No. 20-5579

In The
Supreme Court of the United States

ISRAEL TORRES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, MADISON SOCIETY FOUNDATION, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition is a nonprofit organization that defends constitutional rights through legislative and grassroots advocacy, litigation, education, and outreach programs.

Firearms Policy Foundation is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts.

California Gun Rights Foundation is a nonprofit organization that advances civil rights by focusing on educational, cultural, and judicial efforts.

Madison Society Foundation is a nonprofit corporation that supports the right to arms by offering the public education and training.

Second Amendment Foundation (SAF) is a nonprofit foundation that protects the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. Chicago*.

SUMMARY OF ARGUMENT

This Court's precedents require a historical justification for firearm prohibitions on felons. Both

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

English and American tradition support firearm prohibitions on dangerous persons—disaffected persons posing a threat to the government and persons with a proven proclivity for violence. This tradition of disarming dangerous persons has been practiced for centuries. It was reflected in the debates and proposed amendments from the Constitution ratifying conventions, and throughout American history.

There is no tradition of disarming peaceable citizens. Nor is there any tradition of limiting the Second Amendment to "virtuous" citizens. Historically, nonviolent criminals who demonstrated no violent propensity were not prohibited from keeping arms. Indeed, some laws expressly allowed them to keep arms.

Thus, using history and tradition to interpret the Second Amendment's text, as *Heller* did, "the people" who have the right to keep and bear arms include peaceable persons like Torres.

Certiorari should be granted to clarify that the historical justification for prohibitions on felons referenced in *Heller* and *McDonald* is the tradition of disarming dangerous persons.

ARGUMENT

I. This Court promised a historical justification for firearm prohibitions on felons.

In *District of Columbia v. Heller*, this Court's analysis focused on the Second Amendment's text, using

history and tradition to inform its original meaning. 554 U.S. 570, 576–619 (2008). In doing so, this Court identified a series of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons." *Id.* at 626–27 & n.26. These "longstanding regulatory measures" were repeated in *McDonald v. City of Chicago*, 561 U.S. 742, 786 (2010).

Heller promised that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635.

II. The historical justification for firearm prohibitions on felons is the tradition of disarming dangerous persons.

There is no tradition in American history of banning peaceable citizens from owning firearms. A historical analysis shows that the historical justification this Court relied on to declare bans on felons "presumptively lawful" must have been the tradition of disarming dangerous persons.

A. In English tradition, arms prohibitions applied to disaffected and other dangerous persons.

England's historical tradition cannot be directly applied to an interpretation of the Second Amendment, because the American colonists developed their own distinct arms culture that reflected their heavy

dependence on firearms for survival and sport. *See* 1 Charles Winthrop Sawyer, FIREARMS IN AMERICAN HISTORY 1 (1910) ("The Colonists in America were the greatest weapon-using people of that epoch in the world. Everywhere the gun was more abundant than the tool.").

Nevertheless, as an ancestor of American arms culture, English arms culture is useful for understanding the background of the American right. As Justice Harlan wrote, the "liberty of the individual" in America was secured with "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., dissenting).

One English tradition from which American tradition developed was that of disarming violent and dangerous persons. This tradition dates back to at least AD 602, when The Laws of King Aethelbirht made it unlawful to "furnish weapons to another where there is strife." ANCIENT LAWS AND INSTITUTES OF ENGLAND 3 (Benjamin Thorpe, ed. 1840). By the seventeenth century, one's arms were confiscated for going armed "offensively" or committing an affray in the presence of a Justice of the Peace. Michael Dalton, THE COUNTREY JUSTICE 36, 37 (1690).

Most often, "dangerous persons" were disaffected persons disloyal to the current government, who might want to overthrow it—or political opponents defined as such. The precedent for disarming rebellious segments of the population was established during the Welsh Revolt from 1400 to 1415. 2 Henry IV ch. 12 (1400-01).

Leading up to the Glorious Revolution of 1688, Whigs and nonAnglican Protestants were often disarmed.

In 1660, Lords Lieutenant were issued instructions for "disaffected persons [to be] watched and not allowed to assemble, and their arms seized." 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1660–1661, at 150 (1860). Additionally, King Charles II ordered the Lord Mayor and Commissioners for the Lieutenancy of London "to make strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody." 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, at 237 (1895).

England's 1662 Militia Act empowered officials "to search for and seize all arms in the custody or possession of any person or persons" deemed "dangerous to the peace of the kingdom." 8 Danby Pickering, THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING CHARLES II, TO THE LAST YEAR OF KING JAMES II 40 (1763).

That same year, Charles II ordered deputy lieutenants of Kent "to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits." 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, at 538.

Charles II then issued orders to eighteen lieutenants in 1684 to seize arms "from dangerous and disaffected persons." 27 CALENDAR OF STATE PAPERS,

DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1684–1685, at 26–27, 83–85, 102 (1938).

James II succeeded Charles II in 1685, but was soon overthrown in the Glorious Revolution of 1688. At that point, "dangerous persons" often included Tories loyal to James II.

After Ireland rose in a Jacobite rebellion, a 1695 statute forbade the carrying and possession of arms and ammunition by Irish Catholics in Ireland. 7 William III ch. 5 (1695). In addition to distrusted "papists," a legal manual instructed constables to search for arms possessed by persons who are "dangerous." Robert Gardiner, THE COMPLEAT CONSTABLE 18 (3d ed. 1708).

King William III called in 1699 for the disarming of "great numbers of papists and other disaffected persons, who disown his Majesty's government." 5 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1699–1700, at 79–80 (1937).

The following year, The House of Lords prayed that William III "would be pleased to order the seizing of all Horses and Arms of Papists, and other disaffected Persons, and have those ill Men removed from London according to Law." 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 20 (1742). In response, William III "assured them he would take Care to perform all that they had desired of him." *Id.*

Then in 1701, William III "charge[d] all lieutenants and deputy-lieutenants, within the several counties of [England] and Wales, that they cause search to be made for arms in the possession of any persons whom they judge dangerous." 6 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1700–1702, at 234 (1937) (second brackets in original).

Disarmament actions in English tradition focused on dangerous persons—violent persons and disaffected persons perceived as threatening to the crown.

B. In colonial America, arms prohibitions applied to disaffected and other dangerous persons.

Similar to England, disarmament laws in colonial America were designed to keep weapons away from those perceived as posing a dangerous threat. Such laws were often discriminatory and overbroad—and thus unconstitutional by the later-enacted Second Amendment—but were always intended to prevent danger. *See*, *e.g.*, LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 234–35 (1868) (1656 New York law "forbid[ing] the admission of any Indians with a gun . . . into any Houses" "to prevent such dangers of isolated murders and assassinations").

Inspired by England's Statute of Northampton, some American laws forbade carrying arms in an aggressive and terrifying manner. A 1736 Virginia law authorized constables to "take away Arms from such who ride, or go, offensively armed, in Terror of the

People" and bring the person and their arms before a Justice of the Peace. George Webb, THE OFFICE OF AUTHORITY OF A JUSTICE OF PEACE 92–93 (1736).

During wars with Catholic France, special laws against Catholics were enacted in Maryland (with a large Catholic population), and next-door Virginia. For example, during the French & Indian War (1754–63), Virginia required Catholics to take an oath of allegiance; if they refused, they were disarmed. 7 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35–37 (1820). An exception was made for "such necessary weapons as shall be allowed to him, by order of the justices of the peace at their court, for the defence of his house or person." *Id.* at 36.

The American Revolution began on April 19, 1775, when Redcoats marched to Lexington and Concord to conduct house-to-house searches for guns and gunpowder. Armed Americans resisted this attempt at confiscation. *See* Nicholas Johnson et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 262–64 (2d ed. 2017).

As in any war, each side attempted to reduce the arms in the hands of the other side. In 1776, in response to General Arthur Lee's plea for emergency military measures, the Continental Congress recommended that colonies disarm persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend,

by arms, these United Colonies." 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 283–85 (1906).

Massachusetts acted to disarm persons "notoriously disaffected to the cause of America . . . and to apply the arms taken from such persons . . . to the arming of the continental troops." 1776 Mass. Laws 479, ch. 21. Pennsylvania enacted similar laws in 1776 and 1777. 8 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 559–60 (1902); 9 *id.* at 110–14.

More narrowly, Connecticut disarmed persons criminally convicted of libeling or defaming acts of the Continental Congress; convicts also lost the rights to vote, hold office, and serve in the military. 4 THE AMERICAN HISTORICAL REVIEW 282 (1899).

In 1777, New Jersey empowered its Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess." 1777 N.J. Laws 90, ch. 40 §20.

That same year, North Carolina stripped "all Persons failing or refusing to take the Oath of Allegiance" of citizenship rights. Those "permitted . . . to remain in the State" could "not keep Guns or other Arms within his or their house." 24 THE STATE RECORDS OF NORTH CAROLINA 89 (1905). Virginia did the same. 9 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 282 (1821).

Pennsylvania in 1779 determined that "it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms," so it "empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state." THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782).

Like the English, and out of similar concerns of violent insurrections, the colonists disarmed those who might rebel against them. The Revolutionary War precedents support the constitutionality of disarming persons intending to use arms to impose foreign rule on the United States.

C. At Constitution ratifying conventions, influential proposals called for disarming dangerous persons and protecting the rights of peaceable persons.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35. *Heller* thus concluded with "our adoption of the original understanding of the Second Amendment." *Id.* at 625. The ratifying conventions are therefore instructive in interpreting the ultimately codified right.

Samuel Adams opposed ratification without a declaration of rights. Adams proposed at Massachusetts's convention an amendment guaranteeing that "the said

constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971). Adams's proposal was celebrated by his supporters as ultimately becoming the Second Amendment. *See* BOSTON INDEPENDENT CHRONICLE, Aug. 20, 1789, at 2, col. 2 (calling for the paper to republish Adams's proposed amendments alongside Madison's proposed Bill of Rights, "in order that they may be compared together," to show that "every one of [Adams's] intended alterations but one [i.e., proscription of standing armies]" were adopted); Stephen Halbrook, THAT EVERY MAN BE ARMED 86 (revised ed. 2013) ("[T]he Second Amendment . . . originated in part from Samuel Adams's proposal . . . that Congress could not disarm any peaceable citizens.").

In the founding era, "peaceable" meant the same as today: nonviolent. Being "peaceable" is not the same as being "law-abiding," because the law may be broken nonviolently. Samuel Johnson's dictionary defined "peaceable" as "1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent." 2 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773). Thomas Sheridan defined "peaceable" as "Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 438 (2d ed. 1789). According to Noah Webster, "peaceable" meant "Not violent, bloody or unnatural." 2 Noah Webster,

AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated). *Cf.* BLACK'S LAW DICTIONARY (6th ed. 1996) (defining "peaceable" as "Free from the character of force, violence, or trespass."). *Heller* relied on Johnson, Sheridan, and Webster in defining the Second Amendment's text.[2]

New Hampshire proposed a bill of rights that allowed the disarmament of only violent insurgents: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836).

After Pennsylvania's ratifying convention, the Anti-Federalist minority—which opposed ratification without a declaration of rights—proposed the following right to bear arms:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents,

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[2] For Johnson, *see Heller*, 554 U.S. at 581 ("arms"), 582 ("keep"), 584 ("bear"), 597 ("regulate"). For Sheridan, *see id.* at 584 ("bear"). For Webster, *see id.* at 581 ("arms"), 582 ("keep"), 584 ("bear"), 595 ("militia").

in 2 Schwartz, at 665. While the "crimes committed" language is not expressly limited to violent crimes, it seems unlikely that the Pennsylvania Dissent wanted permanent disarmament for every imaginable offense; the context of "real danger of public injury" continues the tradition of disarming the dangerous, including by inferences drawn from criminal convictions.

"[T]he 'debates from the Pennsylvania, Massachusetts and New Hampshire ratifying conventions, which were considered "highly influential" by the Supreme Court in *Heller* . . . confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.'" *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (quoting *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)) (brackets omitted). "Hence, the best evidence we have indicates that the right to keep and bear arms was understood to exclude those who presented a danger to the public." *Id.* (Hardiman, J., concurring).

D. Prohibited persons could regain their rights in the founding era.

Offenders in the founding era could often regain their rights upon providing securities (a financial promise, like a bond) of peaceable behavior. For example, individuals "who shall go armed offensively" in 1759 New Hampshire were imprisoned "until he or she find such surities of the peace and good behavior." ACTS

AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW ENGLAND 2 (1759).

Some states had procedures for restoring a person's right to arms. Connecticut's 1775 wartime law disarmed an "inimical" person only "until such time as he could prove his friendliness to the liberal cause." 4 THE AMERICAN HISTORICAL REVIEW, at 282. Massachusetts's 1776 law provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again . . . by the order of such committee or the general court." 1776 Mass. Laws 484. When the danger abated, the arms disability was lifted.

In Shays's Rebellion, armed bands in 1786 Massachusetts attacked courthouses, the federal arsenal in Springfield, and other government properties, leading to a military confrontation with the Massachusetts militia on February 2, 1787. *See* John Noble, A FEW NOTES ON THE SHAYS REBELLION (1903). After the rebellion was defeated, Massachusetts gave a partial pardon to persons "who have been, or may be guilty of treason, or giving aid or support to the present rebellion." 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, at 145 (1805). Rather than being executed for treason, many of the Shaysites temporarily were deprived of many civil rights, including a three-year prohibition on bearing arms. *Id.* at 146–47.

While the Shaysites who had perpetrated the capital offense of treason had their arms rights restored

after three years, nonviolent felons today, including Torres, are prohibited from possessing arms for life.

E. Nineteenth-century bans applied to slaves and freedmen, while lesser restrictions focused on disaffected and dangerous persons.

Heller looked to nineteenth-century experiences only for help "understanding [] the origins and continuing significance of the Amendment." 554 U.S. at 614.

Nineteenth-century prohibitions on arms possession were mostly discriminatory bans on slaves and freedmen.[3] Another targeted group starting in the latter half of the century were "tramps"—typically defined as males begging for charity outside their home county. Tramping was not a homebound activity, so any beggar could still keep arms at home.

New Hampshire in 1878 imprisoned any tramp who "shall be found carrying any fire-arm or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another." 1878 N.H. Laws 612, ch. 270 §2. The following year, Pennsylvania prohibited tramps from carrying a weapon "with intent unlawfully to do injury or intimidate any other person." 1 A DIGEST OF THE STATUTE LAW

[3] *See*, *e.g.*, 1804 Miss. Laws 90; 1804 Ind. Acts 108; 1806 Md. Laws 44; 1851 Ky. Acts 296; 1860–61 N.C. Sess. Laws 68; 1863 Del. Laws 332.

OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 TO 1894, at 541 (12th ed. 1894).

Vermont, Rhode Island, Ohio, Massachusetts, Wisconsin, and Iowa enacted similar laws. 1878 VT. LAWS 30, ch. 14 §3; Rhode Island, 1879 R.I. Laws 110, ch. 806 §3; 1880 Ohio Rev. St. 1654, ch. 8 §6995; 1880 Mass. Laws 232, ch. 257 §4; 1 ANNOTATED STATUTES OF WISCONSIN, CONTAINING THE GENERAL LAWS IN FORCE OCTOBER 1, 1889, at 940 (1889); 1897 Iowa Laws 1981, ch. 5 §5135.

Ohio's Supreme Court determined that the tramping disarmament law was constitutional because it applied to "vicious persons":

> The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others.

State v. Hogan, 63 Ohio St. 202, 218–19 (1900).

Two Kansas restrictions are also relevant. In 1868, Kansas prohibited "[a]ny person who is not engaged in any legitimate business, any person under the influence of intoxicating drink, and any person who has ever borne arms against the government of the United States" from publicly carrying "any pistol, bowie-knife, dirk, or other deadly weapon." 2 GENERAL STATUTES OF THE STATE OF KANSAS 353 (1897).

Fifteen years later, Kansas prohibited the transfer of "any pistol, revolver or toy pistol . . . or any dirk, bowie-knife, brass knuckles, slung shot, or other dangerous weapons . . . to any person of notoriously unsound mind." 1883 Kan. Sess. Laws 159 §1.

The Kansas Supreme Court held that "other deadly weapons" did not include long guns. *Parman v. Lemmon*, 244 P. 232 (Kan. 1926).[4] Thus, Kansas's laws did not prohibit anyone from *possessing* any arms, nor did they apply to long guns.

F. Most early twentieth-century bans applied to noncitizens, who were blamed for rising crime and social unrest.

The twentieth century is well beyond the historical sources cited in *Heller*. *See Heller*, 554 U.S. at 614 ("Since those [post-Civil War] discussions took place 75 years after the ratification of the Second Amendment,

[4] After initially holding that shotguns (and therefore all firearms) were included based on the rule of *ejusdem generis*, *Parman v. Lemmon*, 244 P. 227 (Kan. 1925), the court reversed itself on rehearing, *Parman*, 244 P. 232.

they do not provide as much insight into its original meaning as earlier sources."). Nonetheless, it is noteworthy that disarmament practices in that era continued to focus on dangerous, potentially violent persons. And no previous law was as burdensome as the modern-day felon ban in 18 U.S.C. §922(g)(1).

Early in the century, increasing immigration from Southern and Eastern Europe was blamed for increasing crime and social unrest. Several states enacted firearm restrictions on noncitizens. Johnson, et al., at 501.

Because the wild game of a state belongs to the people of that state, some states used game laws as a backhanded basis to partially disarm noncitizens.[5] Pennsylvania prohibited noncitizens from possessing rifles or shotguns—the arms most useful for hunting. Noncitizens were still allowed to possess handguns—which were less suited for hunting but well-suited for self-defense. 1909 Pa. Laws 466 §1. Four states followed Pennsylvania's model. 1915 N.D. Laws 225–26, ch. 161 §67; 1915 N.J. Laws 662–63, ch. 355 §1; 1921

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[5] England had similarly used game laws to disarm segments of the population. *See* 1 St. George Tucker, BLACKSTONE'S COMMENTARIES, App. 300 (1803) ("In England, the people have been disarmed, generally, under the specious pretext of preserving the game"). *But see* 2 William Blackstone, COMMENTARIES 412 n.2 (Edward Christian ed., 12th ed. 1793–95) ("everyone is at liberty to keep or carry a gun, if he does not use it for the destruction of game.").

N.M. Laws 201–02, ch. 113 §1; 1923 Conn. Acts 3732, ch. 259 §17.

Pennsylvania's law was upheld in *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). Justice Holmes wrote that the Supreme Court should defer to the judgment of the Pennsylvania legislature; even though many people poached, the legislature could decide "that resident unnaturalized aliens were the peculiar source of the evil." *Id.* at 144. Moreover, "The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense." *Id.* at 143.

Some states barred ownership of all firearms by noncitizens. Utah forbade "any unnaturalized foreign born person . . . to own or have in his possession, or under his control, a shot gun, rifle, pistol, or any fire arm of any make." 1917 Utah Laws 278. Five states followed this model. 1917 Minn. Laws 839–40, ch. 500 §1; 1919 Colo. Sess. Laws 416–417 §1; 1921 Mich. Pub. Acts 21 §1; 1925 Wyo. Sess. Laws 110, ch. 106 §1; 1925 W.Va. Acts 31, ch. 3 §7.

People v. Nakamura held Colorado's alien disarmament statute unconstitutional under Colorado's constitution. 99 Colo. 262 (1936). The Colorado Supreme Court conceded that aliens could be prevented from hunting. But they could not be barred from bearing arms "in defense of home, person, and property." *Id.* at 264. The 1876 Colorado Convention had mostly copied Missouri's 1875 constitutional arms right, which was then the strongest in the nation. But Colorado

went further, changing Missouri's right of the "citizen" to Colorado's right of the "person."

G. Early twentieth-century prohibitions on American citizens applied to only violent criminals; the few laws that applied to nonviolent criminals did not restrict long gun ownership.

The alcohol Prohibition era was violent. States began prohibiting some convicted felons from possessing handguns, which are the guns most often used in crime. *See Heller*, 554 U.S. at 682 (Breyer, J., dissenting) (handguns "are the overwhelmingly favorite weapon of armed criminals."). A 1923 New Hampshire law provided, "No unnaturalized foreign-born person and no person who has been convicted of a felony against the person or property of another shall own or have in his possession or under his control a pistol or revolver . . . " 1923 N.H. Laws 138, ch. 118 §3. Four states followed. 1923 N.D. Laws 380, ch. 266 §5; 1923 Cal. Laws 696, ch. 339 §2; 1925 Nev. Laws 54, ch. 47 §2; 1931 Cal. Laws 2316, ch. 1098 §2 (extending prohibition to persons "addicted to the use of any narcotic drug"); 1933 Or. Laws 488.

Pennsylvania, in 1931, banned persons convicted of "a crime of violence" from possessing most handguns and short versions of long guns. 1931 Pa. Laws 497–98, ch. 158, §§1–4 (pistol or revolver "with a barrel less than twelve inches, any shotgun with a barrel less

than twenty-four inches, or any rifle with a barrel less than fifteen inches.").

The only law that applied to citizens and prohibited the keeping of all firearms was Rhode Island's from 1927. It applied to persons convicted of "a crime of violence." 1927 R.I. Pub. Laws 257 §3. "Crime of violence" meant "any of the following crimes or any attempt to commit any of the same, viz.: murder, manslaughter, rape, mayhem, assault or battery involving grave bodily injury, robbery, burglary, and breaking and entering." 1927 R.I. Pub. Laws 256 §1.

18 U.S.C. §922(g)(1) itself was originally intended to keep firearms out of the hands of violent persons. "Indeed, the current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, ch. 850, §§1(6), 2(f), 52 Stat. 1250, 1250–51 (1938)). "The law was expanded to encompass all individuals convicted of a felony (and to omit misdemeanants from its scope) several decades later, in 1961." *Id.* (citing An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, §2, 75 Stat. 757, 757 (1961)).

H. The historical tradition of disarming dangerous persons provides no justification for disarming Torres.

Heller promised a "historical justification" for bans on felons. 554 U.S. at 635. Indeed, there is a historical justification for violent felons. Violent and dangerous persons have historically been banned from keeping arms in several contexts—specifically, persons guilty of committing violent crimes, persons expected to take up arms against the government, persons with violent tendencies, and those of presently unsound mind. *Binderup*, 836 F.3d at 357 (Hardiman, J., concurring) ("The most cogent principle that can be drawn from traditional limitations on the right to keep and bear arms is that dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment.").

There is no historical justification for completely and forever depriving peaceable citizens like Torres of the right to keep and bear arms.

III. There is no historical justification for disarming "unvirtuous" citizens.

Some scholars and courts have embraced a theory that the right protected only "virtuous" citizens in the founding era. The following sources demonstrate how the theory developed despite lacking historical foundation.

- Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*,

82 MICH. L. REV. 204, 266 (1983). For support that "[f]elons simply did not fall within the benefits of the common law right to possess arms," Kates cited the ratifying convention proposals discussed above.

- Don Kates, *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS. 143, 146 (1986). For support that "the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals)," *id.* at 146, Kates cited his previous article.

- Glenn Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995). For support that "felons, children, and the insane were excluded from the right to arms," Reynolds quoted Kates's *Dialogue* article.

- Saul Cornell, "*Don't Know Much about History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002). For support that the "right was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner," Cornell cited a Pennsylvania prohibition on disaffected persons.

- David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626–27 (2000). Yassky contended that "[t]he average citizen whom the Founders wished to see armed was a man of republican virtue," *id.* at 626, but provided no

example of the right being limited to such men.

Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 491–92 (2004). The authors said, "the Second Amendment was strongly connected to . . . the notion of civic virtue," *id.* at 492, but did not show that unvirtuous citizens were excluded from the right.

- *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009). In addition to Reynolds, Cornell, and the Dissent of the Minority of Pennsylvania, the court cited Robert Shalhope, *The Armed Citizen in the Early Republic*, 49 LAW & CONTEMP. PROBS. 125, 130 (1986), providing a quote to show that in "the view of late-seventeenth century republicanism . . . [t]he right to arms was to be limited to virtuous citizens only. Arms were 'never lodg'd in the hand of any who had not an Interest in preserving the publick Peace.'" This quote—referring to dangerous persons—was about the ancient "Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Romans." J. Trenchard & W. Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, And Absolutely Destructive to the Constitution of the English Monarchy* 7 (1697).

- *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). *Vongxay* cited Kates's *Dialogue* and Reynolds.

- *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010). *Yancey* cited *Vongxay*, Reynolds, and Kates, then Thomas Cooley "explaining that constitutions protect rights for 'the People' excluding, among others, 'the idiot, the lunatic, and the felon.'" *Id.* at 685 (citing Thomas Cooley, A TREATISE ON CONSTITUTIONAL LIMITATIONS 29 (1868)). "The . . . discussion in Cooley, however, concerns classes excluded from voting. These included women and the property-less—both being citizens and protected by arms rights." Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 709–10 (2009).

- *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011). *Bena* cited Kates's *Dialogue* article.

- *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012). *Carpio-Leon* cited *Yancey*, *Vongxay*, Reynolds, Kates, Yassky, Cornell, Cornell and DeDino, the ratifying conventions, and noted the English tradition of "disarm[ing] those . . . considered disloyal or dangerous." *Id.* The court also cited Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO–AMERICAN RIGHT 140–41 (1994), discussing how "Indians and black slaves . . . were barred from owning firearms." *Id.* at 140. Discriminatory bans on noncitizens, however, say little about unvirtuous citizens.

- *Binderup*, 836 F.3d at 348–49 (plurality opinion). The *Binderup* plurality cited each of the above sources.
- *Medina v. Whitaker*, 913 F.3d 152, 158–59 (D.C. Cir. 2019). The court cited the Dissent of the Minority of Pennsylvania, Reynolds, Cornell and DeDino, *Carpio-Leon*, *Yancey*, *Vongxay*, *Binderup*, *Rene E.*, and referenced Massachusetts and Pennsylvania prohibitions on disaffected persons.

None of these sources provided any founding-era law disarming "unvirtuous" citizens—or anyone, for that matter, who was not perceived as dangerous.[6]

IV. Laws sometimes expressly protected the arms of "unvirtuous" citizens.

In American history and tradition, "unvirtuous" citizens were not disarmed. Rather, they were sometimes expressly allowed to maintain their arms.

For example, in 1786 Massachusetts, if the tax collector stole the money he collected, the sheriff could sell the collector's estate to recover the stolen funds. If the sheriff stole the money from the collector's estate sale, the sheriff's estate could be sold to recover the amount he stole. If an estate sale did not cover the stolen amount, the deficient collector or sheriff would be

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[6] For a more thorough analysis on the history of prohibited persons and unvirtuous citizens, *see* Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO L. REV. 249 (2020).

imprisoned. In the estate sales, the necessities of life—including firearms—could not be sold:

> [I]n no case whatever, any distress shall be made or taken from any person, of his *arms* or household utensils, necessary for upholding life; nor of tools or implements necessary for his trade or occupation, beasts of the plough necessary for the cultivation of his improved land; nor of bedding or apparel necessary for him and his family; any law, usage, or custom to the contrary notwithstanding.

1786 Mass. Laws 265 (emphasis added).

This law existed when Samuel Adams proposed his amendment at the Massachusetts ratifying convention. Even citizens who had been convicted of stealing tax money, imprisoned, and had nearly all their belongings confiscated retained their arms rights.

The federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, §1 (1792). Maryland and Virginia had similar exemptions. 13 ARCHIVES OF MARYLAND 557 (William Hand Browne ed., 1894); 3 Hening, at 339.

CONCLUSION

Using history and tradition to interpret the Second Amendment's text, as *Heller* did, "the people" who have the right to keep and bear arms include peaceable persons like Torres. Certiorari should be granted to

clarify that the historical justification for prohibitions on felons referenced in *Heller* and *McDonald* is the tradition of disarming dangerous persons.

Respectfully submitted,

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