No. 19-1418

In The Supreme Court of the United States

ZOIE H.,

Petitioner,

v.

STATE OF NEBRASKA,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Nebraska

BRIEF OF *AMICI CURIAE* PROFESSORS OF SECOND AMENDMENT LAW, FIREARMS POLICY COALITION, FIREARMS POLICY FOUNDATION, CALIFORNIA GUN RIGHTS FOUNDATION, MADISON SOCIETY FOUNDATION, SECOND AMENDMENT FOUNDATION, AND INDEPENDENCE INSTITUTE IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

***Amici* law professors** teach and write on the Second Amendment: Nicholas Johnson (Fordham), Donald Kilmer (Lincoln), George Mocsary (Wyoming), Joseph Olson (Mitchell Hamline), Glenn Reynolds (Tennessee), and Gregory Wallace (Campbell). They were cited by this Court in *District of Columbia v. Heller* and *McDonald v. Chicago*. Oft-cited by lower courts as well, these professors include authors of the first law school textbook on the Second Amendment, and many other books and law review articles on the subject.

Firearms Policy Coalition is a nonprofit organization that defends constitutional rights through legislative and grassroots advocacy, litigation, education, and outreach programs.

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

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

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[1] All parties received timely notice and consented to the filing of this brief. No counsel for any party authored the brief in whole or part. Only *amici* funded its preparation and submission.

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 that protects the right to arms through educational and legal action programs. SAF has over 650,000 members, in every State of the Union. SAF organized and prevailed in *McDonald v. Chicago*.

Independence Institute is a nonpartisan public policy research organization. The Institute's amicus briefs in *Heller* and *McDonald* (under the name of lead amicus Int'l Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (Heller), Alito (McDonald), and Stevens (McDonald).

Amici have an interest in this case because it concerns the fundamental nature of the right to keep and bear arms.

SUMMARY OF ARGUMENT

In the founding era and all times before, 19-to-25-year-olds were never prohibited from owning firearms based on age. Rather, through hundreds of statutes, every colony required 19-to-25-year-olds to own firearms, even when the age of majority was 21.

Only dangerous people were disarmed—in particular, violent persons and disaffected persons who

posed a threat to the government. Prohibited persons usually had their rights reinstated once they ceased being dangerous.

Nebraska prohibits some nonviolent juvenile offenders from possessing firearms until the age of 25—well past the age of majority. The accused juveniles are not entitled to a jury trial. There is no historical justification for such a prohibition, and it is irreconcilable with the fundamental nature of the right to keep and bear arms.

By concluding that the deprivation of Second Amendment rights is not sufficiently serious to trigger the right to a jury trial, the Supreme Court of Nebraska treated the Second Amendment as a second-class right.

ARGUMENT

I. According to original public meaning, Second Amendment protections are in full force from ages 19 to 25.

"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). So, *Heller* concluded with "our adoption of the original understanding of the Second Amendment." *Id.* at 625. In the founding era, 19-to-25-year-olds were fully protected by the Second Amendment. Only dangerous persons were prohibited from

possessing arms. Nebraska therefore imposes a severe and unconstitutional restriction by depriving juveniles of the right until age 25, based on nonviolent offenses and without the right to a jury trial.

A. Throughout the colonial and founding eras, hundreds of statutes mandated gun ownership among 19-to-25-year-olds.

Hundreds of statutes throughout the colonial and founding eras required 19-to-25-year-olds to own firearms and edged weapons. *See* David Kopel & Joseph Greenlee, *The Second Amendment Rights of Young Adults*, 43 S. ILL. U. L.J. 495, 533–89 (2019) (covering the 13 original states and colonies, Vermont, and Plymouth Colony).

The Second Amendment became the law of the land after being ratified by eleven states. At the time of ratification, every ratifying state required 19-to-25-year-olds to own firearms. *Id.* at 537–38 (New Jersey), 542–43 (Maryland), 547–48 (North Carolina), 550 (South Carolina), 554–55 (New Hampshire), 557–58 (Delaware), 562–63 (Pennsylvania), 567 (New York), 569 (Rhode Island), 573 (Vermont), 583 (Virginia). So did the other states. *Id.* at 585 (Massachusetts), 587 (Georgia), 589 (Connecticut).[2]

[2] Connecticut, Georgia, and Massachusetts ratified the entire Bill of Rights—including the Second Amendment—in 1939, to make a statement when dictators like Hitler, Mussolini, Franco, Stalin, and Tojo were wantonly murdering disarmed victims.

The state arms mandates in effect in 1791 were continuations of mandates that had existed in all the colonies since their early days. The exception was Pennsylvania, which had no arms mandate until 1777.

Most statutes requiring firearm ownership were militia statutes. Hundreds of militia statutes enacted prior to the Second Amendment's ratification required 19-to-25-year-olds to own arms. *See id.* at 536–89 (identifying over 200 statutes). Only in 1738–1757 Virginia, when militia duty started at 21, was a minimum militia age over 18.[3]

Many statutes also mandated firearm ownership by women and non-militiamen. These laws did not specifically mention age. Rather, they applied to everyone old enough to conduct particular activities, such as keeping house.

Maryland, in 1639, required "that every house keeper or housekeepers within this Province shall have ready continually upon all occasions within his her or their house for him or themselves and for every person within his her or their house able to bear armes one Serviceable fixed gunne," plus a sword, gunpowder, and other accessories, including flints. 1 PROCEEDINGS AND ACTS OF THE GENERAL ASSEMBLY OF MARYLAND JANUARY 1637/8–SEPTEMBER 1664, at 77 (William Hand Browne ed., 1883).

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[3] This brief focuses on 19-to-25-year-olds because those are the adults affected by Nebraska's arms prohibition.

Virginia had several laws requiring arms to travel, attend church, work in the fields, and attend court. William Waller Hening, 1 THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA, FROM THE FIRST SESSION OF THE LEGISLATURE 127 (1823) (1623 law requiring arms to travel); *id.* (1624, requiring arms to work in the field); *id.* (1624, requiring farmers to possess arms); *id.* at 173 (1632, travel); *id.* (1632, working in the field); *id.* (1632, requiring men to carry arms to church); *id.* at 263 (1643, requiring "masters of every family" to carry arms to church); 2 Hening, at 333 (1676, requiring arms to attend church or court). More broadly, a 1639 law mandated that "ALL persons . . . be provided with arms and ammunition or be fined." 1 Hening, at 226. Laws in 1659 and 1662 required all men capable of bearing arms to own a firearm. *Id.* at 525; 2 Hening at 126. And a 1762 law required persons exempt from militia training to keep the required militia arms at home. 4 Hening, at 534, 537. To the extent that women of any age farmed, traveled, or engaged in other listed activities, the arms mandates applied to them.

A 1632 Plymouth law required that "every freeman or other inhabitant of this colony provide for himselfe and each under him able to beare armes a sufficient musket and other serviceable peece." THE COMPACT WITH THE CHARTER AND LAWS OF THE COLONY OF NEW PLYMOUTH 31 (William Brigham ed., 1836).

To promote immigration, North Carolina issued land grants starting in 1664—but only to settlers who were "armed with a good firelock or matchlock."

1 AMERICA'S FOUNDING CHARTERS: PRIMARY DOCUMENTS OF COLONIAL AND REVOLUTIONARY ERA GOVERNANCE 210–11 (Jon Wakelyn ed., 2006) (Concessions and Agreements, Jan. 11, 1664). In 1701, Virginia required recipients of land grants to keep someone armed and between 16 and 60 on the land. 3 Hening, at 205.

New York in 1684 required that "all persons though freed from [militia] Training by the Law . . . be obliged to Keep Convenient armes and ammunition in Their houses as the Law directs to others." 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 161 (1896). Like other colonies, New York exempted certain persons from militia training based on occupational status (e.g., clergy, physicians), but even exempted persons had to keep arms. *Id.* at 49.

Delaware required "every Freeholder and taxable Person" starting in 1741 to "provide himself with . . . One well fixed Musket or Firelock." George H. Ryden, DELAWARE–THE FIRST STATE IN THE UNION 117 (1938).

Starting in 1779, "every listed soldier *and other householder*" in Vermont had to "always be provided with, and have in constant readiness, a well fixed firelock." VERMONT STATE PAPERS: BEING A COLLECTION OF RECORDS AND DOCUMENTS, CONNECTED WITH THE ASSUMPTION AND ESTABLISHMENT OF GOVERNMENT BY THE PEOPLE OF VERMONT 307 (William Slade ed., 1823) (emphasis added).

New Hampshire required every head of household to own firearms in 1718. 2 LAWS OF NEW HAMPSHIRE: PROVINCE PERIOD, 1702–1745, at 285 (1913). In 1776,

New Hampshire required all males between 16 and 50 *not* in the militia to own firearms. 4 LAWS OF NEW HAMPSHIRE: REVOLUTIONARY PERIOD, 1776–1784, at 46 (1916). Then in 1780, New Hampshire required males under 70 who were exempt from militia training to keep militia arms at home, so they could defend the community if attacked. *Id.* at 276.

The militia mandates certify that 19-to-25-year-olds had full Second Amendment protections. As *Heller* observed, "the 'militia' in colonial America consisted of *a subset of 'the people'*—those who were male, able bodied, and within a certain age range." 554 U.S. at 580 (emphasis added). Because 19-to-25-year-olds were part of the militia, 19-to-25-year-olds were also part of "the people." Also part of "the people" were non-militia 19-to-25-year-olds of both sexes, many of whom were covered by non-militia arms mandates. As the Second Amendment's operative clause states, "the right of *the people* to keep and bear arms, shall not be infringed." U.S. Const., amend. II (emphasis added).

B. There were no age-based restrictions on 19-to-25-year-olds in the colonial or founding eras, regardless of the age of majority.

In contrast to the hundreds of statutes requiring 19-to-25-year-olds to keep and bear arms throughout the colonial and founding eras, there were *no* laws prohibiting them from doing so. This is true, even though "[t]he American colonies, then the United States,

adopted age twenty-one as the near universal age of majority." Vivian Hamilton, *Adulthood in Law and Culture*, 91 TUL. L. REV. 55, 64 (2016).[4]

This is consistent with this Court's interpretation of constitutional rights. "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 74 (1976); *see Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Students in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect"); *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 794 (2011) (quoting *Erznoznik v. Jacksonville*, 422 U.S. 205, 212–13 (1975)) ("[M]inors are entitled to a significant measure of First Amendment protection"). *See also Newsom v. Albermarle*, 354 F.3d 249 (4th Cir. 2003) (high school cannot punish a student for wearing a NRA Shooting Sports Camp shirt).

In sum, 19-to-25-year-olds have full Second Amendment rights, and, as with older persons,

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[4] "The U.S. age of majority remained unchanged from the country's founding well into the twentieth century." Hamilton, at 64. After the Twenty-Sixth Amendment's ratification in 1971, eighteen "began to replace twenty-one across a range of contexts and has been adopted as the near universal age of majority." *Id.* at 65. The age of majority is currently 18 in every state except for Nebraska (19), Alabama (19), and Mississippi (21).

individuals may lose those rights only under certain circumstances.

II. Firearm prohibitions based on nonviolent crimes are inconsistent with historical firearm prohibitions.

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

Disarmament laws in colonial America kept weapons away from persons perceived to be dangerous. Some laws were discriminatory and overbroad—and thus unconstitutional by the later-enacted Second Amendment. *See*, *e.g.*, LAWS AND ORDINANCES OF NEW NETHERLAND, 1638–1674, at 234–35 (1868) (1656 N.Y. law "forbid[ding] 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 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, special 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 Hening, at 35–37. 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 conduct house-to-house searches for 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.

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). In 1777, Virginia did the same. 9 Hening, at 282.

Pennsylvania in 1779 declared 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," and 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).

Both sides of the Revolution were committing treason—either against King George or against their State and the United States. The Revolutionary War

precedents support the constitutionality of disarming persons intending to use arms to impose foreign rule on the United States.

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

When the Massachusetts Convention debated the proposed Constitution, Samuel Adams opposed ratification without a declaration of rights. Adams proposed 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 as a basis of the Second Amendment. *See Independent Chronicle*, Aug. 6, 1789, *in* 6 DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 1453 (1976); 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). 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). *Cf.* BLACK'S LAW DICTIONARY (6th ed. 1996) (defining "peaceable" as "Free from the character of force, violence, or trespass."). *Heller* relied on Johnson, Sheridan, and Webster in defining the Second Amendment's text.[5]

New Hampshire proposed a bill of rights that allowed 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 arms right:

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[5] 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").

> 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, it seems unlikely that the Pennsylvania Dissent wanted permanent disarmament for every imaginable offense; the context of "real danger of public injury" continues the tradition of disarming the dangerous, including by inferences drawn from criminal convictions.

"[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 regain their rights in the founding era.

Offenders in the founding era could 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 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* 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, the Shaysites temporarily were deprived of many civil rights, including a three-year prohibition on bearing arms. *Id.* at 146–47.

While the Shaysites who had perpetrated the capital offense of treason had their arms rights restored after three years, nonviolent juveniles in Nebraska are prohibited from possessing arms for six years beyond the age of majority.

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

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

Most nineteenth-century arms prohibitions were aimed at slaves or free people of color.[6] *See McDonald v. Chicago*, 561 U.S. 742, 770–71 (2010); *id.* at 843–47 (Thomas, J., concurring).

Some laws targeted "tramps"—typically defined as males begging for charity outside their home county.

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[6] *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.

Tramping was not a homebound activity, so any beggar could still keep arms at 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; 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.

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 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 noncitizens, who were blamed for rising crime and social unrest.

The twentieth century is well beyond the historical sources cited in *Heller*. Nonetheless, it is noteworthy that disarmament practices in that era continued to focus on dangerous, potentially violent persons.

Early in the century, increasing immigration from Southern and Eastern Europe was blamed for increasing crime and social unrest. Several states enacted firearm restrictions on noncitizens. Johnson et al., at 501–05.

Because the wild game of a State belongs to the people of that State, Pennsylvania used game laws as a backhanded basis to partially disarm noncitizens. A statute prohibited noncitizens from possessing rifles or shotguns—the arms most useful for hunting. Noncitizens were still allowed to possess handguns—which were less suited for hunting but well-suited for self-defense. 1909 Pa. Laws 466 §1. Four states followed Pennsylvania's model. 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; 1923 Conn. Acts 3732, ch. 259 §17.

Pennsylvania's law was upheld in *Patsone v. Pennsylvania*, 232 U.S. 138 (1914). Justice Holmes wrote that the Supreme Court should defer to the judgment of the Pennsylvania legislature; even though many types of people poached, the legislature could decide "that resident unnaturalized aliens were the peculiar source of the evil." *Id.* at 144. Moreover, "The prohibition does not extend to weapons such as pistols that may be supposed to be needed occasionally for self-defense." *Id.* at 143.

Some states barred ownership of all firearms by noncitizens. 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. Five states followed this model. 1917 Minn. Laws 839–40, ch. 500 §1; 1919 Colo. Sess. Laws 416–17 §1; 1921 Mich. Pub. Acts 21 §1; 1925 Wyo. Sess. Laws 110, ch. 106 §1; 1925 W.Va. Acts 31, ch. 3 §7.

People v. Nakamura, 99 Colo. 262 (1936), held that Colorado's alien disarmament statute violated the Colorado Constitution. The Colorado Supreme Court conceded that aliens could be prevented from hunting. But they could not be barred from keeping and bearing arms "in defense of home, person, and property." *Id.* at 264. The 1876 Colorado Convention had mostly copied Missouri's 1875 constitutional arms right, which at the time was the strongest in the nation. But Colorado went further, changing Missouri's right of the "citizen" to Colorado's right of the "person."

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

The era of alcohol Prohibition was violent. States began passing laws forbidding some convicted felons from possessing handguns, which are the guns most often used in crime. *See Heller*, 554 U.S. at 682 (Breyer, J., dissenting) (handguns "are the overwhelmingly favorite weapon of armed criminals."). 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. Four states followed. 1923 N.D. Laws 380, ch. 266 §5; 1923 Cal. Laws 696, ch. 339 §2; 1925 Nev. Laws 54, ch. 47 §2; 1931 Cal. Laws 2316, ch. 1098 §2 (extending prohibition to persons "addicted to the use of any narcotic drug"); 1933 Or. Laws 488.

Pennsylvania, in 1931, banned persons convicted of "a crime of violence" from possessing most handguns and short versions of long guns. 1931 Pa. Laws 497–98, ch. 158, §§1–4 (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.").

The only law that applied to citizens and prohibited the keeping of all firearms was Rhode Island's

from 1927. It applied to persons convicted of "a crime of violence." 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.

In 1938, Congress enacted a similar law. The Federal Firearms Act "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.*

G. Laws sometimes expressly protected the arms of nonviolent criminals.

In American history and tradition, nonviolent criminals were not disarmed. Rather, they were sometimes expressly allowed to maintain their arms.

For example, in 1786 Massachusetts, if the tax collector stole the money he collected, the sheriff could sell the collector's estate to recover the stolen funds. If the sheriff stole the money from the collector's estate sale, the sheriff's estate could be sold to recover the amount he stole. If an estate sale did not cover the

stolen amount, the deficient collector or sheriff would be imprisoned. In the estate sales, the necessities of life—including firearms—could not be sold:

> [I]n no case whatever, any distress shall be made or taken from any person, of his *arms* or household utensils, necessary for upholding life; nor of tools or implements necessary for his trade or occupation, beasts of the plough necessary for the cultivation of his improved land; nor of bedding or apparel necessary for him and his family; any law, usage, or custom to the contrary notwithstanding.

1786 Mass. Laws 265 (emphasis added).

This law existed when Samuel Adams proposed his amendment at the Massachusetts ratifying convention. Even citizens who had been convicted of stealing tax money, imprisoned, and had nearly all their belongings confiscated retained their arms rights.

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); 3 Hening, at 339.

III. The Second Amendment should be treated as a fundamental right.

"[T]he right to keep and bear arms [is] among those fundamental rights necessary to our system of ordered liberty." *McDonald*, 561 U.S. at 778. "[T]his

right is deeply rooted in this Nation's history and tradition." *Id.* at 768 (quotations omitted). It is not a "second-class right" to be "singled out for special—and specially unfavorable—treatment." *Id.* at 778–79, 780.

Accordingly, the Supreme Court of Nevada recently determined that the deprivation of the right to keep and bear arms requires a jury trial. The court had previously determined that the penalties imposed for first-offense domestic battery were not serious enough to require a jury trial. *Amezcua v. Eighth Judicial Dist. Court of State ex rel. Cty. of Clark*, 130 Nev. 45, 49 (2014). But after the legislature added to the penalties a prohibition on the right to keep and bear arms, the court reconsidered the issue and held that a jury trial was needed. *Andersen v. Eighth Judicial Dist. Court in & for Cty. of Clark*, 135 Nev. 321, 324 (2019).

The Supreme Court of Nebraska, in contrast, allows the right to be deprived until the age of 25, based on a nonviolent conviction imposed without a jury trial. This is contrary to "the fundamental nature of the right."[7] *McDonald*, 561 U.S. at 776.

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[7] A ruling for the petitioner may implicate 18 U.S.C. §921(33)(B)(i)(II), which states that an arms prohibition for a "misdemeanor crime of domestic violence" may be imposed only when the defendant's jury trial right was exercised or knowingly waived. The statute's jury protection, however, applies only in jurisdictions where the defendant was entitled to a jury trial. Unfortunately, before *Heller* and *McDonald*, Congress did enact a statute allowing lifelong fundamental rights prohibitions for "infractions, [that] like traffic tickets, are so minor that individuals do not have a right to trial by jury." *Voisine v. United States*, 136 S. Ct. 2272, 2291 (2016) (Thomas, J., dissenting). A decision by

According to the Nebraska Supreme Court, and American law in general, "juvenile adjudications" are civil, not criminal, in nature. Their "purpose" is "the education, treatment, and rehabilitation of the child, rather than retributive punishment." *In re Zoie H.*, 304 Neb. 868, 876–77 (2020). To the extent that juvenile adjudications depart from the above, by depriving adults of fundamental rights, they must be based on the most accurate fact-finding system known to humankind: trial by jury. U.S. Const. amend. VI.

The problem with the decision below is not unique. *McDonald* stated that the Second Amendment is not a "second class right" subject to "specially unfavorable treatment." 561 U.S. at 779, 780. But some lower courts are in open defiance.

The Second Circuit acknowledged that "analogies between the First and Second Amendment were made often in *Heller*" and that "[s]imilar analogies have been made since the Founding." *Kachalsky v. Cty. of Westchester*, 701 F.3d 81, 92 (2d Cir. 2012). Nevertheless, the court refused to "assume that the principles and doctrines developed in connection with the First Amendment apply equally to the Second," because "that approach . . . could well result in the erosion of hard-won First Amendment rights." *Id.* In other words, if the First and Second Amendments were treated

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this Court in favor of the petitioner would implicate Second Amendment prohibitions for convictions for misdemeanors or lesser offenses without jury rights. But "the magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, No. 18-9526, 2020 WL 3848063, at *20 (U.S. July 9, 2020).

equally, courts would undermine the First to avoid enforcing the Second.

According to the Tenth Circuit, the Second Amendment can be treated as inferior because of its inherent dangers. *Bonidy v. U.S. Postal Serv.*, 790 F.3d 1121, 1126 (10th Cir. 2015) (contrasting bearing arms with gay marriage). The Third Circuit agreed: "While our Court has consulted First Amendment jurisprudence concerning the appropriate level of scrutiny to apply to a gun regulation, we have not wholesale incorporated it into the Second Amendment. This is for good reason: 'the risk inherent in firearms and other weapons distinguishes the Second Amendment right from other fundamental rights. . . .'" *Ass'n of New Jersey Rifle & Pistol Clubs, Inc. v. Attorney Gen. New Jersey*, 910 F.3d 106, 124 n.28 (3d Cir. 2018) (quoting *Bonidy*, 790 F.3d at 1126) (brackets omitted). *See also Holloway v. Attorney Gen. United States*, 948 F.3d 164, 177 (3d Cir. 2020) ("our precedent is cautious in applying the intermediate scrutiny test used in First Amendment cases.").

But as "*Heller* explained, other rights affect public safety too. The Fourth, Fifth, and Sixth Amendments often set dangerous criminals free. The First Amendment protects hate speech and advocating violence. The Supreme Court does not treat any other right differently when it creates a risk of harm. And it has repeatedly rejected treating the Second Amendment differently from other enumerated rights. The Framers made that choice for us. We must treat the Second Amendment the same as the rest of the Bill of Rights." *Ass'n of New Jersey Rifle & Pistol Clubs*, 910 F.3d at

133–34 (Bibas, J., dissenting) (citing *Heller*, 554 U.S. at 634–35; *McDonald*, 561 U.S. at 787–91). *See also McDonald*, 561 U.S. at 783 (noting that all rights imposing limits on police or prosecutors impose safety risks).

When the adult right to defensive arms may be lost by juvenile criminal misconduct, the factual finding should meet the constitutional standard of criminal accuracy and fairness: trial by jury.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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