

No. 24-1046

**In the Supreme Court of
the United States**

JASON WOLFORD ET AL,

Petitioners

v.

ANNE E. LOPEZ,

Respondent

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

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

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QUESTION PRESENTED

Whether the Ninth Circuit erred in holding, in direct conflict with the Second Circuit, that Hawaii may presumptively prohibit the carry of handguns by licensed concealed carry permit holders on private property open to the public unless the property owner affirmatively gives express permission to the handgun carrier?

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**STATEMENT OF INTEREST
OF AMICUS CURIAE**

Amicus curiae National African American Gun Association, Inc. (NAAGA) is a nonprofit association headquartered in Griffin, Georgia, with tax exempt status under Internal Revenue Code § 501(c)(4).¹ NAAGA was founded on February 28, 2015, to defend the Second Amendment rights of members of the African-American community. NAAGA has over 80 chapters in 33 states, and more than 50,000 members living in every state of the United States and the District of Columbia.

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

NAAGA's interest in this case stems in part from the fact that the Second Amendment right to bear arms was denied to African Americans under the the

¹No counsel for a party authored this brief in whole or in part nor did such counsel or any party make a monetary contribution to fund the preparation or submission of this brief. No person other than this amicus curiae, its members, or its counsel made such a monetary contribution.

post-Civil War Black Codes, and the Ninth Circuit in this case seeks to rely on one such law from Louisiana from 1865 to justify Hawaii's restrictions. NAAGA will bring before the Court in this brief matter on this issue not brought to its attention by the parties.

SUMMARY OF ARGUMENT

Hawaii's ban on a licensee carrying a firearm on another's property without express authorization is covered within the plain text of the Second Amendment and is presumptively protected. To demonstrate that the restriction is "consistent with this Nation's historical tradition of firearm regulation," *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022), the Ninth Circuit relies on two supposed analogues, a 1771 New Jersey law that made it an offense to carry a gun on another's lands without a license or written permission, and an 1865 Louisiana law prohibiting the carrying of firearms on the premises or plantation of another without consent.

The existence of merely two such laws almost a century apart, neither of which was subjected to judicial scrutiny, fails to establish a historical tradition. This brief focuses solely on the 1865 Louisiana law, which was enacted during a tumultuous period in the aftermath of the abolition of slavery.

In the immediate post-war period, Louisiana jurisdictions adopted "regulations applying exclusively to the Negro." Senate Ex. Doc. No. 2, 39th Cong., 1st Sess., 23 (Dec. 19, 1865). The town of Opelousas exemplified the trend with its ordinance providing that

“No freedman ... shall be allowed to carry firearms” within the town limits “without the special permission of his employer, in writing, and approved by the mayor or president of the board of police.” *Id.* at 23 & 89.

When they came to its attention, the Freedmen’s Bureau overruled such restrictions. It became clear that prohibitions on freedom of movement and the right to bear arms could no longer explicitly limit their applicability to the “freedmen.” Laws of general applicability would be enacted that were intended and functioned to apply to the freed slaves.

The 1865 enactment making it unlawful to carry a firearm on another’s premises or plantations without consent was part of several enactments signed by Governor Madison Wells that deleted explicit references to the “freedmen” while continuing the policies of the black codes. The gun carry ban could be enforced to prevent freedmen from carrying firearms on premises and on plantations without no-trespassing signage. Another law made it a crime to enter upon a plantation without permission, without any requirement that the land be posted, which limited the freedom of movement of freedmen.

Another law provided for the conscription of “vagrants” who could be detained and hired out to an employer or made to do hard labor on public works for as much as a year. Still another prohibited enticing a person to leave his employer, which kept the freedmen in a condition of servitude.

These laws received national attention in publications like the *New York Tribune*, March 7, 1866, which recited the law making it unlawful to “carry fire arms on the premises or plantations of any

citizen” without consent and concluded: “For the blacks we find a code of laws establishing a system of serfdom, forbidding the free passage of blacks from one plantation to another, and under the form of apprenticeship and Vagrant laws reenacting slavery in fact.”

Testimony before the Joint Committee on Reconstruction established that such laws would have been selectively enforced against the freedmen. Governor Wells, a former slave owner, appointed sheriffs, judges, district attorneys, mayors, and other officers who were recently in the Confederate army. One witness testified that in the courts, “as far as justice to a freedman is concerned, it is a pretence and a mockery.” Report of the Joint Committee on Reconstruction, pt. iv, 81 (1866). Another quoted Governor Wells as saying that “the government must pay for the slaves that had been emancipated....” *Id.* at 116.

Louisiana’s ban on carrying a firearm on premises or plantations without consent was the type of law that Congress sought to render void in the Freedmen’s Bureau Act, S. 60, and the Civil Rights Act, S. 61, which were enacted in 1866. It was also the kind of law sought to be prohibited by the Fourteenth Amendment.

In Congress, former Louisiana governor Michael Hahn was quoted as stating: “It is necessary ... to see that slavery throughout the land is effectually abolished, and that the freedmen are protected in their freedom.... ‘The right of the people to keep and bear arms’ must be so understood as not to exclude the colored man from the term ‘people.’” Cong. Globe, 39th

Cong., 1st Sess. 217 (1866). Representative Thomas D. Eliot quoted the above Opelousas ban on freedmen carrying firearms as an example of the restoration of slavery in fact. *Id.* at 517.

Supporters of S. 61 praised the order by General Sickles in South Carolina recognizing the constitutional right to bear arms, which did not “authorize any person to enter with arms on the premises of another *against his consent*.” *Id.* at 908 (emphasis added). That was the normal rule, in contrast the Louisiana’s law requirement that one could not go on another’s premises “*without the consent*” of the owner.

The Civil Rights Act provided that all citizens “shall have the same right ... to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens....” 14 Stat. 27. The Freedmen’s Bureau Act expanded that language to protect 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....” 14 Stat. 173.

The reference to “the constitutional right to bear arms” was originally proposed by Representative Nathaniel P. Banks, who as a major general had formed the Union government in Louisiana in 1864. Cong. Globe at 585. It was agreed that the expanded language did not change the meaning, implying that the Civil Rights Act also protected the right to bear arms.

In 1867, Congress declared that “no legal State

governments” existed in Louisiana and nine other States, which were subjected to military authority. 14 Stat. 428.

Given that Louisiana was not even considered a state from its secession in 1861 and when it passed the Act making it unlawful “to carry fire-arms on the premises or plantations of any citizen, without the consent of the owner or proprietor,” it cannot be said that this law was “consistent with *the Nation’s* historical tradition of firearm regulation,” *Bruen*, 597 U.S. at 24 (emphasis added).

ARGUMENT

Introduction

“A person licensed to carry a firearm shall not carry a firearm on the property of another without express authorization, written or verbal, or posting of clear and conspicuous signage at the entrance of the building or on the premises.” H.R.S. § 134-9.5. “[W]hen the Second Amendment’s plain text covers an individual’s conduct, the Constitution presumptively protects that conduct. To justify its regulation, ... the government must demonstrate that the regulation is consistent with this Nation’s historical tradition of firearm regulation.” *New York State Rifle & Pistol Ass’n, Inc. v. Bruen*, 597 U.S. 1, 17 (2022).

For historical analogues, the Ninth Circuit relies on two laws “banning the carrying of firearms onto *any* private property without the owner’s consent.” *Wolford v. Lopez*, 116 F.4th 959, 994 (9th Cir. 2024). A 1771 New Jersey law made it an offense “to carry any

Gun on any Lands not his own, and for which the Owner pays Taxes, or is in his lawful Possession, unless he hath License or Permission in Writing from the Owner or Owners or legal Possessor.” *Id.* An 1865 Louisiana law prohibited “carry[ing] fire-arms on the premises or plantation of any citizen, without the consent of the owner or proprietor.” *Id.*

Wolford claims that no evidence exists “that these laws were viewed as controversial or constitutionally questionable. Instead, they were viewed as falling well within the colony’s or the State’s ordinary police power to regulate the default rules concerning private property.” *Id.* However, a West Law search reveals not a single judicial decision on either law by the courts of New Jersey and Louisiana respectively.

From what it called these two historical “dead ringers,” *Wolford* concluded “that the Nation has an established tradition of arranging the default rules that apply specifically to the carrying of firearms onto private property” and that “Hawaii’s modern law falls well within the historical tradition.” *Id.* at 995.

It goes without saying that “two state laws—nearly a century apart—cannot establish a historical tradition at odds with the text of the Second Amendment.” *Wolford v. Lopez*, 125 F.4th 1230, 1238 (9th Cir. 2025) (VanDyke, J., dissenting from denial of rehearing en banc). The New Jersey law was “an antipoaching and antitrespassing ordinance—not a broad disarmament statute.” *Id.* The Louisiana law “was enacted as part of Louisiana’s notorious Black Codes that sought to deprive African Americans of their rights, including the right to keep and bear arms

otherwise protected by state law.” *Id.* at 1239, citing *McDonald v. City of Chicago*, 561 U.S. 742, 771, 779 (2010); *id.* at 845–47 (Thomas, J., concurring).²

This brief focuses solely on the 1865 Louisiana law. “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.” *District of Columbia v. Heller*, 554 U.S. 570, 614 (2008), citing S. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998). “Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources.”³ *Id.*

Heller has another insight relevant here. A 1783 Massachusetts law forbade the residents of Boston to “take into” a dwelling loaded firearms, which was a fire safety measure. *Id.* at 631. “In any case, we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence regarding the right to keep and bear arms for defense of the home.” *Id.* at 632. While that same

²One of the sources *McDonald* cites on those pages is Regulations for Freedmen in Louisiana, in 1 *Documentary History of Reconstruction* 279-80 (W. Fleming ed. 1950), which includes an ordinance of St. Landry parish that is discussed below.

³See Mark W. Smith, “Attention Originalists: The Second Amendment was adopted in 1791, not 1868,” *Harvard Jour. of Law & Public Policy* (Dec. 7, 2022).

point applies here, it is nonetheless important to explain how the Louisiana law was part of the black codes that functioned to violate the right to bear arms of the freedmen. It is in no way a legitimate analogue to establish the original public understanding of the Second Amendment.

The following traces how in the immediate post-war period, Louisiana jurisdictions adopted “regulations applying exclusively to the Negro.” Senate Ex. Doc. No. 2, 39th Cong., 1st Sess., 23 (Dec. 19, 1865). The Act on carrying firearms on the premises or plantations of another without consent deleted references to the freedmen but continued the policies of the black codes. Testimony before the Joint Committee on Reconstruction established that laws were selectively enforced against the freed slaves. Congress sought to do away with such measures through passage of the Civil Rights Act and the Freedmen’s Bureau Act and the proposal of the Fourteenth Amendment.

I. Louisiana Jurisdictions Initially Adopted “Regulations Applying Exclusively to the Negro”

Post-War Louisiana was in a condition of chaos under military occupation that could hardly be said to be a functioning state. Louisiana jurisdictions enacted black codes that severely restricted the freedom of African Americans to set foot on property outside the plantations where they worked and virtually eliminated their right to bear arms.

On December 19, 1865, President Andrew

Johnson transmitted to the Senate the report of Major General Carl Schurz concerning conditions in the South.⁴ It was published as an executive document of the U.S. Senate entitled *Report of Carl Schurz on the States of South Carolina, Georgia, Alabama, Mississippi, and Louisiana*.⁵ The following analysis concerns the black codes and the treatment of the freed slaves in the State of Louisiana.

Schurz observed that J. Madison Wells, who would become Louisiana governor, “placed men into official positions who had hardly returned from the rebel army,” and expressed opposition to his nomination for governor.⁶ “Governor Wells informed me that he had filled the parish offices with men recommended to him by the people of the parishes, and it is fair to assume that in most cases the appointees represented the views and sentiments of the ruling class.”⁷ For instance, the police board of the parish of Bossier “attempt[ed] to revive at once the old slave laws, and to prevent the freedmen from obtaining employment (away) from their former masters.”⁸

⁴Cong. Globe, 39th Cong., 1st Sess. 78 (Dec. 19, 1865).

⁵Senate Ex. Doc. No. 2, 39th Cong., 1st Sess. (Dec. 19, 1865).
<https://archive.org/details/senateexecutived00unit/mode/1up>.

⁶*Id.* at 11.

⁷*Id.* at 23.

⁸*Id.* at 23 & 89.

To the same effect was the ordinance of the town Opelousas containing “a number of regulations applying exclusively to the negro, and depriving him of all liberty of locomotion....”⁹ Similar ordinances were enacted in the town of Franklin and the parish of St. Landry.¹⁰ These ordinances were appended as attachments No. 34 and 35, discussed below.

While what was called the new “organization of free labor” “would not be exactly the re-establishment of slavery in its old form, ... the difference would only be for the worse. The negro ... is positively prohibited from working or carrying on a business for himself; he is *compelled* to be in the ‘regular service’ of a white man, and if he has no employer he is *compelled* to find one.”¹¹ The report continued:

Such was the “organization of free labor” ordained by officials appointed by Governor Wells, and these ordinances were passed while both the emancipation proclamation and a provision in the new constitution of Louisiana abolishing slavery in that State forever were recognized as being in full force. It is needless to say that as soon as these proceedings came to the knowledge of the Freedmen’s Bureau and the department commander they were promptly

⁹Id.

¹⁰*Id.*

¹¹*Id.* at 24.

overruled. But Governor Wells did not remove the police boards that had thus attempted to revive slavery in a new form.¹²

The Schurz report included a number of attachments of original documents that provided more detail to his text. In one instance he referred to documents that were “not of a recent date, but may be taken as true representations of the ideas and sentiments entertained by large numbers today.”¹³ Attachment No. 30 contained “suggestions on the wants of planters before embarking their capital in the cultivation of staple crops,” which was submitted by a committee of planters in New Orleans on November 21, 1864.¹⁴ One of the rules restricted the freedom of movement of the freedmen: “The negroes should not be allowed to go from one plantation to another without the written permit of their employer, nor should they be allowed to go to any town or store without written permission.”¹⁵ Another deprived them of arms: “The possession of arms or other dangerous weapons without authority should be punished by fine or imprisonment and the arms forfeited.”¹⁶

¹²*Id.*

¹³*Id.* at 22.

¹⁴*Id.*

¹⁵*Id.* at 85.

¹⁶*Id.*

Attachment No. 34 included a report from W.B. Stickney, Assistant Superintendent of Freedmen, dated August 1, 1865, about relations with freedmen. It described an attempt by the police jury of Bossier parish “to revive at once the old slave laws” under which officers on patrol duty were directed “to arrest and take up all idle and vagrant persons running at large without employment.”¹⁷ The Freedmen’s Bureau issued an order revoking the law and “prohibit[ing] the parish police juries, established by the civil authorities, from arresting freedmen unless for positive offence against the law.”¹⁸

Attachment No. 34 also included the ordinance of the town of Opelousas dated July 3, 1865, “relative to the police of recently emancipated negroes or freedmen,” which provided that “no negro or freedman shall be allowed to come within the limits of the town of Opelousas without special permission from his employers,” that prohibited “every negro freedman” from being on the streets after 10:00 p.m. without a pass from his employer, that “No negro or freedman shall be permitted to rent or keep a house within the limits of the town,” and that “No negro or freedman shall reside within the limits of the town of Opelousas who is not in the regular service of some white person or former owner....”¹⁹ Further:

¹⁷*Id.* at 23.

¹⁸*Id.*

¹⁹*Id.* at 92.

No freedman who is not in the military service shall be allowed to carry firearms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police. Any one thus offending shall forfeit his weapons and shall be imprisoned and made to work for five days on the public streets or pay a fine of five dollars in lieu of said work.²⁰

Similar ordinances, including almost identical prohibitions on firearms, were enacted by the parish of St. Landry²¹ and the town of Franklin.²² (Attachment No. 35.) Thomas W. Conway, Assistant Commissioner of the Freedmen's Bureau, declared that the Franklin ordinance was "in violation of the emancipation proclamation, the orders of the War Department, and the orders of these headquarters," and ordered his subordinates to "prevent their enforcement and arrest any person attempting to carry them out.... This ordinance, if enforced, would be slavery in substance...."²³

It was now clear that prohibitions on freedom of movement and the right to bear arms could no longer

²⁰*Id.* at 93.

²¹*Id.* at 93-94.

²²*Id.* at 95.

²³*Id.* at 96.

explicitly limit their applicability to the “freedmen.” Laws of general applicability would be enacted that were intended and functioned to apply to the freedmen.

II. The Act on Carrying Firearms on the Premises Or Plantations of Another Without Consent Continued the Policies of the Black Codes

At issue here is the enactment providing that “it shall not be lawful for any person or persons to carry fire-arms on the premises or plantations of any citizen, without the consent of the owner or proprietor, other than in the lawful discharge of a civil or military order...”²⁴ This law was part of several enactments that sanitized explicit references to the “freedmen” while continuing the policies of the black codes.

When the Louisiana General Assembly began meeting on November 23, 1865, Governor J. Madison Wells addressed the legislature about the need for “organization of the militia of the State,” which would “be speedily followed by the abolition of martial law within our borders, and the withdrawal of all troops not required for garrison or fort purposes.”²⁵ Given the

²⁴*Acts Passed by the General Assembly of the State of Louisiana, Extra Session, Held and Begun in the City of New Orleans, on the 23rd of November, 1865*, at 14 (1866). Hereafter “*Acts Passed by the General Assembly.*” https://library.search.tulane.edu/discovery/delivery/01TUL_INS T:Tulane/12434206700006326.

²⁵*Official Journal of the Proceedings of House of Representatives of the State of Louisiana, Extra Session*,

existence of martial law, actions of the legislature could not be considered the functions of a normal state.

The General Assembly proceeded to pass several resolutions and enactments of an extraordinary nature. It declared that “this Representative body” was “the first that has assembled in Louisiana since the surrender....”²⁶ Acknowledging that the state “failed in the late struggle for separate government,” it quoted President Andrew Johnson as saying that “the Southern people must be trusted” and praised his efforts “to restore these States to representation in Congress....”²⁷ Obviously, Louisiana was not one of “the United States” in the normal sense of the word.

Governor Wells signed into law the enactments discussed below. Wells had “belonged to the planter elite that had dominated the state before the war,”²⁸ and owned nearly 100 slaves.²⁹

As pertinent here, the legislature enacted two trespass laws, a law concerning vagrants, and a law that discouraged free employment. First, Act No. 10

November 23, 1865, at 14 (New Orleans 1866). In 1864, General Nathaniel Banks issued a proclamation declaring: “The fundamental law of the State is martial law.” Ted Tunnell, *Crucible of Reconstruction: War, Radicalism and Race in Louisiana, 1862-1877*, at 47 (1984), quoting Banks to President Lincoln, Jan. 11, 1864.

²⁶*Acts Passed by the General Assembly*, at 4.

²⁷*Id.* at 6.

²⁸Tunnell, *Crucible of Reconstruction*, at 98.

²⁹*Id.* at 22.

provided that “it shall not be lawful for any person or persons to carry fire-arms on the premises or plantations of any citizen, without the consent of the owner or proprietor, other than in the lawful discharge of a civil or military order....”³⁰ It provided for a fine of \$1 to \$10 and imprisonment not less than one day or more than ten days.³¹ That could be enforced to prevent freedmen from carrying firearms on premises such as businesses in towns, or on potentially-massive plantations without signage.

Second, Act No. 11 provided that “whosoever shall enter upon any plantation without the permission of the owner or agent, shall be deemed guilty of a misdemeanor, and shall be liable to be arrested and brought before any court of competent jurisdiction, and upon proof of the fact shall be fined in sum not exceeding one hundred dollars, and imprisoned for a term not exceeding one month....”³² The person could also be required to give bond for six months for good behavior.³³ This had a more severe penalty than the above law but did not apply to premises, only plantations.

This law could be selectively enforced against the freedmen to limit their movement. Plantations

³⁰*Id.* at 14.

³¹*Id.* at 14 & 16.

³²*Id.* at 18.

³³*Id.*

could encompass vast acreage, and no requirement existed that the land be posted.³⁴

Third, Act No. 12 provided that the justice of the peace must require a accused vagrant to enter into a bond “for his good behavior and future industry” for one year, and if he failed to do so, “to detain and to hire out such vagrant for a period not exceeding twelve months, or to cause him to labor on the public works, roads, and levees....”³⁵ But if the accused “abandoned his employer, before his contract expired, the preference shall be given to such employer of hiring the accused....”³⁶ Further, in New Orleans, “the accused may be committed to the workhouse for a time not exceeding six months, there to be kept at hard labor on the public works, roads, or levees.”³⁷

As this Court has remarked, “Among these [Black Code] laws’ provisions were draconian fines for violating broad proscriptions on ‘vagrancy’.... When newly freed slaves were unable to pay imposed fines,

³⁴*See State v. Hebert*, 179 La. 190, 191, 153 So. 688 (1934) (quoting a statute from 1910 punishing “whoever shall enter upon any plantation or farm, or upon any grounds upon which crops or fruits of any kind are grown, or into any enclosure without the permission of the owner,” but providing that it shall apply only “to such enclosures as are properly and sufficiently posted by the owner warning trespassers off such premises.”).

³⁵*Acts Passed by the General Assembly*, at 18.

³⁶*Id.*

³⁷*Id.*

States often demanded involuntary labor instead.” *Timbs v. Indiana*, 586 U.S. 146, 153 (2019).³⁸

Fourth, Act No. 16 punished “any one who shall persuade or entice away, feed, harbor, or secrete” a person who leaves his employer with whom he is contracted or assigned to live, or an apprentice who is bound as an apprentice without permission of his employer.³⁹ An offender was liable for damages to the employer and was subject to a fine of \$5 to \$500 and imprisonment for ten days to twelve months.⁴⁰

Acts No. 12 and 15 were the subject of testimony before the Joint Committee on Reconstruction, which was charged with investigating the condition of the Southern States.⁴¹ Lawyer Ezra Hienstadt from New Orleans was asked whether, if federal authorities were withdrawn, “Would they seek in spirit to restore a system of servitude, or would they in good faith carry out the spirit of the emancipation amendment of the Constitution?”⁴² He responded by reference to “the

³⁸“Vagrant laws ... are calculated and intended to reduce them to slavery again; and laws which provide for selling these men into slavery in punishment of crimes of the slightest magnitude” Cong. Globe, 39th Cong., 1st Sess., 1123 (1866) (remarks of Rep. Burton Cook on the Civil Rights Bill).

³⁹Acts Passed by the General Assembly, at 24.

⁴⁰*Id.*

⁴¹Cong. Globe, 39th Cong., 1st Sess. 30 (Dec. 12, 1865).

⁴²Report of the Joint Committee on Reconstruction, H.R. strident. No. 30, 39th Cong., 1st Sess., pt. 3, at 24-25 (Jan. 27, 1866).

enactments of the legislature of Louisiana recently in session,” explaining:

They passed most stringent laws, making it a highly penal offense for any one to do anything that might be construed into encouraging the blacks to leave the persons with whom they have made contracts for labor; and also making it a misdemeanor for the blacks to do so, subjecting them to be arrested as vagrants and sold as such during the remaining portion of the time for which they had contracted, and giving the preference in buying them at such rate to the persons with whom they had made contracts.⁴³

Act No. 11 was seen as part of the same group of laws designed to repress the freedmen. Henry Clay Warmoth, a Republican leader, was appointed in 1864 by General Nathaniel Banks as judge of the provost court in New Orleans, after which he practiced law on issues related to the military occupation.⁴⁴ He wrote a pamphlet that was excerpted in the *New York Tribune*, March 7, 1866, in which he stated: “The Legislature which has just adjourned was composed almost exclusively of persons lately in insurrection against the

⁴³*Id.* at 25. He added: “There have been several instances in the parishes ... where the local authorities passed most strident ordinances on that subject, but which have been overturned by the military authorities.” *Id.*

⁴⁴Tunnell, *Crucible of Reconstruction*, 151-52.

Government.”⁴⁵ He added that “the Executive” – meaning Governor Wells – “has abandoned the party which originally elected him ..., gone clean over to the Rebels....”⁴⁶ About the gun ban and other laws, the *Tribune* stated:

The Legislature backs up the Governor with a law prohibiting “any person or persons to carry fire arms on the premises or plantations of any citizen, without the consent of the owner or proprietor, other than in the lawful discharge of a civil or military order,” – under penalty of fire or imprisonment.... For the blacks we find a code of laws establishing a system of serfdom, forbidding the free passage of blacks from one plantation to another, and under the form of apprenticeship and Vagrant laws reenacting slavery in fact.⁴⁷

As late as 1875, a report by Representative George F. Hoar, chairman of a committee on the conditions in the South, recalled Louisiana’s legislative

⁴⁵“A Test Case for the President,” *New York Tribune*, March 7, 1866, at 6.
<https://www.loc.gov/resource/sn83030213/1866-03-07/ed-1/?sp=6&st=image&r=-0.074,-0.126,1.225,0.468,0>. This article was reprinted in 9 *Public Opinion: A Comprehensive Summary of the Press Throughout the World on All Important Current Topics, Jan.–June 1866*, at 304 (1866). <https://bit.ly/4evpaQE>.

⁴⁶*Id.*

⁴⁷*Id.*

session of 1865, which “enacted a series of laws which must have been designed to restore the negro to a state of practical servitude.”⁴⁸ The ban on carrying a firearm on the premises or plantation of another without consent “depriv[ed] the great mass of the colored laborers of the State of the right to keep and bear arms, always jealously prized and guarded by his white employers.”⁴⁹ The ban on entering a plantation without permission “prevent[ed] any person from seeking any intercourse with the negro for the purpose of giving political or other information except such as his master should approve.”⁵⁰

The provision on vagrants “put[] it into the power of any local magistrate, on summary process, to remand the laborer to a condition of practical slavery.”⁵¹ And the ban on enticing a person to leave his employer meant that “no laborer can leave his employer without leave without becoming an outcast, to whom food and shelter must be denied by all mankind.”⁵²

Those were the views of the supporters of the rights of freedmen of the law that the Ninth Circuit relied on in this case to uphold Hawaii’s prohibition.

⁴⁸Condition of the South, Report No. 261, 43d, 2d Sess., at 10 (1875).

⁴⁹Id.

⁵⁰Id.

⁵¹Id.

⁵²Id.

III. Testimony Before the Joint Committee on Reconstruction Showed that the Laws Were Selectively Enforced Against the Freedmen

Act No. 10 making it unlawful “to carry fire-arms on the premises or plantations of any citizen, without the consent of the owner or proprietor,” and other laws would have been enforced by authorities selected by Governor Wells, who sought to keep the freedmen in a condition of servitude. Several witnesses testified to that effect before the Joint Committee on Reconstruction.

Thomas Conway, who served as general superintendent for freedmen for Louisiana,⁵³ testified that “I was in Governor Wells’s headquarters frequently in New Orleans, and saw him give commissions as judges, district attorneys, mayors of towns, and other officers, to men who yet wore their confederate uniforms, and many of whom I knew had scarcely been back five days from the rebel army.”⁵⁴ At the same time, he ejected every “loyal man” from office.⁵⁵

Conway added that “I frequently attended the sittings of courts in and out of New Orleans, and in the main, found as far as justice to a freedman is

⁵³Report of the Joint Committee on Reconstruction, pt. iv, 78 (Feb. 22, 1866).

⁵⁴*Id.* at 81.

⁵⁵*Id.*

concerned, it is a pretence and a mockery.”⁵⁶ No question exists that the above laws would have been selectively enforced against the freedmen.

John T. Allen, the district attorney for the fourth judicial district of Louisiana, testified that Governor Wells removed the “loyal officers” appointed by former Governor Michael Hahn, adding: “Sheriffs, clerks, recorders, justices of the peace, and police jurors, were all successively removed, and in their places were appointed disloyal men, all of them identified with secession and rebellion....”⁵⁷

John Covode, who had visited Louisiana under orders from the Secretary of War,⁵⁸ testified that “Governor Wells went to work immediately upon his return from Washington to remove from office the loyal people who had been appointed by Governor Hahn, and to fill their places with returned rebel officers, men of the worst class generally.”⁵⁹ In conversations, Wells “said the government must pay for the slaves that had been emancipated, for it had taken or destroyed property enough for that purpose.”⁶⁰ Covode added about Wells: “The old master was not inclined to treat them differently from what he did when they were

⁵⁶*Id.*

⁵⁷*Id.*

⁵⁸*Id.* at 114 (Mar. 3, 1866).

⁵⁹*Id.* at 115.

⁶⁰*Id.* at 116.

slaves; and they, knowing they were free, were not willing to submit to any such treatment.”⁶¹

In sum, now that the laws explicitly restricting where African Americans could go and banning them from carrying arms were nullified, new, facially-neutral laws were in place, and they could be expected to be enforced selectively against African Americans.

IV. Louisiana’s Gun Ban was Inconsistent with The Civil Rights and Freedmen’s Bureau Acts and the Fourteenth Amendment

Louisiana’s ban on carrying a firearm on premises or plantations without consent was the type of law that Congress sought to render void in the Civil Rights Act and the Freedmen’s Bureau Act of 1866. It was also the kind of law sought to be prohibited by the Fourteenth Amendment.

On January 5, 1866, Senator Lyman Trumbull introduced S. 60, a bill to enlarge the powers of the Freedmen’s Bureau, and S. 61, the Civil Rights Bill.⁶² These bills would become of unprecedented importance in regard to both the passage of the Fourteenth Amendment and to recognition of the right to keep and bear arms.

S. 60 provided the Freedmen’s Bureau with jurisdiction in areas where the war had interrupted the ordinary course of judicial proceedings and where State or local laws denied various “civil rights or

⁶¹*Id.*

⁶²Cong. Globe, 39th Cong., 1st Sess., 129 (Jan. 5, 1866).

immunities,” including the “full and equal benefit of all laws and proceedings for the security of person and estate,” on the basis of race, color, or any previous condition of slavery.⁶³

S. 61, the Civil Rights Bill, contained virtually identical language, likewise protecting the right “to full and equal benefit of all laws and proceedings for the security of person and property.”⁶⁴

While numerous references to infringement of the right to bear arms by the freedmen were made in the Thirty-Ninth Congress, several mentioned Louisiana specifically. In debate on a bill to allow black suffrage in the District of Columbia, a speech by former Louisiana governor Michael Hahn was quoted as stating: “It is necessary ... to see that slavery throughout the land is effectually abolished, and that the freedmen are protected in their freedom.... ‘The right of the people to keep and bear arms’ must be so understood as not to exclude the colored man from the term ‘people.’”⁶⁵

In debate on S. 60, Senator James F. Wilson referred to the laws of Louisiana and other Southern states as “codes of laws that practically make the freedman a peon or a serf.”⁶⁶ Exemplifying that, Representative Thomas D. Eliot presented the entire ordinance of Opelousas, Louisiana, including the

⁶³*Id.* at 209 (Jan. 12, 1866).

⁶⁴*Id.* at 211.

⁶⁵*Id.* at 217 (Jan. 12, 1866).

⁶⁶*Id.* at 340 (Jan. 22, 1866).

provision that “No freedman who is not in the military service shall be allowed to carry fire-arms, or any kind of weapons, within the limits of the town of Opelousas without the special permission of his employer, in writing, and approved by the mayor or president of the board of police.”⁶⁷

Representative Nathaniel P. Banks, who as a major general had formed a Union government in Louisiana in 1864, moved to amend S. 60 to recognize for the freedmen “the civil rights belonging to white persons, including the constitutional right to bear arms....”⁶⁸

In debate on S. 61, Senator Henry Wilson referred to General Sickles’ order in South Carolina as having the most provisions “than have ever been issued by an official in the country, for the security of the rights of the freedmen.”⁶⁹ Representative William Lawrence identified it as Sickles’ General Order No. 1 (dated January 1, 1866), which declared regulations for “civil rights and immunities,” including:

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

⁶⁷*Id.* at 517 (Jan. 30, 1866).

⁶⁸*Id.* at 585 (Feb. 1, 1866).

⁶⁹*Id.* at 603 (Feb. 2, 1866).

on the premises of another *against his consent*.⁷⁰

That stated the normal rule that one could not go on another's premises with arms (or for any other reason) "against his consent," in contrast with the Louisiana's law requirement that one could not go on another's premises "*without the consent*" of the owner.

This "most remarkable order," repeatedly printed in the headlines of the *Loyal Georgian*,⁷¹ a prominent black newspaper, was thought to have been "issued with the knowledge and approbation of the President if not by his direction."⁷²

As directed by the Select Committee on the Freedmen's Bureau, Chairman Eliot presented a substitute to S. 60 so that it recognized 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."⁷³ That passed the House.⁷⁴ Senator Lyman Trumbull explained to his colleagues that insertion of "including the constitutional right of bearing arms" did "not alter the meaning."⁷⁵ The Senate then passed the bill as

⁷⁰Id. at 908 (Feb. 17, 1866) (emphasis added).

⁷¹The Loyal Georgian (Augusta), Feb. 3, 1866, at 1.

⁷²Id. at 2.

⁷³Id. at 654 (Feb. 5, 1866).

⁷⁴Id. at 688 (Feb. 6, 1866).

⁷⁵Id. at 743 (Feb. 8, 1866).

amended.⁷⁶ Without mention of that clause, President Johnson vetoed the Freedmen's Bureau Bill.⁷⁷

The above offers insights into what became the Fourteenth Amendment. Representative John Bingham quoted the Civil Rights Bill, including the terms "full and equal benefit of all laws and proceedings for the security of person and property,"⁷⁸ and reiterated his support for "amending the Constitution of the United States, expressly prohibiting the States from any such abuse of power in the future."⁷⁹ He explained that this clause and another one in "the Freedmen's Bureau bill enumerate the same rights and all the rights and privileges that are enumerated in the first section of this [the Civil Rights] bill," quoting the reference to having "full and equal benefit of all laws and proceedings for the security of person and estate, including the constitutional right of bearing arms...."⁸⁰

President Johnson vetoed the Civil Rights Bill, but both houses overrode the veto and the Civil Rights Act of 1866 became law. As enacted, § 1 provided that all citizens "shall have the same right ... to full and equal benefit of all laws and proceedings for the

⁷⁶*Id.* at 748.

⁷⁷*Id.* at 916 (Feb. 19, 1866).

⁷⁸*Id.* at 1291 (Mar. 9, 1866).

⁷⁹*Id.*

⁸⁰*Id.* at 1292.

security of person and property, as is enjoyed by white citizens....”⁸¹

Similarly, Congress passed the second Freedmen’s Bureau Act, H.R. 613, and overrode President Johnson’s veto.⁸² Section 14 of the Act declared its applicability wherever judicial proceedings and constitutional relations to the government were interrupted or discontinued by the rebellion, and until a State was restored and represented in Congress, the following was guaranteed:

the right to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and 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....⁸³

The Freedmen’s Bureau Act applied in Louisiana, and any attempt to enforce Act No. 10 of 1865 against the freedmen would likely have been seen by the Freedmen’s Bureau as a violation of “the constitutional right to bear arms.”

Moreover, in 1867 Congress declared that “no legal State governments or adequate protection for life

⁸¹14 Stat. 27 (1866).

⁸²14 Stat. 173 (1866).

⁸³*Id.* at 176-77.

or property now exists in the rebel States of” Louisiana and nine other States, which were “divided into military districts and made subject to the military authority of the United States....”⁸⁴ Louisiana was assigned to the Fifth Military District under the command of General Philip H. Sheridan, who removed Governor Wells and appointed a provisional governor.⁸⁵ Louisiana was readmitted into the Union in 1868.⁸⁶

Given that Louisiana was not even considered a state between its secession in 1861 and its enactment of Act No. 10 of 1865, making it unlawful “to carry firearms on the premises or plantations of any citizen, without the consent of the owner or proprietor,” it cannot be said that this ban was “consistent with *the Nation’s* historical tradition of firearm regulation,” *Bruen*, 597 U.S. at 24 (emphasis added).

CONCLUSION

This Court should reverse the judgment of the court below and hold that H.R.S. § 134-9.5 violates the Second Amendment.

⁸⁴An Act to Provide for the More Efficient Government of the Rebel States, 14 Stat. 428 (1867).

⁸⁵Tunnell, *Crucible of Reconstruction*, 107.

⁸⁶1 Walter Fleming, *Documentary History of Reconstruction* 476 (1906).

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