No. 18-824

In the Supreme Court of the United States

THOMAS ROGERS, ET AL.,

Petitioners

v.

GURBIR GREWAL, ATTORNEY GENERAL OF NEW JERSEY, ET AL.,

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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

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QUESTIONS PRESENTED

1. Whether the Second Amendment protects the right to carry a firearm outside the home for self defense.

2. Whether the government may deny categorically the exercise of the right to carry a firearm outside the home to typical law-abiding citizens by conditioning the exercise of the right on a showing of a special need to carry a firearm.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF INTEREST
OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. THE SECOND AMENDMENT PROTECTS
THE RIGHT TO CARRY ARMS 4

A. The Text Prohibits Infringement
of the Right of "the People" to "Bear Arms" 4

B. In *Heller*, this Court Recognized
the Right to Keep Arms and to Carry
Arms as Distinct Rights 5

C. The Second Amendment as
Originally Understood Guaranteed
the Right to Carry Arms 6

D. Prohibitions on the Bearing of
Arms by African Americans Reflected
Their Status as Slaves or Non-Citizens 7

II. THE FOURTEENTH AMENDMENT PROHIBITS STATES FROM LIMITING THE RIGHT OF "THE PEOPLE" TO BEAR ARMS TO A SELECTED FEW 12

A. *McDonald* Reaffirmed the Right to Bear Arms for Self Defense 12

B. The Fourteenth Amendment was Understood to Guarantee the Right to Carry Arms from State Violation Through Discretionary Licensing Laws 12

C. Infringement on the Right to Bear Arms is Actionable Under the Civil Rights Act of 1871 20

D. Restrictive Licensing in the Jim Crow Era 22

CONCLUSION 25

TABLE OF AUTHORITIES

CASES Page

Andrews v. State, 50 Tenn. 165 (1871) 5

Cooper v. Savannah, 4 Ga. 72 (1848) 11

District of Columbia v. Heller,
554 U.S. 570 (2008) 2, 5, 12, 14, 15

Harman v. Forssenius,
380 U.S. 528 (1965) 24

Jones v. Helms, 452 U.S. 412 (1981) 16

McDonald v. City of Chicago,
561 U.S. 742 (2010) 3, 6, 12, 13, 16, 17, 19, 20

Nunn v. State, 1 Ga. 243 (1846) 5

Patsy v. Board of Regents,
457 U.S. 496 (1982) 20, 21

Plyler v. Doe, 457 U.S. 202 (1982) 16

Scott v. Sanford, 60 U.S.
(19 How.) 393 (1857) 11

Shelby County, Ala. v. Holder,
570 U.S. 529 (2013) 22

State v. *Harris,* 51 N.C. (6 Jones) 448 (1859) 10, 11

State v. Lane, 30 N.C. 256 (1848) 10

State v. Newsom, 27 N.C. 250 (1844) 10

State v. Post, 20 N.J.L. 368, 1845 WL 34581 (1845) 8

Sutherland v. Commonwealth, 109 Va. 834, 65 S.E. 15 (Va. 1909) 23

Watson v. Stone, 148 Fla. 516, 4 So. 2d 700 (Fla. 1941) 23

CONSTITUTIONS

U.S. Const., Amend. II . . 1, 2, 3, 4, 5, 6, 7, 12, 13, 25

U.S. Const., Amend. III 4

U.S. Const., Amend. XIII 8

U.S. Const., Amend. XIV 2, 3, 11, 12, 13, 15, 16, 18, 19, 22

Mass. Dec. of Rights, XVII (1780) 6

N.C. Dec. of Rights, Art. XVII (1776) 6

Pa. Dec. of Rights, Art. XIII (1776) 6

Va. Const., Art. II, § 20 (1902) 24

Vt. Const., Art. I, § 15 (1777) 6

STATUTES

42 U.S.C. § 1983 20

§ 790.05, 1 Fla. Statutes, 1941 . . . . 22, 23

§ 790.06, 1 Fla. Statutes, 1941 23

Act of 1792, 12 Hening,
Statutes at Large 123 8

Act of 1840, ch. 30 (N.C.) 10

An Act to prevent the Killing of Deer
out of Season, & against Carrying
of Guns and Hunting by Persons not
qualified, § 6, 2 Bush 293, 295 (N.J. 1722) 8

Art. 66, § 73, 1 Maryland Code 464 (1860) 9

Civil Rights Act of 1866 13

Civil Rights Act of 1871,
17 Stat. 13 (1871) 3, 20, 22

Certain Offenses of Freedmen,
1865 Miss. Laws p. 165, § 1 13

Ch. 176, § 1, 8 Laws of the
State of Delaware 208 (1841) 9

Ch. 258, 1926 Va. Acts 285,
repealed, Ch. 296, 1936 Va. Acts 486 24

Chap. 86, § I (1806), in 3 Laws
of Maryland 297 (1811) 9

Chap. 86, § II, in 3 Laws
of Maryland 298 (1811) 9

Chapter 111, §§ 7 & 8, 1
Code of Virginia 423 (1819) 8

Digest of the Laws of the
State of Georgia 424 (1802) 9

Freedmen's Bureau Act,
14 Stat. 173, 176-77 (1866) 13, 18

N.J. Stat. § 2C:39–5(b) 3

N.J. Stat. § 2C:43-6(a)(2) 3

N.J. Stat. § 2C:58–4(c) 4

N.J. Stat. § 2C:58–4(d) 4

Public Laws of the State of
South Carolina 168 (1790) 9

Statutes of the State of
North Carolina 93 (1791) 10

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1st Sess. (1866) 14, 15, 16, 18, 20, 21

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39th Cong., 1st Sess., 297 (1866) 16

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39th Cong., 1st Sess., 20 (1866) 17

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2d Sess. 2 (1872) 21

Fla. Sen. J. 13 (1866) 17

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Reconstruction, H.R. Rep. No. 30,
39th Cong., 1st Sess., pt. 2, at 21 (1866) 14

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Committee to Inquire into the
Condition of Affairs in the Late
Insurrectionary States, vol. 1, 261 (1872) 22

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"Carrying Concealed Weapons,"
15 *Virginia Law Register* 391 (1909) 24

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(W. Fleming ed.1950) 13

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First Federal Congress (1995) 7

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of the Constitution (1976-2000) 6, 7

Gen. D. E. Sickles' General Order No. 1 14

Halbrook, S., *Freedmen, the Fourteenth*
Amendment, and the Right to Bear Arms,
1866-1876 (1998) 12, 13

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Second Amendment (2008) 6

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Convention of 1867 (1867) 19

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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 preserve, protect 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. Chapters in New Jersey include the Harriet Tubman Gun Club and three other chapters.

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

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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 this brief. Preparation and submission of this brief was funded in part by the NRA Civil Rights Defense Fund. Counsel of record for all parties received notice of amicus' intent to file at least ten days prior to this brief's due date and have given written consent.

active/retired military.

NAAGA's interest in this case stems 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 discretionary gun licensing statutes with parallels to New Jersey'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

This Court should decide whether the Second Amendment "right of the people" to "bear arms" really extends to the people or only to an elite approved by state authorities, and to resolve the circuit conflict on this issue.

The Second Amendment guarantees the right to carry arms. The text prohibits infringement of the right to "bear arms," and does not limit that right to one's house. *District of Columbia v. Heller*, 554 U.S. 570 (2008), recognized the separate rights to keep and to bear arms. From the Founding and onward, bearing arms was a right of the citizen, while denial of the right was an incident of slavery. Free blacks were subjected to discretionary licensing laws because they were not considered citizens.

The Fourteenth Amendment prohibits states from banning the carrying of firearms by the people at

large. *McDonald v. City of Chicago*, 561 U.S. 742 (2010), reaffirmed the fundamental character of the right to bear arms for self defense. The Fourteenth Amendment was understood to guarantee the right to carry arms free from state infringement, such as through laws that delegate discretion to officials to deny licenses based on subjective need. Infringement on the right to bear arms is actionable under the civil rights act of 1871. Violation of the right extended into the Jim Crow era. This Court should decide whether allowing discretion to officials to decide whether a law-abiding person "needs" to exercise the right to bear arms is consistent with the constitutional right.

ARGUMENT

Introduction

The Second Amendment provides that "the right of the people to . . . bear arms, shall not be infringed." New Jersey's version may as well read that "the right of a few people who officials decide have a justifiable need may bear arms, but the people at large have no such right."

Possession of a handgun without a permit is a crime of the second degree. N.J. Stat. § 2C:39–5(b). Conviction subjects a person to imprisonment that "shall be between five years and 10 years . . . ." N.J. Stat. 2C:43-6(a)(2).

A permit to carry a handgun may be issued by the chief police officer in one's municipality or by the superintendent of the state police if the applicant "has

a justifiable need to carry a handgun." *Id.* § 2C:58–4(c). The application must show "the urgent necessity for self-protection, as evidenced by specific threats or previous attacks which demonstrate a special danger to the applicant's life that cannot be avoided by means other than by issuance of a permit to carry a handgun." *Id.* Justifiable need must be found by the police official and then by a superior court judge. *Id.* § 2C:58–4(d).

I. THE SECOND AMENDMENT PROTECTS THE RIGHT TO CARRY ARMS

A. The Text Prohibits Infringement of the Right of "the People" to "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, but also to "bear arms," i.e., to carry arms without reference to a specific place. If nothing more is meant than keeping arms in the 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.[2]

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[2]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.").

B. *Heller* Recognized the Right to Keep Arms and to Carry Arms as Distinct Rights

"At the time of the founding, as now, to 'bear' meant to 'carry.' . . . When used with 'arms,' however, the term has a meaning that refers to carrying for a particular purpose – confrontation." *Heller*, 554 U.S. at 584. The term includes to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed . . . ." *Id.* (citation omitted).

Both now and in the 18th century, "'bear arms' was unambiguously used to refer to the carrying of weapons outside of an organized militia." *Id.* Exercise of Second Amendment rights is not limited to the home, in that "preserving the militia was [not] the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting." *Id.* at 599.

Nineteenth-century courts upheld 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'"). While "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" are presumptively valid, *id.* at 626-27, by implication they may be carried in non-

sensitive places.

C. The Second Amendment as Originally Understood Guaranteed the Right to Carry Arms

"The right to keep and bear arms was considered . . . fundamental by those who drafted and ratified the Bill of Rights." *McDonald v. City of Chicago*, 561 U.S. 742, 768 (2010), citing, *inter alia*, S. Halbrook, *The Founders' Second Amendment* 171-278 (2008). In the Founding period, no laws restricted the peaceable carrying of arms. Militia laws required adult males to provide themselves with firearms. The great exception was the Slave Codes which prohibited the carrying or possession of firearms by African Americans. *See id.*

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.").

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).

The Second Amendment would combine these and other proposals. Rep. Roger Sherman expressed the common view in 1791 that it was "the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack upon his liberty or property, by whomsoever made." 14 *Documentary History of the First Federal Congress* 92-93 (1995).

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. Only slaves could not "keep or carry a gun," one of the many disabilities they suffered. Tucker, *A Dissertation on Slavery* 65 (1796).

D. Prohibitions on the 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 altogether, and free blacks were prohibited from carrying arms unless they obtained a license, which was subject to an official's discretion. Such laws reflected that African Americans were not recognized as part of "the people" with the rights of a citizen.

The antebellum New Jersey Supreme Court found slavery to be lawful in the state, before and after independence, as shown by numerous laws, such as "the act of 1694, prohibiting slaves from carrying fire arms . . . ." *State v. Post*, 20 N.J.L. 368, 370, 1845 WL 34581 (1845). Another New Jersey law provided that any "Indian, Negro or Mullato Slave . . . carrying or Hunting with any Gun, without License from his Master" was subject to being whipped. An Act to prevent the Killing of Deer out of Season, & against Carrying of Guns and Hunting by Persons not qualified, § 6, 2 Bush 293, 295 (N.J. 1722).

Virginia law provided that "no negro or mulatto shall keep or carry any gun," except a free negro or mulatto housekeeper may "keep one gun," and a bond or free negro may "keep and use" a gun by license at frontier plantations. Act of 1792, 12 Hening, Statutes at Large 123. A later enactment added: "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 . . . ." Chapter 111, §§ 7 & 8, 1 Code of Virginia 423 (1819).

South Carolina made it unlawful for a slave "to

carry or make use of fire-arms," unless "in the presence of some white person" or with a license from the master. Public Laws of the State of South Carolina 168 (1790). In Georgia, it was unlawful "for any slave, unless in the presence of some white person, to carry and make use of fire arms," unless the slave had a license from his master to hunt. Digest of the Laws of the State of Georgia 424 (1802).

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 provide: "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).

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 make 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.

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 in certain places. 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, and was indicted for doing so. The trial court held that "the County Court had no power to limit the license, and therefore, that the defendant was not guilty." *Id.* at 449.

The state Supreme Court reversed, holding 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.*

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, singly or in companies . . .; and it would give them the full liberty of speech . . ., and to keep and carry arms wherever they went." *Id.* at 417. Overturning *Dred Scott* would be a primary objective of the Fourteenth Amendment.

II. THE FOURTEENTH AMENDMENT PROHIBITS STATES FROM LIMITING THE RIGHT OF "THE PEOPLE" TO BEAR ARMS TO A SELECTED FEW

A. *McDonald* Reaffirmed the Right to Bear Arms for Self Defense

Heller "held that the Second Amendment protects the right to keep and bear arms for the purpose of self-defense . . . ." *McDonald*, 561 U.S. at 791. "Self-defense is a basic right, . . . and in *Heller*, we held that individual self-defense is 'the central component' of the Second Amendment right." *Id.* at 767 (citation omitted). While the right exists "most notably for self-defense within the home," *id.* at 780, the need for self-defense also exists outside the home.

B. The Fourteenth Amendment was Understood to Guarantee the Right to Carry Arms from State Violation Through Discretionary Licensing Laws

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

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

the Right to Bear Arms, 1866-1876 (1998) (republished as *Securing Civil Rights*). 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 carry a firearm that an official had discretion to 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, in 1 *Documentary History of Reconstruction* 289 (W. Fleming ed.1950), quoted in *McDonald*, 561 U.S. at 771.

The above was reflected in a press report as follows: "The militia of this country have seized every gun and pistol found in the hands of the (so called) freedmen of this section of the country. They claim that the statute laws of Mississippi do not recognize the negro as having any right to carry arms." *Harper's Weekly*, Jan. 13, 1866, at 3, col. 2.

Such Second Amendment deprivations were prominently debated in bills leading to enactment of the Freedmen's Bureau Act and the Civil Rights Act of 1866. Rep. Thomas Eliot, sponsor of the former,

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 further quoted from a Freedmen's Bureau report about Kentucky: "The civil law prohibits the colored man from bearing arms . . . ."[3] *Id.* at 657. Accordingly, the Freedmen's Bureau bill guaranteed the right "to have full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right to bear arms." *Id.* at 654.

Opponents of the bill did not disagree with recognition of such rights. Senator Davis said that the Founding Fathers "were for every man bearing his arms about him and keeping them in his house, his castle, for his own defense." *Id.* at 371. Yet prohibitions continued to be enforced. A witness testified that "attempts were made in that city [Alexandria, Va.] to enforce the old law against them in respect to whipping and carrying fire-arms, nearly or quite up to the time of the establishment of the Freedmen's Bureau in that city." Report of the Joint Committee on Reconstruction, H.R. Rep. No. 30, 39th Cong., 1st Sess., pt. 2, at 21 (1866).

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

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[3] *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. We answer certainly you have the same right to own and carry arms that other citizens have. . . .
>
> 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). Similarly, a Freedmen's Bureau report stated: "There must be 'no distinction of color' in the right to carry arms, any more than in any other right." Ex. Doc. No. 70, House of Representatives, 39th Cong., 1st Sess., at 297 (1866).

Introducing the Fourteenth Amendment in the Senate, Jacob Howard referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as . . . 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.[4]

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

> Although the civil rights bill is now the law, . . . [it] is pronounced void by the

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

> 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.[5]

Id. at 3210.

A Mississippi court declared the Civil Rights Act void in upholding the conviction of a freedman for carrying a musket without a license. *New York Times*, Oct. 26, 1866, at 2; see *McDonald*, 561 U.S. at 775 n.24. Another Mississippi court found the ban on freedmen carrying arms 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

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[5]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). Florida Governor Walker stated that the law "in regard to freedmen carrying firearms does not accord with our Constitution, has not been enforced and should be repealed." Fla. Sen. J. 13 (1866).

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

After the Freedmen's Bureau bill was passed and vetoed, it would be passed in override votes by the same two-thirds-plus members of Congress who voted for the Fourteenth Amendment. Halbrook, *Freedmen*, 41-43 (roll-call votes). Section 14 of the Freedmen's Bureau Act declared that where ordinary judicial proceedings were not restored, and until such time as such States were restored to the Union:

> 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. The term "bear arms" was used, and "[i]t would have been nonsensical for Congress to guarantee the full and equal benefit of a constitutional right that does not exist." *Id.* at 779. Further, the Act sought to achieve more than just a non-discrimination rule, for it referred to the "full and equal benefit," not just "equal benefit." *Id.*

That the right to "bear" arms meant to carry them in public was again 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." P. Perlman, *Debates of the Maryland 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 carry a firearm could not be dependent on the discretion of an official.

C. Infringement on the Right to Bear Arms is Actionable Under the Civil Rights Act of 1871

"[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).

"[I]n passing § 1, Congress assigned to the federal courts a paramount role in protecting constitutional rights." *Patsy v. Board of Regents*, 457 U.S. 496, 503 (1982). Patsy then quoted Rep. Henry Dawes' explanation of how the federal courts would protect "these rights, privileges, and immunities . . . ." *Id.*, citing Cong. Globe, 42d Cong., 1st Sess., 476 (1871). Dawes had just explained that the citizen "has secured to him the right to keep and bear arms in his defense." 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 of the city of Richmond or New York should find a drunken negro or white man upon the streets with a loaded pistol flourishing it, & c., and by virtue of any ordinance, law, or usage, either of city or State, he takes it away, the officer may be sued, because the right to bear arms is secured by the Constitution . . . ." Cong. Globe at 337. To the contrary, supporters of the bill were concerned that police would arrest a law-abiding African American on the street who was carrying a pistol for self defense, and they wished to provide a legal remedy for such deprivation.

A year after passage, the Civil Rights Act was the subject of a report from President Grant which stated that parts of the South were under the control of Ku Klux Klans, the objects of which were "to deprive colored citizens of the right to bear arms and of the right to a free ballot . . . ." Ex. Doc. No. 268, 42nd Cong., 2d Sess. 2 (1872). In debate on a bill to expand civil rights protection, Senator John Scott explained how Klansmen seized the firearms of their victims before lynching them. Cong. Globe, 42nd Cong., 2d Sess., 3584 (1872). Senator Pratt observed that the Klansman "fears the gun" of a man in his "humble fortress." *Id.* at 3587. 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.

It was thus commonplace to equate "bear arms"with "carry arms." 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 carry firearms for self defense, including by discretionary licensing laws. This is such a case.

D. Restrictive Licensing in the Jim Crow Era

The Fourteenth Amendment did away with actually naming African Americans in laws prohibiting the right to bear arms. Instead, in the Jim Crow era seemingly-neutral laws imposed prohibitive fees on the poor and were selectively enforced in ways to deny the right of black citizens to carry arms.[6] The following examples from enactments in Florida and Virginia exemplify 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,

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

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 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). He added that "it has been generally conceded to be in contravention of the Constitution and non-enforceable if contested." *Id.*

In Virginia, it was held not unlawful to carry a concealed handgun if it was not readily accessible, such as in saddlebags. *Sutherland v. Commonwealth*, 109 Va. 834, 65 S.E. 15 (Va. 1909). The editors of the *Virginia Law Register* criticized the decision with 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, repealed, Ch. 296, 1936 Va. Acts 486. The intimidating process and 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. 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 the perils of discretionary licence issuance laws. Historically, they have been applied to deny to African Americans and other groups the Second Amendment right to bear arms. In their

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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).

most extreme form, such as today's New Jersey law, allowing such discretion to officials violates the right to bear arms of "the people" at large and creates a privileged elite of license holders. This Court should not let that stand.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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