Nos. 10-56971, 11-16255

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

EDWARD PERUTA, *et al.*,

Plaintiffs-Appellants

v.

COUNTY OF SAN DIEGO, *et al.*,

Defendants-Appellees

Appeal from the United States District Court

for the Southern District of California

No. CV 09CV2371–IEG (BGS)

***AMICUS CURIAE* BRIEF OF CONGRESS OF RACIAL EQUALITY, INC., IN SUPPORT OF PLAINTIFFS-APPELLANTS**

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CORPORATE DISCLOSURE STATEMENT

The Congress of Racial Equality, Inc., has no parent corporations. Since it has no stock, no publicly held company owns 10% or more of its stock.

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IDENTITY OF THE *AMICUS CURIAE*[1]

The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit membership corporation founded in 1942 with local chapters throughout the world, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations. CORE's primary interests are the welfare of the African-American community and the protection of the civil rights of all citizens.

All parties have consented to the filing of this *amicus curiae* brief.

[1] No party's counsel authored this brief in whole or in part. Neither a party or a party's counsel contributed money that was intended to fund preparing or submitting the brief. No person—other than the *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief.

SUMMARY OF ARGUMENT

Second Amendment Jurisprudence generally requires a reviewing court to examine the historical scope of the Second Amendment by looking to the contemporaneous accounts of legislatures, courts, and commentators. However, many of those accounts were racially motivated and actually served to inspire the Fourteenth Amendment's enactment. For example, one recurring method was to differentiate between "citizens" and people in general. African-Americans, slaves, and other minorities were often ineligible for citizenship and therefore did not receive the Constitution's protections, including the right to keep and bear arms. This brief will explore the prejudicial motives of those authorities, some of which were cited in the panel's opinions, and the attempt to rectify them through the passing of the Fourteenth Amendment. The Fourteenth Amendment was understood to guarantee the right to carry arms free from state infringement, including laws that delegate power to state officials with discretion to grant or deny licenses.

The history of deprivation of Second Amendment rights in California is as shameful as that in the United States as a whole. *See generally* Robert Cottrol & Raymond Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity—The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi. Kent L. Rev. 1307-335 (1995); Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist*

Reconsideration, 80 Geo. L.J. 309 (1991); Raymond Kessler, *Gun Control and Political Power*, 5 Law & Pol'y Q. 381 (1983); Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. C.R. L.J. 67 (1991). California's prohibitions on the carrying of arms were motivated, in part, by a desire to disarm racial minorities. This brief seeks to demonstrate that San Diego's implementation of California's concealed carry law is plainly consistent with this nation's—and California's—history of racism through gun control.

ARGUMENT

I. The Racist History of Gun Control

A. Gun Control and the Slave Codes

The development of racially-based slavery in the 17th Century American colonies was accompanied by the creation of laws meting out separate treatment and granting or denying separate rights on the basis of race. An early sign of such emerging restrictions, and one of the most important legal distinctions, was the passing of laws denying blacks—whether free or slave—the right to keep arms. "In 1640, the first recorded restrictive legislation passed concerning blacks in Virginia excluded them from owning a gun." Lee Kennett & James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* 50 (1975). "Virginia law set Negroes apart from all other groups ... by denying them the important right and obligation to bear arms. Few restraints could indicate more clearly the denial to

Negroes of membership in the White community." W. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* 78 (1968).

Fear of slave uprisings in the South accelerated the passage of laws dealing with firearms possession by African-Americans. In 1712, for instance, South Carolina passed "An act for the better ordering and governing of Negroes and Slaves" which included two articles particularly relating to firearms ownership and blacks. 7 Statutes at Large of South Carolina 353-54 (D.J. McCord ed. 1836-1873). Virginia passed a similar act entitled "An Act for Preventing Negroes Insurrections." 2 Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619, 481 (W.W. Hening ed., 1823).

A 1680 Virginia law provided that: "no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon …" A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* 39 (1978) (quoting Act X, 1680; Guild, Black Laws, p. 45.) The late Judge A. Leon Higginbotham Jr. noted that "[t]he 1680 statute would become the model of repression throughout the South for the next 180 years." *Id*.

The slave codes of all of the Southern states prohibited slaves and free blacks from keeping or bearing firearms. A 1748 statute provided that:

> No Negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive. . . . No free negro or mulatto, shall be suffered to keep or carry any firelock of any kind, any military weapon, or any powder or lead,

> without first obtaining a license from the court of the county or corporation in which he resides, which license may, at any time, be withdrawn by an order of such court.

VA. CODE, ch. 3, §§ 7, 8 (1819).

In 1715, Maryland enacted a statute which provided:

> No negro or other slave … shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without license from their said master; and if any negro or other slave shall presume to do, he shall be … be whipped, and his gun or other offensive weapon shall be forfeited … .

The General Public Statutory Law and Public Local Law of the State of Maryland, From the Year 1692-1839 Inclusive 31 (John D. Toy ed., 1840).

Jurist St. George Tucker summarized the badges of slavery: "To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person … are all offenses punishable by whipping." St. George Tucker, *A Dissertation on Slavery* 65 (1796).

Thus, in many states, slaves, and sometimes even free African-Americans, were legally forbidden to possess firearms. Such statutes were held to be constitutional due to the lack of citizen status of African-Americans. *Cooper v. Mayor of Savannah*, 4 Ga. 68, 72 (1848) ("Free persons of color have never been recognized here as citizens; they are not entitled to bear a[r]ms, vote for members of the legislature, or to hold any civil office."); *State v. Newsom*, 27 N.C. 250, 252

(1844) ("The act of 1840 imposes upon free men of color, a restriction in the carrying of fire arms, from which the white men of the country are exempt…. From the earliest period of our history, free people of color have been among us, as a separate and distinct class, requiring, from necessity, in many cases, separate and distinct legislation."). But during that same time period the Georgia Supreme Court noted: "so far as the act of 1837 seeks to suppress the practice of carrying certain weapons secretly, that it is valid, inasmuch as it does not deprive the *citizen* of his natural right of self-defence, or of his constitutional right to keep and bear arms." *Nunn v. State*, 1 Ga. 243, 251 (1846) (emphasis added). Legislators simply ignored the fact that the U.S. Constitution and most state constitutions referred to the right to keep and bear arms as a right of the "people" rather than of the "citizen." Stephen Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason L. Rev. 1, 15 (1981).

Chief Justice Taney argued, in the infamous *Dred Scott* case, that the Constitution could not have intended that free African-Americans be citizens: "For if they were so received, and entitled to the privileges and immunities of citizens … and to keep and carry arms wherever they went." *Dred Scott v. Sanford*, 60 U.S. (19 How.) 393, 416-17 (1857). Taney enumerated the constitutional protections afforded to citizens by the Bill of Rights: "Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be

a witness against himself in a criminal proceeding." *Id.* at 450. Clearly, the Court viewed the right to keep and bear arms as one of the fundamental individual rights guaranteed to American citizens by the Bill of Rights, which African-Americans could not enjoy.

B. Gun Control and the Black Codes

After the Civil War, southern legislatures adopted comprehensive regulations by which the new freedmen were denied many of the rights that white citizens enjoyed. These Black Codes often prohibited the purchase or possession of firearms by freedmen. The Special Report of the Anti-Slavery Conference of 1867 noted that under the Black Codes, African-Americans were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." *Reprinted in* H. Hyman, *The Radical Republicans and Reconstruction* 219 (1967).

Mississippi's Black Code included the following:

> That no freedman, free negro or mulatto, not in the military … and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition ....

1866 Miss. Laws ch. 23, §1, 165 (1865). Alabama's Black Code provided: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own fire-arms, or carry about his person a pistol or other deadly weapon." Cong. Globe, 39th Cong., 1st Sess. 1838 (1866).

> The news that the freedmen were being deprived of the right to bear arms was of particular concern to the champions of Negro citizenship.

> For them, the right of the black population to possess weapons was not merely of symbolic and theoretical importance; it was vital both as a means of maintaining the recently reunited Union and a means of preventing virtual reenslavement of those formerly held in bondage. … This fed the determination of northern Republicans to provide national enforcement of the Bill of Rights.

Cottrol & Diamond, 80 Geo. L.J. at 345-46 (footnotes omitted).

II. The Fourteenth Amendment Was Passed To Protect Fundamental Rights, Including the Rights of Freedmen To Keep And Bear Arms

A. The Legislative History of the Fourteenth Amendment Is Replete With Concerns Raised About the Denial of the Right to Keep and Bear Arms of the Freedmen

In response to the Black Codes and the deprivation of the civil rights of the freedmen, Congress enacted a series of civil rights bills and the Fourteenth Amendment. The legislative histories of these are replete with denunciations of the disarmament of African-Americans, and state the intent to guarantee to the freedmen the individual right to keep and bear arms for personal self-defense. Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 256 (1983); Akhil Reed Amar, *The Bill of Rights* 264-66 (1998); Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* 1-44 (1998) (reissued as *Securing Civil Rights* (2010)).

The Freedman's Bureau Act required that "laws ... concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, *including the constitutional right to bear arms*, shall be secured

to and enjoyed by all the citizens." Act of July 16, 1866, 14 Stat 173, 176 (1866) (emphasis added).

To the framers of the Civil Rights Act of 1866 the issue of the right to keep and bear arms was of vital importance. Senator William Salisbury stated that "[i]n most of the southern States, there has existed a law of the State based upon and founded in its police power, which declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power." Cong. Globe, 39th Cong., 1st Sess. 478 (1866). Representative Henry J. Raymond explained that the rights of citizenship entitled the freedmen to all the rights of United States citizens: "He has a defined status: he has a country and a home; a right to defend himself and his wife and children; *a right to bear arms*; a right to testify in the Federal Courts ... ." *Id*. at 1266 (emphasis added).

During the debate on the Fourteenth Amendment, Senator Samuel Pomeroy listed three indispensable "safeguards of liberty" under the Constitution:

> 1. Every man should have a homestead
> . . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant …; and
>
> 3. He should have the ballot . . . .

Id. at 1182.

The legislators were specifically concerned with the violation in the South of the freedman's right to keep and bear arms. "Senator Howard . . . explicitly invoked 'the right to keep and bear arms' in his important speech cataloguing the 'personal rights' to be protected by the Fourteenth Amendment." Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1167 (1991) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

> [I]t is abundantly clear that the Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, *the right to bear arms*, trial by impartial jury . . . . The Freedman's Bureau had already taken steps to protect these rights, and the Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.

Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877* 258-59 (1988) (emphasis added).

In 1871, Congress considered legislation to suppress the KKK. Representative Benjamin Butler stated that the right to keep and bear arms was absolutely necessary for protection from that institution. He noted instances of "armed confederates" terrorizing African-Americans, and "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to 'keep and bear arms' which the Constitution expressly says shall never

be infringed." H.R. Rep. No. 37, 41st Cong., 3d Sess. 3 (1871). The anti-KKK bill was originally introduced with the following provision:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or *deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property*, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

Cong. Globe, 42nd Cong., 1st Sess. 174 (1871) (emphasis added).

Representative Butler explained the purpose:

> Section 8 is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' .... This provision seemed … to be necessary, because … before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was especially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge ...; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were there in jail in that county.

H.R. Rep. No. 37, 41st Cong., 3d Sess. 78 (1871).

B. A New View of the Constitution: Federal Protection from State Infringements of Fundamental Rights

Representative Roswell Hart stated, during the debates over the Civil Rights Act of 1866, that the Constitution commanded:

> a government whose "citizens shall be entitled to all privileges and immunities of other citizens" …; where "the right of the people to keep and bear arms shall not be infringed." … Have these rebellious States such a form of government? If they have not, it is the duty of the United States to guaranty that they have it speedily.

Cong. Globe, 39th Cong., 1st Sess. 1629 (1866). "[A] recurring theme in the debates of the Thirty-ninth Congress was the need to protect the rights of citizens and to require states to respect those rights." Michael Kent Curtis, *No State Shall Abridge: the Fourteenth Amendment and the Bill of Rights* 42 (1986).

An essential transformation had occurred. The drafters of the Fourteenth Amendment now viewed the Bill of Rights as a federal guarantee against the infringement of essential liberties by state and local government.

> By 1866 leading Republicans in Congress and in the country at large shared a libertarian reading of the Constitution. The Constitution meant what its preamble said. It established liberty.

Id. at 22. "To Republicans the great objects of the Civil War and Reconstruction were securing liberty and protecting the rights of citizens." *Id.* at 54. This was necessary because former Confederate states

> ... apparently believed that [their] power to regulate its local black population, short of actual reenslavement, was undiminished. ... [and so] passed Black Codes denying blacks many important liberties secured to whites. . . . [including] such basic rights as the freedom to move, to contract, to own property, to assemble, *and to bear arms*.

Id. at 35 (emphasis added).

The drafters of the Fourteenth Amendment:

> saw the former slaves as citizens entitled to those rights long deemed as natural rights in Anglo-American society. Their's was a vision of national citizenship and national rights, rights that the federal government had the responsibility to secure for the freedmen and, indeed, for all citizens. This vision, developed during the antislavery

> struggle and heightened by the Civil War, caused Republicans of the Civil War and postwar generation to view the question of federalism and individual rights in a way that was significantly different from that of the original framers of the Constitution and Bill of Rights. If many who debated the original Constitution feared that the newly created national government could violate long established rights, those who changed the Constitution in the aftermath of war and slavery had firsthand experience with states violating fundamental rights. The history of the right to bear arms is, thus, inextricably linked with the efforts to reconstruct the nation and bring about a new racial order.

Cottrol & Diamond, 80 Geo. L.J. at 343 (footnotes omitted).

The drafters of the civil rights acts and of the Fourteenth Amendment specifically intended to protect the individual, fundamental right of the freedmen to keep and bear arms. Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131 (1991); Akhil Reed Amar, *The Bill of Rights* (1998); Stephen Halbrook, *The Jurisprudence of the Second and Fourteenth Amen*dments, 4 Geo. Mason L. Rev. 1 (1981); Stephen Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms:" Visions Of the Framers of the Fourteenth Amendment*, 5 Seton Hall Const. L.J. 341 (1995).

> The Congressional concern about the constitutional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen.

David Kopel, The *Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1453-54 (1998). The focus of the Second Amendment had changed:

> In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government

> would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns. This idea, focusing on private violence and the lapses of local government rather than on the public violence orchestrated by central soldiers, is far closer to the unofficial motto of today's National Rifle Association, "When guns are outlawed, only outlaws will have guns."

Akhil Reed Amar, *The Bill of Rights* 266 (1998).

The drafters of the Fourteenth Amendment made it abundantly clear that they specifically intended to incorporate the Second Amendment and to protect the right to keep and bear arms from state and local legislation. Senator Jacob Howard, introducing the bill which would become the Fourteenth Amendment, referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; ... *the right to keep and bear arms*." Cong. Globe, 39th Cong., 1st Sess. 2765 (May 23, 1866) (emphasis added). "The great object of the first section of this amendment is, therefore, to restrain the power of the States and compel them at all times to respect these great fundamental guarantees." *Id.* at 2766.

This was also the understanding of legal commentators, the press, and the public at large. Senator Howard's speech was heavily covered in the national press. His statement that the Fourteenth Amendment would compel the States to respect "these great fundamental guarantees ... the personal rights guaranteed by the first eight amendments of the United States Constitution, such as ... *the right to keep and bear arms* ...." was reported on the very next day by prominent newspapers. *See* The

New York Times, May 24, 1866, at 1, col. 6.; The New York Herald, May 24, 1866, at 1, col. 3.; National Intelligencer, May 24, 1866, at 3, col. 2.; The Philadelphia Inquirer, May 24, 1866, at 8, col. 2.

> The Framers intended, and opponents well recognized, that the Fourteenth Amendment was designed to guarantee the right to keep and bear arms as a right and attribute of citizenship on which no State could infringe. The passage of the Fourteenth Amendment accomplished the abolitionist goal that each state recognize all the freedoms contained in the Bill of Rights.

Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions Of the Framers of the Fourteenth Amendment*, 5 Seton Hall Const. L.J. 341, 432 (1995).

Thus, it is evident that the Fourteenth Amendment was enacted with the intention to overturn many of the contemporaneous authorities that courts often rely on to limit the scope of the Second Amendment's protection.

III. California's Gun Control History Evidences Attempts to Disarm Minorities

"California gun control laws have … a shameful history of racism." Clayton Cramer, *The Racist Origins of California's Concealed Weapon Permit Law* (Apr. 27, 2015), *available at* SSRN: http://ssrn.com/abstract=2599851.

A. California Gun Control Aimed at Persons of Mexican Heritage

California enacted its first concealed carry law due to a high rate of violence, especially in the aftermath of the Gold Rush, but also with the express purpose of

disarming persons of Mexican heritage, citizen and non-citizen alike. An Act to prohibit the Carrying of Concealed Weapons, Stats. 1863, ch. 485, p. 748 (repealed in 1870 by Stats. 1869-1870, ch. 63, p. 67). During debates in February 1856, a state senator stated "that he was in support of a bill to ban concealed carry if it were for the purpose of disarming 'Greasers.'" Cramer, *The Racist Origins of California's Concealed Weapon Permit Law*, *supra*, at 6. The statute was finally passed in 1863, banning the concealed carrying of "any dangerous or deadly weapon." Theodore Henry Hittell, 1 *The General Laws of the State of California, From 1850 to 1864…* 261m, §§ 1585-1586 (1865), 1:261.

The statute was repealed in 1870, by which time even its supporters had realized that the law was counterproductive. Cramer, *The Racist Origins of California's Concealed Weapon Permit Law*, *supra*, at 7. A newspaper which had previously supported the passage of the concealed weapons ban, a few years later published an editorial urging its repeal, "arguing that the law was both impossible to enforce and unconstitutional because it violated the Second Amendment." *Id.* (citing *The Carrying of Concealed Weapons*, Daily Alta California, Mar. 13, 1869, at 2).

> The Federal Constitution says, "the right of the people to keep and bear arms shall not be infringed." The purpose of that provision, it is well known, was to prevent the practice common in Europe in the last century of seizing all the arms in the possession of the common people, especially in times of political disaffection. As the sovereignty resides in the people in America, they are to be permitted to keep firearms and other weapons and to carry them at their pleasure. … [I]t is evident that the prohibition of carrying concealed weapons is an infringement

> of the right to bear arms. … [T]he rules of legal interpretation, however, require us to find out first what "the right to keep and bear arms" was in 1791 when this provision was adopted. ... We have examined the question, and our opinion ... is that in 1791 there was a right of keeping and bearing arms, that it was not limited in the matter of carrying concealed weapons, and that our statute is an infringement of the right.
> …
> [The concealed weapon ban] disarms the orderly citizen and places no obstruction in the way of the robber.

The Carrying of Concealed Weapons, Daily Alta California, Mar. 13, 1869, at 2.

Another newspaper recounted the reasons for the 1870 repeal: it had no practical effect on criminals, who continued to go armed, and left the law abiding defenseless and subject to arrest and prosecution. *Concealed Deadly Weapons*, Sacramento Daily Union, Dec. 16, 1870, at 2. Much like recent history, the newspaper had found that since the repeal of the ban, crime had decreased as the criminals were afraid of victimizing what could be an armed citizen. *Id.*

From 1870 to 1917, there was no statewide regulation of concealed carry, although some counties required a license to carry concealed. *Ex parte Luening*, 84 P. 445 (1906); *Ex parte Cheney*, 27 P. 436 (1891). In 1917, California again passed a concealed weapon statute. Unlike the 1863 law, it was not a complete ban but instead required a license to carry concealed firearms in cities. James H. Deering, comp., *Supplement to the Codes and General Laws of the State of California* (San Francisco: Bancroft-Whitney Co., 1917), Act 889 §§ 3, 6. No license was required to carry concealed in unincorporated areas. *Id.*

Even before Pancho Villa's raid on Columbus, New Mexico, anti-Mexican animosities were stoked by the violence in Mexico, which at times spilled across the border, and fears of Mexican plans to reconquer lost territories. Barbara Tuchman, *The Zimmerman Telegram* 88-106 (1958); Clayton Cramer, *Race and Reporting: The Los Angeles Times in Early 1916*, *available at* http://www.claytoncramer.com/unpublished/LATimesAndRace.pdf. "This led both to vigilantism and murder of Hispanics … by state and local police." Clayton Cramer, *Race and Reporting*, *supra*, at 3 (citing Paul J. Vanderwood & Frank N. Samparo, *Border Fury: A Picture Postcard Record of Mexico's Revolution and U.S. War Preparedness, 1910-1917* 121 (1988)). "There was certainly great hostility towards Mexicans-Americans in … parts of the United States at the time. After the Santa Ysabel murders of eighteen American mining engineers by Villistas, there were ugly incidents in border cities like El Paso." Cramer, *Race and Reporting*, *supra*, at 6.

After Pancho Villa's raid on Columbus, "for residents of Mexican ancestry or birth, it took a clear turn for the worse" in the U.S. Border States. *Id.* at 3. The actions taken against Mexican-Americans in Los Angeles included cordoning off the "Mexican quarter" of Los Angeles, enforcing an "embargo against the sale of arms and liquor to Mexicans" and arresting and charging Mexican-Americans with violations of a concealed carrying ordinance. *Draw Teeth of War Breeders*, Los

Angeles Times, Mar. 14, 1916, at 2:1. Furthermore, "[n]o guns can be sold to Mexicans and all dealers … have been ordered … to show them to no Mexican until the embargo is lifted." *Id*. *See also Bryn Mawr Officer Disarms Mexicans*, Los Angeles Times, March 19, 1916, 1:13.

California next passed a series of gun control laws in 1923. The Dangerous Weapons Control Law of 1923, Stats. 1923, ch. 339, p. 695. This law required a concealed weapon permit anywhere in the state. *Id.* at § 5. It also prohibited possession of concealable handguns by non-citizens. *Id.* at § 2. It was believed that the benefits of the new law would be "checking *tong* wars among the Chinese and vendettas among our people who are Latin descent." *New Firearms Law Effective on August 7*, San Francisco Chronicle, July 15, 1923, at p. 3, col. 1. The Mexican government protested the passage of the non-citizen handgun ban, since "a large proportion of the foreigners in California were of Mexican descent." Ricardo Romo, *East Los Angeles: History of a Barrio* 157 (1983).

The 1923 law was thus stated by proponents as intended to disarm Chinese and Hispanics. Clayton Cramer, *The Racist Origins of California's Concealed Weapon Permit Law*, *supra*, at 13-14. It was signed into law by KKK-endorsed Governor Friend Richardson. *Id.* *See also* David M. Chalmers, *Hooded Americanism: The History of the Ku Klux Klan* 124 (3d ed. 1981).

In 1924, the California Supreme Court upheld a conviction under the statute. *In re Rameriz*, 193 Cal. 633 (1924). However, in 1972, the California Court of Appeals determined that the non-citizen handgun ban violated the equal protection clause of the Fourteenth Amendment. *People v. Rappard*, 28 Cal. App. 3d 302 (1972).

B. California Gun Control Aimed at Asian-Americans

The 1923 California gun control laws were passed, in part, to disarm Chinese immigrants. *New Firearms Law Effective on August 7*, San Francisco Chronicle, *supra* ("checking *tong* [gang] wars among the Chinese.")

"Throughout the mid-twentieth century, gun statutes like the California alien-in-possession prohibition upheld in *In re Rameriz* used citizenship status as a proxy for racial exclusion. Such laws remained viable because federal law prevented entire racial groups from naturalizing until the passage of the Immigration and Naturalization Act in 1952." Pratheepan Gulasekaram, *The People of the Second Amendment: Citizenship and the Right to Bear Arms*, 85 N.Y.U L. Rev. 1521, 1562 (2010).

In 1922, the Supreme Court reaffirmed that Japanese immigrants were aliens "ineligible for citizenship" based on a 1790 act of Congress that limited citizenship to "free white persons." *Ozawa v. United States*, 260 U.S. 178, 198 (1922); An Act to establish an uniform rule of naturalization, 1 Stat. 103 (1790). After the Civil War

the right to citizenship was extended to African-Americans, but Asians still could not become naturalized citizens. The Naturalization Act of 1870, 16 Stat. 254 (1870).

The 1923 California statute banned the possession of concealable firearms by non-citizens. "[N]o naturalized foreign born person ... shall own or have in his possession or under his custody or control any pistol, revolver or their firearm capable of being concealed upon the person." An Act to Control and Regulate the Possession, Sale and Use of Pistols, Revolvers and other Firearms Capable of Being Concealed Upon the Person, Stats. 1923, ch. 339, p. 695, § 2. Because Asian immigrants were prohibited from becoming naturalized citizens, the effect of this gun control statute had a disparate impact on persons of Asian heritage. An Act to regulate the immigration of aliens to, and the residence of aliens in, the United States, 39 Stat. 874 (1917); The Naturalization Act of 1870, 16 Stat. 254 (1870).

As was the case with persons of Mexican heritage in the aftermath of the Poncho Villa raid, punitive measures, including gun prohibitions, were taken against persons of Japanese heritage after the attack on Pearl Harbor.

The very first official proclamation prohibiting the ownership of firearms came on December 7, 1941. Proclamation No. 2525 (Dec. 7, 1941), 55 Stat. 1700 (1941). The regulations provided that "[n]o alien enemy shall have in his possession, custody or control at any time or place or use or operate any of the following

enumerated articles: a. Firearms ... c. Ammunition ... ." Proclamation No. 2525 (Dec. 7, 1941), 55 Stat. 1700 (1941). *See also* DOJ Regulations, Section 11, Regulations Controlling Travel and Other Conduct of Aliens of Enemy Nationalities, 7 Fed. Reg. 844-02 (Feb. 10, 1942). "Although the federal ban did not constitutionally apply to the second-generation citizens, many Nisei observed the ruling too, in hopes that their efforts would improve treatment of their Issei parents." Linda Tamura, *The Hood River Issei: An Oral History of Japanese Settlers in Oregon's Hood River Valley* 151 (1993).

The regulations were enforced though raids, searches and seizures by federal and state officials. "The most frequent items confiscated were radio transmitters, short-wave radio sets, cameras, and firearms." U.S. Dep't of Justice, *Report to the Congress of the United States: A Review of the Restrictions on Persons of Italian Ancestry During World War II* 17 (2001).

In California, state officials helped in enforcing these federal laws. Searches and seizures of the residences, places of business, and even temples were made. Firearms and ammunition, and even bows, arrows and ceremonial Samurai swords were seized. *Federal agents Visit Hotels Stores And Residences In Hunt For Arms*, The Modesto Bee And News-Herald, Feb. 10, 1942. *See also* The Fresno Bee The Republican, Feb. 10, 11 & 16, 1942; Santa Cruz Sentinel, Feb. 11, 12 & 13, 1942;

The Bakersfield Californian, Feb. 11, 1942; The Daily Telegram, Feb. 11, 1942; The Modesto Bee And News-Herald, Feb. 16, 1942.

Initially the gun ban was, at least facially, limited to non-citizens. However, many American citizens of Japanese heritage were affected in the enforcement efforts. Soon the ban was officially extended to American citizens of Japanese heritage. Public Proclamation No. 3, extended the ban to all people of Japanese ancestry—whether citizen or not—in certain military areas, which included California. Conduct of Enemy Aliens in Military Areas, 7 Fed. Reg. 2543-02 (Mar. 24, 1942).

When the forced resettlement of Japanese-Americans began on March 23, 1942, Lieut. Gen. John DeWitt issued new orders applying to Japanese-Americans—including American citizens. *New Curfew for Japanese Starts Friday*, Oakland Tribune, Mar. 24, 1942, at 1. *See also Enemy Alien Curfew Friday*, San Francisco News, Mar. 24, 1942. The possession of various items, including firearms, was banned. Conduct of Enemy Aliens in Military Areas, 7 Fed. Reg. 2543-02 (Mar. 24, 1942). "Let me warn the affected aliens and Japanese-Americans that anything but strict compliance with this proclamation's provisions will bring immediate[] punishment. … [S]wift justice will follow any violation, whether it involves disobedience to the curfew of the possession of contraband articles." *New Curfew for Japanese Starts Friday*, *supra*, at 1. "In addition, the proclamation prohibited

American-born Japanese from possession of firearms. … Heretofore, possession of such contraband has been prohibited only to aliens." *Id.* The strictest enforcement was promised and any violators would be "immediately punished." *Id.*

California "highway patrolmen and sheriff's deputies" took part in the "raid[s] ... on the Japanese homes" to start "the long-awaited large-scale round-up of Japanese," to "corral" them, "herding them off to an undisclosed concentration center." The Bakersfield Californian, March 25, 1942.

While German and Italian citizens were not rounded up and forced into concentration camps, they were nonetheless subject to the firearms ban. "Penalty for possession of contraband by aliens is internment in a concentration camp for the duration of the war." *New FBI Raids On Enemy Aliens Are Held Likely*, The Modesto Bee And News-Herald, Apr. 25, 1942. Unlike Japanese-Americans, American citizens of German and Italian heritage were not subject to the firearms ban. However, such American citizens were sometimes caught up in the raids on homes of family members who were not citizens. *Id.*

C. California Gun Control Aimed at African-Americans

More recent California gun control measures were enacted with the purpose of disarming African-Americans. In 1967, California prohibited the open carrying of firearms in cities. The Mulford Act, Stats. 1967, ch. 960, p. 2459; California Assembly Office of Research, *Smoking Gun: The Case for Concealed Weapon*

Permit Reform 6 (1986). "This law easily passed after the Black Panthers demonstrated against it by walking into the assembly chamber carrying" firearms. Clayton Cramer, *The Racist Roots of Gun Control*, 4 Kan. J.L. & Pub. Pol'y 17, 21 (1995) (citing *Capitol Is Invaded*, Sacramento Bee, May 2, 1967, at A1, A10). The armed Black Panther demonstration helped the passage of the law. *Id.* (citing *Bill Barring Loaded Weapons In Public Clears Senate 29-7*, Sacramento Bee, July 27, 1967, at A6).

While today's gun prohibitionists may argue that they are not motivated by bigotry in their efforts to disarm citizens, the effect of discretionary licensing laws has a disparate impact upon minorities. What happens when a sheriff is given discretion to issue concealed carry permits? African-Americans are denied. The California state legislature's research arm "has admitted that the vast majority of permits to carry concealed handguns in California are issued to white males." Cramer, *The Racist Roots of Gun Control*, *supra*, at 22 (citing California Assembly Office of Research, *Smoking Gun: The Case for Concealed Weapon Permit Reform* 7 (1986)).

D. Current Gun Control Efforts Are a Legacy of Racism

> Behind current gun control efforts often lurks the remnant of an old American prejudice, that the lower classes and minorities are not to be trusted with firearms. The bias originated in the post-antebellum South for political reasons and may have changed its form, but it still exists.

> Today the thought remains: if you let the poor, and especially the black poor, have guns, they will commit crimes with them.

Tahmassebi, 2 Geo. Mason U. C.R. L.J. at 80. Even gun prohibitionists have frankly admitted that the Gun Control Act of 1968 was "passed not to control guns but to control Blacks." R. Sherrill, *The Saturday Night Special* 280 (1972). "[I]t is difficult to escape the conclusion that the 'Saturday Night Special' is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence. The reference is to 'Niggertown Saturday Night.'" B. Bruce-Briggs, *The Great American Gun War*, 45 Pub. Interest 37, 50 (1976). The link between racism and gun control is not just a legacy of the past but continues today in that the enforcement of facially neutral gun control laws specifically target minorities and minority communities.

Furthermore, discretionary permitting systems invariably discriminate against minorities.

> The worst abuses at present occur under the mantel of facially neutral laws that are, however, enforced in a discriminatory manner. In many jurisdictions which require a discretionary gun permit, police departments have wide discretion in issuing a permit, and those departments unfavorable to gun ownership, or to the race, politics, or appearance of a particular applicant frequently maximize obstructions to such persons while favored individuals and groups experience no difficulty in the granting of a permit.

Tahmassebi, 2 Geo. Mason U. C.R. L.J. at 80-81. Permit systems like California's concealed carry statute, which vest wide discretion in public or police officials, have often been used to stymie civil rights efforts and are often applied in a discriminatory fashion. *See* Tahmassebi, 2 Geo. Mason U. C.R. L.J. at 81. Permits are disproportionally denied to minorities. *Id.* *See also* David Hardy & Kenneth Chotiner, "The Potential for Civil Liberties Violations in the Enforcement of Handgun Prohibitions" in *Restricting Handguns: The Liberal Skeptics Speak Out*, at 209-10; William Tonso, *Gun Control: White Man's Law*, Reason, Dec. 1985, at 24.

Not only are firearms permits less frequently granted to minorities, but minorities are more frequently targeted, stopped, searched, arrested, and convicted of firearms offenses. While African-Americans make up only 13.2 percent of the U.S. population, in 2013, 43.7 percent of those convicted of federal firearms offenses were African-Americans. U.S.A. Quick Facts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/00000.html (last visited Apr 27, 2015); Interactive Sourcebook of Federal Sentencing Statistics: Race of Offenders in Each Primary Offense Category (Fiscal Year 2013), United States Sentencing Commission, http://tinyurl.com/n2b5veo (last visited Apr. 27, 2015). While African-Americans make up only 6.6 percent of California's population, in 2013, 21.3 percent of felony arrests for weapons offenses were African-Americans. California Dep't of Justice, *Crime in California 2013* 34, *available at*

https://oag.ca.gov/sites/all/files/agweb/pdfs/cjsc/publications/candd/cd13/cd13.pdf; California Quick Facts, U.S. Census Bureau, http://tinyurl.com/ovuh (last visited Apr 27, 2015).

E. The Concealed Carry Statute Violates Equal Protection

The Supreme Court invalidated the criminal disenfranchisement provision of § 182 of the 1901 Alabama Constitution as a violation of equal protection. *Hunter v. Underwood*, 471 U.S. 222 (1985). The struck provision was facially neutral and disfranchised those convicted of crimes of moral turpitude. However, the Court found that "disenfranchisement of blacks" was a major purpose of the 1901 constitutional convention even though there was no evidence that this particular clause was adopted for that reason. *Id.* at 224.

Unlike the Alabama constitutional provision, California's concealed carry law is merely a statute. Furthermore, unlike the Alabama constitutional provision, the discriminatory intent of California's law was openly admitted by its proponents. One part of the law, the non-citizen handgun prohibition, has already been struck on equal protection grounds. *Rappard*, 28 Cal. App. 3d 302. As with the Alabama constitutional provision struck in *Hunter v. Underwood*, California's concealed weapon law, unless construed per the panel decision to avoid discretion by the issuing authority, violates a fundamental right based on racial discrimination prohibited by the Fourteenth Amendment.

CONCLUSION

For the foregoing reasons, the previous judgment of the Ninth Circuit panel should be affirmed.

STATEMENT OF RELATED CASES

Pursuant to Circuit Rule 28-2.6, Amicus Curiae identify the following cases as related: *Richards v. Prieto*, No. 11-16255.

Dated: April 30, 2015

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Circuit Rule 29-2(c)(3) because this brief contains 6,978 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in 14-point Times New Roman font.

Dated: April 30, 2015

s/ Stefan B. Tahmassebi
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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 30, 2015.

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