No. 20-843

In The
Supreme Court of the United States

NEW YORK STATE RIFLE &
PISTOL ASSOCIATION, INC., et al.,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL
CAPACITY AS SUPERINTENDENT OF
NEW YORK STATE POLICE, et al.,

Respondents.

**On Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit**

BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, WELD COUNTY, COLORADO, WELD COUNTY SHERIFF STEVE REAMS, INDEPENDENCE INSTITUTE, AND FIREARMS POLICY FOUNDATION IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

INTEREST OF THE *AMICI CURIAE*[1]

***Amici* law professors** teach and/or write on the Second Amendment: Randy Barnett (Georgetown), Royce Barondes (Missouri), Nicholas Johnson (Fordham), Donald Kilmer (Lincoln), Michael O'Shea (Oklahoma City), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), and Eugene Volokh (UCLA). Cited by this Court in *District of Columbia v. Heller* and *McDonald v. Chicago*, and oft-cited by lower courts, these professors include authors of the first law school textbook on the Second Amendment, and many other books and law review articles on the subject. *See* http://davekopel.org/Bruen/ProfessorBiographies.pdf.

Weld County, Colorado, and County Sheriff Steve Reams want the right to bear arms of the more than 300,000 people of the County, and all Americans, to be protected by the "double security" of "the rights of the people" inherent in our system of divided sovereignty. THE FEDERALIST NO. 51.

Independence Institute is a nonpartisan public policy research organization. The Institute's *amicus* briefs in *Heller* and *McDonald* (under the name of lead *amicus* Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*).

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[1] All parties consented to the filing of this brief. No counsel for any party authored the brief in any part. Only *amici* funded its preparation and submission.

Firearms Policy Foundation (FPF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPF focuses on research, education, and legal efforts to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

SUMMARY OF ARGUMENT

The Second Amendment places the right to bear arms on equal footing with the right to keep arms. As dictionaries from the founding era attest, to "bear arms" includes public carriage for lawful purposes.

Americans were the first Englishmen to have a written guarantee of arms rights. From the earliest colonial days, they carried arms to church, court, public assemblies, travel, work in the field, and most everywhere else they pleased—starting in childhood.

After the 1689 English Bill of Rights, peaceable carry was constitutionally protected in England and America. Still, Americans saw the English right as subject to abuse, so they deliberately constitutionalized a broader right.

Nineteenth-century sources and case law, including those relied on by this Court for original understanding, support the right of ordinary citizens to carry for self-defense beyond the home.

ARGUMENT

I. The Second Amendment's text protects the right to carry arms.

A. The text places "bear" on equal footing with "keep."

The Second Amendment protects both the right to *keep* and the right to *bear* arms. U.S. CONST. amend. II. Rather than creating a hierarchy, the text protects both rights equally. Thus, *District of Columbia v. Heller* held that the Second Amendment "guarantee[s] the individual right to *possess* and *carry* weapons in case of confrontation." 554 U.S. 570, 592 (2008) (emphasis added). Just as law-abiding citizens cannot be prevented from *possessing* arms, they cannot be prevented from *carrying* arms.

B. Contemporary dictionaries defined "bear" to mean "carry."

Thomas Sheridan defined "To Bear" as "To Carry." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (6th ed. 1796) (unpaginated).[2] Samuel Johnson defined "Bear" as "To convey or carry." Samuel Johnson, 1 DICTIONARY OF THE ENGLISH LANGUAGE (4th ed. 1773) (unpaginated).[3] The first dictionary of *American* English defined "Bear" as "To Carry" and "To wear," Noah Webster, 1 AMERICAN DICTIONARY

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[2] *Heller* relied on Sheridan to define "bear." *Id.* at 584.

[3] *Heller* relied on Johnson to define "arms," 554 U.S. at 581, "keep," *id.* at 582, "bear," *id.* at 584, and "well-regulated," *id.* at 597.

OF THE ENGLISH LANGUAGE (1828) (unpaginated),[4] and in the definition of "pistol," explained that "Small pistols are carried in the pocket," 2 *id. Heller* defined "bear" as to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed." 554 U.S. at 584 (quotation omitted).

To carry arms in a pocket (*Heller* and Webster) or "upon the person or in the clothing" (*Heller*) are indicia of public activity, not confined to the home.

II. The English Bill of Rights protected the carrying of firearms outside the home.

In constitutional interpretation, the analytical baseline for English history is what the Founders thought of it. *See Heller*, 554 U.S. at 593 ("By the time of the founding, the right to have arms had become fundamental for English subjects."). The Revolution and the founding sought to preserve cherished English liberties *and* to found a new nation on broader rights than those of England. Justice John M. Harlan's famous analysis of American "liberty," including the "right to keep and bear arms," looked to "the balance struck by this country, having regard to what history teaches are the traditions from which it developed as well as the traditions from which it broke." *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J.,

[4] *Heller* relied on Webster to define "arms," *id.* at 581, "keep," *id.* at 582, "bear," *id.* at 584, and "militia," *id.* at 595.

dissenting). American ideals, not the decrees of tyrannical medieval kings, are the foundation of American rights.

A. Americans and English believed that the carrying of arms was the natural right of self-defense.

The first Englishmen to have a written guarantee of arms rights were the settlers of the Virginia Colony in 1607 and the New England Colony in 1620. Their royal charters gave them and all succeeding immigrants the perpetual right to import from the King's dominion's "the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, Defence or otherwise." For the first seven years, there would be no taxes on these America-bound exports. 7 FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS 3787-88 (Francis Thorpe ed., 1909); 3 *id.* at 834-35 (New England) ("Armour, Weapons, Ordinances, Munition, Powder, Shott, Victuals, and all Manner of Cloathing, Implements ... all other Things necessary ... for their Use and Defense").

For England rather than America, the first arms right was not written down until the 1689 Declaration of Rights. Yet, it declared that the right to arms was among the subjects' "true, ancient and indubitable rights." 1 W. & M., Sess. 2, c. 2 (1689).

As a later Member of Parliament put it, "by the bill of rights, the right to carry arms for self-defence

was not created, but declared as of old existence." 69 HANSARD'S PARLIAMENTARY DEBATES, ser. 3, 1151 (May 30, 1843) (M.J. O'Connell).

According to Blackstone, "the right of having and using arms for self-preservation and defence" is part of "the natural right of resistance and self-preservation." 1 William Blackstone, COMMENTARIES 139, 140 (1765). Thus, Edward Christian's founding-era edition of Blackstone stated, "every one is at liberty to keep or carry a gun, if he does not use it for the destruction of game." 2 William Blackstone, COMMENTARIES 412 n.2 (Edward Christian ed., 12th ed. 1794).

Few, if any, cases in colonial America were as well-known as the Boston Massacre trial. The prosecution and the defense agreed that Bostonians had the right to carry defensive arms. The prosecution explained that because of the Redcoats' behavior in Boston, even "the most peaceable" Bostonians "found it necessary to arm themselves with heavy Walking Sticks or Weapons of Defence when they went abroad." 3 John Adams, LEGAL PAPERS OF JOHN ADAMS 274 (Wroth & Zobel eds., 1965). In the prosecution's view, "every man . . . had a right . . . to defend himself if attacked." *Id.* at 149.

Defense counsel for the British soldiers, John Adams, agreed: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence,

that distinction is material and must be attended to." *Id.* at 248.

Blackstone had described self-defense as "the primary law of nature," 3 COMMENTARIES, at 4, which Adams quoted as "[t]he primary cannon in the law of nature," 3 Adams, LEGAL PAPERS, at 244. Adams cited William Hawkins for the rule that all people, including British soldiers, have the right to arm themselves against rioters. *Id.* at 247-48 (citing 1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 71 (4th ed. 1762)).

B. Peaceable carry for self-defense was protected under English tradition.

King James II was overthrown in 1688 in part because he was pushing gun control to extremes. The 1689 Bill of Rights resulted from his "refusal to allow Protestants the right to carry arms for self-defense." 6 William Holdsworth, A HISTORY OF ENGLISH LAW 241 (3d ed. 1924). The right to arms included armed resistance to criminal tyrants. 2 J.L. de Lolme, THE RISE AND PROGRESS OF THE ENGLISH CONSTITUTION 886 (1775) (A.J. Stephens ed., 1838).

Parliament offered the crown to William and Mary, who accepted the Declaration, and it became the Bill of Rights. It corrected prior violations of "the rights of Englishmen"—which were expressly guaranteed to Americans by colonial charters. 7 Thorpe 3788 (Virginia, 1606); 3 *id*. at 1839 (New England, 1620);

1 *id*. at 533 (Connecticut); 2 *id.* at 773 (Georgia); 3 *id*. at 1681 (Maryland); 3 *id*. at 1857 (Massachusetts Bay); 5 *id*. at 2747 (Carolina, later divided into North and South); 6 *id*. at 3220 (Rhode Island).

According to Chancellor James Kent, "the English nation . . . had frequently been obliged to recover their indefeasible rights . . . and then to proclaim them by the most solemn and positive enactments" such as "the bill of rights." 2 James Kent, COMMENTARIES ON AMERICAN LAW *7-8 (O.W. Holmes, Jr. ed., 12th ed. 1873).

1. Fourteenth-Century Orders and Enactments.

Long before there was a written English right to arms, the king tried to prevent trouble from a huge crowd of travelers coming into London for the Feast of St. Thomas the Apostle. A royal instruction "ordered London hostelries to warn their guests 'against going armed in the City.'" 1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-1364, at 156 (Dec. 19, 1343) (A.H. Thomas ed., 1898). The king also instructed the hostels to refuse travelers "not of good fame" or "evildoers." As for "suspicious characters," they should be reported to law enforcement. *Id.* To the Ninth Circuit, the Feast of St. Thomas instructions showed how arms carry restrictions "permeated public life." *Young v. Hawaii*, 992 F.3d 765, 789 (9th Cir. 2021) (en banc).

To the contrary, the Feast of St. Thomas decree presumes that travelers will be carrying arms and will expect to continue carrying in London. The king ordered the hostelers to tell the visitors to pause their usual practices.

Young stated: "In 1350, Parliament specifically banned the carrying of concealed arms." *Id.* at 788. The words *Young* quoted from the statute were accurate: "if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other . . . it shall be judged . . . Felony or Trespass." *Id.* at 788-89; 25 Edw. 3, 320, st. 5, c. 2, §13 (1350).

However, a fuller quote of the statute shows that it punished concealed carry only when perpetrating violent crime:

> if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom for to have his Deliverance*, . . . it shall be judged . . . Felony or Trespass.

Id. §13 (emphasis added).

2. *Chune v. Piott*.

The first reported case on the Statute of Northampton involved a defendant who caused a breach of the peace that terrorized the public. The sheriff could arrest the perpetrator even if the terrorizing acts did not occur in the Sheriff's presence:

> Without all question, the sheriffe hath power to commit, est custos, & conservator pacis, if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, notwithstanding he doth not break the peace *in his presence*.

Chune v. Piott, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis added).

The *Young* opinion quoted only part of the above: "The sheriff could arrest a person carrying arms in public 'notwithstanding he doth not break the peace.'" 992 F.3d at 790. *Chune*'s rule was that sheriffs can arrest if they did not witness the breach. *Young* misstated the rule to say that sheriffs can arrest when there was no breach.

3. *Sir John Knight's Case.*

The famous case of Sir John Knight—prosecuted for peaceably defensively carrying a gun when he attended church—is accurately described in the amicus brief of the Firearms Policy Coalition and Professor Joyce Lee Malcolm. The leading proponent of a contrary view writes:

> [T]here is not a shred of historical evidence to suggest that the Founding Fathers understood it to be the leading case on the Statute of Northampton. In fact, the first ever citation to *Sir John Knight's Case* in any American case, legal commentary, newspaper, or personal correspondence does not appear until

> 1843. Stop and think about that for a moment. How can anyone claim the Founding Fathers understood a case to be authoritative if it was never mentioned or appeared in American discourse from the time it was decided in 1686 to 1843? The answer—at least to historians—is the claim is a complete fabrication. And fabricated history is quite simply not history at all. It is fiction.

Patrick J. Charles, *Judging the Ninth Circuit's Use of History in* Young v. Hawaii, SECOND THOUGHTS BLOG, Apr. 16, 2021.[5]

Actually, William Hawkins's TREATISE OF THE PLEAS OF THE CROWN, discussed next, cited *Knight's Case* for the precise point that peaceable defensive carry of ordinary arms is lawful. Published in England in 1716, with eight editions through 1824, Hawkins was the leading criminal law treatise of the eighteenth century, and widely used in America. Hawkins's explanation that arms carrying was generally legal was cited by the Tennessee Supreme Court, and by Justice of the Peace manuals in the Early Republic. *See Simpson v. State*, 13 Tenn. 356, 358-59 (1833); William Waller Hening, THE NEW VIRGINIA JUSTICE 17-18 (1795); James Parker, CONDUCTOR GENERALIS; OR THE OFFICE, DUTY AND AUTHORITY OF JUSTICES OF THE PEACE 11 (1st ed. 1764).[6] A survey of 21 early American

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[5] https://firearmslaw.duke.edu/2021/04/judging-the-ninth-circuits-use-of-history-in-young-v-hawaii/.

[6] Parker's was one of a few colonial law books written by Americans; Hening "replaced English texts" with "homegrown

law libraries found Hawkins in 11; no other English criminal law treatise was more common in America. Owners included Thomas Jefferson, John Adams, Francis Dana (Mass. Chief Justice, Congressman, Continental Congress delegate, signer of Articles of Confederation), Robert Treat Paine (Mass. Justice, Declaration of Independence signer), Jasper Yeates (Penn. Justice, delegate to Penn. ratifying convention), and Theoplilus Parsons (Mass. Chief Justice). Herbert Johnson, IMPORTED EIGHTEENTH-CENTURY LAW TREATISES IN AMERICAN LIBRARIES 1700-1799, at 29-30, 62 (1978).

The sensational 1686 political trial *Sir John Knight's Case* was reported by two independent reporters. One was Modern Law Reports. 3 Mod. 117 (K.B. 1686) (reported in the nineteenth century in 87 Eng. Rep. 75). The case was separately reported as *Rex v. Sir John Knight* in Comberbach 38 (1686) (90 Eng. Rep. 330). Comberbach followed up with a report a few months later about Sir Knight having to post bond for good behavior. Comberbach 41, 90 Eng. Rep. 331 (1686).

George Wythe, America's first law professor, owned the complete Modern Law Reports series, including the well-regarded volume 3, with *Knight's Case*. *See Modern Reports*, WILLIAM & MARY LAW

. . . republican law." "ESTEEMED BOOKES OF LAWE" AND THE LEGAL CULTURE OF EARLY VIRGINIA 32, 190 (Billings & Tarter eds., 2017).

LIBRARY.[7] Wythe also owned the volume of reports by Roger Comberbach.[8]

A signer of the Declaration of Independence, Professor Wythe served in the Continental Congress and the Philadelphia Convention. Among his apprentices and students were Chief Justice John Marshall, Justice Bushrod Washington, President Thomas Jefferson, President James Monroe, and St. George Tucker (author of the preeminent constitutional law treatise of the Early Republic, *see Heller*, 554 U.S. at 594). "Close with Jefferson throughout his life, [Wythe] bequeathed Jefferson his book collection, which Jefferson later sold to form the Library of Congress." *George Wythe Collection*, HEINONLINE.[9] As described in Part IV.D., the Founders who learned from Professor Wythe acted as if they had an unquestioned right to carry firearms for personal reasons, doing so since childhood.

4. William Hawkins and William Blackstone.

According to *Young*, William Hawkins

> recognized that the lawful public carry of arms required some particular need. The

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[7] http://lawlibrary.wm.edu/wythepedia/index.php/Modern_Reports.

[8] https://lawlibrary.wm.edu/wythepedia/index.php/Report_of_Several_Cases_Argued_and_Adjudged_in_the_Court_of_King%27s_Bench_at_Westminster.

[9] https://home.heinonline.org/content/legal-classics-library/#:~:text=In%201779%2C%20at%20the%20College,form%20the%20Library%20of%20Congress.

> desire for proactive self-defense was not a good enough reason to go armed openly. "[A] man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and [that] he wears it for the safety of his person from his assault."

992 F.3d at 792 (quoting 1 William Hawkins, A TREATISE OF THE PLEAS OF THE CROWN 489 (John Curwood ed., 1824)).

But "such armour" was a reference to "dangerous and unusual Weapons." 1 *Hawkins*, A TREATISE OF THE PLEAS OF THE CROWN, at 488-49. *Heller* turned "the historical tradition of prohibiting the carrying of 'dangerous and unusual weapons' " into the principle that the Second Amendment does not protect such weapons. 554 U.S. at 627. Because handguns are protected arms, *id.* at 629, they are not "dangerous and unusual," and Hawkins's qualification does not apply to them.

As for ordinary weapons, Hawkins explained that "no wearing of arms is within the meaning of this [Statute of Northampton], unless it be accompanied with such circumstances as are apt to terrify the people." 1 *Hawkins*, A TREATISE OF THE PLEAS OF THE CROWN, at 489. Thus, "persons of quality are in no danger of offending against this statute by wearing common weapons," nor are "persons armed with privy [concealed] coats of mail . . . because they do nothing *in terrorem populi*." *Id.*

Dangerous and unusual weapons were terrifying but common weapons could be carried, including in a concealed manner.

Blackstone likewise wrote that "[t]he offence of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the Statute of Northampton." 4 COMMENTARIES, at 148-49. The implication is that, as Hawkins had said, carrying common arms would not fall under the statute. *Young*, however, ignored the reference to "dangerous or unusual weapons" and read Blackstone as "stating that the mere act of going armed in and of itself terrified the people." 992 F.3d at 793.

5. Post-Bill of Rights case law.

For over two centuries after the Bill of Rights, Parliament never passed a general law against peaceable carry, and all the case law recognized the right to carry. In *King v. Smith*, 2 Ir. Rep. 190, 204 (K.B. 1914), the King's Bench held that acting *in terrorem populi* was an "essential element" of the Statute of Northampton. Merely carrying a revolver was not inherently terrifying. *See also Rex v. Meade*, 19 L. Times Rep. 540, 541 (1903) (right to peaceable carry does not include "firing a revolver in a public place, with the result that the public were frightened or terrorized"); *Rex v. Dewhurst*, 1 State Trials, N.S. 529, 601-02 (1820) ("A man has a clear right to protect himself when he is going singly

or in a small party upon the road where he is travelling or going for the ordinary purposes of business" but not to carry arms in a manner "calculated to produce terror and alarm."); Gun License Act, Act 33 & 34 Vict. c. 57 (1870) (10-shilling annual license from the post office to carry a firearm; postal clerks had no discretion to refuse a fee-paying applicant).

No historic post-1686 English or American case interprets the Statute of Northampton to bar peaceable defensive carry.

III. The Founders deliberately constitutionalized a right to self-defense that was broader than that of the English.

The American Founders called the English arms right insufficient. They secured a broader and stronger right, encompassing their own arms tradition informed by their experiences.

A. Americans inherited the natural right of self-defense.

Thomas Jefferson wrote that after the Revolution the Founders "appealed to those [laws] of nature," rather than "search into musty records, to hunt up royal parchments." *Thomas Jefferson to Major John Cartwright*, June 5, 1824, *in* 7 THE WRITINGS OF THOMAS JEFFERSON 356 (H.A. Washington ed., 1855). Consequently, "the constitutions of most of our states"

ensured that "it is their ["the people's"] right and duty to be at all times armed." *Id.* at 357.[10]

James Wilson said, "the great natural law of self preservation" that "is expressly recognized" in Pennsylvania's constitution is the "right of the citizens to bear arms in the defence of themselves." 3 James Wilson, THE WORKS OF THE HONOURABLE JAMES WILSON 84 (1804). Wilson addressed using arms for "the defence of one's person" separate from the right to "defend his house." *Id.* at 84-85. *See Heller*, 554 U.S. at 585 (relying on Wilson's interpretation of the Pennsylvania Constitution to interpret "bear arms" in the Second Amendment).

Other Founders identified the right to bear arms as inalienable. *See*, *e.g.*, 1 WORKS OF FISHER AMES 54 (Seth Ames ed., 1854) (Second Amendment right "of bearing arms" was among those "declared to be inherent in the people"); Stephen Halbrook, THAT EVERY MAN BE ARMED 259 n.169 (1984) (quoting Letter from Albert Gallatin to Alexander Addison, Oct. 7, 1789, MS.

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[10] Many state constitutions expressly recognize the right of self-defense as a natural, essential, or inalienable right. Pennsylvania (1776, 1790); Vermont (1777); Massachusetts (1780); New Hampshire (1783, 1792, 1902); Delaware (1792, 1831, 1897); Ohio (1802, 1851, 1912); Indiana (1816); Illinois (1818); Maine (1819); Iowa (1820); Arkansas (1836 and 1874); Florida (1838, 1868, 1885); New Jersey (1844); California (1849); Kansas (1855); Nevada (1864); Nebraska (1875); Colorado (1876); Idaho (1889); Montana (1889, 1972); North Dakota (1889); South Dakota (1889); Kentucky (1890); Utah (1895); New Mexico (1911). *See* David Kopel, *The Right to Arms in Nineteenth Century Colorado*, 95 DENVER U.L. REV. 329, 427-28 n.802 (2018).

in N.Y. Hist. Soc.—A.G. Papers, at 2) ("The whole of that Bill [of Rights] . . . establishes some rights of the individual as unalienable."). Or as Chancellor Kent wrote, "The right of self-defense . . . is founded on the law of nature, and is not and cannot be superseded by the law of society." 2 Kent, COMMENTARIES, at *15 (Holmes ed.).

Because "the interest in self-protection is as great outside as inside the home," *Moore v. Madigan*, 702 F.3d 933, 941 (7th Cir. 2012), this Court has often recognized the right of self-defense beyond the home. *See*, *e.g.*, David Kopel, *The Self-Defense Cases: How the Supreme Court Confronted a Hanging Judge in the Nineteenth Century*, 27 AM. J. CRIM. L. 294 (2000).

B. Americans disapproved of the constricted nature of the English right and deliberately codified a broader right.

Americans were contemptuous of what they considered to be a constricted English arms right. It is therefore a mistake to incorporate every restriction on the English right into the Second Amendment. *See Bridges v. California*, 314 U.S. 252, 264 (1941) ("to assume that English common law in this [First Amendment] field became ours is to deny the generally accepted historical belief that one of the objects of the Revolution was to get rid of the English common law on liberty of speech and of the press") (quotation omitted); *id.* ("Madison . . . wrote that 'the state of the press . . . under the common law, cannot . . . be the

standard of its freedom in the United States.'" (quoting VI THE WRITINGS OF JAMES MADISON 1790-1802, at 387 (1906))).

When James Madison introduced the Second Amendment in Congress, his notes show that he condemned the limited scope of the "English Decln. of Rts," including that it protected only "arms to Protestts" (Protestants). James Madison, *Notes for Speech in Congress Supporting Amendments, June 8, 1789*, *in* THE ORIGIN OF THE SECOND AMENDMENT 645 (David Young ed., 1991).

St. George Tucker stressed that the American right was "without any qualification as to their condition or degree, as is the case in the British government." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES 143 n.40 (1803). He denounced statutory infringements of the English right, using them as evidence that the English right was not as protective as the American one. *Id.* at App. 300.

William Rawle, author of an 1825 "influential treatise," *Heller*, 554 U.S. at 607, explained, "In most of the countries of Europe, this right . . . is allowed more or less sparingly." William Rawle, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 122 (1825). In England, "it is cautiously described to be that of bearing arms for their defence 'suitable to their conditions, and as allowed by law,'" and was "disgraced by [a]n arbitrary code for the preservation of game." *Id.*

Justice Joseph Story lamented that "under various pretences the effect of this provision [the English right]

has been greatly narrowed; and it is at present in England more nominal than real, as a defensive privilege." 3 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 747 (1833).[11]

Thomas Cooley noted that the Second Amendment "was adopted with some modification and enlargement from the English Bill of Rights." Thomas Cooley, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES 270 (1880).

Regardless of what the English right to "have arms" protected, Americans secured the right to "keep *and bear* arms."

As Representative James Jackson declared in the First Federal Congress, "every citizen was not only entitled to carry arms, but also in duty bound to perfect himself in the use of them." 14 DOCUMENTARY HISTORY OF THE FIRST FEDERAL CONGRESS 95 (1995).

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[11] Americans sometimes overstated the severity of the British laws. For example, the game laws had indeed been a pretext for attempting to disarm almost the entire population under Charles II and James II. But after the Glorious Revolution and the English Bill of Rights, the British could carry arms freely, so long as commoners did not go hunting. *See*, *e.g.*, 2 COMMENTARIES, at 412 n.2 (Edward Christian ed., 1794) ("everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game"); Nicholas Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT 98-99, 133-36 (2d ed. 2017) (pp. 114-18, 139-43 in forthcoming 3d edition, Sept. 15, 2021), http://firearmsregulation.org/ (also in online ch. 22.F.4 & H.5, publicly available shortly).

Describing limitations on "the right to bear arms," Rawle stated that the right "ought not . . . be abused to the disturbance of the public peace," and "even the carrying of arms abroad by an individual, *attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them*, would be sufficient cause to require a surety of the peace." Rawle, VIEW OF THE CONSTITUTION, at 123 (emphasis added). If peaceable carry was not protected, Rawle's exception would make no sense.

IV. Publicly carrying arms was common in early American history.

A. The right of law-abiding citizens to carry arms in public was largely unrestricted throughout the colonial and founding eras.

"The law of Nature and of Nations authorize the right of carrying arms for self defence, by sea as well as by land," declared Rep. Harrison Gray Otis in 1798, "and no law of the United States has ever prohibited to our citizens the exercise of this right." Letter from the Hon. Harrison G. Otis . . . for Petitioning Congress, Against Permitting Merchant Vessels to Arm 11 (Apr. 1798).

The *Young* court thought that "[t]he colonists shared the English concern that the mere presence of firearms in the public square presented a danger to the community." 992 F.3d at 794. But the right to carry arms was never prohibited in any colony or state

during the colonial or founding eras, and was only rarely restricted. Massachusetts and New Hampshire had laws against aggressive carry. Virginia in the late seventeenth century acknowledged the right to carry but forbade armed assemblies. Around the same time, the short-lived colony of East Jersey briefly restricted concealed carry.

East Jersey, a separate colony from 1674 to 1702, outlawed in 1686 the concealed carry of "any Pocket Pistol, Skeines [Irish-Scottish dagger], Stilladoes, Daggers or Dirks, or other unusual or unlawful Weapons." The statute also forbade any "Planter" (frontiersman) to "Ride or go Armed with Sword, Pistol, or Dagger," except when in government service. The statute excepted "Strangers, Travelling upon their lawful Occasions through this Province, behaving themselves peaceably." 23 THE GRANTS, CONCESSIONS, AND ORIGINAL CONSTITUTIONS OF THE PROVINCE OF NEW-JERSEY 289-90 (1758); Richard Lederer, Jr., COLONIAL AMERICAN ENGLISH 175 (1985) (defining "planter" as "One of those who settled new and uncultivated territory"). Thus, the most severe—by far—pre-Second Amendment restriction allowed all colonists to carry long guns in any manner, openly or concealed. Further, all colonists except frontiersmen could carry pistols openly.

Massachusetts in 1692 punished "such as shall Ride, or go Armed *Offensively* before any of Their Majesties Justices, or other Their Officers or Ministers doing their Office, or elsewhere, by Night or by Day, *in Fear or Affray of Their Majesties Liege People*." 1692 Mass. Laws No. 6, at 11-12 (emphasis added). In 1699,

New Hampshire instructed justices of the peace to arrest "affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed *offensively*. . . ." 1699 N.H. Laws 1 (emphasis added). Reflecting the American understanding of the English right, these laws applied to only those who went armed offensively—those who created fear, such as affrayers or rioters. They did not limit defensive carry.

After the suppression of Bacon's Rebellion in 1676, a Virginia statute declared:

> [W]hereas by a branch of an act of assembly under Bacon made in March last, liberty is granted to all persons to carry their arms wheresoever they go, which liberty hath been found to be very prejudicial to the peace and welfare of this colony. Be it therefore enacted . . . that if any person or persons shall . . . presume to assemble together in arms to the number of five or upwards without being legally called together in arms the number of five or upwards, they be held deemed and adjudged as riotous and mutinous. . . .

An Act for the Releife of Such Loyal Persons as have Suffered Losse by the Late Rebells, 2 Stat. (Va.) 386 (1676-1677). Thus, individuals or small groups had the unfettered right to carry.

The totality of restrictions throughout the roughly two centuries that constitute the colonial and founding eras in America consisted of four carry restrictions, none of which were prohibitions. In most colonies and states, public carry was unrestricted throughout that entire period.

B. The Statute of Northampton did not forbid peaceable carry in America.

As evidence of the Statute of Northampton's influence in America, *Young* cites a 1792 North Carolina statute that supposedly copied the English statute verbatim, including text about "the King's servants." 992 F.3d at 778. *Young* cites "1792 N.C. Laws 60, 61 ch. 3," but the lengthier cite is Francois-Xavier Martin, A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH-CAROLINA 60-61 (1792). The State of North Carolina later officially declared that the book "was utterly unworthy of the talents and industry of the distinguished compiler, omitting many statutes, always in force, and inserting many others, which never were, and never could have been in force, either in the Province, or in the State." *Preface of the Commissioners of 1838*, REVISED CODE OF NORTH CAROLINA xiii (1855).

The North Carolina Supreme Court determined that the Statute of Northampton had simply embodied the common law rule against "riding or going about armed with unusual and dangerous weapons, to the terror of the people." *State v. Huntly*, 25 N.C. 418, 420 (1843). It then set forth the common law offense:

> [T]he carrying of a gun per se constitutes no offence. For any lawful purpose . . . the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm,

> and in such manner as naturally will terrify and alarm, a peaceful people.

Id. at 423-24. This paragraph authoritatively describes the Statute of Northampton's meaning in America.

C. Arms carrying was so important to public safety that it was often required.

Every colony and state required militiamen (typically, males aged 16 to 60) regularly to carry arms in public to attend musters. *See* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. Ill. U.L.J. 495 (2019) (describing all colonial and founding era militia statutes).

Additionally, "[m]any colonial statutes required individual arms-bearing for public-safety reasons." *Heller*, 554 U.S. at 601. Colonies required arms carrying to church,[12] court,[13] public assemblies,[14] travel,[15] and work in the field.[16]

Because firing firearms in the air—which necessarily occurred outside the home—served as the

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[12] Virginia (1619, 1632, 1643, 1665, 1676, 1738); Plymouth (1641, 1656, 1658, 1675); Maryland (1642); Connecticut (1644); New Haven (1644); South Carolina (1740); Georgia (1770). *See* Johnson, FIREARMS LAW, at 189-91 (3d ed. 2021).

[13] Virginia (1676). *Id.* at 189.

[14] Massachusetts (1637, 1643); Rhode Island (1639, 1643). *Id.* at 190.

[15] Virginia (1623, 1632); Massachusetts (1631, 1636); Rhode Island (1639); Maryland (1642). *Id.* at 189-91.

[16] Virginia (1624, 1632). *Id.* at 189.

alarm for Indian attacks, Maryland made it illegal to "discharge 3 Gunnns within the Space of 1/4 hour," 3 ARCHIVES OF MARYLAND 103 (William Hand Browne ed., 1885), and Virginia forbade people to "shoot any gunns at drinkeing (marriages and ffuneralls onely excepted)," 1 Hening, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 401-02 (1823). If arms were prohibited in public, these laws would make no sense.

Young's takeaway from carry mandates was that "the colonies assumed that they had the power to *regulate*—whether through *mandates* or *prohibitions*—the public carrying of arms." 992 F.3d at 796. Put differently, because colonies could require arms carrying, colonies could ban arms carrying. Yet colonies also required church attendance. *See* 2 Hening, at 48 (1662 Virginia; everyone with "noe lawfull excuse" shall "diligently resort to their parish church and chappell" every Sunday); 4 RECORDS AND FILES OF THE QUARTERLY COURTS OF ESSEX COUNTY MASSACHUSETTS, 1667-1671, at 89-90 (1914) (fining two people "for frequent absenting themselves from the public worship of God on the Lord's days"); 3 PROVINCE AND COURT RECORDS OF MAINE, 1680-1692, at 93 (Robert Moody ed., 1947) (at the time, part of Massachusetts; fining someone "for not frequenting the publique worship of God"). That colonies sometimes required church attendance does not mean that colonial governments or the people ever thought that colonies could forbid church attendance.

D. The Founders voluntarily carried arms in their everyday lives.

It is not true that when carry was permitted, "those laws were tied to the overarching duty to bear arms in defense of the community, and it was the role of local government, not individuals, to decide when that duty justified or mandated public carry," or that "the public carrying of arms was always subject to conditions prescribed by the legislature." *Young*, 992 F.3d at 796.

As a threshold matter, it was not always government that decided who could carry. Some statutes forbade carry by slaves unless their masters issued them licenses. *See*, *e.g.*, 1715 Md. Laws 117 ("no negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without licence from their said master"); 1797 Del. Laws 104 (no "Negro or Mulatto slave shall presume to carry any guns, swords, pistols, fowling pieces, clubs, or other arms and weapons whatsoever, without his master's special license for the same"). It is implausible that people could grant permission for slaves to carry but could not carry themselves.

Moreover, both the Founders and the founding citizenry at large voluntarily carried arms routinely for defense and sport.

1. John Adams

John Adams, as a 9-or-10-year-old schoolboy, carried a gun daily so that he could go hunting after class. 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 257-59 (1961).

2. Patrick Henry

Patrick Henry would "walk to court, his musket slung over his shoulder to pick off small game." Harlow Giles Unger, LION OF LIBERTY: PATRICK HENRY AND THE CALL TO A NEW NATION 30 (2010).

3. Daniel Boone

"When Daniel was almost thirteen he was given his first firearm, a 'short rifle gun, with which he roamed the nearby Flying Hills, the Oley Hills, and the Neversink Mountains.'" Robert Morgan, BOONE 14 (2007).

4. Meriwether Lewis

Meriwether Lewis's neighbor Thomas Jefferson observed that young Lewis "when only eight years of age . . . habitually went out, in the dead of night, alone with his dogs, into the forest to hunt the raccoon & opossum." 8 WRITINGS OF THOMAS JEFFERSON, at 482.

5. Thomas Jefferson

Thomas Jefferson himself carried as a lad. "When he was ten he was given a gun by his father and sent into the forest alone in order to develop self-reliance." 1 Dumas Malone, JEFFERSON AND HIS TIME: JEFFERSON THE VIRGINIAN 46 (1948).

As an adult, Jefferson wrote about a holster he made for one of his Turkish pistols, "having used it daily while I had a horse who would stand fire," and he noted another holster he made "to hang them [the Turkish pistols] at the side of my carriage for road use." 10 THE PAPERS OF THOMAS JEFFERSON, RETIREMENT SERIES 320-21 (2004). Jefferson advised his fifteen-year-old nephew to "[l]et your gun therefore be the constant companion of your walks." 8 THE PAPERS OF THOMAS JEFFERSON 407 (2004).

6. James Monroe

Every day, "[w]ell before dawn, James left for school, carrying his books under one arm with his powder horn under the other and his musket slung across his back." Tim McGrath, JAMES MONROE: A LIFE 9 (2020).

7. Ira and Ethan Allen

Ira and Ethan Allen regularly carried multiple arms at once. For example, in 1772 Ira, Ethan, and a cousin went to purchase land near New York's border "armed with holsters and pistols, a good case [pair]

of pistols each in our pockets, with each a good hanger [sword].” 1 James Wilbur, IRA ALLEN: FOUNDER OF VERMONT, 1751-1814, at 39 (1928). The next year, during land disputes between the Allen trio and the Royal Governor of New York, Ira wrote that the three men “never walked out without at least a case of pistols.” *Id.* at 44.

8. Joseph Warren

Joseph Warren was targeted by the British as tensions rose in April 1775. After spotting the British watch, one of Warren’s friends “advised Warren not to visit his patients that evening. But Warren, putting his pistols in his pocket, replied, ‘I have a visit to make to Mrs. ___, in Cornhill, this evening, and I will go at once.’” Richard Frothingham, LIFE AND TIMES OF JOSEPH WARREN 452 (1865).

9. William Drayton

When traveling throughout South Carolina in 1775 to promote the Patriot cause, “Drayton always had about his person, a dirk and a pair of pocket pistols; for the defence of his life.” 3 AMERICAN ARCHIVES, 4th ser., at 258 (Peter Force ed., 1840).

10. General Population

Recalling the Boston Massacre, British Captain Thomas Preston—commander of the Redcoats stationed in Boston—noted the admonition of a trial

judge prior to the incident: "that the inhabitants carried weapons concealed under their clothes, and would destroy them [Redcoats] in a moment, if they pleased." THE ANNUAL REGISTER, OR A VIEW OF THE HISTORY, POLITICS, AND LITERATURE, FOR THE YEAR 1766, at 215 (4th ed. 1785).

On the annual commemoration of the Massacre in 1772, Bostonians attended Dr. Joseph Warren's stirring oration. Expecting the speech to upset the Redcoats in attendance, "almost every man [in the audience] had a short stick, or bludgeon, in his hand; and . . . many of them were privately armed." Frederick MacKenzie, A BRITISH FUSILIER IN REVOLUTIONARY BOSTON 37 (Allen French ed., 1926).

Writings from early American history mention people carrying firearms as part of everyday life. *See*, *e.g.*, 1 Isaac Weld, TRAVELS THROUGH THE STATES OF NORTH AMERICA 233-34 (2d ed. 1799) (1796, on the roads from Kentucky/Tennessee to and from Philadelphia/Baltimore, "the people all travel on horseback, with pistols and swords."); 8 THE WORKS OF WASHINGTON IRVING 83 (1866) (In 1808 St. Louis, "[n]ow and then a stark Kentucky hunter . . . with rifle on shoulder and knife in belt, strode along.").

Analyzing Matthew Hale's 1736 English treatise, *The History of the Pleas of the Crown*, St. George Tucker contrasted the English law of treason with American law. In England, said Hale, an assembly of armed men created a rebuttable presumption of treason. But there was no "such presumption in America,

where the right to bear arms is recognized and secured in the constitution itself. In many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without his sword by his side." 5 Tucker, COMMENTARIES, at 19.[17] Apparently the old Virginia statute about armed assemblies, enacted in 1676 after Bacon's Rebellion, was long obsolete.

V. Nineteenth Century case law supports a right to carry arms beyond the home.

The first states to restrict law-abiding citizens' ability to bear arms were Kentucky and Louisiana, which each banned concealed carry in 1813. 2 A DIGEST OF THE STATUTE LAWS OF KENTUCKY 1289-90 (A.G. Hodges ed., 1834); *State v. Chandler*, 5 La. Ann. 489, 489 (1850).

Throughout the nineteenth century, other states enacted similar restrictions. Far from reaching a

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[17] According to one commentator, "Tucker's often quoted observation" was "written in response to the prosecution of Fries's Rebellion in Pennsylvania." Supposedly, "Tucker was commenting on a federal case," and disagreeing with jury instructions that Chief Justice Chase had given in a Fries's Rebellion trial, while riding circuit. Saul Cornell, *The Right To Keep And Carry Arms In Anglo-American Law: Preserving Liberty And Keeping The Peace*, 80 L. & CONTEMP. PROBS. 11, 39 (2017).

This is not true. As Tucker cited the Chief Justice's jury instructions, they said nothing about arms. They involved whether private violence, such as "pulling down . . . bawdy houses was held to be treason."

consensus, courts differed on these laws. As Chancellor Kent noted, "it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons . . . from wearing or carrying concealed weapons, be constitutional. There has been a great difference of opinion on the question." 2 Kent, COMMENTARIES, at *340 n.2 (Holmes ed.). The Supreme Court of Georgia exclaimed, "'*tot homines, quot sententiæ*.'—so many men, so many opinions!" *Nunn v. State*, 1 Ga. 243, 248 (1846).

Approvingly citing five cases interpreting the right to bear arms, *Heller* demonstrated which opinions should guide a Second Amendment analysis. Each held that law-abiding citizens have a right to carry outside the home.

Kentucky's 1813 concealed carry ban was ruled unconstitutional in *Bliss v. Commonwealth*—the case decided closest to the founding—where the highest court of Kentucky held that a prohibition on either concealed or open carry violates the right to bear arms. 12 Ky. 90 (1822); *see Heller*, 554 U.S. at 585 & n.9. "[I]n principle, there is no difference between a law prohibiting the wearing concealed arms, and a law forbidding the wearing such as are exposed; and if the former be unconstitutional, the latter must be so likewise." *Bliss*, 12 Ky. at 92.

The Alabama Supreme Court upheld a concealed carry ban in *State v. Reid* in 1840, declaring that the legislature had "the right to enact laws in regard to the manner in which arms shall be borne . . . as may be

dictated by the safety of the people and the advancement of public morals." 1 Ala. 612, 616 (1840); *see Heller*, 554 U.S. at 585 & n.9, 629. The court held that bearing arms in general could not be forbidden:

> We do not desire to be understood as maintaining, that in regulating the manner of bearing arms, the authority of the Legislature has no other limit than its own discretion. A statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional.

Reid, 1 Ala. at 616-17.

A few years later, in *Nunn*—which *Heller* praised as having "perfectly captured the way in which the operative clause of the Second Amendment furthers the purpose announced in the prefatory clause, in continuity with the English right," 554 U.S. at 612—the Georgia Supreme Court followed *Reid*'s reasoning in upholding a prohibition on concealed carry while striking a restriction on open carry. The concealed carry ban "is valid, inasmuch as it does not deprive the citizen of his natural right of self-defence." *Nunn*, 1 Ga. at 251; *accord Stockdale v. State*, 32 Ga. 225, 227 (1861) (To prohibit both concealed and open carry "would be to prohibit the bearing of those arms altogether, and to bring the Act within the decision in Nunn's case.").

Similarly, the Tennessee Supreme Court held in *Andrews v. State* that a general carry "prohibition is too broad," but "[i]f the Legislature think proper, they may by a proper law regulate the carrying of this weapon publicly, or abroad, in such a manner as may be deemed most conducive to the public peace." 50 Tenn. 165, 187-88 (1871); *see Heller*, 554 U.S. at 608, 614, 629.

Of the cases relied on by *Heller*, only *State v. Chandler* indicated that concealed carry was not protected by the right to bear arms, declaring that open carry "is the right guaranteed by the Constitution of the United States." 5 La. Ann. 489, 490 (1850); *see Heller*, 554 U.S. at 585 & n.9, 613, 626. Yet even *Chandler* was later interpreted by the Louisiana Supreme Court as "prohibiting only *a particular mode* of bearing arms which is found dangerous to the peace of society." *State v. Jumel*, 13 La. Ann. 399, 400 (1858) (emphasis in original). Like the other cases, *Chandler* stands for the proposition that carry by lawful citizens cannot be prohibited.

The right to bear arms being universally recognized, criminal justice officer manuals from early America did not contain instructions to arrest people for peaceably carrying arms. *See* Isaac Goodwin, NEW ENGLAND SHERIFF (1830); Charles Hartshorn, NEW ENGLAND SHERIFF (1844); John Niles, THE CONNECTICUT CIVIL OFFICER (1823); John Latrobe, THE JUSTICES' PRACTICE UNDER THE LAWS OF MARYLAND (1826); Henry Potter, THE OFFICE AND DUTY OF A JUSTICE OF THE PEACE . . . ACCORDING TO THE LAWS OF NORTH CAROLINA (1816).

The nineteenth-century treatises *Heller* cited also recognize the right of ordinary citizens to carry arms in public. *See* THE AMERICAN STUDENTS' BLACKSTONE 84, n.11 (George Chase ed., 3d ed. 1884); John Pomeroy, INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (1868); Benjamin Abbott, JUDGE AND JURY: A POPULAR EXPLANATION OF LEADING TOPICS IN THE LAW OF THE LAND 333, 337 (1868).

CONCLUSION

The Second Amendment's text protects the right to carry arms. History and tradition confirm this meaning. New York's statutes violate the right, and should be held unconstitutional.

The decision below should be reversed.

Respectfully submitted,

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