

No. 97-290

In the
Supreme Court of the United States

DISTRICT OF COLUMBIA
AND MAYOR ADRIAN FENTY,

Petitioners,

v.

DICK ANTHONY HELLER

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
For the District of Columbia Circuit**

***AMICUS CURIAE* BRIEF OF THE
AMERICAN CIVIL RIGHTS UNION
IN SUPPORT OF RESPONDENTS**

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INTEREST OF THE AMICUS CURIAE¹

The American Civil Rights Union (ACRU) is a non-partisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or fit a particular ideology. It was founded in 1998 by long time Reagan policy advisor and architect of modern welfare reform Robert B. Carleson, and since then has filed *amicus curiae* briefs on constitutional law issues in cases all over the country.

Those setting the organization's policy as members of the Policy Board are former U.S. Attorney General Edwin Meese III; former Federal Appeals Court Judge and Solicitor General Robert H. Bork; Pepperdine Law School Dean Kenneth W. Starr; former Assistant Attorney General for Civil Rights William Bradford Reynolds; Walter E. Williams, John M. Olin Distinguished Professor of Economics at George Mason University; former Harvard University Professor, Dr. James Q. Wilson; Ambassador Curtin Winsor, Jr.; and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we want to ensure that all constitutional rights are fully protected, not just those that may advance a particular ideology. That includes the clearly stated right of the people to keep and bear arms under the Second Amendment..

All parties consented to the filing of this brief under blanket consents filed with the Court, and were timely notified.

¹ Peter J. Ferrara authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored the brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

We urge the Court to decide this one case presently before it, with its own particular set of facts, and to reject the invitation of the Solicitor General to write a philosophical treatise attempting to resolve all future Second Amendment cases as well. If the Second Amendment means anything at all, then the challenged prohibitions on gun ownership and use in the District of Columbia are plainly unconstitutional, as they prohibit the use of handguns for self defense within the home, and effectively prohibit such use of other firearms as well. In reaching that result, this Court would establish that the Second Amendment does, indeed, protect an individual right to keep and bear arms. That decision can, just as the decision below did, leave plenty of flexibility and scope to deal with the potential problems raised by the Solicitor General that may arise in future cases. We respectfully submit that this Court should let the standard that would apply to those cases arise out of those cases, and the particular facts they present.

Of course, we also urge the Court to reject the invitation of Petitioners to read a fundamental Constitutional right stated in plain English in the text out of the Constitution altogether. The American people can read, and they can see that unlike some of the other rights found by the Court on the basis of complex reasoning, the Constitutional text forthrightly promises that “the right of the people to keep and bear arms shall not be infringed.” No amount of artful linguistic acrobatics or fanciful historical tales can rub those plain words out of the text. We respectfully submit that the rights clearly stated in The Bill of Rights should be read broadly and vigorously enforced, rather than minimized to suit a particular ideology.

STATEMENT OF THE CASE

Dick Anthony Heller is a special police officer working in the District of Columbia assigned to protect the federal judiciary as a guard at the Federal Judicial Center. PA4a. He carries a handgun while serving in that capacity during his work day. Id. He wants to keep a handgun in his home in the District of Columbia for self defense at night. Id. He applied for a registration certificate for such a handgun, but his application was denied by the District, which explicitly cited D.C. Code Sect. 7-2502.02 in its denial. Id.

That Section entitled “Registration of Certain Firearms Prohibited” states that “A registration certificate shall not be issued for a...Pistol” not validly registered before September 24, 1976. Without such a registration certificate, it is illegal to possess a handgun anywhere, including within the home.

D.C. Code Section 22-4504(a) provides that no person may carry a handgun within the District of Columbia, even within their own home, from room to room, without a license. Such licenses will not be issued either. Bsharah v. United States, 646 A.2d 993 (D.C. 1994)(“It is common knowledge...that with very rare exceptions licenses to carry pistols have not been issued within the District of Columbia for many years and are virtually unobtainable.” 646 A.2d at 996 n.12).

These two D.C. Code Sections ban the possession or use of handguns within the District outright, for self-defense within the home, or for any other purpose.

In addition, D.C. Code Section 7-2507.2 states,

E]ach registrant shall keep any firearm in his possession unloaded and disassembled or bound by a trigger lock or similar device unless such firearm is

kept at his place of business, or while being used for lawful recreational purposes within the District of Columbia.

So even those firearms that can be registered, such as rifles and shotguns, may not be kept in a functional state where they could be used within the home for self-defense. Note that the Section says that these rifles and shotguns could be unlocked, assembled, and loaded for protection of businesses and for recreational purposes, but it says nothing about self-defense within the home. On the face of the statute, therefore, maintaining the functionality of these firearms within the home for self-defense is illegal.

These provisions amount to the strictest gun control laws in the country. Only one other major city, Chicago, bans handguns outright. No state does. Nor does any other state or city prohibit other firearms from being kept in a functional state, for self-defense within the home, or for other lawful purposes.

Heller and 5 other original plaintiffs sued the District claiming that these statutes violated their rights under the Second Amendment to the U.S. Constitution. They argued that under that Amendment they have an individual right to own, possess and use functional firearms readily available for self-defense within the home. The District Court found that all 6 plaintiffs had standing, but that they had no individual right to keep and bear arms under the Second Amendment.

The D.C. Circuit Court of Appeals reversed. It held that only Heller had standing among the original plaintiffs because only he filed for a registration certificate and was denied. But it held that Heller did have an individual right to keep and bear arms under the Second Amendment that was violated by the D.C. Code Sections cited above. Therefore,

the Circuit Court struck down these Sections as unconstitutional.

This Court granted certiorari.

SUMMARY OF ARGUMENT

As a matter of plain English, the text of the Second Amendment protects an individual right to keep and bear arms. The language in the prefatory clause by its own terms does not nullify or place a limit upon the clearly stated individual right in the second clause.

There is no logical alternative interpretation of the Amendment. The collective rights interpretation holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. But that interpretation contradicts not only the language of the Second Amendment, but the language of the Militia Clauses in Article I, Section 8, Article 1, Section 10, and Article II, Section 2 of the Constitution.

Alternatively, Petitioners argue that the Second Amendment provides only for an individual right of those serving in the militia to keep and bear arms for service in the militia. But if that was what the Amendment is supposed to mean, it would have been written as

A well-regulated militia being necessary to the security of a free state, the right of *those who serve in the militia* to keep and bear arms *for use in the militia* shall not be infringed.

But the actual Amendment does not contain any such language limiting the right to the militia. Petitioners are asking the Court to read such language into the Amendment.

Petitioners weave a fanciful tale regarding the history behind the Second Amendment, concluding that the Amendment was a great victory for the states in granting them the right to prevent the Federal government from disarming their militias. But the history shows that the Anti-Federalists completely failed to win any constitutional protection specifically directed to the state militias and their armament, as reflected in the Militia Clauses and other provisions of the Constitution.

All that the Anti-Federalists could get was explicit Constitutional protection for the old English right to keep and bear arms. That was what was put into the Second Amendment. This would at least assure them an armed citizenry on which the states could draw in establishing a militia. But they still had to cede to ultimate Federal control over the militias, as well as to a Federal standing army.

In this historical context, it is easy to see why the framers would add the prefatory clause to the Second Amendment pointing out how the individual right to bear arms would at least protect a foundation for the militias. That was the one concession granted to the Anti-Federalists by the Federalists. But the Constitution, considering the militia clauses and the Second Amendment together, expressly and intentionally did not provide the states anything more than that. And that is why there is no language in the prefatory clause of the Second Amendment limiting in any way the right to keep and bear arms provided in the second clause. It was not intended to provide any such limit. It was just intended to point out that this was the resolution of the debate between the Federalists and the Anti-Federalists over the state militias.

The District's severe gun restrictions violate the plain terms of the Second Amendment. With a complete handgun ban, citizens cannot keep and bear handguns for self-defense

within the home, or anywhere else for any purpose. Moreover, with the ban on carrying handguns, citizens are prohibited from bearing handguns for self-defense within the home, or anywhere else for any purpose.

Requiring that any firearm kept in the home, including rifles and shotguns, must be kept unloaded and disassembled or disabled by a trigger lock or similar device also violates the plain terms of the Second Amendment, as citizens also cannot effectively keep and bear arms for self-defense within the home under this provision.

ARGUMENT

I. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT TO KEEP AND BEAR ARMS.

A. The Text of the Amendment Protects an Individual Right to Keep and Bear Arms.

The Second Amendment states in part, “[T]he right of the people to keep and bear arms shall not be infringed.” As a matter of plain English, this language provides for an individual right to own, possess, and use firearms.

It plainly says that this is a right of the people, not the states. That same term, the people, is used to refer to individual rights in the First, Fourth, Ninth, and Tenth Amendments. The Constitution never confuses, but always distinguishes between, the terms “state” and “people”. E.g. U.S. Const., Amendment Ten, (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the *States*, are reserved to the *States* respectively, or to the *people*.”)(emphasis added); Lund, A Primer on the Constitutional Right to Keep and Bear Arms (Virginia Institute for Public Policy, 2002), at 5 (“The Constitution

nowhere uses the term ‘the people’ to refer to state government.”).

Moreover, the terms “keep” and “bear” are actions that individuals do. States do not bear firearms. Rather, as Black’s Law Dictionary states, “bear” refers to carrying “upon the person or in the clothing or in a pocket, for the purpose...of being armed and ready for offensive or defensive action in a case of conflict with another person.” Emerson v. United States, 270 F.3d 232 (5th Cir. 2001), cert. denied, 536 U.S. 907 (2002). The term “keep” is also commonly used to refer to personal ownership. Emerson, 270 F.3d at 232.

In addition, the Bill of Rights is almost entirely focused on protecting individual rights, with the states mentioned only in the Tenth Amendment, which refers to their powers, not their rights. If the Second Amendment relates not to an individual right but a right of states regarding the militia, why would the framers have stuck it in as the second item in a long list of otherwise individual rights?

The focus on individual rights, of course, reflects the whole history of the Bill of Rights. Those rights were added to the Constitution precisely to protect individual rights from the power of the new Federal government, which the people demanded as a condition of ratifying the Constitution. How can that Amendment possibly now be read as allowing the District of Columbia, under the authority of the Federal government, to completely ban the right to keep and bear arms under general circumstances? That would simply read the Second Amendment out of the Constitution.

The argument of Petitioners is that the language in the first half of the Second Amendment, “A well regulated militia being necessary to the security of a free state”, somehow eliminates the individual right plainly stated in the second

half of the Amendment. But as a matter of plain English, nothing in that prefatory statement limits the substantive, clearly individual right granted in the rest of the Amendment.

A well-regulated militia may well be necessary to the security of a free state. Where does that say in any way that a state, let alone the Federal government as in this case, can entirely ban handguns, and render other firearms dysfunctional for self-defense, in contravention to the right to keep and bear arms promised in the rest of the Amendment? It does not. As Professor Nelson Lund has stated,

If you parse the Amendment, it quickly becomes obvious that the first half of the sentence is an absolute phrase (or ablative absolute) that does not modify or limit any word in the main clause. The usual function of absolute phrases is to convey information about the circumstances surrounding the statement in the main clause, such as its cause. For example: "The teacher being ill, class was cancelled."

Lund, *supra*, at 6. See as well Lund, at 6-7.

Petitioners and their *amici* want to read that prefatory language as not only limiting, but nullifying the individual right stated in the rest of the Amendment, leaving the government with the power to prohibit gun use for self-defense in the home, as in this case. That interpretation would leave the amendment textually incoherent, flatly stating an individual right in the second half of the sentence that is supposedly nullified in the first half of the sentence. As a matter of plain English, the Amendment cannot be read that way.

Moreover, the language of the Constitution is to be interpreted as internally consistent whenever possible. A preamble in particular is not to be interpreted as contradicting

the substantive right that follows if at all possible. Emerson, 270 F.3d at 233, n.32 (“... at least where the preamble and the operative portion of the statute may reasonably be read consistently with each other, the preamble may not properly support a reading of the operative portion which would plainly be at odds with what would otherwise be its plain meaning.”). This is especially true when interpreting a substantive right of the Bill of Rights, which is to be interpreted broadly to protect the rights and liberties of the people.

Rather than reading the prefatory language to nullify the following statement of an individual right, it would be more reasonable and consistent with canons of constitutional interpretation, as well as our history, to read it as strengthening the statement of the following right. The prefatory language does this by bringing up the importance of the militia, which the public so strongly favored at the time for defense of the country, rather than standing Federal armies. What that prefatory language is adding is that the individual right to keep and bear arms that follows must be **especially protected**, because it is essential to maintaining the state militias (non-standing armies of armed citizens), which were to be the first line of defense for the new nation.

The Courts cannot treat the Second Amendment as a politically incorrect, disfavored stepchild of the Bill of Rights. Fidelity to the Constitution requires that courts give it the same zealous protection as every other right stated in our founding document. The Amendment is not being read broadly to protect the rights and liberties of the people if it is somehow interpreted to allow the government to adopt a complete ban on handguns and the use of other firearms within the home for self-defense, as in this case.

B. There Is No Logical Alternative Interpretation For The Second Amendment Other Than As An Individual Right to Keep and Bear Arms.

The individual rights interpretation of the Second Amendment discussed above is reinforced by the recognition that there is no logical alternative interpretation of the Amendment.

One alternative is a collective rights interpretation of the Amendment, which holds that it does not provide for any individual right, but only a collective right of each state to arm and maintain its own militia. But that interpretation contradicts not only the language of the Second Amendment, but the language of other provisions of the Constitution as well.

First, the Second Amendment says that the right belongs to the people, not to the states. As discussed above, the term the people refers to individual rights, not states rights. The terms “keep” and “bear” also refer to individual actions. Moreover, the Second Amendment is placed second in a long list of individual rights, indicating not only that it is an individual right, but a very important one.

Secondly, Article 1, Section 10 of the Constitution prohibits the states from maintaining troops in times of peace without the consent of Congress. Reading the Second Amendment to provide for the right of the states to arm and maintain their own militias would flatly contradict this section. Are we to conclude that Article I, Section 10 has been repealed by the Second Amendment? No one has ever suggested that is so. Consequently, the Second Amendment cannot be said to provide for such a state right.

Thirdly, Article I, Section 8 provides that Congress has the authority to provide for arming the militias. That section

preempts any right of the states to arm their militias. It grants the states only the authority to train the militia and appoint its officers. The states are granted no other authority over the militia anywhere else in the Constitution. Reading the Second Amendment as providing for the right of the states to arm their militias would again flatly contradict this provision, which everyone must concede remains effective today.

Fourthly, Article II, Section 2 states that “[T]he President shall be Commander in Chief of the Army and Navy of the United States, and of the militia of the several states....” If the President orders a state militia to stand down, abandon any arms provided by the state, and go home with any individually owned arms, are we to believe that the Second Amendment grants the states a constitutional right to disobey and refuse?

Would we really want a Second Amendment that says an openly rebellious state has a constitutional right to arm and maintain a militia and the Federal government cannot order it to disband and leave all but personal weapons behind? If so, wouldn't the actions of the Federal government in the Civil War have been unconstitutional? Isn't such an interpretation far more dangerous than to interpret the Amendment to provide for a right of individuals sorely in need of self-defense to keep and bear arms? The Court below rightly characterized this view in saying, “So understood, the right amounts to an expression of militant federalism, prohibiting the federal government from denuding the states of their armed forces.” PA14a.

As Professor Lund concludes,

Turning back to the Second Amendment with these facts in mind, it becomes apparent why the Second Amendment cannot possibly have been meant to constitutionalize a right of the states to keep up

military organizations like the National Guards. That theory implies that the Second Amendment silently repealed or amended two separate provisions of the Constitution: the clause giving the federal government virtually complete authority over the militia, and the clause forbidding the states to keep troops without the consent of the Congress.

When the Bill of Rights was adopted, nobody so much as suggested that it would alter these provisions, and nobody claims such a thing today. Indeed, these two provisions of the original Constitution have allowed the federal government essentially to eliminate the state militias as independent military forces by turning them into adjuncts of the federal army through the National Guard system. Under the states' rights theory of the Second Amendment, the National Guard system must be unconstitutional, which everyone (including the Supreme Court) agrees is not the case.

Lund, *supra*, at 9.

Petitioners and their *amici* offer another alternative interpretation. They argue that the Second Amendment does provide for an individual right, but only a right of those serving in the militia to keep and bear arms for service in the militia.

But as the Court below noted, if that was what the framers meant, then why didn't they say that? The Court below said,

At first blush, it seems passing strange that the able lawyers and statesmen in the First Congress (including James Madison) would have expressed a sole concern for state militias with the language of the Second Amendment. Surely there was a more direct locution, such as "Congress shall make no law disarming the state

militias” or “States have a right to a well regulated militia. PA14a.

Indeed, if the framers meant to say what Petitioners so ardently insist they said, the Amendment would read,

A well-regulated militia being necessary to the security of a free state, the right of *those who serve in the militia* to keep and bear arms *for use in the militia* shall not be infringed.

But the actual language used was not limited to the militia. It says “The right of the people to keep and bear arms shall not be infringed.” There is no limitation to those who serve in the militia or to arms for use in service to the militia. Petitioners are desperately trying to read such limitations into the Amendment.

Petitioners respond to the above quote from the decision of the Court below by saying, “Far ‘strange[r],’ however, was the majority’s supposition that the Framer’s would have written the Amendment this way to protect private uses of weapons.” Pet. Br. at 20. But the language that was used, “The right of the people to keep and bear arms shall not be infringed” states precisely such an individual right in plain English, as argued above, without any limitation to service in the militia. The prefatory phrase merely pointed out that one benefit of this right was to assure that citizens would have available arms that could be used for service in the militia, as the Court below noted. PA34a-35a. But by its own terms that prefatory phrase placed no limitation on the substantive right of the people to keep and bear arms stated so directly in the second clause, as also argued above.

Petitioners complain that this individual rights interpretation reads “the opening clause out of the amendment.” Pet. Br. at 17. But courts cannot ascribe to the

words of the text a meaning they do not have. If the words by their own terms do not place a limitation on the declaration of the substantive right in the clause that follows, then courts may not read such a limitation into the text, as Petitioners urge. It is Petitioners who would read the second clause out of the Amendment, the one that actually states the substantive right.

This individual rights interpretation of the Amendment without limitation to the militia is all the more clear because of the pre-existing right to keep and bear arms noted by the Court below. The Court said, “The wording of the operative clause also indicates that the right to keep and bear arms was not created by government, but rather preserved by it.” PA 20a. The Court explained the ancient origins of the right, saying,

The ancient origin of the right in England was affirmed almost a century later, in the aftermath of the anti-Catholic Gordon riots of 1780, when the Recorder of London, who was the foremost legal advisor to the city as well as chief judge of the Old Bailey, gave the following opinion on the legality of private organizations armed for defense against rioters: The right of His majesty’s Protestant subjects, to have arms for their own defence, and to use them for lawful purposes, is most clear and undeniable. It seems, indeed, to be considered, by the ancient laws of the Kingdom, not only as a *right*, but as a *duty*; for all the subjects of the realm, who are able to bear arms, are bound to be ready, at all times, to assist the sheriff, and other civil magistrates, in the execution of the laws and the preservation of the public peace. And that right which every Protestant most unquestionably possesses, individually, may, and in many cases must, be exercised collectively, is likewise a point which I conceive to be most clearly established by the authority of

judicial decisions and ancient acts of parliament, as well as by reason and common sense.

PA20a n.8. The language quoted here from 225 years ago seems to say precisely what both clauses of the Second Amendment, taken together, say much more succinctly.

The Court below went on to say,

To determine what interests this pre-existing right protected, we look to the lawful, private purposes for which people of the time owned and used arms. The correspondence and political dialogue of the founding era indicate that arms were kept for lawful use in self-defence and hunting....

The pre-existing right to keep and bear arms was premised on the commonplace assumption that individuals would use them for these private purposes, in addition to whatever militia service they would be obligated to perform for the state. The premise that private arms would be used for self-defense accords with Blackstone's observation, which had influenced thinking in the American colonies, that the people's right to arms was auxiliary to the natural right of self-preservation.

PA21a. This language again seems to capture precisely what both clauses of the Second Amendment, taken together, mean to say. This is what "*the* right to keep and bear arms" means in the Second Amendment, an individual right to arms for self-defense and other private, lawful purposes, in addition to the purpose of joining together in collective self-defense.

C. The Framers Intended to Provide in the Second Amendment for an Individual Right to Keep and Bear Arms.

Petitioners weave a fanciful tale regarding the history behind the Second Amendment. They conclude that the Amendment was a great victory for the states in granting them the right to prevent the Federal government from disarming their militias, and that the framers had no other concern behind the Amendment, such as protecting any private use of firearms. But, despite the best efforts of the Petitioners to the contrary, their historical discussion does help to make clear the real history behind the Amendment, which was not what they say it was.

The history shows that the Anti-Federalists completely failed to win any constitutional protection specifically directed to the state militias and their armament. First, the Anti-Federalists wanted the new nation to rely on state run militias with no Federal standing army. But they lost that, as the new Constitution expressly provided for a Federal standing army.

Then the Anti-Federalists wanted the Constitution to provide at least that the states would run and operate their militias. But they lost that too. The Militia Clauses provide that the Congress and the President hold the ultimate authority over the state militias and can take command of them at any time. The Clauses also provide that it is the Federal government that has the power to arm the militias, and grants the states no power to arm them.

Petitioners cite George Mason and Patrick Henry as recognizing the problem here from their Anti-Federalist perspective. Pet. Br. at 24-25. Mason said quite correctly,

The militia may be here destroyed ...by disarming them. Under various pretenses, Congress may neglect to provide for arming and disciplining the militia; and the state governments cannot do it, for Congress has an exclusive

right to arm them....Should the national government wish to render the militia useless, they may neglect them and let them perish.....

Pet. Br. at 24.

Indeed, if Congress or the President orders a state militia to disarm, then under the Constitution it must do so. Even worse for the Anti-Federalists, why would the Federal government ever order a state militia to disarm when it can, in fact, take command of it.

Mason and the Anti-Federalists sought Amendments to grant the states power to arm and organize the militias. Pet. Br. at 25-26. But those Amendments failed. Id. So the law remained as described by Mason above. The Second Amendment did not serve the purpose described by Petitioners. It did not provide protection for any right of the states to arm their militias. Under the Constitution, the Militia Clauses provide for ultimate Federal control over the militias and provide for the Federal government, not the states, to arm the militias.

All that the Anti-Federalists could get was explicit Constitutional protection for the old English right to keep and bear arms. That was what was put into the Second Amendment. This would at least assure them an armed citizenry on which the states could draw in establishing a militia. But they still had to cede to ultimate Federal control over the militias, as well as to a Federal standing army.

In this historical context, it is easy to see why the framers would add the prefatory clause to the Second Amendment pointing out how the individual right to bear arms would at least protect a foundation for the militias. That was the one concession granted to the Anti-Federalists by the Federalists. But the Constitution, considering the

militia clauses and the Second Amendment together, expressly and intentionally did not provide the states anything more than that. And that is why there is no language in the prefatory clause limiting in any way the right to keep and bear arms provided in the second clause. It was not intended to provide any such limit. It was just intended to point out that this was the resolution of the debate between the Federalists and the Anti-Federalists over the state militias.

The historical record makes clear that the framers did intend to provide protection for this individual right to keep and bear arms, which would provide at least some solace to the Anti-Federalists. In Federalist 29, Hamilton writes,

[I]f circumstances should at any time oblige the government to form an army of any magnitude, that army can never be formidable to the liberties of the people, while there is a large body of citizens little if at all inferior to them in discipline and the use of arms, who stand ready to defend their own rights and those of their fellow citizens.

The Federalist No. 29, at 145 (Alexander Hamilton)(G. Carey, J. McClellan eds. 1990). This “large body of *citizens*”, not militiamen, obviously refers to individuals exercising their right to keep and bear arms, not to an organized state militia, which would not be referred to as a large body of citizens.

Madison offered this same response, raising “the advantage of being armed, which the Americans possess over the people of almost every other nation,” in contrast to Europe, where “the governments are afraid to trust the people with arms.” The Federalist No. 46 at 244 (James Madison)(G. Carey, J. McClellan eds. 1990). Madison continued saying that any threat of oppression from a Federal

standing army would be opposed by “a militia amounting to near half a million of citizens with arms in their hands....” Id.

These passages naturally refer again to individual citizens exercising their right to keep and bear arms, the people trusted with arms, the advantage the Americans possess over the people of almost every nation. That half a million armed citizens obviously arises from an armed citizenry that enjoys a protected individual right to keep and bear arms, not a well-regulated militia encompassing a then unheard of half a million man army armed by the state.

The amendments proposed from the state ratifying conventions calling for a Bill of Rights uniformly called for an individual right to keep and bear arms. New Hampshire proposed that “Congress shall never disarm any Citizen unless such as are or have been in Actual Rebellion.”¹ Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 326 (2d ed. 1836).

Madison’s home state of Virginia proposed, “That the people have a right to keep and bear arms; that a well-regulated Militia composed of the body of the people trained to arms is the proper, natural, and safe defense of a free state.”³ Jonathan Elliot, *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 658 (2d. ed. 1836).

These proposals from the Anti-Federalists should be taken as legislative history indicating what the framers were trying to say in the Second Amendment. There is no history showing any challenge or rejection regarding these proposals. Quite to the contrary, the historical evidence shows a desire to mollify the Anti-Federalists by accepting these proposals

Madison's notes from the speech introducing the amendments that became the Bill of Rights show that Madison understood his Second Amendment to provide for an individual right to keep and bear arms, not a collective right of the states. His notes said that the proposed amendments "relate first to private rights." *Id.* This is shown as well by his placing the Amendment second among a long list of individual rights in the Bill of Rights. 12 Papers of James Madison 193-194 (C. Hobson et al. eds. 1979)

While Petitioners and their *amici* repeatedly cite the recently published articles of their colleagues in the gun control movement, they never mention the more contemporaneous top constitutional scholars and authorities from the 19th century who recognized the Second Amendment as providing precisely for an individual right to keep and bear arms. Supreme Court Chief Justice Joseph Story stated in an 1842 treatise that the Second Amendment protects "a right of the citizen" and emphasized that the Amendment protected Americans from "one 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...." Story, *A Familiar Exposition of the Constitution of the United States*, 264-265 (1842). Story also wrote in an 1833 treatise, "[T]he right of the people to keep and bear arms has justly been considered as the palladium of the liberties of the republic." Story, *Commentaries on the Constitution*, Vol. 3, at 746 (1833).

In 1803, St. George Tucker indicated that the Second Amendment was equivalent to Blackstone's "right of the subject," and protected, "The right of self-defense [which] is the first law of nature. 1 St. George Tucker, *Blackstone's Commentaries: with Notes of Reference, to the Constitution and Laws, of the Federal Government of the United States; and of the Commonwealth of Virginia*, 143, 300 (1803). In his authoritative 1829 treatise, William Rawle wrote,

No clause in the Constitution could by any rule of construction be conceived to give to congress a power to disarm the people. Such a flagitious attempt could only be made under some general pretence by a state legislature. But if in any blind pursuit of inordinate power, either should attempt it, this amendment may be appealed to as a restraint on both.”

Rawle, *A View of the Constitution of the United States of America* 125-26 (Da Capo Press 1970)(2d. ed. 1989).

In the face of such evidence, Professor Tribe writes in the new edition of his treatise, changing his previous view,

Perhaps the most accurate conclusion one can reach with any confidence is that the core meaning of the Second Amendment is a populist/republican/federalism one: Its central object is to arm “We the People” so that ordinary citizens can participate in the collective defense of their community and their state. But it does so not through directly protecting a right on the part of states or other collectivities, assertable by them against the federal government, to arm the populace as they see fit.

Rather, the amendment achieves its central purpose by assuring that the federal government may not disarm individual citizens without some unusually strong justification consistent with the authority of the states to organize their own militias. That assurance in turn is provided through recognizing a right (admittedly of uncertain scope) on the part of individuals to possess and use firearms in defense of themselves and their homes...a right that directly limits action by Congress or by the Executive Branch....”

1 Tribe, American Constitutional Law, n.221 at 902 (3d. ed. 2000).

The evidence has also now convinced the Executive Branch of the correctness of the individual rights view, also changing its previous position.²

No doubt the framers did not intend for the right to keep and bear arms to be absolute, allowing for no restriction or regulation, a position not taken by Respondents or their *amici* in this case either.³ Any statement of the framers that may be found reflecting this non-absolute position would not mean that they intended no protection for the individual right to keep and bear arms. Similarly, any regulation of the possession or use of firearms in the colonies or early states would also not mean that the framers intended no protection for this individual right, particularly in regard to the power of the power Federal government to disarm citizens completely.

Despite any such regulations, some of which may have been reasonable and some of which may have been out of bounds on analysis, gun ownership and use in the colonies

² Brief of United States of America as Amicus Curiae, in District of Columbia v. Heller, No. 07-290; Opposition to Petition for Certiorari in United States v. Emerson, No. 01-8780, at 19 n. 3, Appendix A; Memorandum From The Attorney General To All United States Attorneys, Re: United States v. Emerson, Nov. 9, 2001, www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf; Silveira v. Lockyer, 312 F.3d 1052, 1064-65(9th Cir.2002), *cert. denied* 124 S.Ct. 803(2003).

³ Under the non-absolute right undoubtedly intended by the framers, and advanced by Respondents and their *amici*, Federal and state governments, for example, would have all necessary powers to disarm those involved in domestic insurrections or rebellions. Indeed, it is the interpretation advanced by Petitioners and their *amici* that would eviscerate the power to counter rebellious states. For they read into the Amendment a right of the states to arm and maintain a militia, constitutionally protected from the authority of the Federal government.

and early states was widespread. Dederer, *War In America to 1775* (1990) (“[B]y the eighteenth century Americans were the most heavily armed people in the world; not only did colonial law mandate owning and maintaining a firearm, but through the Revolution *most* colonials still shot for the table.” Id. at 251); Black, *War for America: The Fight for Independence 1775-1783* (1991), at 48; *Staples v. United States*, 511 U.S. 600, 610 (1994) (“[T]here is a long tradition of widespread lawful gun ownership by private individuals in this country.”). Jefferson, in fact, attributed Revolutionary War victories to “our superiority in taking aim when we fire; every soldier in our army having been intimate with his gun since infancy.”⁴

Given this context, and the enormous struggle between the Federalists and the Anti-Federalists, it is completely unbelievable to suggest that the Anti-Federalists and others would have quietly accepted a Federal government with the power to disarm the public. Indeed, Petitioners would read out of the Second Amendment the one concession that the Anti-Federalists won, constitutional recognition of the old English right to keep and bear arms.

D. The Supreme Court’s Precedents Do Not Preclude an Individual Right to Keep and Bear Arms in the Second Amendment, But, In Fact, Support It.

Contrary to the claims of Petitioners, the U.S. Supreme Court precedent of *United States v. Miller*, 307 U.S. 174 (1939) does not preclude an individual right to keep and bear arms. Rather, that case, and other Supreme Court precedents, support such a right.

⁴ Jefferson, Letter to an Italian Friend (Fabbroni), June 8, 1776, in Julian P. Boyd (ed.), 2 *The Papers of Thomas Jefferson* (1750-97) 195, 198n.

In Miller, the Defendant was indicted under the National Firearms Act for carrying an untaxed, sawed off shotgun in interstate commerce. The Defendant argued that such possession was constitutionally protected under the Second Amendment.

The Supreme Court never said anything about the Second Amendment solely protecting a right of the states to arm and maintain a militia. Nor did it deny that the Amendment protected an individual right to keep and bear arms.

Rather, the Court simply decided the case by analyzing whether the Second Amendment would protect possession of the weapon in question under the circumstances of the case, and concluded that it did not. Effectively, the Court concluded that the regulation of possession of the sawed off shotgun at issue, a weapon that indiscriminately inflicts great damage, was a reasonable and permissible regulation of the right to keep and bear arms, just as a prohibition on machine guns and grenade launchers would be.

But in analyzing whether the Amendment applied to the weapon at issue, the Court implicitly indicated that the Amendment applied to the individual Defendant in question. For if the Second Amendment does not protect an individual right to keep and bear arms, why analyze whether it covered the Defendant's weapon? The Court could simply have dismissed the Second Amendment claim on the grounds that the Defendant was not a state and, therefore, was not covered by the Amendment.

Moreover, in Prinz v. United States, 521 U.S. 898 (1997), the Supreme Court itself stated that it had not decided the scope of the Second Amendment in Miller, but left that question open. The Court said in Prinz,

In Miller, we determined that the Second Amendment did not guarantee a citizen's right to a sawed off shotgun because that weapon had not been shown to be "ordinary military equipment" that could "contribute to the common defense." The Court did not, however, attempt to define, or otherwise construe, the substantive right protected by the Second Amendment.

Id. at 938, n.1. So this Court itself has said that Miller does not preclude ultimately finding that the Second Amendment does indeed provide for an individual right to arms.

Other Supreme Court precedents expressly refer to the Second Amendment as encompassing an individual right the same as all other individual rights in the Bill of Rights. For example, in United States v. Verdugo-Urquidez, 494 U.S. 259 (1990), the Court said,

[T]he people" seems to have been a term of art employed in select parts of the Constitution.... The Second Amendment protects "the right of the people to keep and bear Arms," and the Ninth and Tenth Amendments provide that certain rights and powers are retained by and reserved to "the people." See also U.S. Const., Amdt. 1 ("Congress shall make no law ...abridging ...the right of the people peaceably to assemble")(emphasis added)... While this textual exegesis is by no means conclusive, it suggests that "the people" protected by the Fourth Amendment, and by the First and Second Amendment, and to whom rights and powers are reserved in the Ninth and Tenth Amendments, refers to a class of persons who are part of a national community or who have otherwise developed sufficient connection with this country to be considered part of that community.

Id. at 265.

Similarly, in Planned Parenthood v. Casey, 505 U.S. 833 (1992), the Court said, “[L]iberty encompasses [] more than those rights already guaranteed *to the individual* against federal interference by the express provisions of the *first eight Amendments*.” Id. at 847 (emphasis added). The Court went on to say,

The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This “liberty” is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech press and religion; *the right to keep and bear arms*; the freedom from unreasonable searches and seizures; and so on.

Id. at 848 (quoting Poe v. Ullman, 367 U.S. 497 (1961)(Harlan, J. dissenting)(emphasis added).

The Second Amendment again was referred to as an individual right the same as the rest of the Bill of Rights in Duncan v. Louisiana, 391 U.S. 145 (1968):

[T]he *personal rights* guaranteed and secured by the *first eight amendments* of the Constitution; such as the freedom of speech and of the press, the right of the people peaceably to assemble and petition the Government for a redress of grievances, a right appertaining to each and all the people, *the right to keep and to bear arms*....

Id. at 168 (Black, J. concurring)(emphasis added)). Similar language can be found in Moore v. City of East Cleveland, 431 U.S. 494 (1977).

Emerson summarized these Supreme Court cases by saying,

Several other Supreme Court opinions speak of the Second Amendment in a manner plainly indicating that the right which it secures to 'the people' is an individual or personal, not a collective or quasi-collective, right in the same sense that the rights secured to 'the people' in the First and Fourth Amendments, and the rights secured by the other provisions of the first eight amendments, are individual or personal, and not collective or quasi-collective, rights.

270 F.3d at 228-229 (citations omitted). Emerson also said, "It appears clear that 'the people' as used in the Constitution, including the Second Amendment, refers to individual Americans." 270 F.3d at 229.

Congress has taken the same view. "The same two-thirds of Congress that proposed the Fourteenth Amendment...also enacted the Freedmen's Bureau Act, which declared protection for the 'full and equal benefit of all laws and proceedings concerning personal liberty, personal security, and...estate..., *including the constitutional right to keep and bear arms....*'" Halbrook, *The Freedmen's Bureau Act and the Conundrum Over Whether the Fourteenth Amendment Incorporates the Second Amendment*, 29 N. Kentucky L.R., No. 4, 683-703 (2002)(quoting Act of July 16, 1866, 14 Stat. 173, 176; 15 Stat. 83 (1886)(emphasis added). Congress consequently again recognized the right to keep and bear arms as an individual right in enacting this legislation to ensure the legal right to arms for the freed former slaves and for discharged Union soldiers so that they could defend themselves against Klan violence.

II. THE DISTRICT'S SEVERE GUN RESTRICTIONS VIOLATE THE SECOND AMENDMENT.

We again urge the Court to decide this one case presently before it, and not try to adopt a standard that will decide all future cases as well, as the Solicitor General suggests. Let the standard that will ultimately govern Second Amendment cases arise out of future adjudication on a case by case basis, based on the particular facts presented by each case.

For all of the reasons stated above, we submit that this Court should rule definitively that the Second Amendment does protect an individual right to keep and bear arms, apart from any service in the militia. If anything violates this right, the severe gun restrictions embodied in D.C. Code Sections 7-2502.02(a)(4), 22-4504(a), and 7-2507.02 plainly do.

D.C. Code Section 7-2502.02 bans handguns in the District, with certain minor exceptions. Obviously, then, such guns cannot be used for self-defense in the home.

D.C. Code Section 22-4504(a) provides that no person may carry a handgun within the District of Columbia, even within their own home, from room to room, without a license. Such licenses will not be issued either. Bsharah v. United States, 646 A.2d 993 (D.C. 1994). This Section effectively bans the use of handguns even within the home for self-defense, as a handgun has to be picked up, and, therefore, carried, to be used. By the terms of the Section, this ban on handgun use for self-defense would apply to handguns registered before September, 1976 as well as after.

These provisions violate the plain terms of the Second Amendment. With a complete handgun ban, citizens cannot keep and bear handguns for self-defense within the home, or anywhere else for any purpose. Moreover, with the ban on

carrying handguns in D.C. Code Section 22-4504(a), citizens are prohibited from bearing handguns for self-defense within the home, or anywhere else for any purpose. As the Court below noted, “the pistol is the most preferred firearm in the nation to ‘keep’ and use for protection of one’s home and family.” PA53a-54a. That is because the pistol, or handgun, is the easiest weapon to wield and use for self-defense.

This direct violation of the plain terms of the Second Amendment is the main reason why these provisions are unconstitutional. The handgun ban and the ban on carrying handguns prohibit citizens from keeping and bearing handguns at all. It is not a matter of a *per se* rule or a rule of reason. It is a matter of violating the plain terms of the Amendment as written.

As the Court below said, “Once it is determined—as we have done—that handguns are “Arms” referred to in the Second Amendment⁵, it is not open to the District to ban them.” PA52a. That is because a complete ban on arms covered by the Second Amendment does not allow citizens to keep and bear such arms at all, and so violates the plain terms of the Amendment.

D.C. Code Section 7-2507.2 requires that any firearm kept in the home, including rifles and shotguns, must be kept unloaded and disassembled or disabled by a trigger lock or similar device. Exceptions are specified for firearms at a

⁵ The standard for determining what arms are covered by the protections of the Second Amendment should be the same as the arms covered by the old, pre-existing, English right to arms, which the Second Amendment just explicitly recognizes. That is arms currently in common use among the general public for self-defense, hunting, and other lawful purposes. PA20 n.8; PA21. That would exclude major military weapons such as machine guns, bazookas, missile launchers, artillery, etc. That would also eliminate the concerns raised by the Solicitor General in his brief.

place of business, or firearms in use for recreational purposes. But no exception is made for firearms in use for self-defense.

So these firearms effectively cannot be used within the home for self-defense either. This provision is consequently unconstitutional for the same reason as the other two. It effectively prevents citizens from keeping and bearing these firearms for self-defense within the home as well, and so, again, directly violates the plain terms of the Second Amendment.

Petitioners argue that the District would never prosecute anyone for violating this section by using a loaded, assembled, and unlocked firearm for self-defense. But courts must look to what statutes say on their face, not to an informal, unenforceable promise that a jurisdiction will read a statute differently from what it plainly says.

Petitioners have also tried to argue that the District can ban handguns for self defense within the home because it has not banned rifles and shotguns used for such purpose within the home. But we have just seen above that D.C. Code Section 7-2507.2 does effectively ban functional rifles and shotguns within the home usable for self-defense.

Moreover, constitutional rights cannot be violated in one context by arguing that they have not been violated in another. The government could not shut down opposition newspapers in violation of freedom of speech on the justification that opponents remain perfectly free to exercise their freedom of speech through books, radio, TV and the Internet. PA53a.

If firearms can't be kept and used for self-defense within the home, then when and where can they be kept and used? This implicates interests in privacy within the home, property ownership, personal self-defense, and the survival of life and

limb, as well as the right to use guns. Self-defense within the home has to be the most vital and urgent use of firearms. Using firearms outside the home surely would not enjoy greater protection than using them inside the home. And using firearms for other purposes surely would not enjoy greater protection than using them for self-defense. The violations of the Second Amendment in this case, therefore, could not be more clear.

Other gun regulations that would not completely ban keeping or bearing particular arms may be constitutional under the Second Amendment. Requiring registration or licenses for handgun ownership and use may be permissible under the Second Amendment if the registration certificates and/or licenses are available without onerous requirements that prevent most or all from getting them. Other restrictions that still allow citizens to keep and bear arms but merely limit their use may also be constitutional, depending on how severe the limit.

The Court below suggested that also permissible as Constitutional under the Second Amendment may be regulations, “to prohibit the carrying of weapons under the influence of intoxicating drink, or to a church, polling place, or public assembly, or in a manner calculated to inspire terror....” PA52a. The Court indicated as well that prohibiting the carrying of concealed weapons or requiring firearm proficiency testing may also be Constitutional.

These cases may require the development of some sort of standard to weigh various factors in deciding them. But these cases are not the present case before this Court. This case can be decided as discussed above by recognizing that the statutes at issue violate the plain language of the Second Amendment, and that the statutes are so extreme that if any gun restrictions violate the Second Amendment these must. That is why this Court can and should leave the development of a standard for

deciding future Second Amendment cases that do not fall into this clear category to arise out of the particular facts and issues presented by those future cases. The Court for now should decide this present case before it and not try to develop now a standard that would decide all future cases.

CONCLUSION

For the foregoing reasons, the decision of the Court below should be affirmed.

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