22-2933

United States Court of Appeals

for the

Second Circuit

Jimmie Hardaway, Jr., Larry A. Boyd, Firearms Policy Coalition, Inc., Second Amendment Foundation, Inc.,

Plaintiffs-Appellees,

– v. –

Steven A. Nigrelli, in his official capacity as Superintendent of the New York State Police,

Defendant-Appellant,

Brian D. Seaman, in his official capacity as District Attorney for the County of Niagara, New York, John J. Flynn, in his official capacity as District Attorney for the County of Erie, New York,

Defendants-Appellees.

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

BRIEF FOR DEFENDANT-APPELLEE BRIAN D. SEAMAN, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE COUNTY OF NIAGARA, NEW YORK

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

PRELIMINARY STATEMENT

This brief is submitted by defendant-appellee, Brian D. Seaman, in his official capacity as the District Attorney for the County of Niagara, New York (hereinafter referred to as "Niagara County District Attorney Seaman"). Plaintiffs-appellees, Jimmie Hardaway, Jr., Larry A. Boyd, Firearms Policy Coalition, Inc., and Second Amendment Foundation (hereinafter referred to collectively as the "Plaintiffs-Appellees"), commenced this action in the United States District Court for the Western District of New York under 42 U.S.C. § 1983 as against defendant-appellant, Steven A. Nigrelli, in his official capacity as Superintendent of the New York State Police (hereinafter referred to as "Superintendent Nigrelli"), Niagara County District Attorney Seaman, and defendant-appellee, John F. Flynn, in his official capacity as District Attorney for the County of Erie, New York (hereinafter referred to as "Erie County District Attorney Flynn"), seeking, *inter alia*, a declaratory judgment that New York Penal Law § 265.01-e(2)(c) infringes upon Plaintiffs-Appellees' rights to bear arms protected under the Second and Fourteenth Amendments to the United States Constitution, thus rendering it devoid of any legal force or effect. [Docket No. 72, *Joint Appendix* ("J.A."), at pp. 53-98].

Plaintiffs-Appellees moved for a temporary restraining order and then a preliminary injunction enjoining Superintendent Nigrelli, Niagara County District Attorney Seaman, and Erie County District Attorney Flynn and their officers, agents,

servants, employees, and all persons in concert or participation with them, from enforcing all of New York Penal Law § 265.01-e(2)(c), and their regulations, policies, and practices implementing it. (J.A. 99-125). The district court granted both Plaintiffs-Appellees' requests for injunctive relief. (J.A. 9-52). Superintendent Nigrelli now appeals from the interlocutory Decision and Order of Judge Sinatra granting the preliminary injunction. (J.A. 343).

As is set forth below, the district court properly granted the preliminary injunction for the purpose of furthering a judicial determination as to the constitutionality of New York Penal Law § 265.01-e(2)(c) and said decision should be affirmed.

JURISDICTIONAL STATEMENT

The district court has original subject matter jurisdiction over this federal question case pursuant to 28 U.S.C. § 1331. This Court has jurisdiction over the instant appeal of the interlocutory order granting Plaintiffs-Appellees' application for a preliminary injunction pursuant to 28 U.S.C. § 1292(a)(1). The instant appeal is timely insofar as Superintendent Nigrelli filed his notice of appeal on November 14, 2022, which is within the thirty days after entry of the order granting the preliminary injunction. *See* Fed. R. App. P. 4(a)(1)(A).

STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion in issuing a preliminary injunction enjoining enforcement of New York Penal Law § 265.01-e(2)(c) finding the Plaintiffs-Appellees met their burden of establishing irreparable harm, a likelihood of success on the merits, and a public interest in issuance of said injunction.

Niagara County District Attorney Seaman respectfully submits the district court did not abuse its discretion in awarding a preliminary injunction as Plaintiffs-Appellees met their burden of establishing an entitlement to a preliminary injunction.

STATEMENT OF THE CASE

On October 13, 2022, Plaintiffs-Appellees filed a Complaint in the Western District of New York setting forth one claim grounded in 42 U.S.C. § 1983 and seeking: (1) a declaratory judgment that New York Penal Law § 265.01-e(2)(c) infringes upon Plaintiffs-Appellees' rights to bear arms protected under the Second and Fourteenth Amendments to the United States Constitution and is thus devoid of any legal force or effect; (2) injunctive relief restraining Superintendent Nigrelli, Niagara County District Attorney Seaman, and Erie County District Attorney Flynn and their officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of the injunction, from enforcing New York Penal Law § 265.01-e(2)(c), and their regulations, policies, and practices

implementing it; (3) Plaintiffs-Appellees' attorneys' fees and costs pursuant to 42 U.S.C. § 1988 and any other applicable law; and (4) all other and further legal and equitable relief, including injunctive relief, against Superintendent Nigrelli, Niagara County District Attorney Seaman, and Erie County District Attorney Flynn as necessary to effectuate the Court's judgement, and/or as the Court otherwise deems just and equitable. (J.A. 53-75). On October 14, 2022, Plaintiffs-Appellees filed a motion for a temporary restraining order and preliminary injunction. (J.A. 99).

On October 19, 2022, Erie County District Attorney Flynn served his response to Plaintiffs-Appellees' application for a temporary restraining order. (J.A. 126-127). On that same date, Niagara County District Attorney Seaman filed his response to Plaintiffs-Appellees' application for a temporary restraining order. (J.A. 128-132). In his response, Niagara County District Attorney Seaman advised the Court that he did not object to the issuance of a temporary restraining order to permit a judicial determination as to the constitutionality of New York Penal Law § 265.01-e(2)(c)(places of worship). (J.A. 131). Further, he advised that none of the assistant district attorneys at the Niagara County District Attorney's Office have had any occasion to enforce the challenged statute and that the Niagara County Legislature passed a resolution on September 13, 2022 in opposition to the actions taken by the State of New York restricting Second Amendment rights. (J.A. 131). On October

19, 2022, Former Superintendent of the New York State Police, Kevin P. Bruen,[1] also filed his opposition to Plaintiffs-Appellees' motion for temporary restraining order. [ECF No. 28].

On October 20, 2022, Plaintiffs-Appellees filed their reply in further support of their motion for a temporary restraining order. [ECF No. 31]. On that same date, the district court heard oral argument in connection with Plaintiffs-Appellees' application for a temporary restraining order and issued its Decision and Order. (J.A. 219-267). The district court entered its Decision and Order and granted Plaintiffs-Appellees' application for a temporary restraining order and ordered that Superintendent Nigrelli, Niagara County District Attorney Seaman, and Erie County District Attorney Flynn and their officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of this temporary restraining order, were enjoined, effective immediately, from enforcing all of N.Y. Pen. L. § 265.01(2)(c) (places of worship or religious observation), and their regulations, policies, and practices implementing it. (J.A. 267). The Decision and Order directed that the temporary restraining order was to remain in effect pending disposition of Plaintiffs-Appellees' motion for preliminary injunction. (J.A. 267).

[1] Under Federal Rule of Civil Procedure 25(d), Steven A. Nigrelli, acting Superintendent of the New York State Police, was substituted in the place of defendant, Kevin P. Bruen, who resigned effective October 19, 2022.

On October 27, 2022, Niagara County District Attorney Seaman filed his response to Plaintiff-Appellees' motion for a preliminary injunction. (J.A. 268-274). In his response, Niagara County District Attorney Seaman reiterated the fact that as District Attorney, he is sworn to uphold and enforce the laws of the state of New York. (J.A. 271). However, considering the significant constitutional challenge as to the validity of New York Penal Law § 265.01-e(2)(c), it is his position that enforcement should be stayed until a judicial determination is made as to the statute's enforceability and constitutionality. (J.A. 271). Based on Niagara County District Attorney Seaman's obligation to "conduct all prosecutions", he believed it would be inconsistent to mandate enforcement of this section of the statute until there is a final judicial determination. (J.A. 274). On that same date, Erie County District Attorney Flynn filed his response to Plaintiffs-Appellees' motion for a preliminary injunction. (J.A. 275-276). Superintendent Nigrelli filed his opposition to Plaintiffs-Appellees' motion for a preliminary injunction. [ECF No. 40]. On November 2, 2022, Plaintiffs-Appellees' filed their reply in further support of their motion for preliminary injunction. [ECF No. 49].

On November 3, 2022, the district court heard oral argument in connection with Plaintiffs-Appellees' application for a preliminary injunction and issued its Decision and Order. (J.A. 335-342, 51). In the Decision and Order, the district court granted Plaintiff-Appellees' motion for a preliminary injunction and ordered that

Superintendent Nigrelli, Niagara County District Attorney Seaman, and Erie County District Attorney Flynn and their officers, agents, servants, employees, and all persons in concert or participation with them who receive notice of this preliminary injunction, were enjoined, effective immediately, from enforcing all of N.Y. Pen. L. § 265.01-e(2)(c) (places of worship or religious observation), and their regulations, policies, and practices implementing it. (J.A. 51-52). The Decision and Order directed that the preliminary injunction was to remain in effect pending disposition of the case on the merits. (J.A. 52).

On November 14, 2022, Superintendent Nigrelli appealed the district court's Decision and Order. (J.A. 343). On November 15, 2022, Superintendent Nigrelli moved for a stay of preliminary injunction pending the outcome of the appeal. [C.A.2 ECF No. 23]. On November 25, 2022, the motion for a stay was opposed. [C.A.2 ECF No. 38]. On December 7, 2022, this Court granted the motion for a stay, subject to a limitation, barring the enforcement of § 265.01-e(2)(c) as it pertains to persons who have been tasked with the duty to keep the peace at places of worship. [C.A.2 ECF No. 53].

STATEMENT OF THE STANDARD OF REVIEW

"When reviewing an order granting either a preliminary or a permanent injunction, [this Court] review[s] the district court's legal holding *de novo* and its ultimate decision for abuse of discretion." *Goldman, Sachs & Co. v. Golden Empire*

Schools Financing Auth., 764 F.3d 210, 214 (2d. Cir. 2014), *citing UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011); *ACORN v. United States*, 618 F.3d 125, 133 (2d. Cir. 2010). A party seeking a preliminary injunction must show (1) irreparable harm; (2) either a likelihood of success on the merits or both serious questions on the merits and a balance of hardships decidedly favoring the moving party; and (3) that a preliminary injunction is in the public interest." *N. Am. Soccer League, LLC v. United States Soccer Federation, Inc.*, 883 F.3d 32, 37 (2d. Cir. 2018)(internal citations omitted). "Where the requested preliminary injunction would stay government action taken in the public interest pursuant to a statutory or regulatory scheme—as it does here—…the party seeking injunctive relief must satisfy the more rigorous prong of 'likelihood of success.' This higher standard of proof requires judicial deference to those regulations developed through reasoned democratic processes." *Bronx Household of Faith v. Bd. of Educ. of City of New York*, 331 F.3d 342, 349 (2d. Cir. 2003)(internal citations omitted).

ARGUMENT

POINT I

PLAINTIFFS-APPELLEES HAVE ESTABLISHED A LIKELIHOOD OF SUCCESS ON THE MERITS OF THEIR SECOND AMENDMENT CHALLENGE TO THE PLACE-OF-WORSHIP PROVISION

The district court appropriately held that Plaintiffs-Appellees are likely to succeed on the merits of their Second and Fourteenth Amendment claim. (J.A. 21).

As properly determined by the district court, New York's new place of worship or religious observation exclusion violates an individual's right to keep and bear arms. (*Id.*). As this Court is aware, the right of individuals to keep and bear arms in public for self defense is set forth in the Second Amendment to the United States Constitution, ratified in 1791: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. Const. amend. II. As discussed at length in the district court's Decision and Order, the Supreme Court has recently explored this right and supplied the requisite framework that resolves the instant issue in three of its decisions. *See generally District of Columbia v. Heller,* 554 U.S. 570 (2008); *McDonald v. City of Chicago,* 561 U.S. 742 (2010); *New York State Rifle & Pistol Assoc., Inc. v. Bruen,* __ U.S. __, 142 S.Ct. 2111 (2022).

The Supreme Court has made clear that individuals have the right to carry handguns publicly for self-defense. (J.A. 36). As noted by the district court, "New York's exclusion is valid only if the State 'affirmatively prove[s]' that the restriction is part of the Nation's historical tradition of firearm regulation." (J.A. 36 citing *Bruen,* 142 S.Ct. at 2127). Since the Second Amendment is the very product of an interest balancing, already conducted by "the People," which "elevates above all other interests the right of law-abiding, responsible citizens to use arms for self-defense", the Court constructed a rigorous test in determining whether this restriction

is part of the Nation's historical tradition of firearm regulation. *Id.* at 1231 citing *Heller,* 554 U.S. at 635.

Despite this long-standing tradition, New York's new exclusion is in direct conflict with the Supreme Court's decision in *Bruen* explaining that "confining the right to bear arms to the home would make little sense given that self-defense is the central component of the Second Amendment right itself. After all, the Second Amendment guarantees an individual right to possess and carry weapons in case of confrontation, and confrontation can surely take place outside the home" and at places of worship. *Id.* at 2135 (internal quotations, citations, and brackets omitted).

The district court appropriately found that Plaintiffs-Appellees' are ordinary, law-abiding citizens which the Second Amendment applies. (J.A. 37). Consistent with *Bruen,* the Second Amendment presumptively guarantees Plaintiffs-Appellees the right to "bear" arms in public for self-defense, including places of worship. (J.A. 37).

With respect to whether Superintendent Nigrelli has met his historical burden, the district court correctly held that he did not. The decision and order extensively discusses the fact that there is no American tradition supporting the challenged law. (J.A. 39-41). Nor is there a historical tradition of broadly prohibiting the public carry of commonly used firearms for self-defense. *Bruen,* 142 S.Ct. at 2138. As mentioned in the Decision and Order, "tradition" requires "continuity" as opposed

to one-offs, outliers, or novel enactments, which Superintendent Nigrelli unsuccessfully attempts to cite in order to meet his burden of demonstrating a tradition of accepted prohibitions of firearms in places of worship or religious observation. (J.A. 42)

The district court appropriately held that New York's place of worship exclusion "violates the Fourteenth Amendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." (J.A. 45 citing *Bruen,* 142 S.Ct. at 2156). Thus, as correctly confirmed by the district court, Plaintiffs-Appellees established that they remain likely to succeed on the merits of their constitutional claim, and the court appropriately issued a preliminary injunction. (J.A. 45).

POINT II

PLAINTIFFS-APPELLEES HAVE DEMONSTRATED IRREPARABLE HARM

The district court properly held that absent a preliminary injunction, Plaintiffs-Appellees' constitutional rights are being violated. (J.A. 46). The Second Circuit has held that irreparable harm is "certain and imminent harm for which a monetary award does not adequately compensate." *Wisdom Imp. Sales Co., LLC v. Labatt Brewing Co., Ltd.,* 339 F.3d 101, 113 (2d Cir. 2003). The existence of irreparable harm is apparent where "but for the grant of equitable relief, there is a substantial chance that upon final resolution of the action the parties cannot be returned to the

positions they previously occupied." *Brenntag Int'l Chem., Inc. v. Bank of India,* 175 F.3d 245, 249 (2d Cir. 1999). Further, the Supreme Court has held that the loss of "First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Roman Cath. Diocese of Brooklyn v. Cuomo,* 141 S.Ct. 63, 67 (2020) quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

It is undisputed that the challenged restrictions, if enforced, will cause irreparable harm to the Plaintiffs-Appellees. As properly found by the district court, law-abiding citizens, including the Plaintiffs-Appellees, are being forced to forego their Second Amendment rights to exercise their First Amendment rights to free exercise of religion, or vice versa. (J.A. 46). The enactment and enforcement of the challenged statute has resulted in Plaintiffs-Appellees being forced to sacrifice their Second Amendment rights by having to disarm before coming to church, being left to the hands of opportunistic, lawless individuals who have no concern about the place of worship exclusion. (J.A. 46, 108, 112). Alternatively, these individuals are forced for their own safety to decline to exercise their right to worship, having been stripped of their ability to defend themselves and their congregations. (*Id.*). Therefore, as correctly decided by the district court, Plaintiffs-Appellees have satisfied the irreparable harm element. (J.A. 47).

POINT III

THE ISSUANCE OF A PRELIMINARY INJUNCTION IS IN THE PUBLIC INTEREST

In order to grant a preliminary injunction, courts must consider whether the issuance of a preliminary injunction is in the public interest. *See Bronx Household of Faith v. Bd. of Educ. of City of N.Y.,* 331 F.3d, 349 (2d Cir. 2003). The public has a significant interest in the "strong sense of the safety that a licensed concealed handgun regularly provides, or would provide, to the many law-abiding responsible citizens in the state too powerless to physically defend themselves in public without a handgun." *Antonyuk v. Bruen,* No. 22-CV-0734, 2022 WL 3999791, at *36 (N.D.N.Y. 2022).

The district court's Decision and Order correctly concluded that a preliminary injunction would serve the public interest of fostering self-defense at places of worship across the state. (J.A. 47). In this case, the challenged law exposes a population of place of worship attendees who will be left at the hands of potentially armed wrongdoers, uninterested in following any law, absent the issuance of a preliminary injunction. (J.A. 48). For example, the recent history of violence in churches, particularly the murder of nine parishioners in Charleston's Emanuel African Methodist Episcopal Church in 2015, has resulted in Plaintiffs-Appellees' conviction to carry for self-defense. (J.A. 108, 112). However, since the enactment of the place of worship ban, Plaintiffs-Appellees are required to disarm before

coming to church in order to comply with the challenge statute, resulting in a diminishment of their personal safety. (J.A. 108, 112).

Further, Niagara County District Attorney Seaman is sworn to uphold and enforce the laws of the State of New York. (J.A. 271). Pursuant to New York County Law § 700, Niagara County District Attorney Seaman is responsible to "conduct all prosecutions for crimes and offenses cognizable by the courts of the county for which he ** shall have been elected". (J.A. 274 citing N.Y. County Law § 700(1)(McKinney). In consideration of the significant constitutional challenge as to the validity of New York Penal Law § 265.01-e(2)(c) that has been raised in this lawsuit, it is his position that enforcement of this provision should be stayed until a judicial determination is made as to the statute's enforceability and constitutionality. (J.A. 271). It should be noted the Niagara County Legislature passed a resolution on September 13, 2022 in opposition to the actions taken by the State of New York restricting Second Amendment rights, wherein it expressed a commitment to "pursuing all legislative and legal remedies, either alone or in concert with other like-minded counties and organizations, to overturn this assault on our Constitutional rights". (J.A. 273-274).

Given the stay of the preliminary injunction, Niagara County and Niagara County District Attorney Seaman are in a position to potentially have to enforce an unconstitutional statute during the duration of time it will take to obtain a final

judicial determination as to the statute's constitutionality and enforceability. Accordingly, a preliminary injunction is appropriate and avoids the untenable position encountered by municipalities in having to enforce a statute for which the constitutionality has been challenged.

CONCLUSION

Based on the foregoing, Niagara County District Attorney Seaman supports Plaintiffs-Appellees' application for a preliminary injunction for the purpose of furthering a judicial determination as to the constitutionality of New York Penal Law § 265.01-e(2)(c). Therefore, the Court should affirm the Decision and Order of the district court granting the Plaintiffs-Appellees' application for a preliminary injunction.

Dated: Buffalo, New York
February 27, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 3,232 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). It has been prepared in a proportionally spaced typeface using MS Word in 14 pt Times New Roman.

Dated: February 27, 2023