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 *AMICI CURIAE* FPC AMERICAN VICTORY FUND, COALITION OF NEW JERSEY FIREARMS OWNERS, SAN DIEGO COUNTY GUN OWNERS, ORANGE COUNTY GUN OWNERS, RIVERSIDE COUNTY GUN OWNERS, CALIFORNIA COUNTY GUN OWNERS, AND KNIFE RIGHTS FOUNDATION, INC. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The FPC American Victory Fund is a § 527 political committee that works to defend and promote fundamental rights, especially the right to keep and bear arms.

The Coalition of New Jersey Firearms Owners ("CNJFO") is a nonprofit member organization based in Sewell, New Jersey that was formed to educate the public about the "need" standard, as well as to advocate for lawful, safe, and responsible firearms ownership in New Jersey. CNJFO strives to restore the basic human right of self-defense for the people of New Jersey—a right that, while guaranteed by the Constitution to all citizens, all three branches of New Jersey government have worked to effectively obliterate.

San Diego County Gun Owners ("SDCGO"), Orange County Gun Owners ("OCGO"), Riverside County Gun Owners ("RCGO"), and California County Gun Owners ("CCGO") are political membership organizations whose purposes are to protect and advance the Second Amendment rights of residents of California. Their memberships consist of Second Amendment supporters who want to protect and restore the right to keep and bear arms in California.

Knife Rights Foundation, Inc. is a non-profit organization that serves its members and the public, focused on protecting the rights of knife owners to keep

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

and carry knives and edged arms, including for self-defense. The purposes of the Knife Rights Foundation include the promotion of education regarding state and federal knife laws, and the defense and protection of the civil rights of knife owners nationwide.

SUMMARY OF ARGUMENT

State constitutions from 1776 to 1868 demonstrate unequivocally that "bear arms" was used to describe carrying arms for individual self-defense. Whatever the most common use of "bear arms" was in ordinary speech, in constitutional enactments, "bear arms" was universally understood as protecting defensive carry of ordinary arms.

History and tradition confirm this. Nineteenth-century carry restrictions, and the cases adjudicating their constitutionality, reflect an understanding that government must allow ordinary citizens to carry arms for self-defense—bans on both open and concealed carry were largely invalidated.

Most hostile to the right to bear arms were the western territories, which were also the most hostile to the rest of the Bill of Rights. But when the people—who often came to resent their territorial governments—ratified their state constitutions, these arms restrictions were replaced by constitutional provisions guaranteeing the right to carry arms. The permanent safeguards enshrined in the state constitutions, not the ad-hoc lawmaking of resented governments in western territories, best reflect the people's understanding of their rights.

Indeed, nineteenth-century writings are replete with examples of people carrying arms. Arms bearing for hunting and self-defense was a universal American habit that played a critical role in Americans' daily life.

ARGUMENT

I. Nineteenth-century state constitutions equated "bear arms" with "carry arms for self-defense."

This Court affirmatively rejected the assertion that "bear arms" implies military use rather than civilian self-defense in *District of Columbia v. Heller*, 554 U.S. 570, 588 (2008) ("that the phrase was commonly used in a particular context does not show that it is limited to that context, and, in any event, we have given many sources where the phrase was used in nonmilitary contexts); *id.* at 589 ("these purposive qualifying phrases positively establish that 'to bear arms' is not limited to military use").

Proponents of the military-use-only view suggest that their argument has been reinvigorated by post-*Heller* databases reflecting common usage, such as *Corpus Linguistics. See* Kyra Babcock Woods, *Corpus Linguistics and Gun Control: Why* Heller *is Wrong,* 2019 BYU L. REV. 1401, 1419–20 (2019); *but see* E. Gregory Wallace, *Legal Corpus Linguistics and the Meaning of "Bear Arms,"* SECOND THOUGHTS BLOG, July 16, 2021.[2] But these arguments still fail to account for the historical usages of "bear arms" outside

[2] https://firearmslaw.duke.edu/2021/07/legal-corpus-linguistics-and-the-meaning-of-bear-arms/.

the military context. For example, anti-poaching legislation drafted by Thomas Jefferson in 1779, and introduced in the Virginia legislature by James Madison in 1785, used "bear arms" to describe hunting. Under the proposed law, anyone convicted of killing deer out of season faced further punishment if, in the following year, he "shall bear a gun out of his inclosed ground, unless whilst performing military duty." A Bill for Preservation of Deer (1785), *in* 2 THE PAPERS OF THOMAS JEFFERSON 444 (J. Boyd ed., 1950). The illegal gun carrier would have to return to court for "every such bearing of a gun" to post an additional good-behavior bond. *Id.* According to the Madison-Jefferson bill, "performing military duty" was but one way to "bear a gun."

But the conclusive refutation to the claim that "bear arms" referred only to carry in a military sense is found in state constitutions from American Independence through the Fourteenth Amendment's ratification. These show unequivocally that "bear arms" was used to describe civilian self-defensive use as well as military employment. Whatever the most common use of "bear arms" was in ordinary speech over this period, when used in constitution drafting, it was *universally* accepted as including carrying arms for self-defense.

From 1776 to 1868, most states ratifying a constitutional arms guarantee made it protect either the keeping and bearing of arms or simply the bearing

of arms,[3] and described the intent behind the arms guarantee in terms of defending persons or entities.

The following state constitutions are listed in chronological order, and abstracted from Professor Eugene Volokh's encyclopedic work, *State Constitutional Rights to Keep and Bear Arms*, 11 TEX. REV. OF L. & POLICY 399 (2007). Where a state adopted a constitutional provision substantially identical to an earlier provision, it is designated with an asterisk; where it adopted a dissimilar new provision, it is designated with a double asterisk. Some states described the arms right as one of "the people," using the plural there and "themselves" in the purpose clause, while others described it was one of "every person" or "every citizen," and used "himself" or its equivalent for the same purpose.

Year	**State**	**Arms Right**	**For the Defense Of**
1776	PA	"bear arms"	"themselves and the state"
1776	NC	"keep and bear"	"the State"
1777	VT	"bear arms"	"themselves and the State"
1780	MA	"keep and bear"	"common defense"

[3] This may reflect an understanding that, if the bearing of arms for self-defense were protected, the right to keep them was superfluous.

1790	PA*	"bear arms"	"themselves and the State"
1796	TN	"keep and bear"	"common defense"
1799	KY	"bear arms"	"themselves and the State"
1802	OH	"bear arms"	"themselves and the State"
1816	IN	"bear arms"	"themselves and the State"
1817	MS	"bear arms"	"himself and the state."
1818	CT	"bear arms"	"himself and the state"
1819	ME	"keep and bear"	"the common defense."
1819	AL	"bear arms"	"himself and the state"
1820	MO	"bear arms"	"defense of themselves and of the state."
1834	TN*	"keep and bear"	"their common defense"
1835	MI	"bear arms"	"himself and the state"
1836	TX	"bear arms"	"himself and the republic"

1836	AR	"keep and bear"	"their common defense"
1838	FL	"bear arms"	"their common defense"
1845	TX**	"keep and bear"	"himself or the State"
1850	MI*	"bear arms"	"himself and the state"
1850	KY*	"bear arms"	"themselves and the State"[4]
1851	OH*	"bear arms"	"their defense and security"
1851	IN*	"bear arms"	"themselves and the State"
1857	OR	"bear arms"	"themselves, and the State"
1859	KS	"bear arms"	"their defense and security"
1861	AR*	"keep and bear"	"their individual or common defense"
1865	MO*	"bear arms"	"themselves and the lawful

[4] Kentucky added, "but the General Assembly may pass laws to prevent persons from carrying concealed arms," underscoring that "bear arms," referred to an individual right to carry arms. Kentucky's concealed weapons law had been struck down in *Bliss v. Commonwealth*, 12 Ky. 90 (1822).

			authority of the State"
1868	SC	"keep and bear"	"the common defense"
1868	TX	"keep and bear"	"himself or the State"[5]
1868	MS*	"keep and bear"	"their defense"
1868	FL	"bear arms"	"themselves and of the lawful authority of the State"
1868	AR*	"keep and bear"	"common defense"

From 1776 to 1868, the people of Alabama, Connecticut, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Oregon, Pennsylvania, Texas, and Vermont—twelve states comprising nearly half the Union[6]— twenty-one times guaranteed a right to "bear arms" in isolation, without reference to "keep," and always for purposes that *expressly and uniformly* included individual self-defense.

The alternate formulation of the right—not just "bear" but "keep and bear"—likewise demonstrates that those drafters understood "bear" to mean "carry."

[5] The 1868 provision added, "under such regulations as the Legislature may prescribe."

[6] In 1776 there were 13 states, in 1822, there were 24, and in 1868, 37.

Over the course of the nineteenth century, some states attached addenda that added legislative power to regulate the right. All but one of these addenda focused upon carrying, and most focused upon concealed carrying. These would have been necessary only if the drafters understood "bear" to include civilian carry.

In 1868 Georgia adopted a guarantee paralleling that of the federal Second Amendment, adding "but the general assembly shall have power to prescribe by law the manner in which arms may be borne." That same year, Texas guaranteed a right to keep and bear arms, adding "under such regulations as the legislature may prescribe."

Two years later (*i.e.*, after ratification of the 14th Amendment), Tennessee, which guaranteed a right to keep and bear arms "for the common defense," added "but the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime." In 1875, Missouri guaranteed a citizen's keeping and bearing of arms "in defense of his home, person and property," adding "but nothing herein contained is intended to justify the practice of wearing concealed weapons."

Three states followed this pattern in 1876. The new state of Colorado adopted a guarantee patterned after that of Missouri, and similarly ending with "but nothing herein contained is intended to justify the practice of carrying concealed weapons." Texas revised its guarantee to end with, "but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime." Finally, North Carolina added, "Nothing herein contained shall justify the

practice of carrying concealed weapons, or prevent the legislature from enacting penal statutes against said practice." None of these additions would have made sense if "bear arms" excluded civilian carry.

The argument that the framing generation, whether of 1791 or 1868, did not understand "bear arms" to mean "carry arms for self-defense," is untenable. Whatever these generations' word usage in everyday conversation, when the words were used in constitutions, "bear arms" meant "carrying for a particular purpose—confrontation," *Heller*, 554 U.S. at 584, which included self-defense as well as organized resistance. *Heller*, therefore, is not only binding precedent, but also historically accurate.

II. Antebellum and post-Civil War case law confirm the original public understanding of the Second and Fourteenth Amendments.

A. Antebellum concealed weapons restrictions and the right to arms.

The earliest American arms restrictions were bans on concealed carrying, mostly enacted in states on the then-southwestern frontier. These were (to judge by the descriptions of the courts that assessed their constitutionality) motivated by the judgment that, in a society that accepted being openly armed, carrying a concealed arm was mischievous.

These laws were struck down in *Bliss v. Commonwealth*, 12 Ky. 90 (1822), and upheld in *State v. Mitchell*, 3 Ind. 229 (1833), *State v. Reid*, 1 Ala. 612 (1840), *State v. Buzzard*, 4 Ark. 18 (1842), and *State v.*

Chandler, 5 La. App. 489 (1850). Of these five courts, only the *Buzzard* court had any doubt that "bear arms" meant "carry weapons." *Bliss* involved a divided court, dealing with a constitution whose right to arms was for "the common defense." *See also Owen v. State*, 31 Ala. 387 (1858) ("The word 'carries,' in the [statutory] section above cited, was used as the synonym of 'bears'").

Several of the decisions made clear their basis in the fact that the legislature had only outlawed one mode of carrying arms. The Louisiana court noted that the law "interferes with no man's right to carry arms (to use its words) 'in full open view,' which places men upon an equality." *Chandler*, 5 La. App. at 490. The Alabama court cautioned that "A statute which, under the pretense of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defense, would be clearly unconstitutional." *Reid*, 1 Ala. at 616.

This understanding was reinforced by *Nunn v. State*, 1 Ga. 243 (1846), in which the Georgia Supreme Court assessed the constitutionality of a poorly drafted statute[7] that, on its face, banned the carrying of all but the largest handguns, "known as horsemen's pistols."

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[7] Among other apparent errors, the statute banned the sale or carrying of certain classes of arms, then contained an exemption for open carry. The exemption, however, only covered four classes of arms, one of which was not banned in the first place.

Applying the federal Second Amendment,[8] the court concluded:

> We are of the opinion, then, that so far as the act of 1837 seeks to suppress the practice of carrying certain weapons *secretly*, that it is valid, inasmuch as it does not deprive the citizen of his *natural* right of self-defence, or of his constitutional right to keep and bear arms. But that so much of it, as contains a prohibition against bearing arms *openly*, is in conflict with the Constitution, and *void*….

Id. at 25. A different approach was taken in Tennessee, whose right to arms was limited to bearing arms "for their common defense." In 1834, its legislature made concealed carry of "Bowie knives" and "Arkansas toothpicks"[9] a misdemeanor and six years later its Supreme Court upheld the measure. *Aymette v. State*, 21 Tenn. 152 (1840). The court reasoned that the Tennessee right to bear arms was for the "common defense," thus it was meant to "protect the public liberty, to keep in awe those who are in power, and to maintain the supremacy of the laws and the constitution." *Id.* at 158. The knives at issue, it found,

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[8] Which may seem anomalous, after *Barron v. Mayor and City Council of Baltimore*, 32 U.S. 243 (1833). The court, like others of the period, took seriously the concept that bills of rights do not create rights, but rather guarantee pre-existing rights. Under that approach, that *other* American constitutions recognized a right was at least evidence that the right exists even where it has not been set out in writing.

[9] Arkansas Toothpicks were long, sharply pointed, double-edged daggers.

were primarily suited for "private broils, and which are efficient only in the hands of the robber and the assassin." *Id*. It added that "to bear arms in defense of the State is to employ them in war, as arms are usually employed by civilized nations." *Id.* at 160.

The predominant understanding of the right to arms over this period thus reflects: (1) "bear arms" meant "carry arms," and that accordingly (2) a government could not ban both open and concealed carry. The minority view, that "bear" meant "carry in a military sense" came in two states, both of whose constitutions limited their arms right to use in "the common defense."

It is noteworthy here that the First Congress did consider adding "for the common defense" to the Second Amendment—and *voted it down*. JOURNAL OF THE FIRST SENATE 77 (1820) ("On motion to amend article the fifth, by inserting the words 'for the common defense' next to the words 'bear arms:' It passed in the negative.").

B. Post-Civil War cases treated "bear" and "carry" as synonymous.

A second form of American arms limitations had a slightly later point of origin than did bans on concealed carry. In the chaos and violence of the post-Civil War era, a few states enacted laws more broadly restricting the carrying of arms.

The first of the challenged postbellum statutes was enacted in Tennessee, whose constitution protected the bearing of arms "for their common defense." In 1870, this was amended to add "but the Legislature shall have power, by law, to regulate the wearing of

arms with a view to prevent crime." Tenn. Const. Art. I, §26 (1870). Its legislature then prohibited the carrying of "any belt or pocket pistol or revolver" whether "publicly or privately." Act of June 11th, 1870, ch. 13 §1, 1870 Tenn. Pub. Acts 28.

The ban on carrying all pistols was voided. The Tennessee Supreme Court distinguished between arms that were "adapted to . . . the efficiency of the citizen as a soldier" and arms that were not. The right to the former class of arms, military-sized handguns, was absolutely protected; the carry of small "pocket" handguns could be restricted. *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 178–79, 182 (1871).

Texas followed a similar course. In 1868, it added "under such regulations as the legislature may prescribe" to its arms guarantee. Tex. Const. Art. I, §13 (1868). Its legislature then prohibited the carrying of "any pistol, dirk, dagger, slung-shot, sword-cane, spear, brass-knuckles, bowie-knife" except for "immediate and pressing" need of self-defense. Act of April 12, 1871, ch. 34, §1, 1871 Tex. Gen. Laws 25.

In *English v. State*, 35 Tex. 473 (1872), the defendants were charged with carrying a butcher knife and a pistol. The Texas Supreme Court held that the arms whose possession and carrying is protected by the Second Amendment are "the arms of the militia man or soldier." The Court listed the weapons thus protected: muskets, bayonets, "holster pistol and carbine," and others. *Id.* at 476. Turning to the Texas constitutional guarantee, it added "[o]ur constitution, however, confers upon the legislature the power to regulate the privilege." *Id.* at 479.

Four years later, Arkansas enacted a similar statute banning the carrying of, *inter alia*, "any pistol of any kind whatever." Act of Feb. 16, 1875, §1, 1874–75 Ark. Laws 155. The Arkansas Supreme Court reviewed the law under its state constitution, whose arms guarantee was for the "common defense." Ark. Const., art. II, §26. It held that the arms whose carry was protected were rifles, shotguns, army and navy revolvers, but not "the pocket pistol." *Fife v. State*, 31 Ark. 455, 460–61 (1876); *see also Wilson v. State*, 33 Ark. 557 (1878).

It should be recognized that these three states were "outliers" of the period. The cases were also presented in an unusual constitutional context. Arkansas had adopted a constitutional arms right limited to the "common defense," Texas had added a provision expressly authorizing the legislature to regulate the carrying of arms, and Tennessee had done both. Even under these conditions, these courts saw that "bear" meant "carry." That "bear" might have a military implication if linked to "the common defense" led them to cabin what arms might be borne or carried, but not to doubt that a civilian carrying an arm was "bearing" it in a constitutional sense.

III. Restrictions from the old west do not inform the Second Amendment's original meaning.

Because "[c]onstitutional rights are enshrined with the scope they were understood to have when the people adopted them," *Heller* "adopt[ed] . . . the original understanding of the Second Amendment,"

554 U.S. at 625, 634–35, and focused overwhelmingly on sources from or available in the founding era.

Post-Civil War material, by contrast, was useful only in the sense that it informed the Second Amendment's original meaning. "Since those discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources." *Id.* at 614. Only to the extent nineteenth century sources reflect "the origins and continuing significance of the Amendment" are they "instructive." *Id.*

Firearm restrictions from the old west—enacted roughly a century after the ratification of the Second Amendment and often before the western territories became sates—have no meaningful bearing on the Second Amendment's original meaning. As this Court recently noted in discounting the importance of treatises "published *after* the Fifth Amendment was adopted," nineteenth-century sources were not used to define the public understanding of the Second Amendment in *Heller*, but instead "were treated as mere confirmation of what the Court thought had already been established." *Gamble v. United States*, 139 S. Ct. 1960, 1975–76 (2019).

Indeed, it is self-evident that obscure, selectively enforced (if enforced at all), one-off laws that prohibited the bearing of arms in the old west do not reflect the Founders' intentions in ratifying the right to "bear" arms. As Chief Justice Marshall explained, "the enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said." *Gibbons v. Ogden*,

22 U.S. (9 Wheat.) 1, 188 (1824). The Founders said that the people have the right to "*bear* Arms." U.S. Const. amend. II (emphasis added), regardless of the practice in future frontier towns.

A. Most pre-statehood restrictions violated the later-enacted state constitutions and should not overshadow those constitutions.

Between 1869 and 1903, then-territories New Mexico, Wyoming, Idaho, Arizona, and Oklahoma enacted restrictions on carrying weapons in incorporated cities and towns, or authorized municipalities to adopt their own restrictions.[10] Far outside the national mainstream, these laws covered few residents. For example, the 1880 census shows the population density of Wyoming was 0.2 persons per square mile, that of Arizona and Idaho 0.3, and that of New Mexico 0.9. 1880 Census, table 1d.[11]

The pre-state territories in the old west were not constrained by state constitutions, and thus sometimes enacted ordinances that would violate the constitutions they would later ratify upon statehood.

For example, the territory of Arizona's 1901 ordinance forbidding carry, Revised Statutes of Arizona Territory, Penal Code, Title XI, §§381, 385, 390 (1901), would have been in direct conflict with the state of Arizona's 1912 constitutional right to bear

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[10] 1869 N.M. Laws 312, ch. 32, §1; 1876 Wyo. Comp. Laws 352, ch. 52, §1; 1888 Id. Sess. Laws 23, §1; 1889 Ariz. Sess. Laws 30, No. 13, §1; 1903 Okla. Laws 643, ch. 25, art. 45, §584.

[11] The density of Oklahoma was not reported since it was not organized as a territory until 1890.

arms that ensured that "The right of the individual citizen to bear arms in defense of himself or the State shall not be impaired, but nothing in this section shall be construed as authorizing individuals or corporations to organize, maintain, or employ an armed body of men." Ariz. Const., Art.11, §26 (1912).[12] Thus, when the state of Arizona banned concealed carry, it was later upheld only because "[t]he right to bear arms in self-defense is not impaired by requiring individuals to carry weapons openly. Appellants are free to bear exposed weapons for their defense." *Dano v. Collins,* 166 Ariz. 322, 323–24 (Ariz. App. 1990).

Similarly, the Supreme Court of Idaho in 1902 reversed a conviction for violating a pre-statehood ban on carrying a deadly weapon within city limits, 1889 Idaho Sess. Laws 27, because the territorial law violated both the Second Amendment and the state of Idaho's constitutional right to bear arms—which provided that "The people have the right to bear arms for their security and defense, but the legislature shall regulate the exercise of this right by law." Idaho Const., Article I, §11 (1889). The court held:

> Under these constitutional provisions, the legislature has no power to prohibit a citizen from bearing arms in any portion

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[12] Tombstone, Arizona required a permit to carry in 1881, Tombstone, Ariz., Ordinance 9 (Apr. 19, 1881), but rather than justify modern-day restrictions, it demonstrates how unjust selective permitting laws can be. See Tom Correa, *Tombstone's Ordinance No. 9 Was Neither Fair Nor Equally Enforced*, AM. COWBOY CHRONICLES (Aug. 8, 2014), http://www.americancowboychronicles.com/2014/08/tombstones-ordinance-no9-was-neither.html.

> of the state of Idaho whether within or without the corporate limits of cities, towns, and villages. The legislature may, as expressly provided in our state constitution, regulate the exercise of this right, but may not prohibit it. A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. . . . [T]he statute in question . . . prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void.

In re Brickey, 8 Idaho 597, 599 (1902).

The New Mexico Court of Appeals held a similar law unconstitutional.[13] Reversing a city ordinance making it "unlawful for any person to carry deadly weapons, concealed or otherwise, on or about their persons, within the corporate limits of the City of East Las Vegas," the court held that the law violated New Mexico's constitutional arms right, which provided: "The people have the right to bear arms for their

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[13] New Mexico's territorial government was not especially concerned with respecting the people's rights. For example, in 1852—when the military was "a stronger power than the civil government"—the military commander of the territory, Colonel Edwin Sumner, wrote in a report to Washington that "[t]he New Mexicans are thoroughly debased and totally incapable of self-government, and there is no latent quality about them that can ever make them respectable." Howard Roberts Lamar, THE FAR SOUTHWEST, 1846–1912: A TERRITORIAL HISTORY 83, 84 (1966, revised ed. 2000). "As of 1870, territorial judges were still struggling to introduce the jury system and American procedures into their courtrooms." *Id.* at 114–15.

security and defense, but nothing herein shall be held to permit the carrying of concealed weapons." *City of Las Vegas v. Moberg*, 1971-NMCA-074, ¶4 (quoting New Mexico Const., Art. II, §6 (1912)). The court concluded that "an ordinance may not deny the people the constitutionally guaranteed right to bear arms, and to that extent the ordinance under consideration is void." *Id.*

An 1881 Kansas statute allowed some municipalities to "prohibit and punish the carrying of firearms, or other dangerous or deadly weapons, concealed or otherwise. . . ." 1881 Kan. Sess. L. 80, ch. 37, §23. Thereafter, the city of Salina in 1901 allowed punishment for the "carrying of fire arms or other deadly weapons, concealed or otherwise." *See Salina v. Blaksley*, 72 Kan. 230 (1905). The Kansas Supreme Court upheld the law, but under a collective rights interpretation of Kansas's constitutional arms provision, *id.* at 231, which *Heller* held cannot be applied to the Second Amendment.

Later in the twentieth century, Kansas's Supreme Court distanced itself from *Blaksley*, without expressly overruling it. In *Junction City v. Mevis*, the court held that a law forbidding anyone "to carry or use, a revolver or pistol, shotgun or rifle of any description" without a license was "unconstitutionally overbroad and an unlawful exercise of the city's police power." 226 Kan. 526, 533, 534 (1979). In 2010, the Kansas legislature amended the state constitution to make the arms provision clear: "A person has the right to keep and bear arms for the defense of self, family, home and state, for lawful hunting and recreational use, and for any other lawful purpose. . . ." Kan. Const. B. of R. §4.

Upon entering statehood, Wyoming replaced its severe carry restriction with one that limited the manner in which arms could be carried. *Compare* Wyo. Unconsol. Law, ch. 52, §§1–3 (1876) ("it shall be unlawful for any resident of any city, town, or village, or for any one not a resident of any city, town or village, in said Territory, but a sojourner therein, to bear upon his person, concealed or openly, any fire arm or other deadly weapon, within the limits of any city, town or village"), *with* Wyo. Const. art. I, §24 (1889) ("The right of citizens to bear arms in defense of themselves and of the state shall not he denied."); and 1890 Wyo. Terr. Laws, ch. 73, §96 (codified at Wyo. Rev. Stat. §5051 (1899)) ("Every person, not being a traveler, who shall wear or carry any dirk, pistol, bowie knife, dagger, sword-in-cane, or any other dangerous or deadly weapon concealed, or who shall carry or wear any such weapon openly, *with the intent, or avowed purpose, of injuring his fellow-man*, shall be fined") (emphasis added). Outside of 1876 to 1889, Wyoming always allowed open carry and has never required a permit. *See* George A. Mocsary & Debora A. Person, *A Brief History of Public Carry in Wyoming*, 21 WYO. L. REV. 341 (2021).

Both New Mexico and Arizona rejected proposed changes to their new constitutional arms provisions that would have allowed greater regulation of arms carrying. *See* THE RECORDS OF THE ARIZONA CONSTITUTIONAL CONVENTION OF 1910, at 678–79 (John S. Goff ed., 1991) (defeating proposal "to regulate the wearing of weapons to prevent crime" and to "regulate the exercise of this right by law"); PROCEEDINGS OF THE CONSTITUTIONAL CONVENTION OF

THE PROPOSED STATE OF NEW MEXICO 81 (1910) (defeating proposal providing that "the legislature may regulate the exercise of this right by law").

Because "[w]estern state constitutional conventions often took place amidst high dissatisfaction with territorial governments," Nicholas J. Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 518 (3d ed. forthcoming 2021), restrictions enacted by territorial governments that were extinguished upon statehood have little value in interpreting the Second Amendment. More relevant are the responses of the people in each former territory, who organized a constitutional convention upon entering the Union for the purpose of securing an arms right in their new state constitution. "State constitutional conventions know that their proposed constitutions must win a popular vote in a general election. The assent of the people as a whole—not just a majority of legislators—is necessary. The constitutional conventions often create permanent safeguards against the recurrence of old legislative mistakes." *Id.* Thus, state constitutions better reflect the people's understanding of their rights than territorial laws.

It is also important to recognize the importance of bearing arms in the old west. Frontier territories sometimes approached anarchy—in 1882, President Chester A. Arthur formally threatened to put Arizona Territory under martial law.[14] Many territories and

[14] *See* Henry P. Walker, *Retire Peaceably to Your Homes: Arizona Faces Martial Law, 1882*, 10 J. OF ARIZ. HISTORY 1 (1969). The proclamation included the finding that "it has become

states not only respected the right of the people to bear arms, but depended on it for order and security. *See* generally Thomas Dimsdale, THE VIGILANTES OF MONTANA: VIOLENCE AND JUSTICE ON THE FRONTIER (1920); William J. McConnell, IDAHO'S VIGILANTES (1984); David B. Kopel, *The Posse Comitatus and the Office of Sheriff: Armed Citizens Summoned to the Aid of Law Enforcement*, 104 J. CRIM. L. & CRIMINOL. 671, 802 (2015).

The rare laws forbidding carry in the old west were often superseded by state constitutions or held unconstitutional, and should not overshadow the common practice and need of carrying arms throughout most of the west.

B. Carry restrictions in the old west were rare and narrow exceptions to the general rule that carry was protected.

The old west ordinances were responses to short-lived local conditions—namely the frequent mass arrival of large numbers of transient cowboys eager for excitement in town. The laws do not show that carry bans are somehow justified in large urban areas, or anywhere else. The governments that enacted them were not designed for dispassionate adjudication of constitutional issues.

> More often than not, territorial appointees after 1865 were political hacks, defeated congressmen, or jobless relatives of congressmen and cabinet members. These

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impracticable to enforce by ordinary course of judicial proceedings the laws of the United States within that Territory…."

> appointees owed their loyalty neither to the territory nor to the branch of government they represented. Thus a territorial judge whose appointment came through a powerful senator could thumb his nose at the Justice Department, which theoretically had jurisdiction over his actions. An unpopular governor with strong congressional backing could stay in office despite a howl of protest from his territorial constituents.

Lamar, THE FAR SOUTHWEST, at 10.

When presented with ordinances "almost exclusively from the frontier and Wild West," Judge Richard J. Leon, Jr., wrote:

> These laws . . . are needles in a legal haystack and come nowhere close to establishing a "universal and long-established tradition," of prohibiting the carrying of firearms in populated areas. They were in place in only an infinitesimal fraction of American jurisdictions, governed a minute portion of the Nation's population, and were found almost entirely in a particular, homogenous region.

Grace v. District of Columbia, 187 F. Supp. 3d 124, 139 n.14 (D.D.C. 2016) (citation omitted). The "particular, homogenous region" in which these laws existed were undeveloped, lawless frontiers that long ago disappeared. *Cf. Heller*, 554 U.S. at 632 ("In any case, we would not stake our interpretation of the Second

Amendment upon a single law . . . that contradicts the overwhelming weight of other evidence.").

Across the rest of the country, the practice in the great majority of states was that ordinary citizens had a right to bear arms. In 1881, New York City for the first time restricted the carrying of concealed—but not openly carried—weapons. ORDINANCES OF THE MAYOR, ALDDERMEN AND COMMONALTY OF THE CITY OF NEW YORK, IN FORCE JANUARY 1, 1881, at 214–15 (1881) ("Every person . . . who shall have in his possession within the city of New York a pistol of any description concealed on his person, or not carried openly, shall be deemed guilty of a misdemeanor."). Massachusetts did not require authorization to carry a loaded pistol or revolver until 1906. 1906 Mass. Acts 150, ch. 172, §2. New Jersey did not ban open carry until 1966. Thus, the general rule throughout the nineteenth century was that the carry of handguns by ordinary Americans was allowed in some manner.

The old west is the last place one should look for precedent on the historical scope of constitutional rights. The era was notorious for violations of a whole host of provisions of the Bill of Rights—not just the Second Amendment. And the carry bans of the old west were temporary expedients for towns dealing with large groups of cowherds eager to drink, gamble, and fight. When statehood replaced ad-hoc lawmaking in the territories, the right to bear arms would adorn the new constitutions, and many of the old laws would be declared unconstitutional.

C. Annie Oakley and women's rights in the old west.

The anti-gun territorial laws showed little regard for the rights and needs of women to defend themselves in the old west. Annie Oakley answered that by teaching "15,000 women how to shoot," and announcing that she "would like to see every woman know how to handle [firearms] as naturally as they know how to handle babies." Stephen P. Halbrook, THE RIGHT TO BEAR ARMS 295 (2021) (citations omitted). "[I]n 1901, she declared: 'Any woman who does not thoroughly enjoy tramping across the country on a clear, frosty morning with a good gun and a pair of dogs does not know how to enjoy life.'" 7 Glenda Riley, THE LIFE AND LEGACY OF ANNIE OAKLEY 7 (1994).

"When a woman was in the streets, Annie urged during a 1904 visit to Cincinnati, she should not carry her revolver in her handbag but should have it ready at all times by concealing it within the folds of a small umbrella. Wearing a stylish, floor-length dress with full sleeves and a high collar, Annie posed for photographs showing women how to prepare themselves and their umbrellas to fend off thieves or 'murderous attack.'" *Id.* Indeed, "Annie Oakley felt a handgun was the appropriate firearm for self-defense—it could be neatly tucked away in a muff or parasol. Given her own history of apparent sexual abuse, she had good reason to take self-defense seriously." *Professor Mary Zeiss Strange Interview*, https://site.nhd.org/13476035/uploaded/Mary_Zeiss_Stange_Interview.pdf.

Annie Oakley, far better than the laws aimed at extinguishing outlawry in the rough and violent

territories of the old west, represented the rights and needs of women to defend themselves against the same threats.

IV. Carrying arms for self-defense was common and known to the framing generations of 1791 and 1868.

The protections afforded arms bearing in the 18th and 19th centuries reflected a simple reality: arms bearing for hunting and self-defense was a universal American practice and had played a key role in America's western expansion.

In the 19th century, travelers' accounts were a popular form of literature, and historian Clayton Cramer has extensively studied these with an eye to assessing the frequency of gun ownership on the American frontier. *See, e.g.*, Clayton Cramer, LOCK, STOCK, AND BARREL (2018). Cramer notes, *inter alia*, an 1830 account that "the long rifle is familiar to every hand," an 1831 report that "there is not a farmer but passes some of his time hunting and owns a good gun," and an 1836 account of wagons bearing immigrants to Michigan: "Each emigrant generally had a wagon or two. . . . The man walked by the side of his team with his rifle over his shoulder." *Id.* at 98, 99, 101. Cramer notes that when Frederick Law Olmstead observed a gentleman carrying a handgun, he asked his fellow railroad passengers whether it was common to carry a pistol in Kentucky. One answered "Yes, very generally," and the other said "*commonly*, but not generally." *Id.* at 118.

When Aaron Burr was tried for treason in 1807, the prosecution cited an armed gathering of his followers, as proof that he meant to levy war against the United States. His attorney responded, "In the upper country every man has a gun; a majority of the people have guns everywhere, for peaceful purposes." Aaron Burr, THE TRIAL OF AARON BURR FOR HIGH TREASON 659 (1808).

In 1857, J. D. Borthwick travelled to California. He and his companions prepared by purchasing arms, "for a revolver and a bowie-knife were considered the first items in a California outfit." J.D. Borthwick, THREE YEARS IN CALIFORNIA 7 (1857). In San Francisco, he attended a masquerade where arms were forbidden. "Several doorkeepers were in attendance, to whom each man as he entered delivered up his knife or pistol, receiving a check for it, just as one does for his cane or umbrella at the door of a picture gallery." *Id*, at 77-78. Borthwick was amused to see that "If any man declared that he had no weapon, the statement was so incredible that he had to submit to being searched. . . ." *Id.* at 78.

On the frontier, civilians were often better armed than the military sent to protect them, At the 1866 Fetterman Massacre, the infantry carried muzzle-loading muskets, while his two civilian scouts had lever-action repeating rifles. The infantry managed to fire two volleys; the scouts fired nearly a hundred rounds. "Both were armed with .44 Henry [repeating] rifles. Had all the command been equally well armed, and had they fought as well, a different story might have resulted." Elmer Keith, SIXGUNS 16 (1961).

But the frontier was not the only part of America where arms-bearing in public was common. In the 1850s, arms came to play a prominent role in protecting the anti-slavery movement. Abolitionist Henry Ward Beecher and his Brooklyn church shipped so many Sharps rifles to anti-slavery settlers in Kansas that the rifles became known as "Beecher's bibles" and his church the "Church of the Holy Rifle." Debby Applegate, THE MOST FAMOUS MAN IN AMERICA: THE BIOGRAPHY OF HENRY WARD BEECHER 282 (2007).[15] Abolitionist leader Cassius Marcellus Clay preferred the Bowie knife, and twice used it to fight his way out of a mob. As he saw it, "when society fails to protect us, we authorized by the laws of God and nature to defend ourselves; based upon the right, 'the pistol and the Bowie knife' are to us as sacred as the gown and the pulpit. . . ." THE WRITINGS OF CASSIUS MARCELLUS CLAY 257 (1848).

Indeed, even Congressmen bore arms to work, for self-defense. In 1856, Rep. Preston Brooks severely beat Sen. Charles Sumner on the Senate floor, and afterwards told Rep. Calvin Chaffee that "I thrashed one Massachusetts man today, and I'd like to thrash another." Later, South Carolina Rep. Aiken observed Chaffee putting a revolver into his desk. He asked if Chaffee would use it, and Chaffee replied, "If any of

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[15] Beecher coauthored a manner of spiritual self-help book, containing the suggestion that "True aiming, in life, is like true aiming in marksmanship. We always look at the fore-sight of a rifle through the hind-sight." Henry Ward Beecher & Edna Proctor, LIFE THOUGHTS 188 (1858). That a New York City clergyman could expect his readers to be familiar with the aiming of a rifle suggests how broad gun ownership was at the time.

your chivalry irritate me, I shall certainly use this revolver." The newspaper account of the exchange ended, "After that, Dr. Chaffee's southern friends were not only civil but cordial." *Ex-Congressman Chaffee Dead*, SPRINGFIELD REPUBLICAN, Aug. 10, 1896, at 10.

Defense arms-bearing in the East remained common throughout the 19th century. In 1895, the *New York World* asked "Should a woman carry firearms to protect herself?", a question raised by a Yonkers lady's writing in "to show how necessary it is for her to carry a revolver when she goes out for a stroll, there being tramps in the neighborhood." *View and Reviews*, NEW YORK WORLD, Aug. 18, 1895, at 17. Five years later, the *New York Times* carried advice on how to make a do-it-yourself shoulder holster for concealed carry. *Features of Some Seasonable Sports*, NEW YORK TIMES, Jan. 7, 1900, at 28. Throughout the 19th century, Massachusetts had no restrictions on carrying arms, concealed or open; its first restrictions came in 1906. Halbrook, THE RIGHT TO BEAR ARMS, at 233. As for New York,

> The law New York State enacted against concealed weapons in 1866 included brass knuckles but not pistols. Yet in the same year New York City made it a misdemeanor to fire a gun within the city limits and in 1877 passed an ordinance requiring a permit to carry a concealed pistol. Apparently, almost anyone who asked for a permit got one, and some didn't bother to ask. "Let a mad dog take a turn around Times Square," the *Tribune* remarked in 1892, "and the spectator is

> astonished to see the number of men who will produce firearms."

33 *Non-combatant's Guide to the Gun Control Fight*, CHANGING TIMES: THE KIPLINGER REPORT 32, 34 (Aug. 1979).

CONCLUSION

Throughout the nineteenth century, the right to carry arms for individual self-defense was common, necessary, and largely recognized by state governments and constitutions. The relatively few restrictions that banned arms carrying were short-lived outliers, almost always from pre-statehood territories that corrected themselves upon joining the Union.

The decision below should be reversed.

Respectfully submitted,

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