No. 25-541

IN THE
Supreme Court of the United States

BENJAMIN SCHOENTHAL, ET AL.,
Petitioners,

v.

KWAME RAOUL, ATTORNEY GENERAL OF ILLINOIS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION OF EILEEN O'NEILL BURKE

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QUESTION PRESENTED

In 2013, Illinois prohibited the possession of licensed firearms on trains and buses "paid for in whole or in part with public funds." Nearly ten years later, petitioner filed suit claiming this law was unconstitutional under the Second Amendment. Petitioner contends that this nation's history and traditions support that such regulations are permissible only where the government provides "comprehensive government security." Petitioner defined this security as any measures functionally equivalent to using magnetometers and armed guards to forcibly disarm individuals upon entry. The district court noted that this theory "makes little sense" and was also "waived" because it was "perfunctory and undeveloped." Petitioner again presented that waived theory on appeal, where he compounded his initial waiver by failing to identify any evidence indicating that he could prevail even if his comprehensive-security theory were accepted. Echoing the district court's sentiments, the Seventh Circuit rejected petitioner's theory, noting that it rested on an "odd" reading of precedent and misunderstood the historical evidence.

The question presented is: Whether petitioner forfeited his soundly rejected Second Amendment theory of sensitive places by failing to properly present it in the district court or on appeal.

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STATEMENT

In 2013, the Illinois legislature enacted the Firearm Concealed Carry Act, 430 ILCS 66/1, et seq., providing for the issuance of licenses to carry concealed weapons in Illinois, *id.* 66/10. The Act also sets forth a number of places in which licensed firearms are prohibited, such as elementary schools, *id.* 66/65(a)(1), childcare facilities, *id.* 66/65(a)(2); judicial buildings, *id.* 66/65(a)(4); and prisons and jails, *id.* 66/65(a)(6). The Act also contains a provision providing that firearms may not be brought into "[a]ny bus, train, or form of transportation paid for in whole or in part with public funds, and any building, real property, and parking area under the control of a public transportation facility paid for in whole or in part with public funds." *Id.* 66/65(a)(8) (hereafter, the "Public Transit Statute").

Nearly a decade after the passage of the Public Transit Statute, in 2022, petitioners Benjamin Schoenthal, Mark Wroblewski, and Douglas Winston (collectively, "Schoenthal") filed this suit against Illinois and the Cook County State's Attorney, claiming that the Public Transit Statute violated their Second Amendment rights by prohibiting individuals from "carry[ing] loaded, operable handguns . . . while traveling on public transportation systems." R. 1 at 3 ¶6.[1] According to Schoenthal, he would travel more frequently via public transit "if he were not forced to disarm" to do so. *Id.* at 10-11 ¶30. While Schoenthal admitted that the Second Amendment is not violated

[1] We cite the district court docket as "R. ___," and the Seventh Circuit docket as "7R. ___."

by prohibiting the carriage of weapons in a government building in which the government "provided security measures to ensure the physical protection" of those therein, he claimed that "magnetometers" are the only security measures sufficient to satisfy this standard in modern times. *Id.* at 17 ¶63.

Following discovery, the district court granted summary judgment for Schoenthal, entering a declaratory judgment that the Public Transit Statute is unconstitutional as applied to his desired conduct. Pet. App. 130a. But to the extent that Schoenthal claimed that a place cannot be sensitive unless it has "comprehensive security," the district court noted that Schoenthal "fail[ed] to establish why 'comprehensive' security is the right threshold," because he "offer[ed] no explanation" how his historical examples translate to such a requirement. Pet. App. 128a. Such "perfunctory and undeveloped arguments," the court explained, "are waived." *Ibid.* (cleaned up). Moreover, the district court went on, this argument simply "makes little sense." *Ibid.*

On appeal, Illinois argued, among other things, that the Public Transit Statute complied with the Second Amendment because this nation's history and traditions show that public transit is properly considered a "sensitive place" within the meaning of this Court's precedents. 7R. 24 at 31-44.

The State's Attorney adopted those arguments in full, 7R. 25 at 44 n.10, but wrote separately to note that this Court has instructed that modern sensitive places can be identified by analogy to the sensitive places already recognized in its Second Amendment precedents – schools, government buildings, legislative assemblies, polling places, and courthouses, *id.* at 44. Analysis of history and judicial precedent revealed several characteristics of those sensitive places that explain why they are considered sensitive, all of which are shared by public transit. *Id.* at 44-51.

Because Schoenthal did not dispute that all of those characteristics are shared by public transit systems, the State's Attorney explained, he forfeited any argument on that subject. 7R. 68 at 23-24. Furthermore, to the extent that Schoenthal argued that a place lacking "comprehensive security" cannot possibly constitute a sensitive place, the State's Attorney noted that Schoenthal had forfeited any argument that comprehensive security was lacking on the public transit systems he sought to utilize, by failing to offer any evidence or argument regarding the security those systems have in place. *Id.* at 24-25. Instead, he offered only a decision of the Delaware Supreme Court, "which obviously says nothing about" the security of mass transit in Cook County, Illinois. *Id.* at 25.

The Seventh Circuit reversed. Pet. App. 1a-67a.

As the court explained, this nation's history and traditions show that public transit is a sensitive place for purposes of the Second Amendment, making the Public Transit Statute constitutional. Pet. App. 17a-56a.

REASONS FOR DENYING THE PETITION

In his petition, Schoenthal argues at some length that this Court should grant review to endorse his novel argument that no place – even a crowded commercial airliner mid-flight – is a sensitive place for purposes of the Second Amendment unless it has been comprehensively secured with a magnetometer, armed guards, or some functional equivalent. This Court should decline this request, for two reasons. First, the district court expressly held Schoenthal's theory waived for want of sufficient development, and Schoenthal has only compounded that initial waiver at every subsequent phase of this litigation. Second, as the district court further recognized, that theory simply makes no sense, because it rests on a basic logical fallacy: Schoenthal's confusion of simple cause and effect. We address these problems, in turn.

I. Schoenthal Has Waived His "Comprehensive Security" Theory, Thrice Over.

While Schoenthal focuses his petition squarely on his notion that "comprehensive government security" is the touchstone of all sensitive places, that argument

stumbles immediately out of the gate for the simple reason that it is waived, thrice over.

First, as the district court explained below, Schoenthal "fail[ed] to establish why 'comprehensive' security is the right threshold," because he "offer[ed] no explanation" how his historical examples translate to such a requirement. Pet. App. 128a. Such "perfunctory and undeveloped arguments," the court explained, "are waived." *Ibid.* (cleaned up).

Second, Schoenthal compounded his initial waiver in the district court with yet another before the Seventh Circuit. On appeal, Schoenthal presented only an as-applied challenge to the Public Transit Statute, under which the merits of his claim were wholly dependent on "the facts of the case before [the court] and not any set of hypothetical facts under which the statute might be unconstitutional." *E.g.*, *United States* v. *Phillips*, 645 F.3d 859, 863 (7th Cir. 2011). Despite this, Schoenthal's briefs to the Seventh Circuit offered no explanation why *any* of the transit systems he hoped to utilize lacked the comprehensive security he thought necessary to make them sensitive for purposes of the Second Amendment.

Instead, his entire argument on that issue was confined to two lonely sentences, relying not on record evidence, but on an opinion of the Delaware Supreme Court, 7R. 54 at 59 (quoting *Bridgeville Rifle & Pistol Club* v. *Small*, 176 A.3d 632, 659 (Del. 2017)). That

opinion says literally nothing (let alone anything of evidentiary value) on the subject of transit security in Cook County.[2] That failure to develop any argument based on the evidence, standing alone, waived any argument before the Seventh Circuit that the evidence permitted judgment in Schoenthal's favor, even on his preferred legal theory. *E.g.*, *Estate of Moreland* v. *Dieter*, 395 F.3d 747, 759 (7th Cir. 2005) ("We will not scour a record to locate evidence supporting a party's legal argument.").

Third, Schoenthal compounds his evidentiary failure before the Seventh Circuit with yet another before this Court. Just as he did in the Seventh Circuit, Schoenthal offers no explanation why any of the transit systems on which he hopes to travel lack the comprehensive government security he demands. Indeed, his petition is largely devoid of any meaningful factual discussion at all. Since arguments not raised in a petition are waived, *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 28 (1993), that omission waives any argument that he can ultimately prevail on the merits even if this Court endorses his comprehensive

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[2] Notably, this is not the first time in recent memory that counsel for Schoenthal has failed to take seriously the need to present a proper factual basis for a Second Amendment claim. See *Viramontes* v. *Cook County*, No. 24-1437, 2025 U.S. App. LEXIS 13331, at *2 (7th Cir. June 2, 2025) (declining to consider Second Amendment challenge on the merits because counsel "failed to develop a record sufficient" for the task).

security theory of sensitive places.

Each of these waivers is individually fatal to Schoenthal's request for certiorari review, because this Court is simply not in the business of considering waived arguments. *E.g.*, *City & County of San Francisco* v. *Sheehan*, 575 U.S. 600, 609 (2015); *Duignan* v. *United States*, 274 U.S. 195, 200 (1927) (collecting authority).

Even more problematic are Schoenthal's dual waivers of any argument regarding the facts of this case, which reduce his petition to a request for the announcement of "an abstract determination by the Court of the validity of a statute, or a decision advising what the law would be on an uncertain or hypothetical state of facts," the purest of advisory opinions. *Nashville, Chattanooga & St. Louis Ry.* v. *Wallace*, 288 U.S. 249, 262 (1933) (citations omitted). These problems easily warrant denial.

II. Schoenthal's Novel Comprehensive-Security Theory Is Not Supported By The Law Or The Facts

Waivers aside, this Court should deny review because Schoenthal has no hope of prevailing on the merits. This is because Schoenthal's novel theory of sensitive spaces, as the district court explained, simply "makes little sense." Pet. App. 128a.

As Schoenthal openly admits, his central legal theory boils down to an anachronistic notion that Founding-era laws – which predate security-grade metal detectors by over a century – can somehow be read to require that modern sensitive places utilize metal detectors or their functional equivalent. Pet. 2 (demanding "metal detectors and armed guards" before a place can be considered sensitive); Pet. App. 127a (noting same); R. 1 at 17 ¶63 (demanding requirement that "individuals [must] pass though [sic] magnetometers when entering the location in question").

Unsurprisingly, a proposed legal rule based on such an anachronism invites seriously problematic results. Schoenthal's counsel does not even dispute this fact, but has expressly confirmed that his proposed constitutional rule would mean that individuals have an absolute Second Amendment right to bring firearms *on commercial airliners* absent TSA security checkpoints forcibly preventing them from doing so. *Carralero* v. *Bonta*, No. 23-4354, Oral Arg. at 37:56-38:05 (9th Cir. April 11, 2024).

That is only but one problematic implication of Schoenthal's proposed rule. To take a historical example, Schoenthal's rule would necessarily imply that John Wilkes Booth had an absolute Second Amendment right to bring a gun into President Lincoln's box at Ford's Theatre, which was no longer "comprehensively secured" after the guard there

carelessly abandoned his post. Or to take a more recent historical example, that theory implies that the individual who attempted to assassinate President Trump in Pennsylvania had an absolute constitutional right to bring an assault rifle to a crowded presidential campaign rally, merely because the Secret Service failed to "comprehensively" secure the rooftop where he laid in wait.

It also implies that a place could be sensitive one day, but not sensitive the next, if the security for some reason drops below whatever arbitrary line Schoenthal deems "comprehensive." That would imply that this Court could no longer prohibit firearms on its premises if a temporary lapse in Congressional appropriations makes "comprehensive" security impossible. Nuclear facilities, too, would no longer be sensitive places if some unforeseen emergency made it impossible to staff them with "comprehensive" security, despite the obvious catastrophes that could result from the use of firearms therein. The same with this nation's schools, which would suddenly be forced to blindly allow guns on their property whenever their security officers go on strike, or call in sick too late to obtain a replacement. Or, most obviously, a magnetometer in a sensitive government facility could simply *break*, suddenly making that facility's prohibition on firearms unconstitutional while the repair crew is at work. We could go on and on, because the problems Schoenthal's proposed rule invites are truly boundless, but the point has been made.

The reason Schoenthal's proposed constitutional rule invites such problems is obvious: it rests on what might be the most rudimentary of logical fallacies, by confusing cause and effect. Even generously accepting for sake of argument – despite Schoenthal's conspicuous inability to offer any historical examples of comprehensive security at schools, see Pet. 25-26 – that at least some historical sensitive places were also comprehensively secured, he has confused the *historical source* of legal authority to comprehensively secure a place with the resulting *exercise* of that legal authority to comprehensively secure that place. Put differently, he treats evidence that a place was historically considered sufficiently secure as to authorize the government to forcibly disarm individuals entering that place as evidence that forcible disarmament is required for that place to be considered sensitive. To sum up the problem in this Court's own terminology, Schoenthal has hopelessly confused "how" governments historically regulated firearms in sensitive places with "why" they authorized such regulations in the first place. *New York State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1, 29 (2022).[3]

[3] Schoenthal compounds this fallacy with his passing strange reliance on the inapposite writings of Cesare Beccaria. Pet. 2-3, 18-19. While Beccaria questioned the general "utility" of weapons control laws – indeed, he discussed those laws in a chapter entitled "Of false ideas of utility" – *Bruen* relegated judicial

Recognition of the logical fallacy that underlies Schoenthal's entire legal argument also reveals the fallacious understanding of constitutional law on which it rests. Without a doubt, the forcible disarmament of an individual citizen by an armed security officer is the strongest possible exercise of government authority to deprive that individual of his ability to exercise the right to lawful self-defense the Second Amendment was designed to protect. *District of Columbia* v. *Heller*, 554 U.S. 570, 628 (2008). But by Schoenthal's reckoning, that maximal *exercise* of authority is the *source* of the authority to act in the first place – lest the government completely *obliterates* the individual right to armed self-defense in a particular place, he would say, the government has no authority to do *anything* undermining that right in that place.

That is simply, and obviously, not how constitutional rights function. This Court has made clear that the Second Amendment is governed by the same "rules" as the other Amendments, *Bruen*, 597 U.S. at 70, but no one would say that a government regulation of speech is improper under the First Amendment unless accompanied by a

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evaluations of regulatory utility to the dustbin along with balancing tests. And to the extent that Beccaria categorically rejected *all* firearm regulation, his position is flatly inconsistent with this nation's regulatory traditions, which *Heller* specifically recognized permit at least some firearm regulations.

"comprehensive" prior restraint. Nor would anyone say that the Fourth Amendment prohibits warrantless searches and seizures in one's home unless the government "comprehensively" ransacks the home and absconds with its entire contents. Or that the right against compelled self-incrimination prohibits coercion of a confession, unless that coercion is accompanied by the "comprehensive" inducement of the rack and screw. Or that equal protection prohibits invidious discrimination against minorities unless the government has "comprehensively" excluded them from the protections of civil society altogether. To the contrary, a core tenet of the nation's entire Constitutional tradition is that, whenever the government deigns to tread on the core values of a constitutional right, it must act with the utmost possible caution, not run rampant. *E.g.*, *Wygant* v. *Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986).

Once it is recognized that "comprehensive security" is not the "why" of regulatory authority over sensitive places, but merely "how" that authority may be exercised when present, the focus properly returns to the basic question of *why* governments historically considered certain spaces so sensitive to either regulate firearms therein or outright forcibly disarm individuals entering those spaces. As *Bruen* explained, modern sensitive places can be determined by analogy to those recognized at common law. 597 U.S. at 30. Looking to those places – specifically, legislative assemblies, polling places, courthouses,

and schools – a few of the principles regarding sensitive places can be discerned.

First, they tend to be government buildings, or places otherwise involved in performing government functions or the provision of government services. As to the latter, the Statute of Northampton specifically focused on the performance of government functions when it made it illegal "to come before the King's justices, or other of the King's ministers doing their office, with force and arms." 2 Edw. 3, c. 3 (1328). Notably, despite limiting possession of firearms in other places, such as "fairs" or "markets," only in circumstances that would naturally cause terror to the people, *id.*, the Statute of Northampton categorically prohibited the possession of firearms where government officials were performing their official duties. Put another way, while a courthouse is unquestionably a sensitive place, the same is true of a local law school when an appellate court holds oral arguments there, allowing firearms to be prohibited there during that time even if such a restriction would not otherwise be appropriate.

As to the former, *Heller* identified "government buildings" as "sensitive places." 554 U.S. at 626. This reflects that the prevailing philosophy of the Founding era recognized that government has a general monopoly on the use of violence. *E.g.*, Thomas Hobbes, LEVIATHAN 92 (1651); John Locke, SECOND TREATISE OF GOVERNMENT §§ 87-88 (1690); John

Locke, *A Letter Concerning Toleration*, A LETTER CONCERNING TOLERATION & OTHER WRITINGS 1, 19 (Mark Goldie, ed., 2010). This monopoly necessarily applies with particular force on the government's own property, in much the same way a private property owner's right to self-defense applies with particular force in his own home via the castle doctrine.

Along the same lines, it also reflects that a cornerstone of the ancient right of self-defense – inherent in its nature as an *exception* to the government monopoly on the use of force – was that the ability to exercise this right was dependent on "the Probability of getting Assistance" from the government. 1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 73 § 25 (4th ed. 1762). Inside a government building, the probability of getting government assistance is at its zenith – indeed, it rises to the level of an affirmative constitutional duty to protect if the government has denied occupants of that building their ordinary ability to protect themselves, *Deshaney* v. *Winnebago Cnty. Dep't of Social Servs.*, 489 U.S. 189, 200 (1989). At the same time, the right to private self-defense is at its nadir, allowing correspondingly greater restriction of the right to bear arms of which the right to self-defense is "the *central component*." *Heller*, 554 U.S. at 599.

Second, sensitive places tend to be locations where the activity in question would be meaningfully interfered with by the presence of firearms, even those

possessed for lawful, legitimate purposes. *E.g.*, *Hill* v. *State*, 53 Ga. 472, 478 (1874) (ability to vote or perform public duties would be "seriously interfered with" if individuals were to do so while armed). That is most obvious with arms at polling places, since a reasonable person seeking to vote would easily be deterred from casting a vote for his or her candidate of choice if armed supporters of a rival candidate are present at the polling place.

That danger is not speculative. This Court has noted that, historically, "[s]ham battles were frequently engaged in" at polling places "to keep away elderly and timid voters of the opposition." *Burson* v. *Freeman*, 504 U.S. 191, 202 (1992). That is not to mention the risk of actual armed conflict between supporters of rival candidates; as *Burson* explained, careful regulation of access to polling places was made necessary by the fact that polling places had become "scenes of battle, murder, and sudden death." *Id.* at 204 (cleaned up). A similar concern applies to courthouses, where firearms on the premises would pose an increased risk of intimidation and violence against witnesses, jurors, litigants, and judges, who all lack the protection of anonymity available to voters at the polling place.

Third, the sensitive places recognized by this Court tend to be discrete, confined places, usually specific buildings. That makes analytical sense – as *Bruen* explained, larger, open places like cities,

sidewalks, and parks cannot be considered sensitive places because it would effectively nullify the Second Amendment right to categorically exclude them from its coverage. 597 U.S. at 30-31. It also is consistent with the fact that the common-law right to self-defense central to the Second Amendment was dependent on the likelihood of government protection, which is less likely to be available in open areas. Hawkins, supra, at 73 § 25 (noting that retreat is less necessary in open spaces).

Fourth, sensitive places tend to be locations where individuals are effectively a "captive" audience because of the nature of the activity conducted therein. See *Maupin* v. *State*, 89 Tenn. 367, 369 (1890) (affirming conviction under statute prohibiting arms at a mill because "[t]he mill was a public place, a place to which customers were constantly invited and daily expected to go"). Courthouses are the most obvious example of this because a host of individuals who make use of courthouses are quite literally forced to be there – defendants hauled into court to defend against civil or criminal charges, summoned jurors, subpoenaed witnesses, etc. – and thus are powerless to avoid armed individuals in those locations. And while other parties might have a choice whether to initiate litigation in the first instance, they still have no choice but to do so in a courthouse, and thus would be practically unable to avoid armed individuals there. Indeed, historic regulations on firearms in courthouses were upheld on this precise ground that,

absent those regulations, individuals making use of those places would be effectively "compelled to mingle in a crowd of men loaded down with pistols and Bowie-knives." *Hill*, 53 Ga. at 478.

Fifth, sensitive places tend to involve the exercise of civic duties, if not express constitutional rights. Participation in court proceedings is an aspect of the First Amendment right to seek redress of grievances, *Bill Johnson's Rests.* v. *NLRB*, 461 U.S. 731, 741 (1983), as is citizen participation in legislative sessions, *e.g.*, *E.R. Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 137-38 (1961). Voting is also a cornerstone constitutional right. *E.g.*, *Reynolds* v. *Sims*, 377 U.S. 533, 561-62 (1964). Restrictions on firearm possession where such rights are exercised reflect that forcing individuals to choose between avoiding armed individuals and exercising their constitutional rights is essentially equivalent to restricting the rights themselves. *Hill*, 53 Ga. at 477-78.

Sixth, sensitive places tend to serve vulnerable members of the population. See *Kipke* v. *Moore*, 695 F. Supp. 3d 638, 655 (D. Md. 2023) ("Like schools, mass transit facilities are crowded spaces that serve vulnerable populations like children and disabled people."). This is most obvious in regard to schools or other places children frequent, since this Court has long upheld laws "protecting the physical and emotional well-being of youth even when the laws

have operated in the sensitive area of constitutionally protected rights." *New York* v. *Ferber*, 458 U.S. 747, 757 (1982). The same is true of polling places, where the concern arises that violence will "keep away elderly and timid" individuals. *Burson*, 504 U.S. at 202. Courthouses, too, often serve the needs of the most vulnerable – abused children and spouses, victims of violent crime, and the mentally ill – who could be deterred from utilizing vital government services provided if required to share the confines of the courthouse with armed individuals other than the law enforcement officers assigned to protect them.

Notably, it is *undisputed* here that (1) these are all aspects of historic sensitive places; and (2) mass transit systems share literally every one of these characteristics of historic sensitive places. After the State's Attorney made these two observations below, 7R. 25 at 43-51, Schoenthal offered no response except to quibble that no *individual* aspect of public transit sufficed to make them analogous, 7R. 54 at 35-44, 62-63. Schoenthal has thus forfeited any argument on either point before this Court. *EEOC* v. *Federal Labor Relations Auth.*, 476 U.S. 19, 22-23 (1986).[4]

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[4] While Schoenthal now insists that the Second Amendment demands a single "*comprehensive* principle" unifying all historical sensitive places, Pet. 19, he also raised no such argument below, thus forfeiting it as well. In fact, his argument was exactly to the contrary – that no particular characteristic (other than the one arbitrary characteristic he thought weighed

That forfeiture effectively ends the historical inquiry here. That public transit systems undisputedly have such a strong resemblance, in multiple respects, to places historically recognized as sensitive shows "why" firearms may be regulated on public transit. And given that Schoenthal himself admits a historic tradition of forcible, "comprehensive" disarmament of individuals in sensitive places, the Public Transit Statute's lesser coercive measures are well within the bounds of historical tradition in "how" it chooses to treat carriage of firearms on public transit, requiring affirmance of the judgment below.

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In sum, this case involves a legal theory that the district court expressly held was waived because it was insufficiently developed below, which was again waived on appeal when Schoenthal failed to present any evidence allowing him to actually prevail on that

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in his favor, of course) could control the sensitivity analysis. That forfeiture aside, he offers no explanation why *Bruen* or any other of this Court's decisions require a grand unified theory of sensitive places – after all, the Founding generation was more than capable of deciding that the different considerations applicable to different places were nevertheless of similarly sufficient *weight* to require that those places be treated similarly vis-à-vis firearms. Moreover, even under Schoenthal's own test, his "comprehensive security" principle fails because he makes no attempt to claim it explains the sensitive status of schools.

theory. Worse, Schoenthal's legal theory is not supported by any law or any facts, because it rests in equal measure on anachronism (magnetometers nonexistent at the Founding) and logical fallacy (self-servingly confusing cause and effect). For these reasons, Schoenthal's petition should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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