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 FOR AMICI CURIAE PROFESSORS OF HISTORY AND LAW IN SUPPORT OF RESPONDENTS

EMMA P. SIMSON
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

JOSHUA A. VITTOR
WILMER CUTLER PICKERING HALE AND DORR LLP
350 South Grand Avenue
Suite 2400
Los Angeles, CA 90071
(213) 443-5300

MARK D. SELWYN
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
(650) 858-6000
mark.selwyn@wilmerhale.com

REBECCA E. S. PRITZKER
WILMER CUTLER PICKERING HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6804

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTEREST OF *AMICI CURIAE*

Amici curiae are 17 preeminent professors of English and American history and law who have studied the history of criminal law and firearms regulation in England and the United States.[1] Their scholarship has been published by major university presses and in leading law journals, awarded numerous prizes, and cited in opinions of the U.S. Supreme Court and Courts of Appeals and a number of state courts. The professors are scholars of international reputation, and many hold endowed professorships.

Amici's interest in this appeal arises from the great importance Second Amendment case law has placed upon a proper historical understanding of the scope of the right to keep and bear arms and of traditional firearms regulations. Given that case law, it is critical that this Court is presented with accurate and reliable accounts of the relevant history and traditions. As historians with extensive expertise about the relevant time periods and events, *amici* are well situated to assist the Court in properly evaluating the historical record relevant to this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Neither English nor American history supports a broad Second Amendment right to carry firearms or other dangerous weapons in public based on a generic interest in self-defense. For centuries, both English

---

[1] A complete list of *amici* is included in the appendix to this brief. All parties have consented to the filing of this brief. No counsel for a party authored the brief in whole or in part. No person, other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of the brief.

and American law have restricted individuals' right to publicly carry arms—especially in populated places and especially in the absence of a special need for self-defense—in order to preserve the public order and public peace.

In England, early royal proclamations, dating as far back as the thirteenth century, generally proscribed carrying arms in public. In 1328, the Statute of Northampton codified earlier restrictions and generally forbade anyone from going "armed" in public places, such as "Fairs" and "Markets." 2 Edw. 3, ch. 3 (1328). The Statute's broad public-carry prohibition reflected the English common law's understanding that the monarchy exercised a monopoly on violence and was principally responsible for preserving the "King's Peace" or public peace; going armed in public was viewed as a challenge to the monarchy's authority and as a threat to the public peace.

In the centuries that followed, and leading up to the American Revolution, the Statute of Northampton remained in force, and legal guidebooks and treatises frequently recognized that English common law and statutory law prohibited going armed in public, save in limited circumstances—for instance, when required by properly accredited officers for legitimate purposes (*i.e.*, when required for suppressing a rebellion).

The English tradition of broad public-carry restrictions ultimately continued across the Atlantic, although the American approach to public-carry restrictions has been dynamic, varying across time and jurisdiction based on social and political changes. Nevertheless, throughout, there is a consistent history and tradition of many American colonies, states, territories, and municipalities imposing broad prohibitions on car-

rying dangerous weapons (including firearms) in public, particularly absent a specific self-defense need. There is also a longstanding tradition, dating back to the nineteenth century, of states and localities adopting licensing schemes that vest local officials with discretion to determine whether individuals can demonstrate "good cause" or lawful purposes to carry arms in public.

As in England, the right to keep and carry arms in the United States has always been weighed against preservation of the public order and peace. The republicanized concept of the "People's Peace" (as opposed to the "King's Peace") has empowered "the people," acting through their representatives, to broadly regulate public carry to maintain public order and peace.

The historical record plainly demonstrates that New York's "good cause" law is not a historical aberration; on the contrary, it is reflective of a long Anglo-American tradition of broad restrictions on carrying dangerous weapons in public. Similar—and even more stringent—regulations have been accepted throughout English and American history as valid means of preserving public order and peace.

I. THE ENGLISH TRADITION OF RESTRICTING PUBLIC CARRY

For centuries leading up to the founding of the American Republic and the adoption of the Second Amendment, English law significantly curtailed the public carrying of dangerous weapons. Early royal proclamations dating as far back as the thirteenth century regularly prohibited going armed in public without special permission. For instance, in 1299, Edward I ordered the sheriff of Shropshire and Stafford to prohibit anyone "from tourneying, tilting … *or otherwise going*

armed within the realm without the king's special licence." 4 Calendar of the Close Rolls, Edward I, 1296-1302, at 318 (Sept. 15, 1299, Canterbury) (H.C. Maxwell Lyte ed., 1906) (emphasis added). Similarly, in 1310, Edward II ordered sheriffs to prohibit any "earl, baron, knight, or other" from "go[ing] armed." 1 Calendar of the Close Rolls, Edward II, 1307-1313, at 257 (Apr. 9, 1310, Windsor) (H.C. Maxwell-Lyte ed., 1892).

In 1328, Parliament codified public-carry restrictions in the Statute of Northampton, which provided that "no Man … [shall] come before the King's Justices … with force and arms … nor to go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere." 2 Edw. 3, ch. 3. The Statute was broad in scope. It prohibited going armed in the public concourse (e.g., in "Fairs" and "Markets"), and it provided only narrow exemptions for the "King's Servants," "Ministers," and "Precepts," and "upon a Cry made for Arms to keep the Peace." *Id.*[2]

Royal orders issued after the Statute's enactment reinforce that the Statute's prohibitions were broad and generally forbade anyone from going armed in public. In 1328, for instance, Edward III ordered the sheriff of Southampton to enforce the Statute throughout the "whole of his bailiwick" by taking and imprisoning those "going armed." 1 Calendar of the Close Rolls, Edward III, 1327-1330, at 420 (Nov. 10, 1328, Wallingford) (H.C. Maxwell Lyte ed., 1896). Two years later, Edward III issued an order to sheriffs, stating it was his "understand[ing] that many are going about armed

[2] Over the ensuing decades, Parliament re-enacted the Statute's prohibition on carrying arms in public at least twice. *See*, *e.g.*, 7 Ric. 2, ch. 13 (1383); 20 Ric. 2, ch. 1 (1396).

in the sheriffs' bailiwick[s], contrary to [the Statute of Northampton]," and directing the sheriffs to imprison those they find "going armed." 2 Calendar of the Close Rolls, Edward III, 1330-1333, at 131 (Apr. 3, 1330, Woodstock) (H.C. Maxwell Lyte ed. 1898). Four years later, Edward III again described the Statute as "ordain[ing] that no one except a minister of the king should use armed force or go armed in fairs, markets, etc. under pain of loss of his arms and imprisonment." 3 Calendar of the Close Rolls, Edward III, 1333-1337, at 294 (Jan. 30, 1334 Woodstock) (H.C. Maxwell Lyte, ed., 1898).

Efforts to enforce the Statute over the next several centuries likewise underscore that it constituted a general prohibition on carrying arms in public. *See* Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 11 (2012) (discussing examples from fourteenth through sixteenth centuries).

Other historical sources further indicate that it was widely understood, for centuries, that going armed in public was generally forbidden. For instance, in 1615, the King's Bench observed in *Chune* v. *Piott*, 80 Eng. Rep. 1161 (K.B. 1615): "Without all question, the sheriff hath power to commit … if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, *notwithstanding he doth not break the peace in his presence*," *id.* at 1162 (emphasis added). English treatises and justice-of-the-peace manuals indicate the same. For example, Joseph Keble's popular justice-of-the-peace manual stated: "[I]f any person … shall be so bold as to go or ride Armed, by night or by day, in Fairs, Markets, or any other places," a justice of the peace may seize his arms and "commit him to the

Goal," Keble, *An Assistance to the Justices of the Peace for the Easier Performance of Their Duty* 224 (1683); *see also* Lambarde, *The Duties of Constables, Borsholders, Tythingmen, and Such Other Lowe and Lay Ministers of the Peace* 13 (1606 ed.) ("[I]f any person … shall be so bold, as to goe, or ride armed, by night, or by day, in Faires, Markets, or any other places: then any Constable … may take such Armour from him … and may also commit him to the Goale.").

In 1689, during the Glorious Revolution, the Convention Parliament drafted the Declaration of Rights (subsequently enacted as the Bill of Rights), which enumerated grievances against James II's rule and identified several rights of English citizens. One enumerated grievance was that James II, who was Catholic, had disarmed Protestants "when Papists were both armed and employed contrary to Law." 1 W. & M. 2d sess., ch. 2. In response, the Declaration of Rights declared that "the subjects[,] which are protestants, may have arms for their defence suitable to their conditions, and as allowed by law." *Id.* This provision did not upend pre-existing restrictions on the right to carry arms, nor did it preclude future restrictions. It stated only that the Protestants "may have Arms … as allowed by law," thereby continuing to condition the ability to carry arms on pre-existing and future restrictions, including the Statute of Northampton's general prohibition on going armed in public. *See* Harris, *The Right to Bear Arms in English and Irish Historical Context*, in *A Right To Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment* 28 (Jennifer Tucker, ed. 2019).

Consistent with that understanding, even after the Declaration of Rights, legal commentators and justice-of-the-peace manuals continued to recognize that the

common law and the Statute of Northampton generally prohibited carrying "offensive" or dangerous weapons in public. For example, Sir William Blackstone's influential treatise observed: "The offence of riding or going armed with dangerous or unusual weapons is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the Statute of Northampton." 4 Blackstone, *Commentaries on the Laws of England* 148-149 (Oxford, England 1769); *see also*, *e.g.*, Dalton, *The Country Justice* 37 (1690) ("If any person shall ride or go armed offensively … in Fairs, Markets, or elsewhere, (by night or by day) in Affray of the Kings people, … every Justice of Peace (upon his own view, or upon complaint thereof) may cause them to be staid and arrested…."); Bond, *A Compleat Guide for Justices of the Peace* 42 (3d ed. 1707) ("Persons with offensive Weapons in Fairs, Markets or elsewhere in Affray of the King's People, may be arrested….").

Some scholars attempt to rely on a single case, *Sir John Knight's Case* (K.B. 1686), as evidence that by the late 1600s, the Statute of Northampton was only understood to prohibit going armed with the intent to terrify and did not prohibit peaceable carry. *See* Petrs' Br. 5-6, 30. There is little in the historical record to support this claim. *See* Harris, *supra* p. 6, at 24-27, 33. The two reported versions of *Sir John Knight's Case* are very short and offer inconsistent accounts of the Chief Justice's pronouncements about the Statute. *See* 87 Eng. Rep. 75; 90 Eng. Rep. 330. One version indicates that the Chief Justice observed that going armed was an offense under the Statute and at common law, "as if the King were not able or willing to protect his subjects." 87 Eng. Rep. at 76. The other version also did not, as Petitioners contend, "recognize[] a general right of men

'to ride armed for their security,'" Petrs' Br. at 30 (quoting 90 Eng. Rep. at 330); rather, it noted that there was a *general connivance to gentlemen* to ride armed for their security," 90 Eng. Rep. 330 (emphasis added). The facts of the cases are also far more complicated than many have acknowledged, undermining the inferences some have tried to draw from Sir John Knight's acquittal. *See* Harris, *supra* p. 6, at 24-27. Finally, even after *Sir John Knight's Case*, English treatises and justice-of-the-peace manuals continued to observe that the law generally prohibited the act of going armed. *See supra* pp. 6-7.

The English tradition of restricting public carry is rooted in the English common law's emphasis on preserving the "King's Peace" or "public peace." English common law had a "special care and regard for the conservation of the peace," because "peace is the very end and foundation of civil society." 1 Blackstone, *Commentaries on the Laws of England* 338 (1765). The monarchy was entrusted with preserving the "peace" and exercised a monopoly on violence. *See id.*; Cornell, *History, Text, Tradition, and the Future of Second Amendment Jurisprudence: Limits on Armed Travel Under Anglo-American Law, 1688-1868*, 83 L. & Contemp. Probs. 73, 81 (2020). The law viewed going armed in public places as an offense against the public peace and as a challenge to the monarchy's power and authority. *See id.*; Binder & Weisberg, *What Is Criminal Law About?*, 114 Mich. L. Rev. 1173, 1183 (2016) ("The criminal jurisdiction of the royal courts was defined by the king's peace, which asserted a monopoly on legitimate violence, particularly in public, where any

unauthorized use of arms could be taken as a claim to governing authority and a challenge to the crown.").[3]

The mere act of going armed was deemed an offense against the public peace because it inherently terrified others and disrupted the peace. Dalton's influential guidebook explained: "[T]o wear Armor, or Weapons not usually worn, … seems also be a breach, or means of breach of the Peace …; for they strike a fear and terror in the People." Dalton, *supra* p. 7, at 282-283. Another treatise noted, "the law doth intend, that he which in a peaceable time doth ride or goe armed, without sufficient warrant or authorities so to doe, doth meane to break the peace, and to doe some outrage," and the intent of the Statute of Northampton was "not onely to preserve peace, & to eschew quarrells, but also to take away the instruments of fighting and batterie, and to cut off all meanes that may tend in affray or feare of the people." Ferdinando Pulton, De Pace Regis Et Regni Viz 4 (1615).[4]

Going armed was therefore considered an offense regardless of whether a person had the intent to terrify

---

[3] Private ownership of firearms was not widespread throughout English history. Other than a select minority of social and political elites, and during select periods of wartime, the Crown prioritized disarmament of the people. *See* Satia, *Who Had Guns in Eighteenth-Century Britain*, in *A Right To Bear Arms? The Contested Role of History in Contemporary Debates on the Second Amendment* (Jennifer Tucker, ed. 2019) 38-39.

[4] *See also, e.g.*, 4 Blackstone, *Commentaries on the Laws of England* 148-149 (1769) ("riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land"); Ward & Cunningham, *The Law of a Justice of Peace and Parish Officer* 6-7 (1769) (when "a man shew[s] himself furnished with … weapons not usually worn, it may strike a fear into others unarmed").

others or whether doing so actually disrupted the peace. Dalton's guidebook underscores this point: "And yet the King's Servants in his presence, and Sheriffs, and their Officers, and other the Kings Ministers, and such as be in their company assisting them in executing the Kings Process, or otherwise in executing of their Office, and all others in pursuing Hue and Cry, … may lawfully bear Armour or Weapons." Dalton, *supra* p. 7, at 37-38. If evil intent or disruption of the peace were required, it would have been unnecessary to clarify that government officials executing their duties or individuals assisting in suppressing breaches of the peace could lawfully bear weapons.[5]

Notably, although English law allowed carrying arms in certain narrow circumstances—such as on hue and cry to suppress a riot or rebellion—it did not permit the general public to carry arms for self-defense in public even where a person had reasonable cause to fear an attack. That is because the monarchy and its agents were responsible for preserving the public peace. The law therefore required ordinary citizens to seek out justices of the peace to bind a threatening party with a peace bond. *See* Cornell, *supra* p. 8, 83 L. & Contemp. Probs. at 82. Hawkins thus observed: "[A] man cannot excuse the wearing such Armour in Publick, by alleging that such a one threatened him, and that he wears it for the Safety of his Person from his Assault." Hawkins, *supra* note 5, at 136.

---

[5] *See also, e.g.*, Hawkins, *A Treatise on the Pleas of the Crown* 135 (1716) ("[T]here may be an Affray where there is no actual Violence; as where a Man arms himself with dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People, which is said to have been always an Offence at Common Law, and is strictly prohibited by many Statutes.").

In sum, for centuries leading up to the founding of the American Republic, English law largely prohibited the act of going armed in public, even for purposes of self-defense, in order to preserve the public peace.

II. The American Tradition Of Restricting Public Carry

The American history of public-carry restrictions is a dynamic one, varying across time and jurisdiction based on social and political changes. Throughout, however, there is a consistent history and tradition of broad restrictions on carrying dangerous weapons, including firearms, in public, especially in the absence of a specific self-defense need.

A. Colonial-Era Restrictions

American colonies carried forward the English tradition—reflected in the Statute of Northampton—of restricting public carry in order to preserve the "King's Peace" or public peace. In 1699, for instance, New Hampshire provided that justices of the peace could arrest "all affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively, or put his Majesty's subjects in fear, by menaces or threatening speeches." 1699 N.H. Laws 1. Justices of the peace could seize and sell the weapons "for the Majesty's use" and "commit the offender[s] to prison" until they were able to find "sureties for the peace and good behavior." *Id.* at 2. Other colonies, including New Jersey and Massachusetts, enacted similar public-carry restrictions. *See* 1686 N.J. Laws 289, 289-290, ch. 9; 1692 Mass. Laws 10, no. 6.

Legal commentators from the colonial era observed that it was an offense to go armed in populated areas. One, for instance, stated:

> Justices of the Peace, upon their own View, or upon Complaint, may apprehend any Person who shall go or ride armed with unusual and offensive weapons, in an Affray, or among any great Concourse of the People, or who shall appear, so armed, before the King's Justices sitting in Court.

Davis, *The Office and Authority of a Justice of the Peace* 13 (1774) (citing Dalton, *The Country Justice* 37 (1705)).

It is true that, during periods of heightened risk of attack, some colonies required certain individuals to carry guns to church or when working in fields away from fortified or populated areas. *See, e.g.*, Trumbull, *The Public Records of the Colony of Connecticut* 95 (1850). However, this *obligation* was not understood as establishing a *right* to carry firearms in public. Mandatory carriage was seen (as it was in England) as part of the subjects' duty to assist in the public defense and ordinary community-based acts of law enforcement. *See* Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 L. & Contemp. Probs. 11, 27-28 (2017). It does not reflect a departure from the English tradition of broad restrictions on public carry.

B. Post-Revolution Restrictions

After the Revolution, states continued to adopt regulations echoing the Statute of Northampton. For instance, North Carolina regarded the Statute of Northampton as remaining in full force. *See* Martin, *A Collection of the Statutes of the Parliament of England in Force in the State of North-Carolina* 60, ch. 3 (1792). Massachusetts continued to make it a crime for anyone

to "ride or go armed offensively, to the fear or terror of the good citizens of this Commonwealth." 1795 Mass. Acts 436, ch. 2. Numerous other states adopted similar prohibitions through common law, *see, e.g.*, Md. Const. of 1776, art. III, §1 (adopting "the Common Law of England" and "the English statutes, as existed at the time of their first emigration"), or through statutes, *see* 1786 Va. Laws 33, ch. 21; 1801 Tenn. Laws 259, 260-261, ch. 22, §6; 1821 Me. Laws 285, ch. 76, §1.

Legal treatises and manuals indicate that these early state laws were enforced as general public-carry prohibitions. Employing language remarkably consistent with the manuals published in England, they instructed justices of the peace, among others, to "arrest all such persons as in your sight shall ride or go armed offensively." Haywood, *A Manual of the Laws of North-Carolina* pt. 2 at 40 (1814) (N.C. constable oath). The manuals provided that these laws did not require that a defendant "threaten[] any person" or engage in "any particular act of violence." Ewing, *A Treatise on the Office & Duty of a Justice of the Peace* 546 (1805). As was true under English law, the act of armed travel with a dangerous weapon such as a firearm, outside of a list of well recognized exceptions (*e.g.*, the duty of militia members to bear arms to keep the peace), was, in and of itself, a violation of the law because of its potential to terrify and disrupt the peace.[6]

---

[6] *See also, e.g.*, 5 St. George Tucker, *Blackstone's Commentaries* 148 (1803) (riding or going armed "with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land"); Dunlap, *The New-York Justice* 8 (1815) ("It is likewise said to be an affray, at common law, for a man to arm himself with dangerous and unusual weapons, in such manner as will naturally cause terror to the people.").

C. Pre-Civil War Regional Variations

Advocates of a broad public-carry right have tended to focus heavily on nineteenth-century Southern court cases and commentators that expressed a permissive view of public carry. *See, e.g.*, Petrs' Br. 8-9. Yet, following *Heller's* directive to examine history for guidance, recent scholarship has uncovered that early to mid-nineteenth-century firearms regulations varied considerably by jurisdiction and geography. In the South, a number of states took a less restrictive approach to public carry, allowing white residents to carry arms openly to perpetuate the South's brutal system of slavery. Outside the South, however, states and territories in the North and West carried forward the more restrictive English tradition by adopting Northampton-style statutes or "good cause" statutes that permitted individuals to carry arms for specified self-defense needs, but otherwise generally prohibited public carry.

1. Broad, Northampton-Style Prohibitions

In the mid-nineteenth century, a number of states and territories continued to adopt Northampton-style prohibitions. New Mexico, for instance, passed a law prohibiting "any person [to] carry about his person, either concealed or otherwise, any deadly weapon"; repeat offenders were required to serve a jail term "not less than three months." 1859 N.M. Laws 94, §2. Delaware also provided that any justice of the peace could arrest and bind "all who go armed offensively to the terror of the people." 1852 Del. Laws 330, 333, ch. 97, §13.

2. "Good Cause" (Or "Massachusetts Model") Laws

The mid-nineteenth century also saw the emergence of "good cause" laws, which generally prohibited public carry but which made exceptions for individuals who had reasonable cause to fear injury to themselves or their property. Massachusetts was the first state to adopt such a law. In 1836, it revised its criminal code, including its Northampton-style statute. As revised, the statute provided: "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." 1836 Mass. Acts 748, 750, ch. 134, §16 (emphasis added). Any person who was ordered to pay a surety could be jailed for failing to do so. *Id.* at 749, §6.

The new Massachusetts law represented an expansion of gun rights beyond the more limited English conception, which had no reasonable fear or good cause exception. *See* Hawkins, *supra* note 5, at 136. It did not, however, establish a right to peacefully carry arms based on a generalized interest in self-defense.

This Massachusetts law became a template for other state laws. Many states (all but one of which were outside the slaveholding South) adopted similar "good cause" laws before the Civil War. *See, e.g.*, 1851 Minn. Laws 526, 527-28, ch. 112 §§2, 17, 18 (entitled "Persons carrying offensive weapons, how punished"); 1847 Va. Laws 127, 129, §16 ("If any person shall go with any offensive or dangerous weapon, without reasonable cause

to fear an assault or other injury, … he may be required to find sureties for keeping the peace[.]").[7]

Each of these laws was understood to do the same thing: broadly restrict public carry, with a limited exception for those with an articulable self-defense need.[8]

3. The Southern Model

Around the same time that Northampton-style and Massachusetts-style laws were being enacted in Northern and Western states, a less restrictive minority approach to public carry emerged in some states in the slaveholding South. This approach generally permitted white citizens to carry firearms openly, though fre-

---

[7] *See, e.g.*, 1838 Wis. Laws 381, §16; 1841 Me. Laws 707, 709, ch. 169, §16; 1846 Mich. Laws 690, 692, ch. 162, §16; 1853 Or. Laws 218, 220, ch. 16, §17; 1861 Pa. Laws 248, 250, §6.

[8] The fact that these laws contemplated the payment of "sureties" does not, as Petitioners and some of their *amici* contend, exempt them from consideration as part of the history of public-carry restrictions in early America. For example, Petitioners' amici argue that such laws were irrelevant because they could only be enforced by private individuals who reasonably feared injury or breaches of the peace. *See* Leider & Lund Br. 4. But not all Massachusetts-style laws depended upon a citizen complainant for enforcement. *See, e.g.*, 1847 Va. Laws 127, §1 ("[A]ll justices of the peace and commissioners in chancery within their respective jurisdictions, shall have power to cause all laws made for the preservation of the public peace, to be kept, and in the execution of that power, may require persons to give security to keep the peace ….."). These laws also imposed significant substantive constraints on those who wished to carry arms for generalized self-defense; if they could not establish reasonable cause to fear an attack, they could be forced to pay significant sureties and could be imprisoned for failing to do so, *see, e.g.*, 1836 Mass. Acts at 750, ch. 134, §16. These laws were also characterized as criminal prohibitions. *See id.* (placing good cause regulation in section of the Code entitled "Of Proceedings in *Criminal* Cases" (emphasis added)).

quently banned concealed carry. *See, e.g.*, 1852 Ala. Laws 586, 588, art. 6, §3274; 1861 Ga. Laws 856, 859, §4413.

This divergent approach was the result of "a unique regional culture" directly connected to the South's brutal system of slavery. Ruben & Cornell, *Firearm Regionalism and Public Carry: Placing Southern Antebellum Case Law in Context*, 125 Yale L.J.F. 121, 123, 125-128 (2015). Southern culture defined the public order in terms of maintaining slavery, and it required white residents to do whatever necessary to guard against uprisings and to punish violations of the restrictions placed on enslaved people. Commentators of the time understood that link. Frederick Law Olmsted attributed the need to maintain control over enslaved people as the reason that "every white stripling in the South may carry a dirk-knife in his pocket, and play with a revolver before he has learned to swim." Olmsted, *A Journey in the Back Country* 447 (1861); *see also McDonald* v. *City of Chicago*, 561 U.S. 742, 844 (2010) (Thomas, J., concurring) ("[I]t is difficult to overstate the extent to which fear of a slave uprising gripped slaveholders and dictated the acts of Southern legislatures.").

Yet, even in the South, states did not uniformly adopt this more lenient model. Some Southern legislatures followed the broader national approach by maintaining Northampton-style prohibitions or "good cause" laws. For instance, Tennessee maintained a Northampton-style statute. *See* 1821 Tenn. Pub. Acts 15, ch. 13 (making it a crime to carry "pocket pistols" or other weapons in public, without exception). Meanwhile, Virginia followed the Massachusetts "good cause" model. *See supra* pp. 15-16.

Moreover, even in the South, there was no unfettered right to carry arms in public. Those states continued to recognize that the government could impose limitations on public carry in order to maintain the "peace." *See, e.g.*, *State* v. *Reid*, 1 Ala. 612, 616 (1840) ("The right guarantied [sic] to the citizen, is not to bear arms *upon all occasions and in all places*." (emphasis added) (quotation marks omitted)). Southern states recognized a distinction between *purposeful* carry—carrying a firearm for a lawful reason—and *permissive* carry—carrying a firearm without any articulable reason to do so.[9] Such limitations included, for instance, restrictions on concealed carry, which was perceived as creating a "tendency to secret advantages and unmanly assassinations," *State* v. *Chandler*, 5 La. Ann. 489, 490 (1850).

D. Post-Civil War Regulations

The post-Civil War era saw a shift in emphasis regarding the right to keep and bear arms and the power to regulate that right. The historical context surrounding this evolution is essential to understanding how gun regulations evolved during Reconstruction and beyond. The militia was a waning institution: citizens were still organized into militia units, but these were not as actively engaged as they had been during the colonial era and the first decades of the republic.[10] Moreover,

---

[9] *See* Cornell, *The Right to Regulate Arms in the Era of the Fourteenth Amendment: The Emergence of Good Cause Permit Schemes in Post-Civil War America*, 55 U.C. Davis L. Rev. Online 65, 75 n.42 (2021).

[10] *See, e.g.*, Shusterman, *Armed Citizens: The Road from Ancient Rome to the Second Amendment* 223 (2020) (noting growth of professional police forces and decline in popularity of concept that citizens participate in militia training).

technological advances spurred by the Civil War made guns more lethal and available. *See* Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, 13 Charleston L. Rev. 125, 147-149 (2018).[11] The decline of the militia and the increase in the lethality of firearms heightened the need for states and municipalities to exercise their power to regulate the right to bear arms to preserve the public order and peace to address increased gun violence. Indeed, the post-Civil War era was one of the most prolific for firearms regulations.[12]

During Reconstruction and thereafter, several Southern states and newly admitted Western states ratified constitutional provisions that underscored that the right to keep and bear arms was viewed as properly subject to broad state regulation, especially to preserve the peace and prevent crime. Texas's constitution, for example, provided that while the people "shall have the

---

[11] *See also* Dupuy, *The Evolution of Weapons and Warfare* 92, 286-289 (1984) (analyzing historical increases in weapon lethality and, in particular, demonstrating that firearms became more than ten times more lethal from the beginning to the end of the nineteenth century).

[12] Petitioners and their *amici* contend that gun regulations after the Civil War were inspired by an insidious racial agenda. The relationship between race and firearms regulation during Reconstruction is complex, but the history does not support Petitioners' claim. For instance, the neo-confederate Black Codes aimed to disarm Black citizens—but subsequent racially neutral laws passed by Republican-dominated state legislatures sought to restrict arms carrying to protect Black citizens from terrorist violence by organizations like the Ku Klux Klan. *See* Cornell, *The Right to Regulate*, *supra* note 9, at 67-70; *see also* Emberton, *The Limits of Incorporation: Violence, Gun Rights, and Gun Regulation in the Reconstruction South*, 17 Stan L. & Pol'y Rev. 615, 621-622 (2006); Miller, *Peruta, The Home-Bound Second Amendment, and Fractal Originalism*, 127 Harv. L. Rev. F. 238, 241-242 (2014).

right to keep and bear arms, in the lawful defense of [themselves] or the State," the "Legislature shall have power by law to regulate the wearing of arms with a view to prevent crime." Tex. Const. (1876), art. I §23.[13]

During that same time period, a number of Southern and Western states also enacted general prohibitions on publicly carrying arms absent a specific self-defense need. New Mexico enacted a statute making it "unlawful for any person to carry deadly weapons, either concealed or otherwise, on or about their persons within any of the settlements of this Territory," with only limited exceptions for carrying deadly weapons on the person's "own landed property" or "in the lawful defense of themselves, their families or their property" when "then and there threatened with danger." 1869 N.M. Laws 312, ch. 32, §1. Texas provided that "[a]ny person carrying on or about his person … any pistol, dirk, dagger, [or other dangerous weapon] … shall be guilty of a misdemeanor" "unless he has reasonable grounds for fearing an unlawful attack on his person, and that such ground of attack [is] immediate and pressing." 1871 Tex. Gen. Laws 1322, art. 6512. Texas's law, too, included only limited exceptions, allowing

---

[13] *See also, e.g.*, Tenn. Const. (1870), art. I, §26 ("[T]he citizens of this State have a right to keep and to bear arms for their common defense. But the Legislature shall have power, by law, to regulate the wearing of arms with a view to prevent crime."); Idaho Const. (1889) art. I §11 ("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."); Georgia Const. (1868), art. I §14 ("[T]he Right of the People to keep and bear Arms shall not be infringed; but the General Assembly shall have power to prescribe by Law the Manner in which Arms may be borne."); Utah Const. (1896), art. I, §6 ("[T]he people have the right to bear arms for their security and defense, but the legislature may regulate the exercise of this right by law.").

a person to "keep[] or bear[] arms on his or her own premises, or at his or her own place of business," and allowing "persons traveling in the state [to] keep[] or carry[] arms with their baggage," *id.* The penalties imposed under these laws were significant. For instance, New Mexico provided that any person violating its ban could be fined up to $50, imprisoned up to 50 days, or both. 1869 N.M. Laws 312, 313, ch. 32, §3.[14]

Municipalities throughout the country also imposed broad public-carry prohibitions. For instance, Nebraska City made it "unlawful for any person to carry, openly or concealed, any musket, rifle, shot gun, pistol … or any other dangerous or deadly weapons, within the corporate limits," with a limited exception "for mere purposes of transportation from one place to another." Nebraska City, Neb., Ordinance no. 7, §1 (1872). Nashville made it unlawful for any person to "carry[] a pistol … or other deadly weapon," and provided that police officers "refus[ing] or neglect[ing] to immediately arrest every … person seen with or known to be carrying [a] deadly weapon[]" were to be "deemed guilty of dereliction of duty." Nashville, Tenn., Ordinance ch. 108

---

[14] *See also* 1870 W. Va. Laws 702, 703, ch. 153, §8 ("If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family or property, he may be required to give a recognizance."); 1875 Wyo. Laws 352, ch. 52, §1 (making it unlawful to carry "any fire arm or other deadly weapon," "concealed or openly," "within the limits of any city, town or village"); 1889 Idaho Laws 23, §1 (making it unlawful "to carry, exhibit or flourish any … pistol, gun or other deadly weapons, within the limits or confines of any city, town or village"); 1881 Kan. Laws 79, 92, ch. 37, §23 (requiring local authorities to "prohibit and punish the carrying of firearms, or other dangerous or deadly weapons, concealed or otherwise"); 1889 Ariz. Laws 16, ch. 13, §1 (banning "any person within any settlement, town, village or city within this Territory" from "carry[ing] … any pistol").

(1873).[15] Even the "cattle towns" of the Old West—romanticized today for the prevalence of gun-toting ranchers—had similar restrictions on the public possession of firearms.[16]

In the latter half of the nineteenth century, many municipalities also began to enact licensing schemes, pursuant to which individuals had to obtain permission to carry dangerous weapons in public. Local officials were vested with discretion to determine whether individuals could establish good cause to carry deadly weapons in public. For instance, cities like Jersey City prohibited carrying dangerous weapons without a permit, which the city's Municipal Court could grant to people "from the nature of their profession, business or occupation, or from peculiar circumstances." *Ordinance in Relation to the Carrying of Dangerous Weapons* §3 (June 17, 1873) (Jersey City, N.J.).[17] More than

---

[15] *See also, e.g.*, Los Angeles, Cal., Ordinance Nos. 35-36 (1878); Salina, Kan., Ordinance No. 268, §2 (1879); La Crosse, Wis., Ordinance No. 14, 176, §15 (1880); Syracuse, N.Y., Ordinances 215, ch. 27, §7 (1890); Dallas, Tex., Ordinance (July 18, 1887); New Haven, Conn., Ordinances §192 (1890); Checotah, Okla., Ordinance No. 11, §3 (1890); Rawlins, Wyo., Ordinances, art. 7 (1893); Wichita, Kan., Ordinance no. 1641, §2 (1899); McKinney, Tex., Ordinance No. 20 (1899); San Antonio, Tex., Ordinances 183, ch. 10 (1899); *When and Where May a Man Go Armed*, S.F. Bulletin, Oct. 26, 1866, at 5.

[16] *See, e.g.*, Dykstra, *The Cattle Towns* 121 (1983) ("Discharging firearms within city limits was invariably proscribed, as was the carrying of dangerous weapons of any type, concealed or otherwise, by persons other than law enforcement officers.").

[17] *See, e.g.*, Salt Lake City, Utah, Ordinances 283, ch. 26, §14 (Feb. 14, 1888) ("Any person who shall carry … any concealed deadly weapon, without the permission of the mayor … , shall, upon conviction, be liable to a fine not exceeding fifty dollars."); Ordinance No. 169: An Ordinance Relating to Public Offenses §18

half of California's population—from small towns to large urban centers—were subject to these discretionary licensing schemes by the end of the nineteenth century. *See* Cornell, *The Right to Regulate*, *supra* note 9, at 68.

By the turn of the twentieth century, a consensus had emerged that states and localities generally had the authority to limit public carry (at least as long as they included a "good cause" exception). A review of digitally-accessible newspaper records reveals that these states and localities wielded that authority by enforcing public-carry regulations.[18] Perhaps the best ev-

---

(June 29, 1888) (Holton, Kansas) ("[T]he mayor of this city may for a good cause shown by any person engaged in any legitimate business, when he deems it necessary for the safety of such person or his business, give to such person a written permit … to carry deadly weapons for his or her defense."); Ordinance No. 29: Concerning the Carrying of Concealed Weapons §2 (Mar. 24 1880) (Nashville, Illinois) ("[T]he Mayor may issue written permits to such persons as in his judgment he may think necessary for safety and protection to carry such arms revocable at the pleasure of the Mayor."); Laws and Ordinances for the Government of the City of Wheeling, West Virginia 204, 206 (1891) (Wheeling, West Virginia) ("It shall be unlawful for any person to carry … any pistol … without a permit in writing from the mayor to do so."); Ordinance No. 265 §7 (Jan. 19, 1882) (St. Paul, Minnesota) ("The Mayor of the city of St. Paul may grant to so many and to such persons as he may think proper, licenses to carry concealed weapons; and may revoke any and all such licenses at his pleasure.").

[18] *See, e.g.*, The Scranton Tribune, (1900), Chronicling America: Historic American Newspapers, Lib. of Congress, https://chroniclingamerica.loc.gov/lccn/sn84026355/1900-05-28/ed-1/seq-8/ (criminal trial list showing two men arrested for carrying concealed weapons); The Columbian, (1903), Chronicling America: Historic American Newspapers, Lib. of Congress, https://chroniclingamerica.loc.gov/lccn/sn83032011/1903-11-19/ed-1/seq-1/ (men placed in jail for concealed carry, with bail ranging from $200-$500); The Scranton Tribune, (1896), Chronicling America: Historic American

idence of this consensus is the detailed entry on public carry in *The American and English Encyclopedia of Law*, a popular legal reference work published at the turn of the century, *see Book Review: American and English Encyclopedia of Law, Vol. 29*, Cent. L.J. 400 (1896). The *Encyclopedia* entry noted: "The statutes of some of the States have made it an offence to carry weapons concealed about the body, while others prohibit the simple carrying of weapons, whether they are concealed or not. Such statutes have been held not to conflict with the constitutional right of the people of the United States to keep and bear arms." Merrill, *The American and English Encyclopedia of Law*, vol. 3, at 408 (Edward Thompson ed., 1887). Other sources, too, reflect the understanding that the government could generally restrict public carry. For instance, John Norton Pomeroy, a leading constitutional scholar of the time, taught that constitutional rights to keep and bear arms were "certainly not violated by laws forbidding persons to carry dangerous or concealed weapons." Pomeroy, *An Introduction to the Constitutional Law of the United States: Especially Designed for Students, General and Professional*, at 152-153 (1868). John Forrest Dillon, another leading legal scholar of the era, wrote that "[e]very state has power to regulate the

---

Newspapers, Lib. of Congress, https://chroniclingamerica.loc.gov/lccn/sn84026355/1896-06-04/ed-1/seq-3/ (trial list reflecting three men arrested and held for concealed carry); The True Northerner, (1888), Chronicling America: Historic American Newspapers, Lib. of Congress, https://chroniclingamerica.loc.gov/lccn/sn85033781/1888-01-25/ed-1/seq-1/ (man serving sixty days in jail for concealed carry); The True Northerner, (1887), Chronicling America: Historic American Newspapers, Lib. of Congress, https://chroniclingamerica.loc.gov/lccn/sn85033781/1887-12-21/ed-1/seq-1/ (chronicling arraignment of man who awaited trial for concealed carry in jail because he could not afford bail).

bearing of arms in such manner as it may see fit, or to restrain it altogether." Dillon, *The Right to Keep and Bear Arms for Public and Private Defense*, 1 Cent. L.J. 259, 296 (1874).[19]

E. Twentieth Century Laws

The early twentieth century witnessed the rapid expansion of licensing schemes to regulate public carry. Such schemes generally required individuals to establish good cause to carry dangerous weapons in public. In 1906, for example, Massachusetts enacted a modernized version of its 1836 law, which prohibited a person from publicly carrying arms without a license, which could be obtained upon a showing of "good reason to fear an injury to his person or property." 1906 Mass. Acts 150, ch. 172, §1. New York and Hawaii followed suit in 1913, prohibiting carrying a firearm without a permit, which required a showing of "proper cause" and "good cause," respectively. 1913 N.Y. Laws 1627, 1629, ch. 608; 1913 Haw. Laws 25, act 22, §1.

In the 1920s, the United States Revolver Association drafted a model law to guide the legislative efforts

---

[19] During this period, even Southern courts upheld restrictions on public carry. The Texas Supreme Court, for instance, twice upheld the state's "good cause" law from constitutional attack. *English* v. *State*, 35 Tex. 473 (1871); *State* v. *Duke*, 42 Tex. 455 (1875). The court described the law as a "legitimate and highly proper regulation," *Duke*, 42 Tex. at 459, and held that it made "all necessary exceptions" for self-defense and that it would be "little short of ridiculous" for a citizen to "claim the right to carry" a pistol in "place[s] where ladies and gentlemen are congregated together," *English*, 35 Tex. at 477-479. The court also observed that Texas law was "not peculiar to our own State," and that nearly "every one of the States of this Union ha[d] a similar law upon their statute books," with many "more rigorous than the act under consideration." *Id.* at 479.

of other states (the "U.S.R.A. Model Act"). The U.S.R.A. Model Act prohibited carrying concealed weapons without a permit, the issuance of which required a showing of necessity. *See* Imlay, *The Uniform Firearms Act*, 12 A.B.A. J. 767, 768 (1926).[20]

Pennsylvania, North Dakota, South Dakota, Washington, and Alabama adopted the U.S.R.A. Model Act and required that an applicant for a concealed carry license show "good reason to fear an injury to his person or property," or another proper reason for carrying a firearm. 1931 Pa. Laws 497, 498-499, Act No. 158, §7; 1923 N.D. Acts 379, 381-382, ch. 266, §8; 1935 S.D. Sess. Laws 355, 356, ch. 208, §7; 1935 Wash. Sess. Laws 599, 600-601, ch. 172, §7; 1936 Ala. Laws 51, 52 §7; *see also* 1923 Cal. Acts 695, 698-699, ch. 339 §8. Oregon required that applicants who wished to carry a concealed pistol show proof that they were of "good moral character," and that "good cause exist[ed] for the issuance thereof." 1925 Or. Laws 468, 471, ch. 260, §8. Michigan required that an applicant for a concealed carry license show that he or she was a "suitable person to be granted [such] a license" and that there was "reasonable cause therefor." 1925 Mich. Pub. Acts 473, 473-474, No. 313, §§5-6. New Jersey authorized judges to issue concealed-carry permits if "satisfied of the sufficiency of the application," and "of the need of such person carrying concealed upon his person, a revolver, pistol, or other firearm." 1925 N.J. Laws 185, 186, ch. 64, §2.

---

[20] Gun-rights advocates of the time supported as "'sane' or 'excellent' … prohibitions on the carrying of firearms for non-sporting and non-hunting purposes, except under license and when absolutely necessary." Charles, *The Invention of the Right to 'Peaceable Carry' in Modern Second Amendment Scholarship*, 2021 U. Ill. L. Rev. Online 195, 197 (2021).

Ultimately, during the first half of the twentieth century nearly every state adopted a law that vested discretion in state and local officials to grant (or deny) good-cause licenses or permits to carry dangerous weapons in public. *See* Grossman & Lee, *May Issue Versus Shall Issue: Explaining the Pattern of Concealed-Carry Handgun Laws, 1960-2001*, 26 Contemp. Econ. Pol. 198, 200 (2008). New York's current licensing regime is consistent with this well-established tradition.

* * * * *

In sum, English and American history and tradition make clear that limitations on the public carry of dangerous weapons, including firearms, are of ancient vintage. There is also a longstanding tradition of licensing schemes, dating to the era of the Fourteenth Amendment, that vest local officials with the power to determine whether individuals have lawful purposes for carrying dangerous weapons in public. New York's law fits comfortably within the centuries-old history of restricting public carry and the longstanding tradition of discretionary licensing schemes.

CONCLUSION

If history and tradition bear on whether New York's law is constitutional, the Court should conclude that it is. The history of firearms regulations does not support the existence of a right to publicly carry dangerous weapons, especially in populated areas and especially absent a specific self-defense need. Further, there is a longstanding tradition of regulating the public carrying of firearms through permitting and licensing schemes, with which New York's regulatory regime is consistent.

Respectfully submitted,

EMMA P. SIMSON
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000

JOSHUA A. VITTOR
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 South Grand Avenue
Suite 2400
Los Angeles, CA 90071
(213) 443-5300

MARK D. SELWYN
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
2600 El Camino Real
Suite 400
Palo Alto, CA 94306
(650) 858-6000
mark.selwyn@wilmerhale.com

REBECCA E. S. PRITZKER
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
(617) 526-6804

SEPTEMBER 2021

APPENDIX

APPENDIX

Amici are the following professors of English and American history and law:

Saul Cornell – Paul and Diane Guenther Chair in American History, Fordham University

Laura F. Edwards – Class of 1921 Bicentennial Professor in the History of American Law and Liberty, Princeton University

Simon Stern – Professor of Law and English, University of Toronto

Jack Rakove – William Robertson Coe Professor of History and American Studies, Stanford University

Robert Weisberg – Edwin E. Huddleson, Jr. Professor of Law, Stanford University

Tim Harris – Munro, Goodwin, Wilkinson Professor of European History, Brown University

Paul Halliday – Julian Bishko Professor of History and Professor of Law, University of Virginia

David Konig – Emeritus Professor of Law and History, Washington University in St. Louis

Steven Pincus – Thomas E. Donnelly Professor of British History, University of Chicago

Steven Gunn –Fellow and Tutor in History and Professor of Early Modern History, Merton College, Oxford University

Tim Hitchcock – Professor of Digital History, University of Sussex

Clive Holmes – Faculty of History, Oxford University

Priya Satia – Raymond A. Spruance Professor of International History and Professor of History, Stanford University

Daniel Szechi – Emeritus Professor in Early Modern History, University of Manchester

Stephen Taylor – Professor of Early Modern British History, Durham University

Jennifer Tucker – Associate Professor of History, Wesleyan University

Jonathan Gienapp – Assistant Professor of History, Stanford University