No. 21-4121

In the United States Court of Appeals for the Tenth Circuit

MELYNDA VINCENT,

Plaintiff-Appellant,

v.

MERRICK GARLAND, et al.,

Defendants-Appellees.

Appeal from the United States District Court for the District of Utah
Case No. 2:20-cv-00883-DBB

BRIEF OF *AMICI CURIAE* FIREARMS POLICY COALITION AND FPC ACTION FOUNDATION IN SUPPORT OF APPELLANT AND REVERSAL

JOSEPH G.S. GREENLEE
FPC ACTION FOUNDATION
5550 Painted Mirage Road
Suite 320
Las Vegas, NV 89149
(916) 517-1665
jgreenlee@fpclaw.org
Counsel of Record

Counsel for *Amici Curiae*

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, and as a non-stock nonprofit corporation, no publicly held corporation could own any share of its stock.

FPC Action Foundation has no parent corporation, and as a non-stock nonprofit corporation, no publicly held corporation could own any share of its stock.

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

STATEMENT OF *AMICI CURIAE*

Firearms Policy Coalition (FPC) is a nonprofit organization devoted to advancing individual liberty and defending individual rights, including those protected by the Constitution. FPC accomplishes its mission through legislative, regulatory, legal, and grassroots advocacy, education, and outreach programs. FPC Law is the nation's first and largest public interest legal team focused on the right to keep and bear arms and adjacent rights, and the leader in the Second Amendment litigation and research space.

FPC Action Foundation (FPCAF) is a nonprofit organization dedicated to restoring human liberty and protecting the rights enshrined in the Constitution. FPCAF conducts charitable research, education, public policy, and legal programs. The scholarship and amicus briefs of the Foundation's Director of Constitutional Studies, Joseph Greenlee, have been cited in *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 142 S. Ct. 2111, 2133 (2022); *Chiafalo v. Washington*, 140 S. Ct. 2316, 2325 (2020); and *N.Y. State Rifle & Pistol Ass'n v. City of N.Y.*, 140 S. Ct. 1525, 1541 (2020) (Alito, J., dissenting).

CONSENT TO FILE

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

[1] No counsel for a party authored this brief in any part. No party or counsel contributed money intended to fund its preparation or submission. No person other than *amici* and their members contributed money intended to fund its preparation or submission.

SUMMARY OF ARGUMENT

Because all Americans are presumptively protected by the Second Amendment, the government can justify the lifetime firearms prohibition for Ms. Vincent only by demonstrating that it is consistent with America's historical tradition of firearm regulation.

The historical tradition of firearm regulation in both England and America allowed for the disarmament of dangerous persons—disaffected persons posing a threat to the government and persons with a proven proclivity for violence. The tradition of disarming dangerous persons was practiced for centuries, including during the colonial, founding, and 19th-century periods in America.

There is no tradition of disarming peaceable citizens. Nor is there any tradition of limiting the Second Amendment to "virtuous" citizens. Historically, nonviolent criminals who demonstrated no propensity for dangerousness—including someone who attempted to pass a $498.12 false check—retained their right to keep and bear arms. Indeed, some founding-era laws expressly secured the arms rights of nonviolent felons.

It is therefore a violation of Ms. Vincent's Second Amendment rights to permanently disarm her based on a conviction for a nonviolent crime.

ARGUMENT

I. The plain text of the Second Amendment presumptively protects all Americans, so the government must demonstrate that prohibiting Ms. Vincent from keeping firearms is consistent with America's tradition of firearm regulation.

The Supreme Court set forth the test for all Second Amendment challenges as follows:

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition of firearm regulation. Only then may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command.

N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111, 2129–30 (2022) (quotation omitted).

The Court conducted the plain text analysis of the Second Amendment in *District of Columbia v. Heller*, 554 U.S. 570 (2008). Analyzing "right of the people," the Court concluded with "a strong presumption that the Second Amendment right is exercised individually and belongs to *all* Americans." *Id.* at 581 (emphasis added). Analyzing "keep Arms," the Court determined that it meant to "have weapons." *Id.* at 582.

Because Ms. Vincent is part of "the people" and wants to "have weapons" for self-defense, "the Constitution presumptively protects that

conduct" and the government can justify disarming her only by demonstrating a historical tradition of such regulation. *Bruen*, 142 S. Ct. at 2130. "*Only then* may a court conclude that the individual's conduct falls outside the Second Amendment's unqualified command." *Id.* (emphasis added).

II. Historically, firearm prohibitions applied to dangerous persons.

A. In English tradition, arms prohibitions applied to disaffected and other dangerous persons.

Bruen cautioned against overreliance on English history but found value in "English practices that prevailed up to the period immediately before and after the framing of the Constitution." 142 S. Ct. at 2137 (quotation omitted).

One English practice that became part of the American tradition was the disarming of violent and dangerous persons. This practice dates back to at least AD 602, when The Laws of King Æthelbirht made it unlawful to "furnish weapons to another where there is strife." ANCIENT LAWS AND INSTITUTES OF ENGLAND 3 (Benjamin Thorpe ed., 1840). By the seventeenth century, one's arms were confiscated for going armed

"offensively" or committing an affray in the presence of a Justice of the Peace. Michael Dalton, THE COUNTREY JUSTICE 36, 37 (1690).

Most often, "dangerous persons" were disaffected persons disloyal to the current government, who might want to overthrow it—or political opponents defined as such. The precedent for disarming rebellious segments of the population was established during the Welsh Revolt from 1400 to 1415. 2 Henry IV ch. 12 (1400–01). Leading up to the Glorious Revolution of 1688, Whigs and nonAnglican Protestants were often disarmed.

In 1660, Lords Lieutenant were issued instructions for "disaffected persons [to be] watched and not allowed to assemble, and their arms seized." 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1660–1661, at 150 (1860). Additionally, King Charles II ordered the Lord Mayor and Commissioners for the Lieutenancy of London "to make strict search in the city and precincts for dangerous and disaffected persons, seize and secure them and their arms, and detain them in custody." 10 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, 1670, at 237 (1895).

England's 1662 Militia Act empowered officials "to search for and seize all arms in the custody or possession of any person or persons" deemed "dangerous to the peace of the kingdom." 8 Danby Pickering, THE STATUTES AT LARGE, FROM THE TWELFTH YEAR OF KING CHARLES II, TO THE LAST YEAR OF KING JAMES II 40 (1763).

That same year, Charles II ordered deputy lieutenants of Kent "to seize all arms found in the custody of disaffected persons in the lathe of Shepway, and disarm all factious and seditious spirits." 1 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, at 538.

Charles II then issued orders to eighteen lieutenants in 1684 to seize arms "from dangerous and disaffected persons." 27 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF CHARLES II, 1684–1685, at 26–27, 83–85, 102 (1938).

James II succeeded Charles II in 1685, but was soon overthrown in the Glorious Revolution of 1688. At that point, "dangerous persons" often included Tories loyal to James II.

After Ireland rose in a Jacobite rebellion, a 1695 statute forbade the carrying and possession of arms and ammunition by Irish Catholics in Ireland. 7 William III ch. 5 (1695). In addition to distrusted "papists," a

legal manual instructed constables to search for arms possessed by persons who are "dangerous." Robert Gardiner, THE COMPLEAT CONSTABLE 18 (3d ed. 1708).

King William III called in 1699 for the disarming of "great numbers of papists and other disaffected persons, who disown his Majesty's government." 5 CALENDAR OF STATE PAPERS, DOMESTIC SERIES, OF THE REIGN OF WILLIAM III, 1699–1700, at 79–80 (1937).

The following year, The House of Lords prayed that William III "would be pleased to order the seizing of all Horses and Arms of Papists, and other disaffected Persons, and have those ill Men removed from London according to Law." 2 THE HISTORY AND PROCEEDINGS OF THE HOUSE OF LORDS, FROM THE RESTORATION IN 1660, TO THE PRESENT TIME 20 (1742). In response, William III "assured them he would take Care to perform all that they had desired of him." *Id.*

Then in 1701, William III "charge[d] all lieutenants and deputy-lieutenants, within the several counties of [England] and Wales, that they cause search to be made for arms in the possession of any persons whom they judge dangerous." 6 CALENDAR OF STATE PAPERS: DOMESTIC

SERIES, OF THE REIGN OF WILLIAM III, 1700–1702, at 234 (1937) (second brackets in original).

Disarmament actions in English tradition focused on dangerous persons—violent persons and disaffected persons perceived as threatening to the crown.

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

Bruen valued colonial laws to the extent that they informed the original understanding of the Second Amendment. 142 S. Ct. at 2142–44. Similar to England, disarmament laws in colonial America were designed to keep weapons away from those perceived as posing a dangerous threat. Such laws were often discriminatory and overbroad—and thus unconstitutional by the later-enacted Second Amendment—but they were 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 an aggressive and terrifying manner. A 1736 Virginia law authorized constables to "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. George Webb, THE OFFICE OF AUTHORITY OF A JUSTICE OF PEACE 92–93 (1736).

During wars with Catholic France, discriminatory laws against Catholics were enacted in Maryland (with a large Catholic population), and next-door Virginia. For example, during the French & Indian War (1754–63), Virginia required Catholics to take an oath of allegiance; if they refused, they were disarmed. 7 William Waller Hening, THE STATUTES AT LARGE; BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA 35–37 (1820). An exception was made 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.

The American Revolution began on April 19, 1775, when Redcoats marched to Lexington and Concord to confiscate guns and gunpowder. Armed Americans resisted this attempt at confiscation. *See* Nicholas Johnson et al., FIREARMS LAW AND THE SECOND AMENDMENT: REGULATION, RIGHTS AND POLICY 262–64 (2d ed. 2017). As in any war, each side attempted to reduce the arms in the hands of the other side.

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 283–85 (1906).

Massachusetts acted to disarm persons "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 1776 and 1777. 8 THE STATUTES AT LARGE OF PENNSYLVANIA FROM 1682 TO 1801, at 559–60 (1902); 9 *id.* at 110–14.

More narrowly, Connecticut disarmed persons criminally convicted of libeling or defaming acts of the Continental Congress; convicts also lost the rights to vote, hold office, and serve in the military. 4 THE AMERICAN HISTORICAL REVIEW 282 (1899).

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.

That same year, North Carolina stripped "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). Virginia did the same. 9 Hening, at 282.

Pennsylvania in 1779 determined 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," so it "empowered [militia officers] to disarm any person or persons who shall not have taken any oath or affirmation of allegiance to this or any other state." THE ACTS OF THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA 193 (1782).

As the Pennsylvania and New Jersey legislatures expressly stated, it was "dangerous" to allow disaffected persons to keep arms. They posed a grave danger and were often violent. For example, "[i]nsurrections were common" in Maryland, Harold B. Hancock, THE LOYALISTS OF REVOLUTIONARY DELAWARE 5 (1977), "[a]t various times Whigs and Tories

confronted one another in insurrections" causing "occasional deaths" in Delaware, *id.* at 4, and when a "Loyal Association" formed to oppose the patriots in Massachusetts, Royal Governor Thomas Gage provided 300 stand of arms and 100 troops to support them," Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON, AND OF THE BATTLES OF LEXINGTON, CONCORD, AND BUNKER HILL 46 (4th ed. 1873); *see also* Rick Atkinson, THE BRITISH ARE COMING 119 (2019) (Virginia's royal governor "boasted that three thousand [loyalists] joined his ranks" after a November 1775 victory); 180 ("southern governors had been given authority to raise loyalist troops"); 253 (a brigadier general reporting that continental troops "ha[d] most happily terminated a very dangerous insurrection" in North Carolina in February 1776); 320 (Newark resident worrying that "our wives & children [are] unprotected … from … the Tories … in the midst of us"); 366 (August 1776 battle in which "loyalist volunteers" fought the patriots); 309 ("Civil liberties for loyalists had become [a] rare commodity" because "Congress had resolved that anyone in America who professed allegiance to King George was 'guilty of treason'").

Like the English, and out of similar concerns of violent insurrections, the colonists disarmed those who might rebel against them. The

Revolutionary War precedents support the constitutionality of disarming persons intending to use arms to impose foreign rule on the United States. But they provide no support for disarming nonviolent criminals who pose no threat of danger.

C. At Constitution ratifying conventions, influential proposals called for disarming dangerous persons and protecting the rights of peaceable persons.

"Not all history is created equal"—because "'[c]onstitutional rights are enshrined with the scope they were understood to have *when the people adopted them*,'" founding era history is paramount. *Bruen*, 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 634–35) (emphasis in *Bruen*). The ratifying conventions are therefore instructive in interpreting the ultimately codified right.

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 his supporters as ultimately becoming the Second Amendment. *See*

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.").

In the founding era, "peaceable" meant the same as today: nonviolent. Being "peaceable" is not the same as being "law-abiding," because the law may be broken nonviolently. Samuel Johnson's dictionary defined "peaceable" as "1. Free from war; free from tumult. 2. Quiet; undisturbed. 3. Not violent; not bloody. 4. Not quarrelsome; not turbulent." 2 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (5th ed. 1773) (unpaginated). Thomas Sheridan defined "peaceable" as "Free from war, free from tumult; quiet, undisturbed; not quarrelsome, not turbulent." Thomas Sheridan, A COMPLETE DICTIONARY OF THE ENGLISH LANGUAGE 438 (2d ed. 1789). According to Noah Webster, "peaceable" meant "Not violent, bloody or unnatural." 2 Noah Webster, AMERICAN DICTIONARY OF

THE ENGLISH LANGUAGE (1828) (unpaginated). *Heller* relied on Johnson, Sheridan, and Webster in defining the Second Amendment's text.[2]

New Hampshire proposed a declaration 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 bear 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.

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to their Constituents, *in* 2 Schwartz, at 665. While the "crimes committed" language is not expressly limited to violent crimes, there is no evidence suggesting that the Pennsylvania Minority was

[2] For Johnson, *see Heller*, 554 U.S. at 581 ("arms"), 582 ("keep"), 584 ("bear"), 597 ("regulate"). For Sheridan, *see id.* at 584 ("bear"). For Webster, *see id.* at 581 ("arms"), 582 ("keep"), 584 ("bear"), 595 ("militia").

advocating for the first ever firearms prohibition for non-dangerous offenses. The only discussion of the proposal came from a Philadelphia Federalist who noted that it allowed for the disarmament of "dangerous persons" such as "insurrectionists." *No. XI*, FEDERAL GAZETTE, Nov. 28, 1788, *in* THE ORIGIN OF THE SECOND AMENDMENT 794 (David E. Young ed., 2d ed. 2001).

"[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*, 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.*

D. Prohibited persons could regain their rights in the founding era.

Offenders in the founding era could often regain their rights upon providing securities (a financial promise, like a bond) of peaceable

behavior. For example, individuals "who shall go armed offensively" in 1759 New Hampshire were imprisoned "until he or she find such surities of the peace and good behavior." ACTS AND LAWS OF HIS MAJESTY'S PROVINCE OF NEW-HAMPSHIRE IN NEW ENGLAND 2 (1759).

Some states had procedures for restoring a person's right to arms. Connecticut's 1775 wartime law disarmed an "inimical" person only "until such time as he could prove his friendliness to the liberal cause." 4 THE AMERICAN HISTORICAL REVIEW, at 282. 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. When the danger abated, the arms disability was lifted.

In Shays's Rebellion, armed bands in 1786 Massachusetts attacked courthouses, the federal arsenal in Springfield, and other government properties, leading to a military confrontation with the Massachusetts militia on February 2, 1787. *See generally* John Noble, A FEW NOTES ON THE SHAYS REBELLION (1903). After the rebellion was defeated, Massachusetts gave a partial pardon to persons "who have been, or may

be guilty of treason, or giving aid or support to the present rebellion." 1 PRIVATE AND SPECIAL STATUTES OF THE COMMONWEALTH OF MASSACHUSETTS FROM 1780–1805, at 145 (1805). Rather than being executed for treason, many of the Shaysites temporarily were deprived of many civil rights, including a three-year prohibition on bearing arms. *Id.* at 146–47. In contrast to the Shaysites who perpetrated the capital offense of treason and had their arms rights restored after three years, Ms. Vincent is prohibited from possessing arms for life.

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

Bruen noted that "evidence of 'how the Second Amendment was interpreted from immediately after its ratification through the end of the 19th century' represent[s] a 'critical tool of constitutional interpretation.'" 142 S. Ct. at 2136 (quoting *Heller*, 554 U.S. at 605). But the Court cautioned "against giving postenactment history more weight than it can rightly bear," *id.*, and emphasized that "to the extent later history contradicts what the text says, the text controls," *id.* at 2137.

Nineteenth-century prohibitions on arms possession were mostly discriminatory bans on slaves and freedmen.[3] Another targeted group starting in the latter half of the century were "tramps"—typically defined as males begging for charity outside their home county. Tramping was not a homebound activity, so this was not a prohibition on keeping arms in the home.

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 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; 1879 R.I. Laws 110, ch. 806 §3; 1880 Ohio Rev. St. 1654, ch. 8 §6995; 1880 Mass. Laws 232,

[3] *See, e.g.*, 1804 Miss. Laws 90; 1804 Ind. Acts 108; 1806 Md. Laws 44; 1851 Ky. Acts 296; 1860–61 N.C. Sess. Laws 68; 1863 Del. Laws 332.

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.

Ohio's Supreme Court determined that the tramping disarmament law was constitutional because it applied to "vicious persons":

> The constitutional right to bear arms is intended to guaranty to the people, in support of just government, such right, and to afford the citizen means for defense of self and property. While this secures to him a right of which he cannot be deprived, it enjoins a duty in execution of which that right is to be exercised. If he employs those arms which he ought to wield for the safety and protection of his country, his person, and his property, 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). Indeed, tramps were "an object of fear," who were "accused … of every conceivable crime" and "probably the most common and widespread of all nineteenth-century bogeymen." Lawrence M. Friedman, CRIME AND PUNISHMENT IN AMERICAN HISTORY 102 (1993). Disarmament efforts in the 19th century therefore continued the earlier tradition of targeting dangerous persons.

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

Some scholars and courts have embraced a theory that the Second Amendment protected only "virtuous" citizens in the founding era. 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*, 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* article.

- 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). Shalhope, quoting a 1697 article opposing standing armies in England, argued 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.'" *Id.* This quote—referring to dangerous persons—was not about colonial America but 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* article.
- *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.* The court 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 noncitizens, however, say little about unvirtuous citizens.

- *Binderup*, 836 F.3d at 348–49 (Ambro, J., opinion). Judge Ambro's opinion cited each of the above sources.
- *Medina v. Whitaker*, 913 F.3d 152, 158–59 (D.C. Cir. 2019). The court cited the Dissent of the Minority of Pennsylvania, Reynolds, Cornell and DeDino, *Carpio-Leon*, *Yancey*, *Vongxay*, *Binderup*, *Rene E.*, and referenced Massachusetts and Pennsylvania prohibitions on disaffected persons.

None of these sources provided any colonial or founding-era law disarming "unvirtuous" citizens—or anyone, for that matter, who was not perceived as dangerous.[4]

Establishing a "historical tradition of firearm regulation" under *Bruen* is a tall order. 142 S. Ct. at 2130. *Bruen* held that "the historical record

[4] For a more thorough refutation of the virtuous citizen test, *see Kanter v. Barr*, 919 F.3d 437, 462–64 (7th Cir. 2019) (Barrett, J., dissenting); *Folajtar v. Attorney Gen. United States*, 980 F.3d 897, 915–20 (3d Cir. 2020) (Bibas, J., dissenting); Joseph Greenlee, *The Historical Justification for Prohibiting Dangerous Persons from Possessing Arms*, 20 WYO L. REV. 249, 275–83 (2020).

compiled by respondents does not demonstrate a tradition," *id.* at 2138, where the respondents produced three colonial statutes (1686 East New Jersey, 1692 Massachusetts, 1699 New Hampshire), *id.* at 2142–44, three late-18th-century and early-19th-century state laws that "parallel[] the colonial statutes" (1786 Virginia, 1795 Massachusetts, 1801 Tennessee), *id.* at 2144–45, three additional 19th-century state laws (1821 Tennessee, 1871 Texas, 1887 West Virginia), *id.* at 2147, 2153, five late-19th-century regulations from the Western Territories (1869 New Mexico, 1875 Wyoming, 1889 Idaho, 1889 Arizona, 1890 Oklahoma), *id.* at 2154–55, and one late-19th-century Western State law (1881 Kansas), *id.* at 2155–56.[5]

In striking contrast to the historical record held insufficient in *Bruen*, there are *zero* historical laws disarming anyone based on virtue.

[5] The Court did not necessarily agree with the government's reading of the colonial laws or the early state laws, but the Court stated that "even if" the government's reading were correct, the record would not justify the challenged regulation. *Bruen*, 142 S. Ct. at 2144.

IV. Historically, many felons were not executed or disarmed.

"At the common law, few felonies, indeed, were punished with death," James Wilson explained soon after his appointment to the first United States Supreme Court. 2 THE WORKS OF JAMES WILSON 348 (James DeWitt Andrews ed., 1896).[6]

Larceny—which, Wilson explained, "is described [as] the felonious and fraudulent taking and carrying away of the personal goods of another," *id.* at 379—was not a capital offense under the laws of the United States or Pennsylvania, *id.* at 383.

The First Congress of the United States established the first federal criminal laws and made larceny punishable by a "fine[] not exceeding the four fold value of the property so stolen, embezzled or purloined" and a "publicly whipp[ing], not exceeding thirty-nine stripes." 1 THE PUBLIC STATUTES AT LARGE OF THE UNITED STATES OF AMERICA 116 (Richard Peters ed., 1845). Someone who stole "any arms, ordnance, munition, shot, powder, or habiliments of war" from the United States could receive the same punishment. *Id.*

---

[6] Wilson added that, "[a]t this moment, every felony does not, in England, receive a punishment which is capital," using "petit larceny" as an example. 2 THE WORKS OF JAMES WILSON, at 348.

Under Pennsylvania's 1790 law, "any person or persons [who] shall hereafter feloniously steal, take and carry away any goods or chattels, under the value of twenty shillings" had to "restore the goods and chattels so stolen, or pay the full value thereof … and be further sentenced to undergo a servitude for a term not exceeding one year." 2 LAWS OF THE COMMONWEALTH OF PENNSYLVANIA, FROM THE FOURTEENTH DAY OF OCTOBER, ONE THOUSAND SEVEN HUNDRED, TO THE TWENTIETH DAY OF MARCH, ONE THOUSAND EIGHT HUNDRED AND TEN 532 (1810). Someone convicted of "larceny to the value of twenty shillings and upwards" had to "restore the goods" or "the full value thereof" and could be "confined [and] kept to hard labour" for up to three years. *Id.* Horse thieves were "confined [and] kept to hard labour" for up to seven years. *Id.*

Additionally, under Pennsylvania's 1794 law, someone convicted of having "falsely forged and counterfeited any gold or silver coin[,] … or of having falsely uttered, paid, or tendered in payment, any such counterfeit and forged coin," or for "printing, signing, or passing any counterfeit notes," was fined and imprisoned for "not less than four, nor more than fifteen years." 3 *id.* at 187–88.

Once these and other felons reentered society after being released from incarceration, they not only had full Second Amendment rights, but they were required to keep and bear arms under the state and federal militia acts. *See* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 533–89 (2019) (covering the militia laws of the 13 original States and their colonial predecessors, plus Vermont, New Haven Colony, and Plymouth Colony). While militia laws occasionally provided exemptions for people employed in certain professions, *see, e.g.*, 1 Stat. 271, §2 (1792) (federal Uniform Militia Act providing exemptions for elected officials, post officers, stage-drivers, ferrymen, inspectors, pilots, and mariners), no militia law in the colonial or founding periods ever provided an exemption based on prior incarceration or crimes committed.

What is more, several colonial and founding-era laws expressly allowed persons convicted of stealing money to keep their arms. In 1786 Massachusetts, estate sales were held to recover funds stolen by corrupt tax collectors and sheriffs. But it was forbidden to include firearms in the sales: "in no case whatever, any distress shall be made or taken from any person, of his arms or household utensils, necessary for upholding life."

1786 Mass. Laws 265. Under this law, which existed when Samuel Adams proposed his amendment at Massachusetts's ratifying convention, even unvirtuous citizens who were convicted of stealing tax money, imprisoned, and had nearly all their belongings confiscated retained the right to keep arms.

Laws exempting arms from civil action recoveries existed since at least 1650. Connecticut's 1650 law allowed officers, upon "execution of Civill Actions.… to breake open the dore of any howse, chest or place" where goods liable to execution were, except that "it shall not bee lawfull for [an] officer to [levy] any mans … armes" or any other implements "which are for the necessary upholding of his life." THE PUBLIC RECORDS OF THE COLONY OF CONNECTICUT, PRIOR TO THE UNION WITH NEW HAVEN COLONY, MAY 1665, at 537 (J. Hammond Trumbull ed., 1850).

The federal Uniform Militia Act in 1792 exempted militia arms "from all suits, distresses, executions or sales, for debt or for the payment of taxes." 1 Stat. 271, §1 (1792). Maryland and Virginia had similar exemptions. 13 ARCHIVES OF MARYLAND 557 (William Hand Browne ed., 1894) (1692 Maryland); 3 Hening, at 339 (1705 Virginia); 4 *id.* at 121 (1723 Virginia).

CONCLUSION

There is no historical tradition of disarming peaceable persons like Ms. Vincent. Nor is there any tradition of disarming people based only on the fact that they committed a felony. Thus, the lifetime firearms ban applied to Ms. Vincent is unconstitutional, and the decision below should be reversed.

Respectfully submitted,

/s/ *Joseph G.S. Greenlee*
JOSEPH G.S. GREENLEE
FPC ACTION FOUNDATION
5550 Painted Mirage Road
Suite 320
Las Vegas, NV 89149
(916) 517-1665
jgreenlee@fpclaw.org
Counsel of Record

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because this brief contains 5,824 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(f).

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, proportionally spaced Century Schoolbook font.

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

CERTIFICATE OF SERVICE

I certify that on October 6, 2022, I served the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

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