

Nos. 25-238, 25-566

In the
Supreme Court of the United States

Cutberto Viramontes, et al.,
Petitioners,

v.

Cook County, Illinois, et al.,
Respondents,

Eddie Grant, Jr., et al.,
Petitioners,

v.

Ronnell Higgins, in his Official Capacity as
Commissioner of the Connecticut Department of
Emergency Services and Public Transportation, *et al.*,
Respondents,

On Writs of Certiorari to the United States Courts of
Appeals for the Seventh and Second Circuits

**BRIEF OF DR. ANGUS MCCLELLAN AND
ORGANIZATIONS UPHOLDING THE
SECOND AMENDMENT'S 1791 MEANING
SUPPORTING PETITIONERS**

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INTEREST OF *AMICI CURIAE*¹

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¹ Besides *amicus* and his counsel, no party or their counsel authored this brief in any way and no other party or their counsel made a monetary contribution intended to fund its preparation or submission.

Jews for the Preservation of Firearms Ownership (“JPFO”) is a 501(c) organization with more than 10,000 members and many more online supporters. Not a lobbying group, JPFO is an educational organization with a vital interest in preserving the individual right to keep and bear arms. Its educational mission turns on accurate Second Amendment histories like the one uniquely developed here.

The Citizens Committee for the Right to Keep and Bear Arms is a 501(c) organization dedicated to promoting the benefits of the right to bear arms. Founded in 1972, the Committee pursues that mission through public education and legislative advocacy on firearms rights. It has a direct stake in the Court’s fidelity to the historical “dangerous and unusual” test’s true traditions.

SUMMARY OF THE ARGUMENT

Pre-1791 Anglo-American law strictly bounded the government’s power to prohibit weapons. Those historic boundaries foreclose the bans at issue here.

The pertinent Second Amendment boundary comes from “the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’” *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). That concept’s historical meaning was fixed before 1791 and entailed three distinct legal rules. All three rules sought to prevent fear and danger among peaceable people. But only one authorized type-based prohibitions, and it does not apply here because it

reaches only arms that both (i) lack recognized lawful uses, and (ii) are characteristically favored by violent criminals. AR-15-style rifles do not fit that third rule. So the government cannot ban them by type.

Historically, Anglo-American law’s “dangerous and unusual” rule captured a settled three-part paradigm. Its three branches let the law sometimes restrict (i) when and where arms were *displayed*, (ii) how they were *used*, and (iii) what *type* of weapon was involved. The standalone “unusual” rule governed frightening displays of lawful arms. The “offensively” rule governed threatening uses of objects capable of harm. Only the “dangerous” weapons rule governed weapon type itself, permitting prohibitions on possession, sale, or manufacture.

First, pre-1791 law established when government could restrict when and where arms were *displayed*. The standalone “unusual” rule allowed restriction of frightening *displays* of otherwise lawful arms when the occasion made them out of place. Lambarde’s 1582 *Eirenarcha*, building primarily on the 1252 Assize of Arms and the Statute of Northampton, described appearing with arms and armor “not usually worne and borne” in circumstances that struck fear. Fraunce later repeated Lambarde’s formulation. And the same line of authority treated arms as lawful when carried for common defense, keeping the peace, or personal defense. The rule about when and where arms were *displayed* thus ran against alarming display at unbecoming times and places, but had nothing to say about possession of weapon types at large.

Second, pre-1791 law established when government could restrict how arms were *used*. The “offensively” rule allowed restriction of threatening manners of weapon use. Dalton’s 1618 *Countrey Justice* prohibited riding or going armed “offensively,” and his fuller treatment extended the rule to any physical object used threateningly—even a pot of scalding water. Gardiner repeated the formulation in 1692. Shaw repeated it in 1756. American manuals and statutes then carried the rule forward. The rule about how arms were *used* thus ran against certain threatening applications of an arm, but had nothing to say about the type used.

Third, pre-1791 law established when government could restrict certain *types* of weapons at large. Of the three lanes for permissible government restriction, the “dangerous” weapons rule alone supported categorical restrictions on the weapon type itself. Hawkins’s 1716 *Pleas of the Crown* supplied the synthesis later repeated by Burn, Blackstone, Dudley, and Boyd, and received in America by Parker and Wilson. Across time and jurisdictions, the tradition yields a measured constellation: Parliament put the launcegay out of the realm, Tudor law targeted short handguns causing “fear and danger” and associated with “robberies” and “horrible murders,” James VI/I banned steelets and pocket dags because they were “utterly unserviceable for ... lawful use . . . but odious, and noted Instruments of murther,” and so forth. This history yields a clear through line. The only time government could ban a particular type of weapon was when both (1) the arm had no recognized lawful

use and (2) the arm was characteristically associated with violent crime.

Neither mark applies to AR-15-style rifles like the AR-15 or the similar rifles prohibited below. Tens of millions of Americans possess them for lawful purposes that American tradition has long protected. Nor are they characteristically favored in violent crime. So under 1791’s “dangerous and unusual” rule, AR-15-style rifles stand with the longbow, musket, and handgun as safeguards of law-abiding people—not weapons government may prohibit by type. If tradition and history of “dangerous and unusual” prevails, the judgments should be reversed.

ARGUMENT

I. The “dangerous and unusual” rule arose from settled principles governing lawful and unlawful uses of arms.

The legal phrase “dangerous and unusual” cannot be understood without its history. Fundamentally, English law judged arms by purpose and context—not by their destructive capacity in the abstract. In other words, English law distinguished among arms according to immediate *purposes*, their *circumstances* of appearance, and the danger their *use* posed to peaceable people. English subjects had the right and duty to keep and bear arms allowed by law for designated purposes. American conditions expanded the lawful purposes for which people commonly possessed and used arms by right and custom. But the governing distinction remained. While government

might regulate the *misuse* or threatening *display* of lawful arms, it could outlaw only arms that had (1) no recognized lawful use and (2) a violent crime inherence.

A. English law distinguished among arms according to purposes.

1. English law did not classify weapons by lethality alone. At least five recurring purposes guided its treatment of civilian arms: common defense, domestic peace, defense of home and person, protection of game, and prevention of fear and danger. The first three often required possession of effective weapons. The Assize of Arms (1181) required arms and armor by rank “for the protection of the lord king and of his realm.”² A 1388 statute permitted servants and laborers to bear bucklers, swords, and daggers in wartime or at muster.³ A 1558 statute required arms “for the better furniture and defence of this Realme.”⁴ And laws from 1503 to 1541 required longbows suitable for common defense while regulating

² Assize of Arms (1181 A.D.), in Adams & Stephens, *Select Documents of English Constitutional History* 23 (1906), <https://perma.cc/8X7N-A2BT>.

³ 12 Rich. 2, c. 6 (1388), 2 *Statutes at Large* 302 (1762), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181839&seq=328>.

⁴ 4 & 5 Phil. & M., c. 2 (1557-58), 4 pt. 1 *Statutes of the Realme* 316 (1819), <https://babel.hathitrust.org/cgi/pt?id=pst.000017915519&seq=404>.

crossbows and short firearms.⁵ Arms made usual and common by those purposes were not categorically prohibited.

2. The same structure governed arms kept for domestic peace. The Assize of Arms (1252) required Englishmen aged fifteen to sixty to keep tiered sets of arms “to the preservation of our peace.”⁶ The Statute of Winchester (1285) required bows and arrows and “[e]very man” his “Harness for to keep the Peace after the antient assize.”⁷ That regime remained operative

⁵ 22 Edw. 4, c. 4 (1482), 3 *Statutes at Large* 460 (1762), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015024269659&seq=476>; 4 *Statutes at Large* 84 (1763), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181821&seq=116>; *id.* at 111, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181821&seq=143>; *id.* at 134, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181821&seq=166>; *id.* at 1522, <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181821&seq=193>; Proclamation No. 121 (Dec. 4, 1528), 1 *Tudor Royal Proclamations* 177 (1964), <https://perma.cc/ZL2F-RF7Z>; 4 *Statutes at Large* 281 (1763), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181821&seq=313>; 5 *Statutes at Large* 70 (1763), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039770717&seq=98>.

⁶ [Translated from Latin] Writ for Enforcing Watch and Ward and the Assize of Arms (1252 A.D.), in Stubbs, *Select Charters* 362 (1921), <https://perma.cc/ZQM7-7MCG>.

⁷ Statute of Winchester, 13 Edw. 1, stat. 2 (1285), 1 *Statutes at Large* 234 (1762), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015024269642&seq=270>.

⁸ *Id.*

into the seventeenth century,⁹ when justices could determine how the people should be “armed, weaponed, or otherwise furnished” to suppress riots.¹⁰ The law prescribed when and why those common arms should appear. It did not ban their possession.

3. English law also recognized arms suited to defense of home and person, including traveling. A 1388 statute allowed servants and laborers to carry bucklers, swords, or daggers while traveling with their masters.¹¹ Henry VIII’s 1541 statute restricted short firearms, yet allowed regulation-length handguns, demi-hakes, and hagbuts “for the defence of his person or house.”¹² Those arms remained lawful because they could serve recognized defensive purposes.

4. One branch of the “fear” and “danger” principle regulated the alarming or fear-inducing *display* of arms that were lawful in themselves: under the Assize of Arms (1252),¹³ one could not legally “go armed” in the full array of required weaponry unless having

⁹ Joyce Lee Malcolm, *The Right to Keep and Bear Arms* 1, 4, 7 (1994), <https://perma.cc/GPN2-XDYA>.

¹⁰ Michael Dalton, *The Countrey Justice* 88 (1618).

¹¹ 12 Rich. 2, c. 6, *supra* note 3.

¹² The bill for cross-bows and hand-guns (Passed 1541), 5 *The Statutes at Large* 70, 72-73 (1763), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039770717&seq=98>.

¹³ Stubbs, *supra* note 6, at 362.

been “deputed” to keep the peace; ¹⁴ the Statute of Northampton echoed that requirement via its allowance for going armed “upon a Cry made for Arms to keep the Peace.” ¹⁵ Such an array became unusual when displayed without a lawful occasion.

Another branch reached particular weapons that the sources associated with fear and danger because they served no recognized lawful purpose, and violent criminals favored them. Demonstrations of this branch lie in the texts of statutes and proclamations rather than in legal commentaries. A 1383 statute, for example, prohibited launcegayes, subject to the King’s special license.¹⁶ Part II develops the distinction. For present purposes, the central point is that English law judged arms by purpose and context, not destructive capacity in the abstract.

¹⁴ Stubbs, *supra* note 6, at 364.

¹⁵ 2 Edw. 3, c. 3 (1328), 1 *Statutes at Large* 422 (1762), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015024269642&seq=462>.

¹⁶ 7 Rich. 2, c. 8 (1383), 2 *The Statutes at Large* 270 (1762), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015065181839&seq=296>; Michael John Harbinson, *The Lancegay and Associated Weapons*, 20 *J. Medieval Mil. Hist.* 138, 157 (2022), <https://www-jstor-org.ccl.idm.oclc.org/stable/j.ctv28m3gnb.10>.

B. American law preserved those principles while expanding the lawful purposes for which arms were commonly kept and used.

1. American conditions broadened the lawful uses of arms without loosening the distinction between lawful arms and prohibitible weapons. Shoulder-fired firearms became ubiquitous for distance defense, hunting, and life on the frontier.¹⁷ The longbow largely disappeared, while the flintlock musket became the eighteenth century’s “principal firearm.”¹⁸ Americans used firearms for common defense, domestic peace, defense of home and person, hunting, pest control, and shooting competitions.¹⁹ A musket

¹⁷ Clayton Cramer, *Armed America* 204 (2007), <https://perma.cc/29GQ-UNGX>; see also 2 *An Historical, Geographical, Commercial, and Philosophical View of the American United States* 104 (London 1795), <https://perma.cc/4VMR-TQEX>; Second Amendment Found. et al. Amicus Br. 18, *N.Y. State Rifle & Pistol Ass’n v. Bruen*, No. 20-843 (U.S. 2022), <https://perma.cc/2558-M9DA>; 1 Beveridge, *The Life of John Marshall* 30 n.3 (1919), <https://perma.cc/RFX6-JW7G>; Letter of Sept. 1, 1775, in 3 Peter Force, *American Archives* 620-21.

¹⁸ Harold L. Peterson, *Arms and Armor in Colonial America, 1526-1783* 3, 11, 12, 155, 157, 159 (1956), <https://perma.cc/C4JQ-RJCG>.

¹⁹ An ACT to encourage the destroying of wolves (1788), 2 *The Laws of Maryland* 181 (HeinOnline).

carried in any of those circumstances was lawful and normal, not “unusual.”²⁰

2. The inherited public uses of arms remained firmly lawful and often mandatory. Militia laws required muskets, swords, pistols, and specified accoutrements for muster and actual service.²¹ Some communities required arms at church or other gatherings to defend against Indian attacks and slave revolts.²² Colonists also owed armed service in the *posse comitatus*, hue and cry, and watch and ward.²³ Statutes prescribed suitable weapons for those duties; Massachusetts, for example, required muskets of a minimum length.²⁴ Governing officers could determine how the people should be armed when keeping the peace.²⁵

3. American law expanded private lawful use most sharply, making firearms ordinary tools of defense,

²⁰ 2 *Historical View of the American United States* 104 (1795), <https://perma.cc/4VMR-TQEX>.

²¹ Clayton Cramer, Colonial Firearm Regulation, 16 J. on Firearms & Pub. Pol’y 1 (2004), <https://perma.cc/LMU2-SM3A>; Nicholas Johnson et al., *Firearms Law and the Second Amendment 177-91* (2022).

²² Johnson et al., *supra* note 21, at 177-91.

²³ Johnson et al., *supra* note 21, at 273.

²⁴ Johnson et al., *supra* note 21, at 178.

²⁵ David B. Kopel, *The Posse Comitatus and the Office of Sheriff*, 104 J. Crim. L. & Criminology 761, 806-07 (2015), <https://perma.cc/5DSX-AFBR>.

hunting, sport, and pest control. Proudly indeed, the right to keep arms for home and self-defense was established in America.²⁶ Hunting, unlike in England, was not confined by class.²⁷ Shooting contests were common, and firearms were widely used to control pests.²⁸ Regulation of those activities generally addressed hunting seasons,²⁹ Sundays,³⁰ methods such as firelight hunting, or trespassing while hunting³¹—not possession of particular arms.

4. Founding-era regulation targeted threatening carriage and misuse—again, not the possession of commonly possessed arm types. Colonial and

²⁶ *District of Columbia v. Heller*, 554 U.S. 570 (2008).

²⁷ An Act for the better preservation of the game, and for securing warrens not inclosed, and the several fishings of this realm (1670), 22 & 23 Car. 2, c. 25, 8 *The Statutes at Large* 380 (1763), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039741072&seq=410>.

²⁸ See P. D. Barclay, A “Curious and Grim Testimony to a Persistent Human Blindness”: Wolf Bounties in North America, 1630-1752, 5 *Ethics, Place & Environment* 25 (2002), <https://doi.org/10.1080/13668790220146429>; An ACT to encourage the killing of wolves within this government (1741), 1 *Laws of the State of Delaware* 256 (1797), https://www.google.com/books/edition/Laws_of_the_State_of_Delaware/dMpJAQAIAAJ?hl=en&gbpv=0

²⁹ 22 & 23 Car. 2, c. 25 (1670), 8 *The Statutes at Large* 380 (1763), <https://babel.hathitrust.org/cgi/pt?id=mdp.39015039741072&seq=410>.

³⁰ Cramer, *Armed America*, *supra* note 17, at 204.

³¹ See, e.g., *A Digest of the Laws of the State of Georgia* 80, 98-99, 428 (1800).

Founding-era laws did regulate threatening or contextually improper carriage to prevent fear and danger. But no colonial legislature prohibited the general possession, sale, or manufacture of a commonly possessed arm.

That history supplies the antecedent premise and post hoc confirmation of the three rules that were established as of 1791. When the Second Amendment came to be, government could sometimes regulate how lawful arms were displayed or used, but it could prohibit the arms themselves only under a distinct and narrower rule that is clearly inapplicable here.

II. By 1791, only one of the three “dangerous and unusual” rules allowed weapon-type prohibitions.

At the time of the Founding, the well-established Anglo-American tradition that was recognized in treatises, statutes, proclamations, and American law enforcement manuals distinguished three varieties of permissible regulation. It let the government sometimes restrict (i) when and where arms were *displayed*, (ii) how they were *used*, and (iii) what *type* of weapon was involved. The “unusual” rule targeted frightening *displays* of particular arms at prohibited times and places; the “offensively” rule targeted threatening carriage or *use* of any physical object that could harm someone; and the “dangerous” weapons rule alone targeted the weapon itself through prohibitions on possession, sale, or manufacture. All protected peaceable people from fear and danger. But only the third authorized government to prohibit a weapon type, and then only when the weapon served no recognized lawful purpose and violent criminals characteristically favored it. Criminal misuse of a lawful arm alone did not make the arm prohibitible.

The formulations developed in sequence. Lambarde stated the “unusual” rule in 1582; Dalton stated the “offensively” rule no later than 1618; and Hawkins’s 1716 synthesis gathered both under “dangerous and unusual” while separately identifying

“dangerous” weapons.³² The first rule regulated display, the second manner, and the third alone the weapon itself. Although Hawkins did not expressly write that types of weapons could be completely banned in the home, the principle of preventing fear and danger in public through weapons control extended to banning weapons that had no recognized lawful purpose and were commonly used by violent criminals, as statutes and proclamations confirmed.

A. The “unusual” rule regulated the frightening display of lawful arms, not possession of arms themselves.

1. Lambarde’s “unusual” rule targeted alarming appearance—not dangerous weapon types. In 1582, Lambarde—the first treatise writer in this line to refer to weapons “not usually worne”—did not mention “dangerous” weapons. He explained that an affray was an offense in public that could arise “without worde or blow given,” as when a man appeared in public “furnished with armour or weapon, which is not usually worne and borne,” because the display would “strike a feare into others,” and he tied that rule to the Statute of Northampton’s *in terrorem populi* language.³³

³² Michael Dalton, *The Countrey Justice* 30 (1618), <https://perma.cc/486H-LJJT>.

³³ William Lambarde, *Eirenarcha: or of The Office of the Justices of Peace* 134-35 (1st ed. 1582), <https://perma.cc/THM6-DFHK>. Lambarde’s writ was the *breve de minis* (writ of threats),

2. English and American authorities had the same display-based rule. Fraunce reprinted Lambarde in 1588.³⁴ Keble described a man “furnished with Armour or Weapon which is not usually worn.”³⁵ Dalton referred to arms worn more than usual or more than suited to the bearer’s degree.³⁶ Webb,³⁷ Parker,³⁸ and Clayton likewise treated appearing “unusually armed” or with “unusual weapons or attendance” as grounds for peace security.³⁹ None made dangerousness an element. The rule crossed the Atlantic in treatises and manuals as a restriction on

forerunner of the *writ of supplicavit* (peace securities); it noted “fear” but not the carrying of “unusual” arms. See William Lambarde, *Eirenarcha* 83, 132 (1582), <https://perma.cc/THM6-DFHK>; Susanne Jenks, Writs De Minis and Supplicavit: *The History of Surety of the Peace*, in *Laws, Lawyers and Texts* 253, 265 (2012), <https://perma.cc/X4GE-7SHD>.

³⁴ Abraham Fraunce, *The Lawiers Logike* 56 (1588), <https://babel.hathitrust.org/cgi/pt?id=osu.32437000376182&seq=135&q1>.

³⁵ Joseph Keble, *An Assistance to Justices of the Peace* 147 (1689), <https://perma.cc/Y9RP-Q832>.

³⁶ Michael Dalton, *The Countrey Justice* 169 (1622), <https://perma.cc/5UHC-HSPX>; Dalton, *The Countrey Justice* 281 (1746), <https://perma.cc/VK8F-W47B>.

³⁷ George Webb, *The Office and Authority of a Justice of Peace* 59 (1736), <https://perma.cc/U2W6-GPGN?>.

³⁸ James Parker, *Conductor Generalis* 137 (1749), <https://perma.cc/ZHU6-8MAQ>.

³⁹ Augustin S. Clayton, *Office and Duty of a Justice of the Peace* 60 (1824) (HeinOnline).

alarming appearance, not a catalogue of prohibited weapons.

3. The medieval statutes made lawful arms “unusual” only when displayed without lawful occasion. The Assize of Arms (1252) required citizens to possess tiered combinations of mail, helmets, swords, lances, knives, and other arms for keeping the peace, yet directed that no one “go armed” as such without special deputation.⁴⁰ The Statute of Winchester required every man to keep “Harnes” or designated weaponry for the peace.⁴¹ The Statute of Northampton barred going or riding armed except “upon a Cry made for Arms to keep the Peace,”⁴² and 7 Rich. 2 repeated the rule limiting when one could ride fully arrayed “in harness.”⁴³

Read together, these statutes made the prescribed hue-and-cry array usual when carried to keep the peace and unusual when displayed without lawful occasion. They did not prohibit its components categorically, regardless of immediate purpose or context. A sword remained lawful for self-defense while traveling, and Elizabeth’s 1579 proclamation

⁴⁰ “... nec etiam aliqui incedant armati nisi specialiter fuerint ad custodiam pacis nostrae deputati...” Stubbs, *supra* note 6, at 364.

⁴¹ Statute of Winchester, *supra* note 7.

⁴² 2 Edw. 3, c. 3, *supra* note 15.

⁴³ 7 Rich. 2, c. 8, *supra* note 16.

likewise treated harquebusses and calivers as lawful for muster, but alarming outside that setting.⁴⁴

4. American conditions made ordinary armed appearance even less “unusual” without changing the rule’s underlying paradigm. Recurring threats and the many lawful *uses* of muskets made armed appearance ordinary.⁴⁵ New Jersey’s 1686 law therefore targeted “great fear” from “unusual or unlawful” swords, pistols, and daggers while exempting military service and travelers acting in self-defense; muskets remained unrestricted.⁴⁶ Similarly, its 1783 and 1797 election laws likewise barred “weapons of war” at polling places to prevent fear, though the same common and lawful arms

⁴⁴ See Proclamation Against the Common Use of Carrying Dags, &c. (July 26, 1579), John Strype, II Part 2, *Annals of the Reformation and Establishment of Religion ... Together with an Appendix of Original Papers of State, Records, and Letters* 295 (1824), <https://archive.org/details/annalsreformati00strygoog/page/295/mode/1up>. This law allowed servants and laborers to carry while traveling with their master or on his message, and did not restrict others from carrying these weapons for self-defense while traveling. 12 Rich. 2, c. 6, *supra* note 3.

⁴⁵ See generally Cramer, *Armed America*, *supra* note 17; see also sources cited *supra* note 17.

⁴⁶ An Act against wearing Swords, &c., in *The Grants, Concessions, and Original Constitutions of the Province of New Jersey* 289-90 (Leaming & Spicer 1881), <https://perma.cc/J5HC-JPZ8>; Johnson et al., *supra* note 21, at 183.

remained usual for muster.⁴⁷ These laws regulated display in *context*, not possession at large.

B. The “offensively” rule regulated threatening conduct with any object, not a disfavored class of weapons.

1. Michael Dalton’s “offensively” rule targeted threatening manner of use, not weapon type. His 1618 *Countray Justice* was the first to state the second rule: no person “shall ride, or goe Armed offensively, before the Justices, or any other the Kings officers.” Dalton substituted “offensively” for Lambarde’s phrase “with weapons not usually borne” in his discussion of the Statute of Northampton.⁴⁸

Dalton’s later definition confirms that the substitution expanded the conduct covered without identifying a forbidden weapon type. It included, first, Lambarde’s unusual array—“harness, guns, bowes and arrowes” not usually borne by the person—and, second, any object capable of harm when carried aggressively or threateningly, even a pot of scalding water.⁴⁹ Dalton also invoked the prohibition on

⁴⁷ Act of Dec. 16, 1783, in Wilson, *Acts of the General Assembly of N.J.* 349 (1784), <https://perma.cc/399T-K237>; see also Act of Feb. 22, 1797, § XII, in Paterson, *Laws of N.J.* 231 (1800), <https://perma.cc/3NQC-NLLC>.

⁴⁸ Dalton, *supra* note 32, at 30.

⁴⁹ Michael Dalton, *The Countray Justice* 202 (1626), <https://perma.cc/L6LC-2PQQ>.

carrying “charged” pistols—another manner-based restriction.⁵⁰ The common thread was conduct suggesting an intent to breach the peace and naturally causing fear.

2. English and American authorities preserved the rule as one of threatening conduct. Gardiner⁵¹ and Shaw⁵² repeated the prohibition on going armed “offensively.” Webb,⁵³ Parker,⁵⁴ Niles,⁵⁵ Davis,⁵⁶ and colonial and state statutes through 1852 did the same.⁵⁷ Because the rule turned on manner and could

⁵⁰ Dalton, *supra* note 32, at 30.

⁵¹ Robert Gardiner, *The Compleat Constable* 18 (1692), <https://perma.cc/CBU7-2DL8>.

⁵² 1 Joseph Shaw, *The Practical Justice of Peace* 661 (1756), <https://perma.cc/8F25-UHK6>.

⁵³ Webb, *supra* note 37, at 92-93.

⁵⁴ Parker used the expression having “offensive Weapons” rather than going armed “offensively,” terms which appear to have been used interchangeably. Parker, *supra* note 38, at 457.

⁵⁵ 1 John M. Niles, *The Connecticut Civil Officer* 146 (1823), <https://babel.hathitrust.org/cgi/pt?id=uc2.ark:/13960/t23b5xf51&seq=17>.

⁵⁶ John B. Davis, *The Massachusetts Justice* 175 (1847), <https://perma.cc/S7BJ-B4DF>.

⁵⁷ “That every Justice of the Peace in the County where the Offence is committed, such as shall ride or go armed Offensively ... in Fear or Affray of Their Majesties Liege People ...” Act of Aug. 22, 1695, *Acts and Laws of the Province of the Massachusetts-Bay* 11-12 [1696]; *see also* Act of June 14, 1701, *Acts and Laws of New-Hampshire* 14, 15 (1716), <https://perma.cc/95BQ-6LP4>; 1821 Me. Laws 285, § 1 (1822); Act of 1821, *Public Statute Laws of Connecticut* 107 (1824),

reach even an ordinary object such as scalding water, it supplied no authority to prohibit a weapon type.

C. The “dangerous” weapons rule permitted categorical prohibitions only for weapons outside lawful use and associated with violent crime.

1. Hawkins supplied the synthesis but not the definition. His 1716 *Pleas of the Crown* was the first treatise in this line to use the term “dangerous and unusual weapons.” Burn,⁵⁸ Blackstone,⁵⁹ Dudley,⁶⁰ and Boyd⁶¹ repeated the formulation in England;

<https://perma.cc/4HSA-78TM>; Del. Rev. Stat. ch. 97, 333 (1852), <https://perma.cc/3CQU-ASTQ>.

⁵⁸ 1 Richard Burn, *The Justice of the Peace* 12-13 (1755), <https://perma.cc/WAD3-4T5F>.

⁵⁹ 4 Bl. Comm. 148-49 (1769), <https://perma.cc/WB23-DPQR>.

⁶⁰ 1 John Dudley, *The Law of a Justice of Peace and Parish Officer* 7 (1769), <https://perma.cc/KU4N-QX7V>.

⁶¹ 1 Robert Boyd, *The Office, Powers, and Jurisdiction, of His Majesty’s Justices of the Peace* 53 (1787), <https://perma.cc/7T2U-78JY>.

Parker,⁶² Wilson,⁶³ Hening,⁶⁴ Jacob,⁶⁵ Clayton,⁶⁶ Dunlap,⁶⁷ Davis,⁶⁸ and other writers received it in America.⁶⁹

Hawkins in this leading role wrote that an affray could arise where a man armed himself with “dangerous and unusual Weapons, in such a Manner as will naturally cause a Terror to the People”; yet “common Weapons” worn for ornament or defense, and privy coats of mail worn defensively, and weapons worn to “suppress Rioters, Rebels, or Enemies,” fell

⁶² James Parker, *Conductor Generalis* 11 (1764), <https://perma.cc/L67K-W79Z>.

⁶³ 3 Bird Wilson ed., *The Works of the Honourable James Wilson* 79 (1804), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433008827820&seq=87>.

⁶⁴ William Hening, *The New Virginia Justice* 49 (1803), <https://perma.cc/J4VC-DQHS>.

⁶⁵ 1 Giles Jacob, *The Law Dictionary* 65, 123 (1811), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433008090577&seq=73>.

⁶⁶ Clayton, *supra* note 39, at 60.

⁶⁷ John A. Dunlap, *The New-York Justice* 8 (1815), <https://perma.cc/L7BH-JEMN>.

⁶⁸ Davis, *supra* note 56, at 379.

⁶⁹ Ellis Lewis, *An Abridgment of the Criminal Law of the United States* 64 (1848), <https://perma.cc/5MYN-PZDE>; Francis Wharton, *A Treatise on the Criminal Law of the United States* 726 (1852), <https://perma.cc/BCV8-6ZTH>; 2 Joel Bishop, *Commentaries on the Criminal Law* § 121 [72] (1865), <https://perma.cc/M69B-WG4V>.

outside the statute absent circumstances “apt to terrify the people.”⁷⁰ Context indicates Hawkins was referring to public misbehavior with weapons rather than general bans on possession (“affrays” were public breaches of peace), and so applying Hawkins’s rule alone to banning particular weapons stretches its historical boundaries. Still, Hawkins acknowledged the category of “dangerous” weapons, and relevant English statutes and proclamations confirm that “dangerous” weapons serving no lawful use and generally being employed by criminals in public to cause fear and terror could face general bans on possession to prevent that public fear.

Hawkins thus preserved Lambarde’s display rule and Dalton’s focus on manner. He recognized lawful defensive uses and separately referred to “dangerous” weapons—a category capable of reaching the weapon itself. But he did not define that category.⁷¹ Nor did

⁷⁰ 1 William Hawkins, *A Treatise of the Pleas of the Crown* 135-36 (1716), <https://perma.cc/9WYD-VM5J>. The passage appeared in the same form in each of his eight editions through 1824.

⁷¹ William Lambarde, *Eirenarcha* 126 (1627), <https://perma.cc/LEJ3-HZDM>.

Coke,⁷² Dalton,⁷³ Rolle,⁷⁴ Pulton,⁷⁵ Hale,⁷⁶ Northampton, or the authorities cited in Hawkins's margins identify a forbidden weapon type.⁷⁷

Hawkins instead attributed the rule to the common law and “many Statutes.”⁷⁸ Because many early common-law texts are lost, those statutes supply the best surviving evidence of the category's content.⁷⁹

⁷² Edward Coke, 3 Inst. 160 (1680), <https://perma.cc/K6FB-VJH9>.

⁷³ Michael Dalton, *Officium Vicecomitum* 29, 73 (1700), <https://perma.cc/U4K4-FM4S>.

⁷⁴ 2 Rol. Ab. 78, <https://perma.cc/QED8-KNXV>. The cases there concern the “no bare words” rule, not the “dangerous and unusual” rule.

⁷⁵ Hawkins's “Pl 4” is to Ferdinand Pulton, not Plowden; Pulton discusses Northampton at page 4 with no mention of “dangerous” weapons. Pulton, *De Pace Regis et Regni* 4 (1623), <https://perma.cc/2GYF-K39R>.

⁷⁶ Matthew Hale, *Pleas of the Crown* 137-138 (1678), <https://babel.hathitrust.org/cgi/pt?id=mdp.35112203494002&seq=160>.

⁷⁷ Hawkins's preface lists his sources: Hale, Coke, Staundforde, Lambarde, Crompton, Pulton, and Dalton; see the margins of p. 135 for this passage's citations.

⁷⁸ “The common law of England consisted of those maxims of freedom, order, enterprise, and thrift ... from time immemorial.” Thomas M. Cooley, *Constitutional Limitations* 21 (1868).

⁷⁹ Matthew Hale, *The History of the Common Law of England* 22, 26 (1739), <https://babel.hathitrust.org/cgi/pt?id=nyp.33433008692547&seq=36>.

3. The defining statutes and related proclamations reserved prohibition for weapons that were both (1) outside lawful use and (2) associated with violent crime. Lethality, military effectiveness, or capacity for grave misuse did not by themselves put a weapon within that prohibitory power.

English law required or allowed highly effective arms for common defense, keeping the peace, and defense of home and person. It called the longbow “the surety, safeguard and continual defence of this realm.”⁸⁰ It required breastplates, chain mail, and swords to keep the peace.⁸¹ And it authorized regulation-length “hand-gun[s], demi-hake[s], or hagbut[s]” “for the defence of his person or house.”⁸² Most revealingly, the same 1541 statute called the longbow both a “safeguard” of England and “an inestimable dread and terror” to its enemies.⁸³ Lethality and military effectiveness did not make an arm “dangerous” in the relevant sense.

4. The launcegay illustrates a weapon placed outside lawful use. A 1383 statute provided that no man should ride in harness contrary to Northampton, “neither with launcegay within the realm, the which launcegaies be clearly put out within the said realm,

⁸⁰ 5 *Statutes at Large*, *supra* note 12, at 70.

⁸¹ Statute of Winchester, *supra* note 7.

⁸² 5 *Statutes at Large*, *supra* note 12, at 70, 72.

⁸³ 5 *Statutes at Large*, *supra* note 12, at 70.

as a thing prohibited by our lord the King.”⁸⁴ The launcegay was a light lance of stiff ash with a sharp, sage-leaf-shaped head. Although a military weapon, it appears in none of the cited English statutes as an arm required or allowed for common defense, keeping the peace, or personal defense. Contemporary scholarship describes its “unwholesome reputation as an instrument of lawlessness and murder” and as the preferred weapon of armed bands that rode the countryside terrorizing the population.⁸⁵ The statute therefore reached the weapon itself, not merely an unbecoming display. The exception proves the rule.

5. Tudor firearms laws in particular distinguished criminally favored weapons from lawful defensive arms. Henry VIII’s 1541 statute prohibited “little short hand-guns” after “malicious and evil disposed minds” used them for “murders, robberies, felonies, riots and routs,” while permitting longer firearms and crossbows suited to defense and wartime service.⁸⁶ For the sake of preventing the “continual fear and danger of the King’s most loving subjects,” no persons at all could “keep in his or their houses or elsewhere” under-length handguns, hagbuts, or demi-hakes. Reaffirming the 1541 statute, Elizabeth’s 1559

⁸⁴ 7 Rich. 2, c. 8, *supra* note 16.

⁸⁵ Harbinson, *supra* note 16, at 138, 157.

⁸⁶ 5 *Statutes at Large*, *supra* note 12, at 70.

proclamation applied the rule against particular handguns used for robberies and murders.⁸⁷

Elizabeth's 1579 and 1594 proclamations sharpened the same distinction. They targeted short dags and pistols associated with robbery, murder, and putting "good, quiet people ... in fear and danger of their lives." Restrictions were employed on carriage, manufacture, and sale, and such weapons were subject to seizure. Harquebusses, calivers, and other weapons suitable for common defense, by contrast, remained lawful; only their carriage outside muster or another proper setting was restricted.⁸⁸ The law distinguished unlawful weapon *types* from lawful arms displayed in an unbecoming *context*.

6. James VI/I stated both historical marks of a prohibitable weapon. His 1616 proclamation stated the rule most expressly. To prevent the land from being "polluted with blood" and to suppress duels and challenges, it condemned steelets, pocket daggers, pocket dags, and pistols as "utterly unserviceable for defence, Militarie practise, or other lawful use, but odious, and noted Instruments of murther, and

⁸⁷ Proclamation of May 17, 1559, <https://perma.cc/EXB5-WMBX>.

⁸⁸ Proclamation Against the Common Use of Carrying Dags, &c. (July 26, 1579), in John Strype, II Part 2, *Annals of the Reformation* 295 (1824), <https://perma.cc/DE2M-QJYX>; Proclamation No. 766, Enforcing Earlier Proclamation against Handguns (1594), 3 *Tudor Royal Proclamations* 141 (1969), <https://perma.cc/R7VV-ULD2>.

mischiefe.”⁸⁹ It prohibited wearing or carrying them and forbade cutlers to make or sell them.⁹⁰

Hence, the weapon itself became subject to categorical prohibition because the proclamation identified both historical marks *together*: (1) no recognized lawful use and (2) a characteristic association with violent crime. These prohibitible, fear-inducing weapons were both “dangerous” to the people and “unusual” in the sense that under no circumstances were they common, normal, or usually carried for any recognized, lawful purpose.

III. AR-15-style rifles bear neither historical mark of a weapon subject to categorical prohibition.

The resulting historical limit is exact: government could prohibit by type—regardless of immediate purpose or context—only arms that both (1) lack any recognized lawful use and (2) are characteristically favored by violent criminals. Neither condition is satisfied by AR-15-style rifles like the AR-15 or the similar rifles prohibited below.

⁸⁹ A Proclamation Against Steeleets, Pocket Daggers, Pocket Dagges and Pistols (Mar. 25, 1616), <https://perma.cc/T2NG-YZJS>.

⁹⁰ *Id.*

A. These firearms are commonly possessed and serve historically protected, lawful purposes.

AR-15-style rifles are not “unusual” in any ordinary sense. Americans possess tens of millions of AR-15s alone, and that rifle is lawful in the vast majority of States.⁹¹ That vast possession places AR-15-style rifles on the opposite side of the historical line from launciegays and pocket dags.

More important to the historical rule, AR-15-style rifles serve recognized lawful purposes. Americans possess and use them for defense of home and person, hunting, target shooting, organized competition, and pest control.⁹² Those are the modern counterparts of the purposes that made the longbow, musket, sword, and handgun lawful safeguards rather than prohibited “dangerous” weapons. Thus, while a legislature might regulate misuse or threatening display without violating the Second Amendment’s “dangerous and unusual” boundary, it may not erase

⁹¹ See *Snope v. Brown*, 145 S. Ct. 1534, 1534–35 (2025) (Kavanaugh, J., statement respecting denial of certiorari) (estimating that Americans possess 20 to 30 million AR-15s and noting that the rifles are lawful in 41 States); *id.* at 1536 (Thomas, J., dissenting from denial of certiorari).

⁹² See *Friedman v. City of Highland Park*, 577 U.S. 1039, 1042 (2015) (Thomas, J., dissenting from denial of certiorari) (identifying self-defense, hunting, and target shooting); *Snope*, 145 S. Ct. at 1534–35 (Kavanaugh, J., statement respecting denial of certiorari).

the distinction by treating an arm’s effectiveness as proof that the arm itself falls outside lawful use.

B. These firearms are not characteristically favored in violent crime.

Nor do AR-15-style rifles bear the mark of criminally favored weapons. Studies estimate that firearms labeled “assault weapons” account for well under one percent of violent crimes.⁹³ AR-15-style rifles can be misused, as can handguns, muskets, knives, and other lawful arms. But the historical rule did not permit prohibition whenever a lawful arm could be used criminally.

AR-15-style rifles therefore bear neither of the two marks that must exist to justify type-based restrictions. They are commonly possessed safeguards used for lawful purposes—not instruments outside lawful use and not identified with violent criminality. The Second Amendment’s “dangerous and unusual”

⁹³ See Pet. for Writ of Cert. at 146a, *Friedman v. City of Highland Park*, No. 15-133 (July 27, 2015) (summarizing studies as finding that less than 2% of crime guns were “assault weapons,” well under 1% were “assault rifles,” and approximately 1 in 400 violent crimes involved an “assault weapon”); Christopher S. Koper et al., *Criminal Use of Assault Weapons and High-Capacity Semiautomatic Firearms: An Updated Examination of Local and National Sources*, 95 J. Urban Health 313, 320 tbl. 1 (2018).

tradition therefore supplies no historical authority for government to prohibit these arms.

CONCLUSION

Anglo-American law's "dangerous and unusual" tradition permitted categorical bans only for weapons outside recognized lawful use and characteristically associated with violent crime. The firearms at issue here satisfy neither condition. So the judgments below should be reversed.

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