

No. 17-982

**In The
Supreme Court of the United States**

—◆—
JOHN TEIXEIRA, et al.,
Petitioners,

v.

ALAMEDA COUNTY, CALIFORNIA, et al.,
Respondents.

—◆—
**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

—◆—
**BRIEF OF AMICI CURIAE CATO INSTITUTE,
JEWS FOR THE PRESERVATION OF FIREARMS
OWNERSHIP, INDEPENDENCE INSTITUTE,
AND MILLENNIAL POLICY CENTER
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

This brief addresses the second question raised by the Petition:

Does the Second Amendment secure a right to sell firearms?

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INTEREST OF THE *AMICI CURIAE*¹

Cato Institute is a non-partisan public policy research foundation that advances the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was founded to restore the principles of constitutional government that are the foundation of liberty.

Jews for the Preservation of Firearms Ownership is a non-profit educational civil rights corporation that focuses on firearms ownership and responsibility. Its work centers on the history of gun control.

Independence Institute is a non-partisan public policy research organization founded on the eternal truths of the Declaration of Independence. The Institute's *amicus* briefs in *District of Columbia v. Heller* and *McDonald v. City of Chicago* (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*).

Millennial Policy Center is a research and educational center whose mission is to develop and promote policy solutions that advance freedom and opportunity for the Millennial Generation.



¹ All parties were timely notified of *amici*'s intent to file this brief and have consented. No counsel for any party authored this brief in whole or in part. No person or entity other than *amici* funded its preparation or submission.

SUMMARY OF ARGUMENT

The Ninth Circuit held here that the right to sell arms is not protected by the Second Amendment. In deciding that important and unsettled question of federal law, the court radically departed from the prevailing Second Amendment methodology of its sister circuits, previously including the Ninth Circuit itself.

Other courts have presumed that a challenged regulation burdens the Second Amendment, and required the government to prove that the regulated activity fell outside of the historical scope of the right. The court below, however, did not require the County to present any historical evidence or argument. Instead, it created an unconvincing historical justification of its own.

With the benefit of only a few Second Amendment cases decided throughout this Court's history, the Circuit Courts have developed a near-uniform approach to maintain consistency in this field. The Ninth Circuit departed from that approach.

Moreover, the court's historical analysis – which led to a holding that severely limits a constitutional right – is badly flawed. Beginning with the first English settlements in 1606, American commerce in arms was given specific legal protection. A century-and-a-half later, Britain turned a political crisis into war when it prohibited commerce in gunpowder and firearms. Had the British won, they planned to make the arms commerce prohibition permanent.

Americans resisted the commerce prohibition by all means necessary. After the Revolution, they created a new government to ensure that British-style infringements of arms rights could never be repeated.

◆

ARGUMENT

I. **THE NINTH CIRCUIT BROKE WITH PRECEDENT BY NOT REQUIRING THE COUNTY TO PROVE THAT THE CHALLENGED REGULATION FALLS OUTSIDE THE HISTORICAL SCOPE OF THE SECOND AMENDMENT**

A. The Government Must Prove that a Regulated Activity Falls Outside the Historical Scope of the Right.

“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). The Circuit Courts agree that the government bears the burden of proving that a regulated activity falls beyond the historical scope of the Second Amendment.

The Seventh Circuit described the prevailing approach in *Ezell v. City of Chicago*:

[I]f the government can establish that a challenged firearms law regulates activity falling outside the scope of the Second Amendment right as it was understood at the relevant historical moment – 1791 or 1868 – then the analysis can stop there; the regulated activity

is categorically unprotected, and the law is not subject to further Second Amendment review.

If the government cannot establish this – if the historical evidence is inconclusive or suggests that the regulated activity is *not* categorically unprotected – then there must be a second inquiry into the strength of the government’s justification for restricting or regulating the exercise of Second Amendment rights.

651 F.3d 684, 702-03 (7th Cir. 2011) (some emphasis added).

The Sixth Circuit, quoting *Ezell*, expressly adopted this approach in *United States v. Greeno*, 679 F.3d 510, 518 (6th Cir. 2012). The court, sitting en banc, later reaffirmed the approach in *Tyler v. Hillsdale Cty. Sheriff’s Dep’t*, 837 F.3d 678, 688 (6th Cir. 2016) (en banc) (“The government bears the burden . . . to conclusively demonstrate that the challenged statute burdens persons historically understood to be unprotected.”).

Following this approach, the Second Circuit struck down a ban on a pump-action rifle. The court explained that *Heller* “identifies a presumption in favor of Second Amendment protection, which the State bears the initial burden of rebutting.” *New York State Rifle & Pistol Ass’n, Inc. v. Cuomo*, 804 F.3d 242, 257 (2d Cir. 2015). Because the state failed to argue that the rifle was unprotected, “the presumption that the Amendment applies remain[ed] unrebutted.” *Id.* at 257 n.73.

The Fourth Circuit assumed that domestic violence misdemeanants are protected because the government failed to prove that they historically were not:

Based on . . . the lack of historical evidence in the record before us, we are certainly not able to say that the Second Amendment, as historically understood, did not apply to persons convicted of domestic violence misdemeanors. We must assume, therefore, that Chester's Second Amendment rights are intact.

United States v. Chester, 628 F.3d 673, 681-82 (4th Cir. 2010).

The Third Circuit scrutinized a ban on firearms with obliterated serial numbers as a restriction on the Second Amendment, because after an inconclusive historical analysis, “we cannot be certain that the possession of unmarked firearms in the home is excluded from the right to bear arms.” *United States v. Marzarella*, 614 F.3d 85, 95 (3d Cir. 2010).

The Ninth Circuit itself had previously taken this approach:

To determine whether a challenged law falls outside the historical scope of the Second Amendment, *we ask . . . whether the record includes persuasive historical evidence* establishing that the regulation at issue imposes prohibitions that fall outside the historical scope of the Second Amendment.

Jackson v. City & Cty. of San Francisco, 746 F.3d 953, 960 (9th Cir. 2014) (emphasis added). In *Jackson*, the

sale of ammunition was protected because the government failed to prove that historically it was not:

Conducting our historical review, we conclude that prohibitions on the sale of ammunition do not fall outside the historical understanding of the scope of the Second Amendment right. *Heller* does not include ammunition regulations in the list of “presumptively lawful” regulations. Nor has San Francisco pointed to historical prohibitions discussed in case law or other “historical evidence in the record before us” indicating that restrictions on ammunition fall outside of the historical scope of the Second Amendment.

Id. at 968 (internal quotations, citations, and brackets omitted).

Finally, in *United States v. Chovan*, “because of the lack of historical evidence in the record before” the court, the Ninth Circuit had to assume a domestic violence misdemeanor’s “Second Amendment rights are intact.” 735 F.3d 1127, 1137 (9th Cir. 2013) (quoting *Chester*, 628 F.3d at 681-82).

B. The County Provided No Historical Evidence or Argument.

The County here did not meet its burden of proving that arms commerce falls beyond the historical scope of the Second Amendment:

[T]he County has offered *no* evidence demonstrating that the Ordinance is the kind of

regulation which Americans would have seen as permissible at the time of the adoption of the Second Amendment. Though the majority has unearthed its own historical narrative to that effect, none of those materials were presented by the County to the district court or in the County's brief on appeal.

Teixeira v. Cty. of Alameda, 873 F.3d 670, 699 (9th Cir. 2017) (en banc) (Bea, J., dissenting) (internal citations omitted) (emphasis in original).

Having no evidence, the County offered no argument, as the now-vacated panel opinion observed:

[T]he County has failed to advance any argument that the zoning ordinance is a type of regulation that Americans at the time of the adoption of the Second Amendment or the Fourteenth Amendment . . . would have recognized as a permissible infringement of the traditional right. . . . [T]he County has not demonstrated that any historical regulation restricted where firearm sales could occur.

Teixeira v. Cty. of Alameda, 822 F.3d 1047, 1058 (9th Cir. 2016).

By not requiring any historical evidence or argument from the County, this case represents a radical break with precedent set by the Ninth Circuit and sister circuits. The decision below thereby excused the County from its duty to justify the prohibition under heightened scrutiny.

C. The Majority’s Historical Analysis Did Not Prove that the Right to Sell Arms was Historically Unprotected.

The majority went to bat for the County, providing its own historical analysis since the County did not. But the majority’s analysis contradicted its conclusion.

The majority began by examining the 1689 English Bill of Rights. The majority found it significant that commentaries by William Blackstone and St. George Tucker “both recognized the right to bear arms in England . . . as a means to provide for the preservation of personal liberties,” and did not mention firearms commerce. 873 F.3d at 684. But it is unremarkable that commentaries would focus on the reason the right was codified rather than listing every imaginable violation. Blackstone affirmed the right “of applying to the courts of justice for redress of injuries.” 1 WILLIAM BLACKSTONE, COMMENTARIES 141 (1775). He did not need to elaborate that the government may not prohibit stationary shops, thereby depriving persons of the writing paper necessary to petition the courts.

1. Colonial government support for arms sales and for limits on sales to Indians do not give Alameda County authority to ban arms sales

Transitioning to colonial America, the majority declared that:

colonial governments substantially controlled the firearms trade. The government provided

and stored guns, controlled the conditions of trade, and financially supported private firearms manufacturers.

873 F.3d at 685. Here, the majority simply cited Solomon Smith, *Firearms Manufacturing, Gun Use, and the Emergence of Gun Culture in Early North America*, 49th Parallel, Vol. 34 (2014).²

The majority cited pages 6-8. These pages correctly observe that firearms were the leading good that the colonists sold to Indians in exchange for furs. The article also says that in New England, “the government outlawed the sale of firearms to native peoples, but an illicit trade of arms pushed colonial governments to change the policy. Official recognition of the firearms trade did not appear until 1669,” when Plymouth Colony licensed colonists to sell arms to Indians. *Id.* at 6.

This is incorrect. Before and after 1669, Plymouth and other colonies sometimes forbade Indian sales, sometimes had lesser controls, and sometimes had no controls. For example, in 1647, Rhode Island forbade sales to only hostile Indians. See NICHOLAS JOHNSON, DAVID KOPEL, ET AL., *FIREARMS LAW AND THE SECOND AMENDMENT* 190-92 (2d ed. 2017) (citing colonial statutes).

Until 1871, Indian tribes were generally treated as foreign nations, which is why agreements with them

² Online only. <https://fortyninthparalleljournal.files.wordpress.com/2014/10/solomonsmithautumn2014.pdf>.

were styled as “treaties,” and required ratification by only the Senate, with no role for the House. *See* Indian Appropriation Act of 1871, ch. 120, 16 Stat. 544, 566 (codified at 25 U.S.C. § 71) (“No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty”). Restrictions on sales to foreigners are fundamentally different from restrictions on sales to citizens. *Cf.* 18 U.S.C. § 922(d)(7) (prohibiting gun sales to persons who have renounced U.S. citizenship).

To the limited extent that colonial laws sometimes restricted firearms sales to Indians who *did* agree to be part of a colonial polity, the laws were restrictions on sales to persons who were perceived to be potentially more dangerous than the general population. Perhaps these laws are precedents for restrictions on sales to certain groups of persons. But sales limits for certain groups are not evidence that there is no sales right at all. Laws restricting the sales of some books to minors do not prove that there is no general right to sell books.

The majority below extrapolated from the Indian restrictions to conclude that there is no right to arms commerce. 873 F.3d at 685. However, discriminatory laws that would violate today’s Fourteenth Amendment are weak precedents.

Moreover, the seventeenth-century limits on sales to Indians (or other persons not loyal to the government)

were the exception to the general right of firearms commerce. For instance, a Virginia law cited by the court below provided the general rule “that all persons have hereby liberty to sell armes and ammunition to any of his majesties loyall subjects inhabiting this colony.” *Laws of Va., Feb., 1676-77, Va. Stat. at Large*, 2 William Waller Hening, *The Statutes at Large; Being a Collection of All the Laws of Virginia* 403 (1823).

The above is fortified by *Heller*. Permissible “prohibitions” on felons and the mentally ill are exceptions to the general right to possess arms. Permissible “forbidding” of arms carrying in “sensitive places” is the exception to the general right to carry arms. Likewise, “conditions and qualifications on the commercial sale of arms” (but not “prohibitions” or “forbidding”) are legitimate limits on the general right to arms commerce. 554 U.S. at 626-27; David Kopel, *Does the Second Amendment Protect Firearms Commerce?* 127 HARV. L. REV. FORUM 230, 235-36 (2014).

The majority also cited pages 18-19 of the Smith article. Noting that “a huge growth in gunsmith numbers occurred during the tumultuous twenty-three year period prior to the American Revolution,” the article observes that colonial governments supported gunsmiths by buying their products in bulk. Smith, at 18-19. Moreover, some governments provided guns for militiamen who could not afford their own.

Subsidies to exercise a right are not restrictions on the right. That colonial governments supported the right to sell arms does not prove that Alameda County

may now prohibit the sale of arms. One might as well suggest that because the U.S. government subsidizes some publishers (e.g., grants from the National Endowment for the Humanities) and gives away free books to some people, the government may outlaw new bookstores.

2. Prohibiting arms sales is inconsistent with maintaining an armed militia or a free state

Moving to the militia, the majority accurately noted that “it would be impossible to overstate the militia’s centrality to the lives of American colonists.” And that, “the emphasis of the colonial governments was on ensuring that the populace was well armed, not on restricting individual stocks of weapons.” Yet the majority determined that the above *supported* the government’s ability to prohibit commerce, because “[g]overnmental involvement in the . . . sale of arms . . . is consistent with the purpose of maintaining an armed militia.” *Teixeira*, 873 F.3d at 685. By such reasoning, state government financial support for some churches in the early republic proves that there is no right to operate a church.

Negating the right to sell arms is *inconsistent* “with the purpose of maintaining an armed militia.” “[O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves.” *Heller*, 554 U.S. at 624 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)). Thus,

allowing government to prohibit arms commerce impedes the ability of militiamen to purchase arms for militia service. As explained below, this is precisely how the British attempted to destroy the American militia.

Further, the majority's reasoning is belied by history. While every colony maintained a militia, *there was not a single founding-era law* restricting arms sales to militiamen. Nor to women, or anyone else considered to have the full scope of civil rights. *See* JOHNSON, at 175-98 (surveying colonial laws).

Briefly discussing the founding era, the majority acknowledged that the Founders "recognized that the availability of arms was a necessary prerequisite to exercising the right to bear arms, as the British embargo had made clear." 873 F.3d at 686. But the majority concluded that "[t]he British embargo and the colonists' reaction to it suggest only that the Founders were aware of the need to preserve citizen *access* to firearms in light of the risk that a strong government would use its power to disarm the people." *Id.*

The majority's premise that the right to access arms can be distinguished from the right to sell arms is untenable. Nothing from the founding era supports it. According to the majority, the Second Amendment right to access arms exists *only to the extent that the government deems sufficient*, at which point the government can prohibit additional sales. The majority view negates a right "understood . . . as protecting Americans against tyranny and oppression." *Id.*

II. THE FOUNDING-ERA UNDERSTANDING OF THE SECOND AMENDMENT PROTECTED THE RIGHT TO SELL ARMS

The issue in this case is one of the issues that precipitated the American Revolution: whether a government can prohibit new firearms commerce within its jurisdiction.

A. Great Britain Banned Domestic Commerce in Gunpowder.

In colonial towns, large quantities of gunpowder were stored in central “powder houses” or “magazines.” Unlike modern smokeless gunpowder, the black powder of the eighteenth century was volatile, so it was prudent to store merchants’ and government reserves in reinforced brick buildings.

In Massachusetts, royal governor Thomas Gage decided that the simplest way to disarm the colonists was to deprive them of gunpowder. He “order’d the Keeper of the Province’s Magazine not to deliver a kernel of powder (without his express order) of either public or private property. . . .” Additionally, “[t]he Crown forcibly purchased arms and ammunition held in the inventory of merchants.”³

³ JOHN ANDREWS, LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON 19-20 (Winthrop Sargent ed., 1866).

1. The “Powder Alarm” nearly sparked war

On September 1, 1774, Gage dispatched Redcoats to the Charlestown powder house to seize hundreds of barrels of gunpowder.

The gunpowder confiscation in Charlestown set off the “Powder Alarm” throughout New England. The colonists “began to collect in large bodies, with their arms, provisions, and ammunition, determining by some means to give a check to a power which so openly threatened their destruction, and in such a clandestine manner rob them of the means of their defence.”⁴

According to Boston merchant John Andrews, “at least a hundred thousand men were equipt with arms, and moving towards us from different parts of the country.”⁵ As a patriot in Litchfield, Connecticut wrote:

[A]ll along were armed men rushing forward, some on foot, some on horseback; at every house women and children making cartridges, running bullets, making wallets, baking biscuit, crying and bemoaning, and at the same time animating their husbands and sons to fight for their liberties tho not knowing whether they should ever see them again.⁶

⁴ Unsigned report, Sept. 5, 1774, in 1 AMERICAN ARCHIVES, 4th ser., at 762 (Peter Force ed., 1843).

⁵ ANDREWS, *supra* note 3, at 42.

⁶ Charles Hopkins Clark, *The 18th Century Diary of Ezra Stiles*, 208 THE NORTH AMERICAN REVIEW 410, 419 (Sept. 1918).

“[T]he powder seizure proved beyond doubt that the colonists were prepared to fight.”⁷ Fortunately, war was averted, if only temporarily.

2. Americans disobeyed the gunpowder restrictions

Thereafter, Americans circumvented the gunpowder restrictions. Abigail Adams informed her husband that about two hundred American patriots had seized gunpowder from the powder house in their hometown of Braintree, Massachusetts, “in consequence of the powders being taken” from Charlestown.⁸ These patriots risked severe consequences to ensure that their neighbors could acquire firearms and ammunition.

Andrews noted on September 21, 1774, that a ship had “brought a quantity of powder, which comes very seasonably at this time, as it’s now five or six weeks since the Governor has allow’d any to be taken out of the magazine here, whereby for some weeks there has not been a pound to be sold or bought in town.”⁹

Similarly, Peter Oliver, Chief Justice of the Massachusetts Superior Court, reported that the Charlestown seizure “provoked the People,” who then sent smugglers

⁷ ROBERT RICHMOND, *POWDER ALARM* 24 (1971).

⁸ *THE BOOK OF ABIGAIL & JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762-1784*, at 72 (L.H. Butterfield ed., 2002).

⁹ ANDREWS, *supra* note 3, at 52.

to obtain powder from the Dutch Caribbean trading post St. Eustatius.¹⁰

Americans also purchased arms from British soldiers. British Lieutenant Frederick MacKenzie recorded in his diary that “[a]rms of all kinds are so much sought after by the Country people, that they use every means of procuring them: and they have been successful amongst the Soldiers, several of whom have been induced to dispose of Arms or such parts of Arms.”¹¹

In August 1774, to encourage domestic production, Paul Revere “engraved a plate diagramming how to refine saltpeter, an essential component in the making of gunpowder.” His instructions were published in the *Royal American Magazine*.¹²

3. Americans denounced the restrictions

Defying a ban on public meetings, residents of Suffolk County (including Boston) convened in September 1774. The resulting Suffolk Resolves stated that Gage’s “hostile intention” was demonstrated when he “in a very extraordinary manner” took the Charlestown powder, and forbade “the keeper of the magazine at

¹⁰ PETER OLIVER, *ORIGIN & PROGRESS OF THE AMERICAN REBELLION* 116-17 (Douglass Adair ed., 1967).

¹¹ FREDERICK MACKENZIE, *A BRITISH FUSILIER IN REVOLUTIONARY BOSTON: DIARY OF LIEUTENANT FREDERICK MACKENZIE*, at 39-40 (Allen French ed., 1926).

¹² STEPHEN HALBROOK, *THE FOUNDERS’ SECOND AMENDMENT* 33 (2008).

Boston to deliver out to the owners the powder which they had lodged in said magazine.”¹³

“Paul Revere rushed copies of the Suffolk Resolutions to the Continental Congress in Philadelphia . . . which unanimously denounced ‘these wicked ministerial measures.’” The “Suffolk Resolves” were reprinted verbatim in the Journal of the Continental Congress, and disseminated throughout America.¹⁴

The Massachusetts Provincial Congress – also meeting in defiance of Gage – twice condemned Gage for “unlawfully seizing and retaining large quantities of ammunition.”¹⁵

B. Great Britain Banned Import of Arms.

On October 19, 1774, King George issued a six-month order-in-council prohibiting the importation of arms and ammunition into America.¹⁶ The “proclamation, it is said, was occasioned by intelligence received from Sheffield and Birmingham of amazing quantities

¹³ THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775 AND OF THE COMMITTEE OF SAFETY 603 (William Lincoln ed., 1838).

¹⁴ 1 JOURNALS OF THE CONTINENTAL CONGRESS 39 (1904); HALBROOK, *supra* note 12, at 43.

¹⁵ THE JOURNALS OF EACH PROVINCIAL CONGRESS, *supra* note 13, at 31 (Oct. 25, 1774), 47 (Oct. 29, 1774).

¹⁶ 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1766-1783, at 401 (2005) (James Munro & Almeric Fitzroy eds., 1912).

of fire arms, &c. being nearly ready to be sent to America.”¹⁷

1. Americans reclaimed confiscated arms

In December 1774, Americans learned of the arms embargo.¹⁸ That same month, they reclaimed previously confiscated arms, many of which were held at Fort William and Mary in southern New Hampshire. A patriot organization, the Boston Committee of Correspondence, learned that two British ships were to pick up seized arms from the fort. Paul Revere delivered the news to New Hampshire; then, “about four hundred men were collected together, and immediately proceeded to his Majesty’s castle . . . and forcibly took possession thereof.”¹⁹ The patriots took “upwards of 100 barrels of powder, 1500 stand of small arms, and several pieces of light cannon.”²⁰ The patriots had created “an insurrection [and] attacked, overpowered, wounded and confined the captain, and thence took away all the King’s powder.”²¹

¹⁷ CONNECTICUT JOURNAL, Dec. 28, 1774, at 1, col. 2.

¹⁸ BOSTON GAZETTE, Dec. 12, 1774, at 3, col. 1; CONNECTICUT COURANT, Dec. 19, 1774, at 3, cols. 2-3.

¹⁹ Gov. Wentworth, letter to Gov. Gage, Dec. 14, 1774, in 18 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803, at 145 (T.C. Hansard: 1813).

²⁰ HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 46 (Charles Bolton ed., 1902).

²¹ Gov. Wentworth, letter to Gov. Gage, Dec. 16, 1774, in 18 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 19, at 146-47.

The royal governor of New Hampshire, John Wentworth, acknowledged that the Americans' actions were the direct result of the arms embargo:

Upon the best information I can obtain, this mischief originates from the publishing [of] the secretary of state's letter, and the King's order in council at Rhode Island, prohibiting the exportation of military stores from Great Britain, and the proceedings in that colony in consequence of it.²²

Wentworth castigated "the imbecility of this government to carry into execution his Majesty's order in council, for seizing and detaining arms and ammunition imported into this province, without some strong ship in this harbour."²³

As Wentworth recognized, prohibiting arms commerce was sure to provoke forcible resistance. To Americans, disarmament was the road to slavery. After a British seizure of imported arms in New York, a note was "secretly conveyed into almost every house in town" asking, "when Slavery is clanking her infernal chains, . . . will you supinely fold your arms, and calmly see your weapons of defence torn from you?"²⁴

²² *Id.* at 146.

²³ *Id.* at 145.

²⁴ 1 AMERICAN ARCHIVES, *supra* note 4, at 1071.

2. Americans disobeyed the arms embargo

Benjamin Franklin masterminded arms imports from the Spanish, French, and Dutch.²⁵ In May 1776, for example, eighteen Dutch ships with “powder shipments disguised as tea chests, rice barrels, *et cetera*” sailed from Amsterdam. They were bound for St. Eustatius,²⁶ the most important of several Caribbean ports that supplied America.²⁷

Americans also emphasized self-reliance. John Adams argued that America could win a war of independence by manufacturing the needed arms:

We could make a sufficient quantity of both [arms and ammunition]. . . . We have many manufacturers of fire-arms now, whose arms are as good as any in the world. Powder has been made here, and may be again, and so may saltpeter. . . . We have all the materials in great abundance, and the process is very simple.²⁸

²⁵ See, e.g., PENNSYLVANIA REPORTER, Apr. 24, 1775, at 2, col. 1 (report from London, Feb. 16, 1775; three large ships recently sailed from Holland, and three more from France “with arms and ammunition and other implements of war, for our colonies in America, and more preparing for the same place.”); RICHMOND, *supra* note 7, at 95.

²⁶ DANIEL A. MILLER, SIR JOSEPH YORKE AND ANGLO-DUTCH RELATIONS 1774-1780, at 41 (1970).

²⁷ *Id.* at 50 (also noting French Martinique, Spanish Hispaniola, and Danish St. Croix).

²⁸ 4 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 39-40 (1851).

The Massachusetts Provincial Congress encouraged “such persons, as are skilled in the manufacturing of fire arms and bayonets, diligently to apply themselves thereto.” The Congress promised to purchase “so many effective arms and bayonets as can be delivered in a reasonable time upon notice given to this congress at its next session.”²⁹

3. Americans denounced the embargo

A writer in the *New Hampshire Gazette* called the embargo a violation of the right to self-defense. He suggested that the law of self-preservation gave the patriots a right to take up the arms they already had to defend their right to acquire more arms. He reminded readers that as soon as the Carthaginians had allowed the Romans to disarm them, they had been wiped out.³⁰

South Carolina’s legislature, now operating independently of British control as the General Committee, declared that “by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them.”³¹

²⁹ THE JOURNALS OF EACH PROVINCIAL CONGRESS, *supra* note 13, at 108.

³⁰ “Letter from A Watchman to the Inhabitants of British America,” in 1 AMERICAN ARCHIVES, *supra* note 4, at 1063-65 (Dec. 24, 1774).

³¹ 1 JOHN DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821).

4. Edmund Burke questioned the legality of the embargo

In Parliament, Edmund Burke urged conciliation with America. He compared the arms embargo with England's previous attempt hundreds of years earlier to disarm the Welsh. Compared to the Welsh embargo, there was "still more question on the legality" of the American prohibition.³²

Indeed, from the first days of permanent English settlement in America, colonists possessed the right to import arms. Binding his "Heirs and Successors," King James I in 1606 granted the "Southern Colony" (Virginia was originally the entire South), the right to import from Great Britain, "the Goods, Chattels, Armour, Munition, and Furniture, needful to be used by them, for their said Apparel, Food, Defence or otherwise."³³ The 1620 Charter of New England (originally the entire North) similarly guaranteed the right to "att all and every time and times hereafter, out of our Realmes or Dominions whatsoever, to take, load, carry, and transports in . . . Shipping, Armour, Weapons, Ordnances, Munition, Powder, Shott, Victuals, and all Manner of Cloathing, Implements, Furniture, Beasts,

³² Speech on Moving His Resolution for Conciliation Colonies (Mar. 22, 1775), in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 208 (Peter Stanlis ed., 1997).

³³ 7 FEDERAL AND STATE CONSTITUTIONS: COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES NOW OR HERETOFORE FORMING THE UNITED STATES OF AMERICA (Francis Thorpe ed., 1909). In the usage of the time, "armour" included all equipment for fighting – weapons and defensive clothing. *Heller*, 554 U.S. at 581.

Cattle, Horses, Mares, and all other Things necessary for the said Plantation, and for their Use and Defense, and for Trade with the People there.”³⁴

Later, in 1689, Parliament enacted the English Bill of Rights, guaranteeing the English people the right to “have arms for their defence.” 1 Wm. & Mary, sess. 2, ch. 2 (1689). Americans believed they also had this right, since colonial charters guaranteed Americans the “rights of Englishmen.”³⁵

By 1776, however, many colonial charters had been revoked, and the monarchy asserted that American rights were merely royal gifts that could be rescinded.

In practice, the colonists’ right of arms commerce was unmolested from 1606 until 1774. The raid on the Charlestown powder house nearly started a war that fall. The war would begin the following spring, triggered by a new arms confiscation raid.

³⁴ 3 FEDERAL AND STATE CONSTITUTIONS, *supra* note 33, at 1834-35.

³⁵ 7 *id.* at 3788 (Southern colony, Virginia, 1606); 3 *id.* at 1839 (Northern colony, New England, 1620); 1 *id.* at 533 (Connecticut); 2 *id.* at 773 (Georgia); 3 *id.* at 1681 (Maryland); 3 *id.* at 1857 (Massachusetts Bay); 5 *id.* at 2747 (Carolina; later North Carolina, South Carolina, and Georgia); 6 *id.* at 3220 (Rhode Island).

Americans, however, thought the English right was too weak. The Second Amendment was understood to be stronger and broader. JOHNSON, at 136-37, 354-57, 415-18 (James Madison, St. George Tucker, William Rawle, Joseph Story).

C. Armed Resistance to Arms Confiscation at Concord Sparked the Revolution.

The embargo declared on October 19, 1774, was scheduled to expire six months hence: April 19, 1775. On that date, a six-month extension of the embargo went into effect.

On April 18, 1775, General Gage ordered Lt. Col. Francis Smith and 700 soldiers to seize American munitions at Concord.³⁶ When colonists learned of the order, Paul Revere, Samuel Dawes, and William Prescott rode from town to town to sound the alarm.

Forewarned, the Americans were forearmed. The militias were ready before dawn at Lexington and Concord. To defend arms rights, the Americans were willing to confront the world's strongest army. That morning, "the shot heard round the world" was fired, and the Revolution commenced.

As armed men – and some armed women – swarmed in from the countryside, the British were harried all the way back to Boston. Sent out to capture firearms and gunpowder, the Redcoats were now besieged in the Boston peninsula. Unable to break the siege, they evacuated the city by sail in March 1776.³⁷

³⁶ PAUL MISENICK, *THE ORIGINAL AMERICAN SPIES: SEVEN COVERT AGENTS OF THE REVOLUTIONARY WAR* 28 (2013).

³⁷ See JOHNSON, at 262-66.

D. Britain Continued to Attempt to Prohibit Arms Commerce.

Even before independence was declared, the Continental Congress created a Secret Committee of Commerce. This Commerce Committee worked with 20 different individuals and firms to procure arms from overseas.³⁸

Additionally, the Americans continued to promote domestic arms commerce. Pennsylvania's former acting governor, the Tory Richard Penn, explained the situation to the Duke of Richmond before the House of Commons:

Duke: Do they make gunpowder in Pennsylvania?

Penn: They have lately.

Duke: Have they taken any methods to procure salt-petre?

Penn: They have established several works for that purpose.

Duke: Do they cast brass cannon?

Penn: They do in the city of Philadelphia.

Duke: Have they the materials and means of casting iron cannon?

Penn: They have, in great plenty.

³⁸ MILLER, *supra* note 26, at 42-43.

Duke: Do they make small arms?

Penn: They do, in great numbers and very complete.³⁹

E. The British Planned to Permanently Ban American Arms Commerce.

In 1777, the British were hopeful that they could end the war by conquering the Hudson River Valley, thereby isolating New England from the rest of America. According to the British plan to prevent future rebellions, arms and arms commerce would be forbidden:

The Militia Laws should be repealed and none suffered to be re-enacted, [and] the Arms of all the People should be taken away . . . nor should any Foundery or manufactuary of Arms, Gunpowder, or Warlike Stores, be ever suffered in America, nor should any Gunpowder, Lead, Arms or Ordnance be imported into it without Licence.⁴⁰

Like the Americans, the British recognized that the extinguishment of American self-government would be possible only if arms commerce was suppressed.

³⁹ “The Duke of Richmond’s Examination of Richard Penn” (Nov. 10, 1775), in 18 THE PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 19, at 913 (speakers’ names added).

⁴⁰ William Knox, *Considerations on the Great Question, What Is Fit to be Done with America*, Memorandum to the Earl of Shelburne, in 1 SOURCES OF AMERICAN INDEPENDENCE: SELECTED MANUSCRIPTS FROM THE COLLECTIONS OF THE WILLIAM L. CLEMENTS LIBRARY 140 (Howard Peckham ed., 1978).

F. Americans Protected Arms Commerce in the Second Amendment.

The Bill of Rights has been interpreted to cover abuses that the Founders never suffered and could not foresee – such as warrantless thermal imaging of homes. *See, e.g., Kyllo v. United States*, 533 U.S. 27 (2001). It is thus implausible to contend that the Bill of Rights does not cover the abuses the Founders *did* suffer – including the ban on firearms commerce – for which they sacrificed their lives, their fortunes, and their relationship with their mother country.

Yet the Ninth Circuit held that infringements on firearms commerce – even a ban within an entire jurisdiction – do not burden the Second Amendment until a plaintiff can prove that she is unable to obtain a firearm somewhere else. *But see Ezell*, 651 F.3d at 697 (rights cannot be forbidden merely because they can be exercised elsewhere) (citing *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981)).

The Founders never asserted that the British prohibition on commerce had completely disarmed them, but they still considered the ban sufficiently flagrant to warrant armed resistance.

Colonial history shaped expectations. Ever since the first settlers at Jamestown and their 1606 charter, Americans enjoyed the freedom of arms commerce. “Regulations on the commercial sale of firearms did not exist at the time of the passage of the Second

Amendment.”⁴¹ As Thomas Jefferson wrote, “Our citizens have always been free to make, vend, and export arms. It is the constant occupation and livelihood of some of them.”⁴²

◆

CONCLUSION

The petition for a writ of certiorari should be granted.

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⁴¹ Carlton Larson, *Four Exceptions in Search of a Theory: District of Columbia v. Heller and Judicial Ipse Dixit*, 60 HASTINGS L.J. 1371, 1379 (2009).

⁴² Secretary of State Thomas Jefferson, letter to George Hammond, British Ambassador to the U.S., May 15, 1793, in 7 THE WRITINGS OF THOMAS JEFFERSON 325, 326 (Paul Ford ed., 1904) (rejecting British demand that U.S. forbid individuals from selling arms to the French).