IN THE UNITED STATES DISTRICT COURT
FOR EASTERN DISTRICT OF LOUISIANA
New Orleans Division

NATIONAL RIFLE ASSOCIATION OF AMERICA, INC., *et al.*,	)	
Plaintiffs	)	
v.	)	
C. RAY NAGIN, Mayor of New Orleans, and	)	**CIVIL ACTION NO. 05-4234**
WARREN RILEY, Superintendent of Police, New Orleans	)	**Hon. Carl J. Barbier** **Section "J"** **Magistrate 2**
Defendants	)	

MEMORANDUM IN OPPOSITION TO DEFENDANTS' RULE 12(b)(1) AND 12(b)(6) *MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND FOR FAILURE TO STATE A VIABLE CLAIM*

The Plaintiffs National Rifle Association, Inc., and Second Amendment Foundation, Inc., by counsel, hereby submit the following facts, reasons, and authorities in opposition to Defendants' Rule 12(b)(1) and 12(b)(6) *motion to dismiss for lack of subject matter* jurisdiction and for failure to state a viable claim.

This is an action to vindicate the constitutional rights of the law-abiding citizens of Louisiana to keep and bear arms to protect themselves from criminal violence, and to enjoin confiscation of

lawful firearms without due process, discriminatory policies based on wealth and violative of equal protection, and arbitrary searches and seizures. These acts were committed against victims of Hurricane Katrina.

The New Orleans defendants C. Ray Nagin and Warren Riley assert that "the states, and by extension their political subdivisions, are free to proscribe the possession of firearms . . . ." Defendants' Memorandum ("Def. Mem.") at 5. However, they are enjoined by the September 23, 2005, Consent Order "from confiscating lawfully-possessed firearms from citizens," and are "ordered to return any and all firearms which may have been confiscated from . . . all . . . persons who lawfully possessed them . . . ."

Parties

Plaintiff National Rifle Association of America, Inc. ("NRA") has a membership of almost 4 million persons, of whom over forty thousand reside in Louisiana, and not less than 8,000 in the following Parishes: Orleans, St. Bernard, Plaquemines, Jefferson, St. Charles, and St. Tammany. Plaintiff Second Amendment Foundation, Inc. ("SAF") has over 600,000 members and supporters nationwide, including thousands in Louisiana, over 200 of whom have contact addresses in the city of New Orleans. Complaint ("Compl."), ¶s 2-3.[1]

[1]The NRA and SAF have standing. "The Supreme Court has long recognized that a voluntary association has standing to bring suit on behalf of its members." *Familias Unidas v. Briscoe*, 619 F.2d 391, 398 n.7 (5th Cir. 1980). Association standing exists even though "it is not possible to state with certainty which of the members in the plaintiffs' associations will be harmed." *American Maritime Ass'n v. Blumenthal*, 458 F. Supp. 849, 855 (D. D.C. 1977), *aff'd* 590 F.2d 1156 (D.C. Cir. 1979), *cert. denied*, 441 U.S. 943 (1979).

Defendants include New Orleans Mayor C. Ray Nagin and New Orleans Police Superintendent Warren Riley (who succeeded Edwin Compass in office[2]). The remaining Defendants have been dismissed by the Consent Decree dated January 3, 2006.

Jurisdiction

Jurisdiction is founded on 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, and under 28 U.S.C. § 1343(3) in that this action seeks to redress the deprivation, under color of the laws, statutes, ordinances, regulations, customs and usages of Louisiana and political subdivisions thereof, of rights, privileges or immunities secured by the United States Constitution. Supplemental jurisdiction is founded upon the laws of the State of Louisiana. This action is brought under 42 U.S.C. § 1983. Compl. ¶s 9-10.

Defendants argue that no jurisdiction exists under § 1331, but ignore Plaintiffs' additional reliance on § 1343(3) and on this Court's supplemental jurisdiction. Def. Mem. at 2.

Facts

The following sets forth the facts as alleged in the Complaint. On August 26, 2005, Governor Kathleen Babineaux Blanco declared a state of emergency based on the imminent threat of Hurricane Katrina to the safety and security of the citizens of Louisiana. Compl. ¶ 11.

In the devastation and breakdown of law and order that followed, law-abiding citizens were left on their own without police protection to protect their families, persons, and property from

[2]F.R.Civ.P. 25(d).

looters, rapists, and criminals of various types. Police officers who stayed on the job to do their duty were overwhelmed. Compl. ¶ 12.

Defendants responded to this crisis in part by ordering that the law-abiding citizens be disarmed, leaving them at the mercy of roving gangs, home invaders, and other criminals. Defendants had no lawful authority to order the wholesale confiscation of firearms from citizens who lawfully possessed such firearms in their homes or who were lawfully carrying such firearms. Compl. ¶ 13.

During and after Hurricane Katrina, Defendants Mayor C. Ray Nagin and P. Edwin Compass III, the Superintendent of Police, pursued a policy of seizing lawfully-possessed firearms from law-abiding residents. Superintendent Compass announced, on or about September 8, 2005, that anyone with a weapon, even one legally registered, will have it confiscated, adding: "No one will be able to be armed. Guns will be taken. Only law enforcement will be allowed to have guns." Some news accounts attributed these statements to then-Deputy Police Chief Warren Riley, but they represent the policies of Defendants Nagin and Compass.[3] Compl. ¶ 14.

During the same period, Mayor Nagin ordered the New Orleans Police and other law enforcement entities under his authority to evict persons from their homes and to confiscate their lawfully-possessed firearms. Police went from house to house and confiscated numerous firearms from citizens at gunpoint. Compl. ¶ 15.

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[3]As noted, Warren Riley has now succeeded Edwin Compass in office.

Thousands of members of Plaintiff NRA and hundreds of members of Plaintiff SAF reside in New Orleans. The overwhelming majority of NRA and SAF members lawfully possess firearms. NRA and SAF members from New Orleans have been and remain subject to having their firearms unlawfully confiscated from their homes and persons pursuant to the policies of Mayor Nagin and Superintendent Compass, subjecting said NRA and SAF members to irreparable harm. Compl. ¶ 16.

While decreeing that ordinary citizens may not possess firearms, Defendants Nagin and Compass followed a policy of allowing certain businesses and wealthy persons to hire armed security guards to protect their property. Compl. ¶ 17.

As a proximate cause of the aforesaid acts of Defendants and their agents and employees, NRA and SAF members have suffered and will continue to suffer irreparable harm in that they are subject to having their lawfully-possessed firearms confiscated from them, or have actually had their lawfully-possessed firearms confiscated from them, subjecting them to endangerment from criminal violence and violating their constitutional rights. Compl. ¶ 22.

ARGUMENT

Introduction

The above allegations must be taken as true for purposes of the pending motion. "If the defense merely files a Rule 12(b)(1) motion, the trial court is required merely to look to the sufficiency of the allegations in the complaint because they are presumed to be true. If those

jurisdictional allegations are sufficient the complaint stands." *Paterson v. Weinberger,* 644 F.2d 521, 523 (5th Cir. 1981). Moreover, for purposes of a Rule 12(b)(6) motion:

> We must accept all well-pleaded averments as true and resolve all factual disputes in favor of the plaintiff. . . . We cannot look outside the pleadings, nor can we uphold the dismissal "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985) (citation omitted).

The Complaint alleges the following claims: Count One, infringement of the right to keep and bear arms, in violation of U.S. Const., Amends. II and XIV (the federal claim) and of La. Const., Art. I, § 11 (over which supplemental jurisdiction exists); Count Two, deprivation of liberty and property without due process, in violation of U.S. Const., Amend. XIV; Count Three, denial of equal protection of the laws, in violation of U.S. Const., Amend. XIV; and Count Four, violation of the right to be secure against unreasonable searches and seizures, in violation of U.S. Const., Amends. IV and XIV.

Defendants' entire argument is that Count One's claim under the Second and Fourteenth Amendments is defective. Their only mention of the other claims is as follows: "Although plaintiffs also assert due-process, equal-protection, and search-and-seizure claims arising under the U.S. Constitution, none of these other claims stands without their Second Amendment claims." Def. Mem. 2. Defendants are silent on the basis of this brazen assertion. Despite defendants not having briefed those issues, the reasons and authorities for the viability of Counts Two, Three, and Four are also set forth below.

I. THE RIGHT TO KEEP AND BEAR ARMS (COUNT ONE)

Count One of the Complaint alleges that the acts of Defendants ordering the confiscation of firearms and actually confiscating firearms from citizens abridged and infringed on the right of Plaintiffs and countless other citizens to keep and bear arms, in violation of La. Const., Art. I, § 11, and U.S. Const., Amends. II and XIV. Compl. ¶ 25.

The following demonstrates that subject matter jurisdiction in this case arises under the Second and Fourteenth Amendments. It then shows that violation of the Second and Fourteenth Amendments states a claim on which relief may be granted. Finally, it explains that this Court has supplemental jurisdiction over this claim based on the Louisiana guarantee.

A. Subject Matter Jurisdiction Arises Under the Second and Fourteenth Amendments

Defendants fail to recognize "the distinction between two sometimes confused or conflated concepts: federal-court 'subject-matter' jurisdiction over a controversy; and the essential ingredients of a federal claim for relief."[4] *Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1238 (2006).[5] The Court held that federal jurisdiction existed under Rule 12(b)(1), and that the issue of whether a claim existed under Rule 12(b)(6) is an entirely separate issue. *Id.* at 1245.

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[4]Defendants state, "because none of the remaining allegations state a claim for which relief may be granted, this Court has no subject matter jurisdiction . . . ." Def. Mem. 2.

[5]"Subject matter jurisdiction in federal-question cases is sometimes erroneously conflated with a plaintiff's need and ability to prove the defendant bound by the federal law asserted as the predicate for relief – a merits-related determination." *Id.* at 1242 (citation omitted).

Where "'the defendant's challenge to the court's jurisdiction is also a challenge to the existence of a federal cause of action, the proper course of action for the district court . . . is to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case' under either Rule 12(b)(6) or Rule 56." *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 494 n.15 (5th Cir. 2005), quoting *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981), *cert. denied*, 454 U.S. 897 (1981).

Williamson, the Fifth Circuit's seminal precedent on this issue, explained that "no purpose is served by indirectly arguing the merits in the context of federal jurisdiction. Judicial economy is best promoted when the existence of a federal right is directly reached and, where no claim is found to exist, the case is dismissed on the merits." 645 F.2d at 415. The court continued:

> This refusal to treat indirect attacks on the merits as Rule 12(b)(1) motions provides, moreover, a greater level of protection to the plaintiff who in truth is facing a challenge to the validity of his claim: the defendant is forced to proceed under Rule 12(b)(6) (for failure to state a claim upon which relief can be granted) . . . . Therefore as a general rule a claim cannot be dismissed for lack of subject matter jurisdiction because of the absence of a federal cause of action.[6]

Id.

The above rule is clearly stated in *O'Quinn v. Manuel*, 773 F.2d 605, 607 (5th Cir. 1985), which defendants cite but essentially ignore. Def. Mem. 2. Defendants further disregard the court's actual holding:

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[6]"Whether the complaint states a cause of action on which relief could be granted is a question of law and . . . it must be decided after and not before the court has assumed jurisdiction over the controversy." *Id.*, quoting *Bell v. Hood*, 327 U.S. 678, 682 (1945).

> In the present case, the face of plaintiff's complaint clearly states a federal question sufficient to confer subject matter jurisdiction on the district court. The complaint invokes section 1983 as well as the first, fourth, and fourteenth amendments to the Constitution . . . . Federal law thus provides both the substantive rights and the remedy for violation of those rights. "In [such] cases jurisdiction is taken as a matter of course."

773 F.2d at 607 (citation omitted).

The face of the Complaint here, alleging violation of the Second and Fourteenth Amendments, is equally supportive of federal subject matter jurisdiction. "'[T]he test for dismissal is a rigorous one and if there is any foundation of plausibility to the claim federal jurisdiction exists.' . . . Jurisdiction is not dependent upon whether the claim for relief is meritorious; the federal courts lack jurisdiction only if the claims are plainly frivolous or 'patently without merit.'" *Evans v. Tubbe*, 657 F.2d 661, 663 (5th Cir. 1981) (citations omitted).

The above distinction is illustrated in *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710-11 (7th Cir. 1999), *cert. denied*, 528 U.S. 1116 (2000), which upheld jurisdiction to hear a Second Amendment claim, even though it thereafter ruled that the claim was not cognizable on the merits. The court addressed the standing component of Rule 12(b)(1) as follows:

> If we were to conclude that the statute runs afoul of the Second Amendment, . . . then the disability imposed by the statute would be void, and Gillespie would regain the opportunity to carry a firearm . . . . In other words, he has suffered a cognizable injury as a result of the statute's enactment, and that injury is one that would be redressed through a favorable ruling on his Second Amendment challenge.

Id. at 710-11.

In sum, this Court has federal subject matter jurisdiction to hear a case alleging violation of

the Second and Fourteenth Amendments to the U.S. Constitution. Whether this case states a claim on which relief may be granted is a separate issue, and it is discussed below.

B. Violation of the Second and Fourteenth Amendments States a Claim on Which Relief May be Granted

This is a case of first impression in the Fifth Circuit. It is well established that the Second Amendment, like other Bill of Rights guarantees, does not apply *directly* to the States. However, neither the Fifth Circuit nor the Supreme Court has decided whether the Second Amendment (like other Bill of Rights guarantees) applies to the States through the Fourteenth Amendment. Existing precedent suggests that the Fifth Circuit and the Supreme Court would decide that issue in the affirmative if called upon to do so today.

The Second Amendment provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." The Fourteenth Amendment provides that no State may deprive any person of life, liberty, or property without due process of law. Defendants take the radical position that "*the states, and by extension their political subdivisions, are free to proscribe the possession of firearms*, not only because the Second Amendment does not prohibit it but also pursuant to the emergency powers granted to the State and *municipality during a state of emergency.*" Def. Mem. 5 (emphasis added).

The Fifth Circuit has held that the Second Amendment guarantees an individual right to keep and bear arms. *United States v. Emerson*, 270 F.3d 203, 260 (5th Cir. 2001), *cert. denied*, 536 U.S. 907 (2002), states:

> We reject the collective rights and sophisticated collective rights models for interpreting the Second Amendment. We hold, consistent with [*United States v. Miller*, 307 U.S. 174 (1939)], that it 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*.

Defendants purport to cite *Miller* for the position rejected by the Fifth Circuit in *Emerson*: "the right to keep and bear arms has never been recognized as a fundamental *individual* right." Def. Mem. 4 (emphasis in original). Defendants also rely on cases in other circuits which endorse the "collective rights" view squarely rejected by *Emerson*.[7]

The Supreme Court stated in a trio of nineteenth century cases that the First, Second, and Fourth Amendments apply only to Congress, and two of these stated that the Amendments do not apply *directly* to the States.[8] However, these cases did not consider whether these rights are incorporated against the State through the Fourteenth Amendment. "[T]hese holdings all came well before the Supreme Court began the process of incorporating certain provisions of the first eight amendments into the Due Process Clause of the Fourteenth Amendment," and "they ultimately rest on a rationale equally applicable to all those amendments . . . ." *Emerson*, 270 F.3d at 221 n.13.

The Fourteenth Amendment was adopted in part to overrule *Scott v. Sandford*, 60 U.S. (19

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[7]Def. Mem. 4 n.1 & 5, relying on, *inter alia*, *Gillespie*, 185 F.3d 693, a case *Emerson* cited as representative of the "collective rights" view rejected in *Emerson*. 270 F.3d 219 n.10.

[8]*United States v. Cruikshank*, 92 U.S. 542, 551-53 (1876); *Presser v. Illinois*, 116 U.S. 252, 265, 267 (1886); *Miller v. Texas*, 153 U.S. 535, 538 (1894).

How.) 393, 417 (1857), which held that African Americans were not citizens – for if they were, they would have the rights to "full liberty of speech" and "to keep and carry arms wherever they went." After the Civil War, Southern States and localities reenacted the Slave Codes as the Black Codes, including prohibitions on blacks from possessing firearms.[9] Senator Jacob Howard, introducing the Fourteenth Amendment in 1866, explained that its purpose was to protect "personal rights" such as "the right to keep and bear arms." Cong. Globe, 39th Cong., 1st Sess., 2765 (May 23, 1866).[10]

Congress recognized in the Freedmen's Bureau Act, passed by over two-thirds of the same Congress which proposed the Fourteenth Amendment, the right to "full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and . . . estate, real and personal, including the constitutional right to bear arms." Ch. 200, 14 Stat. 176, § 14 (1866). The Fourteenth Amendment protects from State infringement the "indefeasible right of personal security, personal liberty and private property," *Griswold v. Connecticut*, 381 U.S. 479, 484-485 n.* (1965) – the very rights the Amendment's Framers declared, in the Freedmen's Bureau Act, included the right to bear arms. The Freedmen's Bureau and Civil Rights Acts of 1866 and the Fourteenth Amendment had

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[9]*E.g.*, Cong. Globe, 39th Cong., 1st Sess. 517 (Jan. 29, 1866) (quoting ordinance of Opelousas, Louisiana).

[10]The historical record "indicates that it was widely recognized that the right to keep and bear arms was to be protected by the Civil Rights Act and the Fourteenth Amendment, and that that right was understood to belong to individuals." Office of Legal Counsel, U.S. Department of Justice, "Whether the Second Amendment Secures an Individual Right" (2004), http://www.usdoj.gov/olc/secondamendment2.htm. See notes 411-422 and accompanying text, citing Halbrook, *Freedmen, the Fourteenth Amendment, & the Right to Bear Arms, 1866-1876* (1998).

common origins and purposes.[11]

United States v. Cruikshank, 92 U.S. 542 (1876), involved alleged private criminal violation of First and Second Amendment rights of black freedmen under the federal Enforcement Act, and did not involve State action. Justice Bradley, sitting as Circuit Judge, stated of the Fourteenth Amendment: "Grant that this prohibition now prevents the states from interfering with the right to assemble," but stated of that issue and of the "conspiracy to interfere with certain citizens in their right to bear arms": "In none of these counts is there any averment that the state had, by its laws interfered with any of the rights referred to . . . ." *United States v. Cruikshank*, 25 Fed.Cas. 707, 714-15 (C.C.D.La. 1874).

Since no State action was involved, the Supreme Court never considered in *Cruikshank* whether the Fourteenth Amendment protected First and Second Amendment freedoms. It noted that the rights "peaceably to assemble" and "of bearing arms for a lawful purpose" long antedated the Constitution, but that the First and Second Amendments protected those rights from "encroachment" or from "be[ing] infringed by Congress," not by private individuals. 92 U.S. at 552-53. For protection of these and other rights from private violence, citizens must rely on the States. *Id.* *Cruikshank* did not refer to encroachment or infringement by the States, as that was not involved in the case.

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[11] *E.g.*, *Hurd v. Hodge*, 334 U.S. 24, 32 (1948); *Georgia v. Rachel*, 384 U.S. 780, 796-97 & n.26 (1966); *City of Greenwood v. Peacock*, 384 U.S. 808, 817 n.11 (1966); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 423-26 (1968).

Cruikshank's only mention of the Fourteenth Amendment was the rejection of a due process right against false imprisonment and murder by private citizens, for the Amendment's due process clause "adds nothing to the rights of one citizen as against another. It simply furnishes an additional guaranty against any encroachment by the State upon the fundamental rights which belong to every citizen as a member of society." *Id.* at 554.

Presser v. Illinois, 116 U.S. 252, 265-68 (1886), held that requiring a permit for an armed march in a city did not violate the rights to associate or to bear arms, and that in any event the First and Second Amendments did not apply to the States.[12] *Presser* did not consider whether the Fourteenth Amendment protects those rights by incorporating them.

Miller v. Texas, 153 U.S. 535, 538-39 (1894), rejected direct application of the Second and Fourth Amendments to the States, but refused to consider whether those Amendments were incorporated into the Fourteenth Amendment:

> And if the fourteenth amendment limited the power of the states as to such rights, as pertaining to citizens of the United States, we think it was fatal to this claim that it was not set up in the trial court. . . . A privilege or immunity under the constitution of the United States cannot be set up here . . . when suggested for the first time in a petition for rehearing after judgment.

Had the issue of incorporation been decided previously, the Court would have so stated, rather than refusing to consider it because it had not been raised below. None of the authorities cited by Defendants seem cognizant that *Cruikshank* decided only that Bill of Rights guarantees do not

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[12] *See id.* at 265 ("the amendment is a limitation upon the power of Congress and the National government, and not upon that of the States.").

provide protection from private violation, or acknowledge that *Presser* and *Miller v. Texas* decided only that such guarantees do not apply directly to the States, but did not consider whether the Fourteenth Amendment protects the rights set forth in these guarantees.[13] Def. Mem. 2-4.

The Supreme Court has never questioned the fundamental character of the substantive guarantees of the Bill of Rights. *Robertson* v. *Baldwin*, 165 U.S. 275, 281-82 (1897), stated of "the freedom of speech and of the press" and "the right of the people to keep and bear arms" that "the law is perfectly well settled that the first ten Amendments to the constitution, commonly known as the Bill of Rights, were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we inherited from our English ancestors . . . ."

More recently, *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), explained:

> "The people" seems to have been a term of art employed in select parts of the Constitution. . . . The Second Amendment protects "the right of the people to keep and bear Arms," . . . . See also U.S. Const., Amdt. 1, ("Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble") . . . . While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, . . . refers to a class of persons who are part of a national community . . . .

As an individual liberty explicitly guaranteed in the Bill of Rights, the right to arms is

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[13]Defendants note an NRA amicus curiae brief in the Supreme Court in an unrelated case which states that the Court should settle the issue of whether the Second Amendment is incorporated into the Fourteenth. Def. Br. 4. Yet since the issue is unsettled in the Fifth Circuit, which would likely hold in the affirmative, it is appropriate for this Court to rule on the issue in the first instance.

fundamental.[14] No constitutional right is "less 'fundamental' than" others, and "we know of no principled basis on which to create a hierarchy of constitutional values . . . ." *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 484 (1982).

Planned Parenthood of Southeastern Penn. v. Casey, 505 U.S. 833, 847 (1992), noted that "all fundamental rights comprised within the term liberty are protected by the Federal Constitution from invasion by the States." The Court added:

> Neither the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects. . . . As the second Justice Harlan recognized:
> "[T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution . . . [such as] the freedom of speech, press, and religion; the right to keep and bear arms . . . . It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . ."

Id. at 841 (citation omitted).

Based on the above Fifth Circuit and Supreme Court precedents, this Court should hold that Count One states a claim on which relief may be granted. It is likely that these courts, if faced squarely with the issue, would decide that the Second Amendment right to keep and bear arms is protected from State infringement through incorporation in the Fourteenth Amendment.

C. Supplemental Jurisdiction Exists Under the State Guarantee

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[14] "The key to discovering whether [a right] is 'fundamental'" is whether it is "explicitly or implicitly guaranteed by the Constitution." *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 33 (1973).

Article I, § 11, of the Louisiana Constitution provides: "The right of each citizen to keep and bear arms shall not be abridged, but this provision shall not prevent the passage of laws to prohibit the carrying of weapons concealed on the person." Defendants fail to mention this component of Count One in their motion to dismiss, other than to assert that the Second Amendment claim is defective, and thus "all of plaintiffs' claims should be dismissed." Def. Mem. 2.

This court has supplemental jurisdiction over Count One. "[W]hen a court grants a motion to dismiss for failure to state a federal claim, the court generally retains discretion to exercise supplemental jurisdiction, pursuant to 28 U. S. C. §1367, over pendent state-law claims." *Arbaugh,* 126 S.Ct. at 1244-45. It need not be decided whether to decline supplemental jurisdiction unless and until "the district court has dismissed all claims over which it has original jurisdiction . . . ." 28 U.S.C. § 1367(c)(3). At that point the court "must consider judicial economy, convenience, fairness, and comity in deciding whether to exercise supplemental jurisdiction over remaining state law claims." *Metropolitan Wholesale Supply, Inc. v. M/V Royal Rainbow,* 12 F.3d 58, 61 (5th Cir. 1994).[15]

Defendants had no authority to abridge the right of law-abiding citizens to keep and bear arms. "The Constitutions of the United States and Louisiana give us the right to keep and bear arms. It follows, logically, that to keep and bear arms gives us the right to use the arms for the intended purpose for which they were manufactured." *McKellar v. Mason,* 159 So.2d 700, 702 (La. App. 7

[15]*See Newport Limited v. Sears, Roebuck & Co.*, 941 F.2d 302, 307-08 (5th Cir. 1991); *Ingram Corporation v. J. Ray McDermott & Co., Inc.*, 698 F.2d 1295, 1317-20 (5th Cir. 1983).

Cir. 1964) (upholding right to defend home), *aff'd*, 245 La. 1075, 162 So.2d 571 (1964) (table).

At the Constitutional Convention of 1973, where the current version of Art. I, § 11, was framed, Delegate John L. Avant, sponsor of the guarantee, noted its purpose to protect "the right to carry a firearm in your automobile, in your boat, or keep one in your place of business." VII Records of the Louisiana Constitutional Convention of 1973: Convention Transcripts, 45th day at 1211. Criminals are deterred knowing "that that store owner, or that homeowner, or that citizen, is in all probability armed and prepared to defend himself." *Id.*[16] Similarly, Delegate Hayes noted the folly of "disarming everybody so the criminals could just have a heyday knowing that you have nothing to protect yourself with." *Id.* at 1216. That is what occurred here as a result of the policies of Defendants, who purported to suspend constitutional rights.

"[I]t is reasonable . . . to regulate the possession of firearms for a limited period of time by citizens who have committed certain specified serious felonies." *State v. Amos*, 343 So.2d 166, 168 (La. 1977). That is not the case regarding law-abiding citizens. *See State v. Williams*, 735 So.2d 62, 70 (La. App. 5 Cir. 1999) (denying that narcotics trafficker "has the equal right to possess or bear arms *as does the law-abiding citizen.*") (emphasis added).[17]

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[16]Delegate Tapper supported the guarantee to preclude restrictions on "the possession of firearms and weapons for the defense of the innocent people so that a man cannot have a weapon in his business place to protect himself, so that you cannot have a weapon in your home to protect yourself . . . ." *Id.* at 1213.

[17]*See also State v. Blanchard,* 776 So.2d 1165, 1173 (La. 2001) ("The requirement of a nexus between the firearm and the drug offense eliminates the risk that the statute will reach noncriminal or constitutionally protected activity without lessening the state's legitimate penal purpose.").

The state may regulate "the carrying of weapons concealed on the person," Art. I, § 11, or require the registration of certain narrowly-defined arms.[18] However, a total ban on and confiscation of *all firearms in all places, including the home, is plainly unconstitutional.*[19]

Defendants argue that "the states, and by extension their political subdivisions, are free to proscribe the possession of firearms" under their emergency powers. Def. Mem. 5. No such emergency powers exist or were invoked here. Designated officials may only "Suspend or limit the sale, dispensing, or transportation of . . . firearms,"[20] not prohibit possession thereof. Moreover, "Nothing in this Chapter shall be interpreted to diminish the rights guaranteed to all persons under the Declaration of Rights of the Louisiana Constitution or the Bill of Rights of the United States Constitution." LSA-R.S. 29:736(D).[21]

The governor's declaration of an emergency may authorize chief law enforcement officers to promulgate orders, to be effective for only five days, "Regulating and controlling the possession,

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[18]*State v. Hamlin*, 497 So.2d 1369, 1371 (La. 1986) (sawed-off shotguns).

[19]"If the constitutional right to keep and bear arms for security is to mean anything, it must, as a general matter, permit a person to possess, carry, and sometimes conceal arms to maintain the security of his private residence . . . ." *State v. Hamdan*, 2003 Wis. 113, 665 N.W.2d 785, 808 (2003). "The right of defense of self, property and family is a fundamental part of our concept of ordered liberty. . . . For many, the mere possession of a firearm in the home offers a source of security." *Arnold v. Cleveland*, 616 N.E.2d 163, 169-70 (Ohio 1993).

[20]LSA-R.S. § 29:724.D(8), 29:737(B)(7).

[21]Defendants' also cite Home Rule Charter of the City of New Orleans, § 4-206(3)(d), but that only authorizes the mayor to declare an emergency, not to confiscate firearms.

storage, display, sale, transport and use of firearms . . . ." LSA-R.S. § 14:329.6.A(6). That does not authorize a prohibition on firearms possession,[22] and may not be interpreted to violate constitutional guarantees.[23]

To clarify, H.B. 760 was signed into law on June 8, 2006,[24] declaring that the above emergency powers shall not "authorize the seizure or confiscation of any firearm . . . from any individual who is lawfully carrying or possessing the firearm . . . ." An exception exists for a peace officer to "disarm an individual if the officer reasonably believes it is immediately necessary for the protection of the officer or another individual." The officer must "return the firearm to the individual before discharging that individual unless the officer arrests that individual for engaging in criminal activity, or seizes the firearm as evidence pursuant to an investigation for the commission of a crime." *Id.*

In sum, in addition to stating a federal claim under U.S. Const., Amends. II and XIV, Count One states a claim on which relief may be granted under Article I, § 11, of the Louisiana Constitution over which this Court has supplemental jurisdiction.

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[22]In contrast to "regulating and controlling" firearms, that section refers to "*Prohibiting* the sale and distribution of alcoholic beverages." § 14:329.6.A(4) (emphasis added).

[23]"[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *United States ex rel. Attorney General v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909).

[24]Act 275, 2006 Regular Session.

II. DEPRIVATION OF LIBERTY AND PROPERTY WITHOUT DUE PROCESS (COUNT TWO)

The Fourteenth Amendment to the United States Constitution provides that no State shall deprive any person of life, liberty, or property without due process of law. Count Two alleges that the firearms confiscated by Defendants constituted private property which was lawfully possessed by Plaintiffs pursuant to State and Federal law. Moreover, the manner in which Plaintiffs kept, bore, and possessed such property constituted liberty interests recognized by State and Federal law. Compl. ¶ 28. This Court has federal subject matter jurisdiction over this count, which states a claim on which relief may be granted. No basis exists for Defendants' bald assertion, without explanation, that "none of these other claims stands without their Second Amendment claim." Def. Mem. 2.

The liberty and property interests at issue here are recognized by La. Const., Art. I, § 11, which guarantees the right to keep and bear arms; LSA-R.S. § 40:1379.3(B), which provides for a permit which "shall grant authority to a citizen to carry a concealed handgun on his person" and which may be revoked only according to specified procedures; by State law allowing the possession and open carrying of firearms;[25] and LSA-R.S. 40:1796, which prohibits local regulation "more restrictive than state law" of firearms possession and transportation. State law also generally respects personal freedom and private property.[26]

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[25]State law prohibits only "the intentional concealment of any firearm . . . on one's person . . . ." R.S. § 14:95. *See State v. Fluker*, 311 So.2d 863, 866 (La. 1975) (gun in open view lawful).

[26]"Every person has the right to acquire, own, control, use, enjoy, protect, and dispose of private property." La. Const., Art. I, § 4(A). "Personal effects, other than contraband, shall never

Federal law provides: "Notwithstanding . . . any rule or regulation of a State or any political subdivision thereof, any person who is not prohibited by this chapter" from receipt of a firearm "shall be entitled to transport a firearm for any lawful purpose from any place where he may lawfully possess and carry such firearm to any other place where he may lawfully possess and carry such firearm . . . ." 18 U.S.C. § 926A (requiring only that the firearm be unloaded and inaccessible).

Defendants deprived plaintiffs of liberty and property interests recognized by the above provisions when they ordered the confiscation of firearms from their lawful possessors in their homes, businesses, automobiles, boats, and otherwise.

"State-created liberty and property interests, including the right to bear arms for defense and security, are protected by the Due Process Clause." *Peoples Rights Organization v. City of Columbus*, 925 F. Supp. 1254, 1269 (S.D. Ohio 1996), *aff'd in part & rev'd in part on other grounds*, 152 F.3d 522 (6th Cir. 1998). The court cited the following for this proposition: *Mills v. Rogers*, 457 U.S. 291, 300 (1982);[27] *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983);[28] and *Hewitt*

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be taken." *Id.* (C).

[27]"Because state-created liberty interests are entitled to the protection of the federal Due Process Clause, . . . the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law." *Id.*

[28]"A State creates a protected liberty interest by placing substantive limitations on official discretion." *Id.*

v. Helms, 459 U. S. 460, 466 (1983).[29]

Like liberty interests, property interests recognized by State law are also protected by the due process clause. "The Constitution does not create property interests; 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law.' . . . Once a state has conferred a property right, it cannot constitutionally deprive such an interest without appropriate procedural safeguards." *Schaper v. City of Huntsville*, 813 F.2d 709, 713-14 (5th Cir. 1987), quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972).[30]

Applying these precedents to uphold an action under 42 U.S.C. §1983 for interference by local officials with State handgun permits, *Kellogg v. City of Gary*, 562 N.E.2d 685, 694 (Ind. 1990), held:

> This right of Indiana citizens to bear arms for their own self-defense and for the defense of the state is an interest in both liberty and property which is protected by the Fourteenth Amendment to the Federal Constitution. . . . This interest is one of liberty to the extent that it enables law-abiding citizens to be free from the threat and danger of violent crime. There is also a property interest at stake, for example, in protecting one's valuables when transporting them. . . .[31]

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[29]"Liberty interests protected by the Fourteenth Amendment may arise from two sources--the Due Process Clause itself and the laws of the States." *Id.*

[30]"These [liberty and property] interests attain this constitutional status by virtue of the fact that they have been initially recognized and protected by state law . . . ." *Paul v. Davis*, 424 U.S. 693, 710-11 (1976). *See Russell v. Harrison*, 736 F.2d 283, 288 (5th Cir.1984) (a complaint alleging an arbitrary and capricious deprivation of a property interest states a cause of action under the Due Process Clause).

[31]*See also Rabbitt v. Leonard*, 36 Conn. Supp. 108, 413 A.2d 489, 491 (1979) ("a Connecticut citizen, under the language of the Connecticut constitution, has a fundamental right to

"This Court has repeatedly held that municipalities or supervisors may face liability under section 1983 where they breach duties imposed by state or local law." *O'Quinn v. Manuel,* 773 F.2d 605, 608 (5th Cir. 1985). *See Augustine v. Doe,* 740 F.2d 322, 327 (5th Cir. 1984) (complaint adequately alleged that detention of person deprived him of liberty, and seizure of his dog deprived him of property, both without due process).

"The right to defend oneself from a deadly attack is fundamental." *United States v. Panter*, 688 F.2d 268, 271 (5th Cir. 1982). Defendants here, the very authorities who ordered the disarming of the citizens, have no legal duty to protect them. *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 197 (1989) ("a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.").[32]

Accordingly, by ordering the confiscation and actually confiscating the firearms belonging to Plaintiffs and countless other citizens, Defendants deprived them of liberty and property without due process of law. Count Two adequately alleges federal jurisdiction and states a valid claim.

III. DENIAL OF EQUAL PROTECTION OF THE LAWS (COUNT THREE)

The Fourteenth Amendment to the United States Constitution provides that no State shall deny to any person the equal protection of the laws. Count Three alleges that at the same time that

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bear arms in self-defense, a liberty interest which must be protected by procedural due process").

[32]"The Due Process Clause is intended to curb governmental abuse of power over the people it governs, not to require state officers to protect the people from each other." *Saenz v. Heldenfels Brothers, Inc.*, 183 F.3d 389 (5th Cir. 1999).

Defendants Nagin and Compass instituted and executed their policy of confiscating firearms from Plaintiffs and other law-abiding citizens and thereby prevented them from protecting their more-modest homes, Defendants allowed selected wealthy persons to keep their firearms and/or to retain armed private security personnel to protect their more expensive homes and properties. One's ability to exercise one's rights and to protect life and property depended on whether one had the economic means to retain armed private security personnel. Compl. ¶ 33.

Defendants discriminated in favor of the selected few, and against Plaintiffs and the great majority of citizens, solely on the basis of wealth and influence. Defendants thereby denied Plaintiffs and countless other citizens the equal protection of the law. Compl. ¶ 34.

This Court has federal subject matter jurisdiction over this count, which states a claim on which relief may be granted. Defendants provide no explanation for their assertion that "none of these other claims stands without their Second Amendment claim." Def. Mem. 2.

Discrimination based on wealth or type of housing as to who may possess firearms violates equal protection. *Hetherton v. Sears, Roebuck & Co.*, 652 F.2d 1152, 1157-58 (3rd Cir. 1981), invalidated a requirement that two freeholders must identify a firearm purchaser, because a state cannot "arbitrarily establish categories of persons who can or cannot buy the weapons." *Id.* at 1157-58. *Hetherton* remarks:

> To limit the options of prospective purchasers for guns to a requirement that only people who own real estate can identify the purchasers is not more constitutionally permissible than a requirement that only Catholics or Blacks or Indians can identify purchasers of handguns.

Id. at 1160.

A less wealthy person who cannot afford a private security service is not more likely to misuse a firearm than is a more wealthy person or a private security guard such person may retain. *See Peoples Rights Organization, Inc. v. City of Columbus*, 152 F.3d 522, 531-32 (6th Cir. 1998) (invalidating law which allowed some to register and possess certain firearms and prohibited similarly-situated persons from doing so), quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992) (equal protection clause "keeps governmental decision makers from treating differently persons who are in all relevant respects alike"), and *Romer v. Evans*, 517 U.S. 620, 632 (1996) ("even in the ordinary equal protection case calling for the most deferential of standards, we insist on knowing the relation between the classification adopted and the object to be attained").

Accordingly, this Court has jurisdiction over Count Three, which states a valid claim on which relief may be granted.

IV. THE RIGHT TO BE SECURE FROM UNREASONABLE SEARCHES AND SEIZURES (COUNT FOUR)

The Fourth Amendment to the United States Constitution, which applies to the States through the Fourteenth Amendment, provides in part that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."

Count Four alleges that Defendants issued or executed orders that persons (including Plaintiffs) be accosted at gunpoint by law enforcement officers and that their persons, homes, boats,

and other properties be searched and temporarily seized, and that their firearms be seized and kept for an indefinite period of time. Plaintiffs committed no unlawful acts, did not threaten any law enforcement officers, or engage in any other activity that would justify such searches and seizures. Compl. ¶ 37. Defendants thus violated the right of Plaintiffs and other citizens to be secure in their persons and houses against unreasonable searches and seizures, in violation of U.S. Const., Amends. IV and XIV. Compl. ¶ 38.

This Court has federal subject matter jurisdiction over this count, which states a claim on which relief may be granted. One can only wonder at the basis for Defendants' affirmation that "none of these other claims stands without their Second Amendment claim." Def. Mem. 2. *See Castellano v. Fragozo*, 352 F.3d 939, 953-54 (5th Cir. 2003) (*en banc*) (referring to "events that run afoul of explicit constitutional protection – the Fourth Amendment if the accused is seized and arrested, for example . . . . Such claims of lost constitutional rights are for violation of rights locatable in constitutional text . . . .").[33]

The mere presence of a firearm does not justify a search of or seizure from its apparent lawful possessor. "[O]wning a gun is usually licit and blameless conduct. Roughly 50 percent of American homes contain at least one firearm of some sort . . . ." *Staples v. United States*, 511 U.S. 600, 613-14 (1994). "Common sense tells us that millions of Americans possess these items [firearms] with

[33]In *Augustine v. Doe*, 740 F.2d 322 (5th Cir. 1984), deputy sheriffs, wielding a sawed-off shotgun and other weapons, seized the person of plaintiff in order to seize his dog without a warrant. "The facts alleged in the complaint establish a clear violation of the fourth amendment." *Id.* at 325.

perfect innocence." *United States v. Anderson*, 885 F.2d 1248, 1254 (5th Cir. 1989) (*en banc*).

"An officer seizes a person when he, 'by means of physical force *or* show of authority, has in some way restrained the liberty of a citizen.'" *Flores v. City of Palacios*, 381 F.3d 391, 396 (5th Cir. 2004), quoting *Terry v. Ohio*, 392 U.S. 1, 19 n.16 (1968) (emphasis added). Defendants, by their orders or their actions, violated the security of the persons and property of Plaintiffs by restraining their liberty and seizing their firearms.

"[P]olice officers may stop and briefly detain an individual for investigative purposes if they have reasonable suspicion that criminal activity is afoot." *Goodson v. City of Corpus Christi*, 202 F.3d 730, 736 (5th Cir. 2000), citing *Terry*, 392 U.S. at 30. Apparent lawful possession of a firearm gives rise to no such reasonable suspicion. "The Fourth Amendment requires some minimal level of objective justification for making the stop." *Id.* at 736 (citation and quotation marks omitted).

Defendants violated the Fourth Amendment by searching the persons, homes, businesses, and motor vehicles of Plaintiffs and seizing their firearms. *See Simmons v. City of Paris, Texas*, 378 F.3d 476, 480 (5th Cir. 2004) (upholding § 1983 claim where "the plaintiffs' home was searched and their persons seized"); *Estep v. Dallas County*, 310 F.3d 353, 358 (5th Cir. 2002) (to search a vehicle for a weapon, the facts must "reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of the weapon.").

Defendants' searches and seizures of persons and their property violated the Fourth and Fourteenth Amendments. Count Four adequately states federal jurisdiction and a cause of action.

CONCLUSION

This Court should deny Defendants' Rule 12(b)(1) and 12(b)(6) motion to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief may be granted.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the Request for Oral Argument on the Plaintiffs' Opposition to Defendants' Rule 12(b)(1) and 12(b)(6) Motion to Dismiss For Lack of Subject Matter Jurisdiction and For Failure to State a Viable Claim has been forwarded via facsimile, e-mail and United States mail, first class, postage prepaid, this 3rd day of August, 2006, as follows:

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