Numbers 08-4244, 08-4241 and 08-4243 (Consolidated)

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs-Appellants

v. Dist Ct. No. 08-C-3696

VILLAGE OF OAK PARK

Defendants-Appellees

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., et al.,
Plaintiffs-Appellants

v. Dist Ct. No. 08-C-3697

CITY OF CHICAGO

Defendants-Appellees

OTIS McDONALD, et al.,
Plaintiffs-Appellants

v. Dist. Ct. No. 08-C-3645

CITY OF CHICAGO

Defendants-Appellees

Appeal from Cases No. 08-C-3696, 08-C-3697 and 08-C-3645, in the United States District Court for the Northern District of Illinois, Eastern Division

BRIEF OF AMICUS CURIAE CONGRESS OF RACIAL EQUALITY
In support of plaintiffs-appellants
Amicus curiae urges reversal of the judgment of the trial court.

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STATEMENT OF IDENTITY OF AMICUS CURIAE

The Congress of Racial Equality, Inc. ("CORE") is a New York not-for-profit corporation founded in 1942, with national headquarters in Harlem, New York City. CORE is a nationwide civil rights organization, with consultative status at the United Nations. CORE's primary interests are the welfare of the black community and the protection of the civil rights of all citizens.

CORE brings a unique perspective to the subject matter of this most important constitutional litigation. Gun control laws were first enacted in this country for the express purpose of subjugating, dominating and oppressing blacks and other minorities. Even after the Civil War, Southern states used oppressive gun control laws to keep the newly freed slaves in a servile condition, to render them defenseless and to deprive them of other rights. The intent of the drafters of the Fourteenth Amendment was to ensure the protection of the freedmen and unionists in the South by incorporating the Bill of Rights, and the Second Amendment in particular, and making them effective against state and local government action.

CORE's National Chairman Roy Innis and National Spokesperson Niger Innis authorized the filing of this amicus curiae brief.

Judgment below should be reversed.

SUMMARY OF ARGUMENT

The history of gun control in America has been one of discrimination, disenfranchisement and oppression of racial and ethnic minorities, immigrants, and other "marginalized" groups. Robert Cottrol and Raymond Diamond, *Never Intended to be Applied to the White Population: Firearms Regulation and Racial Disparity--The Redeemed South's Legacy to a National Jurisprudence?*, 70 Chi. Kent L. Rev. 1307-1335 (1995); Robert Cottrol & Raymond Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309-361 (1991); Raymond Kessler, *Gun Control and Political Power*, 5 Law & Pol'y Q. 381 (1983); Stefan Tahmassebi, *Gun Control and Racism*, 2 Geo. Mason U. Civ. Rts. L.J. 67. Gun control laws were often specifically enacted to disarm and facilitate repressive action against these groups. Id.

After the Civil War, repressive actions taken against the newly freed slaves, including the denial to them of the right to keep and bear their private arms, spurred Congress to pass the Fourteenth Amendment and various civil rights acts. With the Fourteenth Amendment Congress intended to incorporate the Bill of Rights, including, specifically, the fundamental individual right to keep and bear arms guaranteed by the Second Amendment. The legislative debates, and the statements and writings of legislators and commentators at that time, make it clear that the drafters intended that the Amendment protect the right to keep and bear arms of the newly freed slaves and Republicans in the South against the actions of the state and local governments.

ARGUMENT

I. Gun Control and the Slave Codes

The development of racially-based slavery in the seventeenth century American colonies was accompanied by the creation of laws meting out separate treatment and granting separate rights on the basis of race. An early sign of such emerging restrictions, and one of the most important legal distinctions, was the passing of laws denying free blacks the right to keep arms. "In 1640, the first recorded restrictive legislation passed concerning blacks in Virginia excluded them from owning a gun." Lee Kennett and James LaVerne Anderson, *The Gun in America: The Origins of a National Dilemma* 50 (1975). "Virginia law set Negroes apart from all other groups ... by denying them the important right and obligation to bear arms. Few restraints could indicate more clearly the denial to Negroes of membership in the White community." W. Jordan, *White over Black: American Attitudes Toward the Negro, 1550-1812* 78 (1968).

In the later part of the 17th Century, fear of slave uprisings in the South accelerated the passage of laws dealing with firearms possession by blacks. In 1712, for instance, South Carolina passed "An act for the better ordering and governing of Negroes and Slaves" which included two articles particularly relating to firearms ownership and blacks. 7 Statutes at Large of South Carolina 353-54 (D.J. McCord ed. 1836-1873). Virginia passed a similar act entitled "An Act for Preventing Negroes Insurrections." 2 Statutes at Large; Being a Collection of All the Laws of Virginia, From the First Session of the Legislature, in the Year 1619, 481 (W.W. Hening ed. 1823).

The late Judge A. Leon Higginbotham, Jr. summarized a 1680 Virginia law:

> The 1680 statute would become the model of repression throughout the South for the next 180 years. The following provisions are illustrative of its codification of prejudice and the degree to which the statute attempted to make sure that blacks would be recognized as legally inferior:
>
> > 1680. Act X. Whereas the frequent meetings of considerable numbers of Negro slaves under pretense of feasts and burials is judged of dangerous consequence [it] enacted that no Negro or slave may carry arms, such as any club, staff, gun, sword, or other weapon, nor go from his owner's plantation without a certificate and then only on necessary occasions; the punishment twenty lashes on the bare back, well laid on. And further, if any Negro lift up his hand against any Christian he shall receive thirty lashes, and if he be absent himself or lie out from his master's service and resist lawful apprehension, he may be killed…
>
> If blacks could not leave the owner's plantation without a certificate, their mobility was destroyed; if blacks could not carry arms, the potential to resist was reduced.

A. Leon Higginbotham, Jr., *In the Matter of Color: Race and the American Legal Process, The Colonial Period* 39 (1978) (quoting Act X, 1680; Guild, *Black Laws*, p. 45.)

The slave codes of all of the Southern states prohibited slaves from keeping or bearing firearms. A 1748 statute provided that:

> No Negro or mulatto slave whatsoever shall keep or carry any gun, powder, shot, club or other weapon whatsoever, offensive or defensive. . . . 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, with out first obtaining a license from the court of the county or corporation in which he resides, which license may, at any time, be withdrawn by an order of such court.

VA. CODE, ch. 3, §§ 7, 8 (1819).

Maryland law included a statute enacted in 1715, which provided:

> 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, he shall be carried before a justice of peace, and be whipped, and his gun or other offensive weapon shall be forfeited to him that shall seize the same and carry such negro so offending before a justice of peace.

The General Public Statutory Law and Public Local Law of the State of Maryland, From the Year 1692-1839 Inclusive 31 (John D. Toy ed., 1840).

Jurist and abolitionist St. George Tucker summarized the badges of slavery: "To go abroad without a written permission; to keep or carry a gun, or other weapon; to utter any seditious speech; to be present at any unlawful assembly of slaves; to lift the hand in opposition to a white person, unless wantonly assaulted, are all offenses punishable by whipping." St. George Tucker, *A Dissertation on Slavery* 65 (1796).

Thus, in many of the antebellum states, slaves, and sometimes even free blacks, were legally forbidden to possess firearms. State legislation which prohibited the bearing of arms by blacks was held to be constitutional due to the lack of citizen status of the Afro-American slaves. *State v. Newsom*, 27 N.C. 250 (1844); *Cooper v. Mayor of Savannah*, 4 Ga. 68, 72 (1848). Legislators simply ignored the fact that the U.S. Constitution and most state constitutions referred to the right to keep and bear arms as a right of the "people" rather than of the "citizen." Stephen Halbrook, *The Jurisprudence of the Second and Fourteenth Amendments*, 4 Geo. Mason L. Rev. 1, 15 (1981).

Chief Justice Taney argued, in the infamous *Dred Scott* case, that the Constitution could not have intended that free blacks be citizens:

> For if they were so received, and entitled to the privileges and immunities of citizens, it would exempt them from the operations of the special laws and from the police regulations which they [the states] considered to be necessary for their own safety. 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, ... [A]nd it would give them the full liberty of speech in public and in private upon all subjects upon which its own citizens might speak; to hold public meetings upon political affairs, and to keep and carry arms wherever they went.

Dred Scott v. Sanford, 60 U.S. (19 How.) 393, 416-17 (1857) (emphasis added). In a later part of the opinion, Justice Taney enumerated the constitutional protections afforded to citizens by the Bill of Rights: "Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding." *Id.* at 450. Clearly, the Court viewed the right to keep and bear arms as one of the fundamental individual rights guaranteed to American citizens by the Bill of Rights, which blacks, who the Court claimed were not American citizens, could not enjoy.

II. Gun Control and the Black Codes

After the Civil War, southern legislatures adopted comprehensive regulations, often referred to as Black Codes, by which the new freedmen were denied many of the rights that white citizens enjoyed. These Black Codes often prohibited the purchase or possession of firearms by freedmen. The Special Report of the Anti-Slavery Conference of 1867 noted with particular emphasis that under the Black Codes, blacks were "forbidden to own or bear firearms, and thus were rendered defenseless against assaults." Reprinted in H. Hyman, *The Radical Republicans and Reconstruction* 219 (1967).

Mississippi's Black Code, for instance, included the following provision:

> Be it enacted…[t]hat no freedman, free negro or mulatto, not in the military …and not licensed so to do by the board of police of his or her county, shall keep or carry firearms of any kind, or any ammunition, ... and all such arms or ammunition shall be forfeited to the informer ...

1866 Miss. Laws ch. 23, §1, 165 (1865). Alabama's Black Code provided: "That it shall not be lawful for any freedman, mulatto, or free person of color in this State, to own fire-arms, or carry about his person a pistol or other deadly weapon." See The Reconstruction Amendments' Debates 209 (Alfred Avins ed., 1967).

> The restrictions in the black codes caused strong concerns among northern Republicans. The charge that the South was trying to reinstitute slavery was frequently made, both in and out of Congress. The news that the freedmen were being deprived of the right to bear arms was of particular concern to the champions of Negro citizenship. For them, the right of the black population to possess weapons was not merely of symbolic and theoretical importance; it was vital both as a means of maintaining the recently reunited Union and a means of preventing virtual reenslavement of those formerly held in bondage. Faced with a hostile and recalcitrant white South determined to preserve the antebellum social order by legal and extra-legal means, northern Republicans were particularly alarmed at provisions of the black codes that effectively preserved the right to keep and bear arms for former Confederates while disarming blacks, the one group in the South with clear unionist sympathies. This fed the determination of northern Republicans to provide national enforcement of the Bill of Rights.

Cottrol & Diamond, 80 Geo. L.J. at 345-346 (footnotes omitted).

III. A New View Of the Constitution

In response to the Black Codes and the South's deprivation of the civil rights of the freedmen, the U.S. Congress enacted a series of civil rights bills and the Fourteenth Amendment. The legislative histories of these acts and of the Fourteenth Amendment are replete with denunciations of the disarmament of blacks, and state the intent of the drafters to guarantee to the freedmen the individual right to keep and bear arms for personal self-defense. Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 256 (1983); Halbrook, *supra*, 4 Geo. Mason L. Rev. at 21-26; Akhil Reed Amar, *The Bill of Rights* 264-266 (1998). The aforementioned intent

was "[o]ne of the core purposes of the Civil Rights Act of 1866 and of the Fourteenth Amendment." Amar, *supra*, *The Bill of Rights* 264. *See also*, Stephen Halbrook, *Freedmen, the Fourteenth Amendment, and the Right to Bear Arms, 1866-1876* (1998).

One of these civil rights acts was the Freedman's Bureau Act, which required that "laws ... concerning personal liberty, personal security, and the acquisition, enjoyment, and disposition of estate, real and personal, <u>including the constitutional right to bear arms</u>, shall be secured to and enjoyed by all the citizens." Act of July 16, 1866, 14 Stat 173, 176 (1866) (emphasis added). After President Johnson's veto of the Freedmen's Bureau bill, Republicans introduced a second Freedmen's Bureau bill. Cong. Globe, 39th Cong., 1st Sess. 2743 (May 22, 1866) (passed as 14 Stat. 173 (1866)). This bill again specifically guaranteed "the constitutional right to bear arms." Cong. Globe, 39th Cong., 1st Sess. 3412 (June 26, 1866).

In support of Senate Bill No. 9, which declared as void all laws in the former rebel states that recognized inequality of rights based on race, Senator Henry Wilson (R., Mass.) explained that: "In Mississippi rebel State forces, men who were in the rebel armies, are traversing the State, visiting the freedmen, <u>disarming them</u>, perpetrating murders and outrages upon them ... ." Cong. Globe, 39th Cong., 1st Sess. 40 (1865) (emphasis added).

The framers of the Civil Rights Act of 1866 argued that the issue of the right to keep and bear arms by the newly freed slaves was of vital importance. Senator William Salisbury (D., Del.) stated that "[i]n most of the southern States, there has existed a law of the State based upon and founded in its police power, which

declares that free negroes shall not have the possession of firearms or ammunition. This bill proposes to take away from the States this police power." *Id.* at 478. Representative Henry J. Raymond (R., N.Y.) explained that the rights of citizenship entitled the freedmen to all the rights of United States citizens: "He has a defined status: he has a country and a home; a right to defend himself and his wife and children; a right to bear arms; a right to testify in the Federal Courts ... ." *Id.* at 1266 (emphasis added).

During the debate on the Fourteenth Amendment, Kansas Senator Samuel Pomeroy asked:

> And what are the safeguards of liberty under our form of Government? There are at least, under our Constitution, three which are indispensable--
>
> 1. Every man should have a homestead, that is, the right to acquire and hold one, and the right to be safe and protected in that citadel of his love
>
> . . . .
>
> 2. He should have the right to bear arms for the defense of himself and family and his homestead. And if the cabin door of the freedman is broken open and the intruder enters for purposes as vile as were known to slavery, then should a well-loaded musket be in the hand of the occupant to send the polluted wretch to another world, where his wretchedness will forever remain complete; and
>
> 3. He should have the ballot . . . .

Cong. Globe, 39th Cong., 1st Sess 1182 (1866).

The legislators were specifically concerned with the violation in the South of the freedman's right to keep and bear arms.

> Senator Howard . . . explicitly invoked "the right to keep and bear arms" in his important speech cataloguing the "personal rights" to be protected by the Fourteenth Amendment. Howard and others may have been influenced by the antebellum constitutional commentator William Rawle, who had argued

> in his 1825 treatise that the Second Amendment as written limited both state and federal government . . .

Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1167 (1991) (quoting Cong. Globe, 39th Cong., 1st Sess. 2766 (1866)).

> [I]t is abundantly clear that the Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, <u>the right to bear arms</u>, trial by impartial jury . . . . The Freedman's Bureau had already taken steps to protect these rights, and the Amendment was deemed necessary, in part, precisely because every one of them was being systematically violated in the South in 1866.

Eric Foner, *Reconstruction: America's Unfinished Revolution, 1863-1877*, 258-59 (1988) (emphasis added).

Within three years of the adoption of the Fourteenth Amendment in 1868, Congress was considering legislation to suppress the Ku Klux Klan. In a report on violence in the South, Representative Benjamin F. Butler (R., Mass.) stated that the right to keep arms was absolutely necessary for protection. He noted 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). The anti-KKK bill was originally introduced to the House Judiciary Committee with the following provision:

> That whoever shall, without due process of law, by violence, intimidation, or threats, take away or <u>deprive any citizen of the United States of any arms or weapons he may have in his house or possession for the defense of his person, family, or property</u>, shall be deemed guilty of a larceny thereof, and be punished as provided in this act for a felony.

Cong. Globe, 42nd Cong., 1st Sess. 174 (1871) (emphasis added).

Representative Butler explained the purpose of this provision:

> Section 8 is intended to enforce the well-known constitutional provision guaranteeing the right in the citizen to 'keep and bear arms,' ... . This provision seemed to your committee to be necessary, because they had observed that, before these midnight marauders made attacks upon peaceful citizens, there were very many instances in the South where the sheriff of the county had preceded them and taken away the arms of their victims. This was especially noticeable in Union County, where all the negro population were disarmed by the sheriff only a few months ago under the order of the judge ...; and then, the sheriff having disarmed the citizens, the five hundred masked men rode at night and murdered and otherwise maltreated the ten persons who were there in jail in that county.

H.R. Rep. No. 37, 41st Cong., 3rd Sess. 78 (1871).

Representative Roswell Hart, New York Republican, stated during the debates over the Civil Rights Act of 1866:

> The Constitution clearly describes that to be a republican form of government for which it was expressly framed. A government which shall "establish justice, insure domestic tranquillity, provide for the common defense, promote the general welfare, and secure the blessings of liberty"; a government whose "citizens shall be entitled to all privileges and immunities of other citizens"; where "no law shall be made prohibiting the free exercise of religion"; where "<u>the right of the people to keep and bear arms shall not be infringed</u>"; where "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated," and where "no person shall be deprived of life, liberty, or property without due process of law."
>
> Have these rebellious States such a form of government? If they have not, <u>it is the duty of the United States to guaranty that they have it speedily</u>.

The Reconstruction Amendments' Debates, supra, at 193 (emphasis added). "[A] recurring theme in the debates of the Thirty-ninth Congress was the need to protect the rights of citizens and to require states to respect those rights." Michael Kent Curtis, *No State Shall Abridge: the Fourteenth Amendment and the Bill of Rights* 42 (1986).

An essential transformation had occurred. The drafters of the 14th Amendment and anti-slavery Republicans now viewed the Bill of Rights as a federal guarantee against the infringement of essential liberties by state and local government.

> By 1866 leading Republicans in Congress and in the country at large shared a libertarian reading of the Constitution. The Constitution meant what its preamble said. It established liberty.

Id., at 22. "To Republicans the great objects of the Civil War and Reconstruction were securing liberty and protecting the rights of citizens." *Id.*, at 54. In the words of Republican Senator Timothy Howe: "We have [formerly] taken the Constitution in a solution of the spirit of State rights. Let us now take it as it is sublimed and crystallized in the flames of the most gigantic war in history." Cong. Globe, 39th Cong., 1st Sess., 163, 1478 (1866). Republican Congressman George Anderson commented: "We are today interpreting the Constitution from a freedom and not from a slavery standpoint." *Id.*

This was necessary because former Confederate states

> . . . apparently believed that its power to regulate its local black population, short of actual reenslavement, was undiminished. . . . [and so] passed Black Codes denying blacks many important liberties secured to whites. . . . [including] such basic rights as the freedom to move, to contract, to own property, to assemble, <u>and to bear arms</u>.

Curtis, *supra*, at 35 (emphasis added).

The drafters of the 14th Amendment:

> saw the former slaves as citizens entitled to those rights long deemed as natural rights in Anglo-American society. Their's was a vision of national citizenship and national rights, rights that the federal government had the responsibility to secure for the freedmen and, indeed, for all citizens. This vision, developed during the antislavery struggle and heightened by the Civil War, caused Republicans of the Civil War and postwar generation to view the question of federalism and individual rights in a way that was significantly different from that of the original framers of the Constitution and Bill of Rights. If many who debated the original Constitution feared that the newly

> created national government could violate long established rights, those who changed the Constitution in the aftermath of war and slavery had firsthand experience with states violating fundamental rights. The history of the right to bear arms is, thus, inextricably linked with the efforts to reconstruct the nation and bring about a new racial order.

Cottrol and Diamond, *supra*, 80 Geo. L.J. at 343 (footnotes omitted).

IV. The Fourteenth Amendment Incorporates the Bill of Rights

To the Thirty-ninth Congress, when considering, debating and ratifying the Fourteenth Amendment, it was

> abundantly clear that Republicans wished to give constitutional sanction to states' obligation to respect such key provisions as freedom of speech, the right to bear arms, trial by impartial jury, and protection against cruel and unusual punishment and unreasonable search and seizure.

Foner, *supra*, at 258.

Jonathan Bingham, author of the Fourteenth Amendment's Privileges or Immunities Clause, specifically stated that the clause applied the Bill of Rights to the states. *The Reconstruction Amendments' Debates* at 156-60, 217-18. "[T]he powers of the States have been limited and the powers of Congress extended [with Section Five]." Foner, *supra*, at 258. "Over and over [John Bingham] described the privileges-or-immunities clause as encompassing 'the bill of rights' — a phrase he used more than a dozen times in a key speech on February 28." Akhil Reed Amar, the Bill of Rights 45 (1998). Other legislators, such as Republican Sen. Jacob Howard of Michigan, also expressed this intent. *The Reconstruction Amendments' Debates* at 219.

> Discriminatory state laws could be overturned by the federal courts regardless of which party dominated Congress. . . . Congress placed great reliance on an activist federal judiciary for civil rights enforcement – a mechanism that appeared preferable to maintaining indefinitely a standing

> army in the South, or establishing a permanent national bureaucracy empowered to oversee Reconstruction.

Foner, *supra*, at 258.

Senator Jacob Howard, chair of the Joint Committee on Reconstruction, stated, in regard to the Fourteenth Amendment:

> [Section one is intended to impose a] general prohibition upon all the States, as such, from abridging the privileges and immunities of the citizens of the United States. . . . To these privileges and immunities, whatever they may be – for they are not and cannot be fully defined in their entire extent and precise nature – to these should be added the personal right guarantied and secured by the first eight amendments of the Constitution; such as the freedom of speech, . . . [and] <u>the right to keep and to bear arms</u> . . . . [I]t is a fact well worthy of attention that the course of decision of our courts and the present settled doctrine is, that all these immunities, privileges, rights, thus guarantied by the Constitution or recognized by it . . . . do not operate in the slightest degree as a restraint or prohibition upon State legislation. States are not affected by them . . . . [Presently,] they stand simply as a bill of rights in the Constitution, without power on the part of Congress to give them full effect; while at the same time the States are not restrained from violating the principles embraced in them except by their own local constitutions, which may be altered from year to year. 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.

Cong. Globe, 39th Cong., 1st Sess. 2765-66 (1866) (emphasis added.)

"After the War, Republicans were united in their belief that the Bill of Rights should be applied to the states." Michael Anthony Lawrence, *Second Amendment Incorporation through the Fourteenth Amendment Privileges or Immunities and Due Process Clauses*, 72 Mo. L. Rev. 1, 21, n. 86 (Winter 2007). "Republicans in the Thirty-ninth Congress - radical, moderate and conservative alike - expressed their understanding on other occasions as well that the clause was intended to apply the Bill of Rights to the States." *Id.* at 21-22 (Winter 2007), citing Curtis, *supra*, at 34-35 and 68-69. "John Bingham, the author of the amendment, and Senator Howard,

who managed it for the Joint Committee in the Senate, clearly said that the amendment would require the states to obey the Bill of Rights." Curtis, *supra*, at 91.

Even the opponents of the Fourteenth Amendment believed that the Amendment incorporated the totality of the Bill of Rights:

> . . . the most conservative and racist Democratic opponents of the [proposed Civil Rights Act of 1875] embraced with no apparent qualms the view that the Fourteenth Amendment totally incorporated the Bill of Rights. They advanced this reading as a conservative alternative to the even broader reading urged by Republican proponents of the bill, who believed that the Amendment authorized Congress to legislate equal access without regard to race to a wide range of accommodations and amenities in both the public and private sectors.

Bryan Wildenthal, *The Lost Compromise: Reassessing the Early Understanding in Court and Congress on Incorporation of the Bill of Rights in the Fourteenth Amendment*, 61 Ohio St. L.J 1051, 1116-17 (2000).

Subsequent to the passage of the Fourteenth Amendment, the succeeding Congresses expressed the same view, namely that the Fourteenth Amendment had effectuated the total incorporation of the Bill of Rights. In support of the 1871 Enforcement Act, John Bingham stated that:

> the privileges and immunities of citizens of the United States, as contradistinguished from citizens of a State, are chiefly defined in the first eight amendments to the Constitution of the United States. . . . These eight articles I have shown never were limitations upon the power of the States, until made so by the fourteenth amendment.

Cong. Globe, 42nd Cong., 1st Sess. 84 app. (1871).

V. The Fourteenth Amendment Specifically Incorporates the Second Amendment.

The drafters of the civil rights acts and of the Fourteenth Amendment specifically intended to protect the individual fundamental right of the freedmen to keep and bear arms. Amar, *supra*, 100 Yale L.J. 1131. Amar, *supra*, *The Bill of Rights*. Halbrook, *supra*, 4 Geo. Mason L. Rev. 1. Stephen Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms:" Visions Of the Framers of the Fourteenth Amendment*, 5 Seton Hall Const. L.J. 341-434 (1995).

> The [Reconstruction] Congressmen of this period were hardly interested in strengthening the state militias . . . or in reinforcing states' rights. The Congressional concern about the constitutional right to keep and bear arms was plainly a concern about the self-defense rights of individual citizens, especially freedmen.

David Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1453-54 (1998). As noted constitutional scholar Akhil Reed Amar commented, the focus of the Second Amendment had changed:

> In short, between 1775 and 1866 the poster boy of arms morphed from the Concord minuteman to the Carolina freedman. The Creation motto, in effect, was that if arms were outlawed, only the central government would have arms. In Reconstruction a new vision was aborning: when guns were outlawed, only the Klan would have guns. This idea, focusing on private violence and the lapses of local government rather than on the public violence orchestrated by central soldiers, is far closer to the unofficial motto of today's National Rifle Association, "When guns are outlawed, only outlaws will have guns."

Amar, supra, *The Bill of Rights*, at 266.

The drafters of the Fourteenth Amendment made it abundantly clear that they specifically intended to incorporated the Second Amendment and to protect the

Right to Keep and Bear Arms from state and local legislation. The full Senate considered H.R. No. 127, the bill which would become the Fourteenth Amendment, for the first time on May 23, 1866. Cong. Globe, 39th Cong., 1st Sess. 2764-65 (May 23, 1866). Senator Jacob M. Howard, introducing the bill on behalf of the Joint Committee, referred to "the personal rights guaranteed and secured by the first eight amendments of the Constitution; such as freedom of speech and of the press; ... the right to keep and bear arms." *Id.* at 2765 (May 23, 1866) (emphasis added). The Fourteenth Amendment needed to be adopted to protect against state legislation infringing these particular rights. "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 (May 23, 1866).

This was also the understanding of legal commentators, the press and the public at large. Senator Howard's speech introducing the Fourteenth Amendment to the Senate was heavily covered in the national press. Senator Howard's statement that the Fourteenth Amendment would compel the States to respect "these great fundamental guarantees ... the personal rights guaranteed by the first eight amendments of the United States Constitution, such as ... the right to keep and bear arms ...." was reported on the very next day on the first page of the New York Times and the New York Herald and it was also printed in other papers, including the National Intelligencer and the Philadelphia Inquirer. See New York Times, May 24, 1866, at 1, col. 6.; New York Herald, May 24, 1866, at 1, col. 3.; National

Intelligencer, May 24, 1866, at 3, col. 2.; Philadelphia Inquirer, May 24, 1866, at 8, col. 2.

> The Framers intended, and opponents well recognized, that the Fourteenth Amendment was designed to guarantee the right to keep and bear arms as a right and attribute of citizenship on which no State could infringe. The passage of the Fourteenth Amendment accomplished the abolitionist goal that each state recognize all the freedoms contained in the Bill of Rights.

Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions Of the Framers of the Fourteenth Amendment*, 5 Seton Hall Const. L.J. 341, 432 (1995).

CONCLUSION

The Fourteenth Amendment incorporates the Second Amendment and protects the Right to Keep and Bear Arms against oppressive state and local legislation. Judgment below should be reversed.

Respectfully Submitted,

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Dated: February 12, 2009

CERTIFICATE OF SERVICE

I, Stefan Bijan Tahmassebi, counsel of record for Amicus Curiae Congress of Racial Equality, certify that on February 12, 2009, I served the parties with copies of the amicus curiae brief of the Congress of Racial Equality (including a copy in digital form CD-ROM) Certificate of Compliance with Fed. R. App. P. 32(a)(7)(B) and Disclosure Statement, by depositing these in the U.S. Mail, first class postage prepaid, addressed to:

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