No. 07-290

In The
Supreme Court of the United States

DISTRICT OF COLUMBIA AND ADRIAN M. FENTY,
MAYOR OF THE DISTRICT OF COLUMBIA,
Petitioners,

v.

DICK ANTHONY HELLER,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF THE FOUNDATION FOR FREE EXPRESSION AS *AMICUS CURIAE* SUPPORTING RESPONDENT

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INTEREST OF AMICI[1]

The Foundation for Free Expression ("FFE"), as *amicus curiae*, respectfully submits that the decision of the D.C. Circuit panel should be affirmed.

FFE is a California non-profit, tax-exempt corporation formed on September 24, 1998 to preserve and defend the constitutional liberties guaranteed to American citizens. FFE's founder is James L. Hirsen, professor of law at Trinity Law School (15 years) and Biola University (7 years) in Southern California and the author of New York Times bestseller, *Tales from the Left Coast: True Stories of Hollywood Stars and Their Outrageous Politics* and *Hollywood Nation: Left Coast Lies, Old Media Spin, and the Revolution*. Mr. Hirsen has taught law school courses on the Second Amendment and therefore has a particular interest and expertise in this area of constitutional law.

SUMMARY OF THE ARGUMENT

The issue facing this Court is straightforward and urgent: Can the government pass laws that disarm the American people and render them vulnerable to violent attack in their homes and communities? The

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten (10) days prior to the due date of *amicus curiae's* intention to file this brief. *Amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to its preparation or submission.

answer to this question is vital to the life and liberty of every American.

America is a government of the people, by the people, and for the people. It was and is a dramatic departure from the dictatorships common in foreign lands. The Declaration of Independence recognizes life and liberty as inalienable rights. The Second Amendment safeguards the corresponding right to defend these primary rights. Its text and legislative history reveal the individual character of that right, and it is placed in the Bill of Rights among other rights guaranteed to "the people." Early American commentators, state constitutions, and case decisions all confirm that the right to keep and bear arms is an individual right to defend self and others. Many of our criminal and civil laws presuppose the basic natural right to self-defense.

No constitutional right is absolute. However, research reveals that the restrictions heralded by gun control proponents, including those at issue in the District of Columbia, actually increase the violent crime they are supposed to prevent. Mass public shootings occur in supposedly safe "gun-free" zones. But crime has decreased significantly in states where "right-to-carry" laws enable law-abiding citizens to defend and save lives in emergencies. Unfortunately, such heroic efforts rarely make headlines.

Courts have greatly expanded the reach of individual rights in recent decades, carving out rights nowhere mentioned in the Constitution. This Court should consistently interpret the Constitution and not excise a particular right that *is* explicitly guaranteed

because it fails to align with popular political sentiment. "The courts should enforce our individual rights guaranteed by our Constitution, not erase them." *Silveira v. Lockyer*, 328 F.3d 567, 588-589 (9th Cir. 2003) (Kozinski, J., dissenting).

I. THE TEXT OF THE SECOND AMENDMENT SUPPORTS AN INDIVIDUAL RIGHT TO BEAR ARMS.

The wording of the Second Amendment:

> . . . so opaque to us, made perfect sense to the Framers: believing that a militia (composed of the entire people possessed of their individually owned arms) was necessary for the protection of a free state, they guaranteed the people's right to possess those arms.
>
> Don Kates, *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 217-218 (1983) ("Kates, *Handgun Prohibition*")

The individuals who made up the militia had both the right and the legal obligation to possess the arms they needed to defend themselves and their fellow citizens. Even leading liberal scholars acknowledge the individual right inherent in the Amendment. Laurence Tribe has revised his position, abandoning the collective rights view in favor of an individual right to bear arms for self-defense (*see* G-3, *infra*). Alan Dershowitz is strongly opposed to firearms ownership, but he warns against repealing the Second Amendment because that would pave the way for

further revisions to the Bill of Rights and the Constitution. In a telephone interview with reporter Dan Gifford, he stated that:

> "[Those] who are trying to read the Second Amendment out of the Constitution by claiming it's not an individual right or that it's too much of a public safety hazard don't see the danger in the big picture. They're courting disaster by encouraging others to use the same means to eliminate portions of the Constitution they don't like."
>
> Dan Gifford, *The Conceptual Foundations of Anglo-American Jurisprudence in Religion and Reason*, 62 Tenn. L.R. 759, 789 (1995)

A. The Second Amendment Protects Both the Right of the People to Participate in Government and Their Right to be Free From Improper Government Interference.

The liberty on which this nation is built has both an "active" and a "negative" aspect. Citizens enjoy the "active" liberty to participate in our "government by the people" but also the "negative" liberty to pursue their own interests free of unwarranted government intrusion on their private lives. *See generally* Stephen Breyer, Active Liberty (Vintage Books 2006). The Second Amendment captures both aspects of American liberty. Its introductory clause concerns the right to participate in defense of the community ("active" liberty), while the main clause safeguards the individual right to keep and bear arms for self-defense, free of unjustified government regulation ("negative"

liberty). The D.C. statutes at issue violate the Second Amendment's main clause by prohibiting the possession of a functional firearm in the home and failing to provide an exception for self-defense. *See* David Kopel, *In Liberty's Two Arms*, Legal Times (January 14, 2008). The collective rights position highlights the "active" liberty but disregards the "negative" liberty guaranteed by the Amendment.

B. A Well-Regulated Militia is Composed of the Entire People, Prepared to Defend Themselves and Others Using Their Individually Owned Arms.

When the Second Amendment was drafted, virtually all of the people belonged to the militia. They were prepared and obligated to defend themselves and others as needed. In order to fulfill their duties, they had to maintain their own arms and be prepared to use them. If there is no individual right to keep and bear arms, then the government could effectively repeal the Second Amendment by passing laws to disarm the private citizens who make up the militia.

1. The Militia Has Always Been Broadly Defined as an Amorphous Body of the People.

Early Americans feared standing armies and defined the militia accordingly to curtail the need for them. They viewed such armies as a threat to *both* individuals *and* the states:

> "There was a widespread fear that a national standing Army posed an intolerable threat to

> individual liberty and to the sovereignty of the separate States."
>
> *Perpich v. Dept. of Defense*, 496 U.S. 334, 340 (1990) ("*Perpich*")

James Madison, in Federalist No. 46, explained that the newly created congressional power to raise armies (U.S. Const., art. 1, § 8, cl. 12) would not threaten our liberties because any abuse of that power would be opposed by a huge militia composed of armed American citizens. Madison distinguished America from contemporaneous European kingdoms, where governments did not trust the people with arms. The Federalist Papers at 299 (Rossiter, New American Library), cited in *United States v. Emerson*, 270 F.3d 203, 235 (5th Cir. 2001) ("*Emerson*").

American history, early legislation, commentators, and debates at the Constitutional Convention all confirm that the "militia" was composed of "all males physically capable of acting in concert for the common defense." *United States v. Miller*, 307 U.S. 174, 180 (1939) ("*Miller*"). These were "civilians primarily, soldiers on occasion." *Id*. at 179. The militia system was patterned after the ancient pre-colonial practice in England. All free Englishmen were armed and ready to respond to violence, whether criminals attacked their homes or foreign armies invaded their country. Kates, *Handgun Prohibition*, *supra*, at 214-215.

The Militia Act of 1792 defined the militia to include all able-bodied free men between 18 and 45. These men were required to maintain their own arms. *Perpich*, *supra*, at 341. Militia members were civilians

engaged in other occupations, not full-time professional soldiers. *Dunne v. People,* 94 Ill. 120, 138 (1879). The Militia Act was repealed in 1901, but Congress enacted the Dick Act in 1903. This new Act continued to define militia broadly, but divided it between the organized National Guard and the *unorganized* Reserve Militia. *Perpich*, *supra*, at 343. The broad definition of "militia" remains in effect under current federal law. In fact, 10 U.S.C. § 311 has actually broadened the term by removing racial and gender restrictions. Moreover, subsection (b)(2) provides for an "unorganized militia" composed of militia members not belonging to the National Guard or the Naval Militia.

In contrast to later federal circuit cases, this Court did not base its *Miller* decision on the lack of membership in a formally organized state militia. Instead, *Miller* hinged on the particular arms at issue. *Miller*, *supra*, at 178*;* cf. *United States v. Warin*, 530 F.2d 103, 106 (6th Cir. 1976), *United States v. Oakes,* 564 F.2d 384, 387 (10th Cir. 1977), *United States v. Rybar*, 103 F.3d 273, 286 (3d Cir. 1996), *United States v. Wright*, 117 F.3d 1265, 1273-74 (11th Cir. 1997). Just as the First Amendment does not protect the right to say anything, anytime, anywhere, the Second Amendment does not guarantee an absolute right to own any and every type of arms. *Miller* affirmed the broad definition of militia and did not disturb the right to keep and bear appropriate arms for defensive purposes.

2. A Militia is "Well-Regulated" When Citizens are Prepared to Act Defensively in Emergencies, Using Their Lawfully Possessed Weapons. Formal Organization is Not Required.

"A well-regulated" militia is that broad, unorganized group of "the people" who maintain privately owned arms. The "regulation" of the militia must not be confused with formal organization. There was no organizational precedent to the existence of the early American militia, nor does modern law require such organization. If it did, "unorganized militia" would be an oxymoron. *See* 10 U.S.C. § 311(b)(2). The militia is not a free-for-all but is composed of law-abiding citizens who maintain arms and know how to use them. Most states now have nondiscretionary right-to-carry laws that allow law-abiding citizens to carry concealed weapons. All states impose criminal penalties for homicides and other violence not justified by the defense of self or others. These regulations contribute to the "well-regulated" character of the militia.

Armed citizens frequently save lives using lawfully owned weapons. An off-duty police officer, picking up his daughter at Santana High School in San Diego, averted a tragic school shooting by forcing the attacker to take cover. John Lott, The Bias Against Guns: Why Almost Everything You've Heard About Gun Control is Wrong 24-25 (Regnery Publishing, Inc. 2003) ("Lott, Bias Against Guns"). A brave 11-year-old boy saved his mother's life when he shot an intruder holding a box cutter to her head. *Id*. at 7-8. A man who pulled out a knife at a convenience store fled when the owner

told him he kept a gun behind the counter. *Id*. at 10. Another gunman, trying to forcibly enter a residence, ran away upon hearing the owner yell for his wife to get their gun and call police. *Id*. at 10. Assistant principal Joel Myrich immobilized a would-be assassin at a school in Pearl, Mississippi after retrieving his permitted concealed gun from his car. John Lott, More Guns, Less Crime: Understanding Crime and Gun Control Law 236 (University of Chicago Press - 2d ed. 2000) ("Lott, More Guns"). These and many other examples show how the system is working. Americans are defending themselves and others through the lawful use of arms.

C. "A Free State" is a Political Entity in Which Citizens are Secure in Their Homes and Travel Freely Because They Have the Means to Defend Themselves Against Criminal Attacks or Oppressive Government.

A community of unarmed citizens is not "a free state." Our Founders abhorred the despotism of the French monarchy. Police enforced arms prohibitions to "protect" the public against violent crime in France, but these laws were actually a pretext to subordinate the peasant population. Kates, *Handgun Prohibition*, *supra,* at 233. America was intended to be "a free state" where the people are trusted with arms to protect themselves against both common criminals and oppressive government.

1. "A Free State" is a General Reference to a Political Unit. It is Not a Synonym for One of the States of the United States.

The indefinite article "a" is used with no surrounding context to suggest a more definitive meaning. U.S. Const., Amend. XXIII, § 1, cl. 2, also uses the phrase "a State" but the context--Electors for the District of Columbia--shows that it refers to one of "the States" in contrast to the District. Art. III, § 2, cl. 1, speaks to controversies between "a State" and either "Citizens of another State" or "foreign States, Citizens, or Subjects." This language makes no sense except in reference to "the States" that make up the United States. The most natural reading of the Second Amendment is that "a free state" means republic government generally. *Parker v. District of Columbia*, 478 F.3d 370, 396 (D.C. Cir. 2007).

In the First Congress, James Madison proposed language stating that a well-regulated militia was "the best security of a free *country*." Anti-Federalist Elbridge Gerry explained that the change was made to ensure that the federal standing army would never supplant the militia as the means of preserving security. The substitution of "a free *state*" in place of "a free *country*" implies that the "state" to be protected was the entire American nation. *Id.,* at 395-396.

2. The Right to Bear Arms is Broader in Scope Than the Need to Maintain a Well-Regulated Militia.

The Second Amendment's second comma separates its two clauses. The prefatory clause articulates

purpose, while the operative clause describes a specific means to achieve it. Many early state constitutions contain similar preambles. For example, Rhode Island's 1842 constitution provides that: "The liberty of the press being essential to the security of freedom in a state, any person may publish his sentiments on any subject, being responsible for abuse of that liberty." Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U.L. Rev. 793, 794 (1998). The freedom to publish is a means to securing a free state, but it is not restricted to publications that directly contribute to that purpose. Similarly, the right to keep and bear arms is not protected only when it contributes to a well-regulated militia. It is guaranteed to "the people," not merely those who belong to the militia. The means--whether free press or bearing arms--guarantees a right broader in scope than the purpose to be achieved.

3. People Are Not *Free* When They Are Not at Liberty to Move About the Community Without Fear of Criminal Attacks.

The entire community enjoys greater freedom in states with right-to-carry laws:

> The benefits of concealed handguns are not limited to those who use them in self-defense. Because the guns may be concealed, criminals are unable to tell whether potential victims are carrying guns until they attack, thus making it less attractive for criminals to commit crimes that involve direct contact with victims. Citizens who have no intention of ever carrying

> concealed handguns in a sense get a "free ride" from the crime-fighting efforts of their fellow citizens.
>
> John Lott, More Guns, *supra,* at 161

When states enact right-to-carry laws, mass public shootings plummet and so do the number of deaths. The attacks that do occur are typically in "gun-free" zones where concealed weapons are forbidden. Lott, Bias Against Guns, *supra,* at 30. Three horrific European shooting sprees in gun-free "safe" zones show that other countries experience similar results: sixteen people killed in a public school shooting in Germany (April 2002); fourteen regional legislators killed in Zug, a Swiss canon (September 2001); and eight city council members massacred in a Paris suburb (March 2002). *Id*. at 72-73. Strict European gun laws failed to prevent these tragic crime sprees.

D. To "Bear" Arms is to Carry or Wear Them on the Person for the Purpose of Defensive Action in Appropriate Circumstances.

This Court has cited the Second Amendment as a familiar example of the Black's Law Dictionary definition of bearing arms:

> "To wear, bear or carry them upon the person or in the clothing or in a pocket, for the purpose of use, or for the purpose of being armed and ready for offensive or defensive action in case of a conflict with another person."

> Black's Law Dictionary 214 (6th ed. 1990), cited in *Muscarello v. United States*, 524 U.S. 125, 130 (1998)

The term "bear arms" is susceptible to military use but that is not its exclusive meaning. State constitutions of the late eighteenth and early nineteenth centuries frequently protected the right of "the people" to "bear arms" for self-defense outside a military context: Alabama, Connecticut, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, and Vermont. *Emerson*, *supra,* at 230. State Bills of Rights in Kentucky, Massachusetts, North Carolina, Pennsylvania, and Vermont all safeguard "the right of the people to bear arms." Since that right is secured against the governments of individual states in these documents, it cannot possibly be construed as a right that benefits states rather than individuals. Volokh, *The Commonplace Second Amendment*, *supra,* 73 N.Y.U.L. Rev. at 810.

When citizens cannot lawfully bear arms, or where access to them is delayed during the first critical moments of a crime, lives are lost. The longer it takes to secure armed assistance, the greater the danger. An off-duty police officer at the Trolley Square Mall in Utah intervened to stop an attack in progress in February 2007. The mall was a gun-free zone, but fortunately the officer had violated the ban. Still, it took three minutes for him to track down and confront the assailant because he was at the other end of the convoluted mall complex. In the meantime, nine people were shot and five of them died. Other well-publicized massacres have been perpetrated in gun-free zones: Virginia Tech (32 murdered in April 2007);

Columbine High School (13 killed in 1999); Luby's Cafeteria in Killeen, Texas (23 shot to death in 1991); McDonald's in Southern California (21 murdered by an unemployed security guard in 1984). John R. Lott, Jr., *Media Coverage of Mall Shooting Fails to Reveal Mall's Gun-Free-Zone Status* (December 6, 2007), www.foxnews.com/printer_friendly_story/0,3566,315563,00.html. "Gun-free" zones do not prevent crime. Instead, they provide an ideal setting for criminals to launch their attacks without fear that potential victims will be armed.

E. To "Keep" Arms is to Retain Possession of Them.

The word "keep" has been largely neglected in discussions of the Second Amendment. As the D.C. Circuit observed, it has been brushed aside as part of a unitary phrase, "keep and bear," or otherwise dismissed:

> Even if "keep" and "bear" are not read as a unitary term, we are told, the meaning of "keep" cannot be broader than "bear" because the *Second Amendment* only protects the use of arms in the course of militia service.... But this proposition assumes its conclusion, and we do not take it seriously.
>
> *Parker v. District of Columbia*, *supra,* 478 F.3d at 385

This sort of circular reasoning should be avoided in constitutional analysis.

"Keep" poses serious problems for the states' rights proponents:

> While "bear" often has a military meaning, "keep" does not. For centuries, the primary meaning of "keep" has been "to retain possession of." [Citations.] There is only one straightforward interpretation of "keep" in the *Second Amendment*, and that is that "the people" have the right to retain possession of arms, subject to reasonable regulation and restrictions.
>
> *Silveira v. Lockyer*, *supra*, 328 F.3d at 573 (Kozinski, J., dissenting)

The common understanding of "keep" supports a personal, individual right to possess arms for lawful purposes. Early colonial statutes required citizens to "keep" arms in their homes. The law applied not only to military men, but also to those who were not part of the militia due to age or other reasons. Kates, *Handgun Prohibition*, *supra,* at 219-220. The private "keeping" of firearms facilitates the public act of community defense. Robert H. Churchill, *FORUM: RETHINKING THE SECOND AMENDMENT: Gun Regulation, the Police Power, and the Right to Keep Arms in Early America: The Legal Context of the Second Amendment*, 25 Law & Hist. Rev. 139, 167 (2007) ("Churchill, *Gun Regulation*").

Early colonial and state governments did not exercise their police powers to restrict individual ownership of guns. Their consistent legislative restraint strongly suggests that states recognized a

"zone of immunity" around the private right to own firearms. Moreover, state laws imposed affirmative obligations on every free adult male to own and carry arms for defensive purposes. Americans began to consider the right to keep arms a basic right of citizenship, along with voting, holding office, access to the courts, and jury service. *Id*. at 142, 164-166.

F. Arms is a Broad, Indefinite Term That Must be Understood in the Context of the Second Amendment's Purposes.

The Second Amendment does not qualify the term "arms." This broad term must be reasonably defined so as to facilitate the Amendment's purpose and not infringe the right guaranteed. *Miller* held that the Second Amendment did not guarantee rights to the particular arms at issue--a sawed-off shotgun. The "arms" must bear some reasonable relationship to the preservation or efficiency of a "well-regulated militia," as that term is properly understood.

Certain firearms have been the subject of civil lawsuits against gun manufacturers because of their attractiveness to criminals. Such weapons are generally low in price, easy to conceal due to small size and weight, resistant to corrosion, accurate in firing, and high-powered. However, the same factors also help protect law-abiding citizens and lower crime rates in the many states that allow concealed handguns. Lott, Bias Against Guns, *supra*, at 5. It is exactly these firearms that should be protected under the Second Amendment because of their effectiveness when quick defensive action is needed.

G. "The People" is a Term of Art Used in the Constitution to Describe the Individual Citizens of the United States.

This Court has observed that:

> ..."the people" seems to have been a term of art employed in select parts of the Constitution. The Preamble declares that the Constitution is ordained and established by "the People of the United States." The *Second Amendment* protects "the right of the people to keep and bear Arms," and the *Ninth* and *Tenth Amendments* provide that certain rights and powers are retained by and reserved to "the people."
>
> *United States v. Verdugo-Urquidez*, 494 U.S. 259, 265 (1990)

It stretches credibility to restrict "the people" in the Second Amendment to a subset of that term as it is used in other sections of the Bill of Rights. The states' rights model departs even further from the text, requiring us to redefine "the people" as "the States." The language of the Tenth Amendment is evidence that the framers knew how to distinguish between "the people" and "the States." The individual rights position attributes the same meaning to the same words--"the people"--in the First, Second, and Fourth Amendments. *Emerson*, *supra*, at 227.

1. "The People" Has a Collective Aspect But That Aspect is Not Exclusive.

The people of America collectively founded our system of government. It was "we the People" who did "ordain and establish [the] Constitution." *U.S. Const. pream*. However, it does not follow that "the people" may only exercise their constitutional rights in service of the state. Consider, for example, how that principle would apply to First Amendment rights of the people to peaceably assemble, form associations, or engage in religious worship. These rights do not hinge on action in service of the state or any other collective exercise. It would be even more absurd to apply this construction to the Fourth Amendment right to freedom from unreasonable searches and seizures. The states' rights analytical approach to the Second Amendment cannot stand if the same logic is applied to any other right of "the people" in the Bill of Rights. *See Silveira v. Lockyer*, *supra*, 328 F.3d at 575-576 (Kozinski, J., dissenting); Sanford Levinson, *The Embarrassing Second Amendment*, 99 Yale L. J. 637, 645 (1989).

2. "The People" Have "Rights" and "Powers" Under the Constitution. Governments Have "Powers" but Never "Rights."

Either "the people" or "the States" may have powers. The Tenth Amendment reserves to the people or to the States those powers not delegated to the federal government. But only "the people" are guaranteed rights (First, Second, Fourth, and Ninth Amendments). *Silveira v. Lockyer*, *supra*, 328 F.3d at

574-575 (Kozinski, J., dissenting); *Emerson*, *supra,* at 227-228. This Court has acknowledged the distinction:

> The powers of the Government and the rights and privileges of the citizen are regulated and plainly defined by the Constitution itself.
>
> *Scott v. Sandford*, 60 U.S. 393, 449 (1857) (emphasis added) (overruled on other grounds)

If the distinction between powers and rights were unimportant, the framers could have collapsed the Ninth and Tenth Amendments into something like this: "The powers and rights not expressly delegated to the United States are reserved to the people or to the States." Instead, the Ninth Amendment addresses rights retained by the people, whereas the Tenth Amendment speaks to the powers reserved to either the people or to the States. Nowhere does the Constitution grant "rights" to the States.

3. Ordinary Citizens Have the Right to Participate in the Defense of Their Communities and Country.

Laurence H. Tribe, a well respected constitutional law professor and commentator, expressed it well:

> 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 the defense of themselves and their homes...a right that directly limits action by Congress or by the Executive Branch...."
>
> Laurence Tribe, 1 American Constitutional Law 902, n. 221 (3d ed. 2000)

The transition in Tribe's thinking is worth noting. The first two editions of his constitutional law treatise espoused the collective states' rights view of the Second Amendment. *United States v. Wright*, 117 F.3d 1265, 1271 (11th Cir. 1997); *Silveira v. Lockyer*, 312 F.3d 1052, 1068 (9th Cir. 2002). The abrupt change in this scholar's thinking should challenge states' rights proponents to reconsider their position.

II. THE SECOND AMENDMENT PROTECTS AN INDIVIDUAL RIGHT CONSISTENT WITH AMERICA'S FOUNDING DOCUMENTS AND OTHER BASIC LEGAL PRINCIPLES.

The founding of America was truly revolutionary. The people established a radically new form of government based on the consent of those governed. Our founders were careful to safeguard certain liberties so that Americans, unlike their European counterparts, could participate in government and be able to revise or even abolish it if it ever became tyrannical. Early Americans were armed and ready to defend themselves, their families, their communities, and their country.

A. The Declaration of Independence Acknowledges Inalienable Rights to Life and Liberty. The Second Amendment Guarantees an Auxiliary Right to Protect These Primary Rights.

When early Americans broke the political ties with England, they declared:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are **life, liberty** and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

> The Declaration of Independence (emphasis added)

The assurance of rights to life and liberty would ring hollow without a corresponding right to defend and preserve them. Law-abiding citizens use guns to save lives many times a year. A survey of 1,015 people in late 2002 revealed over 2.3 million such uses nationwide in 2001. John Lott, Straight Shooting: Firearms, Economics and Public Policy 46 (Merril Press 2006), citing *The American Enterprise*, July 1, 2003. In 2002, two students at Appalachian Law School retrieved guns from their cars and held an assailant until police arrived. Unfortunately, most news stories only reported that the student heroes "overpowered" the gunman, omitting any mention of the guns. Lott, Bias Against Guns, *supra*, at 24-25. This Court must guard such exercises of Second Amendment rights.

B. The Bill of Rights Consistently Guarantees Individual Rights of "The People."

The Bill of Rights reflects "the twin hallmarks of traditional liberal thought: trust in the people, and distrust in government, particularly the military and the police." Kates, *Handgun Prohibition*, *supra,* at 271. It was not written to create new rights or to "lay down any novel principles of government," but to guarantee rights historically recognized by our English ancestors. *Robertson v. Baldwin*, 165 U.S. 275, 281 (1897). This Court has recognized the right to bear arms as one of the many individual rights that government may never infringe:

> Nor can Congress deny to the people the right to keep and bear arms, nor the right to trial by jury, nor compel any one to be a witness against himself in a criminal proceeding.... The powers over person and property of which we speak are not only not granted to Congress, but are in express terms denied, and they are forbidden to exercise them.
>
> *Scott v. Sandford*, *supra,* 60 U.S. at 450 (1857) (overruled on other grounds)

1. The Organizational Structure of the Bill of Rights and Placement of the Second Amendment are Contrary to the "States Rights" Position.

The first nine Amendments guarantee rights to "the people." The individual character of these rights is generally undisputed. Only the Tenth Amendment mentions the states. If the Second Amendment were intended to guarantee states' rights, it would have logically been placed in ninth or tenth position. Kates, *Handgun Prohibition*, *supra,* 220. Instead, it is placed among other individual rights of "the people" that government may not infringe.

Madison originally intended to place each amendment after the relevant section of the Constitution to which it related. If the Second Amendment were intended to merely limit congressional control over the militia as provided in Article I, Section 8, it would have appeared just after clauses 15 and 16 of that section. Instead, Madison planned to place it after clause 3 of section 9, with

other personal rights rights such as freedom of religion and the press. *Id*. at 223; citing 12 Papers of James Madison 193-194 (R. Rutland & C. Hobson ed. 1977).

2. Individual Rights are Sometimes Exercised by a Group of Individuals.

Individual and collective rights are not mutually exclusive. Constitutional rights are often exercised collectively or for the community's benefit. Individuals enjoy free exercise of religion but corporate worship is common. Individuals may speak freely but sometimes form organizations to express shared viewpoints. These collective rights presuppose the rights of individual group members.

The right to keep and bear arms has both an individual and a collective aspect. It encompasses the private right to defend one's residence against intruders. However, armed citizens also benefit the community, not only by heroic efforts to save lives in public emergencies, but also through general crime deterrence. States that adopted nondiscretionary concealed weapons laws between 1977 and 1992 experienced dramatic declines in public shootings. Lott, More Guns, *supra,* at 115. Research in America and other countries shows that "people who engage in mass public shootings are deterred by the possibility that law-abiding citizens may be carrying guns." *Id*. at 115.

C. Courts Should Be Consistent When Interpreting the Constitution and Guarding the Constitutional Rights of Americans.

> When a particular right comports especially well with our notions of good social policy, we build magnificent legal edifices on elliptical constitutional phrases--or even the white spaces between lines of constitutional text.... It is wrong to use some constitutional provisions as spring-boards for major social change while treating others like senile relatives to be cooped up in a nursing home until they quit annoying us. As guardians of the Constitution, we must be consistent in interpreting its provisions.
>
> *Silveira v. Lockyer*, *supra*, 328 F.3d at 568-569 (Kozinski, J., dissenting)

We dare not sacrifice our Second Amendment rights on the altar of political correctness. Courts cannot pick and choose constitutional rights, expanding some beyond the text while deleting the plain meaning of others. The inconsistency of this approach is acknowledged by an ACLU member who departs from that libertarian organization's "state rights" position[2] on the Second Amendment:

> Thus the title of this essay -- *The Embarrassing Second Amendment* -- for I want to suggest that

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[2] See www.aclu.org, "Gun Control (3/4/2002)," viewed on February 4, 2008.

> the Amendment may be profoundly embarrassing to many who both support such [gun control] regulation and view themselves as committed to zealous adherence to the Bill of Rights (such as most members of the ACLU).
>
> Sanford Levinson, *The Embarrassing Second Amendment*, *supra,* 99 Yale L. J. at 642 (1989)

Moreover, the Bill of Rights should be interpreted in harmony with contemporaneous practice. This Court upheld the practice of opening legislative sessions with prayer, observing that the First Congress voted to appoint a Chaplain for each House just before they drafted the Establishment Clause of the First Amendment. *Marsh v. Chambers,* 463 U.S. 783, 788-92 (1983). Similarly, gun ownership was the norm in early America. Adult men, and even some female heads of household, were required to own arms for defense of self and others. Clayton E. Cramer, Armed America, 4, 9 (Nelson Current, 2006). The gun symbolized both a right and a responsibility to participate in the defense of the community. *Id*. at 167. In this environment, it would be strange indeed to draft a "right of the people to keep and bear arms" that guaranteed nothing more than the right for states to maintain militias, or even for individuals to bear arms--but only in service of the state.

D. Defense of Self or Others Has Long Been Recognized as a Natural Right and a Complete Defense to Criminal or Civil Charges.

Our laws exonerate a person who kills in self-defense because of the high value placed on human life. William Blackstone, 1 Commentaries on the Laws of England 126 (The University of Chicago Press 1979) (1765). The natural right to self-defense has ancient roots:

> ... the doctrine that "a man's home is his castle" originated in cases upholding the right to possess and use arms for home defense. Semayne's Case, 5 Co. Rep. 91a, 91b, *77 Eng. Rep. 194, 195 (K.B. 1603)* (quoted with approval in *Payton v. New York, 445 U.S. 573, 596 n.44 (1980));* Dhutti's Case, Northumberland Assize Rolls (1255) (88 Publications of Surtees Society 94 (1891)) (household servant privileged to kill nocturnal intruder); Rex v. Compton, 22 *Liber Assisarum* pl. 55 (1347) (homicide of burglar is no less justifiable than that of criminal who resists arrest under warrant); Anonymous 1353, 26 *Liber Assisarum* (Edw. III), pl. 23 (householder privileged to kill arsonist).
>
> Kates, *Handgun Prohibition*, *supra,* 204-205, n. 5 (1983)

In 1765, Blackstone proposed three primary, inviolate rights--personal security, personal liberty, and private property--along with the "auxiliary rights" needed to protect them. The maintenance of suitable

arms is one of those auxiliary rights. It arises from "the natural right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression." William Blackstone, 1 Commentaries on the Laws of England 139 (The University of Chicago Press 1979) (1765). When law-abiding citizens maintain private arms and use them defensively, lives are saved, but when they are disarmed by tight gun control laws, criminals thrive.

1. Law-Abiding Citizens Frequently Use Guns to Save Lives and Halt the Escalation of Violent Crime.

Shortly after this Court granted certiorari, a gunman opened fire at the New Life Church in Colorado Springs. An armed congregant with a concealed weapons permit acted swiftly to halt the attack, wounding the assailant. The pastor of the megachurch credited her with saving 100 lives. *Colorado Shooting Highlights Churches' New Emphasis on Security*, (December 10, 2007) www.foxnews.com/printer_friendly_story/0,3566,316378,00.html. If this had been a "gun-free" zone and no one onsite had been armed, the situation would have undoubtedly escalated before police could arrive. In fact, that is exactly what occurred the previous week at a crowded Omaha mall. Eight people were killed and five wounded in this tragedy. Nebraska allows people to carry permitted concealed handguns, but private property owners can ban weapons. The Westroads Mall posted signs prohibiting guns. Most media coverage failed to note that the deadly attack occurred in a "gun-free" zone. John R. Lott, Jr., *Media Coverage*

of Mall Shooting Fails to Reveal Mall's Gun-Free-Zone Status (December 6, 2007), www.foxnews.com/printer_friendly_story/0,3566,315563,00.html.

When violent crime occurs, it takes time to notify the police and even more time for them to arrive at the scene. Lives could be saved in these critical moments if armed law-abiding citizens were prepared and allowed to intervene. Surveys of convicted felons and criminal trial transcripts reveal that criminals fear armed victims and choose their targets accordingly. James D. Wright and Peter Rossi, Armed and Considered Dangerous: A Survey of Felons and Their Firearms (Hawthorne, NY: Aldine de Gruyter Publishers, 1986); John Lott, Bias Against Guns, *supra,* at 9-10. For example, the 1999 shooting at a Los Angeles Jewish community center was planned after the killed determined that security was too tight at other Jewish institutions in the area. *Id*. at 9.

2. Gun Control Laws Do Not Contribute to the Government's Interest in Preserving Human Life.

Gun control proponents advocate laws to reduce violent crime and save lives, including safe storage, registration, background checks, waiting periods, and one-gun-a-month purchase limitations. However, research shows that such laws contribute to a significant increase in crime and thus do not achieve the government's interest in preserving human life.

Safe storage laws like D. C. § 7-2507.2 threaten lives by hindering defensive use in an emergency. Criminals find it more attractive to invade homes

where guns are locked up and not readily available to residents. One study shows that in twelve states with safe storage laws in effect for at least four years, violent crime fell briefly but then rose to an even higher level by the end of the period. Lott, Bias Against Guns, *supra,* at 148. Research shows that safe storage laws are related to statistically significant increases in murders, rapes, robberies, and burglaries. *Id*. at 166-167. Real life examples illustrate the point. A 14-year-old girl in Las Vegas knew where the family guns were stored and how to use them, but because of safe storage laws she could not access them to prevent the stabbing deaths of her younger siblings. The killer, armed with a pitchfork, cut the phone lines and forced his way into the home. *Id*. at 165. Moreover, studies show no consistent evidence that safe storage laws actually reduce accidental gun deaths, possibly because these accidents often occur among not-so-law-abiding segments of society. *Id*. at 158, 188-189.

III. THE INDIVIDUAL RIGHT TO BEAR ARMS IS CONFIRMED BY HISTORY, COMMENTATORS, EARLY STATE CONSTITUTIONS, AND EARLY CASE LAW.

The philosophy of America's founders can be traced back to classical Greece and Rome, where:

> ...the ideal of republican virtue was the armed freeholder, upstanding, scrupulously honest, self-reliant and independent -- defender of his family, home and property, and joined with his fellow citizens in the militia for the defense of their polity.

Kates, *Handgun Prohibition*, *supra,* at 232

The history of early America and its English roots confirms that individual citizens of a free state have the right to arm and defend themselves.

A. England's Bill of Rights Guaranteed The Individual Right to Bear Arms for Self-Defense.

England's Bill of Rights, adopted in 1689 in the aftermath of the English Revolution, provided "That the subjects which are Protestants, may have arms for their defense suitable to their conditions, and as allowed by law." 1 W. & M. Stat. 2d Sess., c. 2 (1689). This provision had to be an individual right to self-defense, because it was guaranteed to "the subjects," and England was not composed of states. Americans drafted their Constitution in the wake of the Revolution, after a vigorous battle for independence. It is highly unlikely they would have forfeited a right they previously held as English subjects. Kates, *Handgun Prohibition*, *supra,* at 238.

B. American Government Departed from the Traditions of Other Countries, Where Governments Did Not Trust the People to Bear Arms.

The American right to bear arms stands in stark contrast to the practices of foreign nations, where governments maintain tight control and only authorized personnel may lawfully keep and bear arms. William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 3 Duke L. J. 1236,

1244 (1994) ("Alstyne, *Personal Right to Arms*"). The Chinese Constitution, for example, describes military duty but omits any corresponding right to keep or bear arms:

> It is the honorable duty of citizens of the People's Republic of China to perform military service and join the militia in accordance with the law.
>
> XIANFA [Constitution] art. 55, cl.2 (P.R.C.), *translated in* The Constitution of the People's Republic of China 41 (1983)

C. The Legislative History of the Second Amendment Supports the Understanding That an Individual Right was Guaranteed.

Several key changes were made to the wording of the Second Amendment. The militia was originally described as being "composed of the body of the people," but the Senate cut these words. While the deletion may seem to support the collective view, Anti-Federalists abhorred the idea of a select militia. They would have viewed it as a threat--not a necessity--to the security of a free state. Since the Bill of Rights was drafted to appease Anti-Federalists, these words were most likely stricken as superfluous. *Emerson*, *supra,* at 250-251. The Militia Act of 1792 later filled the gap with its broad definition of "militia."

The Senate also rejected wording that would have granted states the power to arm and train their militias. Here, it is implausible to explain the excision a unnecessary verbiage, because "the right of the

people" language actually adopted is identical to that used for individual rights in the First and Fourth Amendments. *Id.*, at 249-250.

The final draft also deleted a religious exemption clause. States' rights proponents insist that such a clause could only be understood as an exemption from carrying arms in the service of a state militia. The exemption would have never appeared at all if the Second Amendment were intended to guarantee a private right. *Silveira v. Lockyer*, *supra,* 312 F.3d at 1074, 1085-86 (9th Cir. 2002). However, it may have been deleted precisely because the Amendment's primary purpose was to safeguard an individual right. Moreover, early state laws obligated nearly everyone to own arms and carry them regularly for defensive use. In this context, the religious exemption is a logical accommodation of those citizens, like the Quakers, who could have never conscientiously carried a weapon.

D. The Constitutional Ratification Process Confirms the Understanding of Early Americans That Individuals Had the Right to be Armed.

Federalists and Anti-Federalists held heated debates about the proposed Constitution, but all agreed on the individual nature of the right to bear arms. In a widely distributed article, Federalist Tench Coxe described the future Second Amendment:

> As civil rulers, not having their duty to the people, duly before them, may attempt to tyrannize, and as the military forces which shall

> be occasionally raised to defend our country, might pervert their power to the injury of their fellow-citizens, the people are confirmed by the next article in their right to keep and bear their private arms.
>
> REMARKS *on the first part of the* AMENDMENTS *to the* FEDERAL CONSTITUTION, *moved on the 8th instant in the House of Representatives*, Philadelphia FEDERAL GAZETTE, June 18, 1789 (emphasis added); quoted in *Emerson*, *supra*, at 252.

Anti-Federalist editorials concurred with this description of the Second Amendment as a private right. Kates, *Handgun Prohibition*, *supra,* at 224-225. Anti-Federalists worried that the federal government might destroy the militia through disarmament, prescribed training, or use of a standing army to tyrannize the people. Federalists believed that Americans would never tolerate infringement of their freedoms, because the American people were armed and ready to resist oppression. *Emerson*, *supra*, at 237-240. Noah Webster, urging ratification, wrote that: "Before a standing army can rule, the people must be disarmed; as they are in almost every kingdom in Europe." Kates, *Handgun Prohibition*, *supra,* at 221. As they debated the details of the Constitution and its wording, both parties presupposed that the federal government had no right to disarm the people.

Several of the states--New Hampshire, New York, Rhode Island, Massachusetts, and the Pennsylvania minority--made proposals to guarantee the right to

keep and bear arms. *Id.*, at 221-222. In the Massachusetts Convention, Samuel Adams proposed language assuring that "the said constitution be never construed...to prevent the people of the United States who are peaceable citizens, from keeping their own arms." *Id*. at 224. At Virginia's ratification convention, Patrick Henry objected to authorizing a standing army and granting Congress control of the militia, and he voiced concerns over the lack of clause that would forbid disarming individual citizens: "The great object is that every man be armed... Everyone who is able may have a gun." *Id*. at 228-229. In response to concerns about the controversial new powers granted to Congress to call forth, organize, arm, and discipline the militia, Hamilton and Madison argued that Congress had no power to deprive the people of their right to keep and bear arms. Alstyne, *Personal Right to Arms*, at 1246.

The 1787-88 ratification debates in Pennsylvania, New Hampshire, and Massachusetts produced several proposals for amendments that would safeguard the right to bear arms. New Hampshire offered the broadest protection: "Congress shall never disarm any Citizen unless such are or have been in Actual Rebellion." Churchill, *Gun Regulation*, at 168.

As debates raged on, both sides offered arguments grounded in the belief in an armed citizenry. Fears about federal powers were ultimately calmed by the Bill of Rights, which included the Second Amendment guarantee that government would never infringe the right of "the people" to keep and bear arms.

E. State Constitutions, State Laws, and Early American Legal Commentators All Agreed That the American People Retained the Right to Bear Arms.

1. State Laws and Constitutions Guarded the Individual Right to Bear Arms.

In the early eighteenth century, states reluctantly exercised their emergency military powers in a way that effectively disarmed citizens. However, most states had repudiated such claims on privately owned arms by the decade prior to the drafting of the Constitution. Churchill, *Gun Regulation*, at 155. States began to regulate gun ownership and other civil rights based on a test of allegiance. *Id*. at 159-160. Police powers supported the regulation of dangerous uses of guns and reasonable time-place-manner restrictions. However, Americans began to perceive the right to keep arms as the "birthright" of any citizen who professed his allegiance to the country. *Id*. at 161.

Numerous state constitutions guaranteed a right to bear arms for self-defense, unrelated to military service. These included Alabama, Connecticut, Indiana, Kentucky, Michigan, Mississippi, Missouri, Ohio, Pennsylvania, and Vermont. *Emerson*, *supra,* at 230. The seventeenth article of the Massachusetts Constitution of 1780 provided that "the people have a right to keep and bear arms for the common defense."

2. Early American Commentators Unanimously Agreed That the Second Amendment Guaranteed an Individual Right.

Several commentators familiar to America's founders, including Blackstone, Hawkins, Bracton, and Coke, all affirm a common law right to possess arms for home defense. Kates, *Handgun Prohibition*, *supra,* at 240. Blackstone classified it among the five "absolute rights of individuals" at common law. *Id.* at 240, n. 53.

William Rawle wrote that the Second Amendment prohibited any attempt by either Congress or a state legislature to "disarm the people." William Rawle, *A View of the Constitution of the United States of America* (2d ed. 1829), 125-26. Rawle's proposed restraint of the state legislatures could not coexist with the states' right model.

Former Chief Justice Story held the right to bear arms in high regard:

> The right of the citizens to keep and bear arms has justly been considered... the palladium of the liberties of a republic; since it offers a strong moral check against the usurpation and arbitrary power of rulers; and will generally, even if these are successful in the first instance, enable the people to resist and triumph over them.

3 J. Story, Commentaries § 1890, p. 746 (1833)

Thomas Cooley, another well-respected scholar, traced the Second Amendment to the English Bill of Rights and declared that "the people, from whom the militia must be taken, shall have the right to keep and bear arms; and they need no permission or regulation of law for the purpose." Thomas M. Cooley, The General Principles of Constitutional Law in the United States of America 270-71 (1880).

Viewed against this backdrop of unanimous commentators, it is difficult to conceive of the Second Amendment as guaranteeing anything other than an individual right.

F. Nineteenth Century Case Law and Other Judicial Sources Affirm an Individual Rights Interpretation of the Second Amendment.

Early state cases overwhelmingly affirm that the Second Amendment and/or similar provisions in state constitutions protect the right to bear arms in defense of self *and* the state: *Bliss v. Commonwealth,* 12 Ky. 90, 2 Litt. 80 (1822); *State v. Reid,* 1 Ala. 612 (1840); *Aymette v. State,* 21 Tenn. 154, 2 Hum. 119 (1840); *State v. Buzzard,* 4 Ark. 18 (1842); *Nunn v. State,* 1 Ga. 243 (1846); *State v. Chandler,* 5 La. Ann. 489 (1850); *Cockrum v. State,* 24 Tex. 394 (1859) (affirms inalienable right to self-defense); *Smith v. Ishenhour,* 43 Tenn. (3 Cold.) 214 (1866); *State v. Duke,* 42 Tex. 455 (1875); *Fife v. State,* 31 Ark. 455 (1876); *Wilson v. State,* 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Rosenthal,* 75 Vt. 295, 55 A. 610 (1903). State cases also uphold the reasonable regulations so long as they do not infringe the basic right to self-defense: *State v.*

Mitchell, 3 Blackf. 229 (Ind. 1833); *Aymette v. State,* 21 Tenn. 154, 2 Hum. 119 (1840); *State v. Jumel,* 13 La. Ann. 399 (1858); *English v. State,* 35 Tex. 473 (1872); *Hill v. State,* 53 Ga. 472 (1874); *State v. Duke,* 42 Tex. 455 (1875); *Wilson v. State,* 33 Ark. 557, 34 Am. Rep. 52 (1878); *State v. Workman,* 35 W. Va. 367, 14 S.E. 9 (1891); *In re Brickey,* 8 Idaho 597, 70 P. 609 (1902).

The legislative history of the Fourteenth Amendment is further evidence of the common nineteenth century understanding that the Second Amendment guarantees an individual right. When Senator Howard introduced that Amendment for passage in the Senate, he recommended that:

> To these privileges and immunities [U.S. Const., Art. IV, § 2]... **should be added the 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**....
>
> Cong. Globe, 39th Cong., 1st Sess., 2765-2766 (1866), cited in *Duncan v. Louisiana,* 391 U.S. 145, 166-167 (1968) (Black, J., concurring) (emphasis added)

Although this Court has chosen a process of selection incorporation rather than the wholesale approach advised by Senator Howard, these comments reflect

the widespread perception that the right to bear arms is one of many individual constitutional rights.

G. The U.S. Senate Judiciary Committee and U.S. Justice Department Have Adopted the Individual Rights Position.

The Subcommittee on the Constitution of the U.S. Senate Judiciary Committee has endorsed the individual rights view, based on its research of the archives of the Library of Congress. SENATE SUBCOMM. ON THE CONSTITUTION OF THE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., THE RIGHT TO KEEP AND BEAR ARMS (Comm. Print 1982).

More recently, the U.S. Department of Justice reversed its prior position and affirmed the Fifth Circuit's individual rights holding in *Emerson*. That new position is set forth in the Memorandum From the Attorney General to All United States Attorneys, re: *United States v. Emerson*, November 9, 2001. *See* http://www.usdoj.gov/osg/briefs/2001/0responses/2001-8780.resp.pdf. The Attorney General was convinced by the comprehensive scholarly review undertaken by the Fifth Circuit in deciding *Emerson*, which affirmed the individual right to bear arms but also recognized that restrictions can be imposed to prevent unfit persons from possessing firearms.

CONCLUSION

This Court should uphold the individual right to keep and bear arms guaranteed to Americans, so they

might lawfully defend themselves and their communities.

Respectfully Submitted,

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