22-2933

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JIMMIE HARDAWAY, JR.,
PLAINTIFFS-APPELLEES,

V.

STEVEN A. NIGRELLI, in his Official Capacity as Superintendent of the New York State Police,
DEFENDANT-APPELLANT,

BRIAN D. SEAMAN, in his Official Capacity as District Attorney for the County of Niagara, New York,
DEFENDANTS-APPELLEES.
(Caption continues inside front cover.)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR THE DISTRICT OF COLUMBIA AND STATES OF ILLINOIS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, HAWAII, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEW JERSEY, OREGON, PENNSYLVANIA, RHODE ISLAND, VERMONT, WASHINGTON, AND WISCONSIN AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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INTEREST OF AMICI CURIAE

Amici the District of Columbia and States of Illinois, California, Colorado, Connecticut, Delaware, Hawaii, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, Oregon, Pennsylvania, Rhode Island, Vermont, Washington, and Wisconsin (collectively, "Amici States") submit this brief in support of defendants-appellants pursuant to Federal Rule of Appellate Procedure 29(a)(2). Amici States have a substantial interest in the health, safety, and welfare of their communities, which includes protecting their residents from the harmful effects of gun violence and promoting the safe and responsible use of firearms. To serve that compelling interest, Amici States have long exercised their governmental prerogative to regulate firearms by implementing restrictions on the carrying of firearms in "sensitive places" where such weapons pose special risks. Amici States seek to maintain their right to address the problem of gun violence through legislation that is consistent with the tradition of regulating firearms in sensitive places and tailored to the specific circumstances in each of their communities.

INTRODUCTION AND SUMMARY OF ARGUMENT

As independent sovereigns, Amici States have a responsibility to protect the health, safety, and welfare of the public from threats like gun violence. One of the ways in which they have historically fulfilled this responsibility is by exercising their police powers to implement measures to restrict firearms in sensitive places. Such

regulations do not conflict with the Second Amendment. On the contrary, as the Supreme Court has recognized, the Second Amendment does not protect the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2128 (2022) (quoting *District of Columbia v. Heller*, 554 U.S. 570, 626-27 (2008)).

The challenged provision of New York's Concealed Carry Improvement Act ("CCIA") identifies places of worship and religious observation as sensitive places in which firearms are restricted. That restriction fits squarely within a long tradition of constitutionally acceptable regulations designed to meet states' responsibility to protect their residents. Indeed, many other states likewise restrict firearms in places of worship. And New York's regulation implicates several of the key concerns that underlie other sensitive place restrictions that many states have adopted: limiting the possession and use of firearms in locations where people are exercising other constitutionally protected rights, where vulnerable populations such as children and the elderly tend to congregate, and where large groups of people gather in confined spaces. The district court's preliminary injunction enjoining enforcement of the provision undermines New York's sovereign responsibility to protect public safety within its borders and threatens other states' authority to pass gun regulations in response to local conditions. It should therefore be reversed.

ARGUMENT

I. The Second Amendment Allows States To Implement Reasonable Firearm Regulations To Promote Gun Safety And Protect Against Gun Violence.

Since the Founding, states have enacted restrictions on who may bear arms, where arms may be brought, and the manner in which arms may be carried. *See Bruen*, 142 S. Ct. at 2145. New York's designation of places of worship as sensitive places in which firearms are limited is one in a long line of government restrictions designed to make gun possession and use safer for the public, and it is a lawful exercise of the state's police powers.

States have a fundamental responsibility to protect the public, and they have long exercised their police powers to maintain public health and safety. *See Medtronic Inc. v. Lohr*, 518 U.S. 470, 475 (1996) (explaining that states have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons" (internal quotation marks omitted)). Enacting reasonable measures to promote safety, prevent crime, and minimize gun violence within their borders falls squarely within states' authority. Indeed, there is "no better example of the police power, which the Founders denied the National Government and reposed in the States, than the suppression of violent crime and vindication of its victims." *United States v. Morrison*, 529 U.S. 598, 618 (2000).

The Supreme Court thus has repeatedly affirmed the states' authority to enact reasonable firearm restrictions, even as it has defined the scope and import of the rights conferred by the Second Amendment. In each of its major Second Amendment opinions—*Heller*, 554 U.S. 570, *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *Bruen*, 142 S. Ct. 2111—the Court expressly acknowledged the important role that states play in protecting their residents from the harms of gun violence, a role consistent with our Nation's historical tradition.

In *Heller*, the Supreme Court made clear that the Second Amendment right to keep and bear arms is "not unlimited." 554 U.S. at 626. Although government entities may not ban the possession of handguns by responsible, law-abiding individuals or impose similarly severe burdens on the Second Amendment right, states still possess "a variety of tools" to combat the problem of gun violence. *Id.* at 636. They may, for example, implement measures prohibiting certain groups of people from possessing firearms, and they may "forbid[] the carrying of firearms in sensitive places such as schools and government buildings." *Id.* at 626-27. The Court reiterated this point in *McDonald*, emphasizing that the Second Amendment "by no means eliminates" the states' "ability to devise solutions to social problems that suit local needs and values." 561 U.S. at 785; *see also id.* at 802 (Scalia, J., concurring) ("No fundamental right—not even the First Amendment—is absolute.").

The Supreme Court reaffirmed this principle in *Bruen*. The Court explicitly stated that "nothing in [its] analysis should be interpreted to suggest the unconstitutionality" of provisions "designed to ensure only that those bearing arms . . . are, in fact, 'law-abiding, responsible citizens.'" 142 S. Ct. at 2138 n.9 (quoting *Heller*, 554 U.S. at 635). And, building on *Heller*, the Court "assume[d] it settled" that prohibiting firearms in identified sensitive places (including "schools and government buildings," "legislative assemblies, polling places, and courthouses"), as well as additional analogous locations, is constitutional. *Id*. at 2133. That is, the Second Amendment should not be understood to protect the "right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id*. at 2128 (quoting *Heller*, 554 U.S. at 626-27).

In their concurrence, Chief Justice Roberts and Justice Kavanaugh similarly stressed that *Bruen* should not be read to invalidate "presumptively lawful regulatory measures," including longstanding prohibitions on the possession of firearms by felons, the carrying of firearms in sensitive places, conditions on the commercial sale of arms, or limitations on dangerous and unusual weapons. *Id.* at 2162 (Kavanaugh, J., concurring) (quoting *Heller*, 554 U.S. at 626-27). Justice Alito echoed this sentiment in his concurrence. *Id.* at 2157 (Alito, J., concurring) (explaining that *Bruen* does not "disturb[ ] anything that we said in *Heller* or

McDonald . . . about restrictions that may be imposed on the possession or carrying of guns").

These Supreme Court decisions make clear, moreover, that laws enacted by states to protect their residents need not be uniform: states are empowered to select "solutions to social problems that suit local needs and values," ensuring that firearm regulations appropriately and effectively address the specific circumstances in each state. *McDonald*, 561 U.S. at 785. As the Court in *Bruen* emphasized, the Second Amendment is not a "regulatory straightjacket." 142 S. Ct. at 2133. On the contrary, states are free to enact a wide range of firearm regulations. *See id.* at 2162 (Kavanaugh, J., concurring) ("Properly interpreted, the Second Amendment allows a 'variety' of gun regulations." (quoting *Heller*, 554 U.S. at 636)); *Friedman v. City of Highland Park*, 784 F.3d 406, 412 (7th Cir. 2015) (explaining that "the Constitution establishes a federal republic where local differences are cherished as elements of liberty, rather than eliminated in a search for national uniformity").

Nor must state law be frozen in time. In *Bruen*, for example, the Supreme Court instructed courts to "use analogies" to long-recognized sensitive places—such as schools and government buildings—to "determine [whether] modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." 142 S. Ct. at 2133-34; *see Heller*, 554 U.S. at 627 n.26 (noting that a list of "presumptively lawful regulatory measures," including

restrictions on firearms in schools and government buildings, contains only "examples" and is not "exhaustive"). For example, the vast majority of states regulate the possession and carriage of firearms in childcare facilities that did not exist as such at the time of the Founding or the ratification of the Fourteenth Amendment. *See e.g.*, Sara E. Benjamin-Neelon & Elyse R. Grossman, *State Regulations Governing Firearms in Early Care and Education Settings in the US*, JAMA Network Open, Apr. 2020, at 1, 2-3.[1]

In short, although the Supreme Court has defined the outer bounds of permissible regulations, the Court did not "abrogate" the states' "core responsibility" of "[p]roviding for the safety of citizens within their borders." *Kolbe v. Hogan*, 849 F.3d 114, 150 (4th Cir. 2017) (en banc) (Wilkinson, J., concurring) (quoting *Heller*, 554 U.S. at 635), *abrogated on other grounds by Bruen*, 142 S. Ct. 2111 (2022). States retain not only the freedom, but the fundamental responsibility, to regulate firearms and protect their residents from the harms of gun violence.

II. Consistent With Regulations Adopted By Other States, The Challenged Provision Addresses The Dangers Posed By Firearms In Places Of Worship.

As explained, the Second Amendment allows states to regulate carrying firearms in "sensitive places." *Heller*, 554 U.S. at 626; *see Bruen* 142 S. Ct. at 2132 (reaffirming that in sensitive places, "arms carrying [can] be prohibited consistent

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[1] *Available at* https://tinyurl.com/24ms8zem.

with the Second Amendment"). Because people "can preserve an undiminished right of self-defense by not entering [such] places" or by "taking an alternate route," *United States v. Class*, 930 F.3d 465-66 (D.C. Cir. 2019) (internal quotation marks omitted), laws restricting firearms in places identified as sensitive "neither prohibit nor broadly frustrate any individual from generally exercising his right to bear arms," *Voisine v. United States*, 579 U.S. 686, 714 (2016) (Thomas, J., dissenting); *see* David B. Kopel & Joseph G.S. Greenlee, *The Sensitive Places Doctrine*, 13 Charleston L. Rev. 205, 215 (2018) ("[T]he sensitive places doctrine is an exception to the general right to bear arms.").

The challenged provision of New York law prohibits possessing a firearm in places of worship or religious observation. N.Y. Penal Code § 265.01-e(2)(c). This provision is akin to the laws of many other states. For instance, like New York, Nebraska prohibits concealed carry permitholders from carrying handguns into places of worship, among other sensitive places. Neb. Rev. Stat. § 69-2441(1)(a). And nine other states and the District of Columbia similarly forbid people from carrying firearms in places of worship without first obtaining formal approval from the governing body or religious authority. *See* Ark. Code Ann. § 5-73-306(15); D.C. Code § 7-2509.07(b)(2); Ga. Code Ann. § 16-11-127(b)(4); La. Rev. Stat. § 40:1379.3(N); Mich. Comp. Laws Serv. § 28.425o(1)(e); Miss. Code Ann. §§ 45-9-101(13), 45-9-171(2)(a); Mo. Rev. Stat. § 571.107(1)(14); N.D. Cent. Code

§ 62.1-02-05(1)(b), (2)(m); Ohio Rev. Code § 2923.126(B)(6); S.C. Code. Ann. § 23-31-215(M)(8). Although states have taken slightly different approaches to address the particular needs of their community, all fall within the robust historical tradition of governments regulating the carry of firearms in places of worship.

These laws are a constitutionally permissible response to the heightened danger caused by the presence of firearms in such places. Specifically, restrictions on carrying firearms in places of worship, like other sensitive place restrictions, are employed to protect the exercise of constitutional rights, safeguard vulnerable populations, and prevent violence in large gatherings. And without the power to institute such restrictions, New York and other states would be left unable to effectively prevent gun violence in those locations, putting the public at risk.

First, states frequently designate sensitive places to protect the exercise of constitutional rights. The Supreme Court has recognized that areas in which constitutionally protected activities occur, such as courthouses, polling places, and legislative assemblies, are quintessential examples of sensitive places. *See Bruen*, 142 S. Ct. at 2133; *Heller*, 554 U.S. at 626-27. And many states have limited carrying firearms at such sites, including in courthouses, *see, e.g.*, Ky. Rev. Stat. § 237.110(16)(c); 18 Pa. Cons. Stat. § 913, and other government buildings, *see, e.g.*, 430 Ill. Comp. Stat. 66/65(a)(3), (5), (18). States also prohibit firearms at

political rallies and fundraisers, *see, e.g.*, Neb. Rev. Stat. § 69-2441(1)(a), or the sites of protests or demonstrations, *see, e.g.*, Wash. Rev. Code Ann. § 9.41.300(2).

These locations are recognized as sensitive places in which firearms may be restricted because of the heightened risk that gun violence could threaten constitutional activities or functions. Because of the importance of this interest, such restrictions have been upheld against Second Amendment challenges. The D.C. Circuit, for example, held that a parking lot near the Capitol could be designated a sensitive place because the ability of members of Congress and their staff to operate the national legislature depended on their ability to safely travel to and from their workplace. *Class*, 930 F.3d at 464.

The same reasoning applies to New York's designation of places of worship as sensitive places. Locations like churches, synagogues, and mosques are the heart of many people's religious exercise. They are also increasingly targets of gun violence. *See House of Worship Shootings*, VOA News (last visited Jan. 13, 2023)[2]; Ryan T. Young, *Violent Extremism and Terrorism: Examining the Threat to Houses of Worship and Public Spaces*, FBI (March 16, 2022) (reporting that "threats to members of faith-based communities across the United States [and] houses of worship . . . have been rising in recent years").[3] Such violence may dissuade people

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2 *Available at* https://tinyurl.com/yn9xhyua.

3 *Available at* https://tinyurl.com/3jy452ry.

from attending religious services and otherwise exercising their First Amendment rights. *See* Maxim G.M. Samon, *Protecting religious liberties? Security concerns at places of worship in Chicago*, 117 GEOFORUM 144, 144, 150 (2020) (exploring how security concerns after high-profile attacks on places of worship have increased religious congregations' feelings of vulnerability to attack)[4]; Joseph Blocher & Reva B. Siegel, *When Guns Threaten The Public Sphere: A New Account of Public Safety Regulation Under* Heller, 116 Nw. U. L. Rev. 139, 141 (2021) ("Gun laws protect people's freedom and confidence to participate in every domain of our shared life," including "gathering for prayer[.]").

Arming congregants in these spaces, who often lack expert training and may panic under pressure, could exacerbate an emergency situation and threaten the safety of other worshippers. Secure Comty. Network, *Firearms and the Faithful* 17 (Jan. 2020) (concluding that armed congregants may well have "added to the chaos" in previous active shooter incidents in synagogues).[5] Decisions about how to protect places of worship within the confines of the Second Amendment are therefore best left to the sound discretion of law enforcement and state government. N.Y. Penal Code § 265.01-e(3) (exempting law enforcement and security guards from sensitive place restrictions).

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4 *Available at* https://tinyurl.com/2wnsb2wr.

5 *Available at* https://tinyurl.com/2p8ccd33.

Second, many sensitive places, including places of worship, are gathering sites for vulnerable populations, including children and the elderly. Many congregations host youth services or religious education classes, attracting large groups of children. And worship services tend to be intergenerational, with high attendance rates among the elderly. *See* Faith Comtys. Today, *Twenty Years of Congregational Change: The 2020 Faith Communities Today Overview* 17 (2021) (on average, 33% of surveyed congregations were over age 65).[6] Such individuals cannot easily defend themselves or escape a violent attack, should one occur. And even if vulnerable individuals are not physically injured, exposure to gun violence can cause psychological harm. *See* Heather A. Turner et al., *Gun Violence Exposure and Posttraumatic Symptoms Among Children and Youth*, 32 J. Traumatic Stress 881, 888 (2019) (finding that indirect exposure to gun violence, including witnessing violence or hearing gunshots, can be traumatic to children).[7]

For these reasons, courts consistently have recognized that the frequent presence of children and other vulnerable people in a particular location strongly indicates that it is properly deemed sensitive for Second Amendment purposes. *See, e.g., DiGiacinto v. Rector & Visitors of George Mason Univ.*, 704 S.E.2d 365, 370 (Va. 2011) (holding that "GMU is a 'sensitive place'" because it "is a school" with

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6 *Available at* https://tinyurl.com/yc3d3rtd.

7 *Available at* https://tinyurl.com/ymn9jzf6.

many students "under the age of 18"); *Nordyke v. King*, 563 F.3d 439, 459 (9th Cir. 2009), *vacated*, 611 F.3d 1015 (9th Cir. 2010) ("The [Supreme] Court listed schools and government buildings as examples[of sensitive places], presumably because possessing firearms in such places risks harm to great numbers of defenseless people (e.g., children).").

Indeed, many states exclude firearms from other places that welcome vulnerable segments of the population, particularly children. States frequently bar firearms in and around schools, *see, e.g.*, D.C. Code § 22-4502.01(a), 11 Del. Code Ann. § 1457(a), (b)(1)-(2); Wyo. Stat. Ann. § 6-8-104(t)(ix); 18 Pa. Cons. Stat. § 912, and at school functions, *see, e.g.*, Ga. Code Ann. § 16-11-127.1(b)(1); N.D. Cent. Code § 62.1-02-05(1); W. Va. Code Ann. § 61-7-11a(b)(1). Some states also prohibit weapons in daycare centers and preschools, *see, e.g.*, Mich. Comp. Laws Serv. § 28.425o(1)(b), N.M. Stat. Ann. § 29-19-8(C); S.C. Code Ann. § 23-31-215(M)(6), and other sites frequented by children, *see, e.g.*, 430 Ill. Comp. Stat. 66/65(a)(12) (public playgrounds). Notably, because of these regulations, many places of worship may effectively be sensitive places even in states that have not specifically designated them because places of worship are often attached to parochial schools or childcare sites.

Third, states frequently restrict the use of firearms in confined spaces and locations where large numbers of people tend to gather. *See* Carina Bentata Gryting

& Mark Frassetto, NYRSPA v. Bruen *and the Future of the Sensitive Places Doctrine*, 63 B.C. L. Rev. E. Supp. I.-60, I.-68 (2022) (explaining that "[t]he number of potential targets" and "the increased risk of conflict" inform whether a location is a sensitive place). Religious services frequently involve large, crowded gatherings, especially around holidays, baptisms, weddings, funerals, and other communal events. *See, e.g.*, Jennifer Bisram, *Thousands Pack St. Patrick's Cathedral for Christmas Eve Mass*, CBS New York (Dec. 25, 2022).[8] Indeed, many places of worship have an "open door policy" and are accessible to anyone. *See, e.g.*, Jonah Hicap, *Should churches change open-door policy for security's sake? Leaders express doubts*, Christian Today (Aug. 18, 2015) (describing the "tradition" for "all churches to welcome those who want to pray, join a Bible study or [attend] Sunday services").[9] In dense, crowded spaces, such as a church on Easter, a mosque over Ramadan, or a synagogue on Yom Kippur, firearm use is likely to end in tragedy–not only for those who are shot but also for others who are crushed by panicked crowds. *See, e.g.*, Sophie Reardon, *2 arrested in "targeted shooting" outside Pittsburgh church during funeral*, CBS News (Oct. 28, 2022) (describing individual injured while trying to escape the scene of a church shooting).[10]

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8 *Available at* https://tinyurl.com/9cu6x4yz.

9 *Available at* https://tinyurl.com/2ayww3yb.

10 *Available at* https://tinyurl.com/5434vek3.

Recognizing these dangers, many states limit firearms at crowded events and locations that host large gatherings. *See, e.g.*, N.C. Gen Stat. § 14-277.2(a) (parade routes); 80 Ind. Admin. Code 11-2-2(b) (fairgrounds); Ala. Code § 13A-11-61.2(a) (school and professional athletic events); Tex. Penal Code § 46.03(a) (racetracks and amusement parks); La. Rev. Stat. § 40:1379.3(N) (parades). While these measures vary based on local concerns and conditions, they collectively demonstrate that New York's law is precisely the kind of regulation that states have adopted to address the particular concerns associated with carrying firearms in sensitive places.

In short, New York's restriction on carrying firearms in places of worship and religious observation is a part of a long tradition of states restricting firearms in sensitive places based on the needs of their populations. The provision serves the same purposes as other states' sensitive place laws: it safeguards the exercise of constitutional rights (here, free exercise of religion), it protects vulnerable populations like children and the elderly, and it guards against the heightened risk of injury, both physical and psychological, that can arise when firearms are used in crowded, confined spaces. For these reasons, New York's restriction is consistent with the Second Amendment, and the district court's holding otherwise should be reversed.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief complies with the type-volume limitation in Federal Rule of Appellate Procedure 29(a)(5) because it contains 3,376 words, excluding exempted parts. This brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

/s/ Ashwin P. Phatak
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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on January 24, 2023, an electronic copy of the foregoing was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

/s/ Ashwin P. Phatak
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