UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

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

Plaintiffs-Appellees

v.

STEVEN A. NIGRELLI,

Defendant-Appellant,

BRIAN D. SEAMAN, AND JOHN J. FLYNN,

Defendants.

No. 22-2933

REPLY MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR A STAY PENDING APPEAL

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants
The Capitol
Albany, New York 12224
(518) 776-2044

BARBARA D. UNDERWOOD
Solicitor General
ESTER MURDUKHAYEVA
Deputy Solicitor General
JONATHAN D. HITSOUS
Assistant Solicitor General
of Counsel

Dated: December 2, 2022

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

PRELIMINARY STATEMENT

Appellant Steven A. Nigrelli, in his official capacity as the Acting Superintendent of the New York State Police, seeks a stay pending appeal of a preliminary injunction against the statewide enforcement of a state statute prohibiting carrying firearms in places of worship. The district court erred in granting a preliminary injunction because plaintiffs have not shown a likelihood, let alone a strong likelihood, of success in demonstrating a Second Amendment violation. Absent a stay, the district court's preliminary injunction will continue to disrupt the status quo and jeopardize public safety.

In their opposition, appellees[1] fail to rebut the State's showing of an entitlement to a stay pending appeal. The mere allegation that a firearm regulation infringes the Second Amendment does not entitle appellees to injunctive relief, particularly where the Supreme Court has made clear

---

[1] Appellees represent that "two nonprofit organizations" remain plaintiffs. (Opp. at 3.) The district court agreed with the State, however, that the organizational plaintiffs lacked standing, and therefore limited its order to the two individual plaintiffs. (Motion, Ex. B at 3-4 n.3.) Because lack of standing is a jurisdictional defect, the district court arguably should have dismissed the organizational plaintiffs sua sponte. *See Muntaqim v. Coombe*, 449 F.3d 371, 374 (2d Cir. 2006) (dismissing an appeal sua sponte for lack of standing).

that sensitive place restrictions like the places of worship provision are presumptively legal. In any event, the challenged restriction is supported by ample historical evidence. Appellees fail to meaningfully grapple with this evidence and instead seek to dismiss it based on arbitrary criteria and a misreading of caselaw. Equally unavailing are appellees' speculative arguments regarding the equities.

ARGUMENT

THE PRELIMINARY INJUNCTION SHOULD BE STAYED PENDING APPEAL

A. The District Court's Decision is Flawed on the Merits.

This Court should stay the preliminary injunction because the State is likely to prevail in the appeal.

First, the district court improperly excused appellees from making the requisite "strong showing" of a likelihood of success on the merits to obtain a preliminary injunction that altered the status quo. *See A.H. by and through Hester v. French*, 985 F.3d 165, 177 (2d Cir. 2021). The places of worship provision was in effect for approximately 15 weeks before appellees filed suit, and the injunction therefore altered the status quo. It is no answer to argue, as appellees do, that they were not subject to a

heightened standard because "[t]he status quo is the Second Amendment" and a purported past practice of allowing firearms in places of worship. (Opp. at 7.) Under appellees' reasoning, plaintiffs could seek injunctive relief against a law of any vintage by defining the status quo as the last time the legal landscape comported with plaintiffs' view of the Constitution.

Second, appellees incorrectly insist that under *New York State Rifle & Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), they were excused from the burden to establish the applicability of the Second Amendment to the challenged restriction. According to appellees, courts should regard sensitive place restrictions with skepticism because the Second Amendment's text does not draw any "locational distinction[s]." (Opp. at 8.) This argument is mistaken. The Second Amendment does not define "the people" either, but the Supreme Court has repeatedly characterized the right embodied therein as applying only to "law-abiding" and "responsible" persons. *Bruen*, 142 S. Ct. at 2131; *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). And the Court has interpreted the Second Amendment to apply in one's home or "in public," despite the absence of such distinctions in the text. *Bruen*, 142 S. Ct. at 2134-35.

Similarly, the Supreme Court has explained that sensitive places are outside the "scope of the Second Amendment" and are "presumptively lawful." *Heller*, 554 U.S. at 627 & n.26 (2008). Indeed, in *Bruen* the Court recognized that sensitive places are meaningfully different from other types of public places. *See* 142 S. Ct. at 2133-34. Appellees here therefore had a burden to establish that the specific sensitive place restriction being challenged implicated the Second Amendment before the burden shifted to the government to justify the restriction with historical evidence. *Id.* at 2129-30. And to meet this burden, appellees were required to do more than merely assert that the places of worship provision violates the Second Amendment.

Appellees erroneously contend that *Bruen* "squarely foreclose[s]" the notion that they bear any burden of proof because the Supreme Court concluded that the State did not carry its burden to demonstrate that "that its 'proper cause' licensing regime was analogous to historical sensitive place regulations." (Opp. at 9-10.) All the Court did, however, was reject the State's argument that the "proper cause" requirement should be understood as a place-based restriction. *Bruen*, 142 S. Ct. at 2133-34. That reasoning was not synonymous with a repudiation of the Court's

earlier recognition that restrictions that indisputably apply only to specified sensitive places are presumptively lawful.

Appellees also mistakenly assert that places of worship are not "genuine" sensitive places, which, in appellees' view, are limited to locations that are patrolled by security and "concentrate adversarial conflict as part of democratic governance" or "locations where government officials are at acute personal risk of being targets of assassination." (Opp. at 16-17 (quotation and alterations omitted).) Appellees' proposed definition of a sensitive place has no basis in *Bruen*—which refused to "comprehensively define" sensitive locations—and fails to account for the Supreme Court's unambiguous treatment of schools as sensitive places. *See Bruen*, 142 S. Ct. at 2133; *Heller*, 554 U.S. at 626.

Third, the State in fact amassed extensive evidence supporting a historical tradition of firearms regulation in places of worship. (*See* Mot. at 12-13.) In appellees' opinion, this evidence was insufficient because it was not from the "Founding Era," but from Reconstruction. (Opp. at 13-14.) However, *Bruen* refused to limit its historical analysis to the founding era; indeed, the majority evaluated at length "[e]vidence from around the adoption of the Fourteenth Amendment," a practice that is consistent

with the Court's approach in other cases pertaining to rights incorporated against the States by the Fourteenth Amendment. 142 S. Ct. at 2150; *see Timbs v. Indiana*, 139 S. Ct. 682, 688-89 (2019) (Eighth Amendment right against excessive fines). Appellees offer no compelling reason as to why it would be logical to disregard the prevailing understanding of a constitutional right at the time that right was incorporated.

Next, appellees assail appellant's historical evidence as representing only a "fraction" of States and failing to establish an enduring tradition of prohibiting firearms in places of worship. (Opp. at 14-15.) However, nothing in *Bruen* suggests that a minimum number of identical statutes is necessary to justify a firearms regulation. To the contrary, *Bruen* directed lower courts to evaluate as a general matter "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified," while clarifying that this standard did not demand a "historical *twin*." 142 S. Ct. at 2133 (emphasis in original).

As they did below, appellees also cite to colonial laws that purported to make firearms mandatory in churches. (Opp. at 10-12.) This historical evidence merely confirms that governments have long regulated the

presence of firearms in places of worship. For example, Georgia, in the colonial period, apparently mandated firearms in churches (see Opp. at 12), while later Georgia as a state prohibited guns at places of worship. 1870 Ga. Laws 421. This variation over time in the laws of a single state reflects that States have never viewed the Second Amendment as an impediment to either restricting or allowing firearms in these sensitive locations.

B. The Equities Support a Stay Pending Appeal.

As explained in appellants' motion (at 17-20), the equities strongly support a stay pending appeal.

Appellees contend that the State's public safety rationale for sensitive place restrictions is lacking in support because the State has not shown that sensitive place restrictions are likely to stop mass shootings or other crimes committed with guns. (Opp. at 19.) However, the Constitution "does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970). Similarly, appellees miss the mark in speculating that the presence of firearms could minimize or prevent damage caused by mass shooters. In so doing, appellees ignore

evidence of serious harms caused by untrained persons using firearms in attempted self-defense, or the possibility that the presence of firearms could cause disputes between parishioners or clergy to escalate to dangerous levels. (*See* Mot. at 18-19.) What is beyond speculation, however, is that firearms are capable of seriously injuring and killing people, and that the consequences of such incidents are irreparable.

Appellees also ignore the burden that the injunction imposes on parishioners who would like to worship in a congregate setting without the presence of firearms. Appellees argue that the injunction protects the rights of parishioners who wish to carry weapons while participating in services, though they have not identified evidence of any parishioners that have left their congregations because they cannot attend services while armed. But the injunction at the same time tramples on the rights of parishioners who find guns unsafe, but whose congregations "determine their own firearm policy" in favor of firearms. (Opp. at 20.)

In any event, the challenged law provides ample methods of securing the safety of parishioners and clergy. For example, the places of worship provision does not apply to armed security guards or law enforcement. Penal Law § 265.01-e(3). And the State seeks a limited stay that

would allow places of worship to designate individuals who have valid carry permits to carry firearms in order to provide security to the place of worship. Appellees' only response is that the Second Amendment is "a constitutional right, not a contract right." (Opp. at 20.) That observation is unresponsive to the State's position that a limited stay pending appeal is supported by the equities and adequately protects appellees from any purported injury.

Appellees also fail to defend the district court's hurried preliminary injunction ruling. (Opp. at 20-21.) While appellees claim that the State should have compiled the relevant historical record before enacting the challenged law (*id.* at 21), New York was compelled to quickly promulgate a series of legislative amendments to comply with *Bruen* while continuing to protect public safety in the wake of that decision, which eliminated the "proper cause" requirement that had been a feature of New York's firearms law for over 100 years. State statutes are presumed constitutional and fundamental principles of due process and federalism require that the State be given a meaningful opportunity to present a defense before being subject to an indefinite preliminary injunction. No such opportunity was given here.

Finally, at a minimum, the district court overreached by granting disproportionate statewide injunctive relief based on individualized assertions of harm raised by two individual appellees. The court had no cause to restrain defendants' enforcement of the places-of-worship provision as to everyone, everywhere in New York. Citing *Trump v. International Refugee Assistance Project*, 137 S. Ct. 2080 (2017), appellees propose that this Court could leave the injunction in place as to them and those "similarly situated." (Opp. at 21.) Insofar as they suggest that those similarly situated are persons who wish to carry firearms into places of worship, appellees' "tailoring" proposal serves no limiting function.

CONCLUSION

This Court should grant a stay pending appeal of the district court's order.

Dated: December 2, 2022
Albany, New York

Respectfully submitted,

LETITIA JAMES
Attorney General
State of New York
Attorney for Appellants

By: */s/ Jonathan D. Hitsous*
Jonathan D. Hitsous
Assistant Solicitor General

The Capitol
Albany, NY 12224
(518) 776-2044

BARBARA D. UNDERWOOD
Solicitor General
ESTER MURDUKHAYEVA
Deputy Solicitor General
JONATHAN D. HITSOUS
Assistant Solicitor General
of Counsel

CERTIFICATE OF COMPLIANCE

Pursuant to Rules 27 and 32 of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this document, the document contains 1,907 words and complies with the typeface requirements and length limits of Rules 27(d) and 32(a)(5)-(6).

/s/ Oren L. Zeve