No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,

Petitioners

v.

KEVIN J. BRUEN, ET AL.,

Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR AMICUS CURIAE NATIONAL AFRICAN AMERICAN GUN ASSOCIATION, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

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STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus curiae National African American Gun Association, Inc. (NAAGA) is a nonprofit association with headquarters in Griffin, Georgia, and organized under Internal Revenue Code § 501(c)(4).[1] NAAGA was founded in 2015 to defend the Second Amendment rights of members of the African American community. NAAGA has 127 chapters with over 39,000 members in 39 states and the District of Columbia.

NAAGA's mission is to establish a fellowship by educating on the rich legacy of gun ownership by African Americans, offering training that supports safe gun use for self defense and sportsmanship, and advocating for the inalienable right to self defense for African Americans. Its goal is to have every African American introduced to firearm use for home protection, competitive shooting, and outdoor recreational activities. NAAGA welcomes people of all religious, social, and racial perspectives, including African American members of law enforcement and active/retired military.

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[1]No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund the preparation or submission of this brief. No person other than this amicus curiae, its members, or its counsel made such a monetary contribution. Petitioners gave blanket consent for the filing of amicus curiae briefs in this case, and Respondents gave consent for the filing of this brief.

NAAGA activities include individual and group instruction in firearm safety and marksmanship, target shooting at various ranges, and participation in firearm training for sport and lawful self-defense. As a result of the types of laws at issue in this case, members who are residents of New York or of other states with similar restrictions are deprived of the exercise of their Second Amendment rights to bear arms and would be subject to draconian criminal penalties should they do so.

NAAGA's interest in this case stems in part from the fact that the Second Amendment right to bear arms was denied to African Americans under the antebellum Slave Codes, the post-Civil War Black Codes, and the Jim Crow laws that persisted into the twentieth century. Such laws often included arbitrary prohibitions on the carrying of firearms with parallels to New York's current law. Such laws invariably discriminate against the poor and minorities. NAAGA will bring before the Court matter not brought to its attention by the parties.

SUMMARY OF ARGUMENT

New York's prohibition on carrying a handgun, and its refusal to make carry licenses available to all law-abiding citizens, violates the right of the people to bear arms protected by the Second Amendment.

During the colonial, founding, and early republic periods, slaves and even free blacks, particularly in the

southern states, were either barred from carrying a firearm at all or were required to obtain a license to do so, which was subject to the discretion of a government official. African Americans were not considered as among "the people" with the "right" to "bear arms."

Exclusion of African Americans from the rights of "the people" in the Second Amendment and other Bill of Rights guarantees was in conflict with the explicit text. The argument has been made that the Second Amendment was adopted to protect slavery. But the defect was not in recognizing the rights of *white* Americans, but was in *not* recognizing the rights of *black* Americans. The impetus for recognition of the right to bear arms came from the Northern states, which had abolished or were in the process of abolishing slavery.

After the Civil War, the southern states enacted the Black Codes, which prohibited African Americans from bearing arms unless they obtained a license, which an official had the discretion to grant or withhold. No such requirement existed for a citizen to bear arms.

Congress sought to rectify this by protecting the right of all persons to bear arms in the Civil Rights Act and Freedmen's Bureau Act of 1866. The Fourteenth Amendment was understood to guarantee the right to carry arms from state violation through arbitrary licensing restrictions. The right to bear arms was further protected by the Civil Rights Act of 1871. But restrictive licensing continued in the Jim Crow era.

Rev. Martin Luther King, Jr., was himself denied a carry license under a discretionary issuance law.

New York's discretionary licensing scheme is within a similar legacy as the Black Codes and Jim Crow regimes that prohibited the carrying of firearms by African Americans without a license subject to the discretion of the licensing authority. The difference is that, instead of discriminating only against black people, it deprives the people at large of the right to bear arms and bestows the privilege on a tiny subset of "the people."

ARGUMENT

I. The Historical Exclusion of African Americans from Exercise of the Right to Bear Arms by Total Bans or by Discretionary Licensing Laws Reflected Their Status as Slaves or Non-citizens

In the colonial, founding, and early republic periods, Americans were recognized as having the right peaceably to bear or carry arms in public. The only exception was the slave codes that prohibited slaves and, in some states, free blacks from bearing arms without a license that government authorities had discretion to grant or deny. See Stephen P. Halbrook, *The Right to Bear Arms: A Constitutional Right of the People or a Privilege of the Ruling Class?* 204-63 (2021).

Slaves were deprived of all of the rights that would be set forth in the Bill of Rights. The Second

Amendment was not unique in that regard. St. George Tucker summarized their plight thus:

> 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: With a Proposal for the Gradual Abolition of It, in the State of Virginia* 65 (1796).

Virginia law provided: "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 . . . ." Ch. 111, §§ 7 & 8, 1 Va. Code 423 (1819).

As a Virginia court held, among the "numerous restrictions imposed on this class of people [free blacks] in our Statute Book, many of which are inconsistent with the letter and spirit of the Constitution, both of this State and of the United States," was the restriction "upon their right to bear arms." *Aldridge v. Commonwealth*, 2 Va. 447, 449 (Gen. Ct. 1824).

The contrast with free citizens was stark. Calling the Second Amendment "the true palladium of liberty," St. George Tucker wrote: "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*, App., 300 (1803).

Virginia's only restriction on free citizens was not enacted until 1838, and it related just to the manner of bearing arms: "If a free person, habitually, carry about his person hid from common observation, any pistol, . . . he shall be fined fifty dollars." Va. Code, tit. 54, ch. 196, § 7 (1849).

Other southern states recognized the right to carry arms by free citizens subject to restrictions on concealed carry, and either banned carry by African Americans or subjected it to discretionary licensing. The Kentucky Constitution provided: "That the right of the citizens to bear arms in defense of themselves and the State shall not be questioned." Ky. Const., Art. XII, § 23 (1792). Its restriction on concealed carry was declared violative of that right. *Bliss v. Commonwealth*, 2 Litt. 90, 92 (Ky. 1822).

However, Kentucky law provided that "[n]o negro, mulatto, or Indian, whatsoever, shall keep or carry any gun," except that "every free negro, mulatto or Indian, being a house-keeper, may be permitted to keep one gun," and "all negroes, mulattoes and Indians, bond or free, living at any frontier plantation, may be permitted to keep and use guns . . . by license from a justice of the peace . . . ." Ch. 174, §§ 5& 6

(1798), in 2 Digest of the Statute Law of Kentucky 1150 (1822).

Maryland made it unlawful "for any free negro or mulatto to go at large with any gun, or other offensive weapon . . . ." Ch. 86, § II (1806), in 3 Laws of Md. 297 (1811). However, this did not "prevent any free negro or mulatto from carrying a gun" if he had "a certificate from a justice of the peace, that he is an orderly and peaceable person . . . ." *Id.*

The Court of Appeals of Maryland described "free negroes" as being treated as "a vicious or dangerous population," as exemplified by laws "to prevent their migration to this State; to make it unlawful for them to bear arms; to guard even their religious assemblages with peculiar watchfulness." *Waters v. State*, 1 Gill 302, 309 (Md. 1843).

Some free blacks obtained both permits to travel and gun licenses. "As they traveled with a permit or carried a licensed gun, they were that much closer to citizenship." Martha S. Jones, *Birthright Citizens: A History Of Race and Rights in Antebellum America* 106-07 (2018).

Alabama's bill of rights declared: "Every citizen has a right to bear arms, in defence of himself and the State." Ala. Const., Art. I, § 23 (1819). A concealed weapon ban was upheld because open carry was allowed, and the court cautioned: "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." *State v. Reid*, 1 Ala. 612, 616-17 (1840).

Alabama provided that "no slave shall keep or carry any gun," but added that "any justice of the peace may grant . . . permission in writing to any slave, on application of his master or overseer, to carry or use a gun and ammunition within the limits of said master's or owner's plantation . . . ." Digest of the Laws of the State of Ala. 391-92 (1833).

Tennessee's first constitution declared: "That the freemen of this State have a right to keep and to bear arms for their common defence." Tenn. Const., Art. XI, § 26 (1796). "[S]o solemn an instrument hath said the people may carry arms . . . ." *Simpson v. State*, 13 Tenn. 356, 360 (1833).

By contrast, Tennessee law provided that "[n]o slave shall go armed with gun, sword, club or other weapon" without a certificate from the county court. Acts 1741, c. 24, in 1 Statute Laws of the State of Tennessee of a Public & General Nature, 314 (1831).

Reflecting the above, Tennessee amended its constitutional guarantee, which Arkansas and Florida copied, to state: "That the free white men of this State shall have a right to keep and to bear arms for their common defence." Tenn. Const., Art. I, § 26 (1834); Ark. Const., Art. II, § 21 (1836); Fla. Const., Art. I, § 21(1838).

The Georgia Supreme Court held that the right to bear arms expressed in the Second Amendment is an inalienable right that applies to the states. *Nunn*

v. State, 1 Ga. 243, 250 (1846).The court invalidated a ban on open carry of pistols based on "[t]he right of the whole people, old and young, men, women and boys, and not militia only, to keep and bear *arms* of every description . . . ." *Id.* at 251.

In Georgia, it was unlawful "for any free person of colour in this state, to own, use, or carry fire arms of any description whatever . . . ." § 7, 1833 Ga. Laws 226, 228. Georgia's high court held: "Free persons of color have never been recognized here as citizens; they are not entitled to bear arms, vote for members of the legislature, or to hold any civil office." *Cooper v. Savannah*, 4 Ga. 72 (1848).

Delaware had no restrictions on the peaceable carrying of arms by white persons. However, it forbade "free negroes and free mulattoes to have, own, keep, or possess any gun [or] pistol," except that such persons could apply to a justice of the peace for a permit to possess a gun, which could be granted with a finding "that the circumstances of his case justify his keeping and using a gun . . . ." Ch. 176, § 1, 8 Laws of the State of Del. 208 (1841). The police power was said to justify restrictions such as "the prohibition of free negroes to own or have in possession fire arms . . . ." *State v. Allmond*, 7 Del. 612, 641 (1856).

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). Thus, "[f]or any lawful purpose – either of business or amusement –

the citizen is at perfect liberty to carry his gun." *State v. Huntley*, 25 N.C. (3 Ired.) 418, 422-23 (1843).

But North Carolina made it unlawful "if any free negro, mulatto, or free person of color, shall wear or carry about his or her person, or keep in his or her house, any shot gun, musket, rifle, pistol, sword, dagger or bowie-knife, unless he or she shall have obtained a licence therefor from the Court of Pleas and Quarter Sessions of his or her county . . . ." *State v. Newsom*, 27 N.C. 250, 207 (1844) (Act of 1840, ch. 30). The provision was upheld partly on the ground that "the free people of color cannot be considered as citizens . . . ." *Id.* at 254.

The court further averred: "It does not deprive the free man of color of the right to carry arms about his person, but subjects it to the control of the County Court, giving them the power to say, in the exercise of a sound discretion, who, of this class of persons, shall have a right to the licence, or whether any shall." *Id.* at 253. This is reminiscent of the New York's argument today that the right of the people to bear arms is not infringed by laws granting officials discretion to deny them that very right.

Scott v. Sanford, 60 U.S. (19 How.) 393, 417 (1857), argued against recognition of the citizenship of African Americans because it "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 . . .; and it would give them the full liberty of speech . . ., and to keep and

carry arms wherever they went." Neither do New York residents today have a right to carry arms "wherever they went," or indeed anywhere they go.

In sum, having no arms right was an incident of slavery. Even free blacks were required to obtain a license to possess or carry a firearm, and the license could limit possession to one's premises. Such laws were based on the denial of the rights of citizenship to African Americans.

II. The Right to Bear Arms, Like that of Other Bill of Rights Guarantees, Is Inherent in "The People"

Exclusion of African Americans from the rights of "the people" in the Second Amendment and other Bill of Rights guarantees was in conflict with the explicit text. It would remain for the Thirteenth Amendment to abolish slavery and the Fourteenth Amendment to guarantee fundamental rights to all to rectify the injustice.

The argument has been made that the Second Amendment was adopted to protect slavery.[2] But the

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[2]That theory was first proposed in Carl T. Bogus, "The Hidden History of the Second Amendment," 31 *U.C. Davis L. Rev.* 309 (1998). However, Professor Bogus conceded: "The evidence that the Second Amendment was written to assure the South that the federal government would not disarm its militia . . . is almost entirely circumstantial. Madison never expressly stated that he wrote the Second Amendment for that purpose." *Id.* at 372.

More recently, it has been argued that the Second Amendment was a "bribe paid . . . with Black bodies." Carol

defect was not in recognizing the rights of *white* Americans, but was in *not* recognizing the rights of *black* Americans. Besides Second Amendment rights, African Americans also were denied rights under the First and Fourth Amendments. None of these amendments were adopted to protect slavery.

"[T]he Second Amendment, like the First and Fourth Amendments, codified a pre-existing right." *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008). The English Declaration of Rights recognized thirteen "true, ancient and indubitable rights," including the following: "That the Subjects which are Protestants, may have Arms for their Defence . . . ." 1 W. & M., Sess. 2, c.2, (1689).

The Declaration was plainly not grounded in the need to suppress a domestic slave population – England had none. However, limitation of the right to the majority Protestant population made possible laws disarming the minority Catholic population, 1 W.&M., Sess. 1, c. 15 §4 (1689), similar to southern laws disarming African Americans. In drafting the Second Amendment, James Madison recognized the fallacy of limiting arms to Protestants. Madison, Notes for Speech in Congress, June 8, 1789, 12 *Papers of James Madison*, 193-94 (1979). But the fallacy in the

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Anderson, *The Second: Race and Guns in a Fatally Unequal America* 32 (2021). Much of Professor Anderson's evidence relates to the *unjust and unequal* enforcement of laws relating to firearms discussed in this brief.

southern states would be not recognizing African Americans as part of "the people."

"By the time of the founding, the right to have arms had become fundamental for English subjects." *Heller,* 554 U.S. at 593. "Americans valued the ancient right . . . even more important for self-defense and hunting" than for militia. *Id.* at 599.

From the American Revolution through the adoption of the Second Amendment, the impetus for recognition of the right to bear arms came more from the northern states, where slavery was abolished or dying, than from the southern states. In no way was the Second Amendment a devil's bargain extracted by the slave states from a reluctant North. The history of how this occurred further demonstrates the fundamental right to carry arms for self-defense.

Pennsylvania was the first state to adopt an arms guarantee, which provided: "That the people have a right to bear arms for the defense of themselves, and the state . . . ." Pa. Declaration of Rights, Art. XIII (1776). It passed the first state abolition act. An Act for the Gradual Abolition of Slavery (Pa. 1780). See Arthur Zilversmit, *The First Emancipation: The Abolition of Slavery in the North* 124-37 (1967) (hereafter "Zilversmit").

When the Constitution was proposed in 1789 without a bill of rights, the Pennsylvania Dissent of Minority demanded one, 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* 623-24 (1976). This was not an attempt to protect slavery.

Vermont's Declaration of Rights of 1777 set forth the following fundamental rights and abolished slavery:

> That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty; acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety. Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law, to serve any person, as a servant, slave, or apprentice, after he arrives to the age of twenty-one years; nor female, in like manner, after she arrives to the age of eighteen years . . . .

Vt. Constitution, Art. I, § 1 (1777). See Zilversmit at 116.

The Vermont Declaration also provided: "That the people have a right to bear arms for the defence of themselves and the State . . . ." *Id.*, § 15.

The Massachusetts Declaration of Rights, Article 1 (1780), stated that "[a]ll men are born free and equal, and have certain natural, essential, and unalienable rights," including "the right of enjoying

and defending their lives and liberties . . . ." And it provided in Article 17: "The people have a right to keep and to bear arms for the common defence."

Court decisions in 1781-83 declared slavery unconstitutional under Article I. Zilversmit at 113-15. The Chief Justice of the Massachusetts Supreme Court declared that "slavery is . . . as effectively abolished as it can be by the granting of rights and privileges wholly incompatible and repugnant to its existence." *Id.* at 114.

Samuel Adams proposed in the Massachusetts ratification 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 similarly provided that "[a]ll men are born equally free and independent" and "have certain natural, essential, and inherent rights; among which are the enjoying and defending life and liberty . . . ." N.H. Bill of Rights §§ I & II (1783). New Hampshire courts read that language as abolishing slavery. Zilversmit at 117.

When the federal Constitution was proposed, New Hampshire demanded 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).

In the Virginia convention, George Mason recalled that "when the resolution of enslaving America was formed in Great Britain, the British Parliament was advised . . . to disarm the people; that it was the best and most effectual way to enslave them." 3 Jonathon Elliot ed., *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 380 (1836).

The ensuing debate concerned defense against tyranny and invasion; slavery was never mentioned in reference to the right to bear arms. The Virginia convention demanded that the federal Constitution provide: "That the people have a right to keep and bear arms . . . ." *Id.* at 658-59.

A proposal to abolish slavery in New York's 1777 constitutional convention did not succeed. The state later took various measures to end slavery and finally enacted abolition in 1799. Zilversmit at 139-40, 147-52, 181-82.

Rhode Island abolished slavery in 1784. Zilversmit at 119-21.

New York and Rhode Island, along with North Carolina, demanded that the federal Constitution declare that "the people have a right to keep and bear arms . . . ." 18 *Documentary History of the Ratification of the Constitution*, 298 (1995) (N.Y.); *id.* at 316 (N.C.); 1 Elliot, *Debates in the Several State Conventions*, 335 (R.I.).

In short, the drive for what became the Second Amendment came more from the northern states,

several of which had their own state guarantee of the right to bear arms. And these were the same states that had abolished or were in the process of abolishing slavery. The defect in the American polity was the failure of the southern states to extend recognition of all fundamental rights to African Americans.

The constitutional guarantees accorded to "the people" led to the abolitionist argument that slavery was unconstitutional. The abolitionists saw the denial of rights to African Americans as a violation of the first eight amendments, and their arguments influenced the framers of the Fourteenth Amendment. Jacobus tenBroek, *Equal Under Law* 110-13, 126 (1965).

Abolitionist Lysander Spooner wrote that the Second Amendment "recognize[s] the natural right of all men 'to keep and bear arms' for their personal defence," which was "a right palpably inconsistent with the idea of his being a slave." Lysander Spooner, *The Unconstitutionality Of Slavery* 98 (1860). According to Joel Tiffany, the Second Amendment "is absolutely inconsistent with permitting a portion of our citizens to be enslaved." Joel Tiffany, *A Treatise on the Unconstitutionality of Slavery* 117–18 (1849).

Frederick Douglass agreed with the above arguments. 2 Frederick Douglass, *Life and Writings* 201 (1950). The constitutionality of slavery upheld in *Dred Scott* disregarded "the plain and commonsense reading of the instrument itself; by showing that the Constitution does not mean what it says, and says what it does not mean . . . ." *Id.* at 420.

Frederick Douglass explained in 1865 that "the black man has never had the right either to keep or bear arms." 4 *The Frederick Douglass Papers* 84 (1991). With slavery ending, he stated that the freed people "must have the cartridge box, the jury box, and the ballot box, to protect them." "Frederick Douglass on the American Crisis," *Newcastle Weekly Courant*, May 26, 1865, at 6.

The truism that "the people" in the Second Amendment and other Bill of Rights guarantees really means all of the people would be realized in the Reconstruction Amendments. Today, it is not New York's prerogative to say who may and who may not exercise liberties in the Bill of Rights.

III. The Fourteenth Amendment Was Understood to Guarantee the Right to Bear Arms from State Violation Through Arbitrary Licensing Restrictions

A. Protecting the Right of the People at Large, Particularly the Freedmen, to Carry Arms Was a Primary Objective of the Fourteenth Amendment

The Fourteenth Amendment was understood to guarantee the right to keep and bear arms from state infringement. Under the Black Codes, officials had discretion on whether to issue licenses to allow freedmen to keep arms and, if so, whether they could carry arms out of their homes. Such laws were considered to be in violation of the Second Amendment.

The first state law noted in *McDonald* as typical of what the Fourteenth Amendment would invalidate provided 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, quoted in *McDonald v. City of Chicago*, 561 U.S. 742, 771 (2010). The official had discretion to grant or deny the license.

South Carolina law provided that no person of color "shall, without permission in writing from the District Judge or Magistrate, be allowed to keep a fire arm . . . ." S.C. Stat., No. 4730, § XIII, 250 (1865). An African American convention resolved 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*, 302 (1980). Senator Charles Sumner summarized the petition, noting "that they should have the constitutional protection in keeping arms, in holding public assemblies, and in complete liberty of speech and of the press." Cong. Globe, 39th Cong., 1st Sess. 337 (1866).

Rep. William Lawrence quoted Order No. 1 (1866) for the Department of South Carolina, which declared:

> 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.

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. . . .
>
> 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.

Deprivation of the right to bear arms was 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, explained that the bill would render void laws like that of Opelousas, Louisiana, providing that no freedman "shall be allowed to carry fire-arms" without permission of his employer and as approved by the

board of police. Cong. Globe, 39th Cong., 1st Sess. 517 (1866). He quoted from a report that in Kentucky "[t]he civil law prohibits the colored man from bearing arms . . . ." *Id.* at 657.

Senator Garret Davis said that the Founding Fathers "were for every man bearing his arms about him . . . for his own defense." *Id.* at 371. Yet places like Alexandria, Virginia "enforce[d] the old law against them in respect to whipping and carrying fire-arms . . . ." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).

Senator Samuel Pomeroy noted 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." Cong. Globe, 39th Cong., 1st Sess., 1182 (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 . . . 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.

In support of a bill which required the Southern States to ratify the Fourteenth 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 . . . Cunning legislative devices are being invented in most of the States to restore slavery in fact.[3]

Id. at 3210.

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[3]Florida's 1865 law made it "unlawful for any Negro, mulatto, or person of color to own, use, or keep in possession or under control any . . . firearms or ammunition of any kind, unless by license of the county judge . . . ." Ex. Doc. No. 118, House of Rep., 39th Cong., 1st Sess. 20 (1866). Florida Governor David S. 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).

A Mississippi court declared the Civil Rights Act void in upholding the conviction, under the 1865 Mississippi law quoted above, of a freedman for carrying a musket without a license while hunting. It held that the state arms guarantee protected only citizens. *New York Times*, Oct. 26, 1866, at 2.

Another Mississippi court found the ban on freedmen having arms without a license void:

> The citizen has the right to bear arms in defense of himself, secured by the constitution. . . . 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? . . . 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.

The above judicial decisions were noted in a report from General Ulysses 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).

As passed, the Freedmen's Bureau Act explicitly recognized the right to bear arms, which clearly included the right peaceably to carry arms in public:

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

"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*, 561 U.S. at 777. As such, the right of a law-abiding person to carry a firearm could not be dependent on the discretion of an official.

B. The Right to Bear Arms Was Understood as Protected by the Civil Rights Act of 1871

"[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*, 561 U.S. at 776, citing Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms* 120-31(1998). Today's 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). Rep. Henry Dawes explained how the federal courts would protect "these rights, privileges, and immunities . . . ." *Id.*, quoting Cong. Globe, 42d Cong., 1st Sess., 476 (1871). Dawes had just noted that the citizen "has secured to him the right to keep and bear arms in his defense." Cong. Globe, supra, at 475-76.

Patsy also cited the remarks of Rep. John Coburn, 457 U.S. at 504, who on the same page 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.

"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, Whitthorne objected that "if a police officer . . . 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 peaceably carrying a pistol, and they wished to provide a legal remedy for such deprivation.

A year after passage of the Civil Rights Act, President Grant reported that in parts of the South Ku Klux Klan groups continued to seek "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 Daniel 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." Cong. Globe, 42nd Cong., 2d Sess., 3589 (1872).

While at this point in history the disarming of blacks was taking place more by the Klan rather than by state action, a report recalled the state laws of 1865-66 under which "a free person of color was only a little lower than a slave. . . . [and hence] forbidden to carry or have arms." 1 Report of the Joint Select Committee to Inquire into the Condition of Affairs in the Late Insurrectionary States 261-62 (1872).

In sum, the Civil Rights Act of 1871 was understood to provide a remedy to persons who were deprived of the right to bear firearms. No one suggested that the right was limited to one's house or that the state could limit licenses to carry arms only to persons it subjectively deemed to have a "proper cause" to do so. The laws that subjected the African

Americans to such a discretionary licensing system were among the deprivations that prompted Congress to act.

IV. Discretionary Licensing Facilitated Jim Crow Restrictions

The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to bear arms. Instead, in the Jim Crow era facially-neutral laws imposed prohibitive fees and restrictions on the poor and were selectively enforced in ways to deny the right of black citizens to possess and carry arms.

In 1892, Ida B. Wells wrote that a "Winchester rifle should have a place of honor in every black home, and it should be used for that protection which the law refuses to give." Ida B. Wells, *Southern Horrors: Lynch Law in All its Phases* 16 (1892). She had in mind recent events in Jacksonville, Florida, and Paducah, Kentucky, where well-armed blacks had thwarted lynch mobs.[4]

Perhaps not coincidently, a year later Florida made it a crime for a person "to carry around with him, or to have in his manual possession" a "Winchester

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[4]See Margaret Vandiver, *Lethal Punishment: Lynchings & Legal Executions in the South* 179 (New Brunswick, N.J.: Rutgers University Press, 2006); George C. Wright, *Racial Violence in Kentucky 1865-1940: Lynchings, Mob Rule & "Legal Lynchings"* 169-170 (Baton Rouge: LSU Press, 1990).

rifle or other repeating rifle" without a license, which "may" be granted after posting a $100 bond with approved sureties. 1893 Fla. Laws 71-72. (In 1901, the law was amended to add pistols to the list.) That would be equivalent to $2,859 today.[5] The average monthly wage for farm labor in Florida in 1890 was $19.35.[6] Licenses were obviously beyond the means of poor persons, not to mention the unlikelihood of them being issued to African Americans.

This law "was passed when there was a great influx of negro laborers in this State," and it was "for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population . . . ." *Watson v. Stone*, 148 Fla. 516, 524, 4 So. 2d 700 (1941) (Buford, J., concurring). Moreover, it was estimated that "80% of the white men living in the rural sections of Florida have violated this statute," "not more than 5% of the men in Florida who own pistols and repeating rifles have ever applied" for a license, and that "there had never been . . . any effort to enforce the provisions of this statute as to white people, because it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested." *Id.*

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[5]"Why a dollar today is worth only 3% of a dollar in 1893," Mar. 12, 2021. https://www.in2013dollars.com/us/inflation/1893.

[6]George K. Holmes, *Wages of Farm Labor* 29 (USDA 1912).

In Virginia, it was held lawful to carry a concealed handgun if it was not readily accessible. *Sutherland v. Commonwealth*, 109 Va. 834, 65 S.E. 15 (1909). The editors of the *Virginia Law Register* criticized the decision with unabashed racist rhetoric as follows:

> It is a matter of common knowledge that in this state and in several others, the more especially in the Southern states where the negro population is so large, that this cowardly practice of "toting" guns has always been one of the most fruitful sources of crime . . . . There would be a very decided falling off of killings "in the heat of passion" if a prohibitive tax were laid on the privilege of handling and disposing of revolvers and other small arms, or else that every person purchasing such deadly weapons should be required to register . . . . Let a negro board a railroad train with a quart of mean whiskey and a pistol in his grip and the chances are that there will be a murder, or at least a row, before he alights.

"Carrying Concealed Weapons," 15 *Virginia Law Register* 391-92 (1909).

Registration and an annual tax of one dollar for each pistol or revolver would be enacted in Virginia. Ch. 258, 1926 Va. Acts 285. The intimidating process, the paperwork, and the expense, similar to paying the

$1.50 poll tax for voting,[7] would have made it difficult or impossible for the poor, including African Americans, to obtain or possess handguns.

Possession of an unregistered handgun was punishable with a fine of $25-50 and sentencing to the State convict road force for 30-60 days. *Id.* at 286. See R. Withers, "Road Building by Prisoners," in *Proceedings of the National Conference of Charities and Correction* 209 (1908) ("three-fourths of the convict road force are negroes"). The law functioned to prevent African Americans from carrying handguns and to conscript those who exercised their right to bear arms for forced road work.

The Jim Crow era, with its regime of legal discrimination based on race, ended with the enactment of federal civil rights legislation in the 1960s. Exercise of the right to bear arms for self-defense was essential to protect members of the civil rights movement. African Americans, including civil rights icons, had a long tradition of carrying firearms to protect themselves and their communities. See Nicholas Johnson, *Negroes and the Gun: The Black Tradition of Arms* (2014); Charles E. Cobb, Jr., *This Nonviolent Stuff'll Get You Killed: How Guns Made the Civil Rights Movement Possible* (2014).

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[7]Va. Const., Art. II, § 20 (1902). "The Virginia poll tax was born of a desire to disenfranchise the Negro." *Harman v. Forssenius*, 380 U.S. 528, 543 (1965).

Laws that subjected the right to bear arms to discretionary licence issuance played a role in the history of the civil rights movement. Perhaps the most stark illustration was the denial of a carry license to Martin Luther King, Jr.

Rev. King became nationally prominent as a result of the bus boycott in Montgomery, Alabama, which was triggered by Rosa Parks' disobedience to the segregated seating rules. King became the leader of the boycott movement. In January 1956, King's house was bombed, and armed black men scrambled to protect him, Coretta, and their young daughter. Johnson, *Negroes and the Gun*, 261-62. Professor Johnson relates:

> King even sought a permit to carry a concealed gun in his car. But local authorities determined that he had not shown "good cause" for needing a permit to carry a firearm. A generation later, protests against the caprice and cronyism that pervaded these types of discretionary permit systems would spark a movement toward nondiscretionary, "shall issue" concealed-carry permits that would become the American norm.

Id. at 262.

The denial of King's application made the *Montgomery Advertiser*, which reported:

> A Negro boycott leader whose home was bombed earlier this week has been denied a pistol permit, the sheriff's department said yesterday.
>
> The Rev. M. L. King and two other Negro clergymen requested the permit Wednesday, Sheriff Mac Sim Butler said.
>
> Sheriff Butler said he declined to issue a pistol permit which King said he wanted for a night watchman at his home.
>
> He said threats against him have been received "continuously" and he felt the need for a watchman.

"Negro Leader Fails to Get Pistol Permit," *Montgomery Advertiser*, Feb. 4, 1956, at 3B.

At a meeting of movement organizers to discuss how to protect mass meetings and the leaders, the minutes reflected Rev. King to have stated: "I went to the sheriff to get a permit for those people who are guarding me. 'Couldn't get one'. In substance he was saying 'you are at the disposal of the hoodlums.'" Donald T. Ferron, Notes on MIA Executive Board Meeting (Feb. 2, 1956).[8]

At that time, Alabama law provided: "No person shall carry a pistol in any vehicle or concealed on or about his person, except in his place of abode or fixed

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[8]https://kinginstitute.stanford.edu/king-papers/documents/notes-mia-executive-board-meeting-donald-t-ferron-1.

place of business, without a license therefor . . . ." Uniform Firearms Act, Acts 1936, Ex. Sess., No. 82, § 5, at 51, 52. A probate judge, police chief, or sheriff "*may* . . . issue a license . . . to carry a pistol in a vehicle or concealed on or about his person . . ., if it appears that the applicant has good reason to fear injury to his person or property, or has any other proper reason for carrying a pistol . . . ." *Id.* § 7 (emphasis added).

While the Act did not prohibit open carry of a pistol, its ban on carrying in a vehicle without a license surely hampered the ability of civil rights workers to protect themselves. The Act had no exemption from licensing for armed guards, so those guarding King and other leaders were subject to arrest.

But the instinct for survival was far stronger than the threat of arrest, and many in the civil rights movement carried firearms for that reason. As Professor Cobb relates, "there were few black leaders who did *not* seek and receive armed protection from within the black community. They needed it because both local law enforcement and the federal government refused to provide it." Cobb, *This Nonviolent Stuff'll Get You Killed*, 7-8.

Martin Luther King would have had no problem getting a pistol carry permit today in Alabama or in the forty-one other "shall issue" states. Alabama law now requires that a sheriff "shall issue" a permit to carry a pistol concealed "unless the sheriff determines that the person is prohibited from the possession of a

pistol or firearm pursuant to state or federal law, or has a reasonable suspicion that the person may use a weapon unlawfully or in such other manner that would endanger the person's self or others." Ala. Code 1975 § 13A-11-75(a)(1)a. Unless otherwise provided, "a sheriff may not place conditions or requirements on the issuance of a pistol permit or limit its scope or applicability." *Id.*, § 13A-11-75(a)(1)d.

Would Rev. King have been able to get a carry license under New York's discretionary "proper cause" law? Would he have been able to "demonstrate a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession," per *Kachalsky v. County of Westchester*, 701 F.3d 81, 86 (2nd Cir. 2012)? Wasn't King in a similar threatened situation as many others in the civil rights movement?

In historical perspective, New York's law is heir to the Black Codes and Jim Crow regimes except that, instead of discriminating only against black people, it deprives the people at large of the right to bear arms, which is reserved to members of a privileged class determined by government officials to have "good cause."

CONCLUSION

This Court should reverse the judgment of the court below and hold that New York's limitation of carry licenses to persons that officials decide have a "proper cause" violates the Second Amendment.

Respectfully submitted,

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