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 AMICI CURIAE SECOND AMENDMENT FOUNDATION, BUCKEYE FIREARMS FOUNDATION, CONNECTICUT CITIZENS DEFENSE LEAGUE, FLORIDA CARRY, GRASS ROOTS NORTH CAROLINA, ILLINOIS STATE RIFLE ASS'N, LOUISIANA SHOOTING ASS'N, MARYLAND SHALL ISSUE, MINNESOTA GUN OWNERS CAUCUS, NEW JERSEY SECOND AMENDMENT SOCIETY, SPORTSMEN'S ASS'N FOR FIREARMS EDUCATION, TENNESSEE FIREARMS ASS'N, AND VIRGINIA CITIZENS DEFENSE LEAGUE IN SUPPORT OF PETITIONERS AND REVERSAL

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July 20, 2021

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INTEREST OF AMICI CURIAE[1]

The Second Amendment Foundation, Inc., ("SAF") is a non-profit membership organization with over 700,000 members and supporters, in every State of the Union. Its purposes include education, research, publishing, and legal action focusing on the Constitutional right to keep and bear arms. SAF has an intense interest in this case because it has many members residing in States like New York that enforce "proper-cause"-type licensing regimes that effectively ban them from carrying firearms for self-defense outside the home.

SAF is joined in this brief by Buckeye Firearms Foundation, Connecticut Citizens Defense League, Florida Carry, Grass Roots North Carolina, Illinois State Rifle Association, Louisiana Shooting Association, Maryland Shall Issue, Minnesota Gun Owners Caucus, New Jersey Second Amendment Society, Sportsmen's Association for Firearms Education, Tennessee Firearms Association, and Virginia Citizens Defense League. Each of these non-profit associations, like SAF, is organized for the purpose of defending the

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[1] Pursuant to SUP. CT. R. 37.3(a), amici certify that all parties have consented to the filing of this brief. Pursuant to SUP. CT. R. 37.6, amici certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than amici or their counsel made such a monetary contribution.

constitutional right to keep and bear arms, and each is also deeply interested in the outcome of this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *District of Columbia v. Heller*, this Court held that the Second Amendment guarantees "the individual right to possess and carry weapons in case of confrontation," and that the test for determining whether a governmental restriction falls afoul of that right is to measure the restriction against the Second Amendment's text as understood by "ordinary citizens in the founding generation," as well as Founding-Era history bearing on "the public understanding" of the "pre-existing right" the Amendment was adopted to protect. 554 U.S. 570, 577, 592, 605 (2008) (emphases omitted). The plain text of the Second Amendment addresses with perfect clarity the question whether the government may effectively ban ordinary, law-abiding adults from carrying firearms outside the home, by protecting the right to "bear" arms *in addition to* the right to "keep" them. U.S. CONST. amend. II. And American history answers this question just as unequivocally as the text itself.

From Independence through the end of the Civil War, no State imposed a broad ban prohibiting the carrying of firearms in any manner—with the exception of two nineteenth-century laws in Georgia and Tennessee that were *partially struck down* as *inconsistent with the right to bear arms*. By the time of the Second Amendment's ratification, ten States do not

appear to have enacted statutory restrictions on the public carrying of firearms by law-abiding citizens *at all*—and the remaining three merely imposed Americanized versions of the English Statute of Northampton, which (as in England) were understood to restrict only the carrying of firearms for a malicious purpose or in a particularly terrorizing manner. While some have attempted to read these statutes as a general ban on carrying firearms in public, the text of these statutes and the historical record conclusively refute that revisionist interpretation. Indeed, the many Founders—including the first six Presidents—who routinely carried arms outside the home would surely have been surprised to learn that doing so made them all habitual criminals.

Throughout the eighteenth and nineteenth centuries, Americans continued to routinely carry arms for lawful purposes. Beginning in 1836, a number of States began enacting laws requiring some individuals to post a bond or "surety" before carrying arms—but these applied only upon a complaint that the individual posed a reasonable threat to public safety, only after the individual had an opportunity to present evidence in his defense, and only after a judge concluded the threat to public safety was a real one. Even for this limited subset of the population, these individuals were still allowed to carry firearms provided they posted a bond. These laws *did not* broadly ban public carry. In fact, their enactment confirms that the Northampton-style prohibition—in place in many of the same States that later imposed a surety

requirement—plainly cannot have been understood as a general ban on carrying arms. For under that interpretation, the effect of enacting a surety-type law in these States would have been to allow *only those reasonably accused of posing a threat to public safety* to carry arms.

The other type of restriction that began to emerge in the early-nineteenth century—restrictions on carrying arms in a *concealed* manner, which was then considered by some to be particularly dishonorable—left people free to carry firearms *openly* (and were only upheld as constitutional because they did). In *every* State, ordinary, law-abiding citizens retained the unfettered right to carry arms for lawful purposes in at least some appropriate manner.

The record from every relevant period of American history thus could not be more clear: while the government may bar people from carrying firearms for *unlawful and violent* purposes, and may impose regulations on the mode of carrying (open vs. concealed), it *may not* enforce a law "which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence." *State v. Reid*, 1 Ala. 612, 616 (1840).

ARGUMENT

I. The right to carry firearms was widely enjoyed and protected in Founding-Era America.

The Founding-Era history of the Second Amendment—from the decade or so before the Declaration of Independence, through the ratification of the Bill of Rights in 1791, and up to the Founding generation's gradual exit from the public scene by roughly the end of the first quarter of the nineteenth century—confirms that it protects the right to bear arms outside the home.[2] Early American colonists—and, later, citizens—enjoyed, in the main, an unfettered right to carry firearms for self-defense and other lawful purposes. Apart from race-based limitations, discussed below, only four of the Colonies appear to have enacted statutory restrictions on carrying firearms: New Jersey, Virginia, Massachusetts, and New Hampshire. *See* STEPHEN P. HALBROOK, THE RIGHT TO BEAR ARMS 123 (2021). And of these, only New Jersey enforced a restriction—temporarily, and in just part of

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[2] While this case involves the application of the Second Amendment to State restrictions via the Fourteenth Amendment, the relevant period for determining the original meaning of the right to keep and bear arms is the Founding, given this Court's settled rule "that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government." *Ramos v. Louisiana*, 590 U.S. ___, 140 S. Ct. 1390, 1397 (2020).

the Colony—that even arguably touched upon the right of law-abiding citizens to carry arms peacefully.

In 1686, East New Jersey enacted a law providing that no person "shall presume privately to wear any pocket pistol, skeines, stilettoes, daggers or dirks, or other unusual or unlawful weapons," and that "no planter shall ride or go armed with sword, pistol or dagger" except certain officials and "strangers, travelling upon their lawful occasions through this Province, behaving themselves peaceably."[3] The law did not apply in West New Jersey (which was then governed separately). HALBROOK, *supra*, at 128-29. On its face, the first prohibition only limited concealed carry; and given that limitation, the second prohibition against riding armed was presumably understood—consistently with the contemporaneous understanding of the similarly-worded Statute of Northampton discussed below—as barring only carrying for offensive, malicious purposes (else, it would have rendered the first clause's limit on concealed carriage redundant). *See also id.* at 129 (noting contemporaneous East New Jersey law instructing constables to arrest those who "ride or go arm'd offensively, or shall make or commit any riot, affray, or other breach of the King's peace"). The 1686 East New Jersey law was no longer in force by the time of the American Revolution, and may not have even survived into the 18th century. *Id.* at 130-31.

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[3] 1686 N.J. 289, 289-90, ch. 9.

The only other two colonies that enacted statutes restricting public carry explicitly specified that they merely limited carrying arms in a way that disturbed the peace. Massachusetts in 1694 provided for the arrest of "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 other Their Officers or Ministers doing their Office or elsewhere."[4] In 1699, New Hampshire enacted a similar prohibition.[5]

These statutes contained language patterned after the English Statute of Northampton, which provided, *inter alia*, that "no Man great nor small" shall "go nor ride armed by night nor by day, in Fairs, Markets, nor in the presence of the Justices or other Ministers, nor in no part elsewhere."[6] Some have asserted that Northampton imposed "a broad prohibition on the public carrying of arms." Patrick J. Charles, *The Faces of the Second Amendment Outside the Home*, 60 CLEV. ST. L. REV. 1, 8 (2012). But in reality, the law was conclusively understood—at least by the end of the seventeenth century—as only regulating the right to carry firearms in a narrow and peripheral way, if it had any continuing vitality at all. As Chief Justice Holt of the King's Bench explained in the influential *Sir John Knight's Case*, Northampton was merely

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[4] 1694 Mass. Laws 12, no. 6. Massachusetts enacted a revised version of the statute in 1795. 1795 Mass. Laws 436, ch 2.

[5] 1699 N.H. Laws 1.

[6] 2 Edw. 3, 258, c. 3 (1328).

declaratory of the common-law rule against "go[ing] armed to terrify the King's subjects." 87 Eng. Rep. 75, 76 (K.B. 1686). "[T]ho' this statute be almost gone into desuetudinem," Lord Holt added, "yet where the crime shall appear to be malo animo"—that is, with a specific, evil intent—"it will come within the Act (tho' now there be a general connivance to gentlemen to ride armed for their security)." *Rex v. Knight*, 90 Eng. Rep. 330 (K.B. 1686) (different reporter).

In the years leading up to the American Revolution, *Knight*'s narrow interpretation of Northampton was widely cited and adopted. Sergeant William Hawkins's "widely read Treatise of the Pleas of the Crown," *Atwater v. City of Lago Vista*, 532 U.S. 318, 331 (2001), explained—with a citation to *Knight*—that "no wearing of Arms is within the meaning of this Statute, unless it be accompanied with such Circumstances as are apt to terrify the People," 2 WILLIAM HAWKINS, TREATISE OF THE PLEAS OF THE CROWN 21 (1795) (citing 3 Mod. 117, an alternate citation of 87 Eng. Rep. 75). Theodore Barlow's 1745 treatise likewise noted (also citing *Knight*) that "[w]earing Arms, if not accompanied with Circumstances of Terror, is not within this Statute." THEODORE BARLOW, THE JUSTICE OF PEACE 12 (1745). And Blackstone similarly interpreted the statute as proscribing "[t]he offence of riding or going armed, *with dangerous or unusual weapons*," since such conduct "terrif[ied] the good people of the land." 4 BLACKSTONE COMMENTARIES *148-49 (emphasis added).

Thus, even in England, Northampton was understood to prohibit carrying arms in public only if it was done in a menacing, terrorizing way, with the intent to disturb the peace. And when the American Colonies imported Northampton's prohibition, they effectively codified *Knight*'s limitation by limiting their scope to those who carried arms "[o]ffensively."[7]

The Colony of Virginia may have enforced a similar common-law prohibition on going "offensively armed, in Terror of the People." *See* GEORGE WEBB, THE OFFICE & AUTHORITY OF A JUSTICE OF PEACE 92-93 (1736). In any event, in 1786, after obtaining statehood, Virginia enacted a Northampton-like prohibition by statute.[8] Between the Revolution and 1825, another two States enacted similar Northampton analogues: Tennessee (1801) and Maine (1821).[9] New York and North Carolina, and perhaps other States, may also have enforced like restrictions under the common law offense of "affray." *See* JOHN A. DUNLAP, THE NEW YORK JUSTICE 8 (1815); HALBROOK, *supra*, at 263 n.778 (discussing North Carolina).

All told, from colonial times through 1825, only 5 of the 24 States admitted to the Union by that time appear to have enforced a statutory version of Northampton. And whether applied by statute or through

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[7] 1694 Mass. Laws 12, no. 6; 1699 N.H. Laws 1.

[8] 1786 Va. Laws 33, ch. 21.

[9] *See* 1801 Tenn. Laws 710, § 6; 1821 Me. Laws 285, ch. 76, § 1.

the common law, the evidence is overwhelming that the Northampton-like restriction was understood in the same narrow way as in late-seventeenth-century England: as proscribing the carrying of arms only when done maliciously or in a specially terrifying manner.

That is evident from the leading American legal commentators of the time. St. George Tucker's influential early American edition of Blackstone reproduced Blackstone's discussion of Northampton (with a notation that Virginia had adopted an analogous law), but it also (a) explained that "[i]n many parts of the United States, a man no more thinks, of going out of his house on any occasion, without his rifle or musket in his hand, than an European fine gentleman without a sword by his side," and (b) made clear that Congress would exceed its authority if it "pass[ed] a law prohibiting any person from bearing arms." 1 BLACKSTONE COMMENTARIES App. n.D, at 289 (St. George Tucker ed., 1803); 5 *id.* at 149 & n.14; 5 *id.* at App. n.B, at 19.

Similarly, William Rawle wrote in his "influential treatise," *Heller*, 554 U.S. at 607, that only "the carrying of arms abroad by an individual, *attended with circumstances giving just reason to fear that he purposes to make an unlawful use of them*, would be sufficient cause to require him to give surety of the peace." WILLIAM RAWLE, A VIEW OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 123 (1825) (emphasis added). James Wilson, a leading Framer and Supreme Court Justice, likewise described

Northampton in his widely read Lectures on Law in terms that echo Blackstone: as reaching only the carrying of "dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people." 3 JAMES WILSON, THE WORKS OF THE HONOURABLE JAMES WILSON 79 (1804). And John Haywood, in his turn-of-the-century treatise on North Carolina law, noted that a version of Northampton applied in the State but was limited to "dangerous or unusual weapons" and that the ordinary "[w]earing of arms, however, is not within the meaning of the statute, unless accompanied with such circumstances as are apt to terrify the people." JOHN HAYWOOD, THE DUTY AND OFFICE OF JUSTICES OF THE PEACE, AND OF SHERIFFS, CORONERS, CONSTABLES 11 (1800).

Early-American case law provides further evidence. The Tennessee Supreme Court explained in 1833 that because the state constitution "hath said the people may carry arms," it would be impermissible to "impute to the acts thus licensed such a necessarily consequent operation as terror to the people to be incurred thereby." *Simpson v. State*, 13 Tenn. 356, 360 (1833). In like form, the North Carolina Supreme Court explained that "the carrying of a gun per se constitutes no offence," because "[f]or any lawful purpose … the citizen is at perfect liberty to carry his gun. It is the wicked purpose—and the mischievous result—which essentially constitute the crime." *State v. Huntly*, 25 N.C. (3 Ired.) 418, 422-23 (1843).

This evidence also disposes of the contention that firearms were *inherently* "offensive weapons," such

that the mere carrying of a firearm satisfied any requirement that the going or riding armed be done "offensively." *See* Saul Cornell, *The Right to Keep and Carry Arms in Anglo-American Law*, 80 LAW & CONTEMP. PROBS. 11, 20 (2017); *see also id.* at 22. Plainly, if "the carrying of a gun per se constitutes no offence," *Huntly*, 25 N.C. at 422-23, such that it offended Northampton only if "accompanied with such circumstances as are apt to terrify the people," HAYWOOD, *supra*, at 11, the bare fact that firearms may have counted as "offensive weapons" for certain other purposes did not bring the peaceable carrying of arms within the ambit of these laws. *Accord* 2 HAWKINS, *supra*, at 21-22. Rather, as Hawkins's treatise explained, whether a weapon counted as "offensive" "must greatly depend on the circumstances of the case," and it "is therefore a question of fact for the jury, whether the instrument was carried for the purposes of offence or not?" 1 *id.* at 492.

The practices of the Founding generation confirm that early Americans enjoyed and widely practiced the right to carry firearms out of doors:

- George Washington regularly used a gun for hunting, PAUL L. HAWORTH, GEORGE WASHINGTON: FARMER 255 (1915), and advised his grandson to do the same, PAUL M. ZALL, WASHINGTON ON WASHINGTON 136-37 (2003). He also carried a firearm on a trip into the Ohio Country. WILLIAM M. DARLINGTON, CHRISTOPHER GIST'S JOURNALS 85-86 (1893).

- Thomas Jefferson advised his nephew to "[l]et your gun … be the *constant* companion of your walks," 1 THE WRITINGS OF THOMAS JEFFERSON 398 (letter of Aug. 19, 1785) (H. A. Washington ed., 1884) (emphasis added), and Jefferson himself traveled with pistols for self-protection and designed a holster to allow for their ready retrieval, *see Firearms*, MONTICELLO, https://bit.ly/3hJJsvb. He also described the Constitution as protecting the People's "right and duty to be at all times armed." Thomas Jefferson, *Letter to John Cartwright, June 5, 1824*, NAT'L ARCHIVES FOUNDERS ONLINE, https://bit.ly/2TedtKb.
- James Madison used arms sufficiently frequently to develop a good enough aim that he "should not often miss … on a fair trial at [100 yards'] distance." 1 THE PAPERS OF JAMES MADISON 151-54 (William T. Hutchinson & William M.E. Rachal eds., 1962).
- Alexander Hamilton was often "seen wandering through the woods of Harlem with a single-barrelled fowling-piece." ALLAN MCLANE HAMILTON, THE INTIMATE LIFE OF ALEXANDER HAMILTON 349 (1910).
- In defending the British soldiers charged in the Boston Massacre, rather than arguing that the colonists who clashed with his clients had no right to bear arms in public,

John Adams conceded that, in this country, "every private person is authorized to arm himself; and on the strength of this authority I do not deny the inhabitants had a right to arm themselves at that time for their defence." John Adams, *Argument for the Defense: 3-4 December 1770*, NAT'L ARCHIVES FOUNDERS ONLINE, https://bit.ly/35FCuRh.

- Adams spoke from experience: as a schoolboy he was so fond of shooting for sport that he used to take his gun "to school and leave it in the entry and the moment it was over went into the field to kill crows and squirrels." 3 DIARY AND AUTOBIOGRAPHY OF JOHN ADAMS 257-61 (L.H. Butterfield ed., 1961).
- Taking after his father, John Quincy Adams also frequently used arms for hunting as a young man. His diary repeatedly records how he "went out with the gun," John Quincy Adams, *October 6th, 1785*, NAT'L ARCHIVES FOUNDERS ONLINE, https://bit.ly/3kmmtIt, or "went with my gun down upon the marshes," John Quincy Adams, *August 29th, 1787*, NAT'L ARCHIVES FOUNDERS ONLINE, https://bit.ly/3reIdaq.
- In 1765, an angry mob besieged Benjamin Franklin's home while he was away in London, forcing his wife Deborah to call upon local friends and relatives "to fetch a gun or two" and rally to defend the home. WALTER

ISAACSON, BENJAMIN FRANKLIN 224-25 (2004).

- Similarly, in the 1779 "Fort Wilson Riot," James Wilson and his supporters, armed, defended his home from attack by an angry mob rioting over high wartime prices. 1 HUGH D. GRAHAM & TED R. GURR, VIOLENCE IN AMERICA 408-09 (1969).
- James Monroe was accustomed to carrying his "musket slung across his back" on his way to school in the 1760s, TIM MCGRATH, JAMES MONROE 9 (2020), and later described how he "kept my pistols by me in the carriage" when travelling, 5 THE PAPERS OF JAMES MONROE 294 (Daniel Preston ed., 2014).

Given this historical record, this Court must either declare each of these Founders to be habitual criminals or acknowledge that there was, in fact, no prohibition on carrying firearms at the time of the Founding. And it is not just the Founders that, according to Respondents' reading of history, are scofflaws. Hunting was a primary means of sustenance in much of Virginia and Massachusetts and the other States with Northampton analogues. Respondents cannot point to a single hunter (or any other law-abiding citizen) who was prosecuted for the daily violations of the law that Respondents hypothesize.

Others in the Founding generation also routinely carried arms outside the home for self-defense.

Tensions between the European colonists and the native peoples started early. Bernard Bailyn vividly recounts a series of surprise attacks in 1622 near the Jamestown settlement:

> In plantation after plantation …, the Indians turned on their unsuspecting hosts, in some places while sharing breakfast with people at their tables, and with axes, hammers, shovels, tools, and knives slaughtered them indiscriminately, not sparing eyther age or sexe, man, woman, or childe; so sodaine in their cruell execution that few or none discerned the weapon or blow that brought them to destruction.[10]

Continued westward expansion by the Colonists only exacerbated the tensions with the Native Americans who were being slowly displaced. And those tensions were further stoked by the great Old World powers, who repeatedly sought to enlist the help of native tribes in the contest to dominate the new American continent.[11]

By 1774, James Madison feared that the native peoples were "determined in the extirpation of the

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[10] BERNARD BAILYN, THE BARBAROUS YEARS 101-02 (2012) (quotation marks omitted).

[11] THE REVOLUTIONARY WAR: A CONCISE MILITARY HISTORY OF AMERICA'S WAR FOR INDEPENDENCE 16-17 (Maurice Matloff ed.,1980).

inhabitants."[12] A year later, John Adams described how the "hardy, robust" colonists had become "habituated … to carry their fuzees or rifles upon one shoulder to defend themselves against the Indians, while they carry'd their axes, scythes and hoes upon the other to till the ground."[13] So intense was the fear of dreadful attack by the native peoples that one of the "Abuses and Usurpations" charged of King George the III in the Declaration of Independence was that the Crown had "endeavoured to bring on the Inhabitants of our Frontiers, the merciless Indian Savages, whose known Rule of Warfare, is an undistinguished Destruction, of all Ages, Sexes and Conditions."

The Founding generation also found it necessary to carry firearms for self-defense against ordinary criminals. Modern organized police forces did not begin to appear until the 1830s; at the time of Founding, government-backed "policing was ineffective in cities and towns" and "almost nonexistent on the frontier."[14] And violent crime was rampant.

For example, in the late eighteenth century the New Jersey coastal area known as the Pinelands "were infested with numerous robbers," who "[a]t the

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[12] NOAH FELDMAN, THE THREE LIVES OF JAMES MADISON 15 (2017).

[13] John Adams, *To the Inhabitants of the Colony of Massachusetts-Bay*, NAT'L ARCHIVES FOUNDERS ONLINE (Feb. 6, 1775), https://bit.ly/2SwaXi4.

[14] SAMUEL WALKER & CHARLES M. KATZ, THE POLICE IN AMERICA 29 (2012).

dead of night … would sally forth from their dens to plunder, burn, and murder."[15] "The inhabitants, in constant terror, were obliged for safety to carry their muskets with them into the fields, and even to the house of worship."[16] Elsewhere, "the brutal Harpe brothers … in 1798-99 accounted for anywhere from about 20 to 38 victims in the frontier States of Kentucky and Tennessee."[17] Early American urban areas were no more civilized: "Philadelphia's homicide rate for 1720-1780 was two and a half times that of London in the same period."[18] All told, a leading study of historical crime records concludes that "[t]hroughout most of the seventeenth century," the "peacetime murder rates for adult colonists … ranged from 100 to 500 or more per year per 100,000 adults, **ten to fifty times** the rate in the United States today."[19]

Because of these violent conditions, over half the colonies enforced arms-bearing *requirements* that obliged people to carry arms in certain circumstances such as when traveling or attending church. *See*

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[15] JOHN W. BARBER & HENRY HOWE, HISTORICAL COLLECTIONS OF NEW JERSEY 351 (1868).

[16] *Id.*

[17] 2 VIOLENCE IN AMERICA 34 (Ted R. Gurr ed., 1989)

[18] Jack D. Marietta & G.S. Rowe, *Violent Crime, Victims, and Society in Pennsylvania, 1682-1800*, 66 EXPLORATIONS IN EARLY AM. CULTURE 24, 26 (1999).

[19] RANDOLPH ROTH, AMERICAN HOMICIDE 27, 39 fig.1.3 (2009) (emphasis added).

HALBROOK, *supra*, at 133-35.[20] It would have been incongruous indeed for Colonies such as Virginia (which enacted such a requirement as early as 1619) and Massachusetts (1636) to (1) enforce a Northampton-type statute they purportedly understood as "a broad prohibition on the public carrying of arms," Charles, *Faces of the Second Amendment*, *supra*, at 8, and simultaneously (2) *require* travelers and churchgoers to carry arms for self-defense.

A similar point follows from Virginia's 1677 statute—enacted in response to Bacon's Rebellion—temporarily forbidding the colonists "to assemble together in armes to the number of five or upwards."[21] It plainly follows that *but for* this prohibition, Virginians were free to carry arms in public. Indeed, when the restraint was lifted after residents of James County complained to the Crown's officials the officials explained that "[n]ow every man may bear arms." HALBROOK, *supra*, at 126-27.

Finally, the racist laws many Colonies (and later States) enacted specifically forbidding enslaved or free African Americans from carrying firearms in

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[20] *See, e.g.*, 1624 Va. Laws 121, 127 §§ 24 & 25 (travel and farming); 1631 Va. Laws 174, No. 51 (church); 1636 Mass. Laws 190, § 322 (travel); 1639 R.I. Laws 93, 94 (travel and public meetings); 1641 Laws of the Colony of New Plymouth 69, 70 (church); 1 PUBLIC RECORDS OF THE COLONY OF CONNECTICUT 95 (1850) (church); 1642 Md. Laws 103 (travel and church); 1740 S.C. Laws 417 (church); 1770 Ga. Laws 137, 138 § 1 (church).

[21] 2 Va. Stat. 381, 386.

public removes any conceivable doubt that free whites enjoyed the right to carry arms. A 1715 Maryland statute, for example, provided that "no negro or other slave within this province shall be permitted to carry any gun, or any other offensive weapon, from off their master's land, without licence from their said master."[22] Like prohibitions were enacted in Virginia (1680), South Carolina (1740), North Carolina (1741), Georgia (1768), and Delaware (1797).[23] These laws would have been completely inexplicable had Northampton's prohibition been understood to prohibit *anyone* from carrying arms.

II. The tradition of freely allowing public carriage of firearms continued into the nineteenth century.

The evidence from the years immediately after ratification provides "confirmation" of what earlier sources establish concerning "the public understanding in 1791 of the right codified by the Second Amendment." *Gamble v. United States*, 587 U.S. ___, 139 S. Ct. 1960, 1976-77 (2019). From the early nineteenth century through the Civil War, Americans continued to freely enjoy the right to peaceably carry arms outside the home. Again: the carrying of arms by law-abiding citizens was freely allowed in every State. Through 1861, 14 of the 34 States admitted at the outbreak of the War do not appear to have enforced any

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[22] 1715 Md. Laws 117.

[23] *See* HALBROOK, *supra*, at 127, 135-37, 255-61; An Act For the Trial Of Negroes, ch. 43, § 6, 1797 Del. Laws 104.

statutes regulating the carrying of firearms. And the two new types of regulations that began to emerge decades after the Founding in several of the remaining 20 States—"surety-style" laws and restrictions on concealed carry—did not meaningfully limit public carriage.

A. In 1836, Massachusetts adopted a statute allowing "any person having reasonable cause to fear" that someone carrying arms in public might cause "an injury, or breach of the peace" to make a complaint to a local judge, who then had discretion to require the arms-bearer "to find sureties for keeping the peace" if he wanted to continue to "go armed"—unless he could show that he himself had "reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property," in which case he could continue to carry arms without posting the surety.[24] Between 1836 and the beginning of the Civil War, seven additional States (or territories granted Statehood shortly thereafter) adopted similar "surety-style" laws.[25]

These surety laws have been characterized as "a severe constraint" that limited public carry "to persons who could demonstrate their need to carry."

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[24] 1836 Mass. Laws 748, 750, ch. 134, § 16; *see* HALBROOK, *supra*, at 222-33.

[25] *See* 1838 Wis. Laws 378, 381 § 16; 1841 Me. Laws 707, 709 ch. 169, § 16; 1846 Mich. Laws 690, 692 ch. 162, § 16; 1847 Va. Laws 127, ch. 14, § 16; 1851 Minn. Laws 526, ch. 112, § 18; 1853 Or. Laws 220, ch. 16, § 17; 1861 Pa. Laws 248, 250 § 6.

Young v. Hawaii, 992 F.3d 765, 799, 820 (9th Cir. 2021) (en banc). The bare text of these statutes refutes that description. These laws were triggered only when someone who reasonably felt threatened lodged a complaint—and a judge agreed the fear was reasonable.[26] The party complained of had a right to "be heard in his defense" *before* any judicial decision was made, and he also had a right of appeal.[27]

Moreover, he could nonetheless *continue to carry*, so long as he posted a surety, or bond.[28] As Blackstone explained, a surety was "intended merely for prevention" in circumstances where there was "a probable suspicion, that some crime is intended or likely to happen; and consequently *it is not meant as any degree of punishment*, unless perhaps for a man's imprudence in giving just ground of apprehension." 4 BLACKSTONE COMMENTARIES *249 (emphasis added). Finally, these laws were also accompanied by a safe-harbor provision for anyone carrying a firearm because of "reasonable cause to fear an assault or other injury" to one's person, family, or property.[29]

The enactment of surety-style laws confirms that Northampton-type laws were not understood as bans on carriage. Virginia, Massachusetts, and Maine all (1) enacted a Northampton-analogue and then subse-

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[26] 1836 Mass. Laws 750, § 16.

[27] *Id.* at 749-50, §§ 4, 9, 16.

[28] *Id.* at 750, § 16.

[29] *Id.*

quently (2) enacted a surety-style law.[30] Not only would surety laws have been superfluous in those States, if the broad, revisionist interpretation of Northampton were correct, but the effect of their adoption would have been inexplicable and bizarre. For if Northampton-type laws really did broadly ban carrying arms, the enactment of a surety-style law would have had the effect of *allowing* public carry—but *only* by someone *reasonably accused and adjudged of posing a risk to public safety*. Respondents offer no explanation—and there is none—as to why States would create such a schizophrenic regime: law-abiding citizens are forbidden to carry, but those who are found to be a threat to public safety alone can carry. To state Respondents' view of history is to refute it.

Consistent with their text, surety-style laws were not understood or enforced as general bans on carrying firearms. In 1890, for example, Percy Bridgham—a noted legal journalist for the Boston Daily Globe—explained 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." PERCY A. BRIDGHAM, ONE THOUSAND LEGAL QUESTIONS ANSWERED BY THE "PEOPLE'S LAWYER" OF THE BOSTON DAILY GLOBE 129 (1891). In 1895, the *Boston Daily Advertiser* similarly explained that

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[30] *Compare* 1786 Va. Laws 33, ch. 21, 1795 Mass. Laws 436, ch. 2, *and* 1821 Me. Laws 285, ch. 76, § 1, *with* 1847 Va. Laws 127, ch. 14, § 15, 1836 Mass. Laws 748, 750, ch. 134, § 16, *and* 1841 Me. Laws 707, ch. 169, § 16.

"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."[31]

When surety laws *were* enforced, it was often with racial overtones. In 1856, two African Americans were arrested in the District of Columbia (where a surety-style law was enacted in 1855)[32] and "ordered to give security to keep the peace" for "having loaded pistols with them at a fair held by colored persons in the Fourth Ward."[33] Another African American, Lucas Dabney, was arrested in 1887 for "carrying a loaded revolver"; the judge "took Dabney's personal bonds, and he was released."[34]

Other newspaper accounts also do not support the revisionist interpretation of the surety-style laws. A March 7, 1853 item, for example, relates that one "George W. Ransom of South Boston" was "charged with carrying a concealed weapon" on March 4.[35] It is clear from the rest of the article and from other historical sources that Ransom was one of a large number

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[31] *Boston Daily Advertiser*, July 13, 1895, at 4.

[32] 1855 D.C. Code 570, ch. 141, § 16.

[33] *Carrying Concealed Weapons*, EVENING STAR, Nov. 26, 1856, at 3.

[34] EVENING STAR, Dec. 5, 1887, at 5.

[35] *City Intelligence*, BOSTON COURIER, Mar. 4, 1853 at 4.

of persons arrested for taking part in a violent riot in Charlestown.[36] Clearly, this was not an instance of peaceably carrying arms for self-defense.

Some have cited the 1836 jury charge by Boston Municipal Judge Peter Oxenbridge Thacher, which opined that in Massachusetts "no person may go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to apprehend an assault or violence to his person, family, or property." Charles, *supra*, at 39-40 (quoting PETER OXENBRIDGE THACHER, TWO CHARGES TO THE GRAND JURY OF THE COUNTY OF SUFFOLK 27-28 (1837)). But Thacher's speech was merely a welcome address at the opening of the grand jury term, not an instruction in a particular case; it did not purport to analyze all of the elements of the surety law—which by its plain text was narrowly limited in the way described above.

B. The other type of regulation that States began to adopt in the 19th century—restrictions on carrying concealed firearms—regulated the *manner* of carrying arms, but they did so against the background of *freely allowing* the *open* carrying of arms, thus "le[aving] ample opportunities for bearing arms." *Wrenn v. District of Columbia*, 864 F.3d 650, 662 (D.C. Cir. 2017). The first such law appears to have been enacted in Kentucky in 1813; it imposed a fine on anyone "who shall hereafter wear a pocket pistol, dirk, large knife, or sword in a cane, concealed as a weapon, unless

[36] *Id.*; *see also* HALBROOK, *supra*, at 231.

when travelling on a journey."[37] Similar laws were enacted in seven additional States or territories by 1860.[38]

Such laws were consistent with "the social conventions of the time" which saw "concealed carry [as] the behavior of criminals," manifesting "a hostile, and, if the expression may be allowed, a piratical disposition against the human race." Eugene Volokh, *Implementing the Right to Keep and Bear Arms for Self-Defense*, 56 U.C.L.A. LAW. REV. 1443, 1522-24 (2009) (quoting *On Wearing Concealed Arms*, DAILY NAT'L INTELLIGENCER, Sept. 9, 1820, at 2)). But they left the socially-preferred *open* manner of carrying untouched.

Even so limited, the initial judicial reception to these laws was unfavorable: in *Bliss v. Commonwealth*, the Kentucky Supreme Court struck down Kentucky's concealed-carry restriction as "forbidden by the explicit language of the constitution," reasoning that if the government could restrict either open or concealed carry singly, it would have power "by successive enactments, to entirely cut off the exercise of the right of the citizens to bear arms." 12 Ky. (2 Litt.) 90, 92 (1822). And while later courts generally upheld concealed carry restrictions, they made absolutely clear that the linchpin of these laws' constitutionality

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[37] 1813 Ky. Acts 100, ch. 89, § 1.

[38] 1813 La. Acts 172, § 1; 1819 Ind. Acts 39; 1837 Ark. Rev. Stat. 280; 1838 Va. Acts 76, ch. 101, § 1; 1839 Fla. Acts 423; 1839 Ala. Acts 67, § 1; 1859 Ohio Laws 56, § 1.

was the fact that they left *some* manner of carrying arms—in these cases, openly—unfettered.

In *State v. Reid*, for example, the Supreme Court of Alabama held that the right to bear arms left the government with the authority to regulate the *manner* of carrying arms "as may be dictated by the safety of the people and the advancement of public morals." 1 Ala. 612, 616 (1840). But "the Legislature cannot inhibit the citizen from bearing arms openly," since "[a] statute which, under the pretence of regulating, amounts to a destruction of the right, or which requires arms to be so borne as to render them wholly useless for the purpose of defence, would be clearly unconstitutional." *Id.* at 616-17, 619. Case after case followed the same path, upholding limits on carrying concealed arms but making clear that their constitutionality depended on the continued availability of the right to carry firearms openly. *See Aymette v. State*, 21 Tenn. 154, 160-61 (1840); *State v. Chandler*, 5 La. Ann. 489, 490 (1850); *State v. Jumel*, 13 La. Ann. 399, 399-400 (1858); *State v. Wilforth*, 74 Mo. 528, 531 (1881); *State v. Speller*, 86 N.C. 697, 700 (1882); *see also Cockrum v. State*, 24 Tex. 394, 403 (1859) (concluding that "[t]he right to carry a bowie-knife for lawful defense is secured, and must be admitted"); *compare State v. Mitchell*, 3 Blackf. 229, 229 (Ind. 1833) (upholding ban on concealed carry), *with Walls v. State*, 7 Blackf. 572, 573 (Ind. 1845) (suggesting defense would exist if defendant "exhibited his pistol so frequently that it could not be said to be concealed").

In the few States that *did* attempt to restrict the right to carry arms openly as well, the courts *struck such laws down*. In *Nunn v. State*—a case that *Heller* significantly relied upon and praised for "perfectly captur[ing]" the relationship between the Second Amendment's prefatory and operative clauses—the Georgia Supreme Court made clear that to the extent that State's law "contains a prohibition against bearing arms *openly*, [it] is in conflict with the Constitution, and *void*." 1 Ga. 243, 251 (1846); *accord Stockdale v. State*, 32 Ga. 225, 227 (1861). Similarly, while Tennessee attempted to limit both open and concealed carry,[39] that State's highest court ultimately struck the ban on open carry down. *Andrews v. State*, 50 Tenn. 165, 181, 187 (1871).

These judicial decisions were widely influential. For example, an abortive attempt in Washington D.C. to ban carrying firearms in any manner was swiftly replaced with a restriction on concealed carrying only,[40] with the City Council explaining that "the word 'concealed' " had been added because "[f]or want of that word in the former bill, it is now certain that the corporation will lose every case before the circuit court by appeal from the decisions of the police

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[39] 1821 Tenn. Pub. Acts 15, ch. 13; *accord* 1869-1870 Tenn. Pub. Acts, ch. 13, § 1.

[40] *Compare* Act of Nov. 4, 1857, ch. 5, *in* GENERAL LAWS OF THE CORPORATION OF THE CITY OF WASHINGTON 75 (Robert A. Waters ed., 1860), *with* Act of Nov. 18, 1858, *in id.* at 114.

magistrates."[41] Prof. Cooley's 1870 treatise explained that "to bear arms implies something more than the mere keeping," but cited *Andrews* for the proposition that "the secret carrying of those suited merely to deadly individual encounters may be prohibited." THOMAS M. COOLEY, THE GENERAL PRINCIPLES OF CONSTITUTIONAL LAW IN THE UNITED STATES OF AMERICA 271-72 (1870). Another treatise likewise explained that "the carrying of *concealed* weapons may be absolutely prohibited without the infringement of any constitutional right, while a statute forbidding the bearing of arms openly would be such an infringement." JOHN ORDRONAUX, CONSTITUTIONAL LEGISLATION IN THE UNITED STATES 242-43 (1891).

To be sure, a handful of cases from the post-Civil War era drew a different line in the sand. Interpreting the right to bear arms as limited to the militia context, these cases reasoned that it extended "to the arms of a militiaman or soldier," such as "the musket and bayonet," but not smaller pistols, "dirks, daggers, slungshots, sword-canes, brass-knuckles and bowie knives." *English v. State*, 35 Tex. 473, 476-77 (1871); *compare State v. Buzzard*, 4 Ark. 18, 18 (1842), *Fife v. State*, 31 Ark. 455, 458-61 (1876), and *Haile v. State*, 38 Ark. 564, 566-67 (1882), *with Wilson v. State*, 33 Ark. 557, 559 (1878); *see also Hill v. State*, 53 Ga. 472, 474-75 (1874); 2 JOEL PRENTISS BISHOP, COMMENTARIES ON THE CRIMINAL LAW 74-75, § 124 (4th ed. 1868). Hints of this reasoning are also present in a few of the cases

[41] *Concealed Weapons*, EVENING STAR, Nov. 11, 1858, at 3.

that held that some form of carriage must be left unrestricted. *See Aymette*, 21 Tenn. at 160-61; *Andrews*, 50 Tenn. at 179, 186-88.

The fatal difficulty of relying on the cases articulating this alternative view, however, is that they are premised upon an interpretation of the right to keep and bear arms that was expressly repudiated in *Heller*. That case "made clear that the Second Amendment is, *and always has been*, an individual right centered on self-defense; it has never been a right to be exercised only in connection with a militia." *Young*, 992 F.3d at 837 (O'Scannlain, J., dissenting). These few historical precedents are accordingly "sapped of authority by *Heller*." *Wrenn*, 864 F.3d at 658. Put differently, while a minority of historical cases concluded that a flat ban on carrying certain arms in public did not violate a right to bear arms for militia service, they did not *even so much as suggest* that such a restriction was consistent with the right to bear arms *for self-defense*.

Indeed, we are aware of only one case before the twentieth century that can plausibly be read as supporting that view: the Texas Supreme Court's postbellum decision in *State v. Duke*, 42 Tex. 455 (1875).[42]

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[42] *Walburn v. Territory*, in the course of reversing Walburn's conviction "for carrying a revolver" on evidentiary grounds, stated that "[a]s at present advised, we are of the opinion that the statute violates none of the inhibitions of the constitution of the United States." 59 P. 972, 973 (Okla. 1899). However, it is impossible to determine what the basis for this decision

In *Duke*, the court overruled its earlier decision in *English* that the right to bear arms was limited to arms suitable to militia service, but nonetheless held that a ban on carrying concealable arms either concealed or openly, except when reasonably needed for self-defense, was "a legitimate and highly proper regulation" of the right." *Id.* at 459. For at least three reasons, however, *Duke* cannot support the proposition that the Second Amendment is limited to the home.

First, the solitary decision in *Duke* was "an outlier which marks perhaps the most restrictive interpretation that any nineteenth-century court gave to the defense-based right to bear arms."[43] *Cf. Heller*, 554 U.S. at 632 ("we would not stake our interpretation of the Second Amendment upon a single law, in effect in a single city, that contradicts the overwhelming weight of other evidence"). Second, *Duke* was not decided until 1875, over three-quarters of a century after the Second Amendment's ratification. By contrast, the decision in *Bliss*—written just three decades after ratification—concluded that "[t]he right of the citizens to bear arms in defence of themselves and the state, must be preserved entire." 12 Ky. at 91.

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was—Walburn cited "[n]o authorities" and did not press his constitutional defense "very earnestly." *Id.*

[43] Michael P. 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, 655 (2012).

Third, *Duke*—citing this Court's decision in *Barron v. Baltimore*, 7 Pet. (32 U.S.) 243 (1833)—confined its reasoning to *Texas*'s arms guarantee, which expressly subjected the right to keep and bear arms to "such regulations as the Legislature may prescribe." *Duke*, 42 Tex. 458 (quoting TEX. CONST. art. I, § 13 (1866)). "While the Second Amendment surely tolerates some degree of regulation, its very text conspicuously omits any such regulatory caveat. We shouldn't pencil one in." *Young*, 992 F.3d at 838-39 (O'Scannlain, J., dissenting)

Once again, the very existence of restrictions on *concealed* carry explodes the notion that the surety laws discussed above were understood as blanket bans on carrying arms. For during the nineteenth century, at least five States enacted *both types of laws*.[44] Indeed, one of those States—West Virginia—*adopted both types of laws simultaneously*. That would be utterly nonsensical if surety-style laws really constituted general bans on carriage.

Indeed, the fact that there was *debate* over the validity of concealed-carry restrictions proves that the right to bear arms was universally understood to extend beyond the home. For example, Oliver Wendell

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[44] *Compare* 1838 Va. Acts 76, ch. 101, § 1, *with* 1847 Va. Laws 127, ch. 14, § 16; 1846 Mich. Laws 690, 692 ch. 162, § 16, *with* 1887 Mich. Pub. Acts 144, § 1; 1838 Wis. Laws 378, 381, § 16, *with* 1872 Wis. Laws 17, ch. 7, § 1; 1853 Or. Laws 220, ch. 16, §17, *with* 1885 Or. Laws 33, § 1; *and* 1870 W. Va. Code 692, ch. 148, § 7, *with* 1870 W. Va. Code 702, ch. 153, § 8.

Holmes, Jr., in his edition of James Kent's Commentaries, noted that

> As the Constitution of the United States, and the constitutions of several of the states, in terms more or less comprehensive, declare the right of the people to keep and bear arms, it has been a subject of grave discussion, in some of the state courts, whether a statute prohibiting persons … from *wearing or carrying concealed weapons,* be constitutional. There has been a great difference of opinion on the question."

2 J. KENT, COMMENTARIES ON AMERICAN LAW *340 n.2 (O. Holmes ed., 1873). This debate would have been inexplicable if either the surety or Northampton-type laws were understood to generally ban carrying arms.

Some have sought to dismiss cases like *Bliss*, *Nunn*, and *Reid* as based on an understanding of the Second Amendment right arising "almost exclusively from the slaveholding South" and rooted in "a time, place, and culture where slavery, honor, violence, and the public carrying of weapons were intertwined." Eric M. Ruben & Saul Cornell, *Firearm Regionalism and Public Carry*, 125 YALE L.J. FORUM 121, 123, 125 (2015). That is completely ahistorical. The same rule applied by Georgia in *Nunn* and Alabama in *Reid* was followed by Massachusetts in *Commonwealth v. Murphy*, 166 Mass. 171, 172 (1896). And more generally, the supposed "regional variation in the [Northern and Southern] regulatory tradition[s]," Cornell, *supra*, at

38, *simply did not exist*. Concealed carry restrictions were adopted not only in Southern States like Georgia and Tennessee *but also* in several Northern States, including Indiana and Ohio in the antebellum period, and later New Jersey, New York, Michigan, Iowa, Wisconsin and Oregon. And the surety-style laws that purportedly represent the "more restrictive" Northern tradition, *id.* at 39; *but see supra*, Part II.A, were adopted not only in Northern locales like Massachusetts but also in Slave States like Virginia and Texas.

Indeed, as shown above, the one "regional variation," Cornell, *supra*, at 38, that decidedly *did* exist was the South's enforcement of the notorious Slave Codes. *See supra*, pp. 19-20. Accordingly, to the extent that the Southern States' "distinct cultural phenomena of slavery and honor," Ruben & Cornell, *supra*, at 126, has any continuing relevance to the interpretation of the Second Amendment, it is this: it was the refusal by the Slave States to recognize the free and equal citizenship of African Americans that led those States to impose *the very laws that constitute the closest historical analogues to the "proper cause" licensing restriction challenged in this case.*

CONCLUSION

The Court should reverse the judgment of the Second Circuit.

July 20, 2021

Respectfully submitted,

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