No. 12-57049

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOROTHY McKAY, et al.,

Plaintiffs-Appellants

v.

SHERIFF SANDRA HUTCHENS, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(SACV 12-1458JVS)

AMICUS CURIAE BRIEF OF CONGRESS OF RACIAL EQUALITY, INC., IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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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.

Date: December 4, 2012

Respectfully Submitted,

/s/ Stephen P. Halbrook
Counsel for Amicus Curiae
Congress of Racial Equality, Inc.

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

CONSTITUTIONS

STATUTES

LEGISLATIVE HISTORY

OTHER AUTHORITIES

IDENTITY OF THE AMICUS CURIAE

The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit membership corporation founded in 1942 with local chapters throughout the United States, Africa, and other parts of the world. CORE is the third oldest and one of the 'Big Four' civil rights groups in the United States. From the protests against Jim Crow laws of the 40's through the Sit-ins of the 50's, the Freedom Rides of the 60's, the cries for Self-Determination in the 70's, Equal Opportunity in the 80's, Community Development in the 90's, to the demand for equal access to information, CORE has championed true equality.

CORE's interest in this case stems from the fact that the Second Amendment right to keep and bear arms for self defense is an important civil right that was denied to African Americans under the antebellum Slave Codes, the Black Codes passed just after the Civil War, and under the Jim Crow regimes that persisted into the twentieth century.[1] In states, such as here, with discretionary licensing and permitting statutes

[1]See, e.g., Watson v. Stone, 4 So.2d 700, 703 (Fla. 1941) (Buford, J., concurring) ("the Act [requiring a license to carry a firearm] was passed for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . .").

regarding who may exercise Second Amendment rights, the poor and minorities may suffer discrimination.

In precedent-setting cases such as District of Columbia v. Heller, 554 U.S. 570 (2008), CORE has filed amicus curiae briefs which contribute its unique perspectives. It wishes to do so in this case in that its members will be affected by the decision of this Court.

Appellants consent to the filing of this brief. Appellees failed to respond to counsel's requests for consent. This brief is filed pursuant to F.R.App.P. 29(b).

SUMMARY OF ARGUMENT[2]

The following demonstrates that the Second Amendment guarantees the right to carry arms. The text prohibits infringement of the right to "bear arms," and does not limit that right to one's house. In Heller, the Supreme Court recognized the general right to carry arms. This is demonstrated by further evidence from the founding period. Having no

[2]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.

right to bear arms was an incident of slavery.

The Fourteenth Amendment prohibits states from banning the carrying of arms, including discretionary licensing laws that deny the right to the general public. The Supreme Court in McDonald v. City of Chicago, 130 S.Ct. 3020 (2010), reaffirmed the fundamental character of the right to bear arms for self defense. The Fourteenth Amendment was understood to guarantee the right to carry arms free from state infringement, such as through laws that delegate discretionary power to officials to grant or deny licenses. Finally, infringement on the right to bear arms is actionable under the Civil Rights Act of 1871, 42 U.S.C. § 1983.

ARGUMENT

Introduction

California prohibits carrying a loaded firearm on one's person or in a vehicle in most public places. Cal. Penal Code [P.C.] § 25850. It also prohibits possession of a handgun, even if unloaded, in most public places. §§ 25400, 26350. An affirmative defense exists which would allow carrying a loaded firearm in public where the person "reasonably believes

that any person or the property or any person is in immediate, grave danger and that the carrying of the weapon is necessary for the preservation of that person or property." § 26045(a). "Immediate" means "the brief interval before and after the local law enforcement agency, when reasonably possible, has been notified of the danger and before the arrival of its assistance." § 26045(c).

On a finding of "good cause," a county sheriff "may" issue a license to carry a concealed, loaded handgun. P.C. § 26150(a). Orange County Sheriff Hutchens has a policy under which a desire to carry a handgun for self defense is not "good cause," which instead is defined to require concrete threats or engagement in a business activity subjecting a person to "far greater risk than the general population."

Plaintiffs mounted a Second Amendment challenge to Sheriff Hutchens' policy implementing § 26150(a)'s "good cause" requirement which denies licenses to the citizens at large. The district court denied plaintiffs' motion for a preliminary injunction on the basis that they were not likely to prevail on the merits, had not suffered irreparable harm, did not have the balance of equities in their favor, and did not show the public

interest would be served.

Accordingly, this case concerns whether, where state law provides for issuance of a license to carry a handgun for "good cause," a sheriff may deny such licenses consistent with the Second Amendment under a policy that law-abiding citizens who wish to carry a handgun for self protection do not have "good cause."

I. THE SECOND AMENDMENT GUARANTEES THE RIGHT TO BEAR OR CARRY ARMS

A. The Text Prohibits Infringement of the Right to "Bear Arms," and Does Not Limit That Right to One's House

The Second Amendment provides in part that "the right of the people to keep and bear arms, shall not be infringed." This guarantees not only the right to "keep" arms, such as in one's house, but also to "bear arms," which simply means to carry arms without reference to a specific place. When the Framers intended that a provision of the Bill of Rights related to a house, they said so.[3] They did not recognize a limited right to

[3]U.S. Const., Amend. III ("No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law."); Amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated").

keep and bear arms only in one's house.

This plain textual reference prohibiting infringement on the right to "bear arms" must be respected given that "general statements of the law are not inherently incapable of giving fair and clear warning . . . ." United States v. Lanier, 520 U.S. 259, 271 (1997).[4] Lanier explained:

> When broad constitutional requirements have been "made specific" by the text or settled interpretations, willful violators "certainly are in no position to say that they had no adequate advance notice that they would be visited with punishment. . . . [T]hey are not punished for violating an unknowable something."

Id. at 267 (emphasis added), quoting Screws v. United States, 325 U.S. 91, 104-05 (1945).

Officials may not ignore the plain text of the Constitution under the theory that no case on point has been decided by the Supreme Court to verify that the constitutional command must actually be obeyed. As stated in the Fourth Amendment context: "Given that the particularity requirement is set forth in the text of the Constitution, no reasonable

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[4] "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." Id. (citation omitted).

officer could believe that a warrant that plainly did not comply with that requirement was valid." Groh v. Ramirez, 540 U.S. 551, 563 (2004).

To disregard explicit constitutional text based on supposedly insufficient judicial precedent ignores the primacy of the Constitution and the fundamental rights it protects.[5]

B. In Heller, the Supreme Court Recognized the General Right to Carry Arms

Recognition of the right to carry arms was integral to the decision in Heller, which found: "At the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose – confrontation." District of Columbia v. Heller, 554 U.S. 570, 584 (2008). The term includes to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed . . . ." Id. (citation omitted).

Both now and in the 18th century, "'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia." Id. A number of states in the early Republic guaranteed a right of

[5] "To view a particular provision of the Bill of Rights with disfavor inevitably results in a constricted application of it. This is to disrespect the Constitution." Ullmann v. United States, 350 U.S. 422, 428-29 (1956).

citizens to "bear arms in defense of themselves and the state" or "bear arms in defense of himself and the state." Id. at 584-85. These provisions "guarantee the individual right to possess and carry weapons in case of confrontation." Id. at 592. To be sure, "we do not read the Second Amendment to protect the right of citizens to carry arms for any sort of confrontation, just as we do not read the First Amendment to protect the right of citizens to speak for any purpose." Id. at 595.

The activities protected by the Second Amendment are not limited to the home, in that "preserving the militia was [not] the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." Heller, 554 U.S. at 599.

Heller favorably cited a decision which "construed the Second Amendment as protecting the 'natural right of self-defence' and therefore struck down a ban on carrying pistols openly." Id. at 612, quoting Nunn v. State, 1 Ga. 243, 251 (1846). The Court's quotation from Nunn makes clear the broad meaning of "infringe": "The right of the whole people . . . to keep and bear arms of every description, . . . shall not be infringed, curtailed, or broken in upon, in the smallest degree . . . ." Id.

Heller noted another decision which "held that citizens had a right to carry arms openly . . . ." Id. at 613, citing State v. Chandler, 5 La. Ann. 489, 490 (1850). Nineteenth-century courts "held that prohibitions on carrying concealed weapons were lawful," for "the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." Id. at 626.

Having made clear that there is indeed a right to bear arms and that it may be regulated – not prohibited – Heller added:

> nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.

Id. at 626-27.[6]

The presumptive validity of "laws forbidding the carrying of firearms in sensitive places" obviously means that the right to bear arms includes the carrying of firearms in non-sensitive places. It is inconsistent to rely on this passage in arguing in support of prohibitions on the right to bear

[6]"We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive." Id. at 627 n.26.

arms, and at the same time to deny that Heller made any binding decision that there is a right to bear arms outside the home and that it extends to places that are not sensitive.[7] Heller's lengthy opinion regarding the meaning of the right to "bear arms" is every bit as binding as its brief reference to "presumptively lawful regulatory measures."

Similarly, given that "the inherent right of self-defense has been central to the Second Amendment right," the fact that it is the home where "the need for defense of self, family, and property is most acute" does not imply that such need is non-existent outside the home. Id. at 628. Indeed, Heller proceeded to note: "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban. And some of those few have been struck down." Id. at 629. It cited two cases that invalidated prohibitions on carrying handguns openly or concealed,[8] and quoted from a third case that upheld a ban on concealed

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[7]Concerning the above passages from Heller, United States v. Skoien, 614 F.3d 638, 641 (7th Cir. 2010) (en banc), states: "This is the sort of message that, whether or not technically dictum, a court of appeals must respect, given the Supreme Court's entitlement to speak through its opinions as well as through its technical holdings."

[8]See Nunn, supra, and Andrews v. State, 50 Tenn. 165, 187 (1871) (invalidating "a statute that forbade openly carrying a pistol 'publicly or

carry because the law allowed open carry: "A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." Id., quoting State v. Reid, 1 Ala. 612, 616-617 (1840).

Here, allowing the sheriff to deny a license to carry a handgun on the basis that self-defense is not "good cause" "amounts to a destruction of the right." Allowing firearms to be carried only if one is in danger does not even meet the invalid standard of "requir[ing] arms to be so borne as to render them wholly useless for the purpose of defence," because one would not even know she was in danger until it was too late to carry the firearm.

C. Further Evidence from the Founding Period

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights." McDonald, 130 S.Ct. at 3037, citing, inter alia, S. Halbrook, The Founders' Second Amendment 171-278 (2008). In the Founding period, no laws existed that restricted

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privately, without regard to time or place, or circumstances'").

the carrying of arms. The only laws on the possession of firearms were the militia laws that required able-bodied adult males to provide themselves with firearms. The only exception was the Slave Codes which prohibited the carrying or possession of firearms by slaves. See Halbrook, The Founders' Second Amendment 126-68.

This was exemplified in the episode of the Boston Massacre in 1770. Those protesting the presence of the Redcoats were led by Crispus Attucks, who carried a stick. He was killed when the soldiers fired on the crowd. Samuel Adams wrote that Attucks "was leaning upon his stick when he fell, which certainly was not a threatening posture: It may be supposed that he had as good right, by the law of the land, to carry a stick for his own and his neighbor's defence, in a time of danger, as the Soldier who shot him had, to be arm'd with musquet and ball, for the defence of himself and his friend the Centinel." 2 Writings of Samuel Adams 119 (1904).

Some of the founding-era state constitutions guaranteed the right to bear arms. Two states provided: "That the people have a right to bear arms for the defense of themselves, and the state . . . ." Pa. Dec. of Rights,

Art. XIII (1776);[9] Vt. Const., Art. I, § 15 (1777). North Carolina declared: "That the people have a right to bear arms for the defense of the state . . . ." N.C. Dec. of Rights, Art. XVII (1776). Massachusetts provided: "The people have a right to keep and bear arms for the common defence." Ma. Dec. of Rights, XVII (1780).

The exercise of this right was exemplified in a conversation between Ethan and Ira Allen and a Quaker with whom they lodged:

> We took our pistols out of our holsters and carried them in with us. He looked at the pistols saying 'What doth thee do with those things?' He was answered 'Nothing amongst our friends,' but we were Green Mountain boys, and meant to protect our persons and property . . . .

James B. Wilbur, Ira Allen: Founder of Vermont, 1751-1814, at 40 (1928).

When the Constitution was proposed without a bill of rights, the Pennsylvania Dissent of Minority demanded a declaration, including: "That the people have a right to bear arms for the defense of themselves and their own state, or the United States, or for the purpose of killing game . . . ." 2 Documentary History of the Ratification of the Constitution

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[9]This would be revised to state: "That the right of the citizens to bear arms in defense of themselves and the state shall not be questioned." Pa. Dec. of Rights, Art. XXI (1790).

623-24 (1976). Samuel Adams proposed in the Massachusetts convention "that the said Constitution be never construed . . . to prevent the people of the United States, who are peaceable citizens, from keeping their own arms . . . ." 6 Documentary History of the Ratification of the Constitution 1453 (2000). New Hampshire sought a guarantee that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion. 18 Documentary History of the Ratification of the Constitution 188 (1995).

The Second Amendment would combine these and other proposals by recognizing the right to keep as well as to bear arms. Rep. Roger Sherman's comment in House debate in 1791 expressed the typical view of that right: "He conceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made." 14 Documentary History of the First Federal Congress 92-3 (1995).

In the early Republic, St. George Tucker wrote the first commentaries on the Constitution. See Heller, 554 U.S. at 606. He stated about the Second Amendment:

> This may be considered as the true palladium of liberty . . . The right of self defence is the first law of nature . . . . Wherever . . . the right of the people to keep and bear arms is, under any colour or pretext whatsoever, prohibited, liberty, if not already annihilated, is on the brink of destruction.

1 St. George Tucker, Blackstone's Commentaries Appendix, 300 (1803).

As to exercise of the right, Tucker wrote: "In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." Id., vol. 5, App., Note B, at 19. Only slaves had no such right: "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, unless wantonly assaulted, are all offences punishable by whipping." St. George Tucker, A Dissertation on Slavery 65 (1796).

D. Having No Right to Bear Arms was an Incident of Slavery

Only slaves and, in some cases, free blacks were not accorded the right to bear arms. Virginia law provided that "no negro or mulatto shall keep or carry any gun, powder, shot, club, or other weapon whatever,"

except that a free negro or mulatto housekeeper may "keep one gun, powder and shot," and a bond or free negro may "keep and use" a gun by license at frontier plantations. Acts of 1748 (6 Hening, Statutes at Large 109-10) and 1792 (12 Hening, Statutes at Large 123).

South Carolina made it unlawful for a slave "to carry or make use of fire-arms, or any offensive weapons whatsoever," unless "in the presence of some white person" or with a license from the master. Public Laws of the State of South Carolina 168 (1790). In Georgia, it was unlawful "for any slave, unless in the presence of some white person, to carry and make use of fire arms," unless the slave had a written license from his master to hunt, albeit "lodging the same gun at night within the dwelling house of his master, mistress or white overseer." Digest of the Laws of the State of Georgia 424 (1802).

Maryland provided "that no negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without license from their said master," which was punishable by whipping. The General Public Statutory Law & Public Local Law of the State of Maryland, From the Year 1692-1839 Inclusive

31 (1840). North Carolina provided that "no slave shall go armed with Gun, Sword, Club, or other Weapon," unless he had a certificate to carry a gun to hunt, issued with the owner's permission. Statutes of the State of North Carolina 93 (1791).

Antebellum judicial decisions held that even free blacks had no right to bear arms because they were not considered citizens. State v. Newsom, 27 N.C. 203, 207 (1844), upheld a provision "to prevent free persons of color from carrying fire arms" on the ground that "the free people of color cannot be considered as citizens." Cooper v. Savannah, 4 Ga. 72 (1848), stated: "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms . . . ."

Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), notoriously held that African Americans had no rights that must be respected. Recognition of their citizenship "would give to persons of the negro race, who were recognized as citizens in any one State of the Union, the right to enter every other State whenever they pleased, singly or in companies . . .; and it would give them the full liberty of speech. . .; to hold public meetings upon political affairs, and to keep and carry arms wherever they went."

Id. at 417. Overturning Dred Scott would be a primary objective of the Fourteenth Amendment.

II. THE FOURTEENTH AMENDMENT PROHIBITS STATES FROM BANNING THE CARRYING OF ARMS, INCLUDING DISCRETIONARY LICENSING LAWS THAT DENY THE RIGHT TO THE GENERAL PUBLIC

A. McDonald Reaffirmed the Fundamental Character of the Right to Bear Arms for Self Defense

In Heller, the Supreme Court "held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . ." McDonald v. City of Chicago, 130 S.Ct. 3020, 3026 (2010). "Self-defense is a basic right, . . . and in Heller, we held that individual self-defense is 'the central component' of the Second Amendment right." Id. at 3036 (citation omitted). The Court thus "held" – it did not just suggest by way of dicta – that the Second Amendment protects not just the right to keep, but also the right to "bear arms" for self-defense, which the Court did not limit to one's home.

McDonald reiterated "our central holding in Heller: that the Second Amendment protects a personal right to keep and bear arms for lawful purposes, most notably for self-defense within the home." Id. at 3044.

That the right is guaranteed "most notably for self-defense within the home" implies a right to bear arms outside the home (even if not quite as "notably" as in the home).[10]

B. The Fourteenth Amendment was Understood to Guarantee the Right to Carry Arms from State Infringement, Including Discretionary Licensing Laws

The Fourteenth Amendment was understood and intended to guarantee the right to carry arms from State infringement. State laws that delegated discretionary power to officials to determine who may carry arms were deemed to be infringements.

"In the aftermath of the Civil War, there was an outpouring of discussion of the Second Amendment in Congress and in public discourse, as people debated whether and how to secure constitutional rights for newly free slaves." Heller, 554 U.S. at 614, citing S. Halbrook, Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876

[10]"[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." Snyder v. Phelps, 131 S.Ct. 1207, 1211 (2011) (internal quotation marks and citation omitted). That does not imply that other speech enjoys no protection.

(1998).[11] In particular, the Slave Codes were reenacted as the Black Codes, including prohibitions on both the keeping and the carrying of firearms by African Americans. As Frederick Douglass explained in 1865, "the black man has never had the right either to keep or bear arms." 4 The Frederick Douglass Papers 84 (1991), quoted in McDonald, 130 S.Ct. at 3083 (Thomas, J., concurring).

It is noteworthy that the first state law mentioned in McDonald as typical of what the Fourteenth Amendment would invalidate required a license to carry a firearm that an official had discretion to grant or deny. It was a Mississippi law providing that "no freedman, free negro or mulatto, not in the military service of the United States government, and not licensed so to do by the board of police of his or her county, shall keep or carry fire-arms of any kind . . . ." Certain Offenses of Freedmen, 1865 Miss. Laws p. 165, § 1, in 1 Documentary History of Reconstruction 289 (W. Fleming ed.1950), quoted in McDonald, 130 S.Ct. at 3038. A press report noted: "The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of this section of the

[11]This work has been republished as Securing Civil Rights: Freedmen, the Fourteenth Amendment, and the Right to Bear Arms (2010).

country. They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms." Harper's Weekly, Jan. 13, 1866, at 3, col. 2.

A similar South Carolina law led a convention of prominent blacks there to draft a petition stating: "We ask that, inasmuch as the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed . . . that the late efforts of the Legislature of this State to pass an act to deprive us of arms be forbidden, as a plain violation of the Constitution . . . ." 2 Proceedings of the Black State Conventions, 1840-1865, at 302 (1980). Senator Charles Sumner paraphrased the petition as seeking "constitutional protection in keeping arms . . . ." Cong. Globe, 39th Cong., 1st Sess. 337 (1866) . See McDonald, 130 S.Ct. at 3038 n.18.

Such Second Amendment deprivations were prominently debated in bills leading to enactment of the Freedmen's Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, sponsor of the former, referred to an ordinance of Opelousas, Louisiana, as the type of infringement the Act

would nullify,[12] and further quoted from a Freedmen's Bureau report about Kentucky: "The civil law prohibits the colored man from bearing arms . . . ."[13] Id. at 657. Accordingly, the Freedmen's Bureau bill guaranteed the right "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms." Id. at 654.

Opponents of the Freedmen's Bureau bill did not disagree with recognition of such rights. Senator Davis said that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense. They were for every right and liberty secured to the citizens by the Constitution." Id. at 371. Yet

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[12]Eliot quoted the following:

> No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police. Anyone thus offending shall forfeit his weapons, and shall be imprisoned and made to work five days on the public streets, or pay a fine of five dollars in lieu of said work.

Id. at 517.

[13]See Heller, 554 U.S. at 614-15.

prohibitions continued to be enforced. A witness testified that "attempts were made in that city [Alexandria, Va.] to enforce the old law against them in respect to whipping and carrying fire-arms, nearly or quite up to the time of the establishment of the Freedmen's Bureau in that city." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).

Through an order issued by General Sickles, the Freedmen's Bureau nullified South Carolina's prohibition as follows:

> The constitutional rights of all loyal and well disposed inhabitants to bear arms, will not be infringed; nevertheless this shall not be construed to sanction the unlawful practice of carrying concealed weapons; nor to authorize any person to enter with arms on the premises of another without his consent. No one shall bear arms who has borne arms against the United States, unless he shall have taken the Amnesty oath . . . or the Oath of Allegiance . . . . And no disorderly person, vagrant, or disturber of the peace shall be allowed to bear arms.

Cong. Globe, 39th Cong., 1st Sess. , 908-09 (1866).

This order was repeatedly printed in the Loyal Georgian, a black newspaper, beginning with the issue of Feb. 3, 1866, at 1. That issue also included the following:

> Have colored persons a right to own and carry fire arms?

> A Colored Citizen
>
> Almost every day we are asked questions similar to the above. We answer certainly you have the same right to own and carry arms that other citizens have. You are not only free but citizens of the United States and as such entitled to the same privileges granted to other citizens by the Constitution. . . .
>
> Article II, of the amendments to the Constitution of the United States, gives the people the right to bear arms, and states that this right shall not be infringed. . . . All men, without distinction of color, have the right to keep and bear arms to defend their homes, families or themselves.

Id. at 3. See also Heller, 554 U.S. at 615 (shorter quotation).

"In debating the Fourteenth Amendment, the 39th Congress referred to the right to keep and bear arms as a fundamental right deserving of protection." McDonald, 130 S.Ct. at 3041. The Court quoted Senator Samuel Pomeroy's statement that the "safeguards of liberty under our form of Government" included the following: "He should have the right to bear arms for the defense of himself and family and his homestead." Id., citing Cong. Globe, 39th Cong., 1st Sess., 1182 (1866). Similarly, a report circulated in Congress from the Freedmen's Bureau stating: "There must be 'no distinction of color' in the right to carry arms, any more than in any other right." Ex. Doc. No. 70, House of Representatives, 39th Cong., 1st Sess., at 297 (1866).

Introducing the Fourteenth Amendment in the Senate, Jacob Howard 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 (1866). He averred: "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.[14]

The Fourteenth Amendment passed both houses by the necessary two-thirds and was proposed to the States. In support of a bill which required the Southern States to ratify the Amendment, Rep. George W. Julian argued:

> Although the civil rights bill is now the law, . . . [it] is pronounced void by the jurists and courts of the South. Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments; and a black man convicted of an offense who fails immediately to pay his fine is whipped. . . . Cunning legislative devices are being invented in

[14]Howard's speech was cited as authority in Jones v. Helms, 452 U.S. 412, 424 n.23 (1981); Plyler v. Doe, 457 U.S. 202, 214-15 (1982).

> most of the States to restore slavery in fact.[15]

Id. at 3210.

A Mississippi court declared the Civil Rights Act void in upholding the conviction of a freedman for carrying a musket without a license. New York Times, Oct. 26, 1866, at 2; see McDonald, 130 S.Ct. at 3041 n.24. Another court found the ban void:

> Should not then, the freedmen have and enjoy the same constitutional right to bear arms in defence of themselves, that is enjoyed by the citizen? It is a natural and personal right – the right of self-preservation. . . . While, therefore, the citizens of the State and other white persons are allowed to carry arms, the freedmen can have no adequate protection against acts of violence unless they are allowed the same privilege.

New York Times, Oct. 26, 1866, at 2 (reprinting opinion).

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[15]Florida Governor Walker stated that the law "in regard to freedmen carrying firearms does not accord with our Constitution, has not been enforced and should be repealed." Fla. Sen. J. 13 (1866). John Wallace, a black politician, commented that, except for those hunting on other person's properties, "[t]he law prohibiting colored people handling arms of any kind without a license, was a dead letter," adding: "We have often passed through the streets of Tallahassee with our gun upon our shoulder, without a license, and were never disturbed by any one during the time this law was in force." John Wallace, Carpet Bag Rule in Florida 35 (1885). But the law was enforced in some counties. Jerrell H. Shofner, Nor Is It Over Yet: Florida in the Era of Reconstruction, 1863-1877, at 84 (1974). "The Freedmen's Bureau Bill," New York Evening Post, May 30, 1866, at 2, averred: "In South Carolina and Florida the freedmen are forbidden to wear or keep arms."

These decisions were taken notice of in a report received in Congress from General U.S. Grant stating: "The statute prohibiting the colored people from bearing arms, without a special license, is unjust, oppressive, and unconstitutional." Cong. Globe, 39th Cong., 2d Sess., 33 (1866).

After the Freedmen's Bureau bill was passed and vetoed, it would be passed in override votes by the same two-thirds-plus members of Congress who voted for the Fourteenth Amendment.[16] Section 14 of the Freedmen's Bureau Act declared that in States or districts where ordinary judicial proceedings were not restored, and until such time as such States were restored to the Union and represented in Congress:

> the right . . . to have full and equal benefit of all laws and proceedings 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 of such State or district without respect to race or color or previous condition of slavery.

14 Stat. 173, 176-77 (1866).

"Section 14 thus explicitly guaranteed that 'all the citizens,' black and white, would have 'the constitutional right to bear arms.'" McDonald,

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[16]On the roll call votes, see Halbrook, Freedmen, 41-43.

130 S.Ct. at 3040. The term "bear arms" was used, and "[i]t would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist." Id. at 3043. McDonald also rejected the argument that the above Act and the Fourteenth Amendment sought only to provide a non-discrimination rule. The Act referred to the "full and equal benefit," not just "equal benefit." Id. at 3043.

"In sum, it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." McDonald, 130 S.Ct. at 3042. As such, the right of a law-abiding person to carry a firearm could not be dependent on the discretion of an official.

C. Infringement on the Right to Bear Arms is Actionable Under the Civil Rights Act of 1871, 42 U.S.C. § 1983

"[I]n debating the Civil Rights Act of 1871, Congress routinely referred to the right to keep and bear arms and decried the continued disarmament of blacks in the South." McDonald, 130 S.Ct. at 3041-42, citing Halbrook, Freedmen 120-131. Today codified at 42 U.S.C. § 1983, the Act provides that any person who, under color of State law, subjects a person "to the deprivation of any rights, privileges, or immunities

secured by the Constitution" is civilly liable. 17 Stat. 13 (1871).

"[I]n passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights." Patsy v. Board of Regents, 457 U.S. 496, 503 (1982). Patsy then quoted Rep. Henry Dawes' explanation of how the federal courts would protect "these rights, privileges, and immunities . . . ." Id., citing Cong. Globe, 42d Cong., 1st Sess., 476 (1871). Dawes had just explained that the citizen "has secured to him the right to keep and bear arms in his defense. It is all these . . . which are comprehended in the words 'American citizen,' and it is to protect and secure to him in these rights, privileges, and immunities this bill is before the House." Cong. Globe, supra, at 475-76. See McDonald, 130 S.Ct. at 3075 (Thomas, J., concurring).

On the same point, Patsy also cited the remarks of Rep. John Coburn, 457 U.S. at 504, who on the same page of the Globe observed: "A State may by positive enactment cut off from some the right . . . to bear arms . . . . How much more oppressive is the passage of a law that they shall not bear arms than the practical seizure of all arms from the hands of the colored men?" Cong. Globe at 459. Congress must "enforce by

appropriate legislation the rights secured by this clause of the fourteenth amendment of the Constitution." Id.

"Opponents of the bill also recognized this purpose . . . ." Patsy, 457 U.S. at 504 n.6 (citing remarks of Rep. Washington Whitthorne). On the same page of his speech cited by the Court, Whitthorne objected that "if a police officer of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution . . . ." Cong. Globe at 337. To the contrary, supporters of the bill were concerned that police would arrest a law-abiding African American who was carrying a pistol for self defense, and they wished to provide a legal remedy for such deprivation.

A year after passage, the Civil Rights Act was the subject of a report from President Grant to Congress which stated that parts of the South were under the control of Ku Klux Klans, the objects of which were "to deprive colored citizens of the right to bear arms and of the right to a free ballot . . . ." Ex. Doc. No. 268, 42nd Cong., 2d Sess. 2 (1872). In debate on

a bill to expand civil rights protection, Senator John Scott explained how Klansmen seized the firearms of their victims before lynching them. Cong. Globe, 42nd Cong., 2d Sess., 3584 (1872). Senator Pratt observed that the Klan targeted the black who would "tell his fellow blacks of their legal rights, as for instance their right to carry arms and defend their persons and homes." Id. at 3589.

In sum, the Civil Rights Act of 1871 was understood to provide a remedy to persons who were deprived of the right to carry firearms for self defense. This is such a case.

CONCLUSION

This Court should reverse the order of the lower court denying the motion for a preliminary injunction, order that court to grant said motion, and remand the case for further proceedings.

Date: December 4, 2012

Respectfully Submitted,
Congress of Racial Equality, Inc.,
Amicus Curiae

By Counsel

/s/ Stephen P. Halbrook
Stephen P. Halbrook

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6602 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). 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 Word Perfect 12 in 14-point New Century Schoolbook.

Date: December 4, 2012

/s/ Stephen P. Halbrook
Stephen P. Halbrook

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 December 4, 2012.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: December 4, 2012

/s/ Stephen P. Halbrook
Stephen P. Halbrook

No. 12-57049

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

DOROTHY McKAY, et al.,

Plaintiffs-Appellants

v.

SHERIFF SANDRA HUTCHENS, et al.,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA
(SACV 12-1458JVS)

MOTION OF CONGRESS OF RACIAL EQUALITY, INC., TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS AND IN SUPPORT OF REVERSAL

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The Congress of Racial Equality, Inc., by counsel, pursuant to F.R.App.P. 29(b), hereby moves the Court for leave to file an amicus curiae brief in support of Appellants and in support of reversal. In support thereof, counsel represents that Appellants consent to the filing of this brief. Appellees failed to respond to counsel's requests for consent. In further support thereof, counsel states:

IDENTITY OF THE AMICUS CURIAE

The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit membership corporation founded in 1942 with local chapters throughout the United States, Africa, and other parts of the world. CORE is the third oldest and one of the 'Big Four' civil rights groups in the United States. From the protests against Jim Crow laws of the 40's through the Sit-ins of the 50's, the Freedom Rides of the 60's, the cries for Self-Determination in the 70's, Equal Opportunity in the 80's, Community Development in the 90's, to the demand for equal access to information, CORE has championed true equality.

CORE's interest in this case stems from the fact that the Second Amendment right to keep and bear arms for self defense is an important

civil right that was denied to African Americans under the antebellum Slave Codes, the Black Codes passed just after the Civil War, and under the Jim Crow regimes that persisted into the twentieth century.[1] In states, such as here, with licensing and permitting statutes that are construed as discretionary regarding who may exercise Second Amendment rights, the poor and minorities may suffer discrimination.

DESIRABILITY OF AMICUS BRIEF

This amicus brief is desirable, and the matters asserted herein are relevant to the disposition of the case, in that the brief addresses in considerable detail the original understanding that the Fourteenth Amendment would protect the right of all law-abiding persons to bear arms, and would not subject this right to the discretion of local officials. The Black Codes passed after the Civil War subjected freedmen to such discretionary licensing provisions, and the Fourteenth Amendment was designed in part to eradicate such laws.

In precedent-setting cases such as District of Columbia v. Heller, 554

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[1]See, e.g., Watson v. Stone, 4 So.2d 700, 703 (Fla. 1941) (Buford, J., concurring) ("the Act [requiring a license to carry a firearm] was passed for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . .").

U.S. 570 (2008), CORE has filed amicus curiae briefs which contribute its unique perspectives. It also filed an amicus brief in a case pending before this Court which raises some of the issues herein, Edward Peruta v. County of San Diego, No. 10-56971. This brief does not repeat arguments or factual statements made by the parties.

The amicus curiae brief accompanies this motion.

CONCLUSION

This Court should grant leave to file this amicus curiae brief.

Date: December 4, 2012

Respectfully Submitted,

Congress of Racial Equality, Inc.,

Amicus Curiae

By Counsel

/s/ Stephen P. Halbrook
Stephen P. Halbrook

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 December 4, 2012.

Participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

Date: December 4, 2012

/s/ Stephen P. Halbrook
Stephen P. Halbrook