

December 14, 2023

Second Circuit Strikes Down NY Law That Firearms Cannot Be Brought Onto Private Property Without Express Permission

Ruling Is Limited to Private Property That Is “Open to the Public”

SUMMARY

On December 8, 2023, the U.S. Court of Appeals for the Second Circuit issued a ruling on four cases¹ raising First and Second Amendment challenges to provisions of New York’s 2022 Concealed Carry Improvement Act (“CCIA”) regulating the licensing and public carriage of firearms. As relevant to real estate owners and lessees in New York, the court struck down as unconstitutional the CCIA’s prohibition on the carrying of firearms onto any portion of another person’s private property that is open to the public absent the “affirmative, express consent to armed entry”² by the property owner. Accordingly, individuals will now be permitted to carry guns onto private property open to the public unless the property owner prohibits such carriage, whether by signage or otherwise. Although the panel made additional rulings around the CCIA’s added requirements for obtaining concealed-carry licenses, the ruling does not change the general requirement to obtain a license, which remains a prerequisite for the public carriage of a concealed firearm absent a special status (e.g., a member of law enforcement) that otherwise legalizes such carriage. The Second Circuit remanded to the district court the related question of whether or not this portion of the law is constitutional as applied to private property *not* open to the public.

Accordingly, property owners in New York will now need to consider whether they wish to post signage concerning the carrying of firearms on their property.

BACKGROUND

In response to the U.S. Supreme Court’s decision in *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*,³ which struck down New York’s “proper cause” requirement for carrying a concealed firearm,⁴ New York

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State adopted the CCIA to impose various rules pertaining to firearms. Included in those amendments were added requirements around firearm licensing and prohibitions on carrying firearms in “sensitive locations” and “restricted locations.” With respect to the latter prohibition, the CCIA provides that:

A person is guilty of criminal possession of a weapon in a restricted location when such person possesses a firearm, rifle, or shotgun and enters into or remains on or in private property where such person knows or reasonably should know that the owner or lessee of such property has not permitted such possession by clear and conspicuous signage indicating that the carrying of firearms, rifles, or shotguns on their property is permitted or by otherwise giving express consent.⁵

This “restricted locations” provision created a default rule that the carriage of firearms on private property, whether or not such property is open to the public, is unlawful unless the relevant property contains “clear and conspicuous signage” indicating that such carriage is permissible or the property owner otherwise expressly consents to such carriage.⁶

In reviewing challenges to the constitutionality of various provisions of the CCIA, both the U.S. District Court for the Northern District of New York, in *Atonyuk v. Hochul*,⁷ and the U.S. District Court for the Western District of New York, in *Christian v. Nigrelli*,⁸ enjoined the restricted locations provision, citing First Amendment and Second Amendment protections. Although the court in *Christian* enjoined the restricted locations provision only as it applies to private property open to the public, the court in *Atonyuk* enjoined the provision in *all* applications, including private property not open to the public. These injunctions were all stayed pending appellate review of the relevant cases by the Second Circuit.

THE SECOND CIRCUIT'S DECISION

On appeal, the Second Circuit upheld the more limited injunction issued by the district court in *Christian*, modified the injunction issued by the district court in *Atonyuk* to match that in *Christian*, and remanded to the *Christian* court for a further merits analysis the question of the constitutionality of the CCIA as it applies to private property not open to the public.

In its ruling, the Second Circuit held “to the extent the restricted location provision applies to private property open to the public, the regulated conduct falls within the Second Amendment right to carry firearms in self-defense outside the home.”⁹ The court further agreed that, given the abundance of privately held land in New York, “the restricted location provision would turn much of the state of New York into a default no-carriage zone”¹⁰ and the law’s creation of “a universal default presumption against carrying firearms in public places” poses a serious burden on the Second Amendment rights of lawful gun owners.¹¹ As a result of the foregoing concerns, along with the court’s determination that the State failed to carry its burden under *Bruen* of showing historical analogues of a similar type of firearm regulation in public spaces, the Second Circuit held unconstitutional the application of the CCIA to private spaces open to the public.

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The Second Circuit next stated that it disagreed with the *Christian* court’s legal methodology for analyzing the CCIA as it applies to private property not open to the public and so remanded for the district court judge in that case to consider the issue further. Accordingly, the constitutionality of the CCIA as applied to private property not open to the public remains a live question.

SURVEY OF SELECTED STATES

The following chart summarizes where each of the selected States listed currently stands on the issue of firearm carriage on private properties open to the public. Note that this chart does not indicate, and the requirements may additionally be subject to, other State requirements regarding the legal carriage of firearms generally.

State	Position
California	<p>As of January 1, 2024, California will prohibit the carriage of a firearm into any “privately owned commercial establishment that is open to the public, unless the operator of the establishment clearly and conspicuously posts a sign at the entrance of the building or on the premises indicating that licenseholders are permitted to carry firearms on the property.” Cal. Penal Code § 26230(a)(26). Signs must “be of a uniform design as prescribed by the Department of Justice” and “at least four inches in size.” <i>Id.</i></p> <p>Lawsuits have been filed challenging this statutory provision. See Complaint, <i>Carralero v. Bonta</i>, No. 8:23-cv-01798 (C.D. Cal. Sept. 26, 2023); Complaint, <i>May v. Bonta</i>, No. 8:23-cv-01696 (C.D. Cal. Sept. 12, 2023).</p>
District of Columbia	<p>“Private persons or entities owning property in the District of Columbia may prohibit or restrict the possession of firearms on their property.” D.C. Code § 22-4503.02(b). It is presumed that carriage of a licensed concealed pistol is permitted on private property that is not a residence unless conspicuous signage is posted on the property prohibiting the carriage of a concealed pistol or the owner or an authorized agent communicates such prohibition personally to the licensee. D.C. Code § 7-2509.07(b)(3).</p> <p>Signs prohibiting the carriage of firearms on any private property must be “clearly and conspicuously posted at any entrance, open to the public, of a building, premises, or real property.” D.C. Mun. Regs. tit. 24, § 2346.1. To be considered “conspicuous,” the sign must be at least eight inches by ten inches in size and contain writing in contrasting ink using at least 36-point type. D.C. Mun. Regs. tit. 24, § 2346.2.</p>
Illinois	<p>“The owner of private real property of any type may prohibit the carrying of concealed firearms on the property under his or her control.” 430 Ill. Comp. Stat. 66/65(a-10). Unless the property is a private residence, the owner must post a sign indicating that firearms are prohibited on the property. <i>Id.</i> The sign must “be clearly and conspicuously posted at the entrance” of the building, premises, or real property. <i>Id.</i> § 66/65(d). Signs must be four inches by six inches in size and “of a uniform design as established by the Illinois State Police.” <i>Id.</i></p>

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State	Position
Maryland	A provision in the Gun Safety Act of 2023, which was meant to take effect on October 1, 2023, prohibits the carriage of a firearm onto private property unless the owner or the owner's agent has given express permission for such carriage or has posted a clear and conspicuous sign indicating that such carriage is permissible. Md. Code Ann., Crim. Law § 6-411(d). A federal district court enjoined parts of the Gun Safety Act of 2023 from taking effect, including the "private building consent rule" in § 6-411. <i>See Kipke v. Moore</i> , No. CV GLR-23-1293, 2023 WL 6381503 (D. Md. Sept. 29, 2023).
Texas	The carriage of a handgun on the property of another is prohibited if the license holder received notice that such entry with a handgun was forbidden and the license holder did not receive effective consent to the contrary. Texas Penal Code Ann. §§ 30.06, 30.07. Notice may be provided by oral or written communication from the owner or someone with apparent authority to act for the owner. Texas Penal Code Ann. §§ 30.06, 30.07. A written communication must be displayed in a conspicuous manner clearly visible to the public and include particular prescribed language. Texas Penal Code Ann. §§ 30.05(c), 30.06(c)(3), 30.07(c)(3).
Virginia	Virginia does not have a statutory provision directly addressing the carriage of firearms onto private property that is open to the public. However, the granting of a concealed handgun permit in Virginia does not authorize possession where such possession is prohibited by the owner of private property. Va. Code Ann. § 18.2-308.01(C).
Washington	Washington does not have a statutory provision directly addressing the carriage of firearms onto private property that is open to the public.

IMPLICATIONS

By reversing the presumption of the CCIA as previously in effect, the Second Circuit's decision creates a new default rule that permits gun owners to carry firearms onto private property in New York that is open to the public absent clear indication otherwise. Therefore, if private property owners in New York want to prohibit the carrying of firearms on portions of their property open to the public, they will need to communicate such prohibition by posting signage or using other clear means to relay such message to the general public. Private property owners will then need to consider whether they implement a mechanism to enforce such a prohibition.

New York does not currently have any statutory provisions governing the liability of property owners as a result of their decision of whether or not to prohibit the carriage of firearms, or as a result of their decision of whether or not to post signage if they elect a prohibition. Under New York common law, "[a] property owner has a duty to maintain reasonable security measures to protect those lawfully on the premises for reasonably foreseeable criminal acts of third parties," but "has no duty to protect persons lawfully on the premises against unforeseeable and unexpected assaults."¹² In a 2013 case, a New York appellate court

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held that a shooting at a shopping mall was not reasonably foreseeable, despite the mall security's awareness of mall shootings nationwide, where the evidence established that criminal activity at the mall prior to the shooting had consisted of much less serious offenses.¹³

Some states, such as Florida¹⁴ and Tennessee,¹⁵ have contemplated bills that go even further by requiring property owners who prohibit the possession of licensed firearms on their property to assume "absolute custodial responsibility for the safety and defense"¹⁶ of licensees by providing them adequate protection. Others, such as Tennessee¹⁷ and Wisconsin,¹⁸ go the opposite way by granting broad immunity to property owners who elect not to ban firearms despite having the statutory authority to do so. It remains to be seen how the New York legislature and courts will respond to the Second Circuit's findings and the additional burdens that may or may not be placed on property owners as a result of their decisions in line with this case.

It also remains an open question how the courts will rule with respect to the signage requirement of the CCIA as it applies to private spaces.

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ENDNOTES

- 1 *Antonyuk v. Hochul*, 639 F. Supp. 3d 232 (N.D.N.Y. 2022); *Hardaway v. Nigrelli*, 639 F. Supp. 3d 422 (W.D.N.Y. 2022); *Christian v. Nigrelli*, 642 F. Supp. 3d 393 (W.D.N.Y. 2022); *Spencer v. Nigrelli*, 648 F. Supp. 3d 451 (W.D.N.Y. 2022).
- 2 See *Antonyuk v. Chimento*, Nos. 22-2908, 22-2972, 22-2933, 22-2987, 22-3237, 2023 WL 8518003, at *4 (2d Cir. Dec. 8, 2023).
- 3 597 U.S. 1 (2022).
- 4 *Id.* at 1011.
- 5 N.Y. Penal Law § 265.01-d(1) (2023).
- 6 *Antonyuk*, 2023 WL 8518003, at *78-79.
- 7 639 F. Supp. 3d 232 (N.D.N.Y. 2022).
- 8 642 F. Supp. 3d 393 (W.D.N.Y. 2022).
- 9 *Antonyuk*, 2023 WL 8518003, at *82.
- 10 *Id.*
- 11 *Id.* at *84.
- 12 *Vilsant v. SL Green Realty Corp.*, 149 N.Y.S.3d 241, 242 (N.Y. App. Div. 2021) (quotation marks omitted).
- 13 *Haire v. Bonelli*, 967 N.Y.S.2d 475, 478 (N.Y. App. Div. 2013).
- 14 See, e.g., Fla. SB 610 (2017) (“A business, organization, or entity, including, but not limited to, a private business or a not-for-profit entity, which prohibits a concealed weapon or firearm licensee from carrying a weapon or firearm onto the property of such business, organization, or entity assumes absolute custodial responsibility, when the licensee is prevented from carrying a weapon or firearm due to the prohibition, for the safety and defense of the licensee against any unlawful or reckless act by another person, or any attack by a vicious or wild animal, on the owner’s property or on any property that the licensee is required to traverse in order to travel to and from the location where the licensee’s weapon or firearm is stored.”).
- 15 Tenn. SB 1736 (2016) (“Any person or entity authorized to post property pursuant to § 39-17- 1359 who elects, pursuant to that authority, to prohibit the possession of firearms by a person authorized to carry a handgun pursuant to § 39-17-1351, thereby assumes absolute custodial responsibility for the safety and defense of the permit holder while on the posted property and while on any property the permit holder is required to traverse in order to travel to and from the location where the permit holder’s firearm is stored.”).
- 16 *Id.*
- 17 Tenn. Code Ann. § 39-17-1325(a) (“A person, business, or other entity that owns, controls, or manages property and has the authority to prohibit weapons on that property by posting, pursuant to § 39-17-1359, shall be immune from civil liability with respect to any claim based on such person’s, business’s, or other entity’s failure to adopt a policy that prohibits weapons on the property by posting pursuant to § 39-17-1359.”).
- 18 Wis. Stat. § 175.60(21)(b) (“A person that does not prohibit an individual from carrying a concealed weapon on property that the person owns or occupies is immune from any liability arising from its decision.”).

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