

1 UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
2 -----x

3 STEVEN GOLDSTEIN, *et al.*,  
4 Plaintiffs,

5 v. 22 Civ. 8300 (VSB)

6 KATHY HOCHUL, *et al.*,  
7 Defendants.

8 -----x  
New York, N.Y.  
9 October 29, 2022  
10 10:15 a.m.

11 Before:

HON. VERNON S. BRODERICK,

District Judge

12 APPEARANCES

13 LAW OFFICES OF CORY H. MORRIS

14 BY: CORY H. MORRIS

15 - AND -

16 BENNO & ASSOCIATES P.C.

17 BY: AMEER N. BENNO

Attorneys for Plaintiffs

18 NEW YORK STATE OFFICE OF THE ATTORNEY GENERAL

Attorneys for Defendant Kathy Hochul

19 BY: MATTHEW LAWRENCE CONRAD

20 NEW YORK CITY LAW DEPARTMENT

Attorneys for Defendant Keechant Sewell

21 BY: NICHOLAS ROBERT CIAPPETTA

22 OFFICE OF THE COUNTY ATTORNEY

Attorneys for Defendant Louis Falco, III

23 BY: PATRICK JOHN FISCHER

24

25

1 (Case called)

2 THE COURT: Okay. If I could ask counsel to please  
3 identify themselves for the record.

4 MR. BENNO: For the plaintiffs, Ameer Benno, Ameer N.  
5 Benno, Benno & Associates P.C., 30 Wall Street, 8th Floor, New  
6 York, NY 10005.

7 THE COURT: Good morning.

8 MR. MORRIS: Good morning, your Honor. Also for the  
9 plaintiffs, Cory Morris, Law Offices of Cory H. Morris, 300 E.  
10 Rabro Drive, Suite 126, Hauppauge, NY 11788. Good morning.

11 THE COURT: Good morning.

12 MR. CONRAD: Good morning. Representing the state  
13 departments, Matthew Conrad, New York State Office of the  
14 Attorney General, 28 Liberty Street, 15th Floor, New York, New  
15 York, 10005.

16 MR. CIAPPETTA: Good morning, your Honor.  
17 Representing the city defendants, Nicholas Ciappetta, assistant  
18 corporation counsel, 100 Church Street, New York, New York.

19 MR. FISCHER: Good morning, your Honor. Representing  
20 Defendant Sheriff Louis Falco, III, of Rockland County and  
21 District Attorney Thomas Walsh, II, also of Rockland County,  
22 Patrick Fischer, Rockland County Attorney Law Department, 11  
23 New Hempstead Road, Suite 3rd Floor, New City, New York, 10977.

24 THE COURT: All right. Thank you.

25 So first, just in terms of how I envision proceeding

1 this morning, I apologize for the evening email of my order.

2 I've been tied up on some other things during the week.

3           What I would say, other than the legal questions in  
4 here, with regard to the factual questions, they are mainly I  
5 think, or maybe exclusively, from plaintiffs. I would request  
6 supplemental declarations from the plaintiffs themselves with  
7 regard to those questions.

8           I understand that, in particular, those would be the  
9 more difficult questions for the parties to put together  
10 basically in less than overnight, for plaintiffs to put  
11 together in less than overnight.

12           And also, since they are factual-related things, I  
13 want to make sure that I -- obviously if you have answers  
14 today, I'll hear them. But I want to make sure that the  
15 plaintiffs have an opportunity to -- they may have not even  
16 seen them. But to the extent they have -- an opportunity to  
17 figure out, from their own recollections, calendars, or  
18 whatever, some of those things.

19           With regard to the legal questions, I think some of  
20 them I would oppose obviously without an order. So I think we  
21 should be able to go through those. So my intention would be  
22 to go through the questions that I posed in the order. Since  
23 that time, I've come up with some additional questions. I'll  
24 pose those.

25           And then I would open it up for the parties to either

1 emphasize certain parts of their arguments or, if there are  
2 other things that either of the parties want to bring to my  
3 attention, you can do so. I do not anticipate today having a  
4 decision:

5 Let me ask, Mr. Morris, Mr. Benno, if that makes sense  
6 from your perspective.

7 MR. MORRIS: Yes, your Honor. We did have the  
8 opportunity -- we thank the Court for that opportunity -- to  
9 ask those questions. We also have the licenses for order.

10 THE COURT: Have you provided them to your  
11 adversaries? Do you have any copies for your adversaries?

12 MR. MORRIS: I believe so.

13 THE COURT: All right. If you could hand them up. If  
14 you could provide copies to your adversaries, that would be  
15 great.

16 I'm not going to enter them into the record without --  
17 I would imagine that there may be redactions and other things  
18 that should be made to them. I just wanted to be able to see  
19 them to have a sense of what they say.

20 MR. BENNO: Your Honor, if I may, we will certainly  
21 circulate them and hand them up and then give them to counsel.  
22 But perhaps if we could attach them to the supplemental  
23 declaration.

24 THE COURT: That's fine. I will take them now, and if  
25 you could attach them to the supplemental declarations. Seek

1 leave to make those redactions.

2 Obviously to the extent they fall within the typical  
3 things that get redacted under the local rules and the like or  
4 that are referenced in my individual rules, you should feel  
5 free to make those redactions.

6 If you don't have them now, that's fine. If you do  
7 have copies by the end of today's proceedings, if we could grab  
8 copies of those.

9 MR. BENNO: Your Honor, may I approach?

10 THE COURT: You may.

11 MR. BENNO: If I may, your Honor, just so it's clear  
12 to your Honor, we have a copy of Meir Ornstein's license. We  
13 have a copy of Steven Goldstein's license.

14 With respect to Steven Goldstein's license, I just  
15 want to point out to your Honor, you'll see that the expiration  
16 date is August 28, 2022. He has an email from the state.

17 What happens is when you make an application, they  
18 send you a provisional license he has to keep with him in paper  
19 form to say that your license is still valid until they  
20 ultimately render a decision. So I just wanted to make clear  
21 that that's what that is. His license is still valid.

22 So I'm going to include with this a copy of the email  
23 that he received from the licensing division of the NYPD.

24 THE COURT: You can hand them to my law clerk. That's  
25 fine. If you could provide -- if you have copies, if you could

1 provide them to your adversaries.

2           The first series of questions are, again, factual  
3 questions. And I'm not sure if plaintiffs' counsel has the  
4 answers today. I should be clear. Even if you provide an  
5 answer today, I expect that the supplemental declaration will  
6 include answers to the questions that are in the order. I  
7 don't expect that the supplemental declaration will -- it's  
8 not opportunity to add a surreply and things like that, in  
9 other words, add additional information.

10           If you feel the need to add additional information,  
11 you should make an application and just tell me why you believe  
12 it would be appropriate or just let me know which paragraphs  
13 are not directly responsive to those but what you've added.

14           What I'll do is I'll consider them. And by "consider  
15 them," I mean I'll decide whether or not I'm going to ignore  
16 them. But rather than have you seek advance permission, you  
17 can file them.

18           I'll give your adversaries an opportunity, for the new  
19 stuff, to basically object. I don't anticipate, unless it's  
20 somehow closely related to some of the questions I've asked, I  
21 just can't imagine that -- I'll just leave it at that.

22           So with regard to the first question, which is when  
23 did Plaintiff Goldstein obtain his license to possess a firearm  
24 on the premises of Congregation -- I apologize.

25           How do you pronounce the name?

1 MR. BENNO: Your Honor, can we remain seated?

2 THE COURT: That's fine. That applies to all counsel.  
3 I would ask if you're going to speak, to just pull the  
4 microphone closer to you.

5 MR. BENNO: It's Bnei Matisyahu.

6 THE COURT: I will say in advance that I am probably  
7 going to massacre various names throughout this proceeding.  
8 And I apologize in advance.

9 So with regard to that question --

10 Are you going to be addressing that?

11 MR. MORRIS: Yes. Good morning, your Honor. Cory  
12 Morris for the plaintiffs.

13 I've had the opportunity, and can we thank the Court  
14 for that opportunity -- last evening to speak to both  
15 plaintiffs at length. We actually consulted a rabbi who  
16 actually joined us here today.

17 The simple answer is that Plaintiff Goldstein obtained  
18 his firearm license approximately ten years ago. Plaintiff  
19 Goldstein participated in religious activities four times a  
20 week at Bnei Matisyahu and six times a week elsewhere.

21 THE COURT: This may be out of order.

22 When did Plaintiff Goldstein start attending Bnei  
23 Matisyahu?

24 When did he start attending that synagogue?

25 MR. MORRIS: I believe he started attending that

1 synagogue at its inception, since it started.

2 THE COURT: I can't remember. Was that the 11 years?

3 I don't remember whether it was that congregation or

4 Congregation Zemach that has been in existence for 11 years.

5 MR. BENNO: I believe it's Bnei Matisyahu, your Honor.

6 THE COURT: So he obtained the license when that

7 congregation was formed, and also he started going there at the

8 time.

9 MR. MORRIS: Yes, your Honor. I believe he started

10 going there, and then he obtained the firearm license about ten

11 years ago.

12 THE COURT: So that answers the second part of that

13 question, prior to obtaining his license, did Plaintiff

14 Goldstein participate in religious activities.

15 So prior to attending Bnei Matisyahu, was there

16 another -- because I understand, during the time period, say

17 for the past 11 years, is the answer four times at Bnei

18 Matisyahu and six times at other shuls?

19 MR. MORRIS: I believe so, your Honor. To be clear,

20 visiting a physical location, a house of worship.

21 THE COURT: Yes.

22 MR. MORRIS: But as my colleague and rabbi would say

23 in the audience, since his bris, he's been engaged in religious

24 observation.

25 THE COURT: Sure. There are going to be obviously



1 some additional questions I have with regard to that, the  
2 places of worship versus the language in the statute basically.

3 When did Plaintiff Ornstein obtain his license to  
4 carry a concealed handgun?

5 MR. MORRIS: So Plaintiff Ornstein obtained his  
6 license in 2009.

7 Should I continue with the answer?

8 THE COURT: Yes.

9 MR. MORRIS: He participated in religious observation  
10 and activities nearly every day. Plaintiff had his license,  
11 Ornstein, prior to participating at religious services and  
12 observations through congregation Zemach David because he did  
13 not live in the area prior to 2009.

14 THE COURT: So he obtained his license somewhat after  
15 he moved into the area? Is that accurate?

16 MR. MORRIS: I believe it was the same year.

17 THE COURT: And prior to that, did he have a license  
18 to carry in the location where he previously lived? Do you  
19 know?

20 MR. MORRIS: I do not believe so.

21 THE COURT: And I guess if that could be confirmed in  
22 the supplemental declaration.

23 In the answer to the question that he attended  
24 services every day, was that in connection with the  
25 congregation Zemach David? Or that's generally?

1 MR. MORRIS: It's in connection with Congregation  
2 Zemach David. But, your Honor, services also extend, for  
3 instance, minyan, which could occur even in a business place or  
4 home.

5 THE COURT: So in connection with in paragraph 13 --  
6 this is question 3 of Plaintiff Ornstein's declaration. He  
7 states that he no longer attends Zemach David or any other shul  
8 with as much frequency as he did before the law went into  
9 effect.

10 So these questions, I'm just trying to figure out what  
11 that means, in other words, what is the delta between pre the  
12 law, September 1, 2022, and then post the law's going into  
13 force.

14 MR. MORRIS: So, your Honor, after speaking with  
15 Plaintiff Ornstein, he's made clear that he carried that  
16 firearm without limitation and he engaged in several religious  
17 observations. As of last night, he just gave some examples,  
18 inclusive of: Tzamullah class, minyan, Shabbat, services,  
19 social events, kiddush, bar mitzvah, bris, vach nacht, selling  
20 hummus to fill in prayers.

21 So prior to this law going into effect, he carried  
22 that firearm without limitation.

23 THE COURT: When you say "without limitation," so when  
24 he would leave his house, he was constantly carrying the  
25 firearm?

1 MR. MORRIS: Yes, your Honor.

2 THE COURT: Go ahead.

3 MR. MORRIS: He also, as per our conversation --

4 THE COURT: I'm sorry. Since 2009?

5 MR. MORRIS: I believe so, your Honor.

6 THE COURT: And, again, if it turns out that it's  
7 different earlier on, that could be included in the  
8 supplemental declaration.

9 Go ahead.

10 MR. MORRIS: And I should say, your Honor, both  
11 plaintiffs are standing by. If it please the Court, we could  
12 seek that information and give it to the Court as soon as  
13 possible.

14 THE COURT: Okay.

15 MR. MORRIS: Prior to September 1, 2022, he engaged in  
16 services several times a week and various religious  
17 observations with Congregation Zemach David every day multiple  
18 times a day.

19 THE COURT: In which he would have his firearm?

20 MR. MORRIS: Indeed, your Honor, yes.

21 THE COURT: And after September 1?

22 MR. MORRIS: Your Honor, consulting my client in the  
23 limited contact we've had, at this point, basically we don't  
24 think it's prudent for him to state. He will essentially  
25 exercise his Fifth Amendment Rights. If the defendants here

1 will say that they're not going to prosecute him, then we're  
2 more than glad to --

3 THE COURT: What I should say in connection with that  
4 is the following: You should meet and confer with the  
5 defendants about that.

6 Obviously in asking that question -- and it occurred  
7 to me after I asked it -- that might be the case if in fact  
8 there had been situations where either plaintiffs were carrying  
9 their firearms.

10 Maybe we can break it down this way. I want to  
11 separate out places of worship, therefore, Zemach David and  
12 Bnei Matisyahu -- I want to separate those locations out from  
13 the places of religious observation.

14 In other words, from what I understand what the  
15 plaintiffs have said, or at least part of the argument, is when  
16 they're at work and they have a meeting or when they're at  
17 places and they do other things, in their mind, is that a place  
18 of religious observation? So let's separate out those two.

19 Is it fair for me to say, at this time, with regard to  
20 both of those definitions, that the plaintiffs would exercise  
21 their Fifth Amendment rights at this stage?

22 And I understand because there's a statute that's on  
23 the books. And then the parties can meet and confer about that  
24 and figure that out.

25 MR. MORRIS: So, your Honor, to be clear,

1 Plaintiff Ornstein is not taking that firearm into a shul, not  
2 after September 1, 2022. That's why he's limited going to the  
3 shul.

4 I think we should meet and confer. We'd be more than  
5 glad to do that. We can take the entire day today. Again,  
6 both plaintiffs are available. We even have an ordained rabbi  
7 in the audience here in case we need to consult religiously.

8 THE COURT: So it sounds as if it's really with regard  
9 to the places of religious observation to which  
10 Plaintiff Ornstein would, at least at this time, assert his  
11 Fifth Amendment right. Because the answer, as I understand it,  
12 with regard to Congregation Zemach David or any other shul, is  
13 that he did not carry this firearm, if he attended.

14 MR. MORRIS: Into a place of worship, absolutely.  
15 There was no carrying of a firearm.

16 THE COURT: So let me ask: In terms of -- and I think  
17 you gave the breakdown of attendance prior to September 1,  
18 2022. As I said, if it differs at any point between the 2009  
19 time frame, if there's somehow some difference over the years,  
20 you can indicate that in the supplemental declaration. So  
21 after September 1.

22 Why don't we right now just deal with the places of  
23 worship.

24 MR. MORRIS: In response to your Honor's question of  
25 3B, Plaintiff Ornstein is attending the physical shul,

1 Congregation Zemach, once a week after September 1, 2022. So  
2 he's reduced his attendance.

3 THE COURT: With regard to other shuls?

4 MR. MORRIS: Going on to your Honor's question C,  
5 plaintiff attended, prior to September 1, 22, other shuls one  
6 to two times a week. After Plaintiff Ornstein obtained his  
7 firearm license and prior to September 1, 2022, he consistently  
8 carrying his firearm while engaging in various religious,  
9 observation inclusive of attendance at other shuls.

10 To the extent, again, your Honor asked about carrying  
11 the firearm to the shul after September 1, 2022, he did not do  
12 that, again, with the limitation that we should probably meet  
13 with counsel.

14 THE COURT: Sure. About the places of religious  
15 observance.

16 Let me ask: How often did he attend other shuls after  
17 September 1, 2022?

18 Again, if you know at this time. Otherwise, since I  
19 expect to get the supplemental -- the supplemental declarations  
20 should have answers to all of the questions, even if you  
21 provide them here today.

22 MR. MORRIS: Your Honor, I just want to make sure. I  
23 don't have the answer at my fingerprints here today.

24 THE COURT: Sure.

25 MR. MORRIS: I know Plaintiff Ornstein had limited his

1 attendance at the physical shul. And I should note for  
2 your Honor that the congregation, although meeting at the  
3 physical shul at times, meet also in other places. So although  
4 it's a congregation, that doesn't mean it's necessarily  
5 confined to a building or any specific place.

6 THE COURT: I think that's going to come down to, in  
7 my mind, sort of the places-of-worship issue. So we can deal  
8 with a little bit of that on a definitional standpoint, and  
9 I'll have questions for both sides relating to that.

10 I'm sorry. You said that he limited his attendance at  
11 other shuls after September 1.

12 Do you have a sense of what does that mean compared to  
13 prior to -- I apologize. I don't remember the exact number you  
14 had indicated that prior to September 1 Plaintiff Ornstein  
15 attended other shuls.

16 MR. MORRIS: So prior to September 1, he would attend  
17 other shuls one to two times a week. Your Honor, I think  
18 possibly most prudent, we could call him and just get that  
19 answer.

20 THE COURT: Rather than interrupt the argument here  
21 today, I'm fine with just providing the answer. Again, because  
22 I've requested supplemental declarations, I'm fine with waiting  
23 to get that answer.

24 MR. MORRIS: Prior to September 1, 2022, he attended  
25 Congregation Zemach David several times a week and engaged in

1 religious observations with other members and other Jews every  
2 day multiple times a day.

3 THE COURT: Did you say "several" or "seven"?

4 MR. MORRIS: Several.

5 THE COURT: Again, you can clarify it in the  
6 supplemental declaration and also indicate whether that's sort  
7 of on average or what it is, if it's not consistent.

8 But do you know: What does "several" mean?

9 MR. MORRIS: Several times a day typically for a  
10 religious Jew, minyan, the morning, wrap tefillin. Usually  
11 these things would take place. Especially, for instance,  
12 Plaintiff Goldstein is very similar to Plaintiff Mann in the  
13 *Antonyuk* case. The shul is literally right across the street.

14 These just so matter of factually occur every day. It  
15 could be in excess of three to five.

16 THE COURT: Just so that I understand, with regard to  
17 Zemach David that Plaintiff Ornstein attended prior to  
18 September 1 every day multiple times a day.

19 MR. MORRIS: Your Honor, that could be wearing kippah,  
20 wrapping tefillin, wearing a yarmulke, putting on tzitzit. All  
21 of these acts of religious observance occur at different points  
22 throughout every day. And minyan could occur  
23 morning/afternoon. If there is any sort of kiddush special  
24 occasion or just regular prayer, your Honor -- before a meal,  
25 after a meal.



1 THE COURT: Again, my question was limited to places  
2 of worships. I understand that many of the things you just  
3 mentioned could happen in a places of worship but don't  
4 necessarily have to happen with regard to a place or worship,  
5 at least with regard to that specific question.

6 With regard to Plaintiff Goldstein now, I think I've  
7 covered the questions with regard to Plaintiff Ornstein. If I  
8 haven't, obviously as you go through this with your clients and  
9 craft the supplemental declarations, you can fill in the gaps  
10 of things that I may have missed or clarify what was said  
11 today.

12 So in paragraph 21 of his declaration,  
13 Plaintiff Goldstein states that he no longer attends Bnei  
14 Matisyahu with as much frequency as he did before the law went  
15 into effect.

16 So I guess the first question I have is: How  
17 frequently prior to September 1 did Plaintiff Goldstein attend  
18 Bnei Matisyahu?

19 MR. MORRIS: Plaintiff Goldstein attend approximately  
20 four times a week prior to September 1, 2022. Each time prior  
21 to September 1, 2022, he carried a firearm.

22 THE COURT: Okay. I think that answers the second  
23 question. In other words, every time he would attend, he would  
24 go to Bnei Matisyahu, after he obtained his license, he would  
25 carry his firearm.

1 MR. MORRIS: Yes, your Honor.

2 THE COURT: All right.

3 MR. MORRIS: And I think your Honor is going to ask  
4 after September 1, 2022.

5 THE COURT: Correct.

6 MR. MORRIS: With the same caveat, Plaintiff Goldstein  
7 would attend Bnei Matisyahu once every other week after  
8 September 1, 2022.

9 THE COURT: With regard to the same question, with  
10 regard to the question now, I'm just talking about Bnei  
11 Matisyahu.

12 In the once a week after September 1, are you saying  
13 he did not carry his firearm?

14 MR. MORRIS: Your Honor, he remained religious, but  
15 yes. He complied with the law. He did not carry a firearm. I  
16 should note that he's in Florida now. He's got a license to  
17 carry in Florida. He'll be in shul today, and he'll observe  
18 Sabbath into tomorrow carrying a weapon.

19 THE COURT: So he has a license in Florida also?

20 MR. MORRIS: He does, your Honor.

21 THE COURT: Does he live part time in Florida?

22 MR. MORRIS: I think he visits.

23 THE COURT: How many licenses does he have?

24 MR. MORRIS: I'm aware of at least two, so the  
25 New York and the Florida one. But I believe he might have

1 another carry.

2 THE COURT: Okay. In connection with the supplemental  
3 declaration, I'd like to know how many licenses  
4 Plaintiff Goldstein has.

5 Similarly, with regard to Plaintiff Ornstein, do you  
6 know whether Plaintiff Ornstein -- besides the New York  
7 license, does Plaintiff Ornstein have other firearms from other  
8 jurisdictions?

9 MR. MORRIS: I do not believe so, your Honor.

10 THE COURT: Okay. Again, if you can just confirm that  
11 in the supplemental declaration.

12 So with regard to Plaintiff Goldstein, how many times  
13 a week did he attend other shuls and, when he would go to those  
14 other shuls, would he carry his firearm?

15 MR. MORRIS: So when we spoke to him last night, he  
16 did attend other shuls at various degrees because his license  
17 was limited to the premises of Bnei Matisyahu.

18 THE COURT: Okay. So Plaintiff Goldstein's license is  
19 limited to carry into Bnei Matisyahu.

20 Plaintiff Ornstein's license, is it a general conceal  
21 carry permit and not limited to Congregation Zemach David?

22 MR. MORRIS: Yes, your Honor.

23 THE COURT: So after September 1 -- I apologize. You  
24 may have answered this.

25 So after September 1 of 2022, how many times a week

1 did Plaintiff Goldstein attend other shuls?

2 MR. MORRIS: He didn't provide an exact number. But  
3 in varying degrees, he visited other shuls. Again, sometimes  
4 the congregation is in another building. Right now he's in  
5 Florida, for instance. He'll be in other shul. I'm not sure  
6 if that's geographically limited. Like I said, your Honor,  
7 both plaintiffs are available. I'd love for them to address  
8 the Court, if possible.

9 THE COURT: Sure. If I was going to take testimony, I  
10 would want them here. I would want to be able to observe them.  
11 Doing it on the phone is not efficient in my view.

12 In terms of Plaintiff Goldstein, you don't know  
13 exactly how many times a week he would attend other shuls.

14 Do you have a sense? Was it more than once a week?

15 MR. MORRIS: So, your Honor, to be clear, he's limited  
16 his attendance at his shul and other shuls. To the extent that  
17 he can carry, like in Florida, he's continued to go to shuls.  
18 My understanding is it's diminished as to before September 1,  
19 2022. But certainly we're going to provide that to your Honor.

20 THE COURT: Okay. Also do you know when he attends  
21 other shuls, when he attends shuls in Florida -- obviously this  
22 wasn't one of the questions. I didn't know he had a firearms  
23 license in Florida -- does he always carry his gun?

24 MR. MORRIS: In shul, yes. He carries a weapon. A  
25 firearm I should say.

1 THE COURT: So whenever he goes to shul in Florida, he  
2 carries his firearm?

3 MR. MORRIS: That was my understanding. It was a  
4 little late. He had gotten off the plane around 1:00.

5 THE COURT: With regard to that, since we hadn't  
6 really discussed it, you can follow up with him on that and how  
7 long he's had the Florida license. And if you could attach a  
8 copy with the same sort of instructions with regard to  
9 redaction and stuff like that, of the Florida license.

10 I guess I would ask that to the extent there are  
11 other -- it sounds like it just may be New York and Florida.  
12 To the extent there are other ones, if the supplemental  
13 declaration could address that. I think that covers the  
14 questions for Plaintiff Goldstein. As I said, if not, I'll get  
15 the answers in the supplemental declaration.

16 With regard to Congregation Zemach David, when did  
17 that congregation open?

18 MR. MORRIS: Congregation Zemach David was established  
19 prior to 2012. Plaintiff Ornstein began attending after he  
20 moved in 2012 to the immediate area.

21 THE COURT: And I apologize. Remind me again when he  
22 obtained his license.

23 MR. MORRIS: I believe it was 2009. It is.

24 THE COURT: Okay. Do you know whether prior to 2012,  
25 between 2009 and 2012, in the shul that Plaintiff Ornstein was

1 attending, did he carry his firearm during that time period?

2 Do you know?

3 MR. MORRIS: Yes, your Honor. My understanding, as  
4 per my conversation with plaintiff, is he carried the weapon  
5 everywhere, unless he was, of course, restricted.

6 THE COURT: Let me ask, and this is in regard to both.  
7 I just want to be clear.

8 Were there any occasions where either  
9 Plaintiff Ornstein or Plaintiff Goldstein attend places of  
10 worship that weren't shuls?

11 In other words, at times folks, who are in a  
12 particular congregation or otherwise, may go to other places of  
13 worship.

14 Did that happen?

15 MR. MORRIS: So, your Honor, they went to places like  
16 office buildings. But I think your Honor is asking maybe they  
17 went to a wedding of another faith.

18 Is that your question?

19 THE COURT: And I don't know. Or visited a clergy in  
20 a church or in a mosque or had meetings where they attended  
21 such things. That's what I'm talking about.

22 MR. MORRIS: So religious observation occurred  
23 regularly within the home, within various office settings. I  
24 don't have knowledge -- I know we asked them about mosques  
25 among other things. And they've never been to such a thing,

1 aside from the court case referenced that was referenced by the  
2 Court.

3 So I'd have to follow up with anything on other  
4 religions. But certainly the worship occurred in the home,  
5 outside the home, in office buildings, and other places.

6 THE COURT: To be clear, I'm just saying physically  
7 going to another places of worship. I'm not necessarily saying  
8 they were going there and engaging in any aspect of their  
9 religions. What I'm saying is just physically visiting those  
10 locations. If so, when they went to those locations, did they  
11 carry their firearms.

12 In paragraph 43, it says: "Congregation Bnei  
13 Matisyahu is a membership-based Jewish congregation composed of  
14 approximately 25 families."

15 So the question I was: How many folks is that? In  
16 essence, adults and children and the like.

17 MR. MORRIS: So Plaintiff Goldstein submits that there  
18 are 30 to 40 adult members of Bnei Matisyahu.

19 THE COURT: And also in paragraph 43, it states that  
20 the Congregation Bnei Matisyahu -- that the existence depends  
21 on contribution from its members, the 30 to 40 folks you just  
22 mentioned.

23 Does Bnei Matisyahu receive contributions from  
24 individuals or entities that are not members of the  
25 congregation?

1 MR. MORRIS: We asked him this question.  
2 Plaintiff Goldstein submits that, to his knowledge, Bnei  
3 Matisyahu does not receive contributions or donations from  
4 individuals or entities that are not members of the  
5 congregation.

6 THE COURT: Okay. Does that include governmental  
7 entities?

8 MR. MORRIS: I believe so, your Honor.

9 THE COURT: Okay. Again, if that requires  
10 clarification in the supplemental declaration -- by "that" I  
11 mean sort of any sort, whatever it may be, including COVID  
12 relief funds, for example.

13 Now, are plaintiffs arguing that places of worship do  
14 not have a right to exclude individuals who are carrying  
15 firearms?

16 MR. MORRIS: No, your Honor. I conferred with them,  
17 and under Penal Law Article 265, the place of worship is a  
18 private entity which has the right to exclude guests from  
19 carrying firearms.

20 But as the case of *Antonyuk*, 22 CV 00986, docket entry  
21 27, a recent case, said, there are exceptions. But it's  
22 unheard of that the government would regulate private property  
23 in this manner, private property owners. So we're not saying  
24 that.

25 THE COURT: I guess I'm asking a little bit of a



1 different question. I'm not going about government regulations  
2 of that.

3 I'm just asking, whether the plaintiffs are making the  
4 argument now or even intend to make it in the future, that they  
5 have a right to carry a firearm into a place or worship that  
6 may have a different view of allowing people to carry firearms  
7 in their place or worship.

8 MR. BENNO: Your Honor, no, they're not. Obviously  
9 all places of worship are private. There's establishment  
10 clause issues if they were public. Private entities can  
11 exclude weapons possession. They can set whatever terms that  
12 they wish, as long as they're not discriminatory, to allow  
13 people to come in or to exclude them from coming in.

14 And individuals have to abided by that. Otherwise,  
15 they'll be trespassing. If they trespass, then they can avail  
16 themselves of whatever criminal statutes exist to enforce the  
17 trespassing laws. So these lead to the private entities that  
18 can decide for themselves.

19 THE COURT: Just in connection with the plaintiffs'  
20 attendance at other shuls and to the extent they carried  
21 firearms to those other shuls, did those shuls either know they  
22 were carrying a firearm or did they inquire about whether those  
23 other shuls had any regulations on the folks bringing firearms  
24 into the shul?

25 MR. MORRIS: Your Honor is referring to prior to the

1 September 1, 2022, day. Is that right?

2 THE COURT: Yes. But to the extent -- yes, because,  
3 as I understand it -- again, I think after September 1, with  
4 regard to places of worship and with regard to shuls, neither  
5 defendant, as I understand it, carried their firearm. In part  
6 like Plaintiff Goldstein, as I understand it, could only carry  
7 a firearm to Bnei Matisyahu. But neither one carried a firearm  
8 to other, as I understand it. So, yes. I'm referring to prior  
9 to September 1.

10 MR. MORRIS: So Plaintiff Ornstein carried without  
11 restriction, your Honor. My understanding is that it was  
12 known. One of the questions that your Honor asked was were  
13 other members carrying. It was known that persons carried. I  
14 assume there was an inquiry, but I don't have that information.

15 THE COURT: Okay.

16 MR. MORRIS: Again, your Honor, it skirts very close  
17 to the Fifth Amendment rights of my clients, again because they  
18 fear prosecution. I would love to have a full, open record for  
19 this Court. If we could get a stipulation from defendants  
20 today, I'd be glad to do that.

21 THE COURT: Just to be clear, the question is, with  
22 regard to prior to September 1, to the extent  
23 Plaintiff Ornstein carried his weapon to other shuls or places  
24 of worship, did those places of worship either know that he was  
25 carrying a weapon and/or had he, prior to going, had he already

1 determined that they did not have restrictions on folks  
2 carrying firearms into their place or worship?

3 MR. MORRIS: I believe that was a discussion. In  
4 terms of the carry-on, it's prominent. You could see the  
5 attachment at one's hip of the firearm. We could certainly  
6 clarify, but I believe it was communicated and all knew that  
7 the firearm was there.

8 Just to be clear, that was just Ornstein. That's just  
9 Ornstein because, again, Goldstein was limited to the premise  
10 of Bnei Matisyahu.

11 MR. BENNO: Your Honor, if I may.

12 THE COURT: Yes.

13 MR. BENNO: I believe the answer to that question is  
14 in the declaration of Meir Ornstein in paragraph 6 where he  
15 avers: "Whenever I attended Zemach David, I carried my  
16 concealed handgun." If your question was limited to Zemach  
17 David. I don't know if your Honor was referring to other  
18 places.

19 THE COURT: No. I actually was asking about other  
20 places.

21 MR. BENNO: Forgive me. I misunderstood.

22 THE COURT: That's okay. Although I think I had  
23 previously -- counsel, I think you're right. I previously  
24 asked that question. Paragraph 6 does say that  
25 Plaintiff Ornstein carried his handgun when he would go to

1 Zemach David prior to September 1 of 2022, each time he would  
2 go.

3 All right. So I think we've sort of dealt with 9A and  
4 B. And I think there is still some information that plaintiffs  
5 need to round out to complete those answers.

6 I guess Plaintiff Goldstein, as I understand it, has  
7 not because his carry permit was always limited to Bnei  
8 Matisyahu. So he did not carry his weapon, as I understand it.  
9 But, again, you can clarify as needed.

10 Now, I think I know the answer to number 10 is --

11 So is the permit for Plaintiff Goldstein that he can  
12 carry his gun, prior to September 1, 2022, when he's going to  
13 and from Bnei Matisyahu?

14 In other words, I know he could carry in there. I'm  
15 assuming it also means to and from he could carry.

16 MR. MORRIS: When he spoke to him, he says he only has  
17 a premise license. He's only allowed to carry the weapon at  
18 Bnei Matisyahu. Right now, he can't carry his gun at Bnei  
19 Matisyahu, even if the building is empty.

20 THE COURT: I don't know what the rules are in terms  
21 of whether that means when he's transporting the weapon. Let's  
22 say he's in his car, whether he has to have it in a lockbox or  
23 whether he can have it on his hip so to speak. I don't know  
24 what the limitations of that are.

25 MR. MORRIS: Your Honor, it's a curious circumstance

1 that unfortunately citizens of New York City have had to face  
2 for quite some time now.

3 THE COURT: I'm not sure exactly what you're saying.

4 Are you saying that citizens of New York, that  
5 everybody can't get a permit?

6 Is that what you're saying?

7 MR. MORRIS: The permitting in general, your Honor,  
8 the nest of regulations here that people are supposed to figure  
9 out and comply with here, your Honor.

10 THE COURT: Okay. You're here for the specific case  
11 that you've brought. To the extent you have some other agenda,  
12 in other words, that's separate, and you'll bring other cases.

13 So I understand what you were saying, but I guess one  
14 step at a time is what I would say.

15 I'm sorry. Mr. Benno, did you have something?

16 MR. BENNO: Yes, your Honor. As far as that question  
17 as to whether the law permits him, even though the license to  
18 possess is only on the property of Bnei Matisyahu, whether he's  
19 allowed to transport it and, therefore, go off the premises, we  
20 can inquire about that and include that in a supplemental.

21 THE COURT: That's fine. I'm sure it's somewhere in  
22 the regulations because I assume there are folks who have  
23 licenses to go to ranges and targets and certain things. They  
24 probably know how they need to transport it. That would be  
25 fine.

1           So to question 11 for Plaintiff Ornstein, it sounds  
2 like we have an answer to that, that prior to September 1,  
3 2022, he would carry his gun whenever he would leave his home.  
4 If there is some distinction, that's fine. You can let me know  
5 later on.

6           So what specific terms do plaintiffs allege are vague  
7 in the statute at issue?

8           I say "statute at issue." The plaintiffs, as I  
9 understand it, it's really with regard to -- well, let me just  
10 ask that.

11           What are the phrases or words that are at issue?

12           MR. BENNO: Your Honor, boiled down, to Penal Law  
13 265.01-e(2)(c), that specific statute, the vague wording are  
14 "places of worship" or "religious observation."

15           So we submit that "places" modifies both the word  
16 "worship" and "religious observation." And they're separated  
17 about a disjunctive, the "or." So that phrase, in and of  
18 itself, is, in total, ambiguous and, even broken down into its  
19 constituent parts, doesn't give guidance. "Places of worship"  
20 is ambiguous and vague. So is "places of worship."

21           THE COURT: So let's take those one at a time, first  
22 places of worship.

23           How is it that the terms "places of worship" are  
24 vague?

25           MR. BENNO: Well, as my co-counsel had mentioned

1 before, your Honor, a "place or worship" is, I would submit,  
2 different than a "house of worship." Somebody might understand  
3 a "house of worship" could be -- the heartland would be a  
4 synagogue, a church, a mosque.

5 A "place or worship" could be an office building. It  
6 could be if somebody is on the street with wearing a prayer  
7 shawl walking to their synagogue. There are any number of  
8 places.

9 For instance, in the holidays that just passed, Jews  
10 will congregate by a body water, oftentimes at a park and in a  
11 public place to engage in a ceremony called Tashlich which is  
12 the casting of breadcrumbs into the water symbolic of sins.  
13 That is a place or worship.

14 There are any number events in the Jewish life cycle  
15 and in the Jewish day where there are ritual observances that  
16 would fall into the category "worship" that do not occur within  
17 the four walls of a structure like a synagogue or a church.

18 THE COURT: I think though, at least in my view, that  
19 seems to be conflating places of worship with places of  
20 religious observation.

21 This goes to the construction. If you go to the  
22 dictionary, we can look up "places of worship," and I think we  
23 could find a definition of "places of worship."

24 Now, I haven't looked at the definition for "house of  
25 worship." You raised the issue.

1           How is "house of worship" in your argument, different  
2 than a "place of worship"? And have you compared what the  
3 dictionary may say about each of those?

4           MR. BENNO: I have not compared to the dictionary,  
5 your Honor. I would submit that a "house" would connote a  
6 physical structure. I would submit that a "place" is a much  
7 broader definition than a "house," and the contours of that are  
8 really undefined.

9           I do agree, to the extent we made this argument in our  
10 papers, that the second half of the statute, "religious  
11 observation," is exponentially more vague than "place of  
12 worship."

13           But I don't concede that "place of worship" is  
14 sufficiently defined to put people on notice of what is  
15 encompassed by or to put those who enforce the law on notice of  
16 when somebody traverses the law.

17           THE COURT: Let me ask: In connection with either  
18 preparing your papers or in connection with preparing here, did  
19 you look, either electronically or in hard copy, at  
20 dictionaries to determine what the definition of "place of  
21 worship" might be and what the definition of "house of worship"  
22 might be?

23           MR. MORRIS: Your Honor, I'm looking right now, with  
24 the advent of technology. According to Wikipedia, a "place of  
25 worship" is: "A 'place of worship' is a specifically designed



1 structure or space where individuals or a group of people, such  
2 as a congregation, come to perform acts of devotion,  
3 veneration, or religious study. A building constructed or used  
4 for this purpose is sometimes called a 'house of worship.'"

5 THE COURT: Sometimes.

6 MR. MORRIS: Sometimes. Just the other week -- was it  
7 the other week? -- we had Sukkot.

8 THE COURT: That definition though seems to  
9 communicate that it's sort of reverse of what you're arguing;  
10 in other words, that "place of worship" is a structure like a  
11 church, synagogue, mosque. And then there is some subset that  
12 is part of a "house of worship."

13 In other words, I don't know what that would  
14 necessarily be. Again, this is Wikipedia. But I was thinking  
15 more in terms of.

16 MR. BENNO: *Webster's*.

17 THE COURT: Ideally *Black's Law Dictionary* or  
18 something like that. Again, what I'm driving at is: Are you  
19 saying that I shouldn't apply the normal process of statutory  
20 construction here?

21 MR. BENNO: Your Honor, I think that "place of  
22 worship," to answer the first part of your question, does go  
23 well beyond the physical structure.

24 As my colleague was just saying, Sukkot is an example.  
25 There was this structure, these huts, where Jews observe the

1 holiday. It's an outdoor hut where they have to be able to see  
2 the stars. They pray in there.

3 But I don't think that if we had a dictionary  
4 definition that they would define a Sukkot, which is the hut,  
5 as being a "house of worship," which is, if you even look at  
6 the -- well, that being said, I also mention where we have  
7 individuals assembling for prayer in office buildings, as they  
8 frequently do, that becomes a place of worship, a devotion.  
9 But it is not a synagogue.

10 So to answer the second part of your question --

11 THE COURT: Is that a common use of the term? I  
12 understand that as a matter of argument, in particular where  
13 someone is extremely devout, folks may pray and do religious  
14 acts in various places and, therefore, wherever they are -- is  
15 the argument, wherever they are, that's a place of worship?

16 If so, how is that different than -- I guess I come  
17 back to the "house" versus "place."

18 Has there been a distinction in the law with regard to  
19 "house of worship" versus "place of worship"?

20 MR. BENNO: I don't recall researching that particular  
21 issue, Judge. So I don't the cases to be able to provide to  
22 you that would say whether there is or there is not. But I  
23 would say that in this particular -- you asked about whether  
24 you can apply traditional rules of statutory construction to  
25 this.

1           And I would respectfully submit the answer is no  
2 because -- we are somewhat I guess skipping now. This is the  
3 vagueness argument. The standard here has to be "readily  
4 susceptible." The ambiguous wording has to be "readily  
5 susceptible" to a narrowing construction that would make it  
6 constitutional.

7           Here, it's a bit of a knot because there is no  
8 construction of this statute that will ever make it  
9 constitutional. Even if you were to say that a "place of  
10 worship" means what we all think of a "house of worship" being,  
11 a church or a synagogue, a building, an edifice where prayer  
12 occurs, that would not obviate the First Amendment problems  
13 that we have with the statute. Nor would it eliminate the  
14 Second Amendment issues. Nor would it eliminate the Fourteenth  
15 equal protection issues. So there is no narrowing  
16 construction, even if you did apply this, that could in any way  
17 save the statute.

18           That being said, the Supreme Court has been very clear  
19 that where there is a disjunctive, the two terms are different.  
20 So even if your Honor were to find that a "place of worship" is  
21 a synagogue or a church and can interpret it that way, that  
22 wouldn't save the second half of the statute.

23           THE COURT: Are you saying that I can apply the  
24 statutory construction rules but that, if I apply then, the  
25 statute fails?

1 MR. BENNO: No.

2 THE COURT: Or are you just saying you don't even get  
3 to statutory construction?

4 MR. BENNO: I'm saying that -- well, thank you. I  
5 should have clarified this.

6 You can't apply statutory construction here for the  
7 reason I just said, because there is no constitutional way to  
8 interpret this statute. So you don't have to construct it a  
9 particular way at all.

10 But second, if you did apply that, you would be doing  
11 exactly what the Supreme Court proscribed in *Virginia v.*  
12 *American Booksellers* where it says that a court may not rewrite  
13 a law to conform it to constitutional requirements.

14 So if there is some way to interpret this that you can  
15 see that we don't -- I don't think there is one -- but you'd be  
16 essentially rewriting a law, which would be legislation. And  
17 the Supreme Court has said no.

18 So you can't rewrite it. You can't construe it in a  
19 way that comports with the construction. And I point out *Reno*  
20 *v. ACLU* is very clear. Where the wording is open-ended, as  
21 this one is -- we've spent a few minutes now discussing all of  
22 the different permutations of what a "place of" worship is and  
23 whether it is the same as a "house of worship" and what is the  
24 difference between that and a religious observation. That  
25 underscores and highlights the fact that this is ambiguous.

1           And the court in that case, in *Reno*, said that the  
2 open-ended character of the statute that was being challenged  
3 there provides no guidance whatsoever for limiting its  
4 coverage. The same is true here. There is no guidance in the  
5 statute as to what was intended by this. The wording itself  
6 sheds no light.

7           THE COURT: Okay. Let me ask: In terms of the  
8 argument plaintiffs are making, is the claim that if someone  
9 prays in a location that's not a synagogue, that, wherever that  
10 is, is a place of worship?

11           MR. BENNO: That appears to be what they've written  
12 into law.

13           THE COURT: So if a student prays in school, that  
14 becomes a place of worship?

15           MR. BENNO: It does. But the interesting thing with  
16 that example, your Honor, is that they've chosen to include  
17 schools in their list of sensitive places, separate and apart  
18 from -- there is a separate category dedicated exclusively to  
19 places of worship and religious observation. It's not one set  
20 of terms separated by commas in a serial set of terms.

21           So there is another exclusion for sensitive-place  
22 designation for schools. So nobody is allowed to bring a gun  
23 under this statute into a school anyway, regardless of this.

24           But, yes, there is an overlap. If you pray in a  
25 school -- for instance, the *Bremerton* case where the coach took

1 a knee on the field of the football field after the game, most  
2 certainly it's a place of worship and religious observation.

3 And as you correctly noted, it would present not only  
4 the free exercise and the ambiguity issues under the Fourteenth  
5 Amendment and Second Amendment issues, but it would present an  
6 establishment clause violation as well.

7 THE COURT: Let me ask. So similarly, is the claim  
8 also that every time someone prays in a place, it really  
9 becomes a place of religious observation?

10 MR. BENNO: How can it not?

11 THE COURT: And so, in your argument, the two terms,  
12 "place of religious observation" and a "place of worship," are  
13 both ambiguous and would cover the same thing? In terms of  
14 outside a shul for example.

15 MR. BENNO: I submit, your Honor, that we don't know  
16 where those boundaries are, and nobody knows where those  
17 boundaries are. That is the problem.

18 But "worship" connotes -- maybe I'd have to resort to  
19 the dictionary for this. But I would think a common  
20 understanding of "worship" is some sort of prayer activity.

21 By the way, *Employment Division v. Smith* specifically  
22 says this. The Supreme Court, religious exercise includes not  
23 only actions such as wearing a kippah or wearing a tallit or  
24 devotion or taking communion, to take it out of the Jewish  
25 context, but abstentions as well.

1           If you refrain from eating certain dietary food, if  
2 you refrain from taking certain modes of transportation, those  
3 are the terms that *Smith* pointed-out. That's religious  
4 exercise.

5           I can't see a world where "religious exercise" is  
6 different, because that was the phrase that they were  
7 analyzing, is different than "religious observation." So here,  
8 there is an endless list of activities that fall under  
9 "religious observations" that would not fall under the category  
10 of "worship."

11           THE COURT: Let me turn to the defendants.

12           How do you define a "place of religious observation"?

13           MR. CONRAD: First off, I do want to briefly address  
14 "place of worship." We would ask if they were contending that  
15 that is vague, and I think they said that they were. I do want  
16 to note that their papers don't seem to have made that  
17 argument. So I think their papers simply focuses on the  
18 religious observation. So I just want to point out that I  
19 think that is not something that we heard before from them.

20           THE COURT: Go ahead.

21           MR. CONRAD: With respect to "religious observation,"  
22 the two parts of this section here inform the other. I think,  
23 when you look at it, the core of section is clearly things like  
24 synagogues and churches and places like that.

25           I don't think we need to reach edge cases here today,

1 and I don't think the existence of edge cases renders a statute  
2 facially vague. But I think it's enough to say that,  
3 for example, not every religion might use the term "place of  
4 worship." You can think of places that might not strictly be  
5 places of worship but have the same character.

6 THE COURT: Let me ask, because if we're going to --  
7 first of all, is there an example of a religion -- again,  
8 because "place of worship" it's in a statute. So it's a  
9 secular definition.

10 MR. CONRAD: Yes.

11 THE COURT: So I guess the first question I have,  
12 because you had made the statement that there may be some  
13 religions that don't refer to "place of worship."

14 Is there something that comes to mind?

15 MR. CONRAD: I'm not an expert on any of these  
16 religions but maybe something like a Christian Science reading  
17 room or something like that or a monastery, something like  
18 that, places where the term "worship" might not be perfect.

19 Your Honor, I would also want to note that under a  
20 common sense reading here, we're not talking about someone's  
21 house when they're observing Shabbat or on the street when  
22 they're wearing religious garb.

23 I think, for the purposes of the vagueness analysis,  
24 it's very clear what the law covers. What the law doesn't  
25 cover, the kind of things I just said, is also clear. And the



1 fact that there might be edge cases between that does not  
2 render the law facially vague. It just means that at some  
3 point there might have to be "as applied" challenges.

4 THE COURT: What is the difference that the defendants  
5 would draw between a "place of worship" and a "place of  
6 religious observation"?

7 MR. CONRAD: Well, I don't know that, again, I can  
8 answer every edge case as we sit here today.

9 THE COURT: I'm not even talking about edge cases.  
10 I'm saying: What is, as part of the statute from the  
11 defendants' view -- what is -- because they are, or are they  
12 not separate terms in the statute?

13 MR. CONRAD: They're separate, but I think one informs  
14 the other. And I think, again, maybe the best way to look at  
15 it is that the "place of religious observation" is just meant  
16 to fill in gaps where "place of worship" might not be the exact  
17 term.

18 THE COURT: Isn't that the problem?

19 In other words, you say "fill in gaps." That's what  
20 I'm trying to figure out, what are those gaps. Let's tack a  
21 step back.

22 In terms of "places of religious observation," in  
23 connection with preparation of your papers, did you look in the  
24 dictionary? Or it's all Wikipedia? Is that defined anywhere?

25 MR. CONRAD: I haven't found much actually for the

1 term specifically "place of religious observation." But,  
2 again, I think it's supposed to refer to places of the same  
3 character. It's not supposed to refer to places like someone's  
4 home or on the street. And I think that's clear.

5 THE COURT: Why is that clear?

6 MR. CONRAD: As a matter of a common-sense reading, I  
7 don't think that this is meant to cover someone's private house  
8 when they're observing Shabbat or they're observing some other  
9 kind of religious observation when they're in their house.

10 THE COURT: The intention, I understand that.

11 Was there any discussion about what the difference  
12 would be between a "place of worship" and a "place of religious  
13 observation"? Again, inside the legislature, outside the  
14 legislature, whatever it may be.

15 MR. CONRAD: In terms of the drafting of the  
16 legislation and things like that, I'm sorry. I don't  
17 specifically know.

18 THE COURT: And you mentioned that "places of  
19 religious observation" would -- I think you said "fill in the  
20 gaps" or something like that.

21 Do you have something in mind? In other words, what  
22 would that be? You mentioned I guess other religions that  
23 might not be defined, the Christian Science reading room or  
24 something like that.

25 So wouldn't that cover, to the plaintiffs' point --

1 I apologize. Was it the structure created on Sukkot?

2 MR. MORRIS: Yes, your Honor.

3 THE COURT: So wouldn't a "place of religious  
4 observation" include that?

5 MR. CONRAD: I'm not sure that can be answered in the  
6 abstract without more facts about where it's located or  
7 anything like that. I think that might be the kind of case  
8 that could be the subject of a future as-applied challenge but  
9 not the case that we have here I don't think.

10 THE COURT: You raised the Christian Science reading  
11 room off the top of your head. And I recognize that -- again,  
12 I'm trying to, in my own mind, figure out what the distinction  
13 is between the "place of worship" is and the "place of  
14 religious observation."

15 I guess I sort of asked already.

16 Do you claim that a "place of religious observation"  
17 has a common meaning?

18 MR. CONRAD: I think it is just a question of common  
19 sense. I mean, again, I think you look at something like  
20 someone's personal house, and that's not intended to be covered  
21 by that. I think that's just as a matter of common sense.

22 THE COURT: You say "not intended." So it's the  
23 intention of the legislature or the executive that proposed the  
24 legislation.

25 But what about the party, the public? In other words,

1 in reading the statute and notice to the members of the public.

2 MR. CONRAD: I've been saying "not intended." I think  
3 that also would include "not interpreted." I think a  
4 common-sense interpretation, there would be the same answer.

5 THE COURT: Okay.

6 MR. CONRAD: I also want to point out something I  
7 noticed. Apologies if I'm getting too far afield on the  
8 vagueness issue here. But even in the plaintiffs' reply  
9 brief -- I think it's --

10 THE COURT: Just take your time. You can slow down.

11 MR. CONRAD: In footnote 7 of the reply brief, it's a  
12 quotation from a case. But they are applying it to themselves.  
13 They say: "There is no question as to how the statute will be  
14 applied."

15 So I think there is even some inconsistency from the  
16 plaintiffs as to whether they are interpreting this as vague.

17 MR. BENNO: May I respond to that briefly, Judge?

18 THE COURT: Sure.

19 MR. BENNO: Very briefly. What we're getting at here  
20 is that our clients will be arrested and prosecuted. That's  
21 what we mean. There is no question that if they're in a Sukkot  
22 or they're outside, whatever, they're going to be in violation  
23 of this law, and they'll be arrested and prosecuted. That's  
24 the as-applied challenge. It's not that we're saying that  
25 there is an understanding as to what the parameters are of

1 these terms.

2 MR. MORRIS: Your Honor, just to be clear, an edge  
3 case means my client gets arrested. That gun is removed from  
4 him. And it's the most debilitating process of which there is  
5 no coming back from. It's irreparable.

6 My colleague teaches at Touro Law. I was lucky enough  
7 to go there. If you go there on Sukkot, there will be a  
8 structure on the side of the building. And inside the school,  
9 there is a shul, there is a Torah, and ten men congregate  
10 what's called a minyan.

11 So the idea that one edge case or, if they decide to  
12 arrest all ten of them, it will be an edge case, my client  
13 should not have to suffer or even worry about such a thing that  
14 would chill his First Amendment rights.

15 THE COURT: Let me ask defendants a question which  
16 relates. I'm not sure if it's something I wrote down.

17 Do defendants have a current intention, in light of  
18 the several cases, the case in the Northern District, the case  
19 in the Western District, to enforce the section or the  
20 subsection at issue in the case?

21 MR. CONRAD: Your Honor, I don't think my clients are  
22 the ones directly responsible for on-the-ground enforcement  
23 decisions. So I'm not sure I have an answer to that.

24 But I would just say that I think that it's fair to  
25 presume that these laws will be enforced by reasonable people

1 in a reasonable way.

2 THE COURT: You mean law enforcement.

3 So let me turn then to counsel for the city.

4 Is the NYPD going to be enforcing this particular  
5 portion of the law?

6 MR. CIAPPETTA: I'm not aware of any enforcement to  
7 date, your Honor. We are not taking the position that what's  
8 happened in the other districts of the state prevent that  
9 enforcement from happening.

10 THE COURT: Okay. In the briefing, there is an  
11 argument that's made -- let me sort of flip it on the  
12 plaintiffs -- to say they haven't shown that they are in danger  
13 of being arrested for this.

14 But here, you've indicated that in terms of  
15 enforcement, the NYPD -- it's like a statute on the books for  
16 anything else; in other words, it will be enforced.

17 MR. CIAPPETTA: I can't say it will be, but it may be  
18 enforced. We're not taking the position that the stay applies  
19 to us and that we're staying ourselves for lack of a better  
20 word.

21 THE COURT: Okay.

22 MR. CIAPPETTA: But I do want to note our argument was  
23 a little different on that. I think part of why we're saying  
24 there is not a danger of enforcement action is because the  
25 plaintiffs in their declarations -- at least one of them said

1 that because of the law, they are not carrying the firearm into  
2 the shul. So if they are not carrying the firearm into the  
3 shul or elsewhere, there could be no enforcement action because  
4 they haven't violated the law.

5 THE COURT: I guess the issue, yes, because they're  
6 trying to abide by the law. If they did, they would be in  
7 violation of law subject to arrest.

8 MR. CIAPPETTA: Potentially, yes. But there are  
9 standing cases that say you have to -- and there have been  
10 cases where they've been dismissed recently.

11 THE COURT: That you have to be arrested?

12 MR. CIAPPETTA: Well, that you have to state an  
13 intention to engage in proscribed conduct.

14 THE COURT: Let me ask the plaintiffs: Do you know  
15 whether your clients have an intention to, in essence, carry --  
16 at some point in the future, in other words, let's say this  
17 drags on for however long, do they have an intention to carry a  
18 firearm into a place of worship, a shul?

19 MR. BENNO: If I may, your Honor. I'd first like to  
20 say I think that --

21 THE COURT: You don't believe that's the standard?

22 MR. BENNO: No, because they are giving up -- there's  
23 a tradeoff here: They're carrying their firearm as they have a  
24 constitutional right to do; they're giving up some religious  
25 exercise. If they're engaging in a religious exercise, they

1 have to give up their firearm.

2 There is a sacrifice there of changing their  
3 behaviors. So there is standing. There is a constitutional  
4 harm here where they say, I am going to go into a synagogue  
5 with my gun or not.

6 THE COURT: Let me ask Mr. Fischer a similar  
7 enforcement question in terms of the clients that you  
8 represent.

9 MR. FISCHER: Judge, to date, there has been no  
10 enforcement in the county of Rockland. I don't believe it's  
11 been a conscious decision. I just think no incidents touching  
12 upon the statute have occurred.

13 Speaking to my clients right now, we're not taking any  
14 position on the controversies of this case. So I would imagine  
15 there would be no enforcement until this Court decided the  
16 ultimate issues, Judge.

17 THE COURT: Okay. I'll just ask, again, on that  
18 narrow issue, if you could supplement the record to indicate  
19 that the position that you've taken in your papers covers that  
20 your clients will not be enforcing and what the parameters of  
21 that is.

22 MR. CONRAD: Your Honor, I don't know if you want to  
23 save it for argument time or to address any other vagueness  
24 issues from our perspective.

25 THE COURT: Sure. In a moment. I just had a



1 follow-up question for all parties.

2 Is anyone aware of enforcement anywhere in the state  
3 of New York of this statute when it comes to places of worship  
4 or places of religious observation?

5 First, the defendants.

6 You have to answer out loud.

7 MR. CONRAD: I am not aware of any.

8 MR. CIAPPETTA: I'm not aware of any, your Honor.

9 MR. FISCHER: I'm not aware of any, your Honor.

10 THE COURT: Plaintiffs?

11 MR. MORRIS: Your Honor, the only thing I'm aware of  
12 is the Western District of New York enjoining the statute.

13 THE COURT: I don't know the answer to this. But was  
14 that in connection with an individual who had been arrested  
15 after the enactment of the statute?

16 MR. BENNO: It wasn't an arrest. It was a  
17 pre-enforcement challenge. And the judge found on almost  
18 identical circumstances. They were not Jewish, those  
19 plaintiffs. They were pastors.

20 But they found that there is standing because,  
21 specifically because, there is a credible threat of prosecution  
22 because the law presumes that when there is a reason why at  
23 least, on the books, a criminal law, that the state is going to  
24 enforce it.

25 We've already gone through it in the papers. So I'll

1 rely on those. But there have been numerous statements by both  
2 the governor, by the state police, that they intend to enforce  
3 this law.

4 So, you know, I think the *Hardaway* case, which is the  
5 Western District, goes into that in some detail.

6 MR. MORRIS: Your Honor, we're not aware of a felony  
7 prosecution, but that's what's at stake here. It's a felony.

8 THE COURT: Again, I'm just trying to understand where  
9 things currently stand and whether or not there's been  
10 enforcement to date.

11 MR. BENNO: By the way, Judge, on that I would just  
12 say that the *Babbitt* case, the Supreme Court from '79, we just  
13 heard defense counsel say that -- they have not disavowed any  
14 intention of enforcing this. And that's the standard in the  
15 Supreme Court. If they haven't disavowed, then there's a  
16 credible threat.

17 THE COURT: Let me ask defendants this because the  
18 argument is that plaintiffs haven't shown that they're in  
19 danger of having this enforced against them.

20 Why isn't it sufficient that it's a statute that's on  
21 the books, a criminal statute that's on the books, even if it  
22 has not yet to be enforced?

23 Why isn't that sufficient for standing purposes?  
24 Anybody. Maybe it's for the city I guess.

25 MR. CIAPPETTA: I mean, the case law seems to go

1 beyond that. We cited to the recent *Frey* decision that is in  
2 the Southern District as well. It was involving a penal law  
3 statute. And there they said it just wasn't enough and  
4 some-day intention is not enough to establish the intent part  
5 of it.

6 Secondly, there has to be more. It can't just be a  
7 statute on the books. It has to be that that person was either  
8 enforced against previously or somebody specifically told that  
9 person.

10 THE COURT: What about a person who previously had  
11 carried a firearm to a place of worship, to a shul, and has,  
12 since the enactment of it, because they don't want to be  
13 subject to arrest, stopped?

14 Why isn't that enough?

15 MR. CIAPPETTA: I don't think it would be.

16 THE COURT: But why? In other words, specifically --  
17 again, without getting into whether or not use of a firearm or  
18 having a firearm is somehow tied to their religious  
19 observation, if what they've stopped doing or they've least  
20 curtailed in some degree, is going to the shul, which is what  
21 the statute basically says it proscribes.

22 MR. CIAPPETTA: Right.

23 THE COURT: So why isn't that enough for standing  
24 purposes?

25 MR. CIAPPETTA: Also just to back up a little bit.

1 THE COURT: Sure.

2 MR. CIAPPETTA: We asserted a very limited standing  
3 argument. We're not saying they don't have standing for any of  
4 their claims here.

5 We were asserting standing issues only with respect to  
6 the Second Amendment claim because on there, we feel that there  
7 is very solid case law, the *Frey* case and then the recent  
8 Second Circuit case. I believe it's *John Does 1 through 3 v.*  
9 *Suffolk County*.

10 So to my, in those particular areas, it's a very tough  
11 test, and I think it requires a lot. It's very demanding of  
12 standing.

13 THE COURT: Okay.

14 MR. CIAPETTA: While it might make sense, the change  
15 of behavior, from a layperson's perspective, the cases seem to  
16 require more, at least with respect to the Second Amendment  
17 argument. We haven't asserted standing with respect to First  
18 Amendment or equal protection or the other issues.

19 THE COURT: Let me ask question 15, just so we can get  
20 through.

21 Prior to September 1, did any members of Bnei  
22 Matisyahu carry firearms, other than one of the plaintiffs?

23 MR. MORRIS: Plaintiff Goldstein says no, no one else  
24 except for him.

25 THE COURT: Similarly, prior to September 1, 2022, is

1 any members of Congregation Zemach carry firearms into  
2 Congregation Zemach?

3 MR. MORRIS: Plaintiff Ornstein stated yes. There are  
4 other members who did.

5 THE COURT: Do you have a sense of how many folks  
6 we're talking about? That's okay, because I didn't ask the  
7 question. If you could determine -- again, that is only  
8 obviously within your clients', in the plaintiffs' knowledge,  
9 of how many folks.

10 Also I don't think I asked. How many members are  
11 there of -- since Plaintiff Ornstein joined the congregation of  
12 the Congregation Zemach, how many members are there of the  
13 congregation?

14 You may not know that. If you could just, again, in  
15 the supplemental declaration, just include that, just so that I  
16 have a sense of that.

17 Now let me ask: Are plaintiffs arguing that the  
18 carrying of a firearm is an integral part of the practice of  
19 their religion?

20 MR. CIAPPETTA: I'm sorry, your Honor, to interrupt.  
21 I just wanted to -- I wasn't sure of the sequence of today's  
22 argument. We did have other points we would like to address on  
23 vagueness. I don't know if we'll be arguing separately after  
24 the questions.

25 THE COURT: I'll allow, after we finish the questions,

1 an open period. In all likelihood, we'll probably take a break  
2 in a few moments and then come back to complete the argument.

3 MR. CIAPPETTA: Okay. Thank you.

4 THE COURT: With regard to the question, are the  
5 plaintiffs arguing that a concealed carry -- that carrying a  
6 firearm is an integral part of their religion?

7 Question 18.

8 MR. MORRIS: Your Honor, after conferring with the  
9 plaintiffs, we submit that Jews are not allowed to engage in  
10 religious worship while carrying a firearm. If you carry a  
11 firearm, you cannot exercise your religion.

12 THE COURT: So what happens when the plaintiffs carry  
13 their firearms into the shul? Do they have a lockbox that they  
14 put the firearm in while they pray? Before September 1 of  
15 2022.

16 MR. MORRIS: Your Honor, no. They carried.  
17 Unfortunately, the circumstances that gave rise to their  
18 carries, they carried on them.

19 THE COURT: I'm sorry. Could you repeat what you said  
20 then. I think I misheard then.

21 MR. MORRIS: So Jews are not allowed to engage in  
22 religious worship while carrying a firearm at this point.

23 THE COURT: At this point. My question is though:  
24 Let's say before September 1 of 2022. It's also as a general  
25 matter.

1           Is the carrying of a firearm somehow integral to their  
2 practice of religious?

3           MR. BENNO: Before September 1, 2022, your Honor, we  
4 would submit that for our plaintiffs, yes, because the precepts  
5 of the religion dictate that they have to -- they're obligated  
6 in fact to -- protect life. They're obligated to protect not  
7 just their own lives but other peoples' lives.

8           And given the circumstances of the anti-Jewish hate  
9 attacks, Zemach David shul is literally a stone's throw away  
10 from the Chabad house where a madman went in with a knife and  
11 killed the rabbi and stabbed other people a couple years ago.

12           Yes. So this is a community that's been targeted. So  
13 for them to protect life, that is a religious obligation on  
14 them. So to the extent that, yes, carrying a gun advances that  
15 religious obligation, it is part and parcel of their religious  
16 practice.

17           THE COURT: As a general tenant of many religions,  
18 there is this idea that you are to protect life. That means,  
19 everybody, everybody should be able to carry a gun. Right?

20           MR. BENNO: I'm not a Rabbinic scholar on that, your  
21 Honor. It is certainly not something sacramental, if that's  
22 your question, is it on the same level.

23           THE COURT: It is. So let's take it a step back from  
24 the self-protection or protecting others. And I understand  
25 that tenant.

1 But is it part -- as you said, part of the religion.

2 MR. BENNO: If the question is: Is it part of the  
3 sacrament, is it part of the liturgy, is it part of that, then  
4 the answer is no, it is not. But we submit that it does  
5 further the broader objectives and tenants of the religion.  
6 Either way, the fact is they can't practice their faith while  
7 armed now.

8 MR. MORRIS: Your Honor, just to add to that --

9 THE COURT: But they have. They both have.

10 MR. BENNO: Perhaps at risk of being arrested and  
11 prosecuted. But after September 1, 2022 --

12 THE COURT: **No. After September 1, 2022, my**  
13 **understanding is both plaintiffs have attended shul without**  
14 **their firearms.**

15 MR. BENNO: Right. What my statement was -- maybe I  
16 didn't articulate it clearly. It was they are not allowed to  
17 practice their faith while armed. So they have to be disarmed  
18 in order to do it. So that is a free exercise violation.

19 THE COURT: Okay.

20 MR. MORRIS: And, your Honor, I interject. Since  
21 your Honor -- and thank you for the opportunity to evaluate  
22 this. There is actually a rabbi in the audience now.

23 I conferred with the rabbi about this, and he does  
24 have some legal background.

25 THE COURT: What does that mean?



1           MR. MORRIS: He does have some legal background. I  
2 believe he's pending admission to the bar.

3           THE COURT: I see. Okay.

4           MR. MORRIS: Religious Jews are obligated to protect  
5 life in a different manner than we would ordinarily assume.  
6 The duty is different. For instance, a lifeguard has a duty to  
7 rescue someone who is drowning in the water. But a passerby, a  
8 Jew, has an obligation to protect life even without that duty.  
9 Arguably, in our civil law, we could watch that person drown if  
10 we're not the lifeguard. A religious Jew doesn't have that  
11 opportunity.

12           We have several examples of the hatzalah and other  
13 services that are required to be rendered if you are a  
14 religious Jew. And there are varying degrees, and there are  
15 different types of Jews that essentially are allowed and are  
16 not allowed to perform certain services.

17           But I think what my colleague is getting at -- and  
18 after a debate that could probably go on for several days  
19 amongst Jewish scholars, I think the consensus is clear that,  
20 yes. This carrying is required to fulfill some of these  
21 duties.

22           THE COURT: Do the duties that you're describing, in  
23 terms of what you're saying, do they extend to all persons, not  
24 just folks who are of the Jewish faith?

25           MR. MORRIS: I believe -- to use the drowning example,

1 I don't think a Jew, a devout Jew, could watch somebody drown.

2 No. It would be volitive of their religion.

3 THE COURT: So for lack of a better term, if someone  
4 is in need or in danger, the obligation -- again, I understand  
5 the spectrum of what we're talking about. You say devout Jews.

6 If you could provide a more specific definition of  
7 that, in other words, there are folks who are reformed,  
8 conservative, orthodox.

9 I guess what I'm trying to figure out is: Is that a  
10 general tenant of Judaism? In other words, it may be a general  
11 tenant but that certain folks who practice Judaism don't  
12 necessarily adhere or subscribe to this general idea.

13 I'm just trying to figure out exactly what that, from  
14 a definitional standpoint, what we're talking about here.

15 Or is it easier just to say people in plaintiffs'  
16 position?

17 MR. MORRIS: Your Honor beat me to the punch.  
18 Certainly orthodox. But there are likely more. I would defer.  
19 There is a rabbi 10 feet behind me. So I would defer to him.  
20 Perhaps after, I could provide more of a concrete example.

21 But, for example, hatzalah was the example we spoke  
22 about yesterday. And in Boro Park, Brooklyn, not far from  
23 here, they are required to respond. And their first responder  
24 times are between one and two minutes, because not only they're  
25 so effective, but because it's a duty. They are duty bound to

1 do this.

2 THE COURT: Let me ask, in terms of this, just a  
3 followup to this, and then we'll take a quick break, which is  
4 the integral part of the practice of their religion.

5 With regard to the *Roman Catholic Diocese of Brooklyn*  
6 *v. Cuomo*, is there an argument -- or are you making an  
7 argument? -- that the carrying of -- that in terms of important  
8 religious traditions in the orthodox Jewish faith, that  
9 carrying a gun is akin to sort of the communion that was argued  
10 in the *Roman Catholic Diocese of Brooklyn* case?

11 MR. MORRIS: So I believe the quote your Honor is  
12 referring to is the one about remote viewing not being the same  
13 as communion. And there are important religious traditions in  
14 the orthodox Jewish faith that require personal attendance.

15 THE COURT: And I should point out -- and it may not  
16 be -- in my experience, it may be somewhat different.

17 I know that sacraments can be delivered, certainly to  
18 an Episcopal religion, to individuals who are unable to make it  
19 to a house of worship, to a church. That can be done in  
20 someone's home.

21 I don't know whether that was considered in the  
22 *Roman Catholic Diocese of Brooklyn v. Cuomo*. I don't know.  
23 Quite frankly, I would imagine. Although I don't know, whether  
24 in Catholicism, that is something that is permitted. That's  
25 not the case obviously in front of me.

1           But I think as a factual matter, at least with regard  
2 to communion, that in some aspects of Christianity, it does  
3 happen outside. It may be that within the canons of a  
4 particular religion, that there is that protection for when  
5 sacraments can be delivered.

6           My question is a little bit different here. It is  
7 whether with the plaintiffs are arguing that the canon  
8 regarding this is sort of akin to the taking of communion that  
9 was at issue in the *Roman Catholic Diocese of Brooklyn* case.

10           MR. MORRIS: Your Honor, I believe the concept is in  
11 tandem because the Catholics in this case were compared to the  
12 orthodox Jews in this case. So I believe what your Honor is  
13 asking -- and the answer, I hope -- is that it is not a  
14 religious right, the carrying of a firearm.

15           THE COURT: It's now a little after noon. We've been  
16 going for two hours. I do have some more questions to get  
17 through. And then I'll allow the parties to end their  
18 discussion.

19           But I'm going to pick up the pace I think for the  
20 latter part of our discussion. So why don't we come back in  
21 about ten minutes, and then we'll continue the argument.

22           MR. MORRIS: Thank you, your Honor.

23           MR. BENNO: Thank you, Judge.

24           (Recess)

25           THE COURT: Question 20 relates to the city defendants

1 stated that there may be individuals that are fearful of going  
2 to their houses of worship because they're fearful of attending  
3 service where any person is permitted to carry a firearm.

4 So if feeling safe is the litmus test for barriers to  
5 practice religion, is allowing someone to carry a concealed  
6 weapon in church potentially violative of other folks' rights  
7 in that church.

8 I think this has sort of been answered. It will be  
9 answered by the question I had about the ability, whether the  
10 plaintiffs were arguing that they should be permitted to carry  
11 firearms into places of worship, even if those places of  
12 worship, the private places of worship, basically don't allow  
13 that or prohibit that.

14 But let me hear. I think that what I heard was that  
15 you're not making the argument that the plaintiffs -- the  
16 plaintiffs are not making the argument they should be permitted  
17 to do that.

18 MR. BENNO: Correct, your Honor. Churches,  
19 synagogues, mosques -- they are free to set whatever rules they  
20 wish. Again, I would just point out that that argument, by the  
21 way, was not moored to any data, statistics. It was pure  
22 speculation.

23 THE COURT: I'm not sure what sort of data or  
24 statistics.

25 What sort of data did you have in mind?

1 MR. BENNO: They're saying that people might be afraid  
2 of going to a synagogue because they know that somebody is  
3 carrying a gun there is speculative.

4 If they had some sort of data, however they compiled  
5 the data, of people saying, I don't go to a house of worship if  
6 there is a congregant with a gun because that makes me fearful,  
7 that would one thing.

8 We would still push back on it I'm sure. But that  
9 would still be grounded in some data. This is maybe just some  
10 hypothetical situation where somebody is feeling scared. It's  
11 not real.

12 What is real is our clients' declaration when they say  
13 that the people who attend Bnei Matisyahu and Zemach David feel  
14 more safe knowing that people are carrying a concealed weapon  
15 and that encourages them to participate in religious life.

16 THE COURT: But there are shuls and synagogues that  
17 don't allow firearms into the shul or synagogue.

18 Is that right?

19 MR. BENNO: A hundred percent right. If somebody in  
20 the congregation doesn't like that their particular synagogue  
21 has that rule, they're free to go to another synagogue that has  
22 a different rule. But that's I guess the beauty of the  
23 marketplace of religious houses of worship.

24 THE COURT: Let me ask: With regard to either of the  
25 congregations, have they ever had either -- had they ever

1 employed armed guards at any point in time?

2 MR. BENNO: Well, I know that at least with Bnei  
3 Matisyahu, I believe, your Honor, they have not because they  
4 don't have the financial resources to do that.

5 THE COURT: Again, in the supplemental declaration,  
6 let me ask you to just confirm that.

7 With regard to Plaintiff Ornstein, do you know  
8 whether -- is it Congregation Zemach? -- whether they had armed  
9 guards?

10 MR. BENNO: Other than the congregants you're saying.

11 THE COURT: Yes. Other than the congregants.

12 MR. BENNO: You mean a contracted company or  
13 something.

14 THE COURT: Something like that, yes.

15 MR. BENNO: I don't know the answer to that, Judge.

16 THE COURT: And similarly -- and there are times when  
17 certain places of worship in the city have members of the  
18 police who are stationed outside.

19 I don't know whether -- I assume some of that is the  
20 police department's decision -- but I don't know -- as opposed  
21 to they're hiring NYPD folks to guard it.

22 Do you know whether at any point in time either  
23 congregation have had a police presence, putting aside separate  
24 contractors?

25 MR. BENNO: I haven't presented that question to

1 either of the plaintiffs.

2 THE COURT: Okay. If you could. I was just curious.  
3 It just came to mind.

4 Question 21 talks in terms of the *Bruen* case and  
5 specifically I guess the quote that I think sets the standard  
6 that the *Bruen* case had set forth.

7 Let me ask. And this is a question I think for  
8 probably both parties.

9 Do you view the historical tradition of firearm  
10 regulations as referred to in *Bruen* as static?

11 Or is it something that changes and evolves over time?  
12 First I'll ask the plaintiffs that question.

13 MR. BENNO: So the understanding of the scope of the  
14 Second Amendment is pegged to 1791. *Bruen* makes that clear.  
15 *Caetano* makes that clear.

16 THE COURT: Just 1791? Whatever was there?

17 MR. BENNO: Maybe give or take a window of time on  
18 either side of the year, around the time of the ratification in  
19 the founding era. They've been clear. The Supreme Court has  
20 explicitly stated in all three cases that have dealt with what  
21 the scope is -- and that's *Heller*, *Caetano*, and *Bruen* -- they  
22 have said that. They have said that. So now we know what the  
23 scope is of the Second Amendment.

24 If there is going to be a legislative tearing back of  
25 the right, the Second Amendment right -- just to give a



1 hypothetical, say, somebody who is a convicted felon or  
2 somebody who has psychiatric issues who is no longer allowed to  
3 possess a weapon -- that's a legislative enactment that scales  
4 back the scope of the Second Amendment.

5 In order to determine whether or not the legislature  
6 acted within its powers to do that and that's constitutional or  
7 not, then we look to history and tradition. This is what *Bruen*  
8 has articulated.

9 *Bruen* says that you "look to history and tradition in  
10 the colonial and founding era," and they've pegged it to the  
11 1791 era. "To the extent we look at the 19th century --" there  
12 will be times they look to the 19th century "-- it is never to  
13 overrule the founding era understanding. It is only used --"  
14 this is the word of Justice Thomas in the majority of *Bruen* --  
15 "is to confirm," "to confirm the understanding, as it was, at  
16 the founding era. If there is a complete tension between  
17 them --" so in 1868, when the Fourteenth Amendment was  
18 ratified, somehow there is a completely different hypothetical,  
19 a different understanding, than there was in 1791 "-- then 1791  
20 governs." But they do look -- it confirms to determine whether  
21 there is a historical tradition, but there has to be a  
22 confirmation. So they never say we don't look to the 19th  
23 century. But the operative, concrete, theory is going to be  
24 upon ratification.

25 THE COURT: I'm curious. This is a sort of an aside

1 because there were a lot of folks in 1791 and otherwise that  
2 the Second Amendment didn't apply to that were in this country.

3 We don't need to go down that aside. I think what  
4 bears out is somewhat of a -- and I guess maybe intellectually  
5 or as a legal matter, they would say that later on, the Second  
6 Amendment was broadened to allow people of color and other  
7 folks to be able to have firearms. But certainly it wasn't  
8 rooted in this notion that everybody could have a firearm.

9 That was really the idea of whether it's static or  
10 whether it's something you look at. And you said "era." And  
11 the Supreme Court itself in *Bruen* looked beyond just that  
12 timeframe.

13 Maybe it's setting up how to view the Second  
14 Amendment. Because I note that there is sort of a disagreement  
15 between the parties about what timeframe do you look at. The  
16 way I look at it is that each party is viewing the timeframe  
17 depending upon what was occurring at that time that's  
18 advantageous to their particular argument.

19 Let me ask this because, whether it's statutes that  
20 require people to have guns in places of worship or whether  
21 it's statutes and legislation that restricts firearms, in both  
22 circumstances, isn't that a recognition that there is a place  
23 for the government to regulate firearms in places of worship?

24 MR. BENNO: No. Again, it's because the understanding  
25 of the scope is going to be -- I used 1791. Understand that

1 I'm not saying rigidly that year from January to December, but  
2 I'm saying in that general timeframe. It understood that it  
3 applied to everybody.

4 By the way, to your point, because you mentioned it,  
5 the Fourteenth Amendment, one of the moving forces and reasons  
6 why it was ratified, was in order to ensure that freed slaves  
7 did get the right to all of their Bill of Rights, including the  
8 Second Amendment, so that their Second Amendment rights would  
9 not be taken away. That's one of the driving forces behind it.

10 You did ask a question in your order about who it  
11 encompasses, and *Heller* answers that question very clearly. It  
12 says that: "People -- " as understood in the Second  
13 Amendment's wording "-- refers to all Americans. I'm reading  
14 from *Heller*. It refers to "a class of persons who are part of  
15 a national community or who have otherwise developed sufficient  
16 connection with this country to be considered part of that  
17 community." That's what *Heller* determined it to be. Our  
18 plaintiffs fit into that very comfortably.

19 But to answer your question, it is the defendants'  
20 burden -- and this is *Bruen*. They made it very clear about  
21 this. It is their burden to prove that there is a historical  
22 tradition to impose a restriction on the Second Amendment. It  
23 is not the plaintiffs' burden to show anything. They haven't  
24 met their burden. Prima facia they haven't met their burden.

25 THE COURT: I guess my question is a little bit

1 different. It's one thing to say that the Second Amendment  
2 allows folks to care weapons into places of worship. It's  
3 another thing -- because the statutes that I think you cite in  
4 the plaintiffs' papers are basically saying people are required  
5 by statute to carry it.

6 Doesn't the very fact that the executive branch  
7 basically felt that they had the power to basically require  
8 that, that they're advancing, in the tradition of the  
9 government, regulating firearms in places of worship?

10 MR. BENNO: No. Again, I think, to the extent that  
11 those statutes are raised, it's to show that there is not a  
12 tradition of restricting firearms in places of worship.

13 I will point that to the extent that -- I don't want  
14 to jump the gun, but I think it's going to -- that the  
15 defendants collectively have listed a variety of municipal  
16 county ordinances or some state statutes or maybe a case here  
17 or there -- first of all, the paucity of cases, when you think  
18 about, at the time that they're looking and the reconstruction,  
19 37/38 states -- I don't know how many cities and towns and  
20 counties. But they denominator gets large and their numerator  
21 is very small.

22 And *Bruen* was very clear that this kind of -- I think  
23 the *Hardaway* case called it "spasmodic" instances here and  
24 there. There is a case that says you have to -- you're  
25 prohibited from carrying in church doesn't establish a national

1 tradition.

2 But even the cases and laws that they do cite don't  
3 apply to create a historical tradition in our country for a  
4 variety of reasons: First, they applied to confederate states  
5 and territories, and the southern states were trying to take  
6 guns away and rights away from freed slaves.

7 And the reason the Second Amendment was under martial  
8 law was that they were trying to take guns away from everybody  
9 so they couldn't subjugate the freed African-Americans. That  
10 was the reason for it. It was a unique circumstance in that  
11 era in our nation's history. It doesn't establish a national  
12 tradition.

13 THE COURT: But the second was created at a time --

14 Do you think the folks who wrote the Second Amendment,  
15 would you say that they intended to have, whether folks who  
16 were enslaved or folks who were freed, to have guns?

17 MR. BENNO: Well, their intent is beside the point  
18 because the Supreme Court has been clear that the scope of the  
19 Second Amendment applies to everybody.

20 THE COURT: Again, it's sort of a deeper -- and I  
21 recognize what the Supreme Court has said -- a deeper concern  
22 that somehow the talisman is looking at historically what was  
23 going on back at a time when many people, not only people of  
24 color, but people who were Jewish and people of other stripes,  
25 didn't have those rights. Women also didn't have those rights.

1           That's just rhetorical. I just am questioning  
2 necessarily how -- I think there may be a limited utility to  
3 looking at that. I recognize the Supreme Court has directed  
4 that that's where you look. And obviously I will do so in  
5 connection with this case.

6           I just think when both sides are able to point me to  
7 flip sides of the coin basically, I'm not sure how necessarily  
8 helpful it will be at the end of the day.

9           I'm sorry. Go ahead.

10           MR. BENNO: I will point because you mentioned  
11 suffrage. The Fourteenth Amendment obviously and beyond, the  
12 Nineteenth Amendment for suffrage and the Fifteenth Amendment,  
13 those are going to be evaluated at the time of the  
14 ratification.

15           But the Bill of Rights, every single time the  
16 Supreme Court has determined the scope of the Bill of Rights --  
17 the First Amendment, now the Second Amendment, the Fourth  
18 Amendment, the Fifth Amendment, the Sixth Amendment, the Eighth  
19 Amendment -- all of those, the Seventh Amendment not because it  
20 applies to federal. But all of them the court has said, we've  
21 determined the scope of, the boundaries of, that right as of  
22 the time of the ratification of the Constitution.

23           And the Supreme Court has been clear. The Second  
24 Amendment is not a second-class right. It is on the same level  
25 as the First Amendment and all of the others I just listed.

1           So if they are pegged, as the Supreme Court has been  
2 clear and as Justice Thomas listed in *Bruen* -- he cited to  
3 these cases. The Fourth Amendment clearly didn't apply to  
4 slaves.

5           But now the Supreme Court has been very clear that the  
6 understanding of it applies back in 1791. So too the  
7 understanding applies to the Second Amendment for the scope in  
8 1791.

9           And I don't agree with the premise, your Honor,  
10 respectfully, that it's two sides of the coin because we have  
11 shown that there are statutes that compel bringing guns to  
12 church. And the reason we said is very clear. Those  
13 worshipers felt imperiled by, whether it was --

14           THE COURT: By black people.

15           MR. BENNO: Perhaps. Perhaps also by native tribes.  
16 There is a variety of reasons. It is not just though. But  
17 today, our clients --

18           THE COURT: But it wasn't because -- it wasn't  
19 necessary to practice their religion. In other words, the  
20 reason why they had guns and they were directing men to bring  
21 their guns was in case -- again, whether it's native Americans  
22 or those that they feared at the time, whether they be freed or  
23 enslaved folks, that's why they had their guns, not because of  
24 their religion.

25           MR. BENNO: Correct. They're not saying that the guns

1 were a part of their religion. I agree with you on that, your  
2 Honor.

3 But I will also say that there is no regulation of  
4 guns in a place of worship. The regulation, what they're  
5 talking about in *Bruen* about history and tradition are  
6 restrictions on the Second Amendment. A restriction is taking  
7 away, a prohibition, not saying you must exercise your right.  
8 You must bear arms. That's a mandate.

9 What history and tradition and *Bruen* is talking  
10 about --

11 THE COURT: You're saying that the statutes that they  
12 passed requiring -- so on the one hand, you're saying I guess  
13 that the Second Amendment, just as written, doesn't require  
14 people to bring guns.

15 But the government -- you're saying that when they  
16 legislated that, that you must bring a gun -- that, in other  
17 words, it was just a direction that if someone didn't bring a  
18 gun, they could be --

19 MR. BENNO: It was a recognition that there is no  
20 barrier, there is no prohibition, on having a gun in a church.  
21 So they're telling you, you must bring it for the collective  
22 security of the community.

23 If there had been an understanding that churches were  
24 sensitive places, then they would never have been able to do  
25 that.



1 THE COURT: Wait. Wait. Wait. First of all, the  
2 "sensitive places" is a term of art that has come up more  
3 recently.

4 MR. BENNO: Yes.

5 THE COURT: But since you mentioned, why isn't a place  
6 of worship a sensitive place?

7 MR. BENNO: First of all, again, to show that  
8 something is a sensitive place, we get back to *Bruen*. There's  
9 a roadmap in *Bruen*, and it says that we start with the  
10 presumption.

11 If our clients fall within the text of the Second  
12 Amendment, then it's unqualified command. They are protected.  
13 That's what we start with. And I don't think that any of the  
14 defendants dispute that.

15 And then the burden shifts to the defendants to show  
16 that a restriction is consistent with our nation's history and  
17 tradition. That's the formulation. So what I am submitting on  
18 behalf of my clients is that the defendants have not shown  
19 that.

20 THE COURT: Let me ask: In terms of "sensitive  
21 places," how is a polling place, a school, the places listed I  
22 think by the "such as" I think listed by Justice Kavanaugh, how  
23 are places of worship different than the places that are  
24 enumerated in *Bruen*?

25 MR. BENNO: Well, so, a few different reasons. I go

1 through them in my reply and in my primary, in my principal,  
2 memo.

3 First, the First Amendment specifically explicitly  
4 protects the exercise of religion. So it sets religious  
5 locations apart from polling places, legislative assemblies,  
6 courthouses. *Bruen* listed those --

7 THE COURT: I'm sorry. You listed polling places.  
8 The right to vote is part and parcel. Right?

9 Isn't that part of the Constitution also?

10 MR. BENNO: It is. The thing with the polling  
11 places -- but I'm talking about the free-exercise clause. So  
12 when I was talking about the First Amendment, that's what I was  
13 referring to.

14 As I put into my reply, what seems to be the common  
15 denominator -- we're moving away from -- and I'm happy to do  
16 so. But we're moving away from the defendants' litany of cases  
17 that I showed how they don't apply. So I'll be happy to get  
18 back to you if you wish.

19 THE COURT: Right now I'm turning to, as I understand  
20 your argument then, that a place of worship is not a  
21 sensitive -- and I apologize -- is not considered --

22 MR. BENNO: A sensitive place. That's right. The  
23 reason is -- and the only thing that the defendants argue is --  
24 well, it's a place of congregation. That is not -- *Bruen* is,  
25 again, explicit.

1           Merely being a place of congregation does not qualify  
2 you under the label "sensitive place." So what we've seen is  
3 schools, places where minors are, like a K-through-12 school,  
4 kindergarten through 12 school.

5           THE COURT: So a college would not be considered a  
6 sensitive place under your theory?

7           MR. BENNO: I'm saying this is actually coming from  
8 legal scholarship. I cited it in my reply memo. This is what  
9 these academics have determined, and they said K through 12. I  
10 don't take a position as to whether or not colleges are or not.

11           But "if their location is one that concentrates  
12 adversarial conflict and can generate passionately angry  
13 emotions," and that's where they point out polling places. We  
14 just need at look at today and see how people are so passionate  
15 on whatever side of the aisle they are.

16           THE COURT: All right. People are also passionate  
17 about their religion.

18           MR. BENNO: But religious places also, courthouses.  
19 In fact, the city points out that places where religion is  
20 exercised, synagogues, are places of peace and tranquility and  
21 sanctuary, not places of conflict or where conflict can erupt.

22           THE COURT: I actually take issue with this argument  
23 that polling places are places of conflict. There are polling  
24 places that have been regulated and you can't electioneer  
25 within a certain distance.

1           But it's certainly not the tradition of this country  
2 that that is the case. In other words, that what is written  
3 into the Constitution is that people have a right to the  
4 franchise and they can exercise that franchise. So this notion  
5 or this ingrafting I think of this idea of conflict is  
6 something that I think isn't part of the tradition of this  
7 country.

8           So is that what you think Justice Kavanaugh meant when  
9 he said "polling places" and that's why?

10           MR. BENNO: No. Again, the sensitive location, when  
11 they talk about polling places, goes back to 1791, not  
12 contemporary. And in 1791, what they were talking about, were  
13 there were laws that forbid the mustering of militias in close  
14 proximity to the polling place because it would either  
15 intimidate people from voting or it would make people fearful;  
16 that if they voted a particular way, that they would be  
17 reprisals.

18           So there were laws that limited back then, in 1791 and  
19 before, that stopped militias on election day and in the  
20 location of the polling place. So they said there is a  
21 historical tradition.

22           I'm only saying what one academic is trying to find  
23 the common theme between the places that Justice Kavanaugh  
24 listed, and this is what that particular journal article is  
25 saying.

1           So I'm trying to explain to you why, when you asked  
2 about the First Amendment and how people exercised their  
3 rights, how it's different from a church.

4           THE COURT: So in terms of sensitive places, is the  
5 reading of "sensitive places" that you believe -- again, that  
6 it's a sensitive place and it's only in reference to the 1791  
7 era?

8           In other words, if it wasn't something that at that  
9 time there hadn't been regulation relating to it, then it  
10 cannot be considered a sensitive place now?

11           MR. BENNO: It has to be consistent with what was an  
12 area where the Second Amendment was regulated in an analogous  
13 fashion at the time of the founding. And if we can find  
14 confirmation in the later part of the 19th century, then, sure.  
15 We can look to those for confirmation. But they're not  
16 primary.

17           I would also just point out, Judge, the journal  
18 article says the other place that is deemed sensitive are  
19 government buildings containing officials who are at risk of  
20 assassination.

21           In all of these places -- the schools, the polling  
22 places, the courthouses, the legislatures, the government  
23 buildings -- those are all civic- and government-run  
24 establishments.

25           The very important distinction between a synagogue and

1 a church is that it is a private location. So therefore it  
2 unequivocally falls outside of those categories.

3 THE COURT: Okay. So a place like let's say a nursing  
4 home, that wouldn't be a sensitive place?

5 MR. BENNO: Again, that's not this case, Judge.

6 THE COURT: I'm asking in terms of -- I recognize it's  
7 not this case. I'm just trying to figure out the parameters.

8 So any place -- I guess what you're saying is any  
9 place that wasn't considered or for which there hadn't been a  
10 regulation relating to the Second Amendment back in 1791 cannot  
11 be considered a sensitive place based upon how you read *Bruen*.

12 MR. BENNO: Nursing homes, by the way -- I didn't even  
13 look at that. Maybe there are regulations on hospitals or on  
14 places for the infirmed or some sanitariums where a court would  
15 say there is an analogy to be drawn there.

16 But we didn't look at that obviously. We're focused  
17 on places of worship. What I can say also -- I don't want to  
18 forget to mention this -- to the extent we've been talking  
19 about churches and synagogues and places of worship, there is  
20 undeniably -- and the defendants make no effort to argue  
21 against this in any of their papers.

22 There is no regulation at any point in time in our  
23 nation's history restricting weapons possession, gun  
24 possession, the Second Amendment, and places of religious  
25 observation. I think that is a very important point to make.

1 MR. MORRIS: Judge, just to add, Judge Sinatra in the  
2 western district of New York at page 12 of his decision -- I  
3 quote him: "For all of history until now, the right to carry  
4 for self-defense encompassed New York places of worship." A  
5 determination has been made in this regard but not in the  
6 First Amendment regard.

7 MR. BENNO: Just to finalize it, even if your Honor  
8 were to look and say, well, history and tradition -- you  
9 actually started out by saying is it static. I would just come  
10 back to that and say, well, even if your Honor were to  
11 determine -- I think it would be incorrect. But you can look  
12 at 1868, an era around the ratification of the Fourteenth  
13 Amendment, for history and tradition.

14 It's unnecessary to do it in this case because the  
15 cases and the statutes that they have provided, all of the  
16 defendants, are all so distinguishable. They didn't, by the  
17 way, prohibit -- maybe one or two prohibited guns in a church  
18 the way that this statute does.

19 But some of them you are prohibited from caring a gun  
20 in a church if there is an assembly in the church, not a  
21 categorical ban. If our plaintiffs are alone in their  
22 synagogues with their gun, they violated the law.

23 Some of the statute says you are allowed to publicly  
24 carry but not concealed carry because, back then, what was the  
25 concern was concealed carry. But open carry was not a problem.

1           So they didn't forbid guns in the church if it was  
2 open. And yet other ones say you are forbidden from carrying a  
3 gun in a church if you are doing so to terrify the parishioners  
4 who are there.

5           So there are all these caveats in the statutes that  
6 they have that don't exist with the New York statute and that  
7 present them as non-analogous to this particular statute.

8           THE COURT: All right. Let me ask the defendants: In  
9 connection with "sensitive places," how do you define the  
10 parameters of a "sensitive place" as that term is used in  
11 *Bruen*?

12           MR. CONRAD: Well, I think part of the problem here is  
13 that under plaintiffs' reading of *Bruen*, it sounds like the  
14 only sensitive space restrictions that would ever be permitted  
15 are those specifically mentioned in that case, so basically, I  
16 guess, just schools and government facilities.

17           I don't think that can possibly make sense as an  
18 initial matter. If the only permissible sensitive locations  
19 were those that were explicitly mentioned in *Bruen*, then why  
20 would *Bruen* not just have said that.

21           THE COURT: Let's start from the premise that that's  
22 not the case. In other words, I'm not sure, but I think it was  
23 listed as a "such as."

24           So why, in your view, should places of worship be  
25 considered part of that?



1 MR. CONRAD: Well, in the terms of *Bruen*, I think  
2 because it's clear that there is a deep historical tradition of  
3 considering religious facilities to be sensitive places.

4 In our briefing, we point to multiple state  
5 legislatures and multiple state courts that felt that way  
6 during the formation of our Second Amendment tradition.

7 I think it's also important to note that these are in  
8 addition to states. The statutes and the cases we cite are  
9 also in addition to cases that have broader restrictions. So  
10 it didn't even need to specifically designate religious  
11 facilities as "sensitive."

12 I know plaintiffs have relied a lot on last week's  
13 *Hardaway* decision out of the Western District. And I think  
14 that's actually one thing that the *Hardaway* court wrong, is  
15 that they ignored this context that some states didn't  
16 necessarily have these exact laws because they already had a  
17 broader one in place.

18 THE COURT: Let me ask this though in terms of  
19 sensitive places, do you read the sensitive places and the  
20 reference in *Bruen* that I am directed to look to the timing, in  
21 other words, the consideration, of a place as a "sensitive  
22 place" back in either the passage of the Second Amendment or  
23 the Fourteenth Amendment and what was considered a "sensitive  
24 place" vis-à-vis carrying a weapon?

25 MR. CONRAD: Well, I think that we cited quite a lot

1 of statutes and cases from the era of the Fourteenth Amendment  
2 that do exactly this. I think plaintiffs at one point, when  
3 they were disputing, had mentioned that we had maybe cited one  
4 case out of a large denominator of cases. I don't think that's  
5 true at all.

6 I think we actually cited four cases from state high  
7 courts. That obviously doesn't even include the many cases  
8 that might have been from lower courts. And these cases, from  
9 the era that's relevant here, had a lot to say about this.

10 For example, the Georgia case from 1874 that we cite  
11 said that: "The practice of carrying arms at courts,  
12 elections, and places of worship is a thing so improper in  
13 itself, so shocking to all sense of propriety, so wholly useful  
14 and full of evil, that it would be strange if the framers of  
15 the Constitution had used words broad enough to give it a  
16 constitutional guarantee."

17 That's one example of the four that we cite, again,  
18 all from the highest courts of states of the states that had  
19 these specific restrictions on places of worship because they  
20 didn't have broader restrictions.

21 So I think as far as "sensitive places" go, I think  
22 it's pretty clear that there were quite a few states at that  
23 time that considered places of worship to fall into this  
24 category.

25 THE COURT: Let me ask this in terms of the scope of

1 the *Hardaway* injunction.

2 My reading of it is that it applies to the defendants  
3 in that case and that it's not an injunction that applies  
4 outside of the defendants who were named in that case.

5 Do the parties agree that that is the scope of  
6 *Hardaway*?

7 MR. CONRAD: That's my understanding of it.

8 THE COURT: Plaintiff?

9 MR. MORRIS: Your Honor, I believe this was enjoined.  
10 I've got the decision in front of me. So I'm going to refer to  
11 it. "Ordered: Defendants' agents, servants, employees are  
12 enjoined, effective immediately, from enforcing all New York  
13 Penal Law 265.01-e(2)(c)."

14 THE COURT: The defendants in that case -- and I  
15 apologize, although I do have it here somewhere. The  
16 defendants --

17 MR. MORRIS: There is a footnote, your Honor, that  
18 says: "The states's request to limit any TRO to the individual  
19 plaintiffs is denied as untenable. Either the exclusion  
20 applies or it does not."

21 THE COURT: I'm sorry. What footnote?

22 MR. MORRIS: Footnote 24 on page 40, your Honor.

23 THE COURT: Footnote 24?

24 MR. MORRIS: Yes, your Honor. On the last page, your  
25 Honor.

1 THE COURT: Okay. I was looking at the Westlaw cite.  
2 It doesn't have a 24.

3 If you could read that to me again.

4 MR. MORRIS: Absolutely, your Honor. At the end of  
5 the quote that I just mentioned. It's footnote 24: "The  
6 state's request to limit any TRO to the individual plaintiffs  
7 is denied as untenable. Either the exclusion applies or it  
8 does not."

9 THE COURT: No. I guess what I was referring to is it  
10 that it applies to only the defendants in that case?

11 In other words, do you read it to apply to Steven  
12 Nigrelli, the acting superintendent of the state police; Brian  
13 Seaman, the DA in Niagara County; and John Flynn, the DA in the  
14 county of Erie?

15 MR. MORRIS: Your Honor, the language is broad. It  
16 says: "All persons in concert or in participation who received  
17 notice of this temporary restraining order."

18 We're here. We've submitted this on the record. If  
19 you're asking me if it applies, it should. If it doesn't, we  
20 have more than ample grounds under the First and Second  
21 Amendment to make sure it applies.

22 THE COURT: No. What I'm asking is it sounds like  
23 what you're saying is that you believe it's a statewide  
24 injunction.

25 In which case then, what is the emergent need here?

1 In other words, what's the emergency here if you believe that  
2 that is a statewide injunction?

3 MR. BENNO: First, it's a TRO. So there's a  
4 preliminary injunction hearing. It doesn't apply to the  
5 defendants that we -- there are state defendants here to be  
6 sure, Steven Nigrelli. And I think the others may be district  
7 attorneys up in the counties where this was brought. Steven  
8 Nigrelli is the deputy superintendent of the New York State  
9 Police.

10 The defendants have asserted they don't believe -- and  
11 they've said it a couple times now. They don't believe that it  
12 applies to them. They're not refraining from arresting people  
13 because of it. They've said that earlier today.

14 We take the position that to the extent it applies, it  
15 would apply only to the state defendants, and therefore, the  
16 New York City defendants, the Rockland County defendants, it's  
17 at least questionable. And they seem to have answered how  
18 they're resolving that question in their minds.

19 THE COURT: Okay. I will allow some brief arguments.  
20 I don't have any additional questions. But I'm going to  
21 truncate any additional argument. But I know that the  
22 defendants wanted to make a point about the vagueness issue.  
23 Yes.

24 MR. CIAPPETTA: Your Honor, may I address the last  
25 aspect?

1 THE COURT: Yes.

2 MR. CIAPPETTA: Thank you, Judge. I think you had  
3 heard from the state on the Second Amendment with respect to  
4 sensitive places. So we'd like to be heard on that as well.

5 THE COURT: Yes.

6 MR. CIAPPETTA: Two issues. The first question was  
7 21(A), whether it's static or it evolved. And I think that the  
8 amicus brief that was put in by Everytown Law is very helpful  
9 on that regard. They're not here today.

10 But they have quotes from *Bruen* that say that the  
11 question of 1868 or 1791 is undecided. The Supreme Court could  
12 have very well decided that, if they wanted to, at the time of  
13 *Bruen*, and they did not. So we say it's static. Of course  
14 we're not saying it can change in the 1980s or the 1970s. But  
15 between those periods of time -- that's the relevant period of  
16 time.

17 Indeed, if you look at what's presented in this case,  
18 the plaintiffs cite to a 1770 statute from Georgia requiring  
19 firearms to be brought at places of worship or houses of  
20 worship. But then, by 1870, Georgia repealed that. Obviously  
21 they thought better than that and that was not a place where  
22 firearms should be.

23 THE COURT: Or they thought better that they had the  
24 authority to restrict the carrying of firearms to --

25 Well, it was just repealing that you have to have it.

1 Right?

2 MR. CIAPPETTA: Right. Well, I think they went  
3 further. I think it became a prohibition then. They repealed  
4 it, and they prohibited it. In then in the Supreme Court  
5 decision cited by the state, they said, a few years later "It's  
6 unthinkable to have them there."

7 THE COURT: That is the quote that I just read.

8 MR. CIAPPETTA: It's a sea change. So to say you're  
9 only locked into what happened in 1791 when the Fourteenth  
10 Amendment applied the Second Amendment against the states,  
11 that, to me, would be illogical.

12 Back to the second half of this discussion on what are  
13 "sensitive places" and how to interpret them, the city  
14 defendants address that in two areas:

15 First, we look at the sensitive places identified by  
16 the court in *Bruen*. If you look at *Bruen*, *Heller*, and  
17 *McDonald*, there are certain presumptively lawful regulations  
18 that don't require you to run through the text and tradition  
19 tests. I think that's pretty clear.

20 And the court said, with respect to one of those  
21 presumptively lawful regulations, is sensitive places. And  
22 they say, as you note, "such as, polling places, legislative  
23 buildings, government buildings, education" or schools.

24 So we first argue in our brief that houses of worship  
25 and religious institutions, they fit within that. So they're

1 the "such as." And, such as there, you don't need to go  
2 through the history and tradition test. That's very clear from  
3 the language itself. It says: "Such as similar or analogous  
4 and new places." So the court was not limiting it to that.

5 If you follow the plaintiffs' argument, they would  
6 say, well, that list is only places of conflict, which to me  
7 doesn't make sense because I don't think many of those places  
8 have traditionally been places of conflict, certainly not  
9 educational institutions. And I'm not aware of courthouses  
10 becoming a bed of violence.

11 THE COURT: I guess until folks -- again, not unlike  
12 polling places, until people decide that it is time to start  
13 banning books in school. That's more tonnage than anything.

14 Go ahead.

15 MR. CIAPPETTA: So you have that list there. And, to  
16 me, you have to say, okay. What ties those things together to  
17 find new and analogous places. The presence of conflict is not  
18 what ties them together. The city defendant argues that those  
19 are classic historical institutions that have all been, in one  
20 way or the other, part of the bedrock of this country's  
21 tradition and founding, first.

22 And second, we argue that those are all places,  
23 interestingly, where there is other First Amendment or other  
24 constitutional happening within. So educational institutions,  
25 for example, are free-speech hubs. Students are learning the



1 marketplace of ideas. Polling places are Fifth Amendment  
2 places. You're casting your right to vote. Legislative  
3 buildings, also you're expressing your right to associate,  
4 perhaps, and certainly to speak in a public session. And  
5 houses of worship, likewise, you're exercising your free  
6 exercise rights therein.

7 So, to us, the ties that bind are twofold: It's one:  
8 That all of those institutions are classic institutions that  
9 are critical to the foundation of this country -- whether it's  
10 the right to vote; whether it's the right to educate, which our  
11 founders have said that education is necessary for a  
12 constitutional republic. And without education, you can't  
13 inform the citizens of any of their rights and even their  
14 obligations under our democracy.

15 And then, second, those places in that *Bruen* list  
16 promote other constitutional rights, specifically those in the  
17 Bill of Rights.

18 So that, to me, are the ties that tie it together, not  
19 the scholarly cites that the plaintiff has offered, that it's  
20 either a place of conflict or it's a places where minors are.  
21 Well, that would only involve one of that list there.

22 That list has to have some kind of coherence to it.  
23 And we submit that that coherence is that they are bedrock  
24 American institutions, one; and secondly, that constitutional  
25 rights are being promoted and safeguarded there within.

1 THE COURT: All right. I'm going to cut off argument  
2 there. I do have one more question just to confirm. And I  
3 believe it was Plaintiff Goldstein who is in Florida now.

4 Is that correct?

5 MR. MORRIS: He is.

6 THE COURT: Plaintiff Goldstein isn't moving to  
7 Florida, is he?

8 MR. BENNO: No.

9 THE COURT: In other words, he has a license down  
10 there, and he's able to carry. I'm just trying to make sure  
11 that, in terms of his status here, that he's not changing his  
12 domicile. He's still here.

13 MR. MORRIS: It is. He's here.

14 THE COURT: All right. I know I was going to open it  
15 up, but we've been going for long enough I think. So I'm going  
16 to cut off argument there. I do expect to get the supplemental  
17 declarations.

18 How much time would you need to put those together?

19 MR. BENNO: Well, your Honor, we're running up against  
20 the Jewish sabbath.

21 THE COURT: I have a suggestion. You don't have to  
22 give me an answer now. Why don't you confer with your clients  
23 and your adversaries and propose a date to me when you would  
24 intend to submit the supplementation.

25 MR. BENNO: Certainly, your Honor. I would make one

1 request, if I may.

2 THE COURT: Yes.

3 MR. BENNO: Obviously we feel that there is an urgency  
4 to this, and we want to get this to you right away. I  
5 understand wanting to have the full and robust record, and  
6 we're going to do everything to get that to you as  
7 expeditiously as possible.

8 I would request respectfully that pending the decision  
9 on this preliminary injunction motion, I'd like to at this time  
10 renew our application for the TRO. We can do it on an  
11 accelerated basis to get you those materials so that you have  
12 them to review.

13 But there is an eminence to this. There is an urgency  
14 on our end. It is for all of the reasons that we've said  
15 today, for all of the constitutional grounds.

16 THE COURT: I'm going to adhere here to my prior  
17 ruling. What you have here, in essence -- if you're asking  
18 that, between now and the time that I ultimately issue a  
19 decision, I restrict the statute, I'm not going to do that.

20 Having said that, I'll get your papers, review it, and  
21 we will have a decision. Because my sense is, in the end, that  
22 it's not going to end with me.

23 Well, let me ask: Is *Hardaway* being appealed? Does  
24 anybody know?

25 MR. BENNO: I believe they filed a notice of appeal.

1 Actually, no. They have a TRO.

2 THE COURT: So they have to wait for the PI.

3 MR. CONRAD: It's my understanding that the TRO has  
4 not been because their PI is pending.

5 THE COURT: Is there going to be an evidentiary  
6 hearing?

7 In other words, are there going to be witnesses  
8 testifying at that hearing?

9 MR. CONRAD: I don't know the answer to that. I'm  
10 sorry.

11 THE COURT: So as I mentioned, I'm going to adhere to  
12 my prior ruling in my TRO.

13 MR. CIAPPETTA: Your Honor, I just wanted to note our  
14 objection to the filing of the declaration of Professor Joyce  
15 Lee Malcolm. That was put in in reply.

16 And there is case law. I don't have it in front of  
17 me, but I did research the issue where it says that those  
18 issues should not be put on reply. A declaration should only  
19 come in for the first time with the principal moving papers.

20 THE COURT: Okay. With the understanding that I will  
21 look at -- I haven't focused on that declaration, and I will  
22 consider it as such. So I will look at it with an eye towards  
23 the argument that you're objecting to its submission, because  
24 it was done on reply.

25 MR. CIAPPETTA: I'm sorry. Just one other issue. On

1 the supplemental declaration, to the extent that it's going  
2 beyond any of the issues set forth in your order from last  
3 night, we do reserve our right to maybe put in something short,  
4 if there is something new there that is going beyond these  
5 questions.

6 THE COURT: As I said, if there's something new that's  
7 in there, it will be subject to the same case law that applies  
8 to the reply.

9 MR. CIAPPETTA: Okay.

10 THE COURT: But if you see something that you believe  
11 is new in there and you wish the opportunity to respond, you  
12 should submit a letter to me making the request.

13 MR. CIAPPETTA: Okay.

14 THE COURT: Other than what was discussed here and the  
15 additional questions that I discussed here, that it would be  
16 limited to that.

17 What I would ask though is if there is going to be  
18 something the plaintiff is going to put in in the declaration,  
19 you will meet and confer. And if you can agree that they will  
20 have an opportunity to respond to something new, including what  
21 is in the supplemental declarations, I'm fine with that so that  
22 there isn't a battle back and forth. But if there isn't, then  
23 I'll resolve whatever the dispute is.

24 MR. CONRAD: One quick procedural question,  
25 your Honor. As you noted, it's probably likely that both

1 parties might appeal, if there was an adverse decision here.

2           So I would just ask that whatever the decision is,  
3 you consider staying the effectiveness of any order for maybe  
4 three days, just so that whichever party would like to appeal  
5 can do so without having to run into an emergency stay.

6           THE COURT: I would consider that. In three days. I  
7 might give you a few more days obviously, if it's going to be  
8 appealed. And I'll also be mindful.

9           MR. CIAPETTA: Okay.

10           THE COURT: Thank you. Thank you very much, Counsel,  
11 for coming in. It was a very helpful argument. I look forward  
12 to getting the supplemental declarations. We'll stand  
13 adjourned. Thank you.

14                   (Adjourned)

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