. A congregant, Jack Wilson, quickly killed the assailant with his legally concealed handgun, stopping the deadly attack in seconds. Other armed congregants were also present and quickly responded as well.[25] San Francisco, through this Ordinance, would charge a hero like Jack Wilson with a crime, while empowering violent criminals through the knowledge that it is unlikely anyone will be armed to resist them.

Luckily for these would-be good Samaritans, the Ordinance's restriction on carry in places of worship is unconstitutional. There is no relevant historical tradition of restricting carry in churches. In the founding period, there were "statutes all over America that required bringing guns into churches, and sometimes to other public assemblies." D. Kopel & J. Greenlee, *supra*, at p. 244; *see also Koons*, 2023 WL 3478604, at *21 ("several colonial governments passed laws requiring colonists to bring arms to church"). Additionally, these places are not government buildings, or government organizations—they are private groups of citizens who have the right to defend themselves and others outside of the home.

[21] *Antonyuk I*, 2022 U.S. Dist. LEXIS 182965, at *47.
[22] *Antonyuk II*, 2022 U.S. Dist. LEXIS 201944, at *183-192.
[23] *Siegel*, 2023 U.S. Dist. LEXIS 15096, at *37.
[24] *Koons II*, 2023 WL 3478604, at *83.
[25] Travis Fedschun, *Texas church shooting: Gunman kills 2, 'heroic' congregants take down shooter*, Fox News, (December 29, 2019, 7:47 PM), <https://www.foxnews.com/us/texas-church-shooting-texas-injured-active> (as of June 7, 2023); Fox News Editors, *Texas man who stopped church shooting says he 'had to take out' gunman because 'evil exists'*, Fox News (December 30, 2019, 2:39 PM), < https://www.foxnews.com/us/texas-church-shooting-man-take-out-gunman-west-freeway-church> (as of June 7, 2023).

D. Private Establishment Signage Requirements

The prohibition against the public carry of firearms on private businesses' premises without consent is perhaps the most cynical provision in the Ordinance. It would have the effect of stamping out the right to carry for all practical purposes. Like New York and New Jersey, this bad-faith attempt by the City to undermine a fundamental right will also be struck down by the courts.

The private establishment provision flips directly on its head the traditional practice for private property, especially property belonging to businesses which serve the general public. Usually, if a private property owner wants to exclude people, they must post signs letting everyone know who or what actions are *prohibited*. While it is true that some spaces are so private that there need not be signage to announce they exclude people, that does not apply to places of business open to the general public because they are "by positive law and social convention, presumed accessible to members of the public unless the owner manifests his intention to exclude them."[26]

Moreover, while businesses open to the public do have a broad right to exclude people from their establishments[27], the Ordinance involves the government deciding to exclude people, unless the business owner says otherwise. This is something that would never be acceptable in the First Amendment context.

Entirely separate from the Second Amendment discussion, the private establishment provision also violates the First Amendment rights of business owners. Even those that *do* support the right to carry may decide not to affirmatively consent to patrons carrying a firearm out of fear of public backlash that may hurt their business. In this way, the Ordinance unconstitutionally compels speech for business owners. The Constitution protects them against such compelled speech. Freedom of thought and expression "includes both the right to speak freely and the right to refrain from speaking at all."[28] "Just as the First Amendment may prevent the government from prohibiting speech, the Amendment may prevent the government from compelling individuals to express certain views."[29] And just because business owners are motivated to oppose putting up a sign in part out of fear of lost profits, that doesn't make it any less unacceptable for the State to compel speech.

The *Antonyuk* court agreed, also separately enjoining New York's mirror provision on First Amendment grounds for those property owners that did not want to put up a sign, but also could not feasibly give consent to each individual.

III. CCW Permit Holders Are Overwhelmingly Law-Abiding and Pose No Threat to the Public

The Ordinance is based on the incorrect assumption that people who go through the process of getting a CCW permit are likely to commit crime. The findings preceding the

[26] *Oliver v. United States*, 466 U.S. 170, 193 (1984) (Marshall, J., dissenting).
[27] *Carrillo v. Penn Nat'l Gaming, Inc.*, 172 F. Supp. 3d 1204, 1217 (D.N.M. 2016)
[28] *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).
[29] *United States v. United Foods*, 533 U.S. 405, 410 (2001).

Ordinance's operative text assert that "Over the past several years, a wealth of empirical studies indicate that crime is higher when more people carry firearms in public places." The findings also state that "[b]etween 2020 and 2021, fatal and nonfatal shooting incidents rose by 33% and contributed to the majority of the City's homicides."

Of course, the studies referenced did not find that *people with CCW permits* committed any of this increased crime. Nor do the findings state that San Francisco's crime problems are caused by people with CCW permits. But CCW permitholders are overwhelmingly law-abiding. Even before the *Bruen* ruling, over 40 states were either "shall issue," where a permit must be issued to all citizens who apply and qualify for one, or "constitutional carry," where anyone who is legally allowed to own a gun may carry a pistol concealed or openly without a permit. Millions of law-abiding Americans have legally carried firearms for years.

When California recently tried to pass a law similar to the Ordinance (called Senate Bill 918, which was last year's version of this year's SB 2), it was opposed by the California State Sheriffs Association partially because people with CCW permits almost never commit crimes and are not a problem for law enforcement. The Association stated in a letter to all members of the California State Assembly that SB 918 "greatly restricts when and where licensees may carry concealed and could severely restrict the exercising of [the right to bear arms]…*individuals who go through the process to carry concealed legally are exceedingly unlikely to violate the law*, yet SB 918 turns much of the state into 'no-carry' zones that will do nothing to foster public safety." (Italics added.)

Currently, to get a CCW permit in San Francisco applicants must spend hundreds of dollars, pass an extensive background check, take a training course and psychological exam, and typically must wait a year on top of all of that. The people you should worry about are the criminals already carrying illegally, they don't bother with permits.

IV. Conclusion

If the Ordinance is passed our clients will immediately file a lawsuit to stop it. When we prevail, San Francisco taxpayers will pay dearly for this unconstitutional effort.

Sincerely,
Michel & Associates, P.C.

Konstadinos T. Moros

CC: victor.young@sfgov.org
margaret.baumgartner@sfgov.org
alicia.cabrera@sfcityatty.org