No. 20-1706

In The
Supreme Court of the United States

LEEVAN ROUNDTREE,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Wisconsin

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FIREARMS POLICY FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights. FPC accomplishes its mission through legislative and grassroots advocacy, legal and historical research, litigation, education, and outreach programs. FPC's legislative and grassroots advocacy programs promote constitutionally based public policy. Its historical research aims to discover the founders' intent and the Constitution's original meaning. And its legal research and advocacy aim to ensure that constitutional rights maintain their original scope.

Firearms Policy Foundation (FPF) is a nonprofit organization dedicated to preserving the rights and liberties protected by the Constitution. FPF focuses on research, education, and legal efforts to inform the public about the importance of constitutional rights—why they were enshrined in the Constitution and their continuing significance. FPF is determined to ensure that the freedoms guaranteed by the Constitution are secured for future generations.

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

SUMMARY OF ARGUMENT

This Court's precedents require a historical justification for firearm prohibitions on felons. American history and tradition contemplate firearm prohibitions on dangerous individuals—disaffected persons posing a threat to our society and persons with a proven proclivity for violence. This tradition of disarming dangerous persons has been practiced for centuries. It was reflected in the debates and proposed amendments from the Constitution ratifying conventions, and throughout American history.

There is no tradition of disarming peaceable citizens. Nor is there any tradition of limiting the Second Amendment to "virtuous" citizens. Historically, nonviolent criminals who demonstrated no violent propensity retained their right to keep and bear arms. Indeed, some laws expressly allowed them to keep arms.

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

ARGUMENT

I. THIS COURT PROMISED A HISTORICAL JUSTIFICATION FOR FIREARM PROHIBITIONS ON FELONS.

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

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

Heller promised that "there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us." 554 U.S. at 635. For the reasons explained *infra*, it is important for this Court to clarify the metes and bounds of this exception.

II. THE DEEP CONFLICTS IN THE LOWER COURTS PLUS CONTINUED EXPANSION OF WHAT CONSTITUTES A "FELONY" MAKE THE NEED FOR THIS COURT'S INTERVENTION ACUTE.

Even if the right to arms is not unlimited—no rights are—broad, sweeping abridgements are not to be taken lightly. *Id.* at 635. In *Heller*, this Court held that laws that destroy the "core" right protected by the Second Amendment are unconstitutional. *Id.* at 630.

Yet, based on *Heller*'s mention of longstanding bans on felons, *id.* at 626–27 & n.26, lower courts have consistently upheld laws destroying the Second Amendment rights of peaceable, nonviolent criminals.

This case provides a unique opportunity to give clarity to *Heller*'s statement about presumptively lawful regulations, which has been relied on by lower courts to rubber stamp myriad severe restrictions on the right to arms. By stating that "nothing in [*Heller*] should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons," *id.* at 626, *amici* believe this Court was simply setting the contours of a historically important fundamental right.

Indeed, this Court "kn[ew] of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach," and instead emphasized that "[t]he very enumeration of the right takes out of the hands of government—including the judiciary—the power to decide on a case-by-case basis whether the right is *really worth* insisting upon." *Id.* at 634 (emphasis in original). Yet, the courts below appear to be motivated by non-particularized references to rates of recidivism.

If one thing is clear, it is that the United States is suffering from a problem of overcriminalization, and this problem has serious and unjust consequences for people like Leevan Roundtree. The Brennan Center for Justice has observed that the United States sports as many college graduates as it does people with criminal records. Matthew Friedman, *Just Facts: As Many Americans Have Criminal Records as College*

Diplomas, BRENNAN CENTER FOR JUSTICE (Nov. 17, 2015), https://bit.ly/1SVQ9Vo.

The scope of what constitutes a felony in our great nation has expanded to such a degree that the average American might commit several felonies in a day without even knowing. *See*, *e.g.*, Harvey A. Silvergate, *Three Felonies a Day: How the Feds Target the Innocent* (2009); Glenn Harlan Reynolds, *Ham Sandwich Nation: Due Process When Everything is a Crime*, COLUM. L. REV. SIDEBAR (2013).

This proliferation of nonviolent statutory felonies poses no relation to public safety or a risk of violence. For example, in 2013 a Florida man was charged with the felony of "polluting to harm humans, animals, plants, etc." after he released a dozen heart-shaped balloons to impress his love interest. Erika Pesantes, *Love Hurts: Man Arrested for Releasing Helium Balloon with His Girlfriend*, THE SUN SENTINEL, Feb. 22, 2013, https://bit.ly/2RsWk9V.

The Lacey Act yielded felony treatment for the heinous crime of catching undersized lobsters, packaging them in plastic bags (as opposed to cardboard boxes), and depositing funds into a bank. 16 U.S.C. §3371 (2012); Paul Rosenzweig & Ellen Podgor, *Eight Years for Bagging Lobsters?*, THE HERITAGE FOUNDATION (Dec. 31, 2003), https://herit.ag/2Np3j0k. It is the position of *amici* that violation of these laws could not justifiably result in prison time, much less the irrecoverable forfeiture of fundamental human rights.

With WIS. STAT. §941.29(1m), a more severe analogue of 18 U.S.C. §922(g)(1), and their progeny, the government strips the right to own a firearm from anyone convicted of any felony, at any time, at any place, all without respect to the seriousness of the crime, or its relationship to the use of a firearm.

Given the "strong presumption that the Second Amendment right is exercised individually and belongs to all Americans," it stands to reason that only *truly* longstanding, historically justified restrictions on the right to arms would fall outside the scope of the Second Amendment. *Heller*, 554 U.S. at 581. Permanent disarmament of nonviolent felons is far from longstanding, but rather a modern invention not entitled to the rubber stamp of approval far too many courts misinterpret it to be.

III. THE HISTORICAL JUSTIFICATION FOR FIREARM PROHIBITIONS ON FELONS IS LIMITED TO DISARMING DANGEROUS PERSONS.

There is no tradition in American history of banning peaceable citizens from owning firearms, and misunderstanding this point appears to have lead many lower courts astray. This Court cited as "highly influential" the 1787 "Address and Reasons of Dissent of the Minority of the Convention of the State of Pennsylvania to Their Constituents." *Id*. at 604. In this address, it is stated that "no law should be passed for disarming the people . . . unless for crimes committed, or real

danger of public injury individuals." *Id*. This is one of many pieces of evidence tying the possibility of disarmament to the presence of danger or what could be categorized as a public nuisance at common law—a far cry from pleading to a statutory offense so unserious that the government recommends that no time be served.

While some scholarly sources have concluded that the Founders did not consider "felons within the common law right to arms," what constituted a felony at the time of the Founding was very different from failing to pay child support. *See United States v. Emerson*, 270 F.3d 203 at 226 n.21 (5th Cir. 2001). Felonies at common law were a much narrower class: murder, rape, manslaughter, robbery, larceny, arson, mayhem, and burglary. These were the types of crimes committed by the sort of individual the Founders might have been comfortable with disarming, not reformed layabouts. *See*, *e.g.*, *Jerome v. United States*, 318 U.S. 101, 108 n.6 (1943).

Founding era interpretations—discussed more *infra*—aside, no federal prohibitions on firearm ownership by felons existed for nearly two centuries. The New Deal Era Federal Firearms Act of 1938 only prohibited those "convicted of a crime of violence" from firearm ownership. Federal Firearms Act of 1938, Pub. L. No. 75-185. It was not until 1961 when Congress replaced "crime of violence" with "crime punishable by imprisonment for a term exceeding one year," that the federal prohibition reached all felons, regardless of the nature of the crime committed. *See United States v.*

Weatherford, 471 F.2d 47, 51 (7th Cir. 1972). Even then, Congress was quick to add 18 U.S.C. §925(c), enabling felons to restore their civil rights if the individual is "not likely to act in a manner dangerous to public safety." It was not until 1992 that §925(c) was rendered inutile, far from what can be called "longstanding" legal tradition.

The historical justification this Court relied on to declare felon bans "presumptively lawful" must, then, have been limited to the practice of disarming dangerous persons.

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

The American Revolution began on April 19, 1775, when Redcoats marched to Lexington and Concord to confiscate guns and gunpowder. Armed Americans resisted this attempted confiscation. *See* Nicholas Johnson et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 262–64 (2d ed. 2017). As in any war, each side attempted to reduce the arms in the hands of the other.

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

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

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

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

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

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

ratifying conventions are therefore instructive in interpreting the ultimately codified right.

Samuel Adams opposed ratification without a declaration of rights. Adams proposed at Massachusetts's convention an amendment guaranteeing that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971). Adams's proposal was celebrated by his supporters as ultimately becoming the Second Amendment. *See* BOSTON INDEPENDENT CHRONICLE, Aug. 20, 1789, at 2, col. 2 (calling for the paper to republish Adams's proposed amendments alongside Madison's proposed Bill of Rights, "in order that they may be compared together," to show that "every one of [Adams's] intended alterations but one [i.e., proscription of standing armies]" were adopted); Stephen Halbrook, THAT EVERY MAN BE ARMED 86 (revised ed. 2013) ("[T]he Second Amendment . . . originated in part from Samuel Adams's proposal . . . that Congress could not disarm any peaceable citizens.").

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

war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 438 (2d ed. 1789). According to Noah Webster, "peaceable" meant "Not violent, bloody or unnatural." 2 Noah Webster, AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated). *Cf.* BLACK'S LAW DICTIONARY (6th ed. 1996) (defining "peaceable" as "Free from the character of force, violence, or trespass."). *Heller* relied on Johnson, Sheridan, and Webster in defining the Second Amendment's text.[2]

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

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

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, *in* 2 Schwartz, at 665. While the "crimes committed" language is not expressly limited to violent crimes, it is unlikely that the Pennsylvania Dissent wanted

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

permanent disarmament for every imaginable offense; the context of "real danger of public injury" continues the tradition of disarming the dangerous, including by inferences drawn from criminal convictions.

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

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

Offenders in the founding era could often regain their rights upon providing securities (a financial promise, like a bond) of peaceable behavior. For example, individuals "who shall go armed offensively" in 1759 New Hampshire were imprisoned "until he or she find such surities of the peace and good behavior." ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW ENGLAND 2 (1759).

Some states had procedures for restoring a person's right to arms. Connecticut's 1775 wartime law

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

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

While the Shaysites who had perpetrated the capital offense of treason had their arms rights restored after three years, nonviolent felons today, including Roundtree, are prohibited from possessing arms for life.

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

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

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

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

> The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, to the annoyance and terror and danger of its citizens, his

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

> acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others.

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

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

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

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

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

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

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

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

The only law that applied to citizens and prohibited the keeping of all firearms was Rhode Island's

from 1927. It applied to persons convicted of "a crime of violence." 1927 R.I. Pub. Laws 257 §3. "Crime of violence" meant "any of the following crimes or any attempt to commit any of the same, viz.: murder, manslaughter, rape, mayhem, assault or battery involving grave bodily injury, robbery, burglary, and breaking and entering." 1927 R.I. Pub. Laws 256 §1.

F. The historical tradition of disarming dangerous persons provides no justification for disarming Leevan Roundtree.

Heller promised a "historical justification" for bans on felons. 554 U.S. at 635. There appears to exist a historical justification for bans on violent felons, but the same cannot be said for peaceable people like Roundtree.

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

There is no historical justification for completely and forever disarming peaceable citizens like Leevan Roundtree.

IV. THERE IS NO HISTORICAL JUSTIFICATION FOR DISARMING "UNVIRTUOUS" CITIZENS.

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

- Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983). For support that "[f]elons simply did not fall within the benefits of the common law right to possess arms," Kates cited the ratifying convention proposals discussed above.
- Don Kates, *The Second Amendment: A Dialogue*, LAW & CONTEMP. PROBS. 143, 146 (1986). For support that "the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals)," *id.* at 146, Kates cited his previous article.
- Glenn Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995). For support that "felons, children, and the insane were excluded

from the right to arms," Reynolds quoted Kates's *Dialogue* article.

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

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

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

- *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009). In addition to Reynolds, Cornell, and the Dissent of the Minority of Pennsylvania, the court cited Robert Shalhope, *The Armed Citizen in the Early*

Republic, 49 LAW & CONTEMP. PROBS. 125, 130 (1986), providing a quote to show that in "the view of late-seventeenth century republicanism . . . [t]he right to arms was to be limited to virtuous citizens only. Arms were 'never lodg'd in the hand of any who had not an Interest in preserving the publick Peace.'" This quote—referring to dangerous persons—was about the ancient "Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Romans." J. Trenchard & W. Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, And Absolutely Destructive to the Constitution of the English Monarchy* 7 (1697).

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

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

Martha Stewart Have a Gun?, 32 HARV. J.L. & PUB. POL'Y 695, 709–10 (2009).

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

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

- *Binderup*, 836 F.3d at 348–49 (plurality opinion). The *Binderup* plurality cited each of the above sources.

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

None of these sources provided any founding-era law disarming "unvirtuous" citizens—or anyone, for that matter, who was not perceived as dangerous.[5]

V. LAWS SOMETIMES EXPRESSLY PROTECTED THE ARMS OF "UNVIRTUOUS" CITIZENS.

In American history and tradition, "unvirtuous" citizens were not disarmed. Rather, their right to arms was sometimes specifically affirmed.

For example, in 1786 Massachusetts, if the tax collector stole the money he collected, the sheriff could sell the collector's estate to recover the stolen funds. If the sheriff stole the money from the collector's estate sale, the sheriff's estate could be sold to recover the amount he stole. If an estate sale did not cover the stolen amount, the deficient collector or sheriff would be imprisoned. In the estate sales, the necessities of life—including firearms—could not be sold:

> [I]n no case whatever, any distress shall be made or taken from any person, of his *arms* or household utensils, necessary for upholding life; nor of tools or implements necessary for

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[5] For a more thorough refutation of the virtuous citizen test, *see Kanter v. Barr*, 919 F.3d 437, 462–64 (7th Cir. 2019) (Barrett, J., dissenting); *Folajtar v. Attorney Gen. of the United States*, 980 F.3d 897, 915–20 (3d Cir. 2020) (Bibas, J., dissenting); Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. 249, 275–83 (2020).

> his trade or occupation, beasts of the plough necessary for the cultivation of his improved land; nor of bedding or apparel necessary for him and his family; any law, usage, or custom to the contrary notwithstanding.

1786 Mass. Laws 265 (emphasis added).

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

The federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, §1 (1792). Maryland and Virginia had similar exemptions. 13 ARCHIVES OF MARYLAND 557 (William Hand Browne ed., 1894) (1692 Maryland); 3 Hening, at 339 (1705 Virginia); 4 *id.* at 121 (1723 Virginia).

CONCLUSION

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

on felons referenced in *Heller* and *McDonald* is the tradition of disarming dangerous persons.

Respectfully submitted,

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