IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK
ALBANY DIVISION

David D. BACH,

Plaintiff,

v.

Civil Action No. _____

George E. PATAKI, in his official capacity as Governor of New York; Eliot SPITZER, in his official capacity as Attorney General of New York; James W. MCMAHON, in his official capacity as Superintendent, New York State Police; J. Richard BOCKELMANN, in his official capacity as Ulster County Sheriff,

FEDERAL CONSTITUTIONAL ISSUES OF FIRST IMPRESSION IN THE SECOND CIRCUIT

Defendants.

Plaintiff's Brief in Support of his Application for Preliminary and Permanent Injunction, and Declaratory Relief

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Cases v. United States, 131 F.2d 916 (1st Cir. 1942) 10
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Colgate v. Harvey, 296 U.S. 404 (1935), *overruled by Madden v. Kentucky*, 309 U.S. 83 (1940) 17
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Gitlow v. New York, 268 U.S. 652 (1925) 22
Harman v. Forssenius, 380 U.S. 528 (1965) 19
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Latino Officers Ass'n. v. Safir, 170 F.3d 167 (2d Cir.1999) 4
Lawson v. Kirschner, 152 F.3d 919 (2d Cir. 1998) 8
Lewis v. United States, 445 U.S. 55, 65, n.8 (1980) 9
Love v. Pepersack, 47 F.3d 120 (4th Cir. 1995) 10
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Rodriguez v. DeBuono, 175 F.3d 227 (2d Cir.1999) 4

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United States v. Oakes, 564 F.2d 384 (10th Cir.1977) 10
United States v. Panter, 688 F.2d 268 (5th Cir. 1982) 6
United States v. Rybar, 103 F.3d 273 (3d Cir. 1996) 10
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United States v. Toner, 728 F.2d 115 (2d Cir. 1984).....8
United States v. Tot, 131 F.2d 261 (3rd Cir. 1942).....10
United States v. Verdugo–Urquidez, 494 U.S. 259, 265, (1990).....11
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Wolf v. Colorado, 338 U.S. 25 (1949) 22

STATUTES

Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1994).....16
Consumer Product Safety Improvement Act of 1976, Pub. L. 94-284, Sec. 3(e), May 11, 1976, 90 Stat. 504 15
Federal Firearms Act of 1938, Ch. 850, 52 Stat. 1250 (1938).....15
Firearms Owners' Protection Act of 1986 [§1(b), 100 Stat. 449 (1986) (codified at 18 U.S.C. §926 (1986).....15
Freedmen's Bureau Act of 1866, Act of July 16, 1866, 14 Stat. 173 (1866) 15
Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213 (1968) 15
Militia Law of 1956, 10 U.S.C., Chap. 13 15
National Firearms Act of 1934, 48 Stat. 1236 (1934) 15
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NY Penal Law § 400.00(3)(a).....3
Property Requisition Act of 1941, Ch. 445, 55 Stat. 742 (1941).....15
The Brady Handgun Control Law, 18 U.S.C. §921 (1993) 15
The Right To Keep And Bear Arms, Report of The Subcommittee on The Constitution, Senate Judiciary Comm., S. Rep. No. 522–3, 97th Cong., 2d Sess. (1982).....15

OTHER AUTHORITIES

Akhil Reed Amar, The Bill of Rights and the Fourteenth Amendment, 101 Yale L.J. 1193 (1992)----------13
Brannon P. Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of* United States v. Miller *and the Second Amendment*, 26 Cumb. L. Rev. 961 (1995-96) ----------13
Civil Rights Act of 186 TA \s "Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1994)" 6, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1994)----------16
Cynthia Leonardatos, David B. Koppel & Stephen P. Halbrook, *Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century--and Today*, Journal of Law and Policy, 737 (2001) ----------20
David B. Kopel & Christopher C. Little, The Right Guaranteed by the Second Amendment: A Critique of Domestic Disarmament's *Legal Analysis*, **56 Md. L. Rev. 438 (1997)**----------15
David Kopel, The Second Amendment in the Nineteenth Century, 1998 B.Y.U. L. Rev. 1359, 1362 & n.1 ----------14
David Kopel, *The Supreme Court's Thirty-five Other Second Amendment Cases*, 18 St. Louis U. Pub. L. Rev. 99 (1999) ----------11
David T. Hardy, The Second Amendment and the Historiography of the Bill of Rights, 4 J.L. & Pol. 1 (1987) 13
Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L.Rev. 204 (1983) ----------13
Eugene Volokh, The Commonplace Second Amendment*,* 73 NYU L. Rev. 793 (1998) ------14
Gary Kleck & Mark Gertz*, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, J. Crim. L. & Criminology, 150, 153, 180–82 (1995, Vol. 86 No. 1.) 7
John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right–to–Carry Concealed Handguns*, J. Legal Studies, Vol. 26 (Jan. 1997) ---------- 7
John R. Lott, Jr., *More Guns, Less Crime; Understanding Crime and Gun Control Laws*, University of Chicago Press (2d ed. 2000)---------- 7
Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994) ----------13
Laurence H. Tribe, *1 American Constitutional Law* 902 n.221 (3d ed. 2000) ----------14
Leonard W. Levy, Origins of the Bill of Rights*, 134* (1999)----------14
Nelson Lund, The Past and Future of the Individual's Right to Arms, 31 Ga. L. Rev. 1, 24-26 (1996)----------13
Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 Rutgers L. Rev. 97–197 (1997) ----------15
Robert Cottrol & Robert Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309 (1991)----------13
Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, *8 Stanford L. & Pol'y Rev. 25-40 (1997)* ----------14
Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989) ----------13
Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 Tenn. L. Rev. 597 (1995) ----------15
Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment* [hereinafter Halbrook, *Visions of the Framers*] 5 Seton Hall Const. L.J. 341–434 (1995) ----------16
Stephen P. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984) ----------13
Testimony of Eugene Volokh before the Senate Subcommittee on the Constitution (Sep. 23, 1998) reprinted as *A Right of the People*, Cal. Pol. Rev., p. 23 (Nov./Dec. 1998)----------11
The Fifth Auxiliary Right*, 104 Yale L.J. 995–1026 (1995)* ----------14

William Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 Duke L.J. 1236 (1994)----------13

RULES

1 BLACKSTONE, COMMENTARIES 140-41 (St. Geo. Tucker Ed. 1803). ---------- 1
3 J. STORY, COMMENTARIES § 1890, pp. 746–47 (1833) ---------- 1
Act of July 16, 1866, 14 Stat. 173, 176–77 (1866) ---------- 2
The Right To Keep And Bear Arms, Report of The Subcommittee on The Constitution, Senate Judiciary Comm., 97th Cong., 2d Sess., 9 (1982)----------20

TREATISES

http://www.davekopel.org/2dAmendment.htm ----------13
http://www.saf.org/journal.html ----------13

Preliminary Statement

The issue facing this Court boils down to a single substantive question of constitutional law:

> The Federal Constitution protects the fundamental rights of United States citizens to keep and bear arms, and travel interstate. New York law however, prohibits ordinary, law–abiding, nonresident citizens from obtaining the required license to possess or carry a firearm while temporarily residing, visiting, or traveling within the State solely because they live out of State. Does New York law infringe the fundamental, rights, privileges or immunities of nonresidents under the United States Constitution?

The Second Amendment to the Constitution of the United States was enacted to secure for every individual the fundamental rights to keep and bear arms, and to protect these personal freedoms from federal intrusion. It encapsulates the precious and primary rights of personal security, personal liberty and private property.[1] Ensuring individual political freedom and the common defense of community and State, the Second Amendment embodies the personal rights of self–preservation and self–defense of ones family, home and private property.

Inherent to these basic human rights is the rational means by which a free people may secure and exercise them without fear of government reprisal. As United States Supreme Court Justice Story eloquently observed more than 150 years ago, "[t]he right of citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers. . . ."[2] The "right of the people to keep and bear arms" thus is perhaps the most fundamental of all individual rights—more basic than the guarantees of free speech, petition, jury trial, and privacy.

The keystone to the application of the Bill of Rights to State and local governments, the Fourteenth Amendment established the framework upon which federal courts could act to safeguard these personal freedoms. Included among the most valued of all blessings of liberty secured by the Fourteenth Amendment—was the fundamental right of United States citizens to keep and bear arms. Significantly, the same two–thirds of Congress who adopted the Fourteenth Amendment also voted to

[1] 1 BLACKSTONE, COMMENTARIES 140-41 (St. Geo. Tucker Ed. 1803).
[2] 3 J. STORY, COMMENTARIES § 1890, pp. 746–47 (1833).

enact the Freedmen's Bureau Act, which protected the "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and … estate …, *including the constitutional right to bear arms*…."[3] The framers of the Fourteenth Amendment thus recognized that these fundamental personal rights extended not only to white inhabitants, but were necessary to ensure that freedmen and their families could not be deprived of the reasonable means to protect their lives, their liberty, and their private property from oppressive State and local government rule.

Although the term "travel" is not found in the text of the Constitution, the right to travel from one State to another has been long recognized as a fundamental right that is firmly embedded in our jurisprudence.[4] Indeed, the Supreme Court recently observed that the right to travel is so important that it is "assertable against private interference as well as governmental action ... a virtually unconditional personal right, guaranteed by the Constitution to us all."[5] Thus, any classification that abridges the privileges or immunities of national citizenship, or serves to penalize the exercise of a constitutional right, unless shown to be necessary to promote a compelling governmental interest, is unconstitutional under Section 1 of the Fourteenth Amendment. In addition, a State law that unreasonably burdens or restricts the interstate movement of citizens in or through a State, must be narrowly tailored and bear a close relation to the achievement of substantial State objectives to avoid infringing Article IV, § 2, Cl. 1 of the Federal Constitution.

Under NY Penal Law §§ 265.00 and 400.00 *et seq.*, no person may possess, carry or transport a firearm in New York State unless they have a valid New York firearms license or meet one of the narrowly prescribed exemptions, which apply neither to Bach nor other ordinary nonresident citizens. Various restrictions are placed upon applicants, including primary residency in the county of issuance. Because ordinary nonresident citizens of other States cannot possibly meet New York's residency requirement for issuance of a firearms license, they continue to be deprived of their constitutionally

[3] Freedman's Bureau Act of July 16, 1866, 14 Stat. 173, 176–77 (1866) (emphasis added).
[4] *Saenz v. Roe,* 526 U.S. 489, 498, 119 S.Ct. 1518, 1524 (1999) (citing *United States v. Guest,* 383 U.S. 745, 757 (1966)).
[5] *Id.* at 498 (quoting Justice Stewart's concurring opinion in *Shapiro v. Thompson,* 394 U.S. 618, 643 (1969)).

protected rights to keep and bear arms, and travel interstate solely because they live out of State.

Because NY Penal Law §§ 265.00 and 400.00 *et seq.*, implicate the fundamental, substantive rights of nonresident citizens under the Second and Fourteenth Amendments, and Article IV, § 2, a heightened standard of constitutional review is required, which the State cannot meet in this case. Therefore, this Court must grant declaratory and injunctive relief immediately to protect the fundamental personal rights, privileges and immunities of ordinary, law–abiding, nonresident citizens to keep and bear otherwise lawful firearms while temporarily traveling within the State of New York; and to protect these citizens from unlawful discrimination and criminal prosecution under State law.

Statement of Facts

Bach is a citizen of the United States and the State of Virginia. He possesses a permit to carry a concealed handgun in accordance with Virginia law and owns a 9mm pistol substantially similar to the type used by the United States Armed Forces, National Guard, and law enforcement.

Bach is a Commissioned Officer in the United States Naval Reserve with over twenty–five years of service. He is experienced in handling and providing instruction in many types of small arms due to his service as a Navy SEAL. He holds a Department of Defense Top Secret Security Clearance and has never been convicted of a felony, firearms related crime, or any other serious offense.

Bach is married and has three young children. Although born in New Jersey, he grew up in the Town of Saugerties, County of Ulster, New York where his parents continue to reside.

Bach and his family periodically visit his parents for several days at a time. During the ten–hour drive between Virginia and Upstate New York, and while visiting, Bach wishes to possess and carry his personal firearm to protect his family from violent criminal acts in accordance with current law.

NY Penal Law §§ 265.00 and 400.00(3)(a), when read together, prohibit Bach and other ordinary, law–abiding nonresident citizens from obtaining a firearms license to carry or possess an operable pistol or revolver while traveling in or through New York State solely because they live out of State.[6]

[6] *See Mahoney v. Lewis*, (3 Dept. 1993) 199 A.D.2d 734, 605 N.Y.S.2d 168 (construing the phrase "where the applicant resides" as equivalent to domicile).

New York is the only State in the Union that prohibits *ordinary*, law–abiding citizens of sister States from transporting a handgun in or through the State.[7]

Argument and Authorities

1. Injunctive relief must be granted pending a decision on the merits and permanently to prevent continuing irreparable harm to United States citizens.

A. The standard of review to obtain preliminary and permanent injunctive relief.

In conjunction with Federal Rule of Civil Procedure 65, the applicable standard to obtain preliminary injunctive relief in the Second Circuit is set forth in the seminal case, *Jackson Dairy Inc. v. H.P. Hood & Sons, Inc.*,[8] and its progeny. The movant must clearly establish irreparable harm, and either a likelihood of success on the merits or sufficiently serious questions going to the merits to make them a fair ground for litigation, and a balance of hardships tipping decidedly in favor of the movant.

To establish irreparable harm, the movant must demonstrate an injury that is neither remote nor speculative, but actual and imminent. In addition, the moving party must make a substantial showing of a likelihood of success where the injunction sought will alter, rather than maintain the status quo, or will provide the movant with substantially all the relief sought.[9] Because the injunction sought will alter the status quo, Bach must demonstrate a substantial likelihood of success on the merits.

The standard for a permanent injunction is essentially the same as for a preliminary injunction except that the plaintiff must actually succeed on the merits. The imminent aspect of the irreparable harm requirement however, is not crucial to granting a permanent injunction.[10]

B. The balance of harms tips decidedly in favor of Bach and other ordinary, law–abiding, nonresident citizens traveling in or through the State of New York.

The weight of authority in the Second Circuit recognizes that an alleged deprivation of a substantive constitutional right, which cannot be redressed through a legal remedy, constitutes a *per se*

[7] For purposes of this suit, an "ordinary" nonresident citizen is someone who meets none of the narrowly prescribed exemptions under NY Penal Law § 265.20.
[8] 596 F.2d 70, 72 (2d Cir.1979) (per curiam); s*ee also Latino Officers Ass'n. v. Safir*, 170 F.3d 167, 171 (2d Cir.1999).
[9] *Jolly v. Coughlin*, 76 F.3d 468, 473 (2d Cir. 1996), *cert. denied*, 525 U.S. 824 (1998).
[10] *Rodriguez v. DeBuono*, 175 F.3d 227, 235 (2d Cir.1999).

irreparable injury.[11] Applying this standard, courts have considered the nature of the constitutional violation and whether it implicates a substantive constitutional right. In the context of the First Amendment, the Second Circuit has regarded prior restraints to be particularly repugnant because they vest in government agencies the power to determine important constitutional questions properly vested in the judiciary.[12] Further, courts have found that a chilling effect on constitutionally protected activity is sufficient to establish a cognizable claim.[13]

In this case, Bach and other nonresident citizens continue to suffer irreparable harm because NY Penal Law §§ 265.00 and 400.00 *et seq.*:

- Deprive nonresidents of their fundamental rights to keep and bear arms, and travel interstate in violation of express constitutional guarantees. The alleged deprivation of these substantive constitutional rights constitutes *per se* irreparable harm.
- Impose a prior restraint on constitutionally protected activity by establishing an impossible standard that completely bars ordinary nonresidents from obtaining the required license to possess or carry an otherwise lawful firearm.
- Continue to have a chilling effect on constitutionally protected activity by requiring nonresident citizens to choose between being subjected to felony prosecution and loss of personal property for exercising their substantive constitutional rights, or remaining defenseless victims of actual and imminent violent criminal acts.
- Deprive nonresidents of a rational and effective means to protect and defend themselves, their families and private property from violent criminal acts while traveling within the State of New York. Because the State cannot reasonably assure the safety and welfare of nonresidents within its borders from violent attacks, nonresidents continue to suffer serious bodily harm, loss of life and property in violation of federal constitutional guarantees.
- Unduly burden and indiscriminately penalize nonresidents who are deprived of substantial rights and benefits presently accorded to residents. New York residents may obtain a firearms license provided they meet certain criteria that do not apply to ordinary nonresident citizens.
- Unreasonably burden and restrict the interstate movement of nonresidents by requiring them to surrender their constitutionally protected rights, privileges and immunities in order to gain entry or pass through the State.

The irreparable harm and its chilling effect on constitutionally protected activity is neither remote nor speculative, but actual and imminent as evidenced by the State's continued discrimination against nonresidents and the tens of thousands of disarmed citizens who are brutalized and murdered each year

[11] *Jolly, supra,* 76 F.3d at 482 (finding district court properly relied on the presumption of irreparable injury that flows from a violation of constitutional rights to issue a preliminary injunction); *Mitchell v. Cuomo,* 748 F.2d 804, 806 (2d Cir.1984) (finding no further showing of irreparable injury is necessary if an alleged deprivation of a constitutional right is involved).
[12] *New York Magazine v. Metro. Transp. Auth.*, 136 F.3d 123, 127 (2d Cir.1998).
[13] *American Postal Workers Union v. United States Postal Service*, 766 F.2d 715, 722 (2d Cir.1985).

throughout New York State .[14] The irreparable harm to ordinary, nonresident citizens caused by defendants' firearm restrictions outweighs any remote harm the State may suffer if a preliminary injunction issues. Nonresident citizens merely will be eligible to obtain a New York firearms license provided they meet whatever reasonable, constitutionally valid criteria the State may require. They will have the right to choose whether to use a rational and effective means to protect and defend themselves and their families from violent criminal acts, and to participate in lawful firearms training without fear of criminal prosecution and loss of personal property.[15] These substantial rights and benefits are presently accorded to New York residents based on the unfettered discretion of local authorities, but are denied entirely to nonresidents.

There is neither a constitutionally valid reason to justify these pernicious restrictions nor empirical evidence to demonstrate that nonresidents are less capable than residents of safely and responsibly handling firearms; are more prone to committing violent criminal acts; pose a danger to the community or otherwise constitute the peculiar source of the evil at which the restrictions are aimed. Whatever the State's interests are in banning ordinary nonresidents from possessing firearms, these interests cannot trump the fundamental rights, privileges and immunities of national and state citizenship without an unusually strong justification that is narrowly tailored to achieve those interests.

The public has a substantial interest in protecting the health, safety and welfare of all citizens, including nonresidents, and in vindicating their constitutionally protected rights. Because neither the State nor its law enforcement officials owe a legal duty to respond to an emergency 911 call, or protect or defend an individual citizen or family from violent criminal acts, citizens must rely on self–protection to significantly reduce the risk of deadly harm.[16] Even assuming a duty existed, law enforcement officials lack the resources and capability to prevent such attacks from occurring. Thus, a citizen bearing a cell phone programmed with a speed button to 911 is no match for a knife or club

[14] According to the FBI's Uniform Crime Statistics, over 100,000 violent crimes are committed yearly in New York State.
[15] *See generally, United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982).
[16] *See DeShaney v. Winnebago County Dep't of Soc.* Serv's, 489 U.S. 189 (1989); *Fox v. Custis*, 712 F.2d 84 (4th Cir. 1983); *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982) ("[T]here is no constitutional right to be protected by the state against being murdered by criminals or madmen."); *see also Riss v. New York*, 22 N.Y.2d 579, 240 N.E.2d 806 (1958).

wielding sociopath, drug addict, gang member or street punk intent on committing murder, rape, robbery, aggravated assault or some other heinous crime. Rather, credible evidence demonstrates that millions of *armed* American citizens protect themselves and others from criminal attacks each year, and serve as an effective deterrent to violent crime.[17]

Perversely, by ensuring that nonresidents who abide by New York law will not carry a personal firearm within the State, the law effectively aids and abets criminals by guaranteeing that they will find easy prey who are often identifiable by their out–of–state license plates and unfamiliar with their surroundings. Because attempting to use a cumbersome long–gun as a personal defense weapon is an ineffective alternative, particularly in an automobile, citizens are deprived of the only rational and effective means they have to repel attacks from violent criminal predators. It is not a coincidence that law enforcement chooses handguns as its primary weapon of protection. When used properly, a handgun offers an extremely effective means of personal protection in close combat situations, such as stopping violent criminals.[18] Unfortunately, without an effective weapon, whether a person lives, or is maimed or is otherwise seriously injured, often depends on the mercy of her or his assailant.[19]

Nonresident citizens will continue to suffer irreparable harm as long as New York law continues to unlawfully infringe their fundamental rights to keep and bear arms, and deprive them of the only rational and effective means they have to protect and defend themselves, and their loved ones from violent predatory criminals while temporarily residing, visiting, or traveling in or through the State of New York. The balance of harms thus tips decidedly in favor of Bach and other ordinary, law–abiding, nonresident citizens who continue to be deprived of their basic rights to life, liberty and private property in violation of express constitutional guarantees.

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[17] See Gary Kleck & Mark Gertz*, Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, J. Crim. L. & Criminology, 150, 153, 180–82 (1995, Vol. 86 No. 1.) (surveying the effects of self–defense on crime and documenting that Americans use guns approximately 2.5 million times annually for self–protection); *see also,* John R. Lott, Jr. & David B. Mustard, *Crime, Deterrence, and Right–to–Carry Concealed Handguns*, J. Legal Studies, Vol. 26 (Jan. 1997) (documenting that allowing law–abiding citizens to carry concealed handguns deters violent crime); John R. Lott, Jr., *More Guns, Less Crime; Understanding Crime and Gun Control Laws*, University of Chicago Press (2d ed. 2000).

[18] *See generally Id.*

[19] *See generally,* Jeffery Snyder, *Fighting Back, Crime, Self–defense, and the Right to Carry a Handgun*, Cato Institute, Policy Analysis No. 284 (October 22, 1997).

2. Bach is substantially likely to prevail on the merits because the fundamental rights, privileges and immunities of United States citizens to keep and bear arms, and travel interstate are constitutionally guaranteed.

A. Strict scrutiny is the proper substantive standard of review because New York law implicates a fundamental constitutional right.

The threshold issue before the Court is whether an individual has a substantive constitutional right to keep and bear arms under the Second Amendment. If the Court answers this question in the affirmative, then the proper standard of review of NY Penal Law §§ 265.00 and 400.00 *et seq.,* is strict scrutiny under the compelling state interest test. A lesser standard of constitutional review likely would apply if the Court finds that the right referred to in the Second Amendment secures no substantive guarantee for individual citizens.

B. The Court is not constrained by *stare decisis* from finding that the Second Amendment secures an individual right to American citizens.

The Second Circuit has briefly mentioned the constitutional right to keep and bear arms in five opinions—three published, and two unpublished.[20] In the three published opinions, two are positive or neutral (*Rivera v. Marcus* and *State of New York v. Galamison*), and one is negative (*United States v. Toner*). The remaining two unpublished opinions (*Lawson v. Kirschner* and *United States v. Scanio*) are negative.

Although the opinions in *Toner, Lawson* and *Scanio* indicate that perhaps some Circuit Judges would be inclined to follow a collective rights model, it is apparent that the Second Circuit has never fully considered the nature of the substantive rights safeguarded by the Second Amendment in any of its opinions. Rather, each of these opinions contain references to the Second Amendment that are either *obiter dicta* or involve only a cursory analysis of the Amendment's substantive contours. For

[20] *See appended opinions: United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) ("the right to possess a gun is clearly not a fundamental right.") (Circuit Judge Oakes *dictum,* citing *United States v. Miller,* 307 U.S. 174, 59 S.Ct. 816 (1939)); *but see, Rivera v. Marcus*, 696 F.2d 1016, 1022–23 (2d Cir. 1982) (describing the right to keep and bear arms as an individual right on a par with other fundamental individual rights); *State of New York v. Galamison*, 342 F.2d 255, 265 (2d Cir. 1965) (comparing unlawful protests over inequality of schools and housing with protests alleging denial of Second and Fourth Amendment rights); *cf., Lawson v. Kirschner*, 152 F.3d 919 (2d Cir. 1998) ("[T]he right to possess a gun is clearly not a fundamental right.") (quoting *dictum* in *Toner*, *supra,* 728 F.2d at 128) (*Unpub'd. Op.*); *United States v. Scanio*, 165 F.3d 15 (2d Cir. 1998) (Second Amendment right to keep and bear arms is meant solely to protect the right of the states) (citing *Miller*, *supra,* 307 U.S. 174) (*Unpubl'd. Op.*).

example, Circuit Judge Oakes' passing reference in *Toner* that "the right to possess a gun is clearly not a fundamental right," was made in the context of a criminal case involving an illegal alien convicted of gun trafficking.[21] Because it is well settled that illegal aliens and ex–felons do not have the same constitutional rights as law–abiding American citizens,[22] Circuit Judge Oakes dictum provides little guidance as to how he might actually rule if presented the issues in the current case, and is neither binding on this Court nor any other court. Moreover, unlike the present case, *Toner* did not involve the rights of ordinary, law–abiding nonresident citizens to keep and bear otherwise lawful firearms to protect and defend themselves, and their families from the real and substantial danger of criminal violence. Finally, it is noteworthy that the *pro se* litigants in *Lawson* and *Scanio* were not attorneys. The court of appeals thus lacked the benefit of experienced counsel in presenting these cases.

So thus, it is uncertain how the Second Circuit would rule if confronted with the issues of first impression and legal authority presently before this Court, considering: (1) the context under which the foregoing cases arose; (2) the positive and neutral statements respecting the Second Amendment in *Rivera* and *Galamison*; (3) the lack of in–depth substantive analysis or reasoning; (4) the court of appeals decision not to publish the *Lawson* and *Scanio* opinions; and (5) that none of these opinions establish a binding precedent applicable to the present case.

(1) The Supreme Court's opinion in United States v. Miller is consistent with the individual rights view presently before the Court.

Since no published opinion of the Second Circuit has directly considered the substantive rights protected by the Second Amendment, the only binding authority directly applicable to the facts of this case is the Supreme Court's decision in *United States v. Miller*.[23] The defendant bootleggers, Jack Miller and Frank Layton were indicted for transporting in interstate commerce an unregistered shotgun having a barrel of less than 18 inches in length without having the required stamped written order

[21] *See Toner, supra* at 128 (citing *Miller, supra,* 307 U.S. 174) (opinion appended herein).
[22] *Id.* at 128–29 (discussing the limited constitutional rights of illegal aliens and ex–felons); *see also* (*Lewis v. United States*, 445 U.S. 55, 65, n.8, 100 S.Ct. 915, 921 (1980) (recognizing that firearm restrictions on ex–felons do not "trench upon any constitutionally protected liberties.").
[23] 307 U.S. 174, 59 S.Ct. 816 (1939) (opinion appended herein).

contrary to the National Firearms Act. The defendants filed a demurrer challenging the facial validity of the indictment on Second Amendment grounds. In sustaining the demurrer and quashing the indictment, the district court held that section 11 of the Act violates the Second Amendment. The Supreme Court reversed the district court's decision and remanded the case for further proceedings. The Court expresses its holding as follows:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' *at this time* has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument*. Certainly it is not within judicial notice that this *weapon* is any part of the ordinary military equipment or that its use could contribute to the common defense. *Aymette v. State of Tennessee,* 2 Humph., Tenn. 154, 158.[24]

The *Miller* Court thus held the test to be whether the *weapon* at issue (a sawed–off shotgun) was ordinary military equipment the use of which could contribute to the common defense.

Despite the Supreme Court's narrow holding regarding the particular weapon's utility to the militia or contribution to the common defense, lower courts soon began to interpret *Miller* as requiring the *person*—not the *weapon*, to be related to the preservation of a well-regulated militia in order to receive protection.[25] This eisegesis of *Miller* continued to evolve into what has been termed the "collective rights" and "sophisticated collective rights" models, which nearly every federal court of appeals considering this issue has embraced in one form or another.[26]

Miller however, did not hold that the right belonged only to the State or the National Guard. Rather, it reaffirmed that the militia referred to the entire armed citizenry, and considered on the merits a lawsuit that was brought by an individual—not by a State. Had the lack of such

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[24] *Id.* at 818 (emphasis added) (the *Miller* defendants neither filed a brief nor made an appearance in the Supreme Court.).
[25] *See e.g., Cases v. United States*, 131 F.2d 916 (1st Cir. 1942) (requiring that the person, as a prerequisite to maintaining a Second Amendment claim, have in mind the maintenance and preservation of the militia as a paramount concern); *United States v. Tot*, 131 F.2d 261 (3rd Cir. 1942) (finding Second Amendment was not adopted with individual rights in mind, but as a protection for the States in maintaining their militia organizations), *reversed on other grounds*, 319 U.S. 463 (1943).
[26] *See e.g.,* opinions following the collective rights model: *Love v. Pepersack,* 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Warin,* 530 F.2d 103, 106 (6th Cir.1976); *Gillespie v. City of Indianapolis,* 185 F.3d 693 (7th Cir. 1999); *Hickman v. Block,* 81 F.3d 98, 99 (9th Cir.1996); *compare* opinions following the sophisticated collective rights model: *Cases, supra* 131 F.2d 916; *United States v. Rybar,* 103 F.3d 273, 286 (3d Cir. 1996); *United States v. Hale,* 978 F.2d 1016 (8th Cir. 1992); *United States v. Oakes,* 564 F.2d 384 (10th Cir.1977); *United States v. Wright,* 117 F.3d 1265 (11th Cir. 1997).

membership or engagement in the militia or military been a ground of the decision, the Court's opinion remanding the case to the district court would have mentioned it—but it did not. *Miller's* reasoning thus presupposes an individual right to keep and bear arms while establishing a general standard for lower court's to apply when considering the constitutionality of particular weapons.

Miller is neither inconsistent with the individual rights view presently before the Court nor did it resolve whether the substantive rights secured by the Second Amendment are personal rights of the people or some variant of collective rights applicable only to the States.[27] To the extent that *Miller* applies to the facts of this case, it cuts against the State's collective rights and sophisticated collective rights positions, and is perhaps most noteworthy for the questions it left unanswered.

Consistent with *Miller's* narrow holding, the Justices of the Supreme Court have repeatedly quoted or paraphrased "the right of the people to keep and bear arms" without any reference to the Militia Clause, and typically when referring to the fundamental rights of individuals prescribed by the Bill of Rights.[28] Moreover, no Supreme Court opinion has ever rejected the individual right view or held that the Second Amendment secures only a collective right.[29] Rather, the Court's opinions strongly suggest that the right belongs to individual American citizens.[30] Therefore, this Court is not

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[27] *Printz v. United States*, 521 U.S. 898, 939, 117 S.Ct. 2365, 2386 (1997) ("This Court has not had recent occasion to consider the nature of the substantive right safeguarded by the Second Amendment…. Perhaps, at some future date, this Court will have the opportunity to determine whether Justice Story was correct when he wrote that the right to bear arms "has justly been considered, as the palladium of the liberties of a republic.") (Justice Thomas, concurring opinion).

[28] *See* Testimony of Eugene Volokh before the Senate Subcommittee on the Constitution (Sep. 23, 1998) reprinted as *A Right of the People*, Cal. Pol. Rev., p. 23 (Nov./Dec. 1998) (explaining that in 22 of 27 cases mentioning the Second Amendment, the Justices quoted or paraphrased only "the right of the people to keep and bear arms" language, without even mentioning the Militia Clause).

[29] *See* David Kopel, *The Supreme Court's Thirty-five Other Second Amendment Cases*, 18 St. Louis U. Pub. L. Rev. 99 (1999) (providing a comprehensive review of Supreme Court cases that mention the Second Amendment with nearly all of them presupposing it to protect an individual right).

[30] S*ee e.g., Printz*, *supra*, 521 U.S. at 939 ("The First Amendment … is fittingly celebrated for preventing Congress from 'prohibiting the free exercise' of religion or 'abridging the freedom of speech.' The Second Amendment similarly appears to contain an express limitation on the Government's authority.") (Justice Scalia, majority opinion.); *United States v. Verdugo–Urquidez*, 494 U.S. 259, 265, 100 S.Ct. 1056, 1061 (1990) ("The Second Amendment protects 'the right of the people to keep and bear Arms,' and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to 'the people.'") (Rehnquist, C.J. majority opinion); *Miller, supra* at 183, n.3 (citing "Story on the Constitution, 5th Ed. Vol. 2, p. 646"); *Presser v. State of Illinois*, 116 U.S. 252, 265, 6 S.Ct. 580, 584 (1886) (recognizing that "all citizens capable of bearing arms constitute the reserved military force or reserve militia of the United States as well as of the states, and, . . . the states cannot, … prohibit the people from keeping and bearing arms…."; *compare Scott v. Sanford*, 60 U.S. 393, 417 (1857). ("It would give to persons of the negro race, who are recognized as citizens in any one state of the Union, the right to enter every other state, whenever they pleased. . . .and it would give them full liberty of speech in public and in private upon all subjects upon which its own citizens might meet; to hold public meetings upon political affairs, and to *keep and carry arms* wherever they went….") (Taney, C.J., majority opinion) (emphasis added).

constrained by *stare decisis* from finding that the Second Amendment secures a fundamental, personal "right of the people to keep and bear arms."[31]

C. The Second Amendment protects individual Americans in their rights to keep and to bear arms regardless of whether they are a member of a select militia or performing active military service or training.

Respectfully, the most persuasive authority regarding the scope and nature of the substantive rights protected by the Second Amendment is the recent Fifth Circuit Court of Appeals decision *United States v. Emerson*.[32] A federal grand jury in the Northern District of Texas indicted Emerson for possessing a firearm while subject to a domestic violence restraining order, in violation of 18 U.S.C. 922(g)(8). The district court dismissed the indictment, holding that Section 922(g)(8) violates the Second and Fifth Amendments of the Constitution. Reversing and remanding the case for further proceedings, the court of appeals ruled that application of Section 922(g)(8) did not violate Emerson's rights under the Second or Fifth Amendments.

Although the court of appeals reversed the district court's decision, it held that consistent with the Supreme Court's holding in *Miller*, the Second Amendment:

> *protects the right of individuals*, including those not then actually a member of any militia or engaged in active military service or training, to privately possess and bear their own firearms, such as the pistol involved here, that are suitable as personal, individual weapons and are not of the general kind or type excluded by *Miller*.[33]

While recognizing that the Second Amendment secures an individual right, the court of appeals acknowledged that in certain instances this right may "be made subject to limited, narrowly tailored specific exceptions or restrictions" provided they are "reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country."[34] The court of appeals thus observed that the right is not absolute, but rather is on a par with

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[31] The Northern District appears not to have directly considered the substantive rights protected under the Second Amendment. *Cf. United States v. Showerman*, 68 F.3d 1524, 1526 (2d Cir. 1995) (quoting F. Scullin, District Judge, during plea hearing "THE COURT: You also understand that an adjudication of guilt may deprive you of certain valuable civil rights, such as the right to vote, right to hold public office, *the right to bear arms*, and the right to serve on a jury?") (citation omitted) (emphasis added).
[32] *See appended opinion, United States v. Emerson*, 270 F.3d 203 (2001), *cert. denied,* 122 S.Ct. 2362 (2002).
[33] *Id.* at 260 (emphasis added).
[34] *Id.* at 261.

all the great fundamental civil rights embraced by the Bill of Rights and entitled to no less protection than the Constitution demands.

The Fifth Circuit's decision in *Emerson* represents the most comprehensive analysis of the Second Amendment by any court that has considered it. The court of appeals expressly rejected the "collective rights" view that the Second Amendment only protects a state power to have a militia and the "sophisticated collective rights" view that it only protects bearing arms during actual militia duty or while performing active military service or training.[35]

Consistent with its methodical Second Amendment analysis, the *Emerson* court considered the immense body of persuasive secondary authority that has evolved over the past two decades, which collectively embraces the individual rights view.[36] This assortment of professional literature includes commentary from a number of notable constitutional scholars who are either self–identified liberals or unconnected with the individual rights movement.[37] For example, Harvard Law Professor Lawrence H. Tribe, long considered a Supreme Court candidate, unequivocally embraces the Amendment's central purpose of protecting individual rights:

> [The Second Amendment's] central purpose is to arm "We the People" so that *ordinary citizens* can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit. Rather the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of *individuals to possess and use firearms in the defense of themselves and their homes*—not a right to hunt for game, quite clearly, and certainly not a right to employ firearms to commit aggressive acts against other persons—a right

[35] *Id.* at 226–27 ("We conclude that *Miller* does not support the government's collective rights or sophisticated collective rights approach to the Second Amendment.").
[36] *See e.g.*, Stephen P. Halbrook, *That Every Man Be Armed, The Evolution of a Constitutional Right* (1984); Joyce Lee Malcolm, *To Keep and Bear Arms: The Origins of an Anglo-American Right* (1994) [hereinafter Malcolm, *Origins*]; Robert Cottrol & Robert Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 Geo. L.J. 309 (1991); David T. Hardy, *The Second Amendment and the Historiography of the Bill of Rights*, 4 J.L. & Pol. 1 (1987); Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 Yale L.J. 1193 (1992); Nelson Lund, *The Past and Future of the Individual's Right to Arms*, 31 Ga. L. Rev. 1, 24-26 (1996); Brannon P. Denning, *Can the Simple Cite be Trusted?: Lower Court Interpretations of United States v. Miller and the Second Amendment*, 26 Cumb. L. Rev. 961 (1995-96); *see also* **(http://www.saf.org/journal.html) (http://www.davekopel.org/2dAmendment.htm).**
[37] *See e.g.*; Gary Kleck, *Armed Resistance*, *supra*; William Van Alstyne, *The Second Amendment and the Personal Right to Arms,* 43 Duke L.J. 1236 (1994); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989); Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L.Rev. 204 (1983).

> that directly limits action by Congress or by the Executive Branch and may well, in addition, be among the privileges or immunities of United States citizens protected by § 1 of the Fourteenth Amendment against state or local government action.[38]

Similarly, distinguished legal historian Leonard W. Levy, writing in *Origins of the Bill of Rights*, concluded that there is no doubt about the personal nature of the rights protected by the Second Amendment. Levy asserts that "the very language of the amendment is evidence that the right is a personal one, for it is not subordinated to the militia clause."[39] The conclusions of Tribe and Levy are universally shared by respected constitutional scholars who recognize the Amendment's dual purpose:

> The Second Amendment was meant to accomplish two distinct goals, each perceived as crucial to the maintenance of liberty. *First, it was meant to guarantee the individual's right to have arms for self-defense....* The second and related objective concerned the militia, and it is the coupling of these two objectives that has caused the most confusion. The customary American militia necessitated an armed public.... The clause concerning the militia was not intended to limit ownership of arms to militia members, or [to] return control of the militia to the states, but rather to express the preference for a militia over a standing army.[40]

Although *Emerson* is not binding on this Court, it stands out as the only decision in which a federal court has ever undertaken a comprehensive, meticulous examination of the Amendment's original textual meaning, its historical underpinnings, and prevailing caselaw. Given the apparent lack of considered legal reasoning or analysis of the Second Amendment by lower courts, *Emerson* appears to present considerable persuasive authority. Plaintiff therefore, respectfully requests the Court to adopt *Emerson's* legal reasoning, and thorough textual and historical analysis, which will not be repeated here, in deciding whether the substantive rights secured by the Second Amendment apply to individual American citizens.[41]

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[38] Laurence H. Tribe, *1 American Constitutional Law* 902 n.221 (3d ed. 2000) (emphasis added).
[39] Leonard W. Levy, *Origins of the Bill of Rights*, 134 (1999). Levy is the author of thirty-six books, including *Origins of the Fifth Amendment*, Yale University Press (1999) for which he received the Pulitzer Prize.
[40] Malcolm, *Origins*, *supra* at 162-63 (emphasis added); *see also* Robert Cottrol & Robert Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995–1026 (1995) (providing a comprehensive review of Malcolm's, *Origins)*; Eugene Volokh, *The Commonplace Second Amendment*, 73 NYU L. Rev. 793 (1998) (endorsing the individual rights interpretation and examining the textual structure of the Second Amendment); David B. Kopel, *The Second Amendment in the Nineteenth Century*, 1998 B.Y.U. L. Rev. 1359, 1362 & n.1 (citing dozens of articles endorsing the individual right interpretation); Robert Dowlut, *The Right to Keep and Bear Arms: A Right to Self-Defense Against Criminals and Despots*, 8 Stanford L. & Pol'y Rev. 25-40 (1997).
[41] In his special concurring opinion, Circuit Judge Parker wrote that while not necessarily wrong, the majority's Second Amendment analysis was "dicta." The majority however, sharply rejected this view. *Id.,* at 264–65, n.66.

Finally, the United States Congress has consistently interpreted the Second Amendment in a manner that protects the rights of individual citizens to keep and bear arms. These endorsements include: the Freedmen's Bureau Act of 1866; approval of the Fourteenth Amendment; the National Firearms Act of 1934; the Federal Firearms Act of 1938; the Property Requisition Act of 1941; the Militia Law of 1956; the Gun Control Act of 1968; the Consumer Product Safety Improvement Act of 1976; *The Right To Keep And Bear Arms, Report of The Subcommittee on The Constitution* in 1982; the Firearms Owners' Protection Act of 1986; and the Brady Handgun Control Law of 1993.[42] Because Congress has consistently protected the individual rights of citizens to keep and bear arms, the statutory interpretation that best effectuates Congress' legislative intent throughout history must be considered by the Court in construing the substantive rights protected by the Second Amendment.[43]

In the wake of *Emerson*, courts considering the substantive reach of the Second Amendment will face a conundrum. On one hand, the majority of lower courts have concluded that the Second Amendment secures no substantive right of individual citizens, but rather protects a collective right of varying contours owing to the States or other collectivities. The opinions of these lower courts however, appear to lack the careful analysis and reasoning typically found in cases that implicate a substantive constitutional right, and seem to rely on the erroneous assumption that *Miller* resolved the issue. On the other hand, *Emerson's* meticulous examination of the Amendment's original textual meaning and historical underpinnings has been widely embraced by prominent constitutional scholars from both ends of the political spectrum, and represents the kind of reasoned deliberation traditionally found in federal appellate court opinions when construing the substantive rights of citizens under the United States Constitution. Perhaps no other constitutional right has engendered as much controversy in recent times, but for the right to abortion, which continues to incite fierce political debate.[44] While

[42] *See* Exhibit 1 for citations and references; *see also,* Stephen P. Halbrook, *Congress Interprets the Second Amendment: Declarations by a Co-Equal Branch on the Individual Right to Keep and Bear Arms*, 62 Tenn. L. Rev. 597 (1995).
[43] *See generally,* David B. Kopel & Christopher C. Little, *The Right Guaranteed by the Second Amendment: A Critique of* Domestic Disarmament's *Legal Analysis*, 56 Md. L. Rev. 438 (1997) (explaining that forty-three states have constitutional provisions protecting the right to keep and bear arms. New York is not one them.
[44] *See* Nicholas J. Johnson, *Principles and Passions: The Intersection of Abortion and Gun Rights*, 50 Rutgers L. Rev. 97–197 (1997) (describing the similarities and differences between the rights of armed self–defense and abortion).

such impassioned discourse is essential to maintaining a free society, the future of the Republic depends on the rule of law, leaving this Court to consider that the answer might not be found in the majority of lower court opinions.[45]

D. The Fourteenth Amendment prohibits State and local governments from abridging the fundamental rights, privileges or immunities of American citizens to keep and bear arms while traveling interstate.

During Reconstruction, certain States and localities enacted "black codes," which included invidious gun control laws to disarm African American citizens. These pernicious laws prohibited newly freed slaves from owning or bearing a firearm in localities that refused to recognize their citizenship. To enforce these codes, State and local law enforcement officials routinely subjected black American citizens and white sympathizers to unreasonable searches and seizure of their private property, particularly their firearms and ammunition. Once disarmed, these law–abiding citizens and their families became easy targets of self–appointed midnight marauders who committed atrocities with impunity against them and anyone else opposed to their tyranny.

Congress responded by passing the Civil Rights Act of 1866, the Freeman's Bureau Act, and the Fourteenth Amendment to ensure that the privileges and immunities of national citizenship were protected from oppressive State and local governments.[46] As a number of legal commentators have carefully documented, a paramount objective of the civil rights legislation during Reconstruction was to affirm that no State could deny its citizens any fundamental right, privilege or immunity, including the rights of citizens to keep and bear arms for personal security, personal liberty and self–defense of their families, homes and communities.[47] These privileges and immunities also encompassed the right

[45] The Solicitor General recently informed the Supreme Court in its opposition to *Emerson's* petition for review that: "[T]he current position of the United States … is that the Second Amendment more broadly protects the rights of individuals, including persons who are not members of any militia or engaged in active military service or training, to possess and bear their own firearms, subject to reasonable restrictions designed to prevent possession by unfit persons or to restrict the possession of types of firearms that are particularly suited to criminal misuse." *Gov't. Opp. Br*., n.2.

[46] Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (codified as amended at 42 U.S.C. § 1982 (1994)); Freedmen's Bureau Act of July 16, 1866, 14 Stat. 173, 176–77 (1866); *[and]* U.S. Const., amend. XIV, § 1, respectively.

[47] *See appended article,* Stephen P. Halbrook, *Personal Security, Personal Liberty, and "The Constitutional Right to Bear Arms": Visions of the Framers of the Fourteenth Amendment* [hereinafter Halbrook, *Visions of the Framers*] 5 Seton Hall Const. L.J. 341–434 (1995); *see also,* Cong. Globe, 39th Cong., 1st Sess. 2765 (1866), *cited in* Halbrook, *Visions of the Framers, id.* at 415 (quoting from the debates of Section 1 of the Fourteenth Amendment).

to travel, not an abstract right, but the specific one of white Northern Unionists to travel in the South free from discrimination and criminal violence.

(1) The fundamental rights to keep and bear arms while traveling interstate are privileges and immunities guaranteed to all American citizens by virtue of their national citizenship, and may not be abridged by any State or local government.

The freedom to travel throughout the United States has been long recognized as a fundamental right of all United States citizens by virtue of their national and state citizenship. The Supreme Court has offered various sources for the right, including the Commerce Clause, the Privileges and Immunities Clause of Article IV, § 2, and the Privileges or Immunities Clause of the Fourteenth Amendment. The Court also has recently observed that the right to travel embraces at least three different components:

> It protects the right of a citizen of one State to enter and to leave another State, *the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State*, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.[48]

The Supreme Court's recent landmark opinion in *Saenz v. Roe* breathed new life into the previously dormant Privileges or Immunities Clause of the Fourteenth Amendment.[49] In a 7–2 decision, the Court struck down California's durational residency requirement that discriminated against newly arrived residents seeking welfare benefits. Fearing it would become a welfare magnet, California had adopted a rule that froze the welfare benefits of newcomers to the same amount that they were entitled to receive from their State of origin pending a one–year residency period. In holding that newly arrived citizens from sister States were entitled to the same privileges and immunities enjoyed by long–time residents, the Court relied squarely on the Privileges or Immunities Clause for only the second time since its enactment.[50]

Extending the Court's reasoning in *Saenz* to the facts of this case, it is clear that the contested provisions cannot survive constitutional scrutiny as a matter of law. New York's restrictive firearms

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[48] *Saenz, supra,* 526 U.S. at 504 (emphasis added).
[49] *See generally, id.*
[50] *See Colgate v. Harvey*, 296 U.S. 404 (1935), *overruled by Madden v. Kentucky*, 309 U.S. 83 (1940).

provisions unlawfully burden the right to travel by requiring nonresident citizens to surrender their constitutionally protected rights, privileges and immunities guaranteed to them by virtue of their national citizenship in order to enter or to pass through the State. In particular, nonresidents are welcome visitors only if they are willing to relinquish their fundamental rights to keep and bear arms for personal protection against criminal violence. So while certain classes of citizens are afforded an opportunity to arm and protect themselves from violent criminal acts, ordinary nonresidents are deprived of this basic constitutional right. But unlike California's temporary restrictions in *Saenz*, New York law *permanently* bars nonresidents from taking advantage of substantial benefits and rights solely because they live out of State. If a State law that temporarily reduces the amount of cash benefits received by welfare recipients violates the Privileges or Immunities Clause of the Fourteenth Amendment, then *a fortiori*, a State law requiring United States citizens to permanently surrender their basic rights to life, liberty and private property in order to enter or to pass through the State—must also fail.

(2) New York law violates the Equal Protection Clause of the Fourteenth Amendment because it penalizes United States citizens for exercising their constitutionally protected rights.

Although the holding in *Saenz* rested squarely on the Privileges or Immunities Clause, the Supreme Court did not hesitate to cite earlier opinions striking down similar restrictions on interstate travel as violative of the Equal Protection Clause. In *Shapiro v. Thompson*, the Supreme Court held that neither a State nor the District of Columbia can enact durational residency requirements to inhibit the migration of needy persons, and that any classification that has the effect of imposing a penalty on the right to travel, absent a compelling governmental interest, violates the Equal Protection Clause of the Fourteenth Amendment.[51]

Recognizing that the one–year residency requirement in *Shapiro* "touches on the fundamental right of interstate movement," the Court observed that "[i]f a law has 'no other purpose ... than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it [is]

[51] *Shapiro v. Thompson*, 394 U.S. 618, 629–34, 89 S.Ct. 1322, 1328–32 (1969).

patently unconstitutional.'"[52] The Court thus did not rest its holding upon a finding that denial of welfare benefits actually deterred travel. Rather, it explicitly stated that the compelling state interest test would be triggered by "*any* classification which serves to penalize the exercise of that right [to travel]…."[53]

Similarly, in *Dunn v. Blumstein*, the Supreme Court struck down a one–year residency requirement for Tennessee voters as violative of the Equal Protection Clause.[54] Applying strict equal protection scrutiny, the Court found that "[b]y denying some citizens the right to vote, 'such laws deprive them of a fundamental political right, . . . preservative of all rights.'"[55] The Court observed that "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution . . . 'Constitutional rights would be of little value if they could be . . . indirectly denied". . . ."[56] In addition, the Court concluded that Tennessee's voting restrictions were neither narrowly tailored nor the least restrictive means to achieve the State's objectives.

Applying the same analogy used by the Supreme Court in *Dunn* to the present case—travel by nonresidents in New York is permitted, but only at a price; the right to travel is indirectly penalized, while the rights of nonresidents to keep and bear firearms are absolutely denied. The contested provisions of NY Penal Law §§ 265.00 and 400.00 *et seq.*, thus violate the express terms of the Equal Protection Clause of the Fourteenth Amendment. In addition, New York's discriminatory classification, which targets ordinary, law–abiding, nonresident citizens appears to lack a rational basis and is not reasonable in light of its stated purpose of reducing criminal violence, and protecting the health, safety and welfare of all classes of citizens within its borders.

(3) The rights of citizens to keep and bear arms are among the fundamental personal rights and liberties protected by the Due Process Clause of the Fourteenth Amendment.

Following adoption of the Fourteenth Amendment, the Supreme Court narrowly construed the

[52] *Id.* at 631 (quoting *United States v. Jackson,* 390 U.S. 570, 581 (1968)) (emphasis added).
[53] *See Dunn v. Blumstein*, 405 U.S. 330, 339–40, 92 S.Ct. 995, 1001–02 (1972) (citing *Shapiro, supra* at 634).
[54] *Id.*
[55] *Id.* at 336 (quoting *Reynolds v. Sims,* 377 U.S. 533, 562 (1964)).
[56] *Id.* at 341 (quoting *Harman v. Forssenius,* 380 U.S. 528, 540 (1965)).

"privileges or immunities" subject to the Amendment's protection.[57] In particular, the privileges or immunities under the Constitution would refer only to those rights that were not felt to exist as a process of natural right, but which were granted or created solely by the Constitution such as the rights of interstate travel and suffrage.[58] This paradoxically meant that the rights, which most persons would accept as the most important—those flowing from concepts of natural justice, were devalued at the expense of more technical rights.[59] So when Ku Klux Klan members were charged with having deprived black citizens of their rights to freedom of assembly and to keep and bear arms by *violently* breaking up a peaceable assembly, the Supreme Court held in *United States v. Cruikshank*, that no indictment properly could be brought.[60] The Court found that the rights of citizens to peaceably assemble and bear arms for lawful purposes are neither granted by, nor dependent upon the Constitution for their existence. Thus, the very importance of the rights protected by the First and Second Amendments was used as the basis for the argument that they did not apply to the States under the Fourteenth Amendment. In later nineteenth–century opinions, chiefly *Presser v. Illinois* and *Miller v. Texas*, the Supreme Court adhered to the view that the only privileges or immunities binding on the States were those that were granted or created solely by the Constitution.[61]

Presser is often cited by strict gun control proponents as the definitive authority that citizens have no right to arms whatsoever. But *Presser* did not prohibit the possession or carrying of arms. Rather, it involved an Illinois statute that prohibited "bodies of men to *associate* together as military organizations, or to drill or parade with arms in cities and towns unless authorized by law…."[62]

The defendant Herman Presser was indicted for parading a private military unit of 400 armed men through the streets of Chicago without a license. On appeal before the United States Supreme Court,

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[57] *See Slaughter-House Cases,* 83 U.S. 36, 21 L.Ed. 394 (1872).
[58] *See The Right To Keep And Bear Arms, Report of The Subcommittee on The Constitution, Senate Judiciary Comm*., 97th Cong., 2d Sess., 9 (1982) (citing the *Slaughterhouse Cases, id.*)
[59] *Id.* at 10.
[60] *Id.* citing *United States v. Cruikshank*, 92 U.S. 542, 23 L.Ed. 588 (1876)).
[61] *Id.* (citing *Presser v. Illinois*, 116 U.S. 252 (1886) *[and] Miller v. Texas*, 153 U.S. 535 (1894)); *see also* Cynthia Leonardatos, David B. Koppel & Stephen P. Halbrook, *Miller versus Texas: Police Violence, Race Relations, Capital Punishment, and Gun-Toting in Texas in the Nineteenth Century--and Today*, Journal of Law and Policy, 737 (2001).
[62] *See Presser, supra* at 264–65 (emphasis added).

Presser claimed *inter alia*, that an Illinois statute, which restricted the unauthorized association of groups of men as military–like organizations, violated his rights of assembly, and keeping and bearing arms under the First and Second Amendments. In affirming the State court's ruling finding Presser guilty, the Supreme Court held, based on its reasoning in *Cruikshank*, that the statute did not infringe Presser's right of assembly because the right of assembly is a preexisting right and not a right of national citizenship.[63] The Court thus concluded that the First Amendment right of assembly is protected from infringement by acts of Congress and the national government but not from the actions of State or local officials.

Turning to Presser's Second Amendment claim, the Court held that because the statute did not prohibit citizens from possessing and carrying arms, but rather only prohibited bodies of armed men from associating for military-like exercises in cities and towns, Presser's Second Amendment rights to keep and bear arms were not infringed.[64] Since the Court had held that the substantive rights to keep and bear arms were not infringed by the Illinois statute, the Court concluded that it need not address the question of whether the Illinois law violated the Second Amendment as applied to the States through the Privileges or Immunities Clause of the Fourteenth Amendment.

Although the Supreme Court affirmed its holding in *Cruikshank* that the Bill of Rights in general, and the First and Second Amendments in particular, applied only to actions by the federal government, the Court's opinion did not suggest that the Second Amendment would not protect armed paraders who were not on official state militia duty. Rather, when referring to "all citizens capable of bearing arms" as the "reserve militia," the Court observed that "the States cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms…."[65] In other words, the Court explicitly acknowledged the rights of citizens to possess and carry arms, but regarded the militia power to be found elsewhere than in the Second Amendment.

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[63] *Id.* at 266–68.
[64] *Id.* at 265.
[65] *Id.*

While at least one appellate court has held that *Presser* forecloses any consideration of the Second Amendment's applicability to the States,[66] such wooden reliance ignores nearly 120 years of Fourteenth Amendment jurisprudence and is inconsistent with the fundamental principles laid down by the Supreme Court in subsequent civil rights cases. In finding that the Second Amendment only protects the "right of the people to keep and bear arms" from federal intrusion, the *Presser* Court relied exclusively on its reasoning in *Cruikshank*, which clearly has been superseded by twentieth century opinions holding that portions of the Bill of Rights, including the right of assembly at issue in *Cruikshank*, are binding upon the States.[67] Finally, it is noteworthy that the doctrine of due process incorporation did not yet exist when *Cruikshank, Presser* and *Miller* were decided, thus casting further doubt on their probative value.

Given the legislative history of the Civil Rights Acts and the Fourteenth Amendment; the Supreme Court's opinions in *Saenz, Shapiro* and *Dunn*; and the more expanded views of incorporation that have become embedded in our jurisprudence, it is clear that the fundamental rights and freedoms of citizens to keep and bear arms while traveling interstate are entitled to constitutional protection under the civil rights statutes and the Fourteenth Amendment against infringement by government officials acting under color of State law.

E. New York law unlawfully burdens the rights of nonresidents to move freely and unencumbered in or through the State in violation of Article IV, § 2 of the Constitution.

The Supreme Court has long "recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably

[66] *Quilici v. Village of Morton Grove*, 695 F.2d 261 (1982).
[67] *See* Halbrook, *Visions of the Framers, supra* at 345, n.6 (citing *Gideon v. Wainwright*, 372 U.S. 335, 341 (1963) (incorporating the right to counsel); *Robinson v. California*, 370 U.S. 660, 666 (1962) (incorporating the protection from cruel and unusual punishment); *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949) (incorporating the right to be free from unreasonable search and seizure); *DeJong v. Oregon*, 299 U.S. 353, 364 (1937) (incorporating the right to assembly); *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (incorporating the right to freedom of speech and press); *Chicago, Burlington, & Quincy R.R. Co. v. Chicago*, 166 U.S. 226, 238-39 (1897) (incorporating the right to just compensation)); *see also Patton v. United States*, 281 U.S. 276, 298 (1930) ("The first ten amendments ... were substantially contemporaneous and should be construed *in pari materia*.").

burden or restrict this movement."[68] The source of this constitutional right can be found in the first sentence of Article IV, § 2, which provides that: "[T]he Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." This provision was designed "to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned."[69] Although the Privileges and Immunities Clause cites the term "Citizens," it is well settled that the terms "citizen" and "resident" are essentially interchangeable.[70] Thus, "a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the 'Privileges and Immunities of Citizens in the several States' that he visits" by virtue of his State citizenship.[71] With this purpose in mind, the Supreme Court has held that it is "[o]nly with respect to those privileges and immunities bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment."[72] Thus, the Supreme Court has observed that the Clause "provides important protections for nonresidents who enter a State whether to obtain employment, *Hicklin v. Orbeck,* 437 U.S. 518 (1978), to procure medical services, *Doe v. Bolton,* 410 U.S. 179 (1973), or even to engage in commercial shrimp fishing, *Toomer v. Witsell,* 334 U.S. 385 (1948)."[73]

The Supreme Court has permitted a State to discriminate against nonresidents only where the presence or activity of nonresidents is the peculiar source of the evil or cause of the problem that the State seeks to remedy, and the discrimination bears a close relation to the achievement of substantial State objectives.[74] In deciding whether the degree of discrimination bears a sufficiently close relation to the reasons proffered by the State, the Court has considered whether, within the full panoply of

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[68] *Saenz, supra* at 499 (quoting *Shapiro, supra,* 394 U.S. at 629).
[69] *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (citing *Paul v. Virginia*, 8 Wall. 168, 180 (1869)).
[70] *See United Building & Construction Trades Council v. Mayor and Council of Camden*, 465 U.S. 208, 216 (1984).
[71] *See Saenz, supra* at 501 (quoting *Corfield v. Coryell,* 6 F.Cas. 546 (No. 3,230) (C.C.E.D. Pa. 1825)); *see also* Rehnquist, C. J., dissenting opinion, *id.* at 512–13 (finding that "[n]onresident visitors of other States should not be subject to discrimination solely because they live out of State.").
[72] *New Hampshire v. Piper*, 470 U.S. 274, 279 (1985) (quoting *Baldwin v. Montana Fish & Game Comm'n*, 436 U.S. 371, 383 (1978).
[73] *Saenz, supra* at 502.
[74] *See Hicklin, supra* at 525–29; c*ompare, Baldwin, supra,* 436 U.S. 371 (holding that access by nonresidents to recreational big-game hunting in Montana does not fall within the category of rights protected by the Privileges and Immunities Clause).

legislative choices otherwise available to the State, there exist alternative means of furthering the State's purpose without implicating constitutional concerns.[75]

In this case, the Court must determine whether the fundamental rights of nonresidents to keep and bear arms for personal security and self–defense while traveling in or through the State of New York fall within the privileges and immunities protected by the Clause. Although this precise issue has not been decided by the courts, there is ample controlling authority to find that the fundamental rights implicated by New York's discriminatory classification of nonresidents are within reach of the Clause. The Court need look no further than *Toomer* and *Hicklin*, which the Supreme Court recently cited with approval in *Saenz* to find that the contested provisions cannot survive constitutional scrutiny. The Supreme Court concluded in those cases that there was no reasonable relationship between the danger represented by nonresidents as a class, and the severe discrimination practiced upon them by the State.

Similarly, New York's discrimination against nonresidents bears no reasonable relationship to the State's substantial interest in reducing violent crime and protecting the health, safety and welfare of all classes of citizens within its borders. Significantly, ordinary, law–abiding citizens of other States are neither less capable than New York residents of safely and responsibly handling firearms nor more prone to committing violent criminal acts—nor do they pose a danger to the community or otherwise constitute the peculiar source of the evil at which the restrictions are aimed. New York therefore must find a reasoned and suitably tailored alternative that furthers the federal interest in ensuring a norm of comity between the States and avoids infringing the fundamental rights, privileges and immunities of fellow citizens of sister States whose lives, liberty and private property interests are no less important than those of residents.

[75] *See Friedman, supra* at 67 (citing *Piper, supra* at 284).

Conclusion

The outcome of this motion rests on three constitutional grounds:

- Second Amendment;
- Fourteenth Amendment; and
- Article IV.

Supreme Court caselaw on each of these grounds applies squarely to this case—and in the plaintiff's favor. New York therefore must find a reasoned and suitably tailored alternative to its current licensing system that does not unduly burden and indiscriminately deprive an entire class of citizens the precious and primary rights of personal security, personal liberty and private property.[76] Under such a system, the rights of ordinary, law–abiding, nonresident citizens to possess and bear their own firearms, suitable as personal, individual weapons, would be subject to reasonable, constitutionally valid exceptions or restrictions that are narrowly tailored and strike a balance between: (1) the rights of individuals to use a rational and effective means to protect and defend themselves, and their families from the real and substantial danger of criminal violence; and (2) the State's obligation to provide reasonable assurance to the public that those who are issued permits to carry a firearm will not be a hazard to others. In the meantime, the Court must grant the relief requested in its entirety because New York's current licensing provisions facially, and as applied, violate the constitutional rights, privileges and immunities of Bach and other ordinary, law–abiding, nonresident citizens of the United States.

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[76] *See generally,* Suzanne Novak, *Why The New York State System For Obtaining a License To Carry A Concealed Weapon Is Unconstitutional*, 26 Fordham Urb. L.J. 121 (Nov. 1998) (providing a comprehensive review of New York's arbitrary and inequitable firearms licensing system)*; see also,* Clayton E. Cramer & David B. Kopel, *Shall Issue: The New Wave of Concealed Handgun Permit Laws*, 62 Tenn. L. Rev. 679 (1995) (discussing the impact of conealed carry laws and States that have implemented "shall issue" licensing systems).