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-Appellees.

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

BRIEF OF PLAINTIFFS-APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Constitutions, Statutes, and Rules

Legislative Material

Other Authorities

INTRODUCTION

For the entire history of New York State, individuals like Plaintiffs Reverend Jimmie Hardaway, Jr. and Bishop Larry Boyd have had the right to bear arms in order to defend themselves and their congregations. On September 1, 2022—for the first time in New York's history—the State stripped Hardaway and Boyd of their right as part of an omnibus response to the Supreme Court's decision in *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In newly enacted N.Y. PENAL LAW § 265.01-e(2)(c) (the "Place of Worship Ban"), the State has decreed that "any place of worship or religious observation" is a "sensitive location" where ordinary, law-abiding citizens can no longer carry firearms for self-defense, even if a church or place of worship otherwise would authorize the practice. Reverend Hardaway and Bishop Boyd filed suit, along with two organizations, to enjoin enforcement of the Place of Worship Ban because it violates the Second Amendment's "unqualified command." *Bruen*, 142 S. Ct. at 2126. The district court agreed, temporarily restraining and then preliminarily enjoining enforcement of the Place of Worship Ban.

On appeal, this Court's analysis is straightforward. Since the plain text of the Second Amendment presumptively protects Plaintiffs' proposed course of conduct—carrying handguns for self-defense—the State bears the burden of "demonstrating" that its modern enactments are "consistent with the Nation's

historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. In order to do so, the State needs to come forward with evidence of historical laws that similarly burden the right to bear arms for similar reasons. *Id.* It cannot rely on just *any* laws, but only those from the Founding that are "well-established and representative." *Id.* at 2133. The State lacks such evidence in this case. In fact, the State lacks any evidence of any restriction that banned firearms in places of worship from anywhere in the United Sates during the Founding Era. To the contrary, Founding Era governments often *mandated* that individuals carry firearms into places of worship; they did not ban them. Under *Bruen*, that is dispositive evidence that the Place of Worship Ban is unconstitutional. *Id.* at 2131.

With the historical evidence completely contrary to the Place of Worship Ban at the Founding, the State seeks to manufacture a tradition comprised of a smattering of laws and state-court dicta from the latter half of the nineteenth century. This evidence is irrelevant because it is too late: late-nineteenth-century laws are informative only to the extent they confirm original understanding; they cannot change that understanding. *Bruen*, 142 S. Ct. at 2137 (quoting *Gamble v. United States*, 139 S. Ct. 1960, 1975 (2019)); *see also Espinoza v. Montana Dep't of Revenue*, 140 S. Ct. 2246, 2259 (2020) (emphasis added). It is also too little: the handful of outlier laws and snippets of state-court dicta invoked by New York fall far short of establishing "an enduring American tradition" of banning firearms in

places of worship. Accordingly, the State has not met its burden of showing that the Place of Worship Ban is consistent with the Second Amendment, and this Court should affirm the preliminary injunction.

STATEMENT OF THE ISSUES

1. Whether Defendants' enforcement of NEW YORK PENAL LAW §§ 265.01-e(1), (2)(c)—which forbids carrying firearms for self-defense by ordinary, law-abiding Americans in "any place of worship or religious observation"—likely violates the Second Amendment.

2. Whether the District Court appropriately granted Plaintiffs' motion for a preliminary injunction.

STATEMENT OF THE CASE

I. The Supreme Court reaffirms that text and history governs the Second Amendment analysis.

In *Bruen*, the Supreme Court struck down New York's "proper cause" licensing regime, which restricted licenses for carrying firearms in public to those New Yorkers who "demonstrate[d] a special need for self-protection distinguishable from that of the general community." 142 S. Ct. at 2123. The Court held that the text of the Second Amendment "presumptively guarantees" the "right to 'bear' arms in public for self-defense," and it therefore placed the burden on New York to present evidence demonstrating that the "proper-cause requirement [was] consistent with this Nation's historical tradition of firearm regulation." *Id*. at 2135.

New York attempted to save its restrictions on carrying firearms in public by arguing that its proper-cause regime reflected "a historically grounded approach to protecting sensitive places." Brief for Respondents, *Bruen*, at 34 (Sept. 14, 2021) ("New York Brief"). In *Heller*, the Supreme Court stated in dicta that governments presumptively could regulate the possession of firearms in certain "sensitive places"—though it did not purport to delineate the contours of any such authority, since the issue was not presented in that case. *District of Columbia v. Heller*, 554 U.S. 570, 626–27 (2008); *see also id.* at 635. In *Bruen*, New York seized upon this tentative language, claiming that *Heller*'s dicta had empowered it to enact "sensitive-place laws" that "restrict public carry in places" *anywhere* "people typically congregate and where law-enforcement and other public-safety professionals are presumptively available." New York Brief at 34. And the State asserted that its proper cause law "functionally restrict[ed] concealed carry" in a long list of places it described as "sensitive." *Id.* at 34–35 (cleaned up).

The Supreme Court explicitly rejected New York's "sensitive place" argument, based on three crucial considerations. First, *Bruen* clarified a state's power to designate "sensitive places" is limited and must be centered on historically substantiated analogues. The Court explained that New York's attempt to "expand[] the category of 'sensitive places' simply to all places of public congregation that are not isolated from law enforcement defines the category of 'sensitive places' *far too*

broadly." *Bruen*, 142 S. Ct. at 2134 (emphasis added). To allow the State to designate sensitive places so capaciously "would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense." *Id*. at 2134. The State does not have carte blanche to declare what is and what is not a sensitive place.

Second, *Bruen* explained that the "historical record yields *relatively few* 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited." *Id*. at 2133 (emphasis added). The Court identified only three locations that it "assume[d] . . . settled . . . were 'sensitive places'"—"legislative assemblies, polling places, and courthouses." *Id*. If the Government wishes to assert that there are modern-day locations that are "*new*" sensitive places, the Court explained, it must demonstrate that these new locations are sufficiently analogous to "*those* historical regulations of 'sensitive places'" to be "constitutionally permissible." *Id*. (emphasis added). But what courts may not do is "uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted." *Bruen*, 142 S. Ct. at 2133 (cleaned up).

Third, *Bruen* explained that the burden falls on the State to demonstrate the historical basis for its designated "sensitive places." The decision simply left no ambiguity on this point. Citing its discussion in "Part III-B"—where the Court repeatedly stated that the "burden" fell on the State "to show that New York's

proper-cause requirement is consistent with this Nation's historical tradition of firearm regulation[s]," *id*. at 2135; *see also id*. at 2138, 2150, 2156—the Court held that New York had failed to meet its burden of showing that its understanding of "sensitive places" was sufficiently grounded in any "well-established and representative historical analogue." *id.* at 2132–34 (emphasis omitted). Instead, the Court found that the State had put forward "no historical basis . . . to effectively declare the island of Manhattan a 'sensitive place.'" *Id*. at 2134.

II. New York's Place of Worship Ban.

New York responded to *Bruen* by swiftly enacting an omnibus new gun-control law. Senate Bill S51001 ("S51001") (June 30, 2022, Extraordinary Session). *See* Joint Appendix ("J.A.") at 77. Among other things, S51001 implemented expansive new criminal laws that ban the 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.'" J.A. 17. 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 Place of Worship Ban extends, with certain limited exceptions for police officers, state-designated peace officers, state-registered security guards, and the like, to even those places of worship that would otherwise permit clergy or congregants to carry firearms on their premises. *Id.* at § 265.01-e(3). Under the new ban, possession of firearms by ordinary, law-abiding citizens in a place of worship is a Class E felony. *Id.* at § 265.01-e.

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

Plaintiffs are Reverend Dr. Jimmie Hardaway, Bishop Larry Boyd**,** and two non-profit organizations.[1] After the enactment and enforcement of the Place of

[1] The District Court did not address the standing of FPC and SAF, based on circuit precedent holding that an organization does not have standing to assert the rights of its members under 42 U.S.C. § 1983. J.A. 230 n.3; *see Rumsfeld v. FAIR*, 547 U.S. 47, 53 n.2 (2006). FPC and SAF believe this Court's case law on this point is contrary to binding Supreme Court' precedent, and they preserve the right to seek to overrule that case law in a court competent to do so. J.A. 58–59, ¶ 12.

Worship Ban, Reverend Hardaway was unable to carry a firearm for self-defense or the defense of others at his church. *See* J.A. 107–08, ¶¶ 8–12. 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. J.A. 107, ¶ 4. Prior to the Place of Worship Ban, he would consistently carry a firearm on Trinity Baptist Church's premises while leading services, quietly praying in the pews, preparing a sermon in his office, or providing counseling to congregants. J.A. 107, ¶ 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. J.A. 107–08, ¶ 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 crime. Just last month, a 24-year-old was shot and murdered a block away from Trinity Baptist. *See* Rick Pfeiffer and Mark Scheer, *Suspect sought in murder of man on South Avenue Saturday evening*, NIAGARA GAZETTE (Jan. 23, 2023), https://bit.ly/3YrTaFB. 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 a firearm to defend himself and his parishioners. J.A. 108, ¶ 10. In fact, since

the Charleston tragedy, Reverend Hardaway had almost always carried a firearm for self-defense on Sundays, and at services, until the Place of Worship Ban took effect. *Id*. And recognizing his congregants' right to carry for self-defense, he has previously encouraged other licensed parishioners to carry concealed at Trinity Baptist. J.A. 108, ¶ 11.

Bishop Boyd, Pastor of Open Praise Full Gospel Baptist Church, was similarly affected by the enactment and enforcement of the Place of Worship Ban. He stopped carrying a firearm for self-defense and the defense of others at his church, which he had consistently done before the Ban. *See* J.A. 111–13, ¶¶ 8–12. Moreover, while he had established a policy allowing duly licensed congregants to carry in Open Praise, because of the Ban, his congregants were stopped from carrying there too. J.A. 111–12, ¶¶ 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. J.A. 111–12, ¶ 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. J.A. 112–13, ¶ 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. J.A. 112, ¶ 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 its services. J.A. 111–12, ¶¶ 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 were forced to cease exercising their "right to carry handguns publicly for their self-defense" in their churches, *Bruen*, 142 S. Ct. at 2122, until the district court's orders barring enforcement of the Place of Worship Ban. J.A. 108, ¶ 12; J.A. 112–13, ¶ 12.

IV. Procedural History.

Plaintiffs filed this suit on October 13, 2022. *See* J.A. 58–76. The next day, Plaintiffs filed a motion for a temporary restraining order, an expedited hearing, and a preliminary injunction. J.A. 99–100. After notice, briefing, and a hearing, the district court entered a temporary restraining order. J.A. 228–29. Following further briefing and another hearing, the district court entered a preliminary injunction on November 3, 2022. J.A. 9–10. Acting Superintendent Nigrelli filed a notice of appeal ten days later. *See* J.A. 343. This Court stayed the preliminary injunction in part, except with respect to "persons who have been tasked with the duty to keep the peace at places of worship."

SUMMARY OF THE ARGUMENT

The Second Amendment provides an "unqualified command": "the right of the people to keep and bear Arms shall not be infringed." *Bruen*, 142 S. Ct. at 2126–27; U.S. CONST. amend. II. Under *Bruen*, if the plain text of the Second Amendment applies to Plaintiffs' proposed course of conduct, then Plaintiffs' actions are presumptively protected. The government may bar or otherwise restrict Plaintiffs' conduct if, and only if, it demonstrates that its restriction is "consistent with the Nation's historical tradition of firearm regulation." *Bruen*, 142 S. Ct. at 2130. In making this showing, *the government* bears the burden of demonstrating—by historical evidence—that its modern enactment is constitutional.

The State has failed to demonstrate that the Place of Worship Ban is historically justified as "part of an enduring American tradition of state regulation." *Id*. at 2155. This Court's historical analysis should begin and end with the Founding Era. And during the Founding, governments often *mandated* that individuals carry firearms into places of worship; they did not ban them. *Bruen* instructs that a modern law is unconstitutional "if earlier generations addressed the societal problem, but did so through materially different means." *Id*. at 2131. That is precisely the case here.

To make up for its lack of Founding Era evidence, the State relies on an underwhelming grab-bag of materials from the latter-half of the nineteenth century, including a few non-analogous state laws and state court dicta. This evidence comes

too late. And even if it did not, they are all insufficient, as *Bruen* requires the State to identify "well-established and representative historical analogue[s]." 142 S. Ct. at 2133. These laws are not well-established, representative, or actually analogous.

Since the Place of Worship Ban is likely unconstitutional, the district court correctly held that the other factors weighed in favor of granting preliminary injunctive relief. The violation of the Second Amendment—like the violation of other constitutional rights—is presumptively irreparable. And the State has no interest in enforcing an unconstitutional law, let alone one that hinders its citizens from being ready to defend themselves and their congregations.

This Court should affirm the preliminary injunction.

STANDARD OF REVIEW

To obtain a preliminary injunction against "a statute or regulatory scheme, the moving party must demonstrate (1) irreparable harm absent injunctive relief, (2) a likelihood of success on the merits, and (3) public interest weighing in favor of granting the injunction." *Kane v. De Blasio*, 19 F.4th 152, 163 (2d Cir. 2021) (quoting *Agudath Isr. of Am. v. Cuomo*, 983 F.3d 620, 631 (2d Cir. 2020)); *see also We The Patriots USA, Inc. v. Hochul*, 17 F.4th 266, 295 (2d Cir. Nov. 4, 2021) ("When the government is a party to the suit, our inquiries into the public interest and the balance of the equities merge."). This Court reviews the district court's

decision to grant injunctive relief for an abuse of discretion but assesses its legal holdings de novo. *Id*.

The State attempts to impose a higher standard, one that would require Plaintiffs to demonstrate a "clear" or "substantial" likelihood of success. Br. for Appellant, Doc. 71 at 18 (Jan. 18, 2023) ("State Br."). But, as the district court explained, Plaintiffs sought a "prohibitory preliminary injunction to maintain the status quo"—the status quo set by the Constitution and in place throughout the entire history of New York State prior to September 1, 2022. *A.H. v. French*, 985 F.3d 165, 176 (2d Cir. 2021); J.A. 20. In all events, this Court "need not resolve this dispute because" Plaintiffs have demonstrated that a preliminary injunction is proper "under either standard." *Kane*, 19 F.4th at 163 n.11.

ARGUMENT

I. Plaintiffs Hardaway and Boyd are likely to succeed on the merits.

A. Plaintiffs' proposed course of conduct is presumptively protected by the text 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 plain text. If the plaintiffs' proposed course of conduct falls within the Second Amendment's plain text, then "the Constitution presumptively protects

that conduct." *Bruen*, 142 S. Ct. at 2126. The Supreme Court has defined all of the Second Amendment's key terms. "The people" means "all Americans"; "Arms" includes "all instruments that constitute bearable arms"; and, most relevant here, to bear simply means to "carry." *Heller*, 554 U.S. at 580–82, 584. 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 distinction between locations at all.

As the district court correctly held, the Supreme Court's binding determination of the meaning of these words and phrases definitively resolves the question of whether the plaintiffs' proposed conduct in this appeal is presumptively protected by the Second Amendment. J.A. 21–22; J.A. 37. Reverend Hardaway and Bishop Boyd are Americans who seek to carry bearable arms. As in *Bruen*, these undisputed facts end the textual inquiry: "the plain text of the Second Amendment protects [Plaintiffs'] proposed course of conduct—carrying handguns publicly for self-defense." 142 S. Ct. at 2134. Accordingly, under *Bruen*'s unambiguous directions, "the burden falls on [New York] to show that [the challenged ban] is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2135. "Only if [they] carry that burden can they show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect [Plaintiffs'] proposed course of conduct." *Id.* And at this stage of

the analysis, the State bears the burden of both production and persuasion. *Bruen*, 142 S. Ct. at 2150 (noting it is the government's burden to "sift the historical materials"); *id*. at 2130 n.6.

The State argues that the district court erred in holding that the Second Amendment's text covers Plaintiffs' proposed conduct—and, consequently, in shifting the burden of proof to the government—because "sensitive locations" are "outside the scope of the Second Amendment." State Br. at 25. That is flatly contrary to *Bruen* and *Heller*. Indeed, *Bruen* could scarcely be clearer on this point. To be sure, "[l]ike most rights, the right secured by the Second Amendment is not unlimited." *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 626)). But the whole point of the framework painstakingly laid out by the Supreme Court in *Bruen* is that when the government invokes a limit to the right to keep and bear arms that does not come from the Second Amendment's "plain text," then the burden falls *to the government* to "demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. at 2126.

There is nothing in the plain text of the Second Amendment, obviously, that even remotely creates a limitation based on "sensitive places." Indeed, unlike other Amendments such as the Third and the Fourth, the Second Amendment's text draws no distinctions between locations at all. *See* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner,

nor in time of war, but in a manner to be prescribed by law."); U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."); *Bruen*, 142 S. Ct. at 2134 ("Nothing in the Second Amendment's text draws a home/public distinction."). Accordingly, New York can justify the Place of Worship Ban as consistent with its authority over "sensitive places" only if it demonstrates that its understanding of that authority "is consistent with this Nation's historical tradition of firearm regulation." *Id.* at 2126. "Only if [the ban] is consistent with this Nation's historical tradition may a court conclude that [plaintiffs' proposed] conduct falls outside the Second Amendment's 'unqualified command.'" *Id.* The State's reliance on pre-*Bruen* lower court cases that neglected this rigorous historical scrutiny is unavailing.

The State's assertion that its Place of Worship Ban is "presumptively lawful," State's Br. at 24, thus gets the analysis prescribed by *Bruen* exactly backward. It is the *text* of the Second Amendment that sets the initial presumption: if the constitutional text, on its face, "covers an individual's conduct," then "the Constitution presumptively protects that conduct." *Bruen*, 142 S. Ct. at 2126. Then, it is only through *history* that the State can rebut this presumption and justify its regulation of conduct that the text protects.

The State seeks support for its argument in a footnote in *Heller* that describes the government's authority to regulate "sensitive places" as "presumptively lawful." *See* 554 U.S. at 627 n.26. But this footnote plainly did not use the word "presumptively" in the sense of allocating the parties' respective burdens of production and persuasion. Rather, *Heller*'s statement only indicated that while it "d[id] not undertake an exhaustive historical analysis" of the exceptions it had tentatively sketched, those exceptions were "presumptively lawful" in the sense that the Court presumed that further historical analysis would demonstrate that those restrictions were part of the Nation's tradition. 554 U.S. at 626, 627 n.26.

Bruen itself proves that *Heller*'s "presumptively lawful" language does not relieve the State of the burden of justifying its restrictions through historical analysis, because *Bruen* undertook precisely that historical analysis with respect to sensitive places. And that analysis shows that the government cannot just put the label "sensitive" on a location and then ban firearms there. *Bruen* explicitly rejected exactly New York's attempt to pull off such a maneuver for the entire island of Manhattan. *Id*. Rather, when *Bruen* reviewed the "historical record," the Court identified three—and only three—sensitive places that appeared sufficiently supported by Founding Era history that it could "assume it settled" that they are "consistent with the Second Amendment." 142 S. Ct. at 2133. None of these locations are at issue in these proceedings.

The State's threshold argument about sensitive places fails for another, more fundamental reason: it "would eviscerate the general right to publicly carry arms for self-defense." *Id*. at 2134. Essentially, the State makes an argument for constitutional-analysis-by-label. By the State's lights, as long as the State labels something a sensitive place, it becomes one. That is not how constitutional analysis works. For example, the State could not escape the strictures of the First Amendment through the expedient of labelling every movie rated above PG-13 "obscene." Instead, as *Bruen* explained, "the Government bears the burden of proving the constitutionality of its action," which includes the burden of "showing whether the expressive conduct falls outside of the category of protected speech" by "point[ing] to *historical* evidence about the reach of the First Amendment's protections." *Id*. at 2130 (quoting *United States v. Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816 (2000)). The same is required for the Second Amendment. *Id*. The State cannot simply label something a sensitive place; it must *prove* it is such a place by pointing to historical analogues that establish "an enduring American tradition of state regulation." *Id*. at 2155.

Accordingly, the Second Amendment, and the Supreme Court's decision in *Bruen*, squarely place upon *the State's* shoulders the burden of justifying the Place of Worship Ban, and its efforts to shift that burden to Plaintiffs fails. The question before this Court thus becomes straightforward: Has the State come forward with

historical evidence compelling the conclusion that the Place of Worship Ban is consistent with this Nation's enduring tradition of firearm regulation? The answer is no.

B. The State Has Failed to Meet Its Historical Burden.

The reason the State puts so much effort into shifting the burden to Plaintiffs is not hard to see: it is plain that the State cannot come forward with sufficient historical evidence to justify the Place of Worship Ban. Despite several assertions in its briefing about the need for more time to do historical research, it has now been five months since Plaintiffs filed suit, eight months since the enactment of the Place of Worship Ban, and over a year since oral argument in *Bruen*. And if that were not enough, the State has been on notice since *Heller* was decided in 2008 that its enactments would need to be justified by reference to history. Nevertheless, the State has not identified a *single* enactment or court decision from the Founding Era banning firearms in places of worship—or even any scrap of evidence from that Era suggesting that such a law would be appropriate. That should be the end of the matter.

1. The Founding Era Evidence Demonstrates Colonial and State Governments Mandated Carrying Arms.

By any measure, churches and other places of worship have been fixtures in the communities that now comprise the United States from the beginning. By the Founding Era, the problems of violence in these communities and threats to

parishioners were also present. These two undisputed facts make the historical inquiry in this case "fairly straightforward." *Bruen*, 142 S. Ct. at 2131. "[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." *Id*.

Here, the Place of Worship Ban seeks to address a centuries-old problem but the State lacks any "distinctly similar historical regulation" from the Founding Era. *Id*. That is dispositive. As in *Heller*, where the government seeks to address a "perceived societal problem," such as violence in a particular place, and it "employ[s] a regulation" that the "Founders themselves could have adopted to confront that problem," such as a "flat ban on the possession of handguns," the absence of *any* such bans from the Founding is proof that modern ban is "unconstitutional." 142 S. Ct. at 2131 (citing *Heller*, 554 U.S. at 631, 634).

Bruen also instructs that a modern law is likely unconstitutional "if earlier generations addressed the societal problem, but did so through materially different means." *Id*. And here, many colonial and early State governments addressed the risk of violence in public areas, including churches, through regulations that are *exactly the opposite* of New York's ban: they *mandated* that individuals carry firearms for self-protection in church. In 1643, Connecticut "[o]rdered that one person in every

severall howse wherein is any souldear or souldears, shall bring a musket, pystoll or some peece, w[i]th powder and shott to e[a]ch meeting." J. HAMMOND TRUMBULL, THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY at 93–95 (Hartford, Conn.: Brown & Parsons, 1850). Massachusetts Bay imposed a requirement for colonists to come to church armed. *See, e.g.,* 1 Nathaniel B. Shurtleff, RECORDS OF THE GOVERNOR AND COMPANY OF THE MASSACHUSETTS BAY IN NEW ENGLAND at 190 (Boston: William White, 1853) ("And all such persons . . . shall come to the publike assymblyes with their muskets, or other peeces fit for service, furnished w[i]th match, powder & bullets . . . ." (1639)).

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 at 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.'' (1639)); 3 ARCHIVES OF MARYLAND 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" (1642)); 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE at 174 (William Waller Hening ed.,

1809) (1631 Virginia statute providing that "All men that are fittinge to beare armes, shall bringe their pieces to the church"); *id.* at 263 (1642 Virginia statute requiring that "masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott"); 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"); 6 *id.* at 534 (1755 statute providing the same authority); 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA: PART I, STATUTES, COLONIAL AND REVOLUTIONARY 138, 1768–1773 (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 in at least one State, Georgia, that duty remained on the books after ratification of the Constitution. *See* A DIGEST OF THE LAWS OF THE STATE OF GEORGIA, 1800 Ga. Laws 157 (Watkins, eds.).

> Without a doubt, these laws constitute an important part of the historical record about bearing arms in the church prior to 1789. 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) ("Americans certainly did not think that bringing guns to town was a problem; to the contrary, laws typically required that arms be brought to churches or to all public meetings."). A complete ban on carrying in places of worship obviously cannot be "incorporated into the Second Amendment's scope," *Bruen*, 142 S. Ct. at 2141 n.10, when there existed a longstanding tradition at the Founding of governments *requiring* individuals to carry arms in places of worship. In other words, "[t]o maintain that the scope of the right to bear arms did not extend to the church makes no sense; colonial Americans bore arms in the church on a regular basis and were expected to do so." Boyd, *supra*, 8 LIBERTY UNIV. L. REV. at 699 (emphasis omitted).

The State largely ignores this conclusive Founding Era evidence demonstrating that the Place of Worship Ban is unconstitutional. The State engages with the Founding Era evidence in a single paragraph, arguing that this Court should not countenance the statutes Plaintiffs have identified because the laws may have been motivated by slavery in the South. State Br. at 33. This is a meritless argument. For one, the Supreme Court, in discussing the scope of the Second Amendment in *Heller*, relied on the very 1770 Georgia law that Plaintiffs cite. The Supreme Court explained that "[m]any colonial statutes required individual arms bearing for public-safety reasons—such as the 1770 Georgia law that 'for the security and defence of

this province from internal dangers and insurrections' required those men who qualified for militia duty individually 'to carry fire arms' 'to places of public worship.'" *Heller*, 554 U.S. at 601. In part because of statutes like this, the Supreme Court found that "pre-Second Amendment state constitutional provisions," like the Second Amendment, "secured an individual right to bear arms for defensive purposes." *Id.* at 602.

It is irrelevant that these laws only extended to white residents of the States at the time of the Founding because one of the principal purposes of the 14th Amendment was to ensure that the full scope of fundamental rights secured by the Bill of Rights extended to all citizens, regardless of race. This included providing a constitutional basis for past legislation that "explicitly guaranteed that 'all citizens,' black and white, would have 'the constitutional right to bear arms.'" *McDonald v. City of Chicago*, 561 U.S. 742, 773 (2010) (plurality op.); *see also id.*at 846–850 (Thomas, J., concurring). Since the scope of the Second Amendment extended to arms-bearing in places of worship at the time of the Founding, by virtue of the Fourteenth Amendment that guarantee has been made enforceable against the States and for all citizens of *all races*, even that was not true in 1791.

The State's claim that these Founding Era laws may be tainted with race discrimination comes with particularly poor grace given that New York itself relies on state laws from the Reconstruction South where Southern Governments

repeatedly, either de jure or de facto, sought to disarm newly freed slaves. *Bruen*, 142 S. Ct. at 2151 ("After the Civil War, of course, the exercise of this fundamental right by freed slaves was systematically thwarted."); *McDonald*, 561 U.S. at 847 (cleaned up) (describing "systematic efforts in the old Confederacy to disarm the more than 180,000 freedmen who had served in the Union Army"); *id.* at 779 (quotation marks omitted) ("In the years immediately following the Civil War, a law banning the possession of guns by all private citizens would have been nondiscriminatory only in the formal sense."). One of the leading voices urging that this disarmament must stop came from, of all places, a church. *Id*. at 848 (quoting an editorial published by the African Methodist Episcopal Church).[2]

The State also argues that these Founding-Era arms-bearing requirements actually support *its* position because they show that Founding Era governments regulated firearm use in places of worship. State Br. at 33–34. This argument misunderstands the inquiry. In evaluating historical analogues, the Supreme Court instructs courts to consider "why" and "how" a historical burden was imposed on carrying firearms for self-defense. *Bruen*, 142 S. Ct. at 2132–33. Thus, it is the

[2] In all events, were the Court to go down the road which the State invites, the Court may only approach laws enacted in the Reconstruction South with caution. *See* Stefan B. Tahmassebi, *Gun Control and Racism*, 2 GEO. MASON U. CIV. RTS. L.J. 67, 74 (1991); *cf. Bruen*, 142 S. Ct. at 2149 (warning against reliance on laws where enforcement only involved "black defendants who may have been targeted for selective or pretextual enforcement").

manner in which the Founding Era regulated firearms that is relevant, not the mere fact of regulation. And all of the evidence before the Court demonstrates that governments in the Founding Era regulated the carrying of firearms in places of worship in exactly the opposite manner of the State's Place of Worship Ban. Contrary to the State's assertion, this is dispositive evidence that the Place of Worship Ban is in fact "off the table" under the Second Amendment. *Heller*, 554 U.S. at 636.

2. The State's Evidence is Too Late.

With the evidence from the Founding squarely contradicting the constitutionality of 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 conclusion follows from two lines of binding 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*, 561 U.S. at 765–66.

The State claims that its reliance on evidence from Reconstruction and thereafter is sufficient because "the Supreme Court has never held that Reconstruction-era history is irrelevant." State Br. at 34. But the State misunderstands *how* the Supreme Court has found evidence from this era relevant. First, the Supreme Court in cases such as *McDonald* and *Timbs* looked to the ratification of the Fourteenth Amendment to determine *if* a right is incorporated against the States. The key question in *McDonald*, in which the plurality exhaustively surveyed Reconstruction-Era evidence, was whether the "right to keep and bear arms was considered fundamental" at the time of ratification of the Fourteenth Amendment. 561 U.S. at 776. Justice Thomas, in his concurrence, similarly surveyed evidence of this vintage to determine if "'ordinary citizens' at the time of ratification would have understood the Privileges or Immunities Clause" to include the right to bear arms. *Id*. at 813–850. Likewise, in *Timbs* the Court looked at the "broad[] consensus . . . in 1868 upon ratification of the Fourteenth Amendment" in which "35 of the 37 States—accounting for over 90% of the U.S. population—expressly prohibited excessive fines" as evidence of the fundamental nature of the right. *Timbs v. Indiana*, 139 S. Ct. 682, 688 (2019).

But the question of *whether* the Second Amendment applies against New York is not before the Court in this case. That question was resolved by the Supreme Court in *McDonald*. Instead, this Court must resolve the analytically distinct question of determining the "scope" of the Second Amendment as "understood . . . *when the people adopted* [it]." *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35). In this inquiry, the Supreme Court has consistently held that the protections of the Bill of Rights have the same scope "against the States" as "against federal encroachment." *McDonald*, 561 U.S. at 765; *Timbs*, 139 S. Ct. at 687.

Heller established that *the* scope, for purposes of the Second Amendment, is the original public meaning in 1791. This is why in *Heller* the Court only looked to "mid- to late- 19th century commentary" after "surveying what it regarded as a wealth of authority for its reading" of the Second Amendment from the Founding. *Bruen*, 142 S. Ct. at 2137; *see also Heller*, 554 U.S. at 605. Likewise, in *Bruen* the Court emphasized that "not all history is created equal," and it reiterated that Reconstruction Era evidence could only serve, as in *Heller*, "as mere confirmation of what the Court thought had already been established." *Bruen*, 142 S. Ct. at 2137; *id*. at 2163 (Barrett, J., concurring) ("[T]oday's decision should not be understood to endorse freewheeling reliance on historical practice from the mid-to-late 19th century to establish the original meaning of the Bill of Rights."). After all, "post-ratification adoption or acceptance of laws that are *inconsistent* with the original

meaning of the constitutional text obviously cannot overcome or alter that text." *Id*. at 2137 (quoting *Heller v. District of Columbia*, 670 F.3d 1244, 1274 n.6 (D.C. Cir. 2011) (Kavanaugh, J., dissenting)).

This conclusion is consistent with other recent Supreme Court decisions. In *Espinoza*, 140 S. Ct. at 2258–59, the Court rejected reliance on a practice adopted in "more than 30 states" because it "arose in the second half of the 19th century," *id*. at 2259. Directly contrary to the State's argument in this case, the Court explained that Reconstruction-Era evidence "may reinforce an early practice but *cannot* create one." *Id*. (emphasis added). Consistent with the principle that an early practice can reinforce, but cannot create a contrary understanding, the Court in *Ramos v. Louisiana*, 140 S. Ct. 1390 (2020), in a single sentence, looked to Reconstruction-Era treatises, *id.* at 1396 & n. 18. Yet it only did so after discussing the history in "young American states" and the "backdrop" of the ratification of the Bill of Rights in 1791. In *Gamble v. United States*, 139 S. Ct. 1960 (2019), the Court mentioned nineteenth-century evidence, but only did so to reject it as inconsistent with the Founding-Era evidence it had already surveyed, *id*. at 1975–76.

The State asks this Court to do the opposite of what the Supreme Court has instructed in *Heller*, *Bruen, Espinoza, Ramos,* and *Gamble*—skate past the Founding Era evidence and rely exclusively on a handful of laws and cases from the latter half of the nineteenth century to "create" a regulatory tradition where none existed at the

Founding. *Espinoza*, 140 S. Ct. at 2259. This Court is bound to reject the invitation. *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

3. The State's Anachronistic Evidence is Insufficient.

Even if history from Reconstruction and the decades after were relevant, the State fails to point to any "well-established and representative historical analogue" from this period that supports the Ban. *Bruen*, 142 S. Ct. at 2133. The few statutes and snippets of state court dicta it relies upon are woefully insufficient to demonstrate an "enduring American tradition of state regulation" that could justify the Place of Worship Ban because they are neither well-established, representative, nor analogous. *Id*. at 2155.

The State points to four state laws that imposed certain prohibitions state-wide. *See* State Br. at 28–29 (citing laws from Texas, Georgia, Virginia, and Missouri). Even taking the State's invocation of these four statutes at face value, they would only represent a small fraction of the United States at the time. *Cf. Espinoza*, 140 S. Ct. at 2258-59 (rejecting practice that existed in "more than 30 states"); *Timbs*, 139 S. Ct. at 688 (highlighting protections in "35 of the 37 States"). The absence of analogues in 34 other States during Reconstruction strongly suggests a tradition of *not* forbidding firearms in places of worship even at this late date.

Yet even the four state laws New York has scrounged together are insufficiently analogous to support New York's law. *Bruen* already instructs that

neither Texas nor Georgia during Reconstruction offer insight into the scope of the Second Amendment. Start with Texas. *Bruen* explained that Texas's restrictions (and its court decisions) in the Reconstruction Era were an "outlier[]" at the time and "provide little insight into how postbellum courts viewed the right to carry protected arms in public." 142 S. Ct. at 2153 (discussing, inter alia, *English v. State*, 35 Tex. 473 (1871)). Georgia and its court decisions from Reconstruction cannot be relied upon either. For one, its 1870 enactment directly contradicts its law from the Founding Era, enacted a hundred years earlier and on the books during the Ratification of the Second Amendment. *Espinoza*, 140 S. Ct. at 2259. For another, the Georgia case law by the 1870s had erroneously interpreted the right to keep and bear arms as a militia-based right, rather than a right for individual self-defense. *See 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"). When a state "operated under a fundamental misunderstanding of the right to bear arms," *Bruen* instructs that such laws and court decisions do not "inform the origins and continuing significance of the [Second] Amendment." *Bruen*, 142 S. Ct. at 2155 (quotation marks omitted).

The State's identified restrictions also fail as analogues because they are not "relevantly similar" to the burden imposed by the Place of Worship Ban. Unlike the

Ban challenged here, 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.

New York next reaches further west and even further in time away from ratification, pointing to laws from the territories of Arizona and Oklahoma. *See* State Br. at 29–30. New York made this same exact move in *Bruen*, and the Supreme Court rejected it: "territorial 'legislative improvisations,' which conflict with the Nation's earlier approach to firearm regulation, are most unlikely to reflect 'the origins and continuing significance of the Second Amendment' and we do not consider them 'instructive.'" *Bruen*, 142 S. Ct. at 2154 (quoting *Heller*, 554 U.S. at 614)). Moreover, at the time of these enactments, the populations of Arizona and Oklahoma combined to make up less than "two-thirds of 1% of the population." *Id.*

A valid interpretation of the Second Amendment cannot rest "on a handful of temporary territorial laws that were enacted nearly a century after the Second Amendment's adoption, governed less than 1% of the American population, and also 'contradic[t] the overwhelming weight' of other, more contemporaneous historical evidence." *Id*. (quoting *Heller*, 554 U.S. at 632).

With no statewide (or even territory-wide) enactments to support its interpretation of the Second Amendment, the State is left to cobble together a motley collection of local laws, "broader restrictions" that do not specify places of worship, and dicta in state court cases. *See* State Br. 29–30. This historical hodgepodge from the end of the nineteenth century and early twentieth century is insufficient for multiple independent reasons. For starters, the State's municipal laws are simply a few "localized restrictions," which cannot speak to the "American tradition" across the Nation. *Bruen*, 142 S. Ct. at 2154 ("We have already explained that we will not stake our interpretation of the Second Amendment upon a law in effect in a single State, or a single city."). The broader restrictions are similarly unavailing. "[W]hether the 1869 Tennessee statute applied to long guns is uncertain," Kopel & Greenlee, *supra*, at 252, so it appears to have left at least one method for self-defense open—unlike New York's ban here, *cf. Bruen*, 142 S. Ct. at 2146–47. Idaho's law—in addition to suffering from all the shortcomings of the other territorial restrictions—was also held unconstitutional "shortly after passage" by the Supreme

Court of Idaho. *Bruen*, 142 S. Ct. at 2155 (citing *In re Brickey*, 8 Idaho 597, 70 P. 609 (1902)). The State concludes its evidence with a sampling of state-court dicta. But dicta, by definition, does not actually decide the constitutionality of anything. Non-binding "post-Civil War discussions" taking "place 75 years after the ratification of the Second Amendment" can offer little insight into its scope. *Bruen*, 142 S. Ct. at 2137.

Even setting aside these points, the late-breaking dicta relied on by New York is remarkably underwhelming. The State principally cites cases from Texas (which *Bruen* described as an "outlier[]" jurisdiction); Georgia (which, as discussed, operated under a fundamental misunderstanding of the Second Amendment, *see supra*; Tennessee; and Arkansas (which did little more than cite the decision from Tennessee). An interpretation of the Second Amendment directly contrary to the practice at the Founding cannot rest on such shaky ground. *Bruen*, 142 S. Ct. at 2137; *Espinoza*, 140 S. Ct. at 2258–59. The State also cites an Ohio appellate court decision from 1905, but "20th-century evidence . . . does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Bruen*, 142 S. Ct. at 2154 n. 28.

4. The State Cannot Rely on Analogies to Recognized Sensitive Places.

The Supreme Court in *Bruen* recognized only three specific places where firearms could presumably be prohibited: "legislative assemblies, polling places, and

courthouses." 142 S. Ct. at 2133. The Court then went on to explain that a State can potentially justify "new" sensitive places by drawing "analogies to *those* historical regulations." *Id.* (emphasis added). The State attempts to argue that the Place of Worship Ban is "sufficiently analogous to other sensitive locations," but its argument immediately runs aground because places of worship are not "new." To the contrary, churches and other places of religious observance have been part and parcel of American communities for hundreds of years. Since there is nothing new about places of worship, *Bruen*'s instructions that States can use reasoning by analogy to justify "modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places" simply has no application. *Id.*

Even setting aside this threshold (and dispositive) point, the State's analogies to recognized sensitive locations falter still because places of worship do not share the crucial characteristics that unite the "sensitive places" identified by *Bruen* as presumptively consistent with Founding Era history. As the district court correctly found, these Founding Era sensitive places—"legislative assemblies, polling places, and courthouses," *id.* at 2133—were areas where the government generally provided comprehensive security, where the activity conducted in the location "concentrate[s] adversarial conflict" as part of democratic governance, or where government officials are "at acute personal risk of being targets of assassination." Kopel & Greenlee, *supra*, at 290. For example, there is substantial legislation dating to the

Founding and the first years after ratification providing for security officials at legislatures, courthouses, and polling places. *See* Amicus Br. of Center for Human Liberty, *Antonyuk v Nigrelli*, No. 22-2908, Doc. 313 at 8–17 (2d Cir. Feb. 9, 2023) (collecting statutes regulating or providing for security in courthouses, legislative assemblies, and polling places). Thus, contrary to the State's assertions, the district court's determination of the characteristics of sensitive places is extensively supported by the historical record.

By contrast, the malleable characteristics proposed by the State's purported expert[3] have no substantial historical support. For instance, there is *zero* support at from the Founding Era for a general authority to ban the carrying of all firearms in locations where people assemble or exercise constitutional rights. Indeed, as explained above, to the extent there was a perceived security risk in places like churches in the Founding and the colonies, the solution was to *arm* law-abiding citizens, not to disarm them. Furthermore, as *Bruen* already held, the Statute of Northampton and its successor laws cannot be read to forbid merely carrying a

[3] The State's expert considers the "Second Amendment, at least as articulated by *Bruen*, [to be] historically ruined and fake." Patrick J. Charles, *The Fugazi Second Amendment: Bruen's Text, History, and Tradition Problem and How to Fix It*, 71 CLEVELAND ST. L. REV. at 3 (forthcoming), *available at* https://bit.ly/3Ir3RBD. It is no small wonder why. The State's expert's amicus brief and writings were repeatedly cited by the *dissent* in *Bruen*, *see* 142 S. Ct. at 2180, 2183, 2185, 2188 (Breyer, J., dissenting). This expert is plainly out of step with the governing law which this Court is bound to faithfully apply.

firearm for self-defense, but instead only "prohibit[ed] bearing arms in a way that spreads 'fear' or 'terror' among the people." 142 S. Ct. at 2145. The Place of Worship Ban is not so limited. And *Bruen* explained that defining "sensitive places" to include anywhere "people typically congregate" would "define[] the category of sensitive places *far too broadly*." *Id*. at 2133. So would defining it to include anywhere people exercise constitutional rights. Constitutional rights can be exercised everywhere in any place; the metric for delineating "sensitive places" cannot turn on such an amorphous standard because it "would eviscerate the general right to publicly carry arms for self-defense." *Id*. at 2134.[4]

The State notes that "countless people consult clergy on a host of deeply personal decisions," and it says that possession of firearms would be "disruptive" and "could interfere with the relationship between clergy and parishioners." State Br. 39–40. This is, of course, a policy argument that has no place in assessing the constitutionality of restrictions implicating Plaintiffs' Second Amendment rights. Whether the concealed carrying of firearms is too "disruptive" is a question that the

[4] The State briefly argues that places of worship are similar to schools. *See* State Br. at 39–40. This argument distracts more than it informs. Reverend Hardaway and Bishop Boyd are not challenging New York's restrictions on carrying firearms in schools. And, to the extent there is evidence of restrictions on firearms in schools around the Founding, *see See* Amicus Br. of Center for Human Liberty, *Antonyuk v Nigrelli*, No. 22-2908, Doc. 313 at 20–22 (collecting historical restrictions), that makes the absence of any comparable restriction in places of worship at the Founding all the more significant.

Second Amendment entrusts *the American people* to decide—the leadership of churches and those who worship there. What truly " interfere[s] with the relationship between clergy and parishioners" is taking the often "deeply personal decision[]" about self-defense out of the hands of the clergy and worship leaders for the first time in the history of New York State.

II. The District Court Correctly Concluded That The Other Factors Weigh In Favor of a Preliminary Injunction.

A. Reverend Hardaway and Bishop Boyd have demonstrated irreparable harm.

"The denial of a constitutional right ordinarily warrants a finding of irreparable harm, even when the violation persists for 'minimal periods' of time." *A.H. by & through Hester*, 985 F.3d at 184 (quoting *Int'l Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67, 71 (2d Cir. 1996)). The Second Circuit has reaffirmed this principle time and time again. *See, e.g., Kane*, 19 F.4th at 170; *Hartford Courant Co., LLC v. Carroll*, 986 F.3d 211, 224 (2d Cir. 2021); *Agudath Isr. of Am.*, 983 F.3d at 636; *Johnson v. Connolly*, 378 F. App'x 107, 108 (2d Cir. 2010) (summary order); *Lynch v. City of New York*, 589 F.3d 94, 99 (2d Cir. 2009); *Connecticut Dep't of Env't Prot. v. O.S.H.A.*, 356 F.3d 226, 231 (2d Cir. 2004); *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 350 (2d Cir. 2003); *Bery v. City of New York*, 97 F.3d 689, 693 (2d Cir. 1996); *Jolly v. Coughlin*, 76 F.3d 468, 482 (2d Cir. 1996); *Covino v. Patrissi*, 967 F.2d 73, 77 (2d Cir. 1992); *Mitchell v. Cuomo*,

748 F.2d 804, 806 (2d Cir. 1984). "When an alleged deprivation of a constitutional right is involved, such as the right to free speech or freedom of religion, most courts hold that no further showing of irreparable injury is necessary." 11A WRIGHT & MILLER, FED. PRAC. & PROC. CIV. § 2948.1 (3d ed.) (collecting cases).

These precedents are by no means limited to the First Amendment context. This Circuit has understood the violation of constitutional rights to cause irreparable injury when the injury stems from the denial of Fourth Amendment rights, *Lynch*, 589 F.3d at 99, Eighth Amendment rights, *Mitchell*, 748 F.2d at 806; *accord Johnson*, 378 F. App'x at 108, the right to participate in elections, *Yang v. Kosinski*, 960 F.3d 119, 129 (2d Cir. 2020), a claimed constitutional right to privacy, *Statharos v. New York City Taxi & Limousine Comm'n*, 198 F.3d 317, 322 (2d Cir. 1999), and the constitutional solicitude for state sovereign immunity, *Connecticut Dep't of Env't Prot.*, 356 F.3d at 231.

The violation of a Second Amendment right must be considered equally irreparable. There is no "hierarchy among . . . constitutional rights." *Caplin & Drysdale v. United States*, 491 U.S. 617, 628 (1989). And if there were any doubt, the Supreme Court has twice made clear the Second Amendment is not a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees." *Bruen*, 142 S. Ct. at 2156 (quoting *McDonald*, 561 U.S. at 780 (plurality)).

Even if irreparable harm were not presumed from the constitutional violation alone, Reverend Hardaway and Bishop Boyd have demonstrated it. As the district court explained, Plaintiffs were "forced to forgo their Second Amendment rights to exercise their First Amendment rights to free exercise of religion, or vice versa. And they are forced to give up their rights to armed self-defense outside the home, being left to the mercy of opportunistic, lawless individuals who might prey on them and have no concern about the place of worship exclusion." J.A. 46; *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?"). 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."); *see also* Rick Pfeiffer and Mark Scheer, *Suspect sought in murder of man on South Avenue Saturday evening*, NIAGARA GAZETTE (Jan. 23, 2023), https://bit.ly/3YrTaFB. Every day that Plaintiffs are unable to protect themselves and their congregations is another day the Place of Worship Ban has stripped them of a fighting chance if violent circumstances were to arise. This is exactly the kind of injury that cannot be remedied by damages after litigation has concluded.

The Second Amendment protects fundamental, intangible interests—much like the First Amendment—and such interests are quintessentially irremediable by damages and irreparable after the fact. *Ezell v. City of Chicago*, 651 F.3d 684, 699 (7th Cir. 2011) (internal quotation marks omitted). The Second Amendment protects the right to be "armed and ready for offensive or defensive action in a case of conflict with another person." *Bruen*, 142 S. Ct. at 2134 (quoting *Heller*, 554 U.S. at 584 (2008)) (emphasis added). Because this is a right "for self-defense," it is "a right that can be infringed upon whether or not plaintiffs are ever actually called upon to use their weapons to defend themselves." *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016). A person's whose need for self-defense is thwarted because of a Second Amendment violation suffers "the heaviest kind of irreparable harm." *Rhode v. Becerra*, 445 F. Supp. 3d 902, 954 (S.D. Cal. 2020).

B. The public interest and balance of equities weigh in favor of a preliminary injunction.

When the government is a party, the balance of equities and public interest merge and are considered together. *New York v. United States Dep't of Homeland Sec.*, 969 F.3d 42, 86 (2d Cir. 2020). Here, as the district court correctly concluded, both weigh in favor of granting an injunction. As the court explained, the public interest is served by "fostering self-defense at places of worship across the state." J.A. 47. This is not a "policy" view, State Br. at 51, but a view fully consonant with the Second Amendment's "unqualified command." *Bruen*, 142 S. Ct. at 2126.

The State argues to the contrary with an apparent attempt to smuggle in the very kind of policy considerations that *Bruen* and *Heller* instructed courts not to consider. The Court should reject the State's effort because the State "does not have an interest in the enforcement of an unconstitutional law." *New York Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 488 (2d Cir. 2013). Thus, whatever the policy desires of the State, they are unquestionably beside the point. *Cf. Bruen*, 142 S. Ct. at 2126 n.3 (rejecting argument based on "statistics presumably to justify granting States greater leeway in restricting firearm ownership and use").

In all events, the State's arguments miss the mark. The State argues that "it is well settled that more guns lead to more shootings." State Br. at 49. But, of course, it cites the dissent in *Heller* for this proposition. And it is not well-settled. In 2004, the National Research Council found that existing studies "d[id] not credibly demonstrate a causal relationship between the ownership of firearms and the causes or prevention of criminal violence or suicide." NATIONAL RESEARCH COUNCIL, FIREARMS AND VIOLENCE: A CRITICAL REVIEW 6 (2005), https://bit.ly/3XOPufP. In research updated just last month, RAND found it "inconclusive" whether establishing "gun-free zones" decreased violent crime. RAND, *The Effects of Gun-Free Zones* (updated January 10, 2023), https://bit.ly/2OefCyQ.

Finally, the State argues—again—that it did not have enough time to conduct the requisite historical analysis to justify its law, so even if Plaintiffs' constitutional

rights are likely being abridged, the State should have more time to abridge them while it does more research. That is not how constitutional litigation works. When a law that changes the status quo is likely unconstitutional—and causes irreparable injury that outweighs any countervailing interest in its continued enforcement—then the appropriate course is to preliminarily enjoin the law *while* the parties continue to litigate the merits. And in any event, if the State needed more time to justify the constitutionality of its new enactment, it should have taken more time before *making* that enactment. Constitutional rights may not be infringed because a State did not do its homework.

CONCLUSION

For the foregoing reasons, the District Court's order preliminarily enjoining the enforcement of N.Y. PENAL LAW § 265.01-e(2)(c) should be affirmed.

Dated: February 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of FED. R. APP. P. 32(7)(B) because this brief contains 10,646 words.

Pursuant to FED. R. APP. P. 32, this brief 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 brief has been prepared in a proportionately spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: February 27, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of February 2023, I filed the foregoing via the Court's CM/ECF appellate system, which will electronically notify all counsel requiring notice.

Dated: February 27, 2023

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