22-2933

United States Court of Appeals

for the

Second Circuit

JIMMIE HARDAWAY, JR., ET AL.,

Plaintiffs-Appellees,

– v. –

STEVEN A. NIGRELLI,

Defendant-Appellant,

BRIAN D. SEAMAN, AND JOHN J. FLYNN,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK (No. 22-cv-771)

PLAINTIFFS-APPELLEES RESPONSE TO DEFENDANT-APPELLANT'S MOTION FOR A STAY PENDING APPEAL

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INTRODUCTION

In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), the Supreme Court held that individuals have a constitutional right under the Second Amendment to carry firearms for self-defense outside the home. Shortly following *Bruen*, the State of New York enacted widespread prohibitions on carrying firearms in public. *See generally* Senate Bill S51001 ("S51001") (June 30, 2022, Extraordinary Session). Among other location-specific restrictions, New York banned law-abiding New Yorkers—including Appellees Reverend Jimmie Hardaway, Jr. and Bishop Larry A. Boyd—from carrying their firearms for self-defense in "any place of worship or religious observation." N.Y. PENAL LAW § 265.01-e(2)(c) ("Place of Worship Ban"). This ban applies to all ordinary, law-abiding licensed firearm owners in the State, and it applies whether or not the place of worship would allow possession of firearms on its own accord.

New York's Place of Worship Ban is unconstitutional, and the district court properly enjoined Defendants from enforcing it. In the district court's detailed forty-page opinion, the court correctly applied the governing standard set forth in *Bruen*. First, the Second Amendment's text "presumptively protects" Plaintiffs' "proposed course of conduct." *Bruen*, 142 S. Ct. at 2126, 2134. Plaintiffs are Americans who desire to carry handguns. The Second Amendment's plain text protects that conduct.

Because the text covers Plaintiffs' proposed conduct, the State must "affirmatively prove" that the Place of Worship ban "is consistent with this Nation's historical tradition of firearm regulation" with "relevantly similar" restrictions at the Founding. *Id.* at 2127, 2132, 2135. The State has not met that burden. Indeed, history shows that when early American governments addressed the problem of potential violence in places of worship they did not disarm law-abiding citizens but rather *mandated* that they possess firearms.

Given Plaintiffs' substantial likelihood of success, the stay pending appeal that the State seeks is not warranted. Moreover, the equities favor maintaining the preliminary injunction. The State's motion for a stay should be denied.

FACTS

I. New York's Place of Worship Ban.

New York responded to *Bruen* by enacting Senate Bill S51001. Among other things, S51001 implemented expansive new criminal laws that ban carry of firearms in so-called "sensitive locations," even for those who lawfully obtain a license under the State's updated licensing scheme. As explained by New York Governor Kathy Hochul in her July 1, 2022 press statement, "[i]ndividuals who carry concealed weapons in sensitive locations . . . will face criminal penalties." *Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision*, N.Y.

GOV.'S PRESS OFFICE (July 1, 2022), https://on.ny.gov/3nXWrvA. Defendant Nigrelli "explained that, in New York State, troopers 'are standing ready' to ensure that 'all laws are enforced.' He emphasized that the troopers will have 'zero tolerance,' and it is an 'easy message' that he does not need to 'spell it out more than this.'" Decision & Order (Preliminary Injunction), *Hardaway v. Nigrelli*, No. 1:22-cv-00771, Doc. 52, at 9 (Nov. 3, 2022) ("District Court Op."). The State's designation of these "sensitive locations" as no-carry zones took effect on September 1, 2022.

Among the new "sensitive locations," New York designated "any place of worship or religious observation" as a place where ordinary, law-abiding citizens can no longer carry firearms. N.Y. PENAL LAW § 265.01-e(2)(c). This ban extends to even those places of worship that would otherwise permit clergy or congregants to carry firearms on their premises, save for limited exceptions for police officers, state-designated peace officers, state-registered security guards, and the like. *Id.* at § 265.01-e(3). New York makes the possession of firearms in these "sensitive locations" by ordinary, law-abiding citizens a Class E felony. *Id.* at § 265.01-e.

II. The Place of Worship Ban's Effects on Plaintiffs.

Plaintiffs are Reverend Dr. Jimmie Hardaway, Bishop Larry Boyd**,** and two non-profit organizations. After the enactment and enforcement of the Place of Worship Ban, Reverend Hardaway was unable to carry a firearm for self-defense or

for the purpose of keeping the peace at his church. Declaration of Rev. Dr. Jimmie Hardaway, Jr., *Hardaway v. Nigrelli*, No. 1:22-cv-00771, Doc. 9-4, at ¶¶ 8–12 (Oct. 14, 2022) ("Hardaway Decl."). As Pastor of Trinity Baptist Church, Reverend Hardaway has the responsibility to establish the Church's policies and procedures, including its policies regarding concealed carry of firearms. *Id.* at ¶ 4. Prior to the Place of Worship Ban, he would consistently carry a firearm on Trinity Baptist Church's premises, whether it be while leading services, quietly praying in the pews, preparing a sermon in his office, or providing counseling to congregants. *Id.* at ¶ 8. Trinity Baptist Church, like many places of worship, prides itself on being welcoming to all who wish to participate in services or join the church community. *Id.* at ¶ 9. But this open-door policy carries with it the attendant risk that Reverend Hardaway does not know who will walk into the door for services or whether they come with violent plans. *Id*. This is all the more worrisome because Trinity Baptist is located in a neighborhood that has struggled with violent incidents. Moreover, the recent history of violence in churches, particularly the murder of nine parishioners in Charleston's Emanuel African Methodist Episcopal Church in 2015, reaffirmed Reverend Hardaway's conviction to carry for self-defense and to keep the peace at his church. *Id.* at ¶ 10. In fact, since the Charleston tragedy, Reverend Hardaway has almost always carried a firearm for self-defense on Sundays and at services until the effective date of the Place of Worship Ban. *Id*. And recognizing his congregants'

right to carry for self-defense, he has previously encouraged other licensed parishioners to conceal carry at Trinity Baptist. *Id.* at 11.

Bishop Boyd, Pastor of Open Praise Full Gospel Baptist Church, was similarly injured by the enactment and enforcement of the Place of Worship Ban. He stopped carrying a firearm for self-defense or for the purpose of keeping the peace at his church, which he had consistently done before the Ban. Declaration of Bishop Larry A. Boyd, *Hardaway v. Nigrelli*, No. 1:22-cv-00771, Doc. 9-5, at ¶¶ 8–12 (Oct. 14, 2022) ("Boyd Decl."). Moreover, he had established a policy in which duly licensed congregants could carry in Open Praise as well, but because of the Ban, his congregants were stopped from carrying there too. *Id.* at ¶¶ 4, 8, 11. This is particularly problematic because Open Praise is in the Broadway Fillmore neighborhood of Buffalo, which has struggled with crime, violence, and gang-related incidents. *Id.* at ¶ 9. Bishop Boyd has often heard the "pop, pop, pop" of criminal gunfire on the streets. *Id*. Yet after the Place of Worship Ban, he was left unable to possess a firearm to defend himself and his congregation when he preached on church grounds. *Id.* at ¶ 12. Moreover, as with Reverend Hardaway, the recent history of violence in churches, particularly in Charleston, reaffirmed Bishop Boyd's conviction to carry for self-defense and to keep the peace at his church. *Id*. at ¶ 10. In fact, Bishop Boyd feels a particular obligation, as pastor of the church, to be ready

to defend it, especially since Open Praise prides itself on welcoming all who may come to services. *Id.* at ¶¶ 9–10.

Because of the risk of exposing themselves to arrest and criminal charges for carrying a handgun on the premises of a place of worship or religious observation in violation of the Place of Worship Ban, Plaintiffs disarmed prior to going to their churches before entry of the injunction. Hardaway Decl. ¶ 12; Boyd Decl. ¶ 12.

III. Procedural History.

Plaintiffs filed this suit on October 13, 2022. Appellant's Mot. to Stay, Ex. A, *Hardaway v. Nigrelli*, No. 22-2933, Doc. 23, at 33 (Nov. 15, 2022). The next day, Plaintiffs filed a motion for a temporary restraining order, expedited hearing, and a preliminary injunction. *Id.* at 34. After notice, briefing, and a hearing, the district court entered a temporary restraining order. *Id.* at 36–37. Following further briefing and another hearing, the district court entered the preliminary injunction on November 3, 2022. *See* District Court Op. at 44.

Acting Commissioner Nigrelli filed a notice of appeal ten days later. *See* Not. of Civ. Appeal, Doc. 1 (Nov. 15, 2022). Defendants Seaman and Flynn have neither filed a notice of appeal from the preliminary injunction nor sought a stay pending appeal of that injunction as to their enforcement of the Place of Worship Ban.

ARGUMENT

When considering whether to issue a stay pending appeal, this Court must consider "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 426 (2009).

The district court correctly held that no heightened standard is applicable to Plaintiffs' motion for a preliminary injunction because Plaintiffs sought and obtained a prohibitory injunction to return affairs to the status quo ante—"the last actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc*., 883 F.3d 32, 37 (2d Cir. 2018). The status quo is the Second Amendment and the long history, prior to S51001, of allowing individuals to carry in places of worship with the permission of those places. *Libertarian Party of Connecticut v. Lamont*, 977 F.3d 173 (2d Cir. 2020), is not to the contrary as the plaintiffs there sought the positive of act of "directing the Governor to place their candidates on the ballot," *id*. at 177. Here, Plaintiffs seek an order that the State *not* act and *not* infringe their Second Amendment rights by *not* enforcing the Place of Worship Ban. An order enjoining future enforcement "clearly prohibits, rather than compels, government action." *Mastrovincenzo v. City of New*

York, 435 F.3d 78, 90 (2d Cir. 2006). In all events, Plaintiffs meet any heightened standard.

I. The Place of Worship Ban is unconstitutional.

a. Plaintiffs' proposed conduct is within the presumptive protection of the Second Amendment.

The Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. In *Bruen*, the Supreme Court articulated a framework for determining if firearms regulations are constitutional. It begins with the text. If the plaintiffs' proposed course of conduct falls within the Second Amendment's text, then plaintiffs are presumptively protected. *Bruen*, 142 S. Ct. at 2126. The Supreme Court has defined all of the key terms in *Heller* and *Bruen*. "The people" presumptively means "all Americans," "Arms" presumptively includes "all instruments that constitute bearable arms," and, most relevant here, to bear simply means to "carry." *District of Columbia v. Heller*, 554 U.S. 570, 580–82, 584 (2008). Unlike other Amendments, *see* U.S. CONST. amend. IV, "[n]othing in the Second Amendment's text draws a home/public distinction," *Bruen*, 142 S. Ct. at 2134—or for that matter, any locational distinction at all.

No different textual analysis is required in this appeal. That is why the district court held the plain text of the Second Amendment presumptively protects Plaintiffs' here. District Court Op. at 41–42. Hardaway and Boyd are Americans who seek to

carry bearable arms. As in *Bruen*, these undisputed facts end the textual inquiry; the inquiry becomes historical for which the State bears both the burden of persuasion and production.

The State, however, seeks to flip the burden to Plaintiffs by asking this Court to impose upon Plaintiffs an obligation to establish a further proposition, namely that carrying in sensitive places is presumptively lawful. *See* Appellant's Mem. of Law in Supp. of Mot. for a Stay Pending Appeal, *Hardaway v. Nigrelli*, No. 22-2933, Doc. 23, at 10–11 (Nov. 15, 2022) ("State Br."). *Bruen* squarely forecloses the State's argument. The entirety of *Bruen*'s textual analysis occurred in a short Part III-A of the opinion. *See* 142 S. Ct. at 2134–35. In Part III-B of *Bruen*, the Court shifted to the historical analysis where it *repeatedly* stated that the *State* bears the burden of justifying its modern law within the historical tradition of firearm regulation in America. *See, e.g.*, *id*. at 2135; *id.* at 2138; *id.* at 2150; *id.* at 2156. In discussing how a State could meet *its* historical burden, the Court provided that the State *could* try to justify its restrictions on public carry by pointing to longstanding, "historical regulations of sensitive places." *Id.* at 2133 (quotation marks omitted). The Court offered these as an "example" of historical regulations that States could use to justify contemporary and analogous restrictions. *Id.* In *Bruen*, the Court rejected the State's arguments that its "proper cause" licensing regime was analogous to historical sensitive place regulations not because of a textual inquiry

but rather because the State's "sensitive places" argument was inconsistent with "the general right to publicly carry arms for self-defense" that was established under *history* in "Part III-B." *Id*. at 2134. In other words, the State did not meet its burden to show that the law at issue in *Bruen* qualified as a valid "sensitive place" restriction under the relevant history.

Bruen left no room for doubt: when the State seeks to establish where "one [can] not carry arms," the State must "affirmatively prove" that such restrictions are consistent with the American tradition of firearms regulation. *Id*. at 2127, 2156.

II. The Place of Worship Ban is not consistent with the historical tradition of firearms regulation in the United States.

The State faults the district court for "finding one reason after another to reject the state's historical evidence" and, by doing so, "eliminat[ing] the possibility of supporting a law through historical analogs." State Br. at 16. But the fault lies not with the district court but with the Place of Worship Ban itself. The district court did not "eliminate[] the possibility" of supporting the Place of Worship Ban, it is the history of American firearms regulation that does so.

a. Founding era evidence demonstrates the Place of Worship Ban is unconstitutional.

The State presents *zero* Founding era evidence of any ban on carrying firearms for self-defense in places of worship. Instead, governments in the colonial era and at the Founding often *mandated* that individuals carry firearms into places of worship.

In 1643, Connecticut "[o]rdered[] that one p[e]rson in every severall howse wherein is any souldear or souldears, shall bring a muskett, pystoll or some peece, w[i]th powder and shott to e[a]ch meeting." THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY at 95 (Hartford, Conn.: Brown & Parsons, 1850). Massachusetts Bay at times imposed a requirement for colonists to come to church armed. *See, e.g.,* 1 RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND at 190 (Nathaniel B. Shurtleff ed., Boston: William White 1853) ("And all such persons . . . shall come to the publike assemblyes with their musketts, or other peeces fit for service, furnished w[i]th match, powder & bullets"). Rhode Island, Maryland, Virginia, and Georgia all had similar enactments in the colonial period. *See, e.g.,* 1 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS, IN NEW ENGLAND 94 (John Russell Bartlett ed., 1856) ("[N]oe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to any public Meeting without his weapon.''); 3 PROCEEDINGS OF THE COUNCIL OF MARYLAND, 1636–67, at 103 (William Hand Browne, ed., 1885) ("Noe man able to bear arms to goe to church or Chappell or any considerable distance from home without fixed gunn and 1 Charge at least of powder and Shott"); 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 174 (William Waller Hening ed., 1809) (1632 Virginia statute

providing that "All men that are fittinge to beare armes, shall bringe their pieces to the church"); 1 *id.* at 263 (similar 1643 Virginia statute); 5 *id.* at 19 (1738 Virginia statute providing that "it shall and may be lawful, for the chief officer of the militia, in every county, to order all persons listed therein, to go armed to their respective parish churches"); 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA: STATUTES, COLONIAL AND REVOLUTIONARY, 1768–1773, pt. 1, at 138 (Allen D. Candler, ed., 1911) (1770 Georgia statute mandating that all those "liable to bear arms in the militia" and "resorting, on any Sunday or other times, to any church, or other place of divine worship . . . shall carry with him a gun . . . and shall take the said gun or pistols with him to the pew or seat . . . ."). And at least Georgia's duty remained on the books after ratification of the Constitution. *See* A DIGEST OF THE LAWS OF THE STATE OF GEORGIA 157–59 (Watkins, eds., 1800).

"Based on the colonial laws preceding the adoption of the Second Amendment that made it a legal duty to bear arms in church, the scope of the legal right to bear arms extends to the church, the place of divine worship." Benjamin Boyd, *Take Your Guns to Church: The Second Amendment and Church Autonomy*, 8 LIBERTY UNIV. L. REV. 653, 699 (2014) (emphasis omitted); *see also* David B. Kopel & Joseph G.S. Greenlee, *The Sensitive Places Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 203, 232 (2018).

The absence of any Founding era analogues to the Place of Worship Ban is dispositive. "[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." *Bruen*, 142 S. Ct. at 2131.

b. The Founding era is the relevant time period for historical analysis.

With the evidence from the Founding squarely contradicting the State's law, the State turns to a few laws and court decisions from the latter-half of the nineteenth century. This evidence comes too late. Because the scope of the Second Amendment was set in 1791, the Founding era is the appropriate time period for this Court's historical analysis. *See generally* Mark W. Smith, *'Not all History is Created Equal': In the Post-Bruen World, the Critical Period for Historical Analogues Is when the Second Amendment Was Ratified in 1791, and not 1868 (working draft)*, (Oct. 1, 2022), *available at* https://bit.ly/3CMSKjw. This Court is bound by two lines of Supreme Court precedent, which mandate (1) that the scope of the Second Amendment with respect to the Federal Government is based on the public understanding in 1791, *see, e.g., Heller*, 554 U.S. at 634–35, and (2) that incorporated Bill of Rights provisions mean the same thing when applied to the States and the Federal Government, *see, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742, 765–66 (2010).

The State says it is a mistake to "consult 19th-century history to determine the people's intent to incorporate a right against the States, but not to determine what the people understood that right to mean when they chose to bind their state governments." State Br. at 15. But that is exactly the course taken by the Supreme Court in *McDonald*, in which the court exhaustively surveyed Reconstruction era evidence to determine if the "right to keep and bear arms was considered fundamental" at the time of ratification of the Fourteenth Amendment. 561 U.S. at 776. At the same time, the Court reaffirmed that the "same standards" apply when enforcing the Bill of Rights "against the States" as "against federal encroachment." *Id.* at 765. And *Heller* established that *the* standard, for purposes of the Second Amendment, is the original public meaning in 1791. In sum, the State may wish to change how the Supreme Court does things, but this Court has no basis to do so. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

c. The State's anachronistic evidence is insufficient.

The State's evidence of a few statutes and a couple court decisions from Reconstruction and the decades after is insufficient to demonstrate a representative and well-established tradition of American firearms regulation that could justify the Place of Worship Ban even if that evidence were relevant. The enactments represent a fraction of the 37 states in the Union at the time, thus the absence of other analogues suggests a tradition of *not* forbidding firearms in places of worship. In fact, *Bruen*

already held that Texas (and its court decisions) was an outlier at the time and "provide[s] little insight into how postbellum courts viewed the right to carry protected arms in public." 142 S. Ct. at 2153. Georgia similarly erred by viewing the right to keep and bear arms as a militia-based right, rather than a right for individual self-defense. *Id*. at 2155; *see* also *Young v. Hawaii*, 992 F.3d 765, 837 (9th Cir. 2021) (en banc) (O'Scannlain, J., dissenting) (explaining that decisions, including the Georgia Supreme Court's decision in *Hill v. State*, 53 Ga. 472, 475 (1874) "offer little instructive value"). And the two statutes cited by the State from the then-territories of Arizona and Oklahoma cannot demonstrate an *enduring* tradition. *See Bruen*, 142 S. Ct. at 2154.

But in all events, the State's laws fail as analogues because they are not "relevantly similar" as the burden imposed by these laws is meaningfully different. Unlike the Place of Worship Ban, it appears that Texas and Missouri countenanced judicially recognized exceptions for self-defense. *See Brownlee v. State*, 32 S.W. 1043, 1044 (Tex. Crim. App. 1895); *State v. Wilforth*, 74 Mo. 528, 529–30 (1881). Virginia too had a statutory "good and sufficient cause" exception, 1877 Va. Acts 305, which has been understood to include a self-defense exception. Office of the Attorney General, *Official Advisory Opinion*, Opinion No. 11-043, 2011 WL 1452118, at *1–2 (Apr. 8, 2011); *cf. Bruen*, 142 S. Ct. at 2141 n.11 ("To the extent there are multiple plausible interpretations of Sir John Knight's Case, we will favor

the one that is more consistent with the Second Amendment's command."). As in *Heller*, the presence of a self-defense exception confirms these laws are not relevantly similar. *See* 554 U.S. at 631–32. Additionally, Missouri's and Tennessee's laws both appear to have allowed at least one avenue for the exercise of Second Amendment rights: Missouri "seemingly" allowed for "open carry," *Bruen*, 142 S. Ct. at 2155 n.30; *Wilforth*, 74 Mo. at 531, and "[w]hether the 1869 Tennessee statute applied to long guns is uncertain," Kopel & Greenlee, *supra*, at 253.

The laws cited by the State also did not develop into an enduring tradition of regulation, as at present New York appears to be the *only* State to flatly prohibit all typical law-abiding citizens from carrying firearms in places of worship even with the places' permission.

d. Places of worship are not analogous to genuine sensitive places.

The State briefly argues that places of worship are sufficiently analogized to recognized sensitive places. State Br. at 14. But *Bruen* gave only three specific examples where firearms could be prohibited: "legislative assemblies, polling places, and courthouses." 142 S. Ct. at 2133. By "analogies to *those* historical regulations," the State can potentially justify new sensitive places. *Id.* (emphasis added). What is relevant about those places is the long tradition of the government providing comprehensive security, and the fact each place historically

"concentrate[s] adversarial conflict" as part of democratic governance or reflects locations where government officials are "at acute personal risk of being targets of assassination." Kopel & Greenlee, *supra*, at 290. The State does not provide special protection to places of worship. This stands in stark contrast to evidence dating to the Founding and the first years after ratification in which there is substantial evidence of security officials at legislatures, courthouses, and polling places. *See, e.g.,* VOTES AND PROCEEDINGS OF THE HOUSE OF DELEGATES OF THE STATE OF MARYLAND: NOVEMBER SESSION 1791, at *2 (Frederick Green ed., 1795) (appointing sergeant at arms and door-keeper for state legislature); THE PUBLIC LAWS OF THE STATE OF SOUTH CAROLINA 271 (Grimke, ed., 1790) ("The said sheriffs shall by themselves, or their lawful deputies respectively, attend all the courts hereby appointed, or directed to be held, within their respective districts."); DIGEST OF THE LAWS OF THE STATE OF GEORGIA, *supra*, 611 (Watkins eds., 1800) ("[T]he sheriff of each county or his deputy, is required to attend at such elections, for the purpose of enforcing the orders of the presiding magistrates in preserving good order.").[1] Unlike

[1] Other examples: PENNSYLVANIA STATUTES AT LARGE, VOLUME X: 1779-81, 378 (WM. Stanley Ray ed., 1904) ("sergeant-at-arms" and "door-keeper" for legislature); ABRIDGEMENT OF THE PUBLIC PERMANENT LAWS OF VIRGINIA 42 (Augustine Davis ed., 1796) (court's "serjeant at arms); 1 LAWS OF THE STATE OF NEW JERSEY 36 (Bloomfield ed., 1811) (polling places); 2 LAWS OF THE STATE OF DELAWARE 984 (Samuel & John Adams, eds., 1797) (polling places).

at genuine sensitive places, Founding era governments imposed a duty on people to protect *themselves* at places of worship. *Heller*, 554 U.S. at 601.

III. The equitable factors favor maintaining the preliminary injunction pending appeal.

"Before issuing a stay, it is ultimately necessary . . . to balance the equities—to explore the relative harms to applicant and respondent, as well as the interests of the public at large." *Trump v. Int'l Refugee Assistance Project*, 137 S. Ct. 2080, 2087 (2017) (cleaned up). Here, the equities are squarely in favor of keeping the preliminary injunction in place. The Second Amendment "right to keep and bear arms" is a fundamental right, *McDonald*, 561 U.S. at 778, which protects the "intangible and unquantifiable interest" in personal protection and self-defense that "*cannot* be compensated by damages," *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (emphasis added). The loss of Plaintiffs' rights is "irreparable." *Id.* at 700.

It is all the more irreparable in this instance because the State's ban implicates the yet further right to the free exercise of religion, putting Plaintiffs and other parishioners to the untenable choice of "forgo[ing] their Second Amendment rights to exercise their First Amendment rights to free exercise of religion, or vice versa." District Court Op. at 38; *cf. Simmons v. United States*, 390 U.S. 377, 394 (1968) ("In

these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.").

The State's equitable arguments to the contrary are unsubstantiated. "[T]he State does not show that the carrying of firearms at places of worship" by authorized persons "has resulted in an increase in handgun violence, or that public safety would be impaired if the places of worship restriction is enjoined." District Court Op. at 39. To the contrary, as Plaintiffs' felt need to carry firearms after the horrific murders in Charleston's Emanuel African Methodist Episcopal Church in 2015 demonstrates, places of worship should not be forced by the State to be "left to the mercy of opportunistic, lawless individuals who might prey on them and have no concern about the place of worship exclusion." *Id.* at 38; *see also Bruen*, 142 S. Ct. at 2157 (Alito, J., concurring) ("Will a person bent on carrying out a mass shooting be stopped if he knows that it is illegal to carry a handgun outside the home?"). After all, recent events in Buffalo demonstrate how very real this threat is. *See* Jon Swaine & Dalton Bennett, *Buffalo shooting suspect wrote of plans 5 months ago, messages show*, WASH. POST (May 16, 2022), https://wapo.st/3MKHsAJ (noting Buffalo murderer "mused about other areas he might attack such as majority-Black churches or schools."). Every day that Plaintiffs are unable to protect themselves and their congregations is another day where S51001 has stripped them of a fighting chance if violent circumstances were to arise.

The State claims that the district court did not adequately consider the interest of *some* "parishioners to attend services free from the fear of guns." State Br. at 19. But all the Court's preliminary injunction does is allow places of worship to determine their own firearm policy based on their own parishioners' self-defense needs and concerns. By contrast, a stay would disregard the interest of *all* parishioners by taking away any opportunity for a place of worship to set its own firearm policy based on parishioners' interests.

The State then claims that self-defense concerns can be addressed by Plaintiffs by hiring private security. But a valid alternative to self-defense does not include relying on general police presence or having to hire others. *See Bruen*, 142 S. Ct. at 2133–34 (explaining Second Amendment still applies even though Manhattan is "protected generally by the New York City Police Department"). The Second Amendment is a constitutional right, not a contract right.

Finally, the State says that it needed more time to defend its Place of Worship Ban. State Br. at 19–20. But the State's law was enacted after *Bruen* in which the Supreme Court emphatically and repeatedly told States that they would need to marshal historical evidence to justify new firearms regulations. State political leaders who enacted S51001 all took oaths to follow the Constitution of the United States. *See* N.Y. CONST. art. XIII, § 1; *Cooper v. Aaron*, 358 U.S. 1, 18 (1958). If the State needed more time to justify the constitutionality of its new enactment, it

should have taken more time before *making* that enactment. *Cf. City of Boerne v. Flores*, 521 U.S. 507, 530 (1997) (holding law outside the authority of Congress to enact, in part, because of slim legislative record justifying it).

There is no basis for this Court to issue any stay. But, alternatively, if the Court decides to issue a stay, any tailoring should be consistent with the approach taken by the Supreme Court in *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017), and cited approvingly by the State, State Br. at 21–22. In *Trump*, the Supreme Court tailored its relief pending appeal by "leav[ing] the injunctions entered by the lower courts in place with respect to respondents and those similarly situated." *Id*. at 2087. By similarly situated, the Supreme Court meant those that suffered the same "concrete hardship." *Id*. at 2089.

As a last alternative, any stay under the State's proposal that limits the injunction to only those "who have been tasked with the duty to keep the peace at places of worship or religious observation" should make clear that (1) it is not limited to those who fall within the CCIA's existing exception for police officers, state-designated peace officers, state-registered security guards, and the like, N.Y. PENAL LAW § 265.01-e(3.), but extends to ordinary, law-abiding citizens who have been designated to keep the peace by their places of worship, and (2) it unequivocally extends to Plaintiffs Hardaway and Boyd.

CONCLUSION

This Court should deny the State's motion for a stay pending appeal.

Dated: November 25, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This response complies with the type-volume limitations of FED. R. APP. P. 27(d)(2)(B) because this response contains 5,188 words.

Pursuant to FED. R. APP. P. 27(d)(1)(E), this response complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this response has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: November 25, 2022

/s/David H. Thompson
David H. Thompson

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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of November 2022, I filed the foregoing via the Court's CM/ECF appellate system, which will electronically notify all counsel requiring notice.

In addition, notice was provided via email to counsel at the following email addresses for the non-appellant district attorney defendants:

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