No. 23-526

IN THE

Supreme Court of the United States

CHARLES NICHOLS,
Petitioner,

v.

GAVIN NEWSOM, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONER

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December 14, 2023

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Foundation for Moral Law is a nonprofit organization based in Montgomery, Alabama, the mission of which is to defend the strict interpretation of the Constitution as intended by its Framers. *Amicus* believes the Framers adopted the Second Amendment as protection for the basic right of self-defense, which is essential to the right to life itself. *Amicus* further believes the contested California statute violates the Second Amendment as intended by its Framers.

SUMMARY OF THE ARGUMENT

The State of California and the Ninth Circuit U.S. Court of Appeals have failed to recognize the importance of the right to keep and bear arms as the most basic of all human rights. It is essential to the right of self-defense, which is essential to the right to life itself.

In downgrading the right to keep and bear arms, the state of California and the U.S. Court of Appeals for the Ninth Circuit are in direct conflict with the language of the Second Amendment, which expressly protects the right to "keep" and "bear"

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of *amicus curiae*'s intention to file this brief. Pursuant to Rule 37.6, *amicus curiae* certifies that no party or party's counsel authored this brief in whole or in part, or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

arms, the spirit of the Framers who drafted the Second Amendment, and the recent decisions of this Court.

ARGUMENT

This case deals with the most basic of all human rights—the right to life—and the concomitant right to defend one's life. This right would be meaningless if one were denied the right to carry arms in one's defense.

The Framers developed their understanding of unalienable human rights largely through the writings of Thomas Hobbes and John Locke. For both Hobbes and Locke, all rights stem from the fundamental human motivation to preserve their own lives. Hobbes states this as his first right of nature: "the Liberty each man hath, to use his own power, as he will himselfe, for the preservation of his own Nature; that is to say, of his own life." Thomas Hobbes, *Leviathan* XIV (1651).

Similarly, Locke posits that everyone "is bound to preserve himself, and not to quit his station wilfully." John Locke, *The Second Treatise on Civil Government* § 6 (1689). Consequently, "Men, being once born, have a right to their Preservation." *Id.* at § 25. If humanity's most basic purpose is to live, "natural reason" dictates that they must have the freedom to do what is necessary to preserve their lives. The basic right to life necessarily implies a right to defend oneself against enemies or otherwise hostile forces. Locke epitomizes this sentiment by arguing that one has the right to kill even a petty thief in self-defense, since it is impossible to know his full intentions at the time.

I. California's restriction on carrying firearms in certain areas is contrary to the plain language of the Second Amendment.

This is apparent from the very language of the Second Amendment: "the right of the people to keep and bear arms shall not be infringed." The two initial verbs stand out and carry distinct meanings: "keep" and "bear."

The use of the verb "keep" demonstrates that the Framers intended to protect the right of the individual citizen to own and possess firearms, rather than receiving them from an armory only when reporting for militia or guard duty. As this Court held in *District of Columbia v. Heller*:

> We turn to the phrases "keep arms" and "bear arms." Johnson defined "keep" as, most relevantly, "[t]o retain; not to lose," and "[t]o have in custody." Johnson 1095. Webster defined it as "[t]o hold; to retain in one's power or pos session." No party has apprised us of an idiomatic meaning of "keep Arms." Thus, the most natural reading of "keep Arms" in the Second Amendment is to "have weapons." The phrase "keep arms" was not prevalent in the written documents of the founding period that we have found, but there are a few examples, all of which favor viewing the right to "keep Arms" as an individual right unconnected with militia service.

554 U.S. 570, 582 (2008).

The use of the word "bear" reveals that the Framers intended that individual citizens were to

have the right to carry their firearms in public.[2] Again, as the majority held in *Heller*:

> At the time of the founding, as now, to "bear" meant to "carry." See Johnson 161; Webster; T. Sheridan, A Complete Dictionary of the English Language (1796); 2 Oxford English Dictionary 20 (2d ed. 1989) (hereinafter Oxford). When used with "arms," however, the term has a meaning that refers to carrying for a particular purpose—confrontation.

Id. at 584.

II. California's restriction on carrying firearms is contrary to the intent of those who drafted the Second Amendment.

The Framers clearly contemplated an individual right to keep and bear arms. Consider the following statements of leading Americans of the founding era:

> Oh, Sir, we should have fine times indeed, if to punish tyrants, it were only sufficient to assemble the people. Your arms, wherewith you could defend yourselves, are gone; and you have no longer an aristocratical; no longer a democratical spirit. Did you ever read of any revolution in any nation, brought about by the punishment of those in power, inflicted by those who had no power at all?

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[2] We will not address whether this means only concealed carry, or only open carry, or both, because both rights are violated by the California statute that prohibits carrying arms where people are present.

Patrick Henry, *Speech in the Virginia Ratifying Convention* (Jun. 5, 1788);

"Whenever governments mean to invade the rights and liberties of the people, they always attempt to destroy the militia, in order to raise an army upon their ruins." Rep. Elbridge Gerry of Massachusetts, spoken during floor debate over the Second Amendment, Annals of Congress (Aug. 17, 1789);

> A people who would stand fast in their liberty, should furnish themselves with weapons proper for their defense, and learn the use of them. It is indeed an hard case, that those who are happy in the blessings of providence, and disposed to live peaceably with all men, should be obliged to keep up the idea of blood and slaughter, and expend their time and treasure to acquire the arts and instruments of death. But this is a necessity which the depravity of human nature has laid upon every state. Nor was there ever a people that continued, for any considerable time, in the enjoyment of liberty, who were not in a capacity to defend themselves against invaders, unless they were too poor and inconsiderable to tempt an enemy.

Simeon Howard, *A Sermon Preached to the Ancient and Honorable Artillery Company in Boston* (Jun. 7, 1773);

"For a people who are free, and who mean to remain so, a well-organized and armed militia is

their best security." Thomas Jefferson, *Eighth State of the Union Address* (1808);

> A strong body makes the mind strong. As to the species of exercises, I advise the gun. While this gives moderate exercise to the body, it gives boldness, enterprise and independence to the mind. Games played with the ball, and others of that nature, are too violent for the body and stamp no character on the mind. Let your gun therefore be your constant companion of your walks.

Thomas Jefferson, *Letter to Peter Carr* (Aug. 19, 1785);

"Always remember that an armed and trained militia is the firmest bulwark of republics—that without standing armies their liberty can never be in danger, nor with large ones safe." James Madison, *First Inaugural Address* (March 4, 1809);

> In a general view, there are very few conquests that repay the charge of making them, and mankind are pretty well convinced that it can never be worth their while to go to war for profit sake. If they are made war upon, their country invaded, or their existence at stake, it is their duty to defend and preserve themselves, but in every other light and from every other cause is war inglorious and detestable.

Thomas Paine, *The Crisis* (1778);

"A militia, when properly formed, are in fact the people themselves . . . and include all men capable of

bearing arms." Richard Henry Lee, *Letter from the Federal Farmer to the Republic* (1788);

> The militia is the natural defence of a free country against sudden foreign invasions, domestic insurrections, and domestic usurpations of power by rulers. It is against sound policy for a free people to keep up large military establishments and standing armies in time of peace, both from the enormous expenses, with which they are attended, and the facile means, which they afford to ambitious and unprincipled rulers, to subvert the government, or trample upon the rights of the people. The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

Justice Joseph Story, *Commentaries on the Constitution* § 1890 (1833);

"That no man shou'd scruple, or hesitate a moment to use a[r]ms in defence of so valuable a blessing, on which all the good and evil of life depends; is clearly my opinion; Yet A[r]ms . . . should be the last resource." George Washington, *Letter to George Mason* (Apr. 5, 1769);

> The Constitutions of most of our states assert that all power is inherent in the people; that they may exercise it by themselves, in all

> cases to which they think themselves competent, (as in electing their functionaries executive and legislative, and deciding by a jury of themselves, both fact and law, in all judiciary cases in which any fact is involved) or they may act by representatives, freely and equally chosen; that it is their right and duty to be at all times armed; that they are entitled to freedom of person; freedom of religion; freedom of property; and freedom of the press.

Thomas Jefferson, *Letter to John Cartwright* (Jun. 5, 1824);

"The right of self defense never ceases. It is among the most sacred, and alike necessary to nations and to individuals." James Monroe, *Second Annual Message to Congre*ss (Nov. 16, 1818);

> [C]onceived it to be the privilege of every citizen, and one of his most essential rights, to bear arms, and to resist every attack on his liberty and property, by whomsoever made. The particular States, like private citizens, have a right to be armed, and to defend by force of arms, their rights, when invaded.

Stephen P. Halbrook, *The Founders' Second Amendment* 262 (2012) (quoting Roger Sherman, *Debates on the Militia Act of 1792*); and

"That the said Constitution shall never be construed to authorize Congress to infringe the just liberty of the press or the rights of conscience; or to prevent the people of the United States who are peaceable citizens from keeping their own arms."

Samuel Adams, *Debates of the Massachusetts Convention of 1788*.[3]

Those who drafted the Second Amendment contemplated widespread private ownership and possession of firearms. This is clear from their use of the term "militia" as encompassing all able-bodied adult males. The Constitution did not create the militia; the people have always possessed a natural right to organize locally for their mutual defense.

The militia might be said to be a natural institution of the people like the family, the state, and the church. In the time of the judges of Israel, the ancient Hebrews called their army "the people," and it consisted of all able-bodied men with certain exemptions for those who had economic commitments, a recent marriage, or unmilitary qualities. *Deuteronomy* 20:1–9. As Chaim Herzog and Mordecai Gichon state in *Battles of the Bible* (1997) at pages 37, 85–86, and 109: "The military organization of the Israelites was, like that of all nations emerging from tribal status, based on the duty of every able-bodied male to bear arms and serve, whenever necessary, in his tribal contingent in the national host." As Israel moved from a decentralized confederation of tribes governed by judges to a monarchy under Saul, David, and Solomon, they began to rely upon a standing national army of conscripts instead of a people's militia.

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[3] In quotations throughout this brief, the original spellings have been preserved.

The right to bear arms was the badge of an Anglo-Saxon freeman and was closely associated with his political privileges. In A.D. 878, King Alfred in Anglo-Saxon England gathered the armed citizenry into a fyrd or militia to defend against the Danish invaders.[4] In A.D. 890, the Laws of King Alfred the Great required subjects to possess arms for the defense of the kingdom. After the Norman Conquest, the Assize of Arms contained a similar requirement in A.D. 1181. And § 6 of the Statute of Winchester of A.D. 1285 declared,

> it is commanded that every man have in his house harness [armor] for to keep the peace of the ancient assize; that is to say, every man between fifteen years of age and sixty years, shall be assessed and sworn to armor according to the quantity of their lands and goods.[5]

The American colonies followed a similar practice. The militia of Jamestown Colony was organized as early as 1607 and was frequently called up for military action against the Powatan Federation. The Massachusetts colonies organized their militias from the beginning of their settlement, and in 1636 the Massachusetts General Court organized the militias of the various towns into three regiments. By the time of the French and Indian War in 1760s, the British regulars often used colonial militiamen in their military campaigns.

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[4] Edward P. Cheyney, *A Short History of England* 65 (1919).

[5] G. Adams and H. Stephens, *Select Documents of English Constitutional History* 23–25 (1926).

These militia were locally organized and locally led, but there were also more broad-based units known as "rangers" consisting of men who had previous fighting experience. Each colonial government organized the various town militias within that colony, but there was no pan-colonial force. The idea of cooperation among the colonies was, as of that time, a thing of the future.

The War for Independence forced some changes. The militias of the various states began to work together, and the Continental Congress, for the first time, created a continental army with fixed terms of enlistment and fixed forms of discipline and training. The Massachusetts Legislature directed militia commanders to prepare one-third of their command to respond instantly to calls for action; this one-third became known as the Minute Men (of whom Paul Revere was famously a part). Together, the Continental Army and the militiamen secured American independence. Many colonists praised the militiamen for their loyal and selfless service, but others said the militiamen lacked the training and discipline to stand up to British regulars.

When the Constitutional Convention met in 1787, they gave considerable attention to matters of national defense. They knew the new nation needed a military defense, but they also knew a standing army could be oppressive. Accordingly, they crafted a constitution that balanced the power of the national government against that of the state and local governments and their militias.

First, Article I, § 8 provides that: "The Congress shall have power . . . To raise and support Armies,

but no Appropriation of Money to that Use shall be for a longer Term than two Years;" and that "The Congress shall have power . . . To provide and maintain a Navy." Notice the different language. Congress is empowered to "raise and support" Armies and to "provide and maintain" a Navy, and the two-year appropriation limit for Armies does not apply to the Navy. "Provide and maintain" implies a more permanent force than does "raise and support." The Framers apparently believed a permanent naval force was necessary, but they believed armies should be raised and supported as needed, and in peacetime the nation would rely upon the local and state militias.

Then, Article I, § 8 of the Constitution addresses the militia:

> The Congress shall have power . . . To make rules for the Government and Regulation of the land and naval Forces; To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress.

Congress has supervisory authority over the armed forces generally, but the authority to train the militia and appoint militia officers is reserved to the states, provided they conduct that training

"according to the discipline prescribed by Congress." Congress also has power to provide for calling the militia into federal service, meaning that Congress can federalize the militia of one or more states or pass legislation authorizing the President to call the militia into federal service.

All of this ties in with another provision of the Constitution that deserves our attention—the Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

In 1792, Congress passed the Uniform Militia Act to give limited direction to the state militias. Section 1 of the Act defined militia according to the common historic understanding:

> That each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of 18 years, and under the age of 45 years (except as is herein after excepted) shall severally and respectively be enrolled in the militia by the captain or commanding officer of the company, within whose bounds such citizens shall reside, and that within 12 months of the passing of this act. … That every citizen so enrolled and notified shall, within 6 months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack [etc.] … and shall appear so armed, accoutred and provided, when called out to exercise, or into service . . . and that from and after five years

> from the passing of this Act, all muskets for arming the militia as herein required shall of bores sufficient for balls of the eighteenth part of a pound. And every citizen so enrolled, and providing himself with the arms, ammunition and accoutrements required as aforesaid, shall hold the same exempted from all suits, distresses, executions or sales, for debt or for the payment of taxes.

The definition of the militia as all able-bodied male citizens was in keeping with the understanding of the time. Noah Webster, in the 1828 edition of his *American Dictionary of the English Language*, offered the following definition:

> Militia: The body of soldiers in a state enrolled for discipline, but not engaged in actual service except in emergencies; as distinguished from regular troops, whose sole occupation is war or military service. The militia of a country are the able bodied men organized into companies, regiments and brigades, with officers of all grades, and required by law to attend military exercises on certain days only, but at other times left to pursue their usual occupations.

More recently, *Black's Law Dictionary* defines militia similarly: "The body of citizens in a state, enrolled for discipline as a military force, but not engaged in actual service except in emergencies, as distinguished from regular troops or a regular army. Ex parte McCants, 39 Ala. 112." 1145 (4th ed. 1968).

And the definition found in the United States Code today is similar:

> (a) The militia of the United States consists of all able-bodied males at least 17 years of age and, except as provided in section 313 of title 32, under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard.
>
> (b) The classes of the militia are
>
> (1) The organized militia, which consists of the National Guard and the Naval Militia; and
>
> (2) The unorganized militia, which consists of the members of the militia who are not members of the National Guard or the Naval Militia.

10 U.S.C. § 311.

One purpose of the militia is to defend the liberty of the people against foreign invaders. Throughout history it has worked effectively, and it still works today. CDR Robert Menard attended a 1960 meeting between US Navy personnel and their Japanese counterparts. One American naval officer asked why the Japanese did not invade America's west coast. A Japanese admiral answered: "We knew that probably every second home in your country contained firearms. We knew that your country actually had state championships for private citizens shooting military rifles. We were not fools to

set foot in such quicksand." Massad Ayoob, *The Rationale of the Automatic Rifle* (2001), https://www.backwoodshome.com/the-rationale-of-the-automatic-rifle/.

But the militia serves another purpose: the defense of the people's liberty against domestic tyrants. Lest some think this thought seems radical and almost subversive, consider James Madison's words in *The Federalist No. 46*:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government; still it would not be going too far to say, that the state governments with the people on their side would be able to repel the danger. The highest number to which, according to the best computation, a standing army can be carried in any country, does not exceed one hundredth part of the whole number of souls; or one twenty-fifth of the number able to bear arms. This proportion would not yield in the United States an army of more than twenty-five or thirty thousand men. To these would be opposed a militia amounting to near half a million of citizens with arms in their hands, officered by men chosen from among themselves, fighting for their common liberties, and united and conducted by governments possessing their affections and confidence. It may well be doubted whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops.

(Carey & McClellan eds., 2001).

And Alexander Hamilton, a continental colonel but hardly a wild-eyed revolutionary, expressed a similar thought in *The Federalist No. 29*:

> Little more can reasonably be aimed at with respect to the people at large than to have them properly armed and equipped. . . . This will not only lessen the call for military establishments; but if circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens, little, if at all, inferior to them in discipline and in the use of arms, who stand ready to defend their rights and those of their fellow citizens.

(Carey & McClellan eds., 2001).

Across both the ocean and millennia, Aristotle would have agreed:

> [A] king's body-guard consists of citizens, a tyrant's of foreign mercenaries . . . For those who possess and can wield arms are in a position to decide whether the constitution is to continue or not.[6]

From the adoption of the Uniform Militia Act of 1792 through the passage of the Dick Act in 1903, militias continued to be a bulwark of the nation's

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[6] Stephen P. Halbrook, *That Every Man Be Armed: The Evolution of a Constitutional Right* 7–8 (2013) (quoting Aristotle, *Politics*, § 1301a (350 B.C.)).

defense. Usually, they were organized locally and consisted of men who were mostly friends and neighbors of each other, and they commonly elected their own officers, although they were subject to state regulation. Just before the War Between the States, the United States Army consisted of 1,108 officers and 15,259 enlisted men, but there were thousands of militias, each consisting of about 30 to 60 men. Quickly after the War began, the Union Army swelled to 2,500,000 men, and the Confederate Army had 1,000,000. Both sides also relied upon the militia units which fought for their respective states.

After the War, the status of discipline of many militias gradually declined. In the North, many of the militias simply ceased to exist, and in the South, they were suppressed by the Reconstruction regime. In the 1870s, many states passed new laws requiring male citizens to serve in the militias, but these laws were poorly enforced and largely ignored.

In 1903, Congress passed the Dick Act. Rep. Charles Dick's bill divided the American adult male population, other than those serving on active duty, into two categories: (1) the National Guard (the organized militia), and (2) the Reserve Militia (the unorganized militia, all other able-bodied adult male citizens). The 1916 National Defense Act revised the Dick Act and provided that

> The militia of the United States shall consist of all able-bodied male citizens of the United States . . . who shall be more than 18 years of age and . . . not more than 45 years of age, and said militia shall be divided into 3 classes, the

> National Guard, the Naval Militia, and the Unorganized militia.

And as federal funding for the Guard increased, federal control over the Guard also increased. This enhanced the Guard's ability to respond to domestic threats and to defend against foreign enemies when called to federal service, but the Guard's other traditional function—defending the states and the people against federal tyranny—diminished. However, numerous states have established state guards, often called state militias, state defense forces, or state military reserves, pursuant to 32 U.S.C. § 109, and pursuant to references to the "militia" in most state constitutions. These state guards are subject to the authority of their respective governors and adjutants general but not to federal authorities.

A further reorganization took place in 1933, under which certain specially designated National Guard units received special attention and funding from the federal government. Men who enlisted in these Guard units were considered to have simultaneously enlisted in both their state's Guard Unit and the National Guard of the United States. Members of these units could be ordered to active duty with the United States armed forces, and upon completion of that service, their status would revert to that of members of their state's Guard. Guard units were better funded than before, but much of their independence and their identity as representatives of their respective states was lost. It is an old story, repeated many times before and

many times since: federal aid leads to federal control.

This historical survey demonstrates that the Framers understood the militia to be all able-bodied adult male citizens, and that they intended these citizens to possess and know how to use firearms. Any suggestion that they could not carry these firearms in public would have seemed strange indeed.

III. California's restriction on carrying firearms in certain places is contrary to the direction of this Court in recent Second Amendment cases.

For a substantial portion of America's constitutional history, this Court did not address several key questions concerning the Second Amendment, perhaps because those questions were not squarely presented to the court.

But when those questions were squarely presented to this Court, this Court addressed them and ruled that the Second Amendment indeed provides substantial protection to the right to keep and bear arms.

In *District of Columbia v. Heller*, 554 U.S. 570, (2008), this Court held that the Amendment protects the individual citizen's right to bear arms. The reference to the militia states a reason for the right to bear arms, not a condition thereto. Note that the word "people" is not used interchangeably with the word "state," and that the term "keep and bear arms" implies individual ownership of weapons.

In *McDonald v. Chicago*, 561 U.S. 742 (2010), this Court held that the right to keep and bear arms is incorporated and applied to the States via the Fourteenth Amendment.

And in *New York Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022), this Court struck down a New York law and held that carrying a pistol in public was a constitutional right guaranteed by the Second Amendment.

Putting these decisions together, we see that the Second Amendment right to keep and bear arms is (1) individual, (2) incorporated, and (3) includes the right to carry a firearm.

Now the question is, how strongly did the Framers value this right, and under what circumstances may it be infringed?

A plain, literal reading of the Second Amendment would allow for no such circumstances. It simply says the right "shall not be infringed," with no exceptions. As noted earlier, the Framers developed their understanding of unalienable human rights largely through the writings of Thomas Hobbs and John Locke, both of whom emphasized that the right to self-defense was essential to the most basic right of all, the right to life.

The right to keep and bear arms is essential to exercise the unalienable right of self-defense, defending himself individually, defending his family, and joining with others in a militia to defend his community, state, and nation. And the right of self-defense is essential to exercise the right to life itself.

Depriving a person of the right to carry arms is equivalent to depriving the person of the basic right to defend his life. If one is attacked on the street, it does him little good to have a firearm locked away at home. And one is just as likely to be in danger, maybe even more so, in a heavily populated area than in a sparsely populated area.

CONCLUSION

The Ninth Circuit decision in this case flies in the face of this Court's precedents, especially *Bruen*. It defies the plain wording of the Second Amendment guarantee of the right to "keep and bear" arms and of the Framers' intent to give this unalienable right of self-defense the highest possible protection.

Amicus urges this Court to grant this petition for certiorari and ensure that the constitutional right to keep and bear arms applies in California and the Ninth Circuit.

Respectfully submitted,

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December 14, 2023