No. 20-843

In The Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, 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 *AMICUS CURIAE* PATRICK J. CHARLES IN SUPPORT OF NEITHER PARTY

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Dated: July 19, 2021

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

This *amicus curiae* brief is submitted by historian Patrick J. Charles to inform the Court on the history of laws governing the carrying of concealed and dangerous weapons from the advent of discretionary licensing laws in the mid-to-late nineteenth century through the late twentieth century, while also pointing out some of the potential pitfalls of relying on the historical record in interpreting the Second Amendment.

Amicus curiae is the author of three books and more than twenty articles on the history of the Second Amendment, firearms and weapons laws, and the use of history as a jurisprudential tool. *Amicus curiae*'s scholarship has been cited and relied upon by six Circuit Courts of Appeals and by this Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Amicus curiae* currently serves as a Senior Historian and Legislative Fellow for the United States Air Force (USAF). The information and analysis contained herein are solely those of the *amicus curiae*, and not those of the USAF or the Department of Defense.[1]

[1] *Amicus curiae* certifies that no counsel for party authored this brief in whole or in part and that no person or entity, other than *amicus* or his counsel, has made a monetary contribution to this filing. Counsel for all parties have consented to this filing.

SUMMARY OF THE ARGUMENT

If this Court decides that the history of modern laws governing the carrying of concealed and dangerous weapons is pertinent to the question of whether New York's concealed carry licensing law violates the Second Amendment, the Court should have a contextualized understanding of those laws. Although this brief does not offer an opinion on how the Court should decide this case, a review of the history of laws governing the carrying of concealed and dangerous weapons yields three overarching conclusions. First, for nearly 700 years, our Anglo-American tradition has drawn a legal distinction between carrying and using dangerous weapons in public and doing so on one's own premises. Second, beginning in the mid-to-late nineteenth century, lawmakers enacted and the courts upheld a wide array of regulations pertaining to how, when, and where a person may carry concealed and dangerous weapons in public, including discretionary licensing laws. Third, for much of the twentieth century, discretionary concealed carry licensing laws were not only commonplace, but were also widely accepted by the courts. It was not until the late twentieth century that these laws began to change.

The brief also seeks to assist the Court with guidance in evaluating the history-based arguments that it will be presented by the litigants and their *amici*. The brief emphasizes that to avoid the pitfalls of questionable scholarship that have ensnared some lower courts when adjudicating Second Amendment cases and controversies, this case will require care in navigating

conflicting and competing historical claims. Additionally, it will require the Court to undertake a thorough examination of the sources underlying the historical claims rather than merely accepting them at face value.

ARGUMENT

I. Lessons from History and Tradition on the Law Governing the Carrying of Concealed and Dangerous Weapons

Starting in the mid-1970s, the Second Amendment became a focal point for historical debate. *See, e.g.*, Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent. L. Rev. 349 (2000). The debate centered on whether the Second Amendment protected an individual right and, if so, exactly what right was protected. In the course of that debate, some scholars explored the history of weapons regulations. However, most research was focused on the individual right issue. *See, e.g.*, David Thomas Konig, *Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?*, 25 Law & Hist. Rev. 177 (2007).

It was not until after the Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that scholars began seriously examining the history of weapons laws in detail. Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55 (2017). The laws governing the public carrying of concealed and

dangerous weapons received particular attention. *See, e.g.*, Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 Law & Contemp. Probs. 11 (2017); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373 (2016); David B. Kopel, *The First Century or Right to Arms Litigation*, 14 Geo. L.J. & Pub. Pol'y 127 (2016).

There is considerable debate among the lower courts as to what weight, if any, should be given to the history of these laws in defining the reach of the Second Amendment to firearms carried outside the home. Some have interpreted *Heller* as significantly narrowing the scope of any historical inquiry. *See, e.g.*, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017); *Moore v. Madigan*, 702 F.3d 933 (7th Cir. 2012). Others have interpreted *Heller* to permit an examination of the historical record and sources with more scholarly vigor. *See, e.g.*, *Peruta v. Cty. of San Diego*, 824 F.3d 919 (9th Cir. 2016); *Kachalsky v. Cty. of Westchester*, 701 F.3d 81 (2d. Cir. 2012).

There is also considerable debate among scholars as to which historical eras and bodies of law are relevant. *Compare, e.g.*, Michael O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585 (2012) (advancing the Antebellum South's interpretation of the Second Amendment) *with* Eric M. Ruben & Saul Cornell, *Firearms Regionalism and Public Carry: Placing Southern*

Antebellum Case Law in Context, 125 Yale L.J. Forum 121 (2015) (calling into question the Antebellum South's interpretation on both objectivity and moral grounds). What is undisputed, however, is that time, place, and manner regulations on the carrying of concealed and dangerous weapons are some of the oldest and most longstanding in Anglo-American history. *See generally* Charles, *Faces, Take Two*, *supra*. What is also undisputed is that laws governing the carrying of concealed and dangerous weapons have evolved in the United States over time to meet changing public safety concerns. *Id*.

A. Summary of Laws Governing the Carrying of Concealed and Dangerous Weapons Until the Mid-Nineteenth Century

As early as the late thirteenth century, English law imposed restrictions on the carrying of dangerous weapons in public places. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 593 (1895). This, as part of a broader nationwide legal reform in England, eventually gave rise to the 1328 Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.). That law provided that no one shall bring "force in affray of peace, *nor* to go nor ride armed by day or night, in fairs, markets, nor in the presence of the King's Justices, or other ministers, nor in no part elsewhere." *Id*. (emphasis added); *see also* Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 Eng. Hist. Rev. 842, 850 (1993). This was followed by several

royal proclamations, royal decrees, and other laws restricting the carrying of dangerous weapons in public places. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 13-24 (2012). The royal proclamations are of particular importance in understanding the meaning of the Statute of Northampton. As Sir Edward Coke noted in the section titled "Going or riding armed": "Proclamations are of great force, [because they are] grounded upon the laws of the Realme." SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 162 (1644).

By the late seventeenth century, the same body of law began appearing in the American Colonies, and stayed on the books through the ratification of the Constitution. Cornell, *Keep and Carry*, *supra*, at 29-32: *see also* JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAWS OF STATUTORY CRIMES § 784 (1873) ("But the statute [of Northampton] bears a date long anterior to the settlement of this country, it is of a *sort adapted to the wants of every civilized community*; and, if the question is deemed important, no reason can well be assigned why it should not be regarded as common law in our several States.") (emphasis added).

As confirmed by the writings of various legal commentators up through the eighteenth century, these laws were generally understood to restrict the precautionary carrying of dangerous weapons in public places. Charles, *Faces, Take Two*, *supra*, at 384-92. However, as Justice of the Peace manuals up through

the eighteenth century show (in accord with the flexible common law principles of the time), enforcement of these laws—as was true of most contemporaneous criminal laws—was highly adaptable, discretionary, and subject to local interpretation. Saul Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688-1868*, 83 Law & Contemp. Probs. 73, 82-83 (2020).

It was not until the nineteenth century that the adaptable and discretionary common law model of criminal law enforcement began to develop into more tangible, concrete forms. PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 141-47 (2019). This applied to the laws governing the carrying of concealed and dangerous weapons in public places as well. Initially, two types of laws—concealed carriage prohibitions and the so-called "Massachusetts Model"—dominated the statute and ordinance books. Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1716-25 (2012). The first type—concealed carry prohibitions—were most common in the Antebellum South. These laws were enacted to quell increasing levels of violence, homicides, and dueling. Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 Reg. Ky. Hist. Soc. 370 (1993). The second type of laws—the Massachusetts Model—were most common in the Midwest and historic Northeast. In accord with the Statute of

Northampton, the Massachusetts Model laws prohibited carrying dangerous weapons in public places, and were generally enforced in accordance with the common law surety process.[2] *See, e.g.*, REVISED STATUTES OF THE STATE OF WISCONSIN, PASSED AT THE ANNUAL SESSION OF THE LEGISLATURE COMMENCING JANUARY 13, 1858, AND APPROVED MAY 17, 1858, at 985, ch. 176, § 18 (1858); REVISED STATUTES OF THE STATE OF MAINE PASSED OCTOBER 22, 1840, at 709, ch. 169, § 16 (2d ed. 1841). What distinguished the Massachusetts Model from its English predecessor were exceptions that permitted an individual to carry a concealed and dangerous weapon in public if the individual was able to demonstrate an "imminent" or "reasonable" fear of assault or injury to his or her person, family, or property. *See, e.g.*, ELISHA HAMMOND, A PRACTICAL TREATISE, OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE 184 (1841).

B. Mid-to-Late Nineteenth Century Changes in Laws Governing the Carrying of Concealed and Dangerous Weapons

In the mid-nineteenth century, to meet changing public safety concerns as well as changing social and

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[2] The surety process originally developed out of Anglo-Saxon practice to enforce the king's peace. David Feldman, *The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding Over Power*s, 47 Cambridge L.J. 101, 111-12 (1988). In the late thirteenth- and early fourteenth centuries, the surety process was updated and codified in several statutes. *Id*. at 111-26.

cultural norms, laws governing the carrying of concealed and dangerous weapons once again began to evolve, with different state and local jurisdictions adopting different laws and enforcement models.[3] Charles, *Faces, Take Two*, *supra*, at 414-17; *see also* BISHOP, *supra*, at §§ 238, 320-21, 781-803 (discussing the states' varying approaches to regulating the carrying of dangerous weapons). Many jurisdictions continued to broadly prohibit the carrying of dangerous weapons concealed or otherwise in public—with some providing exceptions for traveling, transport to and from one's residence and place of business, and other presumed lawful acts. App. § III at 67-92. Many others, however, changed their laws to meet their respective public safety, social, and cultural needs. Some modernized the Massachusetts Model by replacing the common law surety process with a scheme that provided for monetary fines, imprisonment, or both. App. § IV at 92-104. Other jurisdictions enacted laws requiring a physical license or permit to carry concealed and dangerous weapons—and gave local government officials wide discretion to decide who could and could not carry within corporate limits. App. § I at 1-45.

The history of laws requiring a physical license or permit to carry concealed and dangerous weapons are

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[3] Given both the volume and variety of such laws, an Appendix has been included to assist the Court. *Amicus curiae* has located more than 300 such laws during his research, with a sample of 100 examples provided in the Appendix. For the Court's convenience, links to the original source documents cited in the Appendix can be found at: https://patrickjcharlesnysrpavbruenamicusbrief.wordpress.com.

particularly relevant in this case. First, that is the very type of armed carriage law at issue in this case. Second, laws requiring a physical license or permit to legally carry concealed and dangerous weapons would go on to dominate American firearms law for the next century.

As far as *amicus curiae* can determine, licensing or permitting laws appear to have originated in California. After the state of California repealed its law prohibiting the carrying of concealed weapons except for "travelers . . . actually engaged in making a journey at the time," STATUTES OF CALIFORNIA, PASSED AT THE FOURTEENTH SESSION OF THE LEGISLATURE, 1863, at 748 (1863); STATUTES OF CALIFORNIA, PASSED AT THE EIGHTEENTH SESSION OF THE LEGISLATURE, 1869-70, at 67 (1870), local California jurisdictions began enacting similarly worded ordinances with the notable difference of granting local government officials discretion to issue armed carriage licenses "to any peaceable person, whose profession may require him to be out at late hours of the night." Ordinance No. 84: Prohibiting the Carrying of Concealed Deadly Weapons, Apr. 24, 1876, CHARTER AND ORDINANCES OF THE CITY OF SACRAMENTO 173 (1896). These licensing or permitting laws quickly spread across California, including in such cities as San Francisco, Santa Barbara, and Fresno to name a few.[4] App. § I.A. at 2-12. And in 1891 the California

[4] The laws continued to spread across California in the early twentieth century. *See* LAWS OF CALIFORNIA AND ORDINANCES OF THE COUNTY AND CITIES OF LOS ANGELES COUNTY RELATING TO

Supreme Court upheld such a law against a state constitutional challenge, albeit not on Second Amendment grounds. *Ex Parte Cheney*, 90 Cal. 617, 621 (1891) ("It is a well-recognized fact that the unrestricted habit of carrying concealed weapons is the source of much crime, and frequently leads to causeless homicides, as well as to breaches of the peace, that would not otherwise occur.").

Laws requiring a physical license or permit to carry concealed and dangerous weapons were also prevalent in Kansas, where state law afforded municipalities wide latitude to "prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise. . . ." THE LAWS OF THE STATE OF KANSAS 134 (1871). While many Kansas municipalities, such as Wichita, Burlington, Abilene, and others, maintained broad prohibitions against publicly carrying concealed and dangerous weapons, App. § III at 68-69, 76-77, 80, 82-85, many others adopted some form of licensing or permitting, App. § I.B. at 12-18. As in California, these laws gave local government officials wide discretion to decide who was allowed to carry concealed and dangerous weapons in public. *Id*.

In addition to the states of California and Kansas, laws requiring a license or permit to carry concealed and dangerous weapons in public were enacted in municipalities across the country. Cities such as

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MINORS 45, 121-22, 129-31, 197, 213-14, 238-39, 267 (1914); CHARTER AND ORDINANCES OF THE CITY OF PASADENA, CALIFORNIA 159 (1905).

Milwaukee, Lincoln, St. Paul, New Haven, and Wheeling (in West Virginia) are all examples, and in every instance their laws gave government officials wide discretion to approve, deny, and revoke said licenses or permits. App. § I.C. at 19-45. In the case of Wheeling, the permit or licensing law survived a constitutional challenge on both Second and Fourteenth Amendment grounds. *Concealed Weapons: Judge Brannon's Decision on This Subject*, WHEELING REGISTER (WV), Oct. 15, 1883, p. 1, *reprinted in* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts Use of History-in-Law*, 67 Clev. St. L. Rev. 227, 214-16 (2019).

The historical evidence that government officials were given wide discretion to approve, deny, and revoke licenses or permits to carry concealed and dangerous weapons in public, and that many jurisdictions adopted broad prohibitions against the carrying of dangerous weapons in public, concealed or otherwise, should not lead the Court to conclude that all armed carriage was prohibited. Certainly, as several mid-to-late nineteenth century legal commentators attest, state and local governments were afforded broad police powers to regulate the carrying of concealed and dangerous weapons. *See, e.g.*, JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394 (1867); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (1868); John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defence*, 1 Cent. L.J. 259, 286, 296 (1874); THOMAS M. COOLEY, A TREATISE ON THE LAW

OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 301 (1879). However, notwithstanding these police powers, it was generally accepted that laws must provide some means by which individuals were able to legally transport or carry dangerous weapons (including firearms) for certain lawful purposes. Patrick J. Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, 13 Charleston L. Rev. 125, 147-55 (2018).

C. The Twentieth Century Proliferation of Discretionary Licensing Laws Governing the Carrying of Concealed and Dangerous Weapons

In the early twentieth century, laws requiring a license or permit to carry concealed and dangerous weapons continued to spread. App. § II at 46-67. Regarding New York, prior to the adoption of its statewide licensing law in 1911, at least seven New York municipalities—New York City, Albany, Brooklyn (passed standalone law but incorporated by New York City in 1898), Buffalo, Elmira, Lockport, and Troy—had all enacted similar laws. App. at 21-24, 32-35, 52-56, 59-60.[5]

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[5] Petitioners cast licensing laws like New York's 1911 law as part of a wide organized effort to "disarm disfavored groups, like . . . immigrants. . . ." Pet. Br. 2; *see also id*. at 13,14, 42-43. This claim is speculative at best. Not only does the history of New York's 1911 law convey a much different story, CHARLES, *supra*, at 175-83, but also the claim ignores that licensing laws had

Despite the continued spread of laws requiring a license or permit to carry concealed and dangerous weapons across the United States, the law relative to armed carriage continued to vary widely jurisdiction to jurisdiction.[6] It was these variations that in part drove the country's two most prominent shooting and marksmanship organizations—first the United States Revolver Association (USRA) and later the National Rifle Association (NRA)—to push for model state firearms legislation. Notably, the model armed carriage law championed by the USRA and NRA were the discretionary licensing or permitting laws. Charles, *Faces, Take Three*, *supra*, at 243-45.

From 1922 to 1930, two model laws were presented to state lawmakers for consideration. The first was the Capper Bill, drafted by the USRA and sponsored by Kansas Senator Arthur Capper. CHARLES, *supra*, at 190-93. This was followed by the Uniform Firearms Act (UFA), which was initially drafted by the National Conference of Commissioners and revised largely at the behest of the USRA and NRA. HANDBOOK

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already spread throughout the United States by that time. App. 1-45, 46-67.

[6] Helpful summaries on the variety of state laws governing the transporting and carrying of arms in the twentieth century can be found in NRA literature. *See, e.g.*, *Digest of State Firearms Laws, Part I and Part II*, AMERICAN RIFLEMAN, Nov. 1936, at 26-27; *Digest of State Firearms Laws, Part III and Part IV*, AMERICAN RIFLEMAN, Jan. 1937, at 32-33. In addition to NRA literature, see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE PROCEEDINGS OF THE FORTIETH ANNUAL MEETING 538-44 (1930).

OF THE NATIONAL CONFERENCE OF COMMISSIONERS UNIFORM STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 711-42 (1924); UNIFORM FIREARMS ACT: DRAFTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 3-14 (1930).

Both the UFA and Capper Bill required persons to show good cause or a justifiable need in order to lawfully carry concealable firearms in public places. UNIFORM FIREARMS ACT, *supra*, at 3-4, §§ 5, 7; "United States Revolver Association Act," *reprinted in* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 890-91, §§ 6, 8 (1925). Likewise, to combat the rapid increase in handgun-related crime via the automobile, both laws contained provisions requiring persons to obtain a license to carry or transport handguns in automobiles, with the UFA extending the licensing requirement to both the concealed and open vehicular transport of handguns. UNIFORM FIREARMS ACT, *supra*, at 3, § 5; "United States Revolver Association Act," *supra*, at 890, § 6. Lastly, to accommodate the needs of law-abiding citizens wanting to use handguns for lawful purposes, both model laws included a list of exceptions. These exceptions permitted the transporting or carrying of handguns by, for example, "any person engaged in the business of manufacturing, repairing, or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual and ordinary course of such business, or to any person

while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode or business to another." UNIFORM FIREARMS ACT, *supra*, at 3, § 6; *see also* "United States Revolver Association Act," *supra*, at 891, § 7.

From their inception, both the UFA and Capper Bill received a wide range of endorsements from lawmakers, law enforcement officials, and both proponents and opponents of firearms restrictions—resulting in the most extensive nationwide overhaul of firearms legislation to that time. CHARLES, *supra*, at 192-99. Yet despite the popularity of the UFA and Capper Bill, the drafters of both laws fell significantly short of their goal to make state and local firearms laws uniform throughout the country. In fact, by the mid-twentieth century fewer than half the states had enacted some version of either the UFA or the Capper Bill. *See Digest of State Firearms Laws, Part I and Part II*, *supra*, at 26–27; *Digest of State Firearms Laws, Part III and Part IV*, *supra*, at 32–33.

What did gain wide acceptance, however, was the adoption of a discretionary, good cause or justifiable need requirement to legally carry concealable firearms in public places. Over the next quarter century, laws requiring a license or permit to carry concealed and dangerous weapons in public continued to proliferate in state assemblies—each of which provided government officials wide discretion to approve, deny, or revoke said permits or licenses. In fact, by the 1960s,

every state in the union except Vermont and New Hampshire had such a law. Richard S. Grossman & Stephen A. Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed Carry Handgun Laws, 1960-2001*, 26 Contemp. Econ. Pol. 198, 200 (2008). And over that period, the constitutionality of the laws was never seriously called into question. Charles, *Faces, Take Three*, *supra*, at 219-22, 248-50.

It was not until the mid-1980s that lawmakers began to modify their respective armed carriage laws from the discretionary permitting or licensing model to a more permissive, mandatory permitting and licensing model (often referred to as "shall issue" carrying laws). Charles, *Faces, Take Two*, *supra*, at 471-73. And now, post-*Heller*, many states are once more modifying their respective armed carriage laws to be even more permissive, with some going so far as to eliminate licensing and permitting altogether. Charles C.W. Cooke, *Constitutional Carry is Spreading*, NRA AMERICA'S 1ST FREEDOM, Apr. 5, 2021, https://www.americas1stfreedom.org/articles/2021/4/5/constitutional-carry-is-spreading.

II. Limitations on the Use of History in Law

History has long been used as a jurisprudential tool. In several instances, the Court has looked to history to conclude that provisions of the Bill of Rights are "incorporated" against the states. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 687-89 (2019); *McDonald v. City of Chicag*o, 561 U.S. 742, 767-78 (2010). In other instances, the Court has used history to inform the scope

of a constitutional protection. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710-21 (1997); *New York Times v. Sullivan*, 376 U.S. 254, 273-77 (1964). And in relying on an analysis of history, the Court has not restricted itself to any particular time or era. Although the Court most frequently examines the historical time period when a constitutional provision, treaty, or law in issue came into existence, *see, e.g.*, *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016-19 (2019) (Gorsuch, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 966-75 (1991), the Court also, at times, relies on other, non-contemporaneous facets of history and tradition*, see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-99 (2015); *NLRB v. Canning*, 573 U.S. 513, 522-38 (2014); *see also McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 371-85 (1995) (Scalia, J., dissenting) (noting that even in cases where history may be read to support one outcome, adhering to longstanding practice and tradition is the better approach).

Exactly how history should inform the decision of Second Amendment cases is open for debate. JOSEPH BLOCHER & DARRELL A.H. MILLER, THE POSITIVE SECOND AMENDMENT 127-31 (2018); Darrell A.H. Miller, *Text, History, and Tradition: What the Seventh Amendment Can Teach Us About the Second*, 122 Yale L.J. 852 (2013); Patrick J. Charles, *The Second Amendment in Historiographical Crisis: Why the Supreme Court Must Reevaluate the Embarrassing "Standard Model" Moving Forward*, 39 Fordham Urb. L.J. 1727, 1842-63 (2012). But should the Court rely upon history, it must

remain cognizant of the limits of history in law, as well as the importance of using history in a transparent and objective way.

Regarding the limits of history in law, writing in 1897, Oliver Wendell Holmes, Jr. warned "of the pitfall of antiquarianism"—that is, being overly focused on a particular past rather than the path of the law, its relationship to the present, and its potential impact on the future. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 Harv. L. Rev. 457, 474 (1897). Holmes indeed saw value in using history to answer legal questions. *Id*. at 459-60, 469. Yet Holmes, fully understanding that the law can only ask so much of history, exercised caution when doing so. *Id*. at 469, 474; OLIVER WENDELL HOLMES, JR., THE COMMON LAW 2 (1881).

Holmes' wisdom is highly relevant here. While the past can tell us much about the laws governing the carrying of concealed and dangerous weapons going back centuries, there is just as much that is hidden. For instance, although the available historical evidence unequivocally demonstrates that for hundreds of years the 1328 Statute of Northampton applied to *both* bringing armed force in affray of peace *and* the act of carrying dangerous weapons in the public sphere, little is known as to how frequently local justices of the peace enforced that law. Very few local enforcement records that would enable historians to accurately answer that question have survived. The same applies to virtually every law governing the carrying of concealed and dangerous weapons through the nineteenth century. Local enforcement records during that time are

fragmented and sparse. *See, e.g.*, CHARLES, *supra*, at 142-45 (postulating why there is little in the way of local enforcement records for the Massachusetts Model).

Since the Court decided *Heller*, more than a thousand Second Amendment challenges to statutes and regulations have been presented to the federal courts. Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1458 (2018). And, because *Heller* relied extensively on history, litigants now routinely advance various historical claims, frequently based on nothing more than conjecture.[7] *See generally* Mark Anthony Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 Hastings Const. L.Q. 531 (2019). Historical claims based on conjecture are, with all due respect, nothing more than historical fiction. One historical fiction can beget another, and another, to the point that myth consumes fact, particularly if it is given the imprimatur of this Court.

As for utilizing history in a transparent and objective way, the Court should refuse to engage in "law office history"—that is, the picking and choosing only those historical narratives that support a particular outcome. John Phillip Reid, *Law and History*, 27 Loy. L. A. L. Rev. 193, 197-203 (1993). By picking and choosing its historical friends, a court sends a dangerous message that policy goals may trump

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[7] *See, e.g.*, *infra* note 5 (addressing Petitioners' speculative xenophobia claim).

historical objectivity. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1060 (1992) (Blackmun, J., dissenting) (arguing against "treat[ing] history as a grab bag of principles, to be adopted where they support [one] theory, and ignored when they do not"). While there is indeed no pleading requirement that litigants and their accompanying *amici* be historically objective and transparent, the courts deciding cases should make a valiant attempt to get history right, lest they enshrine such errors with the courts' own legitimacy. *See, e.g.*, William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va. L. Rev. 1237 (1986). Moreover, where there is legitimate controversy over interpretations of the historical record, the Court should decline to resolve the disputes of scholars and rely only on facts that are generally accepted.

III. Historical Misunderstandings on the Law and Armed Carriage

As outlined in Part I, prior to *Heller*, research into the history of weapons regulations was far from robust. Only after *Heller* did this field of historical scholarship mature, and, in the process, several claims about the history of weapons regulations have been debunked. Perhaps the most significant are those claims relating to the enforcement and scope of the Statute of Northampton. For the past few decades, several scholars incorrectly claimed that the Statute of Northampton was never enforced as it was written. *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104 (1994); *see also* Nelson

Lund, *The Second Amendment*, Heller*, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1363-64 (2009) (relying on Malcolm's non-enforcement claim on the Statute of Northampton); Kevin C. Marshall, *Why Can't Martha Stewart Have a Gun?* 32 Harv. J.L. & Pub. Pol'y 695, 716-17 (2009) (same). Petitioners seem to have followed suit. Pet. Br. 5. But post-*Heller*, when historians and legal scholars began carefully researching the history of weapons regulations, the evidence revealed that this view is untenable.[8]

There are other historical pitfalls pertaining to the laws governing the carrying of concealed and dangerous weapons of which the Court should be aware. *See generally* Charles, *Faces, Take Three*, *supra*. Based on nearly a decade of Second Amendment litigation at the lower courts, four historical claims stand out: those relating to *Sir John Knight's Case*, William Hawkins' 1716 *A Treatise of the Pleas of the Crown*, compulsory

[8] One writer has recently claimed that the Statute of Northampton did not prohibit the "peaceable" carrying of dangerous weapons. STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS? (2021), 26-42. In arriving at this conclusion, the writer ignores several historical documents showing the Statute of Northampton did indeed prohibit *both* bringing armed force affray *and* the act of carrying dangerous weapons in the public concourse, as well as several well-accepted legal commentaries on the subject. *Compare* Charles, *Faces*, *supra*, at 13-23; *accord* Charles, *Faces, Take Two*, *supra* at 382-91, *with* HALBROOK, RIGHT TO BEAR, *supra*, at 26-42. *See also* Patrick J. Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. Ill. L. Rev. Online 195, 211-12 (2021) (rebutting Halbrook's limited interpretation of the Statute of Northampton's enforcement).

arms bearing laws, and the allegation that armed carriage restrictions are racist and an instrument of slavery.

A. *Sir John Knight's Case*

In the mid-1970s, when debate on the Second Amendment in law reviews was just starting, NRA lawyer David I. Caplan opined—without any actual historical evidence other than the *English Reports*—that the obscure 1686 English case *Rex v. Knight*, 90 Eng. Rep. 330 (1686), otherwise known as *Sir John Knight's Case*, 87 Eng. Rep. 75 (1686) [hereinafter *Knight's Case*], forever changed the prosecutorial scope of the Statute of Northampton.[9] According to Caplan,

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[9] In *Knight's Case*, the defendant, Sir John Knight, was prosecuted for walking about the streets and entering a church carrying a gun. Knight was subsequently acquitted by a jury. Why Knight was acquitted remains a mystery. Knight was, however, placed on a peace bond in accord with the surety process. Initially, relying on historian Joyce Lee Malcolm's historical timeline of the case, MALCOLM, *supra*, at 104-5, *amicus curiae* determined that Knight was most likely acquitted under the Statute of Northampton's exception for "assisting" government officials. *See* 2 Edw. 3, c. 3 (1328) (Eng.); Charles, *Faces*, *supra*, at 30; Charles, *Faces, Take Two*, *supra*, at 395. But historian Tim Harris has shown how Knight was prosecuted under the Statute of Northampton for a later, separate instance in which government officials were not present. *See* Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker et al eds., 2019), 23, 25-27. *Amicus curiae* subsequently corrected the record, and it remains unknown why exactly Knight was acquitted by a jury of his peers. *See* CHARLES, *supra*, at 117-18.

after the case was decided, it was generally understood—including by the Founders of our country—that the Statute of Northampton only applied in those cases where an individual carried arms publicly with the "purpose of 'terrify[ing] the King's subjects.'" David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, Fordham Urb. L.J. 31, 32-33 (1976). Caplan also concluded—again without any supporting historical evidence—that *Knight's Case* established the common law rule that the "quiet and peaceful" carrying of dangerous weapons in public places was deemed lawful. *Id*. In the decades that followed, a contingent of writers have either restated or parroted Caplan's views on *Knight's Case* as fact. *See, e.g.*, NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 81-82 (1st ed. 2012); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 49-50, 213 (1984); Robert Dowlut & Janet A. Knoop, *State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 202 (1982).

There are several problems, however, with Caplan's theory that *Knight's Case* effectively re-wrote the Statute of Northampton. They illustrate how easily history can be distorted. CHARLES, *supra*, at 114-20 (addressing the problems with interpreting *Knight's Case* as enshrining a peaceful right to carry). One problem is that the principal source upon which the historical claim was based—the *English Reports*—is incomplete. Until the mid-eighteenth century, the *English Reports* were only partial legal summaries, and therefore

unreliable for reconstructing cases or serving as judicial precedent. In other words, prior to the mid-eighteenth century, the *English Reports* were never intended to be comprehensive case studies and were not used as such. Rather, they served merely to instruct legal practitioners and students on the intricacies of pleading. NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 52-56 (2008).

Another problem with Caplan's argument is that it disregards the facts of *Knight's Case* insofar as historians can reconstruct them. Harris, *supra*, at 26-27; Cornell, *Keep and Carry*, *supra*, at 26-27. At no point did the defendant, Sir John Knight, base his legal defense on his need to carry weapons for self-defense, nor did Knight plead before the King's Bench that he was carrying weapons peacefully.[10] Rather, Knight defended his actions on the grounds of "active Loyalty" to the crown. 3 THE ENTRING BOOK OF ROGER MORRICE 1677-1691: REIGN OF JAMES II, at 308 (Mark Goldie et al. eds., 2007). Moreover, it is historically impossible to conclude that Knight was in any way exercising a common law right to peacefully carry weapons in public

[10] Two writers have attempted to salvage the "peaceable right to carry" interpretation of *Knight's Cas*e by selectively reframing the historical evidence. HALBROOK, RIGHT TO BEAR, *supra*, at 42-44, 51-58; Kopel, *First Century*, *supra*, at 135-36. In doing so, they disregard key portions of the record that contradict their "peaceable right to carry" conclusion. CHARLES, *supra*, at 114-21 (outlining the historiography of *Knight's Case* in Second Amendment literature and what history does and does not inform regarding the outcome); Harris, *supra*, at 25-27 (summarizing the politics surrounding *Knight's Case* and what history does and does not inform regarding the outcome).

places, given that Knight testified at trial that whenever he "had occasion to come to the Town [he] rode with Sword and a Gun, [but] left them at the end of Town when he came in, and took them thence when he went out. . . ." *Id*. at 142. Thus, if the summary of facts of *Knight's Case* reveals anything, it is the fact that going armed in the public concourse was extraordinary. Harris, *supra*, at 27. And despite Knight's acquittal by a sympathetic jury, the King's Bench imposed a bond as surety for Knight's future good behavior. 1 NARCISSUS LUTTRELL, A BRIEF HISTORICAL RELATION OF STATE OF AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714, at 389 (1857); 3 ENTRING BOOK ROGER MORRICE, *supra*, at 311. Going about armed in public places, even peacefully, was not the norm.

But perhaps the most glaring problem with interpreting *Knight's Case* to enshrine a common law right to peacefully carry weapons in public places is that from 1686 to the mid-nineteenth century there is not one instance to be found—not one case, legal summary, legal commentary, newspaper or journal article, nor correspondence—where *Knight's Case* was discussed or cited for this supposed holding.[11] CHARLES, *supra*, at

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[11] *Knight's Case* is indeed cited in William Hawkins' 1716 A *Treatise of the Pleas of the Crown*. 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 135, ch. 63, § 9 (1716). However, Hawkins' text accompanying this citation does not remotely endorse a right to carry dangerous weapons in public places. 1 HAWKINS, *supra*, at 135, ch. 63, § 9. Moreover, although some of the Founders maintained copies of the *English Reports* and Hawkins' treatise, Br. of *Amici Curiae* Professors of Second Amendment Law et al in Support of Petitioners 12-13, the fact remains that there is no evidence of anyone interpreting either *Knight's Case*

114-16. Accordingly, it cannot be legitimately argued that the Founders understood *Knight's Case* to enshrine a common law right to 'peaceably' carry dangerous weapons in public places. Charles, *Invention of the 'Peaceable Carry'*, *supra*, at 195-214 (critically examining the origins, historiography, and evidentiary problems with the 'peaceable carry' interpretation of the Second Amendment).

B. William Hawkins' 1716 *A Treatise of the Pleas of the Crown*

In recent years, many of the same writers who claim *Knight's Case* enshrined a "peaceable right to carry" have also interpreted William Hawkins' 1716 *A Treatise Pleas of the Crown* to support the same proposition. *See, e.g.*, HALBROOK, RIGHT TO BEAR, *supra*, at 46-49. According to these writers, Hawkins' treatise proves that the Statute of Northampton only applied to "those circumstances where carrying of arms was unusual and therefore terrifying," but "'wearing common weapons' in 'the common fashion' was legal." Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101, 102 (2009) (quoting 1

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or Hawkins' treatise as embodying a right to peaceable carry. The absolute earliest that *Knight's Case* is cited in American legal literature is 1843. *State v. Huntly*, 25 N.C. 418, 421 (1843) (citing *Knight's Case* only for the non-controversial proposition that "the Statute of Northampton was made in affirmance of the common law"); *see also* BISHOP, *supra*, at 784 (citing *Knight's Case* in 1873 only for the non-controversial proposition that the "offence created by this statute is said in England to have been such also by the earlier common law").

HAWKINS, *supra*, at 136, ch. 63, § 9); *see also* Pet. Br. 5-6, 30-31.

There are three problems with this interpretation of Hawkins. First, it directly contradicts other early English commentators on the Statute of Northampton: that it was the *act* of carrying dangerous weapons in public that was sufficient to amount to an affray, "strike a feare," or "striketh a feare." *See, e.g.*, MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 129 (1618); WILLIAM LAMBARDE, EIRENARCHA; OR THE OFFICE OF THE JUSTICES OF THE PEACE, IN TWO BOOKES (134-35 (1582). Hawkins himself expressly stated that "there may be an Affray where there is *no actual Violence*; as when a Man arms himself with dangerous and usual weapons. . . ." 1 HAWKINS, *supra*, at 135, ch. 63, § 4 (emphasis added). In other words, as Ferdinando Pluton, the prominent Elizabethan legal editor put it, the Statute of Northampton served "not onely to preserve peace, & to eschew quarrels, but also to take away the instruments of fighting and batterie, and to cut off all meanes that may tend in affray or feare of the people." FERDINANDO PULTON, DE PACE REGIS ET REGNI VIZ 4 (1609).

The second problem with interpreting Hawkins' treatise as espousing a "right to peaceable carry" is that Hawkins' treatise makes a clear distinction between the carrying or assembling of arms in public places and carrying arms in defense of one's home. The former was generally prohibited without the license of government. 1 HAWKINS, *supra*, at 135-36, ch. 63, §§ 5,

8. The latter, however, was permitted so long as the individual's "House" was threatened with "Violence, because a Man's House is as his Castle." *Id*. at 136, ch. 63, § 8; *see also* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 223 (1769); COKE, *supra*, at 161-62. This understanding is buttressed by a separate section in Hawkins' treatise on the surety process, which expressly distinguished between threats to one's person in public and in private. 1 HAWKINS, *supra*, at 158, ch. 65, § 10; *see also* JOSEPH KEBLE, AN ASSISTANT TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 410, 646 (2d ed., 1689); DALTON, *supra*, at 128.

Third, interpreting Hawkins' treatise as supporting a "right to peaceable carry" would make all of Hawkins' preceding passages on the Statute of Northampton superfluous. 1 HAWKINS, *supra*, at 135-36, ch. 63, §§ 4-8. In other words, the carrying exception for "Persons of Quality" in Hawkins' treatise would in effect undo the general rule, *id.* at 136, ch. 63, § 9, and swallow five centuries of historical evidence in the process, CHARLES, *supra*, at 115-16.

C. Compulsory Arms Bearing Laws

Ever since this Court decided *Heller*, litigants have submitted seventeenth and eighteenth century compulsory arms-bearing laws as evidence that the Founders drafted and ratified the Second Amendment with broad public carry rights in mind. *See* Frassetto, *supra*, at 545-48. This includes Petitioners. Pet. Br. 8,

28, 31; *see also* Br. of *Amici Curiae* Professors of Second Amendment Law et al in Support of Petitioners 25-26. Fortunately for historical accuracy, not one circuit court has accepted this argument, and the only circuit court to address whether an eighteenth-century compulsory arms-bearing statute supported extending the Second Amendment outside the home dismissed the claim as stretching the historical record past the breaking point. *Georgiacarry.org v. Georgia*, 687 F.3d 1244, 1264-65 (11th Cir. 2012).

This Court should do the same, for at least two reasons. First, if the history of compulsory arms-bearing statutes informs anything, it is that the government can enact specific time, place, and manner restrictions on arms-bearing, particularly in public places, to assist in the national security. CHARLES, *supra*, at 112-13. Second, after the ratification of the Constitution, it was well understood that state governments—not individuals or independent groups—maintained plenary authority to muster, train, and exercise the militia, including defining when and where firearms could be carried and discharged. Patrick J. Charles, *The 1792 National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective*, 9 Geo. J.L. & Pub. Pol'y 323, 331-58, 374-90 (2011); *see also Presser v. Illinois*, 116 U.S. 252, 264-68 (1886).

D. The Armed Carriage Restrictions Are Racist and Instruments of Slavery Allegation

Since *Heller*, litigants have been arguing that virtually all firearms regulations are rooted in racism and/or the preservation of slavery. Timothy Zick, *Framing the Second Amendment: Gun Rights, Civil Rights and Civil Liberties*, 106 Iowa L. Rev. 229, 242-58 (2020) (critically examining the origins and development of this argument). So far, this Court has rejected such arguments. However, they will most assuredly appear again in this case. Pet. Br. 2 (contending that "restrictions on the right to carry" were primarily aimed at "blacks in the South").

Certainly, no scholar disputes that from the seventeenth century through Reconstruction, people of color were not afforded equal access, ownership and use of firearms alongside whites. BLOCHER & MILLER, *supra*, at 35-36. What cannot be supported, however, are any assertions that all firearms regulations, including armed carriage laws, are inherently racist or instruments of slavery. *See* Br. of Amicus Curiae National African American Gun Association, Inc. 4-18. This assertion ignores that roughly 95 to 99 percent of weapons regulations spanning from the Norman Conquest through the close of the nineteenth century have nothing whatsoever to do with racial discrimination.[12]

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[12] *See Repository of Historical Gun Laws*, DUKE CENTER FOR FIREARMS LAW, https://firearmslaw.duke.edu/repository/search-the-repository/.

Ironically, moreover, at least two eighteenth century compulsory arms-bearing laws cited by Petitioners *were* expressly enacted to maintain the institution of slavery and quell potential slave revolts. Pet. Br. 31 n.1.[13] This too should give the Court pause in accepting any compulsory arms-bearing law arguments.

CONCLUSION

In resolving this case, should history play a role in the Court's decision, *amicus curiae* urges that the Court reject unsubstantiated and poorly research historical claims, including the instances discussed

[13] The 1743 South Carolina law cited by Petitioners required white persons to bring arms to church for the "better ordering and governing negroes and other slaves." 7 THE STATUTES AT LARGE OF SOUTH CAROLINA 417-19 (1840). The 1770 Georgia law required white persons to bring arms to church to quell "internal dangers and insurrections." 19 THE COLONIAL RECORDS OF THE STATE OF GEORGIA (pt. 1) 137-38 (1911). The law was an updated version of a 1757 law of a similar name that also required white persons to bring arms to church to quell "domestick insurrections." 1 THE EARLIEST PRINTED LAWS OF THE PROVINCE OF GEORGIA, 1755-1770, at 15 (1978).

herein, and rely only on historical analysis firmly grounded in evidence and its context.

Dated: July 19, 2021.

Respectfully submitted,

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