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

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BRIEF OF *AMICUS CURIAE* GEORGE K. YOUNG IN SUPPORT OF PETITIONERS

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5 Blackstone (1803) 8, 9, 10

David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789 (1982) 14

Timothy Cunningham, A new and complete law-dictionary, 1789 . . . . 5, 6

John A. Dunlap, THE NEW-YORK JUSTICE (1815). 15

Hawkins, Pleas of the Crown, book 1, ch. 28, sec. 4. 40 21

Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY (1822). 15

Giles Jacob, The law-dictionary (P. Bryne 1811 first American from the second London edition) (1811). 12, 13

Susan Jones, "Justice Scalia on 2nd Amendment Limitations: 'It Will Have to Be Decided,'" CNSNews.com, July 30, 2012, http://cnsnews.com/news/article/justice-scalia-2nd-amendment-limitations-it-will-have-be-decided. 22

A. Kozinski & J.D. Williams, It Is a Constitution We Are Expounding: A Debate, 1989 Utah L. Rev. 978. 3

Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994). 14

George Neumann, The History of Weapons of the American Revolution 150 Harper & Row 1967 22

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INTERESTS OF THE *AMICUS CURIAE*[1]

George K. Young is a native of the State of Hawaii, a United States citizen, and a Vietnam veteran[2]. In 2012, he filed a pro se lawsuit to challenge the constitutionality of the denial of a permit to carry a handgun in Hawaii either openly or concealed. After being summarily dismissed in the district court, Mr. Young obtained pro bono counsel and prevailed in the Ninth Circuit in front of a three-judge panel. *See Young v. Hawaii*, 896 F.3d 1044 (9th Cir. 2018). The Ninth Circuit then reheard his case *en banc*. The Ninth Circuit upheld the denial of his handgun carry permit application. In doing so, it became the only circuit court to find that the Second Amendment does not extend to self-defense outside the home. *See Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021). Mr. Young has filed a writ of certiorari with this court and is awaiting a decision on whether this Court will grant certiorari. *See Young v. Hawaii*, No. 20-1639.[3] Therefore, Mr. Young has an interest in this case because the outcome of this case will likely impact the outcome of his case.

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[1] Pursuant to Supreme Court Rules 37.3 and 37.6, *amicus curiae* states that all parties have consented in writing to the filing of this brief, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amicus curiae* and his counsel, made a monetary contribution intended to fund the preparation and submission of this brief.

[2] *See* https://www.reuters.com/article/us-usa-guns-hawaii/unlikely-pair-could-usher-gun-rights-case-to-u-s-supreme-court-idUSKBN1KT13B (last visited (6/20/2021).

[3] *See* https://www.supremecourt.gov/search.aspx?filename=/docket/DocketFiles/html/Public/20-1639.html.

SUMMARY OF THE ARGUMENT

This Court should find that the Second Amendment right extends outside the home and find that the Petitioners in this case were unconstitutionally denied handgun carry permits. As shown below, the historical tradition of prohibiting carrying "dangerous and unusual" weapons supports the proposition that there is a general right to carry protected arms. The government may only prohibit carrying in "'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected,'" *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014). The lower courts have misinterpreted *Heller's* dangerous and unusual language. A true historical analysis of this doctrine demonstrates that it supports a finding that the Second Amendment applies outside the home. This Court should correct the lower courts' analyses of the dangerous and unusual doctrine, and because the Second Amendment right to armed self-defense extends outside the home, the Court should find that the Plaintiffs in this case were unconstitutionally denied handgun carry permits.

ARGUMENT

I. *Heller*'s Dangerous and Unusual Language Supports the Proposition that the Second Amendment Right Extends Outside the Home.

The text, history and tradition of the Second Amendment, as well as *Dist. of Columbia v. Heller*, 554 U.S. 570 (2008), demonstrates the right to armed self-defense applies outside the home. Writing for the Court in *Heller*, Justice Scalia stated:

> [w]e also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those "in common use at the time." [*U.S. v. Miller*, 307 U.S. 174, 179 (1939)]. We think that limitation is fairly supported by the historical tradition of prohibiting the carrying of "dangerous and unusual weapons."

Heller, 554 U.S. at 627.

The prohibition on carrying "dangerous and unusual weapons" is a prohibition on certain manners of carry. Historically, there was a presumption that people had a general right to carry Arms that was restricted only in certain circumstances. Almost every lower court to interpret this phrase has failed to conduct a proper historical analysis and therefore, have misapplied *Heller*'s dangerous and unusual language.[4] Instead, the lower courts have almost universally held that this phrase applies to certain types of bearable arms, and then by judicial fiat, those courts finds them too deadly for private citizen ownership. *See e.g. United States v. Henry*, 688 F.3d 637 (9th Cir. 2012) (finding that an automatic firearm not protected by the Second

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[4] "[I]n a very real sense, the Constitution is our compact with history . . . [but] the Constitution can maintain that compact and serve as the lodestar of our political system only if its terms are binding on us. To the extent we depart from the document's language and rely instead on generalities that we see written between the lines, we rob the Constitution of its binding force and give free reign to the fashions and passions of the day." A. Kozinski & J.D. Williams, It Is a Constitution We Are Expounding: A Debate, 1989 Utah L. Rev. 978, at 980.

Amendment because it is a dangerous and unusual weapon); *People v. Zondorak*, 220 Cal. App. 4th 829 (2013) (applying the term to a semiautomatic firearm); *Kolbe v. Hogan*, 849 F.3d 114 (4th Cir. 2017) (same as to AR-15 semiautomatic rifles); *Hollis v. Lynch*, 827 F.3d 436, 446 (5th Cir. 2016) (finding machineguns unprotected because "if a weapon is dangerous and unusual, it is not in common use and not protected by the Second Amendment.").

The misuse of this historical term has even been applied to baseball bats. *People v. Liscotti*, 219 Cal. App. 4th Supp. 1 (2013). If the Second Amendment does not apply to a *baseball bat* (which is essentially a club) because it is too "dangerous," then the Second Amendment is a paper tiger, meaning nothing more than what the third branch, and future judges, say it means.

The prohibition on carrying dangerous and unusual weapons is derived from the Statute of Northampton 2 Edw. 3, c. 3 (1328) which is a statute that banned carrying in certain situations, such as affrays. It reads as follows:

> ITEM, it is enacted, That no Man great nor small, of what Condition soever he be, except the King's Servants in his presence, and his Ministers in executing of the King's Precepts, or of their Office, and such as be in their Company assisting them, and also upon a Cry made for Arms to keep the Peace, and the same in such places where Acts happen, [footnote omitted] be so hardy to come before the King's Justices, or other of the King's Ministers doing their office,

> with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere, upon pain to forfeit their Armour to the King, and their Bodies to Prison at the King's pleasure.

2 Edw. 3 Stat. Northampt. c. 3 (1328). This law is cited by several of the commentators on which *Heller* relies. For example, Timothy Cunningham is cited by the *Heller* Court (*see* 554 U.S. at 581). Timothy Cunningham's 1789 law dictionary defines "affray" as follows:

> Affray, Is derived from the French word effrayer, to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror of others; and so is the word used in the statute of Northampton []. It is now commonly taken for a skirmish, or fighting between two or more. … Yet, as it is there said, they differ in this, that where an assault is but a wrong to the party, an affray is wrong to the commonwealth, and therefore both inquirable and punishable in a leet. … Beside this signification, it may be taken for a terror wrought in the subject by an unlawful fight or violence, &c. as if a man shew himself furnished with armour or weapons not usually worn, it may strike a fear into others unarmed; and so it is used in flat 2 Ed 3 c 3. But altho' no bare words, in the judgement of law, carry in them so much terror as to amount to an

> affray, yet it seems certain, than in some cases there may be an affray, where there is no actual violence, as where a man arms himself with dangerous and unusual weapons in such a manner as will naturally cause a terror to the people; which is said to have been always an offence at the Common law and is strictly prohibited by Statute.

See Timothy Cunningham, A new and complete law-dictionary, Affray, 1789. Cunningham defines riding armed, with dangerous and unusual weapons as:

> an offense at Common law. [citation omitted] By the stat. 2 Ed. 3. Cap. 3. None shall ride armed by day or night to the terror of the people; or come with force and arms before the King"s justices...but men may wear common arms according to their quality and fashion, and have attendants with them armed agreeable to their characters; all persons may ride or go armed take felons, suppress riots, execute the King's process…

Cunningham, *supra*, Riding.

As shown below, this is a prohibition against carrying in a threatening manner which disturbs the public, not simply carrying a weapon outside one's home, whereas carrying in an unusual manner was generally not allowed. The lower courts misinterpretation of this phrase might be understandable if they were required to interpret 14th Century case law. However, even a cursory search of the phrase reveals that courts in the 20th century have

already analyzed this phrase correctly. The Supreme Court of North Carolina correctly interpreted the dangerous and unusual language in the historical context as to how it was originally understood. *See e.g. State v. Dawson*, 272 N.C. 535, 159 S.E.2d 1 (1968).[5]

The term "dangerous weapon", in the English common law, is a legal term of art that usually included weapons designed or able to kill human beings. In this context, the Common Law's definition of "dangerous" was any item that could be used to take human life through physical force. *See United States v. Hare*, 26 F. Cas. 148, 163-64 (C.C.D. Md.1818) ("[S]howing weapons calculated to take life, such as pistols or dirks, putting [the victim] in fear of his life … is … the use of dangerous weapons."). *See also The King v. Oneby*, 92 E.R. 465 (Court of the King's Bench

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[5] "It has been remarked that a double-barrel gun, or any other gun, cannot in this country come under the description of 'unusual weapons,' for there is scarcely a man in the community who does not own and occasionally use a gun of some sort. But we do not feel the force of this criticism. A gun is an 'unusual weapon,' wherewith to be armed and clad. No man amongst us carries it about with him, as one of his everyday accoutrements -- as a part of his dress -- and never, we trust, will the day come when any deadly weapon will be worn or wielded in our peace-loving and law-abiding State, as an appendage of manly equipment. But although a gun is an 'unusual weapon,' it is to be remembered that the carrying of a gun, *per se*, constitutes no offense. For any lawful purpose -- either of business or amusement -- 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." *State v. Dawson*, 272 N.C. 535, 544-45 (1968) (citation omitted).

1727) ("Any dangerous weapon, as a pistol, hammer, large stone, &c. which in probability might kill B. or do him some great bodily hurt."). Therefore, as the Hon. Roger T. Benitez of the Southern District of California said, "[a]t bottom, guns are dangerous." *Miller v. Bonta*, No. 19-cv-1537-BEN (JLB), 2021 U.S. Dist. LEXIS 105640, at *105 (S.D. Cal. June 4, 2021). This is historically supported because common arms, such as pistols, are "dangerous" arms and all arms are "dangerous" within this context.

Timothy Cunningham's 1789 law dictionary defined an affray as "to affright, and it formerly meant no more, as where persons appeared with armour or weapons not usually worn, to the terror." When discussing forcible entry or detainer, Blackstone stated, "so that the entry now allowed by law is a peaceable one; that forbidden is such as is carried on and maintained, with force, with violence, and unusual weapons." 5 Blackstone 148 (1803). It would make little sense to think that the distinction was being drawn between peaceable entry and entry with weapons that are difficult to purchase or hard to find. Instead, the term "unusual weapons" means weapons that are being used in a threatening or shocking manner, or weapons that are being used to facilitate an unlawful endeavor.

This position is supported by case law. In an English case, *Baron Snigge v. Shirton*, a tenant was in a dispute with his landlord, and "kept the possession [of the house he rented] with drum, guns, and halberts". *See generally Baron Snigge v. Shirton*, 79 E.R. 173 (1607). "(The drum was only to give notice if any came to enter, but no body offered to enter.)" *Id.*

This was considered keeping "his house with unusual weapons against a purchaser". *Id.*

In another English case, a sailor fired warning shots with a "musqet and ball" across the bow of another ship as a signal and killed a man. *See generally Rex v. Rowland Phillips*, 98 E.R. (1385). The Court found "[t]he firing was not done in an uncommon manner, or with unusual weapons." *Id.* And held "[i]t is impossible upon this special verdict to say, that the defendant is guilty of more than manslaughter. For it is expressly found, that he fired in the usual manner to bring vessels to, and to hit the hallyards." *Id.* In both cases, the weapons were in common use at the time. However, in one case, the weapon was unusual, while in the other case, it was not. The relevant difference between the cases is whether the use of force was reasonable.

This definition of unusual is supported by Blackstone's discussion of forfeited recognizance. "A recognizance for the good behavior may be forfeited … by going armed with unusual attendance, to the terror of the people." 5 Blackstone 256 (1803). At Common Law, just as people could legally own weapons, large groups of people could legally gather, so long as their purpose was lawful. It is when those groups of people became threatening (or terrifying), that those groups were labeled as unusual attendance to the terror of the public and became unlawful. Similarly, when the manner in which one carries a weapon becomes threatening, it is labeled an unusual weapon.

When used to describe weapons, the word, "unusual" is not being used in a different way than when it is being used to describe attendance.

Blackstone states, "Any justice of the peace may… bind all those… who make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people" 5 Blackstone 254 (1803). Just as the common law is not outlawing the assembly of unusual people, the common law is not referring to the type of weapon involved when it mentions unusual weapons. The historical phrase, "dangerous and unusual weapons" does not refer to classes of weapons as the lower courts have erroneously held. Rather it describes a class of behavior when carrying weapons.

Other, stricter laws outlawed specific types of weapons for certain individuals. "The keeping or carrying any gun-powder, shot, club, or other weapon, whatsoever, offensive or defensive, by any negroe or mulatto whatsoever (except in certain special cases) is an offence, for which the gun or other weapon may be seized, and the offender whipped, by order of a justice of the peace." 4 Blackstone 175 (1803). Similarly, King George III issued a statute outlawing the possession of "pistol, hanger, cutlass, bludgeon, or other offensive weapon with intent feloniously". 5 Blackstone 169 (1803). And declared, "such a person shall be deemed a rogue and a vagabond". *Id.* If the term dangerous and unusual weapons meant a type of prohibited arm, then the legislature would have used that phrase with these laws. Rather the carrying of dangerous and unusual weapons refers to a class of conduct with protected arms.

Historically, this class of conduct was that which caused terror. Terror in this context means carrying in a threatening manner. A 1675 dictionary defines terror as, "dread, great fear or fright". An Universal Etymological Dictionary (R. Ware, W. Innys and J. Richardson, J. Knapton (and twelve others)) (1675). An affray may not be committed in private because then, the public would not be terrified. F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852). The Cyclopedia Law Dictionary from 1922 defined terror as:

> That state of mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe; affright from apparent danger. One of the constituents of the offense of riot is that the acts of the persons engaged in it should be to the terror of the people, as a show of arms, threatening speeches, or turbulent gestures; but it is not requisite, in order to constitute this crime, that personal violence should be committed.

The Cyclopedia Law Dictionary (Walter A. Shumaker and George Foster Longsdorf, ed. Callaghan and Company 1922) (1901).

The Collegiate Law Dictionary from 1925 defines terror as "1. The state of mind which arises from the event or phenomenon that may serve as a prognostic of some catastrophe. 2. Affright from apparent danger." The Collegiate Law Dictionary (James John Lewis ed. (1925), The American Law Book Company (1925)). Historically, "terror" was an apprehension of harm to come. In describing a mugging, James Wilson wrote, "If

one assault another with such circumstances of terror as to put him in fear, and he, in consequence of his fear, deliver his money; this is a sufficient degree of violence". 3 Wilson 59 (1804).

Later, Wilson described arson as "a crime of deep malignity … The confusion and terror which attend arson, and the continued apprehension which follows it, are mischiefs frequently more distressing than even the loss of the property." *Id.* at 63. In describing an ideal judge, Wilson writes, "He ought, indeed, to be a terror to evil doers". 2 Wilson 300 (1804). Wilson wrote, in describing interrogation methods, "terror is frequently added to fraud. The practice… is said… to have been derived its origin from the customs of the inquisition." 3 Wilson 155 (1804).

Giles Jacob's law dictionary states, when describing a legal device known as a Surety of the Peace (which appears to be a promise not to harm), "the demand of the Surety of the Peace ought to be soon after the cause of fear; for the suffering much time to pass before it is demanded, shews that the party has been under no great terror." Giles Jacob, The law-dictionary 149 (P. Bryne 1811 first American from the second London edition) (1811). Jacob further described the difference between mere fear and terror while defining the word, "robbery". Jacob wrote,

> [a]nd when it is laid to be done by putting in fear, this does not imply any great degree of terror, or affright in the party robbed. It is enough that so much force, or threatening by word or gesture, be used, as might create an

> apprehension of danger, or induce a man to part with his property without or against his consent.

Id. at 546. From these sources, terror, is more than mere apprehension of danger; it might more aptly be described as the apprehension of an extreme danger, or a catastrophe.

Some American case law comports with the above view. A 1795 case describes "a defence based upon the ground of duress and terror". *U.S. v. Vigol*, 2 U.S. 346 (1795). Another 1795 case stated, "raising a body of men to …oppose and prevent by force and terror, the execution of a law, is an act of levying war." *U.S. v. Mitchel*, 2 U.S. 348 (Pennsylvania circuit court 1795). However, other old American cases treat the word, "terror" as if it were synonymous with the word, "threat". One case mentions people "armed with all the terrors of forfeiture" *Warder v. Arell*, 2 Va. 282 (1796). Another case mentions "the terror of public censure". *State v. Norris* 2 N.C. 429 (1796). A third case mentions "the terrors of a law-suit". *Neilson & Sarrazin v. Dickenson*, 1 Des. 133 (1785).

Either way, as historically understood, the prohibition against carrying dangerous and unusual weapons requires an arm to be carried in a threatening manner. The longstanding prohibition on the carrying of "dangerous and unusual weapons" thus refers to types of conduct with weapons. "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 traveling or going for the ordinary purposes of business. But I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so

carried are calculated to produce terror and alarm". *Rex v. Dewhurst*, 1 State Trials, New Series 529 (1820). A necessary element of this common law crime of affray, to which the "dangerous and unusual" prohibition refers, had always required that the arms be used or carried in such manner as to terrorize the population, rather than in the manner suitable for ordinary self-defense.

Heller's first source on the topic, Blackstone, offered 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*." 4 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 148-49 (1769) (emphasis added). Blackstone referenced the 1328 Statute of Northampton, which, by the time of the American Revolution, English courts had long limited to prohibit the carrying of arms only with evil intent, "in order to preserve the common law principle of allowing 'Gentlemen to ride armed for their Security.'" David Caplan, *The Right of the Individual to Bear Arms: A Recent Judicial Trend*, DET. L. C. REV. 789, 795 (1982) (citing *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686)). "[N]o wearing of arms is within the meaning of this statute, unless it be accompanied with such circumstances as are apt to terrify the people," by causing "suspicion of an intention to commit an[] act of violence or disturbance of the peace." TREATISE ON THE PLEAS OF THE CROWN, ch. 63, § 9 (Leach ed., 6th ed. 1788); *see* Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104-05 (1994).

Heller's additional citations regarding the "dangerous and unusual" doctrine are in accord. "[T]here may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, *in such a manner, as will naturally diffuse a terrour among the people*." James Wilson, WORKS OF THE HONOURABLE JAMES WILSON (Bird Wilson ed., 1804) (footnote omitted) (emphasis added). "It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, *in such manner as will naturally cause terror to the people*." John A. Dunlap, THE NEW-YORK JUSTICE 8 (1815) (emphasis added).

Charles Humphreys stated, that:

> [r]iding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the people of the land … But here it should be remembered, that in this country the constitution guar[]anties to all persons the right to bear arms; then it can only be a crime to exercise this right in such a manner, as to terrify the people unnecessarily.

Charles Humphreys, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (1822); *see also Heller*, at 588 n.10 (quoting same). It is the *manner* of how the right is exercised, not the type of weapon that is carried, that constitutes the crime. Said another way, just because a firearm or other weapon is in common usage at the time does not make the *manner* in which the right is exercised excused or excusable simply due to the type of firearm or weapon carried.

"[T]here may be an affray … where persons arm themselves with dangerous and unusual weapons, in such manner as will naturally cause a terror to the people." William Oldnall Russell, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS 271 (1826). But:

> it has been holden, that no wearing of arms is within [meaning of Statute of Northampton] unless it be accompanied with such circumstances as are apt to terrify the people; from whence it seems clearly to follow, that persons of quality are in no danger of offending against the statute by wearing common weapons … in such places, and upon such occasions, in which it is the common fashion to make use of them, without causing the least suspicion of an intention to commit any act of violence, or disturbance of the peace.

Id. at 272. The Supreme Court then referred to F. Wharton's A Treatise on the Criminal Law of the United States:

> An affray, as has been noticed, is the fighting of two or more persons in some public place, to the terror of the citizens. (footnote omitted) There is a difference between a sudden affray and a sudden attack. An affray means something like a mutual contest, suddenly excited, without any apparent intention to do any great bodily harm. (footnote omitted). … yet it seems certain that in some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons,

> in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, and is strictly prohibited by the statute. For by statute 2 Edw. 3., s. 3, in force in several of the United States, it is enacted….

F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852).

Wharton also includes a manner requirement to the rule against dangerous and unusual weapons. If a man armed himself with a dangerous and unusual weapon in such a manner that did not naturally cause a terror to the people, he would not be guilty of an affray. After discussing the King's statute, Wharton stated:

> It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law. (*State v. Huntley*, 3 Iredell, 418; but see *State v. Simpson*, 5 Yerger 356). On the same general reasoning, it has been held indictable to drive a carriage through a crowded street, in such a way as to endanger the lives of the passers-by ; (footnote omitted) to disturb a congregation when at religious worship; (footnote omitted) to beset a house, with intent to wound, tar and feather; (footnote omitted) to raise a liberty-pole,[6] in the year

[6] "Liberty poles originated as large wooden columns—often fashioned out of ship masts--erected in public squares as part of the 'rites of resistance' to British authority during the American Revolution… After the revolution, they were used as symbols of

> 1794, as a notorious and riotous expression of ill-will to the government; (footnote omitted) to tear down forcibly and contemptuously an advertisement set up by the commissioners of a sale of land for county taxes; (footnote omitted) to break into a house in the day-time, and disturb its inhabitants; (footnote omitted) and to violently disturb a town-meeting, though the parties engaged were not sufficient in number to amount to a riot.

F. Wharton, A Treatise on the Criminal Law of the United States 726 (1852).

All of Wharton's examples compare the reasoning behind outlawing riding with dangerous weapons to the terror of the public with behavior that caused a disruption to the public peace by engaging in behavior that disrupts others' peace. This supports the proposition that carrying dangerous and unusual weapons to the terror of the people is a manner of carry which disturbs others rather than a particular type of weapon. Notably, Wharton referenced rioting. In order

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resistance during the Whiskey Rebellion … They were also adopted by Jeffersonian Republicans as 'prominent and easily recognizable symbols of liberty, equality, and republicanism,' and as symbols of opposition to the Federalist government and to the Sedition Act. [] By the middle of the nineteenth century, the erection of liberty poles 'on highways and public squares' by 'each political party of the country to express its greater devotion to the rights of the people' had come to be viewed as 'a custom sanctioned by a hundred years and interwoven with the traditions, memories and conceded rights of a free people.'" *City of Allegheny v. Zimmerman*, 95 Pa. 287, 294 (1880).

to be charged with rioting, a certain number of people must be involved. Blackstone defined a riot as follows:

> [r]iots, routs, and unlawful assemblies, must have three persons at least to constitute them (footnote omitted) … A riot is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel (footnote omitted): as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.

5 St. George Tucker, Blackstone's Commentaries: with Notes of Reference, to the Constitution and the Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia 146 (1803). The rule against riots is meant to help preserve the public peace and to avoid unruly mobs. Similarly, to preserve the peace, the common law has outlawed reckless displays of firearms in public.

The other sources *Heller* cites in support of the "dangerous and unusual" doctrine are in accord, as are the cases *Heller* cites. *See O'Neill v. State*, 16 Ala. 65, 67 (1849) (affray "probable" "if persons arm themselves with deadly or unusual weapons for the purpose of an affray, *and in such manner as to strike terror to the people*") (emphasis added); *State v. Langford*, 10 N.C. (3 Hawks) 381, 383-384 (1824) (affray "when a man arms himself with dangerous and unusual weapons, *in such a manner as will naturally cause a terror to the people*") (emphasis added); *English v. State*, 35 Tex.

473, 476 (1871) (affray "by terrifying the good people of the land"). In fact, one does not even need to be armed with a firearm to commit the crime of affray under the dangerous and unusual doctrine. *See State v. Lanier*, 71 N.C. 288, 290 (1874) (riding horse through courthouse, unarmed, is "very bad behavior" but "may be criminal or innocent" depending on whether people alarmed).

And in *Simpson v. State* (1833), the Supreme Court of Errors and Appeals of Tennessee dismissed an indictment alleging that "William Simpson, laborer, with force and arms being arrayed in a warlike manner, in a certain public street or highway situate, unlawfully, and to the great terror and disturbance of divers good citizens, did make an affray . . . ." *Simpson v. State*, 13 Tenn. Reports (5 Yerg.) 356, 361 (1833). The Attorney General sought to rely on Hawkins' claim that "there may be an affray . . .where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people, which is said always to have been an offence at common law, and is strictly prohibited by many statutes." *Id*. at 358.

The court held that the indictment was insufficient as it failed to allege the elements of an affray of fighting between two or more persons. The *Simpson* court repeated Hawkins' comment about the Statute of Northampton that "persons of quality are in no danger of offending against this statute by wearing their common weapons, or having their usual number of attendants with them, for their ornament or defence, in such places and upon occasions in which it is the

common fashion to make use of them without causing the least suspicion of an intention to commit any act of violence or disturbance of the peace." *Id.* at 358-59 citing Hawkins, Pleas of the Crown, book 1, ch. 28, sec. 4. 40.

The traditional right to arms "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose." *Heller* at 626. It was a right to keep and carry weapons for usual purposes such as self-defense. This Court should find that the Second Amendment applies outside the home because there is a historical right to carry arms. It should do because the prohibitions on carrying dangerous and unusual weapons demonstrates that there was a right to carry for usual purposes. If there were not, then the prohibition on the carry of dangerous and unusual weapons would not have been required. There simply would have been prohibitions on carrying weapons.

Heller's reliance on this phrase means that it holds that the Second Amendment right extends to armed self-defense outside the home. This Court should do the same here. Correctly interpretating *Heller's* dangerous and unusual language makes sense of its statement that "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings" were constitutional. *See Heller,* 554 U.S. at 626. As shown above, historically it was permissible to prohibit carrying in places where it would be unusual to do so. Those places are what *Heller* refers to when is discusses sensitive places. It might be unusual to carry an arm in one location but not another. People used to

wear ornamental and defensive weapons as part of their everyday dress. George Neumann, The History of Weapons of the American Revolution 150 Harper & Row 1967. ("It was considered normal for civilians to carry pocket pistols for protection while traveling."). This also makes sense considering Justice Scalia's comments on this issue. "[T]here was a tort called affrighting, which if you carried around a really horrible weapon just to scare people, like a head ax or something, that was, I believe, a misdemeanor". *See* Susan Jones, "Justice Scalia on 2nd Amendment Limitations: 'It Will Have to Be Decided,'" CNSNews.com, July 30, 2012, http://cnsnews.com/news/article/justice-scalia-2nd-amendment-limitations-it-will-have-be-decided (last visited 7/14/2021).

Historically, it was normal (usual) for a person to carry an English short sword or dagger to the market and that carry would not be prohibited. Whereas carrying a head axe dressed in full plate mail would be unusual at an English market and could be prohibited because that would likely cause a terror to the people. Similarly, it is constitutionally protected to carry a handgun in most areas. However, in some of those areas it may be permissible to prohibit carrying a long arm while wearing tactical armor even though the government cannot prohibit the carry of handguns.

At Common Law, one had a right to carry protected arms. The government cannot strip the right to carry protected arms without demonstrating that carrying within an area with that specific arm is unusual. This Court should find that the Second Amendment right

extends to armed self-defense outside the home based on the fact the tradition of prohibiting carrying dangerous and unusual weapons directly supports a historical right to carry weapons for usual purpose such as self-defense. The government may only prohibit carrying in "'well-defined and narrowly limited' category of prohibitions 'that have been historically unprotected'" *Jackson v. City & Cty. of S.F.*, 746 F.3d 953, 960 (9th Cir. 2014).

CONCLUSION

This Court should reverse the Second Circuit and find that the denial of Petitioners' handgun carry applications violated the Second Amendment.

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