22-2933

United States Court of Appeals for the Second Circuit

JIMMIE HARDAWAY, JR., LARRY A. BOYD, FIREARMS POLICY COALITION, INC., SECOND AMENDMENT FOUNDATION, INC.,

Plaintiffs-Appellees,

v.

STEVEN A. NIGRELLI, in his official capacity as Superintendent of the New York State Police,

Defendant-Appellant,

BRIAN D. SEAMAN, in his official capacity as District Attorney for the County of Niagara, New York, JOHN J. FLYNN, in his official capacity as District Attorney for the County of Erie, New York,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of New York

REPLY BRIEF FOR APPELLANT

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PRELIMINARY STATEMENT

In *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court clarified the legal framework for analyzing Second Amendment challenges, but it did not, contrary to plaintiffs' insistence, create a historical standard so rigid and inflexible that it would prohibit nearly any gun regulation. To the contrary, *Bruen* recognized that the Second Amendment permits a wide variety of regulations, including the prohibition of firearms in sensitive locations. As explained in the State's opening brief, New York's prohibition on firearms in places of worship fits squarely within the Nation's historical tradition of firearm regulation for two independent reasons: first, there is ample evidence of nineteenth-century restrictions on firearms in places of worship themselves, and second, there is an even longer history of excluding firearms in sensitive locations that share numerous relevant characteristics with places of worship.

In response, plaintiffs misread *Bruen* in several ways. First, they define the scope of the Second Amendment right so broadly that virtually any firearm regulation necessarily interferes with that right, even those the Supreme Court has declared "presumptively lawful." Second, plaintiffs

urge this Court to sweep aside the State's historical evidence with a myopic focus on colonial laws that in no way support their contention that the Second Amendment was originally understood to prohibit bans on firearms in places of worship. And third, plaintiffs incorrectly insist that *Bruen* requires that the historical record include word-for-word historical twins for modern regulations, and that even historical twins would be insufficient if they did not exist in enough States—excluding States plaintiffs deem disqualified from consideration—or if they were passed after plaintiffs' amorphous conception of the "Founding Era." However, a faithful application of *Bruen* cannot categorically exclude historical precursors based on the arbitrary criteria used by plaintiffs and the district court.

Finally, plaintiffs fail to meaningfully rebut the State's arguments as to the remaining preliminary-injunction factors. Instead, plaintiffs insist that the finding of a likelihood of success on the merits alone requires a preliminary injunction in Second Amendment cases. Nothing in *Bruen* authorizes this departure from settled law, and plaintiffs have failed to show a likelihood of success on the merits in any event.

ARGUMENT

POINT I

PLAINTIFFS FAILED TO SHOW A SUBSTANTIAL LIKELIHOOD THAT THEY WOULD PREVAIL IN THEIR SECOND AMENDMENT CHALLENGE TO THE PLACE-OF-WORSHIP PROVISION

Plaintiffs devote most of their brief to the merits of their Second Amendment claim. In the guise of vindicating *Bruen*'s pronouncement that the "constitutional right to bear arms in public for self-defense is not a second-class right," 142 S. Ct. at 2156 (quotation marks omitted), plaintiffs wield the Second Amendment in a manner that would defeat firearm regulations that *Bruen* itself recognized as permissible.

A. The District Court Improperly Relieved Plaintiffs of Their Burden as to the Textual Element of the Second Amendment Inquiry.

Bruen envisions a two-step inquiry: first, courts should inquire whether "the Second Amendment's plain text covers an individual's conduct," and second, if it does, courts should inquire whether the government seeking to regulate that conduct "demonstrate[d] that the regulation is consistent with this Nation's historical tradition of firearm regulation." 142 S. Ct. at 2126. Plaintiffs appear to agree that the party challenging a law on Second Amendment grounds must carry the burden on the first

step of the inquiry (Br. of Pls.-Appellees ("Pls.' Br.") at 13-14), but incorrectly insist that they can satisfy this requirement by defining the Second Amendment right at the highest level of generality. Plaintiffs' suggested approach is unsupported by law and would entitle anyone who assigns the "Second Amendment" label to a claim challenging a firearm regulation to force the government to "sift the historical materials," *Bruen*, 142 S. Ct. at 2150, regardless of the regulation's type and vintage.

To begin, plaintiffs describe the Second Amendment right as protecting all "Americans who seek to carry bearable arms." Pls.' Br. at 14. In actuality, the Second Amendment is not so boundless: it protects "ordinary, law-abiding, adult citizens" who wish to "bear arms in public" for purposes such as self-defense. *Bruen*, 142 S. Ct. at 2134, 2138.

Plaintiffs insist that the Second Amendment's text includes no reference to location, and therefore carrying arms anywhere in public is necessarily within the scope of the right. Pls.' Br. at 15-16. However, the Second Amendment's text does not include "ordinary," "law-abiding," "adult," "citizens," or "self-defense" either, yet the Supreme Court has nonetheless read the text to necessarily imply these limitations—and to permit laws that impose these limitations on firearm possession. *Bruen*, 142 S. Ct. at

2138 n.9. Likewise, plaintiffs' suggestion, that the absence of a textual reference to location means that the Second Amendment necessarily applies in any place open to the public, cannot be squared with the Supreme Court's recognition that restrictions in places such as government buildings are "presumptively lawful." *See District of Columbia v. Heller*, 554 U.S. 570, 626-27 & n.26 (2008); *see also Bruen*, 142 S. Ct. at 2162 (Kavanaugh, J., concurring); *id.* at 2157 (Alito, J., concurring) (noting that *Bruen* does not "disturb[] anything that [the Supreme Court] said in *Heller* or *McDonald* . . . about restrictions that may be imposed on the possession or carrying of guns").

Plaintiffs aver that what the Supreme Court really meant by "presumptively lawful" was merely that the Court expected "further historical analysis would demonstrate that those restrictions were part of the Nation's tradition." Pls.' Br. at 16-17. Plaintiffs' reading of that phrase in *Heller* eliminates the ability of this presumption to serve its intended purpose: to "allocate[e] the burdens of proof between parties." *See Basic Inc. v. Levinson*, 485 U.S. 224, 245 (1988); *see also* Fed. R. Evid. 301 ("the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption"). It is thus no surprise

that the lower courts have taken the Court's use of the term "presumptively lawful" at face value. *See, e.g.*, *Holloway v. Attorney Gen. U.S.*, 948 F.3d 164, 169 (3d Cir. 2020) (a challenger to presumptively lawful firearm restriction had burden to rebut presumption), *cert. denied*, 141 S. Ct. 2511 (2021); *United States v. Class*, 930 F.3d 460, 463 (D.C. Cir. 2019) (same, as to sensitive-place regulation), *abrogated on other grounds by Bruen*, 142 S. Ct. at 2127 n.4. If plaintiffs were correct, on the other hand, then a "presumptively lawful" firearm regulation would actually be presumptively *unlawful*, unless and until the government marshaled history to justify it.

Plaintiffs are also wrong to argue that *Bruen* held that the government must assemble a historical record to defend every sensitive-place regulation. *See* Pls.' Br. at 17. *Bruen* held that the government cannot condition the exercise of the right to bear arms on a showing of special need, which is how it construed New York's proper-cause requirement. 142 S. Ct. at 2156. When the Court cautioned that "there is no historical basis for New York to effectively declare the island of Manhattan a 'sensitive place,'" it was rejecting the suggestion that the proper-cause requirement, strictly applied in densely populated places, could be understood

as a sensitive-place regulation. *Id.* at 2134. Moreover, the Court expressly declared that it had "no occasion to comprehensively define 'sensitive places.'" *Id.* at 2133. The Court did not purport to establish the analytical standard applicable to sensitive-place regulations that are indisputably place-based, nor to alter the general rule that a party challenging a law on Second Amendment grounds must first show that the party's intended conduct falls within the scope of the Second Amendment's text.

B. The Place-of-Worship Provision Is a Constitutional Sensitive-Place Regulation.

In any event, the validity of the place-of-worship provision is amply established by the historical record, which shows numerous historical examples of statutes treating places of worship as sensitive places, and additional historical examples of statutes that treat closely analogous places as sensitive places within the meaning of Second Amendment jurisprudence. Plaintiffs' efforts to distinguish these precedents are unpersuasive.

1. Places of worship are themselves historically recognized sensitive places.

As explained in the State's opening brief (at 20-29), New York's place-of-worship provision has over a dozen nineteenth-century predecessors.[1] Plaintiffs are incorrect that under *Heller* and *McDonald v. City of Chicago*, 561 U.S. 742 (2010), these predecessors were enacted too late in time to establish a tradition of firearm regulation. *See* Pls.' Br. at 26-27. On the contrary, *Heller* describes evidence of post-ratification understanding of a right as a "critical tool of constitutional interpretation." 554 U.S. at 605. And *McDonald* exhaustively retraced Reconstruction-era public understanding of the right to bear arms to support the Court's conclusion that the Fourteenth Amendment incorporated the Second Amendment against the States. 561 U.S. at 770-78. Indeed, *Bruen*'s author has previously remarked that it was appropriate to "begin the assessment of the scope of . . . rights incorporated against the States by looking to what ordinary citizens at the time of the Fourteenth Amendment's ratification

[1] Plaintiffs claim that there are no such predecessors in New York (Pls.' Br. at 1, 38), but that does not undermine the force of the historical precedents that establish New York's right to enact such a prohibition now.

would have understood the right to encompass." *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 141 S. Ct. 2038, 2059 (2021) (Thomas, J., dissenting) (quotation and alteration marks omitted). Moreover, *Bruen* expressly referred favorably to "18th- and 19th-century 'sensitive places,'" 142 S. Ct. at 2133, a statement that would be meaningless if nineteenth-century sensitive places were considered irrelevant.

Plaintiffs acknowledge that courts routinely look to nineteenth-century history to determine whether a right was considered sufficiently fundamental to be incorporated by the Fourteenth Amendment, but they insist that such evidence is irrelevant to the scope of the right because the question of incorporation is "analytically distinct" from the meaning of a particular right. Pls.' Br. at 27-28. That argument makes no sense; if historical evidence is relevant to whether the States considered themselves bound by a right, it must also be relevant to the question of what the State understood that right to mean. To separate these two questions would transform ratification into a bait-and-switch. *See* Br. of Everytown for Gun Safety as Amicus Curiae at 8-10 (Jan. 24, 2023), ECF No. 89.

In any event, this case presents no occasion to decide whether Founding-era or Reconstruction-era law is controlling, because there is

no evident conflict between bodies of law from these periods. *See Bruen*, 142 S. Ct. at 2138. Plaintiffs attempt to manufacture such a conflict by pointing to colonial laws that purported to mandate firearms in places of worship. Pls.' Br. at 19-26. These laws, however, do not create a "dispute[] regarding the lawfulness of" the nineteenth-century prohibitions. *See Bruen*, 142 S. Ct. at 2133.

First, plaintiffs cannot seriously ascribe these laws to the "Founding Era." Pls.' Br. at 24. All but one predate the start of the French and Indian War in 1754[2]—some by more than a century—and are thus far removed from the events in that war's aftermath that precipitated the American Revolution, the subsequent creation of the United States, and the ratification of the Constitution. The remaining colonial law is a 1770 Georgia statute that apparently remained on the books as of 1800. *Id.* at 22-23. However, Georgia later changed course and prohibited firearms in churches. *See* Act No. 285, 1870 Ga. Laws 421, 421 (see J.A. 191). One may understandably wonder how a state legislature would have voted as to the ratification of the Fourteenth Amendment if it had known in 1868

[2] Plaintiffs cite a 1755 Virginia statute but describe it substantially the same as a 1738 Virginia statute. Pls.' Br. at 22.

that a court in *2023* would hold that its approval of the amendment would forever bar it from passing a statute that conflicted with a measure it had enacted while still a colony. In any event, evidence of public understanding requires more than a single colonial statute that was repealed after that colony became a State. *Cf. Bruen*, 142 S. Ct. at 2155 (rejecting "passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood").

Second, government mandates are especially weak evidence of a right against government regulation. After all, the Second Amendment protects the *choice* to carry firearms for self-defense. *Heller*, 554 U.S. at 628-29. Plaintiffs themselves describe the constitutional harm as their inability to make that choice in regard to places of worship. Pls.' Br. at 37-38. Given that laws mandating that people carry firearms directly impact that choice, such laws only underscore that the presence of firearms at places of worship has long been understood as a legitimate subject of government regulation. Plaintiffs respond that the State declines to consider the "how" and "why" behind the colonial laws (*id.* at 25-26), but it is apparent that the "how" was equally offensive to the individual freedoms plaintiffs assert, and the "why" could not possibly have been to empower people to bear arms at places of worship as they deem necessary

for self-defense. Indeed, as the State explained in its opening brief (at 26), the chief interests motivating these laws were preventing slave uprisings and providing a gathering place for militias. (J.A. 160-161.) These motivations do not reflect a public understanding of the limitations imposed on a government's police powers by the Second Amendment or any precursor in the English Bill of Rights.

Because there is no Founding-era law suggesting, much less mandating, the conclusion that restrictions on firearms in places of worship are unconstitutional, the State easily met its burden by pointing to extensive evidence of such laws in the nineteenth century. As explained in the State's opening brief (at 21-24), the State identified historical place-of-worship prohibitions from four States and two territories that became States, broader laws in two additional States that would have covered places of worship, local laws that affected places of worship in three additional States, and judicial decisions in at least two more States. Engaging with the State's reliance on each set of laws individually (Pls.' Br. at 30-34), plaintiffs exalt the parts over the whole, ignoring that the State's evidence collectively represented laws in over a dozen States that

represented approximately 10,905,000 people or 28% of the U.S. population as of 1870[3]—hardly an "underwhelming grab-bag" (*id.* at 11).

Plaintiffs' piecemeal quibbles with the State's evidence are unavailing. For example, plaintiffs seek to disqualify historical firearm laws from Texas as an "outlier" (*id.* at 31, 34), even though the Supreme Court used that description only with respect to the proper-cause requirement at issue in *Bruen*, 142 S. Ct. at 2153. Plaintiffs also seek to disqualify the 1870 Georgia statute as conflicting with the colonial statute enacted a century earlier, ignoring that the 1870 law was challenged and upheld by the Georgia state courts. *See Hill v. State*, 53 Ga. 472, 475 (1874).

More generally, plaintiffs seek to disqualify laws from any southern States, suggesting that they might have racist origins notwithstanding the absence of any racial distinctions or classifications in the text of the statutes. Pls.' Br. at 24-25. In any event, the unfortunate reality is that the eighteenth- and nineteenth-century laws to which *Bruen* directs the Second Amendment inquiry often codified prejudices that existed at the

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[3] U.S. Census Off., Dep't of the Interior, *Statistics of the Population of the United States at the Ninth Census (June 1, 1870)* tbl. 1 (1872). (For sources available online, full URLs appear in the Table of Authorities. All URLs were last visited on March 8, 2023.)

time. The State does not endorse any racist motivations behind certain historical gun regulations; it merely cites these laws to show the public has not historically understood the Second Amendment's right to bear arms to limit a government's ability to regulate firearms in places of worship in the interests of public safety.

Plaintiffs alternatively attempt to distinguish the State's historical precursors as not "relevantly similar" to the place-of-worship provision by pointing to self-defense exceptions in three such laws and uncertainty over whether a fourth applied to long guns. Pls.' Br. at 31-33. Plaintiffs' quibbling calls on the State to supply the very "historical twins" the Supreme Court has declared are unnecessary. *See Bruen*, 142 S. Ct. at 2133. And plaintiffs miss the mark in citing (Pls.' Br. at 33-34) to *In re Brickey*, which held that the Idaho Constitution could not tolerate a law broadly prohibiting "the carrying of [firearms] in any manner in cities, towns, and villages," 8 Idaho 597, 609 (1902). *In re Brickey* did not mention places of worship, and its holding in no way calls into question a State's ability to include of places of worship in a list of "sensitive locations" where firearms are prohibited.

Finally, plaintiffs resort to attacking the State's historical expert as "plainly out of step with the governing law which this Court is bound to faithfully apply" based on his criticism of *Bruen* in academic writing. Pls.' Br. at 36 n.3. Putting aside the fact that plaintiffs never questioned the State expert's qualifications before the district court, the grounds on which they do so now are immaterial. A historical expert's critiques of legal rulings have no bearing on the reliability of his or her historical analysis.

2. Places of worship are sufficiently analogous to the sensitive places *Bruen* identified.

Even if plaintiffs had cast doubt on the probative value of the State's historical evidence, and they did not, the place-of-worship provision would be adequately supported by analogy to other historical sensitive-place regulations. Places of worship share multiple attributes of locations whose sensitive-place status is not in question. In particular, places of worship are sensitive because they are centers of constitutionally protected activity, educate children who are not reasonably expected to defend themselves, and congregate people into enclosed areas where armed self-defense by untrained civilians would exacerbate the risk of casualties.

Plaintiffs assail the State's analogical reasoning for having "no substantial historical support." Pls.' Br. at 36. They overlook the State expert's report, which discussed common features in historical firearm regulations. (*See* J.A. 159-160.) Moreover, the State did not need a historian to point out well-recognized sensitive features of courts, legislative assemblies, and polling places. Nor do plaintiffs meaningfully undermine the accuracy of the State's analogies. Indeed, plaintiffs' emphasis on historical laws barring the carry of weapons in a manner that spreads "fear" or "terror" (Pls.' Br. at 36-37 (quotation marks omitted)) supports rather than undermines the historical underpinning for prohibiting firearms when necessary to protect important public rights or civic functions. After all, fear and terror both produce disruption. *See Class*, 930 F.3d at 464 (firearm ban on Capitol grounds was necessary to protect legislative activity). As to the potential to disrupt protected religious activity, amici ably explain in detail how firearms disrupt the exercise of religion by, among other things, undermining ministers' relationships with congregants and draining financial resources. Br. of *Amici Curiae* Bishops of the Episcopal Church in N.Y. & New England et al. at 17-23 (Jan. 24, 2023), ECF No. 85. Plaintiffs' only response is to label this a

"policy argument" the Court should disregard. Pls.' Br. at 37-38. But it is in no way improper for the Court to evaluate how and why historical and modern firearm laws operate. To the contrary, this is exactly how *Bruen* expected analogical reasoning to proceed. *See* 142 S. Ct. at 2133.

Plaintiffs further contend that *Bruen*'s analogical approach is limited to "new sensitive places," and places of worship are not "new." Pls.' Br. at 35 (quotation marks omitted). The States supporting plaintiffs as amici suggest that, for similar reasons, the omission of places of worship from *Bruen*'s list of locations historically recognized as sensitive "suggests" that the Supreme Court does not regard them as sensitive. Br. of Amicus Curiae State of Mont. & 18 Other States at 5 & n.4 (Mar. 7, 2023), ECF No. 143. To be sure, "when a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack of a distinctly similar historical regulation" suggests its inconsistency with the Second Amendment. *Bruen*, 142 S. Ct. at 2131. But no such inference is compelled from the simple fact that places of worship and firearms predate the Founding. Firearms have changed over the past several centuries. *See Heller*, 554 U.S. at 582. The threat to certain locations posed by semiautomatic weapons is quite different from the threat posed

by muskets. Thus, the Supreme Court's reference to "new sensitive places" logically includes locations that have *become* sensitive because they developed the same characteristics as sensitive places recognized throughout history.[4] Plaintiffs' cramped reading of *Bruen*, by contrast, would preclude common-sense firearm prohibitions inside places like libraries, hospitals, and psychiatric institutions, regardless of how closely they resemble places where firearms have long been restricted.

Plaintiffs' assault on the analogical approach does not stop them from offering analogies of their own, namely, that sensitive places "concentrate[] adversarial conflict as part of democratic governance" and place government officials "at acute personal risk of being targets of assassination." Pls.' Br. at 35-36 (quotation marks omitted). The State agrees that governments may prohibit firearms at locations that share these characteristics. But they are not the *only* characteristics that can

[4] Plaintiffs suggest that places of worship are not analogous to schools for this purpose because firearms in places of worship, unlike schools, have not always been regulated in the same way in the past. Pls.' Br. at 37 n.4. They are mistaken. The analogies may well be deeper now than before, as both schools and places of worship come to serve similar functions in their communities, in precisely the ways that make them sensitive places. And in any event, analogies that *permit* similar treatment under the Second Amendment do not necessarily *compel* that treatment.

support a sensitive-place designation. Historical laws providing for security at courthouses, legislative assemblies, and polling places (*id.*) do not demand such a limitation. Nor do the decisions of the Supreme Court. Indeed, the Court has declared that sensitive places include "schools" and "government buildings." *Heller*, 554 U.S. at 626. Neither of these locations necessarily concentrate conflict or place officials at "acute" risk of assassination. *See Bonidy v. United States Postal Serv.*, 790 F.3d 1121, 125-26 (10th Cir. 2015) (upholding ban on firearms in post office parking lot). Plaintiffs fail to acknowledge the critical similarities between places of worship and the sensitive places that already receive judicial recognition.

POINT II

THE EQUITABLE FACTORS FAILED TO SUPPORT A PRELIMINARY INJUNCTION

The State's opening brief (at 36-46) explained how the district court misapplied the remaining preliminary-injunction elements by finding that there was likelihood of irreparable harm to plaintiffs in the absence of an injunction, that a preliminary injunction serves the public interest, and that the balance of other equities weighs in favor of a preliminary injunction. In response, plaintiffs have done little but reiterate their

Second Amendment arguments, insisting that the purported showing of a constitutional violation necessarily satisfies the equitable factors as well. Pls.' Br. at 12, 38-43. To the contrary, plaintiffs bear the burden of separately satisfying each of the preliminary-injunction factors, which they have failed to do here.

A. Plaintiffs Have Not Demonstrated That They Will Suffer Irreparable Harm Absent a Preliminary Injunction.

Plaintiffs did not satisfy the irreparable-harm element because they delayed in bringing this action and because they have ample means of protecting themselves and their congregants under the existing statute. Plaintiffs contend that irreparable harm is presumed from the asserted Second Amendment violation. Pls.' Br. at 39-40. If that is the case, any such presumption is nonetheless rebuttable and rebutted. *See Time Warner Cable of N.Y.C. v. Bloomberg L.P.*, 118 F.3d 917, 924 (2d Cir. 1997).

As noted in the State's opening brief (at 37-38), plaintiffs inexplicably delayed in filing this action and seeking preliminary-injunctive relief—an argument plaintiffs make no effort to address, much less rebut. Instead, plaintiffs maintain that in order to worship, they must relinquish their ability to defend themselves, "stripp[ing] them of a fighting chance

if violent circumstances were to arise." Pls.' Br. at 40. Yet the existing statute includes exceptions that allow law-enforcement officials and security guards to carry firearms in places of worship, as in other sensitive locations.[5] *See* Penal Law § 265.01-e(3). Although the State highlighted these exceptions in its opening brief (at 38-39), plaintiffs disregard them, leaving it effectively undisputed that, should they avail themselves of the exceptions, they could comply with the place-of-worship restrictions while simultaneously exercising their religious rights without concern for their physical safety.

B. The Preliminary Injunction Harms the Public Interest.

As with their argument about irreparable harm, plaintiffs largely fold their public-interest argument into the merits of their Second Amendment claim. Plaintiffs attempt to justify the district court's skepticism about the utility of gun restrictions by citing studies that purport to identify only a weak link between such firearm restrictions and reduced

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[5] A statutory amendment proposed in the Governor's budget bill would make it easier for plaintiffs to accomplish this goal by creating an additional exception for "persons responsible for security at such place of worship" even if they are not "registered security guards." *See* A3005-A/S4005-A, 246th Sess., pt. F, subpt. A, § 1 (2023).

violence. Pls.' Br. at 42. Those studies, put forth for the first time on appeal, cannot cure the absence of a foundation for the district court's conclusion. *See United States v. Rivera Torres*, 826 F.2d 151, 157 (1st Cir. 1987) (declining to review argument not raised during preliminary-injunction proceedings).

In any event, isolated studies alone cannot justify the district court's annulment of the Legislature's judgment that restricting access to guns is a sound policy for curbing gun violence based on the district court's own disagreement with that judgment. *See New York State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 261 (2d Cir. 2015). According to plaintiffs, the district court merely recognized that the public interest favors enjoining a law that appears to be unconstitutional. *See* Pls.' Br. at 41. That is simply incorrect. By remarking that the public has an interest in the "strong sense of the safety" that guns provide (J.A. 47-48 (quotation marks omitted)), the court based its public-interest finding on its policy determination that the remedy for gun violence is more guns. Such a determination was beyond the court's authority. *See United States Sec. & Exch. Comm'n v. Citigroup Glob. Mkts., Inc.*, 752 F.3d 285, 296 (2d Cir. 2014).

Plaintiffs applaud the district court for its speed in enjoining the place-of-worship provision, claiming it prevented the State from continuing to violate the Second Amendment while the State does "its homework." *See* Pls.' Br. at 42-43. Plaintiffs ignore *Bruen*'s own recognition that the historical deep dive it demands is labor intensive and "can be difficult." *See* 142 S. Ct. at 2134 (quotation marks omitted). In other words, the Supreme Court expected the lower courts to give careful deliberation to questions of how *Bruen* applies to public-safety measures that affect thousands and sometimes millions of people. Instead, the district court enjoined a duly enacted law after giving the State just days to prepare the record necessary to defend it. Such an approach is in no way consistent with the ordinary course of constitutional litigation.

Finally, Niagara County District Attorney Brian Seaman, who was named as a defendant below and requested to appear as an appellee in this Court, separately contends that a preliminary injunction serves the public interest by keeping prosecutors from "potentially hav[ing] to enforce" a criminal statute whose constitutionality is under review. *See* Br. for Def.-Appellee Brian D. Seaman at 14-15 (Feb. 27, 2023), ECF No. 128. This concern is unrealistic, given that prosecutors have five years to charge

a Class E felony—a category that includes the place-of-worship provision. *See* Criminal Procedure Law § 30.10(2)(b); Penal Law § 265.01-e. Further, Seaman ignores the broad discretion that New York gives to all district attorneys to decide whether and what offenses to prosecute. *See People v. Di Falco*, 44 N.Y.2d 482, 486-87 (1978). Seaman cannot demand an injunction to shield himself from the political consequences of refusing to enforce a duly enacted state law.

CONCLUSION

This Court should reverse the district court's order granting a preliminary injunction against enforcement of the place-of-worship provision.

Dated: March 8, 2023
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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a) of the Federal Rules of Appellate Procedure, Kelly Cheung, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 4,704 words and complies with the typeface requirements and length limits of Rule 32(a)(5)-(7) and Local Rule 32.1.

/s/ *Kelly Cheung*