No. 20-843

In the Supreme Court of the United States

♦

NEW YORK STATE RIFLE & PISTOL ASSOCIATION, INC., ET AL.,

Petitioners,

v.

KEVIN P. BRUEN, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF NEW YORK STATE POLICE, ET AL.,

Respondents.

♦

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

♦

BRIEF OF *AMICUS CURIAE* MOUNTAIN STATES LEGAL FOUNDATION'S CENTER TO KEEP AND BEAR ARMS IN SUPPORT OF PETITIONERS

♦

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QUESTION PRESENTED

Whether the State's denial of petitioners' applications for concealed-carry licenses for self-defense violated the Second Amendment.

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IDENTITY AND INTEREST OF *AMICUS CURIAE*[1]

The **Center to Keep and Bear Arms ("CKBA")** is a project of **Mountain States Legal Foundation ("MSLF")**, a Colorado-based nonprofit, public interest legal foundation. MSLF was founded in 1977 to defend the Constitution, protect private property rights, and advance economic liberty. CKBA was established in 2020 to advance MSLF's litigation in protection of Americans' natural and fundamental right to self-defense. CKBA represents individuals and organizations challenging infringements on the constitutionally protected right to keep and bear arms. *See, e.g.*, *Caldara v. City of Boulder*, No. 20-416 (U.S., petition for writ of *certiorari* denied Nov. 16, 2020). MSLF's history of involvement includes filing *amicus curiae* briefs with this Court. *See, e.g.*, *McDonald v. City of Chicago*, 561 U.S. 742 (2010) (representing *amici* Rocky Mountain Gun Owners and National Association for Gun Rights); *District of Columbia v. Heller*, 554 U.S. 570 (2008) (representing MSLF). MSLF's *amici curiae* brief was cited in this Court's *McDonald* opinion. 561 U.S. 742, 777 n.27 (2010). The Court's decision here will directly impact CKBA's current clients and litigation.

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[1] The parties have consented to the filing of this brief. *See* Supreme Court Rule 37.3. Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus curiae* or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

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STATEMENT OF THE CASE

I. HISTORICAL BACKGROUND

"A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. Amend. II.

The Second Amendment owes its existence to the Founders and Framers' respect for natural rights, and their intent to preserve the rights of the individual against the expansive government they were establishing. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) ("WE hold these truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness."); 1 ANNALS OF CONG. 451 (1789) (Joseph Gales ed., 1834) (Madison: "First, That there be prefixed to the constitution a declaration, that all power is originally vested in, and consequently derived from, the people.").

The Founders and Framers drew on their knowledge of history, particularly the longstanding tradition, and even requirement, for private persons to keep and bear arms, as well as their need for the exercise of such a right in successfully fighting the American Revolution. *See* 13 Edw. 1, st. 2, c. 5 (1285) ("It is likewise commanded that every man have in his house arms for keeping the peace in accordance with

the ancient assize . . . ."); 1 W. & M., 2d sess., c. 2 (1689) ("That the subjects . . . , may have arms for their defence suitable to their conditions, and as allowed by law."); THE FEDERALIST NO. 46 (James Madison) ("It may well be doubted, whether a militia thus circumstanced could ever be conquered by such a proportion of regular troops. Those who are best acquainted with the last successful resistance of this country against the British arms, will be most inclined to deny the possibility of it.").

George Washington and James Madison, among other Framers, "firmly believed that the character and spirit of the republic rested on the freeman's possession of arms as well as his ability and willingness to defend himself and his society." Robert E. Shalhope, *The Ideological Origins of the Second Amendment*, 69 J. AM. HIST. 599, 612 (1982). The colonial experience and American Revolution strengthened the notion that an armed populace is essential to liberty. Robert J. Cottrol & Raymond T. Diamond, *The Second Amendment: Toward an Afro-Americanist Reconsideration*, 80 GEO. L.J. 309, 327 (1991).

In 2008, this Court decided the landmark case of *District of Columbia v. Heller*, 554 U.S. 570 (2008), and, soon after, *McDonald v. City of Chicago*, 561 U.S. 742 (2010). *Heller* was this Court's first in-depth analysis of the Second Amendment, the rights it protects, and how courts must examine challenges brought thereunder. *Heller*, 554 U.S. at 635 ("[S]ince this case represents the Court's first in-depth examination of the Second Amendment, one should

not expect it to clarify the entire field . . . ."). *McDonald* reinforced and expanded *Heller*, incorporating the Second Amendment against the states via the Fourteenth Amendment. *McDonald*, 561 U.S. at 791.

The *Heller* and *McDonald* Courts relied on the text of the Second Amendment, and the history and tradition of regulation of the right, to reject infringements imposed on Americans' right to keep and bear arms.

II. LEGAL BACKGROUND

New York generally prohibits individuals from carrying firearms in public—either openly or concealed. *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 85 (2d Cir. 2012) (citing N.Y. Penal Law §§ 265.01–265.04, 265.20(a)(3)). To carry a firearm in public, residents must apply for and receive a license, demonstrating that "proper cause exists for the issuance" of the license. N.Y. Penal Law § 400.00(2)(f). "Proper cause" is not statutorily defined. *Kachalsky*, 701 F.3d at 86.

New York state courts have held that "[a] generalized desire to carry a concealed weapon to protect one's person and property does not constitute 'proper cause.'" *Id.* (citation omitted). Living or working in a "high crime area" is also insufficient. *Id.* at 87 (citation omitted). Instead, the applicant must show "a special need for self-protection distinguishable from that of the general community or of persons engaged in the same profession." *Id.* at 86.

The court in *Kachalsky* upheld this licensing scheme against a constitutional challenge, finding it had not been "'clearly demonstrated' . . . that limiting handgun possession in public to those who show a special need for self-protection is inconsistent with the Second Amendment." *Id*. at 100–01.

III. FACTUAL AND PROCEDURAL BACKGROUND

Petitioners filed this lawsuit in the United States District Court for the Northern District of New York, alleging that state and local officials violated the Second Amendment in rejecting their applications for public carry licenses. Pet.App.3–4. Respondents moved to dismiss based on *Kachalsky*. Pet.App.9–10.

Petitioners maintained that *Kachalsky* was wrongly decided, citing the D.C. Circuit's decision in *Wrenn v. District of Columbia*, that invalidated a licensing scheme like New York's on the principle that "the law-abiding citizen's right to bear common arms must enable the typical citizen to carry a gun." Pet.App.11; *Wrenn v. District of Columbia*, 864 F.3d 650, 668 (D.C. Cir. 2017).

The district court granted Respondents' motion to dismiss, noting that the Second Circuit "has expressly reaffirmed its reasoning in *Kachalsky* since *Wrenn* was decided." Pet.App.4, 12 n.5.

The Second Circuit Court of Appeals affirmed the district court, citing both *Kachalsky* and its own recent reaffirmation that "New York's proper cause

requirement does not violate the Second Amendment." Pet.App.2.

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SUMMARY OF THE ARGUMENT

This case presents an opportunity to authoritatively resolve two questions placed in limbo by lower courts across the nation since the landmark *Heller* and *McDonald* decisions—whether Second Amendment protections extend outside the home and whether a government may effectively prohibit individuals from carrying a firearm in public for self-defense.

The Framers, in structuring the Second Amendment to protect the preexisting, natural right of self-defense, placed the right to *keep* arms and the right to *bear* arms on equal footing. Based on the text, as informed by historical sources, the Second Amendment was crafted to protect the individual right to bear arms upon one's person in public for the purpose of self- and community defense.

Post-ratification treatment confirms this reading. While many courts and scholars have focused on the regulation of the right to bear arms in southern states,[2] regulation of the right in certain, predominately northern, states during the Nineteenth Century demonstrates that those states, like their southern brethren, also recognized a right to bear

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[2] *See, e.g.*, Brief of *Amici Curiae* Professors of Second Amendment Law, *et al.*, at 32–36.

arms in public. This approach, often called the Massachusetts Model, allowed a court of competent jurisdiction to review a private citizen's complaint of another individual carrying arms in a manner likely to cause injury or a disturbance of the peace. If a court found for the complainant, and the defendant did not otherwise have a justifiable fear of injury or harm to himself, his family, or his property, then the court could require the defendant to post a surety before he could carry again.

These laws, which trace their origins to a common law power of the English justices of the peace and English carry regulations, demonstrate a post-ratification recognition of the right to bear arms in public—though the exercise of the right could be subject to minimal regulation for individuals who had previously broken the peace or caused fear of injury. Even then, contemporaneous evidence suggests these Surety Laws were likely rarely enforced, except perhaps to discriminate against members of minority racial groups. Based on the text, implementation, and public understanding of these Surety Laws, states following the Massachusetts Model recognized a broad right to bear arms in public.

New York, by contrast, refuses to recognize the right to bear arms in public, entirely conditioning an individual's ability to bear arms outside the home on the state's discretion—which is far more restrictive than any traditional arms regulation. New York's effective prohibition on the right to bear arms ignores the Second Amendment's text and does not follow any

analogous historical or traditional regulation of the right and is thus unconstitutional.

ARGUMENT

I. THE SECOND AMENDMENT, BY ITS TEXT, PROTECTS THE RIGHT TO BEAR ARMS IN PUBLIC

A. The Plain Language of the Second Amendment Places "Keep" and "Bear" on Equal Footing

The Second Amendment protects, at minimum, the right to keep arms and the right to bear arms. U.S. CONST. Amend. II. The text does not differentiate between the two, nor does it impose a hierarchical structure. *See Heller*, 554 U.S. at 592 ("Putting all of [the Second Amendment's] textual elements together, we find they guarantee the individual right to *possess and carry* weapons in case of confrontation.") (emphasis added); *Moore v. Madigan*, 702 F.3d 933, 936 (7th Cir. 2012) ("Confrontations are not limited to the home . . . . A right to bear arms thus implies a right to carry a loaded gun outside the home.").

Despite the plain language, some courts, including those below, have relegated the right to bear arms to a tier below that of the right to keep arms. *See, e.g.*, *Kachalsky*, 701 F.3d at 89 ("What we know from [*Heller* and *McDonald*] is that Second Amendment guarantees are at their zenith within the

home. What we do not know is the scope of that right beyond the home and the standard for determining when and how the right can be regulated by a government.") (citation omitted); *Young v. Hawaii*, 992 F.3d 765 (9th Cir. 2021) (*en banc*) (finding Hawaii's effective prohibition on the ability to carry arms outside the home "within the state's legitimate police powers and not within the scope of the right protected by the Second Amendment").

If the Framers and Ratifiers of the Bill of Rights had intended such a hierarchy, they would have worded the Second Amendment differently. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824) ("[T]he enlightened patriots who framed our constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they have said.").

B. The Original Public Meaning of the Right to Bear Arms Confirms the Right Extends Outside the Home

In *Heller*, while examining the right to keep arms in the home, this Court analyzed the text of the Second Amendment, including its protection of the right to bear arms, through a historically informed lens.

"In interpreting [the Second Amendment's] text, we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary . . . meaning.'" *Heller*, 554 U.S. at

576 (quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931)). "At the time of the founding, as now, to 'bear' meant to 'carry.'" *Id.* at 584.

The *Heller* Court looked to leading historical dictionaries to analyze the word "bear." Samuel Johnson defined "bear" as "To carry as a mark of distinction . . . . So we say, to bear arms in a coat." Samuel Johnson, 1 DICTIONARY OF THE ENGLISH LANGUAGE 161 (4th ed. 1773). Similarly, Noah Webster defined "bear" as "To wear; to bear as a mark of authority or distinction; as, to bear a sword, a badge, a name; to bear arms in a coat." Noah Webster, 1 AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1828) (unpaginated). Further, in the definition of *pistol*, Webster explained that "Small pistols are carried in the pocket." *Id.*

Heller also treated "bear" as distinct from "keep." To "keep" arms means "to 'have weapons.'" 554 U.S. at 582. To "bear" arms means to "wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

These definitions signify a right to carry arms in public, not simply to possess arms in the home. *See Moore*, 702 F.3d at 936 ("To speak of 'bearing' arms within one's home would at all times have been an awkward usage.").

Moreover, Justice Alito, in his concurrence in *Caetano v. Massachusetts* described Ms. Caetano's drawing a stun gun in a public place, against her violent ex-boyfriend, as an exercise of the Second Amendment's "basic right" of "individual self-defense." 136 S. Ct. 1027, 1028–29 (2016) (Alito, J., concurring) (citing *Heller*, 554 U.S. at 599, 628 and quoting *McDonald*, 561 U.S. at 767).

That the public bearing of arms is protected was made particularly clear in the infamous *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857). There, one of Chief Justice Taney's stated reasons for unjustly holding that Freedmen were not citizens was that, if they were citizens, they would have the right to "keep and carry arms wherever they went." *Dred Scott*, 60 U.S. at 417.

Based on the text of the Second Amendment, the plain, contemporaneous meaning of "bear," and this Court's treatment of the right, protecting the right to bear arms in public is a logical and natural reading of the Amendment. Next, this Court commonly turns to traditional regulation to confirm the original public meaning of the text.

II. TRADITIONAL REGULATION OF THE RIGHT TO BEAR ARMS—SURETY LAWS AND THE MASSACHUSETTS MODEL

Tradition is relevant to this Court's inquiry insofar as post-enactment treatment of the right can help elucidate the public's understanding of the original meaning of the text and the rights protected.

See Heller, 554 U.S. at 605 ("That sort of inquiry is a critical tool of constitutional interpretation.").

Traditional regulation of the right to bear arms—that is regulation during the Nineteenth Century—is commonly divided into two "approaches": the Southern Approach and the Massachusetts Model. *See generally* Robert Leider, *Constitutional Liquidation, Surety Laws, and the Right to Bear Arms* ("Leider, *Surety Laws*"), at 2–3 (George Mason University Legal Studies Research Paper Series No. LS 21-06, 2021), https://ssrn.com/abstract=3697761.[3]

The Southern Approach has received great attention from scholars and courts alike. *See, e.g.*, *Bliss v. Commonwealth*, 12 Ky. (2 Litt.) 90 (1822) (overturning a state prohibition on carrying concealed weapons as unconstitutional under the state constitution); David Kopel, *The Second Amendment and the Nineteenth Century* ("Kopel, *The Second Amendment*"), 1998 BYU L. REV. 1359 (1998) (collecting and analyzing firearms regulations, opinions, and other sources from the Nineteenth Century south). The Southern Approach can be characterized by southern states' general prohibition of the concealed carriage of certain weapons, but the lack of regulation surrounding the open carriage of

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[3] While Professor Leider's paper begins with a presentation of his theory of Constitutional Liquidation, that theory is not relevant to this Court's inquiry. This Court has made clear that traditional regulation is relevant in elucidating the original meaning of the text of the Constitution, not in defining the rights protected or the powers granted therein. Professor Leider's paper is cited specifically for the extensive research conducted into original sources surrounding the Massachusetts Model.

arms. Kopel, *The Second Amendment*, at 1415–16. In other words, individuals were free to exercise their right to bear arms in public, just openly.

The Massachusetts Model, by contrast, is the name given to the approach to regulating the public carriage of arms begun in the Nineteenth Century by Massachusetts, and eventually adopted by seven other states and Washington, D.C. Leider, *Surety Laws*, at 2. These are also known as the Surety Laws, as the common thread in the statutes is the provision of a specific remedy for violating the statute—a surety. Under the statutes, only once a complaint had been filed and had been found reasonable by a court of competent jurisdiction could a restriction be placed on the carriage of arms—and even then, that restriction amounted to nothing more than a surety to keep the peace.

A thorough analysis of the Massachusetts Model shows that the states with Surety Laws, like their southern brethren, recognized that the Second Amendment protects a right to carry arms in public, subject to limited regulation.

A. The Text of the Surety Laws Imposes a Minimal, Individualized, Post-Offense Restriction on Public Carry

The Massachusetts Model earned its name because the approach began with Massachusetts' revision of its public carry regulation in 1836 to read:

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

Of proceedings to prevent the commission of crimes, c. 134, § 16, 1836 MASS. ACTS 750. The states that followed Massachusetts' lead adopted this statute nearly verbatim.[4]

The statute can be broken down into four elements: (1) the regulated activity, (2) an affirmative defense, (3) a standing requirement, and (4) a remedy.

The regulated activity is "go[ing] armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence" in a way that

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[4] An Act to Prevent the Commission of Crimes, § 16 (Wis. 1839); Of proceedings for prevention of crimes, c. 169, § 16, 1840 ME. LAWS 709; Of proceedings to prevent the commission of crimes, c. 162, § 16, 1846 MICH. COMP. LAWS 692; Of proceedings to prevent the commission of crimes, c. 112, § 18, 1851 MINN. LAWS 528; Proceedings to prevent commission of crimes, § 17 (Or. 1853); Proceedings to detect the commission of crimes, § 6 (1861), *reprinted in* A DIGEST OF THE LAWS OF PENNSYLVANIA 248, 250 (John Purdon comp., 1862).

gives "reasonable cause to fear an injury, or breach of the peace . . . ." *Id.*

The statute includes an affirmative defense. If an individual engaged in the regulated activity, his action was considered justified—and thus fell outside the statute's remedy—if he had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property." *Id.* Even if the individual carried arms in a manner that reasonably caused fear to the public, he was provided a statutory defense to the surety requirement so long as he justifiably feared assault, injury, or violence to himself, his family, or his property. *See* NICHOLAS J. JOHNSON, *ET AL.*, FIREARMS LAW AND THE SECOND AMENDMENT 380 (2d ed. 2018) ("[T]here was no bond required if the defendant had reasonable cause to fear injury. After all, the peace had already been broken by whoever was endangering the defendant.").

To limit the application of the statute, the states also included a standing requirement. The statute requires the person lodging complaint with another individual's manner of carriage to have "reasonable cause to fear an injury, or breach of the peace." *Id.*[5] This standing requirement prevented individuals from pursuing complaints against persons who

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[5] Of note, Virginia, which substantively followed the Massachusetts Model, did not have this standing requirement in its statute. Of proceedings to prevent the commission of crimes, c. 14, § 16, 1847 VA. ACTS 129. That omission, however, does not alter the underlying character of the statute, as the regulated activity, the affirmative defense, and the remedy—characterized as a surety to keep the peace—remain the same. At most, it was easier to invoke a court's jurisdiction in Virginia.

peacefully carried arms. *See* JOHNSON, FIREARMS LAW, at 380 ("The Massachusetts system augmented government enforcement of law by allowing private citizens to bring cases against gun carriers whose conduct was unreasonable.").

Most importantly, the statute provided the state with a very limited remedy—a surety to keep the peace. *Id.* "[S]ureties were a means to *prevent* crimes, not to enforce violations of the criminal law." Leider, *Surety Laws*, at 13 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES *252 (explaining that a surety to keep the peace serves as a "caution . . . intended merely for prevention, without any crime actually committed by the party, but arising only from probable suspicion that some crime is intended or likely to happen; and consequently it is not meant as any degree of punishment, unless perhaps for a man's imprudence in giving just ground of apprehension")). While a surety may have been out of reach for some,[6] it is not a prohibition. *See* JOHNSON, FIREARMS LAW, at 380 ("If the private plaintiff could prove that the defendant's action did in fact create 'reasonable cause to fear an injury, or breach of the peace,' then the gun carrier could continue to carry only if he posted a bond for good behavior.").

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[6] It is unclear if the surety requirement would be constitutional today, given our rejection of governments' ability to condition the exercise of fundamental rights on affluence. *See, e.g.*, *Harper v. Virginia State Bd. Of Elections*, 383 U.S. 663, 666 (1966) ("We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard."). That question, however, need not be addressed here.

"The Massachusetts Model left Massachusetts (and the other states that adopted it) with no coercive criminal statute actually forbidding individuals from going armed." Leider, *Surety Laws*, at 13. The Surety Laws imposed minimal, post-offence regulation on specific individuals' ability to bear arms in public, but otherwise left individuals free to carry arms—supporting the plain meaning of the Second Amendment to protect the right to bear arms in public.

B. The Historical Background of the Massachusetts Model Evidences a Longstanding Protection of Peaceable Carry

The Massachusetts Model draws inspiration from the English common law, which allowed a justice of the peace to require a surety to:

> [B]ind all those to keep the peace . . . who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people; . . . and all such persons, as, having been before bound to the peace, have broken it and forfeited their recognizances.

4 WILLIAM BLACKSTONE, COMMENTARIES *254–55 (citation omitted). The surety required by English justices of the peace was simply a guarantor on a bond, which was secured for a specified term of years,

or life. 4 WILLIAM BLACKSTONE, COMMENTARIES *249–50 ("THIS security consists in being bound, with one or more sureties, in a recognizance or obligation to the king, . . . [and] if it be for the good behavior, then on condition that he shall demean and behave himself well, (or be of good behavior) either generally or specially, for the time therein limited, as for one or more years, or for life.").

Along with the common law surety power, the Massachusetts Model drew some inspiration from the now-famous Statute of Northampton: "[N]o man great nor small, . . . [shall] be so hardy to come before the King's justices, or other of the King's ministers doing their office, with force and arms, nor bring no force in affray of the peace . . . ." 2 Edw. 3, c. 3 (1328).

Based on its text and the weight of historical evidence, the Statute of Northampton's prohibition on bringing "force in affray of the peace" did not prohibit the peaceable bearing of arms in public. Two English common law opinions clarify this understanding.

In *Chune v. Piott*, the first reported case to analyze the Statute of Northampton, an English court held that "without all question, the sheriffe hath power to commit . . . , if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis* . . . ." 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis in original).

Later, in 1685, Sir John Knight was accused of "going armed, to the terror of the public" and was charged under the Statute of Northampton and the

common law crime of causing an "affray." *Rex v. Sir John Knight*, 87 Eng. Rep. 75, 75–76 (K.B. 1685). The court acquitted him of this charge, holding: "[T]he meaning of the statute of 2 Edw. 3, c. 3, was to punish people who *go armed to terrify the King's subjects*. It is likewise a great offence at the common law, as if the King were not able or willing to protect his subjects; and therefore this Act is but an affirmance of that law." *Id.* at 76 (emphasis added).[7]

The character of preventing public carriage to the terror of the public was embraced by colonial Massachusetts. Prior to the 1836 surety law, the Massachusetts Bay Colony enacted a hybrid between the Statute of Northampton and the English common law surety power in 1692:

> [E]very justice of the peace, . . . may cause to be stayed and arrested all affrayers, rioters, disturbers or breakers of the peace and such as shall ride, or go armed offensively before any of their majesties' justices, . . . or elsewhere, by night or by day, in fear or affray of their majesties' liege people, and . . . shall commit the offender to prison until he find sureties for the peace and good behaviour, and seize and take away his armour or weapons . . . .

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[7] For more analysis of the Statute of Northampton and its effect on the colonies, *see* Brief for Petitioners, at 5–6, 30–31; Brief of *Amici Curiae* Professors of Second Amendment Law, *et al.*, at 9–13, 24–25.

An Act for the Punishing of Criminal Offenders c. 11, § 6 (1692), *reprinted in* CHARTERS AND GENERAL LAWS OF THE COLONY AND PROVINCE OF MASSACHUSETTS BAY 239–40 (1814). This statute was re-adopted by Massachusetts, after independence, which replaced the King with the Commonwealth. 1795 MASS. ACTS 436. Much like the English common law and the Statute of Northampton, these early Massachusetts laws did not prohibit peaceable carriage. But prior to 1836, Massachusetts' statutes allowed an individual to be jailed for carrying arms to the terror of the public until he could "find sureties for the peace and good behavior," and have his arms seized.

The requirement of ill intent or of terror to the public was retained by the Massachusetts Model, but the remedies of jailing and seizure were abandoned. Embracing the character of protecting peaceable carriage while regulating carriage to the terror of the public, the Surety Laws regulated carriage that the state had direct evidence would cause injury or a disturbance of the peace by the limited remedy of requiring a surety to keep the peace.

C. Nineteenth Century Application and Treatment of Surety Laws

Recent scholarship analyzing early treatment of Surety Laws by states following the Massachusetts Model reinforces the conclusion that these states recognized the right to carry arms in public, while maintaining the ability to minimally regulate that right if it was exercised in a manner that breached the peace.

i. Subsequent Legislation Confirms the Right to Peaceful Public Carry

After enacting and amending its Surety Law, Massachusetts, and the other states with Surety Laws, enacted subsequent legislation suggesting they embraced a broad right to public carriage.

Massachusetts is the clearest example of this. In 1850, Massachusetts passed a criminal penalty for individuals arrested while "armed with any dangerous weapon, of the kind, usually called slung shot . . . ." An Act in relation to the carrying of Slung Shot, c. 194, § 1, 1850 MASS. ACTS 401.

In 1859, Massachusetts expanded this penalty to include "metallic knuckles, billies or any other weapons of a like dangerous character . . . ." An Act in relation to the carrying of dangerous weapons, c. 199, 1859 MASS. ACTS 357. The 1859 Act "became the principal way in which Massachusetts punished some people for carrying concealed weapons." Leider, *Surety Laws*, at 13 (citing *About Concealed Weapons*, BOSTON DAILY GLOBE, June 9, 1898, at 4).

Massachusetts did not amend its 1836 surety law to include "slung shot," "metallic knuckles, billies or any other weapons of a like dangerous character," within the already open-ended statutory list. *See* 1836 MASS. ACTS. 750 ("[S]hall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon . . . ."). Massachusetts also did not

impose a surety requirement in the 1850 or 1859 laws. In other words, if slung shot, metallic knuckles, or billies were carried in a manner that caused injury or a breach of the peace, without justification, Massachusetts could require the individual to provide a surety, even if they were not otherwise arrested. But if slung shot, metallic knuckles, or billies were carried peaceably, without a predicate offence for arrest, the individual was free from punishment.

It was not until 1893 that Massachusetts enacted any form of prohibition on the public carriage of firearms, and even then, the statute only prohibited individuals from "associat[ing] themselves together at any time as a company or organization, for drill or parade with firearms . . . ." An Act concerning the volunteer militia, c. 367, § 124, 1893 MASS. ACTS 1049.

This limitation on armed bodies of individuals parading in the state constitutes the first *actual prohibition* on the ability of individuals to bear arms in public. Before 1893, individuals could not be arrested in Massachusetts for merely carrying arms, even in association with others. At most, individuals who breached the peace, without fear for their own well-being, could be required to provide a surety, or individuals who were otherwise arrested could be fined for carrying certain weapons.

Later, during the late-Nineteenth and early-Twentieth Centuries, every single state that followed the Massachusetts Model passed a criminal statute prohibiting the concealed carriage of arms—but not one prohibited the open carriage of firearms for lawful

purposes. Leider, *Surety Laws*, at 19 ("Proceeding chronologically, Virginia restricted the carrying of concealed weapons in 1838, Pennsylvania in 1850, the City of Washington in 1858, Wisconsin in 1872, Delaware in 1881, Oregon in 1885, Michigan in 1887, Maine in 1917, and Minnesota in 1917.") (primary citations in footnote).[8] Massachusetts itself prohibited the concealed carriage of a weapon without a license in 1906. An Act to regulate by license the carrying of concealed weapons, c. 211, § 2, 1906 MASS. ACTS 172.

The Massachusetts Model reflects a common perspective among those that adopted it—a recognition of the right to bear arms in public. At no point during the Nineteenth Century did any of the Massachusetts Model adopters broadly prohibit the possession of arms in public. They required sureties from individuals who breached the peace and all eventually banned concealed carriage—Massachusetts even passed criminal fines for

[8] 1838 Gen. Assembly, c. 101 (Va.); Act of May 13, 1850 (Penn.) (regionally); Act of Mar. 18, 1875, § 1, Pub. L. 88 (Penn.) (statewide); Act of Nov. 18, 1868 (D.C.); WIS. LAWS OF 1872, c. 7, § 1; An Act Providing for the Punishment of Persons Carrying Concealed Deadly Weapons, c. 548, 1881 LAWS OF DELAWARE 987; An Act to Prevent Persons from Carrying Concealed Weapons, 1885 OR. LAWS 33; Act 29, Sept. 28, 1887 (Mich.); An Act to Prohibit the Carrying of Dangerous or Deadly Weapons without a License, c. 217, 1917 ME. LAWS 216 (prohibiting either the threatening display or the concealed carrying of weapons without a license); An Act Relating to the Manufacture, Sale, and Possession of Dangerous Weapons, c. 243, 1917 MINN. LAWS 354 (prohibiting carrying a weapon with unlawful intent, and making it "presumptive evidence" of unlawful intent that the weapon was carried concealed).

possessing some weapons when otherwise arrested and prohibited groups from parading with arms—but no state ever eradicated the right to bear arms in public. An individual, in 1899 Massachusetts, who bore an arm openly, without breaching the peace, would not be guilty of a single crime.

ii. The Rare, but Discriminatory, Enforcement of Surety Laws

During the Nineteenth Century, there is little evidence of actual enforcement of the Surety Laws by state courts. What evidence there is shows instances of discriminatory enforcement against African American Freedmen, a general knowledge of the lack of enforcement, and a broad recognition of the right to bear arms.

In engaging in a review of contemporaneous newspaper records within the eight states with Surety Laws and Washington, D.C., Professor Leider's research unveils only three apparent prosecutions under the Surety Laws—one in Massachusetts and two in Washington D.C. Leider, *Surety Laws*, at 15–18 (reviewing arrest records and databases of local newspapers, the Library of Congress, and *Newspapers.com*).

In the first, Boston police arrested Isaac and Charles Snowden, two African American men, on April 5, 1851. *Id.* at 16 (citing *Arrests for Carrying Concealed Weapons* ("*Arrests*"), THE LIBERATOR, Apr. 11, 1851, at 59). Both were charged with "'*going armed offensively, to the terror of the people*,' against

the statute." *Arrests*, at 59. Charles' case was continued, but there is no indication of the ultimate disposition; Isaac's case proceeded to judgment. *Id.*

According to court documents, Isaac possessed a concealed "pistol loaded with powder and shot and a butcher knife, to the great terror of the people of [Massachusetts], against the peace of [Massachusetts], and the form of the statute." *James Messer v. Isaac Snowden*, Judgment, Police Court No. 1443 (Mass. Apr. 5, 1851) (on file with counsel). In its coverage of the case, the Liberator noted:

> The watchmen testified that the only reason for their arrest was being seen walking up and down before the chained Court House at [about one o'clock]; that they neither spoke to, threatened, nor struck anyone; that there was nothing about them suspicious, but their presence in the street at that hour; and that they submitted to a detention and search quietly, like good citizens.

Arrests, at 59. Further, "Capt. J. P. Bradley, of the New England Guard" allowed on cross-examination "'that he could not describe [their behavior] otherwise than as being free and independent,' and that such manners would not displease him in his own soldiers!" *Id.*

And yet, the justice of the peace ruled against Isaac and ordered him "to give bonds in five hundred dollars to keep the peace." *The Case of the Snowdens*, THE DAILY REPUBLIC, Apr. 10, 1851, at 3.

The Liberator was incensed that "walking peacefully, up and down the street, with [weapons] in your pocket, which you neither use nor threaten to use, show nor allude to, and the existence of which is not even suspected till a policeman takes them from your pocket, is going '*armed offensively, to the terror of the people*,' against the statute." *Arrests*, at 59. The newspaper suggested discriminatory motives:

> As the judge had discoursed long, and much to his own satisfaction, on the equal justice he was going to render, irrespective of color, he was warmly congratulated by the counsel on his success in this particular, having, on Friday, fixed the bail of Fletcher Webster, with a salary of $5000 a year, son of Daniel, and surrounded with wealthy friends, charged with striking and knocking a watchman down, at $200; and now fixing the bail of a colored man, without a wealthy friend or dollar in the world, allowed to have acted like a good and peaceful citizen, at three times that amount—$600!

Id.

And yet, "[o]n appeal, the Commonwealth abandoned the prosecution." Leider, *Surety Laws*, at 16 (citing Record, *Commonwealth v. Snowden*, No. 1663 (1857)) (on file with counsel). The prosecution noted: "And now said Snowden having behaved quietly & peaceably, & the *object of the prosecution being satisfied by the preservation of the peace*, I will

no further prosecute said Snowden on this appeal & complaint." *Id.* (emphasis added).

In both Washington D.C., cases, the defendants were also African American men. *Id.* at 17. In the first, two African American men were arrested "for having loaded pistols with them at a fair." THE EVENING STAR, Nov. 26, 1856, at 3. According to the newspaper, "[t]he weapons were confiscated, and this morning the men were ordered to give security to keep the peace and pay the costs." *Id.* There is no indication that the men were prohibited from carrying arms in the future, only to provide a surety to ensure they kept the peace.

In the second, an African American man, Lucas Dabney, was arrested for "carrying a loaded revolver." THE EVENING STAR, Dec. 5, 1887, at 5. "He admitted having the weapon in his hand, and thought he had not violated the law, because it was not concealed." *Id.* Dabney was arrested at "about 1 o'clock" in the morning while "walking along 13th street *carrying the weapon in his hand*," and when approached "stepped into the street." *Id.* (emphasis added). Dabney stated he carried the weapon at that late hour out of fear of "night doctors." *Id.* According to the newspaper, the judge stated: "Young man, this matter of night doctors is nothing but idle superstition. You had better leave your weapons at home hereafter. This time, if the attorney is willing, I will take your personal bonds." *Id.* The attorney agreed, noting "these people who are afraid of 'night doctors' are dangerous persons to carry pistols, but in this case he had no objection to the

course proposed," and the judge took Dabney's bond. *Id.*

Given the only three cases that have been uncovered enforcing these Surety Laws in all of the states with those laws were against African American men, and only one appears to have suggested a subsequent prohibition on carriage after conviction (although a judge's suggestion is not an order), it is highly likely that a plain reading of the Surety Laws is accurate—these states did nothing more than convey the power to request a surety when someone carried to the breach of the peace. Even then, historical sources seem to suggest questionable enforcement of the law on a discriminatory basis in these jurisdictions.

Furthermore, nearly as much can be learned from courts omitting any reference to the Surety Laws as can be learned from analysis of the laws themselves. In 1896, the Massachusetts Supreme Judicial Court "resolved an appeal from a person who deliberately violated the [1893] prohibition against parading with firearms to test whether the law was constitutional." Leider, *Surety Laws*, at 13–14 (citations omitted). The court held: "The right to keep and bear arms for the common defense does not include the right to associate together as a military organization, or to drill and parade with arms in cities and towns, unless authorized so to do by law." *Commonwealth v. Murphy*, 44 N.E. 138, 138 (Mass. 1896). In its analysis, the court did not mention the 1836 surety law. If that law had operated as a general prohibition on the public carriage of arms, it would

have been relevant in a case in which "[t]he defendant is complained of for belonging to and parading with a certain unauthorized body of men with arms . . . ." *Id.* at 138; *see* Leider, *Surety Laws*, at 14 ("If the state had generally prohibited public carry in [1836] (and if that were thought constitutional), then it would have followed a fortiori that the state could ban public carry in a parade. Yet, in a case involving public carry, the Supreme Judicial Court did not cite Massachusetts' alleged 60-year history of banning the practice.").

There does not appear to be a single judicial opinion that provides evidence that the Surety Laws provided the state with anything more than the remedy of a surety to keep the peace in scenarios where specific individuals carried arms in a manner that was to the terror of the public. *See* Leider, *Surety Laws*, at 15 (those who argue the Surety Laws broadly prohibited public carriage "do not offer a single example of the surety laws being used to restrain peaceful public carry. And they provide no recorded decisions analyzing the constitutional validity of using surety laws in such circumstances.").

iii. The Public Understanding of the Right to Bear Arms in Surety Law Jurisdictions

Finally, while day-to-day accounts from the latter half of the Nineteenth Century are rare, the evidence signals that the public understood they had a right to bear arms in public in a peaceable manner.

First, the Boston Globe featured a regular column written by Percy A. Bridgham, a member of the Suffolk County bar, who answered legal questions posed by readers. Leider, *Surety Laws*, at 14 (citation omitted). In one instance, a reader asked if the 1859 criminal penalty made it unlawful to carry a concealed weapon. BOSTON DAILY GLOBE, Jan. 18, 1889, at 4. Bridgham responded that "[t]he above does not prohibit anyone from carrying weapons with which to defend themselves." *Id.*

In an 1891 column, he claimed that an "inquiry at the office of the clerk for the Municipal Court reveals the fact that there has not been a single complaint before the court for the past year under [the surety statute or the crime of being armed while arrested.]" Leider, *Surety Laws*, at 16 (quoting *Dangerous Weapons*, BOSTON DAILY GLOBE, Sept. 27, 1891, at 20).

Bridgham also published a book with a collection of responses to legal questions. PERCY A. BRIDGHAM, LEGAL QUESTIONS ANSWERED BY THE PEOPLE'S LAWYER OF THE BOSTON DAILY GLOBE (1891). In his book, Bridgham specifically noted that "[t]here is no statute in this State which expressly forbids the carrying of weapons, but there is a statute that provides that a person so carrying may be required to give bonds to keep the peace." *Id.* at 129. Later, Bridgham again notes "[t]here is no penalty in this State for carrying concealed weapons, except in cases where they are found on a person who is attempting to commit another crime." *Id.* at 170.

A few years prior, in 1895, a different Boston newspaper, the Boston Daily Advertiser, stated:

> Massachusetts has no specific law against carrying concealed weapons . . . . The ordinary citizen who has not otherwise offended against the law is able to arm himself without fear of police interference, so long as he does not attempt to violate the law against the procession of armed organizations.

BOSTON DAILY ADVERTISER, July 13, 1895, at 4. While the Advertiser references the 1893 parading prohibition and the 1859 criminal penalty, it recognizes a broad right to carry arms, even concealed, in public.

Massachusetts is not the only Surety Law state to evidence this. In 1873, the Detroit Free Press published "a similar account of [Michigan's] analogue of the Massachusetts law." Leider, *Surety Laws*, at 14 n.125. The Detroit Free Press stated, "in this state there is no statute whatever against the carrying of concealed weapons." *Concealed Weapons*, DETROIT FREE PRESS, Feb. 26, 1873, at 2. But the newspaper went further, specifically providing:

> So far as it assumes to interfere with the rights of citizens to bear arms openly, it is in direct conflict with the Constitution of the United States and of the State; and as it makes no distinction between the open and secret carrying of weapons, there can be

> little question of its utter invalidity for any purpose whatever.

Id.

And in Pennsylvania, enforcement coverage of its concealed carry ban reveals "people were acquitted and discharged when they carried weapons openly." Leider, *Surety Laws*, at 19 n.159 (citing THE EVENING JOURNAL, Dec. 15, 1899, at 2 ("His deadly weapon was not concealed and the law does not prohibit lunatics from carrying unconcealed weapons.")).

The Massachusetts Model can be characterized as several states' minimal regulation of the right to bear arms in public to maintain the peace when confronted with individuals that were complained of and found to be disruptive to that peace. The text of the statute, with its affirmative defenses and standing requirements, provided the state with a single remedy—a surety capable of forfeit if the individual did not maintain good behavior. The statute is a descendant of the common law power of English justices of the peace to require sureties to keep the peace and the King's attempt to prevent carriage of arms "to the terror of the public." The courts, lawyers, newspapers, and people working with Surety Laws shared this belief through the Nineteenth Century, never explicitly recognizing (and indeed sometimes explicitly denying) a broad prohibition on public carriage. The Massachusetts Model confirms what the text and history of the Second Amendment, and the precedents of the Southern Approach, establish—the Second Amendment protects a broad (although

not unfettered) right to possess arms in public for the purpose of self-defense.

* * *

New York broadly prohibits the carriage of arms in public. The only exception to this prohibition for ordinary citizens who wish to protect themselves in public is to receive a license issued by the state. That license, which Petitioners demonstrate is nearly impossible to receive, is subject to the whims of public officials. Pet. Br. at 13–22. New York's law eradicates the right to bear arms in public except for a privileged few. But the text, history, and tradition of the Second Amendment's protections—including the Massachusetts Model—make clear the opposite should be true. Public carriage for the purpose of self-defense should be the rule, not the exception. One exception to that rule could be to ensure that individuals who have a demonstrable history of causing injury or disturbing the peace be subject to regulation to compel their compliance. If New York broadly recognized the right of individuals to carry arms in public but required those who injured others or brandished their firearms to provide assurance for a period for good behavior, New York's regulation could be constitutional. But that is not what New York does. Instead, New York's broad prohibition on public carriage violates the text, history, and tradition of the Second Amendment and is thus unconstitutional.

CONCLUSION

For the foregoing reasons, this Court should resolve the Question Presented in the affirmative and overturn the Second Circuit's opinion.

Respectfully submitted,

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