No. 20-843

In the Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL., PETITIONERS,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE FIREARMS POLICY COALITION AND PROFESSOR JOYCE LEE MALCOLM AS *AMICI CURIAE* SUPPORTING PETITIONERS

Matthew H. Frederick
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Scott A. Keller
Counsel of Record
Jonathan D. Urick
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
scott@lehotskykeller.com
(512) 693-8350

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending constitutional rights.[1] 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. Since its founding in 2014, FPC has emerged as a leading advocate for individual liberty in state and federal courts, regularly participating as a party or *amicus curiae*.

Joyce Lee Malcolm is Professor Emerita of Law at the Antonin Scalia School of Law at George Mason University. She is a historian and constitutional scholar whose work has focused on the development of individual rights in Great Britain and America, with particular emphasis on the right to keep and bear arms. In addition to scholarly articles and book chapters, she has written eight books, including the definitive TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT (1994) ("MALCOLM"), and the historical study GUNS AND VIOLENCE: THE ENGLISH EXPERIENCE (2002).

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[1] All parties have consented to the filing of this brief. In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

I. The English right to have and use arms at the time of the American Founding included the right to carry common weapons outside the home for self-preservation and defense.[2] And "[t]he language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted." *Ex parte Grossman*, 267 U.S. 87, 108-09 (1925).

In the modern context, this means that the Second Amendment, as incorporated against the States by the Fourteenth Amendment, ensures that the people may carry arms that are "in common use" for lawful purposes outside their homes. *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008) (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). States may proscribe offenses akin to the common law "publick Offence, to the Terror of the People," "affray": (1) public carry "accompanied with such Circumstances as are apt to terrify the People"; and (2) publicly carrying "dangerous and unusual Weapons, in such a manner as will naturally cause a Terror to the People." WILLIAM HAWKINS, 1 A TREATISE OF THE PLEAS OF THE CROWN 134, 135, 136 (1716) ("HAWKINS"); *accord Heller*, 554 U.S. at 627 (relying on Blackstone's recognition that "dangerous and unusual weapons" were not protected). But peaceably carrying common weapons for self-defense is not sufficient to "terrify" the people. HAWKINS at 136.

English history from the late ninth century reveals that the English right to arms developed out of a longstanding *duty* to own, bear, and proficiently use arms.

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[2] All references to "carrying" in this brief refer to carrying *outside* the home, unless otherwise qualified.

MALCOLM at 1. After England's Glorious Revolution of 1688, the English Declaration of Rights enshrined a right to "have arms" that provided robust protection to both possess and carry arms. Just as an English subject's historical *duty* often required publicly carrying weapons, the Declaration of Rights recognized the *right* to possess and carry arms publicly for defense.

II. The en banc Ninth Circuit in *Young v. Hawaii*, erroneously concluded—after relying on sources from which material portions were omitted—that the English right did not include the right to carry weapons outside the home. 992 F.3d 765, 786-94 (9th Cir. 2021) (en banc); *see Peruta v. County of San Diego*, 824 F.3d 919, 929-32 (9th Cir. 2016) (en banc) (similar case, with similar analysis, involving concealed carry).

ARGUMENT

I. The English Right To Have Arms At The Time Of The Founding Included The Right To Peaceably Carry Common Arms Outside The Home For Self-Defense.

Heller recognized that the Second Amendment "codified a *pre-existing* right" that traced back to the English right to arms. 554 U.S. at 592. Just as the English right was relevant in *Heller* to whether the Second Amendment codified an individual right, it is relevant here to the scope of that individual right and whether it protects publicly carrying arms.

At the time of the Founding, the English right to have arms was understood to protect the right of individuals to carry a weapon in public, subject to narrow limitations.

A. The English Right To "Have Arms" Developed From A Longstanding Duty To Possess And Carry Arms.

"The right of citizens to be armed not only is unusual, but evolved in England in an unusual manner: it began as a duty." MALCOLM at 1. English law required subjects to be armed and to use their arms to discharge their duties to protect themselves, their towns, and country.

Over a millennium ago, King Alfred the Great instituted traditions designed to "build[] England's capacity for self-defense … founded on the idea that all the freemen were to be armed, trained, and ready to fight to defend their local and national communities." David B. Kopel, *The* Posse Comitatus *and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. Crim. L. & Criminology 761, 771 (2014) ("*Armed Citizens*"). King Alfred "reform[ed] … the office of sheriff," making it the "pillar" of the English county-based defense system—a militia recognized as the forebearer to the "militia of the Second Amendment." *Id.* at 771-72. This power manifested "in several related forms" that each required English subjects to carry arms publicly. *Id.* at 772.

Self-Defense. An English subject's first duty was to defend himself and to protect his family and property against attack. Accordingly, he was held legally blameless for any harm inflicted upon his assailants. *See* MICHAEL DALTON, THE COUNTREY JUSTICE 308, 356 (London, 1697).

***Posse Comitatus*.** Well into the 1700s, the sheriff had the authority to employ the "'power or force of the county,'" "to enforce the law," "suppress riots and also to enforce civil process—if and only if there was resistance to the civil process," and to "'apprehend Felons, &c. Or disturbers of the peace.'" Kopel, *Armed Citizens*, 104

J. Crim. L. & Criminology at 789-91 (quoting BLACK'S LAW DICTIONARY 1046 (5th ed. 1979); MICHAEL DALTON, THE COUNTREY JUSTICE 315 (London, William Rollins & Samuel Roycroft 1622)).[3]

Hue and Cry. Under English law originating long before the Norman Conquest of 1066, all able-bodied men were obliged to raise a "hue and cry," "turn out with the" weapons "they are bound to keep," and join in the pursuit of fleeing criminals—or else they would commit "an amerciable [criminal] offence." 2 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 578-79 (2nd ed. 1968) (1895). A writ of 1252 was clear that, upon the raising of the cry, neighbors were to turn out with weapons they were bound to keep. *Id.* at 579 & n.2. Those neighbors were "allowed to use deadly force if necessary to prevent the culprit's escape." Kopel, *Armed Citizens*, 104 J. Crim. L. & Criminology at 788-89.

Watch and Ward. Beyond responding to immediate lawlessness, the sheriff had the authority to ensure that townsfolk deterred crime. The "specific duty of keeping 'watch and ward'" was "the power to arrange watches and patrols, and to require townsfolk to take turns on guard duty" under penalty of fine. *Id.* at 788.[4]

Effective exercise of these powers required an armed populace trained in the use of their weapons. The "King insisted that the people be expert in the use of the arms they were obliged to possess. Villages were instructed to

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[3] The sheriff's power to summon the *posse comitatus* also existed in America before and after independence. *See, e.g.*, Kopel, *Armed Citizens*, 104 J. Crim. L. & Criminology at 792-98 (discussing *posse comitatus* in America from before Independence to before the Civil War).

[4] "Watch" was kept in the villages and roads at night, and "ward" was kept during the day. *See* Kopel, *Armed Citizens*, 104 J. Crim. L. & Criminology at 788.

maintain targets or butts at which local men were to practice, first with longbow, later [when firearms became common] with the musket." MALCOLM at 6. To be sure, the "obligation to own and be skilled in the use of weapons does not . . . imply that there were no restrictions upon the type of weapon owned or the manner of its use." *Id.* at 9. But until "the [English] Civil War [in the mid-1600s], restrictions on ownership of weapons were few and not especially onerous." *Id.*

B. By The Time Of The American Founding, The Bygone 1328 Statute Of Northampton Was "In Desuetude" And Was Understood To Permit Peaceably Carrying Common Weapons For Self-Defense.

In spite of its prominence in modern discussions of the English right, the 1328 Statute of Northampton was an "all-but-forgotten" law narrowly "construed as prohibiting one from going armed in a manner to terrify one's fellow subjects." STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS 5, 25 (2021). "No known post-1686 English or American case interprets the Statute of Northampton to bar peaceable defensive carry." David B. Kopel & George A. Mocsary, *Errors of Omission: Words Missing From the Ninth Circuit's* Young v. Hawaii, 2021 U. Ill. L. Rev. Online 172, 180 (2021) ("*Errors of Omission*").

The 1328 Statute itself has little bearing on the English right to arms as understood at the time of the Founding. "[W]hat ultimately matters is not some purportedly original meaning of the medieval Statute, but the understanding of what was recognized as a crime at common law" at the time of the Founding. HALBROOK at 27-28. Only the Founding-era understanding is relevant to the meaning of the "preexisting" right codified by the Second Amendment. *See Heller*, 554 U.S. at 592; *Wrenn v.*

District of Columbia, 864 F.3d 650, 660 (D.C. Cir. 2017) ("*Heller I* holds that by the time of the Founding, the 'preexisting right' enshrined by the Amendment had ripened to include carrying more broadly than the District contends based on its reading of the 14th-century statute. . . . So in light of *Heller I*, we can sidestep the historical debate on how the first Northampton law might have hindered Londoners in the Middle Ages.").

Regardless, the few cases discussing the Statute make clear that what became the English right to have arms included the right to carry common arms for self-defense in a peaceable manner.

1. The 1328 Statute Of Northampton Was Enacted During A Tumultuous Period To Quash Disorder And Was Rarely Enforced.

The Statute of Northampton was enacted in the middle of a series of tyrannical reigns and an era characterized by "[w]ar and political violence." HALBROOK at 27. In this "period of growing anarchy," the monarchy was unable to enforce its laws, and the gentry employed armed forces to frustrate justice. MALCOLM at 104. Thus, the "Statute sought to protect the regime's supremacy and repress disorder." HALBROOK at 27.

"While the Statute of Northampton was primarily concerned with armed nobles frustrating judicial process," the language of the Statute swept more broadly. David B. Kopel, *The First Century of Right to Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y 127, 134 (2016) ("Kopel, *Arms Litigation*"). The Statute provided that "no man great nor small, of what condition soever he be" may

> come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace, nor to go nor ride armed by

> night nor by day, in fairs, markets, nor in the presence of the justices or other ministers, nor in no part elsewhere.

2 Edw. III c. 3 (1328).

"From the beginning, the scope of the Statute of Northampton was unclear." *Rogers v. Grewal*, 140 S. Ct. 1865, 1869 (2020) (Thomas, J., dissenting from denial of certiorari). While "[o]n its face," one clause of "the statute could be read as a sweeping ban on the carrying of arms . . . both the history and enforcement of the statute reveal that it created a far more limited restriction." *Id.*

The statute and common law prohibited bearing dangerous and unusual arms in a manner that was intended to terrify the public or in furtherance of crime—not peacefully carrying arms for self-defense. Longstanding English custom and law make plain that the Statute could not be read to ban *all* public carrying of arms. For instance, subjects "routinely" carried the "most common arm, a knife" for myriad purposes, and knives were "necessarily available for self-defense in an emergency." Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 134. As mentioned above, English law required (1) subjects to be proficient in the use of arms and to be ready to use them for private and public purposes; and (2) towns to provide areas for target practice. MALCOLM at 6. Over time, a mandate that families teach their sons archery gave way to a requirement that families teach their sons how to use muskets. Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 134 (citations omitted). "That in itself would necessarily make it common for people to walk around carrying arms." *Id.*

In all events, "[w]hatever the initial breadth of the [Statute of Northampton], it is clear that it was not strictly enforced in the ensuing centuries." *Rogers*, 140 S. Ct. at 1869 (Thomas, J., dissenting from denial of certiorari). "The greatest exception to the Statute of Northampton

was that it was often flouted." Nicholas J. Johnson, David B. Kopel, George A. Mocsary, E. Gregory Wallace, & Donald E. Kilmer, FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 112 (3d ed., forthcoming Sept. 2021) ("FIREARMS LAW").

2. The Few Cases Even Discussing The 1328 Statute Of Northampton Recognized That Publicly Carrying Common Arms Was Only Punishable If It Terrorized The Public.

Because the Statute was enforced so rarely, the Founders' understanding of the Statute would have been based on two decisions. In both cases, "essential elements of the crime [under the Statute] included not just going or riding armed, but also in affray of the peace"—*i.e.*, "creat[ing] … great fear in the minds of others." HALBROOK at 27; HAWKINS at 134 ("affray" is "a publick Offence, to the Terror of the People").

The first case to simply discuss the Statute, *Chune v. Piott* (1615), did not involve a prosecution under the Statute. Instead, in a case unrelated to the Statute, one of the justices observed in dictum that the sheriff had authority to arrest those carrying arms *in a manner that terrified the public* (thereby breaching the peace) under the Statute, even if the sheriff did not himself witness the breach of the peace:

> Without all question, the sheriffe hath power to commit, est custos, & conservator pacis, if contrary to the Statute of Northampton, he sees any one to carry weapons in the highway, *in terrorem populi Regis*; he ought to take him, and arrest him,

> notwithstanding he doth not break the peace in his presence.

80 Eng. Rep. 1161, 1162 (K.B. 1615) (Justice Croke); *id.* (Justice Houghton: sheriffs may arrest someone "upon suspition" that the person breached the peace out of the presence of the sheriff); *accord* HALBROOK at 36. So *Chune* merely confirmed that the Statute applied when people carried arms to terrify the public.

The second case, *Sir John Knight's Case* (1686), actually involved a prosecution under the Statute that failed because the Statute (1) had gone into desuetude; and (2) did not apply when subjects peaceably carried their arms in public. "Although men were occasionally indicted for carrying arms to terrorize their neighbours, the [Statute of Northampton's] strict prohibition against going armed … had never been enforced" before *Sir John Knight's Case*. MALCOLM at 104. Shortly before England's Glorious Revolution in 1688, Catholic King James II tried to disarm a Protestant official who was enforcing England's anti-Catholic laws. *Id.* The King's Attorney General accused Sir John Knight—the former sheriff of Bristol and militant Anglican—of violating the Statute of Northampton. *Id.* at 104-05. The prosecution alleged that Knight "did walk about the streets armed with guns, and that he went into the church of St. Michael, in Bristol, in the time of divine service, with a gun, to terrify the King's subjects." *Sir John Knight's Case*, 87 Eng. Rep. 75, 76 (K.B. 1685); *accord* MALCOLM at 104-05.

Knight was acquitted by a jury, and two reporters addressed the case. HALBROOK at 51-52.[5] Though the reports differ slightly in emphasis, "[u]nder both reports,

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[5] At the time, judges did not issue written rulings and instead made oral rulings that private reporters would summarize. Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 177.

only malicious, terrifying carry was illegal." Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 135; *accord* HALBROOK at 51 ("going armed in a peaceable manner was not an offense, but doing so in a manner to terrorize others was a crime").[6]

As reported in a summary styled *Sir John Knight's Case*, the Chief Justice said that the Statute prohibited carrying arms *in a manner that would terrify the public*, which was a longstanding offense at common law:

> the meaning of the statute of 2 Edw. 3, c. 3 [the Statute of Northampton], was to punish people who go armed *to terrify the King's subjects*. It is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law.

87 Eng. Rep. at 76 (emphasis added).

Likewise, as reported in a summary styled *Rex v. Knight*, the Chief Justice noted that the Statute had gone into desuetude, but could nevertheless be applied where one carried arms with ill intent to terrify the public or otherwise violate the rights of others: "But tho' this statute be almost gone in desuetudinem, yet where the crime shall appear to be *mal animo*, it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)." 90 Eng. Rep. 330, 330 (K.B. 1686).

In sum, by the late 1600s—even before the English Declaration of Rights affirmed the right of subjects to

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[6] "American courts have cited the Statute of Northampton, sometimes with consideration of how it was construed by *Sir John Knight's Case*." Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 140.

have arms for defense—"the Statute of Northampton was all but forgotten, [and] going armed was a crime only if done so with evil intent." HALBROOK at 43; *accord Rogers*, 140 S. Ct. at 1870 (Thomas, J., dissenting from denial of certiorari) ("the Statute of Northampton was almost obsolete from disuse and prohibited only the carrying arms to terrify"); Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 175.

The failure to prosecute Knight under the Statute likely "drove home to the King the need for a more general statute to disarm subjects." MALCOLM at 105. Two weeks after Knight's acquittal, King James II tried to use the Game Act of 1671 (22 & 23 Car. II c. 25 (1671)) to disarm his Protestant enemies. MALCOLM at 105-06. This Game Act, for the first time, added guns to the list of banned hunting equipment by those under the rank of esquire and without a certain level of income from land.[7]

James II was deposed in 1688 in the Glorious Revolution for, among other reasons, his efforts to intrude on English subjects' individual rights.

C. The 1689 English Declaration Of Rights Enshrined A Right To Carry Common Arms For Self-Preservation And Defense.

1. In response to the abuses of King James II, his victorious opponents drafted the 1689 English Declaration of

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[7] The existence of the 1671 Game Act is further evidence that the Statute of Northampton was not understood to generally disarm the public. In all events, this 1671 Game Act was intended to be enforced by gamekeepers appointed by landowners, though it never seems to have been strictly enforced. MALCOLM at 69-76. Moreover, the prohibition on firearms was not included in future game acts. *See infra* p.18 & n.13.

The Statute of Northampton was not enforced in any known cases in the 1700s or 1800s. HALBROOK at 107.

Rights and, in the same act, installed William and Mary as King and Queen.

The Declaration detailed the "ancient and indubitable rights and liberties of the people" and specified James II's violations of those rights. 1 W. & M. c. 2, § 7.[8] Specifically, the Declaration of Rights (and later, Bill of Rights) identified James II's attempts to disarm the public as an abuse: "By causing several good subjects being protestants to be disarmed at the same time when papists were both armed and employed contrary to law." *Id.* And, in turn, Parliament recognized Protestants' *right* to "have arms" for the first time: "That the subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." *Id.*; *see Heller*, 554 U.S. at 593 (Parliament "accordingly obtained an assurance from William and Mary, in the Declaration of Rights (which was codified as the English Bill of Rights), that Protestants would never be disarmed").[9]

Parliament described the right to have arms as "ancient" because it grew out of the longstanding English duty to be armed: "Writings were not what made arms or anti-quartering ancient. They were ancient in the sense of British constitutionalism, in which long-standing unwritten traditions acquired the force of law."

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[8] Only a Parliament called by a king could pass bills. MALCOLM at 114-15. So, after James fled, a "convention Parliament" was elected and drafted and passed the Declaration of Rights. *Id.* The new king, William of Orange, then called a regular Parliament and its first act was to make the Declaration of Rights the Bill of Rights. *Id.*

[9] Approximately 90% of the English people at the time were Protestants. J.R. JONES, THE REVOLUTION OF 1688 IN ENGLAND 77 n.2 (1972). Catholics were suspected of wanting to overthrow the Protestant monarchy. *E.g.*, MALCOLM at 85. Accordingly their possession of weapons was carefully monitored. *Id.*

JOHNSON ET AL., FIREARMS LAW at 139. Until 1671, English Kings demanded that their citizens be armed—though certain weapons were banned or limited to certain classes at varying times, often according to the whims of the King. *Id.* But Kings Charles II and James II had attacked the long-established order by attempting to disarm subjects by disarming the militia, their political opponents, justices of the peace, and through the use of a game law. *Id.* "The Stuarts thus forced Parliament to affirmatively state as 'ancient rights and liberties' what previously had been implicit social understandings." *Id.* So, "at a crucial moment in English history, when the governing classes seized a rare opportunity to draw up a bill of rights, th[e] long-standing and unpopular duty" to own and carry arms "was transformed into a right." MALCOLM at 1.

The Declaration, however, recognized that the English tradition of possessing and carrying arms was limited by laws against "affray" and other similarly cabined breaches of the peace. So the Declaration permitted those kinds of regulations in declaring that English Protestants had the right to possess and carry arms "as allowed by law." 1 W. & M. c. 2, § 7.

2. Treatises and other sources postdating the Declaration of Rights recognized that the English had the right to *peaceably* carry common arms for self-defense.[10] These sources were available to and informed the Founders' understanding of the English right. *See* HALBROOK at 51 ("These sources informed legal minds on both sides of the Atlantic, whether in England or America."). Accordingly, it is unsurprising that the "Statute [of Northampton] was

[10] Other treatises from before *Sir John Knight's Case* varied in their treatment of the right to carry. *See* HALBROOK at 31, 36-39 (discussing treatises and other guides).

understood by the Framers as covering only those circumstances where carrying of arms was unusual and therefore terrifying"—not as a broader limitation on the right to arms. Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. Sidebar 97, 101 (2009).

William Hawkins' leading 1716 treatise contextualized the carrying of arms (and the Statute of Northampton) with the broader law against "affray"—and thus "confirmed that the Statute of Northampton was for 'dangerous and unusual' arms, not common ones." Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 138-39 (citation omitted). Hawkins' understanding was influential with the Founders. *See, e.g.*, Volokh, 109 Colum. L. Rev. Sidebar at 101-02.

According to Hawkins, "*no wearing of Arms* is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People." HAWKINS at 136 (emphasis added). So "Persons of Quality are in no Danger of Offending against [the Statute of Northampton] by wearing *common Weapons* or having their usual Number of Attendants with them for their Ornament or Defence in such Places and upon such Occasions in which it is the common Fashion to make use of them." *Id.* (emphasis added). For instance, wearing a concealed privy coat of mail "could not be seen and thus would not alarm anyone." HALBROOK at 47.

Sir William Blackstone's influential work likewise recognized a broad right to carry arms peaceably for self-defense, limited only by exceptions for "dangerous or unusual weapons":

> The offense of riding or going armed with *dangerous or unusual weapons*, is a crime against the public peace, by terrifying the good people of the land; and is particularly prohibited by the Statute of Northampton,

> upon pain of forfeiture of the arms, and imprisonment during the king's pleasure: in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour.

4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND*148-49 (1765-69) (emphasis added); *accord* Volokh, 109 Colum. L. Rev. Sidebar at 101 (Blackstone "rendered" the offense defined by the Statute: the "'offense of riding or going armed with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land'").[11]

The right to possess and carry arms for self-defense was crucial to Blackstone's conception of English rights, which he "reduced to three principal or primary articles; the right of personal security, the right of personal liberty; and the right of private property." 1 BLACKSTONE, COMMENTARIES at *125. Those rights would be "declared" "in vain … if the constitution had provided no other method to secure their actual enjoyment." *Id.* at *135. So England "established certain other auxiliary subordinate rights of the subject"—like the right to possess and carry arms—"which serve principally as barriers to protect and maintain inviolate the three great and primary rights, of personal security, personal liberty, and private property." *Id.*; *see id.* at *139 ("having arms for their defence, suitable to their condition and degree, and such as are allowed by law … is indeed a public allowance, under due restrictions, of the natural right of resistance and self-preservation, when the sanctions of society and

[11] Hawkins' and Blackstone's understanding of the right to carry persisted in England into the 1900s. Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 139 & n.56 (collecting cases from 1820 to 1914).

laws are found insufficient to restrain the violence of oppression.").

Blackstone's "works constituted the preeminent authority on English law for the founding generation." *Alden v. Maine*, 527 U.S. 706, 715 (1999); *see* MALCOLM at 130 ("Blackstone's comments on this subject are of the utmost importance since his work immediately became *the* great authority on English common law in both England and America").[12]

In addition to these treatises, the 1820 *Rex v. Dewhurst* decision crystallized what the Declaration's right to arms encompassed. Justice Bayley cited the Declaration of Rights and asked, "are arms suitable to the condition of people in the ordinary class of life, and are they allowed by law?" 1 State Trials, N.S. 529, 601 (1820). His answer made clear that subjects had the right to possess and carry arms for self-defense in public:

> A man has a clear right to arms to protect himself in his house. A man has a clear right to protect himself when he is going singly or in a small party upon the road where he is travelling or going, for the ordinary purposes of business.

Id. at 601-02. And he recognized the same limitation on carrying arms in a manner that would terrify the public: "I have no difficulty in saying you have no right to carry arms to a public meeting, if the number of arms which are so carried are calculated to produce terror and alarm." *Id.* at 602.

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[12] Next to Montesquieu, Blackstone was the European author most cited by the Founders; John Locke was third. *See* Donald S. Lutz, *The Relative Influence of European Writers on Late Eighteenth-Century American Political Thought*, 78 Am. Pol. Sci. Rev. 189, 194 (1984) (table 3).

3. In addition to these treatises and other sources, further acts of Parliament confirm that Parliament understood the right to have arms as durable and including public carry of arms. "[F]or over two centuries after the Declaration of Rights, Parliament never passed a general law against peaceable carry, and all the case law recognized such a right." Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 180 (citation omitted). For instance, Parliament conspicuously excluded guns from prohibitions on certain hunting devices in the 1692 and 1706 Game Acts. MALCOLM at 128.[13] The courts repeatedly confirmed the plain import of those omissions and concluded that guns were not prohibited—and could not be confiscated—under those acts. *Id.* at 128-29.

The right to publicly carry arms—and the limited applicability of the Statute of Northampton—was underscored by Parliament's treatment of Irish Catholics. *See* HALBROOK at 76-87. Unlike English Protestants, Irish Catholics had no right to possess or carry arms whatsoever. *Id.* at 76. Parliament sought to affirmatively forbid Irish Catholics from owning or carrying arms—and "it never occurred to anyone that Irish Catholics, like everyone else, had no right to bear arms based on the unmentioned Statute of Northampton, enacted over 350 years earlier." *Id.*; *accord* MALCOLM at 122.

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[13] Commoners were prohibited from hunting and owning hunting equipment. Only the 1671 Act included guns in this prohibition, and the prohibition was later removed. Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 180.

Additionally, "[f]ears of rebellion in 1819 resulted in a law, which sunset in 1821, against military-style drilling in eleven counties and allowing confiscation of suspected rebels' arms; [but] even that law did not purport to prohibit arms carrying by nonrebels." *Id.* (citation omitted).

By the time of the Founding, London's legal adviser "provide[d] perhaps the clearest summation of the right of Englishmen to have arms at the time of the American Revolution":[14]

> The right of his majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of this kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace.

WILLIAM BLIZARD, DESULTORY REFLECTION ON POLICE 59-60 (London, Dilly 1785).

II. The En Banc Ninth Circuit's Evaluation Of Historical Sources Omitted Crucial Material, Leading The Court To A Flawed Understanding Of The Preexisting English Right To Possess And Carry Arms.

The en banc Ninth Circuit in *Young v. Hawaii* analyzed the English right to carry arms and concluded that the "pre-existing" English right "codified" by the Second Amendment did not include "publicly carrying arms." 992 F.3d at 786, 792; *see Peruta*, 824 F.3d at 929-32 (Ninth Circuit surveying English history to hold that the Second Amendment does not protect the "right of a member of the general public to carry a concealed firearm in public"). And the right to keep and bear arms codified by the Second Amendment was not limited to the English

[14] MALCOLM at 134.

understanding, but to the public meaning of the American Constitution's text when it was ratified, as informed by Founding Era practices. *See, e.g.*, *Heller*, 554 U.S. at 576.

But in all events, the Ninth Circuit relied on incomplete sources from which material portions were omitted, and accordingly misinterpreted historical English law and practice.[15]

A. Royal Proclamations Predating The 1689 Declaration Of Rights Do Not Limit The Right To Have Arms As Understood At The Time Of The Founding.

In both *Young* and *Peruta*, the Ninth Circuit began its analyses with royal proclamations from the 1300s. *Young*, 992 F.3d at 786-87; *Peruta*, 824 F.3d at 929. These decrees and proclamations have little probative value because they predate the Founding by centuries and do not reflect what only later became the English right to possess and carry arms. Furthermore, the Ninth Circuit's analyses do not include the longstanding English duty to own and be proficient in the use of arms, addressed above at pp.4-6. The Ninth Circuit's analyses therefore do not account for the background principles that informed those royal decrees.

For instance, *Young* cited Edward III's order that hostelries warn their guests "against going armed in the City." 992 F.3d at 789 (citing 1 CALENDAR OF PLEA & MEMORANDA ROLLS OF THE CITY OF LONDON, 1323-64 156 (Dec. 19, 1343) (A.H. Thomas ed., 1898)). But this order "*presumes* that ordinary travelers would be carrying and arriving with arms." Kopel & Mocsary, *Errors of*

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[15] *Young*, 992 F.3d at 785 ("We have . . . relied on the parties and amici to direct our focus to the principal historical sources and any important secondary sources they would like us to consider.").

Omission, 2021 U. Ill. L. Rev. Online at 175 (emphasis added); *id.* ("The order was issued on December 19, 1343, shortly before the Feast of St. Thomas the Apostle, potentially drawing a large crowd of miscreants from outside the city.").

B. The 1328 Statute of Northampton Was Not Understood to Limit Peaceable Carry of Common Arms In Both The Fourteenth Century And At The Founding—And The Ninth Circuit's Contrary Analysis Omitted Material Portions From Cited Sources.

The Ninth Circuit's reliance on the Statute of Northampton, its amendments, and enforcement history is similarly misplaced—in part because the Ninth Circuit omitted material portions of the cited historical sources. *Young*, 992 F.3d at 787-91; *Peruta*, 824 F.3d at 929-30.

First, *Young* cited King Edward III's 1350 law for the proposition that "Parliament specifically banned the carrying of concealed arms." *Young*, 992 F.3d at 788-89. But the full text of that 1350 law makes clear that the law prohibited carrying concealed weapons *to commit a crime*:

> And if percase any Man of this Realm ride armed [covertly] or secretly with Men of Arms against any other, *to slay him, or rob him, or take him, or retain him till he hath made Fine or Ransom* for to have his Deliverance … it shall be judged … Felony or Trespass, according to the Laws of the Land of old Times used.

25 Edw. III, 320, st. 5, c. 2, § 13 (1350) (emphasis added); *accord* Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 175 (noting omission); HALBROOK at 29 (same).

Second, the Ninth Circuit did not consider important parts of *Chune* and *Sir John Knight's Case* that demonstrate English law permitted peaceable carry of common weapons.

Regarding *Chune*, the Ninth Circuit "convert[ed] *Chune*'s actual rule (sheriffs can arrest even if they did not witness the peace breached) into a significantly different rule (sheriffs can arrest [for carrying arms] when there is no breach)." Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 176. As addressed above at pp.9-10, Justice Croke stated in dictum that, "if an arms-carrier broke the peace, the sheriff could arrest him even if the breach had not taken *place in the sheriff's presence*." Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 176. (emphasis added). The Ninth Circuit omitted that portion of Justice Croke's statement, however, and determined that *Chune* stood for an altogether different proposition: "The sheriff could arrest a person carrying arms in public 'notwithstanding he doth not break the peace.'" *Young*, 992 F.3d at 790 (citation omitted).

Similarly, regarding *Sir John Knight's Case*, the Ninth Circuit "muddle[d]" the two reports of Knight's acquittal "to reach the conclusion that the case provides no clear precedent." Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 177 (citing *Young*, 992 F.3d at 791). The Ninth Circuit concluded that there was a "dispute" between the two reported versions of the Chief Justice's oral opinion in the *Knight* case. *Young*, 992 F.3d at 791. It combined that alleged "dispute" in the primary sources with contemporary scholarly conjecture to finally conclude that *Sir John Knight's Case* provided no clear understanding of the Statute. *Id.*

To the contrary, the two reports of *Sir John Knight's Case* do not conflict. Both stand for the proposition that

peaceable carry was permissible—while carrying arms with the intent to terrify the people was not. *See supra* pp.10-11. In all events, the two reports provide individual, independent evidence that the Statute of Northampton was not understood to prohibit the carrying of common arms for lawful purposes.

As the Ninth Circuit correctly concluded, one report recounted the Chief Justice as saying that "the Statute of Northampton was 'almost gone in [desuetude],' but Knight could still be punished if he carried arms with malintent to terrify the people." *Young*, 992 F.3d at 790 (alteration in original); *see supra* p.11 (discussing *Rex v. Knight*).

But the Ninth Circuit's recitation of the second report contained omissions that changed the report's meaning entirely. The Ninth Circuit concluded that "the Chief Justice of the King's Bench opined that the meaning of the Statute of Northampton was"—merely—"to punish those who go armed." *Young*, 992 F.3d at 791 (citing *Knight's Case*, 87 Eng. Rep. at 76). The second report said no such thing. It reported the Chief Justice as defining the offense as to "go armed *to terrify the King's subjects*." *Knight's Case*, 87 Eng. Rep. at 76 (emphasis added); *see supra* p.11 (discussing *Sir John Knight's Case*).

Going beyond the reported decisions, the Ninth Circuit speculated that perhaps "Knight was acquitted by virtue of his aristocratic status." *Young*, 992 F.3d at 791 n.11 (citing Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 Law & Contemp. Probs. 11, 26-27 (2017)). But this rationale does not appear in either of the two reports, and the Statute plainly applies to men "great" and "small, of what condition soever [they] be"—including aristocrats. 2 Edw. III c. 3; *see* Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online

at 178 ("Aristocrats were expressly included. Indeed, they were the Statute's primary target because, in 1328, the leading barons and lords often led large criminal gangs.") (citations omitted).[16] Knight himself did not rely on his aristocratic status, and his own lawyer admitted that the Statute "was made to prevent the *people's being oppressed by great men*; but this is a private matter, and not within the statute." *Rex v. Knight*, 90 Eng. Rep. at 330 (emphasis added).

Similarly, the Ninth Circuit asserted that Knight's acquittal was "more of a conditional pardon" because the court imposed a bond on Knight's good behavior. *Young*, 992 F.3d at 791. "But juries acquit, not pardon. Significantly, even the bond did not forbid Knight from carrying

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[16] The Ninth Circuit previously concluded in *Peruta* that the court acquitted Knight "because, as a government official, [Knight] was exempt from the statute's prohibition[.]" 824 F.3d at 931. It seems the Ninth Circuit has since abandoned that rationale—perhaps because of the overwhelming evidence to the contrary. *See* Kopel, *Arms Litigation*, 14 Geo. J.L. & Pub. Pol'y at 135 n.46 (overview of evidence that Knight was not acting as, nor treated as, a government official when he carried a defensive gun to attend church in August 1686).

Indeed, the once-leading academic proponent of this theory—Patrick J. Charles—concluded that *Sir John Knight's Case* did not involve Knight acting as a government official. *Compare* Brief of *Amicus Curiae* Patrick J. Charles in Support of Neither Party 23 n.10, No. 18-280, *New York State Rifle & Pistol Association v. The City of New York*, 2019 WL 2173982 (U.S. May 14, 2019) ("[H]istorian 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.") (citation omitted), *with* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 28 (2012) ("Sir John Knight was cloaked with governmental authority because he committed the act in accordance with the Mayor and Aldermen of Bristol.").

arms." Kopel & Mocsary, *Errors of Omission*, 2021 U. Ill. L. Rev. Online at 178.

Neither of these extratextual rationales can overcome what is plain on the face of the reported decisions themselves—nor do they overcome the understanding of these decisions as reflected in subsequent treatises. *See supra* pp.14-17.

C. The Ninth Circuit Improperly Relegated The Revolutionary 1689 Declaration Of Rights To An Afterthought.

By focusing most of its analysis on events long predating the Founding era, the Ninth Circuit did not give full weight to the revolutionary import of the 1689 English Declaration of Rights. This Declaration recognized as a "true, ancient, and indubitable right[]" that "subjects which are Protestants may have arms for their defence suitable to their conditions and as allowed by law." 1 W. & M. c. 2, § 7.

Peruta suggested that the Declaration of Rights was barely relevant. *See Peruta*, 824 F.3d at 932 ("*To the degree* that the English Bill of Rights is an interpretive guide to our Second Amendment . . . .") (emphasis added). The Ninth Circuit did not analyze the broad sweep of the Declaration of Rights, as it instead narrowly focused on the exception to the right and "the meaning of the phrase 'as allowed by law'" in the Declaration. *Id.*

Similarly, *Young* understood the Declaration of Rights to announce a "conditional right," extending only as far as "'allowed by law.'" 992 F.3d at 793-94 (emphasis omitted; quoting 1 BLACKSTONE, COMMENTARIES *130). The Ninth Circuit therefore concluded that the restrictions imposed by the Statute of Northampton were valid—and expansive—limitations on the right declared centuries later. *Id.* In other words, *Young* applied its

interpretation of a defunct statute to improperly limit the revolutionary Declaration of Rights.

Combined, *Peruta* and *Young* treat the Declaration of Rights as a near-meaningless set of illusory paper promises—not as true and enduring rights that informed the Founders' decision to enshrine the American understanding of the natural, pre-existing right of self-defense in the Second Amendment. The limited exception the Declaration recognized for narrow arms regulation (*i.e.*, "as allowed by law") was not an open-ended grant of authority to trample the right that English subjects secured to possess and carry arms. Rather, as sources pre-dating and post-dating the Declaration confirm, government simply retained its authority to prevent "affray." *See supra* at pp.9-17.

D. Leading Treatises Confirm The Right To Peaceably Carry Common Arms For Self-Defense.

Finally, the Ninth Circuit misconstrued the weight of authority in leading treatises, which recognize that English Protestants had the right to peaceably carry common arms for self-defense.

Most importantly, the Ninth Circuit in *Young* omitted details from the Hawkins treatise's discussion of the Statute of Northampton. *Young* concluded that "Hawkins … recognized that the lawful public carry of arms required some particular need. The desire for proactive self-defense was not a good enough reason to go armed openly." 992 F.3d at 792.

To come to this conclusion, *Young* cited Hawkins' statement that a "man cannot excuse the wearing [of] such armour in public, by alleging that such a one threatened him, and [that] he wears it for the safety of his person from his assault." *Young*, 992 F.3d at 792 (alterations in

original; quoting 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 489 (John Curwood ed., 1824)). But the court did not include the greater context that Hawkins provided about both (1) the range of "such armour"—"dangerous and unusual Weapons"; and (2) the Statute's narrow prohibition against affray—"no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People." HAWKINS at 135, 136.

* * *

In sum, though the Ninth Circuit examined English history in interpreting and applying what it deemed to be the scope of the Second Amendment right to bear arms, the court reached the wrong conclusion. It incorrectly construed a robust right to possess and carry arms as nothing more than an illusory promise. The proper historical analysis confirms that the English right to arms at the time of the Founding included the right to peaceably carry common weapons outside of the home for self-defense. And this right was only limited by well-defined, and well-cabined, exceptions regarding breaches of the peace.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

Matthew H. Frederick
LEHOTSKY KELLER LLP
919 Congress Ave.
Austin, TX 78701

Scott A. Keller
Counsel of Record
Jonathan D. Urick
Jeremy Evan Maltz
LEHOTSKY KELLER LLP
200 Massachusetts Ave. NW
Washington, DC 20001
scott@lehotskykeller.com
(512) 693-8350

Counsel for Amici Curiae

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