No. 20-812

In The
Supreme Court of the United States

LISA M. FOLAJTAR,

Petitioner,

v.

JEFFREY A. ROSEN,
ACTING ATTORNEY GENERAL, et al.,

Respondents.

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

AMICUS BRIEF OF FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, SECOND AMENDMENT FOUNDATION, AND MADISON SOCIETY FOUNDATION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES AND CONSTITUTIONS

TABLE OF AUTHORITIES—Continued

TREATISES

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

INTERESTS OF THE *AMICI*

Amici Firearms Policy Foundation, California Gun Rights Foundation, Second Amendment Foundation, and Madison Society Foundation are § 501(c)(3) tax-exempt organizations, whose goals include securing the right to keep and bear arms as a meaningful individual right. They here desire to document for the Court additional reasons for the grant of certiorari, including the opportunity to apply the Second Amendment's text, history, and tradition to legal restrictions created in the second half of the Twentieth Century.[1]

SUMMARY OF ARGUMENT

The antiquity of the Anglo-American right to arms makes it exceptionally well-suited for application in accord with its text, history, and tradition. At the time of the framing of our Bill of Rights, many of its provisions had little or no history and tradition. The right to arms, in contrast, had a history that stretched back beyond our oldest written laws, and had been prominent for a century before the First Congress penned the Second Amendment.

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[1] No counsel for a party authored this brief in whole or in part, or made a contribution to fund the preparation and submission of this brief. The Firearms Policy Foundation is the only person or entity that made a contribution to fund the preparation of this brief. This brief is filed with the written consent of the parties. *Amici* complied with the conditions by providing ten days' advance notice to the parties.

Viewed against that history, disarmament of nonviolent offenders is an anomaly. The early Republic disarmed only those who showed disloyal proclivities. Ratifying conventions' proposals for a right to arms contained exceptions for violent or insurrectionary individuals, not for the peaceful. Even Twentieth Century restrictions on firearms ownership generally keyed on conviction for violent offenses.

This petition offers the Court an opportunity to explore the application of the Second Amendment's text, history, and tradition to restrictions that originated in the second half of the Twentieth Century.

ARGUMENT

I. The Anglo-American Right to Arms Is Particularly Well-Suited to Interpretation and Application in Light of its Text, History, and Tradition

The right to arms had its origin in a duty to bear arms in the fyrd or militia, a duty that is "older than our oldest records." John J. Bagley & P. Rowley, A Documentary History of England 1066-1540, at 152 (1965). The political stresses of the late 17th century led to the duty being perceived as a right. *See generally* Joyce Lee Malcolm, To Keep and Bear Arms: The Origins of an Anglo-American Right (1994). The 1688 Declaration of Rights guaranteed that "the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." An Act

Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, 1 Wm. & Mar. c. 2. Few, if any, provisions of our Bill of Rights can match this history.

Freedom of expression had little ancestry in the common law. English statutes requiring a government license to print works on politics or religion remained in effect until 1695. Clyve Jones, Britain in the First Age of Party, 1687-1750, at 116 (1986). After that date, authors who criticized government officials or expressed controversial opinions still risked prosecution. As Blackstone wrote,

> In this, and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments the pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequence of his own temerity.

4 William Blackstone, Commentaries on the Laws of England 151-52 (1770).

The right of petition can claim little better ancestry. In 1661, Parliament provided criminal penalties for any subjects who submitted a petition to Parliament or to the king and which bore more than twenty signatures, unless the petition had been approved by three justices of the peace or by a grand jury. An Act Against Tumult and Disorders Upon Pretense of Preparing or Presenting Publick Petitions, 13 Car. II, c. 5 (1661). This was voided, as to the King, by the 1688 Declaration of Rights, which provided that "That it is the Right of the Subjects to petition the King and all Commitments and Prosecutions for such Petitioning are Illegall." An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crowne, 1 Wm. & Mar. c. 2. But petitions to Parliament remained risky. In 1701, Parliament imprisoned the "Kentish Petitioners," five persons who had presented a petition duly approved by the justices of the peace. *See* Robert Winters, Freedom of Assembly and Petition 21-22 (2006).

Freedom from establishment of religion likewise had little history at the time of the Framing. England had, and has, an established church. So did most of the colonies and the early American states. *See generally* Leonard W. Levy, The Establishment Clause: Religion and the First Amendment (1986). Massachusetts' first Constitution, for example, commanded that its legislature require localities "to make suitable provision, at their own expense, for the institution of the public worship of God and for the support and maintenance of public Protestant teachers of piety, religion, and

morality in all cases where such provision shall not be made voluntarily." Mass. Const., Pt. I, Art. III (1780). Connecticut retained its established church, and the political conflicts that this engendered, until 1818. Wesley W. Horton, The Connecticut State Constitution: A Reference Guide 7-8 (1993).

Freedom of religious exercise had only slightly more history at common law. Roman Catholicism was an object of prosecution and discrimination. A 1673 statute barred such Catholics from public office. Act for Preventing Dangers Which May Happen from Popish Recusants, 25 Car. II c. 2. The statute remained in effect until 1829. An Act for the Relief of His Majesty's Roman Catholic Subjects, 10 Geo. IV c. 7. Non-Anglican Protestants fared little better until the 1689 Toleration Act, 1 Wm. & Mar. c. 18, which exempted them from criminal proceedings provided they registered their church buildings and secured licenses for their clergymen.

In short, at the time of the Framing, the right to arms was well-established and had a history and tradition that spanned centuries, which cannot be said of many liberties guaranteed by our Bill of Rights. The right to arms is thus particularly well-suited to application via its text, history, and tradition.

II. The Text, History, and Tradition of the Right to Arms Counsel Against Treating Non-Dangerous Offenders as Outside the Right's Guarantee

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

Disarmament laws in colonial America were few and far between, and designed to keep weapons away from those perceived as posing a dangerous threat. Early laws were directed, for example, at those who sold guns and gunpowder to Indians. In 1675, the Virginia colony imposed the death penalty on such offenders. An Act Prohibiting Trade with Indians, 2 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 336 (1823).

During wars with Catholic France, special laws against Catholics were enacted in Maryland (with a large Catholic population), and next-door Virginia. For example, during the French & Indian War (1754–63), Virginia required Catholics to take an oath of allegiance; if they refused, they were disarmed. 7 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35–37 (1823). An exception was made for "such necessary weapons as shall be allowed to him, by order of the justices of the peace at their court, for the defence of his house or person." *Id.* at 36.

With the outbreak of the American Revolution, Tories were often disarmed. In 1776, in response to

General Arthur Lee's plea for emergency military measures, the Continental Congress recommended that colonies disarm persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies." 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 283–85 (1906).

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

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

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

Pennsylvania in 1779 determined that "it is very improper and dangerous that persons disaffected to

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

Those who refused to take an oath of loyalty to the new governments by that action placed themselves outside the new social compact. They had chosen the option of potentially becoming enemy combatants and spies, the wartime equivalents of violent criminals. Those who were subject to these restrictions could gain immediate release from them, and restoration of their firearm rights, simply by taking the required oath.

B. At Constitutional 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." *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008). The ratifying conventions are therefore instructive in interpreting the ultimately codified right.

Samuel Adams initially 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). After adoption of the Bill of Rights, Adams's supporters treated his proposals as its inspiration and model. *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.").

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

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

> That the people have a right to bear arms for the defence of themselves and their own state,

> or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, *in* 2 Schwartz, at 665. While the "crimes committed" language is not expressly limited to violent crimes, its association with "real danger of public injury" suggests that the Pennsylvania minority had violent offenders in mind.

III. Laws Disarming Those Convicted of Nonviolent Felonies Are a Product of the Second Half of the Twentieth Century

New York's "Sullivan Act," a 1911 enactment, is generally seen as the earliest form of strict gun control law. Yet it did not ban possession by persons based on their criminal record: it required a permit to possess a handgun, and authorities were forbidden to issue permits to non-citizens and those under the age of 16. An applicant's criminal record was not made a consideration. N.Y. Laws 1911, ch. 195.

In the early 20th century, the Sullivan Act's main competitor was the Uniform Pistol Act, sometimes titled the Uniform Firearms Act. The first draft of this model statute dated to 1924, and forbade handgun transfers where there was reason to believe the recipient was an "unnaturalized foreign-born person or has

been convicted of a felony." Report of the Committee on a Uniform Act to Regulate the Sale and Possession of Firearms 23, § 12(3) (1924).

But the 1925 and later versions[2] contained a more narrow prohibition, which forbade handgun possession by those convicted of a "crime of violence," defined as "murder, manslaughter, rape, mayhem, assault to do great bodily harm, robbery [larceny], burglary, and housebreaking."[3] Uniform Firearms Act Drafted by the National Conference of Commissioners on Uniform State Laws, §§ 1, 3 (1925). A contemporaneous commentator explained,

> The justification for the section is the protection afforded by prohibiting the possession of pistols to men who are liable to use them in a way dangerous to society. Experience has shown that crimes of violence are much more likely to be committed by men who have previously been convicted of such offenses.

Sam B. Warner, *Uniform Pistol Act*, 29 J. of Crim. L. and Criminology, 529, 538 (1938).

The first federal restriction on receipt or possession of firearms came in the Federal Firearms Act of 1938, 52 Stat. 1250. This forbade a "person who has

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[2] Later editions were issued in 1926, 1928, and 1930. Prior to the promulgation by the Commissioners on Uniform State Laws, a version had been proposed by the U.S. Revolver Association.

[3] The bracketed word was inserted with the suggestion that adopting states substitute whatever word their statutes employed to describe the named offense.

been convicted of a crime of violence or is a fugutive [*sic*] from justice" to receive a firearm in interstate commerce. It defined "crime of violence" much as had the Uniform Firearms Act, adding assault with a deadly weapon and "assault with intent to commit any offense punishable by imprisonment for more than one year." §§ (6), (2)(f), 52 Stat. 1250, 1251.

A 1961 amendment deleted the definition of "crime of violence" and replaced that term with "crime punishable by imprisonment for a term exceeding one year." An Act to Strengthen the Federal Firearms Act, 75 Stat. 757. This, for the first time, made the federal bar applicable to non-violent offenses.

It thus appears that bars on firearm possession by persons convicted of nonviolent felonies are a product of the second half of the Twentieth Century. The first such federal bar dates only to 1961, 170 years after the ratification of our Bill of Rights.

CONCLUSION

This case affords an opportunity for the Court to explore the Second Amendment's text, history, and tradition, and how those shed light upon enactments that came 170 years after its ratification. The writ should be granted.

Respectfully submitted,

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