No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA
AND MAYOR ADRIAN M. FENTY,

Petitioners,

v.

DICK ANTHONY HELLER,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

RESPONDENT'S BRIEF

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STATEMENT OF THE CASE

Respondent Dick Anthony Heller successfully challenged the Nation's three most draconian infringements of Second Amendment rights. D.C. Code section 7-2502.02(a)(4) forbids registration of handguns, thereby effecting a ban on the possession of handguns within the home. D.C. Code section 7-2507.02 forbids the possession of any functional firearms within the home, without exception. D.C. Code section 22-4504(a) forbids the carrying of a handgun without a license. This section was amended in 1994 to criminalize the unlicensed carrying of a handgun within one's home. "It is common knowledge . . . that with very rare exceptions licenses to carry pistols have not been issued in the District of Columbia for many years and are virtually unobtainable." *Bsharah* v. *United States*, 646 A.2d 993, 996 n.12 (D.C. 1994). Respondent challenges this provision only as it relates to his home.

No state, and only one other major city (Chicago), bans handguns outright. The other two provisions appear unique to Washington, D.C.

In reviewing the handgun ban, the D.C. Circuit correctly applied this Court's test for determining which "arms" are constitutionally protected. *United States* v. *Miller*, 307 U.S. 174 (1939). The court found that handguns pass the *Miller* test, as they are arms of the type in common use by individuals, the possession of which can contribute to the common defense. PA53a.

The D.C. Circuit further held, correctly, that as home possession of handguns is constitutionally protected, Petitioners may not prohibit their movement within the home. The court struck down the license provision for carrying handguns as applied to home possession. PA54a-55a.

Finally, the D.C. Circuit correctly found that the literal text of section 7-2507.02 "amounts to a complete prohibition on the lawful use of handguns for self-defense," PA55a, and is thus unconstitutional.

SUMMARY OF ARGUMENT

The Second Amendment plainly protects "the right of the people"—an individual right—"to keep and bear arms."

However else Petitioners might regulate the possession and use of arms, their complete ban on the home possession of all functional firearms, and their prohibition against home possession and movement of handguns, are unconstitutional.

The Amendment's structure and etymology are not overly mysterious. The first clause, referencing the importance of "[a] well regulated Militia," provides a non-exclusive yet perfectly sensible justification for securing the people's right to keep and bear arms. In any event, the Second Amendment's preamble cannot limit, transform, or negate its operative rights-securing text.

The Second Amendment was engendered by the Framers' bitter experience with the King's disarmament of the population. That disarmament was especially pernicious to the colonists, who fervently believed they possessed an individual right to arms. In resisting British tyranny, the militia were not directed by the government officials they sought to overthrow, but certainly depended on the citizenry's familiarity with, and private possession of, firearms.

The Second Amendment's text thus reflects two related, non-exclusive concerns: it confirms the people's right to arms and explains that the right is necessary for free people to guarantee their security by acting as militia.

The Second Amendment's drafting and ratification history demonstrates it was designed to secure individual rights, consistent with the demands of the Anti-Federalists, whom the Bill of Rights was intended to mollify. Petitioners' militia theory was specifically addressed—and rejected—by the Framers, and that rejection is confirmed by centuries of precedent. Precedent likewise confirms the individual nature of Second Amendment rights.

Under this Court's precedent, the arms whose individual possession is protected by the Second Amendment are those arms that (1) are of the kind in common use, such that civilians would be expected to have them for ordinary purposes, and (2) would have military utility in time of need. A weapon that satisfies only one of these requirements would not be

protected by the Second Amendment. Handguns indisputably satisfy both requirements.

Petitioners concede that a functional firearms ban would be inconsistent with an individual right to arms. The dispute surrounding D.C. Code section 7-2507.02 thus merely concerns statutory interpretation. The D.C. Circuit's interpretation of this section's language is correct.

Although this case does not call upon the Court to determine the standard of review applicable to regulations of Second Amendment rights, Respondent observes that the right to arms protects two of the most fundamental rights—the defense of one's life inside one's home, and the defense of society against tyrannical usurpation of authority. Petitioners' casual use of social science sharply underscores the importance of securing Second Amendment rights with a meaningful standard of review.

Finally, Petitioners' contention that the Second Amendment is not binding law within the Nation's capital is spurious.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP ORDINARY FIREARMS, UNRELATED TO GOVERNMENT MILITARY SERVICE.

A. Preambles Cannot Negate Operative Text.

By its own terms, the rationale of the Second Amendment's preamble is not exclusive. The operative rights-securing clause is grammatically and logically independent of the preamble. Skilled diplomacy, a powerful army, or adherence to the constitution may sufficiently provide for "the security of a free state," and still the people would enjoy their right to arms. Most critically, the preamble cannot contradict or render meaningless the operative text.

As Petitioners note, preambles are examined only "[i]f words happen to still be dubious." Pet. Br. 17 (quotation and citation omitted). "[B]ut when the words of the enacting clause are clear and positive, recourse must not be had to the preamble." James Kent, 1 COMMENTARIES ON AMERICAN LAW 516 (9th ed. 1858). "The preamble can neither limit nor extend the meaning of a statute which is clear. Similarly, it cannot be used to create doubt or uncertainty." Norman Singer, 2A SUTHERLAND ON STATUTORY CONSTRUCTION § 47.04, at 295 (7th ed. 2007).

The Framers were familiar with these rules of construction. One influential English precedent held:

> I can by no means allow of the notion that the preamble shall restrain the operation of the enacting clause; and that, because the preamble is too narrow or defective, therefore the enacting clause, which has general words, shall be restrained from its full latitude, and from doing that good which the words would otherwise, and of themselves, import; which (with some heat) his Lordship said was a ridiculous notion.

Copeman v. *Gallant*, 1 P. Wms. 314, 320 (Ch. 1716); see also Edward Wilberforce, STATUTE LAW: THE PRINCIPLES WHICH GOVERN THE CONSTRUCTION AND OPERATION OF STATUTES 288-89 (1881).

> [G]eneral words in the enacting part, shall never be restrained by any words introducing that part; for it is no rule in the exposition of statutes to confine the general words of the enacting part to any particular words either introducing it, or to any such words even in the preamble itself.

King v. *Athos*, 8 Mod. Rep. 136, 144 (K.B. 1723); see also *Mace* v. *Cadell*, 1 Cowp. 232, 233 (K.B. 1774) ("if the statute meant to comprehend nothing more than is contained in the preamble, it means nothing at all").

Preambles are "properly resorted to, where doubts or ambiguities arise upon the words of the enacting part; for if they are clear and unambiguous, there seems little room for interpretation, except in cases leading to an obvious absurdity, or to a direct

overthrow of the intention expressed in the preamble." 1 Joseph Story, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 326-27 (2d ed. 1851). Accordingly, the Constitution's other preambles are given no weight. "Although that [opening] Preamble indicates the general purposes for which the people ordained and established the Constitution, it has never been regarded as the source of any substantive power. . . ." *Jacobson* v. *Massachusetts*, 197 U.S. 11, 22 (1905).

The Copyright and Patent Clause preamble would arguably possess greater operative force than that of the Second Amendment, as it begins with the infinitive that introduces most powers of Congress. The power "[t]o promote the Progress of Science and the useful Arts," U.S. CONST. art. I, § 8, cl. 8, viewed with the same breadth as the power "[t]o regulate Commerce," U.S. CONST. art. I, § 8, cl. 3, could stand alone absent the text that follows. In contrast, the Second Amendment's preamble merely declares a concept. Yet "Congress need not 'require that each copyrighted work be shown to promote the useful arts.'" *Schnapper* v. *Foley*, 667 F.2d 102, 112 (D.C. Cir. 1981) (citations omitted). And this Court does not question whether copyright and patent laws serve the preambular purpose of promoting progress, though some laws might fail such examination. *Eldred* v. *Ashcroft*, 537 U.S. 186, 212 (2003).

That the Second Amendment contained a declaration of purpose was not unusual for its day. But such declarative language was never given the

transformative effect urged by Petitioners. E.g., Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793, 794-95 (1998). The same Congress that passed the Second Amendment also reauthorized the Northwest Ordinance of 1787, containing this language: "Religion, morality, and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Act of Aug. 7, 1789, ch. 8, 1 Stat. 50, 52. But nobody would seriously contend that were religion, morality, or knowledge one day found unnecessary for good government, schools should no longer be encouraged in the states of the former Northwest Territory.

Petitioners argue that the preamble should be given controlling weight because "'it cannot be presumed that any clause in the constitution is intended to be without effect.'" Pet. Br. 17 (quoting *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 174 (1803)). But their citation to *Marbury* is incomplete—the passage concludes: "unless the words require it." *Marbury*, 5 U.S. (1 Cranch) at 174. Because Petitioners urge an interpretation of the preamble inconsistent with the plain meaning of the operative text, and considering the established rules of construction governing preambular language, the "presumption" urged by Petitioners is rebutted. Notwithstanding *Marbury*, the Court did not give force to the opening preamble in *Jacobson* or to the Copyright preamble in *Eldred*.

No doubts or ambiguities arise from the words "the right of the people to keep and bear arms shall

not be infringed." The words cannot be rendered meaningless by resort to their preamble. Any preamble-based interpretive rationale demanding an advanced degree in linguistics for its explication is especially suspect in this context. "A bill of rights may be considered, not only as intended to give law, and assign limits to government . . . , but as giving information to the people [so that] every man of the meanest capacity and understanding may learn his own rights, and know when they are violated. . . ." 1 St. George Tucker, BLACKSTONE'S COMMENTARIES, app. 308 (1803).

B. The Second Amendment's Plain Text Secures an Individual Right.

"The first ten amendments and the original Constitution were substantially contemporaneous and should be construed *in pari materia*." *Patton* v. *United States*, 281 U.S. 276, 298 (1930), overruled on other grounds, *Williams* v. *Florida*, 399 U.S. 78 (1970). There should be no distinction among "'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. . . ." *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 265 (1990) (citation omitted).

Conceding that the Second Amendment secures individual rights, Petitioners nonetheless argue that the term "bear arms" is exclusively military, such that the Second Amendment right can be exercised only

under the direction of a governmental military organization. Putting aside this rather strange concept of rights—a "right" to particular weapons in an environment where the individual is obliged to obey orders, or a "right" to defend the government but not oneself or one's family—the text does not support this notion.

"Keep and bear" embody distinct concepts in the Second Amendment, just as "speedy and public" reflect separate rights in the Sixth Amendment. Had the Framers eliminated either "speedy" or "public" from the Sixth Amendment, they would have significantly narrowed the right's scope. Cf. U.S. CONST. amend. VIII (proscribing "cruel and unusual punishments").

This case concerns the right to "keep" arms in the ordinary sense of the verb: to possess at home.[1] "Keep" has no exclusive military connotation. "Ordinarily courts do not construe words used in the Constitution so as to give them a meaning more narrow than one which they had in the common parlance of the times in which the Constitution was written." *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533, 539 (1944). When the Constitution was written, English law had "settled and determined" that "a man may keep a gun for the defence of his house and family." *Mallock* v. *Eastly*, 87 Eng. Rep.

[1] See Question Presented. The "bearing" of arms implicates different interests and concerns not at issue here.

1370, 1374, 7 Mod. Rep. 482 (C.P. 1744). Legislatures in England and America employed "keep" in the purely individual sense—especially when disarming minorities. See, e.g., 1 W. & M., Sess. 1, c. 15, § 4 (1689) ("no papist . . . shall or may have or keep in his house . . . any arms. . . ."); 4 Hening's Statutes at Large (Va.) 131 ("no negro, mulatto, or Indian . . . shall hereafter presume to keep, or carry any gun, powder, shot, or any club, or other weapon whatsoever. . . .").

Neither did the term "bear arms" have a uniquely military application. See, e.g., *Muscarello* v. *United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting). Johnson and Webster defined "bear" primarily as "to carry." 1 Samuel Johnson, A DICTIONARY OF THE ENGLISH LANGUAGE (1755) (not paginated); Noah Webster, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE (1st ed. 1828) (not paginated) (also "To wear . . . bear arms in a coat"). Accordingly, "bear arms" often had purely civilian connotations. For example, Parliament forbade Scottish Highlanders to "use or bear . . . side-pistols, or guns, or any other warlike weapons, in the fields, or in the way coming or going to, from or at any church, market, fair, burials, huntings, meetings, or any occasion whatsoever. . . ." 9 Geo. I Chap. 26 (1724), 15 Statutes at Large 246-47 (1765);[2] cf. *Scott* v. *Sandford*, 60 U.S.

[2] See Clayton Cramer & Joseph Olson, *What Does "Bear Arms" Imply?*, GEO. J.L. & PUB. POL'Y (forthcoming 2008), http://papers.ssrn.com/abstract=1081201 (supplying numerous examples).

(19 How.) 393, 417 (1857) (Constitution secured citizens' right "to keep and carry arms wherever they went," along with rights of speech and assembly).[3]

Eighteenth-century constitutional drafters used "bearing arms" in the individual sense. See PA. CONST. OF 1776, art. XIII ("That the people have a right to bear arms for the defence of themselves and the state. . . ."); VT. CONST. OF 1777, Ch. 1, art. XV (same). Petitioners' claim that Pennsylvania's drafters used "themselves" collectively not only defies the word's normal meaning, but would also render it redundant of "the state."[4]

Pennsylvania reiterated "the right of citizens to bear arms, in defence of themselves and the State" in its 1790 constitution. James Wilson, delegate to Pennsylvania's 1790 constitutional convention and later Associate Justice of this Court, explained:

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[3] That early congressional references to "bearing arms" related to military matters was a function of (1) the issues facing Congress in those years, (2) the perception that Congress did not have broad regulatory powers over private arms, and, of course, (3) the Second Amendment's limitation on those powers. Randy Barnett, *Was the Right to Keep and Bear Arms Conditioned on Service in an Organized Militia?*, 83 TEX. L. REV. 237, 260-62 (2004).

[4] "Themselves" as otherwise used by the Pennsylvania drafters is self-evidently not collective: "[T]he people have a right to hold themselves, their houses, papers, and possessions free from search or seizure. . . ." PA. CONST. OF 1776, art. X.

> [W]hen it is necessary for the defence of one's person or house . . . it is the great natural law of self-preservation, which . . . cannot be repealed, or superseded, or suspended by any human institution [but] is expressly recognized in the constitution of Pennsylvania.

3 WORKS OF THE HONOURABLE JAMES WILSON, L.L.D. 84 (Bird Wilson ed., 1804) (citing PA. CONST. OF 1790, art. IX, sec. XXI); see also *Ortiz* v. *Commonwealth*, 681 A.2d 152, 156 (Pa. 1996). "The constitutions of most of our States assert that all power is inherent in the people; that . . . it is their right and duty to be at all times armed. . . ." *Letter from Thomas Jefferson to Justice John Cartwright* (June 5, 1824), 16 WRITINGS OF THOMAS JEFFERSON 45 (A.A. Lipscomb ed., 1907).

Perhaps the most instructive 18th-century usage of "bear arms" is that of James Madison, author of the Second Amendment. In 1785, Madison introduced in Virginia's legislature a hunting bill drafted by Jefferson. The bill stated, in part:

> [I]f, within twelve months after the date of the recognizance he shall *bear a gun* out of his inclosed ground, *unless whilst performing military duty*, it shall be deemed a breach of the recognizance, and be good cause to bind him a new, and every such *bearing of a gun* shall be a breach of the new recognizance. . . .

A Bill for Preservation of Deer (1785), in 2 PAPERS OF THOMAS JEFFERSON 443-44 (J. Boyd ed., 1950) (emphases added).

Madison's usage of "bear" was no personal idiosyncrasy. St. George Tucker, the leading legal scholar of the early Republic, observed:

> The bare circumstance of having arms . . . of itself, creates a presumption of warlike force in England. . . . But ought that circumstance, of itself, to create any such presumption in America, where the right to bear arms is recognized and secured in the constitution itself?

5 Tucker, BLACKSTONE'S COMMENTARIES, app. B at 19 (*Concerning Treason*).

"An individual could bear arms without being a soldier or militiaman." Leonard Levy, ORIGINS OF THE BILL OF RIGHTS 135 (1999). But even if "bear arms" had a purely military connotation, that idiomatic meaning would itself be transformed by inclusion of the word "keep." For example, "Mary knows how to stir the pot" conveys a meaning (i.e., cause trouble) very different from, "Mary knows how to hold and stir the pot" (i.e., cook).

* * *

To the extent the Second Amendment's preamble informs the nature of the operative rights-securing provision, the necessity of a "well regulated Militia"

does not negate, but rather advances the individual character of the right to arms.

The Militia is constitutionally defined as a pre-existing entity, separate and apart from an army or navy that might be raised. U.S. CONST. amend. V (". . . in the land or naval forces, or in the Militia"). "Congress was authorized both to raise and support a national army and also to organize 'the Militia.'" *Perpich* v. *Dep't of Def.*, 496 U.S. 334, 340 (1990). "[T]he militia" are not "troops" or "standing armies," but "civilians primarily"—"all males physically capable of acting in concert for the common defense. . . ." *Miller*, 307 U.S. at 179.

"Who are the Militia? They consist now of the whole people. . . ." 3 Jonathan Elliot, DEBATES IN THE SEVERAL STATE CONVENTIONS 425 (2d ed. 1836) (George Mason). That "the 'militia' is identical to 'the people,'" Akhil Amar, THE BILL OF RIGHTS 51 (1998), is evident from Madison's description of "a militia amounting to near half a million of citizens with arms in their hands," who could resist an oppressive standing army. THE FEDERALIST NO. 46, 244 (James Madison) (Carey & McClellan eds., 1990). This militia reflected "the advantage of being armed, which the Americans possess over the people of almost every other nation," in contrast to "governments [that] are afraid to trust the people with arms." *Id.*; BOSTON EVENING POST, Nov. 21, 1768, at 2, col. 3 ("The total number of the Militia, in the large province of New-England, is upwards of 150,000 men, who all have and can use arms. . . ."); NEW YORK PACKET AND

AMERICAN ADVERTISER, Apr. 4, 1776, at 2, cols. 1-2 ("Whoever asserts that 10 or 12,000 soldiers would be sufficient to control the militia of this Continent, consisting of 500,000 brave men, pays but a despicable compliment to the spirit and ability of Americans").

That "the militia" was broadly composed of the general population, and expected to check government force, belies the notion that "militia" refers only to specific forces organized by government. The American militia's broad composition set it apart from its far narrower English counterpart. "[T]he Militia, in this country, is not a Select part of the People, as it is in England, set apart for that purpose, under Officers . . . employed and paid at the publick charge; but the Whole body of the people from sixteen years of age to fifty." *Speech of Gov. Morris*, June 29, 1744, in 6 DOCUMENTS RELATING TO THE COLONIAL HISTORY OF NEW JERSEY 187 (William Whitehead ed., 1882). "Select militia members in England were required to have qualifications even higher than those required to be a member of the House of Commons." David Young, THE FOUNDERS' VIEW OF THE RIGHT TO BEAR ARMS 11 n.6 (2007) (citation omitted).

The broad civilian understanding of who constitutes "the Militia" continues today. Congress defines "the militia of the United States" as comprising all able-bodied males from 17 to 45, who are or intend to become citizens; and members of the National Guard

up to age 64. 10 U.S.C. §§ 311, 313.[5] Excluded from this definition of Militia, among others, are "members of the armed forces, except members who are not on active duty." 10 U.S.C. § 312(a)(3); accord D.C. Code § 49-401 (District of Columbia required to enroll most able-bodied males age 18 to 45 in militia).

In order that the ordinary civilians constituting the Militia might function effectively, it was necessary that the people possess arms and be familiar with their use. After all, individuals called for militia duty were "expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Miller*, 307 U.S. at 179. Thus, the "militia system . . . implied the general obligation of all adult male inhabitants to possess arms, and, with certain exceptions, to cooperate in the work of defence." *Id.* at 179-80 (citation omitted); see also NEW YORK JOURNAL, May 11, 1775, at 1, cols. 2-3 (recommending "to the inhabitants of this country, capable of bearing arms, to provide themselves with arms and ammunition, to defend their country in case of any invasion").

That a militia be "well regulated" does not mean that it must necessarily be the subject of state control. With respect to troops, "regulated" is defined as "properly disciplined." 7 OXFORD ENGLISH DICTIONARY

[5] Congress may define that part of the Militia to which it wishes to apply its Article I powers, but Petitioners defy logic in suggesting that the protection of a right against the federal government may thus be legislated away by Congress. Pet. Br. 14 n.2.

380 (1933). In turn, "discipline" in relation to arms is defined as "training in the practice of arms." 3 OXFORD ENGLISH DICTIONARY 416 (1933). Notably, pre-revolutionary Americans forming voluntary associations for the purpose of resisting British rule, including Washington and Mason, employed the term "well regulated militia" to describe their associations. 1 Kate Mason Rowland, LIFE OF GEORGE MASON 428 (1892). These organizations were decidedly not sanctioned by any governmental authority.

George Mason succinctly explained the logic underlying the relationship of the Second Amendment's preamble to its operative text when he warned Virginia's ratifying convention that absent a Bill of Rights, "[t]he militia may be here destroyed by that method which has been practised in other parts of the world before; that is, by rendering them useless—by disarming them." 2 Rowland, at 408.

The Second Amendment secures the *pre-existing* right of the people to keep and bear arms.[6] And it does so, in part, because a militia—comprised of the body of ordinary people proficient in the use of their private arms—was deemed necessary. Were the people denied their right to keep and bear arms, they could not function as a well regulated militia.

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[6] *United States* v. *Cruikshank*, 92 U.S. 542, 553 (1875) (right to arms "not a right granted by the Constitution. Neither is it in any manner dependent upon that instrument for its existence").

C. The Framers Secured an Individual Right to Keep and Bear Arms in Reaction to the British Colonial Experience.

"[C]onstitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go *pari passu* with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past." *United States* v. *Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926) (L. Hand, J.). The rights secured by the first eight amendments were not conjured at random, but in reaction to specific outrages of the King's rule. The Second Amendment is no exception. While Petitioners and their amici may not believe that English law secured an individual right to arms for self-defense, colonial Americans certainly did, and it was the repeated, wanton violation of that right that led them to demand and ratify the Second Amendment.

As British troops arrived in Boston to enforce the Townshend Acts in 1768, a call went out for the people to arm themselves. Responding to British criticism of the civilian armament, Samuel Adams declared that "it is certainly beyond human art and sophistry, to prove the British subjects, to whom the privilege of possessing arms is expressly recognized by the Bill of Rights . . . are guilty of an illegal act, in calling upon one another to be provided with them, as the law directs." 1 WRITINGS OF SAMUEL ADAMS 299 (Harry Cushing ed., 1904). Citing Blackstone's "right of having and using arms for self-preservation and defence," Adams added, "[h]ow little do those persons

attend to the rights of the constitution, if they know anything about them, who find fault with a late vote of this town, calling upon the inhabitants to *provide themselves with arms for their defence* at any time. . . ." *Id.* at 317-18 (emphasis in original).

The "Journal of the Times" concurred:

> It is a natural right which the people have reserved to themselves, confirmed by the [English] Bill of Rights, to keep arms for their own defence; and as Mr. Blackstone observes, it is to be made use of when the sanctions of society and law are found insufficient to restrain the violence of oppression.

NEW YORK JOURNAL, Supplement, Apr. 13, 1769, at 1, col. 3.

So accepted was the notion that Americans had the right to arms that Crown prosecutors of the soldiers charged in the Boston Massacre invoked the victims' right to armed resistance against abusive Redcoats. 3 LEGAL PAPERS OF JOHN ADAMS 149, 274 (L. Wroth & H. Zobel eds., 1965). John Adams, in his successful defense of the soldiers, concurred: "Here every private person is authorized to arm himself, and on the strength of this authority, I do not deny the inhabitants had a right to arm themselves at that time, for their defence, not for offence. . . ." *Id.* at 248.

Nonetheless, reports of British troops disarming Americans surfaced as early as February 1769. NEW YORK JOURNAL, Feb. 2, 1769, at 2, col. 2. And much to the dismay of the colonists, the governing council

newly appointed for Massachusetts came to propose "the disarming of the town of Boston, and as much of the province as might be." BOSTON GAZETTE, Sept. 5, 1774, at 3, col. 2. The following day, Lt. General Thomas Gage, commander of the British military in America and Massachusetts Royal Governor, moved the powder stored at Charlestown to Castle William and forbade the release of privately owned powder from the Boston magazine. The ensuing unrest came to be known as "the Powder Alarm." Young, FOUNDERS' VIEW, at 37.[7]

The citizens of Suffolk County, Massachusetts promptly issued a proclamation denouncing the powder seizure (among other outrages). The Continental Congress quickly approved the "Suffolk Resolves." *Id.* at 38. In addition to the powder seizure, "[t]he Crown forcibly purchased arms and ammunition held in the

[7] Owing to the instability of black powder used in colonial times, fire safety measures of the day mandated that large stores of gunpowder, as those belonging to merchants, be stored in "powder houses" away from other structures, as were powder and other arms purchased by a community for the benefit of its citizens. The 1783 Massachusetts statute allegedly "prohibit[ing] Boston citizens from keeping loaded firearms in their homes," Pet. Br. 42, was a *fire safety* measure intended to regulate the storage of gunpowder: "An Act in Addition to the several Acts already made for the prudent storage of Gun-Powder within the Town of Boston." Act of Mar. 1, 1783, ch. XIII, 1783 Mass. Acts 218. The act opens with, "Whereas the depositing of loaded Arms . . . is dangerous to the Lives of those who are disposed to exert themselves when a Fire happens to break out," with no reference to firearms qua firearms being inherently dangerous. *Id.*

inventory of merchants, and an order went out that the inhabitants must turn in their arms." Stephen Halbrook, THE FOUNDERS' SECOND AMENDMENT: ORIGINS OF THE RIGHT TO BEAR ARMS 45 (2008) (citation omitted).

The order to disarm was apparently ignored, but British seizure of private arms continued. "They keep a constant search for every thing which will be serviceable in battle; and whenever they espy any instruments which may serve or disserve them,—whether they are the property of individuals or the public is immaterial,—they are seized. . . ." *Letter of Joseph Warren to Samuel Adams*, Sept. 29, 1774, in Richard Frothingham, LIFE AND TIMES OF JOSEPH WARREN 381 (1865).

The colonists expressed their displeasure over firearms seizures. Worcester County complained to Gage that although "the People [are] justified in providing for their own Defense," passing through Boston Neck entailed having "many places searched, where Arms and Ammunition were suspected to be; and if found seized; yet as the People have never acted offensively, nor discovered any disposition so to do, as above related, the County apprehend this can never justify the seizure of private Property." BOSTON GAZETTE, Oct. 17, 1774, at 2, cols. 2-3. "It is said that the troops, under your command, have seized a number of cartridges which were carrying out of the town of Boston, into the country; and as you were pleased to deny that you had meddled with private property . . . I would gladly be informed on what

different pretence you now meddled with those cartridges. . . .” NEWPORT MERCURY (Rhode Island), Apr. 10, 1775, at 2, col. 1.

The British also prohibited importation of guns and powder, prompting further outcry. “Could they [the Ministry] not have given up their Plan for enslaving America without seizing . . . all the Arms and Ammunition? and without soliciting and finally obtaining an Order to prohibit the Importation of warlike Stores in the Colonies?” NEW HAMPSHIRE GAZETTE AND HISTORICAL CHRONICLE, Jan. 13, 1775, at 1, col. 1 (reprinted in 1 AMERICAN ARCHIVES, 4TH SERIES 1065 (Peter Force ed., 1837)). South Carolina’s General Committee protested that “by the late prohibition of exporting arms and ammunition from England, it too clearly appears a design of disarming the people of America, in order the more speedily to dragoon and enslave them. . . .” 1 John Drayton, MEMOIRS OF THE AMERICAN REVOLUTION 166 (1821).

Notwithstanding the import prohibition and occasional seizure of private weapons, Gage understood that complete disarmament of the population required military domination. Halbrook, THE FOUNDERS’ SECOND AMENDMENT at 49 (collecting sources). The colonists agreed: “[I]f they should come to disarming the inhabitants, the matter is settled with the town at once; for blood and carnage must inevitably ensue. . . .” *Letter of John Andrews*, Sept. 12, 1774, in PROCEEDINGS OF THE MASSACHUSETTS HISTORICAL SOCIETY 359 (1866).

Not surprisingly, the Revolution's first battle opened on April 19, 1775, with an ill-conceived British expedition to seize weapons from private property in Concord. Fear of arms seizures prompted Americans to transfer publicly stored weapons to their homes, and when Redcoats came to seize public and private arms alike, war erupted.

The immediate aftermath of Lexington and Concord found Boston cut off from the remainder of the province. Gage offered Bostonians free passage from the city provided they would deliver their arms for safekeeping. A vote was taken and the people agreed to Gage's terms, surrendering "1778 fire-arms, *634 pistols*, 973 bayonets, and 38 blunderbusses." Richard Frothingham, HISTORY OF THE SIEGE OF BOSTON 95 (1851) (emphasis added).[8] Gage quickly reneged on his promise of safe passage. Young, FOUNDERS' VIEW, at 52.

Americans reacted strongly to the disarmament of Boston. Thomas Jefferson and John Dickinson drafted a "Declaration of the Causes and Necessity of Taking Up Arms," issued by the Second Continental Congress on July 6, 1775. Gage's disarmament scheme figured prominently among the "Causes" for armed revolt:

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[8] Another account repeats these numbers, save for 700 fewer bayonets. 1 David Ramsay, HISTORY OF THE AMERICAN REVOLUTION 176 (1789). Boston's 1765 population totaled 15,520. EARLY CENSUS MAKING IN MASSACHUSETTS, 1643-1765, 102 (1902).

> [I]t was stipulated that the said inhabitants having deposited *their arms* . . . should have liberty to depart, taking with them their other effects. They accordingly delivered up *their arms*, but . . . the governor ordered the arms . . . seized by a body of soldiers; detained the greatest part of the inhabitants in the town, and compelled the few who were permitted to retire, to leave *their most valuable effects* behind.

2 JOURNALS OF THE CONTINENTAL CONGRESS 136-37 (1905) (emphases added).

Disarmament as a grievance became a common theme among the Patriots. For example, addressing Indian tribes in search of alliance, Samuel Adams complained that the British "have told us we shall have no more guns, no powder to use. . . . How can you live without powder and guns? But we hope to supply you soon with both, of our own making." 3 WRITINGS OF SAMUEL ADAMS 212-13.

That the colonists cared little about the prospect of having their guns seized is not the only ahistorical concept underlying Petitioners' repudiation of the Second Amendment. Redcoats and Patriots alike would have puzzled at Petitioners' notion that the Revolution produced an exclusive governmental right to operate an organized militia. The "well regulated militia" of the American Revolution operated not merely beyond the control of, but in direct challenge to, the King's governors.

In Massachusetts, as in other colonies, militia officers were elected from among the militiamen. This "meant that [officers] appointed by the Royal governor would be thrown out. The Provincial Congress further usurped the Crown's militia power by appointing a Committee of Safety that could call out the militia when necessary." Halbrook, FOUNDERS' SECOND AMENDMENT at 48 (citation omitted). Gage recognized this process as a threat to British rule:

> The Officers of the Militia have in most Places been forced to resign their Commissions, And the Men choose their Officers, who are frequently made and unmade; and I shall not be surprized, as the Provincial Congress seems to proceed higher and higher in their Determinations, if Persons should be Authorized by them to grant Commissions and Assume every Power of a legal Government. . . .

1 PARLIAMENTARY REGISTER, 14TH PARLIAMENT, 1ST SESSION 58 (1802).

North Carolina's colonial governor, Josiah Martin, decried the new militias that "submit to the illegal and usurped authorities of [patriotic] Committees." William Hoyt, THE MECKLENBURG DECLARATION OF INDEPENDENCE 44 (1907); see also Vernon Stumpf, JOSIAH MARTIN 112 (1986) ("they are now actually endeavoring to form what they call independent Companies under my nose"). Virginia's Governor, Lord Dunmore, complained that "[e]very County is now Arming a Company of men whom they call an

independent Company for the avowed purpose of protecting their Committee, and to be employed against Government if occasion require." *Letter to Earl of Dartmouth*, Dec. 24, 1774, in 2 WRITINGS OF GEORGE WASHINGTON 445 n.1 (Worthington Ford ed., 1889). Loyalists were horrified by the rise of extra-governmental militias, but Patriots such as John Adams would have none of the criticism:

> "The new-fangled militia," as the specious [Loyalist] calls it, is such a militia as he never saw. They are commanded through the province, not by men who procured their commissions from a governor as a reward for making themselves pimps to his tools, and by discovering a hatred of the people, but by gentlemen, whose estates, abilities, and benevolence have rendered them the delight of the soldiers. . . .

4 WORKS OF JOHN ADAMS 40-41 (1865).

Indeed, extra-governmental militias existed even in times of good relations with the Crown. Pennsylvania, owing to Quaker influence, was alone among the colonies in not having a governmentally organized militia for most of its history. But this did not mean that a militia was unneeded in Pennsylvania, or that the colony lacked for means of defense. Responding to the depredations of privateers on the Delaware River, Benjamin Franklin published *Plain Truth* in 1747, warning of dire consequences were the people, though well-armed, to remain unprepared. 3 WORKS OF BENJAMIN FRANKLIN 1-21 (Jared Sparks

ed., 1882). Franklin quickly followed *Plain Truth* with *Form of Association*, laying out a vision of voluntary mutual self-defense "Associations" palatable to the religiously scrupulous. The Associations would be freely formed by individuals electing their own officers, with neither offensive intent nor governmental compulsion or oversight. 3 PAPERS OF BENJAMIN FRANKLIN 205 (Leonard Labaree ed., 1961).

Franklin's vision triumphed, the 1747 Association enrolling 10,000 men. William Shepherd, 6 HISTORY OF PROPRIETARY GOVERNMENT IN PENNSYLVANIA 530 (1896). But not everyone was comfortable with the arrangement:

> It strongly resembles treason. The people should have desired the president and council to appoint officers for their training, and put themselves under their direction. . . . This is erecting a government within a government, and rebelling against the king's authority.

Id. (quoting *Letter of Thomas Penn to Mr. Peters* (March 30, 1748)). The King in Council disallowed a 1755 law granting formal recognition of the voluntary associations, but Pennsylvanians continued their voluntary armed association in times of need. Young, FOUNDERS' VIEW, 20-23.

John Adams explicitly clarified that militia forces served their purpose regardless of whether they were organized pursuant to law. In the First Continental Congress, Adams proposed a resolution

> that it be recommended to all the Colonies, to establish by Provincial Laws, where it can be done, a regular well furnished, and disciplined Militia, and where it cannot be done by Law, by voluntary Associations, and private Agreements.

1 LETTERS OF DELEGATES TO CONGRESS 132 (Paul Smith ed., 1976).

As war approached, clashes between voluntary militias and colonial governors became not merely philosophical, but physical. When Governor Dunmore seized the powder at Williamsburg, Patrick Henry's Hanover Independent Militia Company forced restitution. R.D. Meade, PATRICK HENRY 50-51 (1969). One paper reported that as a "party of the militia being at exercise on Boston common, a party of the army surrounded them and took away their fire arms; immediately thereupon a larger party of the militia assembled, pursued the Army, and retook their fire arms." MASSACHUSETTS GAZETTE, Dec. 29, 1774, at 2, col. 2.

Militia forces operating without the government's blessing would prove critical to the American war effort. For example, the first American military offensive of the Revolution, Ethan Allen's capture of Fort Ticonderoga, was accomplished by "two hundred undisciplined men, with small arms, without a single bayonet. . . ." Ira Allen, THE NATURAL AND POLITICAL HISTORY OF THE STATE OF VERMONT 44 (reprint 1969).

Respondent does not suggest that members of private paramilitary organizations have a right to commit violent acts under the auspices of acting as a citizen militia. See, e.g., Va. Code § 18.2-433.2; Cal. Penal Code § 11460. The Framers, who organized the militia under the new constitution, doubtless agreed that citizens should not compete with legitimate government authority. "Prudence, indeed, will dictate that Governments long established should not be changed for light and transient Causes. . . . Mankind are more disposed to suffer, while Evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed." THE DECLARATION OF INDEPENDENCE, para. 2 (U.S. 1776).

But as expressed in the Declaration, the Framers saw no tension between accepting the lawful authority of an imperfect and even frequently unjust government, while retaining the ability to resist tyranny. The notion that independent, armed militia would engage in the treason and insurrection forbidden by the Constitution is spurious. The Framers, who used militia organized in direct defiance of the government they deposed, envisioned the militia as a tool for restoring the Constitution in the event of usurpation. See THE FEDERALIST NO. 46 (James Madison), *supra*; THE FEDERALIST NO. 29 (Alexander Hamilton).

> The right of the citizens to keep and bear arms has justly been considered, as the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and it

> will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

2 Story, COMMENTARIES, *supra*, at 607.

Cooley agreed, explaining that the Second Amendment "is significant as having been reserved by the people as a possible and necessary resort for the protection of self-government against usurpation, and against any attempt on the part of those who may for the time be in possession of State authority or resources to set aside the constitution and substitute their own rule for that of the people." Thomas Cooley, *The Abnegation of Self-Government*, 12 PRINCETON REV. 209, 213-14 (1883). The individual use of Second-Amendment-protected arms to check despotism, "far from being revolutionary, would be in strict accord with popular right and duty." *Id.*

> The Second Amendment is a doomsday provision, one designed for those exceptionally rare circumstances where all other rights have failed—where the government refuses to stand for reelection and silences those who protest; where courts have lost the courage to oppose, or can find no one to enforce their decrees. However improbable these contingencies may seem today, facing them unprepared is a mistake a free people get to make only once.

Silveira v. *Lockyer*, 328 F.3d 567, 570 (9th Cir. 2003) (Kozinski, J., dissenting from denial of rehearing en banc). The Framers intended the Second Amendment

to guard against "[o]ne of the ordinary modes, by which tyrants accomplish their purposes without resistance [which is] by disarming the people, and making it an offence to keep arms, and by substituting a regular army in the stead of a resort to the militia." Joseph Story, A FAMILIAR EXPOSITION ON THE CONSTITUTION OF THE UNITED STATES 264 (1847).

Certainly Petitioners would not dispute Americans' justification for revolting against Great Britain, an event that would not have been possible without the private ownership of firearms. And should our Nation someday suffer tyranny again, preservation of the right to keep and bear arms would enhance the people's ability to act as militia in the manner practiced by the Framers.

That the Second Amendment was designed to secure a personal right of the citizens is clear from Madison's notes for the speech introducing the Bill of Rights. "They [the proposed amendments] relate first to private rights," 12 PAPERS OF JAMES MADISON 193-94 (C. Hobson et al. eds., 1979). Madison thus initially proposed placing the Second Amendment alongside other provisions securing individual rights in Article I, sec. 9—following the habeas corpus privilege and the proscriptions against bills of attainder and *ex post facto* laws, together with his proposed protections for speech, press, and assembly. THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 169 (N. Cogan ed., 1997).

If "bear arms" had the exclusively military connotation urged by Petitioners, no one would have proposed qualifying the phrase with "for the common defence." But the Senate rejected just that proposal. JOURNAL OF THE FIRST SESSION OF THE SENATE OF THE UNITED STATES OF AMERICA 77 (1820). Some collective rights adherents speculate that "common defence" was considered redundant, but more plausibly the Senate did not wish to narrow "bear arms" to a purely military usage. After all, the first Congress knew how to condition individual rights on militia service. E.g., U.S. CONST. amend. V (no presentment or indictment right "in cases arising in . . . the Militia, when in actual service. . . .")[9]

Indeed, House debates on the Second Amendment reveal the Framers' reluctance to adopt text that might denigrate the individual character of the right to arms. Collectivists assert that a proposal to include a conscientious objector clause in the Second Amendment confirms the military character of "bear arms." But the proposal was defeated after Rep. Gerry warned "that this clause would give an opportunity to the people in power to destroy the constitution itself. They can declare who are those religiously

[9] Petitioners claim that the "common defence" language was scrapped as an excessive and controversial revision to the Constitution's body, Pet. Br. at 29 n.6, contradicting their claim that the Second Amendment was intended to remedy deficiencies in the Constitution's militia clauses. E.g., Pet. Br. 22, 33.

scrupulous, and prevent them from bearing arms." 1 ANNALS OF CONGRESS 778 (1834).

Representative Scott's objection to the conscientious objector language not only reflected the individual character of the Second Amendment, but also the distinct nature of "keep" and "bear": He said the language would "lead to the violation of another article in the constitution, which secures to the people the right of keeping arms. . . ." *Id.* at 796. Petitioners' claim that "[a]ll remarks recorded in the House's debate related to military service; none pertained to private use of weapons, including self-defense," Pet. Br. 28 (citations omitted), is conclusory—true only if one accepts that "bear arms" as used by Gerry, and the people's "right of keeping arms" as used by Scott, referred to military service. But that construction is insupportable.

Equally unpersuasive is the notion that the defeated conscientious objector clause's military nature imparted a military flavor to what remained and passed as the Second Amendment. Other amendments, as passed, contain unrelated concepts. The First Amendment secures various rights of expression and conscience, yet nobody would contend Madison intended to protect only religious speech or assembly. Likewise, the Fifth Amendment's Grand Jury Clause appears only tenuously related to the Takings Clause. No particular intent can be gleaned from a legislative combination of seemingly unrelated

subjects, especially when anomalous provisions are omitted before final passage.[10]

Petitioners claim that the Second Amendment is derived from the seventeenth of certain amendments proposed by Virginia, and that Virginia "[s]eparately . . . proposed amending the Militia Clauses directly: '11th—That each state respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same.'" Pet. Br. 26 (citation omitted). Yet both proposals originated in the same document, the Second Amendment's precursor among provisions "constituting the bill of rights," and the militia amendment among what the convention labeled "[t]he other amendments." David Young, THE ORIGIN OF THE SECOND AMENDMENT 462 (2d ed. 2001).

If guaranteeing the people's "right to keep and bear arms," with reference to a "well regulated militia" and "a free state," were intended to secure the states a right to arm their militias, the Virginia Convention would not have separately proposed an explicit reservation of the states' militia powers. That the Second Amendment's direct precursor came to Congress in a "bill of rights," alongside a state militia

[10] Notably, Madison's initial Second Amendment draft starts with the right to keep and bear arms, separated from the remaining provisions with a semicolon—the same punctuation Madison used to distinguish unrelated concepts in the First and Fifth Amendments.

power among "other amendments," strongly suggests the two are not identical.

Indeed, if rejected language is any clue as to the meaning of that which was accepted, perhaps the most telling example was the Framers' rejection of the following proposed amendment: "That each State respectively shall have the power to provide for organizing, arming, and disciplining its own militia, whensoever Congress shall omit or neglect to provide for the same. . . ." FIRST SENATE JOURNAL 126.

This proposal stated, in unmistakably direct and concise fashion, exactly that meaning which Petitioners would divine in the Second Amendment through tortured linguistics, fanciful explanations, and "hidden history." *And it was rejected by the Framers.* "[H]istory does not warrant concluding that it necessarily follows from the pairing of the concepts that a person has a right to bear arms solely in his function as a member of the militia." Robert Sprecher, *The Lost Amendment*, 51 AM. BAR ASS'N J. 554, 557 (1965).[11]

The Bill of Rights was never thought necessary by the Federalists, other than as a tool to placate Anti-Federalist resistance to the new constitution. While rejection of militia-powers amendments demonstrates

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[11] The ABA, founded in 1878, notes it has taken the opposite view "[f]or more than forty years." ABA Br. 2. Sprecher's article won the ABA's 1964 Samuel Pool Weaver Constitutional Law Essay Competition.

that the Bill of Rights did not address each and every Anti-Federalist concern, the Second Amendment did at least address a different concern: the individual right to arms.

Demands for a bill of rights prevailed in five of seven constitutional ratifying conventions. The only provisions common to all were freedom of religion and the right to arms. New Hampshire's convention demanded recognition that "Congress shall never disarm any citizen, unless such as are or have been in actual rebellion." 1 Elliot, DEBATES at 326. Pennsylvania Anti-Federalists demanded

> that the people have a right to bear arms for the defense of themselves and their own State, or the United States, or for the purpose of killing game; and no law shall be passed for disarming the people or any of them, unless for crimes committed, or real danger of public injury from individuals.

Levy, ORIGINS, *supra* at 143-44.[12] In Massachusetts, Samuel Adams demanded that "the said constitution be never construed . . . to prevent the people of the United States who are peaceable citizens, from keeping their own arms." DEBATES AND PROCEEDINGS IN THE CONVENTION OF THE COMMONWEALTH OF

[12] As did the Virginia majority, the Anti-Federalist Pennsylvania minority proposed a separate state-militia-powers amendment. *Id.*

MASSACHUSETTS 86 (1856). These were the sentiments Madison addressed in the Second Amendment.

Petitioners' notion that the Second Amendment secures state prerogatives to control their militia free of federal interference—as a limitation or repudiation of congressional militia powers—also contradicts the substantial body of precedent interpreting Congress's authority over the militia. As early as 1820, this Court held that Congress had preempted the field of militia regulation:

> Upon the subject of the militia, Congress has exercised the powers conferred on that body by the constitution, as fully as was thought right, and has thus excluded the power of legislation by the States on these subjects, except so far as it has been permitted by Congress; although it should be conceded, that important provisions have been omitted, or that others which have been made might have been more extended, or more wisely devised.

Houston v. *Moore*, 18 U.S. (5 Wheat.) 1, 24 (1820) (Washington, J.). Dissenting from *Houston*'s conclusion that state courts had concurrent jurisdiction over militia courts-martial, Justice Story (joined by Chief Justice Marshall) nevertheless observed that "a State might organize, arm, and discipline its own militia in the absence of, or subordinate to, the regulations of Congress. . . ." *Houston*, 18 U.S. (5 Wheat.) at 52 (Story, J., dissenting). The Second Amendment "may not, perhaps, be thought to have any important

bearing on this point. If it have, it confirms and illustrates, rather than impugns the reasoning already suggested." *Id.* at 52-53.

This Court would later make clear that with the adoption of the Constitution, "[t]here was left therefore under the sway of the States undelegated the control of the militia to the extent that such control was not taken away by the exercise by Congress of its power to raise armies." *Selective Draft Law Cases*, 245 U.S. 366, 383 (1918). And just as Congress may pre-empt the regulation of the states' militias under Article I, it likewise enjoys the exclusive power to call the states' militias into federal service, which has been delegated to the President since 1795. *Martin* v. *Mott*, 25 U.S. (12 Wheat.) 19, 30 (1827); *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 43-44 (1849). Indeed, while Congress permits the states to maintain a voluntary defense force immune from federal conscription, 32 U.S.C. § 109(c), that part of the militia organized into the National Guard is under plenary federal control, such that a state's governor may not object to the President's training of Guard units overseas. *Perpich*, 496 U.S. 334. Petitioners' Second Amendment theory defies each of these precedents.

Petitioners are not the first to make this mistake. In 1863, Pennsylvania's Supreme Court enjoined the conscription of Union soldiers, theorizing that the Civil War draft violated the state's militia powers. *Kneedler* v. *Lane*, 45 Pa. 238, 259 (1863). One Justice invoked Petitioners' view of the Second Amendment to support the decision. *Id.* at 271-72 (Thompson, J.,

concurring). The court quickly reversed itself. *Id.* at 295. If Petitioners' derision of the individual right to arms as proposing treason or insurrection, Pet. Br. 15 n.3, questions the legitimacy of America's Revolution, their view of the Second Amendment's impact on the allocation of federal-state power would threaten the Union itself.

Petitioners' collective-purpose interpretation is also at odds with this Court's only direct Second Amendment opinion in *Miller*. In examining whether Miller had a right to possess his sawed-off shotgun, this Court never asked whether Miller was part of any state-authorized military organization. "Had the lack of [militia] membership or engagement been a ground of the decision in *Miller*, the Court's opinion would obviously have made mention of it. But it did not." *United States* v. *Emerson*, 270 F.3d 203, 224 (5th Cir. 2001) (footnote omitted). Indeed, the government advanced the collectivist theory as its first argument in *Miller*, PA40a, but the Court ignored it. The Court asked only whether the gun at issue was of a type Miller would be constitutionally privileged in possessing.

II. WASHINGTON, D.C.'S HANDGUN BANS ARE UNCONSTITUTIONAL.

To determine whether a particular weapon falls within the Second Amendment's protection, the Court need not apply any particular standard of review. The question is categorical, identical in kind to the questions courts routinely answer in determining what constitutes "religion" or "speech" under the First Amendment, or what constitutes a "search" or "seizure" under the Fourth.

Answering such questions is often a requisite first step in evaluating the constitutionality of governmental action. Only if protected speech is found will a court examine the permissibility of a particular burden on it; only if an officer has searched or seized a citizen will the reasonableness of the action be examined.

With respect to Petitioners' handgun ban, answering the threshold question resolves the case. If the possession of handguns is protected by the Second Amendment, handguns cannot be completely banned, however else the government may regulate their possession and use.[13] The fact that a type of arm is

[13] Petitioners' claim that no "per se" categorical restrictions exist within the Bill of Rights, Pet. Br. at 44, is false. Cf. *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Ashcroft* v. *Free Speech Coalition*, 535 U.S. 234, 244 (2002) ("a law imposing criminal penalties on protected speech is a stark example of speech suppression"); cf. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 127 (1991)

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protected by the Second Amendment defeats Petitioners' attempt to position this case as a "standard of review" question, such that the government may ban any arms it deems too dangerous even if such arms are traditionally used for lawful civilian purposes. After all, Petitioners can conjure a rationale for banning *any* "arm."[14] Certainly the government may ban arms that are not protected by the Second Amendment and regulate those that are, but the threshold question of whether an arm falls into the former or latter category cannot be avoided.

Nor may the government justify a ban on a particular firearm simply by claiming to allow the possession of others. While it is a dubious proposition that Petitioners allow individuals *any* firearms for private home use, the government's compliance with the Constitution by allowing rifles would not permit the government to violate the Constitution by banning handguns—any more than the government could prohibit books because it permits newspapers and considers them an "adequate substitute." The court

(Kennedy, J., concurring in judgment) (noting that "traditional legal categories" are "preferable to . . . ad hoc balancing").

[14] Indeed, until 1993, the city even banned mace. Now legal, "self-defense sprays" must be registered with the police. D.C. Code § 7-2502.14.

below properly termed this argument "frivolous." PA53a.[15]

The test for whether a particular weapon is or is not within the Second Amendment's protection was established in *Miller*. For all the claims that the D.C. Circuit failed to follow *Miller*, it is Petitioners and their amici—including the Solicitor General—who reject that precedent.

Miller's conceptual framework is plain. First, this Court inquires whether a weapon "at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia," meaning that the weapon is "any part of the ordinary military equipment or that its use could contribute to the common defense." *Miller*, 307 U.S. at 178. Second, the Court explained that when fulfilling the Second Amendment's militia rationale, people "were expected to appear bearing arms supplied by themselves and of the kind in common use at the time." *Id.* at 179. The assumption is that at least some arms of the kind people would use for ordinary civilian purposes—arms in "common use at the time"—would also be the arms used in militia service. This is fully consistent with the historical record, *supra* at 29.[16] It is also

[15] Petitioners implicitly concede the point in admitting that "banning all gun possession"—presumably without impacting the possession of other "arms"—would violate the Second Amendment. Pet. Br. 43.

[16] *Miller*'s earlier use of "at this time," *id.* at 178, makes clear that the relevant time period is the present, not 1791. The

(Continued on following page)

consistent with the understanding of "arms" at the time. "In law, arms are any thing which a man takes in his hand in anger, to strike or assault another." WEBSTER'S DICTIONARY, *supra* at 11 ("Arms").

In sum, an "arm" is protected under the *Miller* test if it is of the type that (1) civilians would use, such that they could be expected to possess it for ordinary lawful purposes (in the absence of, or even despite, legal prohibition), and (2) would be useful in militia service. The latter requirement may be in tension with the pre-existing right to keep and bear arms, which is not always related to militia service.[17] In that respect, *Miller* may be in tension with itself. There is no justification to limit the Second Amendment's protection to arms that have military utility.

Framers clearly intended to preserve people's ability to act as militia, and would not have expected future generations to have obsolete weapons in "common use" any more than the Framers would have expected to secure only 18th-century religions or media. The lineal descendants of personal arms of the type in predictable civilian usage are thus protected, but modern weapons of the type that serve no ordinary civilian function are not.

[17] "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." PA43a (emphasis in original).

But as a practical matter, the second prong adds nothing to the analysis in virtually all cases, including this one. Categorically, firearms "in common use" for civilian purposes—rifles, shotguns, and handguns—are plainly "part of the ordinary military equipment," and their "use could contribute to the common defense." *Miller*, 307 U.S. at 178. The D.C. Circuit's opinion is thus compatible with *Miller*, because handguns meet both *Miller* criteria. Arms that may have great military utility but which are inappropriate for civilian purposes are still sensibly excluded from the Second Amendment's protection, as civilians would not commonly use them.

The *Miller* test for whether a particular arm is constitutionally protected is hardly "unworkable." Pet. Br. 44. To the contrary, *Miller* presents a straightforward constitutional question, lending itself to practical application far more readily than questions of whether a search is "reasonable" under the Fourth Amendment, or at what point "government entanglement" with religion becomes so "excessive" as to violate the First Amendment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 613 (1971). To the extent *Miller* can be read as establishing a "lineal descent" rule, this Court already applies precisely that framework in its Seventh Amendment jurisprudence. For example, parties in discrimination lawsuits are not denied access to civil juries simply because discrimination claims were unknown in 1791. *Curtis* v. *Loether*, 415 U.S. 189, 193-94 (1974).

In cases of unusual or exotic arms, or where the court lacks familiarity with a particular weapon, e.g., *Miller*, 307 U.S. at 178, courts may wish to receive evidence regarding whether a weapon has ordinary civilian application and can be traced to a form historically used by militia forces. But in most cases, as here, the answer will be clear.

No court has questioned that a handgun, generally, is an arm "of the kind in common use" by the public and is either "ordinary military equipment" or otherwise useful in a manner that "could contribute to the common defense." *Miller*, 307 U.S. at 178. As below, the Fifth Circuit experienced no difficulty applying the *Miller* test to handguns. *Emerson*, 270 F.3d at 227 n.22. Even courts hostile to the Second Amendment's individual nature likewise accept that handguns are the type of arms referenced in the Amendment. In adopting the collective-rights theory "without further analysis or citation of authority," *Emerson*, 270 F.3d at 224, the First Circuit conceded that a revolver would fall within the *Miller* test's ambit, as a handgun "may be capable of military use [and] familiarity with it might be regarded as of value in training a person to use a comparable weapon of military type and caliber." *Cases* v. *United States*, 131 F.2d 916, 922-23 (1st Cir. 1942); see also *Quilici* v. *Village of Morton Grove*, 695 F.2d 261, 266 (7th Cir. 1982) ("Handguns are undisputedly the type of arms commonly used for recreation or the protection of person and property") (internal citations omitted).

Indeed, this Court has not required any evidentiary hearing to determine that "pistols . . . may be supposed to be needed occasionally for self-defence." *Patsone* v. *Pennsylvania*, 232 U.S. 138, 143 (1914). That handguns are appropriate tools for lawful self-defense and are a class of weapon "of the kind in common use," *Miller*, 307 U.S. at 179, has been within the judicial notice of this Court and lower federal courts for nearly a century. Nearly forty percent of firearms produced today are handguns. See BATFE Report, http://www.atf.treas.gov/firearms/stats/afmer/afmer2006.pdf.

Congress's specific description of pistols as militia weapons in the Second Militia Act, so soon following passage of the Second Amendment, offers conclusive proof that handguns are within the Second Amendment's protection. PA50a-51a. In defining handguns as militia weapons, Congress broke no new ground. The Continental Congress likewise reported pistols as acceptable militia weapons, 25 JOURNALS OF THE CONTINENTAL CONGRESS 741-42 (1922), as had the various states. See, e.g., ACTS AND LAWS OF THE STATE OF CONNECTICUT 150 (1784); STATUTES OF THE STATE OF NORTH CAROLINA 592 (1791).

Eighteenth-century American governments recognized handguns as militia arms not only due to their military utility, but also owing to the deep roots of civilian handgun ownership from the dawn of the Nation's settlement. Thirteen percent of firearms listed in the Plymouth Colony's probate records from the 1670s were pistols, "and 54.5 percent of lead projectiles recovered from Plymouth Colony digs were

pistol ammunition." Clayton Cramer and Joseph Olson, *Pistols, Crime, and Public Safety in Early America*, WILLAMETTE L. REV. (forthcoming 2008), http://ssrn.com/abstract=1081403 (citation omitted). Two weeks before the Boston Tea Party, John Andrews observed "'twould puzzle any person to purchase a pair of p___ls [pistols] in town, as they are all bought up, with a full determination to repell force by force." *Letter of December 1, 1773* in LETTERS OF JOHN ANDREWS, ESQ., OF BOSTON, 1772-1776, 12 (Winthrop Sargent ed., 1866).

Some of those pistols might have been purchased by the Tea Party Indians, "each arm'd with a hatchet or axe, and pair pistoles." *Id. Letter of December 18, 1773.* The 634 pistols confiscated by General Gage constituted a full 18.25% of the firearms whose seizure the Continental Congress declared a *causus belli*.

Petitioners and their amici greatly overstate our Nation's history of handgun regulation. Washington, D.C.'s complete handgun ban was the first such prohibition on American soil since the Revolution. The fact that "never before in the more than two hundred years of our Republic has a gun law been struck down by the federal courts as a violation of the Second Amendment," Brady Br. 29, is a testament to the extreme nature of Petitioners' enactments. Notably, Petitioners' state amici do not defend or endorse a total handgun ban, which none of them maintains. New York Br. 1, 2.

The oft-cited case of *Aymette* v. *State*, 21 Tenn. 154 (1840), upheld prohibition of carrying certain

knives and daggers, *not* guns, as suggested by some. E.g., ABA Br. 9; Chicago Br. 14 n.15, 32; LDF Br. 15-16.[18] When Tennessee's Supreme Court considered the constitutionality of banning (as opposed to regulating) the carrying of handguns, it struck down the law. *State* v. *Andrews*, 50 Tenn. 165 (1871). On occasion, the carrying of guns has been *required* in this country. See, e.g., 19 COLONIAL RECORDS OF THE STATE OF GEORGIA, PART 1, 138 (1911) (churchgoer "shall carry with him a gun, or a pair of pistols, in good order and fit for service, with at least six charges of gun-powder and ball, and shall take the said gun or pistols with him to the pew or seat").

Various briefs invoke Georgia's 1837 ban on the sale of certain pistols, Appleseed Br. 13; Law Professors Br. 18; Chicago Br. 14, but none mentions that the act was struck down—on Second Amendment grounds—in an as-applied challenge by a man who openly wore a prohibited pistol. *Nunn* v. *State*, 1 Ga. 243 (1846). Oakland does not ban all handguns, LDF Br. 20, a measure that would be impermissible under California law. *Fiscal* v. *City and County of San Francisco*, ___ P.3d ___, 2008 Cal. App. LEXIS 21 (Cal. Ct. App. Jan. 9, 2008). The cited measure addressed a specific type of handgun thought unsuitable for legitimate purposes. Major Cities Br. 9.

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[18] *Aymette* expressly upheld the "unqualified right to keep" arms. *Aymette*, 21 Tenn. at 160.

No trial is required to establish that handguns continue to be in common use for legitimate purposes and that their possession can contribute to the common defense. Handguns are therefore protected arms under *Miller*, and the right to "keep" them "shall not be infringed." U.S. Const. amend. II.

That the "keeping" at issue here relates to the home is significant. Even obscene materials not otherwise protected by the First Amendment may be viewed in the privacy of one's home. *Stanley* v. *Georgia*, 394 U.S. 557 (1969). The exercise of Second Amendment rights within the home is entitled to no less protection. "The government bears a heavy burden when attempting to justify an expansion, as in gun control, of the 'limited circumstances' in which intrusion into the privacy of a home is permitted." *Quilici*, 695 F.2d at 280 (Coffey, J., dissenting).

* * *

The Solicitor General greatly overstates the D.C. Circuit decision's implications for laws governing machineguns. Courts understand that the decision below striking down the handgun bans "address[es] only the possession of handguns, not machine guns." *Somerville* v. *United States*, 2008 U.S. Dist. LEXIS 412 at *4 (W.D. Mich. Jan. 3, 2008). And unlike the laws at issue here banning handguns,[19] federal law *does not* ban the private possession of machineguns,

[19] This case does not address Petitioners' machinegun ban, D.C. Code § 22-4514(a).

of which approximately 120,000 are in lawful civilian possession. Bureau of Justice Statistics, *Selected Findings: Guns Used in Crime* 4 (July 1995), http://www.ojp.usdoj.gov/bjs/pub/pdf/guic.pdf (240,000 registered machineguns); Gary Kleck, TARGETING GUNS: FIREARMS AND THEIR CONTROL 108 (1997) (half of registered machineguns are in civilian use) (citing BATF, *Statistics Listing of Registered Weapons*, Apr. 19, 1989).[20]

"ATF's interest is not in determining why a law-abiding individual wishes to possess a certain firearm or device, but rather in ensuring that such objects are not criminally misused." Testimony of Stephen Higgins, BATF Director, in *Hearings on H.R. 641 and Related Bills, House Judiciary Committee Subcommittee on Crime*, 98th Congress 111 (1986). To that end, federal law subjects machinegun possession to the same stringent regulatory regime considered in *Miller*. 26 U.S.C. § 5801, *et seq.*; 27 C.F.R. §§ 478.98, 479.84, *et seq*. These regulations work: "it is highly unusual—and in fact, it is very, very rare," that legally owned machineguns are criminally misused. Higgins, *supra*, at 117.

Had Miller possessed a machinegun, this Court would presumably have had little trouble finding that the weapon had militia utility. The Court might

[20] Title 18 U.S.C. § 922(o) prohibits the civilian transfer or possession of machineguns not lawfully possessed by May 19, 1986, exempting previously authorized machineguns.

nonetheless have held that machineguns fall outside the scope of the Second Amendment's protection as they were not "in common use at the time" such that civilians could be expected to have possessed them for ordinary lawful purposes. *Miller*, 307 U.S. at 179.

And even if this Court had accepted that some machineguns are protected by the Second Amendment, their current tight regulation under federal law could well pass any level of scrutiny devised by this Court for the regulation of protected arms. Of course, Respondent's simple revolver is no machinegun, and the types of restrictions imposed by the National Firearms Act—including an FBI background check, $200 tax, authorization from one's local chief law enforcement officer, and a statement of "reasonable necessity"—would be inappropriate to apply to a common handgun.

But this case is not about what regulations ought to govern machineguns. The question is whether the arms at issue—including handguns—are protected at all. They are.

III. WASHINGTON, D.C.'S FUNCTIONAL FIREARMS BAN IS UNCONSTITUTIONAL.

Petitioners concede that if the Second Amendment protects an individual right, "a law that purported to eliminate that right—for instance, by banning all gun possession, or allowing only a firearm that was so ineffective that the law effected functional disarmament," would be unconstitutional. Pet.

Br. 43-44.[21] The only dispute is whether D.C. Code section 7-2507.02 "effects functional disarmament."

Determining whether section 7-2507.02 effects functional disarmament requires no fact-finding. And as Petitioners concede, a functional firearms ban would be unconstitutional "whatever [a Legislature's] reasons" might be for enacting it. Pet. Br. 43. Making matters easier, Petitioners agree that section 7-2507.02 "would be unreasonable" if it offered no provision for home self-defense. Pet. Br. 56.

The statutory language is unequivocal: without exception, individuals may never possess a functional firearm at home. If Petitioners had wished to create an exception for home self-defense, they knew how to do so. Section 7-2507.02 permits functional firearms "at [a] place of business, or while being used for lawful recreational purposes." Petitioners cannot "turn a few passages in the legislative history that are partially contrary to the statutory language into a justification for this court to rewrite the statute," *Chem. Mfrs. Ass'n* v. *EPA*, 673 F.2d 507, 514 (D.C. Cir. 1982), and thereby add a saving exemption for home self-defense. "[T]his court will not read into a statute

[21] Cf. *McMann* v. *Richardson*, 397 U.S. 759, 771 n.14 (1970) ("the right to counsel is the right to the effective assistance of counsel") (citation omitted); *Planned Parenthood* v. *Casey*, 505 U.S. 833, 878 (1992) (O'Connor, Kennedy, and Souter, JJ.) ("undue burden exists" if law's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability").

language that is clearly not there. . . . The express inclusion of one (or more) thing(s) implies the exclusion of other things from similar treatment." *Castellon* v. *United States*, 864 A.2d 141, 148-49 (D.C. 2004) (internal quotations and citations omitted).

Indeed, the city successfully asserted a reason for "distinguish[ing] between a home and a business establishment in the Act." *McIntosh* v. *Washington*, 395 A.2d 744, 755 (D.C. 1978). Petitioners cannot now be heard to argue for judicial alteration of the home-business distinction, especially as they can offer no guidelines as to when, exactly, a citizen might render her firearm operational to respond to a perceived threat. Resp. to Pet. for Cert. at 19-21.

Respondent would not quarrel with a true "safe storage" law, properly crafted to address Petitioners' stated concerns. But as *McIntosh* reveals, the city said what it meant and meant what it said in prohibiting armed self-defense inside private homes. The law, as written and defended by the city, is unconstitutional.

IV. THE STANDARD OF REVIEW IN SECOND AMENDMENT CASES IS STRICT SCRUTINY.

Although Petitioners "do[ ] not suggest that gun regulations should be subject to mere rational basis review," Pet. Br. 43, the true nature of their proposed "reasonableness" standard is exposed by their claims

that the Nation's most draconian gun laws are constitutional. The Solicitor General's supposed "heightened" scrutiny standard is scarcely better, demanding that judges weigh conflicting and disputable scientific claims to determine the constitutionality of disarming law-abiding individuals, apparently on an as-applied basis.[22]

As explained *supra* and accepted by the court below, this case does not require the application of any standard of review, because it involves a ban on a class of weapons protected under *Miller*, and a statutory interpretation dispute concerning whether a particular provision enacts a functional firearms ban.

Nonetheless, should the Court venture to comment on the standard of review governing the regulation of Second Amendment rights, it should do so consistent with well-established precedent. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938); cf. *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 33 (1973) (fundamental rights are those

[22] The Solicitor General's "reasonable alternative" test would demand that individuals wishing to exercise a fundamental constitutional right demonstrate their need to do so, subject to the skeptical review of officials hostile to the right. For example, a would-be handgun owner might have to show that she was physically incapable of using a rifle or shotgun. The *Miller* test anticipates this problem: Because handguns are in common use they are constitutionally protected, meaning an individual has the right to choose a handgun as the type of weapon she would keep at home for lawful purposes.

"explicitly or implicitly guaranteed by the Constitution"). Fundamental rights are those "so rooted in the traditions and conscience of our people as to be ranked as fundamental [and] implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed." *Washington* v. *Glucksberg*, 521 U.S. 702, 721 (1997) (citations and quotation marks omitted). Justice Story's "palladium of the liberties" ought to qualify, whether the Second Amendment entails the right to defend one's life, the right to resist tyrannical usurpation of constitutional authority, or even, as Petitioners would have it, a right guaranteeing states freedom and security. See Eugene Volokh, *Necessary to the Security of a Free State*, 83 NOTRE DAME L. REV. 1 (2007).

Today the Court is told that private gun ownership is too dangerous to be counted among first-tier enumerated rights. Americans who suffered British rule might disagree. BOSTON GAZETTE, Dec. 5, 1774, at 4, col. 1 ("But what most irritated the People next to seizing their Arms and Ammunition, was the apprehending [of] six gentlemen . . . who had assembled a Town meeting. . . ."). As our Nation continues to face the scourges of crime and terrorism, no provision of the Bill of Rights would be immune from demands that perceived governmental necessity overwhelm the very standard by which enumerated rights are secured. Exorbitant claims of authority to deny basic constitutional rights are not unknown. See, e.g., *Hamdi* v. *Rumsfeld*, 542 U.S. 507 (2004).

Demoting the Second Amendment to some lower tier of enumerated rights is unwarranted. The Second Amendment has the distinction of securing the most fundamental rights of all—enabling the preservation of one's life and guaranteeing our liberty. These are not second-class concerns. Yet preservation of human life is also the government's chief regulatory interest in arms. Constitutional review of gun laws thus finds both individual and governmental interests at their zenith.

If a gun law is to be upheld, it should be upheld precisely because the government has a compelling interest in its regulatory impact. Because the governmental interest is so strong in this arena, applying the ordinary level of strict scrutiny for enumerated rights to gun regulations will not result in wholesale abandonment of the country's basic firearm safety laws. Strict scrutiny is context-sensitive and is "far from the inevitably deadly test imagined by the Gunther myth." Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts*, 59 VANDERBILT L. REV. 793, 795 (2006). The prohibition on possession of guns by felons, 18 U.S.C. § 922(g), and the requirement that gun buyers undergo a background check for history of criminal activity or mental illness, 18 U.S.C. § 922(t), would easily survive strict scrutiny.

Searching for a lower level of review, the Solicitor General would look to "the practical impact of the challenged restriction," U.S. Br. 8, 24, as courts do at

the outset of examining the constitutionality of election regulations. But voting is a poor analog to gun possession. Each exercise of the right to vote burdens state resources and implicates a direct interest in operating an election, which states have an express grant of authority to regulate. U.S. CONST. art. I, § 4, cl. 1.

And not all election laws are subject to the government's endorsed level of scrutiny. If the Court finds the burden to be "severe," then strict scrutiny is applied. *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick* v. *Takushi*, 504 U.S. 428, 434 (1992). The Solicitor General assumes that no gun regulations—including those at issue here—can impose "severe" burdens on Second Amendment rights. But no such presumption exists in the election field. Considering the severity of the challenged gun laws, the correct standard, per the Solicitor General's precedent, would be strict scrutiny.

The government's fears of a meaningful Second Amendment standard are unfounded. Seven years ago, the Fifth Circuit announced a version of strict scrutiny to evaluate gun laws under the Second Amendment, permitting regulations that are "limited, narrowly tailored specific exceptions or restrictions for particular cases that are reasonable and not inconsistent with the right of Americans generally to individually keep and bear their private arms as historically understood in this country." *Emerson*, 270 F.3d at 261; *United States* v. *Patterson*, 431 F.3d 832, 836 (5th Cir. 2005) (applying *Emerson*, restrictions

are "limited" and "narrowly tailored" but "[p]rohibiting unlawful drug users from possessing firearms is not inconsistent with the right to bear arms guaranteed by the Second Amendment"). Large cities in the Fifth Circuit remain generally more peaceful than Washington, D.C.

The careless handling of social science by Petitioners and their amici underscores the impropriety of adopting anything but the highest level of scrutiny for regulations implicating Second Amendment rights. The matter is only peripheral to the case, but some remarks are in order.

The ABA asserts that "the most notable risk factor for mortality among abused women is the presence of a gun," and argues that "[h]ow to weigh these risks against the desire to own a gun for self defense is a policy judgment, not a constitutional one." ABA Br. 21 n.8 (citing Jane Koziol-McLain, et al., *Risk Factors for Femicide-Suicide in Abusive Relationships: Results From a Multisite Case Control Study*, in ASSESSING DANGEROUSNESS: VIOLENCE BY BATTERERS AND CHILD ABUSERS 143 (J.C. Campbell ed., 2d ed. 2007)) (other citation omitted). Putting aside the likelihood that the Constitution embodies at least some policy choices the ABA finds uncongenial, the cited study does not support the conclusion. The study reports an adjusted odds ratio of 13.0 for "abuser gun access," not *victim* gun access. The study

does not address, much less refute, "the desire to own a gun for self defense."[23]

Petitioners also persist in relying upon a deeply flawed study claiming their handgun ban reduced deaths. Colin Loftin, et al., *Effects of Restrictive Licensing of Handguns on Homicide and Suicide in the District of Columbia*, 325 NEW ENG. J. MED. 23 (1991).[24] Putting aside that correlation does not equal causation, even the correlative relationship is dubious. The study measures death with raw numbers rather than rates, thus ignoring the city's dramatic depopulation through the studied period. Between the two ten-year periods examined in the study, Washington's average annual population declined 15%. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACTS OF THE UNITED STATES. When one examines homicide *rates*, the supposed benefits disappear. The suicide prevention benefits are likewise overstated. Moreover, the study ends in 1988, a year in which the murder rate doubled pre-ban levels, and one year before a severe crime increase. In 1991, the peak year, the homicide rate tripled pre-ban levels. FBI UCR Data compiled by Rothstein Catalog on

[23] A different study indicates that women living alone with a gun face a statistically insignificant odds ratio for increased femicide of 0.22. Jacquelyn Campbell, et al., *Risk Factors for Femicide in Abusive Relationships*, 93 AM. J. PUB. HEALTH 1089, 1090-92 (2003).

[24] The study constituted the bulk of Petitioners' evidence on summary judgment.

Disaster Recovery and The Disaster Center, available at http://www.disastercenter.com/crime/dccrime.htm.

Gun crimes, suicides, and accidents were not unknown in early America. E.g., Cramer & Olson, *Pistols*, *supra*. The same newspaper containing admonishments from Continental Congress representatives that "It is the Right of every English Subject to be prepared with Weapons for his Defense," N.C. GAZETTE (NEWBURN), July 7, 1775, at 2, col. 3, also reported that "a Demoniac" shot three and wounded one with a sword before being shot by others. *Id.* at 3, col. 1.

Petitioners' sophistic "reasonableness" arguments were likewise familiar to the Framers—and rejected. Colonial Americans were conversant with the works of Cesare Beccaria, whose 1764 treatise ON CRIMES AND PUNISHMENTS founded the science of criminology. John Adams cited Beccaria to open his argument at the Boston Massacre trial. 3 LEGAL PAPERS OF JOHN ADAMS 242. In a passage Jefferson copied into his "Commonplace Book" of wise excerpts from philosophers and poets, Beccaria decried the "False Utility" of laws that

> disarm those only who are neither inclined nor determined to commit crimes. Can it be supposed that those who have the courage to violate the most sacred laws of humanity, the most important of the code . . . will respect the less important and arbitrary ones, which can be violated with ease and impunity, and

> which, if strictly obeyed, would put an end to personal liberty. . . . Such laws make things worse for the assaulted and better for the assailants. . . . [These] laws [are] not preventive but fearful of crimes, produced by the tumultuous impression of a few isolated facts, and not by thoughtful consideration of the inconveniences and advantages of a universal decree. . . .

Thomas Jefferson, COMMONPLACE BOOK 314 (1926).

"If it be thought that the privilege is outmoded in the conditions of this modern age, then the thing to do is to take it out of the Constitution, not to whittle it down by the subtle encroachments of judicial opinion." *Ullman* v. *United States*, 350 U.S. 422, 427-28 (1956) (citation omitted).

Petitioners plainly disagree with the Framers' Second Amendment policy choices. Petitioners' remedy must be found within the Constitution's Fifth Article, not with linguistic sophistries or an anemic standard of review that would deprive the right of any real force.

V. THE GOVERNMENT OF THE NATION'S CAPITAL MUST OBEY THE CONSTITUTION.

The Constitution, and its Bill of Rights—including the Second Amendment—are the supreme law of the land. U.S. CONST. art. VI, cl. 1. "That the Constitution is in effect . . . in the District has been so often

determined in the affirmative that it is no longer an open question." *O'Donoghue* v. *United States*, 289 U.S. 516, 541 (1933).

Petitioners' legislative authority is not above the Constitution, but derived from it; a delegation of Congress's authority to legislate for the District. U.S. CONST. art. I, § 8, cl. 17. That power "is plenary; but it does not . . . authorize a denial to the inhabitants of any constitutional guaranty not plainly inapplicable." *O'Donoghue*, 289 U.S. at 539. "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." *Id.* at 541 (citation omitted).

Accordingly, Congress can exercise general police powers within the District, "so long as it does not contravene any provision of the Constitution of the United States." *Palmore* v. *United States*, 411 U.S. 389, 397 (1973) (citation omitted). For example, Congress may operate public schools in the District of Columbia, a power otherwise reserved to the states. But such schools cannot be segregated. *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

Indeed, because the Constitution with its Bill of Rights applies directly to the federal government, of which the city is a creature, Petitioners are bound to respect even those rights that are not incorporated as against the states through the Fourteenth Amendment. See *Pernell* v. *Southall Realty*, 416 U.S. 363 (1974) (Seventh Amendment right to civil jury trial);

United States v. *Moreland*, 258 U.S. 433 (1922) (Fifth Amendment right to grand jury indictment).[25] Even were the pre-incorporation holding of *Presser* v. *Illinois*, 116 U.S. 252 (1886) still good law, which is doubtful,[26] the fact remains that the District of Columbia is not a state. *Hepburn* v. *Ellzey*, 6 U.S. (2 Cranch) 445 (1805). The question of incorporation is therefore not before the Court.

Nothing in Petitioners' precedent suggests that the District is free to ignore constitutional restrictions. The judges of the District's local court system do not merit Article III protection because they are Article I judges. D.C. Code § 11-101; *Palmore*, 411 U.S. at 398. When the District's judges were Article III judges, they enjoyed Article III protection. *O'Donoghue*, *supra* (Congress could not reduce pay of District of Columbia judges). And pre-Sixteenth Amendment tax limitations did not apply within the District of Columbia because Article I's District Clause grants Congress the broad power of "exclusive Legislation" for the city, including the power to tax "in like manner as the legislature of a State may tax

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[25] Petitioners distinguish the Second Amendment as relating only to federal authority over the states, rather than securing individual rights; but that argument assumes their conclusion. Pet. Br. 38.

[26] As Judge Reinhardt recognizes, "*Presser* rest[s] on a principle that is now thoroughly discredited," *Silveira* v. *Lockyer*, 312 F.3d 1052, 1067 n.17 (9th Cir. 2002) (citing *Emerson*, 270 F.3d at 221 n.13).

the people of a State for State purposes." *Gibbons* v. *District of Columbia*, 116 U.S. 404, 407 (1886).

Washington was not planned as a "Forbidden City" in which federal officials would be shielded from the hazards of interaction with the otherwise-free people of the United States. Quite the contrary:

> It is important to bear constantly in mind that the District was made up of portions of two of the original states of the Union, and was not taken out of the Union by the cession. Prior thereto its inhabitants were entitled to all the rights, guaranties, and immunities of the Constitution. . . . [I]t is not reasonable to assume that the cession stripped them of these rights. . . .

O'Donoghue, 289 U.S. at 540.

Finally, there is no logic to Petitioners' extraordinary claim that gun control "is the most important power of self-protection" for the seat of government. Pet. Br. 38. The District Clause, after all, allows Congress to "[erect] Forts, Magazines, Arsenals, dock-Yards and other needful Buildings." U.S. CONST. art. I, § 8, cl. 17. Congress surely has the power to regulate firearms in Washington; but if Congress felt that disarming Americans at home were necessary for its security, it might have attempted to do so in the first 177 years of the city's service as the seat of government. As recent history demonstrates, those who would attack our capital are hardly deterred by

Petitioners' ban on handguns and functional firearms in the home.

CONCLUSION

The decision below is correct with respect to the merits of Respondent's substantive claims, and should be affirmed in that regard.

Respectfully submitted,

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