No. 18-280

In the Supreme Court of the United States

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

Petitioners

v.

THE CITY OF NEW YORK, 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

STEPHEN P. HALBROOK*
3925 Chain Bridge Road
Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com

NEZIDA S. DAVIS
Davis Bakari Law LLC
2915 Pleasant Ridge Dr.
Decatur, GA 30034
(404) 771-1832
nsdavis@davisbakarilaw.com

*Counsel of Record

Counsel for Amicus Curiae

QUESTION PRESENTED

Whether the City's ban on transporting a licensed, locked, and unloaded handgun to a home or shooting range outside city limits is consistent with the Second Amendment, the Commerce Clause, and the constitutional right to travel.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONS

STATUTES

LEGISLATIVE MATERIALS

OTHER AUTHORITIES

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 preserve and defend the Second Amendment rights of members of the African American community. NAAGA has seventy chapters with approximately 30,000 members in thirty States.

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.

NAAGA activities include individual and group

---

[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 this brief. Preparation and submission of this brief was funded in part by the NRA Freedom Action Foundation. Petitioners and respondents gave blanket consent for the filing of amicus curiae briefs in this case.

instruction in firearm safety and marksmanship, target shooting at various ranges, and participation in firearm training for sport and lawful self-defense. NAAGA has four chapters in the State of New York, including the New York Elite Firearms Gun Club, which uses a range just outside the City's limits. Members who are City residents are prohibited from bringing their handguns to the range to participate. The City's stringent licensing requirements discourage persons not only from joining NAAGA, but also from owning firearms at all.

NAAGA's interest in this case stems in part from the fact that the Second Amendment right to keep and 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 possession of firearms with parallels to New York City'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

The City's ban on transporting a handgun from one's home to another lawful place, such as a secondary abode or a shooting range, violates the Second Amendment. Transportation of unloaded, locked, and inaccessible arms is inherent in the textual

guarantee of the right to "keep and bear" arms. That is confirmed by the Amendment's original understanding. Comparable prohibitions on the keeping and bearing of arms by African Americans reflected their status as slaves or non-citizens.

The Fourteenth Amendment prohibits the city from banning possession of a licensed firearm outside of the address of the premises on the license. The right to keep arms in the home for self-defense extends to a second or temporary home. The Fourteenth Amendment was understood to guarantee the right to possess arms from state violation through arbitrary licensing restrictions. Moreover, the right to bear arms was understood as protected by the Civil Rights Act of 1871. The City's onerous discouragement of gun ownership parallels restrictive licensing in the Jim Crow and Anti-Immigrant eras.

ARGUMENT

Introduction

A. State and Local Law

"Under New York law, it is a crime to possess a firearm." *United States v. Sanchez-Villar*, 99 Fed. Appx. 256, 258 (2nd Cir. 2004) (*per curiam*), *vacated & remanded*, 544 U.S. 1029 (2005). Police officers who see a gun may seize it "because of its 'immediately apparent' incriminating character," given that having

a license is an affirmative defense, and that "the right to possess a gun is clearly not a fundamental right." *Id.* at 258 & n.1. Cf. *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) ("the right to keep and bear arms is fundamental to *our* scheme of ordered liberty").

The above stems from the fact that mere possession of a firearm (defined as a pistol or revolver) constitutes criminal possession of a weapon in the fourth degree, a class A misdemeanor. N.Y. Penal Law § 265.01(1). That is punishable by imprisonment not to exceed one year, § 70.15(1), and a fine not to exceed $1000. § 80.05(1).

The above does not apply to possession of a pistol or revolver by a person to whom a license has been issued. § 265.20(3). A license for a pistol or revolver may be issued to "have and possess in his dwelling by a householder . . . ." § 400.00(2)(a). That is known as a "premises" license. A "carry" license may be issued on showing "proper cause." § 400.00(2)(f).

"Proper cause" requires proof of "extraordinary personal danger" such as "by reason of employment or business necessity" or "recurrent threats to life or safety"; however, "the mere fact that an applicant has been the victim of a crime or resides in or is employed in a 'high crime area,' does not establish 'proper cause' . . . ." 38 Rules of the City of New York ("RCNY"), § 5-01(i)(a) & (b). Based on that provision, petitioners and members of the general public are ineligible for a carry license, which would otherwise entitle them to transport their handguns to locations such as a second

home, shooting competition, or convenient shooting range.

The premises license such as that held by petitioners limit possession of their handguns to their residences in the City: "The handguns listed on this [premises] license may not be removed from the address specified on the license except as otherwise provided in this chapter." 38 RCNY § 5-23(a)(1).

A handgun may be removed and transported from the licensed premises only in extremely limited circumstances, including the following: "[T]he licensee may transport her/his handgun(s) directly to and from an authorized small arms range/shooting club, unloaded, in a locked container, the ammunition to be carried separately." § 5-23(a)(3).

Authorized ranges and clubs are limited to New York City. Licensees may not transport their handguns to more convenient or more suitable shooting ranges outside the City in New York, New Jersey, or elsewhere. They may not take their handguns to informal locations on public or private land where shooting is lawful, to shooting competitions in New York or other states, to second homes or temporary places of abode, or to any other place where handguns may be lawfully possessed. Their handguns, which the Second Amendment guarantees them the right to "keep and bear," are essentially held hostage in their homes, with the sole pertinent exception of being transported to one of the handful of small arms ranges or clubs located within the City. And these

restrictions are enforced by severe criminal penalties.

B. The Decision Below

In upholding the restriction that a handgun may not be taken out of the dwelling of a premises licensee other than to a shooting range in the City, the lower court assumed that the law restricts activity protected by the Second Amendment. *New York State Rifle & Pistol Association, Inc. v. City of New York*, 883 F.3d 45, 55 (2018) ("*NYSRPA*"). It found that strict scrutiny does not apply to the ban on transport of a handgun to a second home outside of the City. *Id.* at 57. The plaintiff allegedly presented no evidence of a burden to obtain a premises license for his second home and to acquire a second gun to keep there. The Second Circuit previously held that a $340 application fee for a premises license was not a significant burden. *Id.* at 57-58 (citation omitted).[2] The court did not mention the risks of leaving guns stored but unattended at vacant houses.

The court found that "nothing in the Rule precludes the Plaintiffs from utilizing gun ranges or

---

[2]Had the plaintiff's second home been in a state other than New York, federal law would prohibit him from acquiring a handgun there, unless he would be considered a resident of the second state as well as of New York. It is unlawful for a licensed firearms dealer to transfer a firearm to a person who does not reside in the state where the dealer is located. 18 U.S.C. § 922(b)(3).

attending competitions outside New York City, since guns can be rented or borrowed at most such venues for practice purposes." *Id.* at 61. No support exists in the record for these assertions. In reality, guns are not generally available to rent or borrow at competitions. Club ranges do not generally rent or loan firearms; only some commercial ranges rent firearms, and the types of firearms are very limited.

The court further asserted that plaintiffs failed to demonstrate "that practicing with one's own handgun provides better training than practicing with a rented gun of like model . . . ." *Id.* at 64. There are thousands of different models of firearms on the market, making it highly unlikely that one could find a range that rents the same model that one keeps at home. Moreover, to train safely and effectively or to enter a competition, one must use one's own equipment. Sights must be set correctly for each person's eyes, trigger pull must be what a person is used to, and the gun needs to operate in the same safe, mechanical way.

Since the court found no significant burdens, it applied intermediate scrutiny. It relied solely on the declaration of the former Commander of the License Division, Andrew Lunetta, which discussed in general terms "why taking a licensed handgun to a second home or a shooting competition outside the City . . . constitutes a potential threat to public safety." *Id.* at 63. The declaration speculated that licensees would be susceptible to stress, road rage, and other disputes

such that it would be better not to have a firearm. *Id.* The declaration further alleged that under the prior Rule, which allowed licensees to transport their handguns to ranges outside the City, an unspecified number of licensees transported their firearms loaded or were apparently not going to or from a range. *Id.*

Concluding that its review required "difficult balancing" of the constitutional right with the governmental interests, the court balanced the right away and upheld the Rule. *Id.* at 64. This is the same type of weighing that this Court forbids. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (rejecting a "judge-empowering 'interest-balancing inquiry'").

I. THE SECOND AMENDMENT PROTECTS THE RIGHT TO TRANSPORT ARMS

A. Transport of Arms is Inherent in the Right to "Keep and Bear" Arms

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 or in transport from one place to another, but also to "bear" or carry arms on the person. If nothing more is meant than keeping arms in one home, there would be no point in including a right to bear arms. When a provision of the

Bill of Rights is restricted to a house, it says so.[3]

But this case is not about bearing arms on the person. It is about keeping locked, unloaded, inaccessible arms while being transported from one lawful place to another lawful place.

Transportation of arms is a form of keeping arms. Samuel Johnson defined "keep" in part as "[t]o retain; not to lose," and "[t]o have in custody," while Noah Webster defined it as "[t]o hold; to retain in one's power or possession." *Heller*, 554 U.S. at 582 (citations omitted). "Thus, the most natural reading of 'keep Arms' in the Second Amendment is to 'have weapons.'" *Id.* "Keeping" is not confined to the home.

In concluding that "'[k]eep arms' was simply a common way of referring to possessing arms," this Court cited to historical references to keeping arms in the home as well as to keeping arms during travel or generally for self-defense.[4] Transportation of an inaccessible firearm fits comfortably within the right to "keep" arms.

---

[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.").

[4]*Id.* at at 582 n.7, quoting J. Ayliffe, *A New Pandect of Roman Civil Law* 195 (1734) ("Yet a Person might keep Arms in his House, or on his Estate, on the Account of Hunting, Navigation, Travelling"); W. Duer, *Outlines of the Constitutional Jurisprudence of the United States* 31-32 (1833) ("The right of every individual to keep arms for his defence").

By contrast, to "bear" arms means to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed . . . ." *Id.* at 584 (citation omitted). That includes carrying arms in the militia and "for self-defense and hunting." *Id.* at 599. This case is about the right to keep arms during transportation to lawful places, not about the right to bear arms on the person.

Heller approved nineteenth-century decisions upholding the right to carry handguns openly. *Id.* at 612-13, citing *Nunn v. State*, 1 Ga. 243, 251 (1846). "Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban." *Id.* at 629, citing *Andrews v. State*, 50 Tenn. 165, 187 (1871) (invalidating "a statute that forbade openly carrying a pistol 'publicly or privately, without regard to time or place, or circumstances'"). The City's ban here comes even closer to the severe restriction of the District's handgun ban.

Nineteenth-century State statutes generally allowed the peaceable carrying of handguns, with the restriction in some against carrying concealed. An 1871 Texas law was an outlier in restricting both open and concealed carry, but it applied only to "carrying on or about his person" and did not "prohibit persons traveling . . . from keeping or carrying arms with their baggage . . . ." Tex. Gen. Laws 1322, art. 6512 (1871). The law thus did not "prevent persons traveling in buggies or carriages upon the public highway from placing arms in their vehicles for self-defense, or even

from carrying them from place to place for an innocent purpose." *Maxwell v. State*, 38 Tex. 170, 171 (1873).

The law here is all the more analogous to the District's ban in that it prohibits taking a handgun from the address of the licensed premises to keep at another premises, such as a second or temporary abode. The City's law further infringes on the right to maintain proficiency in the safe use of firearms by taking them to ranges and entering competitions.[5]

Indeed, the City's law does not even exempt taking a firearm out of the premises to a gunsmith for repair without permission. "The right to keep arms, necessarily involves the right . . . to keep them in repair. And clearly for this purpose, a man would have the right to carry them to and from his home . . . ." *Andrews*, 50 Tenn. at 178 (also stating that "the right to keep arms . . . involves the right to practice their use").

In sum, inherent in the right to keep and bear arms is the right to transport arms. Transport is a form of keeping, and given the broader right to bear arms on the person, surely there is a right to transport arms.

---

[5]See *Heller*, 554 U.S. at 617-18, quoting B. Abbott, *Judge and Jury* 333 (1880) ("a citizen who keeps a gun or pistol [and] practices in safe places the use of it . . . exercises his individual right.").

B. The Second Amendment as Originally Understood Guaranteed the Right to Transport Arms from Place to Place

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights." *McDonald*, 561 U.S. at 768, citing, *inter alia*, S. Halbrook, *The Founders' Second Amendment* 171-278 (2008) (hereafter "*Founders*"). In the Founding period, no laws restricted the peaceable keeping or carrying of arms. Militia laws required adult males to provide themselves with firearms and bring them to muster. The great exception was the Slave Codes which prohibited the possession of firearms by African Americans. *See Founders, passim.*

Two state constitutions at the founding 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); Vt. Const., Art. I, § 15 (1777). See also N.C. Dec. of Rights, Art. XVII (1776) ("That the people have a right to bear arms for the defense of the state"; Mass. Dec. of Rights, XVII (1780) ("The people have a right to keep and bear arms for the common defence."). Given such recognition of the right to bear arms, it goes without saying that a lesser right to transport inaccessible arms was recognized as well.

When the Constitution was proposed, the Pennsylvania Dissent of Minority demanded a bill of rights, 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). 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 . . . ." *Id.*, vol. 6, at 1453 (2000). New Hampshire proposed that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion. *Id.*, vol. 18, at 188 (1995). By implication, the right to transport arms went unquestioned.

In *The Federalist* No. 46, James Madison heralded "the advantage of being armed, which the Americans possess over the people of almost every other nation," adding: "Notwithstanding the military establishments in the several kingdoms of Europe, . . . the governments are afraid to trust the people with arms." 15 *Documentary History of the Ratification of the Constitution* 492-93 (1984).

The Second Amendment embodies this trust of the people with arms. Today, New York City does not even trust a premises license holder who has undergone the most rigorous background investigation to take an unloaded, inaccessible, locked handgun out of the house.

St. George Tucker wrote that "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 Tucker, *Blackstone's Commentaries*, App., 300 (1803).

He noted: "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.

The Founders could not imagine that no right existed to transport arms from one place of abode to another, which was commonplace. In 1803, Thomas Jefferson wrote to an innkeeper at Orange Courthouse, between Monticello and Washington, that "I left at your house, the morning after I lodged there, a pistol in a locked case," and asked that it be delivered to either of two members of Congress who would be passing through.[6]

Tucker also wrote that only slaves could not "keep or carry a gun," one of the many disabilities they suffered. Tucker, *A Dissertation on Slavery* 65 (1796). As the following shows, those disabilities reflected the status of being a slave and a non-citizen.

C. Prohibitions on the Keeping and Bearing of Arms by African Americans Reflected Their Status as Slaves or Non-Citizens

From colonial times until adoption of the Thirteenth Amendment, slaves were prohibited from keeping and bearing arms in most circumstances or

---

[6]Original letter on Library of Congress website, http://memory.loc.gov/cgi-bin/ampage?collId=mtj1&fileName=mtj1page029.db&recNum=210.

altogether. Until adoption of the Fourteenth Amendment, free blacks were prohibited from possessing arms without a license, which was subject to an official's discretion. Such laws reflected that African Americans were not trusted or recognized to be among "the people" with the rights of citizens.

New York's colonial slave code provided that "it shall not be lawfull for any Negro, Indian or Mallatto Slave to have or use any Gun or Pistoll but in his Master's or Mistresse's presence or by their direction," punishable by being whipped with twenty lashes. An Act for preventing Suppressing & punishing the Conspiracy & Insurrection of Negroes & other Slaves (1712), *Acts of Assembly Passed in the Province of New-York, from 1691 to 1718* 141 (John Baskett ed. 1719).[7] That was expanded to make it unlawful for a slave "to have or use any gun Pistoll sword Club or any other kind of Weapon whatsoever" except in the owner's presence or direction "and in their own Ground . . . ." An Act for the more Effectual Preventing & Punishing the Conspiracy & Insurrection of Negro & other Slaves (1730).[8]

It is unclear when the above laws were repealed, but "Slavery was abolished here in 1826." *Wright v. Delafield*, 23 Barb. 498, 513 (N.Y. Sup. Ct. 1857).

Virginia law provided that "[n]o negro or mulatto slave whatsoever shall keep or carry any gun,

---

[7]https://www.hrvh.org/cdm/ref/collection/hhs/id/740.

[8]http://schuylerfriends.org/accused_1730_slave_code.html.

powder, shot, club or other weapon whatsoever, offensive or defensive," punishable by no more than thirty-nine lashes, except those living at a frontier plantation could be licensed to "keep and use" such weapons by a justice of the peace. Va. 1819, c. 111, § 7. Further, "[n]o free negro or mulatto, shall be suffered to keep or carry any fire-lock of any kind, any military weapon, or any powder or lead, without first obtaining a license from the court" where he resided, "which license may, at any time, be withdrawn by an order of such court." *Id.* § 8.

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).

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 Alabama 391-92 (1833). The prohibition on a slave leaving the plantation with a licensed gun parallels the City's prohibition on removing a gun from one's premises.

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 license from his master to hunt. Digest of the Laws of the State of Georgia 424 (1802). It was also 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).

Maryland made it unlawful "for any negro or mulatto . . . to keep any . . . gun, except he be a free negro or mulatto . . . ." Chap. 86, § I (1806), in 3 Laws of Maryland 297 (1811). It was unlawful "for any free negro or mulatto to go at large with any gun . . . ." § II, *id.* at 298. However, this did not "prevent any free negro or mulatto from carrying a gun . . . who shall . . . have a certificate from a justice of the peace, that he is an orderly and peaceable person . . . ." *Id.*

That was made stricter to require a license not just to bear, but merely to keep a firearm: "No free negro shall be suffered to keep or carry a 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 . . . ." Art. 66, § 73, 1 Maryland Code 464 (1860).

Delaware 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 or

fowling piece, 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 Delaware 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 or warlike instruments." *State v. Allmond*, 7 Del. 612, 641 (Gen. Sess. 1856).

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 Alabama 391-92 (1833). In short, a slave had to have a license to possess a gun, but it could not be removed from the plantation.

North Carolina provided that "no slave shall go armed with Gun," 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).

North Carolina also 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 as constitutional partly on

the ground that "the free people of color cannot be considered as citizens . . . ." *Id.* at 254. The court also opined that the Second Amendment only applied to the federal government, not to the states. *Id.* at 251.

Somewhat bizarrely, 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 City'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.

Adding that having weapons by "this class of persons" was "dangerous to the peace of the community," *State v. Lane*, 30 N.C. 256, 257 (1848), continued:

> Degraded as are these individuals, as a class, by their social position, it is certain, that among them are many, worthy of all confidence, and into whose hands these weapons can be safely trusted, either for their own protection, or for the protection of the property of others confided to them. The County Court is, therefore, authorised to grant a licence to any individual they think proper, to possess and use these weapons.

The court could not only deny a license outright, but also to limit a license to carry only at one's premises. In *State v. Harris*, 51 N.C. (6 Jones) 448

(1859), a free person of color had a license to carry a gun on his own land, but he was hunting with a shotgun elsewhere with white companions. The court held that "the county court might think it a very prudent precaution to limit the carrying of arms to the lands of the free negro" and that the act did not "prevent the restriction from being imposed." *Id.* at 449. Again, the parallel to the City's policy today is obvious.

Free blacks were not entitled to bear arms, which was a privilege that could be granted or denied by the authorities, based on their status as lacking citizenship. "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).

Scott v. Sanford, 60 U.S. (19 How.) 393 (1857), notoriously held that African Americans had no rights that must be respected. It argued against recognition of their citizenship 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." *Id.* at 417. Neither do City residents today have a right to transport arms "wherever they went."

Overturning *Dred Scott* would be a primary objective of the Fourteenth Amendment, which

overruled that decision. *McDonald*, 561 U.S. at 307-08 (Scalia, J., concurring).

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 FOURTEENTH AMENDMENT PROHIBITS THE CITY FROM BANNING POSSESSION OF A LICENSED FIREARM OUTSIDE OF THE ADDRESS OF THE PREMISES ON THE LICENSE

A. The Right to Keep Arms in the Home for Self-Defense Extends to Second or Temporary Homes

"Self-defense is a basic right, . . . and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right." *McDonald*, 561 U.S. at 767 (citation omitted). The right exists "most notably for self-defense within the home," *id.* at 780, which would also include a second home or temporary abode.

As Justice Stevens agreed in dissent, "we have long accorded special deference to the privacy of the home, whether a humble cottage or a magnificent manse." *Id.* at 866 (Stevens, J., dissenting). William Blackstone recognized that "every man's house is

looked upon by the law to be his castle of defence and asylum" (quoting 3 Commentaries *288), and "*Heller* carried forward this legacy . . . ." *Id.*

As the castle doctrine aptly shows, there is a convergence of Second and Fourth Amendment interests in the home. "The people's protection against unreasonable search and seizure in their 'houses' was drawn from the English common-law maxim, 'A man's home is his castle.'" *Minnesota v. Carter*, 525 U.S. 83, 94 (1998) (Scalia, J., concurring).

The people have a right to be "secure in their persons [and] houses" from unreasonable search and seizure, U.S. Const., Amend. IV, and those houses are not limited to a single dwelling. The people also have a right to keep arms to be secure in their houses, whether permanent or temporary, for similar reasons. *Minnesota v. Olson*, 495 U.S. 91, 98 (1990), explains:

> We are at our most vulnerable when we are asleep because we cannot monitor our own safety or the security of our belongings. It is for this reason that, although we may spend all day in public places, when we cannot sleep in our own home we seek out another private place to sleep, whether it be a hotel room, or the home of a friend.[9]

---

[9]"We stay in others' homes when we travel to a strange city for business or pleasure, when we visit our parents, children, or more distant relatives out of town, when we are in between jobs or homes, or when we house-sit for a friend." *Id.*

"No less than a tenant of a house, or the occupant of a room in a boarding house, . . . a guest in a hotel room is entitled to constitutional protection against unreasonable searches and seizures." *Stoner v. State of Cal.*, 376 U.S. 483, 490 (1964). A person with one residence who also rents a room at a boarding house has Fourth Amendment protection at both abodes. *McDonald v. United States*, 335 U.S. 451, 452 (1948).

In holding that a licensee can simply acquire another handgun to keep at a second house, *NYSRPA*, 883 F.3d at 57, the court below assumes that the second house is permanent and disregards that temporary places of abode deserve Second Amendment as well as Fourth Amendment protection. A person in the military, a traveling salesperson, a construction worker, and a migrant laborer all may stay at temporary abodes for certain periods of time. The lower court further disregards that lower-income persons could not afford to purchase and obtain licenses for a second handgun to keep in secondary or temporary abodes.

B. The Fourteenth Amendment was Understood to Guarantee the Right to Possess Arms from State Violation Through Arbitrary Licensing Restrictions

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 at all and, if so, whether they could take arms out of their homes. Such laws were considered to be in violation of the right.

"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* (1998). 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*, 561 U.S. at 850 (Thomas, J., concurring).

The first state law noted in *McDonald* as typical of what the Fourteenth Amendment would invalidate required a license to have a firearm that an official had complete discretion to limit or deny. Mississippi 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*, 561 U.S. at 771. "[T]he statute laws of Mississippi do not recognize the negro as having any right to carry arms." *Harper's Weekly*, Jan. 13, 1866, at 3.

South Carolina's Black Code provided that no person of color "shall, without permission in writing from the District Judge or Magistrate, be allowed to keep a fire arm," except "the owner of a farm, may keep a shot gun or rifle, such as is ordinarily used in hunting, but not a pistol, musket, or other fire arm or weapon appropriate for purposes of war." S.C. Stat., No. 4730, § XIII, 250 (1865).

An African American convention in South Carolina stated that "the Constitution of the United States explicitly declares that the right to keep and bear arms shall not be infringed," and thus "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). Sen. Charles Sumner summarized the petition in the Senate, noting its demand "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).

Such Second Amendment deprivations were 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 . . . ."[10] *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.

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." *Id.* at 371. Yet prohibitions continued to be enforced, such as in Alexandria, Va., where attempts were made "to enforce 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).

Through Gen. D. E. Sickles' General Order No. 1, the Freedmen's Bureau nullified South Carolina's gun ban as follows:

---

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

> 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. See also *Heller*, 554 U.S. at 615.

"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*, 561 U.S. at 775. 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." *Id.,* citing 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; and a black man convicted of an offense who fails immediately to pay his fine is whipped. . . . Cunning legislative devices are being

> invented in most of the States to restore slavery in fact.[11]

Id. at 3210.

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. *New York Times*, Oct. 26, 1866, at 2; see *McDonald*, 561 U.S. at 775 n.24. 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.

These decisions were noted in a report from General U. S. Grant stating: "The statute prohibiting the colored people from bearing arms, without a special

---

[11]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 Representatives, 39th Cong., 1st Sess. 20 (1866).

license, is unjust, oppressive, and unconstitutional." Cong. Globe, 39th Cong., 2d Sess., 33 (1866).

The Freedmen's Bureau bill was passed by the same two-thirds-plus members of Congress who voted for the Fourteenth Amendment. Halbrook, *Freedmen*, 41-43. Section 14 of the Freedmen's Bureau Act declared that:

> 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*, 561 U.S. at 773.

Opposition to extension of the arms right to freedmen was starkly illustrated in the Maryland constitutional convention of 1867, where a delegate proposed adding to the state bill of rights that "every citizen has the right to bear arms in defence of himself and the State." Phillip B. Perlman, *Debates of the Maryland Constitutional Convention of 1867* at 150-51 (1867). Another delegate moved to weaken that to refer only to "every white citizen," while still another chimed in, "Every citizen of the State means every

white citizen, and none other." *Id.* Given the opposition to recognizing a right of non-whites to bear arms, it was proposed that "the citizen shall not be deprived of the right to keep arms on his premises." *Id.* That too was rejected.

"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 transport a firearm from her house to another lawful place may not be prohibited.

C. 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 Halbrook, *Freedmen* 120-131. 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). The right to transport a firearm from and to one's home is clearly secured by the Constitution.

"[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. See *McDonald,* 561 U.S. at 835 (Thomas, J., concurring).

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 KKK 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 Pratt observed that the Klansman "fears the gun" of a man in his "humble fortress." Cong. Globe, 42nd Cong., 2d Sess., 3587 (1872). 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.

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 keep and bear firearms, a component part of which would be the transportation of arms from one's house to another lawful place. This is such a case.

D. The Rule is Heir to Restrictive Licensing in the Jim Crow and Anti-Immigrant Eras

The ban on taking a licensed handgun out of one's house is but one of an array of City restrictions that discourage firearm ownership, particularly among the poor and minorities. While only the transport provision is at issue here, historically such restrictions have functioned to repress exercise of Second Amendment rights.

The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to keep and 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.[12] Moreover, New York's licensing law originated in Anti-Immigrant motives. The following examples from enactments in Florida, Virginia, and New York demonstrate such goals.

Florida made it a crime for a person "to carry around with him, or to have in his manual possession" a pistol or repeating rifle, without a license. § 790.05, 1 Fla. Statutes, 1941. The law provided that county commissioners "may" grant such license and required the posting of a $100 bond with approved sureties. § 790.06, *id.* Licenses were obviously beyond the means

---

[12] *See Shelby County, Ala. v. Holder*, 570 U.S. 529, 552 (2013) ("the reign of Jim Crow denied African-Americans the most basic freedoms").

of poor persons, not to mention the unlikelihood of them being issued to African Americans.

The above law "was passed when there was a great influx of negro laborers in this State" in 1893 "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 (Fla. 1941) (Buford, J., concurring). "[I]t has been generally conceded to be in contravention of the Constitution and non-enforceable if contested." *Id.*

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,[13] 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. 1926 Va. Acts 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 above illuminates how arbitrary restrictions on the possession of firearms have historically been designed to disarm classes of persons who are mistrusted by the authorities. Similarly, New York's restrictive licensing for "premises" and "carry" permits originated with the Sullivan Act of 1911, in an era of mistrust against Italians and other immigrants. See Don B. Kates, *Restricting Handguns* 17 (1979); L.

---

[13]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).

Kennett & J. Anderson, *The Gun in America* 177-78 (1975).

The first person sentenced under the Sullivan Act was a working man named Marino Rossi, who carried a revolver because he was in fear for his life from the Black Hand criminal gang. Sentencing him to one year in Sing Sing, the judge noted the custom of "your countrymen to carry guns," adding: "It is unfortunate that this is the custom with you and your kind, and that fact, combined with your irascible nature, furnishes much of the criminal business in this country." *New York Times*, Sept. 28, 1911.[14]

The *Times* praised the one-year sentence of Rossi, whose "hot-headed countrymen" carried concealed weapons, adding: "The Judge's warning to the Italian community was timely and exemplary." *Id.*, Sept. 29, 1911.[15]

The law was also designed to dissuade poor persons from obtaining permits, as it continues to do today. Another defendant was a night watchman who worked late in a dangerous area and who "did not feel that he could spare $10 of his small wages to carry a $5 revolver." *Id.*, Sept. 28, 1911.

Instead of being directed only at racial minorities or recent immigrants, the City's law today

---

[14]https://timesmachine.nytimes.com/timesmachine/1911/09/28/105031875.pdf.

[15]https://www.nytimes.com/1911/09/29/archives/the-rossi-pistol-case.html.

expresses mistrust in the citizenry at large, even those who have undergone the rigorous process of obtaining a premises license. That mistrust is repeated in the decision below upholding the law solely on the mere assertion of the former Commander of the License Division that "taking a licensed handgun to a second home or a shooting competition outside the City . . . constitutes a potential threat to public safety." *NYSRPA*, 883 F.3d at 63.

If license holders are a threat to public safety while transporting unloaded, locked, inaccessible handguns from their homes to lawful places, they are surely also a threat to public safety when keeping their handguns at home. But such defamatory assumptions about "the people" are utterly inconsistent with their express right enshrined in the Second Amendment to keep and bear arms, which "necessarily takes certain policy choices off the table." *Heller*, 554 U.S. at 636.

CONCLUSION

This Court should reverse the judgment of the court below and hold that 38 RCNY § 5-23(a)(1), which provides that handguns listed on a premises license "may not be removed from the address specified on the license except as otherwise provided in this chapter," violates the Second Amendment and is void.

Respectfully submitted,

NATIONAL AFRICAN AMERICAN GUN ASSOCIATION, INC.
AMICUS CURIAE

STEPHEN P. HALBROOK*
3925 Chain Bridge Road, Suite 403
Fairfax, VA 22030
(703) 352-7276
protell@aol.com
*Counsel of Record

NEZIDA S. DAVIS
Davis Bakari Law LLC
2915 Pleasant Ridge Drive
Decatur, GA 30034
(404) 771-1832
nsdavis@davisbakarilaw.com

Counsel for Amicus Curiae