

No. 13-17132

UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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JOHN TEIXEIRA, *et al.*,

*Plaintiffs-Appellants,*

v.

COUNTY OF ALAMEDA, *et al.*,

*Defendants-Appellees.*

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Appeal from a Judgment of the United States District Court  
for the Northern District of California  
Honorable William H. Orrick  
Case No. 3:12-cv-03288-WHO

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**EN BANC BRIEF OF *AMICI CURIAE* JEWS FOR THE  
PRESERVATION OF FIREARMS OWNERSHIP AND THE  
INDEPENDENCE INSTITUTE IN SUPPORT OF APPELLANTS**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* Jews for the Preservation of Firearms Ownership hereby states that it has no parent companies, trusts, subsidiaries, and/or affiliates that have issued shares or debt securities to the public.

Independence Institute states that it is a non-profit corporation, incorporated in Colorado. Independence Institute has no parent corporations, nor is there any publicly held corporation that owns more than 10% or more of its stock.

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

Jews for the Preservation of Firearms Ownership (JPFO) is a non-profit educational Wisconsin corporation, founded in 1992. Its mission is education on firearms ownership and responsibility. JPFO has 6,400 members, 11,000 contributors, and 36,000 website subscribers. Based upon original historical research and analysis, JPFO has observed that the 70 million innocent civilians murdered in the 20th century's eight major genocides were victims of "gun control" laws and policies that disarmed them.

JPFO's educational work has addressed the history of gun control in many different contexts. JPFO believes that knowledge of history is essential to interpreting the Second Amendment.

The Independence Institute is a non-profit Colorado educational public policy research organization founded in 1984 on the eternal truths of the Declaration of Independence. The Institute's amicus briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* (under the name of lead amicus, the International Law Enforcement Educators & Trainers Association (ILEETA)) were cited in the opinions of Justices Breyer (*Heller*), Alito (*McDonald*), and Stevens (*McDonald*). The research of

Institute Senior Fellow Rob Natelson was cited in *NLRB v. Noel Canning* (Justice Scalia); *Town of Greece v. Galloway* (Justice Alito); *Adoptive Couple v. Baby Girl* (Justice Thomas); and *Arizona v. Inter Tribal Council of Arizona* (Justice Thomas).

No counsel for a party in this case authored this brief in whole or in part. No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person other than *amici* and their members contributed money intended to fund preparing or submitting this brief.

### **CONSENT TO FILE**

All parties have consented to the filing of this brief.

### **SUMMARY OF ARGUMENT**

Can a government prohibit all new firearms commerce within its jurisdiction? The issue in this case is the same issue that precipitated the American Revolution.

To regain dominance over the increasingly defiant American people, the British prohibited arms commerce. In the summer of 1774, American merchants were prevented from withdrawing their supplies of gunpowder that were stored in powder houses (secure brick buildings).

Soon after, British Redcoats marched out to confiscate the Americans' firearms and gunpowder from the Charlestown powder house.

The prohibition escalated in October 1774, when King George and his ministers embargoed all import of firearms or gunpowder into the thirteen colonies. Edmund Burke, a leading member of Parliament, suggested that the embargo was illegal, and Americans heartily agreed. The Virginia Charter in 1606 and the New England Charter in 1620 had expressly guaranteed the rights of firearms commerce.

Americans defied the British ban on arms commerce by importing firearms and gunpowder from other nations, and by domestic manufacturing. When the British army attempted to confiscate arms at Lexington and Concord on April 19, 1775, the Revolutionary War began. The British embargo on commerce—and American defiance of that embargo—continued throughout the war.

When the London government thought that victory was near in 1777, it wrote a plan to keep defeated America in perpetual submission. The plan included permanent prohibition of all American arms commerce.

The United States Constitution comprehensively protects the American people from the types of abuses that necessitated the

Revolution. Necessarily, the Second Amendment still prohibits the particular abuse that triggered war with Britain hundreds of years ago: prohibition of firearms commerce.

## **ARGUMENT**

### **I. GREAT BRITAIN BANNED DOMESTIC COMMERCE IN GUNPOWDER**

#### **A. Great Britain decided to prevent American commerce in gunpowder**

Since 1765, conflicts between Great Britain and America had been rising over such issues as taxation without representation, general warrants to enforce smuggling laws, and the stationing of Britain's standing army in America, notwithstanding the absence of any foreign danger. Following the 1773 Boston Tea Party, Parliament passed the "Intolerable Acts," including the Massachusetts Government Act, which revoked the colony's charter and wiped out self-government for the colony and for every town therein. The new royal governor was General Thomas Gage, supported by a large garrison of Redcoats in Boston. Yet when

Gage sent the Redcoats to break up a political meeting in Salem, they desisted when they saw that the colonists were well-armed.<sup>1</sup>

In towns, large quantities of gunpowder, such as merchants' reserves, were often stored in a central "powder house" or "magazine." Unlike modern smokeless gunpowder, the black powder of the 18<sup>th</sup> century was volatile, so storage in a reinforced brick building was prudent. These armories also held gunpowder that was owned by a town or the colony, as well as firearms that were given to militiamen who could not afford their own, or which were available as replacements for firearms that broke during combat.<sup>2</sup>

Gage decided that the simplest means to disarm the colonists would be 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: which is attended with great inconvenience to the dealers in that article."<sup>3</sup> In Gage's words, he had

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<sup>1</sup> RAY RAPHAEL, *A PEOPLE'S HISTORY OF THE AMERICAN REVOLUTION* 55 (2002).

<sup>2</sup> David Kopel, *How the British Gun Control Program Precipitated the American Revolution*, 6 CHARLESTON L. REV. 283, 291 (2012).

<sup>3</sup> JOHN ANDREWS, *LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON* 19-20 (Winthrop Sargent ed., 1866) (available at [archive.org](http://archive.org)).

issued “an order to the Storekeeper not to deliver out any Powder from the Magazine, where the Merchants deposit it.”<sup>4</sup> Boston merchant John Andrews observed that “a Guard of soldiers is set upon the Powder house at the back of ye. Common, so that people are debar’d from selling their own property.”<sup>5</sup> Additionally, “[t]he Crown forcibly purchased arms and ammunition held in the inventory of merchants.”<sup>6</sup>

On September 1, 1774, Gage dispatched Redcoats to the Charlestown powder house to seize hundreds of barrels of gunpowder. The pre-dawn surprise raid encountered no opposition, but once the Americans learned of it, it nearly started the war.

### **B. The “Powder Alarm” almost started the war**

The gunpowder confiscation in Charlestown set off the “Powder Alarm” throughout New England, partly in response to rumors that the Redcoats had fired on colonists. The colonists “began to collect in large bodies, with their arms, provisions, and ammunition, determining by

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<sup>4</sup> Thomas Gage, letter to Earl of Dartmouth, Nov. 2, 1774, *in* 1 AMERICAN ARCHIVES, 4<sup>th</sup> ser., at 951 (Peter Force ed., 1843) (available at [amarch.lib.niu.edu](http://amarch.lib.niu.edu)).

<sup>5</sup> ANDREWS, *supra* note 3, at 39.

<sup>6</sup> DAVID HACKETT FISCHER, PAUL REVERE’S RIDE 50 (1994).



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.”<sup>7</sup> Armed militiamen from as far away as Connecticut began marching towards Boston in response to the egregious violation of their rights. According to Andrews, “at least a hundred thousand men were equipt with arms, and moving towards us from different parts of the country.”<sup>8</sup> As a patriot in Litchfield, Connecticut wrote:

all 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.<sup>9</sup>

While all liberties were important to Americans, what aroused them to march in arms was violation of their right to acquire arms in ordinary

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<sup>7</sup> Unsigned report, Sept. 5, 1774, *in* 1 AMERICAN ARCHIVES, *supra* note 4, at 762.

<sup>8</sup> ANDREWS, *supra* note 3, at 42.

<sup>9</sup> Charles Hopkins Clark, *The 18th Century Diary of Ezra Stiles*, 208 THE NORTH AMERICAN REVIEW 410, 419 (Sept. 1918) ([www.jstor.org/stable/25122009?seq=1#page\\_scan\\_tab\\_contents](http://www.jstor.org/stable/25122009?seq=1#page_scan_tab_contents)).

commerce.<sup>10</sup> “[T]he powder seizure proved beyond doubt that the colonists were prepared to fight.”<sup>11</sup> It “stiffened the Americans’ resolve to meet force with force” and “pointed the way to an inevitable confrontation.”<sup>12</sup> Fortunately, the British and American forces never connected. Satisfied by a host of resignations by British officials, the armed Americans dispersed.<sup>13</sup>

### **C. Americans disobeyed the gunpowder restrictions**

Thereafter, Americans circumvented the restrictions on their rights. Abigail Adams wrote her husband to convey the good news that about

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<sup>10</sup> The right to arms includes the right to ammunition under this Court’s precedent. *Jackson v. City & Cty. of San Francisco*, 746 F.3d 953, 967 (9th Cir. 2014) (“the right to possess firearms for protection implies a corresponding right to obtain the bullets necessary to use them.”) (internal quotations omitted). *See also United States v. Pruess*, 703 F.3d 242, 245 n.1 (4th Cir. 2012) (constitutional rules for guns are the same for ammunition); *Herrington v. United States*, 6 A.3d 1237, 1243 (D.C. 2010) (right to ammunition is coextensive with right to firearms); *Andrews v. State*, 50 Tenn. 165, 178 (1871) (“The right to keep arms necessarily involves the right ... to purchase and provide ammunition suitable for such arms.”).

<sup>11</sup> ROBERT RICHMOND, POWDER ALARM 24 (1971).

<sup>12</sup> *Id.* at 31.

<sup>13</sup> STEPHEN HALBROOK, THE FOUNDERS’ SECOND AMENDMENT 39 (2008) (quoting “A Letter from Rhode Island, Dated the 5th Instant,” VIRGINIA GAZETTE, Sept. 15, 1774 at 3, col. 1).

two hundred American patriots had seized the gunpowder from the powder house in their hometown of Braintree, Massachusetts, “in consequence of the powders being taken” from Charlestown.<sup>14</sup> These patriots risked severe consequences, to ensure that their American neighbors could still acquire firearms and ammunition.

Andrews was happy to report 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.”<sup>15</sup>

Similarly, Peter Oliver, Chief Justice of the Massachusetts Superior Court, explained that the Charlestown seizure “provoked the People,” who then sent smugglers to obtain powder from the Dutch Caribbean trading post St. Eustatius. “They also secured Cannon from Vessells, &

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<sup>14</sup> THE BOOK OF ABIGAIL & JOHN: SELECTED LETTERS OF THE ADAMS FAMILY 1762-1784, at 72 (L.H. Butterfield ed., 2002).

<sup>15</sup> ANDREWS, *supra* note 3, at 52.

some of the Kings Forts, & acted with great Vigor in all their Preparations.”<sup>16</sup>

Another means of acquiring arms was purchase from ill-paid British soldiers. As British Lieutenant Frederick MacKenzie wrote in his diary, “Arms 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 [British] Soldiers, several of whom have been induced to dispose of Arms or such parts of Arms.” McKenzie hoped that the recent tarring and feathering of an American buyer who had been caught would deter other Americans.<sup>17</sup>

To encourage domestic production, Paul Revere in August 1774, “engraved a plate diagramming how to refine saltpeter, an essential component in the making of gunpowder.” His instructions were also published in the *Royal American Magazine*.<sup>18</sup>

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<sup>16</sup> PETER OLIVER’S ORIGIN & PROGRESS OF THE AMERICAN REBELLION 116-17 (Douglass Adair ed., 1967).

<sup>17</sup> FREDERICK MACKENZIE, A BRITISH FUSILIER IN REVOLUTIONARY BOSTON: DIARY OF LIEUTENANT FREDERICK MACKENZIE, at 39-40 (Allen French ed., 1926) (available at [archive.org](http://archive.org)).

<sup>18</sup> HALBROOK, *supra* note 13, at 33.

#### **D. Americans denounced the restrictions**

Defying the ban on public meetings, the people of Suffolk County (which includes Boston) met in a special convention in September 1774. According to the Suffolk County Resolutions adopted by the convention, 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 Boston to deliver out to the owners the powder which they had lodged in said magazine"<sup>19</sup> "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.<sup>20</sup>

A committee from the Suffolk convention presented an address to Gage, stating that, "the ferment now excited in the minds of the people,

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<sup>19</sup> THE JOURNALS OF EACH PROVINCIAL CONGRESS OF MASSACHUSETTS IN 1774 AND 1775 AND OF THE COMMITTEE OF SAFETY 603 (William Lincoln ed., 1838) (available at archive.org).

<sup>20</sup> HALBROOK, *supra* note 13, at 43; 1 JOURNALS OF THE CONTINENTAL CONGRESS 39 (1904).

is occasioned ... by seizing the powder in the arsenal at Charlestown; by withholding the powder lodged in the magazine of the town of Boston, from the legal proprietors.”<sup>21</sup> The Massachusetts Provincial Congress—also meeting in defiance of Gage—twice condemned Gage for “unlawfully seizing and retaining large quantities of ammunition.”<sup>22</sup>

## II. GREAT BRITAIN BANNED IMPORT OF ARMS

### A. King George and his ministers forbade arms imports

As Gage despairingly observed, his bans had only encouraged the Americans to arm themselves more.<sup>23</sup> On October 19, 1774, King George III and his ministers issued a six-month order prohibiting the importation of arms and ammunition into America.<sup>24</sup> The “proclamation, it is said, was occasioned by intelligence received from Sheffield and Birmingham of amazing quantities of fire arms, &c. being nearly ready

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<sup>21</sup> JOURNALS OF EACH PROVINCIAL CONGRESS, *supra* note 19, at 606.

<sup>22</sup> *Id.* at 31 (Oct. 25, 1774), 47 (Oct. 29, 1774).

<sup>23</sup> RICHMOND, *supra* note 11, at 32-36.

<sup>24</sup> 5 ACTS OF THE PRIVY COUNCIL OF ENGLAND, COLONIAL SERIES, A.D. 1766-1783, at 401 (Burlington, Can.: TannerRitchie Pub., 2005) (James Munro & Almeric Fitzroy eds., 1912).

to be sent to America.”<sup>25</sup> Moreover, in August and September, Britain’s ambassador to the Dutch United Provinces had informed London about Americans’ purchases there. Usually, Dutch arms were sent via St. Eustatius.<sup>26</sup>

Lord Dartmouth, the Secretary of State for the Colonies, sent Gage a circular letter for distribution “to the Governors in America.” Explaining the order “to prohibit the Exportation from Great Britain of Gunpowder, or any sort of arms or ammunition” to America, the letter announced “His Majesty’s Command that [the governors] do take the most effectual measures for arresting, detaining, and securing any Gunpowder, or any sort of arms and ammunition, which may be attempted to be imported

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<sup>25</sup> CONNECTICUT JOURNAL, Dec. 28, 1774, at 1, col. 2 (available in Readex “America’s Historical Newspapers”).

<sup>26</sup> DANIEL A. MILLER, SIR JOSEPH YORKE AND ANGLO-DUTCH RELATIONS 1774-1780, at 37, 39 (1970).

into the Province under your Government...”<sup>27</sup> Dartmouth also sent Gage the intelligence about Dutch-American arms commerce.<sup>28</sup>

Gage informed the colonial secretary that he was on the lookout for a “Brigantine from Rhode Island with the 40 small Pieces of Ordnance on Board.”<sup>29</sup>

Dartmouth urged Gage to disarm New England, but only if there were “almost a certainty of success.”<sup>30</sup> Gage responded that “Your Lordship’s Idea of disarming certain Provinces would doubtless be consistent with Prudence and Safety, but it neither is nor has been practicable without having Recourse to Force, and being Masters of the Country.”<sup>31</sup>

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<sup>27</sup> Lord Dartmouth, letter to the Governor and Company of R.I., Oct. 19, 1774, *in* 7 RECORDS OF THE COLONY OF RHODE ISLAND AND PROVIDENCE PLANTATIONS IN NEW ENGLAND 305 (John Bartlett ed., 1862) (available at archive.org).

<sup>28</sup> 2 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY at 176-77 (Clarence Carter ed., 1933), *in* HALBROOK, *supra* note 13, at 59.

<sup>29</sup> 1 THE CORRESPONDENCE OF GENERAL THOMAS GAGE WITH THE SECRETARIES OF STATE, AND WITH THE WAR OFFICE AND THE TREASURY 385-86 (Archon 1969) (Clarence Carter ed., 1931) (Dec. 14, 1774).

<sup>30</sup> 2 CORRESPONDENCE OF GAGE, *supra* note 28, at 175 (Oct. 17, 1774).

<sup>31</sup> 1 CORRESPONDENCE OF GAGE, *supra* note 29, at 387 (Dec. 15, 1774).



In the waters near Great Britain, “several capital ships of war, and six cutters,” deployed “to obstruct the American trade, and prevent all European goods from going there, particularly arms and ammunition.”<sup>32</sup> For example, “Two vessels, laden with gun-powder and other military utensils, bound for the other side of the Atlantick, were stopped at Gravesend ... by the out clearers, in consequence of the King’s proclamation.”<sup>33</sup>

In October 1774, an armed British cutter sailed into Amsterdam harbor, blockading the Rhode Island ship *Polly*, which was laden with munition for America.<sup>34</sup> Britain tried to pressure the Dutch government to crack down on the large Dutch arms trade with America.<sup>35</sup>

Besides trying to halt European exports at the source, the British navy targeted American ports. “[S]everal frigates [were] fitted out immediately to sail for America, to be stationed there in order to cruise along the

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<sup>32</sup> 1 FRANK MOORE, DIARY OF THE AMERICAN REVOLUTION 61 (1860) (entry of Apr. 4, 1775) (available at archive.org).

<sup>33</sup> MARYLAND JOURNAL, Jan. 2, 1775, at 2, col. 1.

<sup>34</sup> MILLER, *supra* note 26, at 39.

<sup>35</sup> *Id.* at 39-40, 51-56, 88-91.

coasts, to prevent any ammunition or arms being sent to the Americans by any foreign power.”<sup>36</sup>

### **B. Americans took back the confiscated arms**

In December 1774, the Americans learned of the arms embargo.<sup>37</sup> That same month, they acted to reclaim their arms.

Many of the confiscated arms were held at Fort William and Mary, in southern New Hampshire. A patriot organization, the Boston Committee of Correspondence,<sup>38</sup> learned that two British ships would soon be picking 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.”<sup>39</sup> The patriots took “upwards of 100 barrels of

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<sup>36</sup> ESSEX GAZETTE (Salem, Mass.), Mar. 14, 1775, at 2 (reporting Dec. 28, 1774, news from London).

<sup>37</sup> BOSTON GAZETTE, Dec. 12, 1774, at 3, col. 1; CONNECTICUT COURANT, Dec. 19, 1774, at 3, cols. 2-3 (available in Readex). The *Boston Gazette*’s chief contributor was Samuel Adams, the leading patriot agitator. John Adams (Samuel’s cousin) and patriot attorney James Otis also contributed. HALBROOK, *supra* note 13, at 9.

<sup>38</sup> Since the beginning of the political conflict with Great Britain, Americans had communicated ideas through Committees of Correspondence.

<sup>39</sup> Gov. Wentworth, letter to Gov. Gage, Dec. 14, 1774, in 18 THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE

powder, 1500 stand of small arms, and several pieces of light cannon.”<sup>40</sup>  
The patriots had created “an insurrection ... and ... attacked, overpowered, wounded and confined the captain, and thence took away all the King’s powder.”<sup>41</sup>

The royal governor of New Hampshire, John Wentworth, reported that “the town is full of armed men who refuse to disperse, but appear determined to complete the dismantling the fortress entirely.”<sup>42</sup>  
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 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, which have been published here by the

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YEAR 1803, at 145 (T.C. Hansard: 1813) (available at [archive.org/details/parliamentaryhi00parlgoog](http://archive.org/details/parliamentaryhi00parlgoog)).

<sup>40</sup> HUGH PERCY, LETTERS OF HUGH EARL PERCY FROM BOSTON AND NEW YORK, 1774-1776, at 46 (Charles Bolton ed., 1902) (available at [archive.org](http://archive.org)). A “stand of arms” is a firearm plus the relevant accessories, such as a bayonet, cartridge box, and so on.

<sup>41</sup> Gov. Wentworth, letter to Gov. Gage, Dec. 16, 1774, *in* 18 PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 39, at 146-47.

<sup>42</sup> *Id.* at 147.

aforementioned Mr. Revere, before which all was perfectly quiet and peaceable here.<sup>43</sup>

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.”<sup>44</sup>

As Wentworth recognized, prohibiting arms commerce was sure to provoke forcible resistance. In the understated words of a reporter in London, “orders have been given for the seizing every ship, of what nation soever, that are employed in conveying arms or ammunition to the Americans. This, ’tis thought, will be the cause of some serious disputes.”<sup>45</sup>

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

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<sup>43</sup> Gov. Wentworth, letter to Gov. Gage, *supra* note 39, at 146.

<sup>44</sup> *Id.* at 145.

<sup>45</sup> BOSTON GAZETTE, Jan. 12, 1775, at 2, col. 3 (report from London, Nov. 5, 1774) (available in Readex).

infernal chains, ...will you supinely fold your arms, and calmly see your weapons of defence torn from you?”<sup>46</sup>

### **C. Americans disobeyed the arms embargo**

Benjamin Franklin masterminded arms imports from the Spanish, French, and Dutch.<sup>47</sup> For example, in May 1776, 18 Dutch ships with “powder shipments disguised as tea chests, rice barrels, *et cetera*” sailed from Amsterdam. They were bound for St. Eustatius,<sup>48</sup> the most important of the several Caribbean ports that supplied America.<sup>49</sup>

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

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<sup>46</sup> 1 AMERICAN ARCHIVES, *supra* note 4, at 1071.

<sup>47</sup> *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 11, at 95.

<sup>48</sup> MILLER, *supra* note 26, at 41.

<sup>49</sup> *Id.* at 50 (also noting French Martinique, Spanish Hispaniola, and Danish St. Croix). For more on the Dutch-American trade, *see id.* at 40-46, 51, 54-55, 95.

be again, and so may saltpeter.... We have all the materials in great abundance, and the process is very simple.<sup>50</sup>

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.”<sup>51</sup>

A Philadelphian predicted that the embargo would “be rendered ineffectual by a manufactory of gunpowder, which has lately been set on foot in this Province, the materials of which may be procured in great perfection, and at an easier rate than they can be imported from Great Britain.” He suggested that there are “gunsmiths enough in this Province to make one hundred thousand stands of arms in one year...”<sup>52</sup>

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<sup>50</sup> 4 CHARLES FRANCIS ADAMS, THE WORKS OF JOHN ADAMS 39-40 (1851).

<sup>51</sup> JOURNALS OF EACH PROVINCIAL CONGRESS, *supra* note 19, at 108.

<sup>52</sup> “Extract of a Letter from a Gentleman of Philadelphia to a Member of the British Parliament,” *in* 1 AMERICAN ARCHIVES, *supra* note 4, at 1066 (Dec. 24, 1774).

#### **D. 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:

Equally inexcusable with the Carthaginians, will the Americans be, if they suffer the tyrants who are endeavouring to enslave them, to possess themselves of all their Forts, Castles, Arms, Ammunition, and warlike Stores.

\* \* \*

Could [the British ministry] not have given up their Plan for enslaving America without seizing ... all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies? ... And shall we like the Carthaginians, peaceably surrender our Arms to our Enemies, in Hopes of obtaining in Return the Liberties we have so long been contending for?

\* \* \*

what shall we say ... to the late Order of the King and Council prohibiting the importation of warlike Stores into the Colonies?

\* \* \*

I ... hope that no person will, at this important Crisis, be unprepared to act in his own defence, should he, by necessity, be driven thereto. And I must here beg leave to recommend consideration

to the people on this Continent, whether, when we are by an arbitrary decree prohibited the having Arms and Ammunition by importation, we have not, by the law of self-preservation, a right to seize upon those within our power, in order to defend the liberties which God and nature have given to us.<sup>53</sup>

A Pennsylvanian told a member of Parliament that “[t]he late Proclamation forbidding the exportation of Gun powder and Fire-arms to America seemed intended to take away from the colonies the power of defending themselves by force.”<sup>54</sup>

South Carolina’s legislature was now operating independent of British control, as the General Committee. It 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.”<sup>55</sup> A Rhode Island newspaper published an open letter to Gage denouncing “the late ridiculous proclamation” as “absurd and strained.” The author complained that the

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<sup>53</sup> “Letter from A Watchman to the Inhabitants of British America,” *in id.* at 1063-65 (Dec. 24, 1774).

<sup>54</sup> “Extract of a Letter from a Gentleman of Philadelphia to a Member of the British Parliament,” *in id.* at 1066 (Dec. 24, 1774).

<sup>55</sup> 1 JOHN DRAYTON, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821) (available at [archive.org](http://archive.org)).



import ban was also being used to seize arms transported within the colonies. The only reason for these restrictions, the letter concluded, must be “an actual conspiracy to overthrow the laws and constitution of the country.”<sup>56</sup>

### **E. 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:

during that state of things, Parliament was not idle. They attempted to subdue the fierce spirit of the Welsh by all sorts of rigorous laws. They prohibited by statute the sending all sorts of arms into Wales, as you prohibit by proclamation (with something more of doubt on the legality) the sending arms to America. They disarmed the Welsh by statute, as you attempted (but still with more question on the legality) to disarm New England by an instruction.<sup>57</sup>

In support of Burke’s point about illegality, it could be pointed out that from the first days of permanent English settlement in America, the king

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<sup>56</sup> HALBROOK, *supra* note 13, at 72 (citing NEWPORT MERCURY, Apr. 10, 1775, at 2, col. 1).

<sup>57</sup> Speech on Moving His Resolution for Conciliation Colonies (Mar. 22, 1775), in EDMUND BURKE: SELECTED WRITINGS AND SPEECHES 208 (Peter Stanlis ed., 1997).

had granted the colonists the perpetual right to import arms. Binding his “Heirs and Successors,” King James I in 1606 had granted the “Southern Colony” (Virginia), the right to import from Great Britain, “the Goods, Chattels, Armour, Muniton, and Furniture, needful to be used by them, for their said Apparel, Food, Defence or otherwise.”<sup>58</sup> The 1620 Charter of New England, had 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, Ordinances, Muniton, Powder, Shott, Victuals, and all Manner of Cloathing, Implements, Furniture, Beasts, 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.”<sup>59</sup>

These were the first written guarantees of arms rights in English law. Later, in 1689, Parliament enacted the English Bill of Rights,

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<sup>58</sup> 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 3787-88 (Francis Thorpe ed., 1909) (available in Hein Online). In the usage of the time, “armour” often included all equipment for fighting—weapons as well as defensive clothing.

<sup>59</sup> 3 *id.* at 1834-35.

guaranteeing the English people the right to “arms for their defence.” 1 Wm. & Mary, sess. 2, ch. 2 (1689). Americans thought they had this right too, since colonial charters had guaranteed Americans the “rights of Englishmen.”<sup>60</sup>

Notwithstanding the above guarantees, the English government had revoked colonial charters. It asserted that any rights that Americans enjoyed were only gifts from the monarch, and could be revoked at any time.<sup>61</sup>

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<sup>60</sup> 7 FEDERAL AND STATE CONSTITUTIONS COLONIAL CHARTERS, *supra* note 58, 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 divided into North Carolina, South Carolina, and Georgia); 6 *id.* at 3220 (Rhode Island).

<sup>61</sup> DAVID LOVEJOY, *THE GLORIOUS REVOLUTION IN AMERICA* (1972). As Lovejoy details, the dispute over the rights of Englishmen in 1689 had led to American overthrow of colonial governors in New York, Maryland, and all New England. Subsequently, during most of the 18<sup>th</sup> century, Americans enjoyed the rights of Englishmen, and the English did not press their own theory that those rights were revocable in America. The common danger from France, including France’s colonies in Canada and Louisiana, united the Anglo-Americans. But once France was expelled from North America following its 1763 defeat in the French & Indian War, the British and Americans no longer had a common enemy. The British government in 1763-65 decided to end its former “salutary neglect” of American self-government, and thus began the political conflict that led to the Revolution.

Howsoever the legal merits might have been addressed by a court in 1774, the issue would be settled by the American Revolution. Ever since 1606, Americans had practiced the right of commerce in arms. That right had been unmolested until 1774. The raid on the Charlestown powder house had nearly started a war that fall. The war would begin in the spring, triggered by a new arms confiscation raid.

### **III. ARMED RESISTANCE TO ARMS CONFISCATION AT LEXINGTON AND CONCORD BEGAN THE WAR**

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 destroy American munitions at Lexington and Concord.<sup>62</sup> When some patriots learned of the orders, Paul Revere, Samuel Dawes, and William Prescott rode through the night to sound the alarm.

Forewarned, the Americans were forearmed. The militias were ready before dawn at Lexington and Concord. To defend arms rights, the

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<sup>62</sup> PAUL MISENCIK, *THE ORIGINAL AMERICAN SPIES: SEVEN COVERT AGENTS OF THE REVOLUTIONARY WAR* 28 (2013) (“you will seize and destroy all the Artillery, Ammunition, Provisions, Tents, Small Arms, and all Military Stores whatever”).

Americans were willing to confront the world's strongest army. That morning, "the shot heard round the world" was fired, and the war commenced.

As armed men—and some armed women—swarmed in from the countryside, the British army was harried all the way back to Boston, saved only by a rescue force from Boston. Sent out to seize firearms and gunpowder, the Redcoats were now besieged in the Boston peninsula. Never able to break the siege, they evacuated the city by sail in March 1776.<sup>63</sup>

#### **IV. BRITAIN CONTINUED TO ATTEMPT TO PROHIBIT COMMERCE**

The arms embargo continued throughout the war. Whether Americans had a right to firearms commerce would be decided by what Patrick Henry's "Give me liberty" speech had called "an appeal to arms and to the God of hosts."<sup>64</sup>

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<sup>63</sup> See NICHOLAS JOHNSON, DAVID KOPEL, ET AL. FIREARMS LAW AND SECOND AMENDMENT 147-49 (2012).

<sup>64</sup> WILLIAM WIRT, SKETCHES OF THE LIFE AND CHARACTER OF PATRICK HENRY 140 (9th ed. 1836).

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.<sup>65</sup>

In September 1775, Gage notified Dartmouth that the Americans were still importing arms despite the embargo.<sup>66</sup> Sometimes the British intercepted this commerce, as in seizures at St. Malo and Martha's Vineyard.<sup>67</sup>

In parallel with foreign commerce, 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.

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<sup>65</sup> MILLER, *supra* note 26, at 42-43.

<sup>66</sup> 1 CORRESPONDENCE OF GAGE, *supra* note 29, at 415 (Bermuda, West Indies, and an American privateer seizing a British ordnance ship near St. Augustine).

<sup>67</sup> HALBROOK, *supra* note 13, at 121-22 (citing VIRGINIA GAZETTE, Sept. 14, 1776, at 1, cols. 1-2 ("four American vessels laden with muskets, pistols, swords, bayonets"); VIRGINIA GAZETTE Oct. 23, 1778, at 2, col. 1 (Martha's Vineyard).)

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.

Duke: Do they make small arms?

Penn: They do, in great numbers and very complete.<sup>68</sup>

## V. ON THE VERGE OF VICTORY, THE BRITISH PLANNED TO PERMANENTLY BAN AMERICAN ARMS COMMERCE

In 1777, the British had high hopes that they could end the war by conquering the Hudson River Valley, thereby isolating New England from the rest of America. To prevent future rebellions, Colonial Under-Secretary of State William Knox drafted a comprehensive plan entitled “What Is Fit to Be Done with America?” The Church of England would be established as the state church in every one of the 13 colonies. Parliament

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<sup>68</sup> “The Duke of Richmond’s Examination of Richard Penn” (Nov. 10, 1775), *in* 8 PARLIAMENTARY HISTORY OF ENGLAND, *supra* note 39, at 913 (speakers’ names added).

would have power to tax within America. A hereditary aristocracy would be established. 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 manufactory 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.<sup>69</sup>

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

## **VI. AMERICANS PROTECTED THE RIGHT TO ACQUIRE ARMS IN THE SECOND AMENDMENT**

### **A. Prohibition of firearms commerce was a particular evil that the Founding generation suffered**

Knox's plan for America illustrated what the war was about. After the Americans won, they ensured that no ideas like Knox's could be done to America.

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<sup>69</sup> 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).



The Bill of Rights has been interpreted to cover abuses that the Founders had never suffered and could not foresee—such as warrantless thermal imaging of homes. *See Kyllo v. United States*, 533 U.S. 27 (2001). It would therefore be implausible to contend that the Bill of Rights does not cover the abuses that the Founding generation *did* suffer, and for which they had sacrificed their lives, their fortunes, and their relationship with their home country, Great Britain. The prohibition of firearms commerce was manifestly among those abuses the Founding generation actually suffered.

**B. That prohibition of commerce does not immediately cause disarmament is no excuse for prohibition**

The dissenting Judge in the May 16, 2016, panel decision suggested that infringements on firearms commerce—even a prohibition within a government’s entire jurisdiction—are not worthy of judicial attention until a plaintiff can prove that he or she was unable to obtain a firearm from somewhere else.<sup>70</sup>

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<sup>70</sup> “Conspicuously missing from this lawsuit is any honest-to-God resident of Alameda County complaining that he or she cannot lawfully buy a gun nearby.” *Teixeira v. Cty. of Alameda*, 822 F.3d 1047, 1064 (9th Cir. 2016) (Silverman, J., concurring in part and dissenting in part).

The Founders did not think this way. They never asserted that the British prohibition on commerce had completely disarmed them. To the contrary, they already had firearms and gunpowder, which is why they could fight at Lexington and Concord. Notwithstanding Britain's efforts, Americans obtained more arms—from domestic manufacture and from imports. Although the British ban on firearms commerce did not, in fact, disarm the Americans, Americans still considered the ban a sufficiently flagrant violation of their rights that they took up arms to remedy the violation.

Colonial history had shaped their expectations. Ever since the first settlers had set foot at Jamestown with their 1606 charter, Americans had 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.”<sup>71</sup> 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.”<sup>72</sup>

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<sup>71</sup> 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).

<sup>72</sup> Secretary of State Thomas Jefferson, letter to George Hammond, British Ambassador to the United States, May 15, 1793, in 7 THE

Except for Pennsylvania, the colonies at some times in their history had prohibited arms sales to unfriendly Indians.<sup>73</sup> Some Southern colonies banned arms possession by slaves who did not have permission from their master, and sometimes extended the ban to free blacks.<sup>74</sup> The racial bans on possession can be interpreted as also applying to sales.

Colonies and towns established magazines to store government-owned arms and gunpowder. For example, in Massachusetts, “every township” was legally obliged “to have a large magazine of all kinds of military stores.”<sup>75</sup> While the purpose was military, a secondary benefit was to facilitate private commerce, since merchants could store large quantities of volatile blackpowder in the brick magazine buildings.

### **C. Modern case law recognizes the right to engage in firearms commerce**

*Heller* allows “conditions and qualifications on the commercial sale of arms.” *District of Columbia v. Heller*, 554 U.S. 570, 627 (2008). *Heller*’s

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WRITINGS OF THOMAS JEFFERSON 325, 326 (Paul Ford ed., 1904) (defending right of American citizens to sell arms to French buyers) (available at [lf-oll.s3.amazonaws.com/titles/804/0054-07.pdf](http://lf-oll.s3.amazonaws.com/titles/804/0054-07.pdf)).

<sup>73</sup> See JOHNSON, *supra* note 63, at 111-14.

<sup>74</sup> *Id.* at 114-15.

<sup>75</sup> PERCY, *supra* note 40, at 38.

allowance of “conditions and qualifications” for *how* commerce will take place necessarily means that there *will be* commerce—and necessarily means there can be no *prohibition* of commerce.

The County, however, contends that it need not provide any evidence to support its law. Instead, it insists that its ban on all new gun stores is “traditional” and “presumptively lawful.” Even if the County were correct, the presumption of legality can be rebutted. *See Binderup v. Attorney Gen. United States of Am.*, 836 F.3d 336 (3d Cir. 2016) (en banc); *United States v. Moore*, 666 F.3d 313 (4th Cir. 2012); *Tyler v. Hillsdale Cty. Sheriff's Dep't*, 837 F.3d 678 (6th Cir. 2016) (en banc); *Heller v. District of Columbia*, 670 F.3d 1244 (D.C. Cir. 2011) (*Heller II*); *United States v. Torres-Rosario*, 658 F.3d 110 (1st Cir. 2011). When substantial evidence proves that the law contradicts the founding-era understanding of the right, the presumption is rebutted.

Consistent with *Heller*, this Court and others have recognized that the Second Amendment includes firearms commerce.<sup>76</sup> Such commerce may

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<sup>76</sup> *Jackson*, *supra* note 10, 746 F.3d at 968; *United States v. Marzzarella*, 614 F.3d 85, 92 n.8 (3d Cir. 2010); *Illinois Ass'n of Firearms Retailers v. City of Chicago*, 961 F. Supp. 2d 928, 937 (N.D. Ill. 2014) (“The City’s proffered historical evidence fails to establish that

not be prohibited in one jurisdiction merely because people can exercise their rights in another jurisdiction.<sup>77</sup> The same is true for First Amendment rights. *E.g.*, *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 76-77 (1981) (quoting *Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939)).

When a right is protected, it includes the rights of commercial providers. *See, e.g.*, *Hudnut v. Am. Booksellers Ass’n*, 475 U.S. 1001 (1986) (summarily affirming *Am. Booksellers Ass’n v. Hudnut*, 771 F.2d 323 (7th Cir. 1985)); *Planned Parenthood v. Danforth*, 428 U.S. 52 (1976). Because the Second Amendment is not a “second-class right” that can be “singled out for special—and specially unfavorable—treatment,” the right is governed by the same “body of rules” as “the other Bill of Rights guarantees” that have been incorporated via the Due Process clause of

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governments banned gun sales and transfers at the time of the Second Amendment’s enactment”).

<sup>77</sup> *Ezell v. City of Chicago*, 651 F.3d 684, 697 (7th Cir. 2011); *Ezell v. City of Chicago*, No. 14-3312, 2017 WL 203542 (7th Cir. Jan. 18, 2017) (holding unconstitutional zoning regulations prohibiting shooting ranges in all but 2.2% of the city); *Illinois Ass’n of Firearms Retailers*, *supra* note 76, 961 F. Supp. 2d at 939 (“the fact that Chicagoans may travel outside the City to acquire a firearm does not bear on the validity of the ordinance *inside* the City.”).

the Fourteenth Amendment. *McDonald v. City of Chicago, Ill.*, 561 U.S. 742, 778-780 (2010).

## CONCLUSION

Violating the American arms commerce rights that had first been recognized in 1606, the British government turned a political crisis into war when it prohibited commerce in gunpowder and firearms. If the British had won, their plan was to make the arms commerce prohibition permanent.

Americans resisted the commerce prohibition by all means necessary. They created a new government to ensure that British-style infringements of rights could never be repeated. King George's power to prohibit arms commerce was banished from the United States. No government under American law has such a power. The prohibition of arms commerce is a necessary precursor for disarming the people, and is not allowed in America.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Circuit Rule 29-2(c)(3) because this brief contains 6,978 words, excluding the parts of the brief excluded by Fed. R. App. P. 32(a)(7)(B)(iii).

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

Dated this 31<sup>st</sup> day of January, 2017.

/s/ Joseph G.S. Greenlee  
Joseph G.S. Greenlee



## CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, I served the foregoing brief via the CM/ECF system for the United States Court of Appeals for the Ninth Circuit, which will distribute the brief to all attorneys of record in this case. No privacy redactions were necessary.

Dated this 31<sup>st</sup> day of January, 2017.

/s/ Joseph G.S. Greenlee  
Joseph G.S. Greenlee