

STATE OF NEW YORK  
ERIE COUNTY (SUPREME) COURT

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THE PEOPLE OF THE STATE OF  
NEW YORK

v.

DEFENDANT

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**NOTICE OF MOTION**

Indictment No.

YOUR HONOR:

Please take notice that at a term of Erie County (Supreme) Court held at 9:30 on \_\_\_\_\_, 2023 or as soon thereafter as counsel can be heard, the defendant will move to dismiss the indictment on the ground that Penal Law § 265.03(3), as applied to this case, violates the Privileges and Immunities Clause of the Constitution of the United States (Art IV, § 2). By this motion, the defendant is notifying the New York Attorney General as required by CPLR 1012(b)(1).

\_\_\_\_\_, 2023

Respectfully yours,

ATTORNEY, ESQ.  
Attorney at Law

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TO:

Hon. \_\_\_\_\_

Erie County District Attorney  
25 Delaware Ave.  
Buffalo, NY 14202

Office of the Attorney General  
Litigation Bureau  
Justice Building, 2nd Floor  
Albany, NY 12224

STATE OF NEW YORK  
ERIE COUNTY (SUPREME) COURT

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THE PEOPLE OF THE STATE OF  
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**SUPPORTING AFFIRMATION**

Indictment No.

STATE OF NEW YORK            )  
COUNTY OF ERIE            )       ss.  
CITY OF BUFFALO            )

ATTORNEY, ESQ., an attorney licensed to practice in the courts of this State, affirms the truth of the following statements under penalties of perjury.

1. I am counsel for the defendant, who is charged in this indictment with criminal possession of a weapon in the second degree (Penal Law § 265.03[3]) for his alleged possession of a \_\_\_\_\_.
2. I make this affirmation in support of my motion to dismiss the indictment. The affirmation is made upon information and belief, the sources of which are discussions with my client and a review of the discovery provided by the prosecution.
3. Upon a defendant's motion, the Court may dismiss an indictment on the ground that it is defective, within the meaning of CPL 210.25 (CPL 210.20[1][a]). An indictment is defective, in relevant part, when "the statute defining the offense charged is unconstitutional" (CPL 210.25[3]).
4. Penal Law § 265.03(3) is unconstitutional, as applied to this case, because it violates the Privileges and Immunities Clause of the Constitution of the United States (Art IV, § 2). It does so by embedding a licensing law that denies a fundamental right of American citizenship – the right to keep and bear arms – to non-residents.

**The right to keep and bear arms is a privilege of American citizenship.**

5. “The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States” (US Const Art IV, § 2).
6. The privileges and immunities of American citizenship are those “which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; and which have, at all times, been enjoyed by the citizens of the several states which compose this Union” (*Corfield v. Coryell*, 6 F. Cas. 546, 551 [1823], Washington, J.). “The object of the Privileges and Immunities Clause is to strongly constitute the citizens of the United States as one people, by placing the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned” (*Clement v. Durban*, 147 AD3d 39, 42 [2nd Dept. 2016], *affirmed* 32 NY3d 337, *quoting* *McBurney v. Young*, 569 US 221, 226 [2013]).
7. In other words, the Constitution prohibits States from discriminating against citizens of other States in their ability to exercise the fundamental rights of American citizenship. This means that non-residents, as a subset of non-citizens, must be placed on equal footing with the citizens and residents of New York.
8. One of these fundamental rights is the right to keep and bear arms.
9. The Second Amendment confers a personal right to keep and bear arms for lawful purposes, including the “core lawful purpose of self-defense” (*District of Columbia v. Heller*, 554 US 570, 630 [2008]). Handguns, including the pistol allegedly possessed by the defendant, are protected by the Second Amendment, as “the American people have considered the handgun to be the quintessential self-defense weapon” (*id.* at 629).
10. Without question, “the right to keep and bear arms is a privilege of American citizenship” (*McDonald v. City of Chicago, Ill.*, 561 US 742, 806 [2010], Thomas, J., concurring).

**New York denies non-residents the right to keep and bear arms.**

11. New York regulates the right to keep and bear arms through Penal Law § 400.00, the State's exclusive mechanism for the licensing of firearms (*O'Connor v. Scarpino*, 83 NY2d

12. The licensing law includes a residency requirement. An application for a firearms license must be made “to the licensing officer in the city or county, as the case may be, where the applicant resides, is principally employed or has his or her principal place of business as merchant or storekeeper” (Penal Law § 400.00[3][a]).
13. In other words, New York denies non-residents the ability to obtain a firearms license - and therefore their ability to exercise their fundamental right to keep and bear arms when they pass through the State.
14. The defendant is one of these non-residents. (explanation of circumstances)

15. Ilan Wurman, a law professor at Arizona State University, recently gave an illustration of the meaning of the Privileges and Immunities Clause.

3

16. Replace these states with New York and \_\_\_\_\_, and this is not a hypothetical case; it is exactly this case. New York cannot require non-residents to leave their guns at the door – but it does.
17. The licensing law left the defendant with no ability to possess the quintessential self-defense weapon to protect himself as he drove his truck through the State.
18. Because New York grants its citizens and residents the right to keep and bear arms but denies it to non-residents, Penal Law § 400.00(3)(a) is unconstitutional on its face. Penal Law § 265.03(3) – the criminal prohibition that embeds the licensing law – is unconstitutional as applied to this case.

Because New York denied the defendant his ability to exercise a fundamental right of American citizenship, the indictment must be dismissed.

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ATTORNEY, ESQ.