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In The Supreme Court of the United States

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, et al.,

Petitioners,

v.

THE CITY OF NEW YORK, NEW YORK, et al.,

Respondents.

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

BRIEF OF AMICUS CURIAE PATRICK J. CHARLES IN SUPPORT OF NEITHER PARTY

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INTRODUCTION AND INTEREST OF *AMICUS CURIAE*[1]

This amicus curiae brief is submitted on behalf of historian Patrick J. Charles to inform the Court about the history of the laws governing the transportation and carrying of dangerous weapons from the thirteenth century through the twentieth century, while pointing out some of the pitfalls created by faulty scholarship in this area.

Amicus curiae is the author of three books and more than twenty articles on the history of the Second Amendment, firearms and weapons laws, and the use of history as a jurisprudential tool. Amicus curiae's scholarship has been cited and relied upon by six Circuit Courts of Appeals and by this Court in *McDonald v. City of Chicago*, 561 U.S. 742 (2010). Amicus curiae currently serves as a Senior Historian for both the United States Air Force (USAF) and United States Special Operations Command (USSOCOM). The information and analysis contained herein are solely those of the amicus curiae, and not those of the USAF, USSOCOM, or the Department of Defense.

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[1] *Amicus* certifies that no counsel for a party authored this brief and that no person or entity, other than *amicus* or his counsel, has made a monetary contribution to this filing. Counsel for all parties have provided blanket consent.

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SUMMARY OF THE ARGUMENT

If this Court decides that the history of Anglo-American laws governing the transport and carrying of dangerous weapons is pertinent to its decision whether New York City's handgun transportation law violates the Second Amendment, the Court should use a contextualized understanding of those laws. This brief seeks to provide such an understanding, without offering an opinion as to how the Court should decide this case. The brief also seeks to assist the Court in identifying several unsubstantiated historical claims, some of which have already been presented in this case. The brief emphasizes that any useful historical analysis of these laws must take their context into account and must examine the sources underlying historical claims rather than accepting them at face value.

Even when presented in context, history does not always speak with one voice. No matter the legal or constitutional matter examined within any period or era, there will be a variety of opinions from well-respected scholars in the field. This applies to the history of Anglo-American laws governing the transport and carrying of dangerous weapons. But analysis of these laws in historical context yields some useful overarching conclusions. First, throughout Anglo-American history, lawmakers have enacted and the courts have upheld a wide array of regulations pertaining to how, when, and where a person may transport or carry dangerous weapons in public. Second, local and regional concerns and circumstances

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often played a significant role in determining the type of law enacted. Third, notwithstanding the wide array of regulations governing the transporting and carrying dangerous weapons, some of which were quite restrictive, Anglo-American law has generally afforded individuals some legal rights to transport or carry their personally owned firearms for certain purposes historically considered to be lawful.

ARGUMENT

I. Lessons from History and Tradition on the Law Governing the Transporting and Carrying of Dangerous Weapons

Starting in the mid-1970s, the Second Amendment became a focal point for historical debate. *See, e.g.*, Robert J. Spitzer, *Lost and Found: Researching the Second Amendment*, 76 Chi.-Kent. L. Rev. 349 (2000); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637 (1989). The debate centered on whether the Second Amendment afforded an individual civil right and, if so, exactly what individual right was protected. In the course of that debate, some scholars explored the history of weapons regulations. However, most research was focused on the individual right issue. *See, e.g.*, David Thomas Konig, *Arms and the Man: What Did the Right to "Keep" Arms Mean in the Early Republic?*, 25 Law & Hist. Rev. 177 (2007); Robert H. Churchill, *Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal*

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Context of the Second Amendment, 25 Law & Hist. Rev. 139 (2007).

It was not until after the Court's decision in *District of Columbia v. Heller*, 554 U.S. 570 (2008) that scholars began seriously examining the history of weapons regulations in detail. *See* Robert J. Spitzer, *Gun Law History in the United States and Second Amendment Rights*, 80 Law & Contemp. Probs. 55 (2017). In particular, regulations governing the transport and carrying of dangerous weapons received significant attention. *See, e.g.*, Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law: Preserving Liberty and Keeping the Peace*, 80 Law & Contemp. Probs. 11 (2017); Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Two: How We Got Here and Why It Matters*, 64 Clev. St. L. Rev. 373 (2016); David B. Kopel, *The First Century or Right to Arms Litigation*, 14 Geo. L.J. & Pub. Pol'y 127 (2016).

There is considerable scholarly debate as to what weight, if any, the history of these laws should have on Second Amendment issues regarding the transporting and carrying of dangerous weapons in public places. *Compare, e.g.*, Michael O'Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of "Bearing Arms" for Self-Defense*, 61 Am. U. L. Rev. 585 (2012) (advancing that the antebellum South's interpretation of the Second Amendment should be given considerable jurisprudential weight) *with* Eric M. Ruben & Saul Cornell, *Firearms Regionalism and Public Carry: Placing Southern*

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Antebellum Case Law in Context, 125 Yale L.J. Forum 121 (2015) (calling into question the antebellum South's interpretation on both objectivity and moral grounds). Yet what is indisputable—i.e., what the historical record unequivocally conveys—is that time, place, and manner regulations on the transporting and carrying of dangerous weapons are some of the oldest, most longstanding in our nation's history. *See generally* Charles, *Faces, Take Two*, *supra*. What is also indisputable is that laws governing the transporting and carrying of dangerous weapons have evolved to meet the changing public safety concerns of the times. *Id.* In sum, throughout Anglo-American history, societal changes and technological changes have led to changes in the laws governing the transporting and carrying of dangerous weapons. *Id.*

A. The History of the Laws Governing the Transporting and Carrying of Dangerous Weapons Until the Nineteenth Century

As early as the late thirteenth century, English laws imposed restrictions on the carrying of dangerous weapons in public places. FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I 593 (1895). This, as part of a broader nationwide legal reform in England, eventually gave rise to the 1328 Statute of Northampton, 2 Edw. 3, c. 3 (1328) (Eng.) (stipulating that no one shall bring "force in affray of peace, nor to go nor ride armed by day or night, in fairs, markets, nor in the

presence of the King's Justices, or other ministers, nor in no part elsewhere"); Anthony Verduyn, *The Politics of Law and Order During the Early Years of Edward III*, 108 Eng. Hist. Rev. 842, 850 (1993). This was followed by several royal proclamations, royal decrees, and laws restricting the carrying of dangerous weapons in public places. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 Clev. St. L. Rev. 1, 13-24 (2012) (listing and analyzing several post-1328 royal proclamations and ordinances restricting the carrying of dangerous weapons in public places).[2]

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[2] One scholar, David B. Kopel, claims that the Statute of Northampton did not mean what it said and was only aimed at prohibiting armed force against the crown. Kopel, *First Century*, *supra*, at 133-35. Not only does is this interpretation contradicted by the language of the Statute, it cannot be squared with the primary source documents of the period. *See*, *e.g.*, Membrane 27d, Jun. 28, 1337, 3 CALENDAR OF THE PATENT ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE: EDWARD III, A.D. 1334-1338, at 510 (1895) (calling for a "proclamation in the king's name, at such places in the county of Northumberland as shall be required, that no one shall go armed or lead an armed force or do anything whereby the king's peace may be disturbed, and to arrest and imprison until further order any person found opposing them after such proclamation: made because of many complaints of breaches of the statute of Northampton"); Membrane 8d, Aug. 21, 1337, 3 CALENDAR OF THE PATENT ROLLS: EDWARD III, *supra*, at 512 (mandate to the constable of the castle of Montgomery to "inhibit all persons from going or riding armed or otherwise disturbing the peace, and to imprison until further order those who disregard such inhibition"); Membrane 4d, May 4, 1338, 4 CALENDAR OF THE PATENT ROLLS PRESERVED IN THE PUBLIC RECORD OFFICE: EDWARD III, A.D. 1338-1340, at 78 (1895) ("Mandate, pursuant to the statute of Northampton, to S. bishop of Ely, to cause any persons going armed, leading an armed force, or doing anything else

The royal proclamations are of particular importance in understanding the scope of the Statute of Northampton. As Sir Edward Coke noted in the section titled "Going or riding armed," "Proclamations are of great force, [because they are] grounded upon the laws of the Realme." SIR EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND 162 (1644).

By the late seventeenth century, the same body of laws began appearing in the American colonies, and stayed on the books through the ratification of the Constitution. Cornell, *Keep and Carry*, *supra*, at 29-32. Generally speaking, as is discussed by various legal commentators up through the eighteenth century, these laws restricted the precautionary carrying of dangerous weapons in public places. *See* Charles, *Faces, Take Two*, *supra*, at 384-92. However, as Justice of the Peace manuals up through the eighteenth century show (in accord with the flexible common law

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whereby the king's peace may be broken in his liberties"); *see also* MEMORIALS OF LONDON AND LONDON LIFE IN THE 13TH, 14TH, AND 15TH CENTURIES 268-69 (Henry Thomas Riley ed., 1868) (1351 royal proclamation prohibiting persons from going armed "within the City of London, or within the suburbs, or in any other places between the said city and the Palace of Westminster" except "officers of the King, according to the form of the Statute made at Northamptone"). Kopel commits similar errors and omissions in analyzing the broader historical facets of the English laws governing the carrying of dangerous weapons in public places. *Compare* Charles, *Faces, Take Two*, *supra*, at 378-401, *and* PATRICK J. CHARLES, ARMED IN AMERICA: A HISTORY OF GUN RIGHTS FROM COLONIAL MILITIAS TO CONCEALED CARRY 114-20 (2018) (correcting amicus curiae's account on the history of *Rex v. Knight*, 90 Eng. Rep. 330 (1686)) *with* Kopel, *First Century*, *supra*, at 130-40.

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principles of the time), enforcement of this body of law—as was true of most crimes and misdemeanors—was highly discretionary. Cornell, *Keep and Carry*, *supra*, at 15-24.

B. 19th Century Variants in the United States of Laws Prohibiting Carrying Concealed Weapons.

It was not until the nineteenth century that the discretionary, common law model of enforcing crimes and misdemeanors began to develop into more concrete forms. This applied to the laws governing the transporting and carrying dangerous weapons in public places as well. Initially, two models—concealed carriage prohibitions and nineteenth-century variants of the Statute of Northampton—dominated the statute and ordinance books. Saul Cornell, *The Right to Carry Firearms Outside the Home: Separating Historical Myths from Historical Realities*, 39 Fordham Urb. L.J. 1695, 1716-25 (2012).

In America, the first model—concealed carry prohibitions—were most common in the antebellum South. These laws were enacted to quell increasing levels of violence, homicides, and dueling. Robert M. Ireland, *The Problem of Concealed Weapons in Nineteenth-Century Kentucky*, 91 Reg. Ky. Hist. Soc. 370 (1993). The second model—nineteenth-century variants of the Statute of Northampton—were most common in the Midwest and historic Northeast. In accord with the legal tenets of the Statute of Northampton, these laws prohibited carrying dangerous weapons in

public places, and were generally enforced in accordance with the common law surety process.[3] *See, e.g.*,

[3] The surety process originally developed out of Anglo-Saxon practice as a means to enforce the king's peace. David Feldman, *The King's Peace, the Royal Prerogative and Public Order: The Roots and Early Development of Binding over Powers*, 47 Cambridge L.J. 101, 111-12 (1988). In the late thirteenth and early fourteenth centuries, the Anglo-Saxon surety process was updated and codified in several statutes. *Id.* at 111-26. From the fourteenth century through the early nineteenth century, the surety process remained a staple of Anglo-American law. *See, e.g.*, 4 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES 251-56 and accompanying notes (1803); 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 248-54 (1769); 1 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN 126-33, chs. 61-62 (1716); MICHAEL DALTON, THE COUNTREY JUSTICE, CONTAINING THE PRACTICES OF THE JUSTICES OF THE PEACE OUT OF THEIR SESSIONS 379-415 (1618). One of the key functions of the surety process was preventing public affrays, assaults, and injuries. As it pertained to the precautionary carrying of dangerous weapons in public places, the surety process required individuals to first seek sureties with a constable, justice of the peace, or other official before being permitted to do so. *See, e.g.*, 1 HAWKINS, *supra*, at 158, ch. 65, § 10 (providing that "an Assembly of a Man's Friends for the Defence of his person, against those who threaten to beat him if he go to such a Market is unlawful; for he who is in Fear of such Insults, must provide for his Safety, by demanding the Surety of the Peace against the Persons by whom he is threatened, and not make use of such violent Methods, which cannot but be attended with the Danger of raising Tumults and Disorders to the Disturbance of the Publick Peace: Yet an Assembly of a Man's Friends in his own House, for the Defence of the Possession thereof, against those who threaten to make an unlawful Entry thereinto, or for the Defence of his Person against those who threaten to beat him therein, is indulged by Law; for a Man's House is looked upon as his Castle"); *see also* JOSEPH KEBLE, AN ASSISTANT TO THE JUSTICES OF THE PEACE FOR THE EASIER PERFORMANCE OF THEIR DUTY 410, 646 (2d ed. 1689); DALTON, *supra*, at 128.

REVISED STATUTES OF THE STATE OF WISCONSIN, PASSED AT THE ANNUAL SESSION OF THE LEGISLATURE COMMENCING JANUARY 13, 1858, AND APPROVED MAY 17, 1858, at 985, ch. 176, § 18 (1858); REVISED STATUTES OF THE STATE OF MAIN PASSED OCTOBER 22, 1840, at 709, ch. 169, § 16 (2d ed. 1841). What distinguished these nineteenth-century statutes from their English predecessor was that they provided exceptions that permitted carrying if the individual was able to demonstrate an "imminent" or "reasonable" fear of assault or injury to his or her person, family, or property. *See, e.g.*, ELISHA HAMMOND, A PRACTICAL TREATISE, OR AN ABRIDGEMENT OF THE LAW APPERTAINING TO THE OFFICE OF JUSTICE OF THE PEACE 184 (1841); PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK FOR THE COMMONWEALTH OF MASSACHUSETTS, AT THE OPENING OF TIMES OF THE MUNICIPAL COURT OF THE CITY OF BOSTON, ON MONDAY, DECEMBER 5TH, A.D. 1836 AND ON MONDAY, MARCH 13TH, A.D. 1837, at 27-28 (1837).

It was not long, however, before these two models evolved and adapted to meet changing public safety needs, as well as changing social, cultural, and moral norms in different jurisdictions.[4] Charles, *Faces, Take Two*, *supra*, at 414-17; Mark Anthony Frassetto, *The First Congressional Debate on Public Carry and What*

[4] Given both the volume and variety of mid to late nineteenth-century laws governing the transport and carrying of dangerous weapons, an appendix has been included to assist the Court. Amicus curiae has located nearly 200 such laws during his research, a sample of which is provided in the Appendix.

It Tells Us About Firearms Regionalism, 40 Campbell L. Rev. 335 (2018). Some jurisdictions continued to prohibit only the concealed carrying of dangerous weapons in public. *See* App., § II at ___. Some jurisdictions adopted good cause or justifiable need armed carriage licensing laws, which required individuals to apply for a discretionary local license or permit prior to carrying a dangerous weapon in public. *See* App., § I at ___. Some jurisdictions modernized and standardized the nineteenth-century variants of Northampton by replacing the discretionary, common law surety process with a statutory scheme providing for monetary fines, imprisonment or both. *See* App., § IV at ___. Meanwhile, other jurisdictions simply prohibited armed carriage in public places and assemblies altogether. *See* App., § III at ___.

In summary, by the close of the nineteenth century there was no one-size-fits-all conception of the appropriate restrictions governing the transporting and carrying of dangerous weapons. Rather, there was a wide variation among such laws in various jurisdictions, even within the same state.[5]

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[5] Patrick J. Charles, *The Second Amendment and the Basic Right to Transport Firearms for Lawful Purposes*, 13 Charleston L. Rev. 125, 150-59 (2018). This was partly due to the concept of localism becoming normalized. Joseph Blocher, *Firearm Localism*, 123 Yale L.J. 82, 116-19 (2013); General Powers of the City Council, CHARTER OF THE CITY OF DALLAS 33, 42, § 84 (1899) (recognizing the Dallas city council's authority to "regulate, control, and prohibit the carrying of firearms and other weapons within the city limits"); Title 10: Cities and Towns, REVISED STATUTES OF THE STATE OF UTAH IN FORCE JAN. 1, 1898, at 120, 130, ch. 4,

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Examining the relevant laws in force at this time shows two other things. First, state and local governments were afforded broad police powers to regulate the transport and carrying of dangerous weapons, particularly in public places. *See, e.g.*, JOEL TIFFANY, A TREATISE ON GOVERNMENT AND CONSTITUTIONAL LAW 394 (1867); JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 152-53 (1868); John Forrest Dillon, *The Right to Keep and Bear Arms for Public and Private Defence*, 1 Cent. L.J. 259, 286, 296 (1874); THOMAS M. COOLEY, A TREATISE ON THE LAW OF TORTS: OR THE WRONGS WHICH ARISE INDEPENDENT OF CONTRACT 301 (1879).

Second, notwithstanding the broad police powers afforded to state and local governments, it was generally accepted that any law had to provide an individual with some means by which to transport legally or carry dangerous weapons for certain purposes. What

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§ 51 (Richard W. Young, Grant H. Smith & William A. Lee eds., 1898) (authorizing designated city councils the power to "regulate and prohibit the carrying of concealed weapons"); 1 GENERAL STATUTES OF THE STATE OF KANSAS 421, ch. 37, § 85 (1897) (authorizing designated city councils the power to "prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise"); *id.* at 459-60, ch. 38, § 63 (same); STATUTES OF OKLAHOMA 1890, at 161, ch. 15, art. 2, § 34 (Will T. Little et al. eds., 1891) (authorizing designated city councils the power to "prohibit and punish the carrying of firearms, or other deadly weapons, concealed or otherwise"); An Act for the Government of Cities of the Third Class, May 19, 1877, LAWS OF MISSOURI, PASSED AT THE REGULAR SESSION OF THE TWENTY-NINTH GENERAL ASSEMBLY 156, 166, § 23 (1877) (authorizing designated city councils the power to "prohibit and punish the carrying of firearms and other deadly weapons, concealed or otherwise").

purposes were deemed lawful varied in different localities. Charles, *Right to Transport*, *supra*, at 150-57. However, by the close of the nineteenth century, the transporting and carrying of dangerous weapons between one's residences, between one's residence and one's place of business, as well as for purposes of repairing the weapon, selling it, or hunting or recreational shooting all qualified as lawful purposes. *Id.* at 158-59. The same generally held true for travel or sojourning,[6] or for official business that required the transport or carrying of dangerous weapons from one location to another. *See* App., § V at ___.

Regarding traveling or sojourning with dangerous weapons, not every mid-to-late nineteenth century law operated in the same manner. Charles, *Right to Transport*, *supra*, at 158-59. In some jurisdictions, determining who did or did not qualify as a traveler, sojourner, or person transporting weapons in the ordinary course of business was a matter to be decided by the courts based on the particular facts of the case. *See, e.g.*, M.W. Hopkins, *Concealed Weapons*, 8 Crim. L. Mag. & Rep. 403, 414-18 (1886). In other jurisdictions, it was defined in the law. For instance, in New Mexico, a traveler who stopped in any settlement for more than fifteen minutes was no longer a traveler exempted from the prohibition. An Act to Prohibit the Unlawful Carrying and Use of Deadly Weapons, Feb. 18, 1887, ACTS OF THE LEGISLATIVE ASSEMBLY OF THE TERRITORY

[6] "[Sojourning] means something more than 'traveling', and applies to a temporary, as contradistinguished from a permanent, residence." BLACK'S LAW DICTIONARY 1563 (Rev. 4th Ed. 1968).

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OF NEW MEXICO, TWENTY-SEVENTH SESSION 55, 58, § 9 (1887), *reprinted in* App., § III at ___. In Walla Walla, Washington, the traveler could stop for as long as five days before losing his traveler status. An Ordinance Defining Offenses and Fixing the Punishment Thereof, Aug. 16, 1878, AMENDED CITY CHARTER AND ORDINANCES OF THE CITY OF WALLA WALLA 165, 170, § 27 (1896), *reprinted in* App., § V at ___. Conversely, in several municipalities and localites, the prohibition applied immediately upon entering the respective city or town's "corporate limits." *See* App., § III at ___. Yet despite the wide variation in definitions of travelers, sojourners, or persons transporting weapons in the ordinary course of business, the fact remains that from the mid to late nineteenth century it was generally understood that the law should allow for the transport or carrying of dangerous weapons in certain circumstances.

In some jurisdictions, self-defense was included as grounds for exemption from the prohibition. *See* App., § VI at ___; *see also* Dillon, *supra*, at 286 (stating that to punish a person for carrying dangerous weapons in public when the "circumstances . . . would be to leave [their] life at the mercy of a treacherous and plotting enemy" would be "contrary to all our notions of right and justice"). However, much like the nineteenth century variants of the Statute of Northampton, in most jurisdictions the self-defense exemption applied only to those rare and extreme cases where the threat posed to one's life was imminent and pressing, as opposed to a generalized desire for protection. *See*, *e.g.*, Hopkins,

supra, at 413-14. And the person carrying the dangerous weapon almost always bore the burden of proof to show his or her conduct was lawful. *See, e.g.*, *State v. Barnett*, 11 S.E. 735 (W. Va. 1890); *State v. Livesay*, 30 Mo. App. 633 (1888); *Tipler v. State*, 57 Miss. 685 (1880); *see also* H.C. UNDERHILL, A TREATISE ON THE LAW OF CRIMINAL EVIDENCE 544 (Samuel Grant Gifford ed., 3d ed. 1898); REVISED CODE FOR THE STATUTE LAWS OF THE STATE OF MISSISSIPPI 776 (J.A.P. Campbell ed., 1880).

C. The History of the Law Governing the Transporting and Carrying of Dangerous Weapons Through the Twentieth Century

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The wide variation in regulations governing the transport and carrying of dangerous weapons across America remained the norm throughout most of the twentieth century.[7] And, as in the nineteenth century, twentieth century laws generally afforded individuals some legal means by which they could transport or

[7] Helpful summaries on the variety of laws governing the transporting and carrying of arms in the twentieth century can be found in National Rifle Association (NRA) literature. *See, e.g.*, NATIONAL RIFLE ASSOCIATION, FIREARMS AND LAWS REVIEW 91-138 (1975); J.J. Basil, *State Firearms Controls*, AMERICAN RIFLEMAN, Dec. 1964, at 32-33; *Digest of State Firearms Laws, Part I and Part II*, AMERICAN RIFLEMAN, Nov. 1936, at 26-27; *Digest of State Firearms Laws, Part III and Part IV*, AMERICAN RIFLEMAN, Jan. 1937, at 32-33. In addition to NRA literature, see HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE PROCEEDINGS OF THE FORTIETH ANNUAL MEETING 538-44 (1930) [hereinafter 1930 NCC HANDBOOK].

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carry dangerous weapons for certain defined purposes. However, beginning in the 1920s, there was a movement towards legal uniformity. This had two objectives. First, uniformity would aid federal, state, and local law enforcement in combatting interstate criminal activity. CHARLES, ARMED IN AMERICA, *supra*, at 189-93. Second, uniformity would protect sportsmen, hunters, target shooters, and law-abiding citizens from unknowingly violating the state and local laws. *Id.*

From 1922 to 1930, two model laws were presented to state lawmakers for consideration. The first was the Capper Bill, drafted by the United States Revolver Association (USRA) and first sponsored by Kansas Senator Arthur Capper. This was followed by the Uniform Firearms Act (UFA), which was initially drafted by the National Conference of Commissioners and revised largely at the behest of the USRA and National Rifle Association (NRA). *See* HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS UNIFORM STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FOURTH ANNUAL MEETING 711-42 (1924); UNIFORM FIREARMS ACT: DRAFTED BY THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS 3-14 (1930).

With respect to their provisions regulating the transport and carrying of dangerous weapons, the UFA and Capper Bill were essentially mirror images. Both model laws contained provisions requiring persons to show good cause or a justifiable need before carrying or transporting handguns in public. UNIFORM FIREARMS ACT, *supra*, at 3-4, §§ 5, 7; "United States Revolver Association Act," *reprinted in* HANDBOOK OF THE NATIONAL

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CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND THE PROCEEDINGS OF THE THIRTY-FIFTH ANNUAL MEETING 890-91, §§ 6, 8 (1925). Likewise, to combat the rapid increase in handgun related crime via the automobile, both laws contained provisions requiring persons to obtain a license to carry or transport handguns in automobiles, with the UFA distinguishing itself from the Capper Bill by extending the licensing requirement to both the concealed and open vehicular transport of handguns. UNIFORM FIREARMS ACT, *supra*, at 3, § 5; "United States Revolver Association Act," *supra*, at 890, § 6. Lastly, to accommodate the needs of law-abiding citizens wanting to use handguns for lawful purposes, both model laws included a list of exceptions. These exceptions permitted the transporting or carrying of handguns by, for example, "any person engaged in the business of manufacturing, repairing, or dealing in firearms or the agent or representative of any such person having in his possession, using, or carrying a pistol in the usual and ordinary course of such business, or to any person while carrying a pistol unloaded and in a secure wrapper from the place of purchase to his home or place of business or to a place of repair or back to his home or place of business or in moving from one place of abode or business to another."[8] UNIFORM FIREARMS ACT, *supra*, at 3, § 6; *see also*

[8] At no point did the drafters of either the UFA or the Capper Bill contemplate regulating long guns. *See* UNIFORM FIREARMS ACT, *supra*, at 10; 1930 NCC HANDBOOK, *supra*, at 531. This was intentional, for handguns were far and away the criminal's firearm of choice, followed by machine guns. *See* THE UNIFORM MACHINE GUN ACT DRAFTED BY THE NATIONAL CONFERENCE OF

"United States Revolver Association Act," *supra*, at 891, § 7 (using similar language).

From their inception, both the UFA and Capper Bill received a wide range of endorsements from lawmakers, law enforcement officials, and both proponents and opponents of firearms restrictions—resulting in what was at the time the largest nationwide overhaul of firearms legislation in United States history. CHARLES, ARMED IN AMERICA, *supra*, at 192-99. Yet despite the popularity of the UFA and Capper Bill, the drafters of both laws fell significantly short of their goal to make state and local firearms laws uniform throughout the country. In fact, by the mid-twentieth century fewer than half the states had enacted some version of either the UFA or the Capper Bill. *See Digest of State Firearms Laws, Part I and Part II*, *supra*, at 26-27; *Digest of State Firearms Laws, Part III and Part*

COMMISSIONERS (1932); National Firearms Act, 48 Stat. 1236 (1934). The fact that long guns were not contemplated by the drafters of either the UFA or Capper Bill does not mean that there were no twentieth-century laws governing their transportation or carrying. For much of the twentieth century, despite several states adopting the UFA or Capper Bill, there remained a hodgepodge of state and local laws governing the transporting and carrying of dangerous weapons. *See* footnote 6, *supra*. A nationwide attempt to regulate the transporting and carrying of long guns much in the same way as handguns did not come about until the turbulent events of the 1960s, when it became apparent that groups of people were able to carry long guns in public places without any legal repercussions. It was a problem that lawmakers quickly remedied with the assistance of the NRA. *See* Patrick J. Charles, *The Faces of the Second Amendment Outside the Home, Take Three: Critiquing the Circuit Courts' Use of History-in-Law*, 67 Clev. St. L. Rev. 227, 288-89 (2019).

IV, *supra*, at 32-33; *see also* ADAM WINKLER, GUN FIGHT: THE BATTLE OVER THE RIGHT TO BEAR ARMS IN AMERICA 208-9 (2011) (tallying 18 states by the mid-twentieth century).

Yet despite the continued variation in state and local laws governing the transporting and carrying of dangerous weapons in the mid-twentieth century, the two common themes from the nineteenth century continued to hold true: 1) state and local governments continued to be afforded broad police powers to regulate the transport and carrying of dangerous weapons in public places; and 2) the laws afforded some means by which individuals could legally transport or carry firearms for certain defined purposes. Charles, *Right to Transport*, *supra*, at 167-68. By the mid-twentieth century, a third principle was universally accepted by sportsmen, hunters, gun owners, and by the advocacy organizations that represented their interests. This third principle was that it was never acceptable for anyone to transport or carry a readily operable and loaded firearm in public, unless it was absolutely necessary, and the individual had been given express permission to do so by state or local government officials. *See* Charles, *Faces, Take Three*, *supra* at 249-52, 285-89; *see also* Patrick J. Charles, *The "Reasonable Regulation" Right to Arms: The Gun-Rights Second Amendment before the Standard Model*, A RIGHT TO BEAR ARMS?: THE CONTESTED ROLE OF HISTORY IN CONTEMPORARY DEBATES ON THE SECOND AMENDMENT (Jennifer Tucker, Barton C. Hacker, and Margaret Vining eds., 2019), 167, 174-75.

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The third principle accorded with a basic gun safety rule: never needlessly carry or transport loaded firearms. This rule was first published in 1927 as part of the New York Conservation Department's Ten Commandments of Firearms Safety. *Hunters' Decalogue Given by Game Warden*, NEWS JOURNAL (Wilmington, DE), Oct. 13, 1927, at 3 ("Never carry loaded guns in automobiles or other vehicles."). It was not long before the nation's preeminent sporting, hunting, and firearms safety organization—the NRA—acknowledged the rule and slightly modified it for its own using. In 1938, the second commandment of the NRA's gun safety rules read: "Carry only empty guns, taken down or with the action open, into your automobile, camp and home. Do not load your gun until you are actually in the field and hunting. Unload it the moment you leave." *Ten Commandments of Gun Handling—Going Hunting? Association Advises to Read Rules*, DES MOINES REGISTER, Nov. 4, 1938, at 20. Decades later, the NRA streamlined this rule: "A person should have little or no difficulty in transporting a target or hunting-type rifle or shotgun, provided that such firearm is unloaded and suitably cased or wrapped. It is suggested that the rifle or shotgun be carried in the back seat or trunk (preferably the latter) of the automobile." *Transporting Your Firearms*, AMERICAN RIFLEMAN, Jun. 1970, at 41.

These three common themes in the laws governing the transport and carrying of dangerous weapons remained largely unchallenged until the 1980s. Charles, *Faces, Take Two*, *supra*, at 466-73. It was at this

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juncture that the politics of the Second Amendment and gun rights heated up, and with it, efforts to liberalize the laws governing the transporting and carrying of dangerous weapons. *Id.*

II. Jurisprudential Uses, and Misuses, of History

History has long been used as a jurisprudential tool. In several instances, the Court looked to historical facts to conclude that provisions of the Bill of Rights are "incorporated" against the states. *See, e.g.*, *Timbs v. Indiana*, 139 S. Ct. 682, 687-89 (2019); *McDonald v. City of Chicago*, 561 U.S. 742, 767-78 (2010); *Duncan v. Louisiana*, 391 U.S. 145, 151-56 (1968). In other instances, the Court has used history to inform its decision concerning the scope of a constitutional protection. *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702, 710-21 (1997); *New York Times v. Sullivan*, 376 U.S. 254, 273-77 (1964). And in relying on the historical record, the Court has not restricted itself to any particular time or era. Although the Court has most frequently examined the historical time period when the constitutional provision, treaty, or law in issue came into existence, *see, e.g.*, *Washington State Dept. of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1016-19 (2019) (Gorsuch, J., concurring); *Harmelin v. Michigan*, 501 U.S. 957, 966-75 (1991), the Court has also, at times, relied on other, non-contemporaneous facets of history and tradition, *see, e.g.*, *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597-99 (2015); *NLRB v. Canning*, 573 U.S. 513, 522-38 (2014); *see also McIntyre v. Ohio Elections*

Comm'n, 514 U.S. 334, 371-85 (1995) (Scalia, J., dissenting) (noting that even in cases where history may be read to support one outcome, adhering to longstanding practice and tradition is the better approach).

Using history to decide constitutional questions is a matter of debate. But whatever one's views, pitfalls await those who do so.

A. The Court Should Be Attentive to Unsubstantiated Or Poorly Researched Historical Claims

As outlined in Part I, prior to *Heller*, research into the history of weapons regulations was far from robust. Only after *Heller* did this field of historical scholarship mature, and, in the process, several claims about the history of weapons regulations have been debunked. Perhaps the most significant are those claims relating to the enforcement and scope of the Statute of Northampton. For the past few decades, several scholars incorrectly claimed that the Statute of Northampton had never been enforced as it was written. *See, e.g.*, JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 104 (1994) (claiming the Statute of Northampton was never enforced; *see also* Nelson Lund, *The Second Amendment, Heller, and Originalist Jurisprudence*, 56 UCLA L. Rev. 1343, 1363-64 (2009) (relying on Malcolm's non-enforcement claim on the Statute of Northampton); Kevin C. Marshall, *Why Can't Martha Stewart Have a Gun?*, 32

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Harv. J.L. & Pub. Pol'y 695, 716-17 (2009) (same).[9] But post-*Heller*, when historians and legal scholars began carefully researching the history of weapons regulations, the evidence revealed that this view is untenable. *See* Charles, *Faces*, *supra*, at 13-24; footnote 1, *supra*.

Another prime example of historical misunderstanding involves the obscure 1686 English case *Rex v. Knight*, 90 Eng. Rep. 330 (1686), otherwise known as *Sir John Knight's Case*, 87 Eng. Rep. 75 (1686) [hereinafter *Knight's Case*]. In this case, the defendant was prosecuted for walking about the streets and entering a church carrying a gun. He was subsequently acquitted by a jury.[10] *Compare* Tim Harris, *The Right to Bear Arms in English and Irish Historical Context*, A RIGHT

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[9] Up until the late 1970s, scholars interpreted the Statute of Northampton at face value: *i.e.*, as both a prohibition against armed force and a prohibition against going about publicly armed. *See, e.g.*, Ralph J. Rohner, *The Right to Bear Arms: A Phenomenon of Constitutional History*, 16 Cath. U.L. Rev. 53, 61-62 (1966); F.J.K., *Restrictions on the Right to Bear Arms: State and Federal Firearms Legislation*, 98 U. Pa. L. Rev. 905, 905 (1950); John Brabner-Smith, *Firearm Regulation*, 1 Law & Contemp. Probs. 400, 400 (1934); Lucilius A. Emery, *The Constitutional Right to Keep and Bear Arms*, 28 Harv. L. Rev. 473, 473 (1914).

[10] Initially, relying on historian Joyce Lee Malcolm's work, amicus curiae determined that Knight was most likely acquitted under the Statute of Northampton's exception for "assisting" government officials. *See* 2 Edw. 3, c. 3 (1328) (Eng.); Charles, *Faces*, *supra*, at 30; Charles, *Faces, Take Two*, *supra*, at 395. But historian Tim Harris has shown how Knight was prosecuted under the Statute of Northampton for a later, separate instance in which government officials were not present. *See* CHARLES, ARMED IN AMERICA, *supra*, at 117-18.

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TO BEAR ARMS?, *supra*, at 23, 25-27, *with* MALCOLM, TO KEEP AND BEAR ARMS, *supra*, at 104-5.

Knight's Case was first mischaracterized in the mid-1970s, when a contingent of legal scholars, intent on debunking the collective rights interpretation of the Second Amendment, began advancing the claim that the case was a watershed moment in arms-bearing history. According to this contingent, *Knight's Case* established a common law rule that the "quiet and peaceful" carrying of dangerous weapons in public places was lawful. David I. Caplan, *Restoring the Balance: The Second Amendment Revisited*, 5 Fordham L. Rev. 31, 34 (1976); *see also* Richard E. Gardiner, *To Preserve Liberty—A Look at the Right to Keep and Bear Arms*, 10 N. Ky. L. Rev. 63, 71-72 (1982); *Robert Dowlut & Janet A. Knoop, State Constitutions and the Right to Keep and Bear Arms*, 7 Okla. City U. L. Rev. 177, 202 (1982). This group also claimed that from *Knight's Case* onward, only the carrying of dangerous weapons in a "terrifying" manner or with the "specific intent" to inflict harm upon others was unlawful,[11]

[11] The crime that these scholars are unwittingly describing is assault with a deadly weapon, which was distinct from the Statute of Northampton's general prohibition against carrying dangerous weapons in public places. The legal commentary of William Lambarde, William Hawkins, Michael Dalton, and William Blackstone supports this. *Compare* 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 120 (1768) (describing an assault as "an attempt or offer to beat another, without touching him: as if one lifts up his cane, or his fist, in a threatening manner at another") *with* 4 BLACKSTONE, *supra*, at 148-49 ("riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of

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and that this supposed limiting interpretation of the Statute of Northampton was universally understood by the founders in drafting the Second Amendment.

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the land; and is particularly prohibited by the Statute of Northampton . . . in like manner as, by the laws of Solon, every Athenian was finable who walked about the city in armour"); *compare* DALTON, *supra*, at 128 (sureties for the peace may be enforced "if any Constable shall perceive any other persons (in his presence) to be about to break the peace, either by drawing weapons, or by striking, or assaulting one another . . . he may take assistance, & carry them all before the Justice to find sureties for the peace") *with id.* (sureties of the peace may be enforced by a constable "of such as in his presence shall goe or ride Armed offensively, . . . for these are accompted to be in affray and feare of the people, and a means of the breach of the Peace"); *compare* 1 HAWKINS, *supra*, at 133-34, ch. 63, § 1 (including in the definition of assault "an Attempt, or Offer, with Force and Violence to do a corporal Hurt to another; as by striking at him with, or without, a Weapon, or presenting a Gun at him, at such a Distance to which the Gun will carry, or pointing a Pitch-fork at him, standing within the Reach of it, or by holding up one's Fist at him, or by any other such Act done in an angry threatening Manner") *with id.* at 135, ch. 63, § 4 (citing the Statute of Northampton in writing, "in some Cases there 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"); WILLIAM LAMBARDE, EIRENARCHA: OR THE OFFICE OF THE JUSTICES OF THE PEACE, IN TWO BOOKES, first book, 126 (1581) ("Yet may an Affray be without word or blow given: as if a man shall shew himself furnished with armor or weapon, which is not usually worne and borne, it will strike a feare onto others that be not armed as he[ ] is: and therefore both the Statute of Northampton . . . & the writ therupon grounded, do speake of it by the words, *effray del pais*, and *in terrorem populi*. But an Assault, as it is fetched from another fountain . . . so can it not be performed, without the offer of some hurtfull blow" and "Assault doth not alwa[ys] necessarily imply a hitting") (emphasis added); *see also* J.W. Cecil Turner, *Assault at Common Law*, 7 Cambridge L.J. 56 (1939).

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See, e.g., NICHOLAS J. JOHNSON ET AL., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS, AND POLICY 81-82 (1st ed. 2012); STEPHEN P. HALBROOK, THAT EVERY MAN BE ARMED: THE EVOLUTION OF A CONSTITUTIONAL RIGHT 49-50, 213 (1994).[12]

There are several problems with this interpretation of *Knight's Case* of which the Court should be aware, illustrating how easily history can be distorted by scholars. *See* CHARLES, ARMED IN AMERICA, *supra*, at

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[12] In recent years, a few legal scholars have attempted to buttress this claim by selectively quoting a handful of seventeenth- and eighteenth-century legal commentators. *See* Kopel, *First Century*, *supra*, at 138-40 (selectively quoting Michael Dalton, William Hawkins and William Blackstone); Eugene Volokh, *The First and Second Amendments*, 109 Colum. L. Rev. 97, 101[2] (2009) (selectively quoting William Blackstone and James Wilson). These scholars place emphasis on the language "terrify the people," 1 HAWKINS, *supra*, at 136, ch. 63, § 9, "terrifying the good people," 4 BLACKSTONE, *supra*, 148-49, or "terror among the people," 3 JAMES WILSON, THE WORKS OF THE HONORABLE JAMES WILSON, L.L.D. 79 (Bird Wilson ed., 1804). But a closer, contextual examination of the origins of this language reveals that it was the very act of carrying dangerous weapons in public places that qualified as "terrifying." *See, e.g.*, ROBERT GARDINER, THE COMPLEAT CONSTABLE 18 (1692); KEBLE, *supra*, at 147, 224, 711; RICHARD BOLTON, A JUSTICE OF THE PEACE FOR IRELAND: CONSISTING OF TWO BOOKS 18, ch. 8, § 1, 175-76, ch. 69, §§ 5, 12 (1683); DALTON, *supra*, at 129; LAMBARDE, *supra*, first book, at 134; FERDINANDO PULTON, DE PACE REGIST ET REGNI VIZ 4 (1609); Charles, *Faces, Take Two*, *supra*, at 384-90, 398-400. At that point in time, the use of "terrifying" language was mere legal boilerplate, and referenced an affray, or what was otherwise known as a public (as opposed to private) offense. *See, e.g.*, 4 BLACKSTONE, *supra*, at 145; 1 HAWKINS, *supra*, at 134-35, ch. 63, §§ 1-2; *see also* Harris, *supra*, at 24-25; Charles, *Faces, Take Three*, *supra*, at 267-69.

114-20 (addressing the problems with interpreting *Knight's Case* as enshrining a peaceful right to carry). One problem with the peaceful right to carry interpretation of *Knight's Case* is that the historical source upon which it relies—the *English Reports*—is incomplete. Until the mid-eighteenth century, the *English Reports* were only partial legal summaries, and therefore unreliable for reconstructing cases or serving as judicial precedent. In other words, prior to the mid-eighteenth century, the *English Reports* were never intended to be nor were they used as comprehensive case studies. Rather, the *English Reports* served merely to instruct legal practitioners and students on the intricacies of pleading. *See* NEIL DUXBURY, THE NATURE AND AUTHORITY OF PRECEDENT 52-56 (2008).

Another problem with the peaceful right to carry interpretation of *Knight's Case* is that it disregards the facts of the case insofar as we can reconstruct them. *See* Harris, *supra*, at 25-27; Cornell, *Keep and Carry*, *supra*, at 26-27. At no point did the defendant in the case, Sir John Knight, base his legal defense on his need to carry weapons for self-defense, nor did Knight plead before the King's Bench that he was carrying weapons peacefully.[13] Rather, Knight defended his

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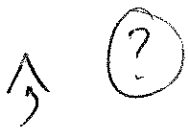
[13] One scholar, David B. Kopel, has attempted to salvage the peaceful right to carry interpretation of *Knight's Case* by selectively reframing the historical evidence. *See* Kopel, *First Century*, *supra*, at 135-36 (asserting that Knight was acquitted because he did not carry arms in a "terrifying manner"). In doing so, Kopel disregarded key portions of the historical record that expressly contradict any peaceful right to carry claim. *See* CHARLES, ARMED IN AMERICA, *supra*, at 114-21; Harris, *supra*, at 25-27. Moreover,



actions on the grounds of "active Loyalty" to the crown. 3 THE ENTRING BOOK OF ROGER MORRICE 1677-1691: REIGN OF JAMES II, at 308 (Mark Goldie et al. eds., 2007). Moreover, it is impossible to conclude that Knight was in any way exercising a common law right to peacefully carry weapons, given that Knight testified at trial that whenever he "had occasion to come to the Town [he] rode with Sword and a Gun, [but] left them at the end of Town when he came in, and took them thence when he went out . . ." *Id.* at 142. Thus, if the summary of facts of *Knight's Case* reveals anything, it is the fact that going armed in the public concourse was extraordinary. Harris, *supra*, at 27. And despite Knight's acquittal by a sympathetic jury, the King's Bench imposed a bond as surety for Knight's future good behavior. 1 NARCISSUS LUTTRELL, A BRIEF

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in Kopel's latest rendition of his claim, Kopel claims that Knight was acquitted because he was carrying arms in self-defense. *See* David B. Kopel & Joseph Greenlee, *The "Sensitive Places" Doctrine: Local Limits on the Right to Bear Arms*, 13 Charleston L. Rev. 203, 220-24 (2018). This notion is problematic for three reasons. First, Knight defended his actions on the grounds of "active Loyalty" to the crown, not self-defense. 3 THE ENTRING BOOK OF ROGER MORRICE, *supra*, at 308; *see also* Harris, *supra*, at 27 (postulating that based upon the historical evidence available Knight was likely acquitted for producing to the jury evidence of his loyalty). Second, it is impossible to state with historical certainty why exactly Knight was acquitted. CHARLES, ARMED IN AMERICA, *supra*, at 118-20. Third and lastly, there is not one piece of evidence in the historical record: that is, not a single case, legal summary, legal commentary, newspaper or journal article, or piece of correspondence, from the time *Knight's Case* was decided up through the mid-nineteenth century, that indicates Knight was acquitted on self-defense grounds. Kopel's claim is hyperbole at best, because it is not supported by the historical record.

HISTORICAL RELATION OF STATE OF AFFAIRS FROM SEPTEMBER 1678 TO APRIL 1714, at 389 (1857); 3 THE ENTRING BOOK OF ROGER MORRICE, *supra*, at 311. Going about armed, even peacefully, was not the norm.

But perhaps the most glaring problem with interpreting *Knight's Case* as enshrining a common law right to peacefully carry weapons in public places is that from 1686 to the mid-nineteenth century there is not one instance to be found—not one case, legal summary, legal commentary, newspaper or journal article, nor correspondence—where *Knight's Case* was discussed or cited for this supposed holding.[14] CHARLES, ARMED IN AMERICA, *supra*, at 114-16. Considering this fact, it is more than an enormous reach for any scholar to argue that the founders understood *Knight's Case* to enshrine a common law right to carry dangerous weapons in public places.

Knowing the historiography of the Statute of Northampton and *Knight's Case* is important for two reasons. First, it illustrates the ease by which myth can consume historical fact. For decades, based on nothing more than incomplete *English Reports* and a highly selective reading of a handful of seventeenth- and eighteenth-century legal commentators, a contingent of legal scholars convinced many in the field that their historical claim was valid, despite its lack of

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[14] The earliest that *Knight's Case* appears in American legal literature is 1843. *See State v. Huntly*, 25 N.C. 418, 421 (1843) (citing *Knight's Case* only for the non-controversial proposition that "the Statute of Northampton was made in affirmance of the common law").

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substantiation and the evidence contradicting it. Second, as can be seen by several appellate courts to have examined this history, it illustrates how unsubstantiated and poorly-researched history can influence judicial outcomes. *See Young v. Hawaii*, 896 F.3d 1044, 1064 (9th Cir. 2018), *vacated for rehearing en banc*, 915 F.3d 681 (9th Cir. 2019) (reading *Knight's Case* and ensuing legal commentary as interpreting the Statute of Northampton to prohibit only the carrying of dangerous weapons in an threatening manner, and allowing the carrying of "common (not unusual) arms for defense (not terror)"); *Wrenn v. District of Columbia*, 864 F.3d 650, 660 (D.C. Cir. 2017) (reading *Heller* as foreclosing an examination of the history of the Statute of Northampton and English law governing the carrying of dangerous weapons); *Moore v. Madigan*, 708 F.3d 933, 936-37 (7th Cir. 2012) (reading *Heller* as requiring an limited, narrow interpretation of the scope of the Statute of Northampton in the wake of *Knight's Case*).

B. Historical Hyperbole Should Not Be Conflated With Historical Fact

Since the Court decided *Heller*, more than a thousand Second Amendment challenges to statutes and regulations have been presented to the federal courts. *See* Eric Ruben & Joseph Blocher, *From Theory to Doctrine: An Empirical Analysis of the Right to Keep and Bear Arms After* Heller, 67 Duke L.J. 1433, 1458 (2018). And, in part because the Court's decision in *Heller* relied extensively on history, it is now commonplace for litigants to advance various historical arguments.

Many have engaged in historical hyperbole: taking one fact from the historical record and extending or inflating it to support the litigant's legal position based on little more than the litigant's imagination. *See generally* Mark Anthony Frassetto, *Meritless Historical Arguments in Second Amendment Litigation*, 46 Hastings Const. L.Q. 531 (2019). This includes the Petitioners, who improperly conflate historic compulsory arms-bearing statutes with a supposedly enshrined right to carry dangerous weapons in public places. Pet. Br. 20-23.

Petitioners are not the first to present this hyperbolic argument before the federal courts. *See* Frassetto, *Meritless Historical Arguments*, *supra*, at 545-48. Fortunately for the sake of historical accuracy not one circuit court has accepted it, and the only circuit court to address whether an eighteenth-century compulsory arms-bearing statute supports and extension of Second Amendment rights outside the home dismissed it as stretching the historical record past the breaking point. *Georgiacarry.org v. Georgia*, 687 F.3d 1244, 1264-65 (11th Cir. 2012).

This Court should do the same, for at least two reasons. First, a contextualized examination of the principal historical source upon which Petitioners rely—the 1792 National Militia Act—actually undercuts their argument. Pet. Br. 21-22 (citing 1 Stat. 271 (1792)). Under the 1792 National Militia Act, the state governments—not individuals or independent groups—maintained plenary authority to train and exercise the militia. *See* Patrick J. Charles, *The 1792*

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National Militia Act, the Second Amendment, and Individual Militia Rights: A Legal and Historical Perspective, 9 Geo. J.L. & Pub. Pol'y 323, 331-58, 374-90 (2011); *Presser v. Illinois*, 116 U.S. 252, 264-68 (1886). Second, if the history of compulsory arms-bearing statutes informs anything, it is that the government can enact specific time, place, and manner restrictions on arms bearing, particularly in public places. CHARLES, ARMED IN AMERICA, *supra*, at 112-13.

Petitioners also claim that because the founders approved of carrying firearms for hunting, government-sponsored militia training, and when travelling, the founders understood the Second Amendment to protect the carrying of dangerous weapons for generalized self-defense purposes in public places. *See* Pet. Br. 23 (citing *Grace v. District of Columbia*, 187 F. Supp. 3d 124, 137 (D.D.C. 2016) and 5 ST. GEORGE TUCKER, BLACKSTONE'S COMMENTARIES app. n.B (1803)). This too is historical hyperbole. *See* Frassetto, *Meritless Historical Arguments*, *supra*, at 539-45 (providing examples of litigants making similar arguments). This argument rests on historical "facts" having nothing to do with the Second Amendment or the right to bear arms. Simply because eighteenth-century persons owned, used, and sometimes carried firearms, and some of the founders remarked on those practices, it does not follow that the Second Amendment was understood to protect a broad, general right to carry dangerous weapons in public places. CHARLES, ARMED IN AMERICA, *supra*, at 113-14.

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There will no doubt be other hyperbolic historical arguments advanced by other participants in this case.[15] By properly relying on contextualized history, however, the Court will be able to identify the flaws in such arguments.

CONCLUSION

In resolving this case, should history play a role in the Court's decision, amicus curiae urges that the Court reject unsubstantiated historical claims and historical hyperbole, including the instances discussed

[15] One such argument to have gained traction in the lower courts is a narrow reading of the nineteenth-century variants of the Statute of Northampton. Despite these laws being clear on their face—prohibiting the act of carrying dangerous weapons in public places unless an individual is able to demonstrate an "imminent" or "reasonable" fear of assault or injury to his or her person, family, or property—two appellate courts, at the suggestion of litigants, have interpreted these laws as affording "robust carry rights." *Wrenn*, 864 F.3d at 661; *Young*, 896 F.3d at 1061-62. Not only does the text and structure of these laws contradict this interpretation, but there is not a single piece of historical evidence that supports it. Charles, *Faces, Take Three*, *supra*, at 272-73.

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herein, and rely only on historical analysis firmly grounded in evidence and its context.

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Respectfully submitted,

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