No. 18-10076

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA,

Plaintiff–Appellee,

v.

ISRAEL TORRES,

Defendant–Appellant.

On Appeal from the United States District Court
for the District of Arizona
Case No. CR-17-00265-JAT-1

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, MADISON SOCIETY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, AND SECOND AMENDMENT FOUNDATION IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amici Curiae* make the following statements:

Firearms Policy Coalition has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Firearms Policy Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Madison Society Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

California Gun Rights Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

Second Amendment Foundation has no parent corporation, nor is there any publicly held corporation that owns more than 10% of its stock.

/s/ *Joseph G.S. Greenlee*
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STATEMENT OF *AMICI CURIAE*

Firearms Policy Coalition is a nonprofit organization that defends constitutional rights through advocacy, research, legal efforts, outreach, and education.

Firearms Policy Foundation is a nonprofit organization that serves its members and the public through charitable programs including research, education, and legal efforts.

Madison Society Foundation is a nonprofit corporation that supports the right to arms by offering education and training to the public.

California Gun Rights Foundation is a nonprofit organization that focuses on educational, cultural, and judicial efforts to advance civil rights.

Second Amendment Foundation (SAF) is a nonprofit foundation dedicated to protecting the Second Amendment through educational and legal programs. SAF organized and prevailed in *McDonald v. City of Chicago*, 561 U.S. 742 (2010).

CONSENT TO FILE

All parties have consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

Supreme Court precedent requires a historical justification for firearm prohibitions on felons. American tradition supports firearm prohibitions on dangerous persons—namely, disaffected persons posing a threat to the government and persons with a proven proclivity for violence. This tradition of disarming dangerous persons has been practiced for centuries. It was reflected in the proposed amendments from the ratifying conventions of Massachusetts, Pennsylvania, and New Hampshire. And it has been reflected throughout American history.

There is no tradition of banning peaceable citizens from owning firearms. Nor is there any tradition of limiting the Second Amendment to "virtuous" citizens. Historically, nonviolent criminals whose firearm possession posed no danger to the public could lawfully keep and bear arms.

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[1] No counsel for a party authored this brief in whole or part. No party or counsel for a party contributed money to fund the preparation or submission of this brief. No person other than *amici* contributed money intended to fund the brief's preparation or submission.

En banc review should be granted to establish a standard for as-applied Second Amendment challenges that is consistent with American history and Supreme Court precedent.

ARGUMENT

I. *Heller* requires a historical justification for firearm prohibitions on felons.

In *District of Columbia v. Heller*, the Supreme Court identified a series of "presumptively lawful regulatory measures," including "longstanding prohibitions on the possession of firearms by felons." 554 U.S. 570, 626–27 & n.26 (2008). Promising "to expound upon the historical justifications for the exceptions" another time, the Court made clear that to be "presumptively lawful," a regulation must be consistent with history and tradition. *Id.* at 635. *See United States v. Vongxay*, 594 F.3d 1111, 1117 (9th Cir. 2010) ("In *Heller*, the Court anticipated the need for [] historical analyses" for felon prohibitions).

II. The historical justification for firearm prohibitions on felons is the tradition of disarming dangerous persons.

A. In colonial America, arms prohibitions applied to disaffected and other dangerous persons.

Disarmament laws in colonial America kept weapons away from those perceived as dangerous.[2] Such laws were often discriminatory and overbroad—and thus unconstitutional—but always intended to prevent danger. *See, e.g.*, LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 234–35 (1868) (1656 New York law "forbid[ing] the admission of any Indians with a gun ... into any Houses" "to prevent such dangers of isolated murders and assassinations").

Inspired by England's Statute of Northampton, some American laws forbade carrying arms in a terrifying manner. Virginia's 1736 law allowed for confiscation of arms, providing that a constable "may take away Arms from such who ride, or go, offensively armed, in Terror of the People" and bring the person and their arms before a Justice of the Peace.

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[2] *See generally* Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO. L. REV. (forthcoming 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3509040.

George Webb, THE OFFICE OF AUTHORITY OF A JUSTICE OF PEACE 92–93 (1736).

Determining that "it is dangerous at this time to permit Papists to be armed," Virginia in 1756 authorized the seizure from those unwilling to swear allegiance of "any arms, weapons, gunpowder or ammunition." 7 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35–37 (1820). An exception was made, however, for "such necessary weapons as shall be allowed to him, by order of the justices of the peace at their court, for the defence of his house or person." *Id.* at 36.

Approaching the Revolutionary War, disaffected colonists became a greater concern due to their likelihood of partaking in or supporting insurrections.

Connecticut punished disaffected colonists in 1775. While persons who actively assisted the British were imprisoned and forfeited their estate, persons who libeled or defamed acts of the Continental Congress were disfranchised and prohibited from keeping arms, holding office, or serving in the military. 4 THE AMERICAN HISTORICAL REVIEW 282 (1899). "Early in the ensuing year (January 2, 1776) Congress again

recommended 'the most speedy and effectual measures to frustrate the mischievous machinations and restrain the wicked practices of these men;' that 'they ought to be disarmed, the dangerous kept in safe custody, or bound with sureties for good behavior.'" *Id.* at 283. The *Connecticut Courant* on May 20, 1776, complained of "[a] gang of Tories," exclaiming that "[i]f these internal enemies are suffered to proceed in their hellish schemes, our ruin is certain." *Id.* Soon after, such Tories were "convicted of high treason, and sentenced to death," rather than merely disarmed or imprisoned. *Id.* at 284.

In 1776, in response to General Arthur Lee's plea for emergency military measures, the Continental Congress recommended that colonies disarm persons "who are notoriously disaffected to the cause of America, or who have not associated, and shall refuse to associate, to defend, by arms, these United Colonies." 1 JOURNALS OF THE CONTINENTAL CONGRESS, 1774–1789, at 285 (1906).

Massachusetts acted within months "to cause all persons to be disarmed … who are notoriously disaffected to the cause of America … and to apply the arms taken from such persons … to the arming of the continental troops." 1776 Mass. Laws 479, ch. 21.

Pennsylvania enacted similar laws in April 1776 and June 1777. 8 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 559–60 (1902); 9 *id.* at 110–14.

In 1777, New Jersey empowered its Council of Safety "to deprive and take from such Persons as they shall judge disaffected and dangerous to the present Government, all the Arms, Accoutrements, and Ammunition which they own or possess." 1777 N.J. Laws 90, ch. 40 §20.

North Carolina went further, essentially stripping "all Persons failing or refusing to take the Oath of Allegiance" of citizenship rights. Those "permitted … to remain in the State" could "not keep Guns or other Arms within his or their house." 24 THE STATE RECORDS OF NORTH CAROLINA 89 (1905). In May 1777, Virginia did the same. 9 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 282 (1821).

In 1779, Pennsylvania, declaring that "it is very improper and dangerous that persons disaffected to the liberty and independence of this state shall possess or have in their own keeping, or elsewhere, any firearms," "empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance." THE ACTS

OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782).

"[T]hese revolutionary and founding-era gun regulations … targeted particular groups for public safety reasons." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012). "Although these Loyalists were neither criminals nor traitors, American legislators had determined that permitting these persons to keep and bear arms posed a potential danger." *Id.*

B. Influential proposals at ratifying conventions called for disarming dangerous persons while protecting the rights of all peaceable persons.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *Heller*, 554 U.S. at 634–35. *Heller* thus concluded with "our adoption of the original understanding of the Second Amendment." *Id.* at 625. The ratifying conventions are instructive in interpreting the right that was ultimately codified.

Samuel Adams opposed ratification without a declaration of rights. Adams proposed at Massachusetts's convention an amendment guaranteeing that "the said constitution be never construed … to prevent

the people of the United States who are peaceable citizens, from keeping their own arms." 2 Bernard Schwartz, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 675 (1971). Adams's proposal was celebrated by supporters as ultimately becoming the Second Amendment. *See Editorial*, BOSTON INDEPENDENT CHRONICLE, Aug. 20, 1789, at 2, col. 2 (calling for the paper to republish Adams's proposed amendments alongside Madison's proposed Bill of Rights, "in order that they may be compared together," to show that "every one of [Adams's] intended alterations but one [i.e., proscription of standing armies]" were adopted); Stephen Halbrook, THAT EVERY MAN BE ARMED 86 (revised ed. 2013) ("[T]he Second Amendment … originated in part from Samuel Adams's proposal … that Congress could not disarm any peaceable citizens.").

"Peaceable" did not necessarily mean law-abiding. A contemporary dictionary defined "peaceable" as "Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE (2d ed. 1789). Noah Webster defined "peaceable" as "Not violent, bloody or unnatural." AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (Noah Webster, 1828). *Heller* relied on both Sheridan's and Webster's definitions in defining the

Second Amendment's text. For Sheridan, *see* 554 U.S. at 584 (defining "bear"). For Webster, s*ee id.* at 581 ("arms"), 582 ("keep"), 584 ("bear"), 595 ("militia").

New Hampshire proposed a bill of rights that allowed the disarmament of only violent insurgents: "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Jonathan Elliot, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 326 (2d ed. 1836).

After Pennsylvania's ratifying convention, the Anti-Federalist minority—which opposed ratification without a declaration of rights—proposed the following right to arms:

> That the people have a right to bear arms for the defence of themselves and their own state, or the United States, or for the purpose of killing game, and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

Nathaniel Breading, et al., *The Address and reasons of dissent of the minority of the convention, of the state of Pennsylvania, to their constituents*, LIBR. OF CONGRESS (Dec. 12, 1787). While the language did not expressly limit "crimes committed" to violent crimes, every arms prohibition to that point had been based on perceived dangerousness.

And the non-criminal basis—"real danger of public injury"—was self-evidently based on violence. There is no indication that the Anti-Federalists hoped to expand arms prohibitions for the first time beyond dangerousness.

"[T]he 'debates from the Pennsylvania, Massachusetts and New Hampshire ratifying conventions, which were considered "highly influential" by the Supreme Court in *Heller* … confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.'" *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 368 (3d Cir. 2016) (en banc) (Hardiman, J., concurring) (quoting *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011)) (brackets omitted). "Hence, the best evidence we have indicates that the right to keep and bear arms was understood to exclude those who presented a danger to the public." *Id.* (Hardiman, J., concurring).

C. Prohibited persons could have their arms rights restored in the founding era.

Persons who would have been prohibited from keeping arms in the founding era were often punished by death. But there were examples of prohibited persons having their arms rights restored. Connecticut's 1775 law disarmed "inimical" persons only "until such time as he could prove

his friendliness to the liberal cause." 4 THE AMERICAN HISTORICAL REVIEW 282 (1899). Massachusetts's 1776 law provided that "persons who may have been heretofore disarmed by any of the committees of correspondence, inspection or safety" may "receive their arms again … by the order of such committee or the general court." 1776 Mass. Laws 484. Once the perceived danger abated, the arms disability was lifted.

Another example came from Shays's Rebellion, "a series of violent attacks on courthouses and other government properties in Massachusetts, beginning in 1786, which led to a full-blown military confrontation in 1787." *Shays' Rebellion*, HISTORY.COM, Aug. 21, 2018.[3] As the rebellion ceased in 1787, Massachusetts established "the disqualifications to which persons shall be subjected, who have been, or may be guilty of treason, or giving aid or support to the present rebellion, and to whom a pardon may be extended." 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, at 145 (1805). Among these disqualifications were the temporary forfeiture of many civil rights, including a three-year prohibition on bearing arms. *Id.* at 146–47.

[3] https://www.history.com/topics/early-us/shays-rebellion.

Compared to the rebels who attempted to overthrow the government and had their arms rights restored after three years, many nonviolent criminals are barred for life under 18 U.S.C. §922(g)(1).

D. Nineteenth-century bans applied to slaves and freedmen, while lesser restrictions focused on disaffected and dangerous persons.

Heller looked to nineteenth-century experiences only for help "understanding [] the origins and continuing significance of the Amendment." 554 U.S. at 614.

Nineteenth-century arms prohibitions were mostly discriminatory bans on slaves[4] and freedmen.[5] Also targeted were "tramps"—typically defined as males begging for charity outside their county, meaning home possession was unrestricted.

New Hampshire, in 1878, imprisoned any tramp who "shall be found carrying any fire-arm or other dangerous weapon, or shall threaten to do any injury to any person, or to the real or personal estate of another…." 1878 N.H. Laws 612, ch. 270 §2. The following year, Pennsylvania prohibited tramps from carrying a weapon "with intent unlawfully to do

[4] *See, e.g.*, 1804 Miss. Laws 90; 1804 Ind. Acts 108; 1806 Md. Laws 44.

[5] *See, e.g.*, 1851 Ky. Acts 296; 1860–61 N.C. Sess. Laws 68; 1863 Del. Laws 332.

injury or intimidate any other person." 1 A DIGEST OF THE STATUTE LAW OF THE STATE OF PENNSYLVANIA FROM THE YEAR 1700 TO 1894, at 541 (12th ed. 1894).

Vermont, Rhode Island, Ohio, Massachusetts, Wisconsin, and Iowa enacted similar laws. 1878 Vt. Laws 30, ch. 14 §3; Rhode Island, 1879 R.I. Laws 110, ch. 806 §3; 1880 Ohio Rev. St. 1654, ch. 8 §6995; 1880 Mass. Laws 232, ch. 257 §4; 1 ANNOTATED STATUTES OF WISCONSIN, CONTAINING THE GENERAL LAWS IN FORCE OCTOBER 1, 1889, at 940 (1889); 1897 Iowa Laws 1981, ch. 5 §5135.

All these laws were enacted to promote public safety by disarming dangerous persons. Ohio's Supreme Court recognized this purpose, opining that Ohio's law was constitutional because it applied to "vicious persons":

> The constitutional right to bear arms is intended … to afford the citizen means for defense of self and property.… If he employs those arms … to the annoyance and terror and danger of its citizens, his acts find no vindication in the bill of rights. That guaranty was never intended as a warrant for vicious persons to carry weapons with which to terrorize others.

State v. Hogan, 63 Ohio St. 202, 218–19 (1900).

E. Most early twentieth-century bans applied to non-citizens, who were blamed for rising crime and social unrest.

Since *Heller* found limited historical value in nineteenth-century sources, it is particularly dubious to rely on twentieth-century sources. 554 U.S. at 614 ("Since those [post-Civil War] discussions took place 75 years after the ratification of the Second Amendment, they do not provide as much insight into its original meaning as earlier sources."). Nonetheless, it is noteworthy that disarmament practices continued to focus on potentially violent persons in the twentieth century. And it is significant that no previous law was as burdensome as §922(g)(1).

In the early twentieth century, as increasing immigration was blamed for surges in crime and social unrest, several states enacted firearm restrictions on non-citizens. Nicholas Johnson, et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 501 (2d ed. 2017).

Some states prohibited non-citizens from possessing arms under the guise of preserving game. Pennsylvania, for the stated purpose of giving "additional protection to wild birds and animals and game," made it "unlawful for any unnaturalized foreign born resident, within this commonwealth, to either own or be possessed of a shotgun or rifle of any

make." 1909 Pa. Laws 466 §1. North Dakota, New Jersey, and New Mexico enacted similar laws. 1915 N.D. Laws 225–26, ch. 161 §67; 1915 N.J. Laws 662–63, ch. 355 §1; 1921 N.M. Laws 201–02, ch. 113 §1.

Connecticut—without the pretense of protecting game—forbade any "alien resident of the United States" to "own or be possessed of any shot gun or rifle." 1923 Conn. Acts 3732, ch. 259 §17. Notably, all these laws allowed handgun ownership.

Some states prohibited ownership of all firearms. Utah forbade "any unnaturalized foreign born person ... to own or have in his possession, or under his control, a shot gun, rifle, pistol, or any fire arm of any make." 1917 Utah Laws 278. Minnesota, Colorado, and Michigan passed similar laws. 1917 Minn. Laws 839–40, ch. 500 §1; 1919 Colo. Sess. Laws 416–417 §1; 1921 Mich. Pub. Acts 21 §1. In 1925, Wyoming and West Virginia also prohibited non-citizens from owning firearms. 1925 Wyo. Sess. Laws 110, ch. 106 §1; 1925 W.Va. Acts 31, ch. 3 §7.

F. Early twentieth-century prohibitions on Americans applied to only violent criminals—the few laws that applied to nonviolent criminals did not restrict long gun ownership.

A 1923 New Hampshire law provided, "No unnaturalized foreign-born person and no person who has been convicted of a felony against the

person or property of another shall own or have in his possession or under his control a pistol or revolver….” 1923 N.H. Laws 138, ch. 118 §3. North Dakota and California passed similar laws that same year, 1923 N.D. Laws 380, ch. 266 §5; 1923 Cal. Laws 696, ch. 339 §2, as did Nevada in 1925. 1925 Nev. Laws 54, ch. 47 §2. California amended its law in 1931 to include persons “addicted to the use of any narcotic drug.” 1931 Cal. Laws 2316, ch. 1098 §2. In 1933, Oregon passed a similar law that also prohibited machine guns. 1933 Or. Laws 488. Notably, none of these laws applied to rifles or shotguns.

Pennsylvania’s 1931 law applied to handguns and *some* long guns: “No person who has been convicted in this Commonwealth or elsewhere of a crime of violence shall own a firearm, or have one in his possession or under his control.” 1931 Pa. Laws 498, ch. 158 §4. “Firearm” included “any pistol or revolver with a barrel less than twelve inches, any shotgun with a barrel less than twenty-four inches, or any rifle with a barrel less than fifteen inches.” 1931 Pa. Laws 497, ch. 158 §1. “Crime of violence” included “murder, rape, mayhem, aggravated assault and battery, assault with intent to kill, robbery, burglary, breaking and entering with intent to commit a felony, and kidnapping.” *Id.*

The only law that applied to citizens and prohibited the keeping of all firearms was Rhode Island's from 1927. It applied to only violent criminals: "No person who has been convicted in this state or elsewhere of a crime of violence shall purchase own, carry or have in his possession or under his control any firearm." 1927 R.I. Pub. Laws 257 §3. "Crime of violence" meant "any of the following crimes or any attempt to commit any of the same, viz.: murder, manslaughter, rape, mayhem, assault or battery involving grave bodily injury, robbery, burglary, and breaking and entering." 1927 R.I. Pub. Laws 256 §1.

18 U.S.C. §922(g)(1) itself was originally intended to disarm violent persons. "[T]he current federal felony firearm ban differs considerably from the version of the proscription in force just half a century ago. Enacted in its earliest incarnation as the Federal Firearms Act of 1938, the law initially covered those convicted of a limited set of violent crimes such as murder, rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of qualifying offenses." *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011) (citing Federal Firearms Act, ch. 850, §§1(6), 2(f), 52 Stat. 1250, 1250–51 (1938)). "The law was expanded to encompass all individuals convicted of a felony (and to omit

misdemeanants from its scope) several decades later, in 1961." *Id.* (citing An Act to Strengthen the Federal Firearms Act, Pub.L. No. 87–342, §2, 75 Stat. 757, 757 (1961)).

III. There is no historical justification for disarming "unvirtuous" citizens.

As this Court observed, some scholars and courts have embraced a theory that the Second Amendment protected only "virtuous" citizens in the founding era. *Vongxay*, 594 F.3d at 1118. The following sources demonstrate how the theory developed despite lacking historical foundation.

- Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204, 266 (1983). For support that "[f]elons simply did not fall within the benefits of the common law right to possess arms," Kates cited the ratifying convention proposals discussed above.
- Don Kates, *The Second Amendment: A Dialogue*, 49 LAW & CONTEMP. PROBS. 143, 146 (1986). For support that "the right to arms does not preclude laws disarming the unvirtuous citizens (i.e., criminals)," *id.* at 146, Kates cited his previous article.

- Glenn Reynolds, *A Critical Guide to the Second Amendment*, 62 TENN. L. REV. 461, 480 (1995). For support that "felons, children, and the insane were excluded from the right to arms," Reynolds quoted Kates's *Dialogue*.
- Saul Cornell, *"Don't Know Much about History": The Current Crisis in Second Amendment Scholarship*, 29 N. KY. L. REV. 657, 679 (2002). For support that the "right was not something that all persons could claim, but was limited to those members of the polity who were deemed capable of exercising it in a virtuous manner," Cornell cited a Pennsylvania prohibition on disaffected persons.
- David Yassky, *The Second Amendment: Structure, History, and Constitutional Change*, 99 MICH. L. REV. 588, 626–27 (2000). Yassky contended that "[t]he average citizen whom the Founders wished to see armed was a man of republican virtue," *id.* at 626, but provided no example of the right being limited to such men.
- Saul Cornell & Nathan DeDino, *A Well Regulated Right: The Early American Origins of Gun Control*, 73 FORDHAM L. REV. 487, 491–92 (2004). The authors said, "the Second Amendment was strongly

connected to … the notion of civic virtue," *id.* at 492, but did not show that unvirtuous citizens were excluded from the right.

- *United States v. Rene E.*, 583 F.3d 8, 15 (1st Cir. 2009). In addition to Reynolds, Cornell, and the Dissent of the Minority of Pennsylvania, the court cited Robert Shalhope, *The Armed Citizen in the Early Republic,* 49 LAW & CONTEMP. PROBS. 125, 130 (1986), providing a quote to show that in "the view of late-seventeenth century republicanism … [t]he right to arms was to be limited to virtuous citizens only. Arms were 'never lodg'd in the hand of any who had not an Interest in preserving the publick Peace.'" This quote—referring to dangerous persons—was about the ancient "Israelites, Athenians, Corinthians, Achaians, Lacedemonians, Thebans, Samnites, and Romans." J. Trenchard & W. Moyle, *An Argument Shewing, That a Standing Army Is Inconsistent with a Free Government, And Absolutely Destructive to the Constitution of the English Monarchy* 7 (1697).
- *Vongxay*, 594 F.3d at 1118. *Vongxay* cited Kates's *Dialogue* and Reynolds.

- *United States v. Yancey*, 621 F.3d 681, 684–85 (7th Cir. 2010). *Yancey* cited *Vongxay*, Reynolds, and Kates, then Thomas Cooley "explaining that constitutions protect rights for 'the People' excluding, among others, 'the idiot, the lunatic, and the felon.'" *Id.* at 685 (citing Thomas Cooley, A TREATISE ON CONSTITUTIONAL LIMITATIONS 29 (1868)). "The … discussion in Cooley, however, concerns classes excluded from voting. These included women and the property-less—both being citizens and protected by arms rights." Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 709–10 (2009).
- *United States v. Bena*, 664 F.3d 1180, 1183 (8th Cir. 2011). *Bena* cited Kates's *Dialogue*.
- *United States v. Carpio-Leon*, 701 F.3d 974, 979–80 (4th Cir. 2012). *Carpio-Leon* cited *Yancey*, *Vongxay*, Reynolds, Kates, Yassky, Cornell, Cornell and DeDino, the ratifying conventions, and noted the English tradition of "disarm[ing] those ... considered disloyal or dangerous." *Id. Carpio-Leon* also cited Joyce Lee Malcolm, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO–AMERICAN RIGHT 140–41 (1994), discussing how "Indians and black slaves ... were barred

from owning firearms." *Id.* at 140. Discriminatory bans on non-citizens, however, say little about "unvirtuous citizens."

- *Binderup*, 836 F.3d at 348–49 (plurality opinion). The *Binderup* plurality cited every source above.

None of these sources provided any founding-era law disarming "unvirtuous" citizens—or anyone who was not perceived as dangerous. Contrasted with the myriad laws disarming dangerous persons, the "historical justification" for bans on felons must be the tradition of disarming dangerous—not merely unvirtuous—persons.

CONCLUSION

En banc review should be granted to establish a standard consistent with American history and Supreme Court precedent.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 29-2(c)(2) because this brief contains 4,199 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in 14-point, proportionately spaced Century Schoolbook font.

Dated this 19th day of March 2020.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on March 19, 2020, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 19th day of March 2020.

/s/ *Joseph G.S. Greenlee*
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