IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GREGORY T. ANGELO, ET AL.	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Civil Action No. 22-cv-1878 RDM
	)	
DISTRICT OF COLUMBIA, ET AL.	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN REPLY TO OPPOSITIONS TO APPLICATION FOR PRELIMINARY INJUNCTION

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Exhibits

1. *TRO, Antonyuk v. Hochul*, No. 22-cv-00986, Doc 27 (N.D.N.Y. Oct. 6, 2022)
2. *TRO, Hardaway v. Nigrelli*, No. 22-cv-00771, Doc 35 (W.D.N.Y. Oct. 20, 2022)
3. Jay Young, *Infrastructure: Mass Transit in 19th- and 20th-Century Urban America* (March 5, 2015)
4. Stanford University, *Rise of the Monopolies: The history of American Railroads* (1996)
5. 1 Joseph Chitty, *Commentaries on the Laws of England by the Late Sir W Blackstone* 142-43 n.18 (1826)
6. Dean Weingarten, *1884 New York Street Car Scene Shows Carry of Pistols Common Before 1911*, Ammoland (September 18, 2022)
7. PBS, *The Buffalo War: The Buffalo Yesterday and Today*
8. Kelly Lynn, *DC Woman assaulted by group of teenagers on Metrobus shares what happened in brutal attack*, WJLA (October 20, 2022)
9. Gerstein Affidavit, *United States v. Caston,* Case No. 2022 CF3 005172
10. Declaration of Mark G. Briley
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SUMMARY OF ARGUMENT

The District's attack on Plaintiffs' standing is without merit. This case is distinguishable from *Seegars v. Gonzalez*, 396 F.3d 1248 (D.C. Cir. 2005) (hereinafter "*Seegars*") because Plaintiffs here, unlike in *Seegars*, have no other option but a pre-enforcement challenge to violating the law and facing arrest and prosecution. Moreover, whatever validity *Seegars* had when it was decided, recent Supreme Court decisions have made it clear that pre-enforcement challenges are justiciable outside the First Amendment arena, the most recent being *New York State Rifle & Pistol Ass'n v. City of New York*, 140 S.Ct. 1525 (2020) (hereinafter "*NYSR&P*"). Plaintiffs aver they would carry on the Metro system, but for fear of arrest and prosecution. Under these facts, Supreme Court precedent says that is sufficient to confer standing on them to contest the Metro ban.

Plaintiffs meet all preliminary injunction requirements. They are likely to prevail on the merits because DC failed to point to established, representative "distinctly similar" restrictions from the founding era banning firearm carry on public transportation vehicles. Public transportation arose shortly after ratification of the Second Amendment and grew throughout the 19th Century to include ferry service, riverboats, omnibuses, commuter rail, interstate passenger rail and street cars. In the early 20th Century subway service developed. Defendants point to no laws prohibiting gun carry on these conveyances during the relevant period, much less an established tradition of banning gun carry on public transportation. That dooms DC Code § 7-2509.07(a)(6).

The Metro system is not analogous to schools or the Capitol grounds. The mere fact minors and government workers are present does not convert a public place into a sensitive place. If guns could be banned everywhere children or government workers might be, in no place in the city could Plaintiffs exercise their Second Amendment right to carry a firearm for personal protection. The Court should eschew opposing parties' invitation to engage in interest balancing and focus

instead on the Supreme Court's requirement that DC demonstrate its regulation is consistent with the Nation's historical tradition of firearms regulation. *See New York State Rifle & Pistol Ass'n v. Bruen,*142 S.Ct 2111 (2022) (hereinafter *"Bruen"*). The District has not met that requirement. The few place restrictions DC and amici point to, other than the voting precincts, legislative assemblies, and courts *Bruen* discussed, were enacted in the late 19th Century and thus are far removed from the Second Amendment's adoption, were enacted in only a few states and territories, were not long standing, and most importantly did not ban gun carry on public transportation.

Even today, carry on public transportation is banned in only a handful of states, and the pedigree of those laws dates only back to the late 20th Century. The largest state in the Nation, California – not a particularly favorable state for Second Amendment freedoms – specifically allows carry on public transportation for those with a carry license like Plaintiffs. New York did not ban public transportation carry until a fit of pique following its loss in *Bruen*, and a New York District Court has issued a TRO restraining enforcement of that provision. Because the DC has failed to justify its carry ban as *Bruen* requires, Plaintiffs are likely to succeed on the merits.

Because this case involves a claim of abridgement of Constitutional rights, the merits element drives the remaining preliminary injunction factors. Plaintiffs suffer irreparable injury because infringement of their Constitutional freedoms constitutes irreparable damage. Likewise, Plaintiffs prevail on the balance of interests because the District has no legitimate interest in denying a Constitutional right. Finally, the public interest is always served by vindication of Constitutional rights. Given that Plaintiffs prevail on all four preliminary injunction factors, grant of a preliminary injunction is necessary to protect their Second Amendment rights.

Grant of a permanent injunction is also justified. The District has had enough time to perform legal research into 19th Century locational gun bans. It has come up empty. It apparently

wants to spend a year inquiring into private policies of carriers during the 19th Century, but that inquiry is irrelevant since *Bruen* talks in terms of legislative prohibitions. Obviously, private actors are not governed by the Bill of Rights, so their actions, whatever they might have been during the relevant period, are irrelevant.

ARGUMENT

I. Plaintiffs have standing to challenge DC Code § 7 2509.07(a)(6).

Plaintiffs are concealed pistol license holders and users of the Metro system in the city. Docs 6-5 – 6-8. They aver an intent to exercise their right under the Second Amendment to carry concealed pistols in public, including on the Metro system. They refrain from doing so, however, as DC Code § 7-2509.07(a)(6) makes such conduct a crime. They fear arrest and prosecution should they violate the public transportation carry ban. *Id.* Thus, they bring a pre-enforcement challenge to the District law seeking a declaratory judgement of unconstitutionality, rather than violating the law, facing arrest and prosecution, and asserting unconstitutionality as a defense.

The District has never disclaimed an intent to enforce the Metro carry ban. Yet, the District argues these facts fail to constitute an imminent injury in the Second Amendment context sufficient to grant Plaintiffs standing to contest the carry ban. Doc 18 at 20. The District relies on *Seegars*, 396 F.3d 1248 for the view that to obtain standing Plaintiffs must be personally singled out or uniquely targeted for prosecution. Doc 18 at 20-21.[1] As we discuss below, *Seegars* implies – as

[1] The District's assertion is not a fair reading of *Seegars.* The Court in *Seegars* actually stated,

> To the extent that this language implied that plaintiffs must be individually or specifically burdened in a way distinct from some broader class of potential prosecutees, it is at variance with Supreme Court precedent. Although injuries that are shared *and* generalized – such as the right to have the government act in accordance with the law – are not sufficient to support standing, see *Allen v. Wright*,468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984), "where a harm is concrete, though widely shared, the Court has found injury in fact." *FEC v. Akins*,524 U.S. 11, 24, 118 S.Ct. 1777, 141 L.Ed.2d 10 (1998) (internal quotation marks omitted); see also *Public Citizen v. United States Dep't of Justice*,491 U.S.

have other courts in this circuit – that in non-First Amendment cases litigants must meet a higher threshold to show standing in pre-enforcement challenges. This is not the law under binding Supreme Court precedent. Moreover, *Seegars* is distinguishable.

To the extent *Seegars*, and before that, *Navegar, Inc. v. U.S.*, 103 F.3d 994 (D.C. Cir. 1997), on which *Seegars* relied,[2] was good law, they have been eviscerated by the recent decision in *NYSR&P*, 140 S.Ct. 1525. That case involved a New York City ordinance which prevented plaintiffs from transporting their guns to a second home, firing range, or shooting competition outside the city. *Id.* at 1526. The record there contains no evidence plaintiffs were singled out or otherwise threatened with prosecution beyond the general expectation the city would enforce its

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> 440, 449-50, 109 S.Ct. 2558, 105 L.Ed.2d 377 (1989) (plaintiffs had standing to challenge non-disclosure of information even where innumerable other parties might make identical requests for disclosure).

Seegars, 396 F.3d at 1253. The harm Plaintiffs face here is not shared by the general public; it is specific to persons like Plaintiffs who are licensed to carry a concealed handgun in public for self-defense and who operate under detailed regulations concerning when and where they may carry their concealed handguns.

[2] *Navegar* found a lack of standing for a pre-enforcement challenge to a portion of the Violent Crime Control and Law Enforcement Act of 1994, Pub.L. No. 103-322, 108 Stat. 1796 ("the Act") which referred to weapons and accessories sharing certain features, rather than to particular brands and models of weapons. 103 F.3d at 1000. The court held that "because the general nature of the language in these portions of the Act makes it impossible to foretell precisely how these provisions may be applied, the issues presented in these challenges are less fit for adjudication, suggesting additional concerns as to their ripeness." *Id.* at 1001. The court in *Seegars* considered itself bound by the holding in *Navegar*, while raising doubt as to its conformity with then existing Supreme Court precedent. *See Seegars*, 396 F.3d at 1253-56.

Significantly, *Navegar* states, "To require litigants seeking resolution of a dispute that is appropriate for adjudication in federal court to violate the law and subject themselves to criminal prosecution before their challenges may be heard would create incentives that are perverse from the perspective of law enforcement, unfair to the litigants, and totally unrelated to the constitutional or prudential concerns underlying the doctrine of justiciability." 103 F.3d at 1000-01. As we show herein, application of *Seegars* to deny Plaintiffs the right to litigate the Constitutionality of the Metro carry ban creates just such perverse incentives and unfairness to the litigants unrelated to the prudential concerns underlying the doctrine of justiciability.

law. *See* Joint App'x, Case No. 18-280 at 26-48 (US May 7, 2019) (amended complaint). *See also New York State Rifle & Pistol Ass'n v. City of New York,* 883 F.3d 45 (2d Cir. 2016); *New York State Rifle & Pistol Ass'n v. City of New York,* 86 F. Supp. 3d 249 (S.D.N.Y. 2015). After the Supreme Court granted certiorari, the city repealed its regulation and sought dismissal of the case as moot. 140 S.Ct. at 1526. Although the Court found the *NYSR&P* plaintiffs had received all the relief they requested in their complaint, rather than dismissing the case as moot, the Court vacated the judgement below and remanded for the Court of Appeals and the District Court to determine whether the plaintiffs could add a damage claim. *Id*. at 1526-27.

The Supreme Court raised no issue as to standing of the *NYSR&P* plaintiffs to make a pre-enforcement challenge. 140 S.Ct. 1525. Indeed, Justices Thomas, Alito and Gorsuch would have decided the case on the merits in plaintiffs' favor. *See* 140 S.Ct. at 1540-44 (Alito, J. dissenting). If plaintiffs had needed to be singled out or personally threatened to have standing, the Court would have never reached the question whether the claims were moot, nor would the Court have vacated and remanded for a determination whether the plaintiffs could assert a damage claim for violation of their Second Amendment rights. The Court would have simply dismissed the case for lack of jurisdiction, as standing is a requirement under Article III's requirement of a case or controversy. *See, e.g., Frothingham v. Mellon,* 262 U.S. 447 (1923); *Schlesinger v. Reservists Comm. to Stop the War,* 418 U.S. 208, 225-26 (1974). Because the Supreme Court's resolution of *NYSR&P* is inconsistent with the District's view that Plaintiffs must be singled out or personally threatened with arrest to have standing, the conclusion that Plaintiffs here have standing to challenge the Metro carry ban is manifestly clear.[3]

[3] No other circuit requires a person pursuing a pre-enforcement challenge in a non-First Amendment context to be singled out or personally threatened to have standing to challenge the offending statute. *See, e.g., Bach v. Pataki,* 408 F.3d 75 (2d Cir. 2005); *Mobil Oil Corp. v. Attorney*

This case does not involve a generalized grievance. Plaintiffs are personally coerced by DC Code § 7-2509.07(a)(6) into not carrying their licensed handguns on the Metro system lest they face arrest and prosecution. The right to bear arms is a fundamental individual right which Plaintiffs must forego on the Metro because of the risk of arrest and prosecution. Cases are clear that even the momentary loss of Constitutional rights constitutes irreparable injury for obtaining a preliminary injunction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (hereinafter "*Elrod"*). *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (hereinafter *"Gordon"*). *See also Davis v. District of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998)). Thus, "although a plaintiff seeking equitable relief must show a threat of substantial and immediate irreparable injury, a prospective violation of a constitutional right constitutes irreparable injury for these purposes." *Id.* (brackets omitted) (quoting *Davis*, 158 F.3d at 1346). By alleging that the defendants have deprived Plaintiffs of a fundamental individual constitutional right, and that this deprivation may be remedied by judicial relief, Plaintiffs have adequately satisfied the Article III standing requirements. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992); *Tennessee Elec. Power Co. v. TVA*, 306 U. S. 118, 137–138 (1939).

Gen. of Va., 940 F.2d 73, 75 (4th Cir. 1991); *Peoples Rights Organization, Inc. v. Columbus*, 152 F.3d 522 (6th Cir. 1998); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999); *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953 (9th Cir. 2014); *Hejira Corp. v. MacFarlane*, 660 F.2d 1356 (10th Cir. 1981).

In *Antonyuk v. Hochul*, Case No. 22-cv-00986, Doc 27 (N.D.N.Y. Oct. 6, 2022), admin. stay issued (2d Cir. Oct. 12, 2022), the court temporarily restrained New York's recently enacted public transportation carry ban. *See* Exhibit 1, hereto. The court's order fails to indicate plaintiffs there were singled out or directly threatened with arrest. Rather the court pointed to the local sheriff saying he would be enforcing the provision, albeit conservatively, while noting that carrying a firearm into any sensitive area is a felony. *Id.* at 15. *See also Hardaway v. Nigrelli*, No. 22-cv-771, Doc 35 at 7-9 (W.D.N.Y. Oct. 20, 2022) (hereinafter *"Hardaway"*) (court found plaintiff had standing to contest New York's recently enacted ban on gun carry in churches, stating that in light of the recency of the law and lack of any indication that it will be repealed the court will presume the government will enforce it) (Copy attached as Exhibit 2).

Nor is this rule peculiar to First Amendment cases. It is true that many pre-enforcement challenges come in the First Amendment arena. *See, e.g., Babbitt v. United Farm Workers Nat'l Union,* 442 U.S. 289 (1979) (hereinafter "*Babbitt"*); *Virginia v. American Booksellers Ass'n,* 484 U.S. 383 (1988); *ACLU v. Alvarez,* 679 F.3d 583, 590 (7th Cir. 2012); *Rhode Island Ass'n of Realtors, Inc. v. Whitehouse,* 199 F.3d 26, 33 (1st Cir. 1999). And the Supreme Court has relaxed the standing rules in some First Amendment cases, particularly in overbreadth challenges. *See, e.g., United States v. Stevens,* 559 U.S. 460 (2010). Cases in this circuit have accordingly suggested a relaxed standing requirement applies in the First Amendment arena compared to other challenges, including challenges alleging violation of Second Amendment rights and have distinguished *Seegars* from First Amendment pre-enforcement challenges on that basis. *See, e.g., Green v. U.S. Dept. of Justice,* 392 F. Supp. 3d 68, 82-84 (D.D.C. 2019). But this takes the Supreme Court's standing doctrine in First Amendment cases too far. There is no practical difference in abstaining from speech because of fear of arrest under an unconstitutional regulation and abstaining from the fundamental Second Amendment right because of fear of arrest under an unconstitutional infringement of the right to keep and bear arms.

The Supreme Court, moreover, has expressly disclaimed that a challenger to a criminal law must violate the law and face criminal prosecution before challenging it. "When an individual is subject to such a threat, an actual arrest, prosecution, or other enforcement action is not a prerequisite to challenging the law." *Susan B. Anthony List v. Driehaus,* 573 U.S. 149, 158 (2014), citing *Steffel v. Thompson,* 415 U. S. 452 (1974) ("[I]t is not necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights"). "Specifically, we have held that a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct arguably

affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* at 159, citing *Babbitt,* 442 U. S. at 298. The Court did not suggest this standard applies only to First Amendment cases.

Heller makes it plain that Second Amendment rights are routed in the fundamental right of self-defense. Although no one can minimize the importance of free speech and an informed electorate in a representative republic, *see e.g.,* Alexander Meiklejohn, *Free Speech and its Relation to Self Government* (Harper Bros. Pub. 1948), political rights are meaningless if one is not alive to exercise them. Moreover, *Bruen* explicitly warned that , "[th]e constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.' *McDonald [v. City of Chicago],* 561 U.S. [742,] 780, 130 S.Ct. 3020 [2010] (plurality opinion)." *Bruen,* 142 S.Ct. at 2156.[4] Just as the Second Amendment is not subject to a separate set of rules substantively, it is not subject to a separate set of rules jurisdictionally. The Supreme Court's admonition applies with no less force to unduly restrictive interpretations of Article III standing that are designed to keep the courthouse doors closed to meritorious Second Amendment claims.

Even before *NYSR&P,* Supreme Court precedent did not support a lesser standing requirement when a First Amendment restriction is under a pre-enforcement challenge. As the Court explained in *MedImmune, Inc. v. Genentech, Inc*., 549 U.S. 118, 128-29 (2007) (hereinafter "*MedImmune"*), "where threatened action by *government* is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—

[4] The Court in *Bruen* suggested parallels in the treatment of First and Second Amendment rights, stating, the standard it was adopting for analysis of Second Amendment rights "accords with how we protect other constitutional rights. Take, for instance, the freedom of speech in the First Amendment, to which *[District of Columbia v.] Heller* repeatedly compared the right to keep and bear arms. 554 U.S. [570,] 582, 595, 606, 618, 634-635 [2022]." *Bruen*, 142 S.Ct. at 2130.

for example, the constitutionality of a law threatened to be enforced. The plaintiff's own action (or inaction) in failing to violate the law eliminates the imminent threat of prosecution, but nonetheless does not eliminate Article III jurisdiction." (Emphasis in original.) The Court discussed various pre-enforcement challenges, including *Terrace* v. *Thompson*, 263 U.S. 197 (1923) (involving a state law which prohibited leasing land to an alien and

> *Steffel* v. *Thompson*, 415 U.S. 452 (1974), [where] we did not require the plaintiff to proceed to distribute handbills and risk actual prosecution before he could seek a declaratory judgment regarding the constitutionality of a state statute prohibiting such distribution. *Id.*, at 458–460. As then-Justice Rehnquist put it in his concurrence, "the declaratory judgment procedure is an alternative to pursuit of the arguably illegal activity." *Id.*, at 480. In each of these cases, the plaintiff had eliminated the imminent threat of harm by simply not doing what he claimed the right to do (enter into a lease, or distribute handbills at the shopping center). That did not preclude subject-matter jurisdiction because the threat-eliminating behavior was effectively coerced. See *Terrace*, *supra*, at 215–216; *Steffel*, *supra*, at 459. The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is "a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate." *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 152 (1967).

549 U.S. at 129.

MedImmun was not a First Amendment challenge. Rather the plaintiff was a party to a patent license agreement and sought a declaratory judgement that the patent was invalid. The Federal Circuit dismissed the case, finding a lack of standing because the plaintiff continued to pay royalties under the agreement and was in no danger of being sued for infringement. 427 F.3d 958 (2005). The Supreme Court, however, held "petitioner was not required, insofar as Article III is concerned, to break or terminate its 1997 license agreement before seeking a declaratory judgment in federal court that the underlying patent is invalid, unenforceable, or not infringed." *MedImmune*, 549 U.S. at 137. *MedImmune* simply cannot be squared with a view there is one standing requirement for First Amendment cases and another for others.

Finally, even if *Seegars* and *Navegar* survive *NYSR&P*, those cases are distinguishable. *Seegars* involved a challenge to the DC handgun ban, stuck down in *District of Columbia v. Heller*, 554 U.S. 570 (2008) (hereinafter "*Heller*"). Although *Seegars* indicates plaintiffs there would have had standing if personally threatened with arrest for possessing handguns in DC in violation of the law, as Chief Judge Ginsburg observed in concurring in the denial of rehearing *en banc*, the *Seegars'* plaintiffs had a ready means for seeking relief with respect to the DC handgun ban without awaiting criminal prosecution. *See* 413 F.3d 1 (D.C. Cir. 2005). They could have applied to register a pistol and then challenged the subsequent denial.[5] *Id.* Thus, a pre-enforcement challenge was not their "sole means of seeking relief" to challenge the DC handgun ban. *Id.* That distinction between the *Seegars* plaintiffs and Plaintiffs here is important. No Supreme Court decision has ever held that relief is unavailable unless either the plaintiff has been prosecuted or has a special, personalized threat of prosecution. That officials will enforce laws is presumed, absent substantial and credible evidence to the contrary. "Thus, in numerous pre-enforcement cases" the Supreme Court "did not place the burden on the plaintiff to show an intent by the government to enforce the law against it," but rather the Court "presumed such intent in the absence of a disavowal by the government or another reason to conclude that no such intent existed." *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013). Here, the District has not disavowed enforcement of the Metro Ban.

The District argues Plaintiffs must demonstrate the harm they suffer is imminent, but the test for that inquiry is merely whether there is "a creditable threat of enforcement." *Barke v. Banks*, 25 F.4th 714, 718-19 (9th Cir. 2022). Under that standard, "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need

[5] Dick Heller followed this course in overturning the District's unconstitutional handgun ban. *See Parker v. District of Columbia,* 478 F.3d 370, 375-76 (D.C. Cir. 2007), *aff'd Heller,* 554 U.S. 540.

not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Babbitt,* 442 U.S. at 302. *See New Hampshire Right to Life Political Action Comm. v. Gardner,* 99 F.3d 8, 14-15 (1st Cir.1996) ("This standard -- encapsulated in the phrase "credible threat of prosecution" – is quite forgiving."), citing *Babbitt*, 442 U.S. at 302. *See Valle del Sol Inc. v. Whiting,* 732 F.3d 1006, 1015 n.5 (9th Cir. 2013) ("we have never held that a specific threat is necessary to demonstrate standing").

Under the District's view of *Seegers*, a constitutional violation enforced by a zero-tolerance policy would be unchallengeable since everyone faces the same generalized threat of prosecution. That is obviously not a correct statement of the law. Were the DC Circuit to adopt this view it should expect reversal pursuant to the Supreme Court's supervisory authority. *See e.g., Caetano v. Massachusetts,* 577 U.S. 411 (2016). Here Plaintiffs' sole remedy, other than breaking the law, risking arrest and prosecution, is a pre-enforcement challenge to DC Code § 7-2509.07(a)(6). They seek a declaratory judgement that the Metro ban is unconstitutional. This is not a generalized grievance. Plaintiffs hold licenses to carry handguns in public for self-defense. They have registered their guns with MPD. A specific statute governs when and where they may carry their firearms.[6] The ramifications of violating the statute are substantial: fines, imprisonment and the loss forever in the District of their Second Amendment rights. *See* DC Code § 7-2502.03(a)(2) (disqualifying persons from registering a firearm if ever convicted of a weapons offense). An actual case and controversy exists here conferring Article III jurisdiction. DC vigorously enforces its gun laws and has not disclaimed the intention to enforce this statute. Indeed, given its response

[6] *Cf. Navegar, Inc. v. U.S.*, 103 F.3d at 1001 ("[B]ecause the general nature of the language in these portions of the Act makes it impossible to foretell precisely how these provisions may be applied, the issues presented in these challenges are less fit for adjudication, suggesting additional concerns as to their ripeness").

herein, the city considers the ban essential to protect public safety. Standing plainly exists. Finally, to the extent the Court is uncertain as to standing, Plaintiffs intend to explore the city's intent to enforce the subject ban in discovery.

II. The Bruen *framework.*

Both the government and amici demonstrate a fundamental misunderstanding of *Bruen.* Their filings essentially suggest that the Court in conducting the sensitive places analysis here engage in the same means-ends interest balancing *Bruen* rejected. Their essential argument spread throughout their filings is guns are dangerous and guns are especially dangerous on the Metro. Although the first point is indisputable, the second is debatable, but largely irrelevant under the analysis *Bruen* requires. Accordingly, it is appropriate to review *Bruen's* framework.

In *Bruen*, the Court expressly rejected means-end scrutiny generally, and specifically the watered-down intermediate scrutiny that had predominated in the lower federal courts:[7] "Today, we decline to adopt that two-part approach. . . . Despite the popularity of this two-step approach, it is one step too many." *Bruen*, 142 S.Ct. at 2127. Means-end scrutiny is inappropriate because it allows courts to "defer to the determinations of legislatures." *Id*. at 2131. "[W]hile that judicial deference to legislative interest balancing is understandable – and, elsewhere, appropriate – it is not deference that the Constitution demands here." *Id*.[8] *Bruen* reiterated *Heller*'s refusal "to engage in means-end scrutiny generally" and expressly rejected "the intermediate-scrutiny test that respondents and the United States now urge us to adopt." *Id*. at 2129.

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[7] *See, e.g., Heller v. District of Columbia,* 670 F.3d 1244, 1252 (D.C. Cir. 2011) (hereinafter *"Heller II"*); *Ezell v. City of Chicago*, 651 F.3d 684, 701-04 (7th Cir. 2011) (hereinafter "*Ezell"*); *United States v. Chester*, 628 F.3d 673, 680 (4th Cir. 2010); *United States v. Marzzarella*, 614 F.3d 85, 89 (3d Cir. 2010).

[8] The amicus brief submitted by Illinois and several other states, essentially calls for the same type of deference to state legislative judgements *Bruen* rejected. *See* Doc 24 at 10.

Bruen endorsed a test based **solely** on text, history, and tradition. "We reiterate that the standard for applying the Second Amendment is as follows: "When the Second Amendment's plain text covers an individuals' conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation." *Id.* at 2129-30. "The test that we set forth in *Heller* and apply today requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding." *Id.* at 2131. In such cases, "the government may not simply posit that the regulation promotes an important interest," rather "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id. at* 2126. *See Id.* at 2150 ("we are not obliged to sift the historical materials for evidence to sustain New York's statute. That is respondents' burden.")

Bruen thus abrogated the two-step, intermediate scrutiny test lower federal courts had predominately followed in assessing Second Amendment claims. Rather, this Court must now stop at the first step of that "two step" analysis. "Step one of the predominant framework is broadly consistent with *Heller*, which demands a test rooted in the Second Amendment's text, as informed by history." *Bruen*, 142 S.Ct. at 2126. The first step is to examine whether the regulation at issue regulates a matter that falls within the "plain text" of the Second Amendment. *Bruen*, 142 S.Ct. at 2129-30. Here the conduct at issue is carrying a firearm in public for self-defense by law abiding persons, conduct *Bruen* confirms the Second Amendment protects. We know Plaintiffs are law abiding because the District has vetted them prior to issuing their concealed carry pistol licenses. The regulation at issue limits their Constitutionally protected conduct by prohibiting them from carrying their concealed handguns on public transportation.

Bruen reiterates *Heller's* holding, 554 U.S. at 582, that "the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.'" *Bruen*, 142 S.Ct. at 2132, quoting *Heller*, 554 U.S. at 582. *Heller* established conclusively that possession of commonly owned firearms for self-defense comes under the protection of the Second Amendment. *See Heller*, 554 U.S. at 592 (Second Amendment "guarantee[s] the individual right to possess and carry weapons in case of confrontation.") *Bruen* extends *Heller's* holding to carrying firearms for personal protection. So, Plaintiffs meet the first portion of the *Bruen* test. *Bruen* instructs that where the plain text of the Second Amendment covers the individual's conduct, then "the Constitution presumptively protects that conduct." *Bruen*, 142 S.Ct. at 2130. At that point "[t]he government must then justify its regulation by demonstrating it is consistent with the Nation's historical tradition of firearm regulation." *Id.*

"'Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.'" *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–635). The government must thus look to 1791 (when the Bill of Rights were adopted), or at the latest, 1868 (when the Fourteenth Amendment was adopted). *See Bruen*, 142 S.Ct. at 2135 ("The Second Amendment was adopted in 1791; the Fourteenth in 1868. Historical evidence that long predates or postdates either date may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years."). Thus, contrary to amicus Everytown's argument (Doc 23 at 6-7), "late-19th-century evidence cannot provide much insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id*. at 2154. Likewise, *Bruen* refused even to address "any of the 20th-century historical evidence brought to bear by respondents or their amici," ruling that such evidence "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* at 2154 n.28.

The government must "identify a **well-established and representative** historical analogue to its regulation" dating back to *circa* 1791. *Id.* at 2133 (emphasis added). In conducting this analysis, *Bruen* states "courts should not 'uphold every modern law that remotely resembles a historical analogue,' because doing so 'risk[s] endorsing outliers that our ancestors would never have accepted.'" *Id.* at 2133, quoting *Drummond v. Robinson*, 9 F.4th 217, 226 (3d Cir. 2021). Rather, "the government [must] identify a well-established and representative historical *analogue*." *Id.* Outliers are not acceptable. *Bruen*, 142 S.Ct. at 2133, 2153, 2156, 2147 n.22. Thus, *Bruen* rejected New York's reliance on three colonial statutes (1686 East New Jersey, 1692 Massachusetts, 1699 New Hampshire), *Id.* at 2142–44, three late-18th-century and early-19th-century state laws that "parallel[] the colonial statutes" (1786 Virginia, 1795 Massachusetts, 1801 Tennessee), *Id.* at 2144–45, three additional 19th-century state laws (1821 Tennessee, 1871 Texas, 1887 West Virginia), *id.* at 2147, 2153, five late-19th-century regulations from the Western Territories (1869 New Mexico, 1875 Wyoming, 1889 Idaho, 1889 Arizona, 1890 Oklahoma), *Id.* at 2154–55, and one late-19th-century Western State law (1881 Kansas), *Id.* at 2155–56.[9]

Here, the conduct DC's statute targets does not represent an unprecedented societal concern nor does it arise from dramatic technological change. *See Heller*, 554 U.S. at 633. The threat of interpersonal violence in an urban setting is not a new phenomenon. And even if modern laws alone could demonstrate a broad tradition of a regulation – and under *Bruen* they cannot – there must at least be a strong showing that such laws are common in the states. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 423–26 (2008) (only six states permitting death penalty for child rapists shows national consensus against it). Opposing parties fail in this regard as well.

[9] The Court did not necessarily agree with the government's reading of the colonial laws or the early state laws, but the Court stated that "even if" the government's reading were correct, the record would not justify the challenged regulation. *See Bruen*, 142 S.Ct. at 2144.

Thus, here, as in *Bruen*, the historical analysis is "fairly straightforward" and "simple." *Bruen*, 142 S.Ct. at 2131–32. The historical analysis is straightforward when, for instance, "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*. at 2131 (emphasis added). The historical analysis is also straightforward when "the Founders themselves could have adopted [a 'distinctly similar' historical regulation to the challenged law] to confront that problem" but did not. *Id*. "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id*. As we show herein, neither the government nor amici have pointed to a "distinctly similar" regulation to the Metro ban, much less a **well-established representative distinctly similar regulation**. Doc 18 at 10. The District never acknowledges this test. *Bruen* also would allow consideration of "relevantly similar" analogues, but only in "cases implicating unprecedented societal concerns or dramatic technological changes." *Bruen*, 142 S.Ct. at 2132. Those circumstances do not exist here; nor has the District met this slightly less intensive, relevantly similar, test.

Bruen further explained, "Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited – e.g., legislative assemblies, polling places, and courthouses – we are also aware of no disputes regarding the lawfulness of such prohibitions." *Id.* at 2133, citing David Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine*, 13 Charleston L. Rev. 205, 229-236, 244-247 (2018) (hereinafter "Kopel, 'The Sensitive Places Doctrine'") and Brief for Independent Institute as *Amicus Curiae* at 11-17**,** Case No. 20-843 (US)**.** "We therefore can assume it settled that these locations were

'sensitive places'… [a]nd courts can use analogies to **those** historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* (Emphasis added.) When assessing "which similarities are important and which are not" the Court looks at (1) "whether modern and historical regulations impose a comparable burden on [a law-abiding citizen's] right of armed self-defense," and (2) "whether that [regulatory] burden is comparably justified." *Id.* at 2132-33.

Heller and *Bruen* "exemplifie[d] this kind of straightforward historical inquiry." *Bruen*, 142 S.Ct. at 2131. Both examined laws enacted to remedy centuries-old problems. Both found those laws lacked an established representative historical analogue. Both, accordingly, declared those laws unconstitutional. In *Heller,* the DC law "addressed a perceived societal problem – firearm violence in densely populated communities" by banning handgun possession in the home. *Bruen*, 142 S.Ct. at 2131. Although "the Founders themselves could have adopted [a similar law] to confront that problem," they did not. *Id*. The Court found it dispositive that no "Founding-era historical precedent" banned handgun possession in the home. *Id*. *Bruen* examined New York's proper cause requirement for obtaining a handgun carry license, which "concern[ed] the same alleged societal problem addressed in *Heller*: handgun violence, primarily in urban area[s]." *Id.* (cleaned up). In striking down New York's proper cause requirement, the Court deemed it controlling that the law lacked an analogue from "before, during, and even after the Founding." *Id.* at 2131–32. As we discuss below, these same points apply equally to DC's Metro carry ban.

At the Founding, the preferred means of addressing the threat of violence was to require individuals to be armed. States "typically required that arms be brought to churches or to all public meetings," and "statutes required arms carrying when traveling or away from home." *See* Kopel

The "Sensitive Places" Doctrine, at 232 (2018) (cited with approval in *Bruen*, 142 S.Ct. at 2133). Plaintiffs here simply want to exercise the same behavior when traveling on public transportation.

III. Neither the government nor amici have shown that a public transportation system is a sensitive area where Second Amendment rights may be proscribed; as such they have not rebutted Plaintiffs' showing of likelihood of success on the merits.

Plaintiffs have shown they are law-abiding persons issued licenses to carry pistols in public in the District, that they would carry their licensed pistol on the Metro system for personal protection, but they decline to do so out of fear of arrest and prosecution. They thus show they come under the plain text of the Second Amendment, which encompasses the right to carry a firearm in public for self-defense. The Constitution presumptively protects that conduct. *Bruen*, 142 S.Ct. at 2126. It was thus incumbent on DC to show, based on the Nation's historical tradition of firearms regulation, that carrying firearms on public transportation may be prohibited. The District has failed to do so. As such, the conclusion Plaintiffs are likely to prevail on the merits of their claim that the Metro ban is unconstitutional is plainly evident. A review of the history of public transportation in the United States will underscore this conclusion.

A. The history of American public transportation in the 19th Century.

Although not prevalent when the Second Amendment was adopted, mass transit systems appeared soon after the founding. Streetcars, elevated and commuter rail, subways, buses, ferries, and other transportation vehicles serving large numbers of passengers and operating on fixed routes and schedules have been part of the urban scene in the United States since the early 19th century. Jay Young, *Infrastructure: Mass Transit in 19th- and 20th-Century Urban America* at 1 (March 5, 2015) (Exhibit 3 hereto).

In 1785, none other than the father of our country, George Washington, established the Patowmack Company to improve the navigability of the Potomac River using canals in what now

the Washington, DC metro area. Soon after, ferry boats regularly crossed the waters of American cities in the early 19th century providing an important precedent to the mass transit industry that emerged later in the century. *Id.* at 2. Steam ferry service, established by Robert Fulton, the steam-boat's inventor, connected Brooklyn and New Jersey to Manhattan in the early 1810s and horse-drawn omnibuses plied city streets starting in the late 1820s. *Id.* at 1. The development of ferry service illustrates the dominant role New York City would play in American urban mass transit. *Id.* at 2. By the 1860s, annual ridership of New York's ferries expanded to more than 32 million. *Id.* Thirteen companies employed 70 steamboats on more than 20 different routes. *Id.* Similar service spread to other northeastern cities, such as Philadelphia, Pittsburgh and Cincinnati. *Id.*

Expanding networks of horse railways emerged by the mid-19th Century prior to the adoption of the 14th Amendment. *Id.* By the late 1820s, New York became home to the first significant form of land-based mass transit: the omnibus. *Id.* This operation involved a large horse-drawn wheeled carriage similar to a stagecoach, open for service to the general public at a set fare. *Id.* Abraham Brower brought the service to New York in 1828 when he launched a route running along Broadway. *Id.* Brower's original vehicles held approximately 12 passengers. *Id.* Three years after Brower inaugurated service, more than 100 omnibuses traveled New York streets. *Id.* By the 1840s, Boston, Philadelphia, Baltimore, and other American cities had omnibus service. It spread from larger to smaller cities in subsequent decades. *Id.*

Horsecars, set on rails, allowed for more passenger capacity and reduced the time and cost of commuting to and from the city's central core. *Id.* at 3. The first horsecar line began service in New York in 1832. *Id.* Following a slow start, other American cities adopted horsecars by the 1850s. *Id.* Typically, a private company ran lines under a municipal franchise. *Id.* By the end of the 1850s, New Orleans, Boston, Philadelphia, Baltimore, Pittsburgh, Chicago, and Cincinnati

provided the service. *Id.* Further expansion developed during the 1860s. *Id.* Two decades later, some 20,000 horsecars traveled on more than 30,000 miles of street railway across the Nation. *Id.*

By the mid-19th century, commuter railways using steam locomotives connected residents living in suburban areas to places of work and entertainment in large cities. *Id.* at 4. Steam power allowed for the introduction of elevated trains in large urban areas such as New York City and Chicago, but they also existed in smaller cities such as Sioux City, Iowa, and Kansas City, Missouri. *Id.* Electric power later led to establishment of cable car lines, street cars and subways. *Id.* at 5. Cable cars were propelled by a moving cable within a street conduit. *Id.* The first cable car line was established in San Francisco in 1873. *Id.* at 5. Most large cities across the United States soon followed building cable car networks. *Id.* Electric street cars made their debut in the 1890s, and by 1913 most cable car lines were replaced by street cars. *Id.* Subway service commenced in Boston in 1898 and in New York City in 1904. *Id.* at 6.

The idea to build a railroad in the United States is attributed to Colonel John Stevens, in 1812. *See* Stanford University, *Rise of the Monopolies: The history of American railroads* (1996) (Exhibit 4, hereto). The earliest railroads consisted of horse drawn cars running on tracks, used for transporting freight. *Id.* The first built was the Granite Railway of Massachusetts, which ran approximately three miles in 1826. *Id.* The first regular passengers and freight carrier was the Baltimore and Ohio railroad, completed in 1827. *Id.* On Christmas Day, 1830, the South Carolina Canal and Railroad Company completed the first mechanical passenger train, marking the birth of the modern railroad industry. *Id.*

By 1835, dozens of local railroads existed. *Id.* With each passing year, the number of railway systems grew exponentially. *Id.* By 1850, more than 9,000 miles of track had been lain. *Id.* The proliferation of railroads let to increased standardization. *Id.* An ideal locomotive was developed which served as the model for subsequent trains. *Id.* Various companies

began to cooperate with one another, to both maximize profits and minimize expenditures. *Id.* In 1850, the New York Central Railroad Company was formed by merging a dozen railroads between the Hudson River and Buffalo. *Id.* Between 1851 and 1857, the U.S. government issued land grants to Illinois to construct the Illinois Central railroad. *Id.* The government set a precedent with this action, fostering the growth of one of the larger companies in the nation. *Id.*

With the onset of the Civil War, production of new railroads fell dramatically. *Id.* At the same time, however, usage of this mode of transportation increased significantly. *Id.* For example, the Battle of Bull Run was won by a group of reinforcements shuttled in on a railroad car. *Id.* By the conclusion of the war, the need for an even more diverse extension of railways was extremely apparent. *Id.* Soon after the war, the first transcontinental railroad was constructed. *Id.* The Union Pacific Railroad company started building from the east, while the Central Pacific began from the west. *Id.* The two companies met at Promontory Point, Utah, on May 10, 1869. *Id.* As they drove the Golden Spike uniting the two tracks, a new age was born. *Id.* Several more transcontinental railroads were built before the end of the century. *Id.*

In the 19th Century riverboat travel on the Mississippi river and its tributaries was another means of public transportation. The first steamboat to travel the Mississippi was the *New Orleans*, whose October 1811 maiden voyage began in Pittsburgh, PA, and ended in New Orleans after traveling along the Ohio and Mississippi Rivers. "A History of Riverboats in Mississippi," available at https://tinyurl.com/mtfp7pd5. By the 1830s, steamboats existed all along the Mississippi River and its major tributaries. *Id.* Propelled by steam-driven paddle wheels, steamboats could navigate the river more quickly and effectively than barges or flatboats. They carried goods such as cotton, timber, and livestock up and down the river, expanding trade throughout the growing U.S. *Id.* Wealthy persons could enjoy leisure

travel on a showboat -- a riverboat used for theater and musical performances. *Id.* Showboats were ornately decorated and would announce their arrival at a port by playing loud music. *Id.*

During the civil war, many steamboats carried troops, provisions, and supplies along the Mississippi river. *Id.* Demand for ships was so high that both the Union and Confederate governments chartered steamboats. *Id.* Riverboat gambling became popular in the early 1900s due to legislation surrounding gaming. *Id.* By keeping games of chance restricted to a riverboat, business owners could evade anti-gambling laws in effect on land in states along the Mississippi. *Id.* According to National Geographic, by 1900, the growth of railroads across the U.S. significantly reduced demand for transporting goods and people via steamboat. *Id.* Many riverboats were retired, but a few showboats remained as a testament to this period. *Id.*

B. There is an absence of post ratification legislation restricting firearm carry on public transportation.

Given the ubiquity of public transportation systems post enactment, the absence of gun carry restrictions is remarkable. Neither DC nor its amici cite a single instance, much less an established history and tradition, of legislation banning gun carry on public transportation in the relevant time period, be that from the founding to the 14th Amendment, or the period following the 14th Amendment's ratification to the beginning of the 20th Century, a time *Bruen* regards as much less significant, 142 S.Ct. at 2137, notwithstanding Everytown's plea to the contrary. *See* Doc 23 at 6-7.[10] That is sufficient to doom the District's public transportation carry ban.

[10] As the Court in *Bruen*, explains (142 S.Ct. at 2137-28):

> [W]e have generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791. *See, e.g., Crawford v. Washington*, 541 U.S. 36, 42-50, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004) (Sixth Amendment); *Virginia v. Moore*, 553 U.S. 164, 168-169, 128 S.Ct. 1598, 170 L.Ed.2d 559 (2008) (Fourth Amendment); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122-125, 131 S.Ct. 2343, 180 L.Ed.2d 150 (2011) (First Amendment).

As shown above, public transportation systems have existed from shortly after the founding. This is thus not a case "implicating unprecedented societal concerns or dramatic technological changes." *Bruen*, 142 S.Ct at 2132. Although public transportation today is not far removed from public transportation as it evolved during the 19th Century, even were we to telescope the historical inquiry to the 20th Century, which *Bruen* says we cannot (*see* 142 S.Ct. at 2137, 2154), the lack of long-standing regulations against gun carry on public transportation is still clear. Although Illinois cites a few additional late 20th Century statutes relating to firearms on public transportation (Doc 24 at 13), it fails to indicate how long these statutes have been outstanding, nor does it dispute that the earliest enactment of the handful of statutes we cited date back at the earliest to 1980s. *See* Doc. 6-1 at 41. Moreover, several of the laws Illinois cites (*Id.*) relate to discharge of firearms on public transportation (*see* Minn. Stat. §609.85; Wash. Rev. Code §9.4I.040), not carriage of firearms. And the California statutes cited (Cal. Penal Code §§171.7(b)(1), 171.7(c)(2)), as Illinois admits, specifically exempt persons with a carry license such as Plaintiffs here. *Id.* In sum, at the founding and throughout most of the 19th Century there were few location specific carry restrictions, and no carry restrictions that DC or amici have pointed to at any time in the 19th Century or early 20th Century relating to public transportation.

This is consistent with *Bruen's* observation that in the founding period, location carry restrictions were limited to courts, legislative assemblies, and voting precincts. *Bruen*, 142 S.Ct. at 2133. Although DC and amici at various points (*see, e.g.*, Doc 18 at 23) cite such laws, we see no need to respond because they are neither distinctly nor relevantly similar to DC's public transportation carry ban. We agree DC may ban carry in those locations. It is noteworthy, however, that these three locations share a unifying characteristic. They lie at the heart of representative government: where laws are made, where laws are enforced, and where the people's

representatives are chosen. In other words, they are the key locations in our representative republic essential to safeguarding the rule of law, areas where the presence of firearms might intimidate or obstruct official proceedings. *See generally* Kopel, *The "Sensitive Places" Doctrine*. *See also Hardaway*, at 30 (Exhibit 2, hereto) ("In contrast [to churches] legislative assemblies, polling places and courthouses are civic locations sporadically visited in general where a bad-intentioned armed person could disrupt key functions of democracy.")

Nor in the context of ground-based public transportation does this case deal with an "unprecedented societal concern." Interpersonal violence was a concern at the founding, just as it remains a concern today. At the founding, the view was that the best solution for minimizing such violence was a well-armed and well-trained populace. The Second Amendment's express wording makes this plain. An actual example of both dramatic technological change and unprecedented societal concern justifying designation of a place as sensitive is that of airliners and airports. The District (Doc 18 at 7) and amici (*see* Doc 25 at 16) suggest if the Metro ban is overturned this will imperil the ban on carrying weapons on airliners. That is an ill-thought-out view.

It is true the ban on guns in planes lacks a "distinctly similar" historical analogue. Not until 1961 did federal law ban passengers from carrying concealed firearms on commercial airliners. *See* Act of Sept. 5, 1961, Pub. L. No. 87-197 (amending section 902 of the Federal Aviation Act of 1958), nevertheless presumably allowing the open carry of firearms.) Later in response to repeated hijackings, Congress mandated screening passengers and carryon bags for weapons. *See* Antihijacking Act of 1974, Pub. L. 93-366, title I, Aug. 5, 1974, 88 Stat. 409.

Airplanes obviously did not exist at the founding, nor at any relevant period thereafter. Air travel represents a mode of transportation that could not have been foreseen at the founding. Moreover, the concern with hijackings of airliners, which often resulted in an airliner landing in a

foreign and hostile country, e.g., Cuba, and potential terrorist activity, represents an unprecedented societal concern inapposite to crime occurring while riding a bus or a subway train. And if that were not enough, the reality that airliners may be turned into weapons of mass destruction conclusively indicates their sensitive nature, notwithstanding that the prohibition on carrying firearms on them is a modern restriction. Moreover, the stringent security protocols existing for passengers and others within the sterile areas of airline terminals, while not necessarily determinative as to sensitive place status, *see, e.g., United States v. Class*, 930 F.3d 460, 465 (D.C. Cir. 2019) (hereinafter "*Class*"), underscore a degree of societal concern for security of air travel if not equal to that of courts, election precincts, and legislatures, certainly closely approaching. *See* Kopel, *The "Sensitive Places" Doctrine* at 490 ("[W]hen a building, such as a courthouse, is protected by metal detectors and guards, the government shows the seriousness of the government's belief that the building is sensitive.")[11] And one would think an unprecedented societal concern ought to be accompanied by enhanced security measures.

C. In the absence of "distinctly similar" historical limits on carry on public transportation, the District and amici rely on inapposite statutes and other authorities, and mischaracterize many of them.

Lacking any apposite historical analogues in the founding period, the District and its amici misstate and mischaracterize what few founding era laws they cite. For example, the District (Doc 18 at 25) asserts, "This category of sensitive places is closely tethered to early American laws prohibiting the carrying of arms near parades and on trains." But the parentheticals the District provides to the laws it cites belie this representation. The New Hampshire law regarding parades

[11] Kopel also explains (*Id.)* that "Screening and armed guards reduce the burden that is inflicted on citizens by locational arms bans. Disarmed, the citizen in a sensitive place cannot defend herself. But when there are metal detectors, the citizen is assured that criminals cannot bring in guns. When armed guards are present, the government takes the responsibility for having armed force at the ready to protect citizens."

prohibited soldiers from having loaded weapons while parading, a reasonable safety measure considering they were openly handling firearms. *Id.* It is the same with the Rhode Island statute the District cites. *Id.* at n.11. These laws did not bar spectators from being armed at parades, much as the District would like to imply. *Id.* And the Iowa statute DC cites prohibited *firing guns at trains,* an extremely dangerous act highly likely to result in death or serious bodily harm to the innocent. That law in no way prohibited persons from being armed on trains. Throughout the opposing parties' filings, they rely on statutes prohibiting the misuse of firearms to justify banning them. Simply stated, no statutes appear to exist banning guns on public transportation in the 19th Century. Indeed, Illinois glosses over the fact that New York for the entire time its subway system has existed did not ban gun carry on buses and subways until after the *Bruen* decision was issued in June. *But see Antonyuk,* at 37 (temporarily restraining enforcement of that provision due to the lack of a representative historical analogue; administrative stay issued October 12, 2022).

The District also makes an irrelevant assertion that "in early America, it was not entirely common for civilians to carry arms in certain crowded gatherings, such as while 'attending [public] meetings,' 1 Joseph Chitty, *Commentaries on the Laws of England by the Late Sir W Blackstone* 142-43 n.18 (1826)." Doc 18 at 26. Reference to the actual document the District cites shows no such statement. *See* Exhibit 5, hereto. In any event, *Bruen* is concerned not with what was common or uncommon social practice, but with the history and tradition of firearms regulation. And the quote DC posits, wherever it might have come from, assuming it actually came from somewhere, has no relation to carrying on transportation vehicles. Anecdotal evidence indicates gun carrying on public transportation was not unusual. The following illustration in the April 19, 1884, Police Gazette shows several passengers in a New York City horsecar with handguns. *See* Dean

Weingarten, *1884 New York Street Car Scene Shows Carry of Pistols Common Before 1911*, Ammoland (September 18, 2022) (Exhibit 6, hereto.)

"How an investigation instituted by a passenger on a New York street car brought a young woman to the front like a little man."

And as disgusting as the practice may have been, PBS reported that by the middle of the 19th Century, train passengers were shooting bison for sport. *See* PBS, *The Buffalo War: The Buffalo Yesterday and Today* (undated) Exhibit 7, hereto. *See also* "Bison on Rails," (1871) available at https://tinyurl.com/hfxcna4y, reproduced below, stating "Railroad travelers shooting buffalo from a train on the Kansas-Pacific Railroad, between Ellis and Kit Carson. It became a custom, in the not to uncommon event of finding a herd of buffalo on the track, to stop the engine and allow the passengers out to shoot them. Indeed, railroads advertised "hunting by rail." *See* Legends of America, *Buffalo Hunters* available at https://www.legendsofamerica.com/we-buffalohunters/ (Hulton Archive/Getty Images).

Lacking any "distinctly similar" historical analogue prohibiting carry on public transportation vehicles, the District and its amici are left to assert a host of kitchen sink arguments to defend the public transportation carry ban. Typical is Brady's claim (Doc 25 at 24) that

> From colonial times through Reconstruction and into the modern era, regulation of public carriage based on place-sensitivity has been considered legitimate and tracked states' responses to social problems. *See* Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 161-62 (2007) ("[C]olonial and early state governments routinely exercised their police powers to restrict the time, place, and manner in which Americans used their guns.").

But Brady's argument is at best misleading as Churchill explains, "Between 1607 and 1815, in clear contrast to English precedent, the colonial and state governments of what would become the first 14 states neglected to exercise any police power over the ownership of guns by members of the body politic." *Id.* at n. 51. He goes on to discuss various militia laws limiting use of guns on the day of muster and requiring "militiamen and other householders to bring their guns to the

muster field twice a year so that militia officers could record which men in the community owned guns." *Id.* at 161. And he states there were regulations over discharge, especially discharge and hunting at night, other hunting regulations, placement of spring (trap) guns, and a Boston prohibition on storing loaded guns, the latter being a fire regulation. *Id.* at 162-64. Churchill, however, says nothing concerning prohibition of possession of firearms at what we would consider to be sensitive places.

Illinois points to modern regulations in Montana and North Dakota prohibiting gun possession in wildlife refuges as well as Florida and Kentucky statutes prohibiting carrying in bars or bar areas of restaurants. Doc 24 at 12. However, Illinois shows no nexus to a ban on public transportation carry of either these hunting or alcohol regulations. *See Id.* DC in turn asserts it has a long history of regulating firearms. Doc 18 at 10-11. Putting aside that several of these regulations have been found unconstitutional and likely many more post *Bruen*, DC omits to highlight that it has never prior to the enactment of DC Code 7-2509.07(a)(6) banned weapons carry on public transportation.[12] We readily concede a historic tradition of firearms regulation exists in America, otherwise it would have been silly for *Heller* and *Bruen* to peg the Constitutionality of firearms regulations to the Nation's history of firearms regulation. But the government's obligation is to demonstrate that *this particular regulation* is consistent with the

[12] The District (Doc. 18 at 11) falsely asserts the Metro carry ban "reaffirmed the rule that pistols are not permitted on the District's public-transit systems," citing *Bsharah v. United States*, 646 A.2d 993, 994-1001 & n.5-7, 12 (D.C. 1994), which the District says upheld "convictions for carrying 'a handgun on a crowded subway train'"). The actual charge, however, was carrying a pistol without a license. It just happened to be that the location where defendants were spotted with guns was the subway. Contrary to the false implication DC gives, there was no charge of carrying on the Metro because there was no statute that actually prohibited that conduct, assuming one had a license to carry. It is regrettable the District chooses to shade the facts here.

historic tradition of firearms regulation by showing well established historical analogues, and this is what the opposing parties have failed to do.

The opposing parties do point to late 19th Century laws adopted by a few states prohibiting carry at various places *other than public transportation facilities*. This would include a Washington State law banning guns in penitentiaries (hardly apposite) (*see* Doc 25 at 25) and Texas, Tennessee, Georgia,[13] Oklahoma and Missouri laws that variously banned guns in schools, at churches or religious assemblies, at places of amusement, and in some cases social gatherings. *See* Doc 18 at 23-27; Doc 25 at 25-27. *Heller* indicates that restrictions on carrying guns in schools are presumptively Constitutional and Plaintiffs have not challenged DC Code Section 7-2509.07(a)'s prohibition on carry in schools nor other parts of this statute relating to houses of worship, nor the rather vague (and likely unconstitutional) prohibition in the statute against carrying firearms at a gathering or special event open to the public.

In any event, the statutes the opposing parties cite were all of late 19th Century origin, rather than near the adoption of the Second Amendment, and under *Bruen* are not entitled to significant weight. *Bruen*, at 142 S.Ct. at 2137 ("As we recognized in *Heller* itself, because post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier

[13] Both the District (Doc 18 at 24) and Brady (Doc 25 at 26) cite the Georgia case of *Hill v. State*, 53 Ga. 472 (1874) which upheld a conviction for carrying a firearm into a court under the cited statute. Although we do not quibble with the ultimate result, i.e., prohibiting carrying arms in courts – it is noteworthy that the court there both disclaimed reliance on the Second Amendment and adopted the militia based collective rights view of the amendment. This is made plain by the court's following statement, "As we have seen, the object of the provision was to secure to the state a well regulated militia. The simple right to carry arms upon the person, either openly or secretly, would not answer the declared purpose in view: Skill and familiarity in the use of arms was the thing sought for." *Id.* Thus, *Hill* is fundamentally inconsistent with both *Heller's* and *Bruen's* holding that the Second Amendment confers individual rights to keep and bear arms unrelated to militia service.

sources.' 554 U.S. at 614, 128 S.Ct. 2783[.]" Moreover, these few late 19th Century statutes hardly evidence the *established tradition Bruen* requires, even were they to qualify as either "distinctly similar" or even "relevantly similar," which they do not. Lastly, these statutes show that the legislatures could have prohibited carry on public transportation systems, which as discussed above by the time these laws were enacted were well developed throughout the country, yet they did not, indicating a view such restrictions would have violated state Second Amendment analogues. *See Bruen,* 142 S.Ct. at 2131.

DC and its amici attempt to analogize carry on the Metro to prohibitions on carry in schools and on the Capitol grounds, *see Class,* 930 F.3d 460, the argument being that because numbers of children and government workers use Metro to get to school and work respectively, they might be targets of an active killer or terrorist attack, and cannot carry firearms to defend themselves. *See, e.g.*, Doc 18 at 7, 13-14, 27 & 30; Doc 25 at 12 & 19. But that argument proves too much because children and government workers can be found almost everywhere in the District. Although DC might want this Court to declare the entire city a sensitive area, *see, e.g., Wrenn v. District of Columbia,* 864 F.3d 650, 659 (D.C. Cir. 2017), that train has left the station and is fundamentally inconsistent with *Bruen*. *See* 142 S.Ct. at 2133-34.

Although the historical case for schools as sensitive places is weak, *see* Kopel, *The "Sensitive Places" Doctrine,* at 287,[14] *Heller's* dicta appear controlling. *See, e.g., Bruen* 142 S.Ct. at 2162 (Kavanaugh, J., concurring). Schools are likely sensitive areas because they are exclusively

[14] "Compared to arms bans in *some* 'government buildings,' arms bans in 'schools' have very weak historical lineage. The first broad bans on carrying at schools appear in a few states in the late nineteenth and early twentieth centuries. They are tainted by their obvious overbreadth—in that they also applied to mixed-sex private social gatherings anywhere in the state. Broad laws against guns in schools come mainly from the late twentieth century, and thus are too novel to be part of history and tradition," *Id*. (Emphasis added.)

dedicated to an education purpose and most persons present are minors.[15] Moreover, there is a heightened need for security at schools in light of active killer attacks. Many schools, especially in the District, have instituted heightened security measures including weapons screening and school resource officers. Importantly the burden associated with prohibiting firearms in schools is de minimis to the average licensed firearm carrier as they rarely have a need to enter a school.

The Metro system on the other hand serves the public in general and plainly lacks an educational purpose. Most importantly, the Metro system is a vital aspect of transportation for DC residents. *See* Doc 24 at 15. Its heavy ridership is testament to its utility. Many persons in the District lack personal vehicles and rely on Metro for transportation for their daily life activities. This is especially the case for persons of limited means. The District already makes it expensive for them to acquire and carry a firearm, charging application fees, fingerprint fees, registration fees, mandating 18 hours of training with a DC instructor, and requiring renewal with still more fees and training every two years. *See generally* DC Code § 7-2501.01 et seg. And although DC blithely suggests persons could walk or bum a ride from a friend (Doc 18 at 38), that does not help someone who is mobility impaired, who needs to travel a substantial distance, or who lacks friends on whom they can rely every time they need to go to work or the grocery store. Denying District licensed carriers access to Metro imposes a more than de minimis burden on them as Justice Alito recognized during the oral argument in *Bruen*.[16] *See also Class*, 930 F.3d at 463, stating with

[15] DC cites (Doc 18 at 28) Joseph Blocher & Darrell A.H. Miller, *The Positive Second Amendment* at 106 (2018) as describing schools as a sensitive place due to the presence of children. Actually, the article muses on the question of *whether* it is the presence of children or the educational purpose which make schools a sensitive place. The combination of the two seems the most likely.

[16] "Justice Alito: Could I -- could I -- could I explore what that means for ordinary law-abiding citizens who feel they need to carry a firearm for self-defense? So, I want you to think about people like this, people who work late at night in Manhattan, it might be somebody who cleans offices, it might be a doorman at an apartment, it might be a nurse or an orderly, it might be somebody who washes dishes. None of these people has a criminal record. They're all law-abiding citizens. They

respect to the presumptively lawful bans on carry in schools or government buildings that "A challenger may rebut this presumption only by 'showing the regulation [has] more than a de minimis effect upon his right' to bear arms. *Heller II*, 670 F.3d at 1253."

Moving on to a specific discussion of *Class*, that case affirmed a conviction for possessing a firearm on grounds under the jurisdiction of the Capitol – one of the more sensitive places in the country – holding that the Capitol grounds are sufficiently integrated with the Capitol itself so as to be a sensitive place. 930 F.3d at 464. We note *Class* did not conduct the historical analysis *Bruen* requires to determine whether a location is sensitive. *See* 930 F.3d at 463-64. Had it done so, however, the court would have had no problem concluding that history supports treating legislative assemblies **and** grounds as sensitive areas. *See Bruen*, 142 S.Ct. at 2133, citing Kopel, *The "Sensitive Places" Doctrine*, at 229-236, 244-247, and stating "We therefore can assume it settled that these locations [including legislative assemblies] were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment."

The District and its amici attempt to shoehorn *Class* to the Metro system by asserting the Metro itself is integrated with the federal government since many federal employees use the Metro system to get to work, and many Metro stations are near federal buildings. *See, e.g.*, Doc 18 at 30; Doc 25 at 22. But the parking lot where Class was found with a firearm was a location *exclusively* set aside for the use of Capitol employees with a permit. 930 F.3d at 464. Moreover, its proximity to the Capitol itself could make it a stalking ground for persons seeking to attack high value targets

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get off work around midnight, maybe even after midnight. They have to commute home by subway, maybe by bus. When they arrive at the subway station or the bus stop, they have to walk some distance through a high-crime area, and they apply for a license, and they say: Look, nobody has told -- has said I am going to mug you next Thursday. However, there have been a lot of muggings in this area, and I am scared to death." Transcript of Oral Argument at 66-67, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. Nov. 3, 2021).

such as Senators and Congressmen and their staffs. *Id.* Thus, it was an area with a uniquely special security concern. *Id.* We also note that although *Class* indicates this is not determinative, the Capitol grounds are marked by an extensive police presence. *See Id.*at 465.[17] Indeed, it is not unusual to see Capitol Police patrolling the grounds armed with M4 select fire machine guns. *See* Chris Marquette and Michael Macagnone, *Capitol Police teams were lacking in weapons certifications*, Roll Call (June 15, 2021) ("The First Responders Unit carry this rifle [the M4] when standing on post or at the barriers."), available at https://tinyurl.com/y6c6tnr3.

The District claims it can ban carry on the Metro given the "government nature" of Metro's property. Such an argument is not supported by *Bruen*, nor by *Heller*, both of which speak of government buildings. If the government could ban carry on all government property, there would be little left of the right to bear arms since all public roads and sidewalks could be classed as sensitive areas. Moreover, in some states the federal government owns much of the land area, e.g., Nevada (80.1 percent), Idaho (61.9 percent), Alaska (60.9 percent) Oregon (52.3 percent), California (45.4 percent), and 24.7 percent in the District. *See* https://crsreports.congress.gov/product/pdf/R/R42346/18#page=10. There is no support in *Heller* or *Bruen* that government ownership of property is sufficient to make that area a sensitive location.

[17] *But see* Justice Alito's discussion during the *Bruen* oral argument:

> So starting with that, could we analyze the sensitive place question by asking whether this is a place where the state has taken alternative means to safeguard those who frequent that place? If it's a—if it's a place like a courthouse, for example, a government building, where everybody has to go through a magnetometer and there are security officials there, that would qualify as a sensitive place. Now that doesn't provide a mechanical answer to every question, and—but it—would that be a way of analyzing—of beginning to analyze this?

Transcript of Oral Argument at 32, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. Nov. 3, 2021).

The District's attempt to link the discrete area of the Capitol grounds to the wide-ranging Metro train and bus system is also unavailing. As we note above, that argument could justify restrictions on carry throughout the vast majority of the District. As *Class* states, however, "Although there is surely some outer bound on the distance Congress could extend the area of protection around the Capitol without raising Second Amendment concerns, Congress has not exceeded it here." *Id.* at 464. "The Maryland Avenue parking lot is just the kind of '*small pocket* of the outside world' where a ban imposes only 'lightly' on the right to carry a weapon in the District of Columbia." 930 F.3d at 465-66 (emphasis added). The Metro train and bus system is simply not a "small pocket of the outside world" where banning carry causes only a de minimis burden on Second Amendment rights.

Finally, the District and amici throughout their submissions rely on various pre-*Bruen* cases, some upholding sensitive area restrictions in places other than public transportation facilities, and other cases – even less on point – sustaining a variety of firearms restrictions. Suffice it to say those cases universally applied the now discredited interest balancing approach, rather than the historical analogue approach *Bruen* mandates. As such they have been abrogated.

D. The Court must reject the opposing parties' invitation to engage in "interest balancing" which Bruen *forecloses.*

Beyond this point, the District and its amici seek to seduce the Court into the now taboo realm of interest balancing. *See Bruen,* 142 S.Ct. at 2129-31. The District, for example, argues variously (Doc 18 at 31) that the Metro system should be considered a sensitive place because it is often crowded, with emotionally frustrated passengers, jostling each other with inter-rider conflict, and that the use of a weapon could injure innocent persons and cause panic and more injury. *See also* Doc 25 at 11. Perhaps District counsel is riding a different line than Plaintiffs, as Plaintiffs' experience is that DC Metro riders are overwhelmingly polite and courteous; they

simply wish to go about their business without facing an assault.[18] In any event, *Bruen* and prior cases foreclose the District's argument.

> But expanding 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. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below. See Part III-B, *infra.* Put simply, there is no historical basis for New York to effectively declare the island of Manhattan a "sensitive place" simply because it is crowded and protected generally by the New York City Police Department.

Bruen, 142 S.Ct. at 2134. *See also Wrenn*, 864 F.3d at 659-61 (rejecting the District's argument that it could limit the carrying of firearms in the densely populated city).

Unfortunately, as the District's and amici's own evidence (*see, e.g.,* Doc 24 at 18-19) shows guns seem to get on the Metro despite DC Code § 7-2509.07(a)(6), just from persons who do not bother to go through the time and expense to obtain a DC carry license and the requisite training necessary to obtain that license, or they cannot because they have a disqualifying felony record.[19] As Justice Alito pointed out " There are -- there are a lot of armed people on the streets of New York and in the subways late at night right now, aren't there? . . . But the people -- all --

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[18] Kelly Lynn, DC woman assaulted by group of teenagers on Metrobus shares what happened in brutal attack, WJLA (October 20, 2022) (Exhibit 8, hereto).

[19] Take for instance Demarvzia Angelo Caston, arrested September 1, 2022, for assault with a dangerous weapon and various other charges relating to a shooting at the L'Enfant Metro Station. According to the Gerstein affidavit submitted in *United States v. Caston,* Case No. 2022 CF3 005172 (attached as Exhibit 9, hereto, Mr. Caston, interjected himself into a dispute, producing "from his waistband a Glock style handgun, racked the gun, and pointed his gun at victim 1 and fired one round, striking the platform tile. *Id.* The round then ricocheted and struck victim 2 in the right foot. *Id.* Victim 2 suffered minor non-life-threatening injuries. *Id.* Mr. Caston, who was sporting an unregistered Polymer 80 "Ghost Gun," did not have a DC concealed pistol license. *Id.* In fact, he was ineligible given his record of convictions for "crimes punishable by terms of imprisonment for more than a year." *Id.* He was previously thrice convicted of assault with a dangerous weapon, as well as possession of a firearm during a crime of violence in 2010; unlawful possession of a firearm, robbery and unlawful possession of sawed-off shotgun in Virginia in 2001. *Id.* The Metro ban did not seem to stop him from having a gun on the Metro.

all these people with illegal guns, they're on the subway --." Transcript of Oral Argument at 68-69, *N.Y. State Rifle & Pistol Ass'n v. Bruen*, No. 20-843 (U.S. Nov. 3, 2021).

Brady wants the Court to consider various social science studies – none of which it actually provides the Court – among which it claims that the presence of guns incites aggression (Doc 25 at 21 & n.29) and that children are mentally damaged by exposure to firearms (Doc 25 at 17-18). The latter is likely news to the hundreds of thousands of children, age 8-18, participating in the 4-H shooting sports programs, *see* https://4-hshootingsports.org/, and the many Boy Scouts earning their riflery merit badges, *see* http://usscouts.org/usscouts/mb/mb123.asp. It is far more likely that children would be traumatized by seeing innocent persons harmed by violent criminal predators as is happening far too often on the Metro system.[20]

Illinois similarly relies on discredited psychological theories claiming that merely seeing guns "primes" aggressive thoughts. Doc 24 at 19 & n.34). The study relied on used flawed, unreproducible research methodology.[21] Subsequent research found opposite effects, insignificant effects, or alternative explanations for the results.[22] The Court should also wonder how one would see firearms required by DC law to be concealed.

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[20] Considerable disagreement exists in academia concerning the validity of studies like those Brady cites. For example, Brady (Doc 24 at nn. 25-26) cites a study by Donahue that right to carry laws result in an increase in crime. Thomas Marvell and Carlisle Moody report serious flaws in Donahue's study. *See Do Right to Carry Laws Increase Violent Crime? A Comment on Donohue, Aneja, and Weber*, 16 Econ Journal Watch 84 (March 2019). Their evaluation revealed no significant effect on violent crime from the adoption of right to carry laws in the 33 states that had as of that time adopted them.

[21] Berkowitz, L., & LePage, *A. Weapons as aggression-eliciting stimuli*, 7 J. of Personality and Social Psychology, 202 (1967).

[22] *See* Frodi, A. *The effect of exposure to weapons on aggressive behavior from a cross-cultural perspective*, 10 Intl. J. of Psychology 283 (1975); Schmidt, H. D., & Schmidt-Mummendey, *A. Weapons as aggression-eliciting stimuli: A critical inspection of experimental results*, 5 Zeitschrift für Sozialpsychologie, 201 (1974).

The Supreme Court in *Bruen*, *Heller*, and *McDonald* paid no heed to any psychological studies or crime statistics in recognizing an historical right of law-abiding citizens to peaceably carry guns for self-defense. Defendants' and amici's pleas from academic studies are effectively part of a means-end test or cost-benefit analysis.[23] Suffice it to say that *Bruen* opted for judges to rely "on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing right* … [as] more legitimate, and more administrable, than asking judges to 'make difficult empirical judgments' about 'the costs and benefits of firearms restrictions,' especially given their 'lack [of] expertise' in the field" *Bruen,* 142 S.Ct. at 2130, quoting *McDonald v. City of Chicago*, 561 U.S. at 790-791 (plurality opinion) (emphasis in original).

Fundamentally, DC and its amici suppose that DC licensed concealed carriers present a threat to innocent persons on the Metro system. In fact, Brady goes as far as to suggest even that the presence of *armed police officers* may increase the prevalence of active killing incidents. *See Id.* at n.29. Their suppositions lack evidentiary support, especially with respect to licensed concealed carriers.[24] DC concealed pistol license holders are required to be schooled in conflict de-escalation and avoidance.[25] And the Chief denies licenses to persons who have exhibited a history of violence or instability, even if they have never been convicted of any violation of the law. *See* DCMR 24.2335.1(d) (A person is suitable for a carry license if he or she "[H]as not

[23] Few gun control laws could pass a cost-benefit analysis because they sweep broadly upon the rights of law-abiding citizens while attempting to constrain the actions of a relatively few criminals who will not obey the laws anyway.

[24] Brady (Doc 24 at 13) raises the prospect of accidental or inadvertent discharges. Most such incidents happen in the home and generally happen to persons under 25 who are shot by a friend (43 percent)_or family member (47 percent), often an older brother. *See* Aftermath, *2021 Accidental Gun Death Statistics in the U.S.*, available at https://tinyurl.com/5n7ay7u7.

[25] *See* DC Code § 7-2509.02(a)(4)(E); Declaration of Mark A. Briley (Exhibit 10, hereto); Declaration of Leon Spears (Exhibit 11, hereto).

exhibited a propensity for violence or instability that may reasonably render the person's possession of a concealed pistol a danger to the person or another").

Conspicuously lacking in DC's and its amici's speculative and conjectural predictions is that licensed gun carry on the Metro system is and has been legal in Virginia and Maryland, and there is zero evidence from opposing parties of criminal violence perpetrated by any person legally carrying a firearm pursuant to a Virginia concealed handgun permit or a Maryland wear and carry permit. Likewise, opposing parties fail to point to a single such incident by a licensed carrier on New York's subway system. Nonetheless, as Justice Alito noted, criminals carry guns on subways and buses despite laws to the contrary. Consider how many innocent lives could have been saved and injuries prevented if just one legally armed individual had been present when Colin Ferguson shot 25 persons in a Long Island railroad car on December 7, 1993. *See* Pat Milton, *Colin Ferguson Convicted of Murdering Six in Train Massacre,* Associated Press (February 18, 1995).

The District and its amici may distrust licensed gun carriers, but the evidence is compelling that licensed gun carriers are far more law abiding than the average citizen *or* the police. *See* Nicholas Johnson, *Lawful Gun Carriers (Police And Armed Citizens): License, Escalation, And Race*, 80 Law And Contemporary Problems 209 (2017) ("As private gun carriers and state laws facilitating them proliferated, skeptics offered dire warnings about the consequences. Fortunately, that parade of horribles did not materialize.") *See also Moore v. Madigan,* 702 F.3d 933, 937-38 (7th Cir. 2012) ("The available data about permit holders also imply that they are at fairly low risk of misusing guns, consistent with the relatively low arrest rates observed to date for permit holders"); Crime Prevention Resource Center, *CPRC in Fox News: Police are extremely Law-abiding, but concealed handgun permit holders are even more so* (February 24, 2015), available at https://tinyurl.com/3t95b4zj. As former MPD Chief Cathy Lanier pointed out, "Law-abiding

citizens that register firearms, that follow the rules, are not our worry." Mike Debonis, *Security, not street crime, at risk after gun ruling, D.C. Police Chief Cathy Lanier says,* The Washington Post (July 30, 2014), available at https://tinyurl.com/4h9tcr46.

As Johnson explains, "One of the most significant things about the spread of the private carry movement is that laws allowing millions of ordinary Americans to carry guns did not turn them into robbers and murderers. This result undercuts the predictions of carnage that were based on the theory that the simple presence of a firearm would transform parking lot bumps into shootouts." Johnson, *Lawful Gun Carriers* at 210. He supports this conclusion with various state data showing very few persons ever have their carry licenses or permits revoked for committing a violent crime. *Id.* at 219-20. Examples from states with high numbers of permits follow:

> FLORIDA. Between, October 1, 1987, and November 30, 2008, Florida issued permits to 1,439,446 people. 166 had their permits revoked for any type of firearms related violation-about 0.01 percent. These revocations overwhelmingly involved individuals accidentally carrying concealed handguns into restricted areas.
>
> MICHIGAN. During 2007, there were over 155,000 licensed permit holders and 163 revocations-about 0.1 percent.44 Over the period from July 1, 2001, to June 30, 2007, there was one permit holder convicted of manslaughter, though it did not involve the use of a gun. Three other people were also convicted of "intentionally discharging a firearm at a dwelling." No one was convicted of "intentionally discharging a firearm at or towards another person."
>
> NORTH CAROLINA. With 246,243 permits issued and 789 revocations, about 0.3 percent of North Carolina permit holders have had their permits revoked over the twelve years from when permits started being issued. "One frequent reason [for revocation] is when the police pull someone over for a traffic violation, [permit holders] fail to tell them that they are a CCW holder."
>
> OHIO. From April 2004 to the beginning of August 2006, 73,530 permits were issued in Ohio. There were 217 revocations, but 69 of these came from the Cuyahoga County Sheriff's Office after a weapons instructor was accused of not providing the training required by state law. Excluding revocations due to improper training, about 0.2. percent of permit holders had their permits revoked. There were no reported incidents of any permit holder having his permit revoked for committing a violent crime. A major reason for revocations was that a licensee moves out of state or dies.

> TEXAS. In 2006, there were 258,162 active permit holders. Out of these, 140 were convicted of either a misdemeanor or a felony, a rate of 0.05 percent. That is about one seventh the conviction rate in the general adult population, and the convictions among permit holders tend to be for much less serious offenses. The most frequent type of revocation, with 33 cases, involved carrying a weapon without their license with them. The next largest category involved domestic violence, with 23 cases. Similar numbers have been reported in Texas every year.
>
> UTAH. With 134,398 active concealed-handgun permits as of December 1, 2008, there were 12 revocations for any type of violent crime over the preceding twelve months-a 0.009 percent rate. None of those involved any use of a gun. Thirteen revocations involved any type of firearms-related offense, a revocation rate of less than 0.01 percent. Since 1994, two permit holders have been convicted of murder, including a police officer who shot his wife. The other murder was not committed with a gun.

(Cleaned up, footnotes omitted.)

* * *

In sum, opposing parties have failed to show that DC's public transportation carry ban is consistent with the Nation's historical tradition of firearms regulation. As such, Plaintiffs are likely to prevail on the merit in this action. And for this reason, they are entitled to issuance of a preliminary injunction.

IV. Plaintiffs have shown irreparable injury.

The District denies Plaintiffs suffer an irreparable injury from the Metro carry ban, but its argument is particularly weak. *See* Doc 18 at 38-39. DC admits that if Plaintiffs show they are likely to succeed on the merits, then irreparable injury is presumed from a Constitutional deprivation. Doc. 18 at 38. The District nonetheless questions the teaching of *Elrod v. Burns,* 427 U.S. 347, 373 (1976) that the loss of Constitutional rights for even minimal periods constitutes irreparable injury. Doc. 18 at 39 n. 18, citing *Chaplaincy of Full Gospel Churches*, 454 F.3d 290, 300 n.7 (D.C. Cir. 2006) (noting that *Elrod* was a plurality opinion). The D.C. Circuit has recently

been much more definitive on the matter, however. In *Mills v. District of Columbia*, 571 F.3d 1304, 1312 (D.C. Cir. 2009) the D.C. Circuit said:

> We further conclude that appellants have sufficiently demonstrated irreparable injury, particularly in light of their strong likelihood of success on the merits. *See CityFed Fin. Corp*., 58 F.3d [738,] 747 [(1995)]. . . . It has long been established that the loss of constitutional freedoms, "for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) (plurality opinion) (citing *New York Times Co. v. United States*, 403 U.S. 713, 91 S.Ct. 2140, 29 L.Ed.2d 822 (1971)).

Indeed, DC cites *Archdiocese of Washington v. WMATA*, 897 F.3d 314 (D.C. Cir. 2018) (Doc. 18 at 38-39). That case teaches that Plaintiffs here would prevail on the irreparable injury factor if they show a likelihood of success on the merits because the loss of Constitutional freedoms even for a minimal amount of time constitutes irreparable injury. *Id.* at 334. Moreover, this case is a particular type of case where the legislation at issue serves to chill Constitutional conduct. *See Chaplaincy of Full Gospel Churches v. England*, 454 F.3d at 301. As the 7th Circuit explained:

> The Second Amendment protects similarly intangible and unquantifiable interests. *Heller* held that the Amendment's central component is the right to possess firearms for protection. 554 U.S. at 592-95. Infringements of this right cannot be compensated by damages. In short, for reasons related to the form of the claim and the substance of the Second Amendment right, the plaintiffs' harm is properly regarded as irreparable and having no adequate remedy at law.

Ezell, 651 F.3d at 699-700 (footnote omitted). *Accord Fisher v. Kealoha*, No. 11-00589, 2012 U.S. Dist. LEXIS 90734, at *40 (D. Haw. June 29, 2012); *Morris v. United States Army Corps of Eng'rs*, 990 F. Supp. 2d 1082, 1089 (D. Idaho 2014); *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 150 (D.D.C. 2016.) "'The right to bear arms enables one to possess not only the means to defend oneself but also the self-confidence and psychic comfort that comes with knowing one could protect oneself if necessary.' *Grace*, 187 F. Supp. 3d at 150." *Rhode v. Becerra*, 445 F. Supp. 3d 902, 954 (S.D. Cal. 2020). Thus DC Code § 7-2509.07(a)(6), which bars Plaintiffs from possessing the means to defend themselves on the Metro system, imposes irreparable injury on them.

V. The balance of equities and the public interest favor grant of the injunction.

As we pointed out in our preliminary injunction application, the D.C. Circuit has acknowledged the "obvious" fact that "enforcement of an unconstitutional law is always contrary to the public interest." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013), as have other circuits. *E.g., K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 114 (3d Cir. 2013) ("[T]he enforcement of an unconstitutional law vindicates no public interest.") Those cases are dispositive of the balance of harms factor and the public interest factor. *See also Archdiocese of Washington v. WMATA*, 897 F.3d at 335.

* * *

Plaintiffs have shown they are likely to succeed on the merits of their claim; that they suffer irreparable injury from DC Code § 7-2509.07(a)(6); that the balance of interests favors them as does the public interest. As such they are entitled to issuance of a preliminary injunction barring enforcement of the public transportation carry ban.

VI. The Court should issue a permanent injunction.

Defendants had 60 days to perform their historical analogue research to justify the public transportation carry ban. They failed to point to any such established distinctly similar legislation enacted during the founding period through the end of the 19th Century, much less showing an established tradition of such legislation. Defendants only rejoinder is they may be able to find private carriers with rules that banned firearms on their conveyances. Doc 18 at 41; Doc 18-14 at 6. That, however, is irrelevant. The Bill of Rights applies to state action, not private action. Private actors generally are free to allow or disallow guns on their premises. That they do or do not is irrelevant to whether the state can make that choice for them under the Second Amendment.

Defendants' expert Brennan Rigas seeks a delay of a year or more to conduct her historical research, not into legislative historical analogues, but into passenger rules of private carriers. *See* Doc 18-14 at 11. DC's other expert, Zachery Schrag, has not even been engaged to conduct whatever historical research DC might pursue. *See* Doc 18-13 at 3. No basis exists for the delay DC is requesting, and the focus of DC's experts is plainly not on the type of historical showing *Bruen* requires of *legislative* restrictions on gun carry on public transportation. DC sought an extraordinary extension of time to respond to Plaintiffs' request for an injunction. It came up dry. The Court need not give it another year to research extraneous matters unrelated to government regulation of gun carry on public transportation. To the extent the Court might nonetheless afford the District some *brief* additional time in this regard to respond to the permanent injunction request, that would be an even more compelling reason to grant Plaintiffs preliminary relief, rather than forcing them to continue to suffer deprivation of their Second Amendment rights.

VII. Conclusion.

Plaintiffs have met the requirements for grant of a preliminary injunction. They have shown likelihood of success on the merits, that they suffer irreparable injury, that the balance of harms favors an injunction and that an injunction is in the public interest. Plaintiffs request the Court grant the requested preliminary injunction. Moreover, since the District has had sufficient time to proffer support for its public transportation carry ban and has failed to support it as *Bruen* requires, the Court should declare the ban unconstitutional and permanently enjoin its enforcement.

Respectfully Submitted,

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Dated: October 30, 2022

CERTIFICATE OF SERVICE

I, George L. Lyon, Jr., a member of the bar of this court, certify that I served the foregoing document on all counsel of record for Defendants through the court's ECF system, this 30th day of October, 2022.

/s/ George L. Lyon, Jr., DC Bar 388678

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

IVAN ANTONYUK; COREY JOHNSON; ALFRED TERRILLE; JOSEPH MANN; LESLIE LEMAN; and LAWRENCE SLOANE,

1:22-CV-0986 (GTS/CFH)

Plaintiffs,

v.

KATHLEEN HOCHUL, in her Official Capacity as Governor of the State of New York; KEVIN P. BRUEN, in his Official Capacity as Superintendent of the New York State Police; JUDGE MATTHEW J. DORAN, in His Official Capacity as Licensing-Official of Onondaga County; WILLIAM FITZPATRICK, in His Official Capacity as the Onondaga County District Attorney; EUGENE CONWAY, in his Official Capacity as the Sheriff of Onondaga County; JOSEPH CECILE, in his Official Capacity as the Chief of Police of Syracuse; P. DAVID SOARES, in his Official Capacity as the District Attorney of Albany County; GREGORY OAKES, in his Official Capacity as the District Attorney of Oswego County; DON HILTON, in his Official Capacity as the Sheriff of Oswego County; and JOSEPH STANZIONE, in his Official Capacity as the District Attorney of Greene County,

Defendants.

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GLENN T. SUDDABY, United States District Judge

DECISION and TEMPORARY RESTRAINING ORDER

Currently before the Court, in this civil rights action by the six above-captioned individuals ("Plaintiffs") against the ten above-captioned employees of the State of New York or one of its counties or cities ("Defendants"), is Plaintiffs' motion for a Temporary Restraining Order. (Dkt. No. 6.) For the reasons set forth below, Plaintiffs' motion is granted in part and denied in part.

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I. RELEVANT BACKGROUND

On June 23, 2022, the Supreme Court held that N.Y. Penal Law § 400.00(2)(f), which conditioned the issuance of an unrestricted license to carry a handgun in public on the existence of "proper cause," violated the Second and Fourteenth Amendments by impermissibly granting a licensing officer the discretion to deny a license to a law-abiding, responsible New York State citizen based on a perceived lack of a special need for self-protection distinguishable from that of the general community. *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111, 2156 (2022) ("*NYSRPA*").

On July 1, 2022, New York State passed the Concealed Carry Improvement Act ("CCIA"), which generally replaced the "proper cause" standard with (1) a definition of the "good moral character" that is required to complete the license application or renewal process, (2) the requirement that the applicant provide a list of current and past social-media accounts, the names and contact information of family members, cohabitants, and at least four character references, and "such other information required by the licensing officer," (3) a requirement that the applicant attend an in-person interview, (4) the requirement of 18 hours of in-person and "live-fire" firearm training in order to complete the license application or renewal process, and (5) a list of "sensitive locations" and "restricted locations" where carrying arms is prohibited. 2022 N.Y. Sess. Laws ch. 371.

The current action is the second attempt by Plaintiff Antonyuk to challenge certain provisions of the CCIA. The first attempt, made by him alone against Defendant Bruen alone, resulted in a dismissal without prejudice for lack of standing. *See Antonyuk v. Bruen*, 22-CV-0734, 2022 WL 3999791, at *15-16 (N.D.N.Y. Aug. 31, 2022) (hereinafter referred to as

"*Antonyuk I*"). In his second attempt, Plaintiff Antonyuk stands with five like-minded individuals, and asserts essentially the same claims as in *Antonyuk I* but against nine additional Defendants. (Dkt. No. 1.) *Cf. Antonyuk I*, 22-CV-0732, Complaint (N.D.N.Y. filed July 11, 2022).

Generally, in their Complaint, Plaintiffs assert three claims against Defendants: (1) a claim for violating the Second Amendment (as applied to the states through the Fourteenth Amendment), pursuant to 42 U.S.C. § 1983; (2) a claim for violating the First Amendment pursuant to 42 U.S.C. § 1983; and (3) a claim for violating the Fifth Amendment pursuant to 42 U.S.C. § 1983. (*Id*.) Each of these claims challenge one or more of the following nine aspects in the revised law: (a) its definition of "good moral character"; (b) its requirement that the applicant disclose a list of his or her "former and current social media accounts . . . from the past three years to confirm the information regarding applicant's character and conduct as required [above]"; (c) its requirement that the applicant list the names and contact information of family members and cohabitants; (d) its requirement that the applicant list at least four "character references" who can attest to the applicant's "good moral character"; (e) its requirement that the applicant provide "such other information required by the licensing officer"; (f) its requirement that the applicant attend an in-person interview by the licensing officer; (g) its requirement that the applicant receive a minimum of 16-hours of in-person firearm training and two-hours of "live-fire" firearm training, at his or her own expense (which they estimate to be "around $400"); (h) its definition of "sensitive locations"; and (i) its definition of "restricted locations." (*Id*.)[1]

[1] Because of the similarity between *Antonyuk* I and this case, the Court accepted the assignment of this case as being "related" to *Antonyuk I* under General Order 12 of this District. The Court rejects the State Defendants' argument that it erred by accepting the assignment of

On September 22, 2022, Plaintiffs filed the current motion for a Temporary Restraining Order and motion for a Preliminary Injunction. (Dkt. No. 6.) On September 28, 2022, the State Defendants and the Oswego County Defendants submitted their briefs in opposition to Plaintiffs' motion for a Temporary Restraining Order. (Dkt. Nos. 17, 18.) On September 29, 2022, the Court conducted oral argument. (Dkt. No. 23.) At the end of oral argument, the Court reserved decision and stated that a decision would follow. This is that decision.[2]

II. GOVERNING LEGAL STANDARD

A. Procedural Standard

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this case. (Dkt. No. 18, at 10.) In support of their argument, the State Defendants cite only the portion of the governing standard. (Dkt. No. 18, at 10, citing N.D.N.Y. Gen. Ord. 12(G)(3) for the language, "A civil case shall not be deemed related to another civil case merely because the civil case: (a) involves similar legal issues, or (b) involves the same parties."].) The omitted portion of the governing standard states as follows: "A civil case is 'related' to another civil case for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transaction or events, a substantial saving of judicial resources is likely to result from assigning the case to the same Judge and Magistrate Judge." N.D.N.Y. Gen. Ord. 12(G)(3). Here, the two cases at issue involve more than "similar legal issues" or "the same parties." They involve almost entirely the *same* legal issues (the second case asserting the same claims as the first case under the First, Second, and Fourteenth Amendments, along with a recharacterized claim under the Fifth Amendment). They also involve two of the same parties and many of the same factual issues, arising from largely the same transaction or events (the most important of which is the passage of the CCIA). All of these facts have resulted in a substantial saving of judicial resources to the Court during the two-week period since Plaintiffs' motion was filed.

[2] The Court notes that, after oral argument on September 29, 2022, the City Defendants filed a brief in opposition to Plaintiffs' motion. (Dkt. No. 20.) Although the City Defendants' brief violates the Court's prohibition against incorporating by reference arguments in other briefs, the Court has considered the City Defendants' brief. The Court notes also that, on September 30, 2022, counsel for Defendant Fitzpatrick, Conway and Stanzione filed a Notice of Appearance (although they did not file opposing briefs). (Dkt. Nos. 24, 25, 26.) Finally, Defendant Soares has neither appeared through counsel nor filed a brief in opposition to Plaintiffs' motion. (*See generally* Docket Sheet.)

Rule 65 of the Federal Rules of Civil Procedure governs temporary restraining orders and preliminary injunctions. Fed. Rule Civ. P. 65(a), (b). In the Second Circuit, the standard for issuance of a temporary restraining order is the same as the standard for a preliminary injunction. *Fairfield Cnty. Med. Ass'n v. United Healthcare of New England*, 985 F. Supp. 2d 262, 270 (D. Conn. 2013), *aff'd as modified sub nom. Fairfield Cnty. Med. Ass'n v. United Healthcare of New England, Inc.*, 557 F. App'x 53 (2d Cir. 2014); *AFA Dispensing Grp. B.V. v. Anheuser–Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010) ("It is well established that the standard for an entry of a temporary restraining order is the same as for a preliminary injunction.").

Generally, in the Second Circuit, a party seeking a preliminary injunction must establish the following three elements: (1) that there is either (a) a likelihood of success on the merits and a balance of equities tipping in the party's favor or (b) a sufficiently serious question as to the merits of the case to make it a fair ground for litigation and a balance of hardships tipping decidedly in the party's favor; (2) that the party will likely experience irreparable harm if the preliminary injunction is not issued; and (3) that the public interest would not be disserved by the relief. *See Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (reciting standard limited to first part of second above-stated element and using word "equities" without the word "decidedly"); *accord, Glossip v. Gross*, 135 S. Ct. 2726, 2736-37 (2015); *see also Am. Civil Liberties Union v. Clapper*, 785 F.3d 787, 825 (2d Cir. 2015) (reciting standard including second part of second above-stated element and using words "hardships" and "decidedly"); *Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 38 (2d Cir. 2010) (holding that "our venerable standard for assessing a movant's probability of success on the merits remains valid [after the Supreme Court's decision in *Winter*]").

With regard to the first part of the first element, a "likelihood of success" requires a demonstration of a "better than fifty percent" chance of success. *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2d Cir. 1985), *disapproved on other grounds, O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349, n.2 (1987). "A balance of equities tipping in favor of the party requesting a preliminary injunction" means a balance of the hardships against the benefits. *See, e.g., Ligon v. City of New York,* 925 F. Supp.2d 478, 539 (S.D.N.Y. 2013) (characterizing the balancing "hardship imposed on one party" and "benefit to the other" as a "balanc[ing] [of] the equities"); *Jones v. Nat'l Conference of Bar Examiners,* 801 F. Supp. 2d 270, 291 (D. Vt. 2011) (considering the harm to plaintiff and any "countervailing benefit" to plaintiff in balancing the equities); *Smithkline Beecham Consumer Healthcare, L.P. v. Watson Pharm., Inc.,* 99-CV-9214, 1999 WL 34981557, at *4-5 (S.D.N.Y. Sept. 13, 1999) (considering the harm to defendant and the "benefit" to consumers in balancing the equities); *Arthur v. Assoc. Musicians of Greater New York*, 278 F. Supp. 400, 404 (S.D.N.Y. 1968) (characterizing "balancing the equities" as "requiring plaintiffs to show that the benefit to them if an injunction issues will outweigh the harm to other parties"); *Rosenstiel v. Rosenstiel*, 278 F. Supp. 794, 801-02 (S.D.N.Y. 1967) (explaining that, in order to "balance the equities," the court "will consider the hardship to the plaintiff . . . , the benefit to [the] plaintiff . . . , and the relative hardship to which a defendant will be subjected") [internal quotation marks omitted].[3]

With regard to the second part of the first element, "[a] sufficiently serious question as to the merits of the case to make it a fair ground for litigation" means a question that is so

[3] *See also Abbott Labs. v. Mead Johnson & Co.*, 971 F.2d 6, 12, n.2 (7th Cir. 1992) ("Weighing the equities as a whole favors X, making preliminary relief appropriate, even though the *undiscounted* balance of harms favors Y.") [emphasis added].

"substantial, difficult and doubtful" as to require "a more deliberate investigation." *Hamilton Watch Co. v. Benrus Watch Co.*, 206 F.2d 738, 740 (2d Cir. 1953); *accord, Semmes Motors, Inc. v. Ford Motor Co.,* 429 F.2d 1197, 1205-06 (2d Cir. 1970).[4] "A balance of hardships tipping decidedly toward the party requesting a preliminary injunction" means that, as compared to the hardship suffered by the other party if the preliminary injunction is granted, the hardship suffered by the moving party if the preliminary injunction is denied will be so much greater that it may be characterized as a "real hardship," such as being "driven out of business . . . before a trial could be held." *Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*, 601 F.2d 48, 58 (2d Cir. 1979); *Int'l Bus. Mach. v. Johnson*, 629 F. Supp.2d 321, 333-34 (S.D.N.Y. 2009); *see also Semmes Motors, Inc.,* 429 F.2d at 1205 (concluding that the balance of hardships tipped decidedly in favor of the movant where it had demonstrated that, without an injunctive order, it would have been forced out of business as a Ford distributor).[5]

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[4] *See also Six Clinics Holding Corp., II v. Cafcomp Sys., Inc.*, 119 F.3d 393, 402 (6th Cir. 1997); *Rep. of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988); *City of Chanute v. Kansas Gas and Elec. Co.,* 754 F.2d 310, 314 (10th Cir. 1985); *R.R. Yardmasters of Am. v. Penn. R.R. Co.*, 224 F.2d 226, 229 (3d Cir. 1955).

[5] The Court notes that, under the Second Circuit's formulation of this standard, the requirement of a balance of *hardships* tipping *decidedly* in the movant's favor is apparently added only to the second part of the first element (i.e., the existence of a sufficiently serious question as to the merits of the case to make it a fair ground for litigation), and not also to the first part of the first element (i.e., the existence of a likelihood of success on the merits), which (again) requires merely a balance of *equities* (i.e., hardships and benefits) tipping in the movant's favor. *See Citigroup Global Markets, Inc.*, 598 F.3d at 36 ("Because the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of hardships tips decidedly' in its favor . . . , its overall burden is no lighter than the one it bears under the 'likelihood of success' standard.") (internal citation omitted); *cf. Golden Krust Patties, Inc. v. Bullock*, 957 F. Supp.2d 186, 192 (E.D.N.Y. 2013) ("[T]he *Winter* standard . . . requires the balance of equities to tip in the movant's favor, though not necessarily 'decidedly' so, even where the movant is found likely to succeed on the merits.").

With regard to the second element, "irreparable harm" is "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Import Sales Co. v. Labatt Brewing Co.*, 339 F.3d 101, 113 (2d Cir. 2003). Irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously occupied." *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

With regard to the third element, the "public interest" is defined as "[t]he general welfare of the public that warrants recognition and protection," and/or "[s]omething in which the public as a whole has a stake[,] esp[ecially], an interest that justifies governmental regulation." *Black's Law Dictionary* at 1350 (9th ed. 2009).

The Second Circuit recognizes three limited exceptions to the above-stated general standard. *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4.

First, where the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less-rigorous "serious questions" standard but should grant the injunction only if the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim. *Id.* (citing *Able v. United States*, 44 F.3d 128, 131 [2d Cir. 1995]); *see also Otoe-Missouria Tribe of Indians v. New York State Dep't of Fin. Servs.*, 769 F.3d 105, 110 (2d Cir. 2014) ("A plaintiff cannot rely on the 'fair-ground-for-litigation' alternative to challenge governmental action taken in the public interest pursuant to a statutory or regulatory scheme.") (internal quotation marks omitted). This is because "governmental policies implemented through legislation or regulations

developed through presumptively reasoned democratic processes are entitled to a higher degree of deference and should not be enjoined lightly." *Able,* 44 F.3d at 131.

Second, a heightened standard–requiring both a "clear or substantial" likelihood of success and a "strong" showing of irreparable harm"–is required when the requested injunction (1) would provide the movant with all the relief that is sought and (2) could not be undone by a judgment favorable to the non-movant on the merits at trial. *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4 (citing *Mastrovincenzo v. City of New York*, 435 F.3d 78, 90 [2d Cir. 2006]); *New York v. Actavis PLC*, 787 F.3d 638, 650 (2d Cir. 2015) ("When either condition is met, the movant must show [both] a 'clear' or 'substantial' likelihood of success on the merits . . . *and* make a 'strong showing" of irreparable harm' . . . .") (emphasis added).

Third, the above-described heightened standard may also be required when the preliminary injunction is "mandatory" in that it would "alter the status quo by commanding some positive act," as opposed to being "prohibitory" by seeking only to maintain the *status quo*. *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4 (citing *Tom Doherty Assocs. v. Saban Entm't*, 60 F.3d 27, 34 [2d Cir. 1995]).[6] As for the point in time that serves as the *status quo*, the Second Circuit has defined this point in time as "the last actual, peaceable uncontested status which preceded the pending controversy." *LaRouche v. Kezer*, 20 F.3d 68, 74, n.7 (2d Cir. 1994); *accord, Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014); *Actavis PLC*, 787 F.3d at 650.

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[6] Alternatively, in such a circumstance, the "clear or substantial likelihood of success" requirement may be dispensed with if the movant shows that "extreme or very serious damage will result from a denial of preliminary relief." *Citigroup Global Markets, Inc.*, 598 F.3d at 35, n.4 (citing *Tom Doherty Assocs. v. Saban Entm't*, 60 F.3d 27, 34 [2d Cir. 1995]).

Finally, the Court rejects the State Defendants' suggestion that the determinations rendered in this Decision are more appropriate for a decision on a motion for a preliminary injunction, because (on such a motion) they would have a sufficient opportunity to adduce historical analogues or expert testimony. (Dkt. No. 23, at 31 [Oral Argument Tr.].) As an initial matter, temporary restraining orders do not actually require an opportunity for such opposition papers or evidence. *See, e.g.,* Fed. R. Civ. P. 65(b)(2) (permitting such orders even without notice to the adverse party). In any event, the State Defendants had a reasonable opportunity, in their opposition papers and oral argument, to advise the Court of all historical statutes they believe to be analogues (including those presented to the Court in *Antonyuk I*). (Dkt. No. 8 [Text Order of Sept. 23, 2022, setting the deadline for the State Defendants' opposition papers as a full seven days after the filing of Plaintiffs' motion].) They simply chose not to do so (possibly because they knew the Court would take notice of those statutes anyway, as it has done). Moreover, although the oral argument scheduled in this action precluded the submission of testimony, the State Defendants had a reasonable opportunity (i.e., seven days) to include the declaration of an expert in their opposition papers (supporting their reliance on purported historical analogues and correcting any errors in the Court's dictum analysis on *Antonyuk I*).[7]

B. Substantive Standard

The Second and Fourteenth Amendments protect an individual's right to "keep and bear arms for self-defense." *NYSRPA v. Bruen*, 142 S. Ct. 2111, 2125 (2022) (citing *D.C. v. Heller*,

[7] Although the Court does not rely on this fact, it notes that the State Defendants had notice of the need for an expert *29 days* before the deadline for their opposition papers in this action, when they learned of the dismissal without prejudice of *Antonyuk I* (and the Court's dictum finding flaws in the CCIA) on August 31, 2022.

128 S. Ct. 2783 [2008] and *McDonald v. City of Chicago*, 130 S. Ct. 3020 [2010]). "[The] definition of 'bear' naturally encompasses public carry." *NYSRPA*, 142 S. Ct. at 2134.

"[W]hen the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct." *Id*. at 2126, 2129-30. "To justify its [firearm] regulation, the government may not simply posit that the regulation promotes an important interest." *Id*. at 2126. Rather, the government must demonstrate that the firearm "regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. at 2126, 2130-31.

"[T]his historical inquiry . . . will often involve reasoning by analogy . . . ." *NYSRPA*, 142 S. Ct. at 2132. Such "analogical reasoning requires only that the government identify a well-established and representative historical analogue, not a historical twin. So even if a modern-day regulation is not a dead ringer for historical precursors, it still may be analogous enough to pass constitutional muster." *Id*. at 2133. On the other hand, "courts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted.'" *Id*. at 2133 (internal quotation marks omitted).

To "enabl[e] [courts] to assess which similarities are important and which are not" during this analogical inquiry, they must use at least "two metrics," which are "central" considerations to that inquiry: "how and why the regulations burden a law-abiding citizen's right to armed self-defense." *NYSRPA*, 142 S. Ct. at 2132-33. More specifically, courts must consider the following: (1) "whether modern and historical regulations impose a comparable burden on the right of armed self-defense"; and (2) "whether that [regulatory] burden is comparably justified." *Id.* at 2133.

Granted, in some cases, this inquiry "will be fairly straightforward." *NYSRPA*, 142 S. Ct. at 2131. For example, "when 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*. "Likewise, if earlier generations addressed the societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional." *Id*. "And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Id*.

However, "other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach." *NYSRPA*, 142 S. Ct. at 2132. This is because "[t]he regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id*. Nonetheless, "the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id*.

III. ANALYSIS

A. Standing

After carefully considering the matter, the Court finds that Plaintiffs have sufficiently shown that they each have standing and that each Defendant is a proper party for the reasons stated in their Complaint, declarations, motion papers, and oral argument. (*See, e.g.,* Dkt. No. 1, at ¶¶ 2-18, 132-232 [Plfs.' Compl.]; Dkt. No. 1, Attach. 3 [Johnson Decl.]; Dkt. No. 1, Attach. 4 [Sloane Decl.]; Dkt. No. 1, Attach. 5 [Leman Decl.]; Dkt. No. 1, Attach. 8 [Antonyuk Decl.];

Dkt. No. 1, Attach. 9 [Mann Decl.]; Dkt. No. 1, Attach. 10 [Terrille Decl.]; Dkt. No. 6, Attach. 1, at 3-14 [attaching pages "1" through "12" of Defs.' Memo. of Law]; Dkt. No. 23, at 4-21, 41-48 [Oral Argument Tr.].) To those reasons, the Court adds the following analysis.

With regard to all Plaintiffs, the Court observes that only "one plaintiff [need] have standing to seek each form of relief requested in the complaint." *Davis v. Federal Election Comm'n*, 554 U.S. 724, 734 (2008). Here, the Court finds that, with regard to each form of relief requested in the complaint, at least one Plaintiff has standing for the reasons stated by Plaintiffs.

With regard to the Oswego County Defendants' argument that Plaintiff Mann lacks standing, Plaintiff Mann has alleged—and repeatedly sworn in a declaration—that he possesses a concrete intention to carry his firearm in his church (which is adjacent to his residence, where he possesses that firearm). (Dkt. No. 1, at ¶¶ 183-84, 188, 191-95 [Compl.]; Dkt. No. 1, Attach. 9, at ¶¶ 4, 12, 16, 20, 25, 28, 30-33 [Mann Decl.].) Plaintiffs have also adduced evidence that, on July 13, 2022, Defendant Hilton publicly stated that he would be enforcing the CCIA (albeit "conservative[ly]"); on July 20, 2022, Defendant Hilton publicly stated, "Under the new law, taking a legally licensed firearm into any sensitive area–such as a … church …[–]is a felony punishable by up to 1 1/3 to 4 years in prison"; and on August 31, 2022, Defendant Hilton publicly stated, "If you own a firearm please be aware of these new laws as they will effect [sic] all gun owners whether we agree with them or not." (Dkt. No. 1, Attach. 9, ¶ 24 [Mann Decl.].) This is sufficient to establish a credible threat of prosecution under the case law cited in *Antonyuk I*, 2022 WL 3999791, at *15-16.

With regard to the Oswego County Defendants' argument that Defendant Hilton is not a proper Defendant, the Court rejects that argument because of his particular duty (and

willingness) to enforce the CCIA in Oswego County (including Plaintiff Man's church). (Dkt. No. 1, Attach. 9, ¶ 24 [Mann Decl.].) As his defense counsel acknowledged during oral argument, "[T]hat's his job." (Dkt. No. 23, at 40 [Oral Argument Tr.)[8]

With regard to the State Defendants' argument that Defendants Hochul, Bruen and Doran are improper Defendants, the Court finds that, although the Court certainly may ultimately find that Defendant Hochul is not a proper party,[9] that issue is more appropriately left for consideration on a more-fully briefed motion for a preliminary injunction; and Plaintiffs have alleged and shown their injuries to be fairly traceable to Defendants Bruen and Doran. Defendant Bruen is a proper Defendant to the extent explained in *Antonyuk I*, 2022 WL 3999791, at *10-15, i.e., due to his involvement of the enforcement of the CCIA's sensitive-location provision and restricted-location provision by state police members, and his involvement in requiring a certification of competition of 18-hours of firearm training in concealed-carry applications).

Furthermore, Defendant Doran is a proper Defendant because he is a relevant licensing officer, as was New York State Supreme Court Justice Richard J. McNally, Jr., in *N.Y. State Rifle & Pistol Assoc., Inc. v. Bruen*, 142 S. Ct. 2111 (2022) ("*NYSRPA*") ("Respondents are the superintendent of the New York State Police, who oversees the enforcement of the State's licensing laws, and a New York Supreme Court justice, who oversees the processing of licensing applications in Rensselaer County."). In response to the State Defendants' argument that

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[8] The Court notes that, during oral argument, counsel for the Oswego County Defendants stated that they are not disputing that Defendant Oakes (the District Attorney of Oswego County) is a proper Defendant. (Dkt. No. 23, at 53 [Oral Argument Tr.].)

[9] *See Antonyuk I*, 2022 WL 3999791, at *14 ("Authority exists for the point of law that the Governor … might *not* be proper defendants (regardless of whether they were named solely in his or her official capacity).") (collecting cases; emphasis in original).

Defendant Doran has not yet actually denied the application of one of the Plaintiffs, the Court finds that (to the extent the filing of such an application is required to establish standing) such an application would be futile for each of two independent reasons.

First, the State Defendants appeared to acknowledge during oral argument that Defendant Doran would essentially be *required* to deny an application that omits a list of social media accounts, character references and family members (*see, e.g.,* Dkt. No. 23, at 28, 37 [Oral Argument Tr.]), as Plaintiff Sloane has sworn that his application will (Dkt. No. 1, Attach. 4, at ¶¶ 7, 10, 15-16 [Sloane Decl.]). Second, in any event, Plaintiffs have adduced evidence that Defendant Conway (the Sheriff of Onondaga County) would not even be considering such an application until October of 2023 due to a lack of available appointments (Dkt. No. 1, Attach. 4, at ¶ 23 [Sloane Decl.]), which delay (regardless of how routine it may be in New York State) would effectively deny him his Second Amendment right. *See NYSRPA*, 142 S. Ct. at 2138, n.9 ("That said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications . . . deny ordinary citizens their right to public carry.").

B. Substantial Likelihood of Success on the Merits

Before analyzing Plaintiffs' substantial likelihood of success on the merits of their claims, the Court makes two observations.

First, with regard to which historical statutes constitute analogues, the Court acknowledges (as stated above in Part II.B. of this Decision) that a "historical twin" is not required. However, because the title "analogue" generally requires a thing to be so similar to

another thing as to be useful for some purpose (such as a determination of whether the two things form part of the same tradition),[10] generally, a historical statute cannot earn the title "analogue" if it is clearly more distinguishable than it is similar to the thing to which it is compared. *See id.* ("[C]ourts should not uphold every modern law that remotely resembles a historical analogue, because doing so risks endorsing outliers that our ancestors would never have accepted."). More specifically, as stated above in Part II of this Decision, an assessment of "which similarities are important and which are not" depends on (1) "whether modern and historical regulations impose a comparable burden on [a law-abiding citizen's] right of armed self-defense," and (2) "whether that [regulatory] burden is comparably justified." *Id.* at 2132-33.

Second, with regard to how many historical analogues constitute a "tradition," the Court declines to adopt a "majority of states" standard.[11] *Cf. Firearms Policy Coalition v. McGraw*,

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[10] *See, e.g., Webster's New College Dictionary* 41 (3d ed. Houghton Mifflin Harcourt 2008) (defining "analogue" as "[o]ne that bears an analogy to another," defining "analogous" as "[c]orresponding in a way that allows the drawing of an analogy," and defining "analogy" as "[c]orrespondence in some respects between otherwise dissimilar things" or "[a] form of logical inference, or an instance of it, based on the assumption that if two things are known to be alike in some respects, then they must be alike in other respects"); *The New Oxford American Dictionary* 54-55 (Oxford Univ. Press 2001) (defining "analogue" as "a person or thing seen as comparable to another," defining "analogous" as "comparable in certain respects, typically in a way that makes clearer the nature of the things compared," and defining "analogy" as "a comparison between two things, typically on the basis of their structure and for the purpose of explanation or clarification").

[11] The Court notes that, in *Antonyuk I*, the Court took notice of the law in the "vast majority" of other states, not merely "the majority" of other states. *Antonyuk*, 2022 WL 3999791, at *34 ("Although Defendant cites some historical analogs for restricting firearms at some of the above-listed locations, he often ignores the fact that [the] *vast* majority of the other states (of which there were 14 in 1791 and 37 in 1868) did not have statutes restricting firearms at those very locations (suggesting that Defendant's 'historical analogs' might represent exceptions to a tradition more than a tradition), and that some of the states even had contrary statutes (for example, statutes regarding carrying in places of worship and educational institutions.").

21-CV-1245, 2022 WL 3656996, at *11 (N.D. Tex. Aug. 31, 2022) the ("[H]istorical record before the Court establishes (at most) that between 1856 and 1892, approximately twenty jurisdictions (of the then 45 states) enacted laws that restricted the ability of those under 21 to 'purchase or use firearms.'"). However, the Court observes that the definition of a "tradition" often involves the passing on of a belief or custom from one generation to another.[12] As a result, generally, one historical analogue (especially if relatively short-lived)[13] would not seem to suffice, appearing more as an aberration or anomaly than as a tradition (with no followers).[14] Furthermore, while two such historical analogues can come closer to constituting a tradition, they can also appear as a mere trend.[15] As a result, the Court generally has looked to instances where there have been three or more such historical analogues (specifically, three or more

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[12] *See, e.g., Webster's New College Dictionary* 1196 (3d ed. Houghton Mifflin Harcourt 2008) (defining "tradition" as "[a] mode of thought or behavior passed from one generation to another," or "[c]ustoms and usages transmitted from one generation to another and viewed as a coherent body of precedents influencing the present"); *The New Oxford American Dictionary* 1974 (Oxford Univ. Press 2001) (defining "tradition" as "the transmission of customs or beliefs from generation to generation, or the fact of being passed on in this way"); *cf. Peabody Twentymile Mining, LLC v. Sec'y of Labor*, 931 F.3d 992, 997 (10th Cir. 2019) (defining "tradition" as "[a] long established and generally accepted custom or method of procedure, having almost the force of a law" or "[a] time-honored practice.").

[13] *See NYSRPA*, 142 S. Ct. at 2155 ("[T]hese territorial restrictions deserve little weight because they were . . . short lived.").

[14] *See D.C. v. Heller*, 554 U.S. 570, 632 (2008) ("[W]e would not stake our interpretation of the Second Amendment upon a single law ... that contradicts the overwhelming weight of other evidence....").

[15] *See Ezell v. City of Chicago*, 651 F.3d 684, 706 (7th Cir. 2011) (finding that two historical statutes "falls far short of establishing that [a regulated activity] is wholly outside the Second Amendment as it was understood" in 1791"); *Illinois Ass'n of Firearms Retailers*, 961 F. Supp. 2d 928, 937 (N.D. Ill. 2014) ("[C]itation to a few isolated statutes—even to those from the appropriate time period—fall[s] far short of establishing that gun sales and transfers were historically unprotected by the Second Amendment") (internal quotation marks omitted).

historical analogues from states, given that such analogues from territories deserve less weight under *NYSRPA*, 142 S. Ct. at 2154-55).

With these observations in mind, the Court proceeds to an analysis of the merits of Plaintiffs' constitutional challenges.

1. "Good Moral Character"

The CCIA's "good moral character" standard appears fatally flawed in two respects. First, it omits the qualifying phrase "other than in self-defense" for the reasons described in *Antonyuk I*, 2022 WL 3999791, at *26-29.[16] Second, and more importantly, the Court interprets the Supreme Court's decision in *NYSRPA* as endorsing a standard that effectively compels (or at least expressly permits) a state to issue a carry license unless the licensing officer finds that the applicant is likely to use the handgun in a manner that endangers oneself or others (other than in self-defense) according to a standard that can fairly be called "objective" (e.g., by a preponderance of the evidence[17] based on the applicant's conduct).[18] However, instead, the

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[16] The Court rejects the State Defendants' argument that the Court's analysis here "runs afoul of the doctrine of constitutional avoidance" (Dkt. No. 18, at 6 [State Defs.' Opp'n Brief]), because the construction proffered by the State Defendants is implausible, given (1) the otherwise-detailed nature of the CCIA, (2) the omission of the "other than in self-defense" exception from the CCIA's express language, and (3) the important role that the idea of "self-defense" plays when one is construing the Second Amendment. With regard to the State Defendants' similar argument that no omission of this exception actually exists because N.Y. Penal Law § 35.15(1) essentially permits a person to use a gun in self-defense (*id.*), the Court rejects that argument for the same three reasons, in addition to the fact that the inquiry on an application to carry concealed is different from the inquiry in a criminal proceeding.

[17] *See, e.g.,* Ga. Code Ann. § 16-11-129 (Supp. 2021) ("The court shall grant the petition for relief if such court finds *by a preponderance of the evidence* that the person will not likely act in a manner dangerous to public safety in carrying a weapon and that granting the relief will not be contrary to the public interest."); 430 Ind. Code 66 § 20 (2021) (permitting denial of an application "[i]f the Board determines *by a preponderance of the evidence* that the applicant

CCIA expressly *prohibits* the issuance of a license unless the licensing officer finds (meaning

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poses a danger to himself or herself or others, or is a threat to public safety …") (emphasis added); Va. Code. § 18.2-308.09(13) (allowing a judge to reject a licensing request if "the court finds, *by a preponderance of the evidence*, based on specific acts by the applicant," that the applicant "is likely to use a weapon unlawfully or negligently to endanger others") (emphasis added); *cf*. Minn. Stat. § 624.714 (2020) ("The court must issue its writ of mandamus directing that the permit be issued … unless the sheriff establishes by *clear and convincing evidence* … that there exists a substantial likelihood that the applicant is a danger to self or the public if authorized to carry a pistol under a permit.") (emphasis added).

[18] *See, e.g.,* Colo. Rev. Stat. § 18-12-203(2) (allowing a sheriff to deny a permit if he or she "has a reasonable belief that *documented previous behavior by the applicant* makes it likely the applicant will present a danger to self or others if the applicant receives a permit") (emphasis added); Iowa Code § 724.8 (2022) (allowing the denial of a license where "[p]robable cause exists to believe, based *upon documented specific actions of the person*, where at least one of the actions occurred within two years immediately preceding the date of the permit application, that the person is likely to use a weapon unlawfully or in such other manner as would endanger the person's self or others") (emphasis added); Me. Rev. Stat. Ann., Tit. 25, § 2003(4) (Cum. Supp. 2022) (defining "good moral character" based on the "reckless or negligent *conduct*" of the applicant" and "information of record relative to *incidents*" involving the applicant) (emphasis added); Minn. Stat. § 624.714 (2020) (providing that "*[i]ncidents of alleged criminal misconduct that are not investigated and documented may not be considered*" during a danger assessment) (emphasis added); Mo. Rev. Stat. § 571.101 (2016) (requiring a permit to be issued if the applicant "[h]as not engaged in a pattern of *behavior*, *documented* in public or closed records, that causes the sheriff to have a reasonable belief that the applicant presents a danger to himself or others") (emphasis added); Utah Code § 53-5-704(3) (2022) (permitting the denial of a "firearm permit if it has reasonable cause to believe that the applicant or permit holder has been or is a danger to self or others *as demonstrated by evidence*, including … past *pattern of behavior* involving unlawful violence or threats of unlawful violence [or] … past *participation in incidents* involving unlawful violence or threats of unlawful violence") (emphasis added); Va. Code. § 18.2-308.09(13) (allowing a judge to reject a licensing request if "the court finds, by a preponderance of the evidence, *based on specific acts by the applicant*," that the applicant "is likely to use a weapon unlawfully or negligently to endanger others") (emphasis added); Wyo. Stat. Ann. § 6-8-104 (2021) ("The [sheriff's] written report shall state facts known to the sheriff which establish reasonable grounds to believe that the applicant has been or is reasonably likely to be a danger to himself or others, or to the community at large as a result of the applicant's mental or psychological state, as *demonstrated by a past pattern or practice of behavior*, or *participation in [certain] incidents* …").The Court notes that, as interpreted by Connecticut's highest court, Conn. Gen. Stat. § 29-28(b) (2021) permits a license unless the licensing officer finds that applicant's "*conduct* has shown them" to be lacking the essential character of temperament necessary to be entrusted with a weapon. *NYSRPA*, 142 S. Ct. at 2123, n.1 (emphasis added).

unless the applicant *persuades* him or her through providing much information, including "such other information required by review of the licensing application that is reasonably necessary and related to the review of the licensing application") that the applicant is of "good moral character," which involves undefined assessments of "temperament," "judgment" and "[]trust[]." Setting aside the subjective nature of these assessments, shouldering an applicant with the burden of showing that he or she is of such "good moral character" (in the face of a de facto presumption that he or she is *not*) is akin to shouldering an applicant with the burden of showing that he or she has a special need for self-protection distinguishable from that of the general community, which is prohibited under *NYSRPA*. In essence, New York State has replaced its requirement that an applicant show a special need for self-protection with its requirement that the applicant rebut the presumption that he or she is a danger to himself or herself, while retaining (and even expanding) the open-ended discretion afforded to its licensing officers.

Simply stated, instead of moving toward becoming a shall-issue jurisdiction, New York State has further entrenched itself as a shall-not-issue jurisdiction. And, by doing so, it has further reduced a first-class constitutional right to bear arms in public for self-defense (which, during the 19th and 18th centuries in America, generally came with an assumption that law-abiding responsible citizens were not a danger to themselves or others unless there was specific ground for a contrary finding) into a mere request (which is burdened with a presumption of dangerousness and the need to show "good moral character"). *See NYSRPA*, 142 S. Ct. at 2156 ("The constitutional right to bear arms in public for self-defense is not a

second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees.") (internal quotation marks omitted).

In support of the CCIA's "good moral character" requirement, the State Defendants rely on precedent permitting them to deny firearms to those posing a danger to themselves or others (other than in self-defense). (*See, e.g.,* Dkt. No. 18, at 4-6 [State Defs.' Opp'n Brief]; Dkt. No. 23, at 25-27 [Oral Argument Tr.].) However, generally, the historical statues forming the basis of that precedent treated people as being entitled to a firearm unless they pose (or more specifically are *found* by the government to pose) such a danger.[19] The CCIA, on the other hand, as stated above, provides that people are *not* entitled to carry concealed unless they can *persuade* a licensing officer (who possesses enormous discretion) that they are not such a danger.

Defendants argue that Plaintiffs' facial challenge must be rejected unless they establish "that no set of circumstances exists under which the regulation would be valid." *Jacoby & Meyers, LLP v. Presiding Justices*, 83 F.3d 178, 184 (2d Cir. 2017).[20] Defendants further argue

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[19] *See, e.g.,* Act of Mar. 14, 1776, ch. VII, 1775-1776 Mass. Act at 31-32, 35 (recommending "the disarming of such persons … *who refuse to associate to defend by arms the United American Colonies*, against the hostile attemps of the British fleets and armies …") (emphasis added); 1777 Pa. Laws 61 An Act, Obliging the Male White Inhabitants of this State to Give Assurances of Allegiance to the Same, ch. XXI, § 4 ("That every person above the age aforesaid *refusing or neglecting to take and subscribe the said oath or affirmation* … shall be disarmed by the lieutenant or sublieutenants of the city or countries respectively.") (emphasis added); Va. Act of May 5, 1777, ch. 3 in 9 Hening's Statutes at Large 281-82 (1821) ("And the justices tendering such oath or affirmation [of Allegiance] are hereby directed to deliver a list of the names of such *recusants* to the county lieutenant, or chief commanding officer of the militia, who is hereby authorised and directed forthwith to cause such recusants to be disarmed.") (emphasis added).

[20] For the sake of brevity, the Court will assume this standard applies, although the Supreme Court has allowed a facial challenge to a statute when the statute would unconstitutionally impact a fundamental right in "a large fraction" of the cases to which the statute applies. *See Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 895 (1992) ("The unfortunate

Plaintiffs have not made this showing because a circumstance can exist in which (1) the licensing officer understands that the "good moral character" provision of the CCIA essentially ends in the words "other than in self-defense," and (2) the licensing officer applies the "good moral character" provision of the CCIA as if it operates more as a "shall issue" regime that is more objective in nature. Unfortunately for Defendants, the Court finds that those are the *only* circumstances under which the "good moral character" provision may be valid under the Constitution. More specifically, the Court finds that the "good moral character" provision of the CCIA can be rendered constitutional only if it were considered as containing the following changes (with deleted words being struck out and new words being underlined):

> ~~No~~ A license shall be issued or renewed except for an applicant . . . who has been found, by a preponderance of the evidence based on his or her conduct,[21]

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yet persisting conditions we document above will mean that in a large fraction of the cases in which § 3209 is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid."), *overruled on other grounds*, Dobbs v. Jackson Women's Health Organization, 142 S. Ct. 2228 (2022).

[21] The Court notes that such a "preponderance of the evidence" standard appears akin to those historical analogues that condition the denial of a right to be arms on a *likelihood* of danger (which is essentially a finding that there is more evidence that danger will occur than there is evidence that it will not occur). *See, e.g.,* 1855 Ill. Criminal Code 365, Offenses Against the Persons of Individuals, Div. V, § 43 (proscribing instances in which a person "shall willfully and maliciously, or by agreement, fight a duel or single combat with any engine, instrument or weapon, the *probable* consequence of which might be the death of either party …"). Such historical analogues include those based on what counsel for the State Defendants have called "a continued belief that Catholics were *likely* to engage in conduct that would harm themselves or others and upset the peace." *Antonyuk I*, 22-CV-0734, Def.'s Opp'n Memo. of Law, at 27-28 (N.D.N.Y. filed Aug. 15, 2022) (emphasis added) (citing statutes). Less deserving of weight, of course, are those later historical analogues from territories. *See, e.g.,* William Lair Hill, *Ballinger's Annotated Codes and Statutes of Washington* (Vol. 2, 1897), 1881 Flourishing Deadly Weapon ("Every person who shall in a manner *likely* to cause terror to the people passing, exhibit or flourish, in the streets of an incorporated city or unincorporated town, any dangerous weapon, shall be deemed guilty of a misdemeanor ….") (emphasis added); Bruce L. Keenan, *Book of Ordinances of the City of Wichita* Carrying Unconcealed Deadly Weapons, § 2 (1899) ("Any person who shall in the city of Wichita carry unconcealed, any fire-arms,

> to not be of good moral character, which . . . shall mean having the essential character, temperament and judgment necessary . . . to use [the weapon entrusted to the applicant] only in a manner that does not endanger oneself or others, other than in self-defense.

N.Y. Penal Law § 400.00(1)(b). As a result, the Court orders Defendants to so construe those provisions when performing their duties in their official capacities.

2. List of Four Character References

The Court begins its analysis of this provision by acknowledging the apparent dearth of historical analogues requiring a responsible, law-abiding citizen to provide character references in order to be permitted to carry a gun.[22] However, just as lacking, it appears, are historical analogues requiring a responsible, law-abiding citizen to even *apply* to be able to carry a gun.

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slungshot, sheath or dirk knife, or any other weapon, which when used is *likely* to produce death or great bodily harm, shall upon conviction, be fined not less than one dollar nor more than twenty-five dollars.") (emphasis added). Taken together, however, the Court finds that these historical analogues suffice to establish a tradition of requiring a likelihood of danger. Finally, the Court notes that such a standard carries the added benefit of providing for a more-meaningful review during any appeal from such a finding.

[22] *See* 1832 Del. Laws 208, § 1 ("[I]f upon application of any such free negro or free mulatto to one of the justices of the peace of the county in which such free negro or free mulatto resides, it shall satisfactorily appear upon the *written certificate of five or more respectable and judicious citizens of the neighborhood*, that such free negro or free mulatto is a person of *fair character*, and that the circumstances of his case justify his keep and using a gun, then and in every such case it shall and may be lawful for such justice to issue a license or permit under his hand and authorizing such free negro or free mulatto to have use and keep in his posession a gun or fowling piece") (emphasis added); Ordinances of Jersey City, Passed By The Board Of Aldermen March 31, 1871, § 3 ("[I]n in all cases the court shall require *a written endorsement of the propriety of granting a permit from at least three reputable freeholder*s ….") (emphasis added); 1881 Ordinances of the Mayor, Aldermen and Commonality of the City of New York art. XXVII, § 265 ("[T]he officer in command at the station-house … shall give said person *a recommendation* to the superintendent of police, or the inspector in command at the central office in the absence of the superintendent ….") (emphasis added). The Court notes that it relies on the first above-cited statute despite how much it may find that statute to be racist and abhorrent.

The Court imagines that historically this application requirement was not common only because the need to restrict gun possession in a geographical area rarely existed. In any event, in those instances where the need did exist (for whatever reason), it is difficult to imagine the absence of an accompanying need to *verify* the statements made in the application (through one or more character references). Indeed, in each of these three historical analogues cited above in note 22 of this Decision, a reference requirement accompanied the application requirement. For these reasons, the Court lets this provision stand.

3. List of Family and Cohabitants

Far more invasive and onerous than a demand for a list of character references, however, appears to be a demand for the "names and contact information for the applicant's current spouse, or domestic partner, any other adults residing in the applicant's home, including any adult children of the applicant, and whether or not there are minors residing, full time or part time, in the applicant's home" (as set forth in Section 1 of the CCIA). Indeed, none of the three historical analogues cited above in note 22 of this Decision contain such a demand. Moreover, the Court finds that no such circumstances exist under which this provision would be valid (other than a circumstance in which the provision was not enforced, which of course is no circumstance at all). As a result, the Court orders its enforcement temporarily restrained.

4. List Social Media Accounts for Past Three Years

Based on the briefing so far in this action (and the briefing in *Antonyuk I*), the Court finds that an insufficient number of historical analogues exists requiring a list of social media accounts for the past three years, for purposes of Section 1 of the CCIA. For example, Defendants have adduced no historical analogues requiring persons to disclose the pseudonyms they have used

while publishing political pamphlets or newspaper articles (which might be considered to be akin to requiring the disclosure of all one's social-media accounts).[23] Moreover, the Court finds that no such circumstances exist under which this provision would be valid (other than a circumstance in which the provision was not enforced). As a result, the Court orders its enforcement temporarily restrained.

5. "Such Other Information Required by the Licensing Officer"

Although the Court can find no historical analogues supporting this requirement (other than perhaps the three historical analogues cited above in note 22 of this Decision), and although this requirement certainly appears to exacerbate the open-ended discretion referenced above in Part III.B.1. of this Decision, the Court can imagine a set of circumstances in which it is constitutionally valid (other than non-enforcement): for example, if the licensing officer were to require only very minor follow-up information from an applicant (such as identifying information). As a result, the Court will let this provision stand for now, although it is willing to revisit the issue during the briefing and hearing on Plaintiffs' motion for a Preliminary Injunction.

6. Eighteen Hours of Firearm Training

The Court has been persuaded by Defendants that historically Americans' familiarity with firearms was far more common than it is today; and it is has not yet been persuaded by Plaintiffs that the CCIA's firearm-training requirements are so onerous as to fall within the scope of what the Supreme Court in *Bruen* called "exorbitant." *NYSRPA*, 142 S. Ct. at 2138, n.9 ("That

[23] Indeed, such historical analogue would be surprising given that the Constitution—and sometimes the Bill of Rights—was vigorously debated in public by individuals who both used pseudonyms and carried guns.

said, because any permitting scheme can be put toward abusive ends, we do not rule out constitutional challenges to shall-issue regimes where, for example, lengthy wait times in processing license applications or *exorbitant* fees deny ordinary citizens their right to public carry.") (emphasis added). As a result, the Court lets that provision stand for now.

7. In-Person Meeting

Unlike an application without character references, the Court can easily imagine an application without an in-person meeting. Indeed, in only one of the three historical analogues cited above in note 22 of this Decision was a reference requirement accompanied by an in-person-meeting requirement. Moreover, that analogue was a city statute,[24] the general reliance on which the Supreme Court has expressed disapproval. *See NYSRPA*, 142 S. Ct. at 2154 ("[T]he bare existence of these localized restrictions cannot overcome the overwhelming evidence of an otherwise enduring American tradition permitting public carry."). Moreover, the Court finds that no such circumstances exist under which this provision would be valid (other than a circumstance in which the provision was not enforced). As a result, the Court orders this provision's enforcement temporarily restrained.

8. Prohibition in "Sensitive Locations"

The CCIA sets forth the following list of "sensitive locations" where concealed carry is prohibited:

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[24] *See* Ordinances of Jersey City, Passed By The Board Of Aldermen March 31, 1871, § 3. ("All applications for permits shall be made *in open court*, by the applicant *in person*, and in all cases the court shall require a written endorsement of the propriety of granting a permit from at least three reputable freeholders ….") (emphasis added).

(a) any place owned or under the control of federal, state or local government, for the purpose of government administration, including courts;

(b) any location providing health, behavioral health, or chemical dependance care or services;

(c) any place of worship or religious observation;

(d) libraries, public playgrounds, public parks, and zoos;

(e) the location of any program licensed, regulated, certified, funded, or approved by the office of children and family services that provides services to children, youth, or young adults, any legally exempt childcare provider; a childcare program for which a permit to operate such program has been issued by the department of health and mental hygiene pursuant to the health code of the city of New York;

(f) nursery schools, preschools, and summer camps;

(g) the location of any program licensed, regulated, certified, operated, or funded by the office for people with developmental disabilities;

(h) the location of any program licensed, regulated, certified, operated, or funded by office of addiction services and supports;

(i) the location of any program licensed, regulated, certified, operated, or funded by the office of mental health;

(j) the location of any program licensed, regulated, certified, operated, or funded by the office of temporary and disability assistance;

(k) homeless shelters, runaway homeless youth shelters, family shelters, shelters for adults, domestic violence shelters, and emergency shelters, and residential programs for victims of domestic violence;

(l) residential settings licensed, certified, regulated, funded, or operated by the department of health;

(m) in or upon any building or grounds, owned or leased, of any educational institutions, colleges and universities, licensed private career schools, school districts, public schools, private schools licensed under article one hundred one of the education law, charter schools, non-public schools, board of cooperative educational services, special act schools, preschool special education programs, private residential or non-residential schools for the education of students with disabilities, and any state-operated or state-supported schools;

(n) any place, conveyance, or vehicle used for public transportation or public transit, subway cars, train cars, buses, ferries, railroad, omnibus, marine or aviation transportation; or any facility used for or in connection with service in the transportation of passengers, airports, train stations, subway and rail stations, and bus terminals;

(o) any establishment issued a license for on-premise consumption pursuant to article four, four-A, five, or six of the alcoholic beverage

> control law where alcohol is consumed and any establishment licensed under article four of the cannabis law for on-premise consumption;
>
> (p) any place used for the performance, art entertainment, gaming, or sporting events such as theaters, stadiums, racetracks, museums, amusement parks, performance venues, concerts, exhibits, conference centers, banquet halls, and gaming facilities and video lottery terminal facilities as licensed by the gaming commission;
>
> (q) any location being used as a polling place;
>
> (r) any public sidewalk or other public area restricted from general public access for a limited time or special event that has been issued a permit for such time or event by a governmental entity, or subject to specific, heightened law enforcement protection, or has otherwise had such access restricted by a governmental entity, provided such location is identified as such by clear and conspicuous signage;
>
> (s) any gathering of individuals to collectively express their constitutional rights to protest or assemble;
>
> (t) the area commonly known as Times Square, as such area is determined and identified by the city of New York; provided such area shall be clearly and conspicuously identified with signage.

2022 N.Y. Sess. Laws ch. 371, § 4 (codified at N.Y. Penal Law § 265.01-e[2]).

Before proceeding to an analysis of the historical justification for the CCIA's list of sensitive locations, the Court makes two observations. First, although the Supreme Court has not altogether barred the expansion of sensitive locations beyond schools, government buildings, legislative assemblies, polling places and courthouses, it has indicated a skepticism of such an expansion based on the historical record. *See NYSRPA*, 142 S. Ct. 2133 ("[T]he historical record yields *relatively few* 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited . . . [other than, for example, legislative assemblies, polling places, and courthouses]."") (emphasis added); *Heller*, 554 U.S. at 626 ("Although we do not undertake an exhaustive historical analysis today of the full scope of the Second Amendment, nothing in our opinion should be taken to *cast doubt* on longstanding prohibitions on . . . laws forbidding the

carrying of firearms in sensitive places such as schools and government buildings . . . .") (emphasis added).

Second, although this Court has found that most of the CCIA's list of "sensitive locations" violate the Constitution, the Court does so not because the list (or a portion of the list) must rise or fall in its entirety but because Defendants have simply not met their burden of "sift[ing] the historical materials for evidence to sustain New York State's statute." *NYSRPA*, 142 S. Ct. at 2150. The Court respectfully reminds Defendants that, because the Second Amendment's plain text covers the conduct in question (carrying a handgun in public for self-defense), "the Constitution presumptively protects that conduct." *NYSRPA*, 142 S. Ct. at 2126. Defendants must then rebut the presumption by "demonstrate[ing] that the regulation is consistent with this Nation's historical tradition of firearm regulation." *Id*. This they have not yet done.

a. Places Controlled by Federal, State or Local Government

Fortunately, the Court need not collect in a footnote citations to the many historical analogues restraining the right to carry a firearm in "any place owned or under the control of federal, state or local government, for the purpose of government administration, including courts" as stated in paragraph "2(a)" of Section 4. This is because the Supreme Court has already expressly acknowledged the permissibility of these restrictions. *See NYSRPA*, 142 S. Ct. 2133 ("[T]he historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited . . . [other than, for example, *legislative assemblies*, polling places, and *courthouses*].") (emphasis added); *Heller*, 554 U.S. at 626 ("[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of

firearms in sensitive places such as . . . government buildings . . . ."). As a result, this provision may stand.

b. Polling Places

Just as common in the historical record as the exception for government buildings (discussed above in Park III.B.7.a. of this part of the Decision) is the exception for locations "being used as a polling place, as contained in paragraph "2(q)" of Section 4. *See NYSRPA*, 142 S. Ct. 2133 ("[T]he historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited . . . [other than, for example, legislative assemblies, *polling places*, and courthouses].") (emphasis added). As a result, this provision may stand.

c. Public Areas Restricted from General Public Access for a Limited Time by a Government Entity

For similar reasons as stated above in Part III.B.7.a. of this Decision, the Court finds that grounds exist to also let stand for now the provision of the CCIA prohibiting concealed carry in "any public sidewalk or other public area restricted from general public access for a limited time or special event that has been issued a permit for such time or event by a governmental entity, or subject to specific, heightened law enforcement protection, or has otherwise had such access restricted by a governmental entity, provided such location is identified as such by clear and conspicuous signage" (as provided in paragraph "2(r)" of Section 4).

d. Places of Worship or Religious Observation

Based on the historical analogues, it is permissible for New York State to *generally* restrict concealed carry in "any place of worship or religious observation" (as contained in

paragraph "2(c)" of Section 4).[25] The Court emphasizes the word "generally" because, of the six historical analogues the Court has located, half of them contain one or more of the following four exceptions: (1) for those bound by "duty" to bear arms at the place of worship;[26] (2) for those possessing "good and sufficient cause" to carry a gun at the place of worship;[27] (3) for those

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[25] *See* 1870 Ga. Laws 421 ("[N]o person in said State of Georgia be permitted or allowed to carry about his or her person any ... pistol, or revolver ... to ... any place of public worship...."); 1870 Tex. Laws 63 ("That if any person shall go into any church or religious assembly, ... and shall have about his person ... fire-arms, whether known as a six shooter, gun or pistol of any kind, such person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than fifty or more than five hundred dollars ...."); 1877 Va. Acts 305, Offenses Against The Peace, § 21 ("If any person carrying any gun, pistol, … or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place, or without good and sufficient cause therefor, shall carry any such weapon on Sunday at any place other than his own premises, shall be fined not less than twenty dollars. If any offense under this section be committed at a place of religious worship, the offender may be arrested on the order of a conservator of the peace, without warrant, and held until warrant can be obtained, but not exceeding three hours."); 1883 Mo. Laws 76 ("If any person shall ... go into any church or place where people have assembled for religious worship, ... having upon or about his person any kind of fire-arms, ... he shall, upon conviction, be punished by a fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not less than five days or more six months, or by both such fine and imprisonment."); 1889 Ariz. Sess. Laws 16-17 ("If any person shall go into any church or religious assembly … and shall have or carry about his person a pistol or other firearm … he shall be punished by a fine not less than fifty nor more than five hundred dollars, and shall forfeit to the County the weapon or weapons so found on his person."); The Statutes of Oklahoma, 1890, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into any church or religious assembly ... any of the weapons designated in sections one and two of this article.").

[26] *See* 1870 Tex. Laws 63 ("[T]his act shall *not apply to any person or persons whose duty it is to bear arms* on such occasions in discharge of duties imposed by law.").

[27] *See* 1877 Va. Acts 305, Offenses Against The Peace, § 21 ("If any person carrying any gun, pistol, … or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place*, or without good and sufficient cause therefor*, shall carry any such weapon on Sunday at any place other than his own premises, shall be fined not less than twenty dollars."); *cf.* The Revised Ordinances of the City of Huntsville, Missouri, of 1894, § 2 ("[I]it shall be good defense to the charge of carrying such weapon [in any church or place where people have assembled for religious worship], if the defendant shall show that he has been

serving as "peace officers" at the place of worship;[28] and (4) for those for whom the place of worship is "his own premises."[29] Together, these historical statutes suggest that there also exists a tradition of permitting an exception to this prohibition for those persons who have been tasked with the duty to keep the peace at the place of worship (particularly when the place of worship can fairly be characterized as those persons' "own premises").

This exception appears even more historically justified when one considers three facts: (1) the fact that the vast majority of the states in 1868 did *not* have this restriction at all (which appears to be what the Supreme Court might call a piece of "overwhelming evidence of an otherwise enduring American tradition" permitting the carrying of firearms in places of worship);[30] (2) the fact that one historical analogue exists actually *requiring* the carrying of firearms to church (at least to the extent that a church congregation may be characterized as a

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threatened with great bodily harm, or had *good reason* to carry the same in the necessary *defense* of his home, *person or property*.").

[28] *See* The Statutes of Oklahoma, 1890, § 7 ("It shall be unlawful for any person, *except a peace officer*, to carry into any church or religious assembly ... any of the weapons designated in sections one and two of this article.") (emphasis added); *cf.* The Revised Ordinances of the City of Huntsville, Missouri, of 1894, § 2 ("The … preceding section [prohibiting concealed carry any church or place where people have assembled for religious worship] shall not apply to … persons whose duty it is to … *suppress breaches of the peace* ….") (emphasis added).

[29] *See* 1877 Va. Acts 305, Offenses Against The Peace, § 21 ("If any person carrying any gun, pistol, … or other dangerous weapon, to any place of worship while a meeting for religious purposes is being held at such place, or without good and sufficient cause therefor, shall carry any such weapon on Sunday at any place *other than his own premises*, shall be fined not less than twenty dollars.").

[30] *See NYSRPA*, 142 S. Ct. at 2154 (balancing historical analogues restricting public carry against "the overwhelming evidence of an otherwise enduring American tradition permitting public carry").

"public meeting");[31] and (3) the fact that not recognizing such an exception treads close to infringing one's First Amendment right to practice religion by attending congregate religious services.

For all of these reasons, the Court finds that the Constitution demands that this provision contain an exception for those persons who have been tasked with the duty to keep the peace at the place of worship or religious observation. The Court therefore orders Defendants to so construe this provision when performing their duties in their official capacities.[32]

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[31] *See Records of the Colony of Rhode Island and Providence Plantations, in New England* 94 (John Russell Bartlett ed., 1856) ("[N]oe man shall go two miles from the Towne unarmed, eyther with Gunn or Sword; and that none shall come to *any public Meeting* without his weapon."). The Court acknowledges that this statute is somewhat farther removed from the relevant time periods (1791 or 1868) than the other historical statutes cited in this Decision. However, the Court does not construe *NYSRPA* as treating relevance as controlled by an on-off switch (permitting historical analogues from one year to be considered, but prohibiting consideration of those from the year before). Rather, the Court construes *NYSRPA* as treating relevance as controlled by a sort of dimmer switch whose slide lever darkens a room at the top and bottom of the control panel but fills the room with light as it approaches the middle (representing our insight into the public understanding of the amendments that were ratified by three-fourths of the state legislatures in 1791 and 1868). For these reasons, the Court finds that the above-cited analogue may be considered but as having less weight. The Court also notes that it does not base its Decision on the historical statutes from the 1600s (even though they may arguably show how "enduring" the tradition was in 1791). *See* 1 William Waller Hening, *The Statutes at Large: Being a Collection of all the Laws of Virginia, from the First Session of the Legislature* 126, 173, 263 (1808) (citing 1632 Virginia statute providing that "ALL men that are fittinge to beare armes, shall bringe their pieces to the church," 1632 Virginia statute providing that "masters of every family shall bring with them to church on Sundays one fixed and serviceable gun with sufficient powder and shott," 1643 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," and similar 1676 Virginia law).

[32] The Court notes that, although it is unclear whether this prohibition applies to Plaintiff Mann while he is in his residence (which is part of the same structure than encloses his church), it is also true that a reasonable licensing officer could properly apply the prohibition as not applying to him while he is in that residence. A closer question is presented with regard to whether the prohibition applies to Plaintiff Mann while he is overseeing "Bible studies, meetings of elders, and other church gatherings" in his residence. (Dkt. No. 1, Attach. 9, at ¶ 13 [Mann

e. Schools, Colleges, and Universities

Based on the historical analogues, it appears permissible for New York State to restrict concealed carry in the following two places: (1) "nursery schools" and "preschools" (as contained in paragraph "2(f)" of Section 4); and (2) "any building or grounds, owned or leased, of any educational institutions, colleges and universities, licensed private career schools, school districts, public schools, private schools licensed under article one hundred one of the education law, charter schools, non-public schools, board of cooperative educational services, special act schools, preschool special education programs, private residential or non-residential schools for the education of students with disabilities, and any state-operated or state-supported schools" (as contained in paragraph "2(m)" of Section 4).[33] *See Heller*, 554 U.S. at 626 ("[N]othing in our

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Decl.].) However, again, the Court finds that a reasonable licensing officer could properly apply the prohibition as not applying to him in such circumstances.

[33] *See* 1870 Tex. Laws 63 ("That if any person shall go into ... any school room or other place where persons are assembled for educational, literary or scientific purposes, ... and shall have about his person ... fire-arms, whether known as a six shooter, gun or pistol of any kind, such person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined in a sum not less than fifty or more than five hundred dollars...."); 1883 Mo. Laws 76 ("If any person shall ... go ... into any school-room or place where people are assembled for educational, literary or social purposes, ... having upon or about his person any kind of firearms, ... he shall, upon conviction, be punished by a fine of not less than twenty-five nor more than two hundred dollars, or by imprisonment in the county jail not less than five days or more six months, or by both such fine and imprisonment."); 1889 Ariz. Sess. Laws 16-17 ("If any person shall go into … any school room, or other place where persons are assembled for amusement or for educational or scientific purposes … and shall have or carry about his person a pistol or other firearm… he shall be punished by a fine not less than fifty nor more than five hundred dollars, and shall forfeit to the County the weapon or weapons so found on his person."); The Statutes of Oklahoma, 1890, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into any ... any school room or other place where persons are assembled for ... for educational ... purposes ... any of the weapons designated in sections one and two of this article."); *cf*. Univ. of Va. Bd. of Visitors Minutes (Oct. 4-5, 1824) ("No *student* shall, within the precincts of the university ... keep or use weapons or arms of any kind, or gunpowder.") (emphasis added); 1878 Miss. Laws, An Act To Prevent The Carrying Of Concealed Weapons And For Other Purposes,

opinion should be taken to cast doubt on longstanding prohibitions on . . . laws forbidding the carrying of firearms in sensitive places such as . . . schools . . . .”). However, the Court cannot find these historical statutes analogous to a prohibition on “summer camps” (as contained in paragraph “2(f)” of Section 4).

As a result, this provision may stand for now (except for the prohibition on concealed carry in “summer camps.”).

f. Places or Vehicles Used for Public Transportation

Based on the historical analogues located thus far, it does not appear permissible for New York State to restrict concealed carry in “any place, conveyance, or vehicle used for public transportation or public transit, subway cars, train cars, buses, ferries, railroad, omnibus, marine or aviation transportation; or any facility used for or in connection with service in the transportation of passengers, airports, train stations, subway and rail stations, and bus terminals.” (as stated subsection “2(n)” of Section 4 of the CCIA). Indeed, historical analogues exist containing specific exceptions permitting the carrying firearms while travelling (presumably because of danger often inherent during travel).[34]

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ch. 46, § 4 (“[A]ny *student* of any university, college or school, who shall carry *concealed*, in whole or in part, any weapon of the kind or description in the first section of this Act described, or any teacher, instructor, or professor who shall, knowingly, suffer or permit any such weapon to be carried by any student or pupil, shall be deemed guilty of a misdemeanor ….”) (emphasis added).

[34] *See, e.g.,* 1813 Ky. Acts 100, An Act to Prevent Persons in this Commonwealth from Wearing Concealed Arms, Except in Certain Cases, ch. 89, § 1 (“[A]ny person in this Commonwealth, who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless when travelling on a journey, shall be fined ….”); Robert Looney Caruthers, *A Compilation of the Statutes of Tennessee* (1836), An Act of 1821, § 1 (“Every person so degrading himself by carrying … belt or pocket pistols, either public or private, shall pay a fine of five dollars for every such offence …: Provided, that nothing herein contained shall

g. Public Assemblies

Based on the historical analogues, it appears permissible for New York State to restrict concealed carry in "any gathering of individuals to collectively express their constitutional rights to protest or assemble" (as contained in paragraph "2(s)" of Section 4).[35] As a result, this provision may stand.

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affect any person that may be on a journey to any place out of his county or state."); Josiah Gould, *A Digest of the Statutes of Arkansas, All Laws of a General and Permanent Character in Force the Close of the Session of the General Assembly* 381-82 (1837) ("Every person who shall wear any pistol … concealed as a weapon, unless upon a journey, shall be adjudged guilty of a misdemeanor."); 1841 Ala. Acts 148–49, Of Miscellaneous Offences, ch. 7, § 4 ("Everyone who shall hereafter carry concealed about his person, a … pistol or any species of firearms, or air gun, unless such person shall … be travelling, or setting out on a journey, shall on conviction, be fined not less than fifty nor more than three hundred dollars …."); 1844 Mo. Laws 577, An Act To Restrain Intercourse With Indians, ch. 80, § 4 ("[N]o person shall … give … to any Indian … any … gun … unless such Indian shall be traveling through the state …."); 1871 Tex. Laws 25, An Act to Regulate the Keeping and Bearing of Deadly Weapons ("[T]his section shall not be so construed as to … prohibit persons traveling in the State from keeping or carrying arms with their baggage …."); 1878 Miss. Laws 175, An Act To Prevent The Carrying Of Concealed Weapons And For Other Purposes, ch. 46, § 1 ("[A]ny person not … traveling (not being a tramp) or setting out on a long journey … , who carries concealed, in whole or in part, any … pistol, … shall be deemed guilty of a misdemeanor …."); 1899 Annotated Statutes of the Indian Territory (Oklahoma), Carrying Weapons, § 1250 ("[N]othing in this act be so construed as to prohibit any person from carrying any weapon when upon a journey …."); *cf.* Charters and Ordinances of the City of Memphis, from 1826 to 1867 ("Any person who … gives to any minor a pistol …, except a … weapon for defense in traveling, is guilty of a misdemeanor.").

[35] *See* 1869-70 Tenn. Pub. Acts 23-24 ("[I]t shall not be lawful ... for any person attending any ... public assembly of the people, to carry about his person, concealed or otherwise, any pistol ...."); 1870 Ga. Laws 421 ("[F]rom and immediately after the passage of this act, no person in said State of Georgia be permitted or allowed to carry about his or her person any ... pistol, or revolver … to … any … public gathering in this State, except militia muster-grounds."); 1870 Tex. Gen. Laws 63, An Act Regulating The Right To Keep And Bear Arms, Chap. 46, § 1 ("That if any person shall go into … any … public assembly, and shall have about his person … fire-arms, whether known as a six shooter, gun or pistol of any kind, such person so offending shall be deemed guilty of a misdemeanor ...."); 1883 Mo. Laws 76 (prohibiting anyone from "having upon or about his person any kind of firearms" in areas including "any other public assemblage of persons met for any lawful purpose other than for militia drill"); 1889 Ariz. Sess. Laws 16-17 ("If any person shall go into … any … public assembly… and shall have or carry

h. Places Used for Entertainment or Amusement and Places Where Alcoholic Beverages Are Consumed

Based on the historical analogues located thus far, it does not appear permissible for New York State to restrict concealed carry in the following two places: (1) "any place used for the performance, art entertainment, gaming, or sporting events such as theaters, stadiums, racetracks, museums, amusement parks, performance venues, concerts, exhibits, conference centers, banquet halls, and gaming facilities and video lottery terminal facilities as licensed by the gaming commission" (as stated in subsection "2(p)" of the CCIA), and (2) "any establishment issued a license for on-premise consumption pursuant to article four, four-A, five, or six of the alcoholic beverage control law where alcohol is consumed and any establishment licensed under article four of the cannabis law for on-premise consumption" (as stated in subsection "2(o)" of the CCIA).

For example, a historical statute exists prohibiting persons from carrying firearms in establishments where alcoholic beverages are consumed (analogous to subsection "2(o)" of Section 4 of the CCIA).[36] However, setting aside the fact that Oklahoma was merely a territory

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about his person a pistol or other firearm… he shall be punished by a fine not less than fifty nor more than five hundred dollars, and shall forfeit to the County the weapon or weapons so found on his person."); The Statutes of Oklahoma, 1890, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into any … any political convention, or to any other public assembly, ... any of the weapons designated in sections one and two of this article.").

[36] *See* The Statutes of Oklahoma, 1890, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into … any place where intoxicating liquors are sold ... any of the weapons designated in sections one and two of this article.").

in 1890 (thus depriving this statute of any more than "little weight," pursuant to *NYSRPA*),[37] one example does not a tradition make.

Similarly, three historical statutes exist prohibiting persons from carrying firearms in "ball rooms" or "social parties" (arguably analogous to the CCIA's ban on guns in "amusement parks, performance venues, concerts, exhibits, conference centers, banquet halls, and gaming facilities" as stated in subsection "2(p)" of the CCIA).[38] However, even setting aside the obvious distinctions between a private dinner party and a public water park, two of the three statutes were from territories.

Granted, one might argue that a gathering in a theater or bar is an "assembly" in that it is a collection of three or more individuals at the same place, and that it is "public" in that it is created by and in front of people (and thus such locations are among those that comprise the "public assemblies" discussed above in Part III.B.7.g. of this Decision). However, the historical statutes do not appear to support such an argument. Furthermore, while the Court has located

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[37] *See NYSRPA*, 142 S. Ct. at 2154-55 (finding the statutes of territories deserving of "little weight" because they were "localized," "rarely subject to judicial scrutiny" and "short lived").

[38] *See* 1870 Tex. Gen. Laws 63, An Act Regulating The Right To Keep An d Bear Arms, Chap. 46, § 1 ("That if any person shall go into … a ballroom, social party or other social gathering composed of ladies and gentlemen, … and shall have about his person … fire-arms, whether known as a six shooter, gun or pistol of any kind, such person so offending shall be deemed guilty of a misdemeanor …."); 1889 Ariz. Sess. Laws 16-17 ("If any person shall go into any … place where persons are assembled … for amusement, … or into any circus, show or public exhibition of any kind, or into any ball room, or any social party or social gathering … and shall have or carry about his person a pistol or other firearm… he shall be punished by a fine not less than fifty nor more than five hundred dollars, and shall forfeit to the County the weapon or weapons so found on his person."); The Statutes of Oklahoma, 1890, § 7 ("It shall be unlawful for any person, except a peace officer, to carry into any … place where persons are assembled … for amusement, … or into any circus, show or public exhibition of any kind, or into any ball room, or any social party or social gathering ... any of the weapons designated in sections one and two of this article.").

nineteenth-century dictionaries defining the word "assembly," it has not yet located a nineteenth-century dictionary defining the more-specialized term "public assembly."[39] To the extent the term "public assembly" appears somewhat like the term "popular assembly," it is worth acknowledging that, in the nineteenth century, the term "popular assembly" was defined differently than the word "assembly."[40] Moreover, this nineteenth-century definition of the term "popular assembly," similar to how the Court has construed the term "public assembly" in this Decision, appears to involve a focus on one's constitutional rights.[41]

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[39] *See, e.g., Webster's Complete Dictionary* 83 (Chauncey Goodrich & Noah Porter 1886) (defining "assembly" as "[a] company of persons collected together in one place, and usually for some common purpose").

[40] *See, e.g., Bouvier Law Dictionary* 156 (Childs & Peterson 1856) (defining "assembly" as "[t]he union of a number of persons in the same place," while defining "popular assembly" as assemblies "where the people meet to deliberate upon their rights; these are guaranteed by the constitution"); *Blacks Law Dictionary* 78-79 (T.H. Flood and Co. 1889) (defining "assembly" as "[a]n intentional meeting, gathering, or concourse of people; of three or more persons in one body; . . . of any number of persons in one place," while defining "popular assembly" as "[a]ny meeting of the people to deliberate over their rights and duties with respect to government . . . ."); Henry Champbell Black, *Dictionary of Law* 95 (West Pub. 1891) (defining "assembly" as "[t]he concourse or meeting together of a considerable number of persons at the same place," while defining "popular assembly" as "those where the people meet to deliberate upon their rights").

[41] Not surprisingly, twentieth-century cases defining "public assembly" vary widely (in addition to being more than a century out of date). *See, e.g., Smith v. City of Montgomery*, 251 F. Supp. 849, 853 (M.D. Ala. 1966) (analyzing a city ordinance that defined a "public assembly" as "any parade, march, formation, procession, picket, group of pickets, pickets, picket line, demonstration, movement, assemblage, muster or display of persons, animals, floats, motor-vehicles or combinations thereof on the public sidewalks, streets, highways or other public ways, for the purpose of presenting a cause; or for the purpose of expressing an opinion to the general public on any particular issue; or for the purpose of protesting or influencing any state of affairs or decision rendered or to be rendered thereon, whether political, economic or social; or for the purpose of celebrating, marking or commemorating any past, present, or future event or occurrence, whether historical or otherwise ..."); *City of Syracuse v. Farmers Elevator, Inc.*, 182 Neb. 783, 786 (Neb. 1968) ("While the defendants sought to restrict the meaning of 'Public assembly,' we interpret it to mean a company of persons collected together in one place, which is

As a result, the Court orders the enforcement of these two provisions temporarily restrained.

i. Times Square

Based on the historical analogues located thus far, it does not appear permissible for New York State to restrict concealed carry in the following place: "the area commonly known as Times Square, as such area is determined and identified by the city of New York; provided such area shall be clearly and conspicuously identified with signage" (as stated in subsection "2(t) of the CCIA). Granted, one might argue that historical statutes banning the carrying of guns in "fairs or markets" are analogous to this prohibition. However, thus far, only two such statutes have been located.[42] Setting aside the fact that the first one appears to apply only to carrying a gun offensively ("in terror of the Country"), and the fact that the second one appears to depend on royal reign, as stated before, two statues do not make a tradition.

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the definition given in Webster's New International Dictionary (2d Ed., Unabridged), p. 165."); *Rapaport v. Messina*, 262 N.Y.S. 815, 817 (N.Y. Sup. Ct., Westchester Cnty. 1965) (defining "place of public assembly," in accordance with N.Y. Labor Law, as including "(1) a theatre, (2) moving picture house, (3) assembly halls maintained or leased for pecuniary gain where one hundred or more persons may assemble for amusement or recreation, except (a) halls owned by churches, religious organizations, grange and public association and free libraries as defined by section two hundred fifty-three of the education law, (b) hotels having fifty or more rooms, (c) state and county fair grounds and buildings connected therewith, (d) grounds or buildings of agricultural societies or associations receiving state aid"); *cf. A Quaker Action Group v. Hickel*, 421 F.2d 1111, 1113, n.1 (D.C. Cir. 1969) (analyzing a Department of Interior regulation that defines "public gathering" as meaning "parades, ceremonies, entertainments, meetings, assemblies, and demonstrations. It does not include events for commercial purposes").

[42] *See* 1786 Va. Laws 33, ch. 21, An Act Forbidding and Punishing Affrays ("[N]o man, great nor small, [shall] go nor ride armed by night nor by day, in *fair or markets … in terror of the Country* ….") (emphasis added); Francois Xavier Martin, A Collection of Statutes of the Parliament of England in Force in the State of North Carolina, 60-61 (Newbern 1792) ("[N]o man great nor small ... except the King's servants in his presence ... be so hardy to ... ride armed by night nor by day, in fairs [or] markets ….").

As a result, the Court orders the enforcement of this provision temporarily restrained.

j. All Other "Sensitive Locations"

Based on the historical analogues presented to the Court thus far, the Court finds it impermissible for New York State to restrict concealed carry in the remaining 10 purported "sensitive locations" set forth in the CCIA: (1) "any location providing health, behavioral health, or chemical dependance care or services" (as stated in subsection "2(b)" of the CCIA); (2) "libraries, public playgrounds, public parks, and zoos" (as stated in subsection "2(d)" of the CCIA); (3) "the location of any program licensed, regulated, certified, funded, or approved by the office of children and family services that provides services to children, youth, or young adults, any legally exempt childcare provider; a childcare program for which a permit to operate such program has been issued by the department of health and mental hygiene pursuant to the health code of the city of New York" (as stated in subsection "2(e)" of the CCIA); (4) "summer camps" (as stated in subsection "2(f)" of the CCIA); (5) "the location of any program licensed, regulated, certified, operated, or funded by the office for people with developmental disabilities" (as stated in subsection "2(g)" of the CCIA); (6) "the location of any program licensed, regulated, certified, operated, or funded by office of addiction services and supports" (as stated in subsection "2(h)" of the CCIA); (7) "the location of any program licensed, regulated, certified, operated, or funded by the office of mental health" (as stated in subsection "2(i)" of the CCIA); (8) "the location of any program licensed, regulated, certified, operated, or funded by the office of temporary and disability assistance" (as stated in subsection "2(j)" of the CCIA); (9) "homeless shelters, runaway homeless youth shelters, family shelters, shelters for adults,

domestic violence shelters, and emergency shelters, and residential programs for victims of domestic violence" (as stated in subsection "2(k)" of the CCIA); and (10) "residential settings licensed, certified, regulated, funded, or operated by the department of health" (as stated in subsection "2(l)" of the CCIA).

Setting aside the lack of historical analogues supporting these particular provisions, in the Court's view, the common thread tying them together is the fact that they all regard locations where (1) people typically congregate or visit and (2) law-enforcement or other security professionals are--presumably--readily available. This is precisely the definition of "sensitive locations" that the Supreme Court in *NYSRPA* considered and rejected:

> In [Respondents'] view, 'sensitive places' where the government may lawfully disarm law-abiding citizens include all 'places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.' . . . It is true that people sometimes congregate in 'sensitive places,' and it is likewise true that law enforcement professionals are usually presumptively available in those locations. But expanding 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. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense.

NSYRPA, 142 S. Ct. at 2133-34. Although historical analogues certainly exist prohibiting carrying firearms in specific places, no historical analogues have been provided prohibiting carrying firearms virtually everywhere, as the CCIA does.

As a result, the Court orders the enforcement of these remaining provisions temporarily restrained.

9. Prohibition in "Restricted Locations"

During oral argument, counsel for the State Defendants defended the CCIA's "restricted location" provision (which prohibits license holders from carrying in other persons' buildings and or on their land, enclosed or not, unless expressly permitted to do so) on the ground that it enables a "homeowner . . . to make an informed decision" regarding who is and who is not allowed to bring a gun onto his or her property. (Dkt. No. 23, at 32-33 [Oral Argument Tr.].) The Court respectfully disagrees with that argument, because (through this prohibition) the State of New York is now making a decision for private property owners that they are perfectly able to make for themselves (and, in fact, did before the CCIA was enacted), as well as arguably compelling speech on a sensitive issue. In any event, however, this policy dispute is irrelevant, because it does not regard the Supreme Court's "historical tradition" standard.

The sole historical analogues provided for the CCIA's "restricted location" provision (which prohibit license holders from carrying in other persons' buildings and or on their land, enclosed or not, unless expressly permitted to do so) are three statutes prohibiting carrying firearms on other people's "inclosed" lands.[43] However, on their face, the *purpose*[44] of those

[43] *See* James T. Mitchell et al., Statutes at Large of Pennsylvania from 1682 to 1801 vol III, p. 254 (Clarence M. Busch, Printer, 1896) (reprinting 1721 Pennsylvania statute reading, "[I]f any person or persons shall presume, ... to carry any gun or hunt on the improved or inclosed lands of any plantation other than his own, unless he have license or permission from the owner of such lands or plantation ... he shall for every such offense forfeit the sum of ten shillings"); 1741 N.J. Laws 101 ("[I]f any Person or Persons shall presume, at any Time after the Publication hereof, to carry any Gun, or hunt on the improved or inclosed Lands in any Plantation, other than his own, unless he have License or Permission from the Owner of such Lands or Plantation ... he shall, for every such Offence, forfeit the Sum of Fifteen Shillings, with Costs attending such Conviction."); 4 Digest of the Laws of Texas Containing the Laws in Force, and the Repealed Laws on Which Rights Rest, from 1754 to 1875 (reprinting 1866 Texas statute reading, "[I]t shall not be lawful for any person or persons to carry firearms on the inclosed premises or plantation of any citizen, without the consent of the owner or proprietor").

statutes appears to be merely to stop poaching. If this were not the case, then why did those statutes require the farmland to be enclosed? Defendants have not persuasively answered this question, and (again) it is their burden to do so; that is the unavoidable effect of the presumption recognized in *NYSRPA*.[45] As a result, the Court orders the enforcement of this provision temporarily restrained, except with regard to fenced-in farmland owned by another or fenced-in hunting ground owned by another.

C. Strong Showing of Irreparable Harm

Plaintiffs have made a strong showing that they will likely experience irreparable harm if the Temporary Restraining Order is not issued for the reasons stated in their motion papers and declarations, and the reasons stated in the Court's Decision and Order in *Antonyuk I*, 2022 WL 3999791, at *36.

Granted, due to the comparative lengths of time involved, a stronger likelihood exists that Defendants would be charged with violating the CCIA during the period between the Court's Decision on Plaintiffs' motion for a Preliminary Injunction and the final disposition of this action than during the period of the Court's Decision on Plaintiffs' motion for a Temporary Restraining Order and a decision on their motion for a Preliminary Injunction. However, a presumption of irreparable harm ordinarily arises from a strong showing of a constitutional deprivation "even when the violation persists for 'minimal periods' of time." *A.H. v. French*, 985 F.3d 165, 176,

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[44] *See NYSRPA*, 142 S. Ct. at 2132-33 (demanding a focus on "why the regulations burden a law-abiding citizen's right to armed self-defense") (emphasis added).

[45] The Court notes that its reading of these cases is in accord with a decision from the Northern District of Illinois. *See Solomon v. Cook Cnty. Bd. of Comm'rs*, 559 F. Supp. 3d 675, 690-91 (N.D. Ill. 2021) (finding that the 1721 Pennsylvania statute and 1741 New Jersey statute both "primarily regulated hunting, not carrying for self-defense").

184 (2d Cir. 2021). This means (among other things) that the presumption arises regardless of *when* during the litigation that deprivation occurs (i.e., before a decision on a motion for a preliminary injunction or before the final disposition of an action).[46] Here, the Court has found that Plaintiffs have made such a strong showing of a constitutional injury for the reasons stated above in Part III.B. of this Decision.

Moreover, this presumption has not been rebutted. Four of the six Plaintiffs have alleged and sworn a concrete intention to violate the law in the immediate future. (*See, e.g.,* Dkt. No. 1, Attach. 3, at ¶¶ 8, 10-13, 16-17, 19, 21, 24 [Johnson Decl.]; Dkt. No. 1, Attach. 5, at ¶¶ 20-22, 32 [Leman Decl.]; Dkt. No. 1, Attach. 9, at ¶¶ 4, 12, 16, 20, 25, 28, 30-33 [Mann Decl.]; Dkt. No. 1, Attach. 10, at ¶¶ 7-9, 11-12, 15-16, 19-20 [Terrille Decl.].) They have also alleged and sworn most if not all of the Defendants' expressed willingness (to varying degrees) to enforce the challenged provisions of the CCIA. (Dkt. No. 1, at ¶¶ 9, 12-14, 17 [Compl.]; Dkt. No. 1, Attach. 3, at ¶¶ 22-23 [Johnson Decl.]; Dkt. No. 1, Attach. 5, at ¶ 22 [Leman Decl.]; Dkt. No. 1, Attach 6 [Notice of CCIA]; Dkt. No. 1, Attach 7 [Legal Bureau Bulletin]; Dkt. No. 1, Attach. 9, at ¶¶ 22-24 [Mann Decl.]; Dkt. No. 1, Attach. 10, at ¶ 21 [Terrille Decl.].) Finally, a fifth Plaintiff has alleged and sworn that applying for such a license in Onondaga County would be futile in the

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[46] *See, e.g., Moxie Owl, Inc. v. Cuomo,* 21-CV-0194, 2021 WL 677915, at *3 (N.D.N.Y. Feb. 22, 2021) (D'Agostino, J.) (recognizing that this presumption applies when a plaintiff has shown a likelihood of success on the merits of his constitutional claim on a motion for a temporary restraining order, although subsequently finding that the plaintiff has not shown such a likelihood of success); *Kelly v. Santiago*, 18-CV-1796, 2019 WL 3574631, at *14 (D. Conn. Aug. 6, 2019) (applying this presumption on a motion for a temporary restraining order, although subsequently denying that motion based on the balance-of-hardships factor); *Smalls v. Wright*, 16-CV-2089, 2017 WL 2200909, at *2 (D. Conn. May 19, 2017) (presuming irreparable harm based on the alleged violation of constitution right on a motion for a temporary restraining order).

future (including the period of time before the Court decides Plaintiffs' motion for a Preliminary Injunction). (Dkt. No. 1, at ¶¶ 225-29 [Compl.]; Dkt. No. 1, Attach. 4, at ¶¶ 21, 23 [Sloane Decl.].) Defendants have not controverted these factual assertions. (*See generally* Dkt. Nos. 17, 18, 20, 23.)

Under the circumstances, the fact that Plaintiffs may stand an even greater chance of being arrested (or having an application ignored) later (during the period of time between a hearing on their motion for a Preliminary Injunction and the final disposition of this action) than now (during the period of time between now and when their motion for a Temporary Restraining Order) in no way diminishes the fact that they stand a sufficient chance of being arrested or having their application ignored now.

D. Balance of Equities and Service of Public Interest

Plaintiffs have made a strong showing that balance of equities tips in their favor and that the public interest would not be disserved by the Court's granting of their motion for a Temporary Restraining Order for the reasons stated in their motion papers (Dkt. No. 6, Attach. 1, at 38-41 [attaching pages "36" through "39" of Plfs.' Memo. of Law]), and in the Court's Decision and Order in *Antonyuk I,* 2022 WL 3999791, at *36.

E. Other Considerations

1. Security

Plaintiffs should be, and are, excused from giving security because there has been no proof of any "costs and damages" that would have been sustained by any Defendant "found to have been wrongfully enjoined or restrained" under Fed. R. Civ. P. 65(c).[47]

2. Duration

Good cause exists to extend the duration of this Temporary Restraining Order beyond the fourteen (14) days referenced in Fed. R. Civ. P. 65(b)(2) for such temporary restraining orders issued "without notice." More specifically, based on the strong showing made by Plaintiffs, and Defendants' unpersuasive response, this Temporary Restraining Order shall be in effect pending a hearing and ruling on Plaintiffs' motion for a preliminary injunction (which shall occur as expeditiously as possible based on that motion's briefing schedule). Currently, that briefing is scheduled to conclude on October 20, 2022.

3. Stay Pending Appeal

Although the State Defendants have not persuaded the Court that this Temporary Restraining Order should be limited to the moving parties, the State Defendants have persuaded the Court that this Temporary Restraining Order should be stayed three business days to allow

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[47] *See Doctor's Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir.1997) (affirming district court decision to not require a franchisor-plaintiff to post a bond for either of its injunctions because the franchisee-defendants "would not suffer damage or loss from being forced to arbitrate in lieu of prosecuting their state-court cases"); *Doctor's Assocs., Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) ("Defendants have not shown that they will likely suffer harm absent the posting of a bond by [Plaintiff]."); *Clarkson Co. v. Shaheen,* 544 F.2d 624, 632 (2d Cir.1976) ("[B]ecause, under Fed. R. Civ. P. 65[c], the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court, the district court may dispense with the filing of a bond."); *Ferguson v. Tabah*, 288 F.2d 665, 675 (2d Cir.1961) ("[The phrase 'in such sum as the court deems proper'] indicates that the District Court is vested with wide discretion in the matter of security and it has been held proper for the court to require no bond where there has been no proof of likelihood of harm, or where the injunctive order was issued "to aid and preserve the court's jurisdiction over the subject matter involved.").

them to seek emergency relief in the Second Circuit. (Dkt. No. 18, at 10; Dkt. No. 23, at 19-20 [Oral Argument Tr.].) The Court finds that the State Defendants' exercise of their right to seek an immediate review by the Second Circuit is appropriate.

ACCORDINGLY, it is

ORDERED that Plaintiffs' motion for a Temporary Restraining Order (Dkt. No. 6) is **GRANTED in part** and **DENIED in part** in accordance with this Decision; and it is further

ORDERED that Defendants, as well as their officers, agents, servants, employees, and attorneys (and any other persons who are in active concert or participation with them) are **TEMPORARILY RESTRAINED** from enforcing the following provisions of the Concealed Carry Improvement Act, 2022 N.Y. Sess. Laws ch. 371 ("CCIA"):

> (1) the provisions contained in Section 1 of the CCIA requiring "good moral character" **EXCEPT** to the extent it is construed to mean that a license ***shall be*** issued or renewed except for an applicant who has been found, ***by a preponderance of the evidence based on his or her conduct***, to ***not*** have "good moral character," which is defined as "having the essential character, temperament and judgment necessary . . . to use [the weapon entrusted to the applicant] only in a manner that does not endanger oneself or others, ***other than in self-defense***";
>
> (2) the provision contained in Section 1 of the CCIA requiring that the applicant "meet in person with the licensing officer for an interview";

(3) the provision contained in Section 1 of the CCIA requiring the "names and contact information for the applicant's current spouse, or domestic partner, any other adults residing in the applicant's home, including any adult children of the applicant, and whether or not there are minors residing, full time or part time, in the applicant's home";

(4) the provision contained in Section 1 of the CCIA requiring "a list of former and current social media accounts of the applicant from the past three years"; and

(5) the "sensitive locations" provision contained in Section 4 of the CCIA **EXCEPT** with regard to the following sensitive locations (where the restrictions remain):

(a) "any place owned or under the control of federal, state or local government, for the purpose of government administration, including courts" (as contained in paragraph "2(a)" of Section 4);

(b) "any location being used as a polling place" (as contained in paragraph "2(q)" of Section 4);

(c) "any public sidewalk or other public area restricted from general public access for a limited time or special event that has been issued a permit for such time or event by a governmental entity, or subject to specific, heightened law enforcement protection, or has otherwise had such access restricted by a governmental entity, provided such location is

identified as such by clear and conspicuous signage" (as contained in paragraph "2(r)" of Section 4);

(d) "any place of worship or religious observation" (as contained in paragraph "2(c)" of Section 4), **EXCEPT** for those persons who have been tasked with the duty to keep the peace at the place of worship or religious observation;

(e) "nursery schools" and "preschools" (as contained in paragraph "2(f)" of Section 4);

(f) "any building or grounds, owned or leased, of any educational institutions, colleges and universities, licensed private career schools, school districts, public schools, private schools licensed under article one hundred one of the education law, charter schools, non-public schools, board of cooperative educational services, special act schools, preschool special education programs, private residential or non-residential schools for the education of students with disabilities, and any state-operated or state-supported schools" (as contained in paragraph "2(m)" of Section 4);

(g) "any gathering of individuals to collectively express their constitutional rights to protest or assemble" (as contained in paragraph "2(s)" of Section 4); and

(6) the "restricted locations" provision contained in Section 5 of the CCIA **EXCEPT** for fenced-in farmland owned by another or fenced-in hunting ground owned by another (where the restriction stands); and it is further

ORDERED that Plaintiffs are **EXCUSED** from giving security; and it is further

ORDERED that this Temporary Restraining Order shall **REMAIN IN EFFECT** pending a hearing and ruling on Plaintiffs' motion for a preliminary injunction (Dkt. No. 6); and it is further

ORDERED that this Temporary Restraining Order is **STAYED** for **THREE (3) BUSINESS DAYS**, from the date of this Decision, to allow Defendants to seek emergency relief in the Second Circuit; and it is further

ORDERED that counsel for Plaintiffs shall promptly and personally serve this Decision and Temporary Restraining Order on Defendant Soares (who has not yet appeared through counsel in this action).

Dated: October 6, 2022

Glenn T. Suddaby
U.S. District Judge

Plaintiffs' Exhibit 2

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

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

Plaintiffs,

v.

STEVEN A. NIGRELLI,
BRIAN D. SEAMAN, and
JOHN J. FLYNN,

Defendants.

22-CV-771 (JLS)

DECISION AND ORDER

Eight days after the Supreme Court struck down New York's unconstitutional "proper cause" requirement for conceal-carry licenses, the State responded with even more restrictive legislation, barring all conceal-carry license holders from vast swaths of the State. The complaint and motion in this case focus solely on one aspect of the new legislation, namely, the portion making it a felony for such a license holder to possess a firearm at "any place of worship or religious observation."

Ample Supreme Court precedent addressing the individual's right to keep and bear arms—from *Heller* and *McDonald* to its June 2022 decision in *Bruen*—dictates that New York's new place of worship restriction is equally

unconstitutional. In *Bruen*, the Court made the Second Amendment test crystal clear: regulation in this area is permissible *only if* the government demonstrates that the regulation is consistent with the Nation's historical tradition of sufficiently analogous regulations. As set forth below, New York fails that test. The State's exclusion is, instead, *inconsistent* with the Nation's historical traditions, impermissibly infringing on the right to keep and bear arms in public for self-defense.

Thus, and for the further reasons set forth below, Plaintiffs' motion for a temporary restraining order enjoining Defendants' enforcement of this place of worship restriction is granted.[1]

BACKGROUND

Reverend Dr. Jimmie Hardaway, Jr. and Bishop Larry A. Boyd filed this lawsuit on October 13, 2022, and are joined by institutional plaintiffs, Firearms Policy Coalition, Inc. ("FPC"), and Second Amendment Foundation ("SAF"). Dkt. 1. Plaintiffs allege claims against three Defendants in their official capacities, namely, the superintendent of the New York State Police, the Niagara County District Attorney, and the Erie County District Attorney. *See id.* Hardaway and Boyd, leaders of their respective churches, "wish to exercise their fundamental, individual right to bear arms in public for self-defense by carrying concealed firearms on church property in case of confrontation to both themselves and their congregants."

[1] Under Fed. R. Civ. P. 25(d), Acting Superintendent Steven A. Nigrelli is substituted in place of Kevin P. Bruen, whose resignation was effective yesterday.

Dkt. 1, ¶ 2. They allege that, as "leaders of their churches, they would be authorized to carry on church premises to keep the peace, and would do so, but for Defendants' enforcement of the unconstitutional laws, regulations, policies, practices, and customs at issue in this case." *Id.* In particular, they seek to prevent the enforcement of New York's new law that makes it a felony to carry firearms at all places of worship and religious observation.

The relevant portion of the new statute adds to the Penal Law, as relevant here:

> § 265.01-e Criminal possession of a firearm, rifle or shotgun in a sensitive location. 1. A person is guilty of criminal possession of a firearm, rifle or shotgun in a sensitive location when such person possesses a firearm, rifle or shotgun in or upon a sensitive location, and such person knows or reasonably should know such location is a sensitive location. 2. For the purposes of this section, a sensitive location shall mean: . . . (c) any place of worship or religious observation . . . .[2]

On October 14, 2022, Plaintiffs[3] moved for a preliminary injunction and a temporary restraining order seeking to enjoin Defendants from enforcing the places

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[2] Section § 265.01-e(3) provides that the restrictions set forth in § 265.01-e(1)-(2) do not apply to, among others, "law enforcement who qualify to carry under the federal law enforcement officers safety act," persons who are "police officers" as defined in the criminal procedure law, persons who are "designated peace officers," as well as "security guards" and "active-duty military personnel." *See* § 265.01-e(3).

[3] FPC and SAF recognize that it is "the law of this Circuit that an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983." Dkt. 1, ¶ 12 (quoting *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011)). FPC and SAF "contend that this circuit precedent is erroneous and should be overruled by a court competent to do so." Dkt. 1, ¶ 12. As such, this Decision and Order focuses solely on the individual Plaintiffs.

of worship and religious observation exclusion. *See* Dkt. 9. Plaintiffs allege that New York's "place of worship ban is unconstitutional." *Id.* at 1.[4]

Hardaway, who is the pastor of Trinity Baptist Church of Niagara Falls, New York, states that he is "currently licensed to carry a handgun pursuant to New York Law with a license issued by Niagara County." Dkt. 9-4, ¶ 6. Prior to the enactment of the place of worship ban, he would "consistently carry a firearm on Trinity Baptist Church's premises. . . ." *Id.* ¶ 8. He intended "to keep carrying for self-defense," but now "cannot because of the enactment and enforcement" of the ban. *Id.* Prior to the enactment of the places of worship exclusion, Hardaway "encouraged [his] parishioners to carry a firearm if they were licensed to do so." *Id.* ¶ 11. He would "continue to permit them to carry on church property, but for the enactment and enforcement of the Places of Worship Ban." *Id.* Because of the ban, Hardaway has had to "disarm before coming to Trinity Baptist Church." *Id.* ¶ 12. He has been "stripped of the ability to keep the peace" and is "suffering diminished personal safety every time" he goes to church. *Id.*

Boyd, who is the founding Pastor and Teacher of the Open Praise Full Gospel Baptist Church, states that he is "currently licensed to carry a handgun pursuant to New York Law with a license issued by Erie County." Dkt. 9-5, ¶ 6. Prior to the enactment of the places of worship exclusion, Boyd "would consistently carry a firearm on Open Praise's premises for self-defense and to keep the peace." *Id.* ¶ 8.

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[4] Unless noted otherwise, page references refer to the number in the footer of each page of the document.

He established a "policy at Open Praise in which duly licensed congregants could carry" and would have intended "to keep carrying" and continue the policy, but now "cannot because of the enactment and enforcement" of the ban. *Id.* Open Praise is a "small congregation," but Boyd nevertheless "will not always know who will walk in the door for services" and "will not know if these strangers come with violent plans." *Id.* ¶ 9. He is "particularly worried about this because of the crime, violence, and gang-related incidents that occur in the Broadway Fillmore neighborhood of Buffalo, where Open Praise is located." *Id.* He now must "disarm in order to comply with the Place of Worship ban." *Id.* ¶ 12.

The Court received submissions from the parties,[5] and heard argument on this motion.

ANALYSIS

I. STANDING

The State argues that Plaintiffs lack standing. Standing relates to a court's constitutional power to hear and decide a case and, therefore, implicates subject-

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[5] Defendant Flynn submitted an Affidavit in Response to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction on October 19, 2022 (Dkt. 25) where he stated that he "leave[s] to the State-related co-defendant the defense" of the litigation from Plaintiffs' challenge. Defendant Seaman submitted a Response to Plaintiffs' Motion for Temporary Restraining Order (Dkt. 27) where he, through attorney Crosby, stated that he "does not oppose entry of a temporary restraining order for the purpose of furthering a judicial determination as to the constitutionality of New York Penal Law § 265.01-e(2)(c)(places of worship)." Dkt. 27 at 2. Seaman included an affidavit from Claude A Joerg, Esq., Niagara County Attorney, which stated that Seaman "does not object to issuance of a temporary restraining order" because "the Niagara County Legislature passed a resolution on September 13, 2022 in opposition to the actions taken by the State of New York restricting Second Amendment rights." Dkt. 27-1, at ¶¶ 5-6. *See also* Dkt. 27-2.

matter jurisdiction. *See Spokeo, Inc. v. Robins,* 578 U.S. 330, 338 (2016). To establish standing, "a plaintiff must show (1) an 'injury in fact,' (2) a sufficient 'causal connection between the injury and the conduct complained of,' and (3) a 'likel[ihood]' that the injury 'will be redressed by a favorable decision.'" *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 157 (2014) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

Only the first element of the test, *i.e.*, whether Plaintiffs have suffered an injury-in-fact, bears discussion here (though all elements are met). An injury-in-fact exists where a plaintiff "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo,* 578 U.S. at 336 (quoting *Lujan*, 504 U.S. at 555). A particularized injury "affect[s] the plaintiff in a personal and individual way." *Id.* (internal quotations and citation omitted). To be sure, the plaintiff's injury must be direct, and a plaintiff "may not raise the rights of a third-party. . . ." *See N.Y. State Nat'l Org. for Women v. Terry*, 886 F.2d 1339, 1347 (2d Cir. 1989).

Pre-enforcement challenges to criminal statutes are "cognizable under Article III." *Cayuga Nation v. Tanner*, 824 F.3d 321, 331 (2d Cir. 2016). The Supreme Court has made it clear that a plaintiff suffers an injury-in-fact sufficient to establish standing when he or she faces "threatened enforcement of a law" that is "sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 158-59. When challenging a law prior to its enforcement, "a plaintiff satisfies the injury-in-fact requirement where he alleges 'an intention to engage in a course of conduct

arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder.'" *Id.* (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 297 (1979)).

A Plaintiff need not first "expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced." *Knife Rts., Inc. v. Vance*, 802 F.3d 377, 384 (2d Cir. 2015) (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 128–29 (2007)). *See also Steffel v. Thompson*, 415 U.S. 452, 459 (1974) ("[I]t is not necessary that [the plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute that he claims deters the exercise of his constitutional rights.").

The identification of a credible threat sufficient to satisfy the imminence requirement of injury in fact "necessarily depends on the particular circumstances at issue." *Picard v. Magliano*, 42 F.4th 89, 98 (2d Cir. 2022) (quoting *Cayuga Nation*, 824 F.3d at 331)). Indeed, the standard articulated by the Supreme Court "'sets a low threshold and is quite forgiving to plaintiffs seeking such pre[-]enforcement review,' as courts are generally 'willing to presume that the government will enforce the law as long as the relevant statute is recent and not moribund.'" *Picard*, 42 F.4th 89 (quoting *Cayuga Nation*, 824 F.3d at 331).

Here, Hardaway and Boyd have established that they suffered an injury-in-fact. New York Governor Kathy Hochul explained, in a July 1, 2022, press statement, that individuals "who carry concealed weapons in sensitive locations . . .

will face criminal penalties." *See* Dkt. 1 (citing NEW YORK GOV.'S PRESS OFFICE, *Governor Hochul Signs Landmark Legislation to Strengthen Gun Laws and Bolster Restrictions on Concealed Carry Weapons in Response to Reckless Supreme Court Decision*, July 1, 2022, available at https://on.ny.gov/3nXWrvA (last visited Oct. 20, 2022). On the eve of the law's enactment, Hochul criticized the Supreme Court's decision in *Bruen* as an attempt to "strip away the rights of a governor to protect her citizens from gun violence." BUFFALO NEWS, *Hochul: Last-Minute Pistol Permit Seekers May be too Late to Avoid NY's New Gun Requirements*, Aug 31, 2022 updated Oct 9, 2022, available at https://buffalonews.com/news/local/crime-and-courts/hochul-last-minute-pistol-permit-seekers-may-be-too-late-to-avoid-nys-new-gun/article_ad5100a0-2943-11ed-af06-cbe41e631955.html (last visited Oct. 20, 2022).

In addition, First Deputy State Police Superintendent Steven Nigrelli (now Acting Superintendent and the substituted Defendant) warned that, if "you violate this law, you will be arrested. Simple as that." *See Antonyuk v. Hochul*, No. 22-CV-0986, 2022 WL 4367410, at ¶ 9 n.1 (N.D.N.Y.) (quoting statement by First Deputy Superintendent of the State Police Steven Nigrelli, "Governor Hochul Delivers a Press Conference on Gun Violence Prevention," https://www.youtube.com/watch?v=gC1L2rrztQs at 37:40)). Nigrelli explained that, in New York State, troopers "are standing ready" to ensure that "all laws are enforced." *Id.* 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." *Id.*

These public statements show that New York residents—including Hardaway and Boyd—face "threatened enforcement of a law" that is "sufficiently imminent." *Susan B. Anthony List*, 573 U.S. at 158-59. *See also Cayuga Nation*, 824 F.3d at 331 (credible threat of prosecution exists when Defendant has "announced its intention to enforce the [law] against the [plaintiffs]"). Further, given the recency of the law—and lack of any indication that it will be repealed—the Court is and should be "willing to presume that the government will enforce" it. *See Picard*, 42 F.4th 89 (quoting *Cayuga Nation*, 824 F.3d at 331).

Indeed, Hardaway and Boyd have changed their behavior in the wake of the State's messaging. According to Hardaway, he would "consistently carry a firearm" at his church and "would intend" to keep doing so, but now "cannot because of the enactment and enforcement of the Place of Worship Ban." Dkt. 9-4, ¶ 8. Prior to the enactment of the restriction, he also "encouraged" his "parishioners to carry a firearm if they were licensed to do so" and he would have continued to do so "but for the enactment" of the restriction. *Id.* ¶ 11. Boyd, similarly, would "consistently carry a firearm" at his church prior to the enactment of the restriction and "established a policy" allowing "duly licensed congregants" to "carry as well." Dkt. 9-5, ¶ 8. Now, however, he "cannot because of the enactment and enforcement" of the restriction." *Id.* Instead, he has "stopped carrying and so" have his parishioners. *Id.* On these facts, Hardaway and Boyd have standing.

II. PLAINTIFFS' MOTION FOR A TEMPORARY RESTRAINING ORDER

A. TRO/Preliminary Injunction Standard

Rule 65 of the Federal Rules of Civil Procedure governs temporary restraining orders and preliminary injunctions. In the Second Circuit, the standard is the same as to both. *Martin v. Warren*, 482 F. Supp. 3d 51, 68 (W.D.N.Y. 2020); *AFA Dispensing Grp. B.V. v. Anheuser-Busch, Inc.*, 740 F. Supp. 2d 465, 471 (S.D.N.Y. 2010) ("It is well established that the standard for an entry of a temporary restraining order is the same as for a preliminary injunction.").

Generally, a party seeking preliminary injunctive relief "must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *N. Am. Soccer League, LLC v. U.S. Soccer Fed'n, Inc.*, 883 F.3d 32, 37 (2d Cir. 2018). Where the preliminary injunction "would stay government action taken in the public interest pursuant to a statutory or regulatory scheme," the moving party "must satisfy the more rigorous prong of 'likelihood of success'" at step two. *Bronx Household of Faith v. Bd. of Educ. of City of N.Y.*, 331 F.3d 342, 349 (2d Cir. 2003).

The standard may be further heightened if "(i) an injunction would alter, rather than maintain, the status quo, or (ii) an injunction will provide the movant with substantially all the relief sought and that relief cannot be undone even if the defendant prevails at a trial on the merits." *Tom Doherty Assocs., Inc. v. Saban Ent., Inc.*, 60 F.3d 27, 33-34 (2d Cir. 1995). If either scenario applies, a plaintiff

must show "a clear or substantial likelihood of success on the merits" at step two. *See N. Am. Soccer League*, 883 F.3d at 37 (internal quotations and citation omitted); *Tom Doherty Assocs.*, 60 F.3d at 35.

When deciding whether an injunction is mandatory and would alter the status quo, the status quo is "the last actual, peaceable uncontested status which preceded the pending controversy." *N. Am. Soccer League*, 883 F.3d at 37 (quoting *Mastrio v. Sebelius*, 768 F.3d 116, 120 (2d Cir. 2014) (per curiam)) (internal quotations omitted). The court also considers whether the injunction would "command[] some positive act"—rather than prohibit some act—by the defendant. *Mastrovincenzo*, 435 F.3d at 89 (quoting *Tom Doherty Assocs.*, 60 F.3d at 34). An injunction that enjoins a defendant from enforcing a regulation "clearly prohibits, rather than compels, government action by enjoining the future enforcement." *Id.* at 90.

Moreover, the heightened standard does not apply to "any [request for an] injunction where the final relief for the plaintiff would simply be a continuation of the preliminary relief." *Tom Doherty Assocs.*, 60 F.3d at 34. Instead, the heightened standard applies when the injunction "will render a trial on the merits largely or partly meaningless, either because of temporal concerns"—like a case involving a live, televised event scheduled for the day the court granted preliminary relief—"or because of the nature of the subject of the litigation"—like a case involving disclosure of confidential information. *Id.* at 35. If a preliminary injunction "will make it difficult or impossible to render a meaningful remedy to a

defendant who prevails on the merits at trial," then the heightened standard applies; "[o]therwise, there is no reason to impose a higher standard." *Id.*

Here, Plaintiffs request that this Court "vindicate that the Second Amendment is not a 'second-class right' by temporarily restraining and then preliminarily enjoining enforcement of the Place of Worship Ban." Dkt. 9-1 at 16. This request seeks to prohibit Defendants from enforcing the new places of worship exclusion; it does not seek an order requiring Defendants to act. In other words, Plaintiffs seek to restore the status that existed before implementation of the places of worship exclusion. They therefore seek a prohibitory—not a mandatory—injunction. Moreover, the Constitution and the Bill of Rights are the status quo—not 2022 legislation on the books for seven weeks. For all of history until now, the right to carry for self defense encompassed New York places of worship.[6]

And relief remains available to Defendants if they prevail at trial on the merits. If Defendants prevail, the Court could vacate any injunctive relief and allow them again to enforce the places of worship ban.

Thus, the standard remains that Plaintiffs must demonstrate: (1) irreparable harm; (2) a likelihood of success on the merits; and (3) that a preliminary injunction is in the public interest. *See N. Am. Soccer League*, 883 F.3d at 37; *Bronx Household of Faith*, 331 F.3d at 349.

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[6] The Court recognizes that courts should not lightly enjoin enforcement of laws; the law at issue here, however, is at odds with higher law, namely—the Constitution. The Court notes here too that Plaintiffs would meet the heightened standard in any event—even if it applied.

B. Likelihood of Success on the Merits

Plaintiffs are likely to succeed on the merits of their Second and Fourteenth Amendment claim.[7] As set forth below, on this historical record, New York's new place of worship or religious observation exclusion violates the right of individuals to keep and bear arms in public for self-defense.

That right was enshrined in the Second Amendment to the Constitution, ratified in 1791: "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. And on three recent occasions, the Supreme Court explored this right and supplied the framework that resolves this issue on this motion. A thorough understanding of the Court's opinions is essential, so they are addressed at length here.

1. Heller

In *Heller*, the Supreme Court held that the District of Columbia's ban on handgun possession in the home, and its prohibition against rendering any lawful

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[7] The State argues that a facial challenge must fail because "it is difficult to demonstrate that mere enactment of a piece of legislation violates the [plaintiffs'] constitutional rights." *See* Dkt. 28 at 9 (citing *Cranley v. Nat'l Life Ins. Co. of Vermont*, 318 F.3d 105, 110 (2d Cir. 2003)). The argument fails. Plaintiffs have shown, at a minimum, that the places of worship restriction lacks a "plainly legitimate sweep" in that it forces individuals to give up their rights to armed self-defense outside the home. *See United States v. Decastro,* 682 F.3d 160, 168 (2d Cir. 2012) (to prevail on a facial challenge, a plaintiff "would need to show that no set of circumstances exists under which the statute would be valid, *i.e.*, that the law is unconstitutional in all of its applications, or at least that it lacks a plainly legitimate sweep") (internal citation omitted).

home firearm operable for the purpose of immediate self-defense, both violated the Second Amendment. *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008).

The Court methodically analyzed the issue. First, the Court noted that, "[a]t the time of the founding, as now, to 'bear' meant to 'carry.' When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose—confrontation." *Id.* at 584 (citations omitted). The Second Amendment, therefore, "guarantee[s] the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment. We look to this because it has always been widely understood that the Second Amendment, like the First and Fourth Amendments, codified a *pre-existing* right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Id.* at 592 (emphasis in original). The Court continued, "[t]here seems to us no doubt, on the basis of both text and history, that the Second Amendment conferred an individual right to keep and bear arms."[8] *Id.* at 595.

After addressing the history related to the Second Amendment's prefatory clause, the Court concluded that, "[t]hat history showed that the way tyrants had eliminated a militia consisting of all the able-bodied men was not by banning the

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[8] The Court noted that, "[o]f course the right was not unlimited, just as the First Amendment's right of free speech was not . . . . Thus, we do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for *any purpose*." *Id.* at 595 (citation omitted) (emphasis in original).

militia but simply by taking away the people's arms, enabling a select militia or standing army to suppress political opponents. This is what had occurred in England that prompted codification of the right to have arms in the English Bill of Rights." *Id.* at 598.

Indeed, founding-era debate with respect to the right to keep and bear arms, "as with other guarantees in the Bill of Rights, was not over whether it was desirable (all agreed that it was) but over whether it needed to be codified in the Constitution." *Id.* It was understood "across the political spectrum that the right helped to secure the ideal of a citizen militia, which might be necessary to oppose an oppressive military force if the constitutional order broke down." *Id.* at 599.[9]

Like most rights, "the right secured by the Second Amendment is not unlimited . . . . [the right is] not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Id.* at 626 (citations omitted). And although the Court indicated that it was not then undertaking "an exhaustive historical analysis" of the full scope of the Second Amendment, nothing in the

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[9] The Court continued, "[i]t is therefore entirely sensible that the Second Amendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new Federal Government would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written Constitution. Justice BREYER's assertion that individual self-defense is merely a 'subsidiary interest' of the right to keep and bear arms . . . (dissenting opinion), is profoundly mistaken. He bases that assertion solely upon the prologue—but that can only show that self-defense had little to do with the right's *codification*; it was the *central component* of the right itself." *Id.* (internal citation omitted) (emphasis in original).

Court's "opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms. We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." *Id.* at 626-27, 627 n. 26.[10]

Striking down the handgun ban, and cementing the notion that the Second Amendment exists as a bulwark against attempts by governments to erode the right to self-defense, the Court concluded that, "the inherent right of self-defense has been central to the Second Amendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *Id.* at 628-29 (footnote, citation, and internal quotations omitted).

The Court also addressed D.C.'s additional requirement "that firearms in the home be rendered and kept inoperable at all times. This makes it impossible for citizens to use them for the core lawful purpose of self-defense and is hence unconstitutional." *Id.* at 630.[11]

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[10] The Court also recognized another important limitation on the right, namely, that "the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons.'" *Id.* at 627 (citations omitted).

[11] The Court spoke to the very importance of the right when it rejected Justice Breyer's dissenting criticism of the Court's "declining to establish a level of scrutiny for evaluating Second Amendment restrictions. [Justice Breyer] proposes . . . a judge-empowering 'interest-balancing inquiry' that 'asks whether the statute

And finally, acknowledging the problem of handgun violence in the country, the Court concluded that, "[t]he Constitution leaves the District of Columbia a variety of tools for combating that problem, including some measures regulating handguns . . . . *But the enshrinement of constitutional rights necessarily takes certain policy choices off the table.* These include the absolute prohibition of handguns held and used for self-defense in the home. Undoubtedly some think that the Second Amendment is outmoded in a society where our standing army is the pride of our Nation, where well-trained police forces provide personal security, and where gun violence is a serious problem. That is perhaps debatable, but what is not debatable is that it is not the role of this Court to pronounce the Second Amendment extinct." *Id.* at 636 (internal citations omitted) (emphasis added).

2. McDonald

Two years later, in *McDonald*, the Court ruled that the Second Amendment applies as well to state governments by operation of the Fourteenth Amendment's Due Process Clause. *McDonald v. City of Chicago*, 561 U.S. 742, 750, 754, 791

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burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests.'" *Id.* at 634. In response, the Court wrote, "[w]e know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach. The very enumeration of the right takes out of the hands of government—even the Third Branch of Government—the power to decide on a case-by-case basis whether the right is really worth insisting upon. A constitutional guarantee subject to future judges' assessments of its usefulness is no constitutional guarantee at all. Constitutional rights are enshrined with the scope they were understood to have when the people adopted them, whether or not future legislatures or (yes) even future judges think that scope too broad." *Id.* at 634-35. The Second Amendment "is the very product of an interest balancing by the people—which Justice BREYER would now conduct for them anew." *Id.* at 635.

(2010). There, the Court noted *Heller's* holding "that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense." *Id.* at 749-750.

To answer the next question whether "the Second Amendment right to keep and bear arms is incorporated in the concept of due process[, the Court analyzed] whether the right to keep and bear arms is fundamental to *our* scheme of ordered liberty or . . . whether this right is deeply rooted in this Nation's history and tradition." *Id.* at 767 (emphasis in original) (internal quotation marks and citations omitted). Without hesitation, the Court answered the question in the affirmative: "*Heller* points unmistakably to the answer. *Self-defense is a basic right*, recognized by many legal systems from ancient times to the present day, and in *Heller,* we held that individual self-defense is 'the *central component*' of the Second Amendment right." *Id.* (citations and footnote omitted) (initial emphasis added and second emphasis in original).

The Court continued, "citizens must be permitted 'to use [handguns] for the core lawful purpose of self-defense.'" *Id.* (alteration in original) (quoting *Heller* at 630). And "the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *Id.* at 778. The Court rejected any attempt "to treat the right recognized in *Heller* as a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees . . . ." *Id.* at 780.

Public safety concerns are no reason to alter the Constitutional analysis. The *McDonald* Court made it clear that, "[t]he right to keep and bear arms . . . is not the only constitutional right that has controversial public safety implications. All of the constitutional provisions that impose restrictions on law enforcement and on the prosecution of crimes fall into the same category." *Id.* at 783.

3. New York State Rifle & Pistol Assoc., Inc. v. Bruen ("Bruen")

The Supreme Court returned to the Second Amendment in June of this year, invalidating the "proper cause" requirement in New York's conceal-carry licensing regime. *New York State Rifle & Pistol Assoc., Inc. v. Bruen*, __ U.S. __, 142 S.Ct. 2111 (2022). Starting where it left off in *Heller* and *McDonald*, the Court recognized that "the Second and Fourteenth Amendments protect the right of an ordinary, law-abiding citizen to possess a handgun in the home for self-defense." *Id.* at 2122.

Next, the Court held that the Second and Fourteenth Amendments also "protect an individual's right to carry a handgun for self-defense *outside the home*." *Id.* (emphasis added).

The issue remaining, then, was whether New York's licensing regime respected that right. The Court concluded that it did not. *Id.* Specifically, "[b]ecause the State of New York issues public-carry licenses only when an applicant demonstrates a special need for self-defense, [the Court] conclude[d] that the State's licensing regime violates the Constitution." *Id.*

Because *Bruen's* detailed analysis offers much to the disposition of this motion, a close examination is necessary, and follows.

In the years since *Heller* and *McDonald*, the Courts of Appeals had developed a "two-step" framework for analyzing Second Amendment cases, which combined history with a means-end scrutiny. *Id.* at 2125. *Bruen* expressly rejected that approach at the outset. *Id.* at 2125-26.

Instead, the Court set forth the proper test: "when the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, *the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation.* Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* at 2126 (citation and internal quotation omitted) (emphasis added). In other words, "the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." *Id.* at 2127.[12]

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[12] The Court acknowledged that, "'[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it.' *McDonald*, 561 U.S. at 803–804, 130 S.Ct. 3020 (Scalia, J., concurring). But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—is, in our view, more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits of firearms restrictions, especially given their lack [of] expertise in the field." *Id.* at 2130

Highlighting the importance of the right, the Court stated that, "[i]f the last decade of Second Amendment litigation has taught this Court anything, it is that federal courts tasked with making such difficult empirical judgments regarding firearm regulations under the banner of 'intermediate scrutiny' often defer to the determinations of legislatures. But while that judicial deference to legislative interest balancing is understandable—and, elsewhere, appropriate—*it is not deference that the Constitution demands here*." *Id.* at 2131 (emphasis added). The Second Amendment, the Court continued, "'is the very *product* of an interest balancing by the people' and it 'surely elevates above all other interests the right of law-abiding, responsible citizens to use arms' for self-defense. It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.* (citation omitted) (emphasis in original).

After setting this high bar, the Court supplied additional guidance. The applicable test "requires courts to assess whether modern firearms regulations are consistent with the Second Amendment's text and historical understanding. In some cases, that inquiry will be fairly straightforward. For instance, when 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.* Likewise, "if earlier generations addressed the

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(internal quotation marks and citation omitted) (emphasis and alteration in original).

societal problem, but did so through materially different means, that also could be evidence that a modern regulation is unconstitutional. And if some jurisdictions actually attempted to enact analogous regulations during this timeframe, but those proposals were rejected on constitutional grounds, that rejection surely would provide some probative evidence of unconstitutionality." *Id.*

Addressing the case before it, the Court noted that "New York's proper-cause requirement concerns the same alleged societal problem addressed in *Heller*: 'handgun violence,' primarily in 'urban area[s].' Following the course charted by *Heller*, we will consider whether 'historical precedent' from before, during, and even after the founding evinces a comparable tradition of regulation. And, as we explain below, we find no such tradition in the historical materials that respondents and their *amici* have brought to bear on that question." *Id.* 2131-32 (internal citations to *Heller* omitted).[13]

The Court next considered the "sensitive places" doctrine, which addresses areas where weapons have historically been prohibited. The Court first referenced

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[13] The Court acknowledged that, while the "historical analogies here and in *Heller* are relatively simple to draw, other cases implicating unprecedented societal concerns or dramatic technological changes may require a more nuanced approach. The regulatory challenges posed by firearms today are not always the same as those that preoccupied the Founders in 1791 or the Reconstruction generation in 1868." *Id.* The Court continued, "[f]ortunately, the Founders created a Constitution—and a Second Amendment—"intended to endure for ages to come, and consequently, to be adapted to the various crises of human affairs." *McCulloch v. Maryland*, 4 Wheat. 316, 415, 4 L.Ed. 579 (1819) (emphasis deleted). Although its meaning is fixed according to the understandings of those who ratified it, the Constitution can, and must, apply to circumstances beyond those the Founders specifically anticipated." *Id.*

Heller's "discussion of 'longstanding' 'laws forbidding the carrying of firearms in sensitive places such as schools and government buildings.'" *Id.* (citation omitted). The Court noted that, "[a]lthough the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—*e.g.*, legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. *See* D. Kopel & J. Greenlee, The 'Sensitive Places' Doctrine, 13 CHARLESTON L. REV. 205, 229–236, 244–247 (2018); see also Brief for Independent Institute as *Amicus Curiae* 11–17. We therefore can assume it settled that these locations were 'sensitive places' where arms carrying could be prohibited consistent with the Second Amendment. And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in *new* and analogous sensitive places are constitutionally permissible." *Id.* (emphasis in original).

Rejecting New York's broad "sensitive places" argument, the Court went on to state that, "[a]lthough we have no occasion to comprehensively define 'sensitive places' in this case, we do think respondents err in their attempt to characterize New York's proper-cause requirement as a 'sensitive-place' law. In their view, 'sensitive places' where the government may lawfully disarm law-abiding citizens include all 'places where people typically congregate and where law-enforcement and other public-safety professionals are presumptively available.' It is true that people sometimes congregate in 'sensitive places,' and it is likewise true that law

enforcement professionals are usually presumptively available in those locations. But expanding 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. Respondents' argument would in effect exempt cities from the Second Amendment and would eviscerate the general right to publicly carry arms for self-defense that we discuss in detail below." *Id.* at 2133-34 (internal citations omitted).

With the rules and analytical tools articulated, the Court applied them to New York's proper-cause requirement, noting that the petitioners were two ordinary, law-abiding adult citizens and, as such, were part of "the people" whom the Second Amendment protects. *Id.* at 2134. Neither party disputed that handguns are weapons in common use today for self-defense. *Id.* As such, the Court turned to whether the plain text of the Second Amendment protects the individuals' proposed course of conduct, namely, "carrying handguns publicly for self-defense." *Id.* at 2134. The Court had "little difficulty concluding that it does," noting that "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms." *Id.* The Second Amendment guarantees the individual right to possess and carry weapons in case of confrontation. *Id.* (citing *Heller*). And the right to "bear arms" refers to the right to carry for self-defense. *Id.* (citing *Heller*).

The Court then reasoned that the right to "bear" naturally encompasses public carry. *Id.* "Most gun owners do not wear a holstered pistol at their hip in

their bedroom or while sitting at the dinner table. Although individuals often 'keep' firearms in their home, at the ready for self-defense, most do not 'bear' (*i.e.*, carry) them in the home beyond moments of actual confrontation. To confine the right to 'bear' arms to the home would nullify half of the Second Amendment's operative protections." *Id.* at 2134-35.

The Court continued, "[m]oreover, confining the right to 'bear' arms to the home would make little sense given that self-defense is 'the *central component* of the [Second Amendment] right itself.'" *Id.* (quoting *Heller*, 554 U.S. at 599, 128 S.Ct. 2783). *See also McDonald*, 561 U.S. at 767, 130 S.Ct. 3020. After all, "the Second Amendment guarantees an 'individual right to possess and carry weapons in case of confrontation,' *Heller*, 554 U.S. at 592, 128 S.Ct. 2783, and confrontation can surely take place outside the home." *Id.* at 2135. "*Many Americans hazard greater danger outside the home than in it. The text of the Second Amendment reflects that reality.* The Second Amendment's plain text thus presumptively guarantees petitioners Koch and Nash a right to 'bear' arms in public for self-defense." *Id.* (citation omitted) (emphasis added).

With that resolved, the Court next evaluated whether the State met its burden to show that its proper-cause requirement is consistent with the Nation's historical tradition of firearm regulation. Only "if [the State] carr[ies] that burden can [it] show that the pre-existing right codified in the Second Amendment, and made applicable to the States through the Fourteenth, does not protect petitioners' proposed course of conduct." *Id.*

Rejecting the State's historical arguments, the Court reasoned that, "[t]hroughout modern Anglo-American history, the right to keep and bear arms in public has traditionally been subject to well-defined restrictions [evaluated at length in the opinion] governing the intent for which one could carry arms, the manner of carry, or the exceptional circumstances under which one could not carry arms. But apart from a handful of late-19th-century jurisdictions, the historical record compiled by [the State] *does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense*." *Id.* at 2138 (emphasis added).

Nor is there any such historical tradition "limiting public carry only to those law-abiding citizens who demonstrate a special need for self-defense . . . . We conclude that [the State has] *failed to meet [its] burden to identify an American tradition justifying New York's proper-cause requirement*. Under *Heller*'s text-and-history standard, the proper-cause requirement is therefore unconstitutional." *Id.* (emphasis added). The Court later noted that "the history reveals a consensus that States could *not* ban public carry altogether." *Id.* at 2147 (emphasis in original).

The Court's analysis of one part of the historical record is noteworthy. "To summarize: The historical evidence from antebellum America does demonstrate that the that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others. Similarly, although surety statutes did not directly restrict public carry, they did provide financial incentives for responsible arms

carrying. Finally, States could lawfully eliminate one kind of public carry—concealed carry—so long as they left open the option to carry openly. None of these historical limitations on the right to bear arms approach New York's proper-cause requirement because none operated to prevent law-abiding citizens with ordinary self-defense needs from carrying arms in public for that purpose." *Id.* at 2150.

Moving to another historical period, the Court noted that, even "during Reconstruction the right to keep and bear arms had limits. But those limits were consistent with a right of the public to peaceably carry handguns for self-defense." *Id.* at 2152. Rejecting the relevance of an outlier law and state-court decisions, the Court stated that it "will not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*, we will not 'stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense' in public." *Id.* at 2153 (citation omitted).

In conclusion, the Court reiterated that the Second Amendment is not a second-class right subject to lesser rules. *Id.* at 2156. The Court indicated that it knew of "no other constitutional right that an individual may exercise only after demonstrating to government officers some special need. That is not how the First Amendment works when it comes to unpopular speech or the free exercise of religion. It is not how the Sixth Amendment works when it comes to a defendant's right to confront the witnesses against him. And it is not how the Second Amendment works when it comes to public carry for self-defense." *Id.* In sum,

then, "New York's proper-cause requirement violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Id.*

4. Application of the *Bruen* Test in this Case

The State argues that the place of worship exclusion complies with *Bruen*. The State cites to 1870-1890 enactments by four states (Texas, Georgia, Missouri, and Virginia) and the territories of Arizona and Oklahoma that contained place of worship firearm restrictions. This does not carry the State's burden, as explained below.[14]

At the outset, as the Supreme Court has made clear, individuals have the right to carry handguns publicly for self-defense. New York's exclusion is valid only if the State "affirmatively prove[s]" that the restriction is part of the Nation's historical tradition of firearm regulation. *Bruen*, 142 S.Ct. at 2127. The test is rigorous because the Second Amendment is the very product of an interest balancing, already conducted by "the People," which "elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense." *Id.* at 2131 (citing *Heller*, 554 U.S. at 635). That balance, struck by the traditions of the American people, "demands" unqualified deference. *Id.*

Indeed, New York's new exclusion is in direct tension with the principle that, "confining the right to bear arms to the home would make little sense given that

[14] "The State" and the State Defendant Nigrelli are used here interchangeably, as the Attorney General's submission functionally does as well.

self-defense is the central component of the Second Amendment right itself. After all, the Second Amendment guarantees an individual right to possess and carry weapons in case of confrontation, and confrontation can surely take place outside the home" and at places of worship. *Id.* at 2135 (internal quotations, citations, and brackets omitted). As *Bruen* stated, many "Americans hazard greater danger outside the home than in it. The text of the Second Amendment reflects that reality." *Id.*

Hardaway and Boyd are ordinary, law-abiding citizens to which the Second Amendment applies. *Id.* at 2134. As it did for the petitioners in *Bruen*, the Second Amendment's plain text thus presumptively guarantees Plaintiffs' right to "bear" arms in public for self-defense—and it does so as well at places of worship, which are open to all comers. *Id.* at 2135 (citation omitted). The next question is whether the State has met its historical burden. It has not.

When 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.* at 2131. New York's law here concerns the same alleged societal problem addressed in Heller: "handgun violence," primarily in "urban area[s]." And, as in *Bruen*, there is no such tradition in the historical materials that the State has "brought to bear on that question." *Id.* at 2132.

Moreover, New York's restriction finds no analog in any recognized "sensitive place." In *Bruen*, the Court noted: "[a]lthough the historical record yields relatively few 18th- and 19th-century 'sensitive places' where weapons were altogether prohibited—e.g., legislative assemblies, polling places, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions . . . . And courts can use analogies to those historical regulations of 'sensitive places' to determine that modern regulations prohibiting the carry of firearms in new and analogous sensitive places are constitutionally permissible." *Id.* (emphasis in original).

In particular, places of worship or religious observation are unsecured, spiritual places that members of the public frequent as often as daily as part of day-to-day life, and encounter vast numbers of other people there—as they do anywhere in public. In contrast, legislative assemblies, polling places, and courthouses are civic locations sporadically visited in general, where a bad-intentioned armed person could disrupt key functions of democracy. Legislative assemblies and courthouses, further, are typically secured locations, where uniform lack of firearms is generally a condition of entry. The State's argument that places of worship are analogous because the exclusion supposedly also minimizes the chance of violence between those with opposing views is undeveloped and, in any event, belies the non-confrontational purpose drawing people to houses of worship in the first place. The argument would apply nearly everywhere in public. The places of worship and

religious observation exclusion thus finds no analogy in *Bruen*'s recognized sensitive places.

Nor is there an American tradition supporting the challenged law here. As in *Bruen*—where, "apart from a handful of late-19th-century jurisdictions, the historical record compiled by [the State] does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense," *id.* at 2138—the State does not demonstrate a tradition of broadly prohibiting the public carry of commonly used firearms for self-defense at all places of worship or religious observation across the state.

Nevertheless, the State relies on a few laws from the late-1800s to insist that a relevant tradition exists. *Bruen* anticipates this argument. Rejecting the relevance of an outlier analogous law and state-court decisions, the Court stated that it would "not give disproportionate weight to a single state statute and a pair of state-court decisions. As in *Heller*,[15] we will not 'stake our interpretation of the Second Amendment upon a single law, in effect in a single [State], that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense' in public." *Id.* at 2153 (citation omitted); *see also id.* at 2142 (doubting that three colonial regulations could suffice).

The Court noted that, "when it comes to interpreting the Constitution, not all history is created equal. 'Constitutional rights are enshrined with the scope they

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[15] The *Heller* Court likewise rejected a dissenting argument addressing a handful of founding-era laws that were either outliers or inapposite. *Heller*, 554 U.S. at 631-33.

were understood to have *when the people adopted them*.'" *Bruen*, 142 S.Ct. at 2136 (citing *Heller*, emphasis in original). Courts "must also guard against giving postenactment history more weight than it can rightly bear." *Id.* at 2136.

In other words, *Bruen* recognized that, "where a governmental practice has been open, widespread, and unchallenged since the early days of the Republic, the practice should guide our interpretation of an ambiguous constitutional provision." *Id.* at 2137 (internal citation omitted). And "to the extent later history contradicts what the text says, the text controls." *Id.*

Indeed, "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.* (internal citation omitted). Because "post-Civil War discussions of the right to keep and bear arms 'took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.'" *Id.* And although it is the Fourteenth Amendment that requires New York to respect the right addressed by the Second Amendment, the Court has "made clear that "individual rights enumerated in the Bill of Rights and made applicable against the States through the Fourteenth Amendment have the same scope as against the Federal Government." *Id.* And the Court has "generally assumed that the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right when the Bill of Rights was adopted in 1791." *Id.*

As the Court surveyed a few additional restrictions appearing randomly in the late 19th-Century, the Court noted that, similarly, "we will not stake our interpretation 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.* at 2154-55 (internal citations omitted). As to certain territorial restrictions, "they appear more as passing regulatory efforts by not-yet-mature jurisdictions on the way to statehood, rather than part of *an enduring American tradition of state regulation.*" *Id.* at 2155 (emphasis added). Especially noteworthy here is the Court's search for "*an enduring American tradition of state regulation.*"[16]

The Court concluded its search for such an enduring tradition in clear terms relevant just as much here: "At the end of this long journey through the Anglo-American history of public carry, we conclude that respondents have not met their burden to identify an American tradition justifying the State's proper-cause requirement. The Second Amendment guaranteed to 'all Americans' the right to bear commonly used arms in public subject to certain reasonable, well-defined restrictions. Those restrictions, for example, limited the intent for which one could

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[16] *Bruen* itself invalidated a century-old New York proper-cause requirement similarly in effect in five other states as well as the District of Columbia. That seven jurisdictions enacted similar restrictions was *insufficient* to meet the State's burden when weighed against a much broader and much older public-carry tradition. If such was a failure of analogs in *Bruen*, the State's argument must also fail here.

carry arms, the manner by which one carried arms, or the exceptional circumstances under which one could not carry arms, such as before justices of the peace and other government officials. Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to 'demonstrate a special need for self-protection distinguishable from that of the general community' in order to carry arms in public." *Id.* at 2156 (internal citations omitted).

Here, the State cites to a handful of enactments[17] in an attempt to meet its "burden" to demonstrate a *tradition* of accepted prohibitions of firearms in places of worship or religious observation. *Bruen*, at 2135, 2138, 2150, 2156. The notion of a "tradition" is the opposite of one-offs, outliers, or novel enactments. Rather, "tradition" requires "continuity." *See generally Bruen*, 142 S.Ct. at 2135-56; *Washington v. Glucksberg*, 521 U.S. 702, 723 (1997); *Tradition*, The American Heritage Dictionary of the English Language (5th ed. 2011).

These enactments are of unknown duration,[18] and the State has not met is burden to show *endurance over time.*[19] As a result, the Court is left with a handful

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[17] A few additional municipal enactments of similar vintage do not alter the result.

[18] As *Bruen* noted, courts are "not obliged to sift the historical materials for evidence to sustain" the challenged statute; "that is [the State's] burden. *Bruen,* at 2150.

[19] As to Georgia and Missouri, the enactments apparently evolved in any event, to allow church leaders to decide the issue for their own churches. 8 LIBERTY UNIV. L.

of seemingly spasmodic enactments involving a small minority of jurisdictions governing a small minority of population. And they were passed nearly a century after the Second Amendment's ratification in 1791.[20] These outlier enactments also contrast with colonial-era enactments that, in fact, *mandated* such carry at places of worship. *See generally* Benjamin Boyd, *Take Your Guns to Church: The Second Amendment and Church Autonomy,* 8 LIBERTY UNIV. L. REV. 653, 699 (2014). These enactments are far too remote, far too anachronistic, and very much outliers—insufficient, then, in the search for an American tradition.

As stated in Justice Alito's concurrence in *Bruen*, "because many people face a serious risk of lethal violence when they venture outside their homes, the Second Amendment was understood at the time of adoption to apply under those circumstances . . . . [As such,] a State may not enforce a law . . . that effectively prevents its law-abiding residents from carrying a gun for this purpose." *Bruen.* 142 S.Ct. at 2157 (Alito, J., concurring). The same is true in this case.

In sum, the Nation's history does not countenance such an incursion into the right to keep and bear arms across all places of worship across the state. The right to self-defense is no less important and no less recognized at these places. The Constitution *requires* that individuals be permitted to use handguns for the core lawful purpose of self-defense. *McDonald,* 561 U.S. at 767. And it protects that

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REV., at 656, 656 n.17, 658-69.

[20] In fact, the State points to no such American law that existed between the founding and 1870.

right *outside the home and in public*. *Bruen*, 142 S. Ct. at 2021. Nothing in the Nation's history or traditions presumptively closes the door on that right *across every place of worship or religious observation*. As in *Bruen*, where the Court stated that, "[n]othing in the Second Amendment's text draws a home/public distinction with respect to the right to keep and bear arms," *id.* at 14, nothing there casts outside of its protection places of worship or religious observation. New York's exclusion violates "the general right to publicly carry arms for self-defense." *Id.* It, too, is one of the policy choices taken "off the table" by the Second Amendment. *Heller*, 554 U.S. at 636.

Because the State has failed to meet its burden to identify an American tradition justifying New York's place of worship or religious observation exclusion, the exclusion "violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." *Bruen,* 142 S.Ct. at 2156. For these reasons, on this record, Plaintiffs are likely to succeed on the merits of their Constitutional claim.

C. Irreparable Harm Absent Preliminary Injunctive Relief

Irreparable harm is "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Imp. Sales Co., L.L.C. v. Labatt Brewing Co., Ltd.*, 339 F.3d 101, 113 (2d Cir. 2003). Irreparable harm exists "where, but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the positions they previously

occupied." *Brenntag Int'l Chem., Inc. v. Bank of India*, 175 F.3d 245, 249 (2d Cir. 1999).

Here, absent a TRO, Plaintiffs' constitutional rights are being violated. Law-abiding citizens are 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.[22]

The Supreme Court has held that the loss of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 67 (2020) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976)). If only "10 people are admitted to each service, the great majority of those who wish to attend Mass on Sunday or services in a

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[22] Justice Alito queried, "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?" *Bruen*, 142 S.Ct. at 2157. He continued: "And while the dissent seemingly thinks that the ubiquity of guns and our country's high level of gun violence provide reasons for sustaining the New York law, the dissent appears not to understand that it is these very facts that cause law-abiding citizens to feel the need to carry a gun for self-defense." *Id.* at 2158. Finally, he noted that "[t]he police cannot disarm every person who acquires a gun for use in criminal activity; nor can they provide bodyguard protection for the State's nearly 20 million residents . . . . Some of these people live in high-crime neighborhoods. Some must traverse dark and dangerous streets in order to reach their homes after work or other evening activities. Some are members of groups whose members feel especially vulnerable. And some of these people reasonably believe that unless they can brandish or, if necessary, use a handgun in the case of attack, they may be murdered, raped, or suffer some other serious injury." *Id.* Indeed, "[o]rdinary citizens frequently use firearms to protect themselves from criminal attack. According to survey data, defensive firearm use occurs up to 2.5 million times per year." *Id.* (citation omitted).

synagogue on Shabbat will be barred. And while those who are shut out may in some instances be able to watch services on television, such remote viewing is not the same as personal attendance. Catholics who watch a Mass at home cannot receive communion, and there are important religious traditions in the Orthodox Jewish faith that require personal attendance." *Id.* Here as well, there "can be no question that the challenged restrictions, if enforced, will cause irreparable harm." *See id.* Plaintiffs satisfy the irreparable harm element.[23]

D. Public Interest

Finally, the Court must consider whether a TRO is in the public interest. *See Bronx Household of Faith*, 331 F.3d at 349. The State argues that broad legal carrying in dense congregate settings can result in spontaneous violence or accidental shootings. But the State does not claim or show that the carrying of firearms at places of worship has resulted in an increase in handgun violence, or that public safety would be impaired if the places of worship restriction is enjoined.

A TRO would, however, serve the public interest of fostering self-defense at places of worship across the state. The public has a significant interest in the "strong sense of the safety that a licensed concealed handgun regularly provides, or would provide, to the many law-abiding responsible citizens in the state too powerless to physically defend themselves in public without a handgun." *Antonyuk v. Bruen*, No. 22-CV-0734, 2022 WL 3999791, at *36 (N.D.N.Y. Aug. 31, 2022).

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[23] The Court is aware of, and respectfully disagrees with, the conclusion on this issue in *Goldstein v. Hochul,* No. 22-CV-8300 (S.D.N.Y. Sept. 30, 2022), and its relevance here.

Absent a TRO, the challenged law creates a vulnerable population of attendees at places of worship left to the whims of potential armed wrongdoers who are uninterested in following the law in any event. A TRO would therefore be in the public interest.

E. Security

Federal Rule of Civil Procedure 65(c) requires the Court to consider whether it should require Plaintiffs to post security and, if so, in what amount. *See Dr.'s Assocs., Inc. v. Distajo*, 107 F.3d 126, 136 (2d Cir. 1997) ("Rule 65(c) gives the district court wide discretion to set the amount of a bond, and even to dispense with the bond requirement [in certain situations].").

On these facts, the Court will not require Plaintiffs to post security because a bond requirement does not fit the fact-pattern and interests involved in this case. *See Dr.'s Assocs.*, 107 F.3d at 135-36 (affirming district court's decision not to require security where the district court "found that [defendants] would not suffer damage or loss from being forced to arbitrate in lieu of prosecuting their state-court cases"). *See also Clarkson Co. v. Shaheen,* 544 F.2d 624, 632 (2d Cir. 1976) (Because no request for a bond was ever made in the district court, and because, under Fed. R. Civ. P. 65, "the amount of any bond to be given upon the issuance of a preliminary injunction rests within the sound discretion of the trial court.")

CONCLUSION

For the above reasons, the Court grants Plaintiffs' motion for a temporary restraining order as follows: it is

ORDERED that Defendants and their officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of this temporary restraining order, are enjoined, effective immediately, from enforcing all of N.Y. Pen. L. § 265.01e(2)(c) (places of worship or religious observation), and their regulations, policies, and practices implementing it;[24]

ORDERED that this TRO will remain in effect through the disposition of Plaintiffs' motion for preliminary injunction;

ORDERED that no bond shall be required; and

ORDERED that Defendants' opposition papers on the preliminary injunction application are due October 28, 2022, at 12:00 pm. Reply papers, if any, are due by November 2, 2022, at 12:00 pm. The parties shall appear for a hearing on the preliminary injunction application on November 3, 2022, at 2:00 pm in the Chautauqua Courtroom, 8th Floor East, 2 Niagara Square, Buffalo, New York.

SO ORDERED.

Dated: October 20, 2022
Buffalo, New York

JOHN L. SINATRA, JR.
UNITED STATES DISTRICT JUDGE

[24] The State's request to limit any TRO to the individual Plaintiffs is denied as untenable. Either the exclusion applies or it does not.

Plaintiffs' Exhibit 3

Infrastructure: Mass Transit in 19th- and 20th-Century Urban America FREE

Jay Young, Outreach Officer, Archives of Ontario

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Summary

Mass transit has been part of the urban scene in the United States since the early 19th century. Regular steam ferry service began in New York City in the early 1810s and horse-drawn omnibuses plied city streets starting in the late 1820s. Expanding networks of horse railways emerged by the mid-19th century. The electric streetcar became the dominant mass transit vehicle a half century later. During this era, mass transit had a significant impact on American urban development. Mass transit's importance in the lives of most Americans started to decline with the growth of automobile ownership in the 1920s, except for a temporary rise in transit ridership during World War II. In the 1960s, congressional subsidies began to reinvigorate mass transit and heavy-rail systems opened in several cities, followed by light rail systems in several others in the next decades. Today concerns about environmental sustainability and urban revitalization have stimulated renewed interest in the benefits of mass transit.

Keywords: mass transit, technology, transportation, utilities, cities, urban growth, streetcar, subway, bus, automobile

Subjects: 20th Century: Pre-1945, 20th Century: Post-1945, Urban History, History of Science and Technology

Mass transit—streetcars, elevated and commuter rail, subways, buses, ferries, and other transportation vehicles serving large numbers of passengers and operating on fixed routes and schedules—has been part of the urban scene in the United States since the early 19th century. Regular steam ferry service connected Brooklyn and New Jersey to Manhattan in the early 1810s and horse-drawn omnibuses plied city streets starting in the late 1820s. Expanding networks of horse railways emerged by the mid-19th century. A half century later, technological innovation and urban industrialization enabled the electric streetcar to become the dominant mass transit vehicle. During this era, mass transit had a significant impact on American urban development, suburbanization, the rise of technological networks, consumerism, and even race and gender relations. Mass transit's importance in the lives of most Americans started to decline with the growth of automobile ownership in the 1920s, except for a temporary rise in transit ridership during World War II. In the 1960s, when congressional subsidies began to reinvigorate mass transit, heavy-rail systems opened in cities such as San Francisco and Washington D.C., followed by light rail systems in San Diego, Portland, and other cities in the next decades. As the 21st century approached, concern about environmental sustainability and urban revitalization stimulated renewed interest in the benefits of mass transit.

The history of urban mass transit in the United States is more complex than a simple progression of improved public transportation modes before the rise of the automobile ultimately replaced transit's dominance by the mid-20th century. Transit history in American cities is rooted in

different phases of urbanization, the rise of large corporate entities during the industrial era, the relationship between technology and society, and other broad themes within American history. At the same time, mass transit history shows the value of emphasizing local contexts, as the details of urban transit unfolded differently across the United States based on municipal traditions, environments, economies, and phases of growth.

Ferry Boats, Omnibuses, and the Beginnings of Mass Transit in the Early 19th Century

The ferry boats that regularly crossed the waters of a few American cities in the early 19th century provided an important precedent to the mass transit industry that emerged later in the century. Before the age of industrialization, the cities of the American merchant economy were primarily sites of commercial exchange of goods and services. Boston, New York, Philadelphia, and most other urban centers were dense, port cities located along rivers, bays, and other bodies of water. And while this geography facilitated the transshipment of goods, it also impeded the expansion of urban settlement. During the early 1810s, Robert Fulton, an engineer and inventor, established a regular ferry service <http://en.wikisource.org/wiki/From_canoe_to_tunnel#mediaviewer/File:From_canoe_to_tunnel_pg_7.jpg> using steam power. The service linked lower Manhattan with Jersey City over the Hudson River, as well as the village of Brooklyn <https://ephemeralnewyork.files.wordpress.com/2013/03/villageofbrooklynmap.png>, at the time a small suburban settlement across the East River. The early development of regular ferry service illustrates the dominant role that New York City would play in American urban mass transit—not surprising considering the city's rapid demographic and physical growth and dominant position in the hierarchy of American cities during the 19th century. Ferries also demonstrate the early connections between transit and urban expansion, as the service allowed commuters living in areas such as the newly subdivided Brooklyn Heights neighborhood to overcome obstacles for continuous settlement posed by bodies of water. Typically, regular users of this service enjoyed above-average incomes and social positions. Unlike most working people, they could afford the expense of a daily fare.[1] By the 1860s, the annual ridership of New York's ferry industry had expanded to more than 32 million people. Thirteen companies employed seventy steamboats for more than twenty different ferry routes.[2] Similar service had also spread to other northeastern cities, such as Philadelphia, Pittsburgh, and Cincinnati. Ferry service is still an integral part of daily commuting in some cities today. Despite its success, however, ferry boat service could do little to improve transportation over land.[3]

By the late 1820s, New York also became home to the first significant form of land-based mass transit: the omnibus. This operation—a large horse-drawn wheeled carriage similar to a stagecoach yet open for service to the general public at a set fare—originated in Nantes, France, in 1826. Omnibus service spread to Paris two years later and to other French cities as well as London by 1832.[4] Abraham Brower brought the service to New York in 1828 when he launched a route running a mile and a quarter along Broadway. Brower's original vehicles, *Accommodation* and *Sociable*, held approximately twelve passengers.[5] Three years after Brower inaugurated service, more than one hundred omnibuses traveled on New York streets.[6] By the 1840s, Boston, Philadelphia, Baltimore, and other American cities had omnibus service. It spread from larger to smaller cities in subsequent decades.[7]

The omnibus had weaknesses. Since most vehicles featured unpadded seats and typically travelled on uneven cobblestone roads (if paved at all), passengers experienced an uncomfortable ride.[8] The fare—generally 12 cents—was too expensive for most urban dwellers. Nonetheless, the omnibus initiated a "riding habit" of regular transit use within its main segment of users: members of the urban middle class. This growing demographic found private stagecoaches too expensive, but they had the affluence and desire to commute to work instead of walking.[9] Although getting around by foot remained the main source of mobility for most urban dwellers, the "walking city" was slowly eroding.

Horsecars: The "American Railway"

A vehicle with less surface friction could reduce the shortcomings that had plagued the omnibus. Horse streetcars—commonly known as horsecars <*http://www.transitmuseumeducation.org/images/vocab/photo_horsecar1917.jpg*>—traveled on rail instead of road, and had numerous advantages over the omnibus. The use of rails provided a faster, quieter, more comfortable ride, while enabling a more efficient use of horse power. This fact allowed for larger cars that carried approximately three times as many riders as the omnibus. Importantly, the horsecar's lower operating cost per passenger mile translated to a cheaper fare for users (typically 5 cents compared to the 12-cent omnibus fare) and a growing "riding habit" within the American urban population.[10] Horsecars reduced the time and cost of commuting to and from the central core, and, thus, they expanded the area of development along the urban fringe. Following a slow start, other American cities adopted horsecars by the 1850s, part of the wider context of rampant urbanization during the second half of the 19th century. Typically, a private company ran lines under a franchise awarded by the municipality that outlined the public roads on which the company could build rails and operate routes, along with other stipulations. By the end of the 1850s, New York, New Orleans, Brooklyn, Boston, Philadelphia, Baltimore, Pittsburgh, Chicago, and Cincinnati provided horsecar service. Further expansion developed during the 1860s.[11] Two decades later, almost twenty thousand horsecars traveled on more than thirty thousand miles of street railway across the United States. Such expansion was particularly notable in contrast to comparatively slower growth in Europe (where people called the technology "American Railways").[12] The horsecar's initial development in the United States, and its early spread across the country, exemplified how the country was often at the forefront of transit use and technological innovation during the second half of the 19th century and the early 20th century.

The world's first horsecar line began service in 1832, when the New York and Harlem Railroad Company inaugurated a horse-powered rail car route along Fourth Avenue. The franchise owners, including banker John Mason, intended the line to serve as the first stage of a passenger steam railway linking lower Manhattan to Harlem. However, fears of noise, smoke, and boiler explosions from those living along the right-of-way prompted the city to prohibit the railroad from operating steam engines within the built-up area south of Twenty-Seventh Street, so the company relied upon horse power within the restricted area.[13] Despite the operating advantages of horsecars, its "technology transfer" to other American cities was slow until the early 1850s. This phenomenon reinforced the value of local contexts, as horsecar lines developed differently in each city based on factors such as local politics, geography, and population density. Horsecars —and the rails upon which they travelled—began a process of redefining the meaning of city

streets that continued with electric streetcars and automobiles. The street became more a place for mobility, diminishing the centrality of sociability, recreation, and other traditional street uses. Initially, popular sentiment opposed the placement of rails along streets, especially since rails were not flush with the street surface and impeded cross movement until the invention of grooved rails in 1852. That same year, New York saw its first horsecar operation distinct from steam railroads, and the service soon spread to many other American locales.[14]

Historians Joel Tarr and Clay McShane demonstrate that horsecars exemplify how the rise of industrialization and urbanization during the 19th century led to a growing exploitation of horse power. Ironically, steam power, an essential component of the first Industrial Revolution, created a greater demand for this older form of energy in industrial cities.[15] Yet the horsecar's reliance on these "living machines" presented the greatest weakness of the technology, especially as cities sought to expand their systems once easily commutable distances from the urban fringe via horsecar were reached. Horses were expensive to maintain. They ate their value in feed each year, required large stables and care from veterinarians, stablehands, and blacksmiths, and their average work life lasted less than five years.[16] In terms of social costs, horses produced massive amounts of pollution as their manure and urine fell on city streets. And once horses met their ultimate fate, their bodies had to be removed. New York alone disposed of fifteen thousand horse carcasses annually.[17] Sudden disease outbreaks were common. The most dramatic occurred in 1872, when an equine influenza epidemic <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2272691/pdf/pubhealthpapoo028-0109.pdf>—the "Great Epizootic"—hit North America (especially eastern seaboard cities). Thousands of horses died during the epidemic, which created operational upheaval for the horsecar industry. Not surprisingly, the event further reinforced the need for cheaper, more reliable forms of transit power.[18]

Steam was one alternative source of power. It had provided power for ferry services since the 1810s and passenger railways two decades later. By the mid-19th century, commuter railways using steam locomotives (essentially short-haul passenger rail) connected affluent residents living in small suburban areas to places of work and entertainment in large cities. For example, upper-middle-class towns, such as New Rochelle and Scarsdale in Westchester County, New York, grew with commuter rail service to New York City, while Evanston, Highland Park, Lake Forest, and other commuter towns emerged around Chicago.[19] Yet steam power presented challenges for urban transit. Many city dwellers living along crowded streets considered the noise, pollution, and other dangers associated with the technology to be nuisances. Steam operation also generally cost more than horse power until the 1870s. A few New York companies gambled on steam-powered conveyances during the 1860s, but they all soon ceased their experiments.[20] Nonetheless, transit companies in greater New York and Chicago began building elevated railroads using steam power above urban thoroughfares. This proved to be among the earliest forms of rapid transit, since vehicles operated on their own right-of-way, not in mixed traffic. By 1893, Jay Gould's New York Elevated Railroad Company <http://en.wikipedia.org/wiki/IRT_Third_Avenue_Line#mediaviewer/File:Bowery,_New_York_City,_ca._1898.jpg> carried half a million daily passengers from lower Manhattan to the Bronx, while Chicago saw the first line of its "L" system open in 1892. Although short-lived "elevateds" existed in the smaller cities of Sioux City, Iowa, and Kansas City, Missouri, high capital costs made them mostly a big city phenomenon unlikely to become a dominant mode of

transit across the United States.[21] Elevateds also darkened the street below. Once electricity became a possible power source by the 1890s, city dwellers clamored for rapid transit to burrow underground.

Power generated from a stationary central source—rather than within a moving locomotive—offered another alternative. Cable cars traveled on rail, similar to horsecars and steam railways, but these vehicles clasped on a moving cable within a street conduit. This feature eliminated much of the noise, smoke, and danger of boiler explosions that plagued urban steam locomotives (although such nuisances were still present at the stationary power source). Cable car operation began in San Francisco in 1873, when Andrew Hallidie began his service on Clay Street <http://www.sparkletack.com/wp-content/img/podcast_img/cablecar2.jpg>. San Francisco's hilly terrain required four horse teams to pull a single omnibus, with some hills too steep for any kind of horse service.[22] Since various transit experiments in steam, compressed air, chemical engines, and electricity failed to produce an inexpensive method of propulsion, cable cars seemed the best alternative to horse power by the 1870s. Following Hallidie's successful operation, most large cities across the United States built cable car networks.[23]

With hindsight, the cable car emerged as a temporary solution for the transit industry until the refinement of a more efficient power distribution method. Cables had advantages over horse power, but they also carried particular weaknesses. Cables were always under the threat of snapping. Maintenance and replacement constituted a complex, expensive process that negatively affected service. Ice buildup produced issues in colder cities. The cable had to run at the same capacity no matter the service level, which meant power generation could not diminish at off-peak times. Twenty years after Hallidie's first run on Clay Street, more than three hundred miles of cable car tracks had been laid across the United States. But numbers declined soon after electric streetcar operation became practical in the 1890s. By 1913, only twenty miles of cable car track were still in use.[24] Electric streetcars and other electric transit technologies exacerbated the changes in urban life that horsecars and cable cars had unleashed.

Transit Becomes Electric

Technological innovations, demand from the transit industry for improved operations, and a desire for mobility enabled the electric streetcar to become the dominant mass transit vehicle in the United States by the turn of the 20th century. The streetcar's use of electricity makes it a key technology of the second Industrial Revolution. "[N]o invention," urban historian Kenneth Jackson has argued, "had greater impact on the American city between the Civil War and World War I than the visible and noisy streetcar and the tracks that snaked down the broad avenues into undeveloped land."[25] The idea of transmitting electrical current to move vehicles had existed since the 1840s, but no practical technique could generate sufficient electrical power. Experiments with battery power also failed in terms of feasible, everyday operation.[26] Early streetcar pioneers such as Leo Daft and Charles van Depoele made significant advances to the technology; however, Frank Sprague <http://en.wikipedia.org/wiki/Frank_J._Sprague#mediaviewer/File:Frank_j._sprague.jpg> (1857–1934) is most commonly associated with the vehicle's development. Similar to names associated with other critical technologies, Sprague was not the sole "inventor" of the electric streetcar. Rather, as transit historian Brian J. Cudahy explains, Sprague's success derived from

"his ability to blend aspects of previous experiments with his own developments into a fully orchestrated whole."[27] A former Edison employee, his key technical contribution was a trolley poll and wheel design that overcame previous flaws whereby overhead electrical wires detached from vehicles (and thus the power source). Sprague's system also demonstrated operational reliability and financial feasibility when it was put to the test along twelve miles of track for the Union Passenger Railway in Richmond, Virginia, in 1888. Twelve years later, 90 percent of all streetcars in the United States relied on his patents, and few horsecars were still in operation.[28]

Street railway companies quickly adopted electricity. Often, they used existing rails and even former horsecar vehicles.[29] Electric streetcars transformed the transit industry. New forms of expertise related to electricity replaced veterinarians, blacksmiths, and other horse-related professions. The new technology also generated mergers with large companies swallowing up smaller enterprises, monopolizing service in urban areas, and employing corporate business forms in order to raise capital needed for investment in electricity infrastructure (in some cases, electrical utility companies were also transit providers). Transit remained within the private market in most American cities until the second half of the 20th century, but the organizational structure of the industry became more complex.[30]

Electric streetcars rapidly spread across the country. Like horsecars decades earlier, electric streetcars accommodated heavier passenger loads compared to predecessors. This reduced passenger cost per mile, lowered fares, and stimulated greater transit use by wider segments of society. Two years after Sprague's Richmond success, the vehicle carried twice the number of passengers in the United States compared to the rest of the world, with thirty-two thousand electric streetcars traversing American streets from small towns to major metropolises—a number that nearly doubled by the turn of the century.[31]

Electric traction also removed an obstacle for underground transit. The London Underground had operated steam-powered trains when it opened in 1863, but most commentators believed Americans would avoid smoke-filled subway tunnels. The massive construction cost also impeded subway building. In 1894, the Massachusetts legislature authorized Boston to build the first subway in the United States. The line, which was completed four years later, buried 1.5 miles of a busy streetcar under Tremont Street's retail district. The Boston Transit Commission, a public body, financed construction, while the private West End Street Railway operated the line and serviced its debt.[32] Public money was also required to build the country's largest subway network in New York—foreshadowing the growing role of the state in mass transit in the second half of the 20th century. In 1904, the Interborough Rapid Transit Company's service began connecting the Bronx to Manhattan, followed by the construction of hundreds of more miles of subway in New York during subsequent decades.[33]

The Effects of Electric Streetcars on Urban Life

Streetcars and other forms of electric traction had a tremendous influence on the shapes and sensations of urban life during the late 19th and early 20th centuries. In many cases, the technology exacerbated trends that began with the horsecar. Streetcars continued the horsecar's role in enabling the seemingly contradictory yet related forces of centralization and dispersal in American cities. In essence, this entailed the general separation between major commercial activities in the downtown and districts of residence and other activities, such as manufacturing,

in less dense areas surrounding the core and along the urban fringe. The American walking city—in which the dominant mode for the journey to work was by foot—came to an end, although many workers still walked to their places of employment.

The many streetcar lines that radiated from central business districts across the United States increased accessibility to and from downtown. The shapes, spectacles, and symbols of what is still associated today with "downtown"—business skyscrapers and other tall buildings as well as large theaters, department stores, hotels, and other palaces of consumption—emerged with the arrival of horsecars, but they reached a new scale with electric streetcars. Electric traction had a centralizing effect by increasing land values in the core and creating the economy of large buildings and places of entertainment during the late 19th and early 20th centuries. These attractions relied upon other technologies such as the elevator, telephone, and electric light, yet the rise of skyscrapers and other iconic elements of the modern urban landscape would have been unlikely without streetcars.[34]

Streetcars played a dramatic role in suburbanization. Unlike the natural limits of horsecars, electric streetcars could journey well beyond the existing city once trackage was laid. In Boston, for example, the area of urban settlement expanded from two miles outside the old walking city core during the horsecar era to four miles during the first decade of electric streetcar service.[35] Suburban living was more readily available to Americans of the growing middle class and in the skilled trades from cities as varied as New York City to Milwaukee. Those who worked within the older city but could not afford the daily ten-cent round trip fare were forced to stay (or walk long distances from the urban fringe).[36] The characteristics of "streetcar suburbs" differed across and within cities, yet they also shared similarities. For example, accessible, cheap land enabled suburban residential developments of semi-detached or detached dwellings set back from the street and surrounded by a yard (apartments also existed). Walkability remained important for at least some daily tasks and, of course, for the journey to the nearby streetcar stop. Thus, on the whole, streetcar suburbs had fairly compact forms and high population densities compared to the automobile-centric suburbs that developed later in the 20th century, although such forms and densities varied based on local influences, levels of affluence, and other factors. Real estate speculators knew the value of streetcar service to their developments. In many cases, transit companies held real estate interests along the urban fringe, which they connected via streetcar to spur development, even if the line itself was unprofitable. Yet the many streetcar suburbs that still dot the American landscape today were not simply the result of ambitious developers, but also the desires and actions of many people, from local politicians to the varied residents who made such places home.

Various social factors joined the development and expansion of the electric streetcar to create the new scale of suburbanization at the turn of the 20th century. The streetcar did not solely create the suburbs; the relationship was more complex. The experience of suburbanization in the United States evolved differently from that in Europe, where dense row housing continued to develop along the urban fringe. Demand existed for suburbanization—and its distinct shapes and forms—as well as the technologies that made it possible. Scholars have often explained such demand through the value placed by Americans on private property ownership and the 19th-century belief in the "rural ideal." To these factors, historian Clay McShane has added popular ideas about public health that emerged during the second half of the 19th century. The miasmic theory of disease contended that vapors emanating from rotting organic matter caused illness. To counter these miasmic threats, Americans sought suburban environments filled with grass, trees, and

fresh air.[37] Ironically, the new scale of suburbanization generated by electric streetcars created new social issues, such as the growing geographic division of wealth and political fragmentation within the American metropolis.[38]

Transit also enabled new social experiences associated with the modern age. Whereas streetcars linked people to department stores, theaters, and other attractions of downtown, the technology also connected riders to attractions at the end of the line. Amusement parks were the most prominent. Transit companies often owned such parks as a means to generate more passenger traffic in outer areas and on off-peak times: weekends and holidays. For example, Atlanta's Ponce de Leon Park originated as a natural springs attraction served by omnibus service and became a large amusement park after the Atlanta Street Railway assumed control of it by the turn of the 20th century. Even one of the greatest attractions at amusement parks—the rollercoaster—had a connection to transit technology; it turned apprehensions about new transit technology (such as the fear of accidents) into a sensorial thrill. According to David Nye, destinations at both ends of the streetcar line—the downtown department store and the amusement park along the urban fringe—promoted a consumerist, mass society that "subverted the Victorian moral code" of thrift and self-restraint.[39]

Electric streetcars, along with subways and elevated railroads, allowed for new ways of seeing the city and its inhabitants. Riding within a swift, enclosed transit vehicle emphasized a visual understanding of the urban landscape. In particular, elevateds allowed for a comprehensive, panoramic view of the city that was unattainable by walking on the ground. The interiors of transit vehicles also became essential public spaces by forcing face-to-face contact between people of varying racial, class, and gender identities. Crowded rush-hour cars such as those of the New York elevateds and subways made social contact particularly common.[40] Ironically, transit interiors became points of intimate contact at the same time that the American city, through suburbanization via transit technology, was becoming more residentially segregated by race and class.[41]

Yet streetcars or other forms of transit also reinforced social differences. They were "moving theaters" of racial conflict, according to historian Robin Kelley.[42] In antebellum America, omnibus companies in New York and Philadelphia forbade African Americans from riding in their vehicles, while slaves sometimes rode with their white owners or in separate conveyances in southern cities.[43] Segregated transit was at the center of Jim Crow–era discrimination in the South. Although the Montgomery Bus Boycott in 1956—sparked by the refusal of Rosa Parks to give up her bus seat to a white passenger—is rightly remembered as a major moment in the Civil Rights movement, African Americans participated in failed protests in at least twenty-five southern cities against the injustice of Jim Crow laws during the first decade of the 20th century. These laws, following the U.S. Supreme Court case *Plessey v. Ferguson* (1896), dictated black riders sit in the back of transit vehicles and give up their seat to white riders if they sat in the middle section.[44] Women had mixed experiences using transit. Spaces within a transit vehicle were common sites of sexual harassment, especially after streetcar companies switched to one-man operations by eliminating guards and ticket collectors who used to watch over passengers in the early 20th century. Such harassment led Julia D. Longfellow of the Women's Municipal League in 1909 to request the operator of New York's Interborough Rapid Transit to provide a female-only car during rush hours (higher operating costs motivated the private company to reject her request).[45] On the other hand, streetcars and other forms of mass transit allowed for

opportunities for greater freedom, through urban mobility, for women, who constituted a high percentage of transit users. A ride on a streetcar embodied the complex contradictions of American urban life during the age of modern technology.

The Decline of Mass Transit in 20th-Century America

Mass transit's importance in the lives of city dwellers decreased by the 1920s. This decline lasted until the 1970s, and, in many ways, it has continued to the present. The roots of this trend emerged during the early 20th century. From 1890 to 1905, annual streetcar ridership across the country more than doubled from two billion to five billion passenger trips. However, over the next two decades ridership grew at a slower rate. From 1917 to 1923, the industry added only one billion more annual trips. Annual transit ridership (all modes including subway, streetcar, and bus) peaked in 1926 (excluding exceptional war-related conditions during the 1940s and early 1950s), with more than seventeen billion passenger trips—a figure since unmatched. The slowdown in transit ridership growth coincided with an explosion of automobile ownership and use: in 1910, Americans owned less than half a million automobiles, a figure that rose to eight million vehicles in 1920.[46] Mass transit's fall in prominence is more complicated than simply the invention and popularity of the private automobile, for as historians of technology remind us, no technology is innately superior to another. Rather, social values and practices influence the acceptance of technologies based on complex factors. Multiple reasons within and outside of the transit industry explain declining passenger numbers during the 20th century.

Starting in the 1910s, inflation imposed pressure on the overwhelmingly private-owned transit industry. Transit companies began to reduce investment in their capital stock before World War I.[47] Inflation led to increased prices for materials (the value of steel rails rose by 50 percent after the war) and other costs. Labor, the largest part of the industry's operating costs, also became more expensive as more workers unionized.[48] Greater demand for better service from interest groups—not only users who protested against any hike to the common five-cent fare, but also politicians and business groups—compounded these economic forces by making more difficult the implementation of positive reforms that could have improved the competitiveness of transit against the automobile.

Another challenge originated with jitneys: privately owned automobiles operated by entrepreneurs who cruised streets (typically those with transit routes) in search of possible customers. Passengers enjoyed the jitney's flexibility, especially its ability to drop off riders closer to their destination compared to the same cost as a streetcar. Unlike transit companies, jitneys usually were unlicensed and paid no municipal fees or taxes. Transit operators saw jitneys as unfair competition and pressured local governments to prohibit the service in many cities. The jitney enjoyed only short-lived success, but it provided but one example of how the automobile threatened the transit industry.[49]

The popular perception that transit was a private business, rather than a public service deserving government aid, added to the industry's woes. Years of negative sentiment from passengers, politicians, and other interest groups about poor service, corruption, and large profits hindered the industry. Historian Paul Barrett argues that municipal ordinances passed in Chicago in 1907 enforced levels of service on the city's private transit provider, but they failed to provide a subsidy that would make such service financially feasible. Instead, either complete municipal

ownership or minimal regulation constituted better alternatives. San Francisco had municipalized transit in 1912, but few cities followed suit until the 1950s.[50] Transit was not alone in suffering from negative opinion; the automobile did too, despite its relative newness. Historian Peter Norton has shown that a consensus of politicians, city planners, and most citizens believed automobile use on city streets should be highly regulated to ensure not only the safety for other road users (especially pedestrians), but also the efficient flow of traffic. The young automobile industry countered such sentiment by branding its product as the symbol of individual freedom. It also lobbied policymakers. This strategy allowed "motordom" to gain policy concessions for items such as parking restrictions, often at the expense of the transit industry and other street users.[51] The private nature of the automobile also may have influenced transit users to drive cars, especially women. The automobile created its own problems, but many ex-transit passengers believed it offered a better alternative to the mixed company in a crowded streetcar, often filled with cigarette smoke and other harassing passengers.[52]

The bus, a vehicle on wheels employing an internal combustion engine, also illustrates the changing tide of transit between 1920 and 1940. Bus service emerged during the first decade of the 20th century and its use grew during the 1920s, when enterprising companies decided to service new suburban developments located past the termini of streetcar lines. Although most streetcar companies initially feared the bus, they increasingly saw it as a flexible vehicle with low capital costs that competed with the automobile and served areas with lower ridership levels. A survey in 1924 revealed that little more than one thousand buses plied American streets, but this figure jumped to at least twenty thousand buses eight years later.[53] Buses slowly replaced streetcar lines across the country. While more than seventy thousand streetcars operated in 370 cities in 1912, only 1,200 vehicles serviced seven cities five decades later.[54]

Scholars and other analysts offer varied explanations for the replacement of streetcars by buses across the United States. One interpretation claims that the phenomenon emerged as part of a conspiracy by General Motors. This argument became popular in the early 1970s, when lawyer Bradford Snell testified in front of a U.S. Senate subcommittee. He contended that General Motors, under its National Coach Lines subsidiary, purchased a number of transit companies during the 1930s and 1940s in order to convert streetcar lines to bus operation, with the purpose of weakening or eliminating transit service so that disgruntled passengers would purchase automobiles. The theory even entered popular culture as inspiration for a plotline in the 1988 film *Who Framed Roger Rabbit*. Although the investigation ultimately found that GM broke anti-trust laws, the central conspiratorial charge—the provision of poor transit service in order to increase automobile sales—was not the basis of the investigation. In fact, most transit historians and other scholars generally disregard the conspiracy theory. National Coach Lines controlled approximately 10 percent of the country's urban transit systems, yet a majority of the remaining 90 percent of companies also switched to buses. Moreover, a consensus within the transit industry believed that buses—operating without the capital concerns of rails—possessed economic and operational benefits compared to streetcars, especially on lower density systems and lines.[55] The case of bus substitution in New York City during the 1920s and 1930s suggests politics played a role in the shift rather than rational cost-benefit considerations of each mode of transport. Historian Zachary Schrag argues that the streetcar-bus debate served as a "proxy" for other issues such as public ownership, regulation, and fare prices.[56] Technological novelty also played a part; to most passengers, a new bus seemed more modern in comparison to streetcars, which many passengers saw as the antique relics of corrupt private transit companies.[57] Regardless, buses likely saved the mass transit industry during the post–World War II era, when

ridership numbers continued to plummet. Implementation of diesel engines and automatic transmissions in buses by the 1940s also reduced energy costs even as these innovations led to noise, pollution, and other negative consequences on the urban environment.[58]

World War II saw a steep but temporary rise in ridership—in fact the highest in the mass transit industry's history. The booming war economy created a strong demand from passengers requiring transit for work trips, especially compared to the rampant unemployment and declining rider figures during the Great Depression. Wartime gasoline and rubber rationing, and an automobile production ban, also led to increased ridership. Yet the boom failed to solve the transit industry's larger issues, which were evident before the war. In fact, the wartime riding experience hurt transit in the long run. Passengers in Detroit and other industrial cities crowded into packed, often dilapidated transit vehicles, which created uncomfortable riding situations and even racial conflict. These memories surely remained with former riders who decided to purchase automobiles once the conflict ended.[59]

After the war, the longer trajectory of declining passenger numbers resumed. Numerous transit companies faced financial ruin, which led to public ownership in Chicago, Los Angeles, and other larger cities in the immediate postwar era. In smaller towns, transit often ceased operation. Despite the wave of public takeovers during the late 1940s and 1950s, the popular conception of transit as a service run on a cost-recovery basis remained unchanged. Service failed to improve significantly enough to curtail declining ridership.[60] At the same time, the postwar years marked the growth of automobile-dependent suburbs and car ownership as well as a rapid push for road building. In 1956, President Dwight Eisenhower signed the Federal Aid Highway Act, which dedicated twenty-five billion dollars to build more than forty thousand miles of limited-access roadways across the country.[61] Although transit's decline began decades before the federal government constructed new highways in the postwar era, the interstate program—which funded 90 percent of urban expressway costs—demonstrated the federal government's enthusiasm for automobility. By the 1950s, the United States had become "car country," according to Christopher Wells.[62] Meanwhile, the transit industry suffered. But change was around the corner.

Federal Funding and a Return to Ridership Stability

Mass transit has made a modest comeback since the 1960s, when the federal government began to subsidize transit expansion on a broad scale. The push for federal funding originated from a coalition of railroad executives and big city mayors. In the late 1950s, rail companies with major freight operations cut many of their unprofitable commuter rail services that served large metropolitan areas. Together, the mayors and rail companies fought for a national transportation policy from the federal government that recognized the importance of mass transit, not just highways and automobiles. Older cities worried that further decline of transit would diminish the competitive advantages of their central cores over more peripheral areas in terms of business services and manufacturing. And middle-class suburbanites who relied on commuter rail worried about the loss of a service that connected them to places of work, consumption, and leisure. A few precedents for capital funding from government existed, for example, municipal funds for subways in Boston and New York City, and federal funding for the Chicago subway during the Great Depression and World War II.[63]

These lobbying efforts came to fruition in 1964 when President Lyndon Johnson signed <http://www.presidency.ucsb.edu/ws/?pid=26369> the Urban Mass Transportation Act (UMTA). The legislation enabled capital grants from the federal government to cover a maximum of two-thirds the capital costs of equipment and facilities for transit systems.[64] Over the next decade, Washington provided more than three billion dollars, which cities used to purchase private systems, improve existing vehicles and infrastructure, and build new systems. From 1965 to 1974, the number of publicly owned transit systems rose from less than sixty to more than three hundred. Yet federal funding alone did not solve transit's woes, as ridership across the country continued to decline in the years following the passage of the act in 1964.[65]

More dramatically, a few cities used new federal funding to construct rapid transit systems. The idea that transit operating in its own right-of-way could best compete with the automobile and the nation's growing expressway network constituted a major impetus for such large-scale, expensive transit systems. Postwar rapid transit was often debated within the wider context of desires for regional government and planning. San Francisco's Bay Area Rapid Transit <https://www.bart.gov/about/history> (BART), approved by area residents in a municipal referendum in 1962, took advantage of federal funding after 1964. Although the original push for BART came from downtown business interests, it was also supported by politicians, the media, and residents, who believed that rapid transit could improve the growing region's traffic congestion, especially following the end of streetcar service across the Bay Bridge between San Francisco and Oakland during the mid-1950s. When BART opened in 1972, it made use of unproven, space-age technology designed by aerospace firms in an attempt to create a more modern transit riding experience. This reliance on unproven technology led to cost overruns and technical problems, but BART quickly became a key part of the San Francisco Bay area's distinctive urban landscape.[66]

The other new major system developed in the nation's capital. The Washington Metro <http://chnm.gmu.edu/metro/> originated from ideas within planning circles during the 1950s to build a small rapid transit system in conjunction with a larger network of automobile freeways. Inner-city residents feared the damage that the controversial Three Sisters Bridge over the Potomac River as well as other freeway plans would have on their communities and the local environment. They pushed for a larger rapid transit system as an alternative to the expressway web. The eventual 100-mile Metro system faced challenges, including a period of stalled capital funding from expressway proponents before a congressional vote stopped the logjam. The first leg of the system opened in 1976 with subsequent sections opening during the next three decades. Despite initial ridership numbers that were lower than originally projected, Metro historian Zachary Schrag argues that the project embodied admirable goals of Great Society–era liberalism: the value of the public realm and the belief in the ability of government to improve the daily lives of its citizens.[67]

Federal funding since the 1960s has had a mixed legacy. Both contemporary scholars and historians looking back at the program are critical. For example, they question UTMA's endorsement of rapid transit systems, which often had ridership numbers far lower than initial projections that were used to promote such networks. An early articulation of this argument came from John Meyer, John Kain, and Martin Wohl in their *The Urban Transportation Problem* (1965). Published soon after President Johnson signed UTMA and based on quantitative analysis, the study criticized transit funding from an economic perspective.[68] Promoters of the Washington Metro had naively argued that ambitious ridership projections would mean that fares alone could

cover all operating and even some capital expenses, a belief that became untenable with inflation during the 1970s. But others, such as Schrag, believe that quantitative critiques overlook the more qualitative benefits that public funding for transit in general—and rapid transit more specifically—has given cities. Schrag cites the positive impact of the Metro on Washington, where rapid transit has reduced the city's reliance on cars, freeways, and gasoline, created more sustainable developments, and improved the mobility of residents—especially those who choose or are unable to own a car because of personal finances, age, or disability.[69]

The 1970s marked a turning point for transit in the United States. Transit historian Brian Cudahy has even suggested that the decade saw the beginning of a "transit renaissance" in the United States.[70] In statistical terms, the long decline of annual passengers since the late 1920s (with the exception of World War II) ended in 1973, although per capita rides continued to decline. This resurgence arose from many factors: growing ecological consciousness from the environmental movement of the late 1960s and 1970s, revolts by citizens against the negative consequences of urban freeways, energy crises, and general disillusionment with the dominant car culture and other problems in American cities. To those searching for an alternative to the automobile, transit seemed like a viable solution to various urban issues, from redevelopment to social equity. Federal subsidies also influenced transit's reversal of fortunes. By the 1970s, funding from Capitol Hill that began in the previous decade started to make its mark. Major rapid transit systems in San Francisco, Washington, and Atlanta opened for use. [71] In 1973, Congress listened to expressway protesters and authorized cities to use funds for transit projects that had been earmarked for the Interstate Highway System. These funds failed to go as far as expressway dollars. Whereas federal funds covered 90 percent of expressway projects, Washington provided only four dollars for every dollar spent by local authorities for transit.[72] Federal funds also began to provide operating subsidies for transit the following year, with passage of the National Mass Transportation Assistance Act.[73]

Since the 1980s, numerous cities have built light rail transit (LRT) systems. With LRT, vehicles operate on lines with dedicated rights-of-way but power is supplied by overhead wires instead of a third rail. LRT requires lower capital costs and ridership levels compared to heavy rail systems, and LRT projects have become more common than capital-intensive heavy rapid transit systems such as BART and the Washington Metro. Escalating construction costs and a more restrictive environment of federal funding for capital projects is one motivation for LRT's rise, which began in the early 1980s.[74] In a development that has proved fascinating to the historian, nostalgia and heritage have also contributed to the popularity of rail transit developments since the 1980s. Cities have kept or built "heritage" streetcar lines (or cable cars in San Francisco) along downtown streets with tourist dollars in mind. When the first LRT line in the United States opened in 1981, it was called the "San Diego Trolley," despite little similarity between the new line and the trolleys that served the city until the late 1940s. Most passengers today have no personal memory of riding streetcars, and so LRT and heritage lines are commonly associated with a vibrant urbanism of the early-20th-century American city rather than the more negative streetcar sentiments and experiences held by many people at the time.[75] The place of the past within current transit branding demonstrates just one example of why the history of mass transit matters today.

Discussion of the Literature

Urban mass transit has been a focus of academic historical research since the 1960s. Sam Bass Warner Jr. produced the first major academic work on the subject.[76] He examined the connections between changing forms of transit technology (namely horsecars and electric streetcars) and residential growth in the Boston suburbs of Roxbury, West Roxbury, and Dorchester. Relying on sources such as censuses, land deeds, government reports, and local histories, Warner focused on the impact street railways and other institutions—as well as the choices of individual builders and residents—had on the metropolitan landscape. He also paid attention to the relationship between commuting and the geography of class, as he noted the overwhelmingly middle-class nature of the new suburbs in contrast to the higher proportion of poorer residents concentrated in the inner city. Warner, writing during the era of suburban "white flight" and the transformation of the inner city through urban renewal, defined this process of suburban–inner city segregation by class as "the central event of the 1870s–1900 era."

Historical research on mass transit history continued during subsequent decades. Such interest developed as part of the growth of urban history during this time, as scholars sought to uncover the historical roots and wider contexts of housing issues, racial segregation, and economic inequality that came to the surface in American cities during the postwar "urban crisis." In the wake of rising concern over air pollution, energy use, and the impact of automobiles on the urban fabric, several works focused on the historical factors that had led to the rise and fall of mass transit (and related, the rise of urban automobile use). Increased attention to transit also followed federal funding starting in the 1960s.[77] Brian J. Cudahy has looked at the issue from a national perspective. Other authors have selected single cities—Scott Bottles on Los Angeles or Paul Barrett on Chicago, for example—as their case studies or took a comparative approach in order to emphasize how such processes unfolded in different locales. A common thread running through much of this work emphasized the technological choices behind various transit forms and the political relationships among private transit providers, local governments, and various interest groups.

A growing body of work by urban historians surveys the impact of suburbanization on American life since the 19th century.[78] The connections between suburbanization and mass transit, along with the growth in automobility and road building, serve as major aspects of the work. Clay McShane used an innovative approach to examine the impact of transportation patterns on urban life.[79] He argued that the rising popularity of the automobile in the early 20th century derived from changing social perceptions of the street as traffic corridors rather than public spaces, a trend that had begun with the railway and mass transit in the 19th century. Peter Norton built on this approach to uncover the highly contested nature of the street in American cities as different interest groups, including mass transit operators and users, fought for or against its transformation via the automobile.[80]

More recently, the influences of environmental history and cultural history have made their mark on the study of mass transit. Clay McShane and Joel Tarr have focused on an integral part of the horsecar that historians had previously ignored: the animal that powered the vehicle. They show the essential role that horses had on not only mass transit, but also the wider processes of change in the industrial American city. David Nye's work on electricity has emphasized the need to consider the creation of social meaning as key in understanding the influence of the electric streetcar and other transit technologies. To Nye, the electric streetcar emerged as part of a constellation of technologies at the turn of the 20th century that influenced the transition to the modern American city based on consumerism and spectacle. Recent scholarship has also focused

less on the elite decisions made within corporate boardrooms and political offices and more on the daily experiences of transit passengers. Robin Kelley and others have conceptualized the transit vehicle as a contested public space in which the practices of racial and gender inequality in everyday life were reinforced and challenged. Others, influenced by a growing emphasis on the user within the history of technology and mobility studies, have examined how unfavorable experiences of transit may have influenced former passengers to purchase automobiles.

While the dynamics of mass transit during the 19th and early 20th century has received a fair amount of attention from scholars, the subject's more recent history has received far less attention. For instance, broad histories of mass transit in the United States rightly emphasize earlier eras when more Americans used transit per capita, while giving much shorter accounts of transit since the mid-20th century. To give one example, no extensive study examines San Francisco's BART—one of the largest megaprojects of the 1960s and 1970s—from a historical perspective. Fortunately, historians are beginning to focus more attention on mass transit during the eras after World War II. Leading this trend is Zachary Schrag's fine work on the Washington Metro, which has brought a postwar perspective to the literature on subways by Clifton Hood and other historians.[81] Public concern about environmental sustainability, alternative transportation forms and energy sources, and the consequences of an automobile-based lifestyle suggest that research on more recent transit history will continue to grow.

Primary Sources

Historians of mass transit use a variety of primary sources to understand issues related to the topic. Such breadth reflects the fact that the study of mass transit requires knowledge of both technical matters and social dynamics, since both elements are interconnected. The voices of elites—politicians, company executives, and technical experts—are often found in reports, trade publications, government records, and other official documents. Uncovering the thoughts and behaviors of ordinary people (whether they be users, observers, or workers) is more challenging but can be gleaned from newspaper reports, literature, and photographs and other forms of visual art as well as the census and other quantitative sources. Scale is a further consideration in the study of mass transit, as transit may be approached from a national to a local perspective. Depending on the research question, scale influences the types of sources used by the historian.

Historical Tables <*http://www.apta.com/resources/statistics/Documents/FactBook/2014-APTA-Fact-Book-Appendix-A.pdf*> presented in the American Public Transportation Association's (APTA) annual *Public Transportation Fact Book* is a good place to begin research on general statistical trends. Information dates to 1890 for some categories and draws from the census and APTA records. George Mason University is home to the American Public Transportation Association records <*http://sca.gmu.edu/finding_aids/apta.html*>. The collection, featuring materials related to APTA, its predecessor organizations, and the Institute for Rapid Transit, is arranged in seven thematic series from meetings and publications to local transit files. Industry trade publications are also excellent sources for understanding mass transit developments. These magazines are usually devoted to a specific transport mode or the industry more generally. A short list of publications includes: *Street Railway Journal* <*http://library.si.edu/digital-library/book/street-railway-journal*> (published 1884–1908); *Electric Railway Journal* <*http://library.si.edu/digital-library/book/electric-railway-journal*> (published 1908–1931); *Bus Transportation*; *Bus World*; *Motor Coach Age/Motor Coach*

Today <http://www.motorbussociety.org/mca/MCA-MCT%20Index%201950-2006.pdf> (published 1950–2003); *Mass Transit*; *Passenger Transport*; *Metro*; *Headlights*; *National Railway Bulletin*; *Railway Age* (published 1856–present).

Several institutions contain historical information on mass transit at a national level. The National Transportation Library <http://ntl.bts.gov/> of the Department of Transportation features digitized sources with an emphasis on statistical, technical, or policy documents. The collection is more useful for the study of the recent past since a majority of its documents date from the late 20th century to the present. The Transportation Research Board operates TRID <http://trid.trb.org/>, a massive search database that covers more than one billion transportation documents, including conference proceedings, technical reports, books, and journal articles related to transit. More than thirty institutions across the United States form the University Transportation Centers <http://www.rita.dot.gov/utc/> program. These centers often feature strong transportation libraries, such as the Harmer E. Davis Transportation Library <http://library.its.berkeley.edu/about> of Berkeley's Institute of Transportation Studies.

Local collections—archives, museums, libraries, and other repositories—are essential for historical research on mass transit in a specific city or region. These collections often feature reports, meeting minutes, and other documents related to local transit activities. For example, the New York Transit Museum <http://web.mta.info/mta/museum/archiveguide.html> houses an extensive collection of materials related to the transit history of the New York metropolitan area. The Dorothy Peyton Gray Transportation Library and Archive <http://www.metro.net/about/library/>—operated by the Los Angeles Metro transit authority—caters to research devoted to Southern California's transportation history. Since transit held a prominent place in public debates and daily life during the 19th and 20th centuries, local newspapers are also excellent sources for research on significant developments as well as more quotidian matters related to local transit history.

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2. Brian Cudahy, *Cash, Tokens, and Transfers: A History of Urban Mass Transit in North America* (New York: Fordham University Press, 1990), 60–61.

3. Jackson, *Crabgrass Frontier*, 33.

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5. Cudahy, *Cash, Tokens, and Transfers*, 8–10.

6. Glen E. Holt, "The Changing Perception of Urban Pathology: An Essay on the Development of Mass Transit in the United States," in *Cities in American History*, edited by Kenneth T. Jackson and Stanley K. Schultz (New York: Alfred A. Knopf, 1972), 325.

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8. Jackson, *Crabgrass Frontier*, 35.

9. Joel Tarr and Clay McShane, *The Horse in the City: Living Machines in the Nineteenth Century* (Baltimore: Johns Hopkins University Press, 2007), 61–62.

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Rise of Monopolies

History of American Railroads

The concept of constructing a railroad in the United States was first conceived by Colonel John Stevens, in 1812. He described his theories in a collection of works called "Documents tending to prove the superior advantages of railways and steam carriages over canal navigation." The earliest railroads constructed were horse drawn cars running on tracks, used for transporting freight. The first to be chartered and built was the Granite Railway of Massachusetts, which ran approximately three miles (1826). The first regular carrier of passengers and freight was the Baltimore and Ohio railroad, completed on February 28, 1827. It was not until Christmas Day, 1830, when the South Carolina Canal and Railroad Company completed the first mechanical passenger train, that the modern railroad industry was born. This industry would have a profound effect on the nation in the coming decades, often determining how an individual lived his life.

By 1835, dozens of local railroad networks had been put into place. Each one of these tracks went no more than a few miles, but the potential for this mode of transportation was finally being realized. With every passing year, the number of these railway systems grew exponentially. By 1850, over 9,000 miles of track had been lain. Along with the proliferation of railroads came increased standardization of the field. An ideal locomotive was developed which served as the model for all subsequent trains. Various companies began to cooperate with one another, to both maximize profits and minimize expenditures.

This interaction of various companies initiated the trend of conglomeration which would continue through the rest of the Nineteenth Century. In 1850, the New York Central Railroad Company was formed by the merging of a dozen small railroads between the Hudson River and Buffalo. Single companies had begun to extend their railway systems outside of the local domain. Between 1851 and 1857, the federal government issued land grants to Illinois to construct the Illinois Central railroad. The government set a precedent with this action, and fostered the growth of one of the largest companies in the nation.

With the onset of the Civil War, production of new railroads fell dramatically. At the same time, however, usage of this mode of transportation increased significantly. For example, the Battle of Bull Run was won by a group of reinforcements shuttled in on a railroad car. By the conclusion of the war, the need for an even more diverse extension of railways was extremely apparent.

Soon after the war, the first transcontinental railroad was constructed. The Union Pacific Railroad company started building from the east, while the Central Pacific began from the west. The two companies met at Promontory Point, Utah, on May 10, 1869. As they drove the Golden Spike uniting the two tracks, a new age was born. Slowly, the small railroad companies would die out or be absorbed by large businesses.

Several more transcontinental railroads were built before the end of the century, all by large corporations. Every decade brought increased standardization. In addition, labor unions were developed to protect the rights of the workers. As companies grew larger, they began to take over other related fields. Soon, large trusts were formed that controlled many aspects of both the economy and society. As more and more areas became controlled by the octopus of the railroad industry, it became apparent that regulation was imperative.

Back to Rise of Monopolies Main Page

Back to Danger of Corporate Monopolies Main Page

Plaintiffs' Exhibit 5

COMMENTARIES

ON THE

Laws of England:

BY THE LATE

SIR W. BLACKSTONE.

A NEW EDITION, WITH PRACTICAL NOTES,

By JOSEPH CHITTY, Esq.

BARRISTER AT LAW.

IN FOUR VOLUMES.

VOL. I.

LONDON:

PRINTED FOR WILLIAM WALKER, STRAND; COWIE, LOW, AND CO. POULTRY; CHALMERS AND COLLINS, GLASGOW; J. PARKER, OXFORD; DEIGHTON AND SONS, CAMBRIDGE; WILSON AND SONS, YORK; MOZLEY, DERBY; CUMMING, AND MILLIKIN, DUBLIN; AND WAUGH AND INNES, EDINBURGH.

MDCCCXXVI.

called upon to fill as sheriffs, grand-jury men, guardians of the poor, &c. &c. have been defined, and the law thereupon expounded; nor will it fail as a general resource for instruction and guidance, to all classes in the discharge of their social duties, and the attainment and protection of their civil rights.

To render the Work more accessible to immediate reference, the subject matter of each chapter has been printed at the top, and a more particular marginal analysis has been added at the side of each page; a table of contents has also been prefixed to each volume; and care has been observed in enlarging and making the index complete.

The Editor cannot refrain from availing himself of this opportunity of acknowledging the obligation he is under to his friend Mr. John Steer, for many very important improvements his learning and talents have suggested. The valuable notes upon the law of Descents were furnished by his son Mr. Henry Chitty, whose excellent work on that subject has met with so flattering a reception. And in many parts of this work the Editor has derived most essential advantage from the zealous assistance of his son Mr. Thomas Chitty.

6, *Chancery Lane*,
23 *January*, 1826.

ther his majesty, nor his privy council, have any jurisdiction, power, or authority by English bill, petition, articles, libel (which were the course of proceeding in the starchamber, borrowed from the civil law), or by any other arbitrary way whatsoever, to examine, or draw into question, determine, or dispose of the lands or goods of any subjects of this kingdom; but that the same ought to be tried and determined in the ordinary courts of justice, and by *course of law*.

[143] 4. If there should happen any uncommon injury, or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right, appertaining to every individual, namely, *the right of petitioning the king, or either house of parliament*, for the redress of grievances. In Russia we are told[y] that the czar Peter established a law, that no subject might petition the throne, till he had first petitioned two different ministers of state. In case he obtained justice from neither, he might then present a third petition to the prince; but upon pain of death if found to be in the wrong. The consequence of which was, that no one dared to offer such third petition; and grievances seldom falling under the notice of the sovereign, he had little opportunity to redress them. The restrictions, for some there are, which are laid upon petitioning in England, are of a nature extremely different; and while they promote the spirit of peace, they are no check upon that of liberty. Care only must be taken, lest, under the pretence of petitioning, the subject be guilty of any riot or tumult; as happened in the opening of the memorable parliament in 1640: and, to prevent this, it is provided by the statute 13 Car. II. st. 1. c. 5. that no petition to the king, or either house of parliament, for any alteration in church or state, shall be signed by above twenty persons, unless the matter thereof be approved by three justices of the peace, or the major part of the grand jury, in the country; (18) and in Lon-

[y] Montesq. Sp. L. xii. 26.

(18) Which the grand jury may do either at the assizes or sessions. The punishment for an offence against this act, is a fine to any amount not exceeding 100*l.* and imprisonment for three months. At the trial of lord George Gordon, the whole court, including lord Mansfield, declared that this statute was not affected by the bill of rights. 1 Wm. & M. st. 2. c. 2. (see Douglas, 571.) But Mr. Dunning, in the house of commons, contended, "that it was a clear and fundamental point in the constitution of this country, that the people had a right to petition their representatives in parliament, and that it was by no means true that the number of names signed to any such petition was limited. To argue that the act of Charles was now in force, would be as absurd as to pretend that the prerogative of the crown still remained in its full extent, notwithstanding the declaration in the bill of rights." See New An. Reg. 1781. V. 2. And the acknowledged practice has been consistent with this opinion.

The state of disturbance and political

don by the lord mayor, aldermen, and common council: nor shall any petition be presented by more than ten persons at a time. But, under these regulations, it is declared by the statute 1 W. & M. st. 2. c. 2. that the subject hath a right to petition; and that all commitments and prosecutions for such petitioning are illegal.

5. The fifth and last auxiliary right of the subject, that I shall at present mention, is that of having arms for their defence, suitable to
[144] their condition and degree, and such as are allowed by law. Which is also declared by the same statute 1 W. & M. st. 2. c. 2. and it is indeed a public allowance under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression. (19)

In these several articles consist the rights, or, as they are frequently termed, the liberties of Englishmen: liberties, more generally talked of than thoroughly understood; and yet highly necessary to be perfectly known and considered by every man of rank or property, lest his ignorance of the points whereon they are founded should hurry him into faction and licentiousness on the one hand, or a pusillanimous indifference and criminal submission on the other. And we have seen that these rights consist, primarily, in the free enjoyment of personal security, of personal liberty, and of private property. So long as these remain inviolate, the subject is perfectly free; for

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excitement in which this kingdom was involved several years, after the peace of 1815, produced further regulations and restrictions of the right of petitioning. The people in the manufacturing districts having little employment, from the general stagnation of trade, devoted themselves with intense ardour to political discussions, and in some places the partizans of reform presuming that their demands would not be conceded to their petitions, were preparing for the alternative of open force. In these circumstances the legislature thought fit to forbid all public meetings (except county meetings called by the lord-lieutenant or the sheriff), which consisted of more than fifty persons, unless in separate townships or parishes, by the inhabitants thereof, of which six days' previous notice must be given to a justice of the peace, signed by seven resident householders. See 60 Geo. III. c. 6. The act also provides for the dissolution of any public meeting by proclamation of a chief civil officer of the place, and persons refusing to depart, are liable to seven years' transportation. Persons attending such meetings with arms, bludgeons, flags, banners, &c. are subject to fine and imprisonment for any term not exceeding two years.

But as the mischief was temporary, the restrictions upon the right of meeting to deliberate upon public measures were limited in their duration, and have mostly expired. Those enactments which were designed to prevent such meetings from being perverted to objects manifestly dangerous to the peace of the community, only continuing in force.

(19) See the statute 60 Geo. III. c. 1 & 2., passed to prevent the training of persons to the use of arms, and authorizing justices to seize arms he believes are in possession of any persons for dangerous purposes.

every species of compulsive tyranny and oppression must act in opposition to one or other of these rights, having no other object upon which it can possibly be employed. To preserve these from violation, it is necessary that the constitution of parliament be supported in its full vigour; and limits, certainly known, be set to the royal prerogative. And, lastly, to vindicate these rights, when actually violated or attacked, the subjects of England are entitled, in the first place, to the regular administration and free course of justice in the courts of law; next, to the right of petitioning the king and parliament for redress of grievances; and, lastly, to the right of having and using arms for self-preservation and defence. And all these rights and liberties it is our birthright to enjoy entire; unless where the laws of our country have laid them under necessary restraints—Restraints in themselves so gentle and moderate, as will appear upon farther inquiry, that no man of sense or probity would wish to see them slackened. For all of us have it in our choice to do every thing that a good man would desire to do; and are restrained from nothing, but what would be pernicious either to ourselves or our fellow-citizens. So that this review of our situation may fully justify the observation of a learned French [145] author, who indeed generally both thought and wrote in the spirit of genuine freedom;[z] and who hath not scrupled to profess, even in the very bosom of his native country, that the English is the only nation in the world where political or civil liberty is the direct end of its constitution. Recommending therefore to the students in our laws a farther and more accurate search into this extensive and important title, I shall close my remarks upon it with the expiring wish of the famous father Paul to his country, "ESTO PERPETUA!"

[z] Montesq. Sp. L. xi. 5.

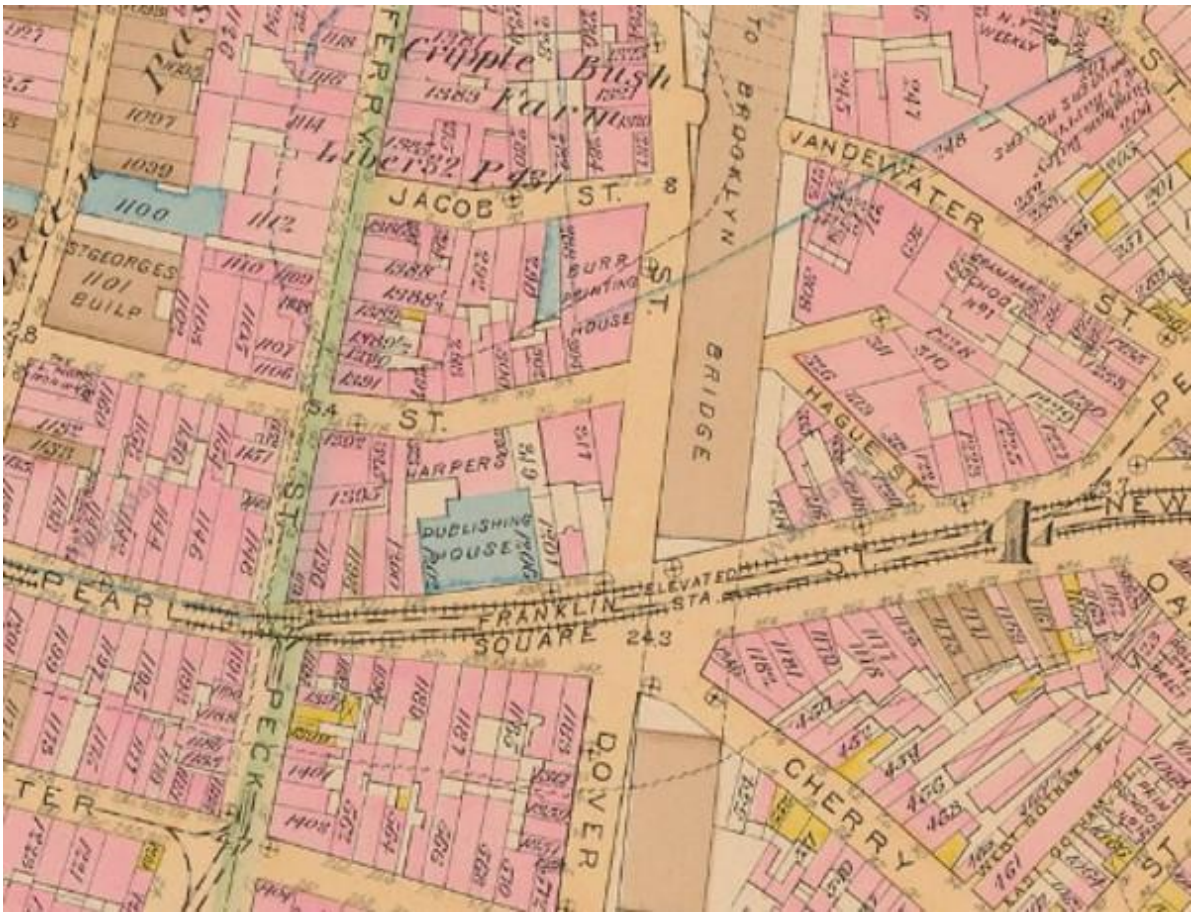
1884 New York Street Car Scene Shows Carry of Pistols Common Before 1911

Ammoland Inc. Posted on September 18, 2022 by Dean Weingarten

Handguns Commonly Carried, An illustration from the April 19, 1884 issue of the National Police Gazette.

U.S.A. –-(AmmoLand.com)-– A version of the above image was published in the April 19, 1884 issue of the National Police Gazzette. The publisher was located at Franklin Square and Dover Street, New York. The location is in Manhattan, New York City.

The probably earlier version, shown above, is found in The Remington Historical Treasury of American Guns, published in 1966, taken from the New York Public Library Picture Collection.



Harper's publishing house is shown at the Franklin Square location in this map from January of 1885.

In 1884, cable car lines were just starting to be considered in New York City, and electric trolleys were not yet in use. The street car in the image was almost certainly a horse-drawn street car, which existed in New York City until 1917.

The relevance of the image is pistols were commonly carried in New York City for self-defense in close proximity to the passage of the Fourteenth Amendment in 1868. Only six passengers are shown seated in the street car. Of those, four are not obscured by other people. All four of the unobscured passengers are shown as carrying pistols or revolvers in the illustration.

Public transportation was not considered to be a "sensitive location" where arms were not permitted.

The street car image was likely created before 1884; even so, 1884 is only 14 years after the Fourteenth Amendment was passed. There was no controversy. One of the major purposes of the Fourteenth Amendment was to ensure everyone in the USA had an enforceable right to keep and bear arms. One of the co-sponsors of the amendment pontificated on exactly that purpose.

From Senator Howard's remarks, on the front page of the New York Times in 1866:

> *"…to these should be added the personal rights guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech and the press; the right of the people to peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people; the right to keep and bear arms;…"*

(snip)

> *The great object of this amendment, is therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees. How will it be done under the present amendment? As I have remarked, they are not powers granted to Congress, and therefore it is necessary, if they are to effectuated and enforced, as they assuredly ought to be, that additional power should be given to Congress to that end. This is done by the fifth section of this amendment, which declares that "the Congress shall have power to enforce by appropriate legislation the provisions of this article." Here is a direct affirmative delegation of*

power to Congress to carry out all the principles of all these guarantees, a power not found in the Constitution."

Those who wish a disarmed population are willing to follow the guidance of George Orwell in the novel 1984 and change history to aid their desire to exercise illegitimate power in the present. One of the clearest examples is the case of Michael Bellesiles falsifying history with his Bancroft prize-winning book, Arming America. Clayton Cramer, a software engineer, and historian, found many outright falsifications.

I sat down with a list of bizarre, amazing claims that Bellesiles had made, and started chasing down the citations at Sonoma State University's library. I found quotations of out of context that completely reversed the author's original intent. I found dates changed. I found the text of statutes changed—and the changes completely reversed the meaning of the law. It took me twelve hours of hunting before I found a citation that was completely correct. In the intervening two years, I have spent thousands of hours chasing down Bellesiles's citations, and I have found many hundreds of shockingly gross falsifications.

Eventually, the Bancroft price was rescinded, and Bellesiles was disgraced. It would not have happened without the tireless efforts of Clayton Cramer and James Lindgren, a law professor. Except for those two men, Bellesiles would have gotten away with wholesale re-writing of history in pursuit of a political agenda.

The street car image helps refute the fabricated history that the carry of pistols was unusual and seldom allowed in the urban centers of the Northeast.

If that were true, there would have been no reason for New York State to pass the notorious Sullivan act in 1911.

About Dean Weingarten:

Dean Weingarten has been a peace officer, a military officer, was on the University of Wisconsin Pistol Team for four years, and was first certified to teach firearms safety in 1973. He taught the Arizona concealed carry course for fifteen years until the goal of Constitutional Carry was attained. He has degrees in meteorology and mining engineering, and retired from the Department of Defense after a 30 year career in Army Research, Development, Testing, and Evaluation.

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The Buffalo: Yesterday and Today

Millions of wild buffalo once roamed the American West. From Mexico to Canada, bison populated the continent long before people settled there.

Scientists believe that bison came to North America via a land bridge from Asia. As herbivores, the bison adapted to the Eastern woodlands and Great Plains, receiving nourishment from the rich grasses.

In the United States, "bison" and "buffalo" are often used interchangeably, although bison is the most accurate term, as "buffalo" technically refers to species from Africa and Asia, such as the cape and water buffaloes.

North American Bison
Photo: Scotty Guinn

Weighing up to 2,400 pounds and standing about six feet tall at the shoulder, bison appear ungainly, yet are surprisingly fleet. In fact, bison can move up to 35 miles an hour, rushing in to defend their young or when approached too closely by people. Their broad shoulders allow them to plow through deep snow, and their shaggy heads are made for pushing snow aside to reach the vegetation below.

The history of the buffalo is entwined with the plight of the Native Americans in the American West. Indian tribes settled these same grasslands centuries later because of the plenteous bison. Native peoples came to rely on the bison for everything from food and clothing to shelter and religious worship. They used almost every part of the animal, including horns, meat and tail hairs.

Lakota Sioux in traditional dress

By the 1800s, Native Americans learned to use horses to chase bison, dramatically expanding their hunting range. But then white trappers and traders introduced guns in the West, killing millions more buffalo for their hides. By the middle of the 19th century, even train passengers were shooting bison for sport. "Buffalo" Bill Cody, who was hired to kill bison, slaughtered more than 4,000 bison in two years. Bison were a centerpiece of his Wild West Show, which was very successful both in the United States and in Europe, distilling the excitement of the West to those who had little contact with it.

To make matters worse for wild buffalo, some U.S. government officials actively destroyed bison to defeat their Native American enemies who resisted the takeover of their lands by white settlers. American military commanders ordered troops to kill buffalo to deny Native Americans an important source of food.

In 1905, zoologist William Hornaday formed the American Bison Society to re-create more wild herds. President Theodore Roosevelt persuaded Congress to establish a number of wildlife preserves, and, with the help of a cadre of private bison owners, the Society was able to stock a number of preserves and parks. This organization supplemented the existing herd of about 20 bison that lived in the newly formed Yellowstone National Park.

Buffalo in Yellowstone National Park

Until 1967, bison numbers were controlled by the park and their population limited to 397. After that year, the National Park Service adopted a new policy of minimal management, and no killing or disease control was done. The population increased, peaking in the 1990s at more than 4,000. Today, the Yellowstone herd stands at over 3,000 animals. It is thought by many to be the United States' last free roaming bison herd.

Currently there are between 150,000 and 200,000 bison throughout North America, although the vast majority of them are raised on ranches for commercial purposes (mostly for meat, hides and skulls).

WJLA – Washington D.C. + Follow View Profile

DC woman assaulted by group of teenagers on Metrobus shares what happened in brutal attack

Kellye Lynn - Oct 20

React | 97

A Southeast D.C. woman who was attacked and pushed off a Metrobus on Monday is sharing her story with 7News.

7News' Kellye Lynn spoke to Kyla Thurston at her apartment about the encounter with the group of teenagers. She told us what D.C. Mayor Muriel Bowser and Metro officials are saying about the incident.

Thurston showed us her ripped jacket and says she is still recovering with a sore body just two days after the attack.

READ MORE: Metro vows to improve the quality of Metrobus service for riders

She said the incident happened after she made one simple request.

DC woman assaulted by group of teenagers on Metrobus shares what happened in brutal attack

"It was an outrage," said Thurston.

On Oct. 17, just before 4 p.m., Thurston said she was on a Metrobus on her way to pick up her diabetes medicine when a group of teens began to curse.

"The only thing I said was, 'Can y'all stop the abusive language?'"

Thurston added that the question prompted the teens to get angry.

> "They started throwing objects at me, they started assaulting me," she said.

"They started throwing objects at me, they started assaulting me," she said.

The 42-year-old Southeast resident said the video, now circulating on social media is still hard to watch. ***(This video may be graphic in nature. Please be advised)***

"I held on as much as I could from them hitting me and kicking me and scratching me and they were just -- I got bruises and everything on my arm," she said.

RELATED: 1 person hospitalized after being stabbed on Metrobus in NE DC, police say

Thurston showed us her torn jacket.

"They ripped my jacket and threw me off the bus like a piece of tissue," she said.

DC woman assaulted by group of teenagers on Metrobus shares what happened in brutal attack

She said during the attack she pleaded with the bus driver.

> "All I kept on saying was bus driver stop the bus, stop the bus. But the bus driver never stopped the bleep bus!"

"All I kept on saying was bus driver stop the bus, stop the bus. But the bus driver never stopped the bleep bus!"

On Twitter, Metro acknowledged that "The incident in the video is disturbing and unacceptable and currently under investigation by Metro Transit Police."

WMATA released a statement regarding the incident Thursday afternoon:

"Metro's General Manager has personally reached out to the victim to extend his apologies for what she experienced on the W4 bus on Monday evening. MTPD and Metro leadership continue their investigation into this incident. The investigation will determine whether proper procedures were followed in this case.

While it is not possible to have MTPD officers aboard all 1,500 buses in the fleet, MTPD routinely patrols buses throughout the region and uses data to focus on routes with a high number of incidents. We encourage anyone who experiences or witnesses unlawful behavior to contact MTPD immediately by calling 202-962-2121, texting MyMTPD (696873), or calling 911."

On Wednesday, Bowser also reacted to the video, even though she hadn't yet seen it.

"That is not any type of crime that we want to see in our city at any time," Bowser said. "Part of what we're talking about today is making sure we have the police force that we need to respond and patrol and assist Metro and its properties,

Caption: Members of the media ask Mayor Bowser about the Monday afternoon, Oct. 17, 2022, Metro bus assault incident. (7News)
Metrobus officials told 7News that the bus operator did not follow proper procedures during this incident. They added that appropriate administrative action will be taken against the driver.

Metro Transit Police Department (MTPD) said they will be increasing patrols on the W4 "as part of its ongoing initiative to increase officer availability and visibility throughout the bus and rail system."

MTPD said this incident is under investigation. Anyone with additional information about this incident can call them at 202-962-2121.

SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION
UNITED STATES
VS
CASTON, DEMARVZIA ANGELO
CCN#: 22126448
Arrest Number: 512216039

The event occurred on 09/01/2022 at approximately 16:35 at 400 7TH STREET SW, WASHINGTON, DC 20024.

On Thursday September 1st, 2022 at L'Enfant Plaza Metro Station at approximately 1600 hours Sgt. B. Minson while working a uniformed detail advised MTPD Communications that he heard shots being fired inside of the Metro Station. I Officer Diffley who was in the area responded.

At approximately 1558 hours an altercation occurred on the Greenline platform between Individual #1 and Victim # 1 (T.B.). According to Victim #1 and Witness #3, Victim #1 bumped into the child of Individual #1, who became irate with Victim #1 and demanded an apology. Victim #1 apologized multiple times. Individual #1 was still unsatisfied and struck Victim #1 in the head with her purse and spat in his face. A man, identified later as Caston, Demarvzia ("the Defendant"), was interfering with the altercation. The Defendant then produced from his waistband a Glock style handgun, racked the gun, and pointed his gun at Victim #1 and fired one round, striking the platform tile. The round then ricocheted and struck Victim #2 in the right foot. Victim #2 suffered minor non-life threatening injuries. At the time the Defendant shot his gun, the area of where the shot was fired was heavily crowded by individuals, to include Individual #1's child. Victim #1 gave a description of the Defendant as black male, with salt and pepper hair (black and grey), brown skin, some "growing-in" facial hair, black pants, and short-sleeved black t-shirt with white design on the front.

The above events where observed by Witness #1 and Witness #2. Witness # 3 attempted to break up the altercation.

At approximately 1600 hours Sgt. Minson arrived on the platform and Victim #2 pointed out Individual #1 as an involved party. Sgt. Minson detained individual #1. Your affiant arrived at approximately 1602 hours and deployed a Patrol Rifle and began canvassing the station. Ofc Tumilty was speaking with Witness #2, who captured a video of the event and broadcast a description of the Defendant armed with the handgun. Ofc Tumilty 's broadcast included a look out for the shooter/ Defendant that included a black t-shirt with white newspaper design.

During the canvas of the station, the Defendant was believed to have fled the station out of the 9th and Maryland Entrance. Your affiant continued the canvas topside with negative results. During the time frame of the initial call until around 1630 hour, multiple MTPD and MPD units responded and assisted with a canvass and processing of the crime scene. As your affiant was returning into the station, a MTPD unit advised over the radio he believed he saw the Defendant who matched the broadcast look out as well as a still image recovered from MTPD Video unit cameras walking back into the station. The unit said he didn't believe the individual was the suspect. Your affiant approached the platform and looking at the picture of the suspect/the Defendant, which showed an averaged height black male, black t-shirt with distinctive white newspaper style print, faded blue jeans, and black and white sneakers. Your affiant observed an individual matching that exact picture walking towards the platform edge on the opposite side of the tracks. Simultaneously, MPD Officer Boyle observed the same individual and was on the same platform as the individual. Officer Boyle confirmed the look-out through MTPD Capt. Brewer, who showed Officer Boyle the picture of the suspect provided by MTPD Video Unit. The suspect (the Defendant) then started to walk towards the escalator, and your affiant walked towards the escalators to cross over. Your affiant observed the Defendant take off his black T-shirt and toss it behind the parapet wall. Ofc. Boyle MPD observed the

Defendant discarding his shirt as well as a L shaped item inside his waistband after the black T-shirt was removed. Ofc. Boyle then went to grab the Defendant who then tensed up and made a motion towards the firearm. Ofc. Boyle then pushed off from the Defendant and drew his issued firearm. The Defendant was ordered to the ground and complied. Officer Boyle said words to the effect 'he has a gun.' Ofc. Bryant and Ofc. Boyle handcuffed the individual, and Capt. Brewer and your affiant provided cover. After the Defendant was handcuffed, he was rolled over to his back exposing a firearm in the front waistband. The firearm was captured on MPD bodycam while still in the Defendant's waistband and then safely removed and secured by Crime Scene. The firearm recovered was a tan Polymer 80 Glock style handgun chambered in 9mm, containing 11 rounds in the magazine and 1 in the chamber. The magazine was a 15 round capacity magazine. The firearm appeared fully functional, with a barrel length less the twelve inches, designed to be fired with a single hand and capable of expelling a projectile by the means of an explosion.

The t-shirt that the Defendant took off and discarded was recovered. It was a short-sleeved black t-shirt with a white newspaper print design on the front. The Defendant was wearing white and black sneakers, blue jeans, and had black and grey hair.

A shell casing was recovered from the offense location on the platform.

An identification procedure was conducted with Witness #2, who indicated that IT did not know. An identification procedure was conducted with Victim #1, who indicated that he was not sure.

The Defendant was identified by his Virginia Identification Card as Caston, Demarvzia Angelo which was located in his right pocket. The Defendant has previously been convicted of crimes punishable by terms of imprisonment more than a year. He was convicted of Assault With Dangerous Weapon (x3), Possession of Firearm During Crime of Violence in 2010 CF3 19508; Unlawful Possession of Firearm in 2010 CF2 10744; and Robbery and Unlawful Possession of Sawed Off Shotgun in Virginia in 2001. Additionally, the Defendant is not licensed to carry a pistol in the District of Columbia.

The event and acts described above occurred primarily in the District of Columbia and were committed as described by defendant(s) listed in the case caption.

Subscribed and sworn before me this 09/02/2022

/s/ Diffley	/s/ Ursiny
Police Officer	Unit Witness / Deputy Clerk
DIFFLEY, ANDREW / 771 / 022339	**Sgt. M. Ursiny**
Printed Name of Member / Badge# / CAD#	Printed Name of Witness / Deputy Clerk

The foregoing statement was made under penalty of criminal prosecution and punishment for false statements pursuant to D.C. Code 22-2405

Plaintiffs' Exhibit 10

DECLARATION UNDER PENALTH OF PERJURY

Mark G. Briley Jr., under penalty of perjury, deposes and states as follows:

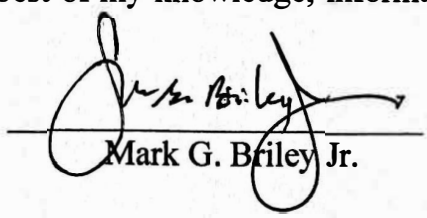
1. My name is Mark G. Briley Jr. I am a full time Certified Firearms Instructor. My current and former firearm related credentials included the following: NRA LE Pistol Instructor *(former)*; NRA Civilian Firearm Instructor for Pistol, Rifle, Shotgun, Metallic Cartridge Reloading and Shotgun Shell Reloading; NRA Training Counselor; NRA Chief Range Safety Officer; Utah BCI Certified CFP Instructor; Maryland State Police Approved Handgun Instructor; State of Delaware CCDW Certified Instructor; District of Columbia Armed Special Police Officer *(former)*; Sig Sauer Certified Pistol Mounted Optics Instructor; District of Columbia MPD Certified Firearms Instructor; and USCCA Certified Firearms Instructor. I have taught thousands of students over the past 15 years, and more than 500 students applying for or renewing the District of Columbia Concealed Pistol License.

2. I teach the DC Concealed Pistol License Course on the average of once a month and have done so for more than three years. In this course I provide the mandatory training the District requires, including conflict management with an emphasis on avoidance, de-escalation and escape. My students also receive a detailed lecture on the elements of self-defense from a District of Columbia licensed attorney with expertise in this subject matter. These elements are innocence, imminence, proportionality, reasonableness and avoidance.

3. Among the things stressed in my course is that a firearm is a tool of last resort, when there is no other option to prevent death or serious bodily harm to the innocent. We advise student that they should carry intermediate weapons such as pepper spray, TASER, baton or Kubotan. We stress to students that if safe retreat is possible, then retreat is the best option as any fight a student gets into runs a greater than zero chance of death and a greater than zero chance of going to prison. We also point out that coming to the aid of an unknown third person poses serious risk since the student likely will not have all the facts sufficient to make a reasoned judgement whether the use of force is lawful or advisable. We also stress situational awareness as an aid to avoid a situation where the student may have to use force, including deadly force. Finally, we stress the ramifications of a use of force incident including the criminal, civil, psychological, financial, and social costs of use of deadly force.

4. The above statement is true and correct to the best of my knowledge, information and belief.

Dated: October 25, 2022



Mark G. Briley Jr.

Plaintiffs' Exhibit 11

DECLARATION UNDER PENALTY OF PERJURY

Leon Spears, under penalty of perjury, deposes and states as follows:

1. My name is Leon Spears. I am a full-time certified firearms instructor. My current and former firearm-related credentials includ(ed) the following: NRA Law Enforcement Handgun, Shotgun, and Patrol Rifle Instructor *(current)*; NRA Chief Range Safety Officer *(former)*; Utah BCI Certified CFP Instructor *(current)*; Maryland State Police Approved Handgun Instructor (Law Enforcement License)*(current)*; State of Delaware CCDW Certified Instructor *(former)*; District of Columbia Armed Special Police Officer *(former)*; and a District of Columbia MPD Certified Firearms Instructor *(current)*. I have taught thousands of students over the past 14 years and have certified more than 5000 clients applying for or renewing the District of Columbia Concealed Pistol License.

2. I teach the D.C. Concealed Carry Pistol License Course every week and have done so since the very beginning of the District's initiation of the permit eight (8) years ago. In this course, I provide the mandatory training the District requires, including conflict management with an emphasis on deescalation, temperament evaluation, and escape. My clients also receive a detailed presentation on the elements of self-defense directly from the District of Columbia Official Code Section 7-2509.02(a)(4).

3. Among the things stressed in my course is that a firearm is a tool of last resort, only to be used in order to prevent death and/or serious bodily harm. I advise my clients that he/she should also consider carrying intermediate weapons such as oleoresin capsicum spray and/or a baton. I stress to each client that if safe retreat is possible, then retreat is the best option. Moreover, the general differences between civil and criminal liabilities and the potential of imprisonment if deemed responsible in the wrongful death of an individual. Lastly, I discuss how implementing a calm-mannered temperament can augment the successful deescalation of a highly emotional event. Lastly, I also discuss situational awareness and jurisdictionally-specific firearms licensing education.

4. The above statement is true and correct to the best of my knowledge, information and belief.

Dated: October 29, 2022

Leon Spears