No. 18-3595

In the United States Court of Appeals for the Third Circuit

RAYMOND HOLLOWAY, JR.
Plaintiff–Appellee

v.

WILLIAM P. BARR, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.
Defendants–Appellants

Appeal from the United States District Court
for the Middle District of Pennsylvania
Case No. 1:17-cv-00081

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

JOSEPH G.S. GREENLEE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org
Counsel of Record

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.

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*
Joseph G.S. Greenlee
Counsel for *Amici Curiae*

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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 through charitable programs including research, education, and legal efforts.

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

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 consented to the filing of this brief.[1]

[1] No counsel for a party authored any part of this brief. No party or counsel contributed money to fund the brief's preparation or submission. Only *amici* and their members contributed money to fund the brief's preparation and submission.

SUMMARY OF ARGUMENT

This Court allows one to successfully challenge an arms prohibition by distinguishing himself from persons historically barred from possessing firearms. But it is unclear under this Court's precedents *who* was historically barred—several different theories have been endorsed by Judges on this Court. Without further guidance, challengers cannot know whom to distinguish themselves from.

This case presents an excellent vehicle to resolve the conflicting theories and define who was historically prohibited from possessing arms—and therefore, who may be prohibited today. It also presents an opportunity to ensure that the test is consistent with history.

Historically, firearm prohibitions applied to dangerous persons—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 practiced throughout the founding era, and reflected in proposed amendments from the ratifying conventions of Massachusetts, Pennsylvania, and New Hampshire.

There is no tradition of banning peaceable citizens from possessing 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 own arms.

En banc review should be granted to establish a clear standard for as-applied Second Amendment challenges that is consistent with the text of the Constitution, properly informed by history and tradition.

ARGUMENT

I. This Court allows challengers to retain their Second Amendment rights by distinguishing themselves from historically barred persons, but this Court has not clearly defined who was historically barred.

This Court allows someone to successfully challenge an arms prohibition by demonstrating that he is "different from those historically barred from possessing firearms." *Holloway v. Attorney Gen. United States*, 948 F.3d 164, 173 (3d Cir. 2020); *accord id.* at 178 n.1 (Fisher, J., dissenting); *United States v. Barton*, 633 F.3d 168, 174 (3d Cir. 2011); *Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336, 347 (3d Cir. 2016) (en banc) (plurality opinion); *id.* at 367–70 (Hardiman, J., concurring); *Beers v. Attorney Gen. United States*, 927 F.3d 150, 157 (3d Cir. 2019).

But it is unclear under this Court's precedents *who* was historically barred from possessing arms. *See Binderup*, 836 F.3d at 351–52 (opinion

of Ambro, J.) (creating a multifactor test based on seriousness and virtuousness); *id.* at 357 (Hardiman, J., concurring) ("dangerous persons likely to use firearms for illicit purposes were not understood to be protected by the Second Amendment."); *Holloway*, 948 F.3d at 173 (finding that under Judge Ambro's *Binderup* test, "[t]here are no fixed rules for determining whether an offense is serious," and considering a new "risk of harm" element). Without further guidance, challengers cannot know whom to distinguish themselves from.

This case presents an ideal opportunity to clearly define who was historically barred from possessing arms. And, as explained below, those historically barred should be defined as violent and similarly dangerous persons.

II. Historically, firearm prohibitions applied to dangerous persons.

"Constitutional rights are enshrined with the scope they were understood to have when the people adopted them." *District of Columbia v. Heller*, 554 U.S. 570, 634–35 (2008). *Heller* thus concluded with "our adoption of the original understanding of the Second Amendment." *Id.* at 625. Therefore, founding-era traditions best inform who can be prohibited

from possessing firearms.[2] *See Binderup*, 836 F.3d at 348–49 (opinion of Ambro, J.); *id.* at 367–69 (Hardiman, J., concurring); *Holloway*, 948 F.3d at 183–85 (Fisher, J., dissenting).

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. Virginia, in 1736, allowed a constable to "take away Arms from such who ride, or go, offensively armed, in Terror of the People." 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).

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

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[2] For an analysis of disarmament laws from pre-colonial England through the mid-twentieth century, *see* 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.

Connecticut punished disaffected colonists in 1775. Persons who libeled or defamed acts of the Continental Congress were disfranchised and prohibited from keeping arms or holding office. 4 THE AMERICAN HISTORICAL REVIEW 282 (1899).

In 1776, 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 immediately "to cause all persons to be disarmed … who are notoriously disaffected to the cause of America." 1776 Mass. Laws 479, ch. 21. Pennsylvania enacted similar laws in 1776 and 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).

"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." *Nat'l Rifle Ass'n of Am., Inc. v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 700 F.3d 185, 200 (5th Cir. 2012).

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

Samuel 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 danger. 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 … confirm that the common law right to keep and bear arms did not extend to those who were likely to commit violent offenses.'" *Binderup*, 836 F.3d at 368 (Hardiman, J., concurring) (quoting *Barton*, 633 F.3d at 174) (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).

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

As Appellee explained, "[s]even Judges of the *en banc Binderup* court endorsed the theory that historically, citizens could be disarmed based on virtue." Pet. for Reh'g at 11 (citing *Binderup*, 836 F.3d at 348 (plurality opinion)). And the panel here applied this virtuousness standard. *Id.* (citing *Holloway*, 948 F.3d at 171, 173). The following sources demonstrate how the virtuousness 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)," 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).
- *United States v. Vongxay*, 594 F.3d 1111, 1118 (9th Cir. 2010). *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. The historical justification for prohibiting firearm possession must be the tradition of disarming dangerous—not merely unvirtuous—persons.

CONCLUSION

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

Respectfully submitted,

/s/ *Joseph G.S. Greenlee*
JOSEPH G.S. GREENLEE
FIREARMS POLICY COALITION
1215 K Street, 17th Floor
Sacramento, CA 95814
(916) 378-5785
jgr@fpchq.org
CO Bar #48023

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) because this brief contains 2,596 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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Dated this 8th day of April 2020.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2020, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Third Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 8th day of April 2020.

/s/ *Joseph G.S. Greenlee*
Joseph G.S. Greenlee
Counsel for Amici Curiae