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 FOR THE GOVERNOR OF TEXAS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE*

Greg Abbott is the forty-eighth Governor of Texas. In that capacity, and in his prior role as Attorney General, he has championed Second Amendment rights in a long string of amicus briefs. *See, e.g.*, Governors Br., *Peruta v. California*, 137 S. Ct. 1995 (2017) (No. 16-894); States Br., *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (No. 08-1521); States Br., *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290); States Br., *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005) (No. 04-5016).

Governor Abbott recently signed seven bills that promote Second Amendment rights for law-abiding citizens in Texas, including a constitutional-carry bill that allows public carry of a handgun with no permit. But when a Texan exercises his constitutional right to travel to a State like New York, *see Saenz v. Roe*, 526 U.S. 489, 498 (1999), he should not have to check his constitutional right to "bear Arms" at the border, U.S. CONST. amend. II. Because this case presents an opportunity to fortify "the individual right to possess and carry weapons in case of confrontation," *District of Columbia v. Heller*, 554 U.S. 570, 592 (2008), Governor Abbott respectfully submits this amicus brief in support of petitioners.

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* All parties gave written consent to the filing of this amicus brief. No counsel for a party authored this brief in whole or in part, and no person other than amicus or his counsel made a monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

Respondents and others cite *English v. State*, 35 Tex. 473 (1871), and *State v. Duke*, 42 Tex. 455 (1875), in trying to take away a Second Amendment right to carry handguns in public for self-defense. *See, e.g.*, Br. in Opp. 22–23; *Young v. Hawaii*, 992 F.3d 765, 805–06 (9th Cir. 2021) (en banc). Any argument based on that pair of Texas cases misses the mark. *English* espoused a militia-based reading of the Second Amendment that the *Heller* Court has since overruled. *Duke* was decided under the short-lived Texas Constitution of 1869, which conferred a broad legislative power to disarm that is absent from the Second Amendment. Both that constitution and the gun laws based on it have since been modified consistent with the right to carry handguns in Texas. The Nineteenth Century case that is most on point, and consistent with current Texas law, is actually a third case, *Cockrum v. State*, 24 Tex. 394, 401 (1859), which recognized an "absolute" right of armed self-defense for law-abiding citizens. That right was recognized in the earliest days of Texas history and is the principle by which the State is governed today.

ARGUMENT

I. Texans Have Enjoyed A Right To Bear Arms Since The Founding Of Their Republic.

Some stereotypes are true: "The people of Texas are now, and ever have been, emphatically an armed population." *Choate v. Redding*, 18 Tex. 579, 581 (1857) (Hemphill, C.J.); *see also* James W. Paulsen, *A Short History of the Supreme Court of the Republic of Texas*, 65 TEX. L. REV. 237, 255 (1986) (recounting

then-Judge Hemphill's use of his bowie knife to repel a courtroom assailant). From the Gonzales Flag of 1835 ("Come and Take It") to the present, Texans have long cherished the right that was confirmed by the Second Amendment, but conferred by God.

On March 2, 1836, not a week before the Alamo fell, the delegates who signed the Texas Declaration of Independence included this grievance against the Mexican government: "It has demanded us to deliver up our arms, which are essential to our defence—the rightful property of freemen—and formidable only to tyrannical governments." 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 1065 (1898). The new Republic of Texas soon had a Constitution to go with its independence, including a Bill of Rights that proclaimed, "Every citizen shall have the right to bear arms in defence of himself and the republic." *Id.* at 1084 (reprinting REPUB. TEX. CONST. OF 1836, Declaration of Rights § 14).

This promise lived on, with a few edits, when the People of Texas ratified a new Constitution in advance of joining the United States of America. *See* TEX. CONST. OF 1845, art. I, § 13 ("Every citizen shall have the right to keep and bear arms in the lawful defence of himself and the ~~republic~~ State."). Delegates at the constitutional convention in Austin debated and rejected a provision that would have empowered the Legislature to ban concealed carry. *See* Stephen P. Halbrook, *The Right to Bear Arms in Texas: The Intent of the Framers of the Bills of Rights*, 41 BAYLOR L. REV. 629, 641–45 (1989). The language they ultimately adopted was shaped by a Kentucky case recognizing a constitutional right to

public carry of weapons for self-defense, whether openly or concealed. *See id.* at 643–44 (citing *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822)).

In an antebellum reading of this constitutional text, the Texas Supreme Court declared that "[t]he right of a citizen to bear arms, in the lawful defense of himself or the state, is absolute." *Cockrum v. State*, 24 Tex. 394, 401 (1859). The defendant there killed a man over accusations of horse-stealing, and his crime jumped from manslaughter to murder because he used a bowie knife—"the most deadly of all weapons in common use." *Id.* at 401, 403–04. Acknowledging a constitutional "right to carry a bowie-knife for lawful defense," the Court held that the Legislature could still "affix a punishment to the abuse of this right," as long as it was not so severe as to "deter the citizen from its lawful exercise." *Id.* at 402–03. Gutting a man with a bowie knife over an insult, in other words, did not qualify as "*lawful* defence of himself." TEX. CONST. OF 1845, art. I, § 13 (emphasis added). The *Cockrum* Court left no doubt, however, about the "absolute" right of law-abiding citizens to carry in public. 24 Tex. at 401; *cf.* Pet'rs Br. 32 ("[T]he people had the *right* to carry arms, and only its *abuse* was or could be prohibited.").

Two new constitutions, at the beginning and end of the Civil War, carried forward the 1845 language with only minor changes. *See* TEX. CONST. OF 1861, art. I, § 13; TEX. CONST. OF 1866, art. I, § 13. But Reconstruction brought yet another constitution in 1869, and this one "was the product of military occupation." *Masters v. State*, 653 S.W.2d 944, 947 (Tex. App.—Austin 1983) (Powers, J., concurring); *see*

also Jane O'Connell, *A Guide to Researching Texas Primary Law*, 58 S. TEX. L. REV. 67, 71 (2016) ("Viewed as the work of military outsiders by many Texans, the 1869 constitution was controversial and unpopular in Texas."). Among other changes, those drafters drastically limited the constitutional rights of armed Texans, going even further than the 1845 provision that had been debated and rejected. *See* TEX. CONST. OF 1869, art. I, § 13 ("Every ~~citizen~~ person shall have the right to keep and bear arms, in the lawful defence of himself or the State, under such regulations as the Legislature may prescribe.").

The Legislature soon availed itself of this broad new power to disarm, passing the Six-Shooter Act to outlaw a man's "carrying on or about his person, saddle, or in his saddle bags, any pistol," unless in his own home or business. Act of Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 1, 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 927 (1898). Open carry of a pistol was still allowed for someone with "reasonable grounds for fearing an unlawful attack" that would "alarm a person of ordinary courage," *id.* §§ 1–2, and long guns could always be carried publicly, save for places like churches and polling places, *see id.* § 3.

In *English* and *Duke*, the Texas Supreme Court held that this statute did not violate the Second Amendment or the Texas Constitution of 1869. *See* Part II, *infra*. That said, 1869's constitutional aberration lasted less than a decade, with ratification of the current Texas Constitution occurring in 1876. Crucially, the People of Texas cut back on the Legislature's power to disarm. *See* TEX. CONST. OF 1876, art. I, § 23 ("Every ~~person~~ citizen shall have the

right to keep and bear arms~~,~~ in the lawful ~~defence~~ defense of himself or the State~~, under such regulations as the Legislature may prescribe~~; but the Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime.").

Undoing the Six-Shooter Act under the new constitution has been long in coming, to be sure, though Texans have always enjoyed a right to public carry of their rifles and shotguns. In his first term, Governor Bush successfully pushed for legislation making Texas a shall-issue State for concealed handgun licenses. *See* S.B. 60, 74th Leg., R.S. (1995). Governor Abbott did the same to allow for open carry in a holster. *See* H.B. 910, 84th Leg., R.S. (2015). Finally, on June 17, 2021, Governor Abbott signed a constitutional-carry bill at the Shrine of Texas Liberty—the Alamo. *See* H.B. 1927, 87th Leg., R.S. (2021). The bill does away with the Six-Shooter Act's blanket ban on carrying a handgun in public. That Reconstruction-era relic will no longer force a law-abiding Texan to shed his constitutional right to bear arms when he steps out of his home or his truck.

II. *Cockrum* Is More Instructive Here Than *English* Or *Duke*.

Those who try to disarm the People often cite *English v. State*, 35 Tex. 473 (1871), or *State v. Duke*, 42 Tex. 455 (1875), for the notion that the Second Amendment does not protect public carry for self-defense. *See, e.g.*, Br. in Opp. 22–23; *McDonald v. City of Chicago*, 561 U.S. 742, 887 (2010) (Stevens, J., dissenting); *id.* at 937 (Breyer, J., dissenting); *Young v. Hawaii*, 992 F.3d 765, 805–06 (9th Cir. 2021) (en banc); *Kachalsky v. County of Westchester*, 701 F.3d

81, 90 (2d Cir. 2012); *Commonwealth v. Caetano*, 26 N.E.3d 688, 693 (Mass. 2015), *vacated*, 577 U.S. 411 (2016); Giffords Law Center to Prevent Gun Violence, *State Right to Bear Arms in Texas*, giffords.org/lawcenter/state-laws/state-right-to-bear-arms-in-texas/. They suggest that the constitutional text could not grant such a protection, when *even Texans* have not read it that way.

This rhetorical ploy misses the mark because it ignores Texas's antebellum recognition of an "absolute" right of armed self-defense for law-abiding citizens—though not for homicidal horse thieves—in *Cockrum v. State*, 24 Tex. 394, 401 (1859). The Texas Supreme Court so held even though the weapon in question, a bowie knife, was "the most deadly of all weapons in common use," an "instrument of almost certain death." *Id.* at 402–03. *Cockrum* tells us far more about how early Texans saw their rights than *English* or *Duke*, which were decided over a decade later under a disputed and short-lived constitution.

English upheld the Six-Shooter Act convictions of a drunkard wearing a pistol and a churchgoer with a butcher knife in his breeches, reasoning that the Second Amendment protects only the "arms of a militiaman or soldier." *See* 35 Tex. at 473–74, 476; *see also* Act of Apr. 12, 1871, 12th Leg., R.S., ch. 34, § 1, 6 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822–1897, at 927 (1898) (outlawing public carry of various knives, in addition to "any pistol"). As Judge Griffith and others have explained, however, cases like *English* "are sapped of authority . . . because each of them assumed that the [Second] Amendment was only about militias and not personal self-defense,"

whereas *Heller* "rejects their crucial premise." *Wrenn v. District of Columbia*, 864 F.3d 650, 658 (D.C. Cir. 2017); *see also* Pet'rs Br. 9, 34–35; *Young*, 992 F.3d at 836–38 (O'Scannlain, J., dissenting); *State v. DeCiccio*, 105 A.3d 165, 195–96 (Conn. 2014).

Even on its own terms, militia-based as they are, *English* is a head-scratcher. Per the opinion, "[t]he arms of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, *holster pistols* and carbine; of the artillery, the field piece, siege gun, and mortar, with *side arms*." 35 Tex. at 476 (emphases added). Yet the case concerned a defendant convicted of carrying a pistol, under a statute outlawing "any pistol." The opinion also declared that "bowie knives belong to no military vocabulary." *Id.* at 477. Try telling that to "[i]ts originator, James Bowie, [who] died at the Alamo defending Texas liberty with his famous knife." Halbrook, 41 BAYLOR L. REV. at 648. While this ignorance of Texas's military history merely hints at a certain contempt for Texans, other language in the opinion is quite overt: "[T]he court's references to . . . 'the customs and habits of the people' as being in conflict with 'intelligent and well-meaning legislators' symbolize[ ] the reconstruction's mission of civilizing purportedly backward Southerners, who were deemed unfit to vote or bear arms." *Id.* at 661 (footnote omitted) (quoting *English*, 35 Tex. at 480); *see also* Hon. James R. Norvell, *Oran M. Roberts and the Semicolon Court*, 37 TEX. L. REV. 279, 288 (1959) (noting that "no Texas lawyer likes to cit[e]" this so-called Semicolon Court, whose opinions are "tabooed by the common consent of the legal profession").

Duke is distinguishable, meanwhile, because the Court did not construe the Second Amendment at all, thinking it inapplicable to the States. 42 Tex. at 457; *contra McDonald*, 561 U.S. at 750 (majority opinion). Instead, *Duke* evaluated the Six-Shooter Act under the controversial Texas Constitution of 1869, which subjected the right to bear arms to "such regulations as the Legislature may prescribe." TEX. CONST. OF 1869, art. I, § 13. That unusual grant of legislative power would prove outcome-determinative. Parting ways with *English*, the *Duke* Court held that at least some pistols were protected as "arms [that] are commonly kept, according to the customs of the people, and are appropriate for open and manly use in self-defense." 42 Tex. at 458. The Six-Shooter Act nevertheless survived constitutional scrutiny because it was deemed "nothing more than a legitimate and highly proper regulation of their use." *Id.* at 459; *accord English*, 35 Tex. at 478 ("Our constitution, however, confers upon the legislature the power to regulate the privilege.").

"While the Second Amendment surely tolerates some degree of regulation, its very text conspicuously omits any . . . regulatory caveat" like the one found in the Texas Constitution of 1869, and courts "shouldn't pencil one in." *Young*, 992 F.3d at 838–39 (O'Scannlain, J., dissenting); *see also* Pet'rs Br. 35 n.4. Indeed, the People of Texas would blot out most of that provision just a year later. *Compare* TEX. CONST. OF 1869, art. I, § 13 (allowing for "such regulations as the Legislature may prescribe"), *with* TEX. CONST. OF 1876, art. I, § 23 (allowing only that "the Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime").

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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