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No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA AND
ADRIAN M. FENTY, MAYOR OF
THE DISTRICT OF COLUMBIA,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

BRIEF FOR GEORGIACARRY.ORG, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the following provisions – D.C. Code §§ 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 – violate the Second Amendment right of individuals who are not affiliated with any state-regulated militia, but who wish to keep handguns and other firearms for private use in their homes?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

RULES

TABLE OF AUTHORITIES – Continued

Page

TREATISES

TABLE OF AUTHORITIES – Continued

Page

IDENTITY AND INTEREST OF *AMICUS CURIAE*

GeorgiaCarry.Org, Inc. submits this *amicus curiae* brief in support of Respondents. Pursuant to Supreme Court Rule 37(2)(a), this *amicus curiae* brief is filed with the written consent of all parties.[1]

GeorgiaCarry.Org, Inc. is a non-profit corporation organized under the laws of the state of Georgia. It is dedicated to preserving and protecting the rights of its members to keep and bear arms.

SUMMARY OF ARGUMENT

The Petitioners recite a selective portion of the history of gun control laws in the District of Columbia, but omit portions of that history which demonstrate that the Petitioners' laws are deeply rooted in a racist attempt to keep arms out of the hands of the politically and economically disadvantaged. This brief will explore the racist history of gun control in the District of Columbia and throughout the country. It also will show how the principles of black oppression

[1] All parties filed blanket consents for briefs *amici curiae* to be filed. GeorgiaCarry.Org, Inc. provided at least ten days' notice to all parties of its intention to file an *amicus curiae* brief. GeorgiaCarry.Org, Inc. represents that no counsel for any party authored this brief in whole or in part, and no person or entity, other than GeorgiaCarry.Org, Inc., its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

via gun control laws of yesterday are used to oppress the politically weak today via those same, and additional, laws.

ARGUMENT

I. Gun Control in the District of Columbia

Gun control in colonial America was virtually unheard of, with the exception of laws that required people to be armed, such as Georgia's 1770 law requiring all males between the ages of 16 and 60 to bear a gun or two pistols while attending church, under the penalty of a fine for failing to be armed. Don B. Kates, Jr., "Handgun Prohibition and the Original Meaning of the Second Amendment," *82 Michigan Law Review* (1983), pp. 216-217.

The unfettered right to keep and bear arms was so commonly accepted that the Founders undoubtedly would find the instant case puzzling indeed. There was, however, a common exception:

> No negro or other slave within this province shall be permitted to carry any gun or any other offensive weapon from off their master's land, without license from their said master, and if any negro or other slave shall presume to do so, he shall be liable to be carried before a Justice of the Peace and be whipped, and his gun or other offensive weapon shall be forfeited to him that shall seize the same. . . .

Laws of Maryland, 1715; Ch. 44, Sect. 32. This provision of Maryland law was incorporated into the law of the District of Columbia:

> The laws of the State of Maryland, as they now exist, shall be and continue in force, in that part of the said District [of Columbia], which was ceded by that State to the United States, and by them accepted, for the permanent seat of government of the United States.

Laws of the United States, 1801, Feb. 27; Sect. 1.

The former DC ban against "negro or slave" gun possession was not enforceable after adoption of the Thirteenth and Fourteenth Amendments. President Andrew Johnson reacted to the ensuing formation of independent black militias in the District of Columbia by ordering General (later President) Grant to disband them, in November 1867. Stephen P. Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (Praeger, 1998), p. 76.

The president's authority to issue this order was hotly debated. The District's military commander told Grant it would be illegal to follow the president's order, absent the existence of martial law. Halbrook, p. 77. The *New York Tribune* opined that the disbanding of the black militias and seizing of arms:

> . . . would be one of the most flagrant and despotic [acts of] usurpation. . . . Even Congress itself has no authority to infringe upon 'the right of the people to keep and bear

> arms. . . .' [N]or can it without a violation of the Constitution, take away any man's musket while he 'keeps it' and 'bears it' for lawful purposes.

"The Militia Disbandment," *New York Tribune,* Nov. 13, 1867, p. 4. *The* (Baltimore) *Sun* added, "Under no construction of the order has it ever been contemplated to interfere with the rights of citizens to possess arms as individuals." "Letter from Washington," *The Sun*, Nov. 9, 1867.

The District's *Daily Chronicle* said:

> [I]n the Constitution of the United States, the right to bear arms is expressly reserved. . . . If the President may order their disbandment, he may also disperse a religious society or a debating club. If he can take away the arms of a citizen, why may he not also take away his clothes or his Bible.

"Volunteer Military Organizations," *Daily Chronicle*, Nov. 12, 1867, p. 2.

The militias stopped their public parades, but they did not disband. They threatened court action, but no outcome of such action is known. Because this event took place just before Johnson's impeachment trial, it soon became overshadowed.

Congressional race-neutral prohibitions in the District began in 1892 when it was made unlawful to have weapons "concealed about their person" outside one's home or place of business, without a license. Act. of July 13, 1892, ch. 159, 27 Stat. 116. In 1943, in

the height of World War II, Congress made it a crime to carry a firearm either openly or concealed outside one's home or place of business without a license. Act of Nov. 4, 1943, ch. 296, 57 Stat. 586. Finally, after Congress gave the District home rule in the 1970s, the present-day bans were enacted. Brief of Petitioners, p. 4.

As will be elucidated in the remainder of this brief regarding gun control laws outside of DC, the advent and evolution of facially race neutral laws does not reflect the true practice and effect of those laws. The potential for future orders of disbandment or similar oppression of particular groups through ostensibly neutral laws is very much alive today.

II. Gun Control in the United States

The history of gun control in the District of Columbia closely parallels the experience of the several states, particularly (though not peculiarly), the southern states. Gun control was used as a tool to subjugate blacks.

> [T]he simple truth-born of experience is that tyranny thrives best where government need not fear the wrath of an armed people. Our own sorry history bears this out: Disarmament was the tool of choice for subjugating both slaves and free blacks in the South. In Florida, patrols searched blacks' homes for weapons, confiscated those found and punished their owners without judicial process. In the North, by contrast, blacks exercised

> their right to bear arms to defend against racial mob violence. Chief Justice Taney well appreciated, the institution of slavery required a class of people who lacked the means to resist.

Silveira v. Lockyer, 328 F.3d 567, 569 (9th Cir. 2003) (Kozinzki, J., dissenting from denial of rehearing en banc) (citations omitted).

The history of gun control can be summarized as consisting of four time periods: 1) pre-Civil War bans either non-existent or applying only to slaves or free blacks, accompanied by widely-held beliefs (and appellate court opinions) that all (white) people had the unrestricted right to keep and bear arms; 2) immediate antebellum and early Reconstruction-era civil unrest associated with armed, black self-defense incidents, and court opinions reversing earlier expansive views on the right to keep and bear arms; 3) late Reconstruction/Industrial Age legislation that was facially race-neutral, ostensibly restricting gun rights for the first time for the population generally, but with those restrictions commonly applied only to black citizens; and 4) mid-20th Century expansion of application of gun control laws to all citizens, accompanied by stricter laws generally.

A. Pre-Civil War Gun Control

To Americans in the late British colonial period and in the early republic, the right to bear arms differentiated free men and slaves. James Burg,

Political Disquisitions ("The possession of arms is the distinction between a freeman and a slave. He . . . who himself belongs to another, must be defended by him, whose property he is, and needs no arms.") Consistent with this thought, early American gun control was an overtly and unapologetically racist regime. Colonial Virginia barred free blacks from owning firearms. 7 Statutes at Large; Being a Collection of all the Laws of Virginia, from the First Session of the Legislature, in the Year 1619, p. 95. South Carolina had a similar ban. 7 Statutes at Large of South Carolina, p. 353-54 (1712). In 1751, Louisiana colonists were to stop and beat "any black carrying any potential weapon," and to shoot to kill a black on horseback that refused a command to stop. Thomas N. Ingersoll, "Free Blacks in a Slave Society: New Orleans, 1718-1812," William and Mary Quarterly, 48:2 [April, 1991], 178-79. Louisiana later prohibited slave use of firearms altogether. Black Code, Ch. 33, Sec. 19, Laws of La. 150, 160 (1806).

Maryland and Mississippi restricted the rights of free blacks to own dogs, for fear they could be trained as weapons. Theodore Brantner Wilson, *The Black Codes of the South* (University of Alabama Press: 1965), 26-30.

On the Kentucky frontier, the practical necessity of pervasive firearms use resulted in slaves and free blacks being permitted to carry guns, but they had to have a permit to do so (unlike whites, who needed no permit). Juliet E.K. Walker, *Free Frank: A Black*

Pioneer on the Antebellum Frontier (University Press of Kentucky: 1983), p. 21.

Florida law authorized white patrols to "enter into all negro houses . . . and search for arms . . . any may lawfully seize and take away all such arms . . . " unless the owner had a license, which had to be issued weekly. 1825 Acts of Fla. 52, 55. Florida later repealed the possibility for free blacks to obtain licenses. Act of 1831 Fla. Laws 30.

Occasional outbreaks of racial violence fostered widespread fear of armed blacks, both slave and free. In 1739, 80 slaves from Stono, South Carolina rebelled and killed 25 whites before they were put down by the militia. Donald Grant, *The Way It Was in the South – The Black Experience in Georgia* (University of Georgia Press, 2001), p. 8. More famously, in 1831, Nat Turner and a band of slaves and freedmen rebelled in Southampton County, Virginia, resulting in the deaths of dozens of white people (varying accounts list the number of deaths between 50 and 60). Virginia's response to the resulting hysteria was to prohibit free blacks to "keep or carry any firelock of any kind, any military weapon, or any powder or lead." Stanley Elkins, *Slavery* (Chicago, University of Chicago Press: 1968), 220. Virginia was not alone, however, as several other states enacted similar regulations affecting the right to bear arms in the next few years following Nat Turner's rebellion.

Georgia passed its first gun ban in 1833, presumably also in response to Nat Turner's rebellion,

with "it shall not be lawful for any free person of colour in this state to own, use, or carry fire arms of any description whatever." 1833 Ga. Laws 226.

In 1834, Tennessee changed its constitution to achieve a similar result. Article XI, Section 26 of the 1796 Constitution said, "That the freemen of this State have a right to keep and bear arms for their common defence." Tennessee changed that provision to state "That the free ***white*** men of this State have a right to keep and bear arms for their common defence." [Emphasis added]. It is interesting to note that this "common defence" language was at the root of the *Aymette v. Tennessee* case cited by this Court in its decision in *U.S. v. Miller,* 307 U.S. 174 (1939). Francis Newton Thorpe, *The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming The United States of America* (Washington, Government Printing Office: 1909), reprinted (Grosse Pointe, Mich., Scholarly Press: n.d.), 6:3428.

Mississippi's pre-war constitution guaranteed a right to bear arms to "every citizen." Mississippi Constitution of 1817, Art. I, § 23. This provision did not apply to slaves, as slaves were not citizens.

Florida likewise passed a law making it "unlawful for any Negro, mulatto, or person of color to own, use, or keep in possession or under control any bowie-knife, dirk, sword, firearms or ammunition of any kind, unless by license of the county judge." The

penalty for violators was an hour in the pillory or 39 stripes. W.E.B. DuBois, *Black Reconstruction in America* (1962).

At about the same time, various state supreme courts were declaring expansive rights to keep and bear arms, and later finding the rights not as expansive when blacks were involved. The Supreme Court of North Carolina declared, in 1843, that the state constitution guaranteed an individual right to carry arms. *State v. Huntly,* 3 Iredell 418, 422-423 (N.C. 1843). The next year the same court reviewed the conviction of a black man for violating a North Carolina law that provided:

> That 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 [without a license] . . . he or she shall be guilty of a misdemeanor. . . .

In upholding Elijah Newsom's (a "free person of color") conviction, the court said:

> We cannot see that the act . . . is in conflict [with the state constitution]. . . . Its only object is to preserve the peace and safety of the community from being disturbed by an indiscriminate use, on ordinary occasions, by free men of color, of fire arms or other arms of an offensive character. ***Self preservation is the first law of nations, as it is of individuals.***

[Emphasis supplied]. *State v. Newsom*, 5 Iredell 181, 27 N.C. 250 (1844). The thought embodied in the emphasized language would become the rationalization for the widespread application of gun control laws more than a century later.

The Supreme Court of Georgia had a similar reversal of opinions at about the same time. In colorful prose, the court declared a widespread, time-tested, absolute right to keep and bear arms:

> The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear arms of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon, in the smallest degree; and all of this for the important end to be attained: the rearing up and qualifying a well-regulated militia, so vitally necessary to the security of a free State. Our opinion is, that any law, State or Federal, is repugnant to the Constitution, and void, which contravenes this right, originally belonging to our forefathers, trampled under foot by Charles I and his two wicked sons and successors, re-established by the revolution of 1688, conveyed to this land of liberty by the colonists, and finally incorporated conspicuously in our own Magna Charta! And Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans, plead eloquently for this interpretation!

Nunn v. Georgia, 1 Ga. 243, 250 (1846). Just two years later, the same court limited this right to white citizens only, holding that "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 and Worsham v. Savannah,* 4 Ga. 68, 72 (1848). This case later would be the basis for ejecting Reconstruction-era black legislators from the state's General Assembly, an event that sparked heavy gun control legislation in Georgia that persists to this day.

The viewpoint of the Supreme Court of Georgia in *Cooper and Worsham* was by no means limited to state courts. This Court adopted the same line of reasoning in the infamous *Dred Scott* decision. Chief Justice Taney, stated that the right to bear arms (which he called "carrying" them) applied to citizens in the territories, and opined that recognizing blacks as citizens would:

> give to persons of the negro race . . . the right to enter every other State whenever they pleased, singly or in companies, without pass or passport, and without obstruction, to sojourn there as long as they pleased, to go where they pleased at every hour of the day or night without molestation . . . and to keep and carry arms wherever they went.

Scott v. Sandford, 60 U.S. 393, 417 (1856).

In sum, pre-Civil War America recognized the constitutional right of white citizens to keep and bear

arms without restriction or limitation but asserted that free blacks and slaves had no right to keep and bear arms or exercise other constitutional rights. No less today, subjects of any sovereign (slave owner or government) who must depend on the charity of their master for the protection of their life, are not really free. At the very essence of life, be it in the jungle or the urban city, is the right to defend it or choose for whom it will be sacrificed.

B. Reconstruction Era Gun Control

As a condition of re-entry to the Union, Congress required all confederate states but Tennessee to modify their constitutions to comport with the United States Constitution, including the Fourteenth Amendment. 14 Stat. 428 (1867). Until such modifications were accomplished, the states were not entitled to congressional representation, were subject to military rule, and their local governments were deemed "provisional" and subject to abolition by the federal government. *Id.* Against this backdrop, the confederate states held constitutional conventions.

At a Maryland constitutional convention in 1867 (after Maryland had rejected adoption of the Fourteenth Amendment), there was a proposal to insert a right to keep and bear arms for "every citizen." The delegates debated whether "white" should be inserted before "citizen," but the popular opinion was that such an inclusion would be redundant. Ultimately, the measure failed altogether out of fear that the

guarantee would allow blacks, drunks, or both, to carry arms. Perlman, *Debates of the Maryland Convention of 1867*, pp. 79, 151.

Mississippi adopted a provision at its constitutional convention of 1868 guaranteeing that "All persons shall have a right to keep and bear arms for their defense," [Mississippi Constitution, Art. I, § 15 (1868)] thus invalidating the racially-based prohibition passed after the war, "that no freedman, free negro or mulatto, . . . not licensed to do so by the board of police of his or her county, shall keep or carry firearms of any kind." Laws of Mississippi 165 (1865).

North Carolina and Georgia adopted provisions at their conventions that closely mirrored the Second Amendment, apparently believing this necessary for readmission to the Union. N.C. Constitution of 1868, Art. I, § 24; Ga. Constitution of 1868, Art. I, § 14.

Interestingly, one expressed reason for adopting the Fourteenth Amendment to the United States Constitution was the penchant of the southern states for violating the right to keep and bear arms of the newly freed slaves. In debate, Rep. George W. Julian complained that the southern states were ignoring the Civil Rights Act of 1866. "Florida makes it a misdemeanor for colored men to carry weapons without a license to do so from a probate judge, and the punishment of the offense is whipping and the pillory. South Carolina has the same enactments. . . . Cunning legislative devices are being invented in

most of the States to restore slavery in fact." Cong. Globe, 39th Cong., 1st Sess., 2765, 3210 (1866).

The draftsman of Section 1 of the Fourteenth Amendment, Rep. John Bingham, later commented that one of the reasons for the adoption of the Fourteenth Amendment was to make the Second Amendment enforceable against the States [Cong. Globe, 42nd Cong., 1st Sess. 337 (1871)] (under the privileges and immunities clause, rather than the due process clause).

Not long after adoption of the Fourteenth Amendment, Congress took up the matter of enforcement legislation, including the "Anti-KKK Bill." Passed as the Enforcement Act, 17 Stat. 13, portions of it survive to this day in 42 U.S.C. § 1983.

A report by Rep. Benjamin F. Butler (R-MA) on violence in the South provided much of the genesis for the Anti-KKK Bill. Among other incidents, Rep. Butler's report cited instances of armed "confederates" terrorizing blacks, and "in many counties they have preceded their outrages upon him by disarming him, in violation of his right as a citizen to keep and bear arms, which the Constitution expressly says shall never be infringed." H.R. Rep. No. 37, 41st Cong., 3rd Sess. 3 (1871). An express provision making it a crime to disarm blacks was dropped from the proposed legislation, much to the dismay of Sen. John Sherman (R-OH), who said, "Wherever the negro population preponderates, there [the KKK] hold their sway, for a few determined men . . . can carry terror

among ignorant negros . . . without arms. . . .” Cong. Globe, 42nd Cong., 1st Sess. 154 (1871).

Opponents of what is now 42 U.S.C. § 1983 were concerned that it could be used as a legal weapon to redress confiscation of black-owned guns. Rep. Washington C. Whitthorne (D-TN) summarized the fear as, “[I]f 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 . . . and by virtue of any ordinance, law, or usage, either of the 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, 42nd Cong., 1st Sess. 337 (1871). *Thus, congressmen on both sides of the aisle recognized and firmly believed that 1) the Second Amendment guarantees an individual right that cannot be infringed; 2) the Fourteenth Amendment applied the Second Amendment to the states; and 3) the Civil Rights Act creates a private right of action for citizens having weapons seized or their Second Amendment rights otherwise infringed.*

With the adoption of the Civil War Amendments, particularly the Fourteenth Amendment, and coupled with the southern state constitutional changes, racially discriminatory laws were subject to serious constitutional challenge. In response, states began passing race-neutral gun control laws, but enforcing them only against blacks. This selective and obviously racist enforcement was widely upheld in state appellate courts.

On September 3, 1868, the Georgia legislature expelled its black members on the grounds that they were ineligible to hold office under the state constitution (notwithstanding the ratification of the Fourteenth Amendment a mere two months earlier). Ed Jackson and Charly Pou, "This Day in Georgia History," Carl Vinson Institute of Government, the University of Georgia, http://www.cviog.uga.edu/Projects/gainfo/tdgh-sep/sep03.htm.

Two weeks later, several hundred black and Republican protestors marched from Albany to Camilla, Georgia, many of them armed. *Atlanta Constitution,* "Difficulty with Negroes in Mitchell County," Sept. 22, 1868, p. 1. As the marchers arrived at the Mitchell County Courthouse, they were ambushed by a posse of whites organized by the Mitchell County sheriff. The protestors were routed, but the posse later was heard to complain that the marchers could have been annihilated if they had not been armed. Still, over a dozen blacks were killed and more than 30 wounded.

In response to the Camilla Massacre, Georgia adopted a (facially) race-neutral law that provided that "no person in said State of Georgia be permitted or allowed to carry about his or her person any dirk, bowie knife, pistol or revolver, or any kind of deadly weapon, to any court of justice, or any election ground or precinct, or any place of public worship, or any other public gathering in this State. . . ." Ga. Laws 1870, Vol. 3, p. 42. Passed in October, the law was ignored by, and not enforced against, armed white

supremacists gathered in a largely successful effort to prevent blacks from voting in the November, 1870 election. Grant, p. 32. Sadly, Georgia's public gathering law remains on its books even today.

Texas also found a pre-war constitutional right that later was eviscerated with facially race-neutral laws. The Supreme Court of Texas found a state and federal constitutional right to carry arms in 1859. *Cockrum v. State,* 24 Tex. 394, 401 (1859).

The Texas Attorney General opined that Texas had "Pretended Laws of 1866 against the Freedmen" intended to "the restoration of African slavery, in the modified form of peonage." As an example, he cited a law that "makes the carrying of fire-arms on enclosed land, without the consent of the land-owner, an offense. It was meant to operate against the freemen alone." *Journal of the Reconstruction Convention Which Met at Austin Texas*, 953-55 (1870).

This Court caused confusion on the issue of the Fourteenth Amendment when it issued the opinion of *U.S. v. Cruikshank*, 92 U.S. 542 (1876). In that opinion, the court held that the first eight amendments to the Constitution restrained only Congress. Turning to the Fourteenth Amendment, however, this Court held that the Fourteenth Amendment restrains state action, but did not apply to the case because there was no state action, i.e., the right to bear arms had been violated by private actors, not state actors. *Id*. at 554. The confusion on this issue remains to this day, with the Supreme Court of Georgia recently

citing to *Cruikshank* for the proposition that the Second Amendment of the United States Constitution contains no rights that the State of Georgia is bound to respect. *Brewer v. State*, 281 Ga. 283 (2006).

By the end of the reconstruction era, *Cruikshank* and the Slaughterhouse cases had effectively gutted any protection of the right to bear arms that the Fourteenth Amendment may have extended to the newly freed slaves, with the result that southern states adopted extensive gun controls, while, ironically, the northeastern states mostly avoided such gun controls until the early twentieth century.

C. Late Reconstruction/Industrial Age Gun Control

A dissenting opinion in the Ohio Supreme Court, which upheld the conviction of a Mexican for concealed carry ***in his own bed***, neatly summarizes the state of racist enforcement of gun laws across the country following the early Reconstruction:

> I desire to give some special attention to some of the authorities cited, supreme court decisions from Alabama, Georgia, Arkansas, Kentucky, and one or two inferior court decisions from New York, which are given in support of the doctrines upheld by this court. The southern states have very largely furnished the precedents. It is only necessary to observe that the race issue there has extremely intensified a decisive purpose to

> entirely disarm the negro, and this policy is evident upon reading the opinions.

State v. Nieto, 101 Ohio St. 409, 430, 130 N.E. 663 (1920) (Wanamaker, dissenting). Continuing, Justice Wanamaker made a modest proposal, a variation of which easily could be applied to the instant case:

> I hold that the laws of the state of Ohio should be so applied and so interpreted as to favor the law-abiding rather than the law-violating people. If [instead] this decision shall stand as the law of Ohio, a very large percentage of the good people of Ohio to-day are criminals, because they are daily committing criminal acts by having these weapons in their own homes for their own defense. The only safe course for them to pursue, instead of having the weapon concealed on or about their person, or under their pillow at night, is to hang the revolver on the wall and put below it a large placard with these words inscribed:
>
> "The Ohio supreme court having decided that it is a crime to carry a concealed weapon on one's person in one's home, even in one's bed or bunk, this weapon is hung upon the wall that you may see it, and before you commit any burglary or assault, please, Mr. Burglar, hand me my gun."

Id. It is worth noting that the Circuit Court below in the instant case relied on some of these southern state court opinions when it stated in dicta that states can regulate strictly where firearms may be

possessed. *Parker v. District of Columbia*, Case No. 03CV00213, Opinion issued March 9, 2007 (D.C. Cir.), *citing State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921).

A Florida Supreme Court justice candidly observed the racist intentions of Florida's gun laws, in particular a prohibition against carrying a concealed weapon:

> I know something of the history of this legislation. The original Act of 1893 was passed when there was a great influx of negro laborers in this State drawn here for the purpose of working in turpentine and lumber camps. The same condition existed when the Act was amended in 1901 and the Act was passed for the purpose of disarming the negro laborers and to thereby reduce the unlawful homicides that were prevalent in turpentine and saw-mill camps and to give the white citizens in sparsely settled areas a better feeling of security. The statute was never intended to be applied to the white population and in practice has never been so applied.

Watson v. Stone, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring).

Another tactic implemented by several states was to put into place economic disincentives to keeping and bearing arms. Tennessee became one of the first states to implement such a tactic, with its "Army and Navy Law" of 1879. Under this law, the sale of all handguns except the "Army and Navy model handgun" was prohibited. This revolver was in common

ownership by whites, especially wealthy whites that were former military officers. The revolvers were too expensive for most blacks. William R. Tonso, "Gun Control: White Man's Law," *Reason,* December 1985. The law was upheld by the Supreme Court of Tennessee. *State v. Burgoyne,* 75 Tenn. 173 (1881).

A U.S. senator from Tennessee, apparently happy with the success of his state's law, proposed that Congress allow the "dominant race" to prevent "the carrying by colored people of a concealed, deadly weapon, most often a pistol." 65 Cong. Rec. 3945, 3946 (Mar. 11, 1924, statement of Sen. Shields).

Arkansas passed a virtually identical law in 1881, and that law was upheld by the Supreme Court of Arkansas. *Dabbs v. State*, 39 Ark. 353 (1882).

In a more blatant effort at "economic" gun control, South Carolina banned pistol sales to anyone but sheriffs and their special deputies, which included members of the Ku Klux Klan, strike breakers, and private bodyguards. Kates, "Toward a History of Handgun Prohibition in the United States," *Restricting Handguns: The Liberal Skeptics Speak Out,* p. 15 (1979).

In 1906, Mississippi implemented a registration system, allowing for race based confiscation. Kates, p. 14.

In 1907, Texas implemented a heavy taxation system on handgun sales. Again, mostly-poor blacks suffered most under this measure. Tonsom *supra*.

New York passed its famous Sullivan Law in 1911, which requires a permit to own a firearm. N.Y. Penal Law § 1897. The permits, issued at police discretion, were commonly denied to unpopular minorities. Tonso, *supra*.

D. Atlanta Race Riots Resulted in Black Disarmament

A series of incidents in 1906 collectively called the Atlanta Race Riots led to widespread confiscation of firearms from blacks in and around the city. Throughout that year, the *Atlanta Journal, Atlanta Constitution*, and other newspapers published articles about a "Negro Crime Wave" involving black men sexually assaulting white women. Rebecca Burns, "Four Days of Rage," *Atlanta Magazine,* Sept. 1906, pp. 142-143; Mark Bauerlein, *Negrophobia: A Race Riot in Atlanta, 1906,* Encounter Books, 2001, pp. 135-173.

The articles brought matters to a head on September 22, 1906, with "Extras" being distributed in downtown Atlanta to a crowd of 5,000 white men and boys. The headlines included "Bold Negro Kisses White Girl's Hand," "Negro Attempts to Assault Mrs. Mary Cafin Near Sugar Creek Bridge," "Two Assaults," and "Third Assault." Burns and Bauerlein, pp. 141-155 and 135-173, respectively. The mob rioted at the news, with roving bands attacking any blacks that they encountered. The next morning's *Atlanta Constitution* had headlines of "Atlanta Is Swept by

Raging Mob Due to Assaults on White Women: 16 Negroes Reported to Be Dead." September 23, 1910, p. 1. Another newspaper reported, "Race Riots on the Streets Last Night the Inevitable Result of a Carnival of Crime Against Our White Women." Bauerlein, pp. 174, 177.

The next day, September 24, black residents armed themselves with guns smuggled into their neighborhoods hidden in rags, caskets, and lumber wagons to defend themselves against future attacks. Bauerlein, pp. 179-186, 205. The black citizens banded together to patrol the streets and protect their neighborhoods. One such area was in Brownsville, on the South Side of Atlanta. *Id.*

That night, seven county policemen and three armed white citizens arrived in Brownsville and saw 25 armed black men together in the street. The white group attacked. When the fighting ended, one police officer was dead and several more were wounded. Six blacks were arrested for carrying concealed weapons. Two of the arrested men were later killed by a mob (while the arrestees still were in shackles). It is unknown how many black casualties there were. Bauerlein, pp. 197-199, 249-252; Burns, p. 158.

As a result of the incident, the Governor dispatched the state militia and some law enforcement units to Brownsville the next day, with orders to confiscate arms from blacks. The residents of Brownsville were taken from their homes and assembled in the street at bayonet point, with a gatling gun

trained on them while their houses were searched. A black man wounded from the night before was found and the law enforcement officers murdered him in front of his family. *Atlanta Journal*, "Town of Brownsville Is Taken By Militia," September 25, 1906; Bauerlein, pp. 201-204.

The *Atlanta Constitution* reported later that day that "Riot's End All Depends on Negroes." Another paper said, "The deepest spot in this crisis is in the existence and liberty at large of Negroes heavily armed and full of malice and vengeance." Bauerlein, p. 204. The *Atlanta Journal* editor James Gray then provided the solution Georgia would ultimately choose to follow in an editorial entitled "Disarm the Negroes." The basis for Mr. Gray's suggestion was his opinion that "A good negro is contaminated by the possession of a weapon in a time like this; a bad negro is made very much worse the moment he places a pistol in his pocket." *Atlanta Journal,* September 25, 1906, p. 6.

Georgia solved its armed black "problem" shortly thereafter, by creating a licensing system that made it a crime to carry a pistol or revolver without a license. Licenses were issued at the discretion of the county "ordinary" (the present-day probate judge), and applicants had to post a bond for $100. Ga. Laws 1910, Vol. 1, p. 134.

While few blacks at the time could have afforded to post a $100 bond, having licenses issued by white men (the only people eligible to hold office – the

ruling in *Cooper and Worsham v. Savannah* that formed the legal basis for expelling Georgia's black legislators) ensured that blacks would not receive licenses. It also is not clear that the law prohibiting unlicensed carrying of firearms was enforced against whites for many years. Not surprisingly, the first arrest under the new statute was of a black man. *Atlanta Constitution*, Dec. 23, 1910, p. 9.

No less than poll taxes with grandfather clauses, these laws sought through economic means to target specific minorities for denial of their rights.

III. Modern Application of Gun Control

As the 20th Century unfolded, gun control was virtually the exclusive province of state and local governments. Infringements on the right to keep arms were few, and infringements on the right to bear arms were limited, and still tended to be applied to racial and other minorities.

All that changed in 1934 with the passage of the National Firearms Act (26 U.S.C. § 5801, *et seq.*). The NFA established a national registry of machine guns and other types of weapons, and imposed taxes on the transfer of such weapons. Notably, for the first time, devices that are not themselves guns (silencers) were defined to be "firearms." The reason for imposing a registry and tax, rather than a ban on the weapons that fell within the ambit of the Act, was the presumption by Congress and United States Attorney General Homer Cummings that a ban would violate

the individual right contained in the Second Amendment. *See* The National Firearms Act of 1934: Hearings on H.R. 9066 Before the House Comm. On Ways and Means, 73rd Cong. 6, 13, 19 (1934).

Even with passage of the NFA, "sporting guns" (i.e., those not regulated by the NFA) continued to be readily available for purchase at gun stores, hardware stores, department stores, and mail order. The assassinations of President John Kennedy, Martin Luther King, Jr., and Senator Robert Kennedy led Congress to pass the Gun Control Act of 1968 (P.L. 90-618, 82 Stat. 12113, 18 U.S.C. § 921, *et seq.*). The GCA imposed a comprehensive scheme of gun control, including regulation of who may possess a gun, who may sell a gun, and where and how they may be transferred.

Race neutral on its face, the GCA has been described with other motives by an avid gun control ***advocate***:

> The Gun Control Act of 1968 was passed not to control guns but to control blacks, and inasmuch as a majority of Congress did not want to do the former but were ashamed to show that their goal was the latter, result was they did neither. Indeed, this law, first gun-control law passed by Congress in thirty years, was one of the grand jokes of our time. First of all, bear in mind that it was not passed in one but was a combination of two laws. The original Act was passed to control handguns after the Rev. Luther King, Jr.,

> had been assassinated with a *rifle*. Then it was repealed and repassed to include the control of *rifles and shotguns* after the assassination of Robert F. Kennedy with a *handgun*. . . . The moralists of our federal legislature as well as sentimental editorial writers insist that the Act of 1968 was a kind of memorial to King and Robert Kennedy. If so, it was certainly a weird memorial, as can be seen not merely by the handgun/long-gun shell game, but from the inapplicability of the law to their deaths.

Robert Sherrill, *The Saturday Night Special and Other Guns,* p. 280 (1972).

With school integration widely implemented throughout the country during the late 1960s and throughout the 1970s, the "white flight" to the suburbs ensued. Inner cities were left without sufficient tax bases to support their infrastructures, leading to well-publicized urban decay and higher rates of poverty and crime.

In an ostensible effort to stem crime, some states began passing various laws aimed at restricting the availability of inexpensive handguns. Among these were the so-called "melting point laws."

The idea behind the melting point laws was that less expensive handguns tended to be made from die cast metals that melted at lower temperatures than their more expensive counterparts. Thus, laws were passed that prohibited the sale of guns that melted below a specified temperature.

Illinois, Hawaii, Maryland, and Minnesota all passed such laws in the 1980s. T. Marcus Funk, "Comment – Gun Control and Economic Discrimination: The Melting Point Case-in-Point," Northwestern University School of Law, 85 J. of Crim. L. & Criminology, 7640806 (1995).

Of course, the effect, if not the purpose, of such laws is to restrict the availability of guns to the poorest citizens – those with no choice but to live in high crime areas and who arguably need guns the most. A National Institute of Justice Study found that:

> The people most likely to be deterred from acquiring a handgun by exceptionally high prices or by the nonavailability of certain kinds of handguns are not felons intent on arming themselves for criminal purposes (who can, if all else fails, steal the handgun they want), but rather the poor people who have decided they need a gun to protect themselves against the felons but who find that the cheapest gun in the market costs more than they can afford to pay.

Funk, p. 794.

In a case stemming from the attempted assassination of President Reagan, the United States District Court for the District of Columbia analyzed the theory and application of policies banning "Saturday Night Specials," and rejected the theory as unsound:

> [T]his Court wonders whether the theory discriminates against those law abiding citizens,

> who purchase a handgun for self defense, but who cannot afford a $200 or $300 weapon and who must resort to the purchase of a cheap handgun. . . .

Delahanty v. Hinckley, 686 F. Supp. 920, 928 (1986), *affirmed* by *Delahanty v. Hinckley,* 900 F.2d 368 (D.C. Cir. 1990). In rejecting a decision of a Maryland court, the District Court explained:

> The effect of such a ruling would be to limit the supply of cheap handguns in the marketplace. While this Court understands that the effort of the Maryland court may be to reduce the number of cheap guns available to criminals, the result is that it may reduce the number of cheap guns available to law abiding citizens as well. The court in quoting comments relating to the "ghetto" and the assertion that such cheap weapons are "ghetto guns" does not define "ghetto." Is a "ghetto" a low income area, or an area made up of persons of a particular race or nationality, or an area where there is an abnormally high crime rate, or all or some of the above. Although the Maryland court does not attempt any definition of "ghetto," it does appear that the salesman who was quoted had very definite ideas as to what he meant by the reference to "ghetto," although he did not define the word. Other sources have defined "ghetto" as "a quarter of a city in which members of a minority, racial or cultural group live especially because of social, legal, or economic pressure." Webster's Third New International Dictionary (1976) at 955. The

> salesman who was quoted seems to assume that anyone residing in a "ghetto" is criminal or suspect. The fact is, of course, that while blighted areas may be some of the breeding places of crime, not all residents of them are so engaged, and indeed, most persons who live there are law abiding but have no other choice of location. But they, like their counterparts in other areas of the city, may seek to protect themselves, their families and their property against crime, and indeed, may feel an even greater need to do so since the crime rate in their community may be higher than in other areas of the city. Since one of the reasons they are likely to be living in the "ghetto" may be due to low income or unemployment, it is highly unlikely that they would have the resources or worth to buy an expensive handgun for self defense. To remove cheap weapons from the community may very well remove a form of protection assuming that *all* citizens are entitled to possess guns for defense. This may be *one* explanation why the Saturday Night Special has a high rate of sale in the low income community. It also raises a question concerning the validity of legislation or court decisions which seek to remove cheaper guns from the market place without taking similar action against higher priced weapons.

Id. at 929.

Patrick Murphy, Police Commission of the City of New York, speaking about "Saturday Night Specials," has stated:

> There is absolutely no legitimate reason to permit the importation, manufacture, or sale of these weapons, or their parts. They are sought only by people who have illicit motives, but who may have some difficulty securing a better gun. No policeman, no Army officer, no security guard, no businessman or merchant, and no sportsman would purchase one of these weapons for any lawful purpose.

Kelley v. R.G. Industries, Inc., 304 Md. 124, 146, 497 A.2d 1143, 1154 (1983). The commissioner apparently offered no opinion regarding whether a poor inner city resident would purchase one for a lawful purpose.

Even the name "Saturday Night Special" derives from a racist pejorative. "It is difficult to escape the conclusion that the Saturday Night Special is emphasized because it is cheap and it is being sold to a particular class of people. The name is sufficient evidence. The reference is to "Niggertown Saturday Night." Barry Bruce-Briggs, "The Great American Gun War," 45 *Public Interest* 37, 50 (1976).

It was at this same time that Petitioners passed their laws under scrutiny in this case. Essentially banning private ownership of guns in various configurations, the laws affect most significantly the 60% black population of the District of Columbia (U.S. Census Data, 2000). When the government employees go home to the suburbs and night falls on the nation's capital, its residents are the ones left to deal with street crime and home invasions.

CONCLUSION

American history, from colonial times to the immediate past, is replete with evidence that gun control has frequently been implemented with a nefarious purpose of subjugating blacks and other minorities. Even today's gun control laws are often vestiges of, or the continuation of, the nation's Jim Crow past. At best, many such laws have greater effects on minorities and the economically disadvantaged. As the parties and other *amici* no doubt will argue, the Framers put into place a constitutional guarantee that the right ***of the people*** to keep and bear arms shall not be infringed. It clearly was the intent of the drafters of the Fourteenth Amendment to ensure that this guarantee applied to ***all*** people and against the states as well as the federal government.

This Court should apply the Second Amendment as it was intended, and eradicate any vestiges of Jim Crow in the District of Columbia's firearms laws.

Respectfully submitted,

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