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APPENDIX A

**UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

Argued December 7, 2006 Decided March 9, 2007

No. 04-7041

SHELLY PARKER, et al.,
APPELLANTS

v.

DISTRICT OF COLUMBIA and
ADRIAN M. FENTY, Mayor of the District of Columbia,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 03cv00213).

Alan Gura argued the cause for appellants. With him on the briefs were *Robert A. Levy* and *Clark M. Neily, III*.

Greg Abbott, Attorney General, Attorney General's Office of State of Texas, *R. Ted Cruz*, Solicitor General, *Troy King*, Attorney General, Attorney General's Office of State of Alabama, *Mike Beebe*, Attorney General, Attorney General's Office of the State of Arkansas, *John W. Suthers*, Attorney General, Attorney General's Office of the State of Colorado, *Charles J. Crist, Jr.*, Attorney General, Attorney General's Office of the State of Florida, *Thurbert E. Baker*, Attorney General, Attorney General's Office of the State of Georgia, *Michael A. Cox*, Attorney General, Attorney General's Office of the State of Michigan, *Mike Hatch*,

Attorney General, Attorney General's Office of the State of Minnesota, *Jon Bruning*, Attorney General, Attorney General's Office of the State of Nebraska, *Wayne Stenehjem*, Attorney General, Attorney General's Office of the State of North Dakota, *Jim Petro*, Attorney General, Attorney General's Office of the State of Ohio, *Mark L. Shurtleff*, Attorney General, Attorney General's Office of the State of Utah, and *Patrick J. Crank*, Attorney General, Attorney General's Office of the State of Wyoming, were on the brief for *amici curiae* States of Texas, et. al. in support of appellants.

Don B. Kates and *Daniel D. Polsby* were on the brief for *amici curiae* Professors Frederick Bieber, et al. and organization *amici curiae* Second Amendment Foundation, et al.

Stefan Bijan Tahmassebi was on the brief for amicus curiae Congress of Racial Equality, Inc. in support of appellants seeking reversal.

Peter J. Ferrara was on the brief for *amicus curiae* American Civil Rights Union in support of appellants.

Robert Dowlut was on the brief for *amicus curiae* National Rifle Association Civil Rights Defense Fund in support of appellants seeking reversal.

Todd S. Kim, Solicitor General, Office of Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were *Robert J. Spagnoletti*, Attorney General, *Edward E. Schwab*, Deputy Solicitor General, and *Lutz Alexander Prager*, Assistant Attorney General.

Ernest McGill, pro se, was on the brief for *amicus curiae* Ernest McGill in support of appellees.

Thomas F. Reilly, Attorney General, Attorney General's Office of Commonwealth of Massachusetts, *Glenn S. Kaplan*, Assistant Attorney General, *J. Joseph Curran, Jr.*, Attorney General, Attorney General's Office of the State of Maryland, *Zulima V. Farber*, Attorney General, Attorney General's Office of the State of New Jersey, were on the brief for *amici curiae* Commonwealth of Massachusetts, et al. in support of appellees. *John Hogrogian*, Attorney, Corporation Counsel's Office of City of New York, and *Benna Ruth Solomon*, Deputy Corporation Counsel, Office of the Corporation Counsel of the City of Chicago, entered appearances.

Andrew L. Frey, *David M. Gossett*, *Danny Y. Chou*, Deputy City Attorney, Office of the City Attorney of the City and County of San Francisco, and *John A. Valentine*, were on the brief for *amici curiae* The Brady Center to Prevent Gun Violence, et al. in support of Appellees. *Eric J. Mogilnicki* entered an appearance.

Before: HENDERSON and GRIFFITH, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Circuit Judge* HENDERSON.

SILBERMAN, *Senior Circuit Judge*: Appellants contest the district court's dismissal of their complaint alleging that the District of Columbia's gun control laws violate their Second Amendment rights. The court held that the Second Amendment ("A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed") does not bestow any rights on individuals except, perhaps, when an individual

serves in an organized militia such as today's National Guard. We reverse.

I

Appellants, six residents of the District, challenge D.C. Code § 7-2502.02(a)(4), which generally bars the registration of handguns (with an exception for retired D.C. police officers); D.C. Code § 22-4504, which prohibits carrying a pistol without a license, insofar as that provision would prevent a registrant from moving a gun from one room to another within his or her home; and D.C. Code § 7-2507.02, requiring that all lawfully owned firearms be kept unloaded and disassembled or bound by a trigger lock or similar device. Shelly Parker, Tracey Ambeau, Tom G. Palmer, and George Lyon want to possess handguns in their respective homes for self-defense. Gillian St. Lawrence owns a registered shotgun, but wishes to keep it assembled and unhindered by a trigger lock or similar device. Finally, Dick Heller, who is a District of Columbia special police officer permitted to carry a handgun on duty as a guard at the Federal Judicial Center, wishes to possess one at his home. Heller applied for and was denied a registration certificate to own a handgun. The District, in refusing his request, explicitly relied on D.C. Code § 7-2502.02(a)(4).

Essentially, the Appellants claim a right to possess what they describe as "functional firearms," by which they mean ones that could be "readily accessible to be used effectively when necessary" for self-defense in the home. They are not asserting a right to carry such weapons outside their homes. Nor are they challenging the District's authority *per se* to require the registration of firearms.

Appellants sought declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201, 2202, and 42 U.S.C. § 1983, but the court below granted the District's motion to dismiss

on the grounds that the Second Amendment, at most, protects an individual's right to "*bear* arms for service in the Militia." (The court did not refer to the word "keep" in the Second Amendment.) And, by "Militia," the court concluded the Second Amendment referred to an organized military body—such as a National Guard unit.

II

After the proceedings before the district judge, we decided *Seegars v. Gonzales*, 396 F.3d 1248 (D.C. Cir. 2005). We held that plaintiffs bringing a pre-enforcement challenge to the District's gun laws had not yet suffered an injury-in-fact and, therefore, they lacked constitutional standing. Although plaintiffs expressed an intention to violate the District's gun control laws, prosecution was not imminent. We thought ourselves bound by our prior decision in *Navegar*, *Inc. v. United States*, 103 F.3d 994 (D.C. Cir. 1997), to conclude that the District's general threat to prosecute violations of its gun laws did not constitute an Article III injury. *Navegar* involved a pre-enforcement challenge by a gun manufacturer to certain provisions of the Violent Crime Control and Law Enforcement Act of 1994, which prohibited the manufacture (and possession) of semiautomatic assault weapons. We held then that the manufacturers whose products the statute listed *eo nomine* had standing to challenge the law in question because the effect of the statute was to single out individual firearms purveyors for prosecution. *Id.* at 999. However, manufacturers whose products were described solely by their characteristics had no pre-enforcement standing because the threat of prosecution was shared among the (presumably) many gun manufacturers whose products fit the statutory description, and, moreover, it was not clear how these descriptive portions of the statute would be enforced. *Id.* at 1001.

In *Navegar*, then, the "factor . . . most significant in our analysis" was "the statute's own identification of particular products manufactured only by appellants" because that indicated a "special priority" for preventing specified parties from engaging in a particular type of conduct. *Id.* Extending *Navegar's* logic to *Seegars*, we said the *Seegars* plaintiffs were required to show that the District had singled them out for prosecution, as had been the case with at least one of the manufacturer plaintiffs in *Navegar.* Since the *Seegars* plaintiffs could show nothing more than a general threat of prosecution by the District, we held their feared injury insufficiently imminent to support Article III standing. 396 F.3d at 1255-56.

We recognized in *Seegars* that our analysis in *Navegar* was in tension with the Supreme Court's treatment of a pre-enforcement challenge to a criminal statute that allegedly threatened constitutional rights. *See id.* (citing *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289 (1979)). In *United Farm Workers*, the Supreme Court addressed the subject of pre-enforcement challenges in general terms:

> When the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder, he "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief."

442 U.S. at 298 (quoting *Doe v. Bolton*, 410 U.S. 179, 188 (1973)). The unqualified language of *United Farm Workers* would seem to encompass the claims raised by the *Seegars* plaintiffs, as well as the appellants here. Appellants' assertions of Article III standing also find support in the Supreme Court's decision in *Virginia v. American Booksellers Ass'n*, 484 U.S. 383 (1988), which allowed a

pre-enforcement challenge to a Virginia statute criminalizing the display of certain types of sexually explicit material for commercial purposes. In that case, the Court held it sufficient for plaintiffs to allege "an actual and well-founded fear that the law will be enforced against them," *id.* at 393, without any additional requirement that the challenged statute single out particular plaintiffs by name.[1] In both *United Farm Workers* and *American Booksellers*, the Supreme Court took a far more relaxed stance on pre-enforcement challenges than *Navegar* and *Seegars* permit. Nevertheless, unless and until this court en banc overrules these recent precedents, we must be faithful to *Seegars* just as the majority in *Seegars* was faithful to *Navegar.*

Applying *Navegar-Seegars* to the standing question in this case, we are obliged to look for an allegation that appellants here have been singled out or uniquely targeted by the D.C. government for prosecution. No such allegation has been made; with one exception, appellants stand in a position almost identical to the *Seegars* plaintiffs. Appellants attempt to distinguish their situation from that of the *Seegars* plaintiffs by pointing to "actual" and "specific" threats, Appellants' Br. at 21, lodged against appellants by D.C.

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[1] Of course, *American Booksellers* can be distinguished from *Navegar*, *Seegars*, and the present case, on the ground that the constitutional challenge at issue there implicated the First (as opposed to the Second) Amendment. The *American Booksellers* Court was concerned that Virginia's statute might chill speech without any prosecution ever taking place, 484 U.S. at 393, thereby creating a wrong without remedy if pre-enforcement standing were denied. But in deciding whether to privilege one amendment to the U.S. Constitution over another in assessing injury-in-fact, we note the statement of our dissenting colleague in *Seegars:* "I know of no hierarchy of Bill of Rights protections that dictates different standing analysis." 396 F.3d at 1257 (Sentelle, J., dissenting). The *Seegars* majority, although it felt constrained by *Navegar* to reach a different result, tacitly agreed with Judge Sentelle's assessment that the injury-in-fact requirement should be applied uniformly over the First and Second Amendments (and presumably all other constitutionally protected rights). *Id.* at 1254.

during the course of the district court litigation. But this is insufficient. None of the statements cited by appellants expresses a "special priority" for preventing *these* appellants from violating the gun laws, or a particular interest in punishing *them* for having done so. Rather, the District appears to be expressing a sentiment ubiquitous among stable governments the world over, to wit, scofflaws will be punished.

The noteworthy distinction in this case—a distinction mentioned in appellants' complaint and pressed by them on appeal—is that appellant Heller has applied for and been denied a registration certificate to own a handgun, a fact not present in *Seegars.* The denial of the gun license is significant; it constitutes an injury independent of the District's prospective enforcement of its gun laws, and an injury to which the stringent requirements for pre-enforcement standing under *Navegar* and *Seegars* would not apply. Since D.C. Code § 22-4504 (prohibition against carrying a pistol without a license) and D.C. Code § 7-2507.02 (disassembly/trigger lock requirement) would amount to further conditions on the certificate Heller desires, Heller's standing to pursue the license denial would subsume these other claims too.

This is not a new proposition. We have consistently treated a license or permit denial pursuant to a state or federal administrative scheme as an Article III injury. *See, e.g.*, *Cassell v. F.C.C.*, 154 F.3d 478 (D.C. Cir. 1998) (reviewing denial of license application to operate private land mobile radio service); *Wilkett v. I.C.C.*, 710 F.2d 861 (D.C. Cir. 1983) (reviewing denial of application for expanded trucking license); *see also City of Bedford v. F.E.R.C.*, 718 F.2d 1164, 1168 (D.C. Cir. 1983) (describing wrongful denial of a preliminary hydroelectric permit as an injury warranting review). The interests injured by an adverse licensing determination may be interests protected at

common law, or they may be created by statute. And of course, a licensing decision can also trench upon constitutionally protected interests, *see*, *e.g.*, *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999) (reviewing District of Columbia's denial of a building permit under the Takings Clause); *Berger v. Bd. of Psychologist Exam'rs*, 521 F.2d 1056 (D.C. Cir. 1975) (reviewing District of Columbia's denial of a license to practice psychology under the Due Process Clause), which will also give rise to Article III injury.

At oral argument, counsel for the District maintained that we should not view this as a licensing case for standing purposes because D.C.'s firearm registration system amounts to a complete prohibition on handgun ownership. The District argues that we must analyze Appellants' standing exclusively under our pre-enforcement precedents, *Seegars* and *Navegar*. We disagree on both counts. The District does not *completely* prohibit handgun registration. *See* D.C. Code § 7-2502.02(a)(4) (allowing certificates for pistols already registered in the District prior to 1976); D.C. Code § 7-2502.02(b) (excluding retired police officers of the Metropolitan Police Department from the ban on pistol registration). Had Heller been a retired police officer, presumably the District would have granted him a registration certificate. The same would be true if Heller had attempted to register a long gun, as opposed to a handgun. In any event, Heller has invoked his rights under the Second Amendment to challenge the statutory classifications used to bar his ownership of a handgun under D.C. law, and the formal process of application and denial, however routine, makes the injury to Heller's alleged constitutional interest concrete and particular. He is not asserting that his injury is only a threatened prosecution, nor is he claiming only a general right to handgun ownership; he is asserting a right to a registration certificate, the denial of which is his distinct injury.

We note that the Ninth Circuit has recently dealt with a Second Amendment claim by first extensively analyzing that provision, determining that it does not provide an individual right, and then, and only then, concluding that the plaintiff lacked standing to challenge a California statute restricting the possession, use, and transfer of assault weapons. *See Silveira v. Lockyer*, 312 F.3d 1052, 1066-67 & n.18 (9th Cir. 2003). We think such an approach is doctrinally quite unsound. The Supreme Court has made clear that when considering whether a plaintiff has Article III standing, a federal court must assume *arguendo* the merits of his or her legal claim. *See Warth v. Seldin*, 422 U.S. 490, 501-02 (1975) (assuming factual allegations and legal theory of complaint for purposes of standing analysis). We have repeatedly recognized that proposition. *See Waukesha v. E.P.A.*, 320 F.3d 228, 235 (D.C. Cir. 2003); *Am. Fed'n of Gov't Employees, AFL-CIO v. Pierce*, 697 F.2d 303, 305 (D.C. Cir. 1982). "Indeed, in reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims." *Waukesha*, 320 F.3d at 235 (citing *Wrath*, 422 U.S. at 502). This is no less true when, as here, the merits involve the scope of a constitutional protection.

Still, we have not always been so clear on this point. Although we recognized in *Claybrook v. Slater*, 111 F.3d 904 (D.C. Cir. 1997), that it was not necessary for a plaintiff to demonstrate that he or she would prevail on the merits in order to have Article III standing, the rest of our discussion seems somewhat in tension with that proposition. We did recognize that in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), when the Supreme Court used the phrase "legally protected interest" as an element of injury-in-fact, it made clear it was referring only to a "cognizable

interest." *Claybrook*, 111 F.3d at 906-07. The Court in *Lujan* concluded that plaintiffs had a "cognizable interest" in observing animal species without considering whether the plaintiffs had a legal *right* to do so. *Id.* (citing *Lujan*, 504 U.S. at 562-63). We think it plain the *Lujan* Court did not mean to suggest a return to the old "legal right" theory of standing rejected in *Association of Data Processing Service Organizations*, *Inc. v. Camp*, 397 U.S. 150, 153-54 (1970), because it cited *Warth*, *inter alia*, as precedent for the sentence which included the phrase "legally protected interest." *Lujan*, 504 U.S. at 560. Rather, the cognizable interest to which the Court referred would distinguish, to pick one example, a desire to observe certain aspects of the environment from a generalized wish to see the Constitution and laws obeyed. Indeed, in *Judicial Watch*, *Inc. v. United States Senate*, 432 F.3d 359 (D.C. Cir. 2005), Judge Williams wrote an extensive concurring opinion (not inconsistent with the majority opinion) in which he persuasively explains that the term "legally protected interest," as used in *Lujan*, could not have been intended to deviate from *Warth*'s general proposition that we assume the merits when evaluating standing. *Id.* at 363-66.

In *Claybrook*, we went on to say, quite inconsistently, that "if the plaintiff's claim has no foundation in law, he has no legally protected interest and thus no standing to sue." *Claybrook*, 111 F.3d at 907. We concluded that plaintiff lacked standing, however, because the government agency in that case had unfettered discretion to take the action it did, and therefore there was "no law to apply." *Id.* at 908. Thus the decision in *Claybrook* was actually based on a separate jurisdictional ground—reviewability under the Administrative Procedure Act—and federal courts may choose any ground to deny jurisdiction, e.g., Article III standing, prudential standing, or subject matter jurisdiction. *See Judicial Watch*, 432 F.3d at 366 (Williams, J., concurring) (noting that *Claybrook* is hard to classify as a

standing opinion). There is no hierarchy which obliges a court to decide Article III standing issues before other jurisdictional questions. *In re Papandreou*, 139 F.3d 247, 255-56 (D.C. Cir. 1998). Therefore, we do not read *Claybrook* to stand for the proposition, *contra Warth*, that we must evaluate the existence *vel non* of appellants' Second Amendment claim as a standing question.[2]

In sum, we conclude that Heller has standing to raise his § 1983 challenge to specific provisions of the District's gun control laws.

III

As we noted, the Second Amendment provides:

> A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms shall not be infringed.

U.S. Const. amend. II. The provision's second comma divides the Amendment into two clauses; the first is prefatory, and the second operative. Appellants' argument is focused on their reading of the Second Amendment's operative clause. According to appellants, the Amendment's language flat out guarantees an individual right "to keep and bear Arms." Appellants concede that the prefatory clause expresses a civic purpose, but argue that this purpose, while it may inform the meaning of an ambiguous term like "Arms," does not qualify the right guaranteed by the operative portion of the Amendment.

[2] Admittedly, in *Taylor v. F.D.I.C.*, 132 F.3d 753, 767 (D.C. Cir. 1997), we observed that the causation requirement of standing could coincide with the causal element in a cause of action. *But cf. id.* at 770 (Rogers, J., concurring). Whether that was correct or not, we concluded that even in that unique situation, not present here, we had discretion to decide the case on the merits or on standing grounds. *Id.* at 767-68.

The District of Columbia argues that the prefatory clause declares the Amendment's only purpose—to shield the state militias from federal encroachment—and that the operative clause, even when read in isolation, speaks solely to military affairs and guarantees a civic, rather than an individual, right. In other words, according to the District, the operative clause is not just limited by the prefatory clause, but instead both clauses share an explicitly civic character. The District claims that the Second Amendment "protects private possession of weapons *only* in connection with performance of civic duties as part of a well-regulated citizens militia organized for the security of a free state." Individuals may be able to enforce the Second Amendment right, but only if the law in question "will impair their participation in common defense and law enforcement when called to serve in the militia." But because the District reads "a well regulated Militia" to signify only the organized militias of the founding era—institutions that the District implicitly argues are no longer in existence today—invocation of the Second Amendment right is conditioned upon service in a defunct institution. Tellingly, we think, the District did not suggest what sort of law, if any, would violate the Second Amendment today—in fact, at oral argument, Appellees' counsel asserted that it would be constitutional for the District to ban all firearms outright. In short, we take the District's position to be that the Second Amendment is a dead letter.

We are told by the District that the Second Amendment was written in response to fears that the new federal government would disarm the state militias by preventing men from bearing arms while in actual militia service, or by preventing them from keeping arms at home in preparation for such service. Thus the Amendment should be understood to check federal power to regulate firearms only when federal legislation was directed at the abolition of state

militias, because the Amendment's *exclusive* concern was the preservation of those entities. At first blush, it seems passing strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as "Congress shall make no law disarming the state militias" or "States have a right to a well-regulated militia."

The District's argument—as strained as it seems to us—is hardly an isolated view. In the Second Amendment debate, there are two camps. On one side are the collective right theorists who argue that the Amendment protects only a right of the various state governments to preserve and arm their militias. So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed fighting forces. On the other side of the debate are those who argue that the Second Amendment protects a right of individuals to possess arms for private use. To these individual right theorists, the Amendment guarantees personal liberty analogous to the First Amendment's protection of free speech, or the Fourth Amendment's right to be free from unreasonable searches and seizures. However, some entrepreneurial scholars purport to occupy a middle ground between the individual and collective right models.

The most prominent in-between theory developed by academics has been named the "sophisticated collective right" model. [3] The sophisticated collective right label

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[3] *See United States v. Parker*, 362 F.3d 1279, 1284 (10th Cir. 2004); *United States v. Price*, 328 F.3d 958, 961 (7th Cir. 2003); *United States v. Emerson*, 270 F.3d 203, 219 (5th Cir. 2001); *Seegars v. Ashcroft*, 297 F.Supp. 2d 201, 218 (D.D.C. 2004); *see also* Robert J. Cottrol & Raymond T. Diamond, *The Fifth Auxiliary Right*, 104 Yale L.J. 995, 1003-04 (1995).

describes several variations on the collective right theme. All versions of this model share two traits: They (1) acknowledge individuals could, theoretically, raise Second Amendment claims against the federal government, but (2) define the Second Amendment as a purely civic provision that offers no protection for the private use and ownership of arms.

The District advances this sort of theory and suggests that the ability of individuals to raise Second Amendment claims serves to distinguish it from the pure collective right model. But when seen in terms of its practical consequences, the fact that individuals have standing to invoke the Second Amendment is, in our view, a distinction without a difference. *But cf. United States v. Emerson*, 270 F.3d 203, 218-21 (5th Cir. 2001) (treating the sophisticated collective right model as distinct from the collective right theory). Both the collective and sophisticated collective theories assert that the Second Amendment was written for the exclusive purpose of preserving state militias, and both theories deny that individuals *qua* individuals can avail themselves of the Second Amendment today. The latter point is true either because, as the District appears to argue, the "Militia" is no longer in existence, or, as others argue, because the militia's modern analogue, the National Guard, is fully equipped by the federal government, creating no need for individual ownership of firearms. It appears to us that for all its nuance, the sophisticated collective right model amounts to the old collective right theory giving a tip of the hat to the problematic (because ostensibly individual) text of the Second Amendment.

The lower courts are divided between these competing interpretations. Federal appellate courts have largely adopted the collective right model.[4] Only the Fifth Circuit

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[4]*See Silveira*, 312 F.3d at 1092; *Gillespie v. City of Indianapolis*, 185 F.3d 693, 710 (7th Cir. 1999); *United States v. Wright*, 117 F.3d 1265,

has interpreted the Second Amendment to protect an individual right.[5] State appellate courts, whose interpretations of the U.S. Constitution are no less authoritative than those of our sister circuits, offer a more balanced picture.[6] And the United States Department of

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1273-74 (11th Cir. 1997); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995); *United States v. Hale*, 978 F.2d 1016, 1019-20 (8th Cir. 1992); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921-23 (1st Cir. 1942).

The District cites a decision in the Second Circuit, *United States v. Toner*, 728 F.2d 115 (2d Cir. 1984), as holding that the Second Amendment protects only a right related to "civic purposes." The District's reliance on this case is plainly wrong. In *Toner*, the court stated only that the Second Amendment right was not "fundamental." *Id.* at 128. The opinion in no way addressed the question whether the Second Amendment requires that use and possession of a weapon be for civic purposes. We are not aware of any Second Circuit decision that directly addresses the collective versus individual nature of the Second Amendment right. *See Silveira*, 312 F.3d at 1063 n.11 (noting that only the Second and D.C. Circuits had yet to decide nature of Second Amendment right).

[5] *Emerson*, 270 F.3d at 264-65.

[6] Of the state appellate courts that have examined the question, at least seven have held that the Second Amendment protects an individual right, *see Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *Brewer v. Commonwealth*, 206 S.W.3d 343, 347 & n.5 (Ky. 2006); *State v. Blanchard*, 776 So. 2d 1165, 1168 (La. 2001); *State v. Nickerson*, 126 Mont. 157 (1952); *Stillwell v. Stillwell*, 2001 WL 862620, at *4 (Tenn. Ct. App. July 30, 2001); *State v. Anderson*, 2000 WL 122218, at *7 n.3 (Tenn. Crim. App. Jan. 26, 2000); *State v. Williams*, 158 Wash. 2d 904 (2006); *Rohrbaugh v. State*, 216 W. Va. 298 (2004), whereas at least ten state appellate courts (including the District of Columbia) have endorsed the collective right position, *see Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987); *Commonwealth v. Davis*, 369 Mass. 886 (1976); *In re Atkinson*, 291 N.W.2d 396, 398 n.1 (Minn. 1980); *Harris v. State*, 83 Nev. 404 (1967); *Burton v. Sills*, 53 N.J. 86, 248 (1968); *In re Cassidy*, 268 A.D. 282, (N.Y. App. Div. 1944); *State v. Fennell*, 95 N.C. App. 140 (1989); *Mosher v. City of Dayton*, 48 Ohio St. 2d 243 (1976); *Masters v. State*, 653 S.W.2d 944, 945 (Tex. App. 1983); *State v. Vlacil*, 645 P.2d 677, 679 (Utah 1982); *see also*

Justice has recently adopted the individual right model. *See* Op. Off. of Legal Counsel, "Whether the Second Amendment Secures an Individual Right" (2004) *available at* http://www.usdoj.gov/olc/secondamendment2.pdf; *see also* Memorandum from John Ashcroft, Attorney General, to All United States' Attorneys (Nov. 9, 2001), *reprinted in* Br. for the United States in Opp'n. at 26, *Emerson*, 536 U.S. 907. The great legal treatises of the nineteenth century support the individual right interpretation, *see Silveira v. Lockyer*, 328 F.3d 567, 583-85 (9th Cir. 2003) (Kleinfeld, J., dissenting from denial of rehearing en banc); *Emerson*, 270 F.3d at 236, 255-59, as does Professor Laurence Tribe's leading treatise on constitutional law.[7] Because we have no direct precedent—either in this court or the Supreme Court—that provides us with a square holding on the question, we turn first to the text of the Amendment.

A

We start by considering the competing claims about the meaning of the Second Amendment's operative clause: "the right of the people to keep and bear Arms shall not be infringed." Appellants contend that "the right of the people" clearly contemplates an individual right and that "keep and bear Arms" necessarily implies private use and ownership. The District's primary argument is that "keep and bear Arms" is best read in a military sense, and, as a consequence, the entire operative clause should be understood as granting only a collective right. The District also argues that "the right of the people" is ambiguous as to whether the right protects civic or private ownership and use of weapons.

Kalodimos v. Village of Morton Grove, 103 Ill. 2d 483 (1984) (stating in dicta that Second Amendment protects collective right).

[7] *See* 1 Laurence Tribe, American Constitutional Law 902 & n.221 (3d ed. 2000). Professor Tribe was not always of this view. *See* Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L.J. 637, 640 (1989) (critiquing Tribe's earlier collective right position).

In determining whether the Second Amendment's guarantee is an individual one, or some sort of collective right, the most important word is the one the drafters chose to describe the holders of the right—"the people." That term is found in the First, Second, Fourth, Ninth, and Tenth Amendments. It has never been doubted that these provisions were designed to protect the interests of *individuals* against government intrusion, interference, or usurpation. We also note that the Tenth Amendment—"The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people"—indicates that the authors of the Bill of Rights were perfectly capable of distinguishing between "the people," on the one hand, and "the states," on the other. The natural reading of "the right of the people" in the Second Amendment would accord with usage elsewhere in the Bill of Rights.

The District's argument, on the other hand, asks us to read "the people" to mean some subset of individuals such as "the organized militia" or "the people who are engaged in militia service," or perhaps not any individuals at all—e.g., "the states." *See Emerson*, 270 F.3d at 227. These strained interpretations of "the people" simply cannot be squared with the uniform construction of our other Bill of Rights provisions. Indeed, the Supreme Court has recently endorsed a uniform reading of "the people" across the Bill of Rights. In *United States v. Verdugo-Urquidez*, 494 U.S. 259, (1990), the Court looked specifically at the Constitution and Bill of Rights' use of "people" in the course of holding that the Fourth Amendment did not protect the rights of non-citizens on foreign soil:

> "[T]he people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States."

> The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." *See also* U.S. Const. amend. I, art. I, § 2, cl. 1. While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendments, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. at 265. It seems unlikely that the Supreme Court would have lumped these provisions together without comment if it were of the view that the Second Amendment protects only a collective right. The Court's discussion certainly indicates—if it does not definitively determine—that we should not regard "the people" in the Second Amendment as somehow restricted to a small subset of "the people" meriting protection under the other Amendments' use of that same term.

In sum, the phrase "the right of the people," when read intra-textually and in light of Supreme Court precedent, leads us to conclude that the right in question is individual. This proposition is true even though "the people" at the time of the founding was not as inclusive a concept as "the people" today. *See* Robert E. Shallope, *To Keep and Bear Arms in the Early Republic*, 16 Const. Comment. 269, 280-81 (1999). To the extent that non-whites, women, and the propertyless were excluded from the protections afforded to "the people," the Equal Protection Clause of the Fourteenth Amendment is understood to have corrected that initial constitutional shortcoming.

The wording of the operative clause also indicates that the right to keep and bear arms was not created by government, but rather preserved by it. *See* Thomas B. McAffee & Michael J. Quinlan, *Bringing Forward the Right to Keep and Bear Arms: Do Text, History, or Precedent Stand in the Way?*, 75 N.C. L. Rev. 781, 890 (1997). Hence, the Amendment acknowledges "*the* right . . . to keep and bear Arms," a right that pre-existed the Constitution like "*the* freedom of speech." Because the right to arms existed prior to the formation of the new government, *see Robertson v. Baldwin*, 165 U.S. 275, 280 (1897) (describing the origin of the Bill of Rights in English law), the Second Amendment only guarantees that the right "shall not be infringed." Thomas Cooley, in his influential treatise, observed that the Second Amendment had its origins in the struggle with the Stuart monarchs in late-seventeenth-century England. *See* Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 270-72 (Rothman & Co. 1981) (1880).[8]

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[8] Indeed, England's Bill of Rights of 1689 guaranteed "[t]hat the Subjects, which are Protestants, may have Arms for their Defence, suitable to their conditions, as allowed by law." 1 W. & M., Sess. 2, c. 2. Here too, however, the right was not newly created, but rather recognized as part of the common law tradition. The ancient origin of the right in England was affirmed almost a century later, in the aftermath of the anti-Catholic Gordon riots of 1780, when the Recorder of London, who was the foremost legal advisor to the city as well as the chief judge of the Old Bailey, gave the following opinion on the legality of private organizations armed for defense against rioters: The right of His majesty's Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a *right*, but as a *duty;* for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of judicial decisions and ancient acts of parliament, as well as by reason and common sense.

To determine what interests this pre-existing right protected, we look to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defense and hunting. *See Emerson*, 270 F.3d at 251-55 (collecting historical materials); Robert E. Shallope, *The Ideological Origins of the Second Amendment*, 69 J. Am. Hist. 599, 602-14 (1982); *see also* Pa. Const. § 43 (Sept. 28, 1776) ("The inhabitants of this state shall have liberty to fowl and hunt in seasonable times on the lands they hold, and on all other lands therein not enclosed . . . .").

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation. *See* William Blackstone, 1 Commentaries *136, *139; *see also Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *Kasler v. Lockyer*, 23 Cal. 4th 472, (2000) (Brown, J., concurring). The right of self-preservation, in turn, was understood as the right to defend oneself against attacks by lawless individuals, or, if absolutely necessary, to resist and throw off a tyrannical government. *See Silveira*, 328 F.3d at 583-85 (Kleinfeld, J.); *see also id.* at 569-70 (Kozinski, J., dissenting from the denial of rehearing en banc); *Kasler*, 97

Opinion on the Legality of the London Military Foot Association, *reprinted in* William Blizzard, Desultory Reflections on Police 59-60 (1785). For further examination of the Second Amendment's English origins, see generally Joyce Lee Malcolm, To Keep and Bear Arms (1994).

Cal. Rptr. 2d 334, 2 P.3d at 605 (Brown, J., concurring).[9]

When we look at the Bill of Rights as a whole, the setting of the Second Amendment reinforces its individual nature. The Bill of Rights was almost entirely a declaration of individual rights, and the Second Amendment's inclusion therein strongly indicates that it, too, was intended to protect personal liberty. The collective right advocates ask us to imagine that the First Congress situated a *sui generis* states' right among a catalogue of cherished individual liberties without comment. We believe the canon of construction known as *noscitur a sociis* applies here. Just as we would read an ambiguous statutory term in light of its context, we should read any supposed ambiguities in the Second Amendment in light of *its* context. Every other provision of the Bill of Rights, excepting the Tenth, which speaks explicitly about the allocation of governmental power,

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[9] The importance of the private right of self-defense is hardly surprising when one remembers that most Americans lacked a professional police force until the middle of the nineteenth century, *see Levinson*, *supra*, at 646 & n.46, and that many Americans lived in backcountry such as the Northwest Territory.

With respect to the right to defend oneself against tyranny and oppression, some have argued that the Second Amendment is utterly irrelevant because the arms it protects, even if commonly owned, would be of no use when opposed to the arsenal of the modern state. But as Judge Kozinski has noted, incidents such as the Warsaw ghetto uprising of 1943 provide rather dramatic evidence to the contrary. *See Silveira*, 328 F.3d at 569-70 (dissenting from the denial of rehearing en banc). The deterrent effect of a well-armed populace is surely more important than the probability of overall success in a full-out armed conflict. Thus could Madison write to the people of New York in 1788:

> Notwithstanding the military establishments in the several kingdoms of Europe, which are carried as far as public resources will bear, the governments are afraid to trust the people with arms. And it is not certain that with this aid alone they would not be able to shake off their yokes.

The Federalist No. 46, at 299-300 (James Madison) (Clinton Rossiter ed., 1961).

protects rights enjoyed by citizens in their individual capacity. The Second Amendment would be an inexplicable aberration if it were not read to protect individual rights as well.

The District insists that the phrase "keep and bear Arms" should be read as purely military language, and thus indicative of a civic, rather than private, guarantee. The term "bear Arms" is obviously susceptible to a military construction. But it is not accurate to construe it exclusively so. First, the word "bear" in this context is simply a more formal synonym for "carry," i.e., "Beware of Greeks bearing gifts." The *Oxford English Dictionary* and the original *Webster's* list the primary meaning of "bear" as "to support" or "to carry." *See Silveira*, 328 F.3d at 573 (Kleinfeld, J.). Dr. Johnson's *Dictionary*—which the Supreme Court often relies upon to ascertain the founding-era understanding of text, *see*, *e.g.*, *Eldred v. Ashcroft*, 537 U.S. 186, 199 (2003)—is in accord. The first three definitions for "bear" are "to carry as a burden," "to convey or carry," and "to carry as a mark of authority." *See* Johnson's and Walker's English Dictionaries Combined 126 (J.E. Worcester ed., 1830) [hereinafter Johnson].

Historical usage, as gleaned from the *O.E.D.* and *Webster's*, supports the notion that "bear arms" was sometimes used as an idiom signifying the use of weaponry in conjunction with military service. However, these sources also confirm that the idiomatic usage was not absolute. *Silveira*, 328 F.3d at 573 (Kleinfeld, J.); *Emerson*, 270 F.3d at 229-32. Just as it is clear that the phrase "to bear arms" was in common use as a byword for soldiering in the founding era, *see*, *e.g.*, Gary Wills, *To Keep and Bear Arms*, N.Y. Rev. of Books, Sept. 21, 1995, at 62-73, it is equally evident from a survey of late eighteenth—and early nineteenth-century state constitutional provisions that the public understanding of "bear Arms" also encompassed the

carrying of arms for private purposes such as self-defense. *See Emerson*, 270 F.3d at 230 n. 29 (collecting state constitutional provisions referring to the people's right to "bear arms in defence of themselves and the State" among other formulations). Thus, it would hardly have been unusual for a writer at the time (or now) to have said that, after an attack on a house by thieves, the men set out to find them "bearing arms."

The District relies heavily on the use of "bearing arms" in a conscientious objector clause that formed part of Madison's initial draft of the Second Amendment. The purpose of this clause, which was later dropped from the Amendment's text, was to excuse those "religiously scrupulous of bearing arms" from being forced "to render military service in person." The Complete Bill of Rights 169 (Neil H. Cogan ed. 1997). The District argues that the conscientious objector clause thus equates "bearing arms" with military service. The Quakers, Mennonites, and other pacifist sects that were to benefit by the conscientious objector clause had scruples against soldiering, but not necessarily hunting, which, like soldiering, involved the *carrying* of arms. And if "bearing arms" only meant "carrying arms," it is argued, the phrase would not have been used in the conscientious objector clause because Quakers were not religiously scrupulous of carrying arms generally; it was carrying arms *for militant purposes* that the Friends truly abhorred (although many Quakers certainly frowned on hunting as the wanton infliction of cruelty upon animals). *See* Thomas Clarkson, A Portraiture of Quakerism, Vol. I. That Madison's conscientious objector clause appears to use "bearing arms" in a strictly military sense does at least suggest that "bear Arms" in the Second Amendment's operative clause includes the carrying of arms for military purposes. However, there are too many instances of "bear arms" indicating private use to conclude that the drafters intended only a military sense.

In addition to the state constitutional provisions collected in *Emerson*, there is the following statement in the report issued by the dissenting delegates at the Pennsylvania ratification convention:

> 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.

The Address and Reasons of Dissent of the Minority of the Convention of Pennsylvania to Their Constituents, *reprinted in* 3 The Complete Anti-Federalist 5, 151 (Herbert J. Storing ed., 1981). These dissenting Anti-Federalists, writing in December 1787, were clearly using "bear arms" to include uses of weaponry outside the militia setting—e.g., one may "bear arms . . . for the purpose of killing game.[10].

We also note that at least three current members (and one former member) of the Supreme Court have read "bear Arms" in the Second Amendment to have meaning beyond mere soldiering: "Surely a most familiar meaning [of 'carries a firearm'] is, as the Constitution's Second Amendment ('keep and *bear* Arms') and Black's Law Dictionary . . . indicate: 'wear, bear, or carry . . . upon the person or in the clothing or in a pocket, for the purpose . . . of being armed and ready for offensive or defensive action in a case of conflict with another person." *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting, joined by Rehnquist, C.J., Scalia, J. and Souter,

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[10] To be sure, collective right theorists have correctly observed that the Pennsylvania dissenters were not speaking for anyone but themselves -- that is, they lost in their attempt to defeat ratification of the Constitution, and lacked the clout to have their suggested amendments sent to the First Congress, unlike the Antifederalist delegates in other state conventions. *See* Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 Chi.-Kent L. Rev. 103, 134-35 (2000). But that the dissenting delegates were political losers does not undercut their status as competent users of late-eighteenth-century English.

J.) (emphasis in original). Based on the foregoing, we think the operative clause includes a private meaning for "bear Arms."

In contrast to the collective right theorists' extensive efforts to tease out the meaning of "bear," the conjoined, *preceding* verb "keep" has been almost entirely neglected. In that tradition, the District offers a cursory and largely dismissive analysis of the verb. The District appears to claim that "keep and bear" is a unitary term and that the individual word "keep" should be given no independent significance. This suggestion is somewhat risible in light of the District's admonishment, earlier in its brief, that when interpreting constitutional text "every word must have its due force, and appropriate meaning; . . . no word was unnecessarily used or needlessly added." Appellees' Br. at 23 (quoting *Holmes v. Jennison*, 39 U.S. (14 Pet.) 540, 570-71 (1840)). Even if "keep" and "bear" are not read as a unitary term, we are told, the meaning of "keep" cannot be broader than "bear" because the Second Amendment only protects the use of arms in the course of militia service. *Id.* at 26-27. But this proposition assumes its conclusion, and we do not take it seriously.

One authority cited by the District has attempted to equate "keep" with "keep up," a term that had been used in phrases such as "keep up a standing army" or, as in the Articles of Confederation, "every state shall keep up a well regulated and disciplined militia . . . ." *See* Wills, *supra*, at 66. The argument that "keep" as used in "the right of the people to keep . . . Arms" shares a military meaning with "keep up" as used in "every state shall keep *up* a well regulated militia" mocks usage, syntax, and common sense. Such outlandish views are likely advanced because the plain meaning of "keep" strikes a mortal blow to the collective right theory. Turning again to Dr. Johnson's *Dictionary*, we see that the first three definitions of "keep" are "to retain; not

to lose," "to have in custody," "to preserve; not to let go." Johnson, *supra*, at 540. We think "keep" is a straightforward term that implies ownership or possession of a functioning weapon by an individual for private use. *Emerson*, 270 F.3d at 231 & n. 31; *accord Silveira*, 328 F.3d at 573-74 (Kleinfeld, J.). The term "bear arms," when viewed in isolation, might be thought ambiguous; it could have a military cast. But since "the people" and "keep" have obvious individual and private meanings, we think those words resolve any supposed ambiguity in the term "bear arms."

* * *

The parties generally agree that the prefatory clause, to which we now turn, declares the Second Amendment's civic purpose—i.e., insuring the continuance of the militia system—and only disagree over whether that purpose was exclusive. The parties do attribute dramatically different meanings to "a well regulated Militia." Appellants argue that the militia referenced in the Second Amendment's prefatory clause was "practically synonymous" with "the people" referenced in the operative clause. The District advances a much more limited definition. According to the District, the militia was a body of adult men regulated and organized by state law as a civilian fighting force. The crucial distinction between the parties' views then goes to the nature of the militia: Appellants claim no organization was required, whereas the District claims a militia did not exist unless it was subject to state discipline and leadership. As we have already noted, the District claims that "the Framers' militia has faded into insignificance."

The parties draw on *United States v. Miller*, 307 U.S. 174, (1939), to support their differing definitions. *Miller*, a rare Second Amendment precedent in the Supreme Court, the holding of which we discuss below, described the militia in the following terms:

> The Militia which the States were expected to maintain and train is set in contrast with Troops which they were forbidden to keep without the consent of Congress. The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion.
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> The signification attributed to the term Militia appears from the debates in the Convention, the history and legislation of Colonies and States, and the writings of approved commentators. These show plainly enough that the Militia comprised all males physically capable of acting in concert for the common defense. "A body of citizens enrolled for military discipline." And further, that ordinarily when called for service these men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time.

Id. at 178-79.

The District claims that *Miller's* historical account of the "Militia" supports its position. Yet according to *Miller*, the militia included "*all males physically capable of acting in concert for the common defence*" who were "*enrolled for military discipline.*" And *Miller's* expansive definition of the militia—qualitatively different from the District's concept—is in accord with the second Militia Act of 1792, passed by the Second Congress.[11] Act of May 8, 1792, ch.

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[11] The second Militia Act was passed on May 8, 1792. On May 2, 1792, Congress had enacted a Militia Act "providing for the authority of the President to call out the Militia." Act of May 2, 1792, ch. XXVIII, 1 Stat. 264. The first Militia Act gave the President power to call forth the Militia in cases of invasion by a foreign nation or Indian tribe, and also in cases of internal rebellion. If the militia of the state wherein the rebellion

XXXIII, 1 Stat. 271. Of course, many of the members of the Second Congress were also members of the First, which had drafted the Bill of Rights. But more importantly, they were conversant with the common understanding of both the First Congress and the ratifying state legislatures as to what was meant by "Militia" in the Second Amendment. The second Militia Act placed specific and extensive requirements on the citizens who were to constitute the militia:

> Be it enacted . . . [t]hat each and every free able-bodied white male citizen of the respective states, resident therein, who is or shall be of the age of eighteen years, and under the age of forty-five years (except as is herein after excepted) shall severally and respectively be *enrolled* in the militia, by the captain or commanding officer of the company, within whose bounds such citizen shall reside, and that within twelve months after the passing of this Act. And . . . every such captain or commanding officer of a company . . . shall without delay notify such citizen of the said enrollment . . . . That every citizen, so enrolled and notified, shall, within six months thereafter, provide himself with a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good rifle, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder; and shall appear so armed, accoutred and provided, when called out to exercise, or into service.

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was taking place either was unable to suppress it or refused to be called up, the first Militia Act gave the President authority to use militia from other states.

Id. (emphasis added).[12]

The reader will note that the Act's first requirement is that the "free able-bodied white male" population between eighteen and forty-five *enroll* in the militia. And enrollment was quite distinct from the various other regulations prescribed by Congress, which included the type of weaponry members of the militia must own. Becoming "enrolled" in the militia appears to have involved providing one's name and whereabouts to a local militia officer—somewhat analogous to our nation's current practice of requiring young men to register under the Selective Service Act. *Silveira*, 328 F.3d at 578 (Kleinfeld, J.). Thus when read in light of the second Militia Act, *Miller* defines the militia as having only two primary characteristics: It was all free, white, able-bodied men of a certain age who had given their names to the local militia officers as eligible for militia service. Contrary to the District's view, there was no organizational condition precedent to the existence of the "Militia." Congress went on in the second Militia Act to prescribe a number of rules for organizing the militia. But the militia itself was the raw material from which an organized fighting force was to be created. Thus, the second Militia Act reads:

> And be it further enacted, That *out of the militia enrolled as is herein directed*, there shall be formed for each battalion at least one company of grenadiers, light infantry or riflemen; and that to each division there shall be at least one company of artillery, and

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[12] Congress enacted this provision pursuant to its Article I, Section 8 powers over the militia: "The Congress shall have the power . . . [t]o provide for organizing, arming, and disciplining, the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the states respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress . . . ." U.S. Const., art. I., § 8.

> one troop of horse: There shall be to each company of artillery, one captain, two lieutenants, four sergeants, four corporals, six gunners, six bombardiers, one drummer, and one fifer.

Id. at 272 (emphasis added).

The crucial point is that the existence of the militia preceded its organization by Congress, and it preceded the implementation of Congress's organizing plan by the states. The District's definition of the militia is just too narrow. The militia was a large segment of the population—not quite synonymous with "the people," as appellants contend—but certainly not the organized "divisions, brigades, regiments, battalions, and companies" mentioned in the second Militia Act. *Id.* at 272.

The current congressional definition of the "Militia" accords with original usage: "The militia of the United States consists of all able-bodied males at least 17 years of age and . . . under 45 years of age who are, or who have made a declaration of intention to become, citizens of the United States and of female citizens of the United States who are members of the National Guard." 10 U.S.C. § 311. The statute then distinguishes between the "organized militia," which consists of the National Guard and Naval Militia, and the "unorganized militia," which consists of every member of the militia who is not a member of the National Guard or Naval Militia. *Id.* Just as in the 1792 enactment, Congress defined the militia broadly, and, more explicitly than in its founding-era counterpart, Congress provided that a large portion of the militia would remain unorganized. The District has a similar structure for its own militia: "Every able-bodied male citizen resident within the District of Columbia, of the age of 18 years and under the age of 45 years, excepting . . . idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous

crime, shall be enrolled in the militia." D.C. Code § 49- 401.

The District argues that the modifier "well regulated" means that "[t]he militia was not individuals acting on their own; one cannot be a one-person militia." We quite agree that the militia was a collective body designed to act in concert. But we disagree with the District that the use of "well regulated" in the constitutional text somehow turns the popular militia embodied in the 1792 Act into a "select" militia that consisted of semi-professional soldiers like our current National Guard. Contemporaneous legislation once again provides us with guidance in reading ambiguous constitutional text. *See* Op. at 30; *see also Silveira*, 328 F.3d at 579-80 (Kleinfeld, J.).

The second Militia Act provides a detailed list of directions to both individuals and states that we take as an indication of what the drafters of the Second Amendment contemplated as a "well regulated Militia." It will be recalled, the second Militia Act requires that eligible citizens enroll in the militia and, within six months, arm themselves accordingly. Subsequent to enrollment, arming oneself became the first duty of all militiamen. *See Silveira*, 328 F.3d at 581 (Kleinfeld, J.). The Act goes on to require of the states that the militiamen be notified of their enrollment; that within one year, the states pass laws to arrange the militia into divisions, brigades, regiments, battalions, and companies, as well as appoint various militia officers; that there be an Adjutant General appointed in each state to distribute all orders for the Commander in Chief of the State to the several corps, and so on.

The statute thus makes clear that these requirements were independent of each other, i.e., militiamen were obligated to arm themselves regardless of the organization provided by the states, and the states were obligated to organize the militia, regardless of whether individuals had armed themselves in accordance with the statute. We take these

dual requirements—that citizens were properly supplied with arms and *subject* to organization by the states (as distinct from actually organized)—to be a clear indication of what the authors of the Second Amendment contemplated as a "well regulated Militia."

Another aspect of "well regulated" implicit in the second Militia Act is the exclusion of certain persons from militia service. For instance, the Act exempts from militia duty "the Vice President of the United States, [executive branch officers and judges], Congressmen, custom house officers, . . . post officers, . . . all Ferrymen employed at any ferry on the post road, . . . all pilots, all mariners actually employed in the sea service of any citizen or merchant within the United States; and all persons who now are or may be hereafter exempted by the laws of the respective states." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271. Thus, even after the founding-era militia became "well regulated," it did not lose its popular character. The militia still included the majority of adult men (albeit, at the time, "free able-bodied white male[s]"), who were to arm themselves, and whom the states were expected to organize into fighting units. Quite unlike today's National Guard, participation was widespread and mandatory.

As the foregoing makes clear, the "well regulated Militia" was not an elite or select body. *See Silveira*, 328 F.3d at 577-78 (Kleinfeld, J.). While some of the founding fathers, including George Washington and Alexander Hamilton, favored such organizations over a popular militia, *see* The Origin of the Second Amendment at xlvii (David E. Young ed., 2d ed. 1995), the Second Congress unambiguously required popular participation. The important point, of course, is that the popular nature of the militia is consistent with an individual right to keep and bear arms: Preserving an individual right was the best way to ensure that the militia could serve when called.

* * *

As we observed, the District argues that *even if* one reads the operative clause in isolation, it supports the collective right interpretation of the Second Amendment. Alternatively, the District contends that the operative clause should not, in fact, be read in isolation, and that it is imbued with the civic character of the prefatory clause when the Amendment is read, correctly, as two interactive clauses. The District points to the singular nature of the Second Amendment's preamble as an indication that the operative clause must be restricted or conditioned in some way by the prefatory language. *Compare* Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. Rev. 793 (1998), *with* Michael C. Dorf, *What Does the Second Amendment Mean Today?*, 76 Chi.-Kent L. Rev. 291 (2000). However, the structure of the Second Amendment turns out to be not so unusual when we examine state constitutional provisions guaranteeing rights or restricting governmental power. It was quite common for prefatory language to state a principle of good government that was narrower than the operative language used to achieve it. Volokh, *supra*, at 801-07.

We think the Second Amendment was similarly structured. The prefatory language announcing the desirability of a well-regulated militia—even bearing in mind the breadth of the concept of a militia—is narrower than the guarantee of an individual right to keep and bear arms. The Amendment does not protect "the right of militiamen to keep and bear arms," but rather "the right of the people." The operative clause, properly read, protects the ownership and use of weaponry beyond that needed to preserve the state militias. Again, we point out that if the competent drafters of the Second Amendment had meant the right to be limited to the protection of state militias, it is hard to imagine that they would have chosen the language they did. We therefore take it as an expression of the drafters'

view that the people possessed a natural right to keep and bear arms, and that the preservation of the militia was the right's most salient political benefit—and thus the most appropriate to express in a political document.

That the Amendment's civic purpose was placed in a preamble makes perfect sense given the then-recent ratification controversy, wherein Antifederalist opponents of the 1787 Constitution agitated for greater assurance that the militia system would remain robust so that standing armies, which were thought by many at the time to be the bane of liberty, would not be necessary. *See* Bernard Bailyn, *The Ideological Origins of the American Revolution* 338-60 (Enlarged ed. 1992). The Federalists who dominated the First Congress offered the Second Amendment's preamble to palliate Antifederalist concerns about the continued existence of the popular militia. But neither the Federalists nor the Antifederalists thought the federal government had the power to *disarm* the people. This is evident from the ratification debates, where the Federalists relied on the existence of an armed populace to deflect Antifederalist criticism that a strong federal government would lead to oppression and tyranny. Antifederalists acknowledged the argument, but insisted that an armed populace was not enough, and that the existence of a popular militia should also be guaranteed. *Compare* The Federalist Nos. 8, 28, 59 (Alexander Hamilton), No. 46 (James Madison) (arguing that an armed populace constitutes a check on the potential abuses of the federal government) *with* Melancton Smith [Federal Farmer], *Observations To A Fair Examination Of The System Of Government Proposed By The Late Convention, And To Several Essential And Necessary Alterations In It* (Nov. 8, 1787), *reprinted in The Origin of the Second Amendment*, *supra*, at 89, 91 (despite the fact that the "yeomanry of the country . . . possess arms" for defense, the federal government could undermine the regular militia and render the armed populace of no importance).

To be sure, as the District argues, the *Miller* Court did draw upon the prefatory clause to interpret the term "Arms" in the operative clause. As we note below, interpreting "Arms" in light of the Second Amendment's militia purpose makes sense because "Arms" is an open-ended term that appears but once in the Constitution and Bill of Rights. But *Miller* does not command that we limit perfectly sensible constitutional text such as "the right of the people" in a manner inconsistent with other constitutional provisions. Similarly, the Second Amendment's use of "keep" does not need to be recast in artificially military terms in order to conform to *Miller.*

We note that when interpreting the text of a constitutional amendment it is common for courts to look for guidance in the proceedings of the Congress that authored the provision. Unfortunately, the Second Amendment's drafting history is relatively scant and inconclusive. *Emerson*, 270 F.3d at 245-51. The recorded debates in the First Congress do not reference the operative clause, a likely indication that the drafters took its individual guarantee as rather uncontroversial. There is certainly nothing in this history to substantiate the strained reading of the Second Amendment offered by the District.

B

We have noted that there is no unequivocal precedent that dictates the outcome of this case. This Court has never decided whether the Second Amendment protects an individual or collective right to keep and bear arms. On one occasion we anticipated an argument about the scope of the Second Amendment, but because the issue had not been properly raised by appellants, we assumed the applicability of the collective right interpretation then urged by the federal government. *Fraternal Order of Police v. United States*

(F.O.P.II), 173 F.3d 898, 906 (D.C. Cir. 1999). The Supreme Court has not decided this issue either. *See id.* As we have said, the leading Second Amendment case in the Supreme Court is *United States v. Miller.* While *Miller* is our best guide, the Supreme Court's other statements on the Second Amendment warrant mention.

In *Dred Scott v. Sandford*, 60 U.S. 393 (1857), the Court asserted the applicability of the Bill of Rights to the territories in the following terms:

> [N]o one . . . will contend that Congress can make any law in a Territory respecting the establishment of religion, or the free exercise thereof, or abridging the freedom of speech or of the press, or the right of the people of the Territory peaceably to assemble, and to petition the Government for the redress of grievances . . . *[n]or can Congress deny to the people the right to keep and bear arms*, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding . . . .These powers . . . in relation to rights of person . . . are, in express and positive terms, denied to the General Government.

Id. at 450 (emphasis added). Although *Dred Scott* is as infamous as it was erroneous in holding that African-Americans are not citizens, this passage expresses the view, albeit in passing, that the Second Amendment contains a personal right. It is included among other individual rights, such as the right to trial by jury and the privilege against self-incrimination. The other Second Amendment cases of the mid-nineteenth century did not touch upon the individual versus collective nature of the Amendment's guarantee.[13]

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[13] In *United States v. Cruikshank*, 92 U.S. 542, 551 (1876), and *Presser v. Illinois*, 116 U.S. 252, 264-66 (1886), the Court held that the Second Amendment constrained only federal government action and did not apply to the actions of state governments. This holding was reiterated in

In *Robertson v. Baldwin*, 165 U.S. 275 (1897), the Court addressed the scope of the term "involuntary servitude" in the Thirteenth Amendment. In discussing limitations inherent in that constitutional provision, the Court said the following:

> The law is perfectly well settled that the first 10 amendments to the constitution, commonly known as the "Bill of Rights," were not intended to lay down any novel principles of government, but simply to embody certain guaranties and immunities which we had inherited from our English ancestors, and which had, from time immemorial, been subject to certain well-recognized exceptions, arising from the necessities of the case . . . .
>
> Thus, the freedom of speech and of the press (article 1) does not permit the publication of libels, blasphemous or indecent articles, or other publications injurious to public morals or private reputation; *the right of the people to keep and bear arms (article 2) is not infringed by laws prohibiting the carrying of concealed weapons;* the provision that no person shall be twice put in jeopardy (article 5)

Maxwell v. Dow, 176 U.S. 581, 597 1900), and *Twining v. New Jersey*, 211 U.S. 78, 98 1908). Indeed, the Second Amendment is one of the few Bill of Rights provisions that has not yet been held to be incorporated through the Fourteenth Amendment. While the status of the Second Amendment within the twentieth-century incorporation debate is a matter of importance for the many challenges to state gun control laws, it is an issue that we need not decide. The District of Columbia is a Federal District, ultimately controlled by Congress. Although subject to § 1983 suits by federal law, *see* An Act to Permit Civil Suits Under [42 U.S.C. § 1983] Against Any Person Acting Under Color of Any Law or Custom of the District of Columbia, Pub. L. No. 96-170, 93 Stat. 1284 (1979), the District is directly constrained by the entire Bill of Rights, without need for the intermediary of incorporation. *See*, *e.g.*, *Pernell v. Southall Realty*, 416 U.S. 363, 369-80 (1974) (applying Seventh Amendment to local legislation for the District.

> does not prevent a second trial, if upon the first trial the jury failed to agree, or if the verdict was set aside upon the defendant's motion; nor does the provision of the same article that no one shall be a witness against himself impair his obligation to testify, if a prosecution against him be barred by the lapse of time, a pardon, or by statutory enactment.

165 U.S. at 281-82 (emphasis added). Just as in *Dred Scott*, the Second Amendment right is mentioned in a catalogue of other well-known individual right provisions, and, in the Supreme Court's thin Second Amendment jurisprudence, *Robertson* has the virtue of straightforwardly suggesting one permissible form of regulatory limitation on the right to keep and bear arms. The decision does not discuss whether the right is individual or collective. Still, *Robertson* tends to cut against any version of the collective right argument. If the right to keep and bear arms offered no protection to individuals, the Court would not likely pick as a noteworthy exception to the right a prohibition on concealed weapons. The individual nature of the permitted regulation suggests that the underlying right, too, concerned personal ownership of firearms.

Few decisions of Second Amendment relevance arose in the early decades of the twentieth century. Then came *Miller*, the Supreme Court's most thorough analysis of the Second Amendment to date, and a decision that both sides of the current gun control debate have claimed as their own. We agree with the *Emerson* court (and the dissenting judges in the Ninth Circuit) that *Miller* does not lend support to the collective right model. *See Silveira*, 328 F.3d at 586-87 (Kleinfeld, J.); *Emerson*, 270 F.3d at 226-27. Nor does it support the District's quasi-collective position. Although *Miller* did not explicitly accept the individual right position, the decision implicitly assumes that interpretation.

Miller involved a Second Amendment challenge by criminal defendants to section 11 of the National Firearms Act (then codified at 26 U.S.C. §§ 1132 *et seq.*), which prohibited interstate transportation of certain firearms without a registration or stamped order. The defendants had been indicted for transporting a short-barreled shotgun from Oklahoma to Arkansas in contravention of the Act. The district court sustained defendants' demurrer challenging their indictment on Second Amendment grounds. The government appealed. The defendants submitted no brief and made no appearance in the Supreme Court. *Miller*, 307 U.S. at 175-77. Hearing the case on direct appeal, the Court reversed and remanded. *Id.* at 183.

On the question whether the Second Amendment protects an individual or collective right, the Court's opinion in *Miller* is most notable for what it omits. The government's first argument in its *Miller* brief was that "the right secured by [the Second Amendment] to the people to keep and bear arms is not one which may be utilized for private purposes but only one which exists where the arms are borne in the militia or some other military organization provided for by law and intended for the protection of the state." Appellant's Br. at 15, 307 U.S. 174. This is a version of the collective right model. Like the Fifth Circuit, we think it is significant that the Court did not decide the case on this, the government's primary argument. *Emerson*, 270 F.3d at 222. Rather, the Court followed the logic of the government's secondary position, which was that a short-barreled shotgun was not within the scope of the term "Arms" in the Second Amendment.

The government had argued that even those courts that had adopted an individual right theory of the Second Amendment[14] had held that the term "Arms," as used in both

[14] Here the brief for the United States cites two state court decisions interpreting state constitutional provisions: *People v. Brown*, 253 Mich.

the Federal and various state constitutions, referred "only to those weapons which are ordinarily used for military or public defense purposes and does not relate to those weapons which are commonly used by criminals." Appellant's Br. at 307 U.S. 174. The government then proceeded to quote at length from a Tennessee state court case interpreting "Arms" in the Tennessee Bill of Rights to mean weapons "such as are usually employed in civilized warfare, and that constitute the ordinary military equipment." *Id.* (quoting *Aylett v. State*, 21 Tenn. (2 Hum.) 154, 157 (1840)). The government's weapons-based argument provided the *Miller* Court with an alternative means to uphold the National Firearms Act even if the Court disagreed with the government's collective right argument. The *Miller* Court's holding is based on the government's alternative position:

> In the absence of any evidence tending to show that possession or use of a "shotgun having a barrel of less than eighteen inches in length" at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear *such an instrument.* Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense. *Layette v. State*, 2 Humphreys (Tenn.) 154, 158.

Miller, 307 U.S. at 178 (emphasis added). The quotation makes apparent that the Court was focused only on what arms are protected by the Second Amendment, *see Emerson*, 270 F.3d at 224, and not the collective or individual nature of the right. If the *Miller* Court intended to endorse the government's first argument, i.e., the collective right view, it

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537 (1931);. *State v. Duke*, 42 Tex. 455 (1875). *See* Appellant's Br. at 18, 307 U.S. 174.

would have undoubtedly pointed out that the two defendants were not affiliated with a state militia or other local military organization. *Id.*

To be sure, the *Miller* Court linked the Second Amendment's language to the Constitution's militia clause: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces [i.e., the militia] the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." 307 U.S. at 178. We take the "declaration and guarantee" referred to by the *Miller* Court to mean the Second Amendment's prefatory clause (which declares the necessity of a "well regulated Militia") and its operative clause (which guarantees the preservation of a right) respectively.

The District would have us read this passage as recognizing a limitation on the Second Amendment right based on the *individual's* connection (or lack thereof) to an organized functioning militia. We disagree. As already discussed, the *Miller* court was examining the relationship between the *weapon* in question—a short-barreled shotgun—and the preservation of the militia system, which was the Amendment's politically relevant purpose. The term "Arms" was quite indefinite, but it would have been peculiar, to say the least, if it were designed to ensure that people had an individual right to keep weapons capable of mass destruction—e.g., cannons. Thus the *Miller* Court limited the term "Arms"—interpreting it in a manner consistent with the Amendment's underlying civic purpose. Only "Arms" whose "use or possession . . . has some reasonable relationship to the preservation or efficiency of a well regulated militia," *id.* at 177, would qualify for protection.

Essential, then, to understanding what weapons qualify as Second Amendment "Arms" is an awareness of how the

founding-era militia functioned. The Court explained its understanding of what the Framers had in mind when they spoke of the militia in terms we have discussed above. The members of the militia were to be "civilians primarily, soldiers on occasion." *Id.* at 179. When called up by either the state or the federal government, "these men were expected to appear *bearing arms supplied by themselves and of the kind in common use at the time.*" *Id.* (emphasis added).

As we noted above, the "Militia" was vast, including all free, white, able-bodied men who were properly enrolled with a local militia officer. By contrast, the Ninth Circuit has recently (and we think erroneously) read "Militia" to mean a "state-created and state-organized fighting force" that excludes the unorganized populace. *Silveira*, 312 F.3d at 1069. As Judge Kleinfeld noted, the Ninth Circuit's decision entirely ignores *Miller's* controlling definition of the militia. 328 F.3d at 578 (dissenting from denial of rehearing en banc). The Ninth Circuit's interpretation of "Militia" also fails to account for the second Militia Act of 1792, *id.* at 578-82, as well as local *federal* militia units such as those provided for by the Northwest Ordinance, *see* Act of Aug. 7, 1789, ch. VIII, 1 Stat. 50, or for the District of Columbia in 1803, Act of March 3, 1803, ch. XX, 2 Stat. 215.

Miller's definition of the "Militia," then, offers further support for the individual right interpretation of the Second Amendment. Attempting to draw a line between the ownership and use of "Arms" for *private* purposes and the ownership and use of "Arms" for *militia* purposes would have been an extremely silly exercise on the part of the First Congress if indeed the very survival of the militia depended on men who would bring their commonplace, *private* arms with them to muster. A ban on the use and ownership of weapons for private purposes, if allowed, would undoubtedly have had a deleterious, if not catastrophic, effect on the

readiness of the militia for action. We do not see how one could believe that the First Congress, when crafting the Second Amendment, would have engaged in drawing such a foolish and impractical distinction, and we think the *Miller* Court recognized as much.

* * *

To summarize, we conclude that the Second Amendment protects an individual right to keep and bear arms. That right existed prior to the formation of the new government under the Constitution and was premised on the private use of arms for activities such as hunting and self-defense, the latter being understood as resistance to either private lawlessness or the depredations of a tyrannical government (or a threat from abroad). In addition, the right to keep and bear arms had the important and salutary civic purpose of helping to preserve the citizen militia. The civic purpose was also a political expedient for the Federalists in the First Congress as it served, in part, to placate their Antifederalist opponents. The individual right facilitated militia service by ensuring that citizens would not be barred from keeping the arms they would need when called forth for militia duty. Despite the importance of the Second Amendment's civic purpose, however, the activities it protects are not limited to militia service, nor is an individual's enjoyment of the right contingent upon his or her continued or intermittent enrollment in the militia.

IV

As a corollary to its collective right position, the District argues—albeit almost as an afterthought—that it is not subject to the restraints of the Second Amendment because it is a purely federal entity.[15] Although it has a militia statute,

[15] This contention originated in a concurring opinion in the District of Columbia Court of Appeals, *see Sandidge v. United States*, 520 A.2d

see D.C. Code § 49-401, the District argues that its militia does not implicate federalism concerns embodied in the Second Amendment—i.e., the District's local legislation does not interfere with the "security of a free State."

The District does not argue, nor could it, that even if the Second Amendment confers an individual right, that right is enjoyed only by the residents of states (that would mean that citizens of the United States who lived in territories, such as the Northwest Territory, prior to their acceptance as states, did not enjoy a constitutional right). In any event, the Supreme Court has unambiguously held that the Constitution and Bill of Rights are in effect in the District. *See O'Donoghue v. United States*, 289 U.S. 516, 539-41 (1933) (quoting *Downes v. Bidwell*, 182 U.S. 244, 260-61 (1901)).

> "The mere cession of the District of Columbia to the Federal government relinquished the authority of the states, but it did not take it out of the United States or from under the aegis of the Constitution . . . . If, before the District was set off, Congress had passed an unconstitutional act affecting its inhabitants, it would have been void. If done after the District was created, it would have been equally void; in other words, Congress could not do indirectly, by carving out the District, what it could not do directly. The District still remained a part of the United States, protected by the Constitution." *Id.* at 541.

Rather, the District's argument amounts to an appendage of the collective right position. It is only if one reads the prefatory language as limiting the operative clause to a guarantee about militias that one ever arrives at the question whether the guarantee is confined to *state* militias.

1057, 1059 (D.C. 1987) (Nebeker, J.), and has been subsequently adopted by a federal district court, *see Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 238-39 (D.D.C. 2004).

Our dissenting colleague recognizes this point; her opinion begins with an acceptance of the collective right interpretation of the Second Amendment. Dissent at 402-04. It is therefore not clear to us that it is even relevant to discuss the meaning of "a free State"—language upon which the dissent heavily relies.[16] Still, taking the argument as presented, we think it wrong on several grounds. First, the dissent (and the District) mistakenly reads "a free State" to mean an actual political unit of the United States, such as New York, etc., rather than a hypothetical polity. In fact, Madison's initial proposal to the First Congress stated that a well-regulated militia was "the best security of a free country." The Complete Bill of Rights, *supra*, at 169. The House committee then substituted "State" for "country" when it initially altered Madison's proposal. We have no record of the House committee's proceedings, but it is not credible to conclude that a profound shift was intended in the change from "country" to "State," particularly as there was no subsequent comment on the change.

The record of the debates in the First Congress relied upon by our dissenting colleague only further undermines the reading of "a free State" as meaning an individual state of the union. As she points out, Elbridge Gerry, an Antifederalist Representative from Massachusetts, criticized an initial formulation of the Second Amendment as follows: "A well regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one." Dissent at 405 n.10. Gerry's obvious fear was that a standing army would be erected as an auxiliary defense of "a free State," and that eventually such an army would entirely

[16] The dissent suggests that our opinion consists largely of dicta. Dissent at 401. But dictum refers to reasoning that does not support the holding of a case. We think all of our reasoning (whether correct or not) directly supports our holding. By contrast, the dissent's "free State" discussion might be thought superfluous.

displace the militia. That Gerry worried a standing army would be understood as the "secondary" security of a free state, however, indicates that he understood "a free State" to mean the new country *as a whole.* After all, no one contended that a standing federal army would be used to protect *individual* states. It was the entire nation, including the District of Columbia, that a standing army would be erected to defend, and thus if a standing army were to supplant the militia in securing "a free State," the "State" in question would undoubtedly have been the United States.

The use of both the indefinite article and the modifier "free" with the word "state," moreover, is unique to the Second Amendment. Elsewhere the Constitution refers to "the states" or "each state" when unambiguously denoting the domestic political entities such as Virginia, etc. With "a free State," we understand the framers to have been referring to republican government generally. The entire purpose of making the militia subject to the authority of the national government was that a standing army would not be necessary. The District's militia, organized by Congress in 1803, *see* Act of March 3, 1803, ch. XX, 2 Stat. 215, was no less integral to that *national* function than its state counterparts. That the D.C. militia is not a state militia does not make it any less necessary to the "security of a free State."

The dissent notes a Supreme Court statement in *Perpich v. Department of Defense*, 496 U.S. 334 (1990), that "there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the *sovereignty of the separate States.*" *Id.* at 340 (emphasis added in dissent). However, the dissent overlooks the other concern with standing armies—that they would pose a threat to *individual liberty.* The language from *Perpich* is entirely consistent, then, with the view that the American people at large (including the residents of the District) would be

equally threatened by the presence of a standing army. And it directly contradicts the dissent's position that the Second Amendment was concerned exclusively with the preservation of state power.

Our dissenting colleague—in order to give a meaning to "the people" in the Second Amendment consistent with her interpretation—analogizes to "the people" in the Tenth Amendment. Dissent at 403 n.5. Contrary to her suggestion, however, the Tenth Amendment does not limit "the people" to state citizens. Rather, the Tenth Amendment reserves powers to "the States respectively, or to the people." The dissent provides no case holding that "the people," as used in the Tenth Amendment, are distinct from "the people" referred to elsewhere in the Bill of Rights. The one case relied upon, *Lee v. Flintkote*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979), is inapposite. That case merely contrasts the District, on the one hand, with the states, on the other; the meaning of "the people" as used in the Tenth Amendment was not at issue. Indeed, *Verdugo-Urquidez*, 494 U.S. at 265, directly contradicts the dissent's reading of "the people" in the Tenth Amendment, just as it contradicts the restrictive reading of "the people" in the Second.

V

The third alternative argument the District presents is that, even if the Second Amendment protects an individual right and applies to the District, it does not bar the District's regulation, indeed its virtual prohibition, of handgun ownership.

The District contends that modern handguns are not the sort of weapons covered by the Second Amendment. But the District's claim runs afoul of *Miller's* discussion of "Arms." The *Miller* Court concluded that the defendants, who did not appear in the Supreme Court, provided no showing that

short-barreled (or sawed-off) shotguns—banned by federal statute—bore "some reasonable relationship to the preservation or efficiency of a well regulated militia." *Miller*, 307 U.S. at 178. However, the Court also observed that militiamen were expected to bring their private arms with them when called up for service. Those weapons would be "of the kind in common use at the time." *Id.* at 179. There can be no question that most handguns (those in common use) fit that description then and now. *See Emerson*, 270 F.3d at 227 n.22 (assuming that a Beretta pistol passed the *Miller* test).

By the terms of the second Militia Act of 1792, all militiamen were given six months from the date of their enrollment to outfit themselves with "a good musket or firelock, a sufficient bayonet and belt, two spare flints, and a knapsack, a pouch, with a box therein, to contain not less than twenty four cartridges, suited to the bore of his musket or firelock, each cartridge to contain a proper quantity of powder and ball: or with a good *rifle*, knapsack, shot-pouch, and powder-horn, twenty balls suited to the bore of his rifle, and a quarter of a pound of powder . . . ." Act of May 8, 1792, ch. XXXIII, 1 Stat. 271 (emphasis added).

Commissioned officers had somewhat more onerous requirements. The Act demanded that, in addition to the foregoing, they "shall severally be armed with a sword or hanger and espontoon . . . ." *Id.* at 271-72. Still further demands were placed on the artillery officers, who were to be "armed with a sword or hanger, a fusee, bayonet and belt, with a cartridge-box to contain twelve cartridges . . . ." *Id.* at 272. But commissioned cavalry officers and dragoons had to assume an even greater expense, perhaps due to the fact that these were volunteer positions reserved for the well-off. The cavalry officers were required to procure "good horses of at least fourteen hands and a half high, and to be armed with a sword and pair of *pistols*, the holsters of which to be covered

with bearskin caps." The dragoon had it even worse, being required to furnish himself "a serviceable horse, at least fourteen hands and a half high, a good saddle, bridle, mailpillion and valise, holsters, and a breast-plate and crupper, a pair of boots and spurs, a pair of *pistols*, a sabre, and a cartouch-box, to contain twelve cartridges for pistols." *Id.* at 272 (emphasis added).

These items were not mere antiques to be hung above the mantle. Immediately following the list of required weapons purchases, the Act provided that militiamen "shall appear so *armed*, accoutred and provided, when called out to exercise, or into service . . . ." *Id.* (emphasis added). The statute even planned phased-in upgrades in the quality of the militia's firearms: "[F]rom and after five years from the passing of this act, all muskets for arming the militia as herein required, shall be of bores sufficient for balls of the eighteenth part of a pound." *Id.* at 271-72.

It follows that the weapons described in the Act were in "common use" at the time, particularly when one considers the widespread nature of militia duty. Included among these militia weapons were long guns (i.e., muskets and rifles) and pistols. Moreover, the Act distinguishes between the weapons citizens were required to furnish themselves and those that were to be supplied by the government. For instance, with respect to an artillery private (or "matross"), the Act provides that he should "furnish himself with all the equipments of a private in the infantry, until proper ordnance and field artillery is provided." *Id.* at 272. The Act required militiamen to acquire weapons that were in common circulation and that individual men would be able to employ, such as muskets, rifles, pistols, sabres, hangers, etc., but not cumbersome, expensive, or rare equipment such as cannons. We take the outfitting requirements of the second Militia Act to list precisely those weapons that would have satisfied the two prongs of the *Miller* arms test. They bore a "reasonable

relationship to the preservation or efficiency of a well regulated militia," because they were the very arms needed for militia service. And by the terms of the Act, they were to be personally owned and "of the kind in common use at the time."

The modern handgun—and for that matter the rifle and long-barreled shotgun—is undoubtedly quite improved over its colonial-era predecessor, but it is, after all, a lineal descendant of that founding-era weapon, and it passes *Miller*'s standards. Pistols certainly bear "some reasonable relationship to the preservation or efficiency of a well regulated militia." They are also in "common use" today, and probably far more so than in 1789. Nevertheless, it has been suggested by some that only colonial-era firearms (e.g., single-shot pistols) are covered by the Second Amendment. But just as the First Amendment free speech clause covers modern communication devices unknown to the founding generation, e.g., radio and television, and the Fourth Amendment protects telephonic conversation from a "search," the Second Amendment protects the possession of the modern-day equivalents of the colonial pistol. *See*, *e.g.*, *Kyllo v. United States*, 533 U.S. 27, 31-41 (2001) (applying Fourth Amendment standards to thermal imaging search).

That is not to suggest that the government is absolutely barred from regulating the use and ownership of pistols. The protections of the Second Amendment are subject to the same sort of reasonable restrictions that have been recognized as limiting, for instance, the First Amendment. *See Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) ("[G]overnment may impose reasonable restrictions on the time, place, or manner of protected speech . . . ."). Indeed, the right to keep and bear arms—which we have explained pre-existed, and therefore was preserved by, the Second Amendment—was subject to restrictions at common law. We take these to be the sort of reasonable regulations

contemplated by the drafters of the Second Amendment. For instance, it is presumably reasonable "to prohibit the carrying of weapons when under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror . . . ." *State v. Kerner*, 181 N.C. 574 (1921). And as we have noted, the United States Supreme Court has observed that prohibiting the carrying of concealed weapons does not offend the Second Amendment. *Robertson*, 165 U.S. at 281-82. Similarly, the Court also appears to have held that convicted felons may be deprived of their right to keep and bear arms. *See Lewis v. United States*, 445 U.S. 55, 65 n.8 (1980) (citing *Miller*, 307 U.S. at 178.) These regulations promote the government's interest in public safety consistent with our common law tradition. Just as importantly, however, they do not impair the core conduct upon which the right was premised.

Reasonable restrictions also might be thought consistent with a "well regulated Militia." The registration of firearms gives the government information as to how many people would be armed for militia service if called up. Reasonable firearm proficiency testing would both promote public safety and produce better candidates for military service. Personal characteristics, such as insanity or felonious conduct, that make gun ownership dangerous to society also make someone unsuitable for service in the militia. *Cf.* D.C. Code § 49-401 (excluding "idiots, lunatics, common drunkards, vagabonds, paupers, and persons convicted of any infamous crime" from militia duty). On the other hand, it does not follow that a person who is unsuitable for militia service has no right to keep and bear arms. A physically disabled person, for instance, might not be able to participate in even the most rudimentary organized militia. But this person would still have the right to keep and bear arms, just as men over the age of forty-five and women would have that right, even though our nation has traditionally excluded them from

membership in the militia. As we have explained, the right is broader than its civic purpose. *See* Volokh, *supra*, at 801-07.[17] D.C. Code § 7-2502.02[18] prohibits the registration of a pistol not registered in the District by the applicant prior to 1976.[19] The District contends that since it only bans one type of firearm, "residents still have access to hundreds more," and thus its prohibition does not implicate the Second Amendment because it does not threaten total disarmament. We think that argument frivolous. It could be similarly contended that all firearms may be banned so long as sabers were permitted. Once it is determined—as we have done—that handguns are "Arms" referred to in the Second Amendment, it is not open to the District to ban them. *See Kerner*, 107 S.E. at 225 ("To exclude all pistols . . . is not a regulation, but a prohibition, of . . . 'arms' which the people are entitled to bear."). Indeed, the pistol is the most

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[17] Of course, the District's virtual ban on handgun ownership is not based on any militia purpose. It is justified solely as a measure to protect public safety. As amici point out, and as D.C. judges are well aware, the black market for handguns in the District is so strong that handguns are readily available (probably at little premium) to criminals. It is asserted, therefore, that the D.C. gun control laws irrationally prevent only law abiding citizens from owning handguns. It is unnecessary to consider that point, for we think the D.C. laws impermissibly deny Second Amendment rights.

[18] The relevant text of the provision reads as follows:

> (a) A registration certificate shall not be issued for a:
>
> . . .
>
> (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has retired from the Metropolitan Police Department. D.C. Code § 7-2502.02.

[19] Although not relevant here, there is also an exception to the registration restriction for retired police officers of the Metropolitan Police Department. *See* D.C. Code § 7-2502.02(b).

preferred firearm in the nation to "keep" and use for protection of one's home and family. *See* Gary Kleck & Marc Gertz, *Armed Resistance to Crime: The Prevalence and Nature of Self-Defense with a Gun*, 86 J. Crim. L. & Criminology 150, 182-83 (1995). And, as we have noted, the Second Amendment's premise is that guns would be kept by citizens for self-protection (and hunting). D.C. Code § 22-4504 [20] restricts separately the carrying of a pistol. Appellant Heller challenges this provision and a companion provision, § 22-4506, insofar as they appear to ban moving a handgun from room to room in one's own house, even if one has lawfully registered the firearm (an interpretation the District does not dispute). In order to carry a pistol anywhere in the District (inside or outside the home), one must apply for and obtain an additional license from the Chief of Police, whom the Code gives complete discretion to deny license applications. Heller does not claim a legal right to carry a handgun outside his home, so we need not consider the more difficult issue whether the District can ban the carrying of handguns in public, or in automobiles. It is sufficient for us to conclude that just as the District may not flatly ban the keeping of a handgun in the home, obviously it may not prevent it from being moved throughout one's house. Such a restriction would negate the lawful use upon

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[20] The relevant text of the provision reads as follows:

> (a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon capable of being so concealed. Whoever violates this section shall be punished as provided in § 22-4515, except that:
>
> (1) A person who violates this section by carrying a pistol, without a license issued pursuant to District of Columbia law, or any deadly or dangerous weapon, in a place other than the person's dwelling place, place of business, or on other land possessed by the person, shall be fined not more than $5,000 or imprisoned for not more than 5 years, or both . . . .
>
> D.C. Code § 22-4504.

which the right was premised—i.e., self-defense.

Finally, there is the District's requirement under D.C. Code § 7-2507.02 that a registered firearm be kept "unloaded and disassembled or bound by trigger lock or similar device, unless such firearm is kept at [a] place of business, or while being used for lawful recreational purposes within the District of Columbia." This provision bars Heller from lawfully using a handgun for self protection in the home because the statute allows only for use of a firearm during recreational activities. As appellants accurately point out, § 7-2507.02 would reduce a pistol to a useless hunk of "metal and springs." Heller does not appear to challenge the requirement that a gun ordinarily be kept unloaded or even that a trigger lock be attached under some circumstances. He simply contends that he is entitled to the possession of a "functional" firearm to be employed in case of a threat to life or limb. The District responds that, notwithstanding the broad language of the Code, a judge would likely give the statute a narrowing construction when confronted with a self-defense justification. That might be so, but judicial lenity cannot make up for the unreasonable restriction of a constitutional right. Section 7-2507.02, like the bar on carrying a pistol within the home, amounts to a complete prohibition on the lawful use of handguns for self-defense. As such, we hold it unconstitutional.

VI

For the foregoing reasons, the judgment of the district court is reversed and the case is remanded. Since there are no material questions of fact in dispute, the district court is ordered to grant summary judgment to Heller consistent with the prayer for relief contained in appellants' complaint.

KAREN LECRAFT HENDERSON, Circuit Judge, dissenting:

As has been noted by Fifth Circuit Judge Robert M. Parker in *United States v. Emerson*, 270 F.3d 203, 272 (2001) ("The fact that the 84 pages of dicta contained in [the majority opinion] are interesting, scholarly, and well written does not change the fact that they are dicta and amount to at best an advisory treatise on this long-running debate.") (Parker, J., concurring), exhaustive opinions on the origin, purpose and scope of the Second Amendment to the United States Constitution have proven to be irresistible to the federal judiciary. *See*, *e.g.*, *Silveira v. Lockyer*, 312 F.3d 1052, 1060-87 (9th Cir. 2003) (as amended); *Emerson*, 270 F.3d at 218-72. The result has often been page after page of "dueling dicta"—each side of the debate offering law review articles and obscure historical texts to support an outcome it deems proper. Today the majority adds another fifty-plus pages to the pile.[1] Its superfluity is even more pronounced, however, because the meaning of the Second Amendment in the District of Columbia (District) is purely academic. Why? As Judge Walton declared in *Seegars v. Ashcroft*, 297 F. Supp. 2d 201, 239 (D.D.C. 2004), *aff'd in part*, *rev'd in part sub nom. Seegars v. Gonzales*, 396 F.3d 1248, *reh'g en banc*

[1] In declaring the District's challenged firearms ordinances unconstitutional, the majority takes over 45 pages, Maj. Op. at 377-401, explaining that the Second Amendment establishes an unrestricted individual right to keep and bear arms, *see id.* at 395. Its analysis can be summarized as follows: The Second Amendment's guarantee clause--"the right of the people to keep and bear Arms, shall not be infringed"--endows "the people" with a right analogous to the individual rights guaranteed in the First and Fourth Amendments. *Id.* at 380-82 (citing *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)). That right is unrestricted by the prefatory clause—"A well regulated Militia, being necessary to the security of a free State"—which simply enunciates the Amendment's "civic purpose," Maj. Op. at 395, and modifies only the word "Arms" in the operative clause, *id.* at 390-91 (citing *United States v. Miller*, 307 U.S. 174 (1939)).

denied, 413 F.3d 1 (2005), "the District of Columbia is not a state within the meaning of the Second Amendment and therefore the Second Amendment's reach does not extend to it." For the following reasons, I respectfully dissent.

I.

As our court has recognized, the United States Supreme Court's guidance on the Second Amendment is "notoriously scant." *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) (*FOP*). While scant it may be, it is, at least to me, unmistakable in one respect. And in that one respect, it dooms appellant Heller's challenge.[2]

In *United States v. Miller*, 307 U.S. 174 (1939), the only twentieth-century United States Supreme Court decision that analyzes the scope of the Second Amendment, the Government appealed the district court's quashing of an indictment that charged Miller (and one other) with a violation of section 11 of the National Firearms Act, Pub. L. No. 474, 48 Stat. 1236, 26 U.S.C. §§ 1132 *et seq.* (1934), by transporting in interstate commerce an unregistered, short-barreled shotgun. *Miller*, 307 U.S. at 175 & n.1. The district

[2] The other five appellants lack standing, *see Seegars v. Gonzalez*, 396 F.3d 1248 (D.C. Cir. 2005), and Heller has standing to challenge only D.C. Code § 7-2502.02(a)(4), under which he applied for, and was denied, a pistol permit. The *only* difference between the standing of the appellants in this case and that of the *Seegars* appellants relates to Heller's permit denial. That is, none of the appellants here, including Heller, faces imminent injury from D.C. Code § 7-2507.02, which requires that any registered firearm be kept unloaded and disassembled or bound by a trigger lock or similar device, or section 22-4504, which prohibits carrying an unregistered pistol. They "allege no prior threats against them [based on those provisions] or any characteristics indicating an especially high probability of enforcement [of those provisions] against them." *Seegars*, 396 F.3d at 1255. Although the appellants lack an administrative remedy with respect to the trigger lock enough to render [their] claim[s] justiciable if the imminence of the threatened injury is inadequate." *Id.* at 1256.

court had quashed the indictment because it concluded that section 11 of the National Firearms Act violated the Second Amendment. *Id* at 177. The High Court disagreed, declaring:

> *In the absence of* any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has *some reasonable relationship to the preservation or efficiency of a well regulated militia*, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178 (emphases added). Then, quoting Article I, § 8 of the Constitution, [3] the Court succinctly—but unambiguously—set down its understanding of the Second Amendment: "With obvious purpose to assure the continuation and render possible the effectiveness of such forces the *declaration and guarantee* of the Second Amendment were made. *It must be interpreted and applied with that end in view.*" *Id.* (emphases added). By these words, it emphatically declared that the *entire* Second Amendment—both its "declaration" and its "guarantee"—

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[3] Article I, section 8 of the Constitution provides:

The Congress shall have Power . . .

> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress. U.S. Const., Art. I, § 8, cls. 15-16.

"must be interpreted and applied" together. *Id.*[4] Construing

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[4] Nine of our sister circuits have noted that the declaratory clause modifies the guarantee clause. *See Silveira*, 312 F.3d at 1066 ("The amendment protects the people's right to maintain an effective state militia, and does not establish an individual right to own or possess firearms for personal or other use."); *Gillespie v. City of Indianapolis*, 185 F.3d 693, 711 (7th Cir. 1999) ("Because Gillespie has no reasonable prospect of being able to demonstrate . . . a nexus between the firearms disability imposed by the statute and the operation of state militias, [the district court judge] was right to dismiss his Second Amendment claim."); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) ("[T]he *Miller* Court understood the Second Amendment to protect only the possession or use of weapons that is reasonably related to a militia actively maintained and trained by the states."); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) ("[T]he *Miller* Court assigned no special importance to the character of the weapon itself, but instead demanded a reasonable relationship between its 'possession or use' and militia-related activity." (quoting *Miller*, 307 U.S. at 178)); *Love v. Pepersack*, 47 F.3d 120, 124 (4th Cir. 1995) ("The courts have consistently held that the Second Amendment only confers a collective right of keeping and bearing arms which must bear a 'reasonable relationship to the preservation or efficiency of a well-regulated militia.'" (quoting *Miller*, 307 U.S. at 178)); *United States v. Hale*, 978 F.2d 1016, 1020 (8th Cir. 1992) ("Whether the 'right to bear arms' for militia purposes is 'individual' or 'collective' in nature is irrelevant where, as here, the individual's possession of arms is not related to the preservation or efficiency of a militia."); *United States v. Oakes*, 564 F.2d 384, 387 (10th Cir. 1977) ("The purpose of the second amendment as stated by the Supreme Court in *United States v. Miller* . . . was to preserve the effectiveness and assure the continuation of the state militia. The Court stated that the amendment must be interpreted and applied with that purpose in view."); *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976) ("[T]he Second Amendment right 'to keep and bear Arms' applies only to the right of the State to maintain a militia and not to the individual's right to bear arms . . . ." (internal quotation omitted)); *Cases v. United States*, 131 F.2d 916, 923 (1st Cir. 1942) ("[T]here is no evidence that the appellant was or ever had been a member of any military organization or that his use of the weapon under the circumstances disclosed was in preparation for a military career."). In *Cases*, the First Circuit considered, *inter alia*, a Puerto Rican criminal defendant's Second Amendment challenge to the Federal Firearms Act. Significantly, the court qualified its Second Amendment analysis as follows:

its two clauses together so that, as *Miller* declares, the right of the people [5] to keep and bear arms relates to those Militia whose continued vitality is required to safeguard the individual States, I believe that, under *Miller*, the District is inescapably excluded from the Second Amendment because it is not a State.[6] However the Second Amendment right has

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> The applicability of the restriction imposed by the Second Amendment upon the power of Congress to legislate for Puerto Rico, or for that matter any territory, raises questions of no little complexity. However, we do not feel called upon to consider them because we take the view that the Federal Firearms Act does not unconstitutionally infringe the appellant's right, if any one in a territory has any right at all, to keep and bear arms.

Cases, 131 F.2d at 920.

[5] I have not *overlooked* the language in *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990), to the effect that "the people" as used in various of the first Ten Amendments refers to "a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community." But just as the Tenth Amendment ties the rights reserved thereunder to "the people" of the individual "States," thereby excluding "the people" of the District, *cf. Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."), the Second Amendment similarly limits "the people" to those of the States, *cf. Adams v. Clinton*, 90 F. Supp. 2d 35, 45 (D.D.C. 2000) ("Although standing alone the phrase 'people of the several States' [in Article I, § 2, cl. 1] could be read as meaning all the people of the 'United States' and not simply those who are citizens of individual states, [Article 1's] subsequent and repeated references to 'state[s]' . . . make clear that the former was not intended."); *see also Verdugo-Urquidez*, 494 U.S. at 265 (citing U.S. Const. Art. I, § 2, cl. 1).

[6] Nor do the Militia Clauses (U.S. Const. Art. I, § 8, cls.15, 16) conflict with the view that the "Militia" of the Second Amendment means those of the States. As used in the Militia Clauses, "Militia" is plural. Indeed, Article I, section 8, clause 16 states that the Congress shall have the power "[t]o provide for organizing, arming, and disciplining, *the Militia*, and for governing such Part of *them.*" (emphasis added). Article II, section 2 also indicates the Militia Clauses refer to "the Militia *of the several States.*" U.S. Const. Art. II, § 2, cl. 1 (emphasis added); *cf.* Oxford English Dictionary 768 (2d ed. 1989) ("Militia" "**4**. *spec.* **a**. Orig., the distinctive name of a branch of the British military service, forming,

been subsequently labeled by others—whether collective, individual or a modified version of either—*Miller*'s label is the only one that matters.[7] And until and unless the Supreme Court revisits *Miller*, its reading of the Second Amendment is the one we are obliged to follow. *See Welch v. Tex. Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 478-79 (1987) ("The rule of law depends in large part on adherence to the doctrine of *stare decisis*."); *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996) ("As one of the inferior federal courts subject to the Supreme Court's precedents, we have neither the license nor the inclination to engage in such freewheeling presumptuousness." (responding to argument that *Miller* is "wrong in its superficial (and one-sided) analysis of the Second Amendment" (internal quotation omitted))).[8]

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together with the volunteers, what are known as 'the auxiliary forces' as distinguished from the regular army . . . .(Construed either as *sing*. or *plural*.)").

[7] Our court has previously "assume[d]" the *Miller* "test" to mean that the guarantee must be read in light of the declaration. *See FOP*, 173 F.3d at 906.

[8] One nineteenth-century Supreme Court precedent, *United States v. Cruikshank*, 92 U.S. 542 (1875), is included in almost every discussion of the Second Amendment. *Miller*, however, does not cite *Cruikshank*, and for good reason. In that case, several criminal defendants challenged their convictions under the Enforcement Act of 1870 making it unlawful to threaten or intimidate "'any citizen, with intent to prevent or hinder his free exercise and enjoyment of any right or privilege granted or secured to him by the constitution or laws of the United States.'" *Id.* at 548 (quoting 16 Stat. 141). In setting aside their convictions, the Supreme Court declared:

> [The right to bear arms for any lawful purpose] is not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence. The second amendment declares that it shall not be infringed; but this, as has been seen, means no more than that it shall not be infringed by Congress.

Id. at 553. This language does not conflict with *Miller*—as I read *Miller*—because it does not define the right but simply recognizes that the right, whatever its content, cannot be infringed by the federal

II.

The Supreme Court has long held that "State" as used in the Constitution refers to one of the States of the Union. Chief Justice John Marshall, in rejecting the argument that the District constitutes a "State" under Article III, section 2 of the Constitution and, derivatively, the Judiciary Act of 1789, explained:

> [I]t has been urged that Columbia is a distinct political society; and is therefore "a state" according to the definitions of writers on general law. This is true. But as the act of congress obviously uses the word "state" in reference to that term as used in the constitution, it becomes necessary to inquire whether Columbia is a state in the sense of that instrument. The result of that examination is a conviction that the *members of the American confederacy only are the states contemplated in the constitution.... [T]he word state is used in the constitution as designating a member of the union*, and excludes from the term the signification attached to it by writers on the law of nations.

Hepburn & Dundas v. Ellzey, 6 U.S. (2 Cranch) 445, 452-53 (1805) (emphasis added); *see also De Geofroy v. Riggs*, 133 U.S. 258, 269 (1890). In fact, the Constitution uses "State"

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government. More interesting is the nineteenth-century case *Miller* does cite, *Presser v. Illinois*, 116 U.S. 252 (1886). There, the Court upheld state legislation against a Second Amendment challenge, relying on *Cruikshank*'s holding that the Second Amendment constrains the national government only. The Court then included the following language:

> [T]he states cannot, even laying the constitutional provision in question out of view, prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

Id. at 584.

or "States" 119 times apart from the Second Amendment and in 116 of the 119, the term unambiguously refers to the States of the Union.[9] U.S. Const., *passim.* Accepted statutory construction directs that we give "State" the same meaning throughout the Constitution. *Cf. Sorenson v. Sec'y of the Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different parts of the same act are intended to have the same meaning." (internal quotations omitted))[10]

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[9] In three instances the Constitution refers to a "foreign State," *see* U.S. Const. art. I, § 9, cl. 8; *id.* art. III, § 2, cl. 1; *id.* amend. XI. "State" with a plainly different meaning also appears in reference to the President's "State of the Union." *Id.* art. II, § 3, cl. 1. The Constitution refers to "a" State five times. *See id.* art. III, § 2, cls. 1, 2; *id.* amend. XXIII, § 1, cl. 2. A descriptive adjective precedes "State" two times. *See id.* art. IV, § 3, cl. 1 ("no new State"); *id.* amend. XXIII, § 1, cl. 2 ("the least populous State").

[10] The legislative history of the Second Amendment also supports the interpretation of "State" as one of the States of the Union. In the First Congress, James Madison proposed language that a well-regulated militia was "the best security of a free *country.*" David Yassky, *The Second Amendment: Structure*, *History*, *and Constitutional Change*, 99 Mich. L. Rev. 588, 610 (2000) (citing *Creating the Bill of Rights: The Documentary Record from the First Federal Congress* 12 (Helen E. Veit, Kenneth R. Bowling & Charlene Bangs Bickford eds., 1991) (Documentary Record)) (emphasis added). After the proposal was submitted to an eleven-member House of Representatives committee (including Madison), however, "country" was changed to "State." *Id.* (citing Documentary Record, *supra*, at 30). As Judge Walton noted:

> Anti-Federalist Elbridge Gerry explained that changing the language to "necessary to the security of a free State" emphasized the primacy of the state militia over the federal standing army: "A well-regulated militia being the best security of a free state, admitted an idea that a standing army was a secondary one."

Seegars, 297 F.Supp.2d at 229 (internal quotation omitted) (citing Yassky, *supra* (quoting The Congressional Register, August 17, 1789)). Indeed, in light of the meaning of "State" as used throughout the Constitution, *see supra* p. 5, and the care the drafters are presumed to have taken in selecting specific language, *see Holmes v. Jennison*, 39 U.S. 540, 570-71 (1840) ("Every word [in the Constitution] appears to have

Although "the Constitution is in effect . . . in the District," *O'Donoghue v. United States*, 289 U.S. 516, 541 (1933), as it is in the States, "[a] citizen of the district of Columbia is not a citizen of a *state* within the meaning of the constitution." *Hepburn*, 6 U.S. at 445 (emphasis in original). Accordingly, both the Supreme Court and this court have consistently held that several constitutional provisions explicitly referring to citizens of "States" do not apply to citizens of the District. *See id.* at 452-53; *see also Bolling v. Sharpe*, 347 U.S. 497, 498-99 (1954) (District not "State" under Fourteenth Amendment); *Adams v. Clinton*, 531 U.S. 941 (2000), *aff'g* 90 F. Supp. 2d 35 (D.D.C. 2000) (three-judge district court held that Constitution does not guarantee District citizens right to vote for members of Congress because District does not constitute "State" within Constitution's voting clauses [11]); *LaShawn v. Barry*, 87 F.3d 1389, 1394 n.4 (D.C. Cir. 1996) ("The District of Columbia is not a state. It is the seat of our national government . . . . Thus, [the Eleventh Amendment] has no application here."); *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979) ("[T]he District, unlike the states, has no reserved power to be guaranteed by the Tenth Amendment."). On the other hand, the Supreme Court and this court have held that the District can parallel a "State" within the meaning of some constitutional provisions. *Loughran v. Loughran*, 292 U.S. 216, 228 (1934) (Full Faith and Credit Clause binds "courts of the District . . . equally with courts of the states"); *Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 198-99 (D.C. Cir. 1996) (while "D.C. is not a state," Commerce Clause and Twenty-first Amendment apply to

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been weighed with the utmost deliberation, and its force and effect to have been fully understood."), the change plainly suggests that the drafters intended to clarify that the right established in the Second Amendment was intended to protect the "free[dom]" of the "State[s]" of the Union rather than the "country."

[11] U.S. Const. art. I, §§ 2-4.

District). Ultimately, "[w]hether the District of Columbia constitutes a 'State or Territory' within the meaning of any particular statutory or *constitutional provision* depends upon the character and aim of the specific provision involved." *District of Columbia v. Carter*, 409 U.S. 418, 419-20, (1973) (emphasis added).

The Second Amendment's "character and aim" does not require that we treat the District as a State. The Amendment was drafted in response to the perceived threat to the "free[dom]" of the "State[s]" posed by a national standing army controlled by the federal government. *See*, *e.g.*, *Emerson*, 270 F.3d at 237-40, 259; *Silveira*, 312 F.3d at 1076. In *Miller*, the Supreme Court explained that "[t]he sentiment of the time [of the Amendment's drafting] strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia" composed of men who "were expected to appear bearing arms supplied by themselves." 307 U.S. at 179. Indeed, at the time of the Constitutional Convention, "there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the *sovereignty of the separate States.*" *Perpich v. Dep't of Defense*, 496 U.S. 334, 340 (1990) (emphasis added). The Second Amendment, then, "aimed" to secure a military balance of power between the States on the one hand and the federal government on the other.[12] Unlike the States, the

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[12] As noted in *Seegars*:

[I]n his efforts to convince the people of the advantages of the Constitution in The Federalist Papers, James Madison noted that although the federal government had a standing army, the people would have the use of militias, stating:

> Let a regular army, fully equal to the resources of the country, be formed; and let it be entirely at the devotion of the federal government: still it would not be going too far to say that the State governments with the people on their side would be able to repel the danger . . . . Besides the advantage of being armed, which the Americans possess over the people of almost every

District had—and has—no need to protect itself from the federal government because it is a *federal* entity created as the seat of that government.

> [T]he Second Amendment was included in the Bill of Rights to ensure that the people would have the ability to defend themselves against a potentially oppressive federal government, which had just been given the authority to maintain a national standing army in Article I of the Constitution. But, the drafters of the Constitution having provided for a 'District . . . [to] become the Seat of the Government of the United States,' and having given Congress 'exclusive' authority both to legislate over this District *and to exercise control over* '*the Erection of Forts*, *Magazines*, *[and] Arsenals* . . . ,' surely it was not intended for the protection afforded by the Second Amendment to apply to an entity that had been created to house the national seat of government. In other words, there is no reason to believe that the First Congress thought that the federal seat of government needed to be protected from itself when the Second Amendment was adopted.

Seegars, 297 F. Supp. 2d at 238-39 (internal citations omitted) (emphasis and alterations in original);[13] *see also*

> other nation, the existence of subordinate governments, to which the people are attached and by which the militia officers are appointed, forms a barrier against the enterprises of ambition, more insurmountable than any which a simple government of any form can admit of.

Seegars, 297 F. Supp. 2d at 235 (internal quotation omitted) (quoting The Federalist No. 46, at 267 (Clinton Rossiter ed., 1961)).

[13] Even if the District were to be considered a "State" under the Second Amendment, I do not believe D.C. Code § 7-2502.02(a)(4) could be challenged thereunder. When adopted, the Bill of Rights protected individuals only against the federal government. *See*, *e.g.*, *Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833). Under the "incorporation"

Sandidge v. 520 A.2d 1057, 1058 (D.C. 1987) ("assuming the second amendment applies to the District of Columbia," majority holds "the Second Amendment guarantees a collective rather than an individual right" (internal quotation omitted)); *see also id.* at 1059 (Nebeker, J., concurring) ("I conclude first that [the Second Amendment] does not apply to the Seat of the Government of the United States.").

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doctrine, however, "many of the rights guaranteed by the first eight Amendments to the Constitution have been held [by the Supreme Court] to be protected against state action by the Due Process Clause of the Fourteenth Amendment." *Duncan v. Louisiana*, 391 U.S. 145, 149, 88 (1968) (Sixth Amendment right to jury trial in criminal case protected against state action); *see also Benton v. Maryland*, 395 U.S. 784, 795 1969) ("Once it is decided that a particular Bill of Rights guarantee is fundamental to the American scheme of justice, the same constitutional standards apply against both the State and Federal Governments." (internal quotation and citation omitted)). But the Supreme Court has never held that the Second Amendment has been incorporated. *Cf. United States v. Cruikshank*, 92 U.S. 542, 553 (1875) ("[The Second Amendment] is one of the amendments that has no other effect than to restrict the powers of the national government . . . ."); *see also Love*, 47 F.3d at 123 ("The Second Amendment does not apply to the states." (citing *Cruikshank*, 92 U.S. 542)); *Cases*, 131 F.2d at 921-22 ("Whatever rights . . . the people may have [under the Second Amendment] depend upon local legislation; the only function of the Second Amendment being to prevent the federal government and the federal government only from infringing that right." (citing *Cruikshank*, 92 U.S. at 553)). Thus, the Amendment does not apply to gun laws enacted by the States. Because the Second Amendment "was specifically included by the drafters of the Bill of Rights to protect the states against a potentially oppressive federal government," *Seegars*, 297 F. Supp. 2d at 230, it would make little sense to incorporate the Amendment. Although the District is a *federal* enclave and thus the Second Amendment might seem to apply without regard to incorporation, to hold that the District constitutes a "State" under the Amendment and yet, at the same time, to treat its laws as federal is a self-contradiction. In other words, either the District, as a federal enclave, enacts federal law, including D.C. Code § 7-2502.02(a)(4), or the District is a "State" and D.C. Code § 7-2502.02(a)(4) is state legislation to which the unincorporated Second Amendment does not apply.

III.

In its origin and operation, moreover, the District is plainly not a "State" of the Union. It is, instead, "an exceptional community," *District of Columbia v. Murphy*, 314 U.S. 441, 452 (1941), that "[u]nlike either the States or Territories, . . . is truly sui generis in our governmental structure." *Carter*, 409 U.S. at 432. The Constitution provides for the creation of the District in Article I, granting the Congress the power "[t]o exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States." U.S. Const. art. I, § 8, cl. 17. As the Supreme Court explained in *O'Donoghue*, "The object of the grant of exclusive legislation over the district was . . . national in the highest sense, and the city organized under the grant became the city, not of a state, not of a district, but of a nation." 289 U.S. at 539-40, (internal quotations and citations omitted). In other words, the District is "the capital—the very heart—of the Union itself . . . within which the immense powers of the general government were destined to be exercised for the great and expanding population of forty-eight states." *Id.* at 539.

The Congress possesses plenary power over the District and its officers. *Id.* "Indeed, '[t]he power of Congress over the District of Columbia includes all the legislative powers which a state may exercise over its affairs.'" *Carter*, 409 U.S. at 429 (quoting *Berman v. Parker*, 348 U.S. 26, 31 (1954)). Although the Congress delegated certain authority to the District's local government in the Home Rule Act of 1973, D.C. Code §§ 1-201.01 *et seq.*, it reserved the authority to enact legislation "on any subject," D.C. Code § 1-206.01, and to repeal legislation enacted by the local government, *id.* § 1-206.02(c)(1). *See Bliley v. Kelly*, 23

F.3d 507, 508 (D.C. Cir. 1994) (describing Home Rule Act).

As do the States, the District maintains a "militia" of "[e]very able-bodied male citizen . . . of the age 18 years and under the age of 45 years" residing in the District, D.C. Code § 49-401, which includes an "organized" division that is "designated the National Guard of the District of Columbia," D.C. Code § 49-406. Nevertheless, the District is again unique in that its militia "is essentially a component of the federal government." *Seegars*, 297 F. Supp. 2d at 241. That is, it is controlled by the federal government and acts only on the order of the President.[14] Executive Order 11,485 authorizes the Secretary of the United States Department of Defense to "supervise, administer and control" the District's National Guard "while in militia status" and to "order out the National Guard . . . to aid the civil authorities of the District of Columbia." Exec. Order No. 11,485, 34 Fed. Reg. 15,411 § 1 (Oct. 1, 1969). The Executive Order also provides that the "Commanding General and the Adjutant General of the National Guard will be appointed by the President," *id.* § 3, and that the Commanding General "shall report to the Secretary of Defense," *id.* § 1; *see also* D.C. Code § 49-301(a)-(b) ("There shall be appointed and commissioned by the President of the United States a Commanding General of the militia of the District of Columbia . . . .[T]he Commanding General of the militia of the District of Columbia shall be considered to be an employee of the Department of Defense."). Unlike a State Governor who can

[14] "The President of the United States shall be the Commander-in-Chief of the *militia* of the District of Columbia." D.C. Code § 49-409 (emphasis added); *see also id.* § 49-404 ("The enrolled militia shall not be subject to any duty except when called into the service of the United States, or to aid the civil authorities in the execution of the laws or suppression of riots."); *id.* § 49-405 ("Whenever it shall be necessary to call out any portion of the enrolled militia the Commander-in-Chief shall order out, by draft or otherwise, or accept as volunteers as many as required.").

mobilize the State militia during civil unrest,[15] the Mayor of the District must request the President to mobilize the District's militia. D.C. Code § 49-103 ("[I]t shall be lawful for the Mayor of the District of Columbia . . . to call on the Commander-in-Chief to aid . . . in suppressing . . . violence and enforcing the laws; the Commander-in-Chief shall thereupon order out so much and such portion of the militia as he may deem necessary to suppress the same . . . ."). *See generally Seegars*, 297 F. Supp. 2d at 240-41 (discussing structure of District's militia).

To sum up, there is no dispute that the Constitution, case law and applicable statutes all establish that the District is not a State within the meaning of the Second Amendment. Under *United States v. Miller*, 307 U.S. at 178, the Second Amendment's declaration and guarantee that "the right of the people to keep and bear Arms, shall not be infringed" relates to the Militia of the States only. That the Second Amendment does not apply to the District, then, is, to me, an unavoidable conclusion.

For the foregoing reasons, I would affirm the district court's dismissal of Heller's Second Amendment challenge to section 7-2502.02(a)(4) for failure to state a claim for relief under Federal Rule of Civil Procedure 12(b)(6). I would affirm its dismissal of the other five appellants' claims as well as Heller's other claims for lack of standing under Federal Rule of Civil Procedure 12(b)(1). Accordingly, I respectfully dissent.

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[15] See, *e.g.*, 4 Pa. Code § 7.211(a) ("The *Governor* will retain command of State peacekeeping forces during a civil disorder.") (emphasis added), (d) ("In the event of disorder, . . . [w]eapons carried by the National Guard will not be loaded nor will bayonets be fixed without the specific order of the *Governor*.") (emphasis added).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SHELLY PARKER, *et al.*, Plaintiff, v. DISTRICT OF COLUMBIA, *et al.*, Defendants.	Civil Action No. 03-0213 (EGS)

MEMORANDUM OPINION

I. Introduction

Plaintiffs in this case are six residents of the District of Columbia who wish to possess a handgun or an assembled long gun in their homes for self-defense but do not do so because they "fear arrest, criminal prosecution, and fine." Compl. at ¶ 1, 3, 5, and 6. Plaintiff Heller has applied for a permit to possess a handgun in his home and has been rejected. Compl. at ¶ 2. The other five plaintiffs have not applied for a permit. None of the plaintiffs have asserted membership in the District of Columbia Militia.

Plaintiffs argue that D.C. Code § 7-2502.02(a)(4)[1],

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[1] "A registration certificate shall not be issued for a . . . (4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976." "Pistol means any firearm originally designed to be fired by use of a single hand." D.C. Code § 7-2501.01(12) (2003).

barring registration of handguns, D.C. Code § 7-2507.02[2], barring the possession of firearms within the home or possessed land, and D.C. Code §§ 22-4504[3] and 4515, forbidding the carrying of firearms within one's home or possessed land without a license, ("D.C. gun control laws") should be permanently enjoined because these laws violate the Second Amendment, which establishes a fundamental individual right to bear arms. Plaintiffs are asking this Court to grant Summary Judgment in their favor.

Defendants in this case are the District of Columbia and Anthony Williams, Mayor of the District of Columbia. Defendants argue that the Second Amendment does not provide an individual right to bear arms. Defendants ask the Court to grant their Motion to Dismiss.

II. Legal Standard

When considering a Motion to Dismiss, the Court construes the facts in the complaint as true and construes all reasonable inferences in the light most favorable to the plaintiff. *See Swierkiewicz v. Sorema*, 534 U.S. 506, 508 (2002). A Motion to Dismiss is granted and the complaint dismissed only if no relief could be granted on those facts. *See Sparrow v. United Air Lines Inc.*, 216 F.3d 1111, 1114 (D.C. Cir. 2002).

In reviewing a Motion for Summary Judgment, the Court must first determine if there are genuine issues of

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[2] "Except for law enforcement personnel described in § 7-2502.01(b)(1), each registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia."

[3] "(a) No person shall carry within the District of Columbia either openly or concealed on or about their person, a pistol, without a license issued pursuant to District of Columbia law . . . Whoever violated this section shall be punished as provided in § 22-4515 . . ."

material fact. *Shields v. Eli Lilly & Co.*, 895 F.2d 1463, 1465 (D.C. Cir. 1990) (citing Fed. R. Civ. P. 56(c)).

Summary judgment should be granted only if the moving party has shown that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986).

III. Legal Analysis

A. Supreme Court Analysis of the Second Amendment Right

Plaintiffs move for summary judgment in this case on the grounds that the D.C. gun control laws are unconstitutional because they violate the Second Amendment to the U.S. Constitution. Defendants have filed a Motion to Dismiss Plaintiffs' Complaint because plaintiffs have not made any showing that their possession or use of a firearm has some reasonable relationship to the preservation or efficiency of a well-regulated Militia.

The Second Amendment provides:

> A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear arms, shall not be infringed.

U.S. Const. amend. II. The U.S. Supreme Court has not considered a direct Second Amendment challenge since its 1939 decision in *United States v. Miller*, 307 U.S. 174 (1939). *In Miller*, the district court granted the defendant's Motion to Dismiss his indictment under the National Firearms Act for unlawfully transporting in interstate commerce an unregistered double barrel 12-gauge shotgun with a barrel of less than 18 inches, on the grounds that the

Act was "in contravention of the Second Amendment to the Constitution." *United States v. Miller*, 26 F. Supp. 1002, 1003 (1939).

The U.S. Supreme Court, on appeal of the dismissal, held that:

> In the absence of any evidence tending to show that possession or use of a 'shotgun having a barrel of less than eighteen inches in length' at this time has some reasonable relationship to the preservation or efficiency of a well-regulated militia, we cannot say that the Second Amendment guarantees the right to keep and bear such an instrument. Certainly it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense.

Id. at 178.

The Court noted that, as originally adopted, the U.S. Constitution reserved to the states "the Authority of training the Militia according to the discipline prescribed by Congress." *Id.* (citing U.S. Const. art. 1 § 8). Accordingly, the Court reasoned that it was "[w]ith obvious purpose to assure the continuation and render possible the effectiveness of such forces the declaration and guarantee of the Second Amendment were made. It must be interpreted and applied with that end in view." *Id.* at 178.

The Court went on to explain the nature and purpose of the Militia in the time when the Second Amendment was enacted. "The sentiment of the time strongly disfavored standing armies; the common view was that adequate defense of country and laws could be secured through the Militia—civilians primarily, soldiers on occasion." *Id.* at 179. When the Militia was called into service, these men were expected to appear bearing arms, which they supplied

themselves. *Id.*

Although the Supreme Court decided *Miller* sixty-five years ago, there has recently been some debate concerning whether Miller should be construed as interpreting the Second Amendment to guarantee either: (1) a collective right of the states to arm the Militia; or (2) a limited individual right to bear arms but only as a member of a state Militia; or (3) an individual right to bear arms for non-Militia use.

This Court reads *Miller*, in concert with the vast majority of circuit courts, as rejecting an individual right to bear arms separate and apart from Militia use. *See id.* at 179-182; *United States v. Emerson*, 270 F.3d 203, 218-19 (5th Cir. 2001). In doing so, this Court incorporates by reference section III (2)(A) Early Judicial History of the Second Amendment and III (2)(B) Modern Second Amendment Jurisprudence of Judge Reggie Walton's opinion in *Seegars v. Ashcroft*, 297 F. Supp. 2d 201 (D.D.C. 2004)(Amended January 29, 2004).

The Supreme Court has twice been presented with the opportunity to re-examine *Miller* and has twice refused to upset its holding. In *Lewis v. United States*, the Court concluded that a statute that criminalizes possession of a firearm by a convicted felon "[did not] trench on any constitutionally protected liberties." 445 U.S. 55, 65 n.8 (1980) (citing *Miller* and three lower court cases rejecting Second Amendment challenges.) Further, the Court dismissed an appeal in which a state court held that the Second Amendment did not confer a right to bear arms unrelated to Militia service for "want of a substantial federal question." *Burton v. Sills*, 394 U.S. 812 (1969). Had the Court thought that the Second Amendment created an individual right that was infringed, the Court could not have reached these conclusions.

Plaintiffs suggest that *Miller* may simply have proposed a test to separate weapons "covered" by the Second Amendment from weapons "not covered" by the Second Amendment. *Cf. Fraternal Order of Police v. United States*, 173 F.3d 898, 906. (D.C. Cir. 1999) (raising the question of the potential meaning of the *Miller* test).

While plaintiffs' arguments are not without merit, if the Supreme Court truly thought that *Miller* was being read to stand for a proposition much greater than the Court intended, it surely would have taken one of the opportunities it has had in the last sixty-five years to grant *certiorari* and correct the misunderstanding. This Court is thus reluctant to accept plaintiffs' reading of *Miller*.

B. Circuit Courts Analysis of the Second Amendment Right

Plaintiffs rely primarily on the Fifth Circuit's decision in *United States v. Emerson* to support their contention that the Second Amendment establishes a fundamental individual right to bear arms, regardless of membership or service in an organized Militia. 270 F.3d 203 (5th Cir. 2001). In *Emerson*, the Fifth Circuit held that the ban on carrying a pistol while subject to a restraining order was reasonable. *Id.* at 260. The two judge majority went on to conclude that the Second Amendment guarantees an individual's right to keep and bear arms for self-defense, defense of property, game hunting, and to enable him to be called on as needed by a state to resist oppression and tyranny by the federal government and the federal standing armies, so long as the weapons are not of a type that have no conceivable application in the context of a state Militia. *United States v. Emerson*, 270 F.3d 203, 260 (citing *United States v. Miller*, 307 U.S. 174 (1939)). In so doing, the two judge majority recognized that it stood alone among all the Circuits in recognizing an individual right to bear arms under the Second Amendment and conceded that Miller did not go

so far as to adopt this view. *Id.* at 218-20, 227 (and cases cited therein). The third judge, who concurred in the result, criticized the majority's Second Amendment opinion as irrelevant dicta because the existence of an individual's right to bear arms was unnecessary to the court's decision. *Id.* at 272-74.

Interestingly, in finding an individual right to bear arms, the two judge majority ignored prior Fifth Circuit decisions. Almost thirty years earlier, the Fifth Circuit was twice presented with criminal defendants who claimed that their fundamental individual right to bear arms under the Second Amendment was violated. In both cases, the Fifth Circuit upheld the defendants' convictions for unregistered saw-off shotguns. Applying *Miller*, the Circuit held that the defendants' possession of shotguns had no relationship to the "preservation or efficiency of a well-regulated Militia" and that the Second Amendment did not guarantee the defendants' right to possess firearms. *United States v. Williams*, 446 F.2d 486, 487 (5th Cir. 1971); *United States v. Johnson*, 441 F.2d 1134, 1136 (5th Cir. 1971)).

This change in position by the Fifth Circuit is troubling in light of the Fifth Circuit's rule that a subsequent panel is precluded from disregarding the holding of an earlier panel unless it is changed by an en banc decision or by a decision of the United States Supreme Court. *See United States v. McFarland*, 264 F.3d 557, 559 (5th Cir. 2001); *Montesano v. Seafirst Commercial Corp.*, 818 F.2d 423, 425-26 (5th Cir. 1987).

The two judge majority attempted to reconcile the appearance of a change of position by dropping a footnote in *Emerson* in which it distinguishes these former cases as being cases that "do no more than apply Miller to virtually identical facts." *Emerson*, 270 F.3d at 227 n. 21. In doing so, the two judge majority brushed these cases aside without any real attempt to distinguish them. Thus, this Court does

not place a great deal of reliance on the stability of *Emerson* even within the Fifth Circuit.

Since *Emerson* was decided, the Fifth Circuit appears to remain the only Circuit to adopt either its narrow construction of Miller as non-dispositive of the nature of the right guaranteed by the Second Amendment, or its finding that the Second Amendment guarantees an individual and fundamental right to bear arms. *See Thomas v. City Council of Portland*, 730 F.2d 41, 42 (1st Cir. 1984) ("Established case law makes clear that the federal Constitution grants appellant no right to carry a concealed handgun."); *United States v. Toner*, 728 F.2d 115, 128 (2d Cir. 1984) (noting gun possession is not a fundamental right); *United States v. Graves*, 554 F.2d 65, 66 n.2 (3d Cir. 1977) (dicta) (*Miller* is controlling on the individual rights question); *Love v. Pepersack*, 47 F.3d 120, 122 (4th Cir. 1995) (The Second Amendment "does not confer an absolute individual right to bear any type of firearm."); *United States v. Napier*, 233 F.3d 394, 403 (6th Cir. 2000) (finding no reason to depart from its established precedent that the Second Amendment does not guarantee an individual right to bear arms); *Stevens v. United States*, 440 F.2d 144, 149 (6th Cir. 1971) (Because the Second Amendment right applies only to state Militias, "there can be no serious claim to any express constitutional right of an individual to posses a firearm."); *Gillespie v. City of Indianapolis*, 185 F.3d 693 (7th Cir. 1999) (The Second Amendment "establishes no right to possess a firearm apart from the role possession of a gun might play in maintaining a state Militia."); *United States v. Nelsen*, 859 F.2d 1318, 1320 (8th Cir. 1988) (recognizing no plausible claim that challenged statute "would impair any state Militia"); *United States v. Hinostroza*, 297 F.3d 924, 927 (9th Cir. 2002); *United States v. Graham*, 305 F.3d 1094, 1106-07 (10th Cir. 2002); *United States v. Bayles*, 310 F.3d 1302, 1307 (10th Cir. 2002); *United States v. Wright*, 117 F.3d 1265, 1273 (11th Cir. 1997) (The Second Amendment is limited to the

"possession or use of weapons that is reasonably related to Militia actively maintained and trained by the states.").

In response to the numerous Circuit Court opinions, plaintiffs argue that although the Supreme Court used the correct interpretation of the term "Militia" when deciding *Miller*, the definition of "Militia" used by most present courts is too narrow. Rather than a small group of people organized by the state to take arms against a tyrannical federal government, plaintiffs claim that the "Militia" referred to in *Miller* was intended and understood at the time to include all private individuals who would be capable of acting for the common defense (i.e. all able-bodied men). Pls.' Opp'n to Defs. Mot. to Dismiss at 8 (citing *Miller*, 307 U.S. at 178-79.).

The Eleventh Circuit considered plaintiffs' broad definition of Militia, but concluded that *Miller* "strongly suggests that only Militias actively maintained and trained by the states can satisfy the 'well regulated Militia' requirement of the Second Amendment." *United States v. Wright*, 117 F.3d 1265, 1272 (11th Cir. 1997).

In response to the Eleventh Circuit's holding, plaintiffs argue that the Framers were largely suspect of any organized Militia and could not have intended for only state-trained Militia to have the right to bear arms. Pls.' Opp'n to Defs. Mot. to Dismiss at 19. Plaintiffs further argue that the Second Amendment could not be construed as a right of the states to arm a Militia because that would be in conflict with Art. 1 § 8, cl. 16 (Congress has the power "to provide for . . . arming . . . the Militia."). Pls.' Mot. for Summ. J. at 32.

This Court is not persuaded that a "well-regulated Militia" means each able-bodied person separate and apart from his or her enrollment or association with a Militia. As the Eleventh Circuit and the plain meaning of the Second Amendment make clear, a Militia must not be a free-for-all.

Rather, a Militia must be "well-regulated" fighting force, implying, at the very least, some semblance of organization at the state or local level. See *Wright v. United States*, 302 U.S. at 583, 588 (1938) ("[E]very word must have its due force, and appropriate meaning; for it is evident from the whole instrument, that no word was unnecessarily used, or needlessly added. The many discussions which have taken place upon the construction of the constitution, have proved the correctness of this proposition; and shown the high talent, the caution, and the foresight of the illustrious men who framed it. Every word appears to have been weighed with the utmost deliberation, and its force and effect to have been fully understood.")

C. District of Columbia Circuit Court Guidance

The District of Columbia Circuit Court's opinions to date provide some guidance regarding its position with respect to the nature of the right guaranteed by the Second Amendment. On rehearing of *Fraternal Order of Police v. United States*, the Circuit upheld a statute that prohibits possession of a firearm by persons convicted of a domestic violence misdemeanor against a Second Amendment challenge by the Fraternal Order of Police. *Fraternal Order of Police v. United States*, 173 F.3d 898, 906 (D.C. Cir. 1999) [hereinafter "FOP II"]. In so doing, the Circuit assumed without deciding, based on the parties' failure to object, that the Miller test was applicable on the facts before it. *Id.* It went on to express some confusion as to the meaning of the test set forth in Miller. The D.C. Circuit then proceeded to avoid altogether the questions of the nature of the right guaranteed by the Second Amendment on the grounds that the FOP argued, without submitting any evidence on the issue, that in "most states," police officers can be called into service in Militias. *Id.*; see also *Fraternal Order of Police v. United States*, 152 F.3d 998, 1002 (D.C. Cir. 1998) [hereinafter "FOP 1"]. The D.C. Circuit saw no need to proceed with an in-depth analysis of the Second

Amendment challenge in light of the lack of evidence presented regarding the relationship of these police officers with any Militia. FOP II, 173 F.3d at 906. While inconclusive, the D.C. Circuit's comments in *FOP II* suggest to this Court that, if presented with the issue, the D.C. Circuit is likely to reject the notion that the Second Amendment guarantees an individual's right to bear arms absent a substantial nexus between the person and the states' ability to maintain a Militia. *Id.* ("FOP never indicates how restrictions . . . would have a material impact on the Militia.").

Plaintiffs argue that implicit in *FOP II* is the idea that if a significant portion of "ordinary citizens" are prohibited from owning handguns, as they are under the D.C. gun control laws, then that in itself would have a material impact on the Militia. Pls.' Opp'n. to Defs. Mot. to Dismiss at 12.

This Court, like the D.C. Circuit Court, sees no need to proceed with an in-depth analysis because none of these plaintiffs have asserted membership or any relationship with any Militia.

In the only other case in this Circuit in which a challenge to a statute was made on Second Amendment grounds, the Circuit dismissed the claim based on defendant's failure to make the argument in the district court. *See United States v. Drew*, 200 F.3d 871, 876 (D.C. Cir. 2000).[4]

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[4] On January 14, 2004, Judge Walton of this Court issued an opinion in Seegar v. Ashcroft that rejected a challenge by five District of Columbia citizens to the D.C. gun control laws on Second Amendment grounds. 297 F. Supp. 2d 201 (D.D.C. 2004) (Amended January 29, 2004).

On October 1, 2003 defendant submitted a Supplemental Memorandum to the Court calling the Court's attention to the recent decision of Judge Roberts of this Court in United States v. Cole, 2003 U.S. Dist LEXIS 14029, filed August 15, 2003. In denying a Motion to Dismiss by a

D. District of Columbia Court of Appeals Holdings

The D.C. Court of Appeals has had occasion to rule on a Second Amendment issue in a case in which the District of Columbia's Carrying a Pistol Without a License statute was challenged. While plaintiffs are correct in their assertion that the holding of the District of Columbia Court of Appeals is not binding on this Court, this Court nonetheless finds the opinions of that court persuasive. On this issue, the District of Columbia Court of Appeals sided squarely with those Circuits that rejected the Fifth Circuit's narrow construction of Miller, and held that "the Second Amendment guarantees a collective rather than an individual right." *Sandidge v. United States*, 520 A.2d 1057, 1058 (D.C. 1987). The D.C. Court of Appeals held that the Second Amendment only:

> protects a state's right to raise and regulate a Militia by prohibiting Congress from enacting legislation that will interfere with that right . . . In sum, 'the right to keep and bear arms is not a right conferred upon the people by the federal constitution.'

Id. (citing *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976); *Cases v. United States*, 131 F.2d 916, 921 (1st Cir. 1942)).

The D.C. Court of Appeals was again confronted with a challenge to the Second Amendment in *Barron v. United States*, 818 A.2d 987 (D.C. 2003). In *Barron*, a criminal defendant appealed his conviction on several grounds including the notion that the District of Columbia's

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criminal defendant charged with possession of a firearm by a convicted felon, Judge Roberts concluded that "...with the exception of the Fifth Circuit, the courts of appeals have consistently held that individuals have no fundamental constitutional right to possess a firearm." Slip Opinion at 12.

statutes prohibiting the carrying of pistol without a license - D.C. Code § 22-4504 and D.C. Code § 7-2502, two of the four statutes at issue in this case—violate the Second Amendment. *Id.* While the D.C. Court of Appeals overturned the conviction on other grounds, the court summarily addressed and dismissed the Second Amendment challenge noting, "in *Sandidge* . . . this court found that the Second Amendment protects the rights of the state to bear arms, not the right of the individual. Therefore, our carrying a pistol without a license statute does not violate the Second Amendment." *Id.* at 994.

IV. Conclusion

Because this Court rejects the notion that there is an individual right to bear arms separate and apart from service in the Militia and because none of the plaintiffs have asserted membership in the Militia, plaintiffs have no viable claim under the Second Amendment of the United States Constitution. Thus, plaintiffs' complaint must be dismissed and their Motion for Summary Judgment denied as moot.

While plaintiffs extol many thought-provoking and historically interesting arguments for finding an individual right, this Court would be in error to overlook sixty-five years of unchanged Supreme Court precedent and the deluge of circuit case law rejecting an individual right to bear arms not in conjunction with service in the Militia.

An appropriate Order accompanies this Memorandum Opinion.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: May 24, 2007
[1042482]

Shelly Parker, et al.,
Appellants

v.

District of Columbia and Adrian M. Fenty,
Mayor of the District of Columbia,
Appellees

BEFORE: Henderson and Griffith, Circuit Judges, and Silberman, Senior Circuit Judge*

O R D E R

Upon consideration of appellees' unopposed motion to stay issuance of the mandate, it is:

ORDERED that the motion be granted. The Clerk is directed to withhold issuance of the mandate until August 7, 2007.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Nancy G. Dunn
Deputy Clerk

* A separate statement by Senior Circuit Judge Silberman is attached.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

Silberman, *Senior Circuit Judge*: Although the District's motion for stay only indicates it "may" petition for certiorari, since appellants did not object, I assume it is understood that the District intends to petition for review in the Supreme Court. If it did not so intend, in my view, it would be inappropriate for it to have sought the stay. *Boim v. Quranic Literacy Institute*, 297 F.3d 542, 543-44 (7th Cir. 2002) (Rovner, J.).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: July 26, 2007
[1056464]

Shelly Parker, et al.,
Appelants

v.

District of Columbia and Anthony A. Williams,
Mayor of the District of Columbia,
Appellees

O R D E R

Upon consideration of appellees' unopposed motion to extend stay of issuance of the mandate is

ORDERED that the motion be granted. The Clerk is directed to withhold issuance of the mandate until September 6, 2007.

FOR THE COURT:
Mark J. Langer, Clerk

BY: Nancy G. Dunn
Deputy Clerk

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: May 8, 2007
[1039073]

Shelly Parker, et al.,
Appellants

v.

District of Columbia and Adrian Fenty,
Mayor of the District of Columbia,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph,* Rogers,* Tatel,* Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges

ORDER

Appellees' petition for rehearing en banc and the response thereto was circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing and appellees' Fed. R. App. P. 28(j) letter, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

* Circuit Judges Randolph, Rogers, Tatel, and Garland would grant the petition for rehearing en banc.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 04-7041 **September Term, 2006**

03cv00213

Filed On: May 8, 2007
[1039073]

Shelly Parker, et al.,
Appellants

v.

District of Columbia and Adrian Fenty,
Mayor of the District of Columbia,
Appellees

BEFORE: Ginsburg, Chief Judge, and Sentelle, Henderson, Randolph,* Rogers,* Tatel,* Garland,* Brown, Griffith, and Kavanaugh, Circuit Judges

O R D E R

Appellees' petition for rehearing en banc was circulated to the full court, and a vote was requested. Thereafter, a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing and appellees' Fed. R. App. P. 28(j) letter, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: Michael C. McGrail
Deputy Clerk

* Circuit Judges Randolph, Rogers, Tatel, and Garland would grant the petition for rehearing en banc.

APPENDIX G

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the D.C. Firearms Control Regulations are codified in D.C. Code §§ 7-2501 *et seq*. as follows:

§ 7-2501.01. Definitions.

As used in this unit the term:

(1) "Acts of Congress" means:

(A) Chapter 45 of Title 22;

(B) Omnibus Crime Control and Safe Streets Act of 1968, as amended (title VII, Unlawful Possession or Receipt of Firearms (82 Stat. 1236; 18 U.S.C. Appendix)); and

(C) An Act to Amend Title 18, United States Code, To Provide for Better Control of the Interstate Traffic in Firearms Act of 1968 (82 Stat. 1213; 18 U.S.C. § 921 et seq.).

(2) "Ammunition" means cartridge cases, shells, projectiles (including shot), primers, bullets (including restricted pistol bullets), propellant powder, or other devices or materials designed, redesigned, or intended for use in a firearm or destructive device.

(3) "Antique firearm" means:

(A) Any firearm (including any firearm with a matchlock, flintlock, percussion cap, or similar type of ignition system) manufactured in or before 1898; and

(B) Any replica of any firearm described in subparagraph (A) if such replica:

(i) Is not designed or redesigned for using rim-fire or conventional center-fire fixed ammunition; or

(ii) Uses rim-fire or conventional ammunition which is no longer manufactured in the United States and which is not readily available in the ordinary channels of commercial trade.

(4) "Chief" means the Chief of Police of the Metropolitan Police Department of the District of Columbia or his designated agent.

(5) "Crime of violence" means a crime of violence as defined in § 22-4501, committed in any jurisdiction, but does not include larceny or attempted larceny.

(6) "Dealer's license" means a license to buy or sell, repair, trade, or otherwise deal in firearms, destructive devices, or ammunition as provided for in subchapter IV of this unit.

(7) "Destructive device" means:

(A) An explosive, incendiary, or poison gas bomb, grenade, rocket, missile, mine, or similar device;

(B) Any device by whatever name known which will, or is designed or redesigned, or may be readily converted or restored to expel a projectile by the action of an explosive or other propellant through a smooth bore barrel, except a shotgun;

(C) Any device containing tear gas or a chemically similar lacrimator or sternutator by whatever name

known;

(D) Any device designed or redesigned, made or remade, or readily converted or restored, and intended to stun or disable a person by means of electric shock;

(E) Any combination of parts designed or intended for use in converting any device into any destructive device; or from which a destructive device may be readily assembled; provided, that the term shall not include:

(i) Any pneumatic, spring, or B-B gun which expels a single projectile not exceeding .18 inch in diameter;

(ii) Any device which is neither designed nor redesigned for use as a weapon;

(iii) Any device originally a weapon which has been redesigned for use as a signaling, line throwing, or safety device; or

(iv) Any device which the Chief finds is not likely to be used as a weapon.

(8) "District" means District of Columbia.

(9) "Firearm" means any weapon which will, or is designed or redesigned, made or remade, readily converted or restored, and intended to, expel a projectile or projectiles by the action of an explosive; the frame or receiver of any such device; or any firearm muffler or silencer; provided, that such term shall not include:

(A) Antique firearms; or

(B) Destructive devices;

(C) Any device used exclusively for line throwing,

signaling, or safety, and required or recommended by the Coast Guard or Interstate Commerce Commission; or

(D) Any device used exclusively for firing explosive rivets, stud cartridges, or similar industrial ammunition and incapable for use as a weapon.

(10) "Machine gun" means any firearm which shoots, is designed to shoot, or can be readily converted or restored to shoot:

(A) Automatically, more than 1 shot by a single function of the trigger;

(B) Semiautomatically, more than 12 shots without manual reloading.

(11) "Organization" means any partnership, company, corporation, or other business entity, or any group or association of 2 or more persons united for a common purpose.

(12) "Pistol" means any firearm originally designed to be fired by use of a single hand.

(13) "Registration certificate" means a certificate validly issued pursuant to this unit evincing the registration of a firearm pursuant to this unit.

(13a) "Restricted pistol bullet" means any bullet designed for use in a pistol which, when fired from a pistol with a barrel of 5 inches or less in length, is capable of penetrating commercially available body armor with a penetration resistance equal to or greater than that of 18 layers of kevlar.

(14) "Rifle" means a grooved bore firearm using a fixed metallic cartridge with a single projectile and designed or

redesigned, made or remade, and intended to be fired from the shoulder.

(15) "Sawed-off shotgun" means a shotgun having a barrel of less than 20 inches in length; or a firearm made from a shotgun if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 20 inches in length.

(16) "Shotgun" means a smooth bore firearm using a fixed shotgun shell with either a number of ball shot or a single projectile, and designed or redesigned, made or remade, and intended to be fired from the shoulder.

(17) "Short barreled rifle" means a rifle having any barrel less than 16 inches in length, or a firearm made from a rifle if such firearm as modified has an overall length of less than 26 inches or any barrel of less than 16 inches.

(18) "Weapons offense" means any violation in any jurisdiction of any law which involves the sale, purchase, transfer in any manner, receipt, acquisition, possession, having under control, use, repair, manufacture, carrying, or transportation of any firearm, ammunition, or destructive device.

§ 7-2502.01. Registration requirements.

(a) Except as otherwise provided in this unit, no person or organization in the District of Columbia ("District") shall receive, possess, control, transfer, offer for sale, sell, give, or deliver any destructive device, and no person or organization in the District shall possess or control any firearm, unless the person or organization holds a valid registration certificate for the firearm. A registration certificate may be issued:

(1) To an organization if:

(A) The organization employs at least 1 commissioned special police officer or employee licensed to carry a firearm whom the organization arms during the employee's duty hours; and

(B) The registration is issued in the name of the organization and in the name of the president or chief executive officer of the organization;

(2) In the discretion of the Chief of Police, to a police officer who has retired from the Metropolitan Police Department; or

(3) In the discretion of the Chief of Police, to the Fire Marshal and any member of the Fire and Arson Investigation Unit of the Fire Prevention Bureau of the Fire Department of the District of Columbia, who is designated in writing by the Fire Chief, for the purpose of enforcing the arson and fire safety laws of the District of Columbia.

(b) Subsection (a) of this section shall not apply to:

(1) Any law enforcement officer or agent of the District or the United States, or any law enforcement officer or agent of the government of any state or subdivision thereof, or any member of the armed forces of the United States, the National Guard or organized reserves, when such officer, agent, or member is authorized to possess such a firearm or device while on duty in the performance of official authorized functions;

(2) Any person holding a dealer's license; provided, that the firearm or destructive device is:

(A) Acquired by such person in the normal conduct

of business;

(B) Kept at the place described in the dealer's license; and

(C) Not kept for such person's private use or protection, or for the protection of his business;

(3) With respect to firearms, any nonresident of the District participating in any lawful recreational firearm-related activity in the District, or on his way to or from such activity in another jurisdiction; provided, that such person, whenever in possession of a firearm, shall upon demand of any member of the Metropolitan Police Department, or other bona fide law enforcement officer, exhibit proof that he is on his way to or from such activity, and that his possession or control of such firearm is lawful in the jurisdiction in which he resides; provided further, that such weapon shall be unloaded, securely wrapped, and carried in open view.

§ 7-2502.02. Registration of certain firearms prohibited.

(a) A registration certificate shall not be issued for a:

(1) Sawed-off shotgun;

(2) Machine gun;

(3) Short-barreled rifle; or

(4) Pistol not validly registered to the current registrant in the District prior to September 24, 1976, except that the provisions of this section shall not apply to any organization that employs at least 1 commissioned special police officer or other employee licensed to carry a firearm and that arms the employee with a firearm during the employee's duty hours or to a police officer who has

retired from the Metropolitan Police Department.

(b) Nothing in this section shall prevent a police officer who has retired from the Metropolitan Police Department from registering a pistol.

APPENDIX H

COUNCIL OF THE DISTRICT OF COLUMBIA

REPORT*

To: Members of the Council.
From: Committee on the Judiciary and Criminal Law,
David A. Clarke, Chairperson
Date: April 21, 1976.
Subject: Bill No. 1-164, the "Firearms Control Act of 1975."

The Committee on the Judiciary and Criminal Law, to which Bill No. 1-164 was referred, having considered the same, reports favorably on the bill as amended.

BACKGROUND OF THIS LEGISLATION

Bill No. 1-164, as amended, evolved from a series of "gun control" bills which have been introduced in this Council. On February 11, 1975, Councilmember John Wilson introduced the first bill (Bill No. 1-24) to amend the D.C. Police Regulations, Articles 50 through 55, dealing with comprehensive firearm bans, registration and licensing. On March 11, 1975, Councilmember Polly Shackleton introduced Bill No. 1-42, the "District of Columbia Handgun Control Act of 1975", which would have defined new crimes in the D.C. Code involving a comprehensive ban, except in certain circumstances, on handguns or handgun ammunition in the District of Columbia. On June 6 and 7, 1975, your committee conducted extensive public hearings concerning the above-described bills and concerning the more general issue of firearm controls. A copy of the notice and the witness list for such public bearings is attached hereto as

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* This report describes the bill as approved by the Council's Judiciary Committee and reported to the Council, which thereafter made some changes in the bill itself before passage.

"Exhibit A". Councilmember Wilson, who participated in the conduct of the aforementioned hearings, on July 22, 1975, introduced Bill No. 1-164 in lieu of his previous bill, in order to amend the D.C. Police Regulations, Articles 50 through 55. Your committee concentrated its attention to Bill No. 1-164 which basically was aimed at reforming the current, firearm registration and licensing regulations. In its major parts, original Bill No. 1-164 would have (1) expanded the registration and reporting requirements currently placed on firearm owners and/or dealers, (2) substantially increased the fees for registering firearms and for obtaining a license to deal in firearms, (3) placed specific duties on personnel of the Office of Corporation Counsel to prosecute and to monitor the firearm regulations, (4) increased the penalties for violating the police firearm regulations, (5) abolished judicial discretion in the process of meting out punishment for violation of the firearm regulations, and (6) mandated that the Chief of Police conduct an active campaign to seize all prohibited firearms. After lengthy research with regard to original Bill No. 1-164 and refinements of gun controls in the District of Columbia, your committee conducted a roundtable discussion and preliminary mark-up on Tuesday, April 6, 1976 to consider an amendment in the nature of a substitute to Bill No. 1-164. On Thursday, April 15, 1975, your committee conducted a mark-up of such amendment. The reported Bill No. 1-164, as amended, is the product of the foregoing deliberations by your committee.

THE PURPOSE OF THIS LEGISLATION

The goals of this legislation are twofold: (1) to reduce the potentiality for gun-related crimes and gun-related deaths from occurring within the District of Columbia; and (2) to strengthen the capacity of the District of Columbia government to monitor the traffic in firearms and ammunition within this jurisdiction. Bill No. 1-164, as amended, would circumscribe the persons eligible to register

firearms in the District of Columbia and would delineate the types of firearms which could not be registered within the District of Columbia. The bill sets forth new and stringent criteria in order to relegate guns with legitimate uses in an urban area to demonstrably responsible types of persons. This legislation would also place more expansive reporting duties upon all firearm owners and dealers. This increased accountability would fortify the government's ability to keep track of the guns which are within the District of Columbia. The increased penalties for violation of these new regulations are designed to deter avoidance of the new requirements.

THE NEED FOR THIS LEGISLATION

Your committee finds that, with reference to the possession, sale, purchase and control of any firearm or destructive device in the District of Columbia, the design and scope of the current D.C. Police Regulations, Articles 50 through 55, have not been sufficiently effective in reducing the potentiality of gun-related deaths and gun-related crimes from occurring within the District of Columbia, and there is a need to significantly improve the capacity of the District government to monitor the traffic of firearms within this jurisdiction.

The easy availability of firearms in the United States has been a major factor contributing to the drastic increase in gun-related violence and crime over the past 40 years. The number of deaths attributed to firearms grows each year. Since 1900, more people have been killed by private citizens using firearms than were killed in all our wars. One out of every 100 deaths in the United States is the result of a firearm. Guns are responsible for 69 deaths in this country each day. Approximately 25,000 gun-deaths occur each year and 200,000 individuals are wounded by firearms during this same period. Close to 3,000 accidental deaths are caused by

firearms (1/4 of the victims are under 14 years of age). For every intruder stopped by a homeowner with a firearm, there are 4 gun-related accidents within the home.

The nationwide statistics dealing with handguns are even more staggering. The number of handguns alone in the U.S. is estimated to be as high as 40 million. (Congressional findings in *Proposed Federal Firearms Act of 1976—H.R. 11193)*. That's approximately 1 handgun for every 5 citizens in this country. And the supply of handguns may be increasing by as much as 2-1/2 million each year.

A crime committed with a pistol is 7 times more likely to be lethal than a crime committed with any other weapon. Over the last several years, statistics have shown that handguns are used in roughly 54% of all murders, 60% of robberies, 26% of assaults and 87% of all murders of law enforcement officials. In 1973, the FBI reported 19,510 murders in the United States, 53% of these homicides were committed with handguns. From 1964-1973 firearms were used to commit 95% of the slayings of police officers—613 by handguns, 104 by rifles and 101 with shotguns. (*Statement of D.C. Delegate Walter E. Fauntroy*).

In 1973, Detroit police reported 751 deaths from all criminal homicides, 24 more than the total number of civilians killed in Northern Ireland during the entire 5-1/2 years of their civil strife. The picture in the District of Columbia is not bright either. The Metropolitan Police Department reported a record 285 murders in the District of Columbia during 1974. Handguns were responsible for 155 of these homicides. In other violent crimes in which firearms were used in 1974-1975, handguns accounted for 88% of the robberies and 91% of the assaults.

Contrary to popular opinion on this subject, firearms are more frequently involved in deaths and violence among

relatives and friends than in premeditated criminal activities. Most murders are committed by previously law-abiding citizens, in situations where spontaneous violence is generated by anger, passion or intoxication, and where the killer and victim are acquainted. (*Murder and Gun Control, American Journal of Psychiatry*, 128 Jan. 1972: 456 No. 7). Twenty-five percent of these murders occur within families.

In addition to the inability of the present D.C. firearms law to reduce the potentiality for gun-related violence, the present regulations have not been sufficiently effective in efficiently monitoring the traffic of firearms and ammunition in the District. The Metropolitan Police Department reports that during the period of 1968-1975, 57,755 firearms were registered in the District of Columbia.[1] Of this total, 41,015 were handguns. However, in spite of the present regulations, less than 1/2 of 1% of the total number of firearms (1974) used in crimes and recovered by the police were registered in D.C. *(Statement of Maurice J. Cullinane, Chief of Police, Metropolitan Police Department before Committee on Judiciary and Criminal Law—1975)*. Approximately 12% of the firearms recovered from all crimes in DC are then registered and only 1.7% of the above-mentioned firearms are registered by the person from whom they were recovered. In addition, pistols have become easy for juveniles to obtain, although the existing regulations prohibit possession of pistols by juveniles.

The startling statistics presented here emphasize the inability of the present law to cope with the problems of gun control in the District of Columbia. This bill, as amended, will strengthen the District Government's role in firearm control by:

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[1] The total number of firearms registered in the District of Columbia as of 11 :00 a.m., March 26. 1976, was 61,089. This includes firearms owned and used by the Metropolitan Police Department.

(1) making pistols and shotguns not registered according to the regulations in effect prior to the effective date of this bill unregisterable in a reasonable endeavor toward eventually freezing the pistol and shotgun population within the District of Columbia:

(2) providing more appropriate penalties for violation of these Regulations.

(3) providing a more stringent pre-clearance procedure to prevent the acquisition, possession and use of firearms by disqualified persons.

(4) providing for annual registration, which will enable the District Government to better monitor the traffic in firearms and provide additional revenue (from annual license and permit fees) to implement this comprehensive program of gun control.

(5) providing for a program of education in the District of Columbia designed to inform the community of the provisions of this act.

Your committee realizes the most effective gun control must eventually be applied at the national level. In the absence of such national action however, it becomes necessary for local governments to act to protect their citizens, and certainly the District of Columbia as the only totally urban statelike jurisdiction should be strong in its approach.

IMPACT ON EXISTING LEGISLATION

A. Effect Upon Title 22, D.C. Code and Related Authority Questions

Bill No. 1-164 as amended, the "Firearms Control Regulations Act of 1975", is enacted for the purpose of amending the existing District of Columbia Police Regulations. Specifically affected are Articles 50 through 55 of those Regulations. This bill does not amend or conflict with the provisions of Chapter 32 of Title 22 of the D.C. Code. It specifically provides as much in section 902.

The authority for the Council of the District of Columbia to amend the aforementioned D.C. Police Regulations stems from not only the plenary delegation of section 302 of the D.C. Self-Government and Governmental Reorganization Act (hereinafter "Home Rule Act") (87 Stat. 787, D.C. Code, sec. 1-124) but also from the second sentence of section 404(a) of that Act (D.C. Code, sec. 1-444(a)), which vests the Council of the District of Columbia with all functions granted to its predecessor District of Columbia Council, including but not limited to the police regulatory powers provided for in the Act of January 26, 1887 (D.C. Code § 1-224), the health and welfare regulatory powers provided for in the Act of February 26, 1892 (D.C. Code § 1-226), the firearm regulation powers provided for in the Act of June 30, 1906 (D.C. Code § 1-227), and the penalty-creating powers provided for in the Act of December 17, 1942 (D.C. Code § 1-224a).

The United States Court of Appeals for the District of Columbia Circuit has rendered a lengthy opinion delineating the relationship between the plenary power of Congress over District affairs and delegated the local government's powers (based on the pre-Home-Rule Act delegations) in the area of firearm control. In *Maryland and District of Columbia Rifle and Pistol Association, RC. v. Washington*, 142 U.S. App. D.C. 375, 442 F.2d 123 (1971), the U.S. Court of Appeals upheld the authority of the former D.C. Council to promulgate the current gun control regulations.

Those seeking a declaration of invalidity in that case claimed that the Congress had pre-empted the area of gun control by the passage of An Act to Control the Possession, Sale, Transfer and Use of Pistols and Other Dangerous Weapons in the District of Columbia (47 Stat. 650) (codified in Chapter 32 of Title 22 of the District of Columbia Code), and that, in the passage of those Regulations the old Council was treading on ground the Congress had reserved for itself. The Court closely examined the legislative history of the various statutes noting that the 1932 statute was a substantial re-enactment of an 1892 statute (Act of July 13, 1892, 27 Stat. 116) predating the delegation of firearms regulatory powers.[2] The Court went on to note that Congress failed to repeal the regulatory powers when it passed the 1932 Act (now codified in Title 22 of the D.C. Code) finding therefrom and from the rest of its examination "a satisfying assurance that Congress, having dealt with some aspects of weapons control, left others for regulation by the District. Indeed ... [the Court could] not fathom any other purpose to be achieved by leaving Section 1-227 in force." (442 F.2d at 131). The Court set forth the text as follows:

> The important consideration, we think, is not whether the legislature and municipality have both entered the same field, but whether in doing so they have clashed. Statutory and local regulation may coexist in identical areas although the latter, not inconsistently with the former, exacts additional requirements, or imposes additional penalties. The test of concurrent authority, this court indicated many years ago, is the absence of conflict with the legislative will. As the court declared in *French v. District of Columbia*, where [t]he subject [is] peculiarly within the scope of the [expressly delegated] police powers of the municipality, the

[2] Act of June 30, 1906 (D.C. Code, sec. 1-227 (1973)).

> exercise of authority ought not to be questioned unless clearly inconsistent with the expressed will of Congress.

Bill 1-164, as amended, would-not clash at all with any provision of Chapter 32 (or any other part) of Title 22 of the Code. Chapter 32 was not enacted to afford the right to possess or carry weapons. Absent some legislation to the contrary, one could possess and carry a gun. Rather Chapter 32 was enacted to restrict the ability to possess and carry a gun.

Far from being in conflict with it, Bill 1-164 applies to present day conditions, the same approach the 72nd Congress took with respect to 1932 conditions. Bill 1-164, as amended, does not permit anything which Chapter 32 was designed to prohibit.

The Corporation Counsel of the District of Columbia argued in his brief in *Maryland and D.C. Rifle and Pistol Association, Inc. v. Washington*. That "since neither the Act of July 8, 1932 [codified in Chapter 32 of Title 22 of the Code], nor any other Act, deals with the registration of pistols by private owners, Article 51, section 1 [of the Police Regulations, prohibiting possession without registration], is not in conflict with any congressional enactment . . . Merely because the District of Columbia Council has added to the very limited congressional enactments relating to possession and transfer of weapons in the District of Columbia, does not mean that the *additions* are in conflict with the original limited provisions of the 1932 Act." (Brief of Appellees, p. 14).

Thus it is clear that Bill 1-164, as amended, was within the authority of the former D.C. Council to enact had it seen fit to do so.

There is no "expressed will of Congress" in the Home Rule Act to repeal the earlier delegations of gun control authority to the city. Any repeal would have to be by implication, and it "is a well-settled rule of statutory construction that there is a presumption against repeals by implication. *See*, Sutherland, Statutory Construction, sec. 2014 (3rd Ed., 1943).[3]

The legislative history of the Home Rule Act clearly indicates that it was the intent of Congress to transfer to the new Council the full and immediate power of the old Council in this area. Both section 321(b) of S. 1435, as reported by the Senate Committee on the District of Columbia, and the second sentence of section 404(a) of H.R. 9682, as reported by the House Committee on the District of Columbia, contain transfers of the authority of the old Council to the new. Both of the Reports indicate an intent to carry forth the old authority. Senate Report No. 93-219 says at p. 3: "The powers of the present Council and Mayor-Commissioner are transferred to the new Council and Mayor." House Report No. 93-482 says on p. 21: "Section (sic] (a) [of section 404] provides that the powers and functions of the present Council and Commissioner are transferred to the new Council and Mayor." Neither of these bills included at the time of their report to their respective houses the contents of section 602(a)(9) of the Home Rule Act. That was added in conference, and thus the "except as otherwise provided in this Act" language of the second sentence of section 404(a) was not directed to section 602(a)(9). It was more probably directed to delegations by the Home Rule Act of authority held by the old Council to other agencies [S. 1435, as reported, provided in the very next section (sec. 322) for functions subdelegated by the old

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[3] Brief for Appellees, *Maryland and D.C. Rifle and Pistol Association, Inc. v. Washington*, U.S. App. D.C. No. 22,927 (1969), p. 17, citing *United States v. Greathouse*, 166 U.S. 601 (1897).

Council and Mayor-Commissioner were not to be considered as transferred pursuant to section 321 of the bill but to be recoupable by specific Council or Mayoral action]. The gun control powers delegated to the city by D.C. Code, sections 1-224, 1-224a, 1-226, and 1-227 conferred on the old Council by section 401(1), 401(2), and 401(4) of the Reorganization Plan Numbered 3 of 1967 were not subdelegated by the old Council nor were they reassigned by the Home Rule Act.

It would be absurd therefore to now conclude that the Home Rule Act, designed and understood by all to have expanded the authority of the local legislature, to have repealed the powers delegated earlier. "It is axiomatic that a statute must not be construed to produce an absurd result." See *Lange v. United States*, 143 U.S. App. D.C. 305, 307-308, 443 F. 2d 720, 722-723 (1971).[4]

Furthermore, Congressional Delegate Water E. Fauntroy, former Chairman of the Subcommittee on the Judiciary of the Committee on the District of Columbia of the United States House of Representatives, submitted for the record a legal memorandum (Exhibit B) supporting this Council's authority to pass Bill No. 1-42, which, as mentioned earlier, would have amended the current firearms law in the District of Columbia by creating a *statutory* ban on handguns within the District of Columbia. And Attorney Harley Daniels, former Counsel to the Subcommittee on the Judiciary of the Committee on the District of Columbia of the United States House of Representatives, also testified in support of this Council's authority to enact Bill 1-42. By contrast, Bill No. 1-164 as reported herein, amends the current police regulations passed by the former D. C. Council. The scope of Bill No. 1-164, as amended, is significantly more clearly

[4] Memorandum of the District of Columbia, *District of Columbia v. Smith*, et al., D.C.C.A. No. 8780 (1974), p. 5.

within the ambit of authority of this Council than Bill 1-42.

The following analysis of the major impact of this bill upon the current firearms regulations illustrates the point further.

B. More Stringent Provisions Regarding Firearm Registration

Bill No. 1-164, as amended, abolishes the dual system under the current regulations whereby persons who own rifles or shotguns must both register and get a license for such firearms. Under the bill, a uniform system of registration is required whereby the Chief obtains not only the same data about the firearms and their owners as he does under the current regulations; but, in addition, the Chief is authorized to obtain information which supplements the current data which he lawfully obtains. For example, under the bill, an applicant would have to inform the Chief as to purpose for which he or she intends to use the firearm.

The bill would require annual registration of firearms as opposed to the current, one-time registration requirement.

The bill would give the Chief 60 days within which to rule upon a registration application in contrast to 30 days under the current regulations.

The new regulations formulated in this bill would expand the existing pre-requisites to be met by any person in order to register his firearm. For example, the class of convicted persons ineligible to register a firearm has been enlarged in this bill. The bill disqualifies anyone from registering who within the 5 years preceding the application for registration was convicted of any weapons offenses (as defined in the bill), violation of any narcotics or dangerous drug laws, or violation of any laws regarding assaults or threats so as to

indicate a likelihood to make unlawful use of a firearm. The current regulations have only a three-year disqualification period for persons convicted of offenses similar to those listed above. Unlike any provisions in the existing regulations, the bill disqualifies any person from registering who was involuntarily committed to a mental hospital within the five years prior to the application or who was adjudicated by any court to be insane or to be a chronic alcoholic within the five years prior to the application. The bill requires a medical certification of cure of the foregoing maladies prior to a registration certificate ever being issued by the Chief to such persons.

The bill changes the current fee schedule for registration certificates. The public record indicates that the $2.00 fee for a registration certificate under the current regulations does not even approximate the cost to the District of Columbia to administer the existing gun control registration system. This bill directs that the Mayor set the fee for registration at whatever amount will meet the cost to the government for administering the registration system.

Just as in the current gun regulations, the bill generally will not allow destructive devices, sawed-off shotguns, machine guns, or short-barreled rifles to be registered. Of course, the bill recognizes that on-duty federal and local law enforcement officers are permitted to possess the above noted weapons. *Cf.* D.C. Code §22-3214.

The bill adds a new category of generally unregisterable firearms in the District of Columbia, namely pistols not registered and shotguns not registered and licensed pursuant to the regulations in effect immediately prior to the effective date of this bill. Such provision denotes a policy decision that handguns and shotguns have no legitimate use in the purely urban environment of the District of Columbia while at the same time avoiding any conflict with constitutional

doctrines which might require compensation for materials declared to be illegal but which were legally possessed prior to the declaration. Moreover, the bill reflects a legislative decision that, at this point in time and due to the gun-control tragedies and horrors enumerated previously in this report, pistols and shotguns are no longer justified in this jurisdiction. During the Congressional review period of thirty legislative days, there will be adequate time for any current possessor of a pistol or shotgun, who is otherwise eligible, to register the same and thus be eligible for registration under the new regulations. Under section 203(c) of the bill, and Article 52, section 414 of the current regulations, his or her application cannot be used to prosecute him or her for illegal possession. If there is any fear that possibly there will be a flurry of firearm purchases or registrations of currently unregistered pistols and shotguns in the District of Columbia prior to this bill completing the full legislative process, it should be noted that the Police Department can provide the Council with daily statistics concerning recent registrations of firearms and with less frequent reports on the inventories of local firearm dealers. If the basis for the above-noted fears becomes a reality based on law enforcement reports, then this Council or the Congress can take further appropriate action prior to the bill being enacted.

Another innovation of the registration provisions of this bill would be the requirement in section 203(a)(10) whereby applicants would have to demonstrate to the Chief that they are knowledgeable of the District of Columbia firearms laws and that they can safely use the firearm which they seek to register.

C. Expanded Licensure Provisions

Bill No. 1-164, as amended, creates two classes of business licensees whereas only one class now exists. The

impact of such classification is to freeze at the current level of fourteen the number of dealers who can sell registerable firearms to the public.

The bill would extend from the current 30 days to 60 days the time allotted to the Chief to rule upon applications for licenses.

The bill requires that applicants for licenses meet the same expanded eligibility requirements as are placed on persons applying for a registration certificate.

A major revision contemplated in this bill is the establishment of a process whereby a licensed dealer can dispose of his inventory in the event that he receives an unfavorable response to his application for renewal of his license. This is to avoid any constitutional problems of confiscation. The current regulations do not address the situation of what, a dealer should do if his license is revoked. Under the provisions of this bill, if a denial or revocation becomes final, than the dealer would have to do any one of the following: register any registerable firearms in his possession, surrender to the Chief those firearms not registered plus all destructive devices, or lawfully dispose of or remove from the District of Columbia any firearms in. which he has an interest.

Bill No. 1-164 as amended contemplates more accountability in the reporting requirements than are presently required of licensees under Article 54, sec. 5(c) of the D.C. Police Regulations. Whereas a licensed dealer is currently required to submit "periodic" reports, Bill No. 1-164, as amended (sec. 410), would require the maintenance of very detailed monthly records by the licensee. The licensee would be required to keep the records current and to open them to inspection upon demand by the Chief.

D. Delineation of Sales or Transfers of Firearms

In both this bill and the current regulations, the range of firearms which may be generally sold or transferred coincides with the range of firearms which may be lawfully registered in the District of Columbia. However, Article 5 of Bill No. 1-164 provides that all sales and transfers of registerable firearms be accomplished only through a licensed dealer to a qualified purchaser.

E. Ammunition Transfers

Article 6 of Bill No. 1-164 substantially follows Article 53 of the current D.C. Police Regulations. Beyond this, section 602 of the bill sets out in detail the precise universe of lawfully possessors' of firearms ammunition; namely, licensees, authorized government personnel, certified collectors, and registrants of firearms of the same caliber as the ammunition possessed.

F. Registration of Firing Range Operators

Section 703 provides that for the first time in this jurisdiction that firing ranges shall be registered with the Chief.

G. Expanded Enforcement Provisions

Under the present Regulations (Article 55, sec. 2) no penalty will befall a person who voluntarily surrenders to the Police a firearm which is not registered, so long as a proclaimed amnesty period is in effect. This bill would abolish the current amnesty and redemption regulations and allow for surrender of firearms to the Chief at any police station and at any time. The same provision is made regarding the voluntary surrender of ammunition.

This bill also provides in section 803 that the Chief of Police publicize certain aspects of the Police regulations concerning firearms. These matters include: the elements of lawful possession, the limitations placed on holders of permits, the provisions for enforcement of the regulations, the provisions for voluntary surrender, and the means by which persons may aid the Police in enforcing the firearms regulations.

The bill sets a new mandatory minimum penalty of 10 days imprisonment and a $300 fine for violation of certain key sections of the bill (section 201 (re: prohibition of possession of a destructive device or unregistered firearm), section 401 (re: prohibition of engaging in firearms business without firearms business license), section 501 (re: limitations on sale or transfer of firearms), section 601 (re: limitations on the sale of ammunition), and section 602 (re: limitations on the possession of ammunition)). Under the current regulations there are no such mandatory sentencing provisions. The Committee reluctantly rejected higher penalties in an effort to remain within the delegated powers of D.C. Code, secs. 1-224, 1-224a, 1-226, and 1-227 so as to be certain of the Council's authority.

The foregoing considered, it should be apparent that this bill would not cause a confiscation law, would not amend any existing laws beyond the current D.C. Police Regulations governing firearms, and would take nothing away from sportsmen and collectors.

APPENDIX I

STATEMENT OF HON. WALTER E. WASHINGTON, MAYOR OF THE DISTRICT OF COLUMBIA

Upon Approving Bill I-165, The Firearms Control Regulations Act July 23, 2976

Today I have approved Bill I-164, the "Firearms Control Regulations Act." The bill is an effort by the Government of the District of Columbia—within the limitations of the Charter—to meet the need to protect its residents and its visitors from both the anguish and fear that firearms produce. It is an important step in the right direction. It represents a step taken with the understanding that no system of firearms control can be fully effective without appropriate controls at the regional and national levels. However, the fact that others must also assist obviously does not serve as a valid reason why the City Government should not do its part to reduce the human misery and toll caused by the passion of handguns by certain persons in our community.

The bill will ban possession of handguns by anyone except police officers and special police, unless the weapons are registered with the City when the law takes effect; new handguns may not thereafter be registered. Possession of sawed-off shotguns, short-barreled rifles and machine guns will continue to be illegal.

It should be noted that the measure does not bar ownership or possession of shotguns and rifles. However, it does require that any firearm validly registered under prior regulations must be registered pursuant to the new law; an application for re-registration is to be filed within sixty days.

Measures such as this one raise issues concerning the rights and privileges of private individuals in our society. Our mail has been particularly heavy on the gun control issue in the past weeks. The letters have ranged from those who want no controls to those who want outright confiscation of all firearms. The majority of letters have stressed individual concern for personal safety. I understand these concerns. But, as law enforcement officers have stressed, a gun in the hands of anyone other than a law enforcement officer or the military does not provide genuine protection for any of us.

I have considered all of the substantial arguments and raised against gun control, and I'm not indifferent to any. But, the time has come when it must be concluded that the lessons of recent history demonstrate that this government must provide the best program of gun control within the limits of its powers.

In short, we regard this measure as a sound attempt to curtail the source of weapons in the City. The City Council has worked closely with my staff in an effort to pass a bill which addresses these concerns and many of the arguments of those who oppose gun control. The measure which it passed, this Bill—is administratively acceptable. I appreciate this effort by the Council. And although there is some concern about the administrative costs and inconvenience of the re-registration provisions of this measure, these concerns are not, in my opinion, of so serious a nature as to warrant disapproval of the Bill.

Finally, I would add a word to those who disagree with the action the City Government has taken. I ask your cooperation and support of our efforts to do what we can to assure the safety and protection of the residents of this community and the many visitors to the nation's capital. We know this Bill is not a panacea; it is just a beginning of a

long process in this nation. In the opinion of the Chief of Police the Bill represents, on balance, a clear improvement over current law and would foster public safety. In the opinion of the Corporation Counsel there is no compelling reason to find the Bill legally objectionable. As the Chief Executive of the District of Columbia, I think it is my duty to approve the Bill and I ask the community to support the City Government in its action today which has but one purpose, that is the protection of the safety and welfare of its citizens and visitors.

APPENDIX J

APPLICATION FOR FIREARMS REGISTRATION OF DICK ANDREW HELLER

A copy of the original handwritten application filled out by Dick Andrew Heller is attached inside of the back cover to this petition.

P.D. 219 Rev. 9/76

METROPOLITAN POLICE DEPARTMENT WASHINGTON, D.C.

APPLICATION FOR FIREARMS REGISTRATION CERTIFICATE

$10.00 FEE REQUIRED WITH THIS APPLICATION PRINT ALL INFORMATION

REGISTRATION NUMBER | DATE REGISTERED | DEALER'S LICENSE NO.

This application for a Firearms Registration Certificate must be handcarried to the Metropolitan Police Department, Firearms Registration Section, 300 Indiana Avenue, N.W. Washington, D.C. 20001 by the purchaser. The purchaser MUST 1) be fingerprinted by the Metropolitan Police Department, however, if the purchaser has been fingerprinted by this department within five (5) years prior to submitting this application he need not be fingerprinted again if he offers other satisfactory proof of identity 2) submit with this application two full face photographs of himself, 1¼ x 1-7/8 inches taken within 30 days of filing this application 3) have vision better than or equal to that required to obtain a valid driver's license in the District of Columbia (a current driver's license will be prima facie evidence that the applicant's vision is sufficient) 4) demonstrate satisfactory knowledge of the laws in the District of Columbia pertaining to firearms and the safe and responsible use of same.
No transfer of a firearm between the seller and the purchaser may be made until a reply from the Chief of Police has been received by both parties involved.

SELLER'S NAME:

STREET ADDRESS: APT. NO.

CITY: ZIP CODE

PURCHASER/OWNER'S NAME: HELLER, Dick A.

STREET ADDRESS: 263 KENTUCKY AVE S.E. APT. NO.

CITY: WASH DC ZIP CODE: 20003

DESCRIPTION OF FIREARM

☐ NEW ☒ USED

MAKE OF WEAPON: HIGH STANDARD

MODEL: BUNTLINE

SERIAL NUMBER: MØ 499-17

MFG. I.D. NUMBER:

NO. OF SHOTS: 9 | CALIBER: .22

NO. OF BARRELS/LENGTH: 1 9½ | FINISH: BLACK | TYPE OF ACTION: single

IDENTIFYING MARKS:

DESCRIPTION OF PURCHASER/OWNER

DATE OF BIRTH: 10 DEC '41 | PLACE OF BIRTH: SAN Diego, CA

OPERATOR'S PERMIT NUMBER: 5555-88-211 | RACE: | SEX: M

OCCUPATION: Armed Security Guard | BUSINESS NAME: BlackHawk Sec.

BUSINESS ADDRESS: 5210 AUTH Rd SUITLAND MD 20746

HOME PHONE NUMBER: 202-544-3425 | BUSINESS PHONE NUMBER: 301-316-8172

PURCHASER/OWNER'S ADDRESSES FOR THE PAST FIVE -5- YEARS WITH DATES OF RESIDENCE

263 KENTUCKY AVE S.E. DC 20003

PURCHASER/OWNER'S OCCUPATION, BUSINESS NAME AND ADDRESSES FOR THE PAST FIVE -5- YEARS WITH DATES OF EMPLOYMENT

GSA Security, BlackHawk, 5210 AUTH Rd. Suitland, MD, Dec 01-JY02 - DCSPO, STING Sec, 635 MASS. AVE, NW, Oct 00-DEC 01 - BURNS Sec., 701 S. 12th, ARL, VA, Nov 99-Sep 00 - VANCE Sec. 1000 Wilson Bl. ARL, VA, JY98-Nov99, HUDCU. 415 7th SWDC, Teller, MAY97-OCT98.

HAVE YOU PREVIOUSLY BEEN DENIED IN THE DISTRICT OF COLUMBIA OR ELSEWHERE ANY PISTOL, RIFLE OR SHOTGUN LICENSE OR REGISTRATION CERTIFICATE? ☒ NO ☐ YES IF YES, EXPLAIN WHY AND BY WHOM

HAVE YOU EVER BEEN INVOLVED IN ANY MISHAP INVOLVING A PISTOL, RIFLE OR SHOTGUN? ☒ NO ☐ YES IF YES, EXPLAIN CIRCUMSTANCES, INCLUDING DATES, PLACES, AND NAMES OF ANY PERSONS INJURED OR KILLED.

GIVE A BRIEF STATEMENT OF YOUR INTENDED USE OF THE FIREARM AND WHERE THE FIREARM WILL BE KEPT

PERSONAL PROTECTION

I HEREBY CERTIFY THAT I AM NOT FORBIDDEN BY EXISTING LAWS AND REGULATIONS FROM PURCHASING OR POSSESSING A FIREARM AND THAT THE INFORMATION GIVEN BY ME ON THIS APPLICATION IS CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF AND DOES NOT KNOWINGLY CONTAIN ANY MATERIAL MISREPRESENTATION OF FACT

Dick A Heller — SIGNATURE OF SELLER — DATE 7-17-02

Dick A. Heller — SIGNATURE OF PURCHASER/OWNER — DATE 7-17-02

The Seller and the Purchaser MUST SIGN IN THE PRESENCE OF EACH OTHER.

NOTICE

This application is VALID as a FIREARMS REGISTRATION CERTIFICATE only when stamped APPROVED by the Chief of Police and a REGISTRATION NUMBER is affixed thereto.

THIS IS NOT A LICENSE TO CARRY A CONCEALED FIREARM.

DISAPPROVED DC Code 7-2502.02

JUL 19 '02 11:00