No. 20-843

In The
Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ROBERT NASH, BRANDON KOCH,

Petitioners,

v.

KEVIN P. BRUEN, in His Official Capacity as Superintendent of the New York State Police, RICHARD J. MCNALLY, JR., in His Official Capacity as Justice of the New York Supreme Court, Third Judicial District, and Licensing Officer for Rensselaer County,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PROFESSORS ROBERT LEIDER AND NELSON LUND, AND THE BUCKEYE FIREARMS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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Amicus Buckeye Firearms Association is a 501(c)(4) social welfare organization that, through grassroots efforts, aims to defend and advance the right of more than 4 million Ohio citizens to own and use firearms for all legal activities, including self-defense, hunting, competition, and recreation. Accordingly, BFA has an interest in ensuring the proper application of the Second Amendment to the United States Constitution.

SUMMARY OF ARGUMENT

The Second Amendment does not permit legislatures to enact broad prohibitions that make it unlawful

[1] Pursuant to this Court's Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* and their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

for most citizens to carry firearms for self-defense. In the nineteenth century, most courts recognized that such broad bans were unconstitutional; they upheld narrower prohibitions against the carrying of concealed weapons only because such laws still granted individuals a reasonable avenue to exercise their right by bearing arms openly. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619 (1840); *Wilson v. State*, 33 Ark. 557, 559–60 (1878); *Nunn v. State*, 1 Ga. 243, 251 (1846); *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 192 (1871).

Some courts and commentators now argue that these restrictive judicial decisions actually reflect a peculiarly Southern "permissive" culture. They posit another common-law regulatory tradition that generally prohibited Americans from carrying weapons in public for self-defense. And, they claim, certain nineteenth-century surety statutes continued the common-law restrictions by prohibiting carrying weapons, except by those who had reasonable grounds to fear attack. They call this the "Massachusetts model," which supposedly demonstrates that early Americans did not recognize a Second Amendment right to public carry, except (perhaps) by a person who was at imminent risk of attack. These claims are based on a false historical account and flawed legal reasoning.

I. The eighteenth-century American common-law offense of going armed to the terror of the people did not prohibit the carrying of firearms for lawful purposes.

A. Some have argued, based on the Statute of Northampton, 2 Edw. 3 c. 3 (1328), that English law prohibited publicly going armed, but this reading conflicts with substantial historical evidence. Despite its broad language, English judges understood the Statute of Northampton to prohibit the carrying of arms only when done *in terrorem populi.*

In any event, eighteenth-century American common law was not coextensive with English common law or with fourteenth-century English statutory law. Early American statutes implementing the common-law offense uniformly required that a person went armed "to the terror of the people" or some equivalent language. American courts of record likewise uniformly held that merely going armed was not a common-law crime; a person committed the common-law offense only when he went armed with a "wicked purpose" and created the "mischievous result" of terrorizing the public. *E.g.*, *State v. Huntly*, 25 N.C. (3 Ired.) 418, 423 (1843).

B. The common law was not used to prevent people from carrying arms for lawful purposes. American common law only criminalized those who "abused" the right to carry arms. *State v. Roten*, 86 N.C. 701, 704 (1882). While the precise contours of what constituted "abuse" may be unclear, that is because the common-law offense was rarely prosecuted in England or in this country, and few judicial decisions examine the offense. Searches of available newspaper databases produce few reports of arrests for the crime in the United States during the nineteenth century.

Most importantly, common-law prosecutions for carrying weapons for self-defense are almost nonexistent. The handful of examples known to exist involve African-American defendants and likely involve racist prosecutions. One case did result in a conviction in police court, but the prosecutor abandoned the case on appeal. There was no tradition of prosecuting people under the common law when they carried arms for lawful purposes.

II. In the mid-nineteenth century, ten jurisdictions patterned their new legal codes on Massachusetts' *Revised Statutes*. Within these enormous new legal codes, one provision authorized justices of the peace to require sureties under certain circumstances from those who went armed. These laws are not evidence that legislatures had discretion to ban publicly carrying firearms for lawful self-defense.

A. The surety laws were not criminal prohibitions on public carry. At most, an individual who went armed would have to post a bond and pledge that he would not commit an act of violence or otherwise breach the peace. The application of surety laws in almost all jurisdictions was further restricted by a standing requirement that a plaintiff could not seek a surety unless he had "reasonable cause to fear an injury" or a "breach of the peace." *Infra* p. 24. This standing requirement made surety laws largely irrelevant to those carrying weapons for lawful purposes.

Eighteenth-century newspaper stories strongly corroborate that these laws did not prohibit or

restrict the carrying of weapons for self-defense. Much like their counterparts in the South, legislatures in so-called "Massachusetts model" states primarily regulated public carry by restricting the carrying of concealed weapons. And some jurisdictions—including Massachusetts itself—had no law prohibiting the carrying of weapons for self-defense, whether openly or concealed.

B. There is strong evidence that the surety laws were largely ignored. There is not a single nineteenth-century decision in any court of record deciding a case involving a surety law. And there are few known cases in justice of the peace courts, let alone cases that involve allegations of carrying weapons for lawful self-defense. Laws that have fallen into desuetude cannot demonstrate either a settled historical practice or a liquidation of the Second Amendment's meaning. This Court should not be misled by those who seek to conjure a Second Amendment that reflects only the policy preferences of today's gun control advocates.

ARGUMENT

From the earliest American judicial decisions, courts have recognized that the Second Amendment and state analogues protect two distinct rights: keeping arms and carrying them. *See, e.g.*, *Nunn v. State*, 1 Ga. 243, 251 (1846); *Aymette v. State*, 21 Tenn. (2 Hum.) 154, 158 (1840); *see also District of Columbia v. Heller*, 554 U.S. 570, 581–92 (2008). Many courts have upheld

limited place and manner restrictions. These include prohibitions against carrying concealed weapons, the carrying of firearms in sensitive places such as courthouses, and carrying firearms while intoxicated. *See, e.g.*, *State v. Reid*, 1 Ala. 612, 619 (1840); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *State v. Shelby*, 2 S.W. 468, 469 (Mo. 1886); *State v. Kerner*, 107 S.E. 222, 225 (N.C. 1921). But courts have routinely struck down broad prohibitions against the public carrying of weapons that constitute "arms" within the meaning of the Second Amendment or state analogues. *See, e.g.*, *Wilson v. State*, 33 Ark. 557, 559–60 (1878); *Nunn*, 1 Ga. at 243; *In re Brickey*, 70 P. 609 (Idaho 1902); *Kerner*, 107 S.E. 222; *Andrews v. State*, 50 Tenn. (3 Heisk.) 165, 192 (1871); *State v. Rosenthal*, 55 A. 610 (Vt. 1903); *see also Reid*, 1 Ala. at 619 (upholding ban on concealed weapons but explaining that a ban on unconcealed weapons would be unconstitutional); *Chandler*, 5 La. Ann. at 490 (similar).

Recently, some commentators and courts have tried to resist this overwhelming precedent by embarking on a rewrite of history. They contend that decisions upholding restrictions only on concealed carry reflect an anomalously permissive approach because these decisions acknowledge that individuals may carry arms openly. Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 YALE L.J.F. 121, 124 (2015). They claim that this putatively permissive approach was unique to the South, *id.* at 128, and they contrast it with what they call the restrictive "Massachusetts

model." The Massachusetts model, they claim, "generally restrict[ed] public carry with limited exceptions for people with reasonable cause to fear attack." *Id.* at 133.

As evidence, these commentators point to surety statutes adopted in ten jurisdictions, most of which required an individual to find "sureties of the peace" upon "complaint of any person having reasonable cause to fear an injury, or breach of the peace" if the person "shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." Of Proceedings to Prevent the Commission of Crimes, ch. 134, § 16, *in* THE REVISED STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS, 748, 750 (Boston, Dutton & Wentworth 1836) [hereinafter REV. STAT. OF MASS.]. They claim that these laws were lineal descendants of the common-law offense of "going armed to the terror of the people," which supposedly banned carrying weapons in public. Ruben & Cornell, *supra*, at 130. Some courts have accepted this revisionist history. *See, e.g.*, *Young v. Hawaii*, 992 F.3d 765, 799–800 (9th Cir. 2021) (en banc); *Norman v. State*, 215 So.3d 18 (Fla. 2017).

The historical record refutes these claims. Both the common-law offense and the surety statutes governed circumstances in which a person's public carrying of weapons threatened to breach the peace. Neither restricted public carry for lawful purposes. Worse, any consensus about the meaning of the constitutional right to bear arms that might be inferred from these

sources is a mirage. There is virtually no evidence that they were commonly enforced in this country, or, more relevantly, that they were enforced against people carrying firearms for lawful purposes. Unenforced laws cannot imply a societal consensus about anything, let alone the kind of settled historical practice that might be relevant to interpreting the meaning of the Constitution.

I. The Common-Law Crime of Going Armed to the Terror of the People Did Not Apply to Peaceful Carry

Courts holding that the Second Amendment does not protect a right to bear arms in public have relied heavily upon the common law, which prohibited going armed to the terror of the people, and the fourteenth-century Statute of Northampton, which was said to be "an affirmance of" that common-law crime, *Sir John Knight's Case* (1686) 87 Eng. Rep. 75, 76 (K.B.). *See, e.g.*, *Young*, 992 F.3d at 787–93. The Statute of Northampton provided:

> [T]hat no man great nor small, of what condition soever he be, except the King's servants in his presence, and his ministers in executing of the King's precepts, or of their office, and such as be in their company assisting them, and also [upon a cry made for arms to keep the peace, and the same in such places where such acts happen,] be so hardy to 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, upon pain to forfeit their armour to the King, and their bodies to prison at the King's pleasure.

2 Edw. 3 c. 3 (1328) (footnote omitted).

Relying on the common law and the Statute of Northampton to support broad restrictions against public carry in the United States is wishful thinking. American statutes recognizing the offense did not make the carrying of weapons a crime unless it was done to the terror of the people. Even then, the common-law crime was seldom enforced here, and there was no tradition of applying the crime against public carry for lawful purposes.

A. American Common Law Did Not Ban Public Carry

At the time of the Framing, American common law did not prohibit individuals from going armed for lawful purposes. The effort to rewrite the history of public carry in the United States by relying on the (alleged) history of English practice rests on a series of profound mistakes.

1. The English historical record does not support claims that the Statute of Northampton traditionally served to prohibit the carrying of weapons for lawful purposes.

Whatever the statute was meant to do in the fourteenth century, it evidently had fallen into desuetude long before our nation was founded. *See*, *e.g.*, STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS: A CONSTITUTIONAL RIGHT OF THE PEOPLE OR A PRIVILEGE OF THE RULING CLASS?, 42–58 (2021); JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 102–06 (1994). As the Ninth Circuit conceded, "[w]e have record of few indictments under the Statute of Northampton." *Young*, 992 F.3d at 789.

More difficult than finding someone charged under the statute is finding someone convicted for violating it. At the time of the Framing, the only significant precedent involving the statute was *Sir John Knight's Case* (1686) 87 Eng. Rep. 75 (K.B.). Depending on which case report one reads, the Chief Justice said either that "the meaning of the statute . . . was to punish people who go armed to terrify the King's subjects," *id.* at 76, or that "tho' this statute be almost gone in desuetudinem, yet where the crime shall appear to be malo animo, it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)," *R v. Sir John Knight* (1686) 90 Eng. Rep. 330 (K.B.). Knight, moreover, was acquitted by the jury. *Id.* While the reason for Knight's acquittal may be the subject of academic curiosity, the case cannot possibly demonstrate that, around the time of the Framing, the Statute of Northampton applied against those who carried weapons for self-defense. No such cases are known to exist.

In an effort to find *any* precedent suggesting that English law broadly banned public carry, the Ninth Circuit relied on *Chune v. Piott* (1615) 80 Eng. Rep. 1161 (K.B.). *Young*, 992 F.3d at 790. But the court inaccurately portrayed Justice Croke's opinion in *Chune*. The Ninth Circuit stated that the King's Bench "concluded that . . . [t]he sheriff could arrest a person carrying arms in public 'notwithstanding he doth not break the peace.'" *Young*, 992 F.3d at 790 (quoting *Chune*, 80 Eng. Rep. at 1162). But Justice Croke actually said that the sheriff could arrest "notwithstanding he doth not break the peace *in his presence*." *Chune*, 80 Eng. Rep. at 1162 (emphasis added). This is almost the opposite of what the Ninth Circuit would have us believe. *See* 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, 175–76.

2. But even if the Statute of Northampton had applied more broadly in England, it still would not matter for this case. Conflating English practice with American law is legally and historically wrong. "The common law of England is not to be taken in all respects to be that of America. Our ancestors brought with them its general principles, and claimed it as their birthright; but they brought with them and adopted only that portion which was applicable to their situation." *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 144 (1829).

Unlike the Statute of Northampton—but consistent with *Knight's Case*—every analogous early

American statute expressly provided that going armed was a crime only when it was done "to the terror of the people" (or some equivalent phraseology). *See* Nelson Lund, *The Future of the Second Amendment in a Time of Lawless Violence*, 116 NW. L. REV. (forthcoming 2021) (manuscript at 23), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3701185 (collecting statutes).

There appear to be few examples of either these statutes or the common law being enforced in this country. *See infra* Part I.B. That alone suggests the offense was rarely committed, presumably because it applied only to extraordinary behavior, which carrying a weapon in public was not. In any event, what little judicial precedent can be found refutes the notion that American common law criminalized the carrying of firearms for lawful self-defense, or that applying the common law in that manner would have been constitutional.

The only significant nineteenth-century judicial decision involving the common-law offense came from the North Carolina Supreme Court in *State v. Huntly*, 25 N.C. (3 Ired.) 418 (1843). That case did not involve lawful self-defense. The court's reporter of decisions recorded the facts as the defendant went armed with a gun and threatened to murder the victim to resolve a dispute over slaves. *Id.* at 419. On appeal, the defendant argued that the indictment did not allege a recognized common-law crime. *Id.* at 420.

Leaving no doubt about the right to carry firearms for lawful purposes, the North Carolina Supreme Court stated:

> [I]t is to be remembered that the carrying of a gun *per se* constitutes no offence. For any lawful purpose—either of business or amusement—the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime. He shall not carry about this or any other weapon of death to terrify and alarm, and in such manner as naturally will terrify and alarm, a peaceful people.

Id. at 422–23. The court affirmed Huntly's conviction because he publicly went armed in a violent manner. *See id.* at 421–22.

Since *Huntly*, North Carolina's courts have understood the common-law crime to apply only to those who "abused" the right to bear arms by carrying arms "to terrify and alarm, and in such manner as naturally will terrify and alarm a peaceful people." *State v. Roten*, 86 N.C. 701, 704 (1882) (quoting *Huntly*, 25 N.C. at 423); *accord Kerner*, 107 S.E. at 225 ("It would also be a reasonable regulation and not an infringement of the right to bear arms to prohibit the carrying of deadly weapons . . . in a manner calculated to inspire terror, which was forbidden at common law."). In its most significant exposition of the common-law offense, the North Carolina Supreme Court defined "the essential elements of the crime" to be that the defendant "(1) armed himself with unusual and dangerous

weapons . . . (2) for the unlawful purpose of terrorizing the people . . . , and, (3) thus armed, he went about the public highways of the county (4) in a manner to cause terror to the people." *State v. Dawson*, 159 S.E.2d 1, 11–12 (N.C. 1968). Carrying firearms for lawful self-defense would not satisfy these elements.

The Tennessee Supreme Court also construed the common-law crime narrowly. In *Simpson v. State*, the defendant was charged with an affray because "with force and arms" he was "arrayed in a warlike manner, in a certain public street or highway situate." 13 Tenn. (5 Yer.) 356, 361 (1833). The court primarily held that the indictment was insufficiently specific. *Id.* at 362. But the court also explained that merely being armed could not constitute "an independent ground of affray" because that would violate the constitutional right to bear arms. *Id.* at 360 ("[A]fter so solemn an instrument [as the state's constitution] hath said the people may carry arms, can we be permitted to impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby; we must attribute to the framers of it the absence of such a view.").

None of the North Carolina or Tennessee decisions even suggests that American law criminalized the carrying of firearms for lawful self-defense. They recognized that interpreting the offense so broadly would violate the constitutional right to bear arms.

3. Whatever restrictions speculation might impute to English common law, the right to bear arms

protected by the Second Amendment and many state constitutions was widely acknowledged to be broader than its English counterpart. *See Aymette*, 21 Tenn. (2 Hum.) at 158 (explaining that the constitutional right to bear arms is much broader than the version in the English Bill of Rights). The English Bill of Rights was narrower on its face than American constitutional provisions. Moreover, although the English Bill of Rights guaranteed that "the subjects which are Protestants may have arms for their defense suitable to their conditions, and as allowed by law," An Act Declaring the Rights and Liberties of the Subject, and Settling the Succession of the Crown (Bill of Rights) 1689, 1 W. & M., c. 2 (Eng.), *in* 9 STATUTES AT LARGE 67, 69 (Pickering 1764), that privilege, as Justice Story explained, "under various pretences . . . ha[d] been greatly narrowed," and by the time of the Framing, was more "nominal than real," 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1891, at 608 (Boston, Hilliard, Gray, & Co. 1833). To the extent that the American right to bear arms could conceivably have conflicted with some ancient English statute, that statute would not be recognized as part of the common law in the United States. *Simpson*, 13 Tenn. at 359; *see also* CHARLES HUMPHREYS, A COMPENDIUM OF THE COMMON LAW IN FORCE IN KENTUCKY 482 (Lexington, Ky., William Gibbes Hunt 1822) ("Riding or going armed with dangerous or unusual weapons, is a crime against the public peace. . . . But here it should be remembered, that in this country the constitution guarantees to all persons the right to bear arms; then it can only be

a crime to exercise this right in such a manner, as to terrify the people unnecessarily.").

B. The Common-Law Crime Had Little Known Record of Enforcement

The vigorous modern debate about the common-law crime of going armed to the terror of the people is made possible by the fact that this crime largely went unenforced. But this fact cuts in favor of the petitioners: there is no historical tradition in this country of using the common law to prevent people from carrying arms for self-defense.

There is very little discussion of the common-law offense in courts of record. North Carolina was one of the few jurisdictions with a judicial decision recognizing and applying the offense. *See Huntly*, 25 N.C. (3 Ired.) 418. In 1968, the North Carolina Supreme Court reported that "prosecutions for the common-law crime of going armed to the terror of the people have been infrequent." *Dawson*, 159 S.E.2d at 11.

Although it is difficult to search justice of the peace records, one *amicus* has searched nineteenth-century newspaper databases for evidence that individuals were arrested for going armed to the terror of the people. *See* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms*, *in* NEW HISTORIES OF GUN RIGHTS AND REGULATION: ESSAYS ON THE PLACE OF GUNS IN AMERICAN LAW AND SOCIETY (Joseph Blocher, Jacob D. Charles, Darrell A.H. Miller

eds., forthcoming ___) (manuscript at 18).[2] In August 2020, searches of the Library of Congress newspaper database from 1800–1900 of the exact phrase "armed to the terror of the people" or "armed offensively" produced 68 and 37 results, respectively. A search of Newspapers.com of "armed to the terror of the people" during the same time period produced 28 results. A search of that database for "armed offensively" produced 23 matches. Very few of these results—at most a handful—are reports of arrests or court proceedings. *Id.* Contrast these results with searches of the same databases for the phrase "carrying concealed weapons." In a search of newspapers between 1800 and 1900, the Library of Congress database returned 24,531 results, including reports of more arrests than can be readily counted. *Id.* The Newspaper.com database returned 104,474 matches for the phrase. *Id.* These statistics indicate that almost all nineteenth-century arrests for carrying weapons were for violations of statutory law, primarily laws against carrying concealed weapons.

Even more rare is finding defendants charged with going armed to the terror of the people when the defendants carried weapons for lawful self-defense. One such case occurred on April 5, 1851. Two brothers, Isaac and Charles Snowden, were arrested in Boston while carrying concealed weapons. *Arrests for Carrying Concealed Weapons*, THE LIBERATOR, Apr. 11, 1851, at 59. Both were charged with going armed offensively to the terror of the people. *Id.* The Justice of the Peace

[2] A draft of the chapter is available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3697761.

ordered Charles to find a surety to keep the peace. Docket, *Commonwealth v. Snowden*, No. 1443 (Bos. Police Ct. Apr. 5, 1851).

But Isaac's case proceeded to a criminal judgment. In court, "[t]he [arresting] watchmen testified that the only reason for [the Snowdens'] arrest was [their] being seen walking up and down before the chained Court House" at 1:00 AM, and that "they neither spoke to, threatened, nor struck anyone" and that "there was nothing about them suspicious, but their presence in the street at that hour." *Arrests for Carrying Concealed Weapons*, *supra*, at 59. The defendants testified that they carried the weapons for protection. *Id.* The Justice of the Peace convicted Isaac and fined him $1, taxed him $6 in costs, and required him to post a $500 bond to appeal. *Id.*[3]

A contemporaneous newspaper account was incredulous that "walking peacefully, up and down the street, with arms in your pocket, which you neither use nor threaten to use" could constitute going armed offensively to the terror of the people. *Id.* The newspaper also believed the high appeal bond resulted from the fact that Isaac was poor and African-American. *Id.*

Isaac appealed his conviction to the Municipal Court. If mere public carry were enough to constitute

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[3] The newspaper incorrectly reported a $600 appeal bond. For the correct amount, see *Commonwealth v. Snowden*, Bos. Police Ct. R. Book 1117 (May 1851). All records from Massachusetts unreported case decisions can be found at https://www.law.gmu.edu/faculty/docs/unreported_massachusetts_cases.

the common-law crime, his appeal would have been meritless; he was caught red-handed, and in 1851, he could not challenge the admission of evidence using the exclusionary rule. *See Commonwealth v. Wilkins*, 138 N.E. 11, 12 (Mass. 1923) (holding that unconstitutionally seized evidence was admissible), *abrogated by Mapp v. Ohio*, 367 U.S. 643, 655 (1961). Yet, on appeal, the Commonwealth abandoned the prosecution, declaring: "And now said Snowden having behaved quietly & peaceably, [and] the object of the prosecution being satisfied by the preservation of the peace, I will no further prosecute said Snowden on this appeal & complaint." Complaint, *Commonwealth v. Snowden*, No. 1443 (Bos. Police Ct. Apr. 5, 1851); *see also Commonwealth v. Snowden*, Bos. Police Ct. R. Book 1117 (May 1851) (similar). This dropped prosecution cannot possibly tell us what the common law forbade.

The common law requires cases for development. Cases involving going armed to the terror of the people were few, and cases involving defendants engaged in lawful activities extraordinarily rare. Consequently, there was little judicial development of the offense's essential elements or of the limits that the constitutional right to bear arms would impose. There is no basis for concluding that the common law forbade carrying weapons in public.

II. Surety Laws

Claims that mid-nineteenth-century surety laws show the absence of a right to carry weapons in public

are based on a provision in the first Massachusetts legal code. In 1832, the Massachusetts General Court authorized the creation of a Commission "to revise, collate and arrange . . . the general statutes of the Commonwealth, which are or may be in force at the time such commissioners may finally report their doings in the premises." Resolve Providing for a Revision of the General Statutes of the Commonwealth, ch. 30, *in* RESOLVES OF THE GENERAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS 103 (1832). The product of this effort was the *Revised Statutes of the Commonwealth of Massachusetts*, which passed the legislature on November 4, 1835. REV. STAT. OF MASS., *supra*, at 801. The *Revised Statutes* totaled about 800 pages. As major legal codification projects often go, the *Revised Statutes* partly compiled existing law and partly revised it. One revision occurred on page 750, which altered the powers that justices of the peace could exercise over persons going armed. The revised provision, Section 16, read:

> If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.

REV. STAT. OF MASS., *supra*, at 750.

Massachusetts' *Revised Statutes* served as a template for other states codifying their laws. Nine other jurisdictions—Wisconsin (1839), Maine (1840), Michigan (1846), Virginia (1848), Minnesota (1851), Oregon (1853), the District of Columbia (1857), Pennsylvania (1860), and West Virginia (1870)—adopted an identical or nearly identical provision to Section 16, authorizing justices of the peace to bind over some people who carried weapons. App. 1–5.

As an initial matter, it is not clear that the surety laws are even relevant to interpreting the meaning of the Second Amendment. As explained below, the laws did not actually prohibit public carry, and they were passed approximately a half century after the Second Amendment's ratification. They tell us nothing about how the Founding generation understood the federal Constitution or the scope of the right to bear arms for self-defense.

Nor do the surety laws reflect any known post-enactment effort to liquidate the meaning of the right to bear arms. It may be, as James Madison believed, that "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." THE FEDERALIST NO. 37, at 236 (James Madison) (Jacob E. Cooke, ed. 1961). But there is no known evidence that the Massachusetts legislature—or any of the legislatures that copied the Massachusetts provision—reached any considered judgment

about the scope of the Second Amendment when enacting the surety laws. In fact, there is no known evidence that they debated the surety laws or their constitutionality at all. *See* Leider, *supra*, at 12. These surety laws were a minor justice of the peace provision buried in huge code reform projects.

That leaves settled practice. In *District of Columbia v. Heller*, this Court looked to post-enactment practice "to determine *the public understanding*" of the Second Amendment "in the period after its enactment or ratification." 554 U.S. at 605. And in other contexts, this Court has looked to post-enactment practice to settle the meaning of disputed constitutional provisions. *See, e.g.*, *NLRB v. Noel Canning*, 573 U.S. 513, 527–38 (2014) (looking to post-enactment practice to determine what constitutes a legislative "recess").

Some commentators and judges have argued that the surety laws demonstrate that settled nineteenth-century historical practice restricted public carry to those who had reasonable cause to fear attack. This is wrong. The surety statutes, on their face, did not prohibit public carry for lawful purposes, and the evidence strongly suggests that the statutes were rarely invoked. A fortiori, they would not have been enforced against those carrying weapons for lawful purposes.

A. The Surety Statutes Did Not Prohibit Carrying Firearms for Lawful Purposes

1. Some commentators have pointed to the Massachusetts law and concluded that it "forbade arming oneself except in unusual situations," Saul Cornell, *The Right to Carry Firearms Outside of the Home*, 39 FORDHAM URB. L.J. 1695, 1720 (2012). That characterization is demonstrably false.

Massachusetts-style surety laws simply required that, in some cases, persons going armed could be required to find sureties to keep the peace. Surety laws were not criminal statutes. As Blackstone explained, sureties served as a:

> caution . . . intended merely for prevention, without any crime actually committed by the party, but arising only from a probable suspicion, that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's impudence in giving just ground of apprehension.

4 WILLIAM BLACKSTONE, COMMENTARIES *251–52. Surety laws were a means to prevent the commission of a crime; they were not a means of prosecuting violations of the criminal law. This is why states that actually sought to restrict public carry—including those that already had surety laws—passed criminal laws governing the carrying of concealed weapons. *See* App. 6–11.

2. Not only were the surety laws not criminal, they would have been difficult to invoke against public carry for lawful purposes. A person would only have standing to file a complaint if the person had "reasonable cause to fear an injury" or a "breach of the peace."[4] As a Wisconsin justice of the peace manual makes clear, the form complaint required that the plaintiff have "reasonable cause to fear a breach of the peace, and personal injury at the hands of the [defendant]." THOMAS W. WATERMAN, THE WISCONSIN AND IOWA JUSTICE 620 (New York, Banks, Gould & Co. 1853). The "reasonable cause" self-defense exception only kicked in *after* the plaintiff could plead reasonable cause to fear injury or a breach of the peace. And even if the self-defense exception failed, a person would only have to post a surety to keep the peace; the carrying of a weapon was still not a crime.

Although the surety law remained on the books for decades, there is little evidence that Massachusetts viewed this law as a significant limitation on public carry. To the contrary, when the legislature wanted to impose restrictions on public carry, it enacted new criminal statutes. Beginning in 1850, Massachusetts made it a crime for a person to be "armed with any dangerous weapon, of the kind usually called slung shot" when committing or being arrested for committing a crime.

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[4] Virginia (and West Virginia after separation) did not adopt the standing limitation. App. 4–5. But what little information about it *amici* have found suggests that Virginia's surety law was not seriously enforced. *See infra* p. 32.

Act of Apr. 15, 1850, ch. 194, § 1, 1850 Mass. Acts 401, App. 6. This statutory crime soon expanded to cover other dangerous weapons. 1860 Mass. Stat. ch. 164, § 10, App. 7. Newspaper accounts indicate that this law became the principal way in which Massachusetts punished some people for carrying concealed weapons. *See, e.g.*, *About Concealed Weapons*, BOS. DAILY GLOBE, June 9, 1898, at 4 (explaining that, in Suffolk County (which includes Boston), "it is customary to prosecute" individuals found with concealed weapons when arrested for "disturbance of the peace or of any offense more serious than drunkenness").

Massachusetts restricted public carry further in 1893, when it prohibited armed bodies of men from drilling and parading with firearms. 1893 Mass. Stat. ch. 367, § 124. The passage of this law is hardly consistent with an understanding that individuals had already been forbidden since 1836 to carry firearms except when they were in danger.

There is also circumstantial evidence that the Massachusetts Supreme Judicial Court did not view the surety law as a general ban on public carry. In 1896, the court resolved a constitutional challenge to the prohibition against parading with firearms. *Commonwealth v. Murphy*, 44 N.E. 138 (Mass. 1896). Citing this Court's decision in *Presser v. Illinois*, 116 U.S. 252 (1886), the court held that "[t]he right to keep and bear arms for the common defense does not include the right to associate together as a military organization." *Murphy*, 44 N.E. at 138. The court, moreover, noted that "[t]he protection of a similar constitutional provision

has often been sought by persons charged with carrying concealed weapons, and it has been almost universally held that the legislature may regulate and limit the mode of carrying arms." *Id.* For support, the decision went on to cite seven Southern cases and an early Indiana case, *id.*,—the same state cases that Massachusetts-model proponents claim lacked influence outside the South. *See* Ruben & Cornell, *supra*, at 123–24.

Murphy is also significant because of what the opinion did not say. The court omits any mention of the surety statute. Yet, if Massachusetts had generally prohibited public carry since 1836 (and if that were thought constitutional), then it would have followed that the state could ban public carry in a parade. Yet, the Supreme Judicial Court did not mention Massachusetts' supposed 60-year history of banning public carry.

3. Nineteenth-century Massachusetts newspaper accounts indicate that the surety law did not ban public carry. Percy A. Bridgham, a member of the Suffolk County bar, answered readers' legal questions in the *Boston Daily Globe*. In 1889, someone asked whether it was unlawful to carry concealed weapons. Bridgham responded that Massachusetts law only criminalized carrying weapons while being arrested, but that law "does not prohibit any one from carrying weapons with which to defend themselves." *Carrying Weapons*, BOS. DAILY GLOBE, Jan. 18, 1889, at 4. In a book Bridgham published with a collection of legal questions, he noted that "[t]here is no statute in this State which expressly forbids the carrying of weapons,

but there is a statute that provides that a person so carrying may be required to give bonds to keep the peace." *See* PERCY A. BRIDGHAM, ONE THOUSAND LEGAL QUESTIONS ANSWERED BY THE PEOPLE'S LAWYER OF THE BOSTON DAILY GLOBE 129 (1890); *see also id.* at 170 ("There is no penalty in this State for carrying concealed weapons, except in cases where they are found on a person who is attempting to commit another crime."). Bridgham finally grew exasperated answering the question, and in 1896 wrote:

> The law in regard to concealed weapons has been answered in this column until it is worn out, and will not be responded to hereafter. There is practically no law against carrying concealed weapons in New Hampshire or Massachusetts. If a person committing an offense is found to have weapons he can be punished for it, but you can carry as many as you can pile on if you do not commit any crime while doing so.

BOS. DAILY GLOBE, June 29, 1896, at 4. In 1895, the *Boston Daily Advertiser* also reported that "Massachusetts has no specific law against carrying concealed weapons. . . . The ordinary citizen who has not otherwise offended against the law is able to arm himself without fear of police interference, so long as he does not attempt to violate the law against the procession of armed organizations." *Concealed Weapons*, BOS. DAILY ADVERTISER, July 13, 1895, at 4.

Newspaper accounts in other surety states confirm that their surety laws were not bans on public

carry. Michigan passed its surety law in 1846. Yet, in 1873, the *Detroit Free Press* reported that "in this State there is no statute whatever against the carrying of concealed weapons."[5] *Concealed Weapons*, DETROIT FREE PRESS, Feb. 26, 1873, at 2. The newspaper also believed that if the surety law were a broad restriction on public carry, it would violate the state and federal right to bear arms because the law "makes no distinction between the open and secret carrying of weapons." *Id.* Pennsylvania passed its surety law in 1860. *See* App. 4. Yet, *The Philadelphia Inquirer* reported decades later that Pennsylvania law did not prohibit carrying weapons openly nor did it prohibit carrying concealed deadly weapons with lawful intent. *See Deadly Weapons*, PHILA. INQUIRER, Dec. 30, 1897, at 2 (recognizing that Pennsylvania law did not prohibit carrying arms openly and that "the right to openly bear arms is guaranteed by the federal constitution" (capitalization altered)); *Everybody's Column*, PHILA. INQUIRER, Nov. 25, 1900, at 8.

Newspaper accounts of unreported cases confirm this. In 1899, a man who had been twice previously committed to an asylum entered Philadelphia City Hall visibly armed and sought an interview with the Mayor. EVENING J., Dec. 15, 1899, at 2. Police disarmed him, and arrested him for carrying a concealed deadly weapon. *Id.* The court acquitted him and "allowed him to go forth armed" because "[h]is deadly weapon was

[5] Michigan restricted the carrying of concealed weapons in 1887. App. 7.

not concealed and the law does not prohibit lunatics from carrying unconcealed weapons." *Id.*

4. Like Massachusetts, virtually every other surety jurisdiction eventually adopted statutory criminal laws restricting the carrying of concealed weapons. Proceeding chronologically, Virginia restricted the carrying of concealed weapons in 1838, Pennsylvania in 1850, the City of Washington in 1858,[6] Wisconsin in 1872, Oregon in 1885, Michigan in 1887, Maine in 1917, and Minnesota in 1917. App. 6–11 (collecting statutes). None of these laws prohibited carrying firearms openly for self-defense or other lawful purposes. What some commentators have called the "Southern model" (prohibiting concealed weapons while allowing open carry) was not limited to the South. Throughout much of the country, it was the generally accepted form of regulating public carry while respecting the right to bear arms. *See, e.g.*, *In re Brickey*, 70 P. 609, 609 (Idaho 1902) ("A statute prohibiting the carrying of concealed deadly weapons would be a proper exercise of the police power of the state. But the statute in question does not prohibit the carrying of weapons concealed . . . but prohibits the carrying of them in any manner in cities, towns, and villages. We are compelled to hold this statute void."); *State v. Nieto*, 130 N.E. 663, 664 (Ohio 1920)

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[6] The City passed a law banning all public carry in 1857, Act of Nov. 4, 1857, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON 75 (Washington, Robert A. Waters 1860), but modified it to apply only to concealed weapons in 1858 because members of the city council believed that a complete ban on public carry would not withstand a court challenge. *See Concealed Weapons*, EVENING STAR, Nov. 11, 1858, at 3.

("The statute does not operate as a prohibition against carrying weapons, but as a regulation of the manner of carrying them. The gist of the offense is the concealment.").

* * *

Some courts have cited the surety laws to claim that "most states outside of the South in the mid-nineteenth century prohibited in most instances the carrying of firearms in public, whether carried concealed or openly." *See, e.g.*, *Norman*, 215 So.3d at 30 n.12. But they have bought into a false history. Even outside the South, the carrying of firearms for self-defense was generally lawful during the nineteenth century, including in states that adopted surety laws.

B. The Surety Statutes Have Virtually No Known Record of Enforcement

Not only did the surety statutes not ban public carry, there is substantial evidence that these laws were hardly invoked. Only a few known cases arose under the surety statutes. There is not a single known decision from a court of record—not one—applying the surety laws. In the history of the United States, there have been five cases from courts of record discussing surety laws. All are from the twenty-first century, and

all involve Second Amendment challenges to modern bans on public carry.[7]

It is also incredibly difficult to find complaints before justices of the peace seeking a surety because a person went armed. Proponents of the Massachusetts model offer only a single case, *Grover v. Bullock*, in which the justice of the peace *declined* to require a surety. Ruben & Cornell, *supra*, at 130 n.53. Moreover, the plaintiff in that case alleged that the defendant "did threaten to beat, would, main, and kill" him, Complaint, *Grover v. Bullock*, No. 185 (Worcester Cty. Aug. 13, 1853), so the example does not even suggest that surety laws restricted the carrying of firearms for lawful self-defense.

Massachusetts model proponents try to explain away this lack of precedent. They contend that because these cases were resolved at the justice of the peace level, we should not expect "Westlaw-searchable case law." Ruben & Cornell, *supra*, at 130 n.53. But lack of evidence confirming their theory is not evidence in

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[7] *Young*, 992 F.3d at 819–20; *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 140–41 (D.D.C. 2016); *Wrenn v. District of Columbia*, 864 F.3d 650, 661 (D.C. Cir. 2017); *Norman*, 215 So.3d at 30 n.12; *State v. Christian*, 274 P.3d 262, 279–80 (Or. Ct. App. 2012) (Edmonds, S.J., dissenting). Two other Pennsylvania cases quote the provision for reasons not relevant to the weapon-carrying provision. *Commonwealth v. Miller*, 305 A.2d 346 (Pa. 1973) (complaint resulting from a husband who threatened in his wife with a gun in their own home; the question was whether the defendant was entitled to a trial by jury in a surety case); *Commonwealth v. Cushard*, 132 A.2d 366, 367–68 (Pa. Super. Ct. 1957) (complaint resulting from a threat of "bodily harm").

support of their theory. Whatever might establish a constitutionally relevant body of precedent, such precedent cannot be conjured by sheer speculation. Proponents of this theory bear the burden to show a real tradition or practice.

It is true that archival research in justice of the peace courts is difficult and many records no longer exist. But there are indirect ways to search for relevant evidence. Nineteenth-century newspapers routinely reported on local court matters. One *amicus* has tried to locate any news reports of surety cases alleging the carrying of arms. He has only found a handful of possible additional cases, involving African-American defendants in the District of Columbia and Massachusetts. *See* Leider, *supra*, at 16–17.

Consistent with this lack of evidence, nineteenth-century newspapers reported that surety laws were not actively enforced. Virginia had an unusually broad surety provision that authorized sureties for anyone carrying weapons; unlike most states, there was no standing limitation to those who faced a threat or feared a breach of the peace. Of Proceedings to Prevent the Commission of Crimes, ch. 14, § 16, 1847 Va. Acts 127, 129, App. 4–5. Yet, in 1855, the *Richmond Dispatch* reported, "We have frequently seen deadly weapons in the possession of persons who should not have been allowed to carry them, in court rooms, but do not now remember ever having seen the law enforced against one of them." *Local Matters: Deadly Weapons*, RICHMOND DISPATCH, June 18, 1855, at 2. In 1891, Bridgham, the Massachusetts lawyer, reported that

"inquiry at the office of the clerk of the Municipal Court reveals the fact that there has not been a single complaint before the court for the past year" under the surety statute. P.A. Bridgham, *Dangerous Weapons*, BOS. DAILY GLOBE, Sept. 27, 1891, at 20.

Although the Ninth Circuit has claimed that the surety laws constituted "a severe constraint on anyone thinking of carrying a weapon in public," *Young*, 992 F.3d at 820, that contention has no support in the historical record. It would be easier to argue that modern criminal statutes prohibiting adultery, *see, e.g.*, N.Y. PENAL LAW § 255.17 (McKinney 2021); WIS. STAT. § 944.16 (West 2021), constitute a "severe constraint" on extramarital affairs. Unlike the surety laws, these statutes at least purport to criminalize the behavior in question. But laws that have fallen into desuetude do not constrain behavior. Moreover, no one could think that unenforced laws prohibiting widespread conduct prove that the laws would be constitutional if they were ever enforced.

CONCLUSION

Amici curiae respectfully request that this Court hold that the Second Amendment protects the right to carry a pistol outside the home for self-defense.

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