No. 2008-884

IN THE
THE SUPREME COURT OF THE UNITED STATES

JANUARY TERM 2008

State of Old York,

Petitioner

v.

Sun Longone,

Respondent

State of Old York,

Petitioner

v.

York Loading Company,

Respondent

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

RESPONDENT'S BRIEF

EXAM #993-273-287 I
EXAM #993-274-053 II

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QUESTIONS PRESENTED

I. Does the Second Amendment protect an individual's right to "keep and bear arms" and, therefore, invalidate provisions of the Old York Code which impose severe restrictions on an individual's ability to lawfully possess a handgun?

II. Do provisions of the Old York Code which regulate the delivery, transportation and possession of handguns and handgun ammunition "relate to" a carrier's service and, therefore, violate the Supremacy Clause of the United States Constitution because of the preemption provision in section 14501(c)(1) of the Federal Aviation Administration Authorization Act of 1994?

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The decision of the United States District Court Southern District of Old York, *Sun Longone v. State of Old York*, *York Loading Company v. State of Old York*, Consolidated Case No. 06-99374 (April 9, 2006), is contained in the Record of Appeal at pages 8-21. The decision of the United States Court of Appeals for the Fourteenth Circuit, *Sun Longone v. State of Old York*, *York Loading Company v. State of Old York*, Consolidated Appellate No. 06-89432 (May 22, 2007), is contained in the Record of Appeal at pages 22-33.

STATEMENT OF JURISDICTION

A statement of jurisdiction is omitted in accordance with the rules of the 2007-2008 Moot Court Program.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The texts of the following authorities relevant to the determination of the present case are set forth in the appendix:

U.S. Const. art. VI, cl. 2

U.S. Const. amend. II

Old York Code Section 40.1 *et seq.*

49 U.S.C. § 14501(c)

STATEMENT OF THE CASE

Sometime after April 26, 2002, the Old York Legislature enacted controversial gun control laws. R. at 3. These new laws imposed severe restrictions on the possession and transportation of handguns and handgun ammunition. R. at 3.

Specifically, Old York Code section 40.5 requires all persons in Old York to hold a registration certificate for the possession or control of any handgun. R. at 6. That section, however, limits issue of registration certificates to current or former law enforcement officers residing in Old York. *Id.* In effect, only Old York law enforcement officers may possess or control any handguns. Further, section 40.6 imposes additional requirements on persons actually holding a registration certificate. R. at 7. No persons may possess a handgun unless the handgun is unloaded and disassembled or bound by a trigger lock. *Id.*

Old York Code sections 40.3, 40.4, and 40.7 impose similar restrictions on the delivery of handguns and handgun ammunition. R. at 6-7. Section 40.3 prohibits the delivery of handgun ammunition to a minor. R. at 6. Section 40.4 provides as a defense to section 40.3 proof of reasonable reliance of government documentation of age and identity. *Id.* In effect, no one may deliver handgun

ammunition without verifying the identification of the recipient.

Old York Code section 40.7 contains exemptions from these restrictions. R. at 7. Section 40.7 allows transportation of handgun ammunition if the primer is permanently deactivated and the propellant removed. *Id.* Section 40.7 also allows transportation of handguns if the handgun is unloaded in a locked container. *Id.*

Old York enacted these sweeping reforms in reaction to a bizarre shooting incident on the senate floor of the Old York State Legislature. R. at 2-3. Senator Aldwin fell under severe public scrutiny for offensive remarks made during an interview. R. at 2. During a subsequent speech on the senate floor, he reiterated his previous remarks by claiming that "all children are goats." *Id.* He then took out a concealed handgun and began firing random shots. *Id.* Twelve senators died before Old York Capitol police officers shot and killed Senator Aldwin. *Id.*

Sun Longone, an Old York resident, applied to register his handgun after the enactment of the new gun control laws. R. at 3. Longone lives in Sitriale and works at the Waste Management Facility in Moltosanto, two of the most dangerous cities in Old York. R. at 10. On June 23, 2005,

local thugs brutally assaulted Longone and broke his legs as he walked home after a late shift. *Id.* To better protect himself in the future and calm his fears, Longone bought a handgun which he planned to keep in his home. *Id.* Old York denied his application for a registration certificate because he did not qualify under Old York's definition of a law enforcement officer. R. at 10-11.

The York Loading Company ("YLC") is one of the largest delivery companies in the world. R. at 4. Headquartered in another state, YLC nevertheless routinely transports handguns and handgun ammunition into Old York. R. at 11. After the enactment of Old York's new restrictions, however, YLC suffered steep profit declines. *Id.* Old York's restrictions on the delivery of handgun ammunition to minors, especially, led to YLC's losses. *Id.*

Sun Longone and YLC filed separate actions in the U.S. District Court for the Southern District of Old York. R. at 4. Longone claimed that Old York's new restrictions violate his Second Amendment right to bear arms. *Id.* YLC claimed that the Federal Aviation Administration Authorization Act ("FAAAA") preempts the restrictions which apply to the delivery of handgun ammunition. *Id.* Both Longone and YLC sought injunctive and declaratory relief. *Id.*

The District Court consolidated the two actions under Rule 42(a) of the Federal Rules of Civil Procedure. R. at 9. Longone, YLC, and Old York each moved for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *Id.*

The District Court granted Old York's motion for summary judgment against Longone. R. at 9. The Court held that the Second Amendment does not confer rights on individual citizens. *Id.* The Court also granted YLC's motion for summary judgment against Old York. R. at 10. The Court held that the FAAAA preempts Old York's regulations of the delivery of handgun ammunition. *Id.*

Longone and Old York both filed appeals in the Fourteenth Circuit Court of Appeals. R. at 5. The Circuit Court reversed the District Court's dismissal of Longone's claim. R. at 28. The Court held that Old York Code sections 40.5 and 40.6 violate the Second Amendment because the Second Amendment confers an individual right to keep and bear arms. *Id.* The Circuit Court, however, affirmed the District Court's grant of summary judgment in favor of YLC. R. at 29-30. It agreed with the District Court that the FAAAA expressly preempts Old York's regulations because they relate to a carrier's prices, routes, or services. R.

at 29.

This Court granted Old York's petition for certiorari. R. at 34. It certified two issues for review. *Id.* The first issue asks whether the Second Amendment protects an individual right to keep and bear arms for private use. The second issue asks whether the FAAAA preempts a State from exercising its public health and police powers to regulate the delivery of handgun ammunition.

SUMMARY OF ARGUMENT

I. A proper reading of the Second Amendment clearly guarantees an individual private right to keep and bear arms. Old York code sections 40.5 and 40.6 violate the Second Amendment because those sections infringe on the individual right to keep and bear arms.

The plain text of the Second Amendment provides the primary source for this court's interpretation. Additionally, this Court must read the Second Amendment's use of "the people" in harmony with the entire Bill of Rights. The historical context further supports the individual rights theory because the Framers intended the Second Amendment to provide for an individual right.

Judicial precedent also favors a construction of the Second Amendment which guarantees an individual right. *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001). The Second Amendment's guarantee to keep and bear arms is a fundamental liberty and applies to the States via the Fourteenth Amendment.

Old York Code Sections 40.5 and 40.6 violate the Second Amendment right of an individual to keep and bear arms. The legislation at issue seeks to impermissibly regulate handguns. Handguns are a type of weapon protected

by the Second Amendment. Supreme Court precedent clearly shows that handguns are a type of weapon which the Second Amendment protects. Old York code sections 40.5 and 40.6 unconstitutionally restrict individual access to handguns. The legislation passed by the State of Old York seeks to ban ordinary private citizens from the free exercise of their Second Amendment right to keep and bear arms.

II. The Federal Aviation Administration Authorization Act of 1994 (FAAAA) expressly preempts sections 40.3, 40.4, 40.5 and 40.7 of the Old York Code. Congress, by adopting the "relating to" language, intended the FAAAA to preempt all state laws which either make an "express reference to" or have a "forbidden significant effect" on a carrier's service. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992).

The FAAAA preempts sections 40.3 and 40.4 of the Old York Code because those sections expressly reference a carrier's service by regulating the delivery of handgun ammunition. The FAAAA also preempts sections 40.3, 40.4, 40.5 and 40.7 because those sections, by requiring burdensome methods of transporting handguns and handgun ammunition, have a forbidden significant effect on a carrier's service. The FAAAA also preempts those sections

because they are inconsistent with its structure and purpose since they impose burdens on a carrier's ability to function in interstate commerce and do not fall under the FAAAA's listed exceptions.

Further, the FAAAA preempts sections 40.3, 40.4, 40.5 and 40.7 regardless of whether Old York enacted them as public safety measures under its police power. Congress' clear intent to preempt all state laws which relate to a carrier's service rebuts any presumption in favor of state laws enacted under a state's historic police power. Moreover, the presumption does not even apply here because of the history of significant federal presence in the interstate transportation of goods.

ARGUMENT

I. OLD YORK CODE SECTIONS 40.5 AND 40.6 VIOLATE THE SECOND AMENDMENT BECAUSE THOSE SECTIONS INFRINGE ON THE INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS

The debate over the proper interpretation of the Second Amendment is comprised of three different conceptual theories. The first theory is that the Second Amendment "preserves a collective, rather than individual right." *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995). The collective rights, or "states" rights theory conceives the Second Amendment as solely allowing for a state to arm a militia. *See, e.g., id.* (noting that right to keep and bears arms "must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia'") (citation omitted).

The second theory is the sophisticated collective rights model. This model premises the Second Amendment right to "keep and bear Arms" on active membership in an organized militia. *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942)(holding that Federal Firearms Act did not violate defendant's Second Amendment rights because defendant failed to show former or current membership in a military organization).

The final theory unambiguously recognizes the rights of individuals to keep and bear arms. Although this theory has found little acceptance in the various Circuit Courts of Appeals that have addressed this issue, it is the most tenable construction of the Second Amendment.

A. The plain text of the Second Amendment provides the primary source for this Court's interpretation

The proper construction of the Second Amendment begins and in this case concludes with a plain text reading of the Amendment's language. The United States Constitution as a written instrument binds this Court as paramount law. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 178, 1803 WL 893, at *26 (1803); *see also, e.g.*, *South Carolina v. United States*, 199 U.S. 437, 448 (1905)("The Constitution is a written instrument. As such, its meaning does not alter. That which it meant when it was adopted, it means now."). This Court looks to the plain text of the Constitution as the principal source of its meaning. *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 188, 1824 WL 2697, at *71 (1824)("[T]he enlightened patriots who framed our constitution ... employed words in their natural sense, and ... intended what they have said.").[1] As a result this

[1] *See also* Letter from James Madison to Thomas Ritchie (Sept. 15, 1821), *in* III Letters and Other Writings of James Madison 228 (P. Fendall ed., 1865). James Madison

Court does not look beyond the written words of the Constitution unless the plain text leaves the meaning ambiguous. *Lake County v. Rollins*, 130 U.S. 662, 670 (1889)("[W]hen the text of a constitutional provision is not ambiguous, the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.").

1. *This Court must read the Second Amendment's use of "the people" in harmony with the entire Bill of Rights*

The plain text meaning of the Second Amendment's operative clause prohibits Old York's restrictions on handguns. The Second Amendment provides that "the right of *the people* to keep and bear Arms, shall not be infringed." U.S. Const. amend. II (emphasis added). The phrase "the people" retains the same meaning throughout the Constitution. *See Patton v. United States*, 281 U.S. 276, 298 (1930)("The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia* [in light of each other].") (italics in original). Thus, this Court must interpret the Second Amendment's use of "the people" consistently throughout the Bill of Rights. *See United States v.*

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insisted that ("[I]n expounding and applying the provisions of the Constitution ... the legitimate meanings of the Instrument must be derived from the text itself.")

Verdugo-Urquidez, 494 U.S. 259, 265 (1990)("'[T]he people' protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community."). This Court's interpretation of both the First and Fourth Amendments implicitly defines "the people" as including each individual of the whole of the American citizenry. *See, e.g.*, *Mapp v. Ohio*, 367 U.S. 643, 646 (1961)(holding that the Fourth Amendment's guarantee to "the people" protects against "all invasions on the part of the government and its employes [sic] of the sanctity of a man's home and the privacies of life") (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)); *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937)(highlighting that the First Amendment's right of the people peacefully to assemble distinguishes between states and individuals because "government[s] may be responsive to the will of the people"). The correct interpretation of "the people" in the Second Amendment is that it references all the citizens of the several States.

The Second Amendment's substantive guarantee is "to keep and bear Arms." U.S. Const. amend. II. The plain text interpretation of "bear Arms" and "the people" in the

Second Amendment provides that the right to "keep and bear Arms" is individual. *See United States v. Emerson*, 270 F.3d 203, 232 (5th Cir. 2001)("The appearance of 'bear Arms' in the Second Amendment accords fully with the plain meaning of the subject of the substantive guarantee, 'the people.'"). The plain text interpretation of the Second Amendment's operative clause guarantees an individual right to both "keep and bear Arms".

2. *The Second Amendment's prefatory clause does not negate the individual right guaranteed by the operative clause*

The prefatory clause to the Second Amendment provides that "[a] well regulated Militia, being necessary to the security of a free State . . . ." U.S. Const. amend. II. This clause, while perhaps illustrative of one purpose for which the Second Amendment was created, does not, and cannot constrain the operative clause.

While a recent Ninth Circuit case incorrectly asserts that this is the only example of a prefatory clause to be found in the body of the Constitution, *Silveira v. Lockyer* 312 F.3d 1052, 1068 (9th Cir. 2002), the preamble to the Copyright and Patent Clause is strikingly similar. The prefatory clause provides that its purpose is "[t]o promote the Progress of Science and the useful Arts." U.S. Const. art. I, § 8, cl. 8. This clause, if read as narrowly as the

Silveira court read the Second Amendment's prefatory clause, renders the Copyright and Patent clause void in every area outside the sciences and the arts. *See Silveira*, 312 F.3d at 1068-69.

B. Historical context shows that the Framers intended the Second Amendment to provide for an individual right

The Second Amendment's preamble citing the need for a "well regulated militia" must be read in light of the then-existing notion regarding militia membership. U.S. Const. amend. II. Proponents of the states and collective rights models distort this reference by constricting it merely to membership in State organized militia. This both undercuts the importance the Framers had in protecting against standing armies and requires an all too limited interpretation of the meaning of militia.

In *United States v. Miller*, 307 U.S. 174, 178-79 (1939), this Court directly addressed the issue of what constituted a militia for purposes of the Second Amendment. This Court described the militia as being composed of "all males physically capable of acting in concert for the common defense." *Id.* This definition finds support in the Second Militia Act of 1792 which defined "militia" to include "every free able-bodied white

male citizen of the respective states."[2] Uniform Militia Act of 1792, ch. 33, § 1, 1 Stat. 271, 271, *repealed by* Dick Act, ch. 196, 32 Stat. 775 (1903). This definition supports the proposition that the militia is the "raw material from which an organized fighting force was to be created." *Parker v. District of Columbia*, 478 F.3d 370, 381 (D.C. Cir. 2007), *cert. granted sub nom.*, District of Columbia v. Heller, 76 U.S.L.W. 3273, 2007 U.S. LEXIS 12324 (U.S. Nov. 20, 2007) (No. 07-290). These tenets illustrate the clear inference that the need for a militia can only be met by securing a right to keep and bear arms in the citizenry as a whole.

C. Judicial precedent favors a construction of the Second Amendment which guarantees an individual right

Aside from the instant case, only two other federal appellate courts have held that the Second Amendment supports the individual rights model. *See United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001); *Parker*, 478 F.3d at 395. Additionally, the Fourteenth Circuit below also held that the "Second Amendment confers rights on the

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[2] This language is also found in the present day form of the Militia Act. 10 U.S.C.A. § 311 (West 2008). While the modern version drops the anachronistic reference to race it again frames the militia as being composed of able bodied citizens. § 311(a) ("The militia of the United States consists of all able-bodied males at least 17 years of age.").

individuals to keep and bear arms, regardless of any membership or participation in a militia." R. at 26.

This Court's seminal Second Amendment jurisprudence, in *United States v. Miller*, 307 U.S. 174 (1939), is properly read as granting an individual right to keep and bear arms. Although *Miller* "is a decision that both sides of the gun debate claim as their own," a fair reading of the decision lends support to the individual right model. *Parker*, 478 F.3d at 392.

Miller involved a Second Amendment challenge to section 11 of the National Firearms Act. 307 U.S. at 176. Specifically, the challenge involved whether the Second Amendment was violated when petitioner was arrested for transporting a shotgun with a barrel of less than 18 inches across state lines. *Id.* at 177. This Court held that the Second Amendment was not implicated in the matter, but rather based its decision on the meaning of a "weapon," not on whether the Second Amendment conferred an individual right. *Id.* at 178.

Although this Court in *Miller* did not directly reach the issue of whether the Second Amendment conferred an individual right, language in the opinion implicitly endorses this model. This Court wrote that "we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument." 307 U.S. at 178. The use by

this Court of the limited reference to "such an instrument" is clear authority that the court was not concerning itself with the right to keep and bear arms generally, but instead with the narrower question of what type of arms the Second Amendment protects. This Court issued this narrow opinion, despite the fact that the government brief in the case raised the issue that the Second Amendment did not confer an individual right. *Emerson*, 270 F.3d at 224. By disposing of the case based on the type of weapon, not the right, the *Miller* decision implicitly endorses the individual rights theory.

Aside from the direct authority of the *Miller* case, there is authority from two Circuit Courts of Appeals which support the individual rights theory of the Second Amendment. The Fifth Circuit Courts of Appeals took up the issue of whether the Second Amendment conferred an individual right. *Emerson*, 270 F.3d 203. The court held that, despite the fact that many circuits ruled for a collective rights theory, the Second Amendment was intended to provide for an individual right. *Id.* at 260. At issue in *Emerson* was whether violation of 18 U.S.C. § 922(g) (8) (C) (ii) was unconstitutional on its face when applied to a temporary restraining order. *Id.* at 203. The Fifth Circuit Court of Appeals reversed the District Court's

ruling that it was unconstitutional, but while doing so the majority in *Emerson* directly ruled on the Second Amendment issue and decided that it applied to individuals. *Id.* at 260. The court in *Emerson* found that the precedent in *Miller* lent itself to an individual rights interpretation, and that the individual rights theory was founded on a more precise reading of the text as well as a more complete contextualization of historical precedent. *Id.* at 221-62.

In contrast to the *Emerson* decision, the Ninth Circuit Court of Appeals ruled in *Silveira* that the Second Amendment did not allow for a individual rights interpretation. 312 F.3d at 1087. The *Silveira* court directly addressed *Emerson,* and attempted to dismantle the arguments that the *Emerson* court forwarded in support of an individual right. *Id.* at 1067-93. Chief among the arguments offered by the *Silveira* court was that while the Second Amendment's language of "the people" must be read *in pari materia* with the rest of the Bill of Rights, the prefatory clause reference to a militia constrains this right exclusively to the States. *Id.* at 1068-72. This reasoning relied on by the *Silveira* court is at odds not only with *Emerson,* but also with the *Miller.*

Silveira articulates a definition for the term militia that constrains it to simply a function of the "state

military organizations." *Id.* at 1070. This view of the militia is partially correct, but leaves out the basic notion that militias are distinct from standing armies. The *Silveira* court indirectly acknowledged this by noting that the historical conception of a militia likely used by the Framers is "a state military force to which the able bodied male citizens of the various states might be called to service" *Id.* This recognition that a militia calls for all able-bodied men lies at the heart of the Second Amendment's right. In order for a militia to be effective it must be able to respond quickly and effectively to any need upon which it would be called to defend. The *Silveira* court in effect allows for states to so restrict firearm ownership as to completely moot the possibility of ever providing for a "well regulated militia." U.S. Const. amend. II.

D. The Second Amendment's guarantee to keep and bear arms applies to the states via the Fourteenth Amendment

The individual right to "keep and bear arms" protected by the Second Amendment is a fundamental liberty and as such is incorporated unto the states. When this Court last ruled on this question the incorporation doctrine was not yet developed. In the roughly 112 years since this Court last addressed this issue, the doctrine of incorporation

has been expanded to make many of the specific liberties found in the Bill of Rights obligatory on the States. Although this Court has twice ruled on this issue and found that the Second Amendment was simply a restriction on the Federal Government, each of these decisions were prior to the inception of this Court's incorporation doctrine.

In *United States v. Cruikshank*, 92 U.S. 542, 553 (1875), this Court stated that the Second Amendment "is one of the amendments that has no other effect than to restrict the powers of the national government." Similarly, in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), this Court held that the Second Amendment "is a limitation only upon the power of Congress and the National government." While neither of these cases has been directly overruled on this issue, this Court, in *Gideon v. Wainwright*, 372 U.S. 335, 343 (1963), set forth a concise summation of the current incorporation doctrine. This Court concluded that "certain fundamental rights, safeguarded by the first eight amendments against federal action, [are] also safeguarded against state action by the due process of law clause of the Fourteenth Amendment." *Id.*

E. Old York Code sections 40.5 and 40.6 violate the Second Amendment right of an individual to keep and bear arms

1. *Handguns are a type of weapon protected by the Second Amendment*

Handguns are one type of weapon that clearly pass the test in *Miller* as among those properly within the purview of the Second Amendment. 307 U.S. at 178. The *Miller* Court articulated a two-part test for whether a certain type of weapon should be afforded Second Amendment protection. *Id.* The first prong of this test asks whether the weapon bears "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Id.* Whatever the status of the current market, handguns certainly provide a source of preservation for a militia since they are weapons and may be used in battle.

The second prong asks whether the weapon "is any part of the ordinary military equipment" or whether "[the weapon] use could contribute to the common defense." *Id.* Again it is plainly obvious, and possibly within judicial notice, that handguns satisfy both halves of the conjunctively phrased second prong. Handguns are certainly "ordinary military equipment," shown by the fact that every police officer carries a handgun, and training in the use of handguns is a prerequisite to formal induction into the

Armed Services. Likewise, handguns are a weapon that "could contribute to the common defense." Although there exist whole categories of weapons that the State of Old York is free to ban, the Second Amendment prohibits a complete ban on this type of weapon.

2. *Old York Code sections 40.5 and 40.6 unconstitutionally restrict individual access to handguns*

There is obviously a need for states to regulate many of the aspects of handgun ownership, and Mr. Longone does not deny that all such legislation would be unconstitutional. The legislation enacted by the State of Old York goes beyond the police power to regulate gun ownership to serve a legitimate state interest, constituting an impermissible ban on legal handgun ownership. R. at 6-7.

II. THE FAAAA EXPRESSLY PREEMPTS SECTIONS 40.3, 40.4, 40.5 AND 40.7 OF THE OLD YORK CODE

The Supremacy Clause of the United States Constitution prescribes that "the Laws of the United States . . . shall be the supreme Law of the Land." U.S. Const. art. VI, cl. 2. As a result, Congressional laws can preempt state statutes. *See, e.g.*, *Schneidewind v. ANR Pipeline Co.*, 485 U.S. 293, 310 (1988) (holding that federal Natural Gas Act preempts Michigan statute regulating authority of natural gas companies to issue securities). Congressional intent determines whether preemption applies. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996). Congress intends to preempt state law when it "adopt[s] express language defining the existence and scope of pre-emption." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 109 (1992) (Kennedy, J., concurring in judgment and concurring in part)). The plain wording of the preemption clause contains the best and primary evidence of Congressional intent. *CSX Transp., Inc. v. Easterwood*, 507 U.S. 658, 664 (1993).

A. The text of Section 14501(c)(1) of the FAAAA shows Congressional intent to broadly preempt all state regulations relating to the price, route, or service of a motor carrier

The Federal Aviation Administration Authorization Act of 1994 ("FAAAA") provides that "a State . . . may not

enact or enforce a law . . . *related to* a price, route, or service of *any* motor carrier . . . ." 49 U.S.C.A. § 14501(c)(1) (West 2008) (emphasis added). The terms "any" and "related to" indicate a broad preemptive intent. "Any" means "one . . . of whatever kind." *N.H. Motor Transp. Ass'n v. Rowe*, 448 F.3d 66, 72 (1st Cir. 2006) (quoting Merriam Webster's Collegiate Dictionary 53 (10th ed. 2001)), *cert. granted*, 127 S. Ct. 3037 (2007). As a result, the FAAAA preempts a state law even if that state law only affects a single motor carrier. *Id.*

The phrase "related to" indicates a similarly broad reach. This Court, interpreting the preemptive provision of the Airline Deregulation Act of 1978 ("ADA"), concluded that the phrase "relating to" expresses a "broad pre-emptive purpose." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992). Thus, the FAAAA preempts state laws which have a mere "connection with or reference to" the price, route, or service of any motor carrier. *Id.* at 384. The test is whether a state law either makes an "express reference to" or has a "forbidden significant effect" on such a price, route, or service. *Id.* at 388.

The Conference Committee Report accompanying the FAAAA explicitly states that the FAAAA does not "alter the broad

preemption interpretation adopted by the United States Supreme Court" in *Morales*. H.R. Conf. Rep. No. 103-677, (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1994 WL 440339, at *83. These committee reports provide arguably the best non-textual source of Congressional intent. *Simpson v. United States*, 435 U.S. 6, 17-18 (1978) (Rehnquist, J., dissenting). The legislative history thus also indicates that Congress, by using the phrase "related to," clearly intended Section 14501(c)(1) of the FAAAA to have the broad preemptive reach outlined in *Morales*.

B. Section 14501(c)(1) of the FAAAA preempts sections 40.3, 40.4, 40.5 and 40.7 of the Old York Code because those sections relate to a carrier's service

1. *Sections 40.3 and 40.4 expressly reference a carrier's service by regulating the delivery of handgun ammunition*

A law "relates to" a carrier's service when it makes an "express reference" to such service. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992). Old York Code section 40.3 prohibits a person or corporation from delivering or causing to be delivered any handgun ammunition to a minor. Old York Code § 40.2(a) (defining "person" as "an individual or corporation"). Section 40.4 provides that reasonable reliance on "satisfactory evidence of age and identity" is a defense to prosecution under section 40.3.

These sections by their very terms refer to the services of the York Loading Company ("YLC"). YLC cannot provide the service of delivering handgun ammunition unless it reasonably relies on governmental documentation indicating that the recipient is over 18. Old York Code § 40.2(d) (defining "satisfactory evidence of age and identity"). As a result, YLC cannot deliver handgun ammunition if the recipient is unavailable or does not have proper identification. Further, if the recipient is available and does have proper identification, YLC still must take the time to verify the identification. The FAAAA preempts these regulations because they make express reference and thus "relate to" YLC's service of delivering handgun ammunition.

2. *Sections 40.3, 40.4, 40.5 and 40.7 have a forbidden significant effect upon a carrier's service because they require burdensome methods of transporting handguns and handgun ammunition*

A law also "relates to" a carrier's service when it has a "forbidden significant effect" on such service. *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992). In *Morales*, this Court held that even though certain Texas regulations did not expressly reference airline fares, the regulations related to such fares because they imposed severe restrictions on airline

advertising. *Id.* at 390. The ADA preempted these regulations because they imposed "a significant impact upon the airlines' ability to market their product, and hence a significant impact upon the fares they charge." *Id.*

Likewise, Old York Code sections 40.5 and 40.7, without making express reference to a carrier's service, nevertheless impose severe restrictions on such service. Section 40.5 provides that "no person in this State may possess or control any handgun . . . [without] a registration certificate for the handgun." But these certificates "may be issued only to law enforcement officers or former law enforcement officers residing in this State." *Id.* Section 40.5 thus limits handgun possession or control to current or former law enforcement officers residing in Old York. In effect, YLC and its employees cannot deliver handguns since they certainly possess or control the handguns they transport. *See, e.g.*, Cal. Penal Code § 12025(g) (West 2008) (defining "possession" of firearm as including "custody"). Surely, a law that effectively prohibits YLC from delivering handguns imposes a "significant impact" on its ability to provide this service. *Morales*, 504 U.S. at 390.

Old York Code sections 40.3 and 40.4 similarly create

a "forbidden significant effect" on YLC's service. In addition to expressly referring to a carrier's service, these sections impose severe burdens on YLC's ability to deliver handgun ammunition to of-age recipients. *See* Part II.B.1, *supra*, at pp. 25-26. These sections also in effect force YLC to make multiple delivery attempts if the recipient is not available or does not have the proper identification. The restrictions at the least significantly affect the "timeliness and effectiveness" of YLC's service. *See UPS v. Flores-Galarza*, 318 F.3d 323, 335-36 (1st Cir. 2003) (holding that the FAAAA preempts Puerto Rico regulation forbidding delivery unless recipient produces certificate because regulation "significantly affects the timeliness and effectiveness of UPS's service").

Moreover, the exemptions in Old York Code section 40.7 do not relieve the "forbidden significant effects" of sections 40.3, 40.4, and 40.5. Section 40.7 allows transportation of handgun ammunition "from which the propellant has been removed and the primer has been permanently deactivated." Section 40.7 also permits YLC to transport a handgun if it is "unloaded in a locked container." As a result, YLC must inspect all handguns and ammunition to make sure these items conform to section

40.7.[3] YLC not only must train its employees for these tasks, it also must take the time to carry out these inspections. The exemptions thus do not in the least ease the restrictions on YLC's ability to make timely and effective deliveries. *UPS*, 318 F.3d at 335-36.

C. The FAAAA preempts sections 40.3, 40.4, 40.5 and 40.7 of the Old York Code because those sections also are inconsistent with the structure and purpose of the FAAAA

The language of a preemption statute best determines Congress' intent. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 486 (1996) (citation omitted). However, the "structure and purpose of the statute as a whole" also shed light on which laws Congress intended to preempt. *Gade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 98 (1992) (plurality opinion). The FAAAA preempts Old York's regulations of a carrier's service because those regulations conflict with the "provisions of the whole" FAAAA and its "object and policy." *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (citations omitted).

[3] The deactivation of primers alone involves an especially complicated and uncertain process. *See, e.g.*, Dillon Precision Products, *Safety Points to Know Before You Begin*, http://www.dillonhelp.com/rl550benglish/safety.htm (last visited Feb. 10, 2008).

1. *Sections 40.3, 40.4, 40.5 and 40.7 of the Old York Code are inconsistent with the purpose of the FAAAA because they impose burdens on a carrier's ability to function in interstate commerce*

Congress enacted the FAAAA preemption provision to ease the burden on carriers imposed by regulations which differ from state to state. H.R. Conf. Rep. No. 103-677, (1994), *reprinted in* 1994 U.S.C.C.A.N. 1715, 1994 WL 440339, at *86-87 (noting that state laws affecting carriers do not regulate "in the same manner or to the same degree" and that the need for preemption "has arisen from this patchwork of regulation"). As a result, the FAAAA's preemption provision serves "the public interest" and is "necessary to facilitate interstate commerce."[4] *Id.* at *87. Congress thus intended the FAAAA to preempt all state laws which affect a carrier's service because such laws cause "significant inefficiencies" and "increased costs" and inhibit "transportation companies to freely compete more efficiently and provide quality service to their

[4] Even the American Trucking Associations ("ATA") supported federal preemption "after years of official policy against intrastate motor carrier deregulation." *Id.* at *88. The ATA, in fact, filed an amicus brief before this Court in favor of FAAAA preemption of Maine provisions regulating the delivery of tobacco. *See* Br. of the Am. Trucking Ass'ns, Inc. and the Chamber of Commerce of the United States of America as Amici Curiae in Support of Resp'ts, *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 557 (Oct. 11, 2007) (No. 06-457), 2007 WL 3020791.

customers." *Id.* at *87-88.

The Old York provisions regulating the delivery of handguns and ammunition squarely conflict with the FAAAA's goal of freeing carriers from the effects of cumbersome state regulation. To make such deliveries, YLC must comply with severely burdensome requirements, which force YLC to train its employees, inspect packages and verify identification. *See* Part II.B.2, *supra*, at pp. 26-29. As a result, YLC must modify its operations solely to make deliveries in Old York. However, as "one of the world's largest package and delivery companies," R. at 4, YLC needs the ability to standardize its services. *See, e.g.*, Joint Appendix at 67-68, *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 557 (Aug. 23, 2007) (No. 06-457), 2007 WL 2426402 at * 67-68 (a nationwide carrier's operations are "based on uniformity" which is essential to "survival in a highly competitive industry"). Moreover, this Court looks beyond the particular burden imposed by a single state to the effect such regulations impose if enacted by "all 50 States" in different ways. *Egelhoff v. Egelhoff*, 532 U.S. 141, 151 (2001) (ERISA preemption provision seeks to eliminate conforming conduct to the "peculiarities of the law of each jurisdiction") (citation omitted). The FAAAA preempts Old York's regulations because they not only

impair YLC's ability to carry out its service in Old York but frustrate Congress' goal of promoting interstate commerce through state deregulation of carriers. *See Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 389 (1992) (holding that the ADA preempts Texas regulations partly because "State to State" variation in taxes and surcharges forces the airlines to conduct their business differently in each state).

2. *Sections 40.3, 40.4, 40.5 and 40.7 of the Old York Code are inconsistent with the structure of the FAAAA because the FAAAA's listed exceptions imply the exclusion of other exceptions*

The structure of the FAAAA indicates that Congress intended to subject YLC in its delivery of handguns and ammunition to only federal regulation. For example, in *Gade v. National Solid Waste Management Ass'n*, 505 U.S. 88, 100 (1992) (plurality opinion), this Court held that the federal Occupational Safety and Health Act of 1970 ("OSH Act") preempted Illinois statutes because the OSH Act "as a whole" evidenced Congress' intent to "avoid subjecting workers and employees to duplicative regulation." This Court looked to the saving clause of the OSH Act, which exempted a state law from preemption in specific circumstances. *Id.* The "natural implication" of the saving clause was that the OSH Act preempted all state laws

which did not fall under that clause. *Id.* If the OSH Act exempted state laws which did not fall under the saving clause, the saving clause became "superfluous." *Id.* (noting that "[i]t is our duty to give effect, if possible, to every clause and word of a statute") (alteration in original) (internal quotation marks omitted) (citations omitted). Thus, the provisions of the OSH Act "as a whole" indicated that Congress intended the OSH Act to preempt any state laws which did not fall under the saving clause. *Id.* at 102.

The FAAAA contains a similar saving clause. The FAAAA saves from preemption state regulations "with respect to [the safety] of motor vehicles," "highway route controls," "limitations based on size or weight" of the vehicle or "the hazardous nature of the cargo," and "financial responsibility" of carriers relating to insurance. 49 U.S.C.A. § 14501(c)(2)(A) (West 2008). The FAAAA also does not preempt state regulation of "the intrastate transportation of household goods" or "the price of for-hire motor vehicle transportation by a tow truck." § 14501(c)(2)(B),(C). Old York's regulations do not fall under any of these exceptions because they regulate the delivery of handguns and ammunition, not household goods,

insurance, tow trucks, or highway routes. *See* R. at 29. Old York's regulations likewise do not fall under the hazardous cargo or motor vehicle safety exceptions because they aim to regulate the "unfettered access to guns and bullets," not the inherent danger of a carrier transporting such cargo. *See* R. at 20. As a result, the FAAAA's saving clause saves none of Old York's regulations.

Further, the FAAAA's saving clause, as an "exception to [the] general rule" of preemption, implies that only the "enumerated matters" in that clause escape preemption. *City of Columbus v. Ours Garage and Wrecker Serv., Inc.*, 536 U.S. 424, 428-29 (2002). Congress thus did not intend to exempt from preemption regulations not covered in the saving clause. *See, e.g.*, *United States v. Brockamp*, 519 U.S. 347, 352 (1997) (noting that Internal Revenue Code provision's "explicit listing of exceptions" to its statute of limitations indicates that Congress did not intend courts to read "other *unmentioned*" exceptions) (emphasis added). The basic language and layout of the FAAAA bear out Congress' intent. Section 14501(c)(1) contains the "[g]eneral rule" of preemption and section 14501(c)(2) lists the "[m]atters not covered." Thus, the structure of the FAAAA as a whole also supports preemption of Old York's regulations.

D. The FAAAA preempts sections 40.3, 40.4, 40.5 and 40.7 of the Old York Code regardless of whether Old York enacted those sections as public safety measures under its police power

Old York contends that the FAAAA does not preempt its regulations because they are public safety measures. R. at 20. Though this Court presumes that Congress did not intend to preempt a state law enacted pursuant to a state's "historic police powers," that presumption avails Petitioner nothing for two reasons. *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (citations omitted). First, the "clear and manifest purpose of Congress" to preempt state laws such as Old York's easily rebuts the presumption. *Id.* Second, the presumption against preemption does not even apply in this context because interstate transportation of goods is not "a field which the States have traditionally occupied." *Id.; see also United States v. Locke*, 529 U.S. 89, 108 (2000) (noting that the presumption of "nonpre-emption is not triggered when the State regulates in an area where there has been a history of significant federal presence") (citations omitted).

Clearly, Congress intended the FAAAA to preempt all state regulations relating to a carrier's service. The text of the FAAAA's preemption provision, as well as its structure and Congress' purpose in enacting it support preemption here. *See* Part II.A, *supra*, at pp. 23-25 and Part II.C, *supra*, at pp. 29-35. Congress' "clear and manifest purpose" rebuts any presumption against preemption. *Medtronic*, 518 U.S. at 485.

Moreover, federal regulation under the Commerce Clause of the interstate transportation of goods dates back to 1887. *See, e.g.*, Br. of Resp'ts at 3-4, *Rowe v. N.H. Motor Transp. Ass'n*, 128 S. Ct. 557 (Oct. 11, 2007) (No. 06-457), 2007 WL 3000332 at *3-4. Given this "history of significant federal presence" in the interstate transportation of goods, the presumption simply does not apply. *Locke*, 529 U.S. at 108.[5]

[5] Old York may still exercise its police power to protect its citizens from gun violence. California, for example, has similar provisions. *See, e.g.* Cal. Penal Code § 12324 (West 2008) (exception for propellant removal and primer deactivation). But the only provision which prohibits the *delivery*, as opposed to the *sale*, of ammunition, is section 12321, which follows federal law in prohibiting armor piercing ammunition. *See* 18 U.S.C.A. § 922(a)(8) (West 2008). Additionally, any such regulations must comport with the Second Amendment. *See* Part I, *supra*, at pp. 9-22.

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fourteenth Circuit should be affirmed.

Dated: February 15, 2008

Respectfully submitted,

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Counsel for Respondent

APPENDIX A

The relevant United States constitutional provisions provide:

U.S. Const. art. VI, cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. amend. II

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.

APPENDIX B

The relevant provisions of the Old York Code provide:

Old York Code section 40.2

Definitions. As used in this title, these terms have the following meanings.

a. Person. "Person" means an individual or corporation.

. . .

d. Satisfactory evidence of age and identity. "Satisfactory evidence of age and identity" means a document issued by a government entity that bears the name, date of birth, and photo of the person.

. . .

Old York Code section 40.3

Illegal delivery of handgun ammunition. No person may knowingly deliver or cause to be delivered any handgun ammunition to a person under 18 years of age.

Old York Code section 40.4

Defense. Proof that a person or his or her agent requested, received and reasonably relied upon satisfactory evidence of age and identity may be a defense to any criminal prosecution under this title.

Old York Code section 40.5

Registration. No person in this State may possess or control any handgun, unless he or she holds a registration certificate for the handgun. Registration certificates may be issued only to law enforcement officers or former law enforcement officers residing in this State. No registration certificate may be issued for any handgun not validly registered to the current applicant before the effective date of this title.

Old York Code section 40.6

Handguns must be unloaded and disassembled or locked. No person holding a registration certificate may keep any handgun in his or her possession unless the handgun is unloaded and disassembled or bound by a trigger lock or similar device.

Old York Code section 40.7

Exemptions. Nothing in this title prohibits the possession, sale, or transport of handgun ammunition from which the propellant has been removed and the primer has been permanently deactivated. Nothing in this title prohibits a person from transporting a handgun through this State if that person is transporting the firearm in a manner permitted by federal law and provided, further, that

the handgun is transported unloaded in a locked container.

APPENDIX C

The relevant provisions of the Federal Aviation Administration Authorization Act of 1994 as codified in title 49 of the United States Code provide:

§ 14501 Federal authority over intrastate transportation

. . .

(c) Motor Carriers of Property. -

(1) General rule. - Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713 (b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.

(2) Matters not covered. - Paragraph (1) -

(A) shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of

financial responsibility relating to insurance requirements and self-insurance authorization;

(B) does not apply to the transportation of household goods; and

(C) does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.